
Order Decision

Site visit made on 4 July 2018

by Grahame Kean B.A. (Hons), PgCert CIPFA, Solicitor HCA

An Inspector appointed by the Secretary of State for Environment, Food and Rural Affairs

Decision date: 09 October 2018

Order Ref: ROW/3187187

- This Order is made under Section 53 (2) (b) of the Wildlife and Countryside Act 1981 (the 1981 Act) and is known as the Northumberland County Council Definitive Map Modification Order (No 21) 2016.
- The Order is dated 15 August 2016 and proposes to modify the Definitive Map and Statement for the area by adding to it byways open to all traffic (BOAT's) as shown on the Order plan and described in the Order Schedule.
- There were two objections outstanding when Northumberland County Council submitted the Order to the Secretary of State for Environment, Food and Rural Affairs for confirmation.

Summary of Decision: The Order is confirmed

Preliminary matters

1. None of the parties requested an inquiry or hearing into the Order, therefore the Order is considered on the basis of the written representations supplied. I made an unaccompanied site inspection of as much of the route as was accessible, although parts were obstructed by considerably dense undergrowth.
2. The principal objection to be considered is that whilst the claimed route is accepted as a public vehicular right of way, no part of it has met the statutory test for inclusion in the Definitive Map and Statement as a BOAT.
3. One objection relates to the practical difficulties that may arise if a BOAT is found to exist. However my task is to decide whether on the evidence an existing right of way should be recorded under the 1981 Act, irrespective of the practical implications arising. I cannot therefore consider this matter further.

The Main Issues

4. The Order is made under s53(2)(b) of the 1981 Act, relying on the occurrence of events specified in s53(3)(c)(i) and (iii). The main issue is whether evidence discovered by the Council, taken with all other relevant evidence is sufficient to show, on a balance of probabilities that a right of way not shown in the Definitive Map and Statement subsists over land in the area shown on the Map.
 5. By s32 of the Highways Act 1980 account must be taken of any map, plan or history of the locality or other relevant document and to give such weight to it as is justified by the circumstances.
 6. If I find that the Order route is subject to public vehicular rights, in addition I must consider (a) whether the character of the route is such that it satisfies the definition of a Byway Open to All Traffic and (b) whether the public's right to
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use mechanically propelled vehicles (MPVs) over it is subject to the provisions of s67 of the Natural Environment and Rural Communities Act 2006 (2006 Act).

Reasons

Status of the Order route

7. Armstrong's County Map of 1769 does not show any route over land crossed by the Order route.
8. Fryer's County Map of 1820, Greenwood's County Map of 1828 and Cary's Map of 1820-32, clearly show a road or track over the claimed route. In the map key for John Cary's (1827) Plate 58, such a road or track appears to correspond to a "Parochial Road".
9. It has previously been held that a route identified as a parochial road provides a little support that the route was a public carriageway, although it was not clear what the expression means. In my view the term parochial road may suggest the existence of a public carriageway but this evidence needs to be considered in the context of all other evidence.
10. Fryer's, Cary's and Greenwood's maps were published after the inclosure process began. They are small scale maps but demonstrate a consistent depiction of the route over a number of years. Although not providing direct evidence of its status, they are indicative of the physical existence over time of a route capable of carrying public vehicular traffic.
11. The Ordnance Survey (OS) Map of c1860, at 1:2500 scale, and accompanying Book of Reference identify the route of alleged byway No 30 and most of alleged byway No 42 as a "Public Road". The 1st edition 6 inch OS Map of 1866 shows all alleged byways Nos 30, 42 and 29 as a road or track. The 1899 2nd edition 6 inch OS Map, as with the 3rd edition OS Map of 1925-6, the 1:10,560 scale OS Map of 1957 and 1:10,000 OS Map 1977, depict the claimed route as an enclosed road or track.
12. No inference as to the status of the route can be drawn from OS maps but they illustrate the existence of the route through time. Account is also taken of the OS 1 inch Map of 1945-7. The key to the map lists some roads coloured in yellow with narrow parallel lines as "other motor roads narrow - Good". The claimed route is identified within the key "other motor roads narrow - Bad", suggesting it was less easy to negotiate it by motor vehicle when surveyed.
13. The North Sunderland Railway Deposited Plan of 1891 clearly identifies as a track or road the route of alleged BOAT's Nos 29 and 42. The Council suggests that the route is numbered to correspond to the entry in the accompanying Book of Reference for a "Public highway and occupation road". The term "occupation road" usually connotes a road laid out for the benefit of the occupiers of adjoining properties and not a public highway. However the numbering is by no means clear on the plan, a task made more difficult by the fact that the parish boundary coincides with the line of the route at this point.
14. The objector has provided a helpful commentary on the operation of the Railway Clauses Consolidation Act 1845 and the North Sunderland Act 1892, the local Act that identifies the roads across which a proposed railway may be constructed on the level. He relies on the Schedule in s30 of the 1892 Act, where the entries corresponding to those picked out by the Council in the Book

