



Order Decision

Hearings held on 14 March 2018 and 17 December 2019

by Sue Arnott FIPROW

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

Decision date: 28 January 2021

Order Ref: ROW/3176232/M1

- This Order, dated 20 June 2016, is made under Section 53(2)(b) of the Wildlife and Countryside Act 1981. It is known as the Northumberland County Council Definitive Map Modification Order (No. 12) 2016.
- It proposes to modify the definitive map and statement for the area by recording a byway open to all traffic in the Parishes of Craster and Rennington, as shown on the Order map and described in the Order schedule.
- There were three objections and one representation outstanding when Northumberland County Council submitted the Order for confirmation to the Secretary of State for Environment, Food & Rural Affairs.
- In accordance with Paragraph 8(2) of Schedule 15 to the Wildlife and Countryside Act 1981 I have given notice of my proposal to confirm the Order with modifications. One objection has been submitted in response.

Summary of Decision: The Order is confirmed without the modifications previously proposed.

Procedural matters

1. If confirmed with the modifications set out in paragraph 67 of my interim Order Decision issued on 7 February 2019, the Order would record on the definitive map and statement a byway open to all traffic (BOAT) as proposed but over only that part of the Order route between points Q, R and S1 (as marked on the modified Order map). It would not record the remaining section (S1-S), essentially on the basis that this section does not meet the criteria for recording a BOAT on the definitive map but is more properly regarded as forming part of the ordinary road network.
 2. One objection (from Messrs Robertson) has been submitted to my proposal to confirm the Order, irrespective of the modifications proposed.
 3. On 17 December 2019 I held a second public hearing at County Hall in Morpeth to consider this objection together with a further representation by agents on behalf of Mr Brown, the owner of Dunstan Hill Farm.
 4. I had visited the site of the claimed byway open to all traffic (BOAT) during the afternoon of 13 March 2018 prior to opening the initial hearing into this Order. I did so again, unaccompanied, during the afternoon prior to the hearing on 17 December 2019. At the close of this event, none of the parties present requested that I make a further visit.
 5. Following the second hearing which examined new evidence submitted by the objectors, I issued a letter (without prejudice) to all parties indicating that I was minded to reach certain conclusions which differed significantly from those
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set out in my interim Order Decision and therefore invited further submissions on the interpretation of the evidence. I received three responses including one from the the Trail Riders' Fellowship (TRF) which attached further evidence. All were circulated for final comment.

6. However, before reaching my final conclusions, additional information was submitted by Mr Kind and the TRF. In the course of carrying out further research, Mr Kind discovered information amongst records held by Northumberland County Council (NCC) that I considered relevant to this decision. Consequently this new material was circulated to all parties with an invitation to comment or make further submissions although none were received.

Main Issues

7. In my interim Order Decision I noted that there were three main issues to be addressed: the first is whether the evidence shows that a public right of way for vehicles was once in existence along the Order route; the second is whether any such rights still exist today for all vehicles, and thirdly, if carriageway rights are shown to subsist, whether the way should be recorded on the definitive map and statement in the category 'BOAT'.
8. These remain the questions to be answered in light of the additional evidence that has been put forward since my interim Order Decision was issued. As before, the evidence must be judged on a balance of probability.
9. A fourth matter concerns changes to the details recorded in the definitive statement for two connecting public footpaths that would be necessary as a consequence of recording the Order route on the definitive map. This is essentially an administrative formality and has not been questioned.

Reasons

10. On the first point, having examined the evidence previously submitted, it was my conclusion that the Order route had been a vehicular highway, most probably dating back to the early nineteenth century. However I acknowledged that the matter was very finely balanced.
11. Since then I have received additional evidence provided by Messrs Robertson which, they submit, tips the balance in favour of the way being a private road, not a public one. I also have material submitted by and on behalf of the TRF which supports their contention that the map-maker Greenwood showed the Order route as a carriageway in 1828, not a bridleway, and further that records show NCC diligently managed the highway network for which it took responsibility post-1929¹. I consider this new evidence below in the context of the material I previously examined in order to reach a final conclusion.
12. The second issue was not, and still is not, challenged. If a carriageway is shown to subsist, it would retain rights for all types of traffic.
13. The third question depends upon my conclusion remaining that the Order route is historically a public carriageway and must be addressed in the light of all the additional evidence and submissions.

¹ As provided in the Local Government Act 1929.

The new evidence

Tenancy Agreements and Conveyancing Records

14. I now have before me additional documentary evidence provided by Messrs Robertson from their family archive. This consists of the particulars of sale of the Dunstanburgh Castle Estate in 1904, an extract from a tenancy agreement in 1911, a copy of a tenancy agreement in 1920, details and an extract from a plan relating to the sale of land in 1935 and an extract from the vesting of land in George Elliot Robertson following probate of the will of William Robertson.
15. The family association with the land in this area dates back to an agreement in **1895** through which Mr George Robertson took the tenancy of Embleton South Farm.
16. In **1904** Embleton South Farm (which included the land to the immediate north of the Order route Q-R) and Stamford Farm (which held the field through which this section actually passes) were offered for sale as part of the Dunstanburgh Castle Estate. Mr George Robertson was noted as holding a tenancy of both farms. Field 40 (which contains the track Q-R) was noted as being laid to pasture at the time.
17. The objectors submit that the sale document references the tracks, quarries, kilns and footpaths that were being sold as part of the lot. The Order route was included with the land whereas the public road to Embleton was not. They argue this shows it was a private road to the old limekilns with access only by permission or instruction of the landowner.
18. I agree there is nothing in this document which adds any weight at all to the proposition that the Order route was a public highway but it does not rule it out. In fact I regard it as broadly neutral in evidential terms. The Order route is shown as a track leading from point Q to the property boundary at R and continuing beyond. The contemporary 25" Ordnance Survey map indicated a link between Q-R and the former quarry area in which the kiln was located but neither the 1904 sale plan or particulars give any indication of the purpose of the track, nor do they note any rights over it, public or private.
19. There is no obvious reason why the tenant of Stamford Farm, having the benefit of this limekiln on the property, would need to gain access to the limekiln north of Dunstan Hill. By 1904 the OS map shows the quarry at this location to have ceased operation (being labelled on the 1863 OS map "Old Quarry"). It is entirely possible that use (public or private) was made of the Order route Q-R to reach this quarry in the early-nineteenth century (or at such time as the quarry there was actually operational) but there seems to be no tangible evidence to support that theory other than the existence of tracks for which the status is unclear. I can place little weight on this, either way.
20. Next is a short extract from the **1911** tenancy agreement between Mrs Eyres Monsell (the landowner) and Mr Robertson relating to Embleton South Farm. The objectors point to the phrase: "*the tenant shall not allow any footpath or other easement to be created on any part of the said Farm*", submitting that this demonstrates that the owner of the land did not intend to dedicate a right of way in 1911.
21. I accept this offers *some* evidence of a lack of intention to dedicate rights of any kind over the land although it does not preclude the possibility that a

highway had already been established before the date of the tenancy. In any event I can give this little evidential weight since it is my understanding (from the land parcels identified in the 1904 sales documents) that the field in question (No 40) was held by Stamford Farm, not Embleton South Farm. Although both were tenanted by Mr W Robertson at the turn of the twentieth century, it is only the owner of the affected land that can dedicate a highway; it is therefore the intentions of the relevant landowner that are at issue when determining whether a right of way can be presumed to have been dedicated.

22. In **1920** a tenancy agreement was signed between Sir Arthur Sutherland and Mr W Robertson in respect of Stamford Farm which did include field 40 and therefore the Order route section Q-R.
23. The objectors highlight four particular clauses in this agreement².
24. Clause 3(a): In this, the landlord retains the rights to access, and to the produce from, all quarries, kilns, woods etc and it is the duty of the landlord to compensate appropriately for damage caused in retrieving these.

It is submitted that this would not be necessary if the quarries etc could be accessed by public tracks or roads.
25. Clause 3(c): Here, all rights of way over the farm are reserved for the landlord.

It is argued that if public carriageways crossed the farm land, this clause would not be necessary and such a road would be referenced.
26. Clause 5: This refers to maintenance of all occupation roads.

