

North Yorkshire County Council

Executive Members

14 June 2021

Opposed Modification Order to add Restricted Byways to the Definitive Map at Stonebeck Up, Fountains Earth and Ilton-Cum-Pott

Report of the Assistant Director – Travel, Environment and Countryside Services

1.0 Purpose of the report

- 1.1 To advise the Corporate Director - Business and Environmental Services (BES) and Executive Member for Open to Business of an opposed Definitive Map Modification Order (DMMO).
- 1.2 To request the Corporate Director, in consultation with the Executive Member for Open to Business, to authorise that North Yorkshire County Council (NYCC), in its submission of the opposed Order to the SoS will support confirmation of the Order.

2.0 Background

- 2.1 The application for the DMMO was submitted to the County Council in October 2005 by the Trail Riders Fellowship for an existing bridleway and part footpath to be recorded as a byway open to all traffic (BOAT). Changes in legislation in 2006 meant that this route could not, in officers' view, be recorded as a BOAT but the application was still investigated to establish whether the route could be recorded as a restricted byway.
- 2.2 The application was supported by
- 25 Evidence of Use Forms
1 Statutory Declaration
- Historical Evidence:
- 1854 Fountains Earth Moor Inclosure
 - 1834 Greenwood's map of Yorkshire
 - 1775 Thos. Jeffreys Map of Yorkshire
 - 1974 W & AK Johnstons "Readyfold Coloured Touring Map" 3 miles to 1 inch
 - 1947 Geographia Road Map 3 miles to 1 inch
 - 1846 1st edition 1" OS map
 - 1856 1st Edition 6" OS map
 - 1892 2nd Edition 6" OS map
- 2.3 Attached to this report as Appendix A is a copy of the report submitted to the Assistant Director – Transport, Waste and Countryside Services dated 18 August 2020.
- 2.4 The Assistant Director – Transport, Waste and Countryside Services approved the making of a DMMO which was subsequently advertised, attracting two objections which remain outstanding. The County Council cannot confirm a DMMO where there are outstanding objections; the Order must be forwarded to the Secretary of State for resolution.

3.0 Responses to the publication of the sealed order

- 3.1 The Order was made on 20 November 2020 and following the advertisement of the Order 2 objections were received. Both objections were regarding technicalities within the Order, not about the principle of whether the evidence supports the status of the route being recorded as a restricted byway.
- 3.2 The first objection relates to a section of the route between Points A – X on Appendix A Plan 3 attached to this report. This section has been incorrectly included in the Order. It is currently maintainable highway and the effect of the Order as it stands would be to downgrade that section and thus extinguish motor vehicular rights which was not the intention of the application.
- 3.3 This section was incorrectly included when the application route was recorded in 2005 and went un-noticed until the consultation on the Order was carried out. When forwarded to PINS the submission will include an explanation on this point, and would request that if the Order is to be confirmed, a modification be made to the Order by the Inspector to exclude this section.
- 3.4 The second objection also relates to sections A - B on Appendix A Plan 2, referring to the widths of the route as described within the Order, and to the recording of the field gates on the route, within the Order. However, the widths described were derived from the user evidence and the normal width of Restricted Byways, and the field gates are already recorded on the Definitive Map and Statement.
- 3.5 The key issue here is what width of route the public have acquired the right to use, at the time that right was acquired, and whether or not the gates were in existence when the rights were acquired.
- 3.6 These matters will be fully considered by the Inspector via the Statements of Case which will be submitted by the various parties but which do not have any material effect on the stance to be taken by the Authority.

4.0 Representation made by the local member

- 4.1 No formal representations were received from the local councillor in response to the consultations regarding the Modification Order.

5.0 Financial implications

- 5.1 As the relevant evidence submitted consists mostly of documentary evidence, as the user evidence relates to motorcycle use of the route which is minimally relevant to the proposal to add a restricted byway to the Definitive Map, it is probable that the Order would be resolved by written representations.
- 5.2 There would be an unavoidable cost to the Authority in preparing a submission to the SoS, and responding to any queries raised by the SