

Highways Committee

10 December 2021

Alleged Public Footpath from West View to St Mary's Church Yard, Barnard Castle.



Wildlife and Countryside Act 1981

Definitive Map Modification Order Application

Report of Alan Patrickson, Corporate Director of Neighbourhoods and Climate Change and Helen Lynch, Head of Legal and Democratic Services.

Electoral division(s) affected:

Barnard Castle West, County Durham

Purpose of the Report

- 1 In this report the Highways Committee is asked to consider all the relevant evidence gathered in support of an application to modify the Definitive Map and Statement of Public Rights of Way by adding a public footpath from a ginnel that connects the High Street with West View through a plot of land, that was once the site of the National Girls School, to a boundary wall separating it from St Marys Church yard in Barnard Castle (**Document A, point A-B**).

Executive summary

- 2 The original application route shown in (**Document B, point A to C**) was to add a footpath from the ginnel that connects West View and the High Street through a plot of land that was formerly the Old National Girls' School, now privately owned, and ecclesiastical land (church yard) that belongs to St Mary's Church, to join an adopted highway running west to east through the church yard. As a Public Right of Way cannot arise by presumed dedication over land that is ecclesiastical in nature the route required shortening to that shown in (**Document A**). This has resulted in a cul-de-sac that terminates at a hole in the boundary wall between the two plots of land.
- 3 The amended application route of the alleged public footpath, shown in *Document A*, is approximately 17 metres in length and runs from an old stone doorway, from the ginnel (Grey Lane North) that connects the

High Street with West View (**Document C, photograph A & A.1**), through a plot of privately owned land that was once the site of the National Girls' School (**Document C, photograph B & B.1**), to a hole in the boundary wall of St Mary's Church in Barnard Castle (**Document C, photograph C**).

- 4 Consultations on the proposed addition were carried out in 2008 with Local Councillors, landowners/occupiers and user groups/organisations. However, due to the length of time that had elapsed, between receiving the application in 2005 and it being reviewed by the Highways Committee, a second consultation was required (**Document D**). The consultations resulted in one letter supporting the application route (**Document E**).
- 5 The evidence submitted consists of user evidence forms and witness statements (**Document F**). A total of 23 individuals submitted user evidence. Out of the 23 users that submitted user evidence forms and/or statements 11 have the required 20 years or more use. After careful consideration and a thorough investigation of the evidence it was determined that only 2, out of the 11 with the required 20 or more years use (**Document G**), met the legal tests and could be considered as the 'public at large' (*Legal Framework, paragraphs 18 to 24*). Therefore, due to the limited number of users that can be classed as the 'public at large' we as a surveying authority recommend that the Definitive Map and Statement should not be modified by way of adding the alleged footpath, and that the application be refused.

Recommendation(s)

- 6 It is recommended that the Committee accept the officer's recommendation to refuse the application and therefore not make a Definitive Map Modification Order to amend the Definitive Map and Statement by way of adding c.17 metres of public footpath under section 31 of the Highways Act 1980 and 53(3)(b) & (3)(c)(i) of the Wildlife and Countryside Act 1981.

Background

Application

- 7 The alleged path was brought to the attention of Durham County Council in August 2003 by two separate individuals, both prospective purchasers of the land, querying the status of the alleged path. Following this Mr and Mrs Watson, one of the interested parties and prospective purchasers, collated and submitted user evidence forms to Durham County Council to support a Definitive Map Modification Order Application. User evidence witness interviews and statements were also carried out and collected by members of the Access & Rights of Way Team. Copies of the user evidence forms and witness statements can be found in (**Document F**).

