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## Order Decision

Site visit made on 19 August 2019

by **Susan Doran BA Hons MIPROW**

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

Decision date: 25 September 2019

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### Order Ref: ROW/3208512

- This Order is made under Section 53(2)(b) of the Wildlife and Countryside Act 1981 and is known as The Northumberland County Council Definitive Map Modification Order (No 9) 2017.
- The Order is dated 18 September 2017 and proposes to modify the Definitive Map and Statement for the area by adding Byways Open to All Traffic, upgrading a Footpath to Byway Open to All Traffic, deleting a Footpath and amending various particulars, as shown in the Order plan and described in the Order Schedule.
- There were 3 objections outstanding when Northumberland County Council submitted the Order for confirmation to the Secretary of State for Environment, Food and Rural Affairs.

**Summary of Decision: The unconfirmed part of the Order is confirmed subject to the modifications set out in the Formal Decision**

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### Preliminary Matters

1. Northumberland County Council ('the Council') confirmed part of the Order<sup>1</sup> on 21 May 2018. Accordingly, the matters before me for determination are the proposed addition to the Definitive Map and Statement ('DMS') of a byway open to all traffic ('byway'), Eglington Byway No.45, and the amendment of the Definitive Statement ('DS') in respect of Eglington Footpath No.37.
2. All three objections concern the proposed byway, with one questioning whether all or any of it qualifies to be recorded as a byway.
3. The Council points out that Eglington Footpath No.37 is in fact recorded in the DMS as *Bridleway* No.37 and seeks a modification to the Order to reflect this. None of the objections raises this point and I agree with the Council that it is unlikely anyone will have been prejudiced as a result of this error. Should I decide to confirm the unconfirmed part of the Order I shall modify it accordingly.

### The Main Issues

4. The criteria for confirmation of the unconfirmed part of the Order are contained in Section 53(3)(c) of the Wildlife and Countryside Act 1981 ("the 1981 Act"), in this case subsections 53(3)(c)(i) and 53(3)(c)(iii). These require me to consider whether, on a balance of probability, firstly a byway subsists between points X and Y on the Order plan, and secondly (in this case) the particulars of Footpath No.37 (noting paragraph 3 above) require modification.

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<sup>1</sup> In exercise of their powers under Part III of the Wildlife and Countryside Act 1981 (paragraph 5(1) of Schedule 15), confirming as unopposed that part of the Order concerning routes in the Parish of Newton-by-the-Sea

5. As regards the proposed byway, the Council relies on documentary evidence. Section 32 of the Highways Act 1980 ('the 1980 Act') requires me to take into consideration any map, plan or history of the locality, or other relevant document provided, giving it such weight as is appropriate, before determining whether or not a way has been dedicated as a highway. There is also some user evidence to consider, although the Council does not rely on this in terms of establishing the route's status.
6. I shall examine the evidence as a whole to establish whether a public right of way for vehicles exists in respect of the proposed byway. However, the Natural Environment and Rural Communities Act 2006 (the 2006 Act) extinguished rights for mechanically propelled vehicles over such ways, unless they were preserved by any of the exceptions set out in Section 67 of that Act.
7. Section 67(2)(b) of the 2006 Act saves rights for mechanically propelled vehicles over an existing public right of way if, immediately before commencement<sup>2</sup> it was not shown in a DMS but was shown in a list required to be kept under section 36(6) of the 1980 Act, usually known as the list of streets ('LoS'). In this case, the Council says the proposed byway is identified in their LoS as being part of the U3002 road, with 155 metres of the western end of the route having come into being following the A1 Trunk Road (Brownieside Improvement Side Roads) Order 1991. Further, the route was not shown in the DMS. Accordingly, the exception applies, motorised vehicle rights have been preserved, and the way should be recorded as a byway. Against this it is argued that the proposed route does not meet the statutory test to be recorded as a byway; it is a private access way used for estate and agricultural traffic, there is insufficient evidence to demonstrate that a public right of way exists, and its identification as a publicly maintainable highway is mistaken.
8. I shall consider the evidence as a whole and should I find that motorised vehicular rights exist, I shall go on to consider whether it is appropriate that the way be recorded in the DMS as a byway.
9. The proposed amendment to the description of Footpath No.37 (noting paragraph 3 above) is consequential upon my finding that a byway subsists in respect of Eglington Byway No.45.

