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| **Order Decision** |
| Inquiry held on 28 January 2020 |
| **by Sue Arnott FIPROW** |
| **an Inspector appointed by the Secretary of State for Environment, Food and Rural Affairs** |
| **Decision date: 11 October 2022** |

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| **Order Ref: ROW/3193904/M2** |
| * 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 30) 2016 Byways Open to All Traffic Nos 20 & 17 (Parishes of Bamburgh & North Sunderland).
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| * The Order is dated 1 December 2016. It proposes to modify the definitive map and statement for the area by recording a byway open to all traffic from the B1340 public road south of Bamburgh, via Greenhill and Fowberry, to the U2018 public road at Shoreston Hall, as shown on the Order map and described in the Order schedule.
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| * There were four 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.
* In accordance with Paragraph 8(2) of Schedule 15 to the Wildlife and Countryside Act 1981 I have (twice) given notice of my proposal to confirm the Order with modifications. An objection from two parties has been submitted in response to the latest proposal, together with two representations.
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| **Summary of Decision:**  | **The Order is confirmed subject to the modifications previously proposed including the additional minor modifications.** |

**Procedural matters**

1. If confirmed with the modifications set out in paragraph 69 of my interim Order Decision issued on 9 April 2020, and the further modifications proposed in paragraph 64 of my interim Order Decision issued on 5 August 2021, the Order would record on the definitive map and statement a byway open to all traffic (BOAT) as proposed over the two end sections R-X and T-Z-S-Y but a right of way on foot only over the connecting length X-Y. In addition several distances that were inaccurately stated in the Order Schedule would be corrected and the width stated for the footpath along the unenclosed section between X and Y would be reduced from 5 metres to 2.5 metres.
2. The objection now before me for consideration was submitted by Mr Kind also on behalf of the Trail Riders’ Fellowship. This does not oppose my proposal to further modify the Order by reducing the width of section X-Y but continues to argue for confirmation of the Order without modification of the status of the Order route between those two points.
3. I will refer to Mr Kind and the Trail Riders’ Fellowship jointly as ‘the objectors’. Their objections are stated to relate principally to factual errors in the interim Order Decision as regards the accuracy of early maps, an incorrect approach to the updating of the Council’s highway records, and inconsistency with other decisions of the Secretary of State.
4. Although notice of the most recently proposed modifications to the Order was advertised as required by paragraph 8 of Schedule 15 to the Wildlife and Countryside Act 1981, the objections relate to other aspects of the Order. Since no final decision has yet been reached, the scope of paragraph 7 of the Schedule still enables such matters to be considered.
5. Two representations have also been submitted. One, by the order-making authority, Northumberland County Council (NCC), still contends that the evidence demonstrates the existence of a BOAT over the full length of the Order route. The second, by Mr Boulton on behalf of the Bamburgh and Cragside Estates, supports confirmation subject to all the modifications I have proposed. Neither party has submitted further evidence.

**Main Issues**

1. The two main issues identified in my previous interim Order Decisions continue to apply: the first is whether the evidence shows that a public right of way for vehicles was once in existence along (all or part of) the Order route; the second is whether any such rights still exist today and, if so, whether these should be recorded on the definitive map and statement as a BOAT.

Reasons

1. The objectors have provided further evidence that has not been previously considered in this case. I shall address this new material first, in the context of the evidence I have already examined, before considering whether this should alter the conclusions I have reached.

