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Case No: CO/4635/2022

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
PLANNING COURT

Royal Courts of Justice Strand, London, WC2A 2LL

Date: 20/04/2023

Before :

HIS HONOUR JUDGE JARMAN KC
Sitting as a judge of the High Court
Between :

TRAIL RIDERS FELLOWSHIP	**Claimant**
- and -	
(1) SECRETARY OF STATE FOR ENVIRONMENT, FOOD AND RURAL AFFAIRS	**Defendants**
(2) NORTHUMBERLAND COUNTY COUNCIL	

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Mr Paul Wilmshurst (instructed by **DMH Stallard LLP**) for the **claimant Mr Ned Westaway** (instructed by the **Government Legal Department**) for the **first defendant**
The **second defendant** did not appear and was not represented

Hearing date: 28 March 2023
- -

Approved Judgment

This judgment was handed down remotely by circulation to the parties' representatives by email and released to the National Archives for publication. The date and time for hand-down is deemed to be 10:30am on the 20 April 2023.

HH Judge Jarman KC:

Introduction

1. The claimant applies under paragraph 12 of schedule 15 of the Wildlife and Countryside Act 1981 (the 1981 Act) to quash the Northumberland County Council Definitive Map Modification Order (No 30) 2016 Byways Open to All Traffic Nos 20 & 17 (Parishes of Bamburgh & North Sunderland) (the order). The order was made by an inspector, Sue M Arnott, appointed by the first defendant (the Secretary of State) after a public inquiry in January 2020. Northumberland County Council (NCC) in 2016 had proposed a modification of the definitive map and statement for the area by recording a byway open to all traffic (BOAT) from the B1340 public road south of Bamburgh, via Greenhill and Fowberry, to the U2018 public road at Shoreston Hall. However, the inspector, who is a Fellow of the Institute of Public Rights of Way, determined that that part of the order route between Greenhill and Fowberry should be modified to show a footpath only. The claimant contends that that modification was wrong as a matter of public law, and that the whole of the order route should have been determined as a BOAT.

2. The inspector made three order decisions. I shall refer to these as OD1, OD2, and OD3 respectively, followed where appropriate by the paragraph number. In OD1, dated April 2020, the inspector gave notice that she proposed, after examining historical documentary evidence, to depict the section of the order route between Greenhill and Fowberry, which she notated X-Y, as a public footpath and not a BOAT. As this was not what was proposed by the NCC, the inspector, as she was required to do by paragraph 8 of schedule 15 of the 1981 Act, gave notice of her proposal for this further modification and to give an opportunity for objections and representations thereto.

3. The claimant objected to the proposed further modification in respect of the order route between X-Y being shown as a public footpath and not a BOAT and submitted additional evidence from one of its members Alan Kind, which was circulated for comment. The inspector considered this and issued OD2 in August 2021, in which she maintained that the section X-Y should be indicated as a public footpath and not a

BOAT. However, she also proposed a new modification which was that the footpath between X-Y should be reduced from 5 meters to 2.5 meters in width. Further notice of this new modification and an opportunity to make further objections and representations was given.

4. The claimant made further objections, which were not limited to the width of the footpath, but dealt with such matters as to the accuracy of early maps, an alleged incorrect approach of the inspector to the updating of highway records and alleged inconsistencies with other decisions of the Secretary of State. The inspector considered these objections, and issued OD3 in October 2022, in which she further maintained her decision that section X-Y should be indicated as a public footbath and not a BOAT.

5. The claimant's challenge, which does not need permission, is based on three grounds, as follows. A fourth was not pursued.

    i) The inspector made a mistake in concluding that a 1951 highway authority map did not show a physical feature between X-Y;

ii) The inspector did not accord proper weight to pre-1931 maps showing such a feature or to the description of the order route (including X-Y) as "cross roads" in a commercial map by Greenwood & Co published in 1827-8 (the Greenwood map);

iii) The inspector misdirected herself in law as to the improbability of two vehicular cul-de sacs leading to Greenhill and Fowberry respectively if X-Y is a footpath only.

6. NCC did not appear and was not represented at the hearing, but the Secretary of State refutes each of these grounds as follows:

i) On a fair reading of the ODs the inspector does not say that the 1951 map shows no link between X-Y but rather that the link shown was on a different alignment to the order route;

ii) The inspector dealt with each of the pre-1931 maps and the weight to be attached to each of them were matters for her. There is no clear definition of the term "cross roads."

iii) The inspector gave reasons for concluding that the order route comprised two vehicular cul-de-sacs, namely that they each lead to several properties.