- 8 The alleged path crosses one parcel of land under private ownership. The site of the former Old National Girls' School is owned by Mr Mockford who owns a nearby property and purchased the land in March 2006 from the Diocesan Board of Finance.
- 9 Between 2003 to 2008 a combination of user evidence forms and witness statements were submitted for an alleged footpath leading from Gray Lane North, a ginnel that connects West View and the High Street, through two plots of land, to an adopted pathway that runs West to east through the Church Yard. The application was upgraded to a formal application in February of 2005. The application was submitted by Mrs Watson for a Definitive Map Modification Order, under Section 53 of the Wildlife and Countryside Act 1981, to record the aforementioned footpath on the Definitive Map and Statement. The original application route is shown in **Document B, point A to C**. The amended route, when considering that a public footpath cannot arise by presumed dedication over ecclesiastical land, is shown in **Document A, point A - B**. The application was never formally amended. It's believed that a verbally agreement to amend the route was reached after a discussion was had with the applicant regarding the ecclesiastical nature of the churchyard.
- 10 The evidence submitted consists of a combination of 16 user evidence forms with 10 witness statements.
- 11 All the evidence forms were submitted to a former colleague. Witness interviews and statements were also carried out by a former colleague. A draft Highways Committee report was compiled but for reasons unknown the application was never reviewed or brought before this Committee.
- 12 The formal application that was submitted in 2005 was highlighted as never having been considered by the Highways Committee shortly after the appointment of two Definitive Map Officers in 2019. It was determined, due to the amount of time that had elapsed, since the submission in 2005, that this application needed to be progressed.

Route

- 13 The original route of the alleged path can be broken into two sections. The first section travels in a generally northerly direction, leaving Gray Lane North, a historic ginnel, through a stone doorway that leads into the site of the former National Girls School. It crosses this rectangular parcel of scrub land, which is surrounded by walls, before exiting through a gap in the wall, created by the then Teesdale District Council in 1980 (**Document H**), into St Mary's Churchyard. The path is defined with a surface of fine stone and is c.17 metres in length and less than 1 metre wide (**Document A, point A - B & Document C, photographs B & B.1**). The second section follows the edge of the churchyard abutting the rear wall of Brick House Yard to join the adopted footpath which traverses the Churchyard. It is on a slight incline and is now predominately earth and grass and is c. 20 metres in length and is of

indeterminable width (**Document B, point B – C & Document C, photographs C**).

- 14 Due to the ecclesiastical nature of St Marys Churchyard and it being subject to ecclesiastical law, whereby a public footpath cannot arise through presumed dedication, the application route has been amended to that shown in **Document A, point A-B**.

Consultation and Objections

- 15 Consultations on the amended application were carried out in 2008 with Local Councillors, landowners/occupiers and user groups/organisations. However, due to the length of time that had elapsed between receiving the application in 2005 and it now being reconsidered by the Highways Committee a second consultation was required (**Document D**). The consultations resulted in one letter supporting the application route (**Document E**).
- 16 In March 2005 the Council contacted the Diocesan Board of Finance about the application, giving them the opportunity to submit any evidence and also to propose resolving the issue by agreement. However, the Board stated that it did not accept the public right of way existed and was not agreeable to a creation agreement (**Document I**). The churchyard section of path is subject to specific ecclesiastical law which is discussed later in the report (*Legal Framework, paragraphs 18 to 24*).
- 17 **The only considerations that the Council can take into account are those that relate to whether the alleged footpath, currently not shown on the Definitive Map, meet the legal tests a set out under section 31 of the Highways Act 1980 and 53(3)(b) & (3)(c)(i) of the Wildlife and Countryside Act 1981.**

Legal Framework

- 18 Under the provisions of Section 53 of the Wildlife and Countryside Act 1981, the County Council as Surveying Authority has a duty to keep the Definitive Map and Statement under review and is required to make a Modification Order under Section 53(3)(c)(i) on the discovery by the authority of evidence which, when considered with all other relevant evidence available to them, shows that a right of way subsists or is reasonably alleged to subsist.

