

RIGHTS OF WAY COMMITTEE

11 July 2017

PUBLIC RIGHTS OF WAY

DEFINITIVE MAP MODIFICATION ORDER (No 2) 2016

BYWAY OPEN TO ALL TRAFFIC No 30 (PARISH OF CARHAM)

Report of the Executive Director of Local Services
Cabinet Member: Councillor Glen Sanderson, Environment and Local Services

Purpose of report

To inform the Committee of the decision, of the Inspector appointed by the Secretary of State for the Department of the Environment, Food and Rural Affairs, to determine, following written representations, the above Order that attracted five objections.

Recommendations

It is recommended that the Committee notes the Inspector's decision to confirm the Order, as made.

1.0 BACKGROUND

- 1.1 In April 2016 the County Council made and advertised Definitive Map Modification Order (No 2) 2016. This Order sought to record a byway open to all traffic on the basis of historical documentary evidence. Modification Order (No 2) 2016 attracted 5 objections, from some of the landowners, an adjacent land owner, the Parish Council and the local County Councillor. The objections were made primarily on the basis that the route was unsuitable for public motor vehicular traffic.
- 1.2 At its meeting in September 2016, the Rights of Way Committee agreed with the officer recommendation that, on a balance of probabilities, public motor vehicular rights had been shown to exist, that the Order be referred to the Secretary of State for determination, and that the Council support confirmation of the Order, as made.
- 1.3 In February 2017, the Order was submitted to the Secretary of State for determination. The Planning Inspectorate concluded that none of the

objections had been made on grounds relevant to the determination of this Order. They wrote to the objectors inviting them to modify their objections and Carham Parish Council withdrew their objection at this stage. The other objectors did not modify their objections to include any matters relevant to the determination of the Order, so the Planning Inspectorate decided that this case could be determined by an Inspector based on the 'papers on file' (i.e. without the need to hold a public local inquiry or hearing or written representations).

- 1.4 On 20th June 2017, the Inspector appointed by the Secretary of State confirmed Definitive Map Modification Order (No 2) 2016, as originally made. The Inspector was satisfied that, on a balance of probability, based on the documentary evidence available, public motor vehicular rights exist over this route. She also found that the route satisfied the test for be recorded on the Definitive Map as a byway open to all traffic.

BACKGROUND PAPERS

Local Services Group File: Modification Order (No 2) 2016 & B/10/30z
Report Author Alex Bell – Definitive Map Officer
(01670) 624133
Alex.Bell@Northumberland.gov.uk

Wildlife and Countryside Act 1981

Definitive Map and Statement of Public Rights of Way for the County of Northumberland

The Northumberland County Council

Definitive Map Modification Order (No 2) 2016

Byway Open to All Traffic No 30 (Parish of Carham)

This Order is made by Northumberland County Council under Section 53(2)(b) of the Wildlife and Countryside Act 1981 ("the Act") because it appears to that authority that the Definitive Map and Statement of Public Rights of Way for the County of Northumberland require modification in consequence of the occurrence of events specified in Section 53(3)(c)(i) and (iii), namely, 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 such that the land over which the right subsists is a public path, a restricted byway or, subject to section 54A, a byway open to all traffic; and that there is no public right of way over land shown in the map and statement as a highway of any description, or any other particulars contained in the map and statement require modification.

The authority has consulted every local authority whose area includes the land to which the order relates. The Northumberland County Council hereby order that:

1. For the purposes of this Order the relevant date is 1 January 2016.
2. The Definitive Map and Statement of Public Rights of Way for the County of Northumberland shall be modified as described in the Schedule and shown on the map attached to the Order.
3. This Order shall take effect on the date it is confirmed and may be cited as The Northumberland County Council Definitive Map Modification Order (No 2) 2016.

Definitive Map Modification Order (No 2) 2016

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Parish	Path No.	Modification	OS Map Nos.	Def Map Nos.
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Former Berwick-upon-Tweed Borough

Carham	FP 4	Statement amended	NT 83 NE	18
Carham	FP 5	Statement amended	NT 83 NE	18
Carham	BOAT 30	Addition	NT 83 NE	18

Definitive Map Modification Order (No 2) 2016

Description of Modification to Definitive Map and Statement

Former Berwick-upon-Tweed Borough

Carham **Footpath No 4** **(NT 83 NE)**

Part I Map: The map is not affected.