7. The inspector made an unaccompanied visit to the site on the afternoon before the inquiry. I have had supplied to me current photographs of the route X-Y. It starts at Greenhill farm, which lies just off the B1380 coastal road to the south of Bamburgh. It then runs westward along a field boundary of fence and stone to the north and open to the field on the other side. It then turns at right angles to run south along another stone field boundary and open to the field. It then crosses a water course known as Ingram Burn, before turning slightly to the west and following another field boundary to the south. The boundary here is hedge and fence, and again the route is open to the field. At the end of that field the route turns at right angles to the west to follow another field boundary of hedge and fence and open to the field. It then arrives at Fowberry Farm at point Y. The route is mostly covered with grass but with wheel ruts visible in places.

The first order decision

8. At OD1/5, the inspector identified the two main issues as whether the evidence shows that a public right of way for vehicles was once in existence along the order route, and whether any such rights still exist today that should be recorded on the definitive map and statement. At OD1/15, the inspector referred to section 32 of the Highways Act 1980 which provides:

> "A court or other tribunal, before determining whether a way has or has not been dedicated as a highway, or the date on which such dedication, if any, took place, shall take into consideration any map, plan or history of the locality or other relevant document which is tendered in evidence, and shall give such weight thereto as the court or tribunal considers 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, and the custody in which it has been kept and from which it is produced."

9. At OD1/7, she said that if she was to confirm the order proposed by NCC, she must be satisfied that the evidence available shows that the public rights of way described within it subsist on the balance of probabilities.

10. In OD1/15-20 the inspector first had regard to highway records. She noted that the publicly maintainable highways for which responsibility was transferred from Belford Rural District Council to NCC in 1932 was shown on a map (the handover map) of that year. This map showed no connection at all between Greenhill and Fowberry. Maps prepared by the NCC under the Restriction of Ribbon Development Act 1935, which were presumed to be based on the handover map, show an identical gap.

11. However, a list of roads maintainable at public expense kept by NCC in 1964 shows the order route as such a road, as do subsequent NCC records. At some uncertain time, NCC surfaced parts of these roads, namely those sections which lead from recognised public vehicular roads to Greenhill from the east and Fowberry from the south. In a NCC map dated 1951, a route is shown from point X which does not proceed to point Y but instead runs south to connect at the tarmacked road at a different point noted as S, so the section running east from point Y is not recorded as being publicly maintainable

12. In respect of the highway records, she concluded that the obvious discrepancy between the 1930 maps and the post-1964 records could only be explained either by a formal procedure resulting in X-Y being adopted as a publicly maintainable highway, or there was a mistake in drafting post-1935 maps. In her view, the absence of formal documentation to indicate the former, and the 1951 and 1961 maps showing the maintainable highway along the line of a footpath, weigh in favour of the latter.

13. At OD1/21-29, the inspector went on to consider earlier evidence. She noted the earliest evidence of the order route was the Greenwood map, on which it was put in the category of "cross roads," which the inspector said was a term with no clear definition. The inspector said that to add to the confusion, the Greenwood map showed a route which connected with the order route as a bridleway which today is accepted as being private. She referred to earlier commercial maps by Fryer (1820) and Cary (1820-1832) which suggested that the early nineteenth century was a period of significant change in terms of the highway network. No other contemporaneous documents had been submitted, but the inspector concluded that a track has physically existed along the line of the order route since 1828. What she could not deduce from the Greenwood map was whether the track was a public or private one.

14. She then dealt with the Ordinance Survey (OS) maps from the first edition in 1864/5 and accepted that it was not the role of the OS to determine the legal status of ways which were recorded. The accompanying book of record noted only a road to the south of the order route as "Public Road," which is now accepted to be a private road, so the inspector concluded that that cast doubt on the veracity of the OS evidence.

    Maps prepared under the Finance Act 1910 showed no support for a public way along X-Y.

