

NORTH LINCOLNSHIRE COUNCIL

PLANNING COMMITTEE

Decision Letter – Yorkshire Moors Bottom Road, Crowle

1. OBJECT AND KEY POINTS IN THIS REPORT

- 1.1 To bring members up to date with respect to Yorkshire Moors Bottom Road, Crowle, following the publication of a decision letter by the Secretary of State for Environment, Food and Rural Affairs concerning an appeal by Crowle Town Council.

2. BACKGROUND INFORMATION

- 2.1 The decision letter (see Appendix) is part of an ongoing debate that was initiated by North Lincolnshire Council when on 3 April 2003 an order was made to add to the “County of Lincoln, Parts of Lindsey (Isle of Axholme)” definitive map and statement a byway open to all traffic over the length of Yorkshire Moors Bottom Road in the Township of Crowle between Dole Road and the former county boundary.
- 2.2 A byway open to all traffic (BOAT) is a public right of way and therefore a highway. BOATs were created by the Countryside Act 1968. They are a type of carriageway but one as defined under section 66(1) of the Wildlife and Countryside Act 1981, namely “a highway over which the public have a right of way for vehicular and all other kinds of traffic, but which is used by the public mainly for the purposes for which footpaths and bridleways are so used”.
- 2.2 The order was opposed by Crowle Town Council. However, the Secretary of State found in North Lincolnshire Council’s favour in his decision letter published 21 April 2005. In coming to his decision, the inspector followed Planning Inspectorate Advice Note 8: “The test for a carriageway to be a BOAT relates to its character or type and in particular whether it is more suitable for use by walkers and horseriders than vehicles”.
- 2.3 Yorkshire Moors Bottom Road south of Dole Road is maintainable at public expense, a fact North Lincolnshire Council accepted when it was added to the list of streets – the schedule of maintainable highways held under the Highways Act 1980 – in 1999. The way is, though, an unmade rural track. It has never been surfaced by the highway

authority. Its *character* is thus one of a quiet unmade rural lane *more suitable for use by walkers and horseriders than vehicles*.

- 2.4 The adding of Yorkshire Moors Bottom Road to the definitive map was not discretionary. The law requires North Lincolnshire Council to seek to modify the definitive map and/or statement on the discovery of evidence that a way not hitherto included subsists or is reasonably alleged to subsist.
- 2.5 However, all orders made to modify the definitive map and/or statement must contain a width. Crowle Town Council argued that the width was 66 feet and that the definitive statement should be modified accordingly. But the only reference to such a width that either North Lincolnshire Council or Crowle Town Council could find was the Crowle Inclosure Award 1823. North Lincolnshire Council felt that because the award set out Yorkshire Moors Bottom Road as a *private* rather than a *public* road, the width specified could not be taken to be the width of the highway it subsequently became.
- 2.6 On 21 November 2006 Crowle Town Council applied under section 53(5) of the Wildlife and Countryside Act 1981 to modify the definitive statement by introducing a width of 66 feet. The proposition was that the width was 66 feet and no other. North Lincolnshire Council declined the application, so Crowle Town Council appealed.

3. **OPTIONS FOR CONSIDERATION**

- 3.1 Note the decision letter.

4. **ANALYSIS OF OPTIONS**

- 4.1 Act according to the Secretary of State's directions.

5. **RESOURCE IMPLICATIONS (FINANCIAL, STAFFING, PROPERTY, IT)**

- 5.1 Financial
 - 5.1.1 From within the budget of the Environment Team.
- 5.2 Staffing
 - 5.2.1 From within the existing establishment.

6 **OTHER IMPLICATIONS (STATUTORY, ENVIRONMENTAL, DIVERSITY, SECTION 17-CRIME AND DISORDER, RISK AND OTHER)**

- 6.1 Statutory

6.1.1 Wildlife and Countryside Act 1981 (as referred to within this report).

6.2 Environmental

6.2.1 An up-to-date definitive map and statement benefit users and landowners alike by providing each with an accurate record of who may go where and by what means.

6.3 Risk

6.3.1 An order to modify the definitive statement could be objected to within six weeks of the making of the order's advertisement. Duly disputed orders cannot be confirmed by North Lincolnshire Council and must be referred instead to the Secretary of State. Should such an eventuality arise, a report detailing the situation and the options for dealing with it would be brought before Planning Committee at that time.

7. OUTCOMES OF CONSULTATION

7.1 Not applicable.

8. RECOMMENDATIONS

8.1 It is recommended that the Secretary of State's decision letter be noted.

Church Square House
SCUNTHORPE
North Lincolnshire
DN15 6XQ

Author: Colin Wilkinson
Date: 22 January 2009

Background Papers used in the preparation of this report:

SCANNED

defra

Department for Environment
Food and Rural Affairs

Mr C Wilkinson
Senior Public Rights of Way Officer
North Lincolnshire Council
Church Square House
PO Box 42
SCUNTHORPE
North Lincolnshire DN15 6XQ

National Rights of Way Casework Team
Citygate
Gallowgate
Newcastle upon Tyne
NE1 4WH

Switchboard: 0191 201 3300
Direct line: 0191 202 3641
Fax: 0191 202 3744

Email: Julie.HUME@gone.gsi.gov.uk

Your ref: NATROW/Y2003/529A/07/52

Our ref: CTW/15/21

Date: 14 January 2009

Dear Sir

**WILDLIFE AND COUNTRYSIDE ACT 1981
APPEAL UNDER PARAGRAPH 4(1) OF SCHEDULE 14
BY CROWLE TOWN COUNCIL AGAINST THE DECISION OF NORTH
LINCOLNSHIRE COUNCIL NOT TO MAKE AN ORDER UNDER SECTION 53(2)
IN RESPECT OF VARYING THE PARTICULARS WITH REGARD TO THE WIDTH
OF BYWAY OPEN TO ALL TRAFFIC (BOAT) 21, YORKSHIRE MOORS BOTTOM
ROAD, BETWEEN DOLE ROAD AND CROOK O'MOOR ROAD, PARISH OF
CROWLE**