Part II Statement: To be amended as follows:
From the East Learmouth-Branxton Moor road at the east side of the former North Eastern Railway in a southerly direction by Tithehill to join Byway Open to All Traffic No 30 (the Hagg-East Moneylaws road), east of Hagg.

Carham **Footpath No 5** **(NT 83 NE)**

Part I Map: The map is not affected.

Part II Statement: To be amended as follows:
From Byway Open to All Traffic No 30 (the Hagg-East Moneylaws road) north-east of West Moneylaws in a south-easterly direction to join Footpath No 9 in the Parish of Kilham.

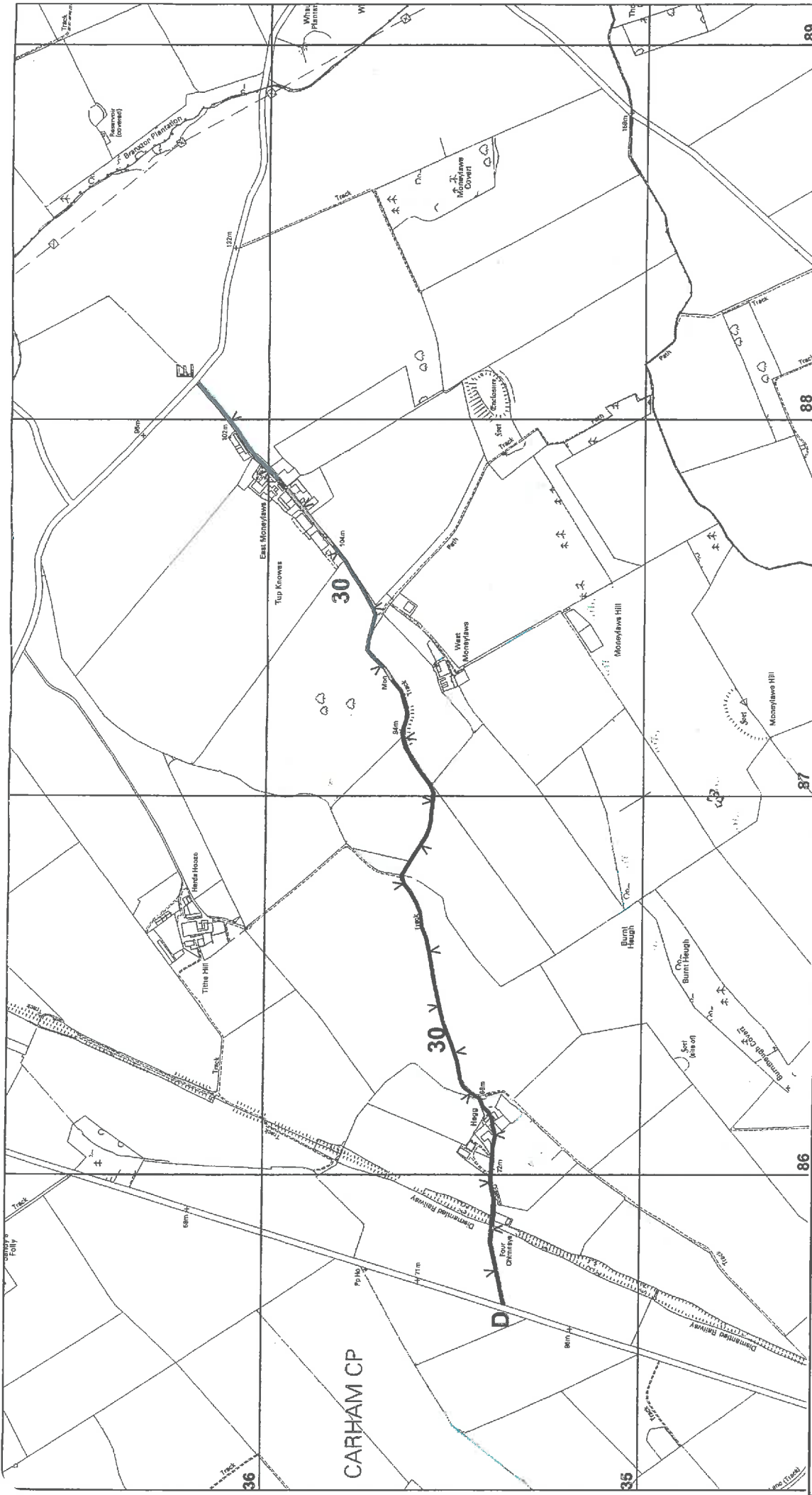
Carham

Byway Open to All Traffic No 30

(NT 83 NE)