***New evidence***

1. Three maps have been submitted that were not previously before me: two by John Cary and one by C Smith.
2. Cary’s small-scale “Map of Northumberland” (1787) and his “New Map of England and Wales” (1794) are both similar to that by Armstrong (1769) in the area in question but with sufficient variation to indicate that these were not simply copied.
3. The map by Smith dated 1801 also bears a close resemblance to the road layout shown by Armstrong. He marks a road heading northwards from a point west of Elford (noted by Armstrong as New Houses but un-named by Smith) curving north eastwards to Burton and continuing to the coastal road north west of Monks House. Whilst the name ‘Foubrey’ is positioned along this road (and assumed to be Fowberry), on Smith’s map it is hard to pinpoint exactly where this lies in relation to the road.
4. It is the objectors’ contention that, together with Armstrong’s map, these three maps are evidence of an early through-route of which the section of the Order route X-Y formed a part. In short, Bridleway 10 to Greenhill via Fowberry is argued to form part of the road shown by Armstrong between Burton and the coastal road, and the maps by Cary and Smith corroborate this.
5. My previous assessment of the accuracy of Armstrong’s map is criticised as being wrong to expect that the exact line of the Order route be shown. It is argued that very few pre-Ordnance Survey (OS) map makers could reproduce the precise line of a road; lines should be shown “sufficiently well such that there is probability that it is a particular road”.
6. Despite issues with distortion of scale and projection, and necessarily being of a schematic nature, I fully agree that Armstrong and others do show the presence of a road in broadly the location of the route at issue here, connecting Fowberry and Greenhill. It is on the question of whether it is probably the specific line X-Y that I have doubts, essentially because of later evidence.
7. The objectors refer to other decisions issued on behalf of the Secretary of State in similar cases which are said to be inconsistent with my approach here.
8. In one case referred to as the ‘Rivergreen’ decision (FPS/P2935/7/32M), the objectors point to my conclusion there which included the following: “*it is this junction which still fails to convince me that the road shown by Armstrong north of the river was on the same alignment as the order route commencing at point B. But even though those doubts remain, I do accept that there was in 1769 a through-road crossing the river at the mill and that this was quite probably available to the travelling public. However I stop short of Mr Kind’s conclusion that this was along the exact alignment of the Order route A-B although I agree this is unlikely to differ at the river crossing because of the position of the mill and ford*” I see no conflict at all between this conclusion and the view I expressed at paragraph 20 of my interim decision issued on 5 August 2021, concluding “*That is not to say that I reject the notion there was a road broadly in that general direction*.”
9. In a further case at Dunstan Hill (ROW/3176232/M1) where my approach is said to be inconsistent, Armstrong’s map was said to have been accepted with no comment about its accuracy. In my opinion, again, there is no conflict. There, like here and in the Rivergreen case, the evidence from maps produced by Fryer, Greenwood and Cary’s later map suggests there were substantial changes to highways around the turn of the nineteenth century although no documentation has been unearthed to explain the legal process followed at the time.
10. Mr Kind’s demonstration of the accuracy of the commercial maps relied on in evidence, through a triangulation exercise, is informative. So too is the additional material provided in the booklet “Somerset Maps: Day & Masters 1782/Greenwood 1822” published by the Somerset Record Society. This explains that the records of Ordnance or Trigonometrical Survey of England and Wales (1799-1811) were made available to commercial surveyors of that period. Therefore it is perhaps not surprising to find the maps produced by Greenwood (and by Fryer) remarkably accurate in their depiction of roads.
11. I note one particularly apt paragraph of this publication: “*Between 1782 and 1822 Somerset experienced, like many other counties, perhaps a greater degree of landscape change than in any other period of comparable length throughout its history. Inclosure of common land, drainage of marsh, improvement of roads, creation of parks and woodland, and industrialisation all contributed significantly to what in many places was nothing short of a revolution in its man-made scenery*.”
12. Rather than demonstrating inconsistency, in my view this infers a degree of consistency within this part of Northumberland insofar as it acknowledging this as a period of great change. Although the same records tend to be at issue, the evidence is different in each case and must be assessed on its individual merits.