1. The Secretary of State for the Environment, Food and Rural Affairs has considered the appeal under paragraph 4(1) of Schedule 14 to the Wildlife and Countryside Act 1981 made by Crowle Town Council on 28 June 2007 against your authority's decision not to make an Order modifying their Definitive Map and Statement for the area by varying the particulars of Byway Open to All Traffic (BOAT) 21, known as Yorkshire Moors Bottom Road, which is shown on the Annex B map which accompanies the Secretary of State's decision letter on the appeal, and which runs from its junction with Dole Road and extends in a generally south westerly direction to its junction with Crook O'Moor Road, so that its width is given as 66 feet (as opposed to its 7.5 metres definitive width).
2. The Secretary of State, having considered the appeal, considers that an Order should be made. A copy of the letter to [REDACTED] Crowle Town Council, is attached.
3. Accordingly the Secretary of State, under the powers contained in paragraph 4(2) of Schedule 14 to the Wildlife and Countryside Act 1981 and of all other powers enabling him in that behalf, hereby directs North Lincolnshire Council to make an Order under Section 53(2) of, and Schedule 15 to, the 1981 Act to modify the Definitive Map and Statement for the area, as proposed in the application of Crowle Town Council of 21 November 2006.



DEFRA



4. I would be grateful if the Council would notify this office when an Order has, in compliance with the direction, been made.

Yours faithfully



JULIE HUME

Authorised by the Secretary of State for
the Environment, Food and Rural Affairs
to sign in that behalf

Enc:

defra

Department for Environment, Food and Rural Affairs

[REDACTED]
Crowle Town Council

National Rights of Way Casework Team
Citygate
Gallowgate
Newcastle upon Tyne
NE1 4WH

Switchboard: 0191 201 3300
Direct line: 0191 202 3641
Fax: 0191 202 3744

Email: Julie.HUME@gone.gsi.gov.uk

Our ref: NATROW/Y2003/529A/07/52
Date: 14 January 2009

Dear Sir

**WILDLIFE AND COUNTRYSIDE ACT 1981
APPEAL UNDER PARAGRAPH 4(1) OF SCHEDULE 14
BY CROWLE TOWN COUNCIL AGAINST THE DECISION OF NORTH
LINCOLNSHIRE COUNCIL NOT TO MAKE AN ORDER UNDER SECTION 53(2)
IN RESPECT OF VARYING THE PARTICULARS WITH REGARD TO THE WIDTH
OF BYWAY OPEN TO ALL TRAFFIC (BOAT) 21, YORKSHIRE MOORS BOTTOM
ROAD, BETWEEN DOLE ROAD AND CROOK O'MOOR ROAD, PARISH OF
CROWLE**

1. I am directed by the Secretary of State for the Environment, Food and Rural Affairs to refer to the appeal of Crowle Town Council made under Section 53(5) of, and Paragraph 4(1) of Schedule 14 to, the Wildlife and Countryside Act 1981 against the decision of North Lincolnshire Council not to make an Order modifying their Definitive Map and Statement for the area by varying the particulars of Byway Open to All Traffic (BOAT) 21, known as Yorkshire Moors Bottom Road, which is shown on the attached Annex B map and which runs from its junction with Dole Road and extends in a generally south westerly direction to its junction with Crook O'Moor Road, so that its width is given as 66 feet (as opposed to its 7.5 metres definitive width).
2. An Inspector, Susan Doran BA Hons MIPROW, has carefully considered all the submissions made with regard to this appeal and has submitted her report to the Secretary of State. A copy of the Inspector's report is attached as Annex A to this letter. The case for Crowle Town Council as the appellant and the case for North Lincolnshire Council are set out in paragraphs 6 to 31 and 32 to 49, respectively, of the inspector's report. Third party submissions of Mr J Carney are set out at paragraphs 50 to 55. The Inspector, whose conclusions are set out in paragraphs 56 to 72 of her report, has recommended, at paragraph 73, that the appeal be allowed.

3. The Secretary of State agrees with the Inspector's conclusions and accepts her recommendation. Having taken all the arguments and representations presently before him into account, the Secretary of State has reached the view that an Order should be made. Therefore in accordance with the provisions of paragraph 4(2) of Schedule 14 of the Wildlife and Countryside Act 1981, he has directed North Lincolnshire Council to make an Order, under Section 53(2) of, and Schedule 15 to, the Act modifying the Definitive Map and Statement for the area by varying the particulars of the width of BOAT 21, Yorkshire Moors Bottom Road, to that of 66 feet as proposed in the application of Crowle Town Council dated 21 November 2006. This decision is given without prejudice to any decision that may be given by the Secretary of State in exercise of his powers under the said Schedule 15.