Part I **Map:** Adding thereto a byway open to all traffic, from a point marked D, on the C20 road, 410 metres west of Hagg, in a general easterly and north-easterly direction along the U1013 road for a distance of 2765 metres, to a point marked E, on the C29 road, 300 metres north-east of East Moneylaws.

Part II **Statement:** To be prepared as follows:
As an 8.5 to 9 metre wide byway open to all traffic, from the C20 road, 410 metres west of Hagg, in an easterly direction for a distance of 415 metres. Thereafter as a 6 to 7 metre wide byway, continuing in an easterly direction for a distance of 50 metres, passing farm buildings. Thereafter as a 5 metre wide byway (with a brief 4 metre wide pinch point between number 3 The Hagg Cottages and The Hagg Farm) in an easterly direction for a distance of 55 metres, then north-easterly direction for a distance of 115 metres, then easterly direction for a distance of 490 metres, then north-easterly direction for 85 metres. Thereafter as a 5 metre wide byway in a south-easterly direction for a distance of 145 metres then easterly direction for a distance of 105 metres. Thereafter as a 7 to 8 metre wide byway, in a general north-easterly direction for a distance of 430 metres, passing a small monument to the Reverend Ralph Erskine. Thereafter as a 6 to 8 metre wide byway, in an easterly direction for a distance of 95 metres. Thereafter as a 9 metre, gradually reducing to 6 metre, wide byway, in a north-easterly direction for a distance of 165 metres, then as a 6.5 to 7.5 metre wide byway for a further 60 metres. Thereafter as an 8 metre wide byway in a north-easterly direction for a distance of 110 metres, then as an 11 to 12 metre wide byway for a further 280 metres, then as an 8 to 9 metre wide byway for a further 165 metres to join the C29 road, 300 metres north-east of East Moneylaws.



Northumberland
Northumberland County Council
 Infrastructure
 Local Services
 County Hall Morpeth Northumberland
 Telephone 0845 600 6400 NE61 2EF

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Wildlife and Countryside Act, 1981

**Definitive Map of
 Public Rights of Way
 for the
 County of Northumberland**

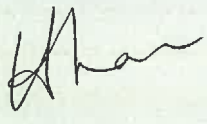
**The Northumberland
 County Council**

**Modification Order
 (No.2) 2016**

Public Footpath to be deleted		Scale: 1/10,000 Date: January 2016
Public Footpath		
Public Bridleway		
Restricted Byway		
Byway Open to All Traffic		
O.S. Map NT 83 NE	Definitive Map No 18	Parish(es) Carham
Former District(s) Berwick		

IN WITNESS whereof the Common Seal of the County Council of Northumberland was hereunto affixed on the *4th* day of *April* 2016

The Common Seal of the County Council of Northumberland was hereunto affixed in the presence of:-



Duly Authorised Officer



The foregoing order is hereby confirmed
Sue Arnott **20 JUN 2017**
An Inspector appointed by The Secretary of State for Environment, Food and Rural Affairs

Order Decision

On papers on file

by **Sue M Arnott FIPROW**

an Inspector appointed by the Secretary of State for Environment, Food and Rural Affairs

Decision date: 20 June 2017

Order Ref: ROW/3169908

- This Order is made under Section 53(2)(b) of the Wildlife and Countryside Act 1981. It is known as the Northumberland County Council Definitive Map Modification Order (No. 2) 2016.
- The Order is dated 4 April 2016. It proposes to modify the definitive map and statement for the area by recording a byway open to all traffic in Carham Parish, as shown on the Order map and described in the Order schedule.
- There were five objections outstanding¹ when Northumberland County Council submitted the Order for confirmation to the Secretary of State for Environment, Food and Rural Affairs.