- 19 The Highways Act 1980, Section 31 states that, in the absence of contrary intention, a way may be 'deemed to have been dedicated as a highway' where 'it has been actually enjoyed by the public as of right and without interruption for a full period of twenty years', that period to be calculated retrospectively from the date when the right of public use was brought into question. As of right means without force, without secrecy and without permission. The use must be sufficient for a landowner to understand that rights are being asserted.
- 20 Churchyard land is consecrated and designated for the purposes of a burial ground forever. On consecration the land will have changed legal character and ceased to be land over which a right of way could arise. Therefore, it is not possible for public footpath rights to be acquired over such land by means of deemed dedication.
- 21 It is unusual for a cul-de-sac to be a public right of way, however, there are circumstances where this is possible. The route must serve the purpose of reaching a place of public resort in addition to meeting the required legal tests. All the circumstances of a case need to be considered.
- 22 The Human Rights Act is of relevance. Whilst article 1 to the first protocol (peaceful enjoyment of property) and article 8 (right to respect for family, private life and home) are engaged, it is important to note that these rights are qualified, not absolute, which means that they can be interfered with in so far as such interference is in accordance with domestic law and is necessary in a democratic society for the protection of the rights and freedoms of others. It is considered that any interference occasioned by the making of a Modification Order is both in accordance with domestic law (the Wildlife and Countryside Act 1981) and is in the public interest as it is necessary in a democratic society for the protection of the rights and freedoms of others, namely the public who wish to use the way.
- 23 The Council has a duty arising from Section 149 of the Equality Act 2010 to have due regard to the need to achieve the following objectives:
- (a) eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under the Equality Act 2010;
 - (b) advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it;
 - (c) foster good relations between persons who share a relevant protected characteristic and persons who do not share it.
- It is not considered that the assessment of this application raises any specific Public Sector Equality duty matters.
- 24 Should Members resolve that a Modification Order should not be made in accordance with the above legislation, this is not necessarily the end

of the legal process. Should a Modification Order not be made, the applicant and the landowner/s must be informed. The applicant will have an opportunity to make an appeal against the refusal to make the Modification Order to the Secretary of State, who will either direct the Council to make an Order or uphold the decision to refuse the application.

Relevant Evidence

25 **Document F** – User Evidence

26 **Document H** – Teesdale District Council Reclamation Scheme –
West View, Barnard Castle

Assessment of the evidence

- 27 The part of the route subject of the original application which crossed St Mary's Church yard is not capable of being a public right of way and the application was amended to delete this part of the claimed route. Accordingly, only that part of the route from A-B is now under consideration.
- 28 The evidence suggests the earliest date this route was brought into question was in 2003 when the status of the path was queried by Mr Watson and by a prospective purchaser of the land and subsequently an application was submitted. These were acts considered sufficient to bring the route into question and therefore the relevant twenty-year period should be calculated retrospectively from 2003 i.e. from 1983-2003.
- 29 The requirement to submit 20 or more user evidence forms is not a legislative requirement. However, the RoW team regard 20 or more user evidence forms that indicate 20 or more years continual and uninterrupted use, as per section 31(1) of the Highways Act 1980, by each individual as a useful benchmark that an application route has been used by a sufficient number of the public. Any application made to have an alleged footpath added to the definitive map and statement must meet the legal tests.
- 30 The evidence submitted consists of a combination of 16 user evidence forms and 10 witness statements. A total of 23 individuals submitted user evidence. There is no evidence that over the relevant period, the route has ever been obstructed, that any user has ever been prevented from using it or of the landowner doing anything else to legally prevent a public footpath coming into being such as the erection of signage. Accordingly, on the face of it, the use is as of right.
- 31 The user evidence that was submitted in support of the application was thoroughly investigated. Out of the 23 individuals that submitted user

evidence: 5 have indicated that they used the route to visit friends who are residents of West View/immediate vicinity; 4 have indicated that they used the route to visit relatives who are residents of West View/immediate vicinity; 7 are residents of West View/immediate vicinity and have indicated that they use the route for daily/weekly activities such as to go shopping, take children to school etc; 2 have indicated that they used route to visit both friends and relatives who are residents of West View/immediate vicinity; 2 have detailed London addresses and indicated that they used the route to collect shopping, assuming for relatives of West View/immediate vicinity; 2 *haven't indicated that they used the route to visit friends or relatives of any of the residents at West View/immediate vicinity*, and 1 purpose unknown as data provided is incomplete (**Document G**). The 2 individuals that haven't indicated that they used to route to visit friends or relatives of any of the residents at West View/immediate vicinity have indicated that they used the route specifically for leisure, dog walking and as part of a route that accesses Demenses (park, recreational ground).