4. A copy of this letter has been sent to North Lincolnshire Council.

Yours faithfully

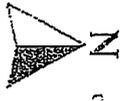
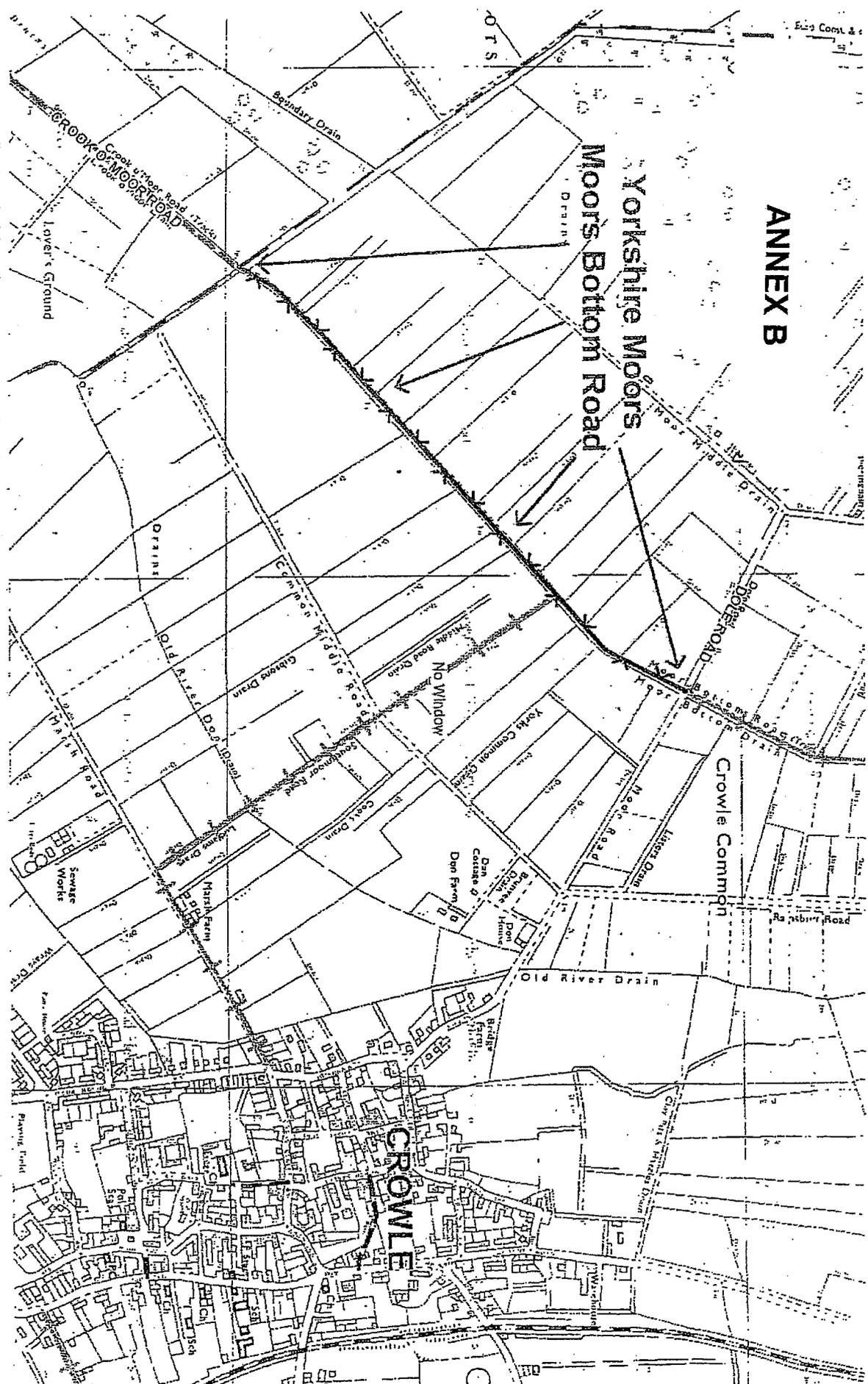
A rectangular area containing a blacked-out signature, likely of Julie Hume, as indicated by the text below.

JULIE HUME

Authorised by the Secretary of State for
the Environment, Food and Rural Affairs
to sign in that behalf

Enc:

ANNEX B



Based upon the Ordnance Survey map with the permission of
Ordnance Survey on behalf of the Controller of Her Majesty's Stationery Office.
(Unauthorized reproduction infringes Crown Copyright
and may lead to prosecution or civil proceedings.)

NORTH LINCOLNSHIRE COUNCIL 100013349 2007

Drawing Title: title_text
Drawn by: CTW
Scale: 1:10,000

Date: 2 May 2007
OS Grid Ref: grid_text



Highways and Planning Service
Head of Service,
G Popple

The Ordnance Survey map data included within this publication is provided by North Lincolnshire Council under license from Ordnance Survey in order to fulfil its public function to act as a highway and planning authority. Persons viewing this mapping should contact Ordnance Survey copyright for advice where they wish to license Ordnance Survey map data for their own use.



Report to the Secretary of State for Environment, Food and Rural Affairs

by Susan Doran BA Hons MIPROW

The Planning Inspectorate
4/11 Eagle Wing
Temple Quay House
2 The Square
Temple Quay
Bristol BS1 6PN

☎ 0117 372 6372
email: enquiries@plns.gsi.
gov.uk

an Inspector appointed by the Secretary of State for Environment, Food and Rural Affairs | Date: 20 March 2008

WILDLIFE AND COUNTRYSIDE ACT 1981

REPORT INTO AN APPEAL BY

CROWLE TOWN COUNCIL

AGAINST THE DECISION OF

NORTH LINCOLNSHIRE COUNCIL

NOT TO MAKE AN ORDER UNDER SECTION 53(2)

IN RESPECT OF

VARYING THE PARTICULARS WITH REGARD TO THE WIDTH OF
BYWAY OPEN TO ALL TRAFFIC 21, YORKSHIRE MOORS BOTTOM ROAD,
BETWEEN DOLE ROAD AND CROOK O'MOOR ROAD, PARISH OF CROWLE

Case Details

- This appeal is made by Crowle Town Council under Schedule 14 Paragraph 4(1) of the Wildlife and Countryside Act 1981 against the decision of North Lincolnshire Council not to make a modification order under Section 53(2) of that Act.
- The application dated 21 November 2006 was refused by notice dated 19 June 2007.
- The appellant claims that the width of Byway Open to All Traffic ("BOAT") 21 Crowle, given as 7.5¹ metres in the County of Lincoln - Parts of Lindsey (Isle of Axholme) Definitive Statement, should be modified to 66 feet².

