

NORTH LINCOLNSHIRE COUNCIL

Planning Committee

RESTRICTED BYWAY 150, WROOT

1. OBJECT AND KEY POINTS IN THIS REPORT

- 1.1 To decide what to do next with a definitive map modification order that was duly challenged when it was advertised as made.
- 1.2 The key points are:
 - a) the order seeks to modify the definitive map and statement by upgrading from bridleway to restricted byway two connecting unmade lanes in Wroot; and
 - b) two objections have been lodged – one opposing the order outright; the other supporting the order in principle, but wanting the widths within it more clearly defined.

2. BACKGROUND INFORMATION

- 2.1 On 10 September 2008 Planning Committee instructed that an order be made under section 53 of the Wildlife and Countryside Act 1981 upgrading Thatch Carr Bank and Misson Bank on the “County of Lincoln, Parts of Lindsey (Isle of Axholme)” definitive map and statement on the basis of historical evidence supplied by Tim Hart, Senior Definitive Map Officer at Nottinghamshire County Council. Mr Hart’s accompanying application had sought to add the lanes to the definitive map as a byway open to all traffic. However, members took the view that changes in the law in the form of the enactment of the Natural Environment and Rural Communities Act 2006 meant that the correct status was now restricted byway. Mr Hart has not challenged this view. It is assumed, therefore, that he understands why members came to this decision and is satisfied that they were right to do so.
- 2.2 The order (see Appendix One) was made on 14 January 2009 and advertised on site and in the Scunthorpe Telegraph on 16 April 2009. Site notices were maintained until after the closing date for objections and representations on 29 May 2009.

- 2.3 The two objectors are: (1) John Carney, 38 Lindsey Drive, Crowle; and (2) the Byways and Bridleways Trust (BBT), Newcastle upon Tyne, an organisation and statutory consultee for orders made under the Wildlife and Countryside Act 1981 that campaigns nationally for more and better access to public rights of way for off-road motorists, drivers of horse-drawn vehicles and cyclists. Mr Carney believes the two lanes are public carriageways intended primarily for motor vehicles that should be maintained accordingly. Such a public carriageway is not a public right of way. Only public rights of way are recorded on a definitive map (and statement, the map's accompanying written schedule). He therefore does not want the order to be confirmed (i.e. brought into effect) because he thinks this would be legally wrong. Whereas the BBT express support for the order in broad terms, but on the condition that the order is modified so that the widths of the lanes set out within are depicted with greater precision.
- 2.4 Members ruled at their meeting on 10 September 2008 that if objections to the order were duly lodged they would receive a further report before determining what, within the parameters of the law, they would like to happen to the order next.

3. OPTIONS FOR CONSIDERATION

- 3.1 To send the order to the Secretary of State (for the Environment, Food and Rural Affairs) with a recommendation that the order be confirmed as made.
- 3.2 To send the order to the Secretary of State with a recommendation that the order be confirmed subject to certain specified modifications.
- 3.3 To send the order to the Secretary of State with a recommendation that the order not be confirmed.

4. ANALYSIS OF OPTIONS

- 4.1 Only the Secretary of State can confirm an order in respect of which there remain duly served objections unless those objections are formally withdrawn. Mr Carney was written to on 11 June 2009 inviting him to withdraw his objection. However, he has so far declined. There is little point in lobbying BBT to withdraw if Mr Carney remains steadfast. Moreover, the BBT objection is not necessarily unreasonable.
- 4.2 What BBT are saying is that while the order specifies a width ranging from 4.5 metres to seven metres, this does not make clear where along the route the variation in width takes place. This could be overcome if the Secretary of State were to modify the order map so as to illustrate

the width variation by way of grey shading along the course of that length. This manner of illustration is a way of showing variable widths in public rights of way orders suggested by the Department of the Environment, Food and Rural Affairs ("*Non-Statutory Guidance on Recording of Widths in Public Path, Rail Crossing and Definitive Map Modification Orders*", 12 February 2007). However, once the order has been sent to the Secretary of State, such a modification will be entirely at his discretion.