- 32 Out of the 23 individuals that submitted user evidence 11 have the required 20 or more years of uninterrupted use. Out of those 11: 9 have indicated that they used the route to visit friends or relatives who are residents of West View/immediate vicinity, and 2 *haven't indicated that they used the route to visit friends or relatives of any of the residents at West View/immediate vicinity*. The 2 individuals that haven't indicated that they used to route to visit friends or relatives of any of the residents at West View/immediate vicinity have indicated that they used the route specifically for leisure, dog walking and as part of a route that access Demenses (park, recreational ground).
- 33 It is considered that the 9 users in question are not the public at large but a defined class of persons namely residents and lawful visitors of residents whose use of the way is private in nature rather than public.
- 34 Of the remaining Two users, whilst their use would be public in nature, it is not considered that two users alone would be sufficient to bring to the attention of the landowner that public rights were being asserted. Accordingly, the strength of the user evidence that has been submitted is not considered to be sufficient to establish that a public footpath is reasonably alleged to subsist.

Main implications

Maintenance

- 35 If the committee members do not agree the officer's recommendation and this route is added to the Definitive Map as a Public Footpath, the County Council as Highway Authority will not become responsible for the maintenance of the surface or any furniture associated with the route.

Conclusion

- 36 It is considered, after examining all of the available evidence, that the route under investigation, leading from Gray Lane North, through the site of the former National Girls' School to the boundary wall of St Marys Churchyard, does not meet the legal test as per section 31 of the Highways Act 1980 and 53(3)(c)(i) of the Wildlife and Countryside Act 1981, and a Definitive Map Modification Order should therefore not be made to update the Definitive Map and Statement to record it as a public footpath.

Background papers

<F:\Rights of Way\Modification Orders\A Barnard Castle - West View>

Other useful documents

- Previous Cabinet reports / None

Author(s)

Josephine Upchurch

Tel: 03000 365341

Mike Ogden

Tel: 03000 265331

Neil Carter

Tel: 03000 269723

Appendix 1: Implications

Legal Implications

See paragraphs 18 to 24

Finance

N/A

Consultation

See paragraphs 4, 15 and 16

Equality and Diversity / Public Sector Equality Duty

N/A

Climate Change

N/A

Human Rights

See paragraph 22

Crime and Disorder

N/A

Staffing

N/A

Accommodation

N/A

Risk

N/A

Procurement

N/A

Appendix 2: West View Application (as submitted by the applicant)

Please acknowledge → LMW
- inform JG
- discuss with AJC

DURHAM COUNTY COUNCIL ENVIRONMENT
APPLICATION FOR MODIFICATION ORDER

A

Wildlife and Countryside Act 1981 The Definitive Map and Statement of Public Rights of Way for the County of Durham

E
C

32.05

80

To: Deputy Chief Executive, (Environment and Change Management)
of: Durham County Council, County Hall, Durham DH1 5UQ

I/We, [redacted] (Name)
of [redacted], BARNARD CASTLE (Address)
CO DURHAM DL12 [redacted]

hereby apply for an order under section 53(2) of the Wildlife and Countryside Act 1981 modifying the Definitive Map and Statement for the County of Durham by:-

(i) (~~Deleting~~) (adding) the (footpath) (~~bridleway~~) (~~byway open to all traffic~~) (Delete whichever is inapplicable)
from WEST VIEW, BARNARD CASTLE
to ST MARY'S CHURCH YARD, BARNARD CASTLE

(ii) (Upgrading) (downgrading) to a (footpath) (bridleway) (byway open to all traffic) the (footpath) (bridleway) (byway open to all traffic) (Delete whichever is inapplicable)
from _____
to _____

(iii) (Varying) (adding to) the particulars relating to the (footpath) (bridleway) (byway open to all traffic) (Delete whichever is inapplicable)
from _____
to _____
by providing that _____

as shown on the plan attached.

