

|  |
| --- |
| **Order Decision** |
| Site visit on 22 June 2021 |
| **by Sue Arnott FIPROW** |
| **an Inspector appointed by the Secretary of State for Environment, Food and Rural Affairs** |
| **Decision date: 21 September 2021** |

|  |
| --- |
| **Order Ref: ROW/3235802** |
| * This Order 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) 2017 Byway Open to All Traffic No 22 (Parish of Doddington).
 |
| * The Order is dated 2 October 2017. It proposes to modify the definitive map and statement for the area by recording a byway open to all traffic to the north and east of Fenton, as shown on the Order map and described in the Order schedule.
 |
| * There were two letters of objection and one representation 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 Order is confirmed.** |

**Procedural matters**

1. This Order was due to be determined by means of a public hearing but the introduction of Covid-19 lockdown restrictions in March 2020 meant that a public meeting of this nature could not be held as planned. In order to progress this matter without delay, interested parties were invited to consider whether a change of procedure would be acceptable in these circumstances. As a result, it was agreed that the Order would be determined following a further written exchange together with an unaccompanied visit to the site.
2. I am grateful to all concerned for their assistance in making this alternative arrangement during difficult times. For the record I carried out my inspection of the Order route on 22 June 2021 alone.
3. When the Order was publicised, two objections were submitted. One of these was on behalf of the landowner affected by the route that is the subject of this Order. The second was on behalf of the Trail Riders’ Fellowship. Although both parties are statutory objectors, they contest the Order for quite different reasons. So as to distinguish between their reasoning in this Order Decision, I shall refer to them where appropriate as “the landowner” and “the TRF”. Whilst Mr Kind has made submissions on behalf of the TRF, he has also made separate representations in his own right.
4. Subsequent representations were received from Northumberland County Council (NCC), Mr Kind, the British Horse Society and Ms J Stewart, and later from Ms J Roseff. I have taken account of all relevant evidence in reaching my decision.

**Main Issues**

1. Northumberland County Council made the Order under the Wildlife and Countryside Act 1981 (the 1981 Act) on the basis of events specified in Sections 53(3)(c)(i) and 53(3)(c)(iii). If I am to confirm it, I must be satisfied that evidence has been discovered which shows, on a balance of probability, that the public rights intended to be recorded do subsist and that other particulars contained in the map and statement require modification.
2. There are three main issues here: 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 exist, whether the way should be recorded on the definitive map and statement in the category ‘BOAT’.
3. A fourth issue concerns changes to the details recorded in the definitive statement for a connecting public bridleway that would be necessary as a consequence of recording the Order route as a public right of way but this is essentially an administrative formality.

Reasons

***Background to the Order***

1. If confirmed, the Order would record the route in question (shown on the Order map as Z-A) as a byway open to all traffic, that is “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”.[[1]](#footnote-2)
2. On the basis of the historical evidence it discovered, NCC concluded that public vehicular rights of way did (and still do) exist along the Order route, relying on the legal maxim ‘*once a highway, always a highway*’. Further, NCC considered that Section 67 of the Natural Environment and Rural Communities Act 2006 (the 2006 Act) does not affect the continued existence of such rights.
3. Sub-section 67(1) of that Act provides that upon commencement on 2 May 2006 any existing public right of way for mechanically propelled vehicles (MPVs) was extinguished if it was over a way which, immediately before that date, was not shown in the definitive map and statement or was shown as either a footpath, bridleway or restricted byway, unless such rights were saved by virtue of falling into one of the categories for exemption.
4. NCC took the view that public MPV rights were not extinguished, having been saved by sub-section 67(2)(b) which provides as follows: “(2) Sub-section (1) does not apply to an existing public right of way if … (b) immediately before commencement it was not shown in a definitive map and statement but was shown in a list required to be kept under section 36(6) of the Highways Act 1980 … (list of highways maintainable at public expense)”. It is not disputed that the Order route appears on such a list (identified as U1034).
5. Consequently the Order was made to record a BOAT on the basis that a public vehicular right of way exists, that rights for MPVs have been saved, and that the route has the character of a way mostly used in the manner in which a public footpath or bridleway is used[[2]](#footnote-3).
6. The landowner contends that the evidence does not show the Order route to be a public road, whilst the TRF argues it does but that the road does not fit the criteria for addition to the definitive map and statement.

