



## Order Decision

Hearing held on 24 April 2018

**by Sue M Arnott FIPROW**

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

**Decision date: 23 May 2018**

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### **Order Ref: ROW/3179790**

- This Order is made under Section 53(2)(b) of the Wildlife and Countryside Act 1981. It is known as the Council of the City of Sunderland (Footpath No. 10 Ryhope) Definitive Map Modification Order 2017.
- The Order is dated 9 February 2017. It proposes to modify the definitive map and statement for the area by adding a footpath between St Nazaire Way and the National Cycle Network Route 1 at Ryhope Village, as shown on the Order map and described in the Order schedule.
- There was one objection outstanding when the Council of the City of Sunderland submitted the Order for confirmation to the Secretary of State for Environment, Food and Rural Affairs.

**Summary of Decision: The Order is confirmed.**

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### **Procedural matters**

1. On 24 April 2018 I held a hearing at the Civic Centre in Sunderland, having visited the site of the claimed public footpath, unaccompanied, during the previous afternoon. At the close of the event, none of the parties present requested a further visit.

### **The Main Issues**

2. The main issue here is whether the evidence is sufficient to show that, in the past, the Order route has been used in such a way that a public footpath can be presumed to have been established.
  3. The Council of the City of Sunderland (SCC) made the Order under Section 53(2)(b) of the Wildlife and Countryside Act 1981 (the 1981 Act) on the basis of events specified in sub-section 53(3)(b). In this case, this requires evidence which shows, on a balance of probability, that a period of time has expired in relation to the route in question such that its use by the public on foot raises a presumption of dedication as a public footpath.
  4. Whilst the evidence need only be sufficient to *reasonable allege* the existence of a public right of way to justify an order being made, the standard of proof required to warrant confirmation of an order is higher. In this case and at this stage, evidence is required which shows, *on the balance of probability*, that a right of way subsists along the Order route.
  5. Therefore if I am to confirm the Order I must be satisfied that, on a balance of probability, the evidence shows that a public right of way subsists along the Order route.
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6. The case in support of the Order was based on the presumed dedication of a public right of way under statute, the requirements for which are set out in Section 31 of the Highways Act 1980. For this to have occurred, there must have been use of the claimed route by the public on foot, as of right and without interruption, over the period of 20 years immediately prior to its status being brought into question so as to raise a presumption that the route had been dedicated as a public footpath. This may be rebutted if there is sufficient evidence that there was no intention on the part of the relevant landowner(s) during this period to dedicate the way for use by the public; if not, a public footpath will be deemed to subsist.
7. However, for reasons explained below, it became apparent at the hearing that reliance would instead need to be placed on the common law approach. In addressing this possibility the issues I need to examine are whether, during any relevant period, there was express or implied dedication by the owner(s) of the land in question (each having the capacity to dedicate a public right of way) and whether there is evidence of acceptance of the claimed right by the public. The burden of proof lies with those that assert the existence of a public path.

## **Reasons**

### ***Historical context***

8. The history of this route is complex. Until 1962, it formed the carriageway of the A19 main highway. By order made on 26 October 1962 by the Minister of Transport, it was stopped up following construction of a new road to its west (now the A1018). Consequently, when the order came into operation on 9 November 1962, all public rights over it were extinguished.
9. However it seems that, at least as far as the present Order route is concerned, the old road was not physically closed off at that time and it is now claimed that use by the public post-1962 may have re-established a right of way.
10. The route closed in 1962 was known as the old Stockton Road. It crossed over the Murton to Seaham Mineral Railway Line by means of a bridge, identified on the 1855 Ordnance Survey (25": 1 mile) map as "Stockton Bridge". [This lay to the south of the point shown on the present Order map as "C".] Although no evidence has been presented to confirm the date of the bridge's removal, this occurred before the line closed in the late 1980s or early 1990s<sup>1</sup>. Mr Hepple recalled that, even before this happened, the bridge had been boarded off because it was unsafe and could not be used by members of the public.
11. In or around 1999 the National Cycle Network Route 1 was established along the former railway line, crossing the old Stockton Road just south of point C. Around this time, an A-style pedestrian barrier and a metal low level horse stile were installed at point B by local authority staff to prevent motor cycle use.
12. Further change came in 2002 with proposals for the A1018 Southern Radial Route, now known as St Nazaire Way. The old Stockton Road was identified in the 2002 Side Roads Order as a private access road, with a short section being stopped up where it crossed the proposed new highway<sup>2</sup>. This left the section to the south of the new road intact (this being the section A-B-C and beyond, as shown on the present Order map). However the part to the north, which

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<sup>1</sup> I have noted that claimant no 1/17 referred to this taking place in 1993.

