

Wildlife and Countryside Act 1981

Definitive Map Modification Order

Proposal to re designate 'Nanny Poes Lane 'in Middlestone, to the Definitive Map and Statement of Public Rights of Way as Restricted Byway after further review of evidence.

Report of

Alan Patrickson, Corporate Director of Neighbourhoods and Climate Change and Paul Darby, Corporate Director of Resources

Electoral division(s) affected:

Coundon

Purpose of the Report

- 1 At the Meeting of the Highways Committee on 8 November 2021, Members resolved to make a Definitive Map Modification Order to add a route as a Bridleway which is currently unrecorded. In this report the Highways Committee is asked to reconsider this matter in light of a review of the evidence by Officers following contact from a member of the public. Accordingly, the committee is now asked to instead add the route to the Definitive Map & Statement as a Restricted Byway. A Restricted Byway gives the additional right to use a carriage or other horse drawn vehicle along the way (**Document A**).

Executive summary

- 2 The track is 0.5mile long and approximately 2.4-3.6m wide and comprises an enclosed Lane that runs between Middlestone and Leasingthorne. On 08 November 2021 this Committee agreed to add the route to the Definitive Map as a Bridleway, following an application by the British Horse Society for a Bridleway to be recorded. It was formerly an old road between the villages of Middlestone and Leasingthorne. On the Definitive Map it is shown as connected/joined to

Public Footpath 70 (Spennymoor) on its north-east side and Public Footpath 62 (Bishop Auckland) on the north-west (**Document A**). The Definitive Statements for the adjoining footpaths state the paths emerge onto road which runs from Middlestone to Leasingthorne. Historical documentary evidence has shown that this route has been a public road since at least the late eighteenth century (it may well be older) as shown on the Dean and Chapter Survey (**Document B**). It was originally maintained by the Council Highways dept as shown on the Handover Maps from 1930, although it is likely it was falling out of use by this period and recorded then as an unclassified road. It is unclear when it dropped from the Council's List of Streets/ Adopted Highways (no record was found), no stopping up order was discovered either and it is arguable that when it was dropped it should have been reclassified as a public right of way with, at the least, Bridleway status. The original application sought to add the route as a Bridleway as the route is mainly used for this purpose. In these circumstances, Byway status was not initially considered. However, in the light of objections raised against reclassification of a former road to the north, Nanny Pops Lonnen, and in order to get the route added to the Definitive Map as soon as possible we would ask the committee to approve an order to add the route as Restricted Byway.

- 3 A second consultation on the basis of Restricted Byway status was carried out with Landowners, user groups, County Councillors and the local Town Council. Letters in support were received from the British Horse Society, Open Spaces Society, and the Ramblers, no objections were received.

Recommendation(s)

- 4 It is recommended that the Committee agrees to make a Definitive Map Modification Order for the addition to the Definitive Map & Statement of a Restricted Byway between points A & B on the plan (**Document A**), known as Nanny Poes Lane, under the provisions of **section 53(3)(c)(i) of the Wildlife and Countryside Act 1981**, that the Corporate Director of Resources be informed accordingly. The Order shall subsequently be confirmed as an unopposed Order or referred to the Secretary of State for determination in the event of objections.

Background

- 5 An application was submitted by Ms Sue Gamble of the British Horse Society in September 2018 to add the route named here as Nanny Poes Lane to the Definitive Map and Statement (**A-B on Document A**). Initially the Highways Committee agreed to the making of a Draft Order confirming the route's addition to the Definitive Map as a Bridleway.

After a review of the evidence, prompted by an objection received to a similar decision applied to a route to the north, Nanny Pops Lonnen, it was decided to seek re-classification of this route as Restricted Byway, therefore avoiding potential future objections and the matter being referred to the Secretary of State for determination.

- 6 Consultees have included the Town Council and Local County Councillors, landowners, occupiers, user groups. No objections were made by any of the consultees and support has been expressed by the British Horse Society to the registration of such unrecorded routes

Documentary Evidence in support of the application

7 1773 Dean and Chapter Survey Durham University Library (DCD/E/AA/19/1-2)

- 8 The earliest known documentary evidence which depicts the application route is the 1773 Dean and Chapter Survey Plan (**Documents B and C**).

- 9 The Dean and Chapter Plan is a record of the land holdings belonging to the 'See of Durham' it is a detailed record of individual land allotments, as well as Highways. In this document the application route is very clearly shown as an enclosed lane running north – south between Middlestone Village and Leasingthorne where it meets the (former) Turnpike Highway. The route is shown joined by a footpath on the northwest side (annotated by a single dashed line, approximate with current Footpath 62). The route is clearly named on this document as '*Leasingthorne Lane*'.