- of Reference identify the land as "public road" with no reference to an occupation road.
15. The Council has not clearly explained by illustrative methods or otherwise precisely where the alleged numbering occurs on the deposited plan, but does provide the Schedules for both parishes in the Book of Reference. After carefully considering these in conjunction with the plan it seems to me likely that the reference to "Public highway and occupation road" is to that part of alleged BOAT's Nos 29 and 42 that traverse the proposed line of the railway. The 1892 Act was however passed after the deposited plans were made available for scrutiny and comment. Thus the objector points out in effect that the simple reference to "public road" can be more readily relied upon. I agree.
 16. On the Finance Act 1910 Map, alleged byway No 30 and most of alleged byway No 42 are shown with a boundary that excludes them from being part of the surrounding farm land. There appear to be no accompanying forms or field books available, or at least any that have been supplied. However the parts of the alleged byways referred to are clearly shown as excluded from surrounding hereditaments, and annotated similarly to the Newham to West Fleetham road which the claimed route joins at Point T on the Order Map.
 17. Finance Act records are not conclusive but part of the jigsaw puzzle to be considered along with other relevant material. Whilst there is an absence of written evidence of a specific deduction in the tax due for a public right of way, and the southernmost third of the route is not included in the same way on the Map, when considered with other documentary evidence, the Map supports the contention that public carriageway rights subsist along the Order route.
 18. The route is not shown as a publicly maintainable road on the 1932 Belford Rural District handover map nor, in the 1937 map and schedule prepared under the Restriction of Ribbon Development Act 1935, as protected from ribbon development. The omissions from these two documents are the main inconsistencies in the material supplied. Although records of the relevant local authorities from this period can provide cogent evidence of a route being maintained or maintainable, and therefore of its status as public highway, the absence of such evidence should nonetheless be considered along with such other documentary evidence as does exist, either before or after such period.
 19. The route is identified on County Council highways maps and schedules in 1951, 1958, 1964 and 1974 as a publicly maintainable road. The 1951 record has a differently coloured road marking which possibly indicates it to be a later addition. Although there is no impediment to including public footpaths or bridleways, I have no evidence that in the rural areas of Northumberland public paths or bridleways were deliberately shown on the 1958, 1964 or 1974 County Road Schedules, which are the predecessors of the List of Streets.
 20. Alleged BOAT's Nos 29, 30 and 42 are identified in the Council's List of Streets as at 2 May 2006, as being the U2052 road. Inclusion of a route in the list of streets is not conclusive of the rights it carries or of actual maintenance carried out. However the presumption of regularity applies to such records held under s36 of the Highways Act 1980, namely that a statutory authority will have acted lawfully in accordance with its duty in maintaining its records. Overall the records consistently purport to accept liability for maintenance of the road, which carries weight in support of the existence of public vehicular rights.

21. In addition the Bridges and Roads Committee minutes from 1951 refer to a report from the Private Street Works sub-committee relating to the U2502 road. Significantly, the report acknowledges that the road appears to be maintainable by the public and the Council should accept responsibility for it. It recommended that for the time being only the minimum amount of work should be done to provide a passable route on foot. Maintenance of a route by the public is strong evidence that it is a highway. The degree of maintenance liability is a separate issue, the duty being generally held to be to maintain the surface of publicly maintainable highways to a standard that is reasonably passable for the ordinary traffic of the neighbourhood.
22. Neither the draft Map nor the Provisional Map records the claimed route as a footpath or bridleway. Its inclusion on the base map as the U2052 road is consistent with its being regarded as part of the county unclassified road network. Further, the Original Definitive Map of 1962 shows the route as the U2052 road, not a public footpath, bridleway or Road Used as Public Footpath.
23. After considering the individual documentary evidence in its context, including the presence and absence of the claimed route, as well as all the evidence taken together, I am satisfied on the balance of probabilities that the use and reputation of the claimed route was such as to justify the inference that it was dedicated as a public carriageway.

Whether the Order route can be recorded on the Definitive Map and Statement as a BOAT

24. Section 66(1) of the Wildlife and Countryside Act 1981 defines a BOAT as “a highway over which the public have a right of way for vehicular and all other kinds of traffic but which is used by the public mainly for the purpose for which footpaths and bridleways are so used”.
25. It has been established since this definition appeared in the 1981 Act, that Parliament did not intend that highways, over which the public have rights for vehicular and other types of traffic, should be omitted from definitive maps and statements because they had fallen into disuse, if their character made them more likely to be used by walkers and horse riders than vehicular traffic.¹
26. The objector suggests that I should also take into account as a material consideration in this case a previous order decision relating to an alleged BOAT in a different part of the Council’s area.² Although it is not directly relevant to the Order I agree that it illustrates the general approach to be taken in applying the test for a BOAT as set out in the 1981 Act.
27. Several pre-order written consultation responses were made regarding the claimed route. An adjoining landowner has marked on a plan a section of the claimed route which remains an overgrown pathway to the north of which it is not possible to take motor vehicles and he states that the Council provided a footbridge over the route (Point X on the Order Map).
28. The objector’s states he has with other motorcyclists “occasionally with a motorcycle from the early 1980’s onwards” used the Order route, but this is not elaborated upon, in terms of precisely how frequently or recently the user has occurred.