<sup>2</sup> The Side Roads Order appears only to have provided an alternative private access (No 11) to the field east of the Order route with no alternative means of reaching the field to the west.

previously linked with Stockton Road, appears to have been subsumed within the highway verge on the north eastern side of the new roundabout.

13. Construction works began around 2003 and continued for around 5-6 years in total but changes in the vicinity of the route now at issue seem to have been substantively complete by 2006. During this period a fence was in place across the Order route at point A; however access could easily be gained by walking a matter of metres around the eastern end of this fence.
14. The Order route continued to exist as an old road, bounded by hedges on both sides for the most part and unrestricted to pedestrians until 2013 when Mr Hepple erected his own fence and locked gate across the way at point A. Around the same time, hedge cuttings were placed across the stiles at point B preventing access. This led to complaints being made to SCC, to investigation of the status of the way and to the submission of user evidence statements from local people. Following consideration of a report dated 12 October 2015, SCC concluded that a public right of way had been reasonably alleged to subsist and subsequently made the Order on 9 February 2017.

### **Land ownership**

15. Ownership of the land over which the former A19 passes is not registered. The highway authority, SCC, does not claim ownership. Instead it has accepted that the '*ad medium filum*' rule should apply; this is a rebuttable presumption that an owner of land which abuts a highway owns to the centre line of the road.
16. In this case, land to the east of the old road is registered to the Church Commissioners for England. Their ownership was noted in the 2002 compulsory purchase order (CPO) associated with the side roads order, as was its tenant (Mr D Smith of Willow Farm, Ryhope).
17. To the west of the Order route, land ownership lies with the objector, Mr Hepple. He purchased the land on 18 August 2009 from the Secretary of State for Health. In 2002 the CPO had recorded the owner as the Sunderland Health Authority, the land being "unoccupied" with no lessee listed. However Mr Hepple provided evidence suggesting that he had been renting the field (initially from the Northern Regional Health Authority) from 1990 until his purchase of the land.
18. Land Registry documents confirm that when the property transferred to Mr Hepple's ownership, the land was sold with "*whatever right, title and interest the Secretary of State for Health has (if any) in the subsoil of (the old road)*".
19. It is not my role to determine ownership of the Order route. However the intentions and actions of the landowner are important factors when analysing evidence to establish whether a right of way has been dedicated for public use. I therefore need to be as clear as is possible in the circumstances as to who the relevant landowner/s were during the periods under scrutiny.
20. In the absence of any direct evidence of ownership of the Order route, I shall need to presume that the eastern half of A-B-C is owned by the Church Commissioners and that the western side has been owned by Mr Hepple since August 2009 and Secretary of State for Health before that. In both cases the direct evidence of adjacent land ownership stretches back only to 2002 but, again in the absence of information (or argument) to the contrary, I shall presume this has remained unchanged from 1962.

***Implied dedication at common law***

21. The consequence of my finding that until 2009 the western half of the Order route is presumed to have been owned by the Secretary of State for Health, is that it must therefore be regarded as "Crown Land". As a result, the possibility of dedication of a public right of way arising under the terms prescribed in Section 31 of the Highways Act 1980 is ruled out. If such a dedication is to be established over this part of the Order route, it could only do so under common law principles<sup>3</sup>. I therefore propose to consider this approach first.
22. There is no evidence to indicate that at any relevant time, the presumed owners of the land did not have the capacity to dedicate a public right of way over the claimed footpath. Indeed, this point was not challenged.
23. Neither was it argued that there had ever been an express dedication at any time post-1962. The issue in this case is whether dedication should be implied from the actions, or inaction, of (or on behalf of) the relevant owners of the adjacent land.
24. Under the common law approach, it is not sufficient simply to demonstrate use by the public of a certain route for a long time. Where such use did occur and no steps were taken to prevent it, the public's use of the way may constitute evidence that the landowner was quite content it should continue and therefore contribute to the justifiable conclusion that dedication of the way could reasonably be implied. However the focus needs to be the landowner – what actions were taken (or not) in relation to public use and what could fairly be deduced from that in relation to the status of the way in dispute, assuming of course that the level of public use was sufficient to make the owner aware that a right of way was being asserted.
25. At the hearing Mr Bracken submitted that between 1993 and 2013 there was a clear twenty year period when the public was using the way 'as of right'<sup>4</sup>. There had been no notices advising the public they could not use the way, there had been no other challenges to use of the way and it was clear that the public had continued to use the road. The adjacent landowners had not intervened until Mr Hepple erected his fence in 2013 to stop fly-tipping on the site, effectively bringing the status of the way into question.
26. Mr Bracken acknowledged that use by the public may have been interrupted at some time between 2004 and 2008 when St Nazaire Way was under construction, but he pointed to the aerial photographs which indicate that people walked around the fenced construction site to continue along the Order route. In his submission the obstructions associated with the new road were of a temporary nature and not intended to challenge the public's use of the Order route. The dangers of the construction site would be obvious to pedestrians and people would assume that any associated blockages would be there to protect them from danger.
27. In response, Mr Hepple argued that the construction of the Southern Radial Route had changed the nature of the Order route beyond recognition, yet it seemed that no-one had challenged the 2002 plans at the time. His interpretation of the 2002 side roads order was that it had closed off all access