***The nature of the route as a cul-de-sac***

1. Before analysing the historical evidence I note firstly that the route proposed by this Order appears to be a cul-de-sac for vehicles. Although it would connect with Bridleway 11 at point A, no further onward public vehicular rights would be recorded by this Order beyond that junction. Clearly the road does continue beyond the locked gate and ‘private’ notice at point A, leading south eastwards to the B6525, but the status of that way is not (directly, at least) at issue here[[3]](#footnote-4). However it is impossible to disregard the physical existence of a through-route since the early nineteenth century at least (as demonstrated by Fryer’s map of 1820) when considering the history of the Order route Z-A.
2. At point A there is no obvious destination of interest to the public to explain a vehicular cul-de-sac in this location. Since this issue was highlighted in the submissions, I invited further comments from the parties in order to establish whether in fact this route could technically constitute a public highway over and above bridleway status.
3. No clear explanation emerged to support a cul-de-sac highway here. For this reason I propose to consider the section Z-A in the context of what I shall refer to as ‘the whole road’ although I will emphasise that it is only the Order route that is before me for determination.

***Evidence of public vehicular rights***

1. The evidence in this case is quite limited. It includes historical maps, tithe records, Ordnance Survey (OS) maps, material prepared under the Finance Act 1910 and twentieth century highway records. Most significantly the Order route is recorded as a publicly maintainable highway and has been so shown in the County’s road records since the 1950s.
2. An early map of Northumberland by Armstrong (1769) does not show the Order route[[4]](#footnote-5) although the Fenton to Barmoor and Lowick road is shown with double dashed lines, connecting with the Doddington to Barmoor road (B6525) somewhere near to its present day junction. Whilst this obviously cannot confirm the existence of the Order route and its continuation south eastwards in the late eighteenth century, it appears that the roads to which it connected were certainly in use.
3. Maps by Fryer in 1820 and Cary (1820-1832) both show the whole road as part of the local network, passing ‘Nesbitt Buildings’ and ‘Hanging Hall’[[5]](#footnote-6). Yet Greenwood’s map published in 1828 omitted both this and the Fenton-Barmoor road; on this map a road to Nesbitt Buildings (in the vicinity of the present Fenton House) is shown from Nesbitt, and a group of buildings close to point A (later labelled as ‘Hanging Hall’ by the OS) was shown as being reached via the present Fenton Hill. The physical existence of the whole road at the time of Greenwood’s map does not seem to be in doubt as it was recorded by Fryer before 1828 and is clearly shown on the first edition OS map in the mid 1860s. Yet there is no clue to its omission by Greenwood.
4. Given this surprising inconsistency between Fryer/Cary and Greenwood, I invited comments from interested parties, seeking views on the conflicts between these maps and the respective weight to be attached to each.
5. NCC points out that Greenwood is usually the more accurate of commercial map-makers of the time but not infallible. The council recognises there is no obvious reason why the Order route and the connecting Kimmerston to Bar Moor road should be omitted altogether.
6. The BHS suggests that Greenwood may have considered the route to be less than a public carriageway, in particular a bridleway. Nevertheless it is the Society’s view that the Order route was part of a pre-existing through-road. It also points out that Fenton House was not built until c1875 so is not shown on the early commercial maps
7. On behalf of the TRF, Mr Kind points to a number of present day recognised public roads in the locaility that were also omitted by Greenwood. He accepts that their collective omission cannot be explained, but submits that the absence of the Order route is therefore of less significance than had it been the only one missing.
8. I recognise that Greenwood is usually quite reliable is representing the highway network with a reasonable degree of accuracy; indeed it is for this reason that the complete absence of the whole route from the 1828 map is so puzzling.
9. The road is not marked on the map attached to the Fenton Tithe Award of 1849 either, although ‘Hanging Hall’ is shown alongside the track that now carries Bridleway 11 which continued to Fenton Hill.
10. Yet the whole road from point Z via A to the B6565 has been shown consistently for over a century on all OS editions (1864, 1899, 1924-25, 1957, 1965, 1988) although none of these maps confirm its status as a *public* way.
11. The OS Book of Reference which accompanied the OS first edition map draws attention to the fact that in the mid-nineteenth century the Order route and its continuation passed through three townships: Fenton, Nesbitt and Doddington. Both public roads and private roads are listed within each of these townships but disappointingly it has not been possible to marry up the reference numbers with the corresponding land parcels on the first edition 25” maps.