Recommendation: I recommend that the appeal is allowed

Preliminary Matters

1. I have been appointed to report to the Secretary of State for Environment, Food and Rural Affairs on the above mentioned appeal made in accordance with Paragraph 4 of Schedule 14 to the Wildlife and Countryside Act 1981 ("the 1981 Act").
2. The evidence in this case comprises documentary evidence. I am satisfied that I can make a recommendation on the appeal without a site visit.
3. This report consists of a description of the route, the material points made in submissions, my conclusions based on an assessment of the evidence against the relevant criteria, and a recommendation.
4. I have reported on submissions made subsequent to the original appeal papers and circulated to the parties for comment.

Description of the Route

5. The route, known as Yorkshire Moors Bottom Road ("the Road"), commences at its junction with Dole Road (OS grid ref. SE 7623 1388) and proceeds in a generally south westerly direction to its junction with Crook O'Moor Road (OS grid ref. SE 7538 1302).

The Case for the Appellant

The material points are:

6. Confirmation of the Order adding the BOAT to the Definitive Map and Statement in 2005³ resulted in a reduction of the Parliamentary awarded width of the Road from 66 feet to a maximum of 24 feet.
7. With a maximum width of 24 feet and no mention in the Order of a minimum width, landowners have further encroached upon the Road.
8. The Application relied on the following evidence,

¹ About 24.6 feet

² About 20.12 metres

³ Planning Inspectorate order decision reference FPS/Y2003/7/5

- the Crowle Inclosure Award which set out the parcels of land to the immediate west of the Road, with a prescribed boundary to be maintained thereafter
- a photograph of a boundary marker post (in situ) set out by Humberside County Council during the 1970s at a distance of 66 feet from the Bray of Moor Bottom Drain
- a letter from the Planning Inspectorate confirming the Inspector (in reaching his decision on the Order) did not have authority to overturn Parliamentary Awards

Summary of the Appeal⁴ and additional comments submitted during the Appeal process

9. The General Inclosure Act of 1801 and the Crowle Inclosure Act of 1813 direct that the 1822 **Crowle Inclosure Award** is final, binding and conclusive, and is legal evidence in all courts. The orders of the Commissioners as to the width of the Road and the maintenance of the boundary fences had the full authority of Parliament behind them.
10. The validity of the Crowle Inclosure Award was tested in the High Court in 1976 and found by the Judge to be good. He said the courts would "uphold long-standing awards if they were unchallenged at the time". The width of the Road was not challenged at the time and was therefore approved by the adjoining allottees having the right of appeal. It may be presumed that all roads directed to be set out and awarded by the Commissioners were set out to their awarded widths between 1816 and 1822.
11. When directing that roadside fences be maintained forever, the Commissioners were following the requirements of the 1801 Act - these remain binding today. The Award Map was approved by the allottees. It confirms the Road's name and that it is 66 feet wide. It confirms its position within Crowle and by inference that it was intended to be a thoroughfare linked with Crowle to the east and Crook O'Moor in Thorne to the south-west. The Award in effect set out private roads to be used by the inhabitants of the whole township: all the inhabitants of Crowle had an established right to dig and carry away peat from the Yorkshire Moors before the Crowle Inclosure Act was passed, as confirmed by the Thorne Inclosure Act 1811. Thus, the inhabitants of Crowle constituted the public of the locality. In the *Dunlop*⁵ case it was held if the class of persons entitled to use a private road is large enough they are indistinguishable from the public at large. Therefore, *Dunlop* has no application here.
12. The Award Map also confirms, by a series of 'T' marks alongside the Road boundary, that the allottees were required to make and maintain a living fence (i.e. a hawthorn hedge).

⁴ Legal submissions regarding the appeal are made by Mr C Seymour on behalf of Crowle Town Council. He states that he has a personal legal interest in the matter. Mr Seymour relies on his submission 13 August 2007 and only where specifically mentioned in it, on his submission of 27 May 2005. Additional submissions have been made by the Town Council.

⁵ *Dunlop v Secretary of State for the Environment and Cambridgeshire County Council* QBD [1995] 94 LGR 427