15. At OD1/30-36 the inspector went on to deal with the history of preparing definitive maps and statements of public rights of way under the National Parks and Access to the Countryside Act 1949 (the 1949 Act). Preparations for the first edition took place in the early 1950s. The inspector noted that the first appearance of a part of X-Y was on NCC's 1951 highways map but via a route which was shown on the small scale OS base as a single dash line, broadly between X and S but not via Y. A pencilled question mark on the original 1951 map appears to be tagged to this single dash line. In the absence of a better explanation it seemed to the inspector that the connection XS was simply drawn to follow the underlying line on the base map, which line had appeared on earlier OS maps, but which was adjusted on the 1964 highways map, suggesting that a mistake had been discovered.

16. Records show that the surveyors completed the task of preparing the first definite map and statement for the area in 1954, and the inspector found that it was reasonable to deduce that the pre-drawn highways shown thereon were based on NCC's 1951 highways map. The order route was clearly surveyed as part of this exercise, because field gates were marked at X and Y and at three places in between. It appeared to the inspector that the surveyors were noting the order route as a public right of way on foot.

17. The inspector then went on to evaluate the historical evidence at OD1/37-52. She found that the pre-1932 evidence supports the existence of a track along the full length of the order route since 1828 at least, but evidence of a public carriageway as a through-route was dependent on what she described as "a generous interpretation of Greenwood's map which itself contains ambiguities." She found on the balance of probabilities that X-Y was not considered to be a publicly maintainable highway in 1932 and that it was probably not a public carriageway at all. The evidence pointed to a mistake being made that led to its inclusion in the highway records in 1964 and subsequently. X-Y was reputed to be a public footpath in the 1950s when the definitive map was being prepared, but that mistake in the highway records led to this being omitted. She found that on the balance of probabilities those sections of the order route which had been tarmacked carried a public right of way for all traffic "despite both being cul-de-sac highways, albeit ones which serve to provide access to several properties."

18. The inspector's formal decision was that she proposed to confirm the order, but with modifications, which included on the order map the additions of points including X-Y and the amendment on the notation used to depict section X-Y so as to indicate "Public Footpath to be added." There were then set out corresponding proposed changes to the order index and the order schedule. Because of the need to give notice, as referred to above, the inspector ended the formal decision by saying that a letter would be sent to interested persons about the advertisement procedure.

The second order decision

19. The additional evidence then submitted by Mr Kind included a clearer copy of the 1951 highways map. At OD2/6-11, the inspector corrected a previous finding in relation to pencilled words on that map, but indicated that the pencilled question mark

    still called for an explanation. She thought that Mr Kind was correct in saying that this was attached to another short pencilled line running eastwards from point Y, as that was added to the 1964 highways map on what is now the line of the order route. She accepted that as an explanation of the process that was followed by NCC between the

production of the 1951 and 1964 maps showing highways for what it was responsible, but noted that there was no evidence of the reasoning for this, and no paper trail to support the alignment changes.

20. At OD2/12-43, the inspector dealt in detail with the new evidence. This included extracts from Greenwood's map from which she accepted that had the order route been regarded as a bridleway in 1828, it would probably have been annotated as such. The fact that it was not points towards the route being depicted as a carriageway and more probably a public one rather than private. She accepted that the further analysis showed Greenwood's map as being prepared with a remarkable degree of accuracy, both in terms of topographical survey as well as the depiction of "cross roads" which, in general, now matches the county's vehicular highway network. She noted, however, that the Greenwood map shows some roads which are not now recognised as public rights of way of any description.

21. The inspector then referred to Mr Kind's criticism of the lack of any previous reference by her to an earlier map by Armstrong in 1769. She accepted that this showed very clearly a road via "Fowbrey" to the east but remained unconvinced that this followed the exact line of the order route, "…even allowing for Armstrong's stylised representation of roads on his maps." She further accepted that that road was probably a road of some import to have been worthy of inclusion, but repeated her previous view that the early maps suggested that the early nineteenth century was a period of significant change in terms of the highway network.

22. At OD2/23, the inspector said this:

> "Returning to the Greenwood map, and given its close correlation with the modern day highway network, I will increase the weight I place on this as evidence of a public highway for vehicles along the order route. But I must nonetheless qualify this insofar as this was a commercial map, albeit one of superior quality, and commercial maps are rarely sufficient in their own right to permit the inference to be drawn that a route was a highway. However, combined with evidence from other sources they can tip the balance of probability in favour of such status."