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<sup>3</sup> A twenty year period subsequent to the sale in 2009 has not yet passed during which a case for presumed dedication could be made under the statutory approach.

<sup>4</sup> Use 'as of right' is interpreted as being use by the public that is not by force, does not take place in secret and is not on the basis of permission.

to the Order route and despite a statement in the 2002 Order to the effect that a reasonably convenient alternative means of private access would be provided, none had materialised here. The old Stockton Road could no longer be accessed from the same point, but none of the forms completed by the claimants had mentioned this. In fact most of the claimants referred to the route linking St Nazaire Way with the National Cycle Network Route 1; neither of these routes was in existence before 1999, yet some people claimed their use stretched back to the 1960s or earlier.

*Actions of the landowner*

28. Until 2013, when Mr Hepple installed a fence across the Order route at point A and blocked the stiles at point B, there is no evidence which suggests any action was taken by or on behalf of the adjacent landowners to influence use of the old road in any way. Given its physical character as an old highway, adjacent landowners must have been aware that members of the public continued to enjoy access along it<sup>5</sup>, yet no action was taken, either to gate it or to erect notices preventing public access.
29. Not only did the road remain open, at the end of the 1990s when National Cycle Network Route 1 was established, stiles were installed at point B to prevent use by motor bikes whilst facilitating access for other types of user. No evidence has been provided of negotiations with adjoining landowners at that time but it seems clear that a local authority would not have spent its resources installing these stiles unless the public was using the route. There is no record of any objection to these stiles from adjacent landowners since their installation. Their acceptance of these structures would understandably be interpreted by local users as visible recognition that the public was entitled to use the way, at the very least on foot.
30. I therefore have no hesitation in concluding that, until Mr Hepple's actions in 2013, the failure of the adjacent landowners to restrict use by the public from 1962 onwards, together with their acceptance of the stiles at point B from 1999 onwards, on a route which retained its physical character as a highway, was entirely consistent with dedication of the route as a public right of way and constitutes evidence from which such dedication can be implied.

*Acceptance by the public*

31. If the way can be presumed to have been dedicated, did the public accept it? That is the question which follows. SCC has analysed the details from the 17 completed evidence forms it received from local people, although it discounted 6 of these, leaving 11 who claim to have used the way for varying periods of time. All state their use dated back as far as 1993 and 7 claim to have been using the way since the 1960s. Three recall their use before 1962 (although the Order route was clearly still a full public road at that stage).
32. None of these people were called to give evidence in person at the hearing, despite most of them indicating their willingness to do so on their forms. Neither did SCC follow up these written statements by interviewing the claimants. Consequently there are many questions which arise from analysis of the forms that now must remain unanswered and I can place far less weight on this evidence than might otherwise have been the case, had further details been available.

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<sup>5</sup> At least before the bridge was removed and post-1999

