

NORTH YORKSHIRE COUNTY COUNCIL**PLANNING AND REGULATORY FUNCTIONS SUB COMMITTEE****2 MARCH 2012****APPLICATION TO ADD A RESTRICTED BYWAY TO THE DEFINITIVE MAP AND STATEMENT AT STANWICK PARK, STANWICK ST JOHN****Report of the Corporate Director – Business and Environmental Services****1.0 PURPOSE OF THE REPORT**

- 1.1 To advise Members of an application for a Definitive Map Modification Order, the effect of which, if confirmed, would be to add a Restricted Byway along the track running from South Lodge, Stanwick St John, past Outer Lodge, to the Aldbrough St John road. A location plan is attached to this report as **Plan 1**. The route referred to is shown as A - B on **Plan 2**, which is also attached to this report.
- 1.2 To request Members to authorise the Assistant Chief Executive, Legal and Democratic Services, to make a Definitive Map Modification Order.

2.0 THE COMMITTEE'S RESPONSIBILITIES

- 2.1 The Committee in considering the Modification Order application acts in a quasi-judicial capacity. It is fundamental that consideration and determination of an issue is based on the evidence before the Committee and the application of the law. The merits of a matter have no place in this process and so the fact that a decision might benefit or prejudice owners, occupiers or members of the general public, or the Authority, has no relevance to the issues which members have to deal with and address.
- 2.2 The Committee's decision whether to "make" an Order is the first stage of the process. If Members authorise an Order being "made", and there are no objections to the Order, the County Council can "confirm" the Order. However, if there is objection to an Order that is not subsequently withdrawn, only the Secretary of State would have the power to decide if it should be "confirmed". It would then be likely that a Public Inquiry would be held, and the decision whether or not to confirm the Order would rest with the Secretary of State.

3.0 LEGAL ISSUES

- 3.1 Under Section 53 of the Wildlife and Countryside Act 1981 the County Council has a duty to keep the Definitive Map and Statement under continuous review and to make a Modification Order to modify the Definitive Map and Statement where the discovery of evidence which, when considered with all other relevant evidence available to them, indicates that a right of way which is not shown on the map and statement subsists or is reasonably alleged to subsist.

- 3.2 Under Section 31 of the Highways Act 1981 a statutory presumption arises that a way has been dedicated as a highway on proof that the way has actually been enjoyed by the public, as of right, and without interruption for a full period of 20 years, unless there is sufficient evidence that there was no intention during that period to dedicate it. That period of 20 years is to be calculated retrospectively from the date when the right of the public to use the way is brought into question.
- 3.3 At common law a route can be held to have been dedicated as a public right of way on the basis of evidence of use. There is no prescribed period over which it must be shown that use has occurred but an inference of dedication by a landowner must be capable of being drawn. The use relied on must have been exercised “as of right”, which is to say without force, without secrecy and without permission. The onus of proof lies with a claimant.