13. The First Edition **Ordnance Survey** ("OS") map (surveyed 1819-1822) confirms the fences alongside the northern boundary of the Road had been made as directed. The Deposited Plan for the Axholme Railway confirms that these fences were still in position in 1846 when the Road was considered to be a Public Road. These are good evidence it was set out and fenced as awarded.
14. The **Railway Act of 1848** was a Public Act and its provisions were afforded careful public scrutiny than otherwise would have been the case. Its provisions cannot be disputed or challenged today. Although never built as proposed, the matters contained in the Act are conclusive as to the status of the roads referred to. There was scope for changes to be made during the various processes the scheme went through, thus time for anything in the Book of Reference to have been amended by Parliament. Whilst the Book of Reference states certain roads were "Occupation Road", the Road was shown on the Deposited Plan as parcel number 119 which Section 11 of the Act states was a "Public Road". The Railway Company would not have been prepared to have gone to the additional expense if the roads to be crossed were not considered to be public roads before the Act was passed. There existed in the Crowle area at this time a type of road known as a "Public Occupation Road" which it was lawful practice for the Surveyor of Highways to repair, so there is nothing unusual in the Deposited Railway Plans stating "Occupation Road" and the Act of Parliament stating "Public Road". The statute takes precedence over the contents of Deposited Plans and the Book of Reference prepared earlier for that Act, and is conclusive. It is the earliest evidence of the Road as a public road.
15. The Act further confirms that other roads which connected the Road with the Township of Crowle were also public roads notwithstanding that they were also awarded as private roads.
16. The Book of Reference confirms several of the original allottees of 1822 survived in 1846 (when the Bill was prepared and presented to Parliament). This raises the presumption that the fences they were ordered to maintain still survived and bounded the road as shown on the Deposited Plan. Therefore the awarded width must still have been intact 24 years after the Award was made.
17. It further confirms that the Constables of Crowle retained their legal interest in the Road which was originally awarded by the Commissioners. Parish Constables were statutory officers responsible for presenting "all defects of highways and bridges", and ensuring assessments for the repairs of highways were collected from those persons on whom the liability rested by reason of statute, tenure, prescription or inclosure. The post was longer term than that of Surveyor of the Highways who was appointed annually and thus provided more continuity. They must have had a good knowledge of highway law and have been aware at the beginning of the 19th Century that many so-called private roads were in use by the public as highways. They were not concerned with strictly private matters affecting individuals or groups of individuals. Because they were ordered to keep the Road in repair, the inference arises it was a public possession for the use and enjoyment of the whole parish. By 1846 not only were the Constables responsible for the support and repair of the Road, but were also recorded as owners of the soil. They must have been aware of the difference between strictly private roads and those that were highways, otherwise they would have objected to inclusion of the route as a public road in

the 1848 Railway Act. Their ownership of the Road continued until the Local Government Act 1894 vested the property of the Vestry in the Parish Council.

18. The railway documents support the inference from other evidence that the Road was used by the local inhabitants as a thoroughfare and highway from when it was set out in lieu of the former ways across the Yorkshire Moors. If the Road was a public road by 1846, given the circumstances and its location, it must have been a highway before that time. The railway documents did not create the public roads they merely recorded their status and existence. Once it was accepted that the Road was no longer a private road but was a public road, the awarded width could not be diminished except by lawful means.
19. As well as accessing allotments it served the northern end of Crowle and its farmsteads as a route to the goods and passenger railway station at Medgehall.
20. A comparison of the 1910 Finance Act and a recent sales document for a parcel of land abutting the Road shows the land parcel has increased in size.

Conclusions

21. As there is no evidence to the contrary, it must be concluded that the statutory width of the Road is 66 feet between and exclusive of the ditches (or where they should be).
22. The evidence of the Inclosure Acts and Award is binding and conclusive. Therefore, as no legal event⁶ has taken place since the Road was awarded in 1822 to alter or diminish the statutory width of 66 feet that width remains the lawful width.
23. The roadside fences which were ordered to be made and maintained in 1822 were still in position in 1843. Therefore, if the Road was originally 66 feet wide it remained the same width when Parliament recognised it as a public road.
24. Once accepted to be a public road, it remained a public road and any encroachment or diminishment became unlawful (notwithstanding whether or not it was unlawful before that time).
25. As it was considered to be a public road in 1848, the inference arises that it was a highway before this date, and, in all probability, had been used by the public of the locality as a thoroughfare from the moment it was set out.
26. The liability to support and repair the Road was placed upon the Constables of the Township. By 1846 they were also regarded as the owners of the Road. As the Constables were public officers, they were not concerned with private matters. Therefore, their legal interest in the Road adds weight to the presumption that from 1822 onwards, the Road was a public highway. In the terms of the law at that time it was in fact a "Private Highway".
27. The roadside fences were ordered to be maintained forever. As the courts have declared, any removal of roadside hedges required by statute to be so

⁶ A member of the Town Council who researched the Quarter Sessions records found no evidence of an Order reducing the Road's width. Evidence was found of an action in 1885 concerning private carriage roads which it is said shows the local highway authority had a statutory duty to repair and maintain private carriageways

maintained is unlawful. Therefore, the present encroachments upon the awarded width of the Road have no lawful foundation.

28. The leading case on the requirement to maintain Inclosure fences is *Garnett v Pratt* (1926) All ER. It states, "It seems to me that it would be extraordinary if, after he (the Commissioners) had directed the fences to be erected, the person on whom he had laid that obligation could, the moment after he erected, have pulled them down...or let them go into decay so that after a few years they would be useless. If that were true the Acts would be a farce"⁷.
29. The acknowledged maxim applies, "Once a highway, always a highway."
30. North Lincolnshire Council ("the Council") was acting *ultra vires*⁸ when it resolved to defend existing boundaries rather than to seek to establish ancient boundaries.
31. At the very least, the word "maximum" (with regard to width) should be removed from the Definitive Statement.

The Case for North Lincolnshire Council

The material points are:

32. The appeal must be considered under Section 53(3)(c)(iii) of the 1981 Act, the modification of particulars contained in the map and statement, the particular being the width described in the statement. Furthermore, the decision should turn "on the balance of probability" and crucially "he who asserts must prove".
33. The only known reference to a width of 66 feet that carries legal force is the Crowle Inclosure Award 1823. It sets out the route as a "Private Carriage Road". As an Award to which the General Inclosure Act 1801 applied, to determine whether this referred to a route over which the general public had a right of way, the judgement in *Dunlop* must be taken into account. Therefore, unless those to whom the Award gave licence to use the route were sufficiently numerous as to be indistinguishable from the public at large, the award must not be taken to confer highway status.
34. What happened in terms of the route becoming public at a later date is immaterial so far as determining its width as a highway from the Award. Only boundaries set out with reference to a highway can be taken as highway demarcations.
35. BOAT 21 presently has a width of 7.5 metres. The question is what evidence has been discovered that makes it more probable than not its width is 66 feet. The application relates to no other width.