- 4.3 Unlike BBT, Mr Carney thinks the order should never have been made. He says "the order route is not a public right of way, it is part of the highway network". He also states that what he calls *full highways* "are still being change to Rights of Way, i.e (Easement over private land)" [sic]. He makes allegations, too, to the effect that North Lincolnshire Council are downgrading highways to avoid maintaining them and in so doing are acting outside the law. For example: "If NLC do not need to maintain this way as part of the highway network an application to the magistrates court is the proper legal procedure". Moreover, "NLC ROW Officers supported by the Cabinet Member for Highways do are not recognising the limits of the lawful activity placed on the council NLC is still operating the Policy, Defending the Highways" [sic].
- 4.4 If officers understand Mr Carney correctly, he seems to be saying that a public right of way is not a highway. He defines a restricted byway, for instance, as "rights for horses and walker [sic] and those that require access to land" and a right of way in general as an "easement over private land". Yet a public right of way is a highway every much as the public roads we drive our cars on. *Public right of way* is simply a generic term encompassing certain classifications of minor highway. They consist of public footpaths, public bridleways, restricted byways and byways open to all traffic. The last two can be used by vehicles but have the character of a bridleway. Thus, "when deciding whether a way ought to be shown on the definitive map and statement as a byway open to all traffic, authorities should examine the characteristics of the way ... The test also relates to its character or type and whether it is more suitable for use by walkers and horse riders than vehicles" (Defra *Rights of Way Circular 1/09: Guidance for Local Authorities*, paragraph 4.38). And a restricted byway is essentially a byway open to all traffic other than for mechanically propelled vehicles.
- 4.5 In deciding whether Thatch Carr Bank and Misson Bank should appear on the definitive map, what has to be considered is not whether the lanes are maintainable at public expense but what their status is. Mr Carney's reference to the judge's comment about how just because a road is not on the list of streets – the statutory register of highways maintainable at public expense held by the highway authority – does not mean it is not necessarily maintainable at public expense is one officers agree with. The problem is that at the moment neither lane is recorded on either the list of streets or the definitive map. And whether the lanes should be recorded on either or both of these statutory

records depends on the best available evidence at any one point in time.

- 4.6 The evidence that members considered last year led them to the conclusion that both lanes were highways. Moreover, that the status of these highways was restricted byway. They also concluded that these were highways maintainable at the public expense. If the present order that Mr Carney disputes were to be confirmed, therefore, Thatch Carr Bank and Misson Bank would be added both to the list of streets, as Mr Carney wants, and to the definitive map, which he does not want.
- 4.7 So what members now have to decide is whether what Mr Carney has submitted since the order was made causes them to believe their original decision was wrong. Bearing in mind that if that decision was wrong, then by implication Nottinghamshire County Council's decision about five years ago to add the continuation into Nottinghamshire of Misson Bank to their definitive map was probably also wrong.
- 4.8 Going back to the Defra advice about character, Thatch Carr Bank and Misson Bank are rough tracks each with an unmade surface. They have the appearance of never having been otherwise. They are not fit for driving a car down. If these do not have the character of a way more suited to walkers and horse riders then what ways might? Officers do not dispute that the evidence points to these lanes being maintainable at public expense. That means that legally they should be maintained to a standard suitable for the ordinary traffic of the day. Officers do not believe, however, that the ordinary traffic of the day compares with the traffic along a metalled carriageroad.
- 4.9 Mr Carney makes numerous points throughout his two submissions. These are dealt with in the order in which they were made in Appendix Two.
- 4.10 One further point relates to the ruling in *Todd v Secretary of State for the Environment, Food and Rural Affairs* 2004. From this it appears that the test for deciding to make an order is less stringent than when it comes to confirmation. The legislation triggering a definitive map modification order on the discovery of evidence requires that the evidence in question raises a presumption that the right of way is *reasonably alleged to subsist*. However, the test at common law, which applies once the order has been made, is the more exacting *on the balance of probability*. Officers are confident, however, that the quality of the evidence is such that, whichever test is applied, the decision to modify Misson Bank and Thatch Carr Bank from bridleway to restricted byway is the right one.

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

5.1 Financial

5.1.1 From within the existing budget of the Environment Team. If an inquiry is held, costs may be awarded against one party to another on application to and at the discretion of the Secretary of State on the grounds of unreasonable behaviour. Otherwise parties pay their own costs.

5.2 Staffing

5.2.1 From within the existing complement of the Environment Team. Were an inquiry to be held, Legal Services' assistance could be called upon to advise and advocate.

5.3 Property

5.3.1 None.

5.4 IT

5.4.1 None.

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, Schedule 15, paragraph 7(1):* "If any representation or objection duly made is not withdrawn the authority shall submit the order to the Secretary of State for confirmation by him". Therefore, unless the objections are withdrawn, we must so refer the order, whereupon the Secretary of State must either hold an inquiry or afford any person who has made a duly lodged and not withdrawn objection or representation the right to be heard. This is unless the Secretary of State decides that the objection or representation is irrelevant to whether the order should be confirmed, with or without modifications (Wildlife and Countryside Act 1981, Schedule 15, paragraph 7(2), (2A) and (3)).

6.1.2 The Secretary of State can modify an order. However, if this (1) affects land not affected by the order, (2) omits the order route, (3) shows a way other than the order route or (4) shows the order route as a highway of a different description, he must first give not less than 28 days' notice of his intention, inviting representations or objections with respect to the proposal. Again, he must either hold an inquiry or afford any person who has made a duly lodged and not withdrawn objection or representation the right to be heard. This is unless the Secretary of State decides that the objection or representation is irrelevant

to whether the order should be confirmed in accordance with his proposals (Wildlife and Countryside, Schedule 15, paragraph 8).

