

**Name of meeting and date:** Strategic Planning Committee – 29 July 2020

**Title of report:** Definitive Map and Statement of Public Rights of Way. Re-assessment of legal status of Huddersfield 231, Nether Moor Farm, South Crosland. Re-consideration of evidence following quashing of Kirklees Council (Huddersfield Public Bridleway 231 - Sandy Lane to Nether Moor Road, South Crosland) Public Path Modification Order 2018.

## **1. Purpose of Report**

- 1.1. **Members are asked** to re-consider the evidence regarding the status of Byway Open to All Traffic (BOAT) Huddersfield 231 and decide on the requisite modification of the Definitive Map and Statement of public rights of way under s.53 Wildlife and Countryside Act 1981.
- 1.2. On 23 Nov 2017 the Huddersfield area Planning Sub-Committee) resolved to make a Definitive Map Modification Order (DMMO) to downgrade the status recorded in the Definitive Map and Statement (DMS) from BOAT to bridleway. This was as a result of investigation of applications for DMMOs from the owners of Nether Moor Farm ('the landowners' and 'the applicants') alleging the way was wrongly recorded as a BOAT. The landowners subsequently objected to the Order, but it was subsequently Confirmed by the Secretary of State following a Public Inquiry.
- 1.3. Following advertising of the Confirmation of the Order, the Order was challenged by application to the High Court. The Secretary of State and Kirklees Council accepted that there was an error regarding a particular aspect of the Inspector's reasoning in his Decision. Had the error not been made the Inspector might have reached a different conclusion. As the law does not currently provide for only an Inspector's Decision to confirm it to be quashed the Order itself has been quashed. The matter has been returned to the Council. Members should make a further decision, based on all the evidence now available, on making a new Order and seeking its confirmation.

## **2. Summary of Report**

- 2.1. Huddersfield 231 was recorded on the first Definitive Map and Statement (the 'first DMS' in 1975 as a Road Used as a Public Path (RUPP). Following review of the DMS, it became recorded on the West Yorkshire Modified Definitive Map and statement (the 'current DMS') in October 1985 as a Byway Open to All Traffic (BOAT).
- 2.2. In 2012 Mrs & Bradley of Nether Moor Farm applied for a DMMO to instead record Huddersfield 231 as a public footpath. The way is shown on a plan at item 2 in appendix A. Briefly, the route comprises an enclosed track between Sandy Lane and Nether Moor Road, passing through a dairy farm. The farm had been occupied by the Bradley family since the late 19<sup>th</sup> century and owned by members of the family since 1954.
- 2.3. An earlier application in 2009 to downgrade the recorded status to footpath had been returned to the applicants at their request. In 2014 a further application was made to instead record part Huddersfield 231 only as a footpath, to its junction with FP Huddersfield 233, with support for the 2012 application being subsequently withdrawn.
- 2.4. The 2014 application was made on the premise that the applicant by then considered there was a technical flaw in the depiction of 231 on the Definitive Map, being shown with incorrect notation for a BOAT (a solid black line). This is in spite of the route being described as a BOAT in the Statement. It was argued that this meant that the DMS did not in fact record a BOAT at all. Further, that there was a failure to include the reclassification of Huddersfield 231 to BOAT in an Order made preparatory to the publication of the current DMS.