Summary of the appeal response⁹ and additional comments submitted during the Appeal process

36. It is necessary to construe from the evidence adduced that on the balance of probability it was more likely than not the **Crowle Award** set out the Road as

⁷ As cited in *Seymour v Flamborough Parish Council*, [1997] HC 969-ii 1997-98 p.40-47

⁸ Beyond the authority conferred by law

⁹ The Council states this is made in response to the Appellant's submissions of 27 May 2005 and 13 August 2007

a highway, if that highway is to be taken to have a width of 66 feet. Or, it must be more probable than not that the boundaries the Appellants contest existed when highway status was attained are the same as set out under the Award. Otherwise the contention must fail because there is clear evidence that by 1890 the width of the Road was akin to that today, and certainly by 1910 to 1920 when the Finance Act 1910 maps were compiled. This width at around 24 feet is substantially less than 66 feet. There is no evidence for a width of 66 feet post-Award. "Once a highway, always a highway" only applies to highways, not to private roads. The Appeal is not about establishing the most appropriate width for BOAT 21, but whether the Council should be directed to make an order substituting the current 7.5 metres for 66 feet (or its metric equivalent). It is accepted the Road became a highway but it cannot be said when that was.

37. The relevance of the *Dunlop* ruling in terms of who could use a private carriage road is the key factor - arguably the matter rests on this. There were about 184 allottees under the Award. The population of the Parish of Crowle was 1,961. Not all the allottees lived in the Parish (as the Thorne Electoral Roll 1861 shows). The definition of user was such that the use was "exclusive"; one had to be an owner or occupier, and the land owned or occupied had to be part of an ancient inclosure or allotment. The Act specifies the owners and proprietors were entitled to rights of common. Having a right of common is not the same as having ownership or occupancy. The owners of estates in Eastoft were not entitled to rights on Crowle and Ealand Commons. Therefore, owners and occupiers cannot embrace all inhabitants of the parish of Crowle of which the township of Eastoft was a part. The wording is not synonymous with the inhabitants at large. If the Award had granted use of the private roads to the inhabitants at large (and surely it would have said so), then the proviso in *Dunlop* (paragraph 33 above) would have been met. However, there is no evidence of this: how can anything exclusive (i.e. the owners and occupiers) be inclusive (i.e. the inhabitants at large) when only a minority of the inhabitants of Crowle would at that time have owned or occupied land. These were occupation roads. Awards commonly used a generic definition to cover all those for whom use of private roads was intended, generally those with the need to access land.
38. The Appellant contends that private roads were highways. However, the Award and its enabling legislation distinguish between public and private roads in terms of maintenance and usage. They are clear, for example, "And we do hereby order and direct that all the Public Roads by us hereby awarded shall for ever hereafter be repaired in such the same manner as the other public roads in the same Townships are now repaired"¹⁰. Whereas, "And we do order and direct that the several Private Roads by us set out and awarded shall from time to time and at all times hereafter be supported and kept in repair by the Constables for the time being of the respective Townships of Crowle and Eastoft and paid for by the Owners and Occupiers of Lands included in the Schedule hereunto annexed intituled A Schedule of Lands Liable to the repair of Private Roads"¹¹.

¹⁰ Page 17 of the Crowle Inclosure Award 1823

¹¹ Page 25 of the Crowle Inclosure Award 1823

39. Section 8 of the General Inclosure Act 1801 "set out and appoint[ed] the publick Carriage Roads and Highways". Section 9 dealt with the appointment of surveyors to maintain the public carriage roads. Section 21 of the Crowle Inclosure Act 1813 provided for allotments "for the Purpose of getting Sand or other Materials for the Repairs of the several public Highways within the said several Townships of Crowle, Eastoft and Ealand respectively". Thus, "And in further pursuance of the said recited Acts and according to the directions thereof We set out and allot the award unto the Surveyors of the Highways of the Township of Crowle for the time being for the purpose of getting material for the repairs of the Highways in the same Township"¹². There are no such allotments for the repair of the private roads or with regard to the produce (herbage) of public roads, and the definition "publick Carriage Roads and Highways" and of private roads appears to be self-explanatory.
40. Public roads had to be at least 30 feet wide (Section 8, General Inclosure Act 1801). *R v Secretary of State ex parte Andrews* (1993) ruled that the fact footpaths were set out under Section 10 of the 1801 Act, the same section under which private roads were, meant where awards had set out new footpaths under the 1801 Act, they had done so illegally. Such footpaths could not be public by virtue of the awards that purported to create them. Similarly, therefore, any road set out in an award to less than 30 feet could not have been public either, because public roads could not be less than that. However, every road leading to the Yorkshire Moors Bottom Road was only 24 feet wide. Nor is there any distinction within the Award between private roads of one width as opposed to those of another. They are all private and all have the same purpose to access land that has been allotted and awarded. Only the public roads are thoroughfares to other destinations such as neighbouring villages. This was reinforced in *Dunlop*. The Road was and is a cul-de-sac.
41. Public roads of the parish were the responsibility of the Surveyor of Highways. Whereas the Constables performed a variety of tasks e.g. maintaining law and order, they were not responsible for the maintenance of the public roads. That they had knowledge of or a legal interest in the public roads has nothing to do with conducting public maintenance. They were specifically responsible for the private roads, being charged with responsibility for and maintenance of private or occupation roads on behalf of owners and occupiers. Indeed the last 2 private roads listed in the Award were not highways, yet these were the responsibility of the Constables. The Appellants have not reconciled this with the other private roads or with *Dunlop*. Nor are they able to point to any example of an indisputably public road that the Constables maintained (e.g. a road described as public in the Award). If the private roads had been public, responsibility for them would have fallen to the Surveyor of Highways.
42. The roadside fences might have to be maintained in perpetuity, but enforced by whom. The *Flamborough* ruling does not give *locus standi*¹³ to inhabitants unless the fences border a highway. Based on current records (the definitive statement) the fence-line as was is approximately 41.5 feet from BOAT 21. There could have been an order made at any time reducing the width. It is not known whether the Appellants have checked the Quarter Sessions Minute

