



Northumberland County Council

TYNEDALE LOCAL AREA COUNCIL

12 June 2018

**PUBLIC RIGHTS OF WAY
DEFINITIVE MAP MODIFICATION ORDER (No 7) 2017
ALLEGED RESTRICTED BYWAY NO 158
PARISH OF ALLENDALE**

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

Purpose of report

In this report, the Committee is asked for its views on the action now thought appropriate in determining the above mentioned Order.

Recommendation

It is recommended that the Committee agree that the Order is submitted to the Secretary of State for the Department of the Environment, Food and Rural Affairs for determination, accompanied by a recommendation that the Order is not confirmed.

1 BACKGROUND

1.1 The proposal in the Order is to add, to the Definitive Map and Statement:

Restricted Byway No 158

An 18.28 metre wide grass surfaced restricted byway from Byway Open to All Traffic No 124 (the U8022 road) 545 metres north-east of Stone Stile Farm in an easterly direction for a distance of 680 metres to a field gate, then continuing in an easterly direction as a 5 metre wide moorland path for a distance of 360 metres to join Public Bridleway No 45, 280 metres south-east of Gaterley Hill summit

- 1.2 The proposal results from an application submitted in October 2015 by Janet Lennard of Hexham and supported by historical evidence claiming that the route carried public vehicular rights and should be recorded on the Definitive Map as a restricted byway.
- 1.3 In July 2016 the County Council's Rights of Way Committee considered all the available evidence both in support and rebuttal of the alleged restricted byway and resolved that in the light of the evidence submitted, there was insufficient evidence to justify that restricted byway rights had been reasonably alleged to exist over the claimed path.
- 1.4 In September 2016 Janet Lennard, the applicant, submitted an appeal against the County Council's decision not to make an order.
- 1.5 In March 2017 the Planning Inspectorate issued a decision and concluded that the appeal should be allowed.

2 THE ORDER

- 2.1 The proposal was the subject of a Modification Order made on 3rd July 2017 and advertised on 14th July 2017. Public advertisements were displayed on site, and all known owners / occupiers of the land affected were notified with 56 days given for formal objections / representations.
- 2.2 During the statutory period for objections / representations no objections were received and the Council is now in a position where it could choose to confirm the Order as unopposed.

3 OBJECTIONS

- 3.1 By letter dated 6th September 2017, Christine Liversedge of Allen View, Catton, submitted a representation in support of the Order stating:
 - i) "As a horse owner/ rider living in Catton, I wish to register my support for the acceptance of this alleged restricted byway.
 - ii) "Whilst i have no additional evidence to that already supplied by Janet Lennard, I would draw your attention to the need for more off-road bridleways. The level of traffic, especially HGV's, vehicles towing trailers and tractors, has increased significantly and riding the main Catton to Allendale road is becoming more problematic and unsafe if riding a young or nervous horse..
 - iii) "I have ridden in the Catton area for some 30 years and would have used this track if the gate onto the fells had been able to be opened from my horse, it would make a welcome additional safe route for all the local horse riders.

- iv) “I can see no reason to reject this request to add this route to the Definitive Map in that it would not adversely affect the local landowners and it would be of benefit to other road users in helping to reduce the need to ride on the main roads.”

3.2 By letter dated 7^h September 2017, Cath Dennis of Allen View, Catton submitted a representation in support of the Order stating:

“I have lived in Catton for 31 years and during that time have owned a horse and ridden in the surrounding countryside. While I cannot add to the wealth of compelling evidence already submitted in support of Restricted Byway 158 being added to the definitive map I can reiterate the need to increase the opportunities for off road horse riding. Adding Restricted Byway 158 to the definitive map would create an extra off road route for local riders. I understand that the Inspector appointed by the Secretary of State for Environment, Food and Rural Affairs has directed NCC to add this byway to the definitive map and I hope that this will happen as it will be of benefit to cyclists, walkers and horse riders”

