

Name of meeting: Strategic Planning Committee

Date: 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.

Purpose of report: **Members are asked to re-consider** the evidence 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 in respect of Byway Open to All Traffic (BOAT) Huddersfield 231
 An Order made following a decision of the Planning Sub-Committee (Huddersfield) on 23 Nov 2017 was Confirmed by the Secretary of State following a Public Inquiry.
 The Order was challenged by application to the High Court and was subsequently quashed due to an error in the Secretary of State's Decision.
Members are asked to make a further decision on making a new Order and seeking its confirmation.

Key Decision - Is it likely to result in spending or saving £250k or more, or to have a significant effect on two or more electoral wards?	Not applicable
Key Decision - Is it in the <u>Council's Forward Plan (key decisions and private reports)?</u>	Not applicable
The Decision - Is it eligible for call in by Scrutiny?	No – non-executive power rests with Council committee
Date signed off by <u>Strategic Director</u> & name	Karl Battersby – 08/07/2020
Is it also signed off by the Service Director for Finance?	Yes - Eamonn Croston 06/07/2020
Is it also signed off by the Service Director for Legal Governance and Commissioning?	Yes - Sandra Haigh on behalf of Julie Muscroft 06/07/2020
Cabinet member portfolio	N/A

Electoral wards affected: Crosland Moor & Netherton

Ward councillors consulted: Cllrs. E Hill, M Kaushik & M Sarwar

Public or private: **Public**

Has GDPR been considered? Yes. Evidential material associated with the report contains personal data. Signatures and personal contact details have been redacted. As a public local inquiry has already been held to consider the same evidence, the names and addresses of witnesses and other personal data have already been released into the public domain. In light of this, such personal data has not been redacted in this report.

1. Summary

- 1.1. In summer 2012 the Council received an application from Mrs & Bradley of Nether Moor Farm ('the landowners' and 'the applicants') for a Definitive Map Modification Order (DMMO) to change the recorded status of Huddersfield 231 on the Definitive Map and Statement (DMS) from Byway Open to All Traffic (BOAT) to public footpath. The application had originally been submitted in 2009, as an application to change the recorded status from BOAT to bridleway but had been returned to the applicant at their request and re-submitted to the Council in 2012 (DMMO file ref: 159). Support for DMMO application 159 was withdrawn by the landowner applicants in December 2016.
- 1.2. In February 2014 the Council received a further DMMO application from the landowners to add to the DMS a public footpath over the western part of Huddersfield 231. I.e. for that part from Sandy Lane to its junction with public footpath Huddersfield 233 ('path 233'). (DMMO file ref: 182). That application was made on the premise that the applicants by then considered that a technical flaw in the depiction of Huddersfield 231 on the Definitive Map (see paragraph 1.8 below) meant that a BOAT was not in fact recorded on the Definitive Map at all, and that only part of the route carried public rights, as a public footpath.
- 1.3. The evidence adduced in support of applications 159 and 182 was fundamentally the same in both cases.
- 1.4. The routes to which these applications relate are shown on a plan at item 2 in appendix A to this report. Briefly, the route comprises an enclosed track between

Sandy Lane and Nether Moor Road, passing through farm premises, being a working dairy farm.

- 1.5. Subsequent to the making of these application, the applicants' stance regarding the status of the route changed. The applicants support for application 159 was formally withdrawn in December 2016. This did not remove the Council's standalone duty to keep the DMS under continuous review and make any Orders as appear requisite as a result of the discovery of evidence that the DMS requires modification).
- 1.6. The applicants have since strongly argued that no part of Huddersfield 231 is a public right of way of any type and no longer stand by their earlier assertions (supported by evidence) that the whole route is a bridleway or footpath, or that the part from Sandy Lane to its junction with footpath Huddersfield 233 only is a public footpath.
- 1.7. The evidence considered in preparation of this report includes submissions relating to both these applications as well as other available evidence. This includes documentary evidence, as well as user and other personal evidence, including evidence given at a public inquiry in 2019. The relevant evidence now available is considered in detail in the detailed 'Discussion of Evidence' at item 1 appendix A to this report.
- 1.8. The depiction of Huddersfield 231 on the current Definitive Map is as a solid line, which is not a notation recognised in the key or the regulations¹ governing the notation to be used on Definitive Maps. The Statement accompanying the Map describes Huddersfield 231 as a "Byway Open to All Traffic" (BOAT). (Extracts from the current Definitive Map and Statement are included at items EEE and FFF in the background papers to the Leeds Report). The correct notation for a BOAT is a bold solid line with 'v' markings either side along its length. Officers recognise this anomaly but consider that the Map and Statement taken together collectively show that the way is recorded as a BOAT.
- 1.9. The applicants allege that an additional error was made in the recording of Huddersfield 231 as a BOAT by West Yorkshire Metropolitan County Council