12. I have noted various aspects of these maps which might possibly offer clues to the past, including the position of Hanging Hall and Nesbitt Buildings, the Order route being open to the moor on the eastern side until the late-1800s, the establishment of Fenton House in the late nineteenth century; all may be relevant to the status of the whole road but there is not sufficient detail to reveal it. Further there are aspects of the landscape here which suggest that the land inclosure movement of the late eighteenth/early nineteenth centuries may have had influence, yet no inclosure award or map has been discovered.
13. The records compiled under the 1910 Finance Act are indecisive as regards the status of the way. The Order route is not excluded from adjacent hereditaments as might be expected if it were a recognised vehicular highway.
14. The only evidence of an early road remains the two (similar) commercial maps which swing the balance of probability very slightly towards an historical public way and the OS mapping which confirms its physical existence ever since that period. On its own this would fall a long way short of the evidence required to prove a public carriageway.
15. Yet it is recognised that the Order route X-A has been included in the highway authority’s list of maintainable highways since its record dated 1951 and is on all those that followed including the 1958 road schedule (Glendale Rural District of Berwick Division), 1964 map and schedule (Wooler Division), 1974 list (Wooler Division) and the 2006 NCC list.
16. However it is equally clear that this cul-de-sac was not included in the Glendale Rural District Council handover map or the list of “Unclassifed Roads in Glendale Rural District” published in minutes of the NCC Bridges and Roads Committee 26 June 1939. Neither is it on the list (published in August 1939) of unclassified roads related to the Restriction of Ribbon Development Act 1935.
17. NCC candidly admits it does not know why the route was added in the 1950s or why it was identified as a cul-de-sac. The authority has no evidence to explain this but suggests it *may* have been recognised as a public vehicular through-road but maintainable by the public only between A and Z with responsibility for the remainder lying in private hands.
18. In 2014 the landowner confirmed that the Order route was assumed to be part of the adopted highway and that it has for many years been maintained by NCC which has carried out road and verge works. (An objection to the Order was later lodged on practical grounds, noting also that the land is included in the estate title.)
19. At all stages in the preparation of the definitive map and statement in the 1950s it seems the Order route was noted as a public road and Bridleway 11 (initially numbered 5) was marked as connecting at a gate near point A. This proceded without question, implying that Z-A was judged to be of at least of an equivalent status.
20. I am aware that the highway authority’s records of maintenance liability are not definitive. Although they are required to be kept by law, there are no prescribed statutory procedures for adding or removing routes from them.
21. Mr Kind produced copies of records extracted from the minute books of NCC’s Highway Committee from 1929 to the 1960s. He had undertaken extensive research so as to better understand how the authority managed its unclassified roads during this period.
22. These records reveal that NCC chose to manage the new highways for which it became responsible in 1929[[6]](#footnote-7) by initially delegating maintenance and improvement works back to the same district surveyors who previously worked on unclassified roads. Mr Kind submits that this shows a strong inference of knowledge and competence in the maintenance of unclassified roads at the time since the same surveyors continued to oversee the highways in their area for several more years after the handover. Additions to the network of publicly maintainable highways (adoptions) were handled by the County Council but there is no record of the Order route being the subject of formal adoption.
23. I have no cause to doubt Mr Kind’s submission that the highway engineers and surveyors employed by NCC (and Glendale District Council before that) were competent and that the authority complied with its various duties in relation to highway maintenance. That is demonstrated by the minutes of the meetings provided by him.
24. However, it also true that those same district highway officers prepared a map in 1932 showing publicly maintainable highways to be ‘handed over’ which omitted the Order route, and seven years later published a map and schedule listing unclassified roads which did likewise.
25. In my view, it is not unreasonable to question the evidence that supported the addition to the 1951 map, particularly in an exercise like this which is seeking to determine the permanent legal status of the way, not solely who is to maintain it. To do otherwise would be to simply accept that the surveyors discovered something that persuaded them it was a publicly maintainable road but where there is no actual record of what that was. In my opinion, that would be to take any ‘presumption of regularity’ a step too far.
26. However, no reason has been forthcoming to explain the purpose of a well-maintained cul-de-sac highway in this location surfaced with tarmac at the public expense. There is no rule against a highway leading to a dead-end in the countryside such as this but in determining whether a highway subsists in law, how, when and why it came about are reasonable questions to ask.