## **Reasons**

### ***Eglington Byway No.45***

#### *Documentary evidence*

10. Armstrong's Map of 1769 shows the Order route and identifies it (in the key) as a 'Country Road', while the way depicted on Cary's 1787 and 1794 Maps appears on the latter map as a 'bye-road'. Fryer's Map of 1820 depicts it as 'Other Roads', Cary's 1820-32 Map as a 'Parochial Road', and Greenwood's Map of 1820 as a 'Cross Road'. All are consistent in showing the route (or given the scale of these maps one broadly consistent with it) as part of the road network at the time, although I note that a spur to Charlton Hall is shown in the same manner on some of these maps.
11. Ordnance Survey ('OS') maps from 1866/67 are consistent in depicting the Order route. The 1899 6-inch map shows it either side of the 'Lodge' at

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<sup>2</sup> 2 May 2006

Charlton Hall together with the track leading south from it with one of the boundaries delineating it darker or 'shaded'. This was a method used by OS surveyors to depict a 'carriage drive', although this might include approaches to country houses and farm access roads. However, by 1925/26 only the eastern portion of the Order route is shown, likewise on the 1957 edition. The 'missing' western portion<sup>3</sup> coincides with that part of the route shown bounded to the north, but open to the south, on earlier OS editions, as well as on Armstrong's and Greenwood's County Maps. By 1977/78 the whole length of the Order route is again depicted. Since 2000 the Order route has been marked as an 'Other Route with Public Access'. Whilst OS maps provide good evidence of the physical features in existence at the time of the surveys, they have long carried a disclaimer as regards status<sup>4</sup>. Accordingly, this evidence does not establish whether the route depicted was public, or a private farm or estate track as claimed by the landowners.

12. The Order route is shown on the 1932 Alnwick Rural District 'handover map', coloured red, identifying it as a publicly maintainable road<sup>5</sup>; and on the Restriction of Ribbon Development Act map of c.1939, coloured green, again identifying it as a publicly maintainable road, and identified as route 4 in the Schedule c.1937. It is identified as part of the U3002, a publicly maintainable road coloured purple, on the 1951 Council Highway Map, and is listed in the County Road Schedules of 1958, 1964 and 1974, the map attached to the 1964 Schedule marking the Order route purple, again representing a publicly maintainable road. It is shown on the Council's LoS as at 2 May 2006. Collectively, this evidence supports the existence of public vehicular rights over the Order route.
13. It is likely the later highway records relied to some extent on the earlier 'handover map' and records in their preparation, but there is no evidence that the Order route's inclusion was in error. Maintenance responsibilities at public expense would not have been undertaken lightly by the highway authority, and whilst there may be little or indeed no evidence of works having taken place, as argued by the landowners, that in itself does not mean the way is not a publicly maintainable highway.
14. During the preparation of the DMS, Survey Maps were marked with known public roads coloured brown, in this case the 1954 map showing the Order route from the 'Lodge' east to point Y on the Order plan. No public rights of way were claimed over it and none shown on the Draft, Provisional or Definitive Maps.
15. Its course, where shown or described, in all of these maps and documents<sup>6</sup> reflects the situation prior to the change in its alignment alongside the A1 in 1991. It was then that part of the route was stopped up (24 metres at the western end) and a north-south section of road established alongside the A1 to replace it, under the A1 Trunk Road (Brownieside Improvement Side Roads) Order 1991<sup>7</sup>. This evidence supports the likely existence of public vehicular

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<sup>3</sup> Passing through the large field lying adjacent to and east of the A1 dual carriageway

<sup>4</sup> Since 1888 to the effect that the representation of a track or way on the map was not evidence of the existence of a public right of way

<sup>5</sup> This map shows the roads transferred from Alnwick Rural District Council to Northumberland County Council for maintenance responsibility purposes

<sup>6</sup> With the exception of OS maps from 2000 onwards

<sup>7</sup> Referred to in Schedule 1 as the length of highway to be stopped up, with the new highway referred to by the letter 'A', as shown on the plan accompanying it

rights since this part of the Order route is identified as 'new highway' being a road rather than a bridleway, footpath or private means of access. Further, the length of new highway is separate to the new underpass, private access and bridleway created to the north of point X<sup>8</sup> which does not form part of the Order route.