I/We attach copies of the following documentary evidence (including statements of witness) in support of this application:-

List of documents MAPS, HISTORIC PLANS + WITNESS STATEMENTS
ALREADY SUPPLIED TO THE COUNTY COUNCIL WITH EARLIER
CORRESPONDENCE.

Dated 31/08/05 01/02/05 Signed [redacted]

Note: This application must be accompanied by a map showing the right(s) of way applied for. Legally such map must be at a scale of not less than 2½" to 1 mile, but the scale should be sufficient to enable the accurate determination of the way on the ground.

B

Section 53(5) of, and Schedule 14 to, the Wildlife and Countryside Act 1981
The Definitive Map and Statement of Public Rights of Way
for the County of Durham

To: (1) Durham Diocesan Registry (Name)
of: The Park Gate House, Auckland Castle, Bishop Auckland, (Address)
Co. Durham DL14 7NP.

I/We, [REDACTED] (Name)
of [REDACTED] BARNARD CASTLE (Address)
CO DURHAM DL12 [REDACTED]

hereby give notice that on 1 FEBRUARY 2005 I/we made application to the Deputy Chief Executive, (Environment and Change Management), Durham County Council, County Hall, Durham DH1 5UQ that the Definitive Map and Statement for the area be modified by:-

(i) (~~Deleting~~) (adding) the (footpath) (bridleway) (~~byway open to all traffic~~) (Delete whichever is inapplicable)

from WEST VIEW, BARNARD CASTLE
to ST MARY'S CHURCH YARD BARNARD CASTLE

(ii) (Upgrading) (downgrading) to a (footpath) (bridleway) (byway open to all traffic) the (footpath) (bridleway) (byway open to all traffic) (Delete whichever is inapplicable)

from _____
to _____

(iii) (Varying) (adding to) the particulars relating to the (footpath) (bridleway) (byway open to all traffic) (Delete whichever is inapplicable)

from _____
to _____
by providing that _____

as shown on the plan attached.

Dated 1/02/05 Signed [REDACTED]

Note (1): This notice must be served on every owner and occupier (landowner and tenant) of any land to which the application relates, in accordance with paragraph 2 of Schedule 14 to the Wildlife and Countryside Act 1981.

Copy of Notice Served

DURHAM COUNTY COUNCIL ENVIRONMENT
CERTIFICATE OF SERVICE OF NOTICE OF APPLICATION FOR MODIFICATION ORDER

C

Wildlife and Countryside Act 1981
The Definitive Map and Statement for the County of Durham
Certificate of Service of Notice of Application for Modification Order

