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## Interim Order Decision

Inquiry opened on 23 May 2023

by **K R Saward Solicitor, MIPROW**

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

Decision date: 5 January 2024

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### Order Ref: ROW/3278454

- This Order is made under Section 53(2)(b) of the Wildlife and Countryside Act 1981 ('the 1981 Act') and is known as the Kirklees Council (Huddersfield 231 – Sandy Lane to Nether Moor Road, South Crosland) Definitive Map Modification Order 2020.
- The Order is dated 11 September 2020 and proposes to modify the Definitive Map and Statement ('DMS') for the area by downgrading a way recorded as a byway open to all traffic ('BOAT') to a bridleway and to record a number of limitations to the route, as detailed in the Order plan and described in the Order Schedules.
- There was one objection outstanding at the commencement of the Inquiry.

**Summary of Decision: The Order is proposed for confirmation subject to the modifications set out below in the Formal Decision.**

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### Procedural Matters

1. The Order replaces one made on 24 January 2018. The 2018 Order had been confirmed with modifications by a previous Inspector on 17 June 2019 following an Inquiry held earlier that year. After legal proceedings were begun in the High Court for a statutory review, the 2018 Order was quashed by consent on 27 November 2019. After jurisdiction was returned to Kirklees Council as Order Making Authority ('OMA'), it re-made the Order on 11 September 2020 following further investigation. This decision supersedes that issued on 17 June 2019 and relates to the new 2020 Order.
2. In making my determination I shall consider matters totally afresh on the basis of all information presented. The previous Inspector's decision is part of the history and to that extent it is a consideration amongst many others. I am not bound by any part of that previous Decision, and I remain mindful that other evidence and arguments have since emerged. My decision is made on the totality of evidence seen and heard.
3. Shortly before the Inquiry opened, the British Horse Society complained to the Planning Inspectorate over what it considered to be libellous content within a paragraph of the statutory declaration of Robert Bradley, one of the statutory objectors. Whilst making no admission, Counsel for Mr Bradley offered on his behalf to redact the disputed content in order to avoid any delay in proceedings whilst matters were resolved. Arrangements were made for all copies to be redacted accordingly.
4. Following agreement between the principal parties, the evidence of the Green Lane Association ('GLASS'), which focussed on historical records, was heard ahead of that presented by the statutory objectors.

5. The Inquiry was scheduled for 3 days. This was insufficient time given the issues before the Inquiry upon which witnesses were to be called and others wished to be heard. The Inquiry resumed on 3 October 2023 for a further 2 days in person. Regrettably, due to an oversight at the Planning Inspectorate, I was not informed of a change in venue resulting in day 4 of the Inquiry opening late at 10.30am.
6. Mr Champion, the OMA's Definitive Map Officer, was unable to attend the Inquiry on 3 and 4 October 2023. No objection was raised to the use of a webcam to enable Mr Champion to observe proceedings remotely.
7. Due to a rail strike, I agreed that exceptional circumstances existed for a blended event on 4 October 2023 so that anyone affected could attend remotely. As it was, all advocates were able to make arrangements to appear in person for the final day and no-one else requested remote access.
8. My site visit was conducted on the morning of 25 May 2023. I was accompanied by Mrs Bradley (statutory objector), Mr Carr (objectors' consultant) and Mr Champion (for the OMA). The western stretch of the route between the farmyard and Nether Moor Road was heavily overgrown making it unsuitable for safe passage on foot. Therefore, I observed this stretch by walking through the fields immediately adjacent to the stone wall enclosing this part of the route.
9. During the site visit it emerged that the points shown on the Order Map for the position of gates and poles do not appear to correspond with those on the ground. I was shown various points where metal poles are placed across the route for the purposes of moving livestock. The location varies depending upon where cows are being moved to or from. The poles are usually rested upon the stone wall on either side of the track or perhaps a gate.
10. In view of the above, I invited the OMA and objectors to liaise and produce an agreed note on the accuracy of the limitations recorded in the Order. Agreement could not be reached on all points but a note on limitations was submitted by both the OMA and the Bradleys (with attachments) on 27 July 2023. Of course, the issue of limitations only arises if the Order is to be confirmed (either with or without modifications).
11. One point worthy of mention at the outset, is that the OMA recognises there is an error in the grid reference given in the Order for point D. The position of point D is also incorrectly shown on the Order map and should be closer to the eastern end of the yard at Nether Moor Farm. Modifications are requested by the OMA to correct these errors in the event of confirmation of the Order.
12. Following new information arising on the interpretation of historical maps in the evidence of Mr Hobson (professional witness for GLASS), I agreed to the submission of a supplementary proof of evidence from the statutory objectors' professional witness in rebuttal. The supplemental proof of evidence from Mr Carr is dated 31 August 2023. Appendix 10 thereto (Greenwoods' map and advert) was re-submitted ahead of the resumed Inquiry as it was incomplete.

### **Main Issues**

13. The Order has been made under section 53(2)(b) of the 1981 Act in consequence of the occurrence of an event specified in section 53(3)(c)(ii). The statutory objectors, Mr and Mrs Bradley, maintain that the evidence discovered

reveals there is no public right of way over land shown in the DMS as a highway of any description, being an event specified within section 53(3)(c)(iii). Whilst the Order has been made solely under section 53(3)(c)(ii), in view of the objectors' position, I shall consider section 53(c)(iii) also. It is open to me to modify the Order should I be satisfied by the evidence that it is appropriate to do so.

14. It follows that the main issue is whether there has been a discovery by the OMA, as the surveying authority, of evidence which (when considered with all other relevant evidence available) is sufficient to show that a highway shown in the DMS subsists as a highway of a particular description which ought to be there shown as a highway of a different description or that there is no public right of way over land shown in the DMS.
15. Guidance is contained within Department for Environment, Food and Rural Affairs, Rights of Way Circular 1/09, version 2 October 2009. This provides, at paragraph 4.33, that the evidence needed to downgrade a way recorded in the DMS with "higher" rights to one with "lower" rights will need to fulfil certain stringent requirements. All three of the following conditions must be met.
  - the evidence must be new – an order 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.
16. In considering the evidence, I will have regard to the leading judgment in *Trevelyan v Secretary of State for the Environment, Transport and the Regions* [2001] EWCA CIV 266 where relevant to the issues before me. In the judgment of Lord Phillips M.R.:

*"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. Proof of a negative is seldom easy, and the more time that elapses, the more difficult will be the task of adducing the positive evidence that is necessary to establish that a right of way that has been marked on a definitive map has been marked there by mistake."*
17. In view of the above, the starting point is that the appeal route is presumed to exist, as a BOAT (i.e., a public right of way for all traffic including vehicles but mainly used by the public as a footpath or bridleway).
18. It is for those contending a mistake has been made to provide evidence which demonstrates that, on a balance of probabilities, the appeal route is of a lower status than that shown in the DMS or that no public rights of way exist.

19. Thus, the burden of proof lies with the OMA to support its contention that the BOAT should be recorded as a bridleway. Similarly, the onus is upon the statutory objectors to demonstrate that an error occurred such that no public right of way exists and the route should be deleted from the DMS altogether.
20. In reaching my decision I have considered the caselaw referred to by all parties.

### **Background**

21. The background to this case is not altogether straight-forward and warrants brief summary.
22. The Order route is recorded in the current DMS (relevant date of 30 April 1985) as 'Huddersfield 231'. The route passes along the farm track off Sandy Lane to the west, continuing through the farmyard at Nether Moor Farm. It proceeds along a narrower enclosed track leading through the fields forming part of the agricultural unit to connect with Nether Moor Road to the east.
23. Mr and Mrs Bradley are the affected landowners. They are business partners running Nether Moor Farm as a working dairy farm. The farm has been in Mr Bradley's family for several generations dating back to the 1890's.
24. Upon realising in early 2009 that the Order route is recorded in the DMS as a BOAT, Mr and Mrs Bradley applied to the OMA to 'downgrade' the route to a bridleway. Having amended the application in 2012 for a downgrade to a footpath, they subsequently withdrew the application altogether in 2016 after obtaining specialist advice. Notwithstanding these changes, the OMA has a statutory duty to keep the DMS under continuous review.
25. Having conducted a review, the OMA made an Order to change the BOAT to a bridleway as originally applied for. The Bradley's objected on the ground that no public right of way exists along the Order route. An Inquiry was held in 2019. After the Order was confirmed by the previous Inspector, the Bradleys mounted a legal challenge in the High Court resulting in the Order being quashed.
26. The new and existing Order was made in essentially the same terms. That is not to say the current proceedings are simply a repeat of what has gone on before. This time round there are other interested parties, new issues arising and differences in the arguments advanced as the case has evolved.
27. For instance, the OMA previously relied upon user evidence for statutory dedication under section 31 of the Highways Act 1980 over the period 1989 to 2009. It now relies on user evidence prior to 1975 to mount a case of dedication at common law.
28. Unlike the first Inquiry, GLASS is now an interested party opposing the Order and any downgrade in status of the recorded route or the addition of limitations. The main thrust of the case brought by GLASS focusses on the application and interpretation of matters of law and documentary evidence. It challenges whether there has been the discovery of evidence, a point not previously in contention.
29. In addition, Mrs Mallinson is an interested party supporting the OMA and the downgrade in status from a BOAT to bridleway. Mrs Mallinson gave evidence as a 'volunteer' in public rights of way matters having participated in Inquiries in other counties and undertaken training with the British Horse Society.

30. The objectors maintain their position that the Order route was erroneously included on both the original 1975 DMS and the current 1985 DMS.

## Reasons

### *Discovery of evidence*

31. With reference to the wording of section 53(3)(c), there must be ‘the discovery by the authority of evidence which when considered with all other evidence available to them’ shows that an error has been made, for an event to have occurred for the purposes of section 53(2)(b) of the 1981 Act.
32. As set out in *Kotarski v SSE* [2010] EWHC 1036 (Admin), (at paragraph 24), it is a precondition for the exercise of the statutory power of review that there is the discovery of evidence which (when considered with all other relevant evidence) shows that particulars contained in the DMS require modification.
33. If there has been no ‘discovery’ of evidence, or the evidence does not show that the route is incorrectly recorded then there can be no event to have triggered the making of the Order. The evidence must be new in terms of not having been previously considered. An inquiry cannot simply re-examine the same evidence considered when the DMS was first drawn up (*Burrows v SSEFRA* (QBD) [2004] EWHC 132 (Admin)).
34. GLASS argues that no event has occurred under section 53(3) and, as such, there was no justification to make the Order and there is no jurisdiction to confirm it. Unless and until such an event occurs, there is a conclusive presumption in favour of the DMS pursuant to section 56 of the 1981 Act.
35. To support its stance that jurisdiction depends upon the occurrence of an ‘event’, reliance is placed upon *R v. SSE, ex. p. Burrows and Simms* [1991] 2 QB 354. Section 56 of the 1981 Act provides that the DMS is conclusive evidence as to the particulars contained therein. However, in *Burrows and Simms*, Lord Justice Purchas found “*no difficulty in reconciling sections 53 and 56 of the 1981 Act once the comparatively restricted purpose of the legislation as a whole is understood, namely the preparation and maintenance of an authoritative record in the form of a definitive map and statement showing those highways over which the public have rights of way whether as “ramblers” only or as “ramblers and riders”.*”
36. LJ Purchas proceeded that: “*Once prepared... and until subsequently revised*” the DMS is conclusive evidence in rights of way disputes between landowners and the various categories of persons exercising rights of way. “*The duty under section 53 of the 1981 Act is a continuous one to keep the map and statement up-to-date and where evidence becomes available which would indicate that there was an error in the definitive map or any subsequent revision thereof, the surveying authority is under a duty to revise the map and statement accordingly.*”
37. As per *Burrows and Simms* and *Kotarski*, section 56 applies generally but not such as to inhibit a review under section 53. At review under section 53, neither the map nor its accompanying statement is conclusive evidence of its contents. *Norfolk County Council v SSEFRA* [2005] EWHC 119 (Admin) provides authority that the only presumption capable of applying at the review stage is the evidential presumption identified by the Court in *Trevelyan*.



38. I am invited to consider three factors by way of discovery of evidence: (1) lack of a legal event order (2) line-style on the current Definitive Map (3) an internal Council Memorandum from 1974.

The Omnibus Order

39. The OMA claims that new, cogent evidence has been discovered principally from the lack of an order for re-classification of the route from a RUPP to a BOAT. It says this is indicative of an error in the preparation of the current 1985 DMS. The objectors agree. GLASS does not.
40. In examining the issue of 'discovery', it is appropriate in this instance to consider how the DMS evolved.
41. When the first DMS was published on 10 July 1975 (with a relevant date of 20 April 1966), the map showed the route as a Road Used as a Public Path ('RUPP'). The definitive statement described it as 'Footpath (CRF)' with a 10ft width. Section 27(6) of the National Parks and Access to Countryside Act 1949 defined a RUPP as meaning '*a highway, other than a public path, used by the public mainly for the purposes for which footpaths or bridleways are so used.*'
42. After a review was carried out under section 33 of 1949 Act, and as part of the special review of RUPPs under the Countryside Act 1968, the status of the Order route was included as a BOAT in the draft revised map and statement published on 29 February 1980. No objections or representations were received to this classification. The review of the DMS for West Yorkshire was then abandoned upon direction of the Secretary of State for Environment issued on 27 January 1984 in exercise of powers under section 55(1) of the 1981 Act.
43. Under section 55(5)(b) of the 1981 Act, where a review was abandoned after a draft DMS had been prepared and the period for making representations or objections had expired, 'the authority shall by order modify the map and statement under review' so as to show any particulars shown in the draft map and statement but not in the DMS under review. The relevant order was the 1985 Omnibus Modification Order of 22 October 1985 ('the Omnibus Order'). There is consensus that such a legal event order was required to re-classify the RUPP as a BOAT. I agree.
44. When the current DMS was published with a relevant date of 30 April 1985, the route was classified as a BOAT. The OMA and objectors agree that the reclassification of the Order route was never included in the Omnibus Order intended to modify the DMS to show changes included in the draft revision map and statement. No other order has been found to achieve this outcome. According to the OMA's research, it appears that various RUPPs in the former Huddersfield County Borough area were also omitted.
45. In essence, the OMA and objectors argue that due process was not followed because the route should not have been recorded in the current DMS as a BOAT without the correct legal order in place.
46. GLASS submits that the absence of a legal event order to reclassify the RUPP as a BOAT is no more than an administrative error as the surveying authority clearly intended such reclassification, as acknowledged by both Mr Champion (for the OMA) and Mr Carr (for the objectors). The error, GLASS maintains, does

not constitute evidence that the route was wrongly recorded. To support this contention, GLASS quotes from the Consistency Guidelines that were compiled by the Planning Inspectorate and remain accessible online at GOV.uk. At paragraph 4.2.18 the Guidelines say:

*"When considering whether a right of way already shown on definitive map and statement should be deleted, or shown as a right of way of a different description, the Inspector is not there to adjudicate on whether procedural defects occurred at the time the right of way was added to the definitive map and statement (for example notice was incorrectly served). Unless evidence of a procedural defect is relevant to establishing the correct status of the right of way concerned (for example a key piece of documentary evidence indicating a different status was ignored), there can be no reason to consider it."*

47. The Guidelines are expressed to be 'neither definitive nor exhaustive and do not set any precedent. They are subject to change, whether by the application of new case law, or as a result of new understanding following academic research.' Whilst the GOV.uk website page has been updated from time-to-time, the Consistency Guidelines are not current having been last reviewed in April 2016. GLASS says that despite my 'health warning' on this point, there is no legal authority contradicting the above cited passage at paragraph 4.2.18.
48. First and foremost, the Consistency Guidelines are guidelines only. They do not have the force of law. Secondly, the Guidelines acknowledge that there may be circumstances in which 'procedural defects' may be relevant to the status of a way, and thus subject to consideration in the context of deletion or downgrade. Thirdly, the example given in the Guidelines of a procedural defect is a notice being incorrectly served, which is not comparable with the lack of a legal event order. A distinction may also be drawn between procedural defects and drafting errors in the DMS. It will depend on the circumstances.
49. According to GLASS, the requirement for 'discovery' does not necessarily mean that the evidence must be 'new' in the sense of being previously unknown to the OMA, but it must be evidence that the authority has not considered before. This submission is not wholly in line with *Mayhew v SSE* [1993] 65 P&CR 344, 353 where it was held that the 'event' in the subsection is concerned with the finding out of some information which was not known to the surveying authority when the earlier Definitive Map was prepared. The power under the section 53(2) is not to make such modifications as appear desirable, but requisite in consequence of the events in subsection (3).
50. GLASS submits that the Omnibus Order is not capable of being relevant evidence as it is of no probative value. It cites paragraph 20 of *Kotarski*, a case concerning an anomaly between map and statement. At paragraph 20, it says:  
*"Notwithstanding a divergence between them, both the definitive map and the definitive statement are capable of being relevant evidence as to the existence or non-existence of the right of way in a review. This follows from the approach of the Court of Appeal in the Trevelyan case."*
51. I do not see how this particularly assists the position taken by GLASS. The judgment in *Kotarski* goes on at paragraph 24 to say:

*“The discovery that there is a divergence between the two is plainly the discovery of such evidence, and it is unnecessary that it should be characterised as ‘new evidence.’ It is sufficient that there was the discovery of what the Inspector described as ‘a drafting error’, which was itself the result of what the Court of Appeal in ex. p. Burrows and Simms characterised as ‘recent research.’”*

52. In my view, too much emphasis is placed by GLASS on a narrow application of the word ‘evidence’ and by imputing a requirement for ‘probative value’, for which I can see no authority in the caselaw cited. I recognise that the omission of the route from the Consolidation Order does not reveal anything on status, nature or user of the route or divulge an incorrect classification. From that viewpoint, I agree that it does not suffice in isolation to trigger an event in section 53(3). However, section 53(3) imposes no requirement for the discovered evidence to be of ‘probative value’. It is the discovered evidence combined with all other available evidence that must be of some substance. This is borne out by *Roxlena Limited v Cumbria County Council* [2019] EWCA Civ 1639, where in reference to section 53(3)(c), Lord Justice Lindblom said (at paragraph 62):

*“In each case the occurrence of the specified ‘event’ is not simply the ‘discovery’ of the evidence in the sense of its being physically found. It also requires a consideration of that evidence, together with any other relevant evidence available to the surveying authority, which actually ‘shows’ the circumstance in subsection (c)(i), (ii) or (iii) - in effect, therefore, a composite event.”* [ underlining added for emphasis].

53. GLASS finds it unconscionable for the OMA to use its own failure to reverse the consequences of its legal duties over 35 years later. It submits that it is now too late to argue that the DMS was unlawfully made. As I understand it, that is not the precise argument advanced by either the OMA or objectors. Rather, the point pursued is that the DMS erroneously includes the Order route as a BOAT, or at all, and the Consolidation Order is part of the evidence. I agree that the absence of a legal event order provides evidence of an error in compilation of the DMS. Statute provides for the correction of errors however late discovered and so it is unclear how the concept of unconscionability can apply here.
54. With reference to *Archway Sheet Metal Works Ltd v SSCLG* [2015] EWHC 794 (Admin), GLASS further argues the presumption of regularity applies i.e., all that should have been done to carry through a particular action has been done, unless there is evidence to the contrary. As such, GLASS advances that the validity of the DMS and its entries must be assumed up to and until any successful legal challenge. *Calder Gravel v Kirklees MBC* [1990] 60 P & C R 332, 338-339, is also cited to support the argument that it must be assumed that proper administrative procedures were followed and the 1985 DMS lawfully included Huddersfield 231 as a BOAT.
55. As submitted by Counsel for the OMA, there is already a presumption of conclusivity within the statutory framework at section 56 of the 1981 Act and mechanism to depart from it through the review provisions in section 53. That being so, it is difficult to see that the presumption of regularity applies as a generic public law principle. *Trevelyan* is the key legal authority in the approach for the purposes of the Act, as referenced above. Proper procedures are



presumed to have been followed, but this is subject to there being an absence of evidence to the contrary.

56. As the map is missing from the Omnibus Order, GLASS says this poses the question of what else is missing. GLASS finds it odd that the 1985 DMS was published showing Huddersfield 231 (and other routes) as a BOAT if there was no legal justification. It again cites *Archway Sheet Metal Works Ltd* that the presumption of regularity applies to internal local authority resolutions.
57. There is no reason to believe that anything aside from the map is missing when the text appears complete. Given that the route was included as a BOAT within the draft revision and was subsequently so recorded in the DMS, it clearly *should* have been included within the Consolidation Order. The OMA's research has not revealed any other orders and there is nothing to indicate more than one Order was made. Archival research undertaken on behalf of the objectors similarly failed to uncover any further Order.
58. By adding the BOAT to the DMS without a legal order, there was a failure of the Council at the time to comply with the legal procedures. That omission was of such significance it cannot be dismissed as a mere procedural flaw. The effect was to erroneously record the BOAT because it could only be added with the requisite legal order in place. Thus, an error has come to light that does not appear to have been previously considered and it has not been addressed.
59. As noted in *Kotarski*, the general approach of the Court of Appeal in *ex.p. Burrows and Simms* recognised the purpose of the legislation and "*the importance of maintaining an authoritative map and statement of the highest attainable accuracy.*"
60. I also bear in mind the ongoing duty imposed by section 53(2) on the OMA, as the surveying authority, to keep the DMS under continuous review. That duty would not be fulfilled if the emergence of an error of fundamental importance in the compilation of the DMS could not amount to the discovery of evidence.
61. As made clear in *ex. p. Burrows and Simms*, "*Parliament never removed the duty to revise and keep the record up-to-date so that not only changes of status caused by supervening events, e.g., ....., but also changes in the original status of highways or even their existence resulting from recent research or discovery of evidence, should all be taken into account in order to produce the most reliable map and statement that could be achieved.*"
62. When considering the context of the legislation and importance placed upon securing a DMS of the highest attainable accuracy, it seems to me that there has been a discovery of evidence of an error in the form of the BOAT added to the DMS without the requisite legal order. As indicated above, this alone neither indicates that the route ought to be shown as a highway of a different description nor that there is no public right of way over the land. Consideration is required to all other relevant evidence available before that conclusion can be drawn.

#### Line style

63. It is an uncontentious point that the Order route is not marked on the current Definitive Map in the correct manner to denote a BOAT. The correct notation is a continuous brown line with or without arrowheads above or below the line rather

than a solid black line as it appears. Nevertheless, the accompanying Statement clearly describes its location and status as a BOAT, which is undisputed.

64. The objectors and OMA also say that the route being shown in the incorrect line-style for a BOAT (as then stipulated in the Wildlife and Countryside (Definitive Maps and Statements) Regulations 1983) is discovered evidence. Whilst incorrectly marked on the current Definitive Map, there is not a conflict with the Definitive Statement in the same way as *Kotarski*. I note Mr Carr's evidence for the objectors that anyone looking at the map alone would be unclear as to the status depicted. However, the map and statement must be read together whereupon it becomes apparent that the route is recorded as a BOAT. It is not suggested that the DMS can, or should, be interpreted any differently.
65. Plainly there is a drafting error in the map. Whilst GLASS says it would be novel if such an error could amount to discovered evidence, drafting errors can suffice.
66. Counsel for the OMA and objectors make a persuasive point that if there was no discovery of evidence for the purposes of section 53(3)(c) then it would not be possible to invoke (c)(iii) to modify "*any other particulars contained in the map and statement*". In other words, an error in the map or statement would not be correctable unless there was some other form of discovered evidence. That would not be consistent with the importance of maintaining, as an up-to-date document, an authoritative DMS of the highest attainable accuracy.
67. Accordingly, there is sufficient reason to conclude that the incorrect line-style on the current definitive map is also discovered evidence. It shows, at least, that the particulars contained in the map require modification to a correct line style. To that extent, even if I were to find that the case is not made out to downgrade or delete the route, there would still be evidence of an event requiring a modification order under section 53(3)(c)(iii) to correct the error.

#### The 1974 Memorandum

68. An internal memorandum of the former West Yorkshire Metropolitan Council dated 5 June 1974 from the Executive Director, Transportation & Traffic to the Director of Administration provided an update on progress in the compilation of the Huddersfield Provisional Map under the 1949 Act. The matter was being dealt with by a Mr Eggins who is evidently the author. He states:

*"The classification of routes as between F.P., F.P.(CRF) & B.W. appear to depend purely on the physical characteristics with no regard to historical use either probable or actual.*

*To enable an accurate assessment to be made of the likely past use of each way it would be essential to walk at least 20% of the 595 paths listed and try to get much more local information thereon.*

*However, as such a course is impracticable at present, it is proposed that a reasonable assessment be made on a logical basis and then await the outcome of the deposit."*

69. The 1974 Memorandum flags up concerns that routes generally were identified as public rights of way due to their physical characteristics rather than any proper analysis of historical or user evidence.

70. GLASS took the position that as the Council Officer had raised those concerns, they must have been considered at the time and cannot be new evidence. Matters are not that straightforward when considered in context i.e., the circumstances at that time and the decision-making process. By the time of the 1974 Memorandum, the Huddersfield Provisional Map had already been published with the route shown as a RUPP. Thus, the memorandum could not have been taken into account at that decision-making stage. Plus, there is no further evidence that anything happened in response to the memorandum.
71. Given how generically the 1974 Memorandum is framed, I do not concur with the objectors' view that it could amount, on its own, to a requisite discovery of evidence. However, there need only be one discovery of evidence which is already achieved, as discussed above. The memorandum provides supplemental information of flaws in the preparation of the first DMS which may have affected the recording of the route as a RUPP. To that limited extent it feeds into the discovery of evidence.

***Summary on whether there is a 'discovery of evidence'***

72. There is new and cogent evidence that proper procedures were not followed given the absence of the route from the Omnibus Order and incorrect notation on the map. The discovery of evidence is but one part of the requirements within section 53(3). The question still arises over whether there is evidence of some substance put in the balance to outweigh the initial presumption that the right of way exists, as recorded.

***The Trevelyan Presumption***

73. Having concluded that there is a discovery of evidence to engage the procedure in section 53(3), the issue turns to the approach in *Trevelyan*.
74. The objectors maintain that there is cogent evidence to displace the presumption in *Trevelyan*, primarily contained in the 1974 Memorandum. The OMA agrees that any *Trevelyan* presumption that might have applied to the 1st (1975) DMS has been displaced given the existence of the 1974 Memorandum. While the OMA stressed the point to be 'finely balanced', it considers that it would not be justified to presume the correctness of the route's RUPP classification in the 1st DMS in light of the Memorandum. Had the route not been a RUPP, it could not have been reclassified as a BOAT.
75. The OMA emphasised that it does not say that the 1974 Memorandum provides evidence that the Order route was mistakenly recorded as a public right of way.
76. The objectors refer to the 'litany of concerns' raised in the 1974 Memorandum with reference to (a) routes shown with out-of-date notations and non-standard classifications (b) the statement containing unnecessary details (c) routes with unrealistic widths (d) paths described in the statement not appearing on the map (e) the classification of routes (as quoted above) which the objectors consider to be particularly significant.
77. Mr Carr (for the objectors) believes the Memorandum indicated a fundamental problem across the board involving a substantial number of paths in the area. Emphasis is placed on the reference to there being "no regard" to historical use, which the objectors say is crucial and central to whether public rights exist.

78. The position taken by GLASS is that the 1974 Memorandum is generalised and the work of a frustrated man asking for more time and resources.
79. The 1974 Memorandum highlights potential inaccuracies in compilation of the first DMS with explicit reference to the classification of routes between F.P., F.P.(CRF) and B.W. Concern is not expressed by Mr Wiggins over the status of any route as a public right of way, only the correct classification. Notably, he does not pass comment on any specific routes or give examples. Nor does he specify the routes where assumptions had been made based on physical characteristics. Whilst Mr Wiggins says that statements include unnecessary details, he does not say they are incorrect. There has certainly been no suggestion in this appeal that the comments over 'unrealistic widths' might apply to the Order route.
80. Nothing from the 1974 Memorandum reveals or indicates that the Order route was not a public right of way or wrongly classified. It raises only the possibility of an error in how routes bearing those notations became classified. On my reading, the author's concerns do not affect the very existence of routes, as the objectors claim. In any event, the question at this juncture is whether sufficient evidence exists to rebut the initial presumption that the DMS is correct, rather than the conclusion to be drawn.
81. Some points highlighted by the objectors may potentially support other evidence when considered in the round, but I am not swayed that they reveal evidence of cogency. In my judgement the Memorandum is too generic and lacking in clarity on specific concerns to amount to the evidence of some substance required to outweigh the initial presumption that the right of way exists as a BOAT or at all. I also note that the author proposed 20% of the routes be walked to enable an accurate assessment whereas the Order route had already been surveyed three times. In my view the Memorandum alone does not constitute cogent evidence of some substance to rebut the evidential presumption in favour of the DMS, but it is evidence to be viewed in the context of all other evidence.
82. Nevertheless, I do not agree with GLASS that the *Trevelyan* presumption cannot be rebutted by an administrative error in failing to classify the route from a RUPP to a BOAT. It was not a mere formality that a legal order be made but a legislative requirement of fundamental importance. Cogent evidence of substance is found in the discovery that the route was omitted from the Consolidation Order. Without a legal order, the route could not have been recorded in the DMS. There was an error. It provides evidence to rebut the presumption in *Trevelyan* "*that the proper procedures were followed and thus that such evidence existed.*"
83. Identification of the incorrect line style contrary to the relevant regulations was evidence of substance in itself of an error which undermines the *Trevelyan* presumption in terms of the accuracy of the map.
84. When considering all the evidence in its entirety, it does suffice, on the balance of probabilities, to outweigh the initial presumption that the DMS is correct.
85. It follows that the issue turns to a consideration of whether the available evidence, taken as a whole, shows that the Order route ought to be recorded as a public right of way of lower status or deleted altogether.

### **Records leading to the preparation of the DMS**

86. It is appropriate to look at the context and the evolution of the DMS in particular.
87. The route was recorded as a footpath in the 1<sup>st</sup> Draft DMS produced pursuant to the 1949 Act, with a relevant date of 1 September 1952. No objections were received to the recording or its status. This provides evidence that the way was considered at least a footpath in the early 1950s.
88. After the 1<sup>st</sup> Draft DMS, there followed a period of dormancy until preparation of 2<sup>nd</sup> Draft Map and Statement in 1966. It appears that the process was effectively re-started. A new survey was carried out by Huddersfield Civic Society in 1965 whereupon the 'walking plan' shows the route as a RUPP. The route was walked again in 1966 prior to production of the 2<sup>nd</sup> Draft Map, which shows the route as RUPP 410 but described it in the Statement as "footpath (CRF)". There is no record of any objection.
89. It is worth noting that the Government guidance issued to Councils at that time within Circular 58/1953 (issued 14 October 1953) provided:

*"The survey provisions of the Act are only directed to establishing the existence of such rights of way as are proper to footpaths and bridleways, and are not intended to settle the question whether the public have any other rights over such ways (e.g. a right of way for wheeled traffic)."*
90. The Provisional Map and Statement prepared in 1974 and 1<sup>st</sup> DMS that followed in 1975 were based upon the 2<sup>nd</sup> Draft Map with the route shown in the line style for a RUPP on the map and "footpath (CRF)" in the statement. By this time, the route had passed two statutory stages without any recorded objection or challenge.
91. The term "CRF" did not have any official recognition. As explained by Lord Denning in *R v SSE ex parte Hood* [1975] 1 QB 891, when authorities prepared their maps under the 1949 Act, they divided RUPPs into two sub-divisions which have no statutory authority. They divided them into "CRF" and "CRB," which denoted "cartroad footpath" and "cartroad bridleway," meaning respectively that there was a public footpath along a cartroad or a public bridleway along a cartroad. In making that division the local authorities did not mean to say whether the cartroad was public or private for carts, because they did not know which it was. They only meant to say by "CRF" that there was a public footpath along a road and by "CRB" that there was a public bridleway along a road.
92. It is not known why the proposed status of the route changed from a footpath in the 1<sup>st</sup> Draft Map to a "CRF" classification added by the time of the 1<sup>st</sup> DMS map. The OMA surmises that, in using the term "footpath (CRF)", the Surveyor may have been influenced by the physical characteristics of the route. That explanation would tie in with the comments made in the 1974 Memorandum.
93. Once the Countryside Act 1968 came into force, the first review thereafter was a 'special review'. By section 9, RUPPs were reclassified as either a BOAT, bridleway or footpath and the term RUPP was abolished. The test for reclassification was set out in section 10. The considerations required to be taken into account were: (a) whether any vehicular right of way is shown to exist (b) whether the way is suitable for vehicular traffic having regard to the position



and width of the existing right of way, the condition and state of repair, and nature of the soil, and (c) where used by vehicular traffic, whether extinguishment of vehicular rights would cause any undue hardship.

94. The special review covering the Metropolitan County of West Yorkshire began in the late 1970s. By this time the judgment in *Hood* had confirmed that a special review under the Countryside Act 1968 could only take away vehicular rights and where there was new evidence or evidence not previously considered by the local authority. There was no machinery enabling the local authority to re-open the whole question of whether the highway was shown properly in the definitive map. In the schedule for the “*Review of Public Paths recorded as C.R.F Paths by the former Huddersfield Authority*”, the suggested status of Huddersfield 231 was a bridleway due to ‘its connection with maintained highway at each end, together with the character and width of the path’. None of the RUPPs bearing the CRF notation in the schedule were suggested for reclassification as a BOAT.
95. In view of *Hood*, on a re-classification a RUPP could not be downgraded so as to take away rights of bridleway or on foot. The conclusive presumption in section 32(4)(b) of the Act of 1949 remained unimpaired. Therefore, without new evidence that the route was only a footpath, there was a conclusive presumption of a right of way on foot and on horseback or leading a horse. As such, the route could not have been recorded as anything less than a bridleway.
96. It is not known what evidence existed to result in the reclassification of the route as a BOAT when the Draft Revision Map and Statement was placed on deposit for public inspection in 1980 (with a review date of 1 October 1979). The OMA suggests that it reflects robust guidance in Government advice at the time in Circular 123/77 and confirmation in *Hood* that RUPPs were cartroads. When new procedures were introduced under the 1981 Act, the special review was abandoned. It led to the current 1985 DMS.

### ***Documentary evidence***

97. Section 32 of the Highways Act 1980 requires that documentary evidence is taken into consideration ‘before determining whether a way has or has not been dedicated as a highway’ – and that such weight is given to this evidence as ‘justified by the circumstances, including the antiquity of the tendered document, the status of the person by whom and the purpose for which it was made or compiled, the custody in which it has been kept and from which it was produced.’
98. As the Inquiry progressed in May 2023, consensus was achieved among the OMA, the statutory objectors and GLASS that each individual historical map before the Inquiry is neutral in evidencing the status of the route, except for the Finance Act map. That position had changed to some degree by the time the Inquiry resumed in October 2023 after Mr Carr, the objectors’ professional witness, had undertaken further archival research. This resulted in Mr Carr revising his overall assessment to say that the documentary evidence, as a whole, indicates the route is private.
99. Reliance is placed on three maps in particular to support the case for deletion as a private way. I shall focus on those three maps given the consensus of neutrality for all others, except the Finance Act map, where I start.

*Finance Act 1910 records*

100. Mr Hobson was called by GLASS as a professional witness. It is the Finance Act map which Mr Hobson considers is the tipping point in favour of public rights of some kind, although he acknowledged that the position was finely balanced. This contrasted with his proof of evidence where he had suggested that the Finance Act provided clear evidence of vehicular rights. Mr Hobson retracted this comment during cross-examination saying that his view expressed within his proof had been “too strong”.
101. The Finance (1909-1910) Act 1910 provided for the levying of tax on the increment increase in site value of land between its valuation as at 30 April 1909 and its subsequent sale or transfer. A complex system was in place for calculating the ‘assessable site value’ of land. The system allowed for deductions, amongst other things, the amount by which the gross value would be diminished if the land were sold subject to fixed charges and to any public rights of way or public rights of user and to the right of common and to any easements affecting the land.
102. Each area of land, or hereditament, was identified on a map and information recorded in a ‘field book’. Routes shown on the base maps which correspond with known public highways, usually vehicular, are not normally shown as included in the hereditaments and will appear uncoloured and unnumbered.
103. Section 94 of the 1910 Act made it a criminal offence for a landowner to knowingly make a false statement or representation for the purpose of obtaining any allowance, reduction, rebate, or repayment in respect of any duty under this Act, either for himself or for any other person.
104. The Finance Act records show in this case that the Order route runs through hereditaments 4689 and 4690. There were no deductions for “public right of way or user” within 4689. No inferences can be drawn from this as landowners were not compelled, and did not always declare, public rights of way. This was acknowledged by all three professional witnesses who gave evidence.
105. There was a deduction of £35 for hereditament 4690. Aside from the Order route (being Nether Moor Lane), there was also what is now Footpath 233 (FP 233) and Nether Moor Road all within hereditament 4690. Mr Hobson estimated the area of land within the hereditament occupied by all three to be approximately 1.122 acres combined. By deducting the quarried areas from the hereditament, he calculated that approximately 38.04 acres remained. From the field book entries, the total area subject to valuation for the hereditament was 38.75 acres.
106. Mr Hobson calculated a detached part of the hereditament to be approximately 0.71 acres. The sale value for agricultural land in 1910 is thought to be in the region of £29 per acre based on the valuation book entry. Mr Champion (for the OMA) agreed the figure was thereabouts and Mr Carr said he did not consider it wrong. As the amount ascribed to public rights of way or user is not much greater than the price of 1 acre, GLASS considers it more probable than not that the deduction related to all three ways rather than one or two of them.
107. Mr Champion acknowledged that £35 seemed a large amount but added that he had not studied the matter in any great detail. Indeed, his evidence was given prior to that of Mr Hobson who produced a note following his oral testimony, at

the request of the Inquiry, on how he had arrived at his calculations on the Finance Act documents. In view of the complexities, opportunity was given to the objectors to secure their own research and to provide a supplemental proof of evidence in reply. A deadline of 31 August 2023 was agreed as reasonable by all parties. On that date, Mr Carr provided a supplementary proof of evidence to which he spoke at the resumed Inquiry and was cross-examined.