16. Although the LoS can include publicly maintainable bridleways and footpaths, the Council has no evidence to suggest that, in Northumberland, such routes were shown in the 1958, 1964 or 1974 County Road Schedules which preceded the current LoS. All three Schedules include a similar description of the U3002 road of which the Order route is part. The LoS does not purport to be a record of what legal rights exist over the ways shown and is thus not conclusive evidence of the existence of public vehicular rights. Nevertheless, it may provide evidence of such rights and I consider its inclusion in these records attracts some weight that they exist.
17. Farm records which it is said do not demonstrate the Order route is a byway have not been provided. However, property records will not necessarily refer to public rights, and tend to be concerned with private rights.

#### Conclusions on the documentary evidence

18. Early County Maps and the OS mapping show the Order route as a whole or in part. It was identified by the Council as a publicly maintainable road from the 1930s onwards in highways maintenance maps and records. Although many of these documents were produced for internal use, the 1935 records, for example, were published and thus open to public scrutiny. It is also likely that routes were considered before being included in successive documents as suggested by the re-numbering or amended descriptions of ways shown therein. It was identified as a road in the 1991 Side Roads Order. In addition, the Order route is recorded on the LoS as a highway maintainable at public expense, irrespective of how often maintenance work may have been carried out by the highway authority.
19. Considering this evidence as a whole I do not share the view the Order route was mistakenly identified as a publicly maintainable highway, or that it is a private estate road. Neither do I find that the documentary evidence adduced is insufficient for a conclusion to be reached that a public right of way for vehicles exists. The Order route has been recorded and regarded as a road by the highway authority for maintenance purposes for many decades. I conclude it was historically a public vehicular highway, and further to its absence from the DMS and inclusion in the LoS<sup>9</sup>, public rights for mechanically propelled vehicles have been saved.

#### *Whether the route should be recorded as a byway*

20. It is submitted, in summary, that the definition of a byway does not require there to be evidence of current use and that the 'concept or character of the way' is relevant in determining whether it should be recorded as a byway<sup>10</sup> along with use, even if rights are rarely if ever exercised by the public. In considering and balancing these factors, a conclusion may be reached that

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<sup>8</sup> Point X being the gate beside the A1 which is opposite the C47 road at North Charlton on the west side of the dual carriageway

<sup>9</sup> At 2 May 2006

<sup>10</sup> *Masters v Secretary of State for the Environment, Transport and the Regions* [2000] EWCA Civ 249 ('Masters')

rather than a byway, a way may be in whole or in part, part of the 'ordinary road network'. If so, then it would not be appropriate for it to be recorded in the DMS<sup>11</sup>.

21. Considering firstly the definitions. A byway is a carriageway and thus a right of way for vehicular traffic, but one which is mainly used for the purposes for which footpaths and bridleways are used - by walkers and horse riders<sup>12</sup>. This definition distinguishes byways from 'ordinary roads'<sup>13</sup>. I note though that the term 'ordinary road' is not defined but rather is used to describe a particular type of way. It seems to me, for a route to be recorded as a byway, to satisfy its definition, its current use is relevant. However, and having regard to *Masters* the characteristics of the way are also relevant. For a carriageway to be a byway there does not need to be use on foot or horseback, or for any such use to be greater than use by vehicles, although in *Masters* there was no use of the way in question. But the character or type of way and whether it is more suitable for use by walkers and riders, than by vehicles, is also relevant in deciding whether it should be shown in the DMS.
22. In considering the evidence of use I note the landowners maintain there has been no public use of the section between X and the 'Lodge', and the use claimed is unsubstantiated. There is no formal survey of use available. The Council considers use of the Order route by the public with motor vehicles is minimal, and it is not a through route for 'normal' motor vehicles. Dwellings at Charlton Hall have a separate vehicular access to their properties, although the Order route, via connecting routes to Y and the 'Lodge', is also available. Evidence adduced by the Council during their investigations suggests the Order route is used by walkers, horse riders and cyclists and that this type of user will exceed use by the public with motor vehicles.
23. There is some evidence of infrequent use from the early 1980s by motorcycles, and some such use may pre-date this. The British Horse Society comments that the Order route makes a useful link with Bridleway 37 and that it is used by horse riders and dog walkers, although no further details are given. The Cyclists Touring Club marks the route from Y to the 'Lodge' as one used without problem. There is no comment regarding the remainder of the route, but this may be due to the correspondent having no knowledge of it.
24. That use has not been observed is not evidence that it has not occurred. Whilst periods and frequency of use, or claimed non-use are not clarified there is evidence of use, although it is somewhat limited and some use described is not current. Nevertheless, it suggests the Order route is used by pedestrians, horse riders and cyclists and is potentially used by the public with vehicles. It follows from this that the main use is consistent with and satisfies the definition of a byway as set out above (paragraph 21).
25. However, some use appears to be confined to certain sections and this may reflect the character or type of the Order route. Between the A1 dual carriageway and the 'Lodge' there is some evidence of past metalling, as may be encountered on a 'carriageway' traversed with vehicles, although it is largely now grassed over. I agree with the Council that this section is unlikely to be