4 DISCUSSION

- 4.1 The procedures under the 1981 Act empower the authority to confirm proposals only where these are unopposed and no modification is needed. Where there is an unresolved objection, or where a modification, however minor is needed, the proposal must be submitted for determination by the Secretary of State for the Department of the Environment, Food and Rural Affairs.
- 4.2 Although the County Council is in a position to confirm the order as unopposed officers are conscious that when the evidence was considered by members at their meeting in July 2016 it was agreed that the evidence was insufficient to support an assertion that restricted byway rights had been reasonably alleged to exist.
- 4.3 The Inspector appointed to determine the appeal, while agreeing that the appeal failed ‘Test A’ - *Does a right of way subsist on the balance of probabilities*, concluded that the appeal passed ‘Test B’ - *Is it reasonable to allege that a public right of way subsists*.
- 4.4 Although there are no objections to the Order the evidence submitted by the applicant in support of their appeal is not considered sufficient to persuade officers that, on the balance of probabilities, a public right of way exists over the Order route.

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 7) 2017

Restricted Byway No 158 (Parish of Allendale)

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), 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.

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 March 2017.
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 7) 2017.

Modification Order (No 7) 2017

Index

Former Tynedale District

Parish	Path No.	Modification	OS Map Nos.	Definitive Map Nos.
Allendale	Restricted Byway No 158	Addition	NY85NW/NE	217/218

Modification Order (No 7) 2017

Description of Modification to Definitive Map and Statement

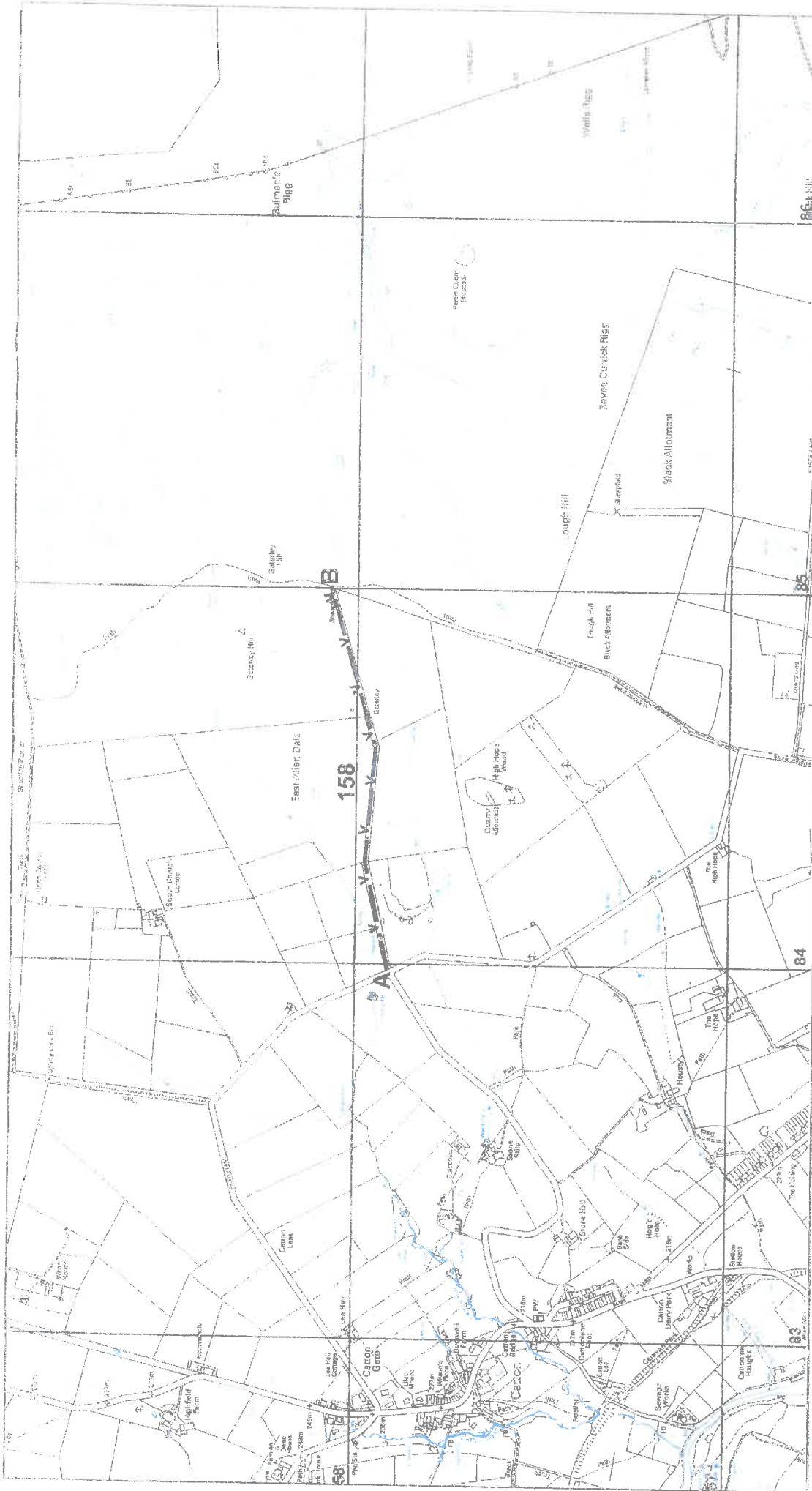
Former Tynedale District

Parish of Allendale

Restricted Byway No 158

(NY85NW/NE)

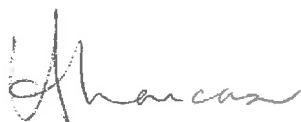
- Part I Map: Adding thereto, a restricted byway, from a point marked A on Byway Open to All Traffic No 124 (the U8022 road) 545 metres north-east of Stone Stile Farm in an easterly direction for a distance of 1040 metres to a point marked B on Public Bridleway No 45, 280 metres south-east of Gaterley Hill summit.
- Part II Statement: To be prepared as follows:
An 18.28 metre wide grass surfaced restricted byway from Byway Open to All Traffic No 124 (the U8022 road) 545 metres north-east of Stone Stile Farm in an easterly direction for a distance of 680 metres to a field gate, then continuing in an easterly direction as a 5 metre wide moorland path for a distance of 360 metres to join Public Bridleway No 45, 280 metres south-east of Gaterley Hill summit.



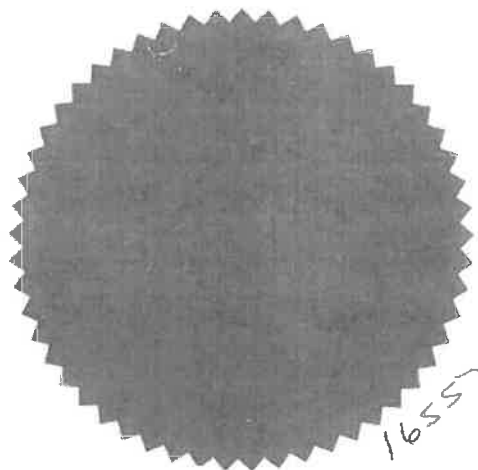
Public Footpath to be Deleted	Public Footpath	Public Eridrway	Restricted Byway	Byway Open to All Traffic
<p>The Northumberland County Council</p> <p>Modification Order (No.7) 2017</p>				
<p>Wildlife and Countryside Act, 1981</p>		<p>Definitive Map of Public Rights of Way for the County of Northumberland</p>		
<p>Northumberland County Council Infrastructure Local Services County Hall, Morpeth, Northumberland Telephone 0845 600 6400 NE61 2EF</p>		<p>Distributive Map No 217/218 Scale 1:10,000 Date: March 2017</p>		
<p>This map is reproduced from Ordnance Survey material with the permission of Ordnance Survey 67373/10. It is the property of Her Majesty's Stationery Office © Crown Copyright. Unauthorised reproduction is prohibited in any form and may be liable for prosecution or civil proceedings.</p> <p>NORTHUMBERLAND COUNTY COUNCIL - OS Licence No. 100049046</p>		<p>O.S. Map NY 85 NW/NE Former Districts Tyndale</p>		

IN WITNESS whereof the Common Seal of the County Council of Northumberland was hereunto affixed on the 3rd day of July 2017

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

A handwritten signature in cursive script, appearing to read "Hancock".