108. Mr Carr dismissed Mr Hobson's approach as having no basis in fact or evidence and entirely speculative. Whilst not disputing the mathematics, Mr Carr suggested that Mr Hobson had guessed at the figures, and it was "easy to make them fit". Specifically, Mr Carr disagreed that the quarries would have been excluded from the calculations and further disputed the existence of any detached part of 4690, which he had been unable to locate in the index plans.
109. Although Mr Carr professed to be the only expert giving evidence to the Inquiry, both Mr Hobson and Mr Champion are also experienced professionals qualified to give an opinion. Whilst Mrs Mallinson acknowledged to having no professional experience in rights of way, that does not diminish her view that inclusion of the Order route within hereditaments strongly suggests the route did not have public vehicular rights at the start of the 20<sup>th</sup> century.
110. Ultimately, I do not find it possible on the analysis and material available to conclude that the £35 deduction was likely to have included all three ways. Quite simply, the methodology of Surveyors at the time is unknown. There is no supporting evidence before me by way of caselaw, Order Decisions or legal commentary. At the very least, I would expect examples from other hereditaments verifying Mr Hobson's theory before attributing it weight.
111. Equally, I do not draw the same conclusion as Mr Carr that the inclusion of the route within the landholding is more consistent with private status than public. Mr Carr submits that had the route been public, it would have been excluded from valuation in the same manner as other public roads in the area. The fact of the matter is, that it cannot be determined one way or another with any level of clarity whether or not the Order route was excluded as part of the £35 deduction.

*Plan of the manor of South Crosland, property of Richard Henry [Beaumont] c1764-65*

112. This plan was uncovered by GLASS. Mr Hobson described the map as extensively damaged with few markings remaining although in the immediate vicinity of Nether Moor Farm part of the route can be seen leading eastwards towards Nether Moor Road. Having examined the original version, Mr Carr interprets the map as showing a cul-de-sac road leading towards Nether Moor Farm and then out to surrounding fields. He regards this as entirely consistent with the origins of the route being private leading only to land and property.
113. The evidence of Mr Carr contradicts the report by STICKS research agency who conducted research on behalf of GLASS. The researcher also examined the original map and reported that: "*A short portion of Huddersfield 231, immediately to the north of the farm building also appears to be marked with solid boundary lines - however this ends in a damaged area of map with no markings, making it impossible to tell if a recognized path or track ran across to Nether Moor Road along the route of Huddersfield 231 at this point or not.*"

114. Mr Carr insisted that he had looked specifically and did not consider the map damaged in the area of the route.
115. Under cross-examination Mr Carr admitted to errors on what he reported as depicted on another map, the undated South Crosland Beaumont Map. Mr Carr confirmed that I should disregard the last sentence of paragraph 8.12 of his main proof where he describes a short section in the vicinity of Nether Moor Farm which appears to be open to the field to the south. Mr Carr also accepted paragraph 8.13 to be wrong where he says the route appears to be separated from the remainder by a physical boundary feature. Of course, this does not mean that Mr Carr is mistaken on the 1764 map, but it also does not follow that he must be right simply because he appeared in person and the researcher from STICKS had not.
116. There is directly opposing evidence of fact on what can be seen due to the state of the 1764 map. I am not assisted by the poor quality of the photocopied image. Both Mr Hobson and Mr Champion took the view that there was nothing inconsistent on the map with a through route along the alignment of the Order route to Nether Moor Road.
117. In the circumstances, it cannot be established if the route is depicted as a cul-de-sac. In any event, account should be taken of context. As Mr Carr accepted, it is not known who the 1764 map was produced for, there is no key to show public highways and the purpose was unlikely to show public rights of way.

*Township Map of South Crosland belonging to RH Beaumont Esq, 1822*

118. The Order route is shown bounded on both sides between points A and E where it terminates. Thus, the route appears as a cul-de-sac stopping at the fields.
119. Mrs Mallinson took a similar line to the objectors by pointing out that the Order route is shown as part of the estate. Whilst the objectors argue that this reinforces the route had private status, Mrs Mallinson thought it strongly suggests that it did not have public vehicular rights.

*Greenwood's maps 1817 and 1828*

120. Despite the small scale of Greenwood's maps, it can be gleaned that the Order route is shown off Sandy Lane as far as the farm and not beyond. Greenwood's maps showed both public and private routes but is clearly not comprehensive given the omission of roads shown on the Plan of South Crosland 1804, the Township Map 1822 and South Crosland Estate map 1839.
121. The route was clearly shown as a through route to Nether Moor Road on the earlier and larger scale 1804 map. Mr Carr points out that the 1804 map has a solid line across the eastern end of the track where it meets Nether Moor Road which he interprets as a gate following standard mapping convention. That may well be so, and the presence of a gate might suggest that the public did not drive that way but not necessarily so. Public roads which are gated do exist. Nevertheless, there was no such line in subsequent mapping.
122. All things considered I regard Greenwood's maps of very limited evidential value in this case.

### **Assessment and conclusions on documentary evidence**

123. The objectors say that as the route did not link to any other public right of way or a place of popular public resort, the origins of the route was as a private track. I find the 1764 map indeterminable. If it does show a cul-de-sac that would be consistent with the 1822 Township map and Greenwood's maps. However, that does not sit comfortably with a through route depicted in 1804, albeit seemingly gated. It is acknowledged by Mr Carr that "the Order route did become a through route eventually" as shown on the South Crosland Estate Plan 1839.
124. Under cross-examination by the OMA's Counsel, Mr Carr said that he certainly does not draw a firm conclusion that the route was private. It was the maps showing the route to the farmstead as a cul-de-sac that tipped the balance. Mr Carr acknowledged that *if the documentary evidence is neutral and 50:50 "then the balance of probabilities test isn't met and it doesn't outweigh the presumption."*
125. Collectively, I find the historical maps do not suffice to demonstrate that the route was a cul-de-sac.
126. In Mrs Mallinson's view what tips the balance in favour of bridleway status is the Finance Act maps and 1822 Estate Plan showing the route as part of the estate which she would not expect of a public vehicular highway, plus two letters identifying the route as an 'occupation road'.
127. The first letter written in 1949 by agents for the landowner to a company undertaking tipping at Nethermoor Lane instructs them to "*leave that part of the surface of Nethermoor Lane, used as an Occupation Road by the Tenant, in as good a state as it was before you commenced tipping.*" The second letter of 1 April 1954 to the Bradley's Solicitors concerning their purchase of Nethermoor Farm refers to a right of access reserved for the owner of Greengate Knoll "*along the occupation road coloured brown.*" The plan is missing but this appears to refer to the Order route given the location of Greengate Knoll.
128. Accordingly, there is some evidence of the Order route being an occupation road, indicative of a private route for vehicular traffic. It does not rule out the possibility of lesser public rights. Even if the 1764 map does reveal a cul-de-sac, it strikes me that too much reliance is placed by the objectors on too few maps to tip the balance in favour of a private route. The combined effect of the maps overall is neutral on public/private status.
129. Whilst emphasis is placed by the objectors on the origins of the route being a cul-de-sac and thus private, this does not progress their case very far. It could still have become a public highway subsequently.

### **Settled land**

130. The land crossed by the Order route was held in settlement between 1887 and either the death of the last tenant in 1948 or upon the grant of probate in 1950. This poses the question of whether it was possible for dedication as a public right of way to have occurred during the period of strict settlement.
131. Mr Carr produced two Order Decisions where the issue of settled land arose. The Inspector accepted, in Order Decision ref: FPS/J1155/7/106 (dated



29 September 2016) that there appeared to be no capacity to dedicate in that particular case when the land was in settlement, but the decision did not turn on it. There were many periods when the land was not in settlement for dedication to occur. In the second Order Decision ref: FPS/J1155/7/115 (26 October 2017), the Inspector accepted that the tenant for life was not free to grant rights over the land without agreement of the other interested parties or specific provision within the trust deed. Neither decision binds me to a particular view which I must reach on the information before me in this Inquiry. There is nothing to say the same arguments, material and circumstances were before those Inspectors.

132. Dedication of settled land could occur under section 56(1) of the Settled Land Act 1925 for “a sale or grant for building purposes, or a building lease, or the development as a building estate of the settled land, or any part thereof, or at any other reasonable time, the tenant for life, for the general benefit of the residents on the settled land, or on any part thereof .....”. Section 56(2) clarifies that “in regard to the dedication of land for the public purposes aforesaid, a tenant for life shall be in the same position as if he were an absolute owner”.
133. On day 1 of the Inquiry, the OMA confirmed agreement with GLASS that there would have been no bar to dedication during the period of settlement. Counsel for the objectors clarified that the objectors agree that during the period of settlement there was no absolute bar to dedication, but they maintain that there needs to be a high bar for implied dedication. They say that the authority in *Farquhar v Newbury RDC* [1909], to the effect that dedication may be inferred against the beneficiaries of the settled land with the knowledge and approval of the tenant for life, is highly distinguishable.
134. The objectors’ stated position was not wholly followed by their own professional witness. Mr Carr is incorrect to say that there are only two circumstances whereby a tenant for life of land that is subject to settlement has the capacity to dedicate (i) by express power within the settlement itself, or (ii) under section 56 of the Settled Land Act 1925. Dedication can be inferred against the tenant for life and the beneficiaries, as per *Farquhar*.
135. All parties referred to commentary in Sauvain, *Highway Law* (6th edition, 2022) which states (at paragraph 2-40): “Prior to 1926 the concurrence of the tenant for life and all other parties with relevant interests in settled land was required in order to dedicate land as a highway, although such concurrence could be implied [my emphasis added]. Under the Settled Land Act 1925 s.56(2), the tenant for life was given the same power to dedicate land for public purposes as an absolute owner.”
136. The above interpretation supports the argument advanced by GLASS (and adopted by the OMA) that the Settled Land Act 1925 had the effect of enabling a tenant for life to dedicate land as a highway more generally without the consent of the beneficiaries under the settlement. This also applied retrospectively with amendments to the Settled Land Act 1882 to permit a tenant for life to exercise the power to dedicate ‘at any other reasonable time’ and thus not limited to circumstances involving building works.
137. That is not to say the power to dedicate was without limits. It must be within the parameters of section 56(1) because section 56(2) expresses the power to be “in regard to the dedication of land for the public purposes aforesaid”. As such,

dedication must be *for the general benefit of the residents on the settled land, or on any part thereof*. To that extent I agree with the objectors that the tenant for life is not placed in exactly the same position as the absolute landowner.