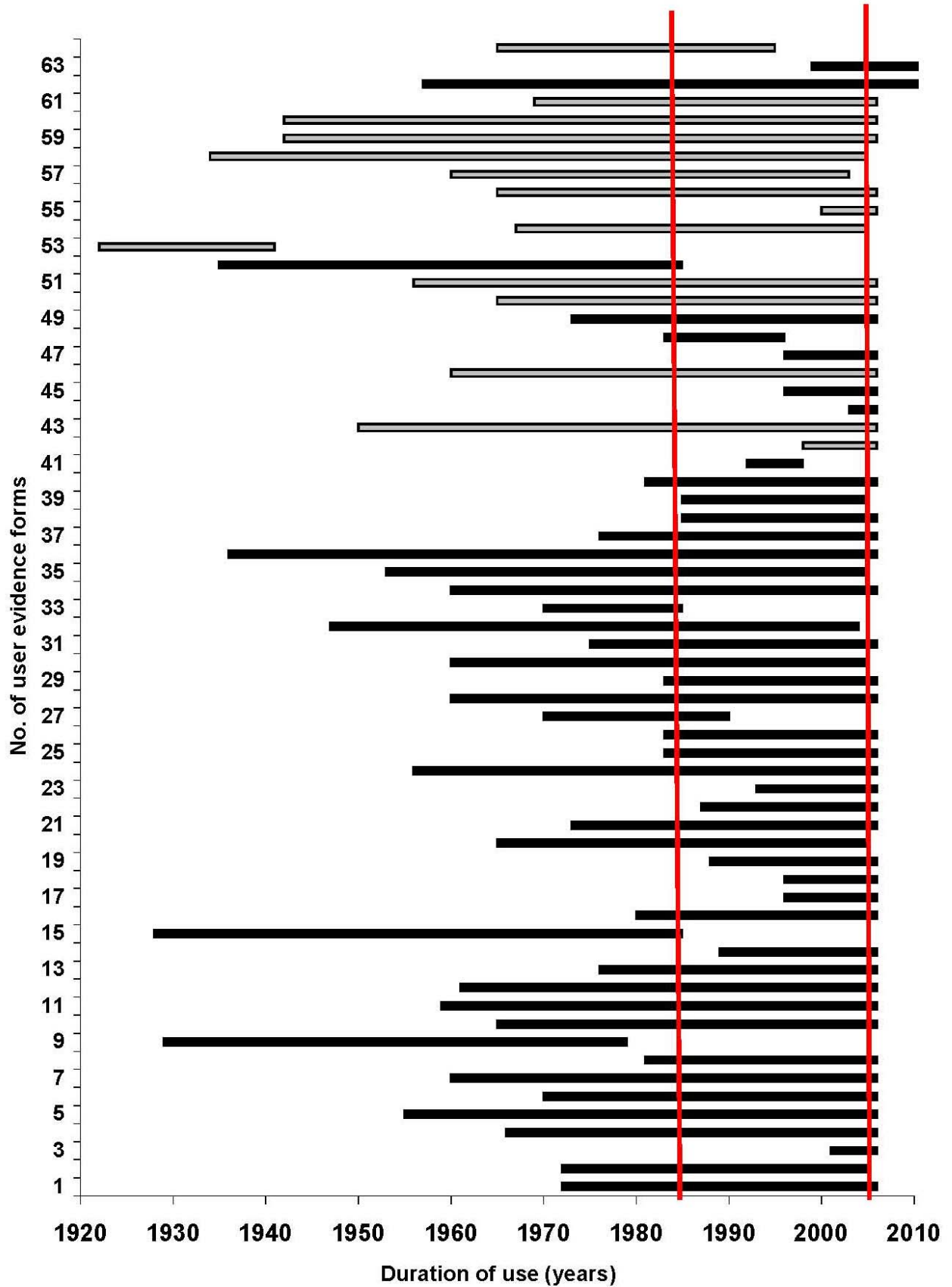
4.0 BACKGROUND

- 4.1 On 27 September 2006 Stanwick St John & Carlton Parish Council submitted an application under The Wildlife & Countryside Act 1981 to add the route shown A – B on Plan 2 to the Definitive Map and Statement as a Byway Open to all Traffic (BOAT). The application was submitted after the cut-off date for applications to record a BOAT as set out in the Natural Environment & Rural Communities Act 2006, therefore the Parish Council agreed to amend the application to record the route as a Restricted Byway.
- 4.2 The application was submitted after the owners of South Lodge and Outer Lodge put up gates (two field gates and an electric gate) across the application route in 2005, and challenged a small number of people using the route. The 20 year period of use required to show dedication of the route as a public right of way can therefore be set as 1985-2005.

5.0 EVIDENCE IN SUPPORT OF THE APPLICATION

- 5.1 The application was supported by 61 evidence of use forms, claiming uninterrupted use of the route from the 1920's up until 2005/2006, on foot, bicycle, horseback and in motor vehicles. During investigations into the application in 2011, a further three evidence of use forms were submitted, making a total of 64 forms.
- 5.2 The chart below shows the claimed use of the route. The bars coloured black show use of the route “as of right”, (ie “without secrecy, force or permission”), and the bars coloured grey show users who had a private right to use the route, or who used it with permission. The red vertical lines show the relevant 20 year period.