Summary of Decision: The Order is confirmed.

The Main Issues

1. There are two main issues here: the first is whether the evidence shows that a public right of way for vehicles was once in existence along the Order route; the second is whether any such rights still exist today and should be recorded on the definitive map and statement. A third issue concerns changes to the details recorded in the definitive statement for two connecting public footpaths that would be necessary as a consequence but this is essentially an administrative formality.
2. The Order was made under the Wildlife and Countryside Act 1981 (the 1981 Act) on the basis of events specified in Sections 53(3)(c)(i) and 53(3)(c)(iii). If I am to confirm it, I must be satisfied that evidence has been discovered which shows, on a balance of probability, that the public rights intended to be recorded do subsist.
3. If confirmed, the Order would record the route in question (shown on the Order map as D-E) as a byway open to all traffic, that 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 purpose for which footpaths and bridleways are so used*".²
4. On the basis of the historical evidence it discovered, NCC concluded that public vehicular rights of way did (and still do) exist along the Order route, relying on the legal maxim '*once a highway, always a highway*'. Further, NCC considered that Section 67 of the Natural Environment and Rural Communities Act 2006 (the 2006 Act) does not affect the continued existence of such rights.

¹ One has since been withdrawn.

² Section 66 of the 1981 Act

5. Sub-section 67(1) of that Act provides that upon commencement on 2 May 2006 any existing public right of way for mechanically propelled vehicles (MPVs) was extinguished if it was over a way which, immediately before that date, was not shown in the definitive map and statement or was shown as either a footpath, bridleway or restricted byway unless such rights were saved by virtue of falling into one of the categories for exemption.
6. NCC took the view that public MPV rights were not extinguished, having been saved by sub-section 67(2)(b) which provides as follows: "(2) Sub-section (1) does not apply to an existing public right of way if ... (b) immediately before commencement it was not shown in a definitive map and statement but was shown in a list required to be kept under section 36(6) of the Highways Act 1980 ... (list of highways maintainable at public expense)".
7. Consequently the Order was made to record a BOAT on the basis that a public vehicular right of way exists, that rights for MPVs have been saved, and that the route has the character of a way mostly used in the manner in which a public footpath or bridleway is used³.

Reasons

Evidence of public vehicular rights

8. NCC made this Order having discovered from its own records evidence to suggest that the route in question should be recorded on the definitive map and statement as a public vehicular highway.
9. That evidence falls broadly into four categories: historical maps, railway records, the records prepared under the Finance Act 1910 and twentieth century highway records.
10. Whilst the settlements of 'Hagg', 'Old Money Laws' and 'New Money Laws' are shown on a map produced by Armstrong in 1769, no road is shown between them. The earliest evidence of a road connecting the highway to the west of Hagg with the highway to the east of what was then 'Old Moneylaws' appears on a map published in 1820 by Fryer. This road was similarly recorded on maps produced by Cary between 1820 and 1832 and by Greenwood in 1828.
11. The Ordnance Survey first recorded this road on its 1862 map and then on subsequent editions published in 1865-66, 1899, 1924-5 and 1972. In the Book of Reference accompanying the 1862 map, the route now at issue was recorded as a "Public Road", both in sections which lay in the Township of Learmouth to the west and in the Township of Moneylaws to the east.
12. None of these plans and documents offer conclusive evidence of the existence of a vehicular highway although they are all consistent with a road of that status. However together I consider the balance tips in favour of a public way, not a private one, and leans towards an all-purpose road rather than a bridleway.
13. However more weight can be attributed to other records. In particular, the deposited plan of the Alnwick and Cornhill Branch of the North Eastern Railway. This showed the position of the (then proposed) railway line running to the west of Hagg and crossing the road in question. The accompanying Book of

³ A characteristic of a BOAT established in the case of *Masters v SSETR* [2000] 2 All ER 788, (CA) [2000] EWCA Civ 249, (CA)[2000] 4 All ER 458, (CA)[2001] QB 151

Reference (dated 1881) identified this as "Public Highway" (as opposed to an occupation road or footpath, both of which are noted elsewhere in the schedule), and the "Owners or Reputed Owners" are listed as "The Glendale District Highway Board". There would be no reason to identify this as a public road and to incur the expense of making provision for the public to cross the railway unless it was absolutely necessary. Consequently this is good evidence of the status of the way at that time.