***Summary and conclusions***

1. My overall impression from the evidence is that historically the whole route probably formed a link in the local highway network, being part of a minor public through-road which connected with highways at both ends. The two commercial maps from the early 1800s suggest that at the time it may have run across open moor land.
2. My suspicion is that changes were then in motion, perhaps associated with inclosure in the early part of that century, and that this led to Greenwood’s omission of several roads in the vicinity of Fenton, Nesbitt and Doddington from his survey. However I recognise that this theory has no direct support from the evidence before me and I do not rely on it. But what is quite clear is that despite the Greenwood map, the whole road has continued to physically exist for approaching two centuries and for the most part has been enclosed on both sides throughout its length. That fact does not preclude it from being private but the unchallenged public interest in the maintenance of Z-A over 50 years or more (albeit its origin is unexplained) adds weight to the case for public vehicular rights, even if only applicable to the northernmost section.
3. Although there is some mention of use by the public, on foot and horseback, of the continuation south eastwards from point A, I have insufficient evidence before me to prompt my further investigation into this section.
4. I am wholly satisfied that the route Z-A is of at least bridleway status and have considered whether to propose a modification to the Order to reflect this. However that would ignore the acceptance by the landowner of publicly-funded maintenance carried out over many years to ensure the route is to vehicular standard. Therefore on balance I conclude that, although very finely balanced in this case, the scales fall in favour of recording this route Z-A as a vehicular highway, albeit an apparent cul-de-sac with no clear public interest at point A.
5. To summarise, on a balance of probability I conclude that the evidence is sufficient to show that a public right of way for vehicles subsists between points Z and A.
6. The depiction of the Order route in the list of maintainable highways held by NCC is not disputed and therefore MPV rights for the public are unaffected by the 2006 Act so that rights continue to exist for all types of vehicle.
7. On behalf of the TRF, Mr Kind has challenged NCC’s conclusion that the route qualifies for inclusion in the definitive record as a BOAT. He argues that there is no evidence to show that the Order route is other than an ordinary minor vehicular public road.
8. The question is whether the route fits the statutory description as set out in paragraph 8 above. When deciding whether a way ought to be shown on the definitive map and statement as a BOAT, paragraph 4.38 of Circular 1/09 advises authorities to “*examine the* ***characteristics*** *of the way. Relevant case law suggests that, for a carriageway to be a BOAT, it is not a necessary precondition for there to be equestrian or pedestrian use or that such use is greater than vehicular use. The test also relates to its* ***character*** *or* ***type*** *and whether it is more* ***suitable*** *for use by walkers and horse riders than vehicles*.”[[7]](#footnote-8)
9. This reflects the *Masters[[8]](#footnote-9)* case where, in his judgement, Roch LJ concluded that “*The purpose of the definition* (in the 1981 Act) *was to identify the way Parliament intended should be shown on the definitive map and statement by its* ***type*** *or* ***character”.***
10. Although the provision of a tarmac surface does suggest a road capable of forming part of the ordinary road network, its nature as a vehicular cul-de-sac with no place of public interest at point A, and its onward connection only for bridleway traffic, satisfies me that this route has the character of the type of road envisaged for inclusion on the definitive map as a BOAT.
11. I therefore conclude that the Order route should be recorded on the definitive map and statement as a BOAT, that the consequential administrative changes to the connecting bridleway are required and that Order should be confirmed.

***Other matters***

1. The landowner has challenged the width of the Order route as stated in the Order schedule. This would define the width as varying between 10 and 15.5 metres, the measurement recorded by NCC between boundaries on each side. It is argued that the surfaced road is nearer 3-3.5m and that this is the width that this is the extent of the carriageway.
2. In response NCC highlights the (rebuttable) presumption that the highway extends from boundary to boundary, thereby including the grass verges which are included for use by pedestrians and horse riders, particularly when a motor vehicle is using the carriageway.
3. I agree with NCC’s interpretation and do not consider it necessary to make any amendment to the Order as regards width.

**Conclusion**

1. Having regard to the above and all other matters raised in the written representations, I conclude that the Order should be confirmed.

**Formal Decision**

1. I confirm the Order.

Sue Arnott

**Inspector**

1. Section 66 of the 1981 Act [↑](#footnote-ref-2)
2. A characteristic of a BOAT established in the case of *Masters v SSETR [2000] 2 All ER 788, (CA) [2000] EWCA Civ 249, (CA)[2000] 4 All ER 458, (CA)[2001] QB 151* (the *Masters* case). [↑](#footnote-ref-3)
3. Although I am aware that the Ramblers’ Association commented that the BOAT should continue to the B6525. [↑](#footnote-ref-4)
4. I agree with NCC’s interpretation of this map. It is unfortunate that a crease in the map along the line of the Order route gives the impression of a road. [↑](#footnote-ref-5)
5. Both buildings are shown by Fryer and Cary in different positions to those on later OS maps but I attach little significance to this inaccurate labelling by the earlier mapmakers. In fact Armstrong’s map in 1769 also noted Hanging House but in a position well to the east of the Order route. [↑](#footnote-ref-6)
6. As provided in the Local Government Act 1929 [↑](#footnote-ref-7)
7. Emphasis added [↑](#footnote-ref-8)
8. *Masters-v-the Secretary of State for the Environment, Transport and the Regions* *[on application of the Court of Appeal judgment] [2000] 4 All ER 458* [↑](#footnote-ref-9)