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<sup>11</sup> *Suffolk CC v Mason* [1979] AC 795 by reference to National Parks and Access to the Countryside Act 1949, and it is argued, by analogy, the 1981 Act

<sup>12</sup> Section 66(1) of the Wildlife and Countryside Act 1981

<sup>13</sup> As stated by Hooper J in *Masters*



used by 'normal' motor vehicles in the sense, for example, of a family car. It is gated at two points along its length. Alongside the A1, where it is gated, the section established by the 1991 Side Roads Order has a metalled (but not tarmacadamed) surface. From the 'Lodge' to Y (and beyond) the Order route is sealed with a tarmacadam surface having an appearance in keeping with what might typically be regarded as a 'normal' or 'ordinary' road that may be used by a 'normal' car and is unobstructed.

26. Historically, parts of the route have been depicted in such a way that they may be interpreted as forming part of the 'ordinary road' network, for example on some OS maps (subject to the OS definition of a carriage road and other caveats, paragraph 11), or through inclusion in highways maintenance records, or indeed its exclusion during the DMS process. Such evidence may enter the mix, but the test for byway status focuses on the character or type of way and whether it is more suitable for use by walkers and horse riders, than by vehicles.
27. I consider that the Order route from X to the 'Lodge' has the character or type of a route the physical condition of which is more likely to be used, and is more suitable for use, by pedestrians and horse riders than by vehicles, albeit use with a motorcycle and off-road vehicle is possible. Although the section alongside the A1 has the appearance of a 'road' it is unsealed and thus likely to fall short of what might typically be regarded as an 'ordinary road' that the public might use with a 'normal' or 'ordinary' car. Further, I agree with the Council that its junction with the A1 dual carriageway suggests public use on foot, horseback and pedal cycle is likely to outweigh public use with motor vehicles.
28. I consider it would be open to me to regard the tarmacadamed section from Y to the 'Lodge' as part of the ordinary road network, were it not for the fact that it does not connect with the 'ordinary road' network at one or both ends: not at the 'Lodge' where I find the continuation is consistent with a byway; and not at Y where its continuation is a byway<sup>14</sup>.
29. I note the submissions of the Council that the definition of a way as a byway leads to certainty for users not only as regards its status and the rights that may be exercised, but also of its description in terms of, for example, the width. Further that it does not follow from the inclusion of a route on the LoS that it is a vehicular right of way. These factors have not had a direct bearing on the conclusions I have reached as to whether the Order route should be recorded as a byway. I conclude that the Order route is a vehicular highway and having regard to the submissions I find that it should be recorded in the DMS as a byway, rights for mechanically propelled vehicles having been saved by the exception set out in section 67(2)(b) of the 2006 Act.

### ***Eglingham Footpath No. 37***

30. The effect of the unconfirmed part of the Order in this regard, if confirmed, would be to amend the description of the public right of way contained in the Definitive Statement; the Definitive Map would remain unaltered. No objections or representations have been received to this proposal. Since the amendment seeks only to clarify that the way commences/terminates on Eglingham Byway

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<sup>14</sup> Newton-by-the-Sea Byway No.31, confirmed by the Council as part of the unopposed part of this Order on 21 May 2019

No.45, having concluded that the said byway should be recorded in the DMS, I consider it is appropriate to confirm the unconfirmed part of the Order in this regard, subject to the modification identified in paragraph 3 above.

### **Other matters**

31. Concerns that the proposed byway is unsuitable as a public right of way for motorised vehicles due in part to its gated junction with the A1 have no bearing on my decision as such matters cannot be taken into account under the 1981 Act.

### **Conclusions**

32. Having regard to these and all other matters raised in the written representations, I conclude that the unconfirmed part of the Order should be confirmed with modifications that do not require advertisement.

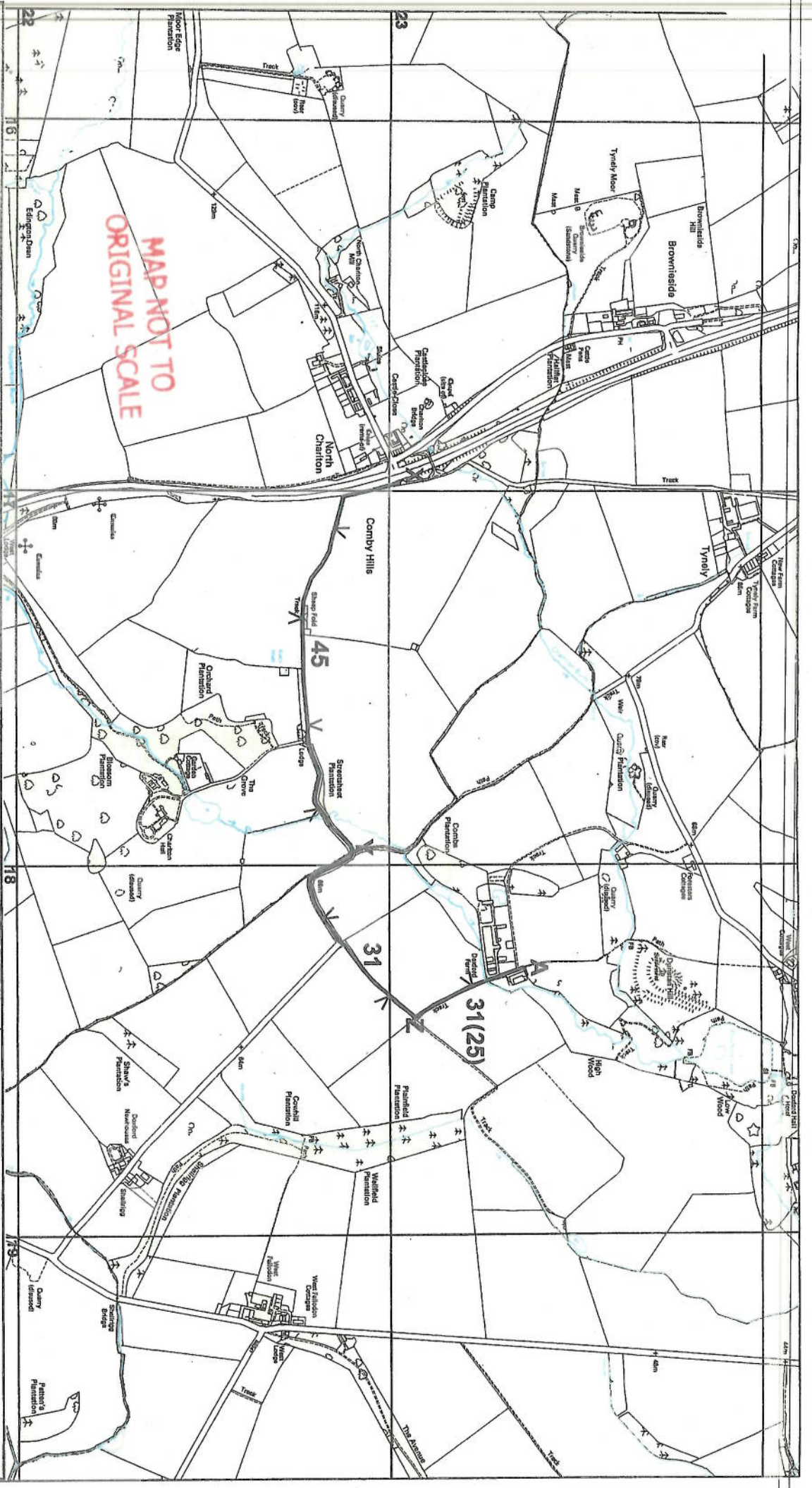
### **Formal Decision**

33. I confirm the unconfirmed part of the Order subject to the following modifications,

- On page 2 of the Order, the 'Index', for the first route listed delete 'FP 37' and insert 'BR 37'
- On page 3 of the Order, 'Description of Modification to Definitive Map and Statement', for the first entry delete 'Footpath No 37' and insert 'Bridleway No 37'
- On page 8 of the Order, after 'Parish of Eglingham' (where it first occurs) delete 'Footpath No 37' and insert 'Bridleway No 37'

*S Doran*

**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.9) 2017**

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

O.S. Map NU 12 SE	Definitive Map No 49	Scale: 1/10,000
Former District(s) Alnwick	Patch(es) Eglingham/Newton-by-the-Sea	Date: April 2017

*W. Moore*