6.1.3 A confirmed order must be advertised so as to allow an aggrieved person 42 days within which to question its validity. This is done by application to the High Court. To succeed, an applicant needs to satisfy the court that under the 1981 Act the taking effect of the order is either not within the powers of section 53 or his interests have been substantially prejudiced because some or all of the requirements of Schedule 15 have not been complied with. If so satisfied, the court may “quash the order, or any provision of the order, either generally or in so far as it affects the interests of the applicant”. Otherwise, “the validity of any order shall not be questioned in any legal proceedings whatsoever” (Wildlife and Countryside Act 1981, Schedule 15, paragraph 12).

6.1.4 For other statutory requirements, please refer to the report of 10 September 2008.

6.2 Environmental

6.2.1 Accurate definitive maps and statements benefit users and landowners/lesses/occupiers alike. Rights of way bring people into the countryside, thereby boosting the rural economy. It is important, therefore, that users of rights of way have confidence in the accuracy of the information they are supplied with in terms of where those rights of way run and the status of individual routes as well. All changes to the definitive map are passed on to the Ordnance Survey, who update their maps accordingly at the following revision. Landowners/lessees/occupiers, on the other hand, want to know where the public should be, what their obligations towards them are and how best to manage their land around that public access. Visitors to the countryside also provide some landowners/lessees/occupiers with alternative sources of income as farmers increasingly diversify into tourism.

6.3 Diversity

6.3.1 None.

6.4 Section 17-Crime and Disorder

6.4.1 None.

6.5 Risk

6.5.1 The decision to confirm the order, with or without modifications, will be the Secretary of State's. Therefore his interpretation of the evidence might not be the same as North Lincolnshire

Council's. But whatever the outcome, the most important factor is subjecting the evidence to scrutiny through due legal process so that however Misson Bank and Thatch Carr Bank are ultimately shown on the definitive map, this reflects the most fair and thorough evaluation of that evidence to date.

6.5.2 Any costs incurred and officer time spent assisting the Secretary of State in reaching his decision is an inevitable part of the legal duty North Lincolnshire Council are under to keep the definitive map under continuous review. The holding of a public inquiry would be the costliest means of arbitration, largely because it is generally the most time consuming. But again, whether one is held is a matter outside this authority's control.

6.6 Other

6.6.1 None.

7. OUTCOMES OF CONSULTATION

7.1 Mr Carney was written to on 11 June 2009 addressing his concerns and enquiring whether he might be prepared to withdraw his objection. It is standard practice to check first whether objectors to an order might withdraw rather than risk referring an order to the Secretary of State unnecessarily. His reply of 15 July 2009, while brief and not answering the question of withdrawal directly, gave no indication however that he was prepared to do so. Instead it appeared to re-emphasise his opposition.

7.2 The BBT have been informed that because there is another objector who is unlikely to withdraw, they can expect their concerns about how the order describes the width to be addressed by the Secretary of State regardless.

7.3 No objection or representation was received from an affected landowner, lessee or occupier despite all being notified when the order was made.

8. RECOMMENDATIONS

8.1 It is recommended that:

8.1.1 "Definitive Map Modification (Restricted Byway 150, Wroot) Order 2009(1)" is sent with the two duly made objections to the Secretary of State for Environment, Food and Rural Affairs with a request that the Secretary of State either (1) confirms the order as made or, should he think fit, (2) confirms the order

subject to a modification of the order map so as better to indicate the variations in width along its length;

8.1.2 if the order is submitted to the Secretary of State, North Lincolnshire Council participate fully in the Secretary of State's preferred means of arbitration; and

8.1.3 unless as a result of the order no highway is shown to exist over Misson Bank and Thatch Carr Bank, Misson Bank and Thatch Carr Bank be added to the list of streets made and kept corrected up to date in accordance with section 36(6) of the Highways Act 1980.

SERVICE DIRECTOR HIGHWAYS AND PLANNING

Church Square House
PO Box 42
Scunthorpe
North Lincolnshire
DN15 6XQ
Author: Colin Wilkinson
Date: 22 September 2009

Background Papers used in the preparation of this report – office file 55/150/DMMO, held electronically at Church Square House

Appendix 1

Wildlife and Countryside Act 1981

**County of Lincoln, Parts of Lindsey
(Isle of Axholme)**

**Definitive Map Modification
(Restricted Byway 150, Wroot)
2009(1)**



Wildlife and Countryside Act 1981

County of Lincoln, Parts of Lindsey (Isle of Axholme), Definitive Map and Statement

"Definitive Map Modification (Restricted Byway 150, Wroot) Order 2009(1)"

This order is made by North Lincolnshire Council under section 53(2)(b) of the Wildlife and Countryside Act 1981 ("the Act") because it appears to that authority that the County of Lincoln, Parts of Lindsey (Isle of Axholme), Definitive Map and Statement require modification in consequence of the occurrence of an event specified in section 53(3)(c)(ii) – namely, the discovery of evidence which (when considered with all other relevant evidence available to them) shows that a highway shown in the map and statement as a highway of a particular description ought to be there shown as a highway of a different description – of the Act.