¹ See the Court of Appeal judgment in *Masters v SSETR (2000) QBCOF/1999/1095C*.

² Order Decision Ref FPS/P2935/7/53, 16 February 2017.

29. I have no reason to doubt that motor cycles may have been taken through the route, but at 1.25m wide the bridge is clearly unsuitable for four wheeled vehicles. Whilst appearing to be sturdy enough to take motorcycles, it has ridges along its length. These may not deter the adventurous or well-padded rider, but in general would dissuade persons from using the bridge other than on foot or horseback. To my mind it is not constructed to facilitate the passage of motor vehicles generally or indeed cycling, although the Cyclists Touring Club provided a statement and a map identifying the claimed route as one which has been cycled without problem. Yet its character does reflect in my view how the Council's predecessor seemed to accept maintenance responsibility for the route in 1951, as primarily a way passable on foot.
30. Northumbrian Estates, whose ownership of land stops at the footbridge, opines that it is not suitable for any vehicular use, only pedestrian. According to them the route to the south was tarmaced by another owner for access to his fields. It is not however possible to characterise the whole route as a metalled way despite its having a tarmac or hard surface for some of its length.
31. According to the representative of the British Horse Society the claimed route is a wide hedged lane which, as I saw on my visit, from its south end at Point U has a stone surface up to where it crosses the disused railway line. Thence it has a rough mown grass surface up to the footbridge, which he regards as suitable only for horse riders, walkers and cyclists. North of the bridge to Point T, it is said that the route suffers from some overgrowth but not sufficient to prevent use by horse riders. Although there is no direct evidence of current use by foot or horse traffic, the BHS representative also stated that a walker on the route confirmed the route to be well used by the public. The Council's Definitive Map officer visited the site at least twice to inspect it and put up notices, and considers that the route is not heavily used by the public.
32. The definition of s66 as interpreted by the courts, results in current use being relevant as to whether a way should be recorded as a BOAT, although the balance of user is not wholly conclusive. The representations received from the objector and the consultees relate direct or indirectly to use of the Order route by foot, on horseback and on cycle, as well as by motorcycles.
33. That said the user evidence on all fronts is very short on detail. Whilst there is information to suggest a slight use, in each case of use on foot, on horseback and by motor vehicle, it is insufficient to enable me to conclude whether the actual and current use of any of the alleged BOAT's or the route as a whole, is mainly for the purpose for which footpaths and bridleways are so used.
34. Consequently, although the objector is correct in that bare character of the route cannot be chosen as a substitute test, I should have regard to it. Based on all the available evidence, including the historical documents, the objections and representations received, and the physical character of the route, I find that it is of a character that is not generally suitable for vehicular traffic but is such that it is more likely to be used by walkers and horse riders. I have considered the objector's arguments to the contrary and the several judicial authorities which he supplied, with some care, but his case is not supported by evidence robust enough to persuade me otherwise.
35. I conclude that, on the balance of probabilities, the character of the route is such that it satisfies the statutory definition of a BOAT found in section 66 (1) of the 1981 Act.

The impact of Section 67 of the 2006 Act

36. Section 67 (1) of the 2006 Act extinguished, as of 2 May 2006, any right the public had to use mechanically propelled vehicles (MPV's) over a route not shown in the definitive map and statement or over a route that was shown in the map and statement but only as a footpath, bridleway or restricted byway.
37. The general extinguishment provision of s67(1) is however subject to a number of exceptions. Section 67(2)(b) excepts ways that are recorded on the list of streets as being maintainable at public expense and not recorded on the definitive map and statement as rights of way.
38. Since the claimed route is on the list of streets but, although marked on the base map, not recorded on the definitive map and statement, I conclude that the right which the public has to use the Order route with MPV's, was not extinguished on 2 May 2006. It follows that the Order route can be recorded on the Definitive Map and Statement as BOAT's Nos 42, 29 and 30.

Widths specified in the Order

39. There were no objections to the widths of the claimed route as variously specified in the Order, which are between 7 and 10 metres. There is no clear evidence on this matter from the documentary sources, and the specified widths may be greater than the width of the trodden way on some sections. However they are based on measurements taken on site by the Council. I am satisfied that having regard to the type of user, the nature of the surfaces and other physical features, the specified widths are reasonable and appropriate to apply.