It does not refer to public roads. It is submitted that this supports the fact that there are none within the farm land, particularly as the clause expressly excludes any mains water supply pipes.
27. Clause 15: This prohibits the tenant from granting any public rights of way. Like the 1911 tenancy agreement, this is said to support the fact the landowner had no intention to dedicate any rights of way across the farm in 1920.
28. These are standard clauses frequently found in land tenancies. The landlord's right to access the land is a general one, and one that would be necessary in any event unless the quarry, kiln or wood lay wholly within the limits of a highway (which is not a realistic scenario). Rights of way over the farm allow access to all parts of the land whereas public rights of way of whatever classification restrict the user to a right to pass or re-pass along a particular route over land. The maintenance of occupation roads is, again, a general obligation; the roads to be maintained are not specifically identified and therefore it is not possible to know for sure whether Q-R was considered to be one of these or a way that was to be maintained at the public expense.
29. As regards this document I repeat my conclusion in respect of the 1904 sales particulars: that the 1911 tenancy does rule out the possibility that the Order route was a public highway but it adds no weight to support it.
30. In **1935** Stamford Farm, Embleton South Farm and part of Embleton Glebe Farm were sold to Mr W Robertson by his landlord Sir Arthur Sutherland. Brief extracts from the agreement for sale are submitted, from which it is clear that

² The best copy of this document is still extremely difficult to decipher. However Messrs Robertson's transcript of the relevant clauses was not disputed.

- the field containing the Order route was included. The objectors make the point that the land over which the claimed public road passes in field 40 was included in the sale (as was a noted footpath elsewhere on the property); it was not excluded in the same way as the B1340 road to Embleton was excluded.
31. In fact the footpath referred to is shown on the underlying OS base map used for the transaction; it would appear that neither this, nor any other public right of way, is specifically identified in the agreement for sale. However that is not unusual and the absence of any direct reference is not proof that such rights did not exist.
 32. The final document submitted concerns the transfer of land to Mr G E Robertson following the death of William Robertson in **1963**. This includes a schedule listing the land parcels transferred. The objectors point out there is no mention of any public carriageway or any other public right of way affecting the track.
 33. I agree, but it would be unusual to find such a reference in a document of this nature and therefore the significance of the omission is much reduced.
 34. In drawing together my conclusions on this additional evidence it is clear that none of these documents offer substantive evidence that would preclude the possibility that section Q-R carried a public right of way. Much of the text quoted reflects standard clauses found in typical agreements relating to land tenancies and sales.
 35. Nevertheless, if the Order route were a publicly-maintainable carriageway, it is strange that (a) there is no mention of any rights over the way in the sales particulars (public or private) when the track is clearly shown continuing eastwards from point R on the sales plan, and (b) there is no recognition of the burden of its maintenance being funded from the public purse.
 36. Even more puzzling is the depiction on the 1904 plan of what was referred to at the first hearing as Uncle Will's private track³ in the same brown colouring as other recognised public roads when the Order route appeared merely as a uncoloured double-pecked line. Nowhere amongst these documents are there any clues as to the purpose of this track. Although the objectors contend it simply served the old quarry and limekiln, since its first depiction on OS maps in 1866 it has been shown to continue across the parish boundary, linking the two highways at Q and S via Dunstan Hill. Had there been evidence of private easements to facilitate passage between Stamford Farm and Dunstan Hill Farm, perhaps to provide access to limekilns, quarries or the smithy, that might have offered support for this being a private road but there is no such proof in these documents.
 37. As a result, I find this new evidence does show that there was no acknowledgement of a public road amongst those with a landowning interest, but the weight I can attach to this is not sufficient to disturb the probability that a historical carriageway (as shown by Greenwood) continued to exist, albeit one that may have fallen out of general use.