The authority have consulted every local authority whose area includes the land to which the order relates. North Lincolnshire Council hereby order that:

1. For the purposes of this order the relevant date is 5 January 2009.
2. The County of Lincoln, Parts of Lindsey (Isle of Axholme), Definitive Map and Statement shall be modified as described in Part 1 and Part 2 of the Schedule and shown on the map attached to the order.
3. This order shall take effect on the date it is confirmed and may be cited as the "Definitive Map Modification (Restricted Byway 150, Wroot) Order 2009(1)".

SCHEDULE

PART 1

Modification of Definitive Map

Description of path or way to be upgraded

A – B, as indicated on the map: the upgrading of an 840-metre-long track known as Thatch Carr Bank from public bridleway to restricted byway that commences at a point on the road between the village of Wroot and Greenholme Bank Farm adjacent to Wroot Grange at grid reference SE71940186 and proceeds in a west-north-westerly direction over a width of between 4.5 metres and 5.5 metres to its junction with the southernmost end of Public Footpath 150 at grid reference SE71120201.

B – C, as indicated on the map: the upgrading of a 1,120-metre length of the track known as Misson Bank from public bridleway to restricted byway that commences at its junction with the southernmost end of Public Footpath 150 at grid reference SE71120201 and proceeds in a south-south-westerly direction over a width of between 4.5 metres and seven metres to its intersection with the Nottinghamshire county boundary at grid reference SE70890092.

PART 2

Modification of Definitive Statement

Variation of particulars of path or way

A restricted byway of a width of between 4.5 metres and seven metres commencing at a point along the road between the village of Wroot and Greenholme Bank Farm adjacent to Wroot Grange at grid reference SE71940186 and proceeding in a west-north-westerly direction for 840 metres to its junction with the southernmost end of Public Footpath 150 at grid reference SE71120201 and thence in a south-south-westerly direction for 1,120 metres to its intersection with the Nottinghamshire county boundary at grid reference SE70890092.

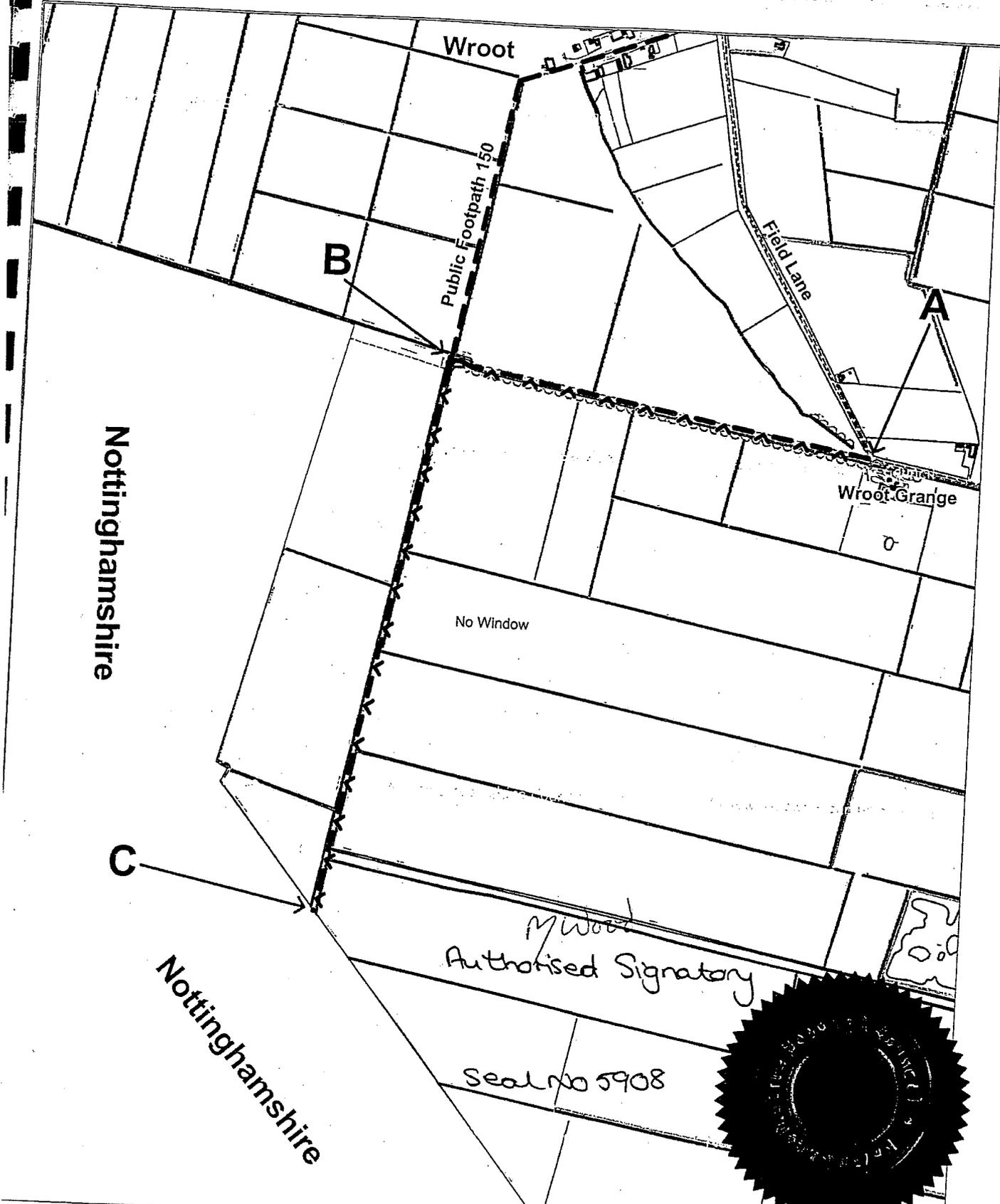
The COMMON SEAL of
NORTH LINCOLNSHIRE COUNCIL
was hereunto affixed
in the presence of:

M Wood
(authorised signatory)

Dated: *14th January 2009*

Seal Number: *5908*





rawing Title: "Definitive Map Modification (Restricted Byway 150, Wroot) Order 2009(1)"

S Grid Ref: grid_text	Drawn by: CTW	Scale: 1:10,000	Date: 5 January 2009
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NORTH LINCOLNSHIRE COUNCIL 100013349 2008



Highways and Planning Service
Service Director,
G Popple

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Appendix Two

Mr Carney has submitted two emails detailing his objections to the confirmation of “Definitive Map Modification (Restricted Byway 150, Wroot) Order 2009(1)”. He makes numerous points. These are considered below in the order in which they appear in the emails. Mr Carney’s comments are given in italics. Officers’ commentary is what follows in each case.

Email One

- 1.0 *The former IoARDC kept the “list of streets” required by the Public Health Act 1925 in a map form. Highways that were County roads in the IoARDC area were recorded on this map it was in the council offices highway records at Epworth, the document is today held by Mr Allen who removed it from the Gables Epworth in 1996.*

The requirement of section 84 of the Public Health Act 1925 to maintain a list of streets maintainable by the inhabitants at large – the term since superseded by “maintainable at the public expense” – applied only to urban authorities. Therefore it did not apply to the Isle of Axholme Rural District Council, the then highway authority for Misson Bank and Thatch Carr Bank. RDCs were the highway authorities in rural areas until 1929. The requirement for all highway authorities to hold a list of streets was introduced by the Local Government Act 1972 (effective from 1 April 1974).

Mr Allen is categorical that he neither holds the map Mr Carney describes nor removed it from The Gables.

- 2.0 *This List of Streets is not an internal document. It is conclusive. Any street on that list can only be removed by due process of the law. It cannot be taken off or changed by the whim of an officer who thinks that he knows better than the person who put it on in the first place. The law holds that whatever is done under statutory powers is done correctly in the first instance unless proved otherwise.*

Officers suppose Mr Carney is referring to the sentence in the second paragraph of section 2.7(i) of the report to Planning Committee on 10 September 2008: “Handover maps were internal working documents and there was no requirement to produce them”. Handover refers to the transfer of responsibility for all highways from the rural district councils to the county councils under the Local Government Act 1929 (effective from 1 April 1930). RDCs typically handed maps to the county councils showing where the highways they had been responsible for were. These were very much internal documents. The Planning Inspectorate’s Consistency Guidelines, viewable online, state, for example: “However, inspectors should be mindful that these [handover] documents were principally for internal administrative use,

were not readily available to the public and did not purport to be a record of rights". And the Discovering Lost Ways Project (recently reformed as the Stakeholders' Working Party), reporting for Natural England in 2007, pointed out: "It is important to recognise that the production of formal handover records following the 1929 legislation was never a legal requirement. While it was clearly in the interests of a County Council to produce a clear record of the routes for which it was taking responsibility, there was no requirement on it either to open up the process to public scrutiny or to deposit a copy of any map so produced with the County Record Office" (paragraph 3.1.1, *Research Standard 3.11, 1929 Highways Handover Maps*).