Conclusion

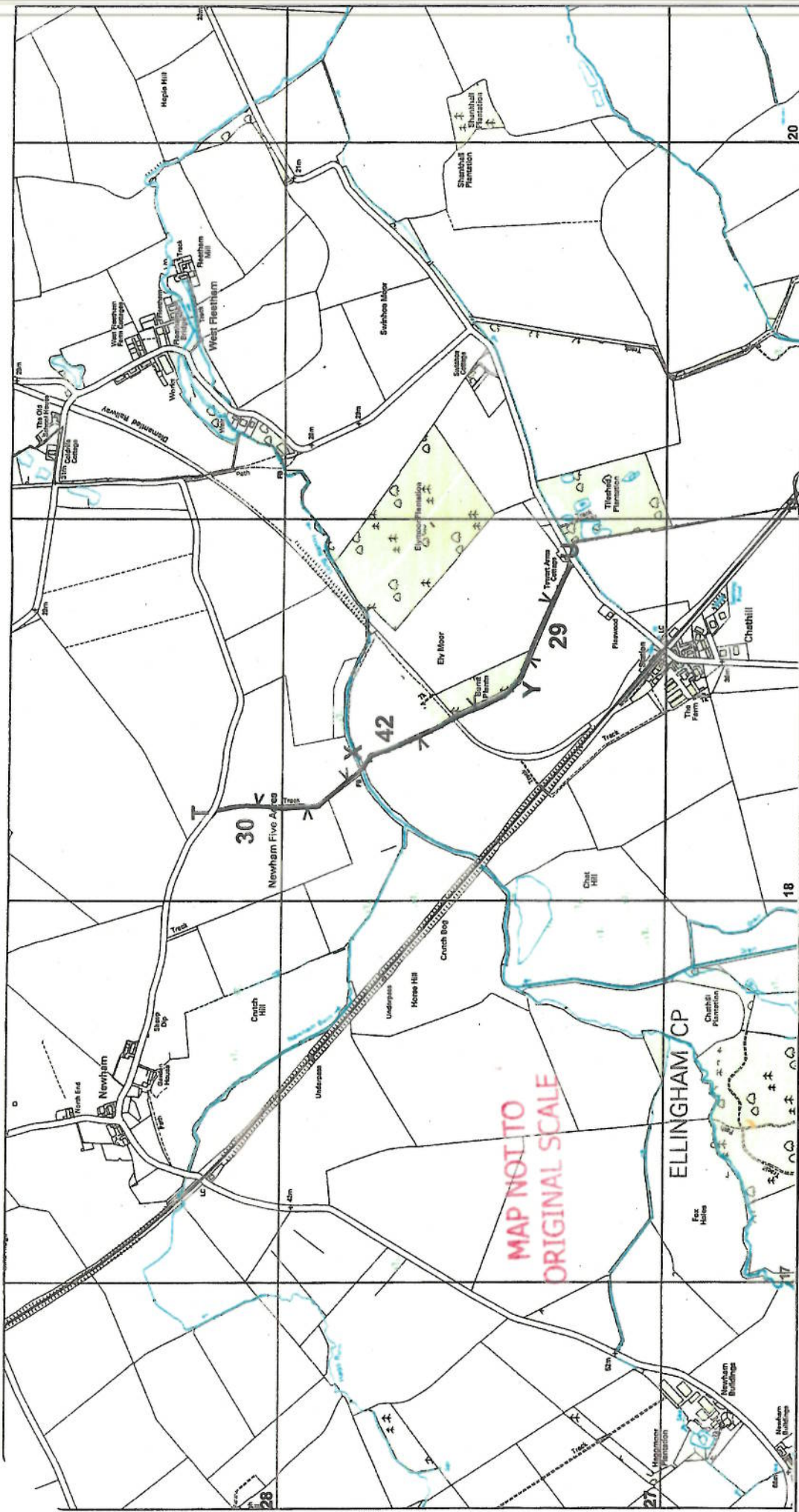
40. For the above reasons and considering all other matters raised in the written representations I conclude that the Order should be confirmed.

Formal decision

41. I confirm the Order.

Grahame Kean

INSPECTOR



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Wildlife and Countryside Act, 1981

**Definitive Map of
 Public Rights of Way
 for the
 County of Northumberland**

**The Northumberland
 County Council**

**Modification Order
 (No.21) 2016**

- Public Footpath to be deleted
- Public Footpath
- Public Bridleway
- Restricted Byway
- Byway Open to All Traffic

O.S. Map NU 12 NE	Definitive Map No 41	Scale: 1/10,000
Former District(s) Berwick	Parish(es) Ellingham / Beadnell	Date: July 2016

NJ Horner