- 2.5. Officers do not agree with the argument regarding the incorrect notation on the map; the Map and Statement *taken together* do record a BOAT. However it is accepted that a procedural error was made regarding the failure to formally reclassify Huddersfield 231 as a BOAT in an Order modifying the Map and Statement in 1985, but subsequently including the route in the Modified Map and Statement with that status.
- 2.6. The landowners' current position is that no public right of way exists over any part of the way in question, that it was recorded in error, and *any* use of the way was with permission. This is at odds with the earlier position which had not challenged the existence of lower rights in general but had focussed refuting vehicular use, following an increase in use by recreational off-road vehicles. It is also at odds with their position in 2013/14, when it was accepted that there was a public right of way on foot from Sandy Lane to the junction with footpath Huddersfield 233.
- 2.7. The evidence adduced in support of the 2012 and 2014 applications was broadly the same, including historical documentary evidence, and evidence forms, letters and statements from people associated with the farm. Investigation of the applications led to user evidence being received from equestrians and other who claimed to have used the way over a number of decades. The evidence was investigated in depth in 2017 by officers from Leeds City Council on behalf of Kirklees. Evidence was also considered in detail and witnesses cross examined at the Public Inquiry in 2019.
- 2.8. Officers have now taken into account *all* the evidence now available, including evidence and legal arguments presented at the Public Inquiry, along with the Order Decision and the High Court challenge. A detailed analysis of the evidence submitted, and other evidence considered is found in the 'Discussion of Evidence' at item 1 Appendix A to the report. A report detailing investigation of the evidence available as of 2017 is also of relevance, as are the conclusion reached by the Inspector having heard all the evidence. Re-investigation has focused on a re-analysis of documents relating to the development of the DMS from the early 1950s onwards to 1975 and its review in the 1970s / 1980s, evidence from people associated with Nether Moor Farm, and evidence from people who claimed to have used the way up to 1975 when the way was recorded as a RUPP on the first DMS.
- 2.9. There is a legal presumption that public rights of way shown on the Definitive Map actually exist. The evidence needed to remove (including to downgrade the recorded status of) what is shown as a public right from such an authoritative record will need to fulfil certain stringent requirements:
  - (a) the evidence must be new – an order to remove a right of way (or downgrade) cannot be founded simply on the re-examination of evidence known at the time the Definitive Map was surveyed and made.
  - (b) the evidence must be of sufficient substance to displace the presumption that the Definitive Map is correct.
  - (c) the evidence must be cogent.
- 2.10. Members are asked to decide whether the evidence as a whole demonstrates that any DMMO is requisite. An Order to delete or downgrade the recorded status of a public right of way would be requisite only if the evidence meets the requirements described at paragraph 2.9
- 2.11. Should the evidence be considered to show that the way has been recorded as a BOAT in error, the legal presumption that the way is correctly recorded in the DMS will no longer apply. Members should then also consider whether evidence has been discovered that demonstrates that a public right of way of another type, e.g. a public footpath or bridleway, has been dedicated. Members should also consider whether the evidence shows that a public right of way has been dedicated subject to limitations or conditions (e.g. the existence at the time of dedication of gates or stiles).
- 2.12. The relevant statutory provision is found in s.31 Highways Act 1980 ("the 1980 Act"). This requires consideration of whether there has been use of a way by the public, 'as of right' (without force, secrecy or permission) and without interruption, for a full period of twenty years prior to its status being brought into question and, if so, whether there is evidence that any landowner demonstrated a lack of intention during this period to dedicate a public right of way.

2.13. Dedication at common law requires consideration of three main issues: whether the owner of the land had the capacity to dedicate a highway, whether there was express or implied dedication by the landowner and whether there has been acceptance of the dedication by the public. Evidence of the use of a way by the public 'as of right' may support an inference of dedication and may also show acceptance of the dedication by the public.

### **3. Ward Councillor comments**

3.1. Ward members have been informed about matters regarding the disputed status of Huddersfield 231 at various times since at least 2017. They have been offered an opportunity to provide additional evidence and have been informed of the report being brought to committee. No further comments have been received.

### **4. Officer recommendations and reasons**

4.1. That the Strategic Planning Committee authorises the Service Director, Legal, Governance and Commissioning to make and support confirmation of a Definitive Map Modification Order to downgrade the recorded status of Huddersfield 231 from Byway Open to All Traffic to public bridleway under sections 53(2)(b) and 53(3)(c)(ii) of the 1981 Act.

4.2. Additionally, officers recommend that any Order vary the particulars shown in the Statement accompanying the Definitive Map to record limitations including a gate and stile at point B on the plan at item 2 in appendix A and two removable bars, poles or rails at points D and E.

### **Reasons**

4.3. Section 53 (3)(c)(ii) states that an Order to modify the Definitive Map and Statement should be made upon "(c) the discovery by the authority of evidence which (when considered with all other relevant evidence available to them) shows... (ii) that a highway shown in the map and statement as a highway of a particular description ought to be there shown as a highway of a different description".

4.4. In accordance with the conclusions in the 'Discussion of Evidence' appended at item 1 in appendix A to this report, (in particular paragraphs 9.1 to 9.17 in the Discussion), it is considered that there is sufficient cogent evidence to show that Huddersfield 231 was recorded on the West Yorkshire Modified Definitive Map and Statement in error and to outweigh any presumption that it is correctly recorded. Further, the evidence shows, on the balance of probabilities, that the way should instead be recorded as a public bridleway, with the addition of limitations described at paragraph 4.2 above.