138. I do not concur with Mr Carr that section 1 of the Rights of Way Act 1932 would have been unnecessary if a tenant for a life had capacity to dedicate for two reasons. Firstly, subsection (1) made no alteration in the existing law but merely indicates the circumstances in which the Court will presume dedication (as per General Note to section 1(1) in Freeman's Rights of Way 1934). Secondly, subsection (2) removed obstacles to dedication where there had been a full 40 years of use during which time there had not been a person with capacity to dedicate, but there are numerous categories of persons who may be incapable of dedicating besides tenants for life.
139. This all leads me to the view that settlement was not necessarily an impediment to dedication. The objectors say that there is no evidence that dedication would be for the general benefit of the residents on the settled land. The difficulty with this stance is that it is for those asserting an error in the DMS to make out their case. It is not for the OMA to demonstrate the existence of the public right of way, as recorded, despite a period of settlement. The objectors have not demonstrated that there was an impediment to dedication because the settlement was always in favour of minors or those with no capacity to dedicate, for instance.
140. In closing submissions for the objectors, Counsel describes the issue of settlement as 'largely a red herring' as there is no evidence whatsoever before the Inquiry that any dedication occurred during the period of settlement. As such, it is said that the issue is somewhat academic. That is not necessarily so as the Order route was included on the draft DMS either within the period of settlement or soon after depending on when the settlement ended i.e., 1948 or 1950. Of course, dedication could have occurred prior to or after settlement.
141. I conclude that the issue of settled land neither evidences an error in the first or current DMS, nor that dedication could not have occurred.

### ***Analysis of the evidence***

142. There was clearly an error in the addition of the Order route to the current DMS in the absence of the requisite legal order. This undermines the evidential value of the current DMS. I have found the documentary evidence to be neutral and there is no apparent evidence of a public vehicular highway on which classification as a BOAT was founded. Of course, there may have been evidence available to the surveying authority that is not available today. I bear that in mind as an important point in relation to both the existence and status of the route.
143. Emphasis is placed on the 1974 Memorandum by the objectors in two respects. Firstly, that little or no local enquiries were made as to the existence and status of routes throughout the definitive map process. Secondly, the suggestion that depiction of a route on the maps was based purely on their physical character and without reference to the existence or otherwise of public rights.
144. As set out above, the 1974 Memorandum concerns "classification of routes as between F.P., F.P.(CRF) & B.W." rather than questioning their public status. It

does not provide evidence that an error occurred by including the route within the 1<sup>st</sup> DMS such that no public rights existed.

145. There is good reason to believe from the 1974 Memorandum that some routes were incorrectly classified based upon physical characteristics alone resulting in the incorrect recording of public rights above footpath status. This is the most likely explanation for classification of the route as a BOAT in the absence of evidence demonstrating public vehicular rights.
146. The OMA accepts that the evidential value of the 1<sup>st</sup> DMS of the route having at least bridleway status is undermined by the 1974 Memorandum. It also accepts that there is an apparent irregularity in the production of the 1<sup>st</sup> DMS under the 1949 Act. In particular, the route had appeared as a footpath on the 1952 Draft Map but then changed to depiction as a RUPP in the 1966 Draft Map whereupon it was described as a "footpath CRF" and repeated in the 1<sup>st</sup> (1975) DMS. The non-statutory notation of "CRF" in the 1<sup>st</sup> DMS is probative of footpath use only (albeit the legal effect was a RUPP).
147. It is notable that there were no objections to the inclusion of the Order within the DMS when deposited at draft and provisional stages or when deposited in 1975. Indeed, the procedures leading up to the deposit not only met the requirements of the 1949 Act but gave additional opportunity for landowner objections or representations to the 2<sup>nd</sup> Draft Map. Despite these processes, the landowners did not object.
148. I find it probable that the route is not a BOAT but carries lesser public rights. I agree with the previous Inspector that from the inclusion of the route within the 1<sup>st</sup> DMS, it has minimum status as a footpath. The question turns to whether any higher rights can be demonstrated through user evidence.

### ***Dedication at common law***

149. The OMA's case for bridleway status relies upon implied dedication at common law. This requires consideration of three issues: (i) whether any current or previous owners of the land had capacity to dedicate a highway (ii) whether there was express or implied dedication by the landowners and (iii) whether there is acceptance of the highway by the public. There is no fixed period of use at common law and depending on the facts of the case it may range from a few years to several decades. There is no particular date from which use must be calculated, but it must be 'as of right' meaning without secrecy, force or consent.
150. The burden of proof, including the landowner's intention to dedicate the route as a bridleway, is upon those asserting the public right of way, in this case the OMA. The test of the evidence is the balance of probabilities. There is no presumption of intention to dedicate that applies once sufficient evidence of user has been demonstrated in the same way that occurs under section 31 of the Highways Act 1980.

### ***The period to be considered***

151. As the route is recorded as a BOAT in the current DMS, the public would have been entitled to use it as such from the relevant date of 30 April 1985. There is consensus between the objectors and OMA that any use by the public after 30 April 1985 must have been authorised and thus was 'by right' rather than 'as

of right' (i.e., without consent), as required to give rise to either implied dedication at common law or by statutory dedication. Indeed, this issue was the basis of successful legal challenge to the previous Order.

152. The objectors go a step further and maintain that all claimed public use of the Order route after 20 April 1966, being the relevant date for the first DMS of 1975, would also have been 'as of right'. As a result, the objectors say that any public rights of way would need to have been expressly or impliedly dedicated as a public right of way before 20 April 1966. The OMA disagrees and argues that user up to the sealing date of 10 July 1975 was still 'as of right' notwithstanding the retrospective provisions of the statute. In concluding that the route is a bridleway, Mrs Mallinson relies upon the same interpretation of section 32(4)(b) as applied by the OMA but acknowledged this was a matter for the lawyers.
153. Under section 32(4) of the National Parks and Access to Countryside Act 1949, a DMS prepared under section 32(1) of that Act "*shall be conclusive as to the particulars contained therein..... that is to say- (b) where the maps shows a bridleway, or a road used as a public path, the map shall be conclusive evidence that there was at the said date [emphasis added] a highway as shown on the map, and that the public had thereover at that date a right of way on foot and a right of way on horseback or leading a horse, so however that this paragraph shall be without prejudice to any question whether the public had at that date any right of way other than the rights aforesaid; and ....*".
154. The "said date" is not defined. It is section 32(2) that provides for the particulars to be contained in the DMS to be those contained in the provisional DMS "*and every definitive statement shall include a note of the relevant date specified in the corresponding provisional statement.*" When read in the context of this preceding sub-paragraph, it follows that the "said date" is the "relevant date". Both Counsel for the objectors and OMA agree it cannot be otherwise.
155. Mr Champion, the OMA's Definitive Map Officer, acknowledged that the "said date" for the purposes of section 32(4)(b) is 20 April 1966 and that the subsection provides for conclusivity from that date. However, Mr Champion maintained this was only the position if there was in fact a public right of way in existence on the relevant date. In essence, he sought to distinguish between a scenario where an error had been made in the recording of the route and where no error arose. Mr Champion accepted that if the route was correctly recorded as a RUPP, then conclusivity was retrospective. On the other hand, if it was not a RUPP on the said date Mr Champion submitted that conclusivity did not arise as it was not possible to make something exist if it did not.
156. In re-examination, Counsel invited Mr Champion to envisage someone using the route in 1970 and what information would be available to that person or the landowner. Mr Champion replied that the Draft Map would show the route as a public footpath. He re-iterated that there was no conclusivity at that point in time or until after the first DMS was sealed in 1975. This was the line the OMA invited me to take in closing submissions. It is emphasised that until the 1975 DMS achieved its definitive status, no statutory provision was in force under which any right to use the route could be conclusively related. Prior to that, there was nothing which would have defeated the landowner's ability to challenge use. The OMA submits that matters must be gauged by reference to the position when the use was occurring and critically, how matters then appeared to the landowner.



157. There is logic to the OMA's argument. The retrospective effect of section 32(4) could have seemingly curious outcomes particularly in circumstances such as this where there is a gap of several years between the said date and publication date. For instance, use that was unauthorised at the time and amounted to trespass might retrospectively become lawful. A public right of way could legally exist before anyone knew of such rights.
158. However, if the words of section 32(4) are applied to give their ordinary and natural meaning, then the outcome is clearly that the map *shall* be conclusive evidence as to the status of the route from the said date. That is what statute says and I have no discretion to depart from it. There is no caveat or proviso written into section 32(4) and no authority has been drawn to my attention of a different interpretation.
159. On that basis, I cannot agree with the OMA that the conclusive evidence of the route as a RUPP with equestrian rights runs from the sealing date of the 1975 Order, allowing the possibility for dedication at common law prior to that date. I must apply the relevant date in the 1<sup>st</sup> (1975) DMS of 20 April 1966. Accordingly, any use by the public on foot and on horseback from that date in 1966 would also have been 'by right' and not 'as of right'. It follows that I must assess the evidence to establish if dedication at common law occurred before 20 April 1966.