User Evidence Chart for claimed Restricted Byway at Stanwick Park
 (Grey bars show use with private rights or permission, black bars show use "as of right")



- 5.3 Of the 64 witnesses who completed user evidence forms, ten state that they had been challenged or prevented from using the route. Six witnesses give the dates of this challenge as 2005 or 2006, and another two give no date. One witness was asked where she was going by the owner of Outer Lodge in 2000, but was not stopped from using the route and was told that she was allowed to use the route as she lived in Stanwick. Another witness once found the gate at South Lodge shut in around 2000, but was unable to ascertain if it was locked or just shut as she is disabled so could not get out of her mobility scooter to check. Apart from these two occasions, none of the other witnesses state that they were ever stopped or challenged whilst using the route prior to 2005.
- 5.4 Of the ten witnesses who were challenged or prevented from using the route, four state that they were challenged by the owners of either South Lodge or Outer Lodge. Others state that they were prevented or put off using the route for one or more of the following reasons; the presence of loose Alsatian dogs (three users), difficult-to-use gates (six users) and vehicles parked on the route (five users).
- 5.5 A further 16 witnesses make reference to the gates installed in 2005, but state that the gates have not prevented them using the route.
- 5.6 One user states that she found the gate at South Lodge locked on a number of occasions in September 2005. None of the other witnesses have stated that they ever found any gates locked.
- 5.7 Some of the witnesses referred to a private right to use the track, set out in the deeds of some of the properties in Stanwick. Further investigation has shown that this private right applies to the properties that were sold as part of the Stanwick Park Estate in 1922.
- 5.8 Of the 64 forms only three user evidence forms have been withdrawn from the supporting evidence as these witnesses clearly state they have private rights in their property deeds, setting out a right "*at all times and for all purposes along the roadways marked on the said plan*", one of which corresponds to the line shown as A – B on Plan 2 of this report. Five other user evidence forms submitted by residents of Stanwick have been included in the supporting evidence, although it is uncertain whether they have private rights or not (four have not stated that they have private rights on the form, and one former resident could not remember if he had private rights or not).
- 5.9 A further 12 forms have been withdrawn from the supporting evidence, either because they showed use with permission, or used the route for access to farmland / livestock.
- 5.10 This leaves 49 valid user evidence forms; 44 showing clear use of the route "as of right" and another five completed by Stanwick residents who have not stated they have private rights.
- 5.11 Of the 49 valid user evidence forms, witnesses have all used the route by one or more means - on foot (43 witnesses), on horseback (29 witnesses), in a motor vehicle (15 witnesses), and on a bicycle (21 witnesses).
- 5.12 On the valid user evidence forms, reasons given for using the route include access to Aldbrough, leisure walking, dog walking, going to church, visiting friends and family, recreational riding, exercising horses, and as a safer alternative to the road. All of these are *bone fide* reasons for using a public right of way.

5.13 No historical evidence was submitted with the application.

6.0 EVIDENCE AGAINST THE APPLICATION

6.1 During initial investigations into the application, an objection was received from the owner of Outer Lodge, alleging that use of the route had been in exercise of private rights or by permission, and not “as of right”, and therefore could not be used as evidence of a public right of way. The owner stated that she has lived at Outer Lodge since 1998, and in that time the track has hardly ever been used, and that when it was used it was by those with a private right or those who had been given permission.

6.2 In her objection letter, the owner of Outer Lodge lists a number of people who she believes have a private right to use the route, because they farm land adjacent to the route. All user evidence forms completed by those using it to access land they own or farm have already been withdrawn from the supporting evidence.

6.3 The owner of Outer Lodge claims that many of the horseriders using the route did so in connection with a local riding stable, the owner of which she believes was given permission to use the route. She stated that other riders used it with the hunt, which also had permission to use the route.

7.0 RESPONSES FROM OTHER LANDOWNERS AND TENANTS

7.1 A neighbouring landowner (whose family owned Stanwick Park from 1922 until 1988, including the properties with access to the track and the land crossed by the application route) stated that he believes the route is a public right of way. He stated that for over 60 years, while the land was in the ownership of his family, the route was used by Stanwick residents and others without restriction on a daily basis. Over the years it had been used by Stanwick residents to get to the shops and services at Aldbrough, by people going to Stanwick church, by the postman, dustmen and delivery drivers, and by horseriders on a circular ride.

7.2 The current tenant of the land crossed by the application route (another member of the family who owned Stanwick Park from 1922-1988) stated that he believes the route is a public right of way. He also stated that he had never stopped anyone from using the route.

7.3 Agents for the current landowner (an investment company which purchased the land in 1988) stated they had no evidence to submit contrary to the application.

7.4 It appears that the owners of South Lodge do not own any land crossed by the application route, although it is believed that they are responsible for putting up one of the new gates across the route.

