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| **Order Decision** |
| Site visits made on 14 July 2021 and 5 September 2022**by Helen Heward BSc Hons MRTPI** |
| **an Inspector appointed by the Secretary of State for Environment, Food and Rural Affairs** |
| **Decision date: 19 December 2022** |

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| **Order Ref: ROW/3240110 M1** |
| * This Order is made under Section 53 (2) (b) of the Wildlife and Countryside Act 1981 (the 1981 Act) and is known as the Northumberland County Council Definitive Map Modification Order (No 13) 2018, Byway Open to All Traffic No 39 (Parish of Chollerton).
* The Order is dated 22 October 2018 and proposes to alter the Definitive Map and Statement for the area by adding a byway open to all traffic as shown on the Order Plan and described in the Order Schedule.
* There were a number of objections outstanding when Northumberland County Council (the Council) submitted the Order to the Secretary of Statefor Environment, Food and Rural Affairs for confirmation.
* In accordance with paragraph 8(2) of Schedule 15 of the 1981 Act I gave notice of my proposal to confirm the order with modifications. One objection was received from the Council.
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| **Summary of Decision: I have confirmed the Order subject to the modification that I formerly proposed.** |

Procedural Matters

1. The effect of the Order with the modifications set out in the interim Order Decision would record on the Definitive Map and Statement a byway open to all traffic (BOAT) as proposed over the Order route as described in the Northumberland County Council Definitive Map Modification Order (No 13) 2018, Byway Open to All Traffic No 39 (Parish of Chollerton) and shown on the accompanying map, SAVE THAT:-
2. The description in the Order Schedule be amended to
* add the words “*or thereabouts*” after 14 metre wide,
* delete references to two gates adjacent to the quarry haul road, and
* delete references to the section described as “*a 7-metre-wide metalled bridleway for a distance of 150 metres to a point on the U8154 road, 20 metres west of St Marys Church, Great Swinburne*”.
1. The Order map be amended to reposition Point N to reflect the above.
2. As well as the proposed addition to the Definitive Map and Statement, the Order includes a consequential modification to the description of Chollerton Bridleway 23.

**Main Issue**

1. The Council does not dispute my finding that the Order should be confirmed subject to the proposed modifications to add the words “*or thereabouts*” after 14 metre wide, and delete references to two gates adjacent to the quarry haul road.
2. The Council takes issue only with the proposed deletion of the section of the order route described as “*a 7-metre-wide metalled bridleway for a distance of 150 metres to a point on the U8154 road, 20 metres west of St Marys Church, Great Swinburne”.*
3. In my previous decision I was not satisfied that this section of the Order route met the statutory definition of a BOAT found in section 66(1) of the 1981 Act.
4. Therefore the sole issue at this stage is whether the character of the section of the Order route from Mill Cottage to Point N on the Council’s Order map is such that it satisfies the definition of a BOAT.

