

Highways Committee

Status of Coal and Houselop Lanes Wolsingham North Moor

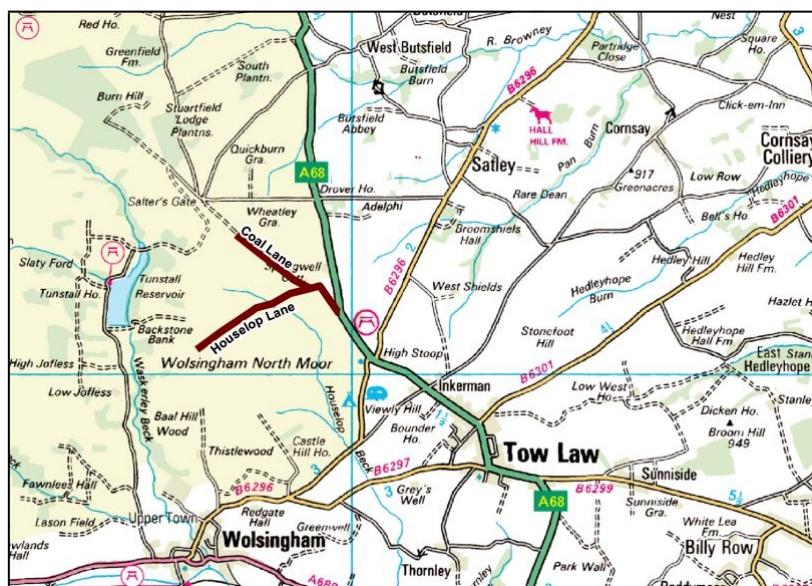


Wildlife and Countryside Act 1981 Definitive Map Modification Order application

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

Purpose of the Report

- 1 To consider an application to record 2 public byways on the Definitive Map and Statement of Public Rights of Way.



General background

- 2 A number of applications were lodged by a member of the public with the County Council in the 1990s for the registration of public byways in the Weardale area. The 2 routes considered in this report were determined by the Highways Committee on 3 March 2011 when it was decided that the routes should be registered as public byways. In the intervening time several issues have arisen which necessitate a re-consideration of that decision i.e. case law affecting the validity of certain Definitive Map Modification Order applications and a High Court challenge made by the owners of the land affected by 3 of the other routes determined on 3 March 2011. Members may recall that 6 routes were considered in March 2011 but that 1 decision was withdrawn by the Committee on 22 Nov 2011.

However, of these 5 remaining routes previously considered by the Committee, 3 were subject of a successful Judicial Review challenge in June 2013 by the landowner who is not the landowner of the 2 routes subject of this report. Negotiations are ongoing with the landowner of the other 3 routes and consequently they are not under consideration in this report. Whilst the successful JR challenge was not in respect of the 2 routes subject of this report and the previous decisions in respect of them have not been formally quashed, the legal principles established as a result of that challenge are equally applicable to these 2 routes, hence the need to reconsider the previous decisions upon them.

- 3 The application to modify the Definitive Map and Statement is based on evidence of 18th century enclosure and depiction on nineteenth century maps. Submitted with the Application was a negative of the Award plan and copies of the old ‘road’ maps and Ordnance Survey maps referred to. No copy of the Inclosure Award was however attached. Further information on Inclosure Acts and Awards in County Durham is found in **Document A**.
- 4 Consultees have included the Local Members, Parish Councils, landowners, path user groups and the North Pennines AONB. The only comments lodged were objections by the owners while support has been expressed by the British Horse Society to the registration of such unrecorded routes. These are found at **Document B**.
- 5 It is considered that the Committee should appraise the documentary evidence afresh in order to make new determinations as to the status of each of the 2 routes in the context of a changed legal landscape since the Committee’s previous decisions in 2011.

Legal Framework

- 5 Under the provisions of Section 53 of the Wildlife and Countryside Act 1981 (the 1981 Act), 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 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)).
- 6 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.
- 7 The application being considered is for public byway status of the 2 routes. Section 66 (1) of the 1981 Act 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'. The Countryside and Rights of Way Act 2000 introduced the concept of, a restricted byway over which there is a public right of way as for byways open to all traffic but without the rights for mechanically propelled vehicles. This category of Restricted Byway is relevant in the context of the 2 routes under consideration in this report.