Duly Authorised Officer



Appeal Decision

by Alan Beckett BA MSc MIPROW

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

Decision date: 07 March 2017

Appeal Ref: FPS/P2935/14A/4

- This Appeal is made by Janet Lennard (the Appellant) under Section 53 (5) and Paragraph 4 (1) of Schedule 14 of the Wildlife and Countryside Act 1981 (the 1981 Act) against the decision of Northumberland County Council (the Council) not to make an Order under section 53 (2) of that Act.
- The Application is dated 5 October 2015 and was refused by the Council on 15 August 2016.
- The Appellant claims that the definitive map and statement of public rights of way should be modified by adding a Restricted Byway from Byway Open to All Traffic No 124 (the U8022 road) north of The Hope in an easterly direction to join public bridleway no 45 south east of Gaterley Hill summit.

Summary of Decision: The Appeal is allowed.

Preliminary Matters

1. I have been directed by the Secretary of State for Environment, Food and Rural Affairs to determine this Appeal under Section 53 (5) and Paragraph 4 (1) of Schedule 14 of the 1981 Act.
2. This Appeal has been determined on the basis of the papers submitted.

Main Issues

3. Section 53 (3) (c) (i) of the 1981 Act provides that a modification order should be made on the discovery of evidence which, when considered with all other relevant evidence available, 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.

Reasons

4. In arriving at my conclusions I have taken account of the evidence submitted by the parties; the relevant part of the Wildlife and Countryside Act 1981 and the findings of the High Court in the *Bagshaw and Norton*¹ case.
5. The need for an Order to be considered when evidence is submitted as to the possibility of rights of way existing is dealt with under Section 53 of the 1981 Act. Section 53 (3) (c) (i) of the 1981 Act provides that an Order should be made on the discovery of evidence which, when considered with all other relevant evidence available, 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

¹ *R v Secretary of State for the Environment ex parte Bagshaw and Norton* (QBD)[1994] 68 P & CR 402, [1995] JPL 1019

area to which the map relates. As made clear by the High Court in *Bagshaw and Norton*, this involves two tests:

Test A - Does a right of way subsist on the balance of probabilities? This requires clear evidence in favour of the Appellant and no credible evidence to the contrary.

Test B. Is it reasonable to allege on the balance of probabilities that a right of way subsists? If there is a conflict of credible evidence, and no incontrovertible evidence that a right of way cannot be reasonably alleged to subsist, then the answer must be that it is reasonable to allege that one does subsist.

6. The Appellant bases her case upon an interpretation of documentary evidence from the nineteenth and twentieth centuries and has not provided any evidence of use of the claimed path by the public. The evidence available to me comprises documents submitted by the Appellant together with other documents consulted by the Council when investigating the application to add the path to the definitive map. Correspondence was received from the agent for the owners of the land over which the claimed Restricted Byway would run; however, the landowner did not submit any documentary evidence in relation to the case.

Documentary evidence

Hexham and Allendale Inclosure award 1800

7. The route at issue is shown in the inclosure award map as being bounded by fences or walls until it reaches the stinted pasture on Gaterley Hill; at the point where the route reaches the stinted pasture the map shows the location of a pinfold; the route is labelled 'Gaterley Road'. At the western end the road forms part of a crossroads with Houstie Carrs Road and Coldcoats Road.
8. The claimed route is described in the inclosure award as "*One other private carriage road, sixty feet in breadth, beginning at Houstie Carrs Road, opposite the end of Coldcoats Road, and leading eastwards to the stinted pasture, for the use of the owners and occupiers, for the time being, of lands and allotments in Catton Grieveship*".
9. I understand that the Act under which the inclosure award was made is dated 1792. Neither party has submitted a copy or extracts from the enabling Act to demonstrate the powers under which the inclosure commissioners acted although the Council submitted that the enabling Act stated that all public roads should be set out at least 30 feet in breadth whereas 'private roads' should not exceed 30 feet.
10. The Appellant draws attention to what she considers to be an inconsistency within the inclosure award in that the commissioners had awarded a private road at a width commensurate with a public road in contravention of the provisions of the enabling Act. The Appellant also submits that it would have been necessary for the public to have access along Gaterley Road to reach the pinfold where stray livestock would be held. Furthermore, Gaterley Road is recorded on the inclosure plan as such without the addition of the word 'private'; this is in contrast to another way, Ardley Road which was awarded as a private road and labelled as such on the inclosure plan but which is now recorded on the List of Streets as a publicly maintainable highway.

11. The Council submits that the inclosure award is binding as to the facts set out in the award and plan and that Gaterley Road was set out as a private carriage road and that there was no evidence that this subsequently evolved into a public right of way.
12. Gaterley Road was awarded as a private road but not solely for the use of named individuals but for a wider class of persons '*the owners and occupiers....of lands and allotments in Catton Grieveship*'. Whilst the inclosure award evidence does not provide conclusive evidence of the existence of public rights over the appeal route, the description of the route as being a private road does not preclude the possibility of the public having subsequently acquiring rights along Gaterley Road.

Small scale commercial nineteenth century maps

13. Gaterley Road is shown by both Fryer (1820) and Greenwood (1828) as a fenced or walled track leading to the stinted pasture and are shown in the same manner as other known public roads with the key to Greenwood's map describing Gaterley Road as a 'cross road'. Cary's map (published between 1820 and 1832), on the other hand, neither shows Gaterley Road nor the northern section of Houstie Carrs Road nor any of the awarded roads which led to the stinted pasture.
14. Of these three maps, Fryer's depiction of the route closely resembles that shown on the inclosure award map with Gaterley Road ending at the stinted pasture whereas Greenwood shows the route to extend over the stinted pasture to connect with what is now public bridleway 502/045 which is shown to run north-south over the stinted pasture.
15. The depiction of Gaterley Road on these small scale commercial maps does not preclude the existence of public rights.

Allendale tithe award 1849

16. The tithe map depicts Gaterley Road as a fenced or walled route leading to the stinted pasture and in the same manner as BOAT 502/124 which leaves Houstie Carrs Road a little to the north of Gaterley Road. None of the tracks shown leading to the stinted pasture have apportionment numbers and would not appear to have been considered capable of producing a titheable crop. The tithe map does not show a track, way or path continuing towards bridleway 502/045 from the eastern end of the walled lane, however, the extract from the tithe map submitted does not show any detail of the stinted pasture and the land may not have been the concern of the tithe commissioners.
17. The Appellant submits that there are a number of walled lanes shown on the tithe map which lead to the stinted pastures of which all except Gaterley Road and Beacon Hill Road² are recorded as public rights of way in the definitive map and statement; the Appeal route is shown in the same manner as other known public routes which lead to the stinted pastures. The Council acknowledges that the enclosed section of the appeal route is shown in the same way as other recognised public highways but does not consider that this demonstrates that the route was a public way at the time of the tithe survey.

² An application to add a restricted byway along Beacon Hill Road is the subject of a further and separate application made by the Appellant on 5 October 2015.

18. Whilst the recording of public rights was not the primary purpose of the tithe commutation process, the depiction of the walled section of the route on the tithe map does not preclude the existence of public rights over it. No conclusions can be drawn from the tithe map regarding the unenclosed section of the Order route as the stinted pasture appears not to have been of interest to the tithe commissioners.