14. Although the maps and schedules prepared under the 1910 Finance Act were not intended to form a public record of rights of way, they can offer helpful information nonetheless. The exercise was aimed at producing a baseline survey from which present and future land values could be assessed for taxation. Since the presence of a public path could affect the value of land, these were often identified. Where (as here) a road was shown excluded from the adjacent land parcels which were valued by the district surveyors, this is usually interpreted as strong evidence that the road was a highway and usually a vehicular one. There is nothing to suggest that was not the case with the Order route.
15. Turning to the highway maintenance records, the road is included on the Glendale District Council Handover Map of 1932 (on which the Order route is shown as Road no. 15); the Council's Highways Map dated 1951 and Schedule dated 1958 (as Road U1013); the County Road Map and Schedule of 1964 (again as Road U1013); and the County Road Schedule of 1974 (which is similar to the 1964 description). Further it is included in the most recent electronic version of the list of highways maintainable at the public expense (known as the Network Management Information System).
16. It is important to be clear that these are all records of maintenance liability, not definitive lists identifying the legal status of the ways there shown. NCC submits that the overwhelming majority of routes in Northumberland recorded on the 1932 Handover Map (and now its list of streets) are undisputed public carriageways, thus raising a presumption that the Order route was likewise a vehicular road. In the absence of evidence to the contrary I am content to accept that argument in relation to the route now at issue.
17. This conclusion is supported by the evidence originating from the 1950s onwards when the first definitive map and statement was in preparation. The public paths now recorded as definitive footpaths 4 and 5 are described as joining the 'Hagg-East Moneylaws road', the clear assumption being that this road was a highway carrying a public right greater than footpath or bridleway.
18. As required by the Restriction of Ribbon Development Act 1935, NCC prepared a map and an accompanying schedule to record all public roads (but not footpaths or bridleways) in the Glendale Rural District to which the provisions of this Act were to apply. Although no map is available for this area, the accompanying schedule included the Order route as Road No. 23. As these details were in the public domain as a result of this process, I accord a degree of extra weight to the inclusion of the Order route in these records although it is not substantive proof.
19. Overall I conclude that the balance of probability swings in favour of the Order route historically being established as a publicly maintainable vehicular highway between points D and E on the Order map, at least prior to 2 May 2006.

The effect of the Natural Environment and Rural Communities Act 2006

20. NCC concluded that the exception offered by sub-section 67(2)(b) of the 2006 Act was applicable to the Order route D-E on the basis that the route is recorded on its list of publicly maintainable highways and is not recorded on the definitive map and statement. No representations have challenged this and I am satisfied that the evidence supports that conclusion.

Conclusions on the historical evidence

21. On balance I am satisfied that the evidence points towards the Order route having been a full vehicular highway dating back to the early nineteenth century at least.
22. Records also show this route to be exempt from the statutory extinguishment of rights for mechanically propelled vehicles instigated by sub-section 67(1) of the 2006 Act on the grounds provided in sub-section 67(2)(b).
23. It follows from this that the route should be recorded on the definitive map and statement as a byway open to all traffic, the nature of its use and character fitting that description.

Other matters

24. All those who have objected to this Order have raised concerns about the likely effects of motor vehicles, driven or ridden by the public, using the Order route. Safety and nuisance issues, the potential for accidents and the deterioration of the road surface are all understandable fears. However these are not matters I can take into account in determining the legal status of the Order route although they may be relevant to the future management of the highway.