23. The inspector then went on to consider evidence supplied by Mr Kind from other sources, including NCC highway committee minute books from 1929 to the 1960s, and an appendix to a 1937 report to NCC's bridges and roads committee. This described the order route from Shoreston Hall to Fowberry and the order route to Greenhill from the highway to the east as cul-de-sac routes. In a footnote, the inspector then observed, by referring to OD1/47, that NCC appeared to have no difficulty in accepting these roads as cul-de-sac highways albeit ones providing access to several properties. In light of that report, as well as the handover map, perhaps this is not surprising.

24. From the minutes, the inspector accepted that the highway surveyors were competent and that NCC complied with its duties of highway maintenance, but again referred to the 1932 handover map which omitted the middle section of the order route, as did a map and schedule listing unclassified roads some eight years later. Again she accepted that the 1951 map contained an alignment error that was later corrected to show the

order route which has being shown on highway maps and schedules ever since, but again referred to the lack of information to explain the basis for the inclusion of the link between Fowberry and Greenhill in the first place. To accept that these surveyors discovered something which persuaded them that it was a publicly maintainable road when there is no record of what that was, would be to take any presumption of regularity a step too far, according to the inspector. She continued that there is no evidence that the landowners were notified of the inclusion of X-Y in the 1950 maps or that they consented to or challenged this at the time or since, or of express dedication or formal adoption, or to confirm that works were carried out at the public expense on that section.

25. Having examined that other evidence the inspector returned to ask the question, other than the Greenwood map, what other evidence is there to support the existence of a public carriageway between points X-Y? She said that these surveyors may have discovered an answer to that in the 1950s but their remit was confined to the maintenance of roads and there was no process for determination of legal status other than through the courts. In summary, although the inspector attached a little more weight to the Greenwood map than she did previously, she remained of the view that there is not sufficient evidence to show on the balance of probability that a public vehicular right of way exists between points X-Y.

26. At OD2/44-49, the inspector considered further evidence from Mr Kind which he submitted supported X-Y being recorded as a bridleway, but because of uncertainty as to the source of the information, she gave it little weight. At OD2/50-59, she dealt with new submissions, and accepted Mr Kind's argument that the order route was not included in the definitive map and statement simply because it did not qualify to be recorded as a footpath bridleway or 'road used a public path,' not because it appeared on the county roads map. However she qualified that acceptance by saying that it would be naive to believe that the latter did not inform the former to a significant extent. She then considered submissions from other objectors, including as to the width of the footpath between X-Y and accepted that that should be reduced to 2.5 metres, which necessitated further notification and opportunity for objections and representations.

The third order decision

27. Further objections were made by Mr Kind on behalf of the claimant, not to the proposal to reduce the width, but continuing to argue for confirmation of the order without the modification of the status of the order route X-Y. He submitted three further plans, not previously before the inspector: Cary (1787 and 1794), and Smith (1801). The inspector dealt with these and accepted that they bore a close resemblance to the road layout shown in Armstrong's map which she had dealt with in OD2. Mr Kind criticised the inspector's previous assessment of the Armstrong map on the basis that it was wrong to expect that the exact line of the order route would be shown on such a map, because few pre-OS mapmakers could produce precise lines of a road and the question was whether the lines were shown sufficiently well such that there is a probability that it is a particular road. Mr Kind also argued that other decisions on behalf of the Secretary of State in similar cases were inconsistent with the inspector's approach.

28. In relation to the effect of the new evidence on other evidence previously considered, the inspector dealt with this in OD3/20-33. As a passage in OD3/29 (which I shall italicise) is the subject of particular criticism by Mr Wilmshurst, on behalf of the claimant, I shall set it out in full together with the paragraphs which follow:

> "29. The objectors argue that the post-1828 records may not support Greenwood but neither do they contradict it. That is true until the 1929 handover map clearly omitted X-Y. If that was a mistake, it was replicated on the map prepared under the restrictions of ribbon development act 1935 that was publicised in 1937 *and again on the highway authority map of county maintained roads in 1951*." The 'error' remained unaddressed for over 20 years during the transition from district council responsibility to the county when, as the objectors have previously demonstrated, official procedures were diligently observed and despite annual inspections of the road network (as referred to in my first interim Order Decision at paragraph 28).
>
> 30. I previously accepted that the 1951 map contained analignment error that was later corrected to show the Order route and that X-Y has been shown on highways maps and schedules ever since then without challenge. But there is still no documented explanation for this addition.
>
> 31. The only evidence of significant weight which supports XY being a carriage way is the Greenwood map. The earlier commercial maps endorse a route which possibly does include this section but as part of a much longer road, the majority of which appears to have ceased to exist by the early nineteenth century. In my view that fact lessens the weight I allocate to the Armstrong, Cary and Smith maps. Similarly the Fryer and later Cary maps omit the Fowberry to Greenhill connection which again causes me to question the basis on which Greenwood showed it.
>
> 32. Weighing against this is the handover map to which I alsoattached significant weight together with the publication of this map in 1937 and the acknowledged diligence of the county's highway maintenance engineers over the course of more than 20 years before the 1951 county road record was amended. In addition I gave weight to the evidence from the surveys carried out in the early 1950s in preparation for the first definitive map and statement for the area.
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> 33. I recognise that the matter is finely balanced here but it ismy conclusion that the evidence is still not sufficient to tip the scales so as to show that the link between Fowberry and Greenhill (X-Y) carries a public right of way for vehicles."