***Effect on other evidence previously considered***

1. I have previously considered the map of Northumberland in 1828 produced by Greenwood and, as a result of further information, revised the weight I attached to his depiction of the Order route as a ‘cross road’. I concluded (and still accept) that this represents “a carriageway and more probably a public one than private”.
2. Referring to the cases of *Hollins v Oldham* [1995] (Ch) C94/0206 (unreported) and *Fortune v Wiltshire Council* [2012] EWCA Civ 334, the objectors now go one step further and invite me to consider this as raising a presumption that the Order route was a public highway in 1828. They argue this “1828 presumption” is important.
3. I agree with their submission that if, the Order route were wholly recorded on the handover map and in all subsequent highway records, then the public maintenance obligation might be explained by the carriageway having been in existence since 1835 at least.
4. What I cannot accept is the concept of a presumption as to its status being raised by one commercial map, albeit one which depicts the Order route with remarkable accuracy in terms of alignment. I recognise the Greenwood map is deserving of significant evidential weight but it is just one piece of evidence that must be weighed alongside others pre-and post-dating 1828 in reaching a balanced view.
5. The objectors submit that “the ‘sequence of evidence and sufficiency of proof’ is key to a correct determination. I agree, but my analysis differs.
6. Pre-dating Greenwood are maps produced by Armstrong, Cary, Smith and Fryer dating back to 1769. I have agreed that Armstrong was depicting a road broadly in the vicinity of the Order route from Fowberry to Greenhill and that this was also apparent on the subsequent maps by Cary and Smith. However Fryer shows a rather different picture, not only as regards S-Y-X (which is not included) but also the remainder of Armstrong’s route which originated at New Houses, ended at Greenhill and passed through Burton; the position of Burton (and the roads around it) may have been in transition but Fryer shows no trace of the road from New Houses (and neither does any map subsequent to this).
7. I recognise that historically highways evolve over time and that documentary records are not always available to explain early changes, but it seems to me that the disappearance of the remainder of Armstrong’s road south of Burton suggests major alterations to the network of public ways which could equally have applied to the Burton to Greenhill section.
8. The objectors identify three alternative through-routes which “waxed and waned as the years passed”. I will summarise these as Ingram Lane to Shoreston Hall, Shoreston Hall to Greenhill via Fowberry (the Order route) and Ingram lane to Greenhill via Fowberry. The purpose of this is to show that X-Y is part of a through-road and therefore should carry the same status as the remainder of the route. They argue that there would have been no sense in Greenwood publishing a map that could not be used by the travelling public because it wrongly showed a public carriageway here. I understand the theory of the argument but this does not change the actual evidence that is available to support it.
9. It is a fact that in 1828 Greenwood depicted cross roads along all parts of the Order route and adjoining ways too, yet contemporary maps by Cary and Fryer did not show the Fowberry-Greenhill link X-Y (although I note again that Fryer showed R-X as a cul-de-sac to Greenhill). Subsequent mapping and relevant records over the next century were equivocal as to status of the route.
10. The objectors argue that the post-1828 records may not support Greenwood but neither do they contradict it. That is true until the 1929 handover map clearly omitted X-Y. If that was a mistake, it was replicated on the map prepared under the Restrictions of Ribbon Development Act 1935 that was publicised in 1937 and again on the highway authority map of county maintained roads in 1951. The ‘error’ remained unaddressed for over 20 years during the transition from district council responsibility to the county when, as the objectors have previously demonstrated, official procedures were diligently observed, and despite annual inspections of the road network (as referred to in my first interim Order Decision at paragraph 28).
11. I previously accepted that the 1951 map contained an alignment error that was later corrected to show the Order route and that X-Y has been shown on highways maps and schedules ever since then, without challenge. But there is still no documented explanation for this addition.
12. The only evidence of significant weight which supports X-Y being a carriageway is the Greenwood map. The earlier commercial maps endorse a route which possibly does include this section but as part of a much longer road, the majority of which appears to have ceased to exist by the early nineteenth century. In my view that fact lessens the weight I allocate to the Armstrong, Cary and Smith maps. Similarly the Fryer and later Cary maps omit the Fowberry to Greenhill connection which again causes me to question the basis on which Greenwood showed it.
13. Weighing against this is the handover map to which I also attach significant weight, together with the publication of this map in 1937 and the acknowledged diligence of the county’s highway maintenance engineers over the course of more than 20 years before the 1951 county road record was amended. In addition I give weight to the evidence from the surveys carried out in the early 1950s in preparation for the first definitive map and statement for the area.
14. I recognise that the matter is finely balanced here but it is my conclusion that the evidence is still not sufficient to tip the scales so as to show that the link between Fowberry and Greenhill (X-Y) carries a public right of way for vehicles.