Ordnance Survey maps

19. The first edition 25-inch to 1-mile map of 1865 shows Gaterley Road as running between fences or walls towards the stinted pasture and is coloured brown and is numbered 484. The entry in the Book of Reference for parcel number 484 reads "Public Road". The Appellant draws attention to Gaterley Road being shown and described in the same way as Coldcoats Road (coloured brown, numbered 513 and described as a public road) an inclosure award public road and now a tarmac publicly maintainable road.
20. Successive editions of the 6-inch to 1-mile maps published between 1865 and 1951 are consistent in that they show the Appeal route to be fenced or walled from the junction with Houstie Carrs Road to the stinted pasture. These maps show that the enclosed section terminates at a point labelled "Gaterley" but do not show a path or way running over the stinted pasture to bridleway 502/045; the only feature shown on this section is the northern boundary wall of the adjacent field.
21. Whilst Ordnance Survey maps do not provide direct evidence of the status of any track shown on them, they do provide evidence of the existence of observable features at the time of the survey. In this case, the OS maps demonstrate the continued existence of a track or way capable of carrying vehicular traffic to at least the stinted pasture. The entry in the Book of Reference for Gaterley Road provides evidence in support of the Appellant's claim as to the public status of the walled section of the Appeal route as it was regarded at the time of the survey to be of the same status as the adjacent Coldcoats Road. The Ordnance Survey maps suggest that there was no observable track or way over the stinted pasture.

Finance Act 1910

22. The Appeal route is shown excluded from adjacent hereditaments between Houstie Carrs Road and the stinted pasture and was not subject to incremental value duty. None of the Finance Act documentation submitted sheds any light on how the stinted pasture was treated by the Inland Revenue valuer. The Appellant submits that the exclusion of the enclosed section of the Appeal route from valuation provides evidence that the route was considered to be a public road at the time of the survey. The Council submits that it would be reasonable to assume that the route was excluded from valuation as it was considered to be a public or private road.
23. The Finance Act provided for the levying of tax on the increase in site value of land between its valuation as at 30 April 1909 and, broadly speaking, its subsequent sale or other transfer. All land holdings (or hereditaments) in England and Wales were to be valued, although under section 35 (1), land belong to a rating authority was exempt from the provisions of the Finance Act. Land which belonged to a rating authority included public carriageways within the rating authority's area.

24. If a route in dispute is external to any hereditament, it is therefore possible that it was considered by the valuer to be a public highway normally but not necessarily vehicular, since the existence of footpaths and bridleways over land were usually dealt with by way of deductions from site value in the valuer's Field or Valuation Book entries. The representation of part of the Appeal route as being separate from private ownership is evidence which sits in the scale in favour of the Appellant.

Conclusions

25. The documentary evidence adduced in this case shows that the walled section of the Appeal route has been in existence as a feature in the landscape since 1800 when it was set out as a private road to provide access to the stinted pasture for the owners and occupiers of Catton Greiveship. The route was set out a width commensurate with that of a public road and would have been capable of carrying public vehicular traffic.
26. The walled section of the appeal route was recorded as a public road by Ordnance Survey in 1865 and was excluded from valuation under the Finance Act 1910 which is also supportive of the walled section being a public highway.
27. Other than Greenwood's map of 1828, none of the documents considered show the existence of a route between the end of the walled section of the Appeal route and public bridleway 502/405. However, the absence of the route from Ordnance Survey mapping from 1865 onwards does not demonstrate that a right of way had not come, or could not have come into existence at an earlier date.
28. The members of the Council's Rights of Way Committee reached their decision based on an interpretation of the available documentary evidence. The Appellant draws a different conclusion based on a different interpretation of the same documents. In my view, the Appeal fails Test A set out in paragraph 5 above as there is a conflict in the interpretation that can be placed upon the available evidence. However, I have not read or seen any evidence which would inevitably defeat the Appellant's claim; consequently I conclude that the Appeal succeeds against Test B as the evidence adduced is such that it is reasonable for the Appellant to allege that a public right of way subsists over the Appeal route.
29. Having regard to these and all other matters raised in the written representations I conclude that the Appeal should be allowed.

Formal Decision

30. In accordance with paragraph 4 (2) of Schedule 14 to the 1981 Act Northumberland County Council is directed to make an order under section 53 (2) and Schedule 15 of the 1981 Act to modify the definitive map and statement to add a restricted byway as set out in the application of 5 October 2015. This decision is made without prejudice to any decision that may be given by the Secretary of State in accordance with her powers under Schedule 15 of the 1981 Act.

Alan Beckett

Inspector