8.0 COMMENTS ON THE EVIDENCE

- 8.1 It is clear that there are a number of people resident in Stanwick who have a private right to use the application route “at all times and for all purposes”, and a small number of people who use the route to access farmland or livestock. These 2 categories of witness cannot be included in the evidence in support of the acquisition of public rights. However, it is also clear that the route has been widely used by others (approximately $\frac{3}{4}$ of those who completed evidence of use forms), “as of right” and this use has been unchallenged for over 70 years.
- 8.2 Consideration must be given to case law (*Mildred v Weaver* 1862, *Holloway v Egham UDC* 1908) which suggests that where a limited class of persons is entitled to use a route, it could be seen to negate any use which has been “as of right”. This is because it may not be reasonable to expect a landowner to differentiate between those exercising private rights, and those using the route “as of right”, making it difficult for them to challenge users.
- 8.3 Other case law states that on the other hand, it could be argued that on a route that a large number of people are entitled to use, it may not be worth the owner’s while to exclude the general public (*Grand Surrey Canal Co. v Hall* 1840).
- 8.4 However, even if the case in 8.2 applies to this route, if a landowner did not want the route to acquire public rights he could take other actions, such as putting up notices stating that the route was only open to those with private rights, or making a Section 31(6) deposit.
- 8.5 The current landowner has stated they have no evidence to submit, and there is no indication that they have taken any action to show an intention not to dedicate a public right of way.
- 8.6 There is no evidence that there were ever any notices stating that the route was private, or that anyone using the route was stopped or challenged prior to 2005. Members of the family previously owning the land who responded to investigations have stated that they were aware of public use of the route and believed the public had a right to use it.
- 8.7 Although it has been claimed that horseriders from a local stable had been given permission to use the route, this has been denied by the owner of the stable. In a telephone conversation with an Officer from the Definitive Map Team, the owner of the riding stable in question stated that she had never been given permission to use the route, but had used it believing it to be a public right of way. The riding stables were opened in about 1980, and at that time were based in Eppleby. The business moved to Sandwath Farm (part of the Stanwick Park landholding) in 1999, then moved to Namens Leases Farm, Aldbrough in 2010. The owner of the riding stable stated that ever since the business has been open, riders from the stable have used the route unchallenged, believing it to be open to the public.
- 8.8 During investigations into the application, 26 witnesses who stated they had used the route on horseback were contacted for further information about their use of the route. Of the 14 who replied, only four had a connection to the riding stable in question. The other ten had been riding independently, either on their own or with friends.

8.9 Apart from the challenges to users in 2005 (detailed in paragraphs 5.3 & 5.4), it would appear that no other actions were ever taken to stop people using the route. Witnesses have commented that the previous owner of Outer Lodge was always friendly to people using the route. It has also been stated by witnesses that the electric gates installed at Outer Lodge were easy to open from horseback or on foot.

9.0 CONCLUSIONS

9.1 Although it is clear that the route has been used by a number of people in exercise of private rights or with express permission, Officers are satisfied that the user evidence also demonstrates use of the route by a large number of walkers, horseriders, cyclists and motorists "as of right" (ie without force, secrecy or permission), for well over 20 years, before any challenges to users were made in 2005. Officers have been presented with no evidence of actions showing an intention not to dedicate by any landowner or tenant prior to 2005.

9.2 Due to the NERC Act 2006 (paragraph 4.1), public rights to use the route in a motor vehicle have been extinguished, so the highest status that the route could be recorded as, is a Restricted Byway.

9.3 It is considered that a public right of way is reasonably alleged to subsist, and that an Order should be made to add the route to the Definitive Map and Statement as a Restricted Byway.

10.0 RECOMMENDATIONS

It is therefore recommended that

i) The Committee authorise the Corporate Director, Business and Environmental Services to make a Definitive Map Modification Order for the route shown as A – B on Plan 2 of this report to be shown on the Definitive Map as a Restricted Byway.

ii) In the event that formal objections to that Order are made, and are not subsequently withdrawn, the Order be referred to the Secretary of State for determination. In so doing the Corporate Director exercises powers delegated to him under the County Council's Constitution in deciding whether or not the County Council can support confirmation of the Order.