Statutory framework

29. Part III of the 1981 Act deals with the manner in which public rights of way may be ascertained. Section 53(2) sets out the duty on local authorities to keep the definitive map and statement of such rights prepared under the 1949 Act under continuous review and make such modifications as are requisite in response to events. Subsection (3)(c)(i) provides such events include:

> "…the discovery by the authority of evidence which (when considered with all other relevant evidence available to them) shows … that a right of way which is not shown in the map and statement subsists or is reasonably alleged to subsist over land in the area to which the map relates …".

30. Paragraphs 7 and 8 of schedule 15 sets out the procedures where an order modifying the definitive map and statement is opposed, which include the holding of a local inquiry by an inspector appointed by the Secretary of State to hear representations and objections, after which the order may be confirmed with or without modifications.

31. A statutory right of challenge to such confirmation is provided by paragraph 12 of schedule 15 as follows:

> "(1) If any person is aggrieved by an order which has taken effect and desires to question its validity on the ground that it is not within the powers of section 53 or 54 or that any of the requirements of this Schedule have not been complied with in relation to it, he may within 42 days from the date of publication of the notice under paragraph 11 make an application to the High Court under this paragraph.
>
> (2) On any such application the High Court may, if satisfiedthat the order is not within those powers or that interests of the applicant has been substantially prejudiced by a failure to comply with those requirements, quash the order, or any provision of the order, either generally or in so far as it affects the interests of the applicant.
>
> (3) Except as provided by this paragraph, the validity of anorder shall not be questioned in any legal proceedings whatsoever."

Legal principles

32. The legal principles to be applied, as opposed to how they should be applied, were not in dispute before me and were the subject of diligent research by both counsel. The principles to be applied to such an application are those of public law review, or of "ordinary judicial review" as Carnwath LJ, as then was, put it in *Whitworth v Secretary of State for Environment Food and Rural Affairs* [2010] EWCA Civ 1468, paragraph 13. Accordingly, the court must not concern itself with the merits, but confine itself to the question whether the order is flawed as a matter of public law. This is particularly important in the present case where the inspector was dealing with historical evidence. At paragraph 27, Carnwath LJ said:

> "27. The Inspector's review and analysis of the historic material runs to some 70 paragraphs. This was not a matter of interpretation of legal instruments, which would naturally be appropriate for review by the courts, but of factual inferences to be drawn from a range of disparate material, including maps, sale plans, local history and guide-books."

33. There are particular principles to apply where, as here, a mistake of fact is alleged as a ground for legal challenge in judicial review. These were summarised, again by Carnwath LJ, in *E v Secretary of State for the Home Department* [2014] EWCA Civ 49 at paragraph 66:

> "First, there must have been a mistake as to an existing fact, including a mistake as to the availability of evidence on a particular matter. Secondly, the fact or evidence must have been "established", in the sense that it was uncontentious and objectively verifiable. Thirdly, the appellant (or his advisers) must not have been responsible for the mistake. Fourthly, the mistake must have played a material (not necessarily decisive) part in the tribunal's reasoning."

34. Such decision letters must be read fairly and as a whole, without excessive legalism or criticism. The parties realistically accept that in the present case, all three order decisions should be read together. In *Clarke Homes Ltd v Secretary of State for Environment* [2017] PTSR 1081 Sir Thomas Bingham MR, said at 1089:

> "I hope I am not over-simplifying unduly by suggesting that the central issue in this case is whether the decision of the Secretary of State leaves room for genuine as opposed to forensic doubt as to what he has decided and why. This is an issue to be resolved as the parties agree on a straightforward down-to-earth reading of his decision letter without excessive legalism or exegetical sophistication."