**Reasons**

1. S66 of the 1981 Act provides that a BOAT 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 purposes for which footpaths and bridleways are so used.
2. In my earlier decision I found that it was reasonable to infer that at the time the Definitive Map and Statement were prepared the Council considered the Order route to be a public road and that there was an overall body of evidence which led me to conclude that the probability is that a publicly maintainable vehicular highway existed along the proposed Order route at, and over time, before 2 May 2006.
3. Amongst other things that evidence included that the route appears marked as ‘U8154’ on the base map used for the original Definitive Map survey coloured brown. The Council had advised that known public roads were generally coloured brown to indicate the extent of the road network. The Order route appears on the County Council Highways Maps of 1951 and 1964 coloured purple and labelled U8154. In the 1964 County Road Schedule the route is identified as U8154 Swinburn Castle Road, 1.63 miles long and described as “*From C.213 east of Camphill Plantation south-eastwards via St. Mary’s Church, Great Swinburn, to join A68 opposite its junction with C.221*”. In the 1974 County Road Schedule it is similarly identified and described but with the addition of grid references NY930769 for the junction with the C213 and NY942775 for the junction with the C221. The entire route is marked and identifiable on the County of Northumberland List of streets Maps as at 2 May 2006. I acknowledge that the historical evidence for the unsealed section is largely the same as that for the sealed section.
4. The section of metalled road beyond Mill Cottage running southwest to Swinburne Mill has no recorded status. Similarly I have noted that the road running southwest into great Swinburne beyond St Mary’s Church is not part of the public road network.
5. The Masters case in the Court of Appeal clarified confusion over the meaning of the phrase “*but which is used by the public mainly for the purposes for which footpaths and bridleways are so used”.*  (Masters-v-the Secretary of State for the Environment, Transport and the Regions [Application of the Court of Appeal Judgement [2000] 4 All ER 458).
6. Hooper J in the High Court held that the definition in S66 was to be construed purposively and that the purpose of giving a definition was to distinguish byways from ordinary roads. The Court of Appeal upheld the decision. In his judgement Roch LJ stated that “*I consider that in defining a byway open to all traffic in the terms set out in section 66(1) of the Wildlife and Countryside Act 1981, Parliament was setting out a description of the ways which should be shown in the maps and statements as such byways. What was being defined was the concept or character of such a way*. *Parliament did not intend that highways over which the public have rights for vehicular and other types of traffic, should be omitted from definitive maps and statements because they had fallen into disuse if their character made them more likely to be used by walkers and horse riders than by vehicles.*”
7. The Council argue that although the 150m section at the southern end of the route has a tarmac surface this should not prevent it from being recorded as a BOAT. In support of their position they submitted 12 confirmed Order decisions where part of the route had a tarmac surface. The Council argue that in Northumberland most of the sections of tarmac road which have been added as BOATs have tended to be continuations of generally longer sections of unsealed road. I agree with the Council that a tarmac surface does not prevent a route, or section, being recorded as a BOAT. The surface is but one element contributing to character.
8. Consistency in decision making is important. I have reviewed all of the photographic evidence submitted, visited all but one of the confirmed BOATs referred to by the Council and revisited Great Swinburne and the route of proposed Byway Open to All Traffic No 39.
9. However, determining matters such as “the character of a way” requires a subjective assessment based on the individual features and characteristics of the way being considered. Each case must be assessed on its own merits with regard to the test set out in Masters.
10. The Council considers that the Order route should be considered holistically. However, I found a marked change in the character of the way where the leaves the metalled lane southeast of Mill Cottage to pass through the gate and run through the field. where there is a mixture of stony, semi-metalled patches, soft and boggy patches and occasional deep ruts and the open feel of the route crossing the field takes on the character of a route mainly used by walkers or those on horses.
11. In this respect I remain of the view that the overall character of the section, from Mill Cottage to Point N on the Order map as proposed by the Council, including but not limited to, the surface, width, and layout, create an impression of a road used primarily as a motor road. I found it to appear largely indistinguishable from the vehicular highway at Great Swinburne by St Mary’s Church.
12. Applying the test set by Masters, my conclusion remains that the character of the section of the Order route described as “*a 7-metre-wide metalled bridleway for a distance of 150 metres to a point on the U8154 road, 20 metres west of St Marys Church, Great Swinburne”, and shown running from* Point N on the Council’s proposed Order map to Mill Cottage, does not meet the statutory definition of a BOAT found in section 66(1) of the 1981 Act.

**Conclusion**

1. Bearing in mind all relevant matters, I conclude that the Order should be confirmed subject to the modifications.

**Formal Decision**

1. In exercise of the powers transferred to me, the Order is confirmed with the following modifications:
2. The Order map is amended to illustrate the southern end of the Order route ending at a new Point N immediately north-east of Mill Cottage where the Order route meets a metalled road.
3. The Schedule Part II statement is amended to read:-

“A 14 metre wide, or thereabouts, metalled byway open to all traffic, from the C213 road 700 metres east of Barrasford Park Flats, in a south-westerly direction for a distance of 45 metres then as an 11 metre wide byway incorporating a 3 metre wide track in a south-easterly and southerly direction for a distance of 480 metres crossing the Barrasford Quarry haul road, then continuing as a 6 metre wide grass surfaced byway in a general southerly and south-easterly direction for a distance of 505 metres across pasture fields, then continuing as a stone/gravel path crossing the Swin Burn via a bridge, at level, in a general south-westerly and south-easterly direction for a distance of 430 metres to a point north-east of Mill Cottage.”

**Helen Heward**

INSPECTOR