33. For example, 8 of the claimants describe the start of the claimed footpath as St Nazaire Way and 6 identify the end point as the National Cycle Network Route 1. None of these people have explained how their use differed before 1999 when neither of these two features existed. None of the 11 claimants have been able to explain how they continued beyond point C in the absence of a railway bridge (although the exact date of its removal remains elusive). None of the claimants have mentioned the fence which is visible on photographs in the vicinity of point A in 2005, carrying an advertisement for the road contractors (Birse).
34. Without answers to these questions, I am left in some doubt over the veracity of the claimed use. This is particularly so in relation to use before 1999 as it is not clear whether people were physically able to continue beyond point C whilst the railway was still in service, the bridge out of action and ultimately removed. The aerial photographs available from 2001 onwards confirm the link with the cycle route and the presence of the stiles at B but prior to this there is no clear explanation for how some of the claimants proceeded to Ryhope Dean or Seaham as stated on their forms.
35. The 2001 aerial photographs also illustrate the length of the old Stockton Road before the Southern Radial Route cut across its northern end. There seems little doubt that the 2002 side roads order closed off a section of this hedged lane within the bounds of the then proposed, and now present, A1018 highway. However this did not directly affect the section which is now the subject of this Order. There is no record of any concern being expressed in 2002 by local people about future access along the old road but that may have been because they understood the plans to mean that section A-B-C would still be available to them as before. That is indeed what subsequently happened.
36. I have looked very carefully at the 2005 photographs which show the Birse fence. During the year or two this was in situ, it is clear that people were not able to approach the Order route from the north on the original alignment of the old road, but it is equally apparent from the discernible worn line on the ground that access was still available by walking around the fence. Yet I hesitate to assume that the claimants did actually approach the Order route in this way since none mention it on their forms, yet the fact that it has not been mentioned tends to suggest that their use was not actually interrupted by the fence; no complaints are noted from that period.
37. On the matter of interruptions, Mr Bracken drew my attention to the case of *Fernlee Estates [2001] EWHC Admin 360* where, at paragraph 16, Mr Justice Scott Baker said that to constitute an interruption in this context "*there must be some physical and actual interruption which prevents enjoyment of the way rather than merely acts which challenge the user while allowing it to go on*".
38. The Birse fence does not appear to have been intended to deliberately challenge use of the Order route; the Company would have no reason to do so. On balance, I am inclined to accept that it did not interrupt the otherwise continuous use of the Order route by the public on foot between 1999 and 2013.
39. However the number of claimants is quite limited and, although their experience goes back many more years than twenty, for reasons I have explained above I am unwilling to accept their testimony further back in time than 1999; after this date I can be reasonably certain that the Order route did form part of an accessible through-route.

40. There is no fixed number of claimants, nor frequency of use, regarded as the minimum necessary to demonstrate use by the public. In simple terms it must be sufficient to alert a landowner to the possibility that the public may be establishing a right of way over his or her land. That can depend on the context. Where, as here, the character of the way is such that, since inception, its prime use has been as a highway, the level of use required to establish the way as a public footpath is, in my view, sufficiently met by the eleven claimants providing evidence of their usage.
41. Although this evidence covers a period of only 14 years, when combined with the character of the way being unaltered since its days as a public road, and the presence throughout that time of the local authority installed stiles at point B, I am satisfied that the dedication implied by the acquiescence of the adjacent landowners was accepted by the public.
42. Whilst I have been unable to ascertain exactly when the bridge over the former railway was blocked off and later removed, there is also a period of time before 1999 when use of the old Stockton Road will have contributed to the local belief that the public was still able to enjoy access along the route. That part was severed by the 2002 side roads order will not have affected the continued existence of any pre-existing public rights between points A, B and C.
43. In conclusion, and on the basis of the information provided, I am satisfied that the relevant statutory test is met: that, on a balance of probability, a public right of way on foot has been shown to subsist along the Order route, and consequently that the Order should be confirmed.

### **Other matters**

44. At the hearing I queried whether or not the Order could properly constitute a highway in the sense that it clearly leads from a public highway at its northern end (A1018 St Nazaire Way) but does not appear to connect with any recorded public right of way to the south. The National Cycle Network Route 1 is not recorded on either the definitive map or on the highway authority's list of streets maintainable at public expense.
45. There is no rule of law that a highway cannot exist as a cul-de-sac<sup>6</sup>, and it is not a requirement of a public right of way that it must lead from one public highway to another<sup>7</sup>; if there is some attraction at one end which might cause the public to wish to use it, this could be sufficient to justify the conclusion that a public highway has been created, in legal terms as a cul-de-sac<sup>8</sup>.
46. This was a point which also arose in a case referred to by Mr Hepple: *Hamilton v Dumfries and Galloway Council [2009] CSIH 13* which primarily addressed the procedures for stopping up a highway.
47. In the present case I am satisfied that National Cycle Network Route 1 is a place to which the public resort and has been promoted as such since 1999 at least, despite no formal recognition of its status as accessible to the public.
48. Mr Hepple submitted that if the Order route is to be recorded, the full length of the old Stockton Road should also be considered. That is a fair and logical

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<sup>6</sup> R v SSE ex parte Bagshaw and Norton (QBD)[1994] 68 P & CR 402, [1995] JPL 1019

<sup>7</sup> Attorney General & Newton Abbot RDC v Dyer [1945] 1 Ch 67

<sup>8</sup> Roberts v Webster [1967] 66 LGR 298, 205 EG 103

argument given that some claimants state they used the route to walk beyond the cycleway. However the limits of the evidence before me here do not allow me to form any reliable view of the status of this route south of point C.