¹ Described in Schedule 1 to the Wildlife and Countryside (Definitive Maps and Statements) Regulations 1993, available at <https://www.legislation.gov.uk/ukksi/1993/12/schedule/1/made>

(“WYMCC”) when the current DMS was produced in 1985. Specifically, omission of formal reclassification of Huddersfield 231 from “a Road Used as a Public Path” (RUPP) to BOAT from the Omnibus Order made immediately prior to the publication of notice of preparation of the Modified DMS.

- 1.10. Huddersfield 231 was first recorded in the Definitive Map and Statement for the Huddersfield area prepared and published by WYMCC in 1975. (The ‘first DMS’). It was shown as a “Road Used as a Public Path” (RUPP) in the first Definitive Map and described as a “Footpath (CRF)” in the accompanying Statement. (Items QQ and RR in the background papers to the Leeds Report).
- 1.11. The applicants allege that there were errors in the recording of Huddersfield 231 by WYMCC (and its predecessor authority Huddersfield County Borough Council (‘Huddersfield CBC’)) in the preparation / production of the first DMS.
- 1.12. The Council has a duty to determine DMMO applications and a standalone duty to keep the DMS under continuous review. The Council must consider the available evidence, before reaching a decision on making any requisite Order to modify the DMS to show a correct record of public rights of way.
- 1.13. The applications were investigated by officers from Leeds City Council on behalf of Kirklees Council and a report with recommendations produced in 2017. (The ‘Leeds Report’). That report was appended to a brief cover report presented to this committee in November 2017, endorsing its recommendations.²
- 1.14. In November 2017, the Council determined the DMMO applications and resolved to make an Order to vary the particulars contained in the DMS to record Huddersfield 231 as a public bridleway rather than a BOAT.

² The 2017 Report to the Huddersfield Planning Sub-Committee is available at <https://democracy.kirklees.gov.uk/documents/s20661/Hud231%20DMMO%20Kirklees%20committee%20report%2023%20Nov%202017%203.pdf>

The ‘Leeds Report’ is available at <https://democracy.kirklees.gov.uk/documents/s20663/Leeds%20DMMO%20report%20Hud231.pdf>

Published background documents to the Leeds Report are available at <https://democracy.kirklees.gov.uk/ecSDDisplay.aspx?ID=1411&RPID=507337344>

- 1.15. A DMMO was made and advertised in January 2018. This is included at item 1 in Appendix B. A single objection was received, from the applicants (now also the 'objectors'). The principal ground stated was that there was not sufficient evidence of dedication and use (as a bridleway) to confirm the order as made. The Order was referred to the Secretary of State.
- 1.16. A Public Inquiry was held in January / February 2019. The objectors maintained that Huddersfield 231 had been recorded on the first DMS in error, no public rights of way of any description existed historically, and no public rights of way have subsequently been dedicated.
- 1.17. Following the Public Inquiry, the Inspector appointed by the Secretary of State confirmed the Order, with minor modifications in respect of limitations and conditions regarding existence of gates and rails across the route. The Order Decision, setting out the Inspector's findings, is found at item 2 in Appendix B.
- 1.18. The Inspector's Decision was challenged by application to the High Court. A copy of the application is found at item 3 in Appendix B.
- 1.19. The Secretary of State (and the Council) conceded one of the grounds cited by the applicants, in that there was a flaw in the reasoning of the appointed Inspector regarding dedication of a bridleway at common law. The Inspector found that use of the route by equestrians after the present 1985 DMS was "by right" and thus not use "as of right" so that a statutory presumption of dedication could not apply. However, in concluding that there had been dedication of a bridleway at common law, he failed to consider the implications of the route having been recorded as a RUPP on the first DMS for the question of whether use of the route had been "by right" rather than "as of right". The Inspector did not take account of this when considering common law dedication and, had he done so, he may have reached a different conclusion.
- 1.20. As a result, the Order was quashed by the High Court by means of a Consent Order (item 4 in Appendix B). Regrettably, the Court did not have the legal power to quash simply the Inspector's decision itself rather than the Order.
- 1.21. Only one of the grounds of challenge was conceded. Many of the Inspectors' other conclusions appear to be valid, particularly with regard to his consideration of historic