The list of streets is a different document entirely. Officers agree with Mr Carney that this is in the public domain. In accordance with the Highways Act 1980, section 36(7), it "shall be kept deposited at the offices of the council by whom it was made and may be inspected by any person free of charge at all reasonable hours ...".

- 3.0 *Mr Justice Glidewell held in West Yorkshire MCC v Molly Wedgewood 22-1-85 at page 9: "I agree that the records kept by the County Council of streets maintainable at the public expense is conclusive that the streets in it are so maintainable but it is not conclusive that those streets not listed in it are not so maintainable".*

Officers also agree. We are unclear, therefore, what the relevance of this reference is.

- 4.0 *It is clear, the Order route is not a Public Right of Way, it is part of the highway network. And has been so since the 17th century NLC do not claimed that it has been "stopped up" by a Magistrates Order.*

The first sentence is a contradiction in terms in that a public right of way *is* a highway. It seems that when Mr Carney refers to "highway", what he means is a highway predominantly used by motorised vehicles. But even a public footpath is a highway. For example, within the definitions at section 329 of the Highways Act 1980, "*footpath* means a *highway* over which the public have a right of way on foot". Moreover, "*restricted byway* has the same meaning as in Part II of the Countryside and Rights of Way Act 2000" – that is, "*restricted byway* means a *highway* over which the public have restricted byway rights, with or without a right to drive animals of any description along the *highway*, but no other rights" [our emphasis].

So a public right of way is conclusively, in law, a highway. The issue, therefore, must instead be one of status. Are Misson Bank and Thatch Carr Bank public rights of way, as North Lincolnshire Council believe, or carriageways used mainly by motorised traffic, as Mr Carney believes?

Had it not been for the enactment of the Natural Environment and Rural Communities Act 2006 (as discussed in the report to Planning Committee of 10 September 2008) officers would have been recommending to members that Misson Bank and Thatch Carr Bank be added to the definitive map as byways open to all traffic. But because the 2006 Act intervened to extinguish the right of way for mechanically propelled vehicles, the rights that remain constitute a restricted byway (i.e. a right of way for all traffic other than motor vehicles). Reference to the stopping up of those rights in the magistrates' court is therefore irrelevant. The rights were stopped up by an Act of Parliament and therefore their preservation was beyond North Lincolnshire Council's control.

As for the question of whether, had it not been for the 2006 Act, the lanes would have been carriageways used mainly by motor vehicles or byways open to all traffic: Defra advise that on the basis of case law this specific test "relates to the way's character or type and whether it is more suitable for use by walkers and horse riders than vehicles". Furthermore, "it is not a necessary precondition for there to be equestrian or pedestrian use or that such use is greater than vehicular use" (Defra Rights of Way Circular 1/09, Guidance for Local Authorities, paragraph 4.38). The Planning Inspectorate offer the same advice (Advice Note 8). The case the advice is taken from, moreover, is *Masters v Secretary of State for the Environment, Transport and the Regions*, February 2001.

Officers disagree with Mr Carney, therefore, about the order route not being a public right of way. We agree with him, however, about it being part of the highway network.

- 5.0 *A copy of the section of the map (list of streets) is attached, together with the information supplied by the applicant, it is obvious that when this highway was put on the DM someone got it wrong. As a highway that was set out on the ground before the 1835 Highways Act it is a maintainable highway.*

The map Mr Carney is referring to is not a copy of the list of streets, as alleged. Officers believe it is a working map that the Isle of Axholme RDC handed over to Lindsey County Council on the assumption of responsibility for highways by the latter from the former. "DM" presumably stands for definitive map and "this highway" Thatch Carr Bank and Misson Bank. Thatch Carr Bank and Misson bank are currently shown on the definitive map as bridleways (bridleway being "a highway over which the public have the following but no other rights of way, that is to say, a right of way on foot and a right of way on horseback or leading a horse, with or without a right to drive animals of any description along the highway", Highways Act 1980, section 329). The showing of a bridleway on a definitive map is conclusive evidence in law that at the map's relevant date (the Isle of Axholme map's is 21 September 1953) the public had a right of way on foot, on horseback or

leading a horse (Wildlife and Countryside Act 1981, section 56(1)(b)). Therefore the discovery of evidence needed to overcome that conclusive evidence has to be strong. It is insufficient simply to protest “someone got it wrong”. Nevertheless the law provides that a definitive map be kept under continuous review and necessary changes be made as soon as practicable (Wildlife and Countryside Act, section 53(2)). In the case of Misson Bank and Thatch Carr Bank, on the basis of the evidence members considered and ruled on on 10 September 2008, that evidence was thought to be compelling. The difference is that members’ analysis of that evidence brought them to a different conclusion from that of Mr Carney. Not over whether the ways should be maintained at public expense. Both North Lincolnshire Council and Mr Carney agree that they should be. But what their status should be if a higher status than bridleway appertains. On the specific point of the Highways Act 1835, officers agree further with Mr Carney that highways in existence at this date are publicly maintainable.