35. Courts should respect the expertise of the specialist planning inspectors and start at least from the presumption that they will have understood the policy framework correctly, per Lord Carnwath in *Hopkins Homes Ltd v Secretary of State for Communities and Local Government* [2017] UKSC37; [2017] 1 WLR 1865 at paragraph 25. That applies to inspectors considering rights of ways, as was the inspector in the present case, see *Open Spaces Society v Secretary of State for Environment Food and Rural Affairs* [2022] EWHC 3044 (Admin) per Sir Ross Cranston at paragraph 76.

36. The courts have also considered the term "cross road" which the inspector had to consider here, particularly in relation to the Greenwood map, and have acknowledged that such a term may be evidence of public roads, as it suggests a thoroughfare between two places, see *Trafford v St Faith's Rural District Council* (1910) 74 JP 297, *Hollins v. Oldham* [1995] (unreported) C94/0206, and *Fortune v. Wiltshire Council* [2012] EWHC Civ 334. In the latter case, Lewison LJ, giving the judgment of the court, considered the meaning of the term at paragraphs 54-56. He observed that the term in old maps did not have its modern meaning of a point at which two roads cross, but included a highway running between, and joining, regional centres. He had regard to guidance given to inspectors on the point. He referred to the conclusion of the judge in that case, His Honour Judge McCahill QC, sitting as a judge of the High Court, that the Greenwood map in that case supported the emerging picture of an established thoroughfare, and observed that the label "cross road" added further support. Modern guidance to inspectors, PINS "DMO Consistency Guidelines" (5th Revision July 2013), makes similar points, but adds that inspectors will need to take into account that the meaning of the term may vary depending on the road pattern/markings in each map.

37. As for the proper approach to whether a country cul-de-sac can be a highway, that has also been the subject of judicial comment. In *AG (ex rel Hastie) v Godstone Rural District Council* JP 24 May 1912, Parker J, as he then was, said this:

> "It is possible, of course, that a public way may end in a cul-desac, but it appears rather improbable that part of a continuous thoroughfare should be a public highway and part not."

38. In *Roberts v Webster* (1968) 66 LGR 298, Widgery J (as he then was, sitting in the Court of Appeal) held at page 305:

> "The authorities clearly show that there is no rule of law which compels a conclusion that a country cul-de-sac can never be a highway. The principle stated in the authorities is not a rule of law but one of common sense based on the fact that the public do not claim to use a path as of right unless there is some point in their doing so, and to walk down a country cul-de-sac merely for the privilege of walking back again is a pointless activity. However, if there is some kind of attraction at the far end which might cause the public to wish to use the road, it is clear that that may be sufficient to justify the conclusion that a public highway was created."

Ground 1

39. I turn now to the grounds with those principles in mind. Mr Wilmshurst submits that the inspector, in saying in OD3/29 that the 1951 highway map omits X-Y is wrong, as it clearly includes X-Y as part of the overall route. He submits that this is a mistake which fulfils each of the requirement in *E* to make good a public law challenge on a mistake of fact. It is vital to the overall conclusion. The years of WWII were unlikely to be period of detailed consideration of highway maintenance maps. The 1951 highway map not only shows X-Y, but is clearly the genesis of subsequent maps.

40. In my judgment it is not a fair reading of the inspector's decisions to focus on OD3/29. Regard must also be had to her previous decisions on the 1951 highway map. In OD1, she found that the 1951 map did show a route from X, but one which

    did not terminate at Y but at a different point, point S. Accordingly, there was no section of the order route shown running east from point Y, and so no record of the order route being publicly maintainable at that point. She also thought it likely that the connection X-S was simply drawn to follow the underlying single dash line on the map.

41. Then a clearer copy of the 1951 map was provided to her, which she dealt with in OD2. She accepted from that that there was a short pencilled line running east from point Y, and that that was an explanation of the process that was followed by NCC *between* the production of the 1951 and 1964 maps showing highways for what it was responsible (my emphasis). She also found that there was no evidence of the reasoning for that process or paper trail to justify the alignment changes.

42. In my judgment it is clear from OD3/30, that the inspector had these points well in mind, when returning yet again to the evidence previously considered. I am

unpersuaded that in doing so the inspector made any mistake at all. If she did, in my judgment, it was not a mistake as to existing fact or one that was uncontentious or objectively verifiable.