- 8 The Natural Environment and Rural Communities Act 2006, 'the 2006 Act', provides that where a route is not shown on the Definitive Map and Statement as of 2 May 2006 then rights for mechanically propelled vehicles are 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. The application for the 2 routes being considered was 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 2006 Act, namely that an application had been made prior to 20 January 2005 and the Council had made a previous determination.
- 9 However subsequent case law on the exception provisions in the 2006 Act has focussed on whether applications made before the cut off date in 2005 can be considered to have been properly made. If an application was not properly made then it cannot fall within the exception and accordingly, mechanically propelled vehicular rights would be extinguished. In particular, the Court of Appeal in the case of *R (on the application of Winchester College and another) v Hampshire County Council [2008] EWCA Civ 431*. held that an application can only be properly made for the purposes of attracting the exemption in Section 67(3) of the 2006 Act if it complies with all the provisions of paragraph 1 of Schedule 14 to the 1981 Act (i.e. it is made in the prescribed form, accompanied by a map drawn to the prescribed scale and accompanied by the documentary evidence (including statements of witnesses) which the applicant wishes to adduce in support of the application).
- 10 Therefore it is important to decide whether or not the application for the 2 routes under consideration was properly 'made' and meet all the provisions of paragraph 1 of Schedule 14 to the 1981 Act. The effect of Section 67(1) of the 2006 Act means that if a right of way for mechanically propelled vehicles can be established on the documentary evidence presented but the application is not properly 'made', then the application for byway status would fail with the appropriate status being that of restricted byway.
- 11 When the Committee determined on 3 March 2011 to make its decisions to register these routes as byways it considered (with Counsel's advice) that the application was properly made so as to satisfy the Section 67(3) 2006 Act exemption to extinguishment of mechanically propelled vehicular rights. However, since that time, 3 of the other 3 March 2011 routes were the subject of a successful Judicial Review challenge in the High Court by the landowners where it has been accepted that that they were not compliant with all of the requirements of paragraph 1 of Schedule 14 to the 1981 Act.

- 12 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 take into account issues such as the suitability or desirability of the routes subject of the application.

Description of Coal and Houselop Lanes (the 2 routes)

- 13 Coal and Houselop Lanes lead off the A68, just north of High Stoop (north west of Tow Law). Houselop Lane initially heads north westerly before turning south westerly for a total of 2.5km, eventually joining Wolsingham Byway 157 (Hexham Lane). Coal Lane forks off Houselop Lane, starting 650m from the A68 and continuing for 1,45km to Saltersgate Lane (Unclassified road 25.1). Both routes, for the most part, cross open heather moor and are not discernible.
- 14 Both routes are shown in more detail in the plan found at **Document C**.
- 15 The land over which both routes run is privately owned.

Documentary Evidence

- 16 The earliest known documentary evidence of Coal Lane is the 1767 Wolsingham Inclosure Award (North Moor). A route generally corresponding with both lanes is also depicted on various 19th century maps.

Wolsingham South, North and Park Moor Inclosure Act of 1765 and Award of 1767.

- 17 The relevant section of the Award plan and a typed transcript of the section relating to the Lanes lies within what is called the North Moor and is shown in **Document D**.
- 18 The Award states that ‘...And we do hereby Order Award Direct and appoint that all the said several Common Public Highways above mentioned and set out and called by the several names of**Henslop Lane, Coal Lane**... And every one of them shall and may from time to time and at all time hereafter be used by all manner of persons passing and repassing either on foot or with horse wains carts carriages and cattle and for all other purpose whatsoever at their free will and pleasure and shall be made and for ever remain of the breadth of sixty feet at the least’.
- 19 **Document D** shows the routes depicted on the Award Plan. Houselop Lane follows A-B-C-E while Coal Lane C-D.
Document E superimposes the award routes onto a modern Ordnance Survey (OS) map (existing registered public rights of way in the vicinity are also shown).