³ At paragraph 37

Greenwood's map of 1828

38. After considering submissions made at the first hearing, my conclusion (as set out in paragraph 19 of my interim decision) was that the evidential balance tilted slightly more in favour of the Order route being shown on this map as a public way than a private one but that this was not hugely persuasive.
39. Looking again at the evidence which pre-dated this map (the commercial maps listed in my previous paragraph 13), it suggests that there were substantial changes to highways in this area between the production of maps by Armstrong in 1769 and Greenwood in 1828. Smith's map in 1801 echoed Armstrong's survey, with Fryer (1820)⁴ and Cary (1827) appearing to show intermediate stages in the evolution of a 'new' road network.
40. The legitimacy of the process which lay behind these apparent road changes is not at issue here but it is disappointing that no formal record has been unearthed that would shed light on the changes to the highway system in this area during the early nineteenth century. The field system around Dunstan Hill strongly suggests formal inclosure, especially within Craster parish. Yet, as I previously noted, no record of any inclosure act, award or agreement has been discovered.
41. It is possible that the status of the Order route was defined through such a process, and that this may have explained the inclusion of the track Q-R-S on Greenwood's map as a 'cross road'. However I recognise that is speculation arising from an attempt to build a picture from the evidence with a missing piece of the jigsaw and I fully accept the TRF's comment that: "*Speculation is not a sound substitute for evidence*".
42. As a result of additional research, the TRF has submitted several examples of routes annotated by Greenwood on his map of Northumberland with the words "Bridle Way", "Bridle Road" or "Drift Road". From the analysis provided, I now accept that, had the Order route been regarded as a bridleway in 1828, it would most probably have been annotated accordingly. However it was not.
43. Consequently I must augment my previous conclusions by finding, on balance, that in 1828 Greenwood was depicting a *carriageway*, and more probably a public one than private. Further I will modify my conclusion at paragraph 19 of my interim decision thus: the overwhelming majority of the roads in this locality mapped by Greenwood correlate closely with present day public *carriageways*. I therefore increase the weight I place on the map by Greenwood as evidence of a public highway for vehicles.

⁴ Although dates of survey are not given for the maps published by Fryer in 1820 and by Cary during the ensuing decade, it would appear that the only part of the Order route recorded at that time was Q-R, the road turning north-eastwards to what is now Spittalford.

Council Highway Records

44. The objectors cast further doubt on the reliability of the Handover Map, pointing out that there are two routes shown as number '34'; however, at the hearing it was agreed that the road between Dunstan Square and Dunstan Steads⁵ is probably numbered '54' and therefore number 34 is not duplicated.
45. Although that point may have been resolved, the objectors also criticise the lack of any supporting documentation to underpin the 1932 Handover Map. With the exception of the Greenwood map, I am inclined to agree.
46. Attaching a degree more weight to the 1828 map as evidence of a (probably public) carriageway highlights the disparity with the nineteenth century evidence that post-dates it. In particular the Ordnance Survey Boundary Remarks Book recorded the way as "Occupation Road" although other records from the period pre-dating the Handover Map are more equivocal.
47. Yet there is no doubt at all that the Order route was included on the Alnwick RDC Handover Map dated 1932 as a publicly maintainable highway on the transfer of responsibility. All other roads similarly shown on this map are recognised public carriageways.
48. This remains the key piece of evidence in this case carrying significant weight, together with another contemporary record: the Alnwick RDC Schedule of Reputed Public Rights of Way⁶. As I noted previously this includes what are now Footpaths 9 and 10, clearly described as connecting with 'Dunstan Hill Road'. The fact that the Order route itself was *not* included suggests that it did not fall into the category of either 'Footpath, Bridle Road or Cart Road' but nonetheless carried public rights.
49. Since the second hearing, additional evidence has been discovered by Mr Kind, following his research into the minute books of NCC's Highways Committee (1929-1961). The extracts he has now submitted focus on references to unclassified roads and public paths.
50. These illustrate the process by which NCC chose to manage the new highways for which it became responsible, seemingly by initially delegating maintenance and improvement works back to the district surveyors who were allocated a budget accordingly. The TRF submits that this shows a strong inference of knowledge and competence in the maintenance of unclassified roads at the time. In short, the self same surveyors from the district council who previously worked on unclassified roads continued to oversee the highway network although additions to the network of publicly maintainable highways (adoptions) were handled by the County Council.
51. The TRF highlights the annual inspection of highways carried out by the County Council and the accuracy of the mileage noted for unclassified roads as evidence that NCC took its new responsibilities and record keeping seriously.
52. The NCC minutes note that the Restrictions of Ribbon Development Act 1935 brought in provisions which prevented development near classified highways without the consent of the highway authority. The same restrictions could also

⁵ This is currently recorded on the definitive map as a public bridleway. It was the subject of an order considered at Alnwick Magistrates' Court on 7 July 1965 that extinguished public vehicular rights whilst retaining a bridleway.