43. Mr Wilmshurst made a further point that the highway shown on the handover map at Greenhills went beyond the point subsequently marked X by the inspector. In my judgment it is not clear from the small scale of the map that it did, but even if it did, it went only a short distance past and ended at a point to which it is unclear why the public would want access.

44. Ground 1 therefore fails.

Ground 2

45. There are three parts to ground 2. The first relates to the early maps, which the inspector found showed a route broadly on the same line as the order route. Mr Wilmshurst emphasises that such maps were expensive to produce and to buy, and the purpose of them was to show those who could afford to buy them where they could travel on horseback or in carriages. He submits that the inspector, in dismissing this evidence because it was not on the exact line of the order route, was expecting too much of the unsophisticated methods of the early map makers.

46. However in OD3/31, the inspector made clear that she attached weight to these maps, albeit little weight. She accepted that these maps endorse a route which possibly does include X-Y, but as part of a much longer road, the majority of which appears to have ceased to exist by the early nineteenth century. This was in the context of her finding in OD1/22 that the early commercial maps of 1820-32 suggest that the early nineteenth century was a period of significant changes in the highway network. The inspector repeated this point in OD2/22 and OD3/16. Having accorded these early maps little weight, she then went on in OD3/31-32 to attach weight to other pieces of evidence. At OD3/33 she acknowledged that the matter was finely balanced.

47. In my judgment, such weight was a matter for this experienced inspector. It is not appropriate for this court to attempt to review her balancing exercising.

48. As for the inspector's reference to the notation of cross roads in the Greenwood map, again Mr Wilmshurst focuses on one passage in OD1/21 where she says the term has no clear definition, a phrase reflected in Mr Kind's submissions. Again, however that is not a fair reading of her decisions as a whole. In OD2/15, she accepted that Mr Kind's further analysis of the road shown on the Greenwood map shows a close correlation between those "cross roads" and the present day vehicular highway network. Accordingly in OD2/23, she accorded more weight to the Greenwood map as evidence of a public highway for vehicles along the order route than she had previously. She then went on in the following paragraphs to look at other evidence, but for the reasons she gives, including that the Greenwood map shows roads which are not now recognised a public rights of way of any description, she remained of the view that there is not sufficient evidence to show on the balance of probability that a public vehicular right of way exists between X-Y. That was a conclusion she was entitled to come to on the evidence before her.

49. The final part of this ground is that the inspector's decisions show a degree of inconsistency with other decisions in similar cases. The references to the inspector's decisions in this case set out above serve to show just how intricate and case specific the process of the assessment of historical maps in any given case is. As Carnwath LJ observed in *Whitworth*, this process is one of drawing inferences of fact from disparate material. In my judgment, such inferences may vary form case to case, depending on the evidence and the material. The inspector was not persuaded that there was any inconsistency. Nor am I.

Ground 3

50. That leaves Mr Wilmshurst's submission that the inspector ought to have taken into account the improbability of two cul-de-sacs at each end of the order route in a rural setting and/or of the order route changing status from a highway to a footpath and back to a highway again. That may well be the case in the open countryside where there is no indication of any reason why the public would want to access, for example a field gate, just to turn round again. Scenic spots have been mentioned in the authorities as an example of such an indication.

51. However, in the present case, the inspector pointed to such an indication, namely that the cul-de-sacs led to several properties, and the NCC appeared to have no difficulty in accepting these cul-de-sacs as highways. It does not appear that the details of the properties, or of why the public might want to access them, was dealt with in any detail in the evidence, but in my judgment that was a conclusion the inspector was entitled to come to on the historical evidence. Mr Wilmshurst submits that private rights of way would probably be sufficient to serve such properties, which, on greater examination might have been a conclusion which was open to her, but that in my judgment does not detract from her conclusion. He also submitted that point X does not extend to all buildings at Greenhill, but it is not clear which are farm buildings which the public may not need to access, and others such as cottages as annotated on some of the plans which they may.

Conclusion

52. In conclusion, in my judgment the challenge to the inspector's decisions fails. There is no justification for the court to interfere with any of her modifications to the order

as confirmed by her. Counsel helpfully indicated that any consequential matters which cannot be agreed will be dealt with on the basis of written submissions. Any such submissions, together with a draft order agreed as far as possible, should be filed within 14 days of hand down of this judgment.