***Summary***

1. Having examined all the available evidence before me, on the balance of probability I have concluded that the section of the Order route I have referred to as X-R and T-S-Y carry a public vehicular right of way and that any rights for motorised vehicles still remain, having been preserved from extinguishment by virtue of subsection 67(2)(b) of the Natural Environment and Rural Communities Act 2006. My previous conclusion(s) that these two sections meet the criteria for classification as BOATs has not been challenged and I again conclude these two routes should be recorded with that status as proposed in the Order as made.
2. I have also concluded, on the balance of probability and taking account of all the information now available, that the evidence is not sufficient to show that the section linking X and Y carries a public right of way for vehicles but that a public right of way on foot (at least) exists along this section of the Order route and should be recorded with that status as I previously proposed.
3. I have also concluded that minor changes are necessary to the lengths of the route defined in the Order Schedule for North Sunderland parish, and that the width stated for the footpath along the unenclosed section between X and Y should be reduced from 5 metres to 2.5 metres.

**Conclusion**

1. Having regard to the above and all other matters raised at the inquiry and in the written representations, I confirm the Order with the modifications previously proposed, together with the further amendments latterly advertised.

**Formal Decision**

1. I confirm the Order subject to the following modifications:

On the Order map

* Add points X, Y and Z;
* Amend the notation used to depict section X-Y so as to indicate “Public Footpath to be added”;

In the Order Index

* Add “Bamburgh FP 20 – Addition – NU 13 SE – 32”

In the Order schedule

*(The modified text below is underlined)*

* **Bamburgh Footpath No 9**: In Part II Statement delete “Byway Open to All Traffic No 20 (the Greenhill–Saddlershall road)” and substitute “Footpath No 20”;
* **Bamburgh Bridleway No 10**: In Part II Statement delete “(the Greenhill-Saddlershall road)”;
* **Bamburgh Byway Open to All traffic No 20**:

In the heading add “and **Footpath No 20**”

In Part I Map: Amend description to read: “Adding thereto a byway open to all traffic, from a point marked R, on the B1340 road, 230 metres north-east of Greenhill, in a general south-westerly direction along the U2021 road for 245 metres to point X; continuing as a footpath in a south westerly, southerly then south-westerly direction for 805 metres to point Y; then as a byway open to all traffic in a southerly then easterly direction along part of the U2018 road for a distance of 310 metres, to a point marked S on Byway Open to All Traffic No 17, in the Parish of North Sunderland, 135 metres west of Saddlershall.”

In Part II Statement: Amend description to read: “As a 6.5 to 7.8 metre wide byway open to all traffic, from the B1340 road, 230 metres north-east of Greenhill, in a south-westerly direction for a distance of 195 metres. Then as a 7.4 metre, narrowing to 6.3 metre, wide byway continuing in a south-westerly direction for a further 50 metres to Greenhill. Then as a 7.2 to 7.3 metre wide footpath continuing in a south-westerly direction for a further 85 metres. Thereafter as a 2.5 metre wide footpath in a south-westerly direction for a distance of 170 metres to a junction with Public Footpath No 9, then in a general southerly direction for a distance of 180 metres, crossing the Ingram Burn by means of a bridge/culvert, then in a south-westerly direction for a distance of 55 metres, then southerly direction for 155 metres, then westerly direction for 140 metres. Thereafter as a 5.7 metre wide footpath, in a westerly direction, for a distance of 20 metres to the entrance to Fowberry. Thereafter as a 6 metre wide byway in a southerly direction for a distance of 200 metres to a junction with Public Bridleway No 10. Thereafter as a 6.5 to 7 metre wide byway in an easterly direction for a distance of 110 metres to join Byway Open to All Traffic No 17, in the Parish of North Sunderland, 135 metres west of Saddlershall.”

* **North Sunderland Byway Open to All traffic No 17**:

In Part I Map: In line 5, delete “820 metres” and substitute “1305 metres”;

In Part II Statement:

In line 3, delete “50 metres” and substitute “45 metres”;

In line 4, delete “100 metres” and substitute “95 metres”;

In line 7, delete “310 metres” and substitute “280 metres”;

In line 10, delete “430 metres” and substitute “400 metres”;

In line 12, delete “140 metres” and substitute “125 metres”.

Sue Arnott

**Inspector**