¹² Page 27 of the Crowle Inclosure Award 1823

¹³ The right to be heard in court or other proceedings

Books for evidence of this. After all, the width of the Road is more or less a uniform 7.5 metres throughout its length. (Although it is more likely that the width was already reduced before highway status was gained.)

43. The Council is not aware of the existence of an 1862 Inclosure Award (paragraph 53 below) and does not believe such an award exists.
44. The Appellant relies on the **Railway Act 1848**. However, this is suggestive of status by reputation rather than conclusive and there is nothing within the Act or the deposited plans indicative of width. The Appellants cannot possibly be sure the fences set out under the Award were still in situ. The Book of Reference describes the Road as an occupation road and lists owners or reputed owners. These were the Constables who would not be responsible for highway maintenance, suggesting it was not a highway. There are other anomalies e.g. occupation roads part owned by the Surveyor of Highways. The term public occupation road existed in Thorne, but the Road was in Crowle and it was maintained by Crowle, not Thorne.
45. There are strong indications that the present width was the same in 1890. The **OS County Series Map 1:2500 First Edition 1890** is indicative, especially when the areas it shows for the enclosures abutting the Road are compared with the allotted areas under the Award¹⁴. The roads are representational so cannot be measured accurately. However, a visual comparison of the Award and OS maps suggests the difference between the awarded width and that which can be measured is great – by 1890 there was no width of 66 feet, it was about half that which had been intended. The allotments had enlarged some time between 1823 and 1890, thus by the time it became a highway the width had diminished. The 1890 width corresponds with that on the ground today.
46. The 1824 OS map is a composite document embodying material from a succession of dates, based on a survey of 1819-22 but extensively revised prior to publication. It cannot be relied on to show what physical features existed in 1824 since it was added to throughout the 19th Century.
47. The 1906 OS name book is the earliest reference to the Road as public.
48. The **1910 Finance Act** map leaves the Road uncoloured, suggesting it was regarded then (some time between 1910 and 1920 when the Act was repealed) as being public. But the coloured hereditament plots alongside are evidence for the by then enlarged (by comparison with the Award) enclosures belonging to their owners rather than the highway having been encroached upon. Evidence of a reduction in width from 1910 onwards is not relevant.
49. The evidence and caselaw do not favour the Road having been awarded as a highway. The only evidence of its width comes from the Inclosure Award. If it was not a highway in 1823, there is no subsequent evidence that proves a width of 66 feet when it attained highway status, when its boundaries were altered after the Award.

¹⁴ The Council provides calculations which show that all the awarded allotments had increased in size slightly by 1890.

Third party submissions

50. Mr J Carney submitted extracts of documentary evidence in support of his claim that the Road has been a highway maintainable at public expense for over a hundred years. I summarise the main points as follows.
51. The named individuals in the Inclosure Award were those sponsoring it. The words "exclusive use of owners and occupiers of old Inclosure" covered all the inhabitants, as every one of the inhabitants lived on old enclosure (it was copyhold land).
52. The Inclosure Award and Plans were enrolled at Quarter Sessions in 1823. The Surveyor and Commissioners swore under oath that the allotments bounded by fences and ditches and the roads and drains were set out on the ground. The Justices of the Peace certified the Award as required by the 1801 Act that the roads had been properly made. The schedule of lands was to be maintained by the Constables (a public office). They were instructed to collect the rates to maintain the private roads set out under the Award. There is no evidence that any roads set out in the Award were to be maintained by a private body. The Road was awarded in 1823, dedicated to the public and maintained by the Township.
53. In 1862 the Parish of Crowle undertook a second Inclosure, enrolled at Quarter Sessions in 1863. The Award plan¹⁵ shows the Road was not a cul-de-sac. Furthermore, it shows the Road at one chain in width i.e. 66 feet.
54. From 1824 to 1865 (the formation of Crowle Sanitary and Highway Board) the Crowle Vestry Committee set one rate for the maintenance of all the highways in the parish. In the Local Boards Minute Book are the 1878 Railways Locomotive Act returns to Lindsey Council. The Road is classed as a public highway maintained by the Crowle Board. The Isle of Axholme Rural District Council List of Highways Maintainable at public expense 1953 lists the Road. It was indicated as an unsurfaced road on the Lindsey County 'A' Map.
55. The Council's calculations of field sizes (with respect to the reduction of the Road's width) do not take account of warping (levelling of the land).

Conclusions

Introduction

56. In considering the evidence and submissions, I take account of the relevant part of the 1981 Act and to court judgements as referred to by the parties, reference being given (in square brackets) to earlier paragraphs where appropriate.
57. The application was made under Section 53(2) of the 1981 Act which requires the surveying authority to keep their Definitive Map and Statement under continuous review, and to modify them upon the occurrence of specific events cited in Section 53(3). In this case, the variation to a width is dealt with in Section 53(3)(c)(iii) which provides that an Order should be made on the

¹⁵ The extract provided cuts the wording short but the title reads "Plan of Lands and Works in the Parishes of (missing 'C')rowle, Luddington Belt (missing letters) Adlingfleet and Althorpe referred to in the description of the drainage works set out by the Commissioner' signed Makin Durham and dated 13th(?) September 1862

discovery of evidence which when considered with all other relevant evidence available shows "any other particulars contained in the map and statement require modification".