Historic Maps.

Map of the County of Durham by John Cary 1820 (Document D).

- 10 John Cary's map was created for commercial purposes (like Greenwood below) and records most major highways as well as many minor roads. The village of Middlestone is shown as is the application route which runs south from it, it replicates the same orientation as on, the Dean and Chapter Survey.

Christopher Greenwood 1820 (Extract from pictures in print website <http://valentine.dur.ac.uk/pip/index.html>)

- 11 This is a survey of the county undertaken by Map maker Christopher Greenwood between 1817 and 1819 for the purpose of compiling a County Atlas, that was to be sold on a commercial basis to the nobility, clergy and gentry. It records most major highways as well as many minor roads. On this edition map the application route is very clearly

depicted to the south of Middlestone village, it is depicted by two solid lines on either side of the route with a bold with black and white dash fill (**Document E**).

1843 Tithe Plan and Apportionment Book (Documents F and G)

- 12 The nineteenth century Tithe survey was undertaken pursuant to an Act of Parliament 'The Tithe Commutation Act 1836' for the purpose of recording land tenure, field systems, and land use. The 1843 Tithe Plan for Middlestone depicts the route, with no discernible change from the earlier Dean and Chapter Survey and Map surveys, it is numbered on the Tithe Plan as plot 104– and described in the apportionment book as 'a Lane' (**Document G**).

First Edition Ordnance Survey Map (DUL) Sheet XXVI.4: 1857 1st Edition OS 1:25" inch: (Document H)

- 14 Ordnance Survey maps were produced pursuant to an 1841 Act of Parliament as an official survey of England and Wales. ***Ordnance Survey Maps cannot per se be used as evidence of a routes status but is evidence of the physical existence of a route.*** The application route is depicted with the same layout as shown on the Dean and Chapter Plan. It is very clearly annotated with the name '*Nanny Poes Lane*', the first time this name appears on a map, a change from the earlier Dean and Chapter '*Leasingthorne Lane*'. It is also recorded in the accompanying book of reference as – '204 -Nanny Poe's Lane (public)'.

First Edition Ordnance Survey: Document G 1861 1st Edition OS 1:6" (Document I)

- 15 The application route is shown on the same layout as the previous edition. However, the lane is not named on this edition map.

Second Edition 1897 1:25": (Document J)

- 16 The application remains unchanged as on previous maps.

Second Edition 1898 1-inch Ordnance Survey Map: (Document K)

- 17 No change to application route.

Inland Revenue Plan 1910: (Document L)

- 18 This plan was produced by the Valuation Office under the 1910 Finance Act for the purposes of land taxation. The application route is shown as a white road, meaning a public road which was not liable for a taxation.

Third Edition 1915 Ordnance Survey (Document M)

- 19 The application route is shown again on the same orientation as previous edition maps.

Bartholomew Map 1920 (Document N)

- 20 Bartholomew were a Scottish Firm of mapmakers and created maps for academic purposes, but also commercial maps intended for travellers and cyclists. The application route is clearly unchanged on this edition, the map key classes the road as 'intermediate' and passable, third-class road.

Highways Handover Map 1930 (Document O and P)

- 21 Under the 1929 Local Government Act, which came into effect on 1 April 1930 Rural District Councils (RDCS) ceased to act as Highways authorities and all Highways (and public paths) passed to County Councils. This route is shaded blue, an unclassified country road at this period. Interestingly the accompanying notes state the name of the road as Leasingthorne to Middlestone, whilst the description calls it 'Nanny Pop' (perhaps confused with Nanny Pop Lonnen to the north of Middlestone subject of a previous report), length 0.5mile, and width app 12ft, there was no expenditure on maintenance including the 5 years prior to the handover. This suggests the route was already little used at this period.

1939 Ordnance Survey (Document Q)

- 22 No change to the route, except that the parish boundary has been moved to eastern boundary of the lane, from its former position adjacent the line of Kirk Merrington Road (C113) to the south.

Selection of Photos of Nanny Poes Lane

- 23 Taken by applicant Views South taken from North end Middlestone (**Document R**).

Views North taken from South end Leasingthorne (**Document S**).

Assessment of the evidence

- 24 The County Council, as Surveying Authority, has to make a decision in accordance with the case law and relevant legislation, in particular the provisions of the 1981 Act and the Human Rights Act 1998. The only considerations that the Council can take account of are those that relate to whether the alleged public right of way is reasonably alleged to

subsist. It would be unlawful to consider issues such as the suitability or desirability of the routes subject of the application.