⁶ Prepared under the Rights of Way Act 1932 but otherwise undated

- be applied to unclassified roads by resolution of the highway authority. It appears that NCC took advantage of this scheme.
53. On 28 June 1937 an appendix to a report to the Bridges and Roads Committee listed all unclassified roads in Alnwick Rural District, including the Order route as No 23. I previously noted that an advertisement was placed in the press on 28 June 1937 to announce endorsement of this list of roads to which the relevant provisions of the 1935 Act were to be applied.
54. At paragraph 34 of my interim decision I concluded that "*There is little doubt that this (the 1937 list of unclassified roads) will have been based on the 1932 map*". However it now seems that it may have been based on more than just the map itself. The pre-handover surveyors continued to work on highways within Alnwick District for some years after the transfer post-1929; indeed it appears that it was not until 1939 the NCC minutes note that new in-house surveyors were to be recruited.
55. Had there been a mistake on the 1932 Handover Map, it now seems highly likely that the wrongful inclusion of the Order route would have been spotted, particularly when such a mistake would have been replicated in the 1935 Act list of unclassified roads and the map accompanying that published list.
56. I accept the objectors' comment that no public money has ever been known to have been spent on the Order route other than between S and S1 at Dunstan Hill. In the light of the latest research material, I suspect the upgrading of this latter section may have followed the 'Agriculture (Improvement of Roads) Act 1955' but no records have been discovered to explain this.
57. However I am now more convinced that the weight of the evidence does swing towards the Order route having once been recognised as a public vehicular road and one which was understood by the relevant authorities to be maintainable at the public expense, even though evidence of actual works is scant.
58. I agree with the objectors' point that there is no apparent benefit of using the Order route when other roads within the local network offer better alternatives; indeed that may be why the road fell out of use. However the merits of the route are not at issue when determining the true legal status of the way.
59. I acknowledge again what I believe to be the genuine recollections of the Robertsons, whose family has farmed the land for well over a century, that the road has always been regarded as private.
60. Nevertheless, on the basis of all the material now before me, I am satisfied that the balance of probability test has been met and that historically the Order route was established as a publicly maintainable vehicular highway between points Q, R and S on the Order map long before living memory.

The effect of the Natural Environment and Rural Communities Act 2006

61. I previously accepted that the exception offered by sub-section 67(2)(b) of the Natural Environment and Rural Communities Act 2006 (the 2006 Act) was applicable to the Order route and was satisfied that the evidence supports the conclusion that it still carries full public carriageway rights. No representations have been submitted to the contrary, and that remains my view.

Classification as a 'byway open to all traffic'