58. In considering the evidence, my recommendation is reached on the balance of probability. I make no comment in respect of the claimed encroachment of the route as raised in submissions. Nor do I comment on the manner in which the matter has been conducted by the parties.
59. A full copy of the Crowle Inclosure Award has been provided. For much of the other evidence referred to by the parties, extracts of documents have been produced.

Assessment of the evidence

60. The Crowle Inclosure Award was based on the 1801 General Inclosure Act [9,33,39,40]. The Award set out the Road as a "Private Carriage Road" having a width of 66 feet [33], to be "supported and kept in repair by the Constables" [26,38]. I consider the issue here turns on the interpretation of the term 'private carriage road' and on the role of the Constables.
61. The preamble to the Award names the "Owners and Proprietors" of the ancient lands to be inclosed, who were entitled to rights of common over the land to be inclosed. The Award further states that all the private roads set out and awarded were for the "exclusive use of the Owners and Occupiers of ancient inclosures and allotments" in the Parish of Crowle [37].
62. It is suggested that the inhabitants of Crowle had a pre-existing right to access the common with vehicles as conferred by the 1811 Thorne Inclosure Award [11]. An extract from the Thorne Award states that Crowle Moors were not to be inclosed. Therefore, it is asserted the Road was for the use of the inhabitants of the parish, and thus the term 'private carriage road' in this case meant for use by the public, a 'private highway' in effect.
63. This, it is claimed, is supported by the fact the Road was to be maintained by the Constables who held a public office [17,26,41] and thus the Road must have been public: the reference to private referring to maintenance rather than status. Furthermore, it is argued the Road as set out by the Commissioners at the specified width was to be fenced and those fences be kept in repair forever [11,12,27,42].
64. The Award does appear to distinguish between the use of public and private roads, and states the maintenance of the former was to be in the same manner as the other public roads in the Township, and of the latter by the Constables [38]. It is not disputed by the parties that the Constables were public officials; and they appear to have been charged with responsibilities for the private roads, but funded by the owners and occupiers. However, it seems to me that the issue turns rather on who was entitled to use the Road, and whether or not they constituted the public, such that if that were so it could be concluded the Road set out was awarded for public use, and thus its width determined as that awarded in 1822. In my view, and having regard to the judgement in *Dunlop*, the Award specifies those entitled to use the Road in such a way that suggests use was restricted to a particular group of people, a point in favour of the

Council's case. It is unlike the extract supplied from the Thorne Award which specifies a broad category, the tenants, commoners and inhabitants of Crowle who maintained a right of common. I do not consider that it can be concluded from the evidence available to me that a 'public' interpretation can be applied to the Road set out in the Crowle Award. The term 'private carriage road' does not itself confer or infer a public right of passage by vehicle.

65. Notwithstanding how the term 'private' is interpreted, the Council accepts that the Road became public [36], indeed it was added to the Definitive Map and Statement as a BOAT in 2005 [6]. In determining the width of the Road, I consider the issue is, if it cannot be interpreted that the Road was awarded as public, when did it achieve public status, and what evidence is there for its width at that time.
66. The Award set out the Road as 66 feet wide in 1822. There is no subsequent evidence of any legal event to reduce the width of the route either from the awarded width or any other width [22].
67. The Council considers that the Road had achieved public status around the early 1900s as evidenced by reference to it as a public road in the OS name book [47] and later exclusion from land parcels in the Finance Act records [48]. In terms of the Road's width the Council points to the 1880 OS map [36] from which they deduce the Road had acquired a width similar to that recorded in the Definitive Statement (24.6 feet or 7.5 metres).
68. Whilst the 1906 document is good evidence of the reputation of the Road as public at that time, there is earlier evidence to be considered. The Appellants rely on the 1848 Railway Act which describes the Road as public, notwithstanding that earlier in the process the Book of Reference recorded it as an occupation road [14]. Deposited documents were in the public domain. The status of a way had an impact on the cost of the scheme and it is unlikely railway plans would show a route at a higher status than was actually the case. I consider this is good evidence in support of the Appellant's case that the Road was considered to be a public highway at that time.
69. There is no scale on the Railway plan extract provided so it is not possible to determine the Road's width from it. It is known that some of the original allottees from the time of the inclosure occupied land adjacent from which the Appellant infers the awarded width would have been retained [16]. Indeed, the plan confirms the fences were in place in 1846 [13].
70. A Drainage Plan dated 1862 submitted by an interested party is said to be a second inclosure award [53] but this is disputed by the Council. Nevertheless, whatever its purpose, the extracts provided depict the Road. The Plan has a scale of 12 chains to one inch, a chain being a measurement of 66 feet. It is stated that the Road is depicted as a chain in width and whilst I am unable to verify this with accuracy from the extracts provided, which do not appear to be at scale, this has not been disputed by the Council. The Plan lends weight to the Appellant's view that the Road's width had been maintained by the allottees between the time of inclosure and the 1848 railway documents.
71. On the available evidence and on the balance of probability, I conclude that the evidence weighs in favour of the Appellant's case that the Road had the status

of a public highway by 1848 at which time its width was 66 feet as awarded, and this width would have been available to the public. It follows that I consider the provisions of Section 53(3)(c)(iii) have been met and an order should be made.

Overall Conclusion

72. For the reasons given above, I conclude that North Lincolnshire Council was not justified in their decision.

Recommendation

73. I recommend that the appeal should be allowed.

S M. Doran

Inspector