- 25 In this case it is considered that the most important pieces of evidence are the Dean and Chapter Plan of 1773 and the 1939 Highways Handover Map and index (**Documents B and O**). This Dean and Chapter Plan was an important part of a survey of the Church's landholdings, the application route is named on this plan as '*Leasingthorne Lane*' and if it was not meant for the public it is highly likely it would be annotated to state so. The route was formerly recorded as a publicly maintainable highway that historically connected Middlestone Village to Leasingthorne and the Turnpike Highway (now the C113). The 1939 Handover Map was used to show which Highways were maintainable at public expense when transferring responsibility for Highways from the local Parish to Durham County Council. This demonstrates it was considered to be a public road at that time, also there is no record available as to why the route later disappeared from the County Councils Adopted Highways list, and no evidence of a stopping up order. It is arguable that it was a mistake of the local authority at the time that it was left off the Definitive Map without any defined status. As legislation states, the fact that a highway may have fallen into disrepair and/or disuse has no impact upon its status as highway (see below para 31).
- 26 Whilst the other map-based evidence is corroboratory, less weight must be afforded to these in accordance with Section 32 of the Highways Act as they were not produced for the purposes of showing the status of the route but for other purposes, such as taxation
- 27 The inclusion of the route on the Dean and Chapter Plan, the lack of any formal stopping up order, and its former inclusion on Highway Handover Maps, taken together with subsequent map evidence is sufficient to demonstrate on the balance of probabilities that a Public Right of Way with Restricted Byway rights is reasonably alleged to subsist over the route in question and no contrary evidence has been discovered.

Whilst the route is likely to have historically carried public motor vehicular rights, the reason why the route cannot be recorded as a Byway Open to All Traffic (BOAT) is because the Natural Environment and Rural Communities Act 2006 extinguished public motor vehicular rights which were not recorded at that time and no exceptions apply. In short, the fact that the route was not recorded on the Council's list of streets as a carriageway or on the DM&S as a BOAT means that any public motor vehicular rights have been extinguished so a Restricted Byway is the highest class of highway which can be recorded in respect of the route.

Legal Framework

- 28 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 which is not shown in the Map and Statement subsists, or is reasonably alleged to subsist over land in the area to which the map relates, being a right of way to which this part applies
- 29 The evidence in this case is documentary evidence provided by the applicant Mrs S. Gamble (who researches on behalf of the British Horse Society) and is based on advice contained in the book Rights of Way: Restoring the Record by Sarah Bucks and Phil Wadey and the County Council's guidance document Applying for a Definitive Map Modification Order.
- 30 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.
- 31 Once a highway comes into existence, it can only cease to be a highway in certain circumstances, such as by way of a formal stopping up procedure. The fact that the highway may have fallen into disrepair and/or disuse has no impact upon its status as highway.
- 32 Section 67 of the Natural Environment and Rural Communities Act 2006 operates to extinguish public motor vehicular rights over routes which were not recorded as such as of May 2006 and which do not fall within the limited categories of exception from such extinguishment.

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.

- 33 Should Members resolve in principle that a Modification Order be made in accordance with the above legislation, this is merely the start of the legal process. Once a Modification Order is made, it must be publicised, and the owners will have an opportunity to formally object to it. Should objections be received, the Modification Order would have to be referred to the Secretary of State who would usually hold a Public Inquiry before deciding upon whether or not to confirm the Modification Order.

Main implications

- 34 If this route is added to the Definitive Map as a Restricted Byway, this does not create a new public right of way, it is merely a formal recording of what already exists. However, the County Council as Highway Authority will become responsible for the maintenance of the surface to a standard suitable for Restricted Byway use only, shared with those having private rights of access

Conclusion

- 35 The evidence has been revisited as a consequence of an objection we received regarding a Modification Order published for a route to the north of Middlestone called Nanny Pops Lonnen, that was also determined as having Bridleway status by this Committee on 8 November 2021. We would rather revisit and address this issue by way of a new decision by the Committee before making an Order for Nanny Poes Lane thereby hopefully avoiding objections and the need to have both routes determined by the Secretary of State (see paragraph 33 above), who is likely to rule in favour of Restricted Byway status. After a review of all available historical evidence, the route 'Nanny Poes Lane' is determined to be a Public Right of Way with user rights commensurate with Restricted Byway status. Therefore, a Definitive Map Modification Order should be made to record this route as a Restricted Byway.

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Appendix 1: Implications

Legal Implications

Text.

Finance

Council has a duty to maintain the surface of the route to Restricted Byway Standard.

Consultation

Landowners and User Groups, Parish Council

Equality and Diversity / Public Sector Equality Duty

N/A

Climate Change

N/A.

Human Rights

Para 32.

Crime and Disorder

Staffing

N/A

Accommodation

N/A

Risk

Text.

Procurement

N/A.

Appendix 2: Evidence

Appendix 3: Responses