62. In paragraphs 50 to 63 of my interim Order Decision I considered in some detail the factors to be taken into account when determining whether or not a public carriageway should be recorded on the definitive map and statement as a BOAT. It was my conclusion then that the Order route Q-R-S1 is more likely to be used by the public as walkers or horse riders than with vehicles and that therefore this should be recorded as a BOAT, but that the likely use and character of the section S1-S is such that it does not fit the criteria for inclusion in the definitive record. Further, it was more properly regarded as forming part of the ordinary road network.
63. At the first hearing Mr Bell argued that the Order route should be seen as a single entity and the whole road should be recorded as one, particularly when use by the public is most likely to be as a through-route. He made similar submissions in writing to the second hearing.
64. Previously it was not clear to me whether the residents of the Dunstan Hill farm cottages that face onto section S-S1 enjoyed a private right of vehicular access or relied on a public one. At the second hearing I was told that ownership of the cottages and the tarmac-surfaced access track lies with Dunstan Hill Farm⁷. That does still leave open the question of whether the residents drive along S-S1 as a member of the public or essentially in the exercise of a private right.
65. This may be a matter of semantics to an extent given my conclusion that a vehicular highway subsists, but the likely use by *the public* is a factor that will influence whether or not it should be recorded on the definitive map.
66. I remain conscious that there are no categorical guidelines on interpreting the criteria for a BOAT but the sources I examined in my interim decision invite consideration of the 'concept', 'type' or 'character' of the way, and its 'suitability for use by pedestrians and horse riders' rather than a direct assessment of its current main use.
67. Whilst my views on other aspects remain largely unchanged, on reflection I consider the evidence tilts in favour of use of this section being more probably by members of the public either on foot, on horseback or with bicycles than with vehicles, despite its sealed surface.
68. The essential question is whether both sections of this historical carriageway are "*used by the public mainly for the purpose for which footpaths and bridleways are so used*" since that is the test to be applied. Although the answer is not clear cut, on balance it is my view that both fall into this category and should be recorded on the definitive map as one continuous BOAT.

Conclusions on the historical evidence

69. On a balance of probability, I am satisfied that the evidence points towards the Order route having been a vehicular highway dating back to the early nineteenth century at least.
70. This route is exempt from the statutory extinguishment of rights for mechanically propelled vehicles provided by sub-section 67(1) of the 2006 Act on the grounds provided in sub-section 67(2)(b). Such rights therefore continue to exist.

⁷ I was informed that Mr Brown purchased the additional land in 2012.

71. Finally, I conclude the overall character and nature of use of the Order route fits the description of a byway open to all traffic such that, as proposed by the Order (as made), it should be added to the definitive map and statement with that status.

Other matters

72. I have noted representations made on behalf of Mr Brown of Dunstan Hill Farm concerning the accuracy of a local authority search carried out by the NCC Local Land Charges Department in 2010 in connection with the purchase of the property. Such a search will normally reveal only what is already recorded. In this case, the evidence shows that unclassified road U2016 was stated to affect the land in question.

Conclusion

73. Having regard to the above and all other matters raised at both hearings and in the written representations, I conclude that the Order should be confirmed as made and without the advertised modifications.

Formal Decision

74. I confirm the Order as originally made.

Sue Arnott

Inspector

APPEARANCES

In support of the proposed modifications to the Order

Mr A Bell Definitive Map Officer; Northumberland County Council
Mr A D Kind Also representing the Trail Riders' Fellowship

Opposing the Order and the proposed modifications

Mr D Robertson Landowner
Mr J Robertson Landowner

DOCUMENTS

In addition to those documents submitted at the previous hearing(s)

1. Copy of the statutory objection to the proposed modifications
2. Statement of case submitted by Mr A Kind on 3 September 2019
3. Statement of case submitted by Mr J Robertson on 23 September 2019 together with additional evidence
4. Statement of case submitted by Mr A Bell for NCC on 24 September 2019
5. Statement of case submitted by Ms A Jones of George F White LLP dated 24 September 2019
6. NCC's response to Document 5 (above)
7. Copy of email from Ms Jones (George F White) to Mr Bell (NCC) sent 16 December 2019
8. NCC's response to statements of case submitted by Messrs Robertson and George F White
9. Question and Submission Notes prepared by Mr Kind on behalf of the Trail Riders' Fellowship

Additional document submitted after the close of the hearing

10. Further submissions of Messrs Robertson dated 6 January 2020
11. Letter from Planning Inspectorate to interested parties sent 9 June 2020
12. Responses from Messrs Robertson (15 June 2020), TRF (29 June 2020) and NCC (30 June 2020)
13. Email from Planning Inspectorate to interested parties (29 July 2020)
14. Responses from Mr Kind and TRF (31 July 2020) and Messrs Robertson (17 August 2020)
15. Email from Mr A J Brown sent 17 August 2020
16. Submission of Alan Kind and the Trail Riders' Fellowship dated 23 September 2020 and attached paper "Unclassified Roads and Public Paths as Referenced in the Northumberland County County Highways Committee Minutes"