Conclusion

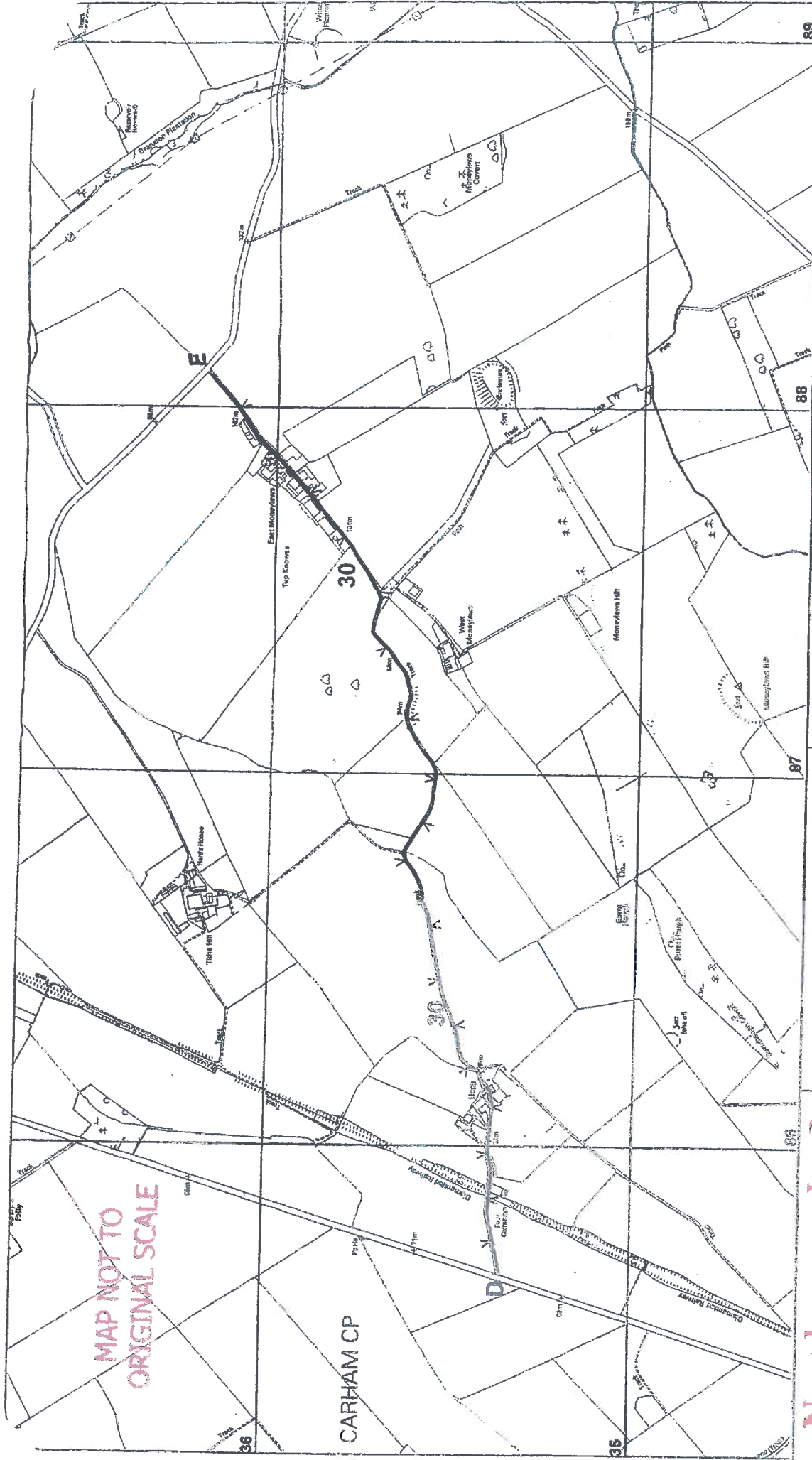
25. Having regard to the above and all other matters raised in the written representations, I conclude that the Order should be confirmed.

Formal Decision

26. I confirm the Order.

Sue Arnott

Inspector



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Northumberland County Council
 Infrastructure
 Local Services
 County Hall, Morpeth, Northumberland
 Telephone 0845 600 6400 NE61 2EF

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Wildlife and Countryside Act, 1981

Definitive Map of Public Rights of Way for the County of Northumberland

The Northumberland County Council

Modification Order
 (No.2) 2016

- Public Footpath to be deleted
- Public Footpath
- Public Bridleway
- Restricted Byway
- Byway Open to All Traffic

O.S. Map NT 83 NE
 Definitive Map No. 18
 Scale: 1/10,000

Former District(s) Berwick
 Parish(es) Carham
 Date: January 2016