### **Evidence of use**

160. None of the users who appeared at the Inquiry claimed use before April 1966 and the OMA did not advance a case on this basis. Although Mr Champion confirmed he had not personally conducted an assessment of user evidence pre-1966, there are charts and tables within the OMA's bundle for around 61 user evidence forms ('UEFs'). Having examined these forms, the charts/tables can give a misleading impression as they include forms completed by Mrs Bradley and others connected with the farm. Some were lawful visitors who completed forms to support the objectors' case. When eliminating those with clear or apparent consent, only 1 user remains claiming equestrian use from 1965. Patently, this does not suffice to demonstrate dedication at common law if, as I have concluded, bridleway use from 20 April 1966 was 'by right'.
161. Even if I am wrong in that conclusion and the publication date can be applied, the OMA still relies upon relatively few users over a short period of time preceding and up to 1975.
162. Six witnesses gave live evidence of their use. Sue Crowther had not completed a UEF but came forward to describe riding the route from July 1967. Sue Chadwick, Mary Wilkinson and Pat Whitham are from the same family who said they rode the route together from 1972. In his statutory declaration, Mr Bradley disputes that anyone from the Whitham family used the track before 1976. He further states that their use was with the consent of his father given in the late 1970s after he had met Mary Whitham (Wilkinson) at school.
163. Virginia Stewart rode with the Whitham family probably from 1972 but it might have been 1973 or even 1974. Her UEF said her use began in 1975 and that she had "*always been given permission by the landowner up until the beginning of the year*". According to Mr Bradley, Virginia Stewart had consent from his father in the late 1970's. It follows that any use before then was without consent.



164. Janet McCrorie had stated in her UEF that her use began in 1976 but stated orally that it was 1973/1974. Her mother Carol had specified in her UEF that both she and Janet had landowner permission to use the route. As pointed out by the previous Inspector, people can conflate tolerated use with permission. That certainly seems to be the case for Janet McCrorie whose mother is recorded to have said in interview in 2017 that “*We were never refused use of the route.....they never complained and we never requested permission.*”
165. Four other users who did not give evidence claimed cycle or equestrian use before 1975, two from 1972, one from 1971 and one from 1965. Therefore, in total 10 users claimed bridleway use up to 1975.
166. It does not diminish the user evidence that several of the users are from the same family or are friends. Many were children pre-1975. Memories also fade but the same may be true for Mr Bradley whose recollections conflict with user accounts. Whereas the evidence was tested for six users, Mr Bradley’s evidence was not.
167. Mr Uney, a nephew of Arthur and Herbert Bradley, provided a statutory declaration for the objectors stating that Arthur, Herbert and his mother challenged anyone who was not meant to use the track throughout the 1960’s and 1970’s. This contrasts with the witnesses who say they were never challenged. Even though Messrs Bates, Dyson and Sykes said they did not see horse riders in their visits to the farm in the period before July 1975, it does mean such use did not occur.
168. The objectors cite acts of interruptions as inconsistent with the intention to dedicate with reference to *Poole v Huskinson (1843) 11 M.&W.827* that “*a single act of interruption by the owner is of much more weight, upon a question of intention, than many acts of enjoyment.*”
169. Firstly, the Huddersfield Falcons say in a letter dated 24 January 2019 that they have held motorcycle trials 2-3 times per year at Nether Hall Farm since 1952 with the permission of the landowners. During the trials, tape is placed across the farm access to direct members into the car parking fields and then towards the woodland where trials are held. The tape also prevents anyone accessing the track during the trials for safety purposes.
170. I do not regard these very occasional events as interruptions contrary to implied dedication. There is no evidence of signs excluding public access or evidence that riders were turned back. The evidence from users was that horses and motorbikes do not mix and riders would generally avoid the area during events.
171. Secondly, I would not regard the route being ‘necessarily frequently blocked due to farming operations’ sufficient to defeat implied dedication. Such interruptions would be very temporary as livestock is moved or agricultural vehicles/ machinery is used. Riders may have turned back rather than wait but that falls short of causing interruption in use. They are no more than the ordinary workings of a farm. The objectors develop the argument that horse riders regularly passing through a working dairy farm are two uses that are ‘inherently inconsistent’ and thus inconsistent with an intention to dedicate through their working farm.

172. A flaw in that argument is that the Bradley's original application sought a downgrade of the route to a bridleway and acknowledged it had such status. Of course, this was many years later than 1975, but it is notable given that Robert Bradley (objector) has been at the farm since birth in 1964. He took ownership from his father Arthur in 2005 who had bought the farm with his brother Arthur in 1954 after being tenanted by the family for many years.
173. Despite protesting now that the route has always been private, this is not how the objectors' case was advanced before. There has been a radical change in position. Mr Bradley's father and uncle were the landowners with the capacity to dedicate pre-1966 and 1975. If the track was only used by a few people permitted by Arthur and Herbert Bradley as the objectors say, it is difficult to reconcile why the objectors had acknowledged bridleway status unless that was their true belief.
174. Indeed, Robert Bradley's three sisters also completed 'public rights of way information forms' in 2009 identifying the route as a bridleway. The forms were signed to certify the facts stated were true. The accompanying letter of Helen Clark said that as a child she remembered "*a few horses using the lane*" and "*this was, we were told a bridlepath*". She further said that "*my father was happy to allow walkers and horse riders to use the lane...*" but challenged anyone using a vehicle. Joan Taaffe similarly provided a letter saying: "*my father often spoke of how the lane to the farm was a private track but he has no objections to horses travelling it and people walking it.*"
175. Catherine Dixon wrote that "*my father or brother have never stopped people walking or horse riding along the track and they accepted that this was a reasonable thing to do in the countryside.*" Her statutory declaration explains that she had meant that she had not witnessed her father or brother stopping anyone and she does not recall seeing any horse riders or walkers using the track.
176. Much of Mrs Bradley's evidence in chief, focussed on explaining why she blames the Council Officer at the time for advising the Bradleys to apply for a downgrade to a bridleway as the best outcome they could hope to achieve. This is uncorroborated. Indeed, the written exchanges indicate that the Officer invited the Bradleys to provide evidence to support a deletion of the route and even attended the archives with Mrs Bradley in an attempt to uncover evidence.
177. Mrs Bradley maintains that she always regarded the route as a 'permissive bridleway' and subsequently amended the application to utilise this term.
178. During cross-examination, Mrs Bradley was reluctant to answer the questions being put and seemed intent on repeating the same points whatever she was asked. As it is, Mrs Bradley's earliest personal knowledge of the route dated from 1983 when visiting the farm for the first time. Her evidence of events prior to that time was hearsay, principally from what she had been told by her husband. Critically, the position on implied dedication must be gauged on how matters appeared to the landowner at the time rather than with the benefit of hindsight. What occurred post 1975 is irrelevant.
179. More weight attaches to the statutory declaration made under oath by Mr Bradley than an unsworn witness statement which is simply signed. However, Mr Bradley did not appear at the Inquiry for his evidence to be tested. His

statutory declaration therefore has less weight than evidence given orally and tested. As someone with direct knowledge of use of the track prior to July 1975, it may have been helpful to hear answers to questions on his written account. That is particularly so given that letters he had signed on 13 June 2012 and 4 December 2013 stated how he had *“provided information which proves that the track I own was only ever surveyed as a footpath or potentially a bridle path which is the way it has operated for decades.”*

180. Whilst Robert Bradley and Helen Clark now state that their father was only happy to let horse riders use the track if they sought permission first, that is not borne out by the witness accounts or the supporting material for the 2009 application. Having certified the route to be a bridleway in 2009, it diminishes the confidence I can place in the objectors' evidence when taking an altogether different stance some years later.
181. The OMA does not say that the user evidence alone suffices to find an inference of dedication of a bridleway at common law but combined with the previous evidence of the Bradley family.
182. I am satisfied there is evidence that Arthur and Herbert Bradley, the landowners at the relevant time, were aware of bridleway use. Whilst some riders associated with the family had consent, it is unlikely that applied to all. This is illustrated by the testimony heard from riders living locally who would be classified as members of the public. The picture emerging is of Arthur Bradley acquiescing to equestrian use albeit riders may have needed to wait on occasion for livestock or machinery to be moved before passing by.
183. Although the objectors seek to resile from their evidence given previously when seeking a downgrade in the route, I find it more plausible than not that Mr and Mrs Bradley did regard the route as a bridleway. Of course, they were not the landowners with capacity to dedicate at the time. However, their previous stance adds credence to the way being regarded as a public bridleway by their close family predecessors in title.
184. Nevertheless, none of this overcomes the fact that there was only a short period of equestrian use at low intensity prior to July 1975. The evidence as a whole simply does not suffice to demonstrate an intention by the landowners to dedicate a bridleway at common law, even if that date is capable of application.

### **Conclusion on user evidence**

185. The burden of proof has not been discharged to demonstrate, on the balance of probabilities, that dedication of the Order route as a bridleway had occurred for any period up to either 1966 or 1975, whichever date is applied.
186. Notwithstanding that conclusion, I have already found the evidence to suffice to demonstrate an error in the DMS and that the Order route should be recorded as a public footpath.