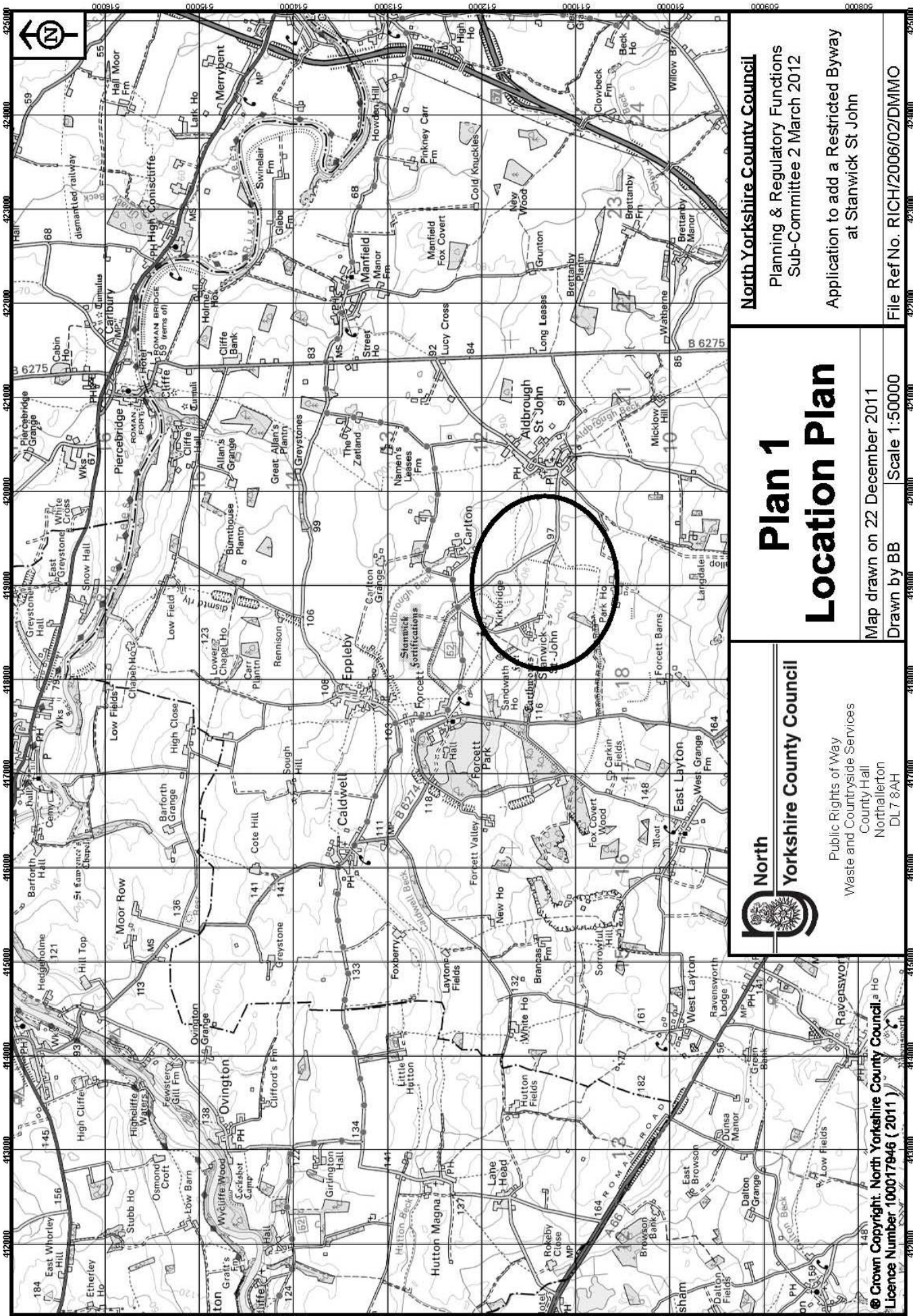
DAVID BOWE
Corporate Director Business and Environmental Services

Author of Report: Beth Brown, Definitive Map Officer

Background papers

- DMMO application dated 27 September 2006
- Evidence submitted in support of, and against the application

The documents are held on a file marked: County Council's Planning and Regulatory Functions Sub-Committee, 2 March 2012, Application to add a Restricted Byway to the Definitive Map and Statement at Stanwick Park, Stanwick St John, which will be available to Members at the meeting.