First Edition Ordnance Survey Maps

- 20 The first Ordnance Survey maps (25" to a mile) for the area crossed by the lanes are dated 1860 and shown at **Document F**. There are a number of routes depicted on this OS map with the Awarded Coal Lane showing more resemblance to what was present in 1860 than Houselop Lane. The 1860s map routes, the Awarded routes are depicted on a modern map at **Document G**, as well as the existing public rights of way.
- 21 Saltersgate Lane (the end point of the northwest end of Coal Lane) is already recorded on the List of Streets (register of publicly maintainable highways). On the 1st edition OS (25") this parcel of land is numbered 13a and the corresponding Book of Reference records it as "Public road".
- 22 It should be noted that the depiction of a route on an OS map cannot per se be used as evidence of the status of a route but is evidence of the physical existence of a route.

Other Maps

- 23 Several historic maps illustrate routes generally corresponding with both lanes although the route of Coal Lane is more consistently depicted on a more similar line. The routes are shown on the Greenwood map (1820), which is based on a survey completed in 1818 and 1819. A map by Hobson (1840) mirrors the Greenwood representation of the route of Coal Lane. Greenwood's Map is shown in **Document H**.

Evidence on the ground

- 24 The majority of the routes cross open heather moorland and are not evident as clear tracks on the ground. There are some short sections following worn trackways, moorland edge and some semi improved pasture.
- 25 The first 480 metres starting at the A68 is a 'largely undefined' grass track adjacent to the boundary wall following the 1860 OS route. Along Coal Lane there are some 'sunken trackways' in the heather but these are difficult to locate in the open moorland. Houselop Lane is only evident where it follows a worn pathway along the edge of the moor in the vicinity of Houselop Beck where it overlaps with the existing Wolsingham Footpath 59.

Aerial Photography

- 26 Aerial photography from 1940, 2001 and Google Maps (up to date) are consistent with and illustrate the 'evidence on the ground' at paragraphs 22 to 23 above.

Existing Public Rights of Way

- 27 The routes coincide with Wolsingham Footpath 61 along the first 480m section from the A68 and Houselop Lane overlaps with a 150m stretch of Footpath 59 at Houselop Beck.

Objections

- 28 Objections have been lodged by the owners of the land and found at **Document B**. The main concerns expressed are the damage to the heather and peat, spoiling of the area for the existing users e.g. walkers, the 60' width proposed which in the opinion of the objector amounts effectively to the nationalisation of land by the Council, putting the land's business usage into jeopardy and inevitable costs being incurred by the Council in terms of maintenance.

Officer Response

- 29 *The determination of a Modification Order application is constrained by the criteria which have been set out earlier in the Legal Framework part of this report. A decision cannot be made on the basis of the impact of the proposals or their desirability or suitability. There is little flexibility for the Council when making decisions on Definitive Map Modification Order proposals.*
- 30 *Although the owners will have legitimate concerns the Council can work with the land owners to try and reduce the impacts of usage of these routes on the land concerned. Negotiations have taken place with the owners and the Applicant for more suitable routes which could reduce the impact for the management of the land while providing routes that would be easier to use. However, no agreement has been reached.*

Human Rights Act implications

- 31 *Turning to the objections in the context of the Human Rights Act 1998, 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 considered that any interference 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 routes.*

Recommendations and Reasons

- 32 The Wolsingham Inclosure Award is considered to be undisputable evidence of the creation of the public highways specified within it. The Wolsingham Inclosure Act of 1765 went through a legal and constitutional process which has the same authority as national legislation.
- 33 In addition to the inclosure evidence, the most significant of the historic map evidence is the OS plans of the 1860's followed by Greenwood's Map of 1820. The OS plans were based on their own surveys and Greenwood's

mostly from original survey. Coal Lane is the clearest of the 2 routes on the old OS maps, depicting the majority of it, whereas the Greenwood map illustrates a route indicative of Coal Lane. Houselop Lane is less evident. The OS maps show a route to the north with a slightly different orientation and Greenwoods similarly. It is possible that the function of the Houselop award route may have been part superseded by the route depicted on the 1st OS; however there is no record indicating any legal change or conclusive physical evidence relating to changes to the orientation of the award route.

