

Highways Committee

Byway Applications in Weardale & Teesdale



Wildlife and Countryside Act 1981

Definitive Map Modification Order applications

Joint Report of Ian Thompson, Corporate Director of Regeneration & Economic Development and Colette Longbottom, Head of Legal & Democratic Services

Purpose of the Report

- 1 To consider applications to modify the Definitive Map and Statement of Public Rights of Way.

General background

- 2 Between 1992 and 1995 8 formal applications were submitted by Mark Snoddy for Modification Orders under section 53 of the Wildlife and Countryside Act 1981 to add byways to the Definitive Map and Statement of Public Rights of Way.
- 3 In 1996, 5 of the applications were considered by the County Council, which decided to modify the Definitive Map and Statement to include the 5 routes as byways. Following objections to these Modification Orders, the routes were considered by an Inspector at a Public Inquiry (October 1998). At the Inquiry the Council conceded that the evidence for one of the routes was inadequate and asked that the Order be modified accordingly. The Inspector confirmed the Order with respect to the other 4 routes with certain additional modifications. The Inspector's decision to confirm the Order was then challenged in the High Court with respect to three of the routes by one of the landowners. The Treasury Solicitor acting on behalf of the Planning Inspectorate agreed by consent that the Orders be quashed on a narrow legal point concerning the exact alignment of the routes. This has left 6 of the 8 applications still outstanding. A summary of these matters is shown in Document **OK**.
- 4 The 6 application routes are across open moorland areas of Teesdale and Weardale. Their locations are described below and a general location plan is found at Document **OG**

| Referred to in report as | Name of route | Length Approx | General description of route |
|--------------------------|----------------|---------------|--|
| Route 1 | Middleton Lane | 8.4km | Starting to the south of Wolsingham and following in a westerly direction to a point |

| | | | |
|---------|------------------------------------|-------|---|
| | | | to the south of Bollihope |
| Route 2 | Pikestone and Stanhope Road (Lane) | 5.8km | Starting just north of Bedburn and following in a generally north westerly direction to a point on Middleton Lane, to the south of Frosterley |
| Route 3 | Hartop Lane | 1.8km | Starting at a point on Pikestone Lane to link with a point on Middleton Lane |
| Route 4 | Coal Lane | 2.1km | Starting at a point on the A68 north west of Tow Law and following in a north westerly directly to Salter's Gate |
| Route 5 | Houselop Lane | 2.5km | Starting at a point on Coal Lane and following in a westerly direction to meet the byway known as Hexham Lane, to the north of Wolsingham |
| Route 6 | Old Stanhope Road | 5.3km | Starting to the north of Eggleston and following in a northerly direction towards Bollihope |

- 5 Due to the nature of the evidence and legal considerations, the 6 routes shown above are considered separately in this report. Pikestone and Stanhope Lanes form a continual route and are included throughout the report as Routes 2. Some sections of routes 1, 2, 4 and 6 follow in the general direction of and coincide with existing footpaths or bridleway. Routes 3 and 5 do not coincide with any existing public rights of way.
- 6 The applications were submitted based on evidence of enclosure, an array of nineteenth century maps and also usage. The Inclosure Acts referred to are the Hamsterley, Lynesack, Softley and South Bedburn Inclosure Act and Award (31 George 11) 1760 and the Wolsingham South, North and Park Moor Inclosure Act 1765 and Award 1767. Further information on Inclosure Acts and Awards in County Durham is found in Document **OF**.
- 7 The precise line of the order routes was the issue considered by the High Court and the applications have therefore now been thoroughly re-investigated. Although only 3 of the 7 applications were considered by the High Court the other 4 clearly also need to be scrutinised with this same consistent methodology. The main difficulty with the application routes arises because there is minimal visible evidence of the routes on site and the inclosure plans do not reconcile with the Ordnance Survey plans including the earliest produced in the 19th century.

- 8 The applications are for public byway status. The Wildlife and Countryside Act 1981 Section 66 (1) states that a Byway Open to all Traffic 'means 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'.
- 9 Consultees have included the Local Members, Parish Councils, landowners, Natural England, the North Pennines AONB and path user groups. Responses are found at Document **OL**.