documentary evidence up to the development of the first Definitive Map and Statement.

- 1.22. In consequence of the above, jurisdiction over this matter has now returned to the Council as the Surveying Authority and Order Making Authority. The Council had already discharged its statutory duty to determine the DMMO applications and decided that an Order should be made to vary the particulars to downgrade the recorded status from BOAT to bridleway. However, this position should now be revisited, and further consideration given as to whether the available evidence as a *whole* still supports the making of a DMMO, and the nature of any such Order.
- 1.23. 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.
- 1.24. As the Surveying Authority the Council has a duty to keep the DMS under continuous review, and, following the discovery of evidence that shows that the DMS requires modification, make any Orders as appear requisite.
- 1.25. A detailed analysis of the evidence submitted, and other evidence considered is found in the 'Discussion of Evidence' at item 1 Appendix A.

2. Information required to take a decision

- 2.1. Members are asked to consider the report, the available evidence for and against the downgrading of recorded public rights and the discussion of evidence found in appendix A, and decide what Order, if any, to make.
- 2.2. It is the council's statutory duty to maintain the Definitive Map and Statement and make any requisite Orders.
- 2.3. General guidance for members is included at Appendix 1.
- 2.4. The applications were made under the Wildlife & Countryside Act 1981 ('the 1981 Act').

- 2.5. The Council should consider the available evidence, including evidence heard at the public inquiry, and make an Order to modify the record of public rights of way when it is requisite in accordance with section 53 of the 1981 Act.
- 2.6. Section 53(3)(c) of the 1981 Act provides that an Order to modify the DMS should be made following the discovery of evidence which (when considered with all other relevant evidence available) shows
- (i) 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;
 - (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; or
 - (iii) 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.

2.7. In *Trevelyan*³ Lord Phillips MR held that:

“Where the Secretary of State or an inspector appointed by him has to consider whether a right of way that is marked on a definitive map in fact exists, he must start with an initial presumption that it does. If there were no evidence which made it reasonably arguable that such a right of way existed, it should not have been marked on the map. In the absence of evidence to the contrary, it should be assumed that the proper procedures were followed and thus that such evidence existed. At the end of the day, when all the evidence has been considered, the standard of proof required to justify a finding that no right of way exists is no more than the balance of probabilities. But evidence of some substance must be put in the balance, if it is to outweigh the initial presumption that the right of way exists.”

2.8. The approach described in *Trevelyan* should also be followed by the committee when considering whether there is sufficient evidence for the Council to make an order to

³ *Trevelyan v Secretary of State for Environment, Transport and the Regions* [2001] EWCA Civ 266.

delete a way or to downgrade a way with “higher” rights to a way with “lower rights”, e.g. a from BOAT to footpath or bridleway.

2.9. Government guidance to local authorities in England is contained in Defra’s Rights of Way Circular 1/09, version 2. A copy is included at item 2 in Appendix H.

2.10. Circular 01/09 states at paragraph 4.33:

“The evidence needed to remove what is shown as a public right from such an authoritative record as the definitive map and statement... will need to fulfil certain stringent requirements. These are that:

- *the evidence must be new – an order to remove a right of way cannot be founded simply on the re-examination of evidence known at the time the definitive map was surveyed and made.*
- *the evidence must be of sufficient substance to displace the presumption that the definitive map is correct.*
- *the evidence must be cogent.*

While all three conditions must be met they will be assessed in the order listed.”

2.11. In summary, the Committee must consider whether there is new evidence of sufficient substance to displace and outweigh the initial presumption that Byway Open to All Traffic (BOAT) Huddersfield 231 is correctly recorded in the Definitive Map and Statement. Any such evidence must be cogent, i.e. clear, logical and convincing. A simple re-examination of the evidence known at the time the Definitive Map was surveyed and made would not be sufficient for an Order to be made.

2.12. Should the evidence be considered to show that the way has been recorded as a BOAT in error, i.e. the evidence meets the requirements described at paragraphs 2.7 to 2.12 above, the legal presumption that the way is correctly recorded in the DMS will no longer apply.

2.13. 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 there is evidence to show that a public right of way has been dedicated subject to any

limitations or conditions (such as the existence at the time of dedication of gates or stiles).

- 2.14. In terms of the dedication of a public right of way, the relevant statutory provision is found in Section 31 of the Highways Act 1980 (“the 1980 Act”). This requires consideration of whether there has been use of a way by the public, ‘as of right’⁴ 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.
- 2.15. 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.
- 2.16. Members are advised that if a DMMO is made, which then attracts objections which are not subsequently withdrawn, then the Council would not be able to formally confirm its own Order but would be obliged to forward it to the Secretary of State at Defra for determination.
- 2.17. After considering the evidence and the relevant criteria members have a number of options, of which those below are the most likely:
- 2.18. The first option for members is to decide that the Council should make an Order to downgrade the recorded status of Huddersfield 231 from BOAT to public bridleway.
- 2.19. The second option for members is to decide that the Council should make an Order to downgrade the recorded status of Huddersfield 231 from BOAT to public footpath.
- 2.20. The third option is for the Council to make an Order to delete from the Definitive Map and Statement the whole length of BOAT Huddersfield 231, on the basis that in the view of members the evidence demonstrates it is recorded in error, also that the

⁴ ‘As of right’ means without force, secrecy or permission.

evidence shows that no part of the way recorded as Huddersfield 231 is a public footpath or bridleway.

- 2.21. The fourth option is for the Council to decline to make an Order to downgrade the recorded status of Huddersfield 231 from BOAT, but instead make an Order to vary the particulars shown on the map to show Huddersfield 231 by the correct notation for a BOAT as per Schedule 1 to the Wildlife and Countryside (Definitive Maps and Statements) Regulations 1993.
- 2.22. The fifth option would be for the Council to make an Order to downgrade to footpath the part of Huddersfield 231 from Sandy Lane to its junction with footpath Huddersfield 233, and delete from the Definitive Map and Statement the continuation of Huddersfield 231 to Nether Moor Road on the grounds that that part is not a public right of way.
- 2.23. It is requested that members also consider the Council's stance regarding confirmation of any opposed Order. It may actively support confirmation of its Order (the usual position) take a neutral stance, or (rarely) oppose confirmation of an Order.

3. Implications for the Council

3.1. Working with People

- 3.1.1. Not applicable.

3.2. Working with Partners

- 3.2.1. Officers have engaged with landowners and user groups when gathering and investigating the evidence connected with this matter.

3.3. Place Based Working

- 3.3.1. N/A.

3.4. Climate Change and Air Quality

- 3.4.1. Work to ensure that the public rights of way network is correctly recorded on the Definitive Map and Statement and is available for use may encourage a modal shift towards use of more sustainable forms of transport. This is consistent with the

Council's response to the declared Climate Emergency, the Kirklees Walking and Cycling Strategic Framework, and Council commitments to action on air quality.

3.4.2. However, the Council has statutory duties with regards to maintenance of the Definitive Map and Statement of public rights of way. Stated commitments in respect of climate change and sustainable travel should not be taken into account when considering the legal status of the route, which may or may not be legally available for public use with mechanically propelled vehicles.

3.5. Improving outcomes for children

3.5.1. Not applicable.

3.6. Other (e.g. Legal/Financial or Human Resources)

3.6.1. The Council has a statutory duty to maintain the formal record of public rights of way and to respond to applications and discovery of evidence of unrecorded and mistakenly recorded public rights of way.

3.6.2. As the original Order has been quashed the Council should make a further decision as to the status of Huddersfield 231, taking into account all evidence now available following consideration of the matter by the Secretary of State's Inspector, making any Order that is requisite further to section 53 of the Wildlife & Countryside Act 1981. In accordance with the Council's delegation scheme, this is a decision for the Planning Committee.