### **Limitations**

187. At my request, the objectors and OMA liaised on the accuracy of the limitations recorded in the Order. Some, but not all, limitations are agreed. The parties agree that a fundamental preliminary point is that the existence and extent of

limitations necessarily depends upon when the public right of way came into existence. Their submissions make the assumption that any finding of creation of a bridleway from implied dedication arose either prior to 1966 or 1975.

188. I have not found sufficient evidence of a bridleway, but a public footpath. The distinction does not matter for the purposes of recording limitations. The key issue is those that existed at the time of dedication. This must have been prior to the relevant date in 1966 when the route was recorded as a “footpath (CRF)” in the 1<sup>st</sup> DMS. The 1<sup>st</sup> draft DMS with a relevant date of 1 September 1952 is evidence the route was considered a public footpath in the early 1950’s.
189. It is agreed that a limitation for a former stile and gate at point B should be recorded as described in the Order. The objectors say that reference should be added to a length of wall that formerly abutted and was situated at right angles to the stile and gate. In their view, if the stile is to be recorded then so should the wall. An aerial photograph is supplied in which the wall is visible adjacent to the location identified by the OMA for the stile. I agree that the wall should be added.
190. Point C on the Order map denotes the location of the current ‘yard end gate’ across the Order route in between farm buildings. No limitation is currently included for point C. The OMA and objectors are said to agree that a gate at or in the vicinity of point C should be recorded as a limitation should evidence be found to show dedication of a public right of way “after its installation in the late 1950’s as is contended by the Council”.
191. In fact, the OMA’s note says that it considers, on balance, the gate was likely to have been installed in the 1970’s as a replacement for a wooden gate at point B. It is the objectors who say there has “always been a gate at Point C since the late 1950’s”. Based on the 1<sup>st</sup> draft DMS, the evidence points to dedication as a footpath before the late 1950’s. As such, I do not add a limitation for the gate.
192. As previously noted, an error in the grid reference for point D requires correction and its position revised on the map. The OMA and objectors agree that a limitation of a ‘removable bar, pole or rail’ at point E is correctly recorded.
193. Aside from those at points D and E, the objectors seek a series of other locations for moveable poles to be added as limitations which are used daily depending upon whereabouts cattle are being moved. They also seek the addition of six other field access gates which open onto the route and remain open while cattle are moved. The gates are said to have existed since before arrival of the Bradley family in the late 1800’s and the additional poles used “from the 1950’s at the latest”. I agree with the OMA that there is insufficient evidence that the gates and poles affected the route at the time of dedication.
194. No limitation is recorded for point F which the OMA identifies as the former location of two boulders previously placed within the track to deter vehicles. They were not in place at the time of dedication to be recorded.

### **Overall Conclusions**

195. On the balance of probabilities, it has not been demonstrated that an error occurred such that no public right of way exists and the route should be deleted from the DMS altogether. However, there has been a discovery of evidence which (when considered with all other relevant evidence available) is sufficient to

show that the BOAT shown in the DMS subsists as a highway of a different description, namely a public footpath.

196. Having regard to all other matters raised at the Inquiry and in the written representations, I conclude that the Order should be proposed for confirmation as a public footpath.

### **Formal Decision**

197. I propose to confirm the Order subject to the following modifications:-

In the Order schedule: Part 1

- Delete the word 'bridleway' and replace with 'footpath'.

In the Order schedule: Part 2

- In the 'General' column, first entry, insert the word 'wall' after 'Gate'.
- In the 'General' column, second entry, replace grid reference 'SE 1170 1338' with 'SE 1167 1336'.

On the Order map:

- The line style to be changed to that of a footpath.
  - In the key, delete the word 'Bridleway' and replace with 'Footpath'.
  - Replace grid reference 'SE 1170 1338' with 'SE 1167 1336'.
  - Move point D to grid reference 'SE 1167 1336'.
198. Since the confirmed Order would show as a highway of one description a way which is shown as a highway of another description in the Order as submitted, Paragraph 8(2) of Schedule 15 to the Wildlife and Countryside Act 1981 requires that notice shall be given of the proposal to modify the Order and to give an opportunity for objections and representations to be made to the proposed modifications. A letter will be sent to interested persons about the advertisement procedure.

*KR Seward*

INSPECTOR



## APPEARANCES

### For Kirklees Council:

Mr Alan Evans Counsel for the Council

who called:

Sue Chadwick  
Mary Wilkinson  
Patricia Whitham  
Virginia Stewart  
Philip Champion Definitive Map Officer

### Interested party – in support

Diana Mallinson

### Also in support:

Sue Crowther  
Janet McCrorie

### In objection:

Ms Ruth Stockley Counsel, instructed by Irwin Mitchell LLP on behalf  
of Mr Robert and Mrs Angela Bradley

who called:

John Sykes (assisted by  
Ian Bagshaw)  
Kenneth Bates  
Philip Dyson  
Angela Bradley  
Robin Carr Statutory objector  
Consultant

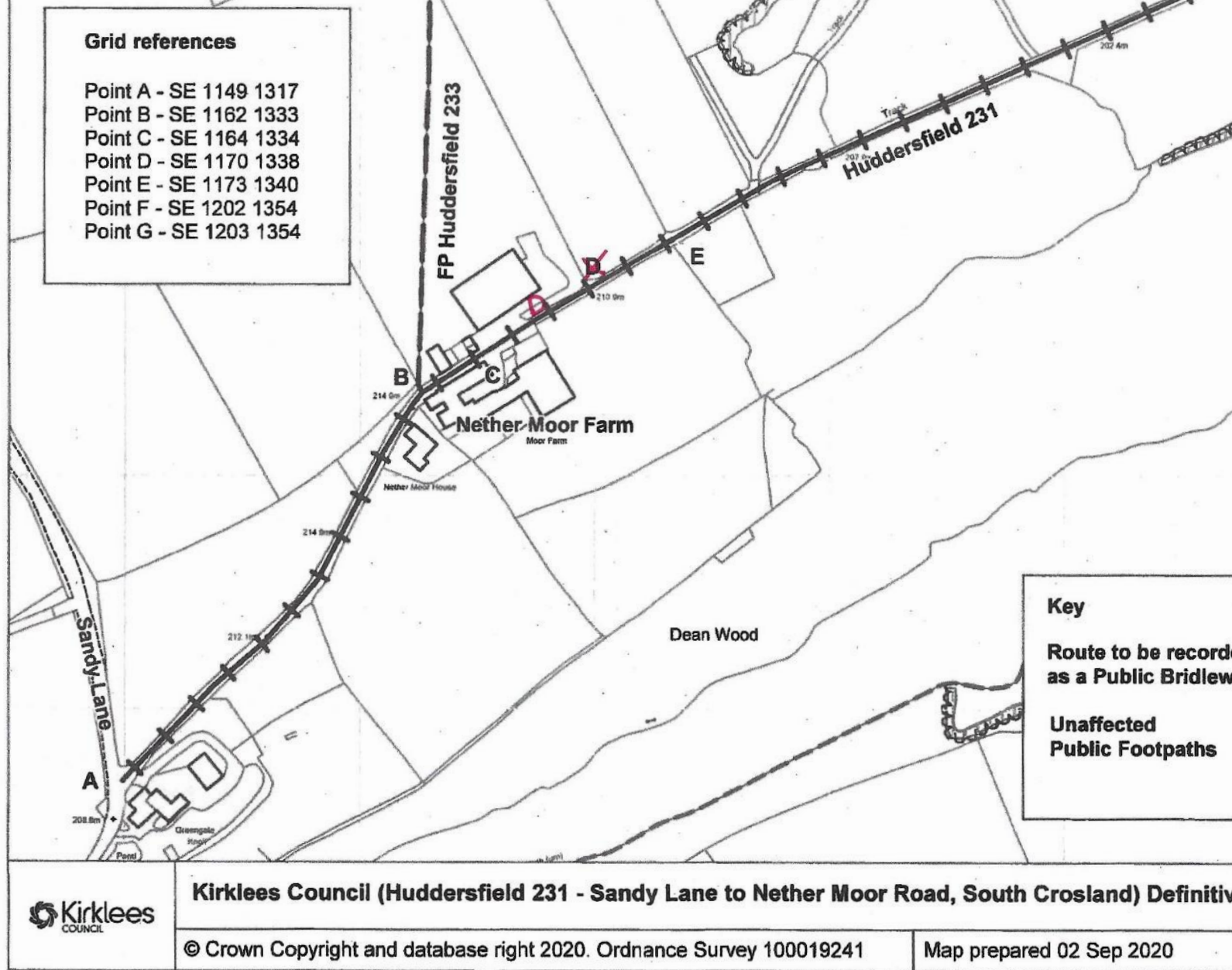
### Interested party:

Miss Esther Drabkin-Reiter Counsel, instructed by the Green Lane Association  
Ltd

who called:

Phil Hobson Consultant





**DOCUMENTS submitted at the Inquiry**

1. Index to OMA bundle to include PDF page numbers
2. Enlarged image of Appendix 3 to Mr Hobson's proof produced by Mrs Mallinson
3. Extract of paragraphs 14.2.17 – 14.2.26 of the Consistency Guidelines produced by Mrs Mallinson
4. Statement of Case of the OMA with updated references to include page numbers of the OMA's paginated bundle
5. Opening statement on behalf of the OMA
6. Opening statement on behalf of GLASS
7. Opening statement on behalf of the objectors
8. Note of Phil Hobson on calculation of areas in hereditament 4690 of Finance Act 1910 records
9. OMA and objector's notes on limitations recorded in the Order
10. Supplemental proof of evidence of Robin Carr (including replacement Appendix 10)
11. Objectors updated Inquiry bundle (October 2023)
12. Closing submissions (partly handwritten) for Mrs Mallinson
13. Closing submissions for GLASS
14. Closing submissions for the statutory objectors
15. Closing submissions for the OMA