49. In his submission, Mr Hepple also questioned the motives of both SCC and the individual claimants in pursuing the Order. As I explained at the hearing, neither the merits nor any disadvantages of the claimed public footpath are at issue here; the question for me in determining this Order is whether or not a public right of way has already come into existence as a matter of law.
50. Finally, I note Mr Hepple's indignation that SCC removed his fence before the Order had been determined and before the status of the Order route had been conclusively established. The actions of SCC in this regard are not relevant to my consideration of the evidence in this case and I make no comment on the steps taken in respect of the fence.

### **Conclusion**

51. Having regard to the above and all other matters raised in the written representations and at the hearing, I conclude that the Order should be confirmed.

### **Formal Decision**

52. I confirm the Order.

*Sue Arnott*

**Inspector**

## **APPEARANCES**

### **In support of the Order**

Mr P Bracken                      Solicitor; Sunderland City Council  
Mr T Ducker                      Public Rights of Way Officer; Sunderland City Council

### **Opposing the Order**

Mr G Hepple                      Objector  
Ms S Newby

### **Observing in a neutral capacity**

Mr N Harrison

## **DOCUMENTS**

1. Copy of the statutory objection
2. SCC's statement of case with appendices 1-5 including (1) user evidence forms; (2) table of accepted/rejected forms; (3) Order plan; (4) objection, & (5) photographic evidence (dated 2006/2015)