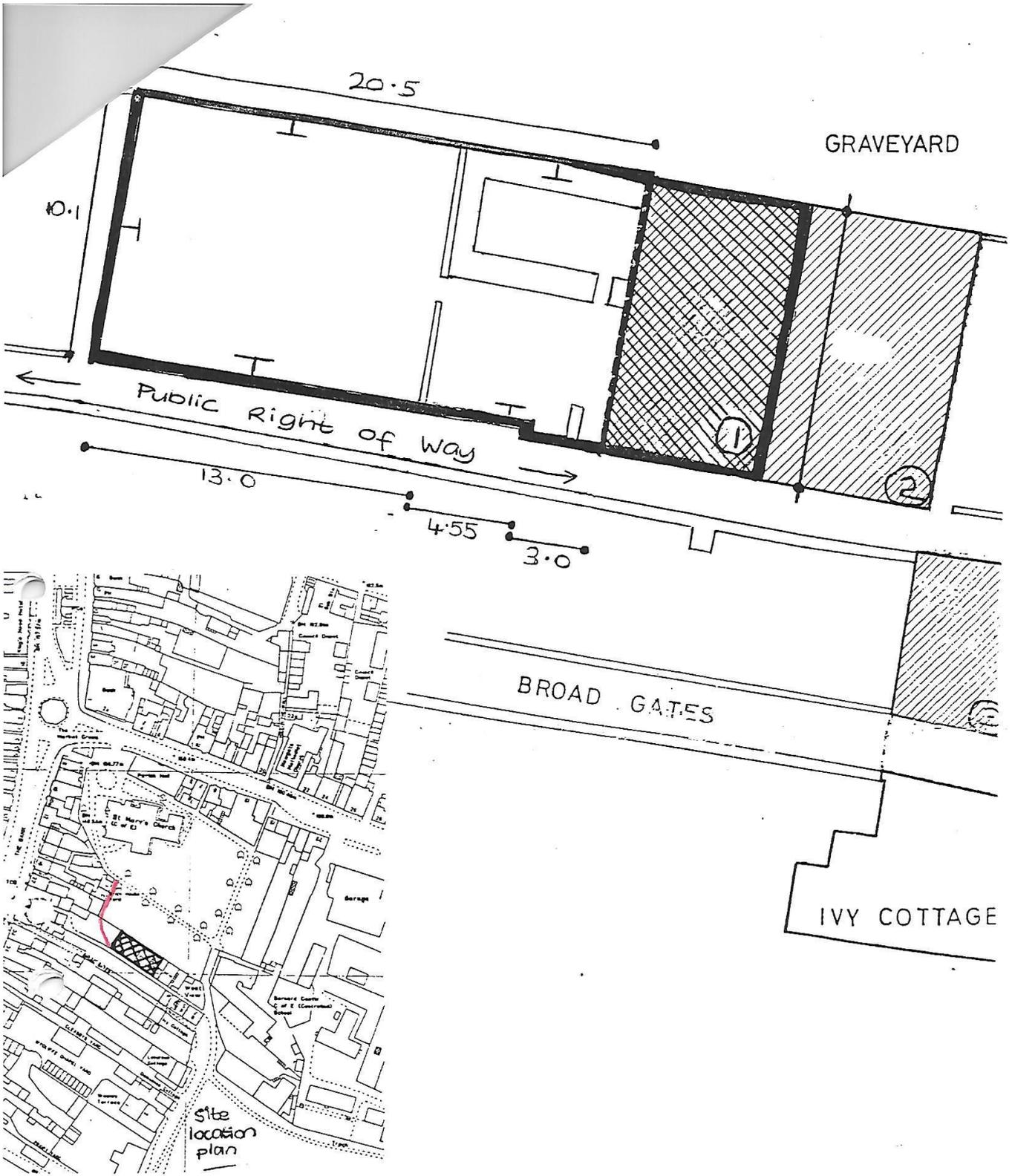
To: Deputy Chief Executive, (Environment and Change Management)
of: Durham County Council, County Hall, Durham DH1 5UQ

I/We, [REDACTED] (Name)
of [REDACTED] (Address)
BARNARD CASTLE
CO DURHAM DL12 [REDACTED]

hereby certify that the requirements of paragraph 2 of Schedule 14 to the Wildlife and Countryside Act 1981 have been complied with.

Dated 01/02/05 Signed [REDACTED]

Note: Please enclose copies of all notices served upon all owners and occupiers.



PLAN REFERRED TO: 1 WEST VIEW, THE BANK,
BARNARD CASTLE

HOUSING REFERENCE: HSG.85/1/606

NATIONAL GRID REFERENCE: NZ0508 1620

SCALE: 1: ²⁰⁰~~500~~

DATE: 22 January, 1996