- 34 The depiction of the existing public footpaths on the Definitive Map is considered to be of little assistance in determining the exact route of Houselop Lane and is not of sufficient accuracy to be of use in the context of this application. Most of Coal Lane has no resemblance to any recorded public rights of way.
- 35 To review the alignment of both routes a GIS based mapping exercise has been carried out to overlay the 1st edition OS, Inclosure Award plans and existing public rights of way onto a modern OS map in order to assess whether the routes are one and the same. This is shown at **Document G**. It is accepted that a comparison of maps, particularly the Award and the OS based maps, is a 'best fit' given that they have different origins and cannot strictly be a like for like comparison. However, the inclosure plans were created at a time when surveying and drafting methods were well advanced in order for accurate plans to have been made and related to features on the ground. They should be considered as being accurate, as well as the OS plans. In this case the award plan can be plotted on to modern OS mapping data with very reasonable accuracy. For Coal Lane a significant majority of the route shown on the 1st edition OS map falls entirely within the 60ft width of the Award route (as mapped onto GIS). It is considered that on the balance of probabilities these represent the same route.
- 36 In conclusion, on the balance of probabilities, Officers are of the view that there is sufficient evidence of the dedication of a public byway under Section 32 of the Highways Act 1980 and the requirements of the Wildlife and Countryside Act 1981 Section 53(c)(i) and (ii) have been fulfilled to record a public byway (subject to the operation of the 2006 Act) in accordance with the Enclosure and other evidence mentioned above.
- 37 It is however necessary to assess whether the Application to record the 2 routes as byways contained sufficient material to satisfy the statutory requirements of paragraph 1 of Schedule 14 to the 1981 Act. If so, the motor vehicular element of the byway status demonstrated by the evidence outlined above would not be extinguished by the provisions of Section 67(1) of the 2006 Act. If not, then the 2006 Act would operate to extinguish the motor vehicular rights and the 2 routes would only be capable of being recorded as Restricted Byways. It has already been established by the Judicial Review challenge in the High Court that the applications for the other 3 routes were not compliant with paragraph 1 of Schedule 14 to the 1981 Act. Although these 2 routes were not challenged as part of that Judicial Review (different owner), it is of note that the application was

submitted in the same format without the full documentation relied on. Accordingly, it must be concluded that the application for these 2 routes is not properly made and mechanically propelled vehicular rights have therefore been extinguished. In the circumstances, the 2 routes can only be recorded as restricted byways.

- 38 As the Committee resolutions of 3 March 2011 in respect of these 2 routes were not quashed by the High Court, it will be necessary for the Committee to rescind its previous decisions in order to make new decisions on these 2 routes.

RECOMMENDED RESOLUTION

- 39 It is recommended that Members resolve to:
- i) Rescind the resolutions of the Highways Committee of 3 March 2011 to add Coal Lane and Houselop Lanes to the Definitive Map and Statement as Byways Open to All Traffic and
 - ii) Make a Modification Order to add to the Definitive Map and Statement Coal Lane and Houselop Lanes as restricted byways at a width of 60 ft as depicted 'Award Route' on the plan attached at **Document G**.

Documents attached to the report

Document A	Briefing note regarding Inclosure Awards
Document B	Consultation responses
Document C	Overview plan at 1:25,000
Document D	Wolsingham Award Plan (North Moor) and Award Transcript
Document E	Modern OS map overlaid with Definitive Map and Award Routes
Document F	1860s (1 st edition) Ordnance Survey Plan
Document G	Modern OS map overlaid with Award, 1860 OS and Definitive Map
Document H	Greenwood Map 1820s

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 31 of report

Consultation

See paragraph 4 of the report

Procurement

Not applicable

Disability Discrimination Act

Not Applicable

Legal Implications

See paragraphs 5 – 12 of report