Legal Framework

- 10 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 under review and is required to make a Modification Order on the discovery of evidence which (when considered with all other relevant evidence available to them) shows that a right of way which is not shown on the Map and Statement is reasonably alleged to subsist, or that a public right of way already recorded ought to be shown as a highway of a different description (Section 53(c)(i) and (ii)).
- 11 Section 32 of the Highways Act 1980 deals with the consideration of documentary evidence when determining whether a highway has been dedicated. It allows for any maps, plans or history of a locality or other relevant document to be tendered in evidence and for appropriate weight to be placed on the document including the antiquity of the document, the status of the person by whom and the purpose for which it was created and the source from which it has been stored and produced.
- 12 The Natural Environment and Rural Communities Act (NERC) 2006 determined that where a route was not shown on the Definitive Map and Statement as of 2 May 2006 then rights for mechanically propelled vehicles would be extinguished other than where a specified exception applies. One of the legislation's aims was to prevent rights for motor vehicles over routes, like those being considered here, being established where they had been created as highways at a time before motor vehicles existed. All the applications were made prior to 20 January 2005 and therefore on the face of it meet one of the specified exemptions set out in Section 67 (3) of the NERC Act.
- 13 However the saving provisions of this subsection were closely considered by the Court of Appeal in the case of *R (Warden and Fellows of Winchester College and another) v Hampshire County Council 2008.*) That case turned on whether the application had been properly 'made' for the purposes of Section 67(3). The Court held that an application can only be properly made if it complies with all the provisions of paragraph 1 of Schedule 14 to the Wildlife and Countryside Act 1981 (i.e. it is made in the prescribed form, accompanied by a map drawn to the prescribed scale and accompanied by any documentary evidence (including statements of witnesses) which the applicant wishes to adduce in support of the application).

- 14 Therefore it is critical to these applications that they were properly 'made' and meet all the provisions of paragraph 1 of Schedule 14 to the 1981 Act otherwise the effect of Section 67(1) of the NERC Act would mean that any right of way for mechanically propelled vehicles would be automatically extinguished and there would be no need to consider the evidence for byway status any further.
- 15 Given the detailed findings in the *Winchester* case, Counsel's advice was obtained on whether each of the applications before this Committee could be considered to be properly 'made' under the above mentioned statutory provisions. The Advice is attached at Document **OM**. However it is a matter for this Committee to decide on the evidence before it as to whether the applications meet these criteria.
- 16 The County Council, as Surveying Authority, has to make a decision in accordance with the law and in particular the provisions of the Wildlife and Countryside Act 1981. Given these legal criteria, a decision to make an order would be lawful despite the rights of individuals. The only considerations that the Council can take account of are those that relate to whether the alleged public right of way exists. It would be unlawful to take into account issues such as the suitability or desirability of the applications.

Report layout

- 17 A separate report follows for each of the 6 routes:
- 1 Middleton Lane
 - 2 Pikestone Lane and Stanhope Road (Lane)
 - 3 Hartop Lane
 - 4 Coal Lane
 - 5 Houselop Lane
 - 6 Old Stanhope Road
- 18 Appendices are indexed and attached after the reports. Those labelled 0A, 0B etc are documents relevant to all or most of the routes while documents specific to a particular route start with the number of the route eg 1 = Middleton Lane, 4 = Coal Lane.

Background papers:

| | | |
|--------|------------------------------------|---------------|
| RED/NM | Middleton Lane | 3/93/029 |
| | Pikestone and Stanhope Road (Lane) | 3/92/030 & 31 |
| | Hartop Lane | 3/92/032 |
| | Coal Lane | 3/95/033 |
| | Houselop Lane | 3/95/034 |
| | Old Stanhope Road | 3/95/036 |

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Appendix 1: Implications

Finance

Not Applicable

Staffing

Not Applicable

Risk

Not Applicable

Equality and Diversity

Not Applicable

Accommodation

Not Applicable

Crime and Disorder

Not Applicable

Human Rights

See paragraph 16 of report

Consultation

Not Applicable

Procurement

See paragraph 9 of report

Disability Discrimination Act

Not Applicable

Legal Implications

Not Applicable