3.6.3. Any person may make an objection or representation to an Order modifying the Definitive Map and Statement. If objections are made and not withdrawn, any Order made would be forwarded to the Secretary of State and most likely be considered by an Inspector appointed by the Secretary of State, who may or may not confirm the Order.

3.6.4. The financial costs associated with the making or confirmation of an Order, or associated with referral of an opposed Order to the Secretary of State, would be met from existing budgets and should not be taken into account when considering the evidence regarding the status of the way in question.

4. Consultees and their opinions.

- 4.1. No statutory consultations with prescribed bodies are required prior to making a Modification Order decision. Ward members have been informed about matters regarding the disputed status of Huddersfield 231 at various times since at least 2017, have been offered an opportunity to provide additional evidence and have been informed of the report being brought to committee. No further evidence or comments have been received.
- 4.2. User groups and statutory consultees were also formally consulted following the making of the DMMO in 2018. This resulted in a formal objection from the landowners who argued that no public right of way of any description existed over Huddersfield 231. The matter was heard at a public inquiry in 2019. No further consultations have been carried out as part of the current re-investigation of the evidence.

5. Next steps and timelines

- 5.1. If an Order is made, it will be advertised in the local newspaper and notices placed on site. Copies of the notice and Order would be sent to landowners and various statutory consultees. Anyone may submit a written objection to the Order during the relevant notice period (minimum 42 days).
- 5.2. If no duly made objections are received, or if any objections made are withdrawn, the Council could confirm its own Order.
- 5.3. If objections to an Order are received and not withdrawn an Order must be referred to the Secretary of State for Environment, Food and Rural Affairs who will make a decision as to whether or not an Order should be confirmed. That would normally involve the appointing of an Inspector and the holding of a public local inquiry to hear the evidence. Alternatively, a case may be considered through an exchange of written representations or at an informal public hearing.

6. Officer recommendations and reasons

- 6.1 **Officers recommend that** members chose option 1 at paragraph 2.18 and authorise the Service Director, Legal, Governance and Commissioning to make and seek 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 Wildlife and Countryside Act 1981.

- 6.2 **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 to this report, and two removable bars, poles or rails at points D and E.

Reasons

- 6.3 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”.
- 6.4 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 6.2 above.

7. Cabinet Portfolio Holder’s recommendations

Not applicable

8. Contact officer

Phil Champion, Definitive Map Officer. 01484 221000

9. Background Papers and History of Decisions

9.1. 872/1/MOD/159 & 182

9.2. Appendices

- Appendix 1 – Guidance for Members

The following appendices are available at

<https://democracy.kirklees.gov.uk/ecCatDisplay.aspx?sch=doc&cat=13668>

- Appendix A – Discussion of Evidence and plan of route
- Appendix B – DMMO, Order Decision, High Court Claim and Consent Order
- Appendix C – Additional evidence not included in appendices to Leeds Report
- Appendix D – User Evidence Forms (WCA8 forms) from equestrians etc. (Evidence to 1975 only)
- Appendix E – Proofs of Evidence and Statutory Declarations (Supporters, evidence to 1975 only)
- Appendix F – Evidence from persons associated with Nether Moor Farm (User Evidence Forms, letters and Proofs of Evidence – evidence to 1975 only)
- G – Additional documents included with Objectors Statement of Case
- Appendix H – Circulars, guidance and regulations.

9.3. Previous Decisions

- 23 November 2017: Sub-committee decision to authorise the making of an order to record Huddersfield public right of way 231 at Nether Moor farm as a public bridleway.
- October 2018: Interim emergency delegated powers exercised by Karl Battersby to submit to the Secretary of State a Statement of Case seeking recording of Huddersfield 231 as a public footpath.
- 13 December 2018: Sub-committee decision to endorse original stance that way ought to be recorded as a public bridleway.

9.4. The Leeds City Council Report is available at

<https://democracy.kirklees.gov.uk/documents/s20663/Leeds%20DMMO%20report%20Hud231.pdf>

9.5. Published background documents to the Leeds Report are available at

<https://democracy.kirklees.gov.uk/ecSDDisplay.aspx?ID=1411&RPID=507337344>

10. Service Director responsible

10.1. Sue Procter - Service Director, Environment Economy & Infrastructure Directorate.