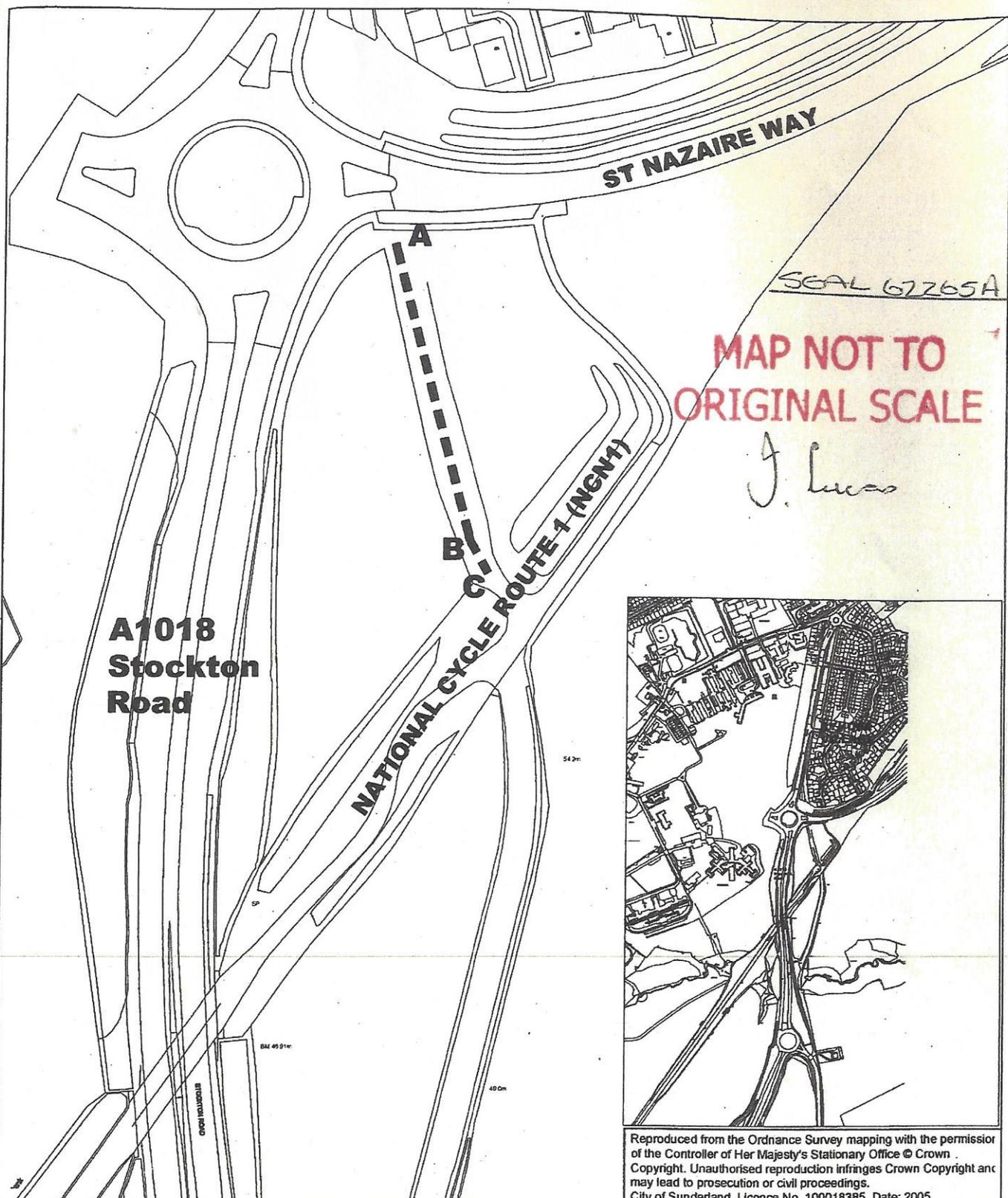
#### Submitted at the hearing

##### *By SCC:*

3. Land Registry documents relating to Title Nos. TY376191, TY483525, TY500480, TY403430 and TY422296
4. Copy of The East of Snaith – York – Thirsk – Stockton on Tees – Sunderland Trunk Road (Seaton Bank Railway Bridge, Ryhope Diversion, Side Roads) Order 1962
5. Extracts from The City of Sunderland (Southern Radial Route – A1018 Classified Road)(Side Roads) Order 2002 and The City of Sunderland (Southern Radial Route – A1018 Classified Road) Compulsory Purchase Order 2002
6. Copy of SCC initial report dated 12 October 2015 and decision record for claimed public right of way on the line of the former A1018
7. Series of coloured aerial photos dating from 2001 to 2017 including other supplemental photos
8. Copies of letters giving notice of making of the Order
9. Additional email from User Ref 1
10. User analysis compiled by SCC
11. Email note concerning land registry search

##### *By Mr Hepple*

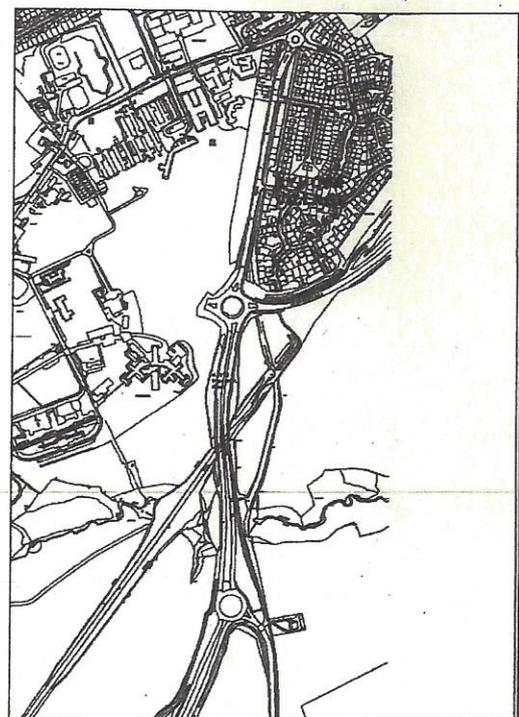
12. Folder containing statement of case and enclosures 1-10 including (1) email dated 9/8/13, (2) Order map; (3) photographs (2001-2015); (4) correspondence with SCC; (5) details from Smiths Gore; (6) planning matters; (7) Police matters; (8) highway issues; (9) photographs; (10) relevant case law



SEAL 67265A

MAP NOT TO ORIGINAL SCALE

J. Lucas



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**CITY OF SUNDERLAND (ST NAZAIRE WAY RYHOPE)  
DEFINITIVE MAP MODIFICATION ORDER 2016**

**FOOTPATH TO BE ADDED BY THIS ORDER — — — — —**

PROJECT LEADER		GC		NORTH 
DRAWN BY		TD		
DATE	160627	SCALE	1:1,000	
DRAWING No.	SCC/PROW/CI RT/St Naz/RDD151028		SHEET SIZE A4 REVISION V1	