- 6.0 *Instead of correcting this mistake NLC Officers believe that they have the power to change a full highway which has been wrongly recorded on the Definitive map as a footpath into a Restricted Byway – rights for horses and walker and those that require access to land.*

It is assumed that by *full highway* Mr Carney means one that can be used by all types of traffic. However, officers are not acting on the basis of *power*, which is discretionary, but *duty*. On the discovery of evidence raising a reasonable allegation that the definitive map and/or statement are/is wrong, the surveying authority – North Lincolnshire Council – *must* make a modification order to correct the error as soon as reasonably practicable (Wildlife and Countryside Act 1981, section 53). Nor is the order route at present recorded as a footpath, as Mr Carney states, but as a bridleway. Members have already analysed the evidence detailed in and appended to the report to Planning Committee on 10 September 2008 and found restricted byway, not “full highway” (i.e. carriageway), to be the appropriate status. If members now rule that the order be sent to the Secretary of State for confirming as made, Mr Carney will have an opportunity thereafter to persuade the Secretary of State that the order should not be confirmed.

- 7.0 *In making this Order NLC actively do not recognise the limits of lawful activity placed on the Council by Statutory Instrument, the Ultra Vires doctrine and the Highways Authority’s duty to protect the public use and enjoyment of a highway. (Section 130 Highways Act 1980)*

If, on the other hand, Misson Bank and Thatch Carr Bank are indeed restricted byways, the very proposition the present order sets out to test, we would be exceeding our power were we to treat the routes as being of a higher status.

- 8.0 *The amendments to the CROW Act (Hansard 16-11-2000 cols 372-374) supported by NLC were withdrawn and it was made clear that the*

legal procedure to “stop up a highway that is part of the highway network” was the magistrates court which allows two magistrates to decide if the ROW on foot and horses are maintained.

Mr Carney does not specify the amendments to the Countryside and Rights of Way Act 2000 he is referring to. But anyway, the present order does not seek to stop up anything. It is about what status the definitive map should record Misson Bank and Thatch Carr Bank as having. For decades they were recorded as bridleways. At the time of writing they still are. So the present order is about recognising higher rights, not lesser ones. About that, North Lincolnshire Council and Mr Carney signally agree. It is simply the extent of those higher rights on the interpretation of the available evidence at the time of writing over which we differ. Both of us want highway records of the highest degree of accuracy.

- 9.0 *NLC ROW Officers supported by the Cabinet Member for highways do not recognising the limits of the lawful activity placed on the council NLC is still operating the Policy, “Defending the Highways”*

This allegation is wrong on all counts. The decision to make public rights of way orders is a non-executive one and therefore does not involve the cabinet member. “Defending the Highways” was superseded in 2007 by a generic highway enforcement policy. The latter combined the former with the till then quite separate public rights of way enforcement policy. The public rights of way enforcement policy was written because “Defending the Highways” was only ever intended for highways other than public rights of way. It therefore has no relevance to discussions about public rights of way.

Email Two

- 1.0 *On the 1953 Isle of Axholme map (copy attached) the above order route is a highway for all purposes The way is also on the Lindsey County Council, Highways maintained by the County Council 1947 map. The route is a highway for all purposes on maps published by the authorities responsible for maintenance until the abolition in 1972.*

Why officers think Mr Carney’s interpretation of the 1953 map is wrong is set out above in reply to point five of his first email. The routes that were included were all the highways that were maintainable by the highway authority – not just ones of a certain status. That was why the routes were given differing classifications ranging from A for the primary routes down to F for the ones of least importance. Misson Bank and Thatch Carr Bank were classified as F. We must remember too that North Lincolnshire Council are not saying that vehicles do not have a right of way along these tracks. We have already stated how were it not for the Natural Environment and Rural Communities Act 2006 we would have modified the definitive map to show them as byways open to all traffic. But as already discussed above, the

government require surveying authorities to distinguish a BOAT from a carriageway intended for use primarily by motor vehicles by considering its character. So F classification on the 1953 map, being the lowliest status possible, appears to add weight to the proposition that Misson Bank and Thatch Carr Bank belong on the definitive map, not vice versa.