North Yorkshire County Council

Planning & Regulatory Functions
Sub-Committee 2 March 2012

Application to add a Restricted Byway
at Stanwick St John

File Ref No. RICH/2006/02/DMMO

Plan 1 Location Plan

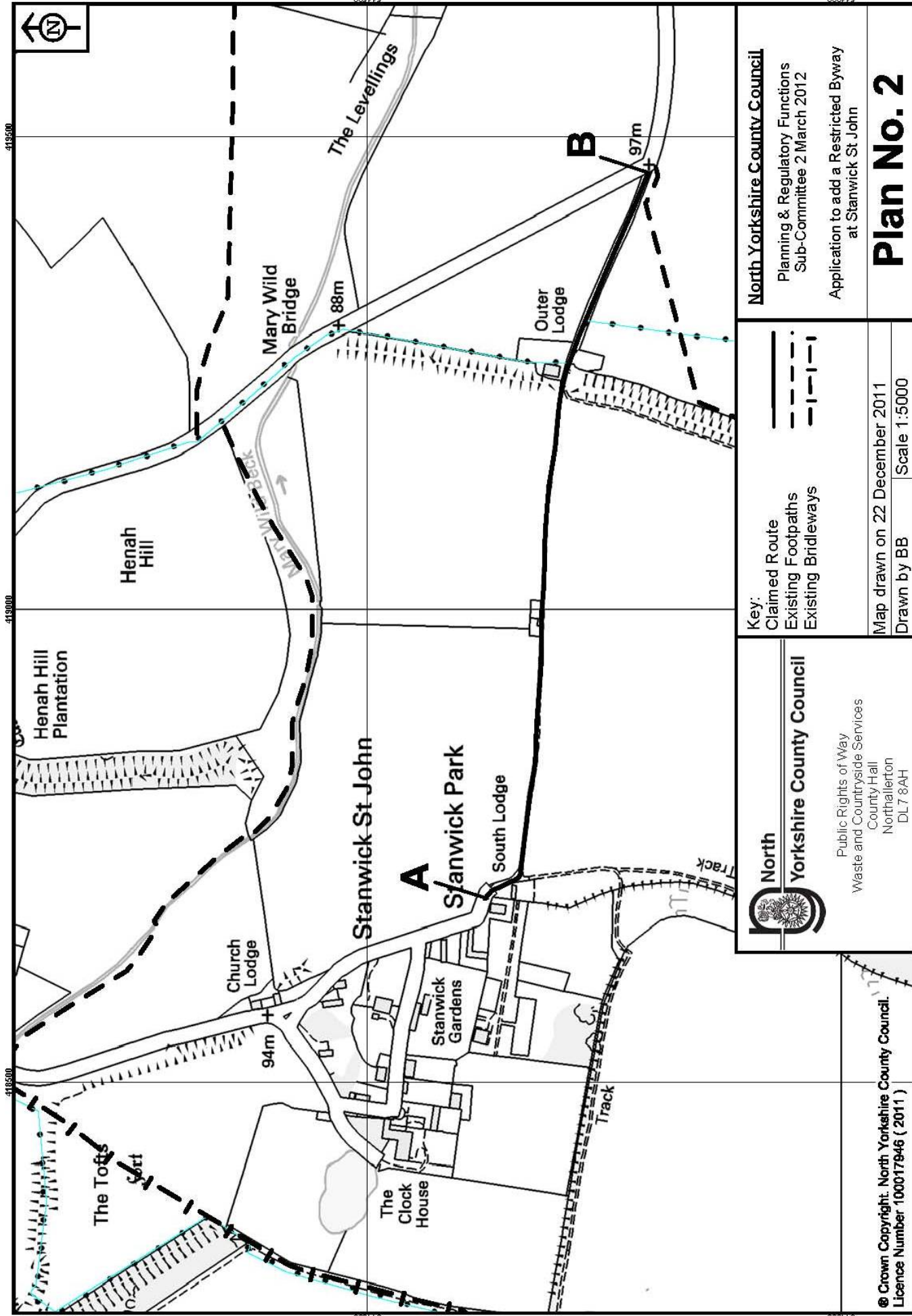
Map drawn on 22 December 2011

Drawn by BB Scale 1:50000



Public Rights of Way
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County Hall
Northallerton
DL7 8AH

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 County Hall
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Key:
 Claimed Route
 Existing Footpaths
 Existing Bridleways

Map drawn on 22 December 2011
 Drawn by BB Scale 1:5000

North Yorkshire County Council
 Planning & Regulatory Functions
 Sub-Committee 2 March 2012

Application to add a Restricted Byway
 at Stanwick St John

Plan No. 2

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