- 2.0 *Mr Wilkinson's report to Members is correct that this section of the way has been a recorded public highway since 1639 The report fails to inform members that all highways created before 1835 are publicly maintained highway (report to members September 2008) for all purposes*

The report's claim that records handed over from former predecessor authorities are internal working papers is absurd, these documents are the public record, they should be Archived and not altered. Will you please fetch to the attention of this officer that these documents cannot be altered with a packet of coloured crayons or a pen, as copy documents sometimes are.

Reaffirming the answer to point five, email one, officers agree all highways in existence at the commencement of the Highways Act 1835 are publicly maintainable by virtue of common law. But we cannot see how this assists us in establishing status. Because Misson Bank and Thatch Carr Bank are acknowledged by North Lincolnshire Council to be publicly maintainable highways whether that status be bridleway, restricted byway or carriageway. The report to members on 10 September 2008 made clear that taken on its own the Hatfield Chase Map 1639 is weak evidence of highway status. Its evidential value is a little higher when viewed alongside the other evidence. But as for what traffic was entitled to use Misson Bank and Thatch Carr Bank in 1639, if at this date they were indeed highways – from the Hatfield Chase Map this is impossible to tell.

Mr Carney's other point about the handover maps not being internal working documents is dealt with above in response to point two of his first email.

The allegation that North Lincolnshire Council officers alter the handover maps with coloured crayons or a pen is false.

- 3.0 *This order is clear, NLC is maintaining its policy "Defending the Highways, and full highways that are recorded as part of the highway network that's surface have not been sealed, are still being changed to Rights of Way, i.e. (Easement over private land).*

"Defending the Highways" did not apply to rights of way. It is no longer North Lincolnshire Council policy, having been superseded in 2007. Nor does Mr Carney state what relevance he believes "Defending the Highways" has to his arguments. North Lincolnshire Council only ever try to record any particular highway according to our interpretation of

the best evidence available at the time. But note the reference to unsealed surfaces. This returns us to the government's character test when judging whether a vehicular route is a byway or a carriageway (the former belonging on the definitive map and the latter not).

Misson Bank and Thatch Carr Bank, moreover, have not been changed to rights of way by this authority. They were on the Isle of Axholme definitive map as bridleways when it was first published by Lindsey County Council in 1962. Nor do officers understand what Mr Carney means by "easement over private land" in relation to rights of way. An easement is the right to cross another's land to reach one's own property. Only specified persons can exercise the right. Therefore it cannot be a public right of way, a public right of way being a highway and therefore open to all.

- 4.0 *As you are aware, if NLC do not need to maintain this way as part of the highway network an application to the magistrates court is the proper legal procedure.*

This is a further example of Mr Carney appearing to confuse the obligation to maintain with highway status. It is as if Mr Carney believes that only highways that are carriageways such as those that are tarmacked that we typically drive our cars along are maintainable at the public expense. But as officers keep stressing throughout this appendix, public rights of way are highways too. What distinguishes public rights of way from non-PRoW highways is their status (i.e. what traffic they are open to) rather than who is responsible for their upkeep. Virtually every public right of way on the definitive map is maintainable at the public expense, Misson Bank and Thatch Carr Bank included. With respect to Mr Carney, his reference to the magistrates' court is therefore irrelevant.

- 5.0 *Attached is a copy of part of County highways maintained by the IoARDC 1953 (original held by Tim Allen) to 1974. It is clear that route is a full highway. The NERC legislation of 2000 and 2006 do not give the Authority powers to change part of the recorded highway network into a ROW by making a DMMO on a recorded unclassified road (see Hansard 16-11-2000 cols 372-374)*

If by "full highway" Mr Carney means a carriageway intended for use mostly by motor vehicles he is presumably saying that the order route is not a public right of way by virtue of being a highway of a status higher than public right of way. Only public rights of way can be recorded on a definitive map. But if that is so, he does not go on to explain *why* he thinks "it is clear". A public right of way is already part of the recorded highway network because a public right of way is a highway and the definitive map is a legal record. Misson Bank and Thatch Carr Bank are already public rights of way because they are already featured on the definitive map. Therefore it is legally impossible to change any recorded particular relating to them without recourse to

a definitive map modification order (DMMO). The relevance of the Natural Environment and Rural Communities (NERC) Act 2006 is whether Misson Bank and Thatch Carr Bank should be byways open to all traffic or restricted byways. Members will recall that when they considered this on 10 September 2008 they decided on the latter for the reasons set out in that earlier report.

- 6.0 *Senior management responsible to the Council for ensuring that the proper statutes and regulations are complied with have failed, NLC officers are still changing part of the highway network into rights of way by the same policies as quite improperly used for the last 12 years. The Definitive Maps withdrawn from Humberside CC Archives and held in NLC Rights of Way Department is now of little if no credibility*

No comment except that definitive maps cannot be of little or no credibility because these are statutory records and conclusive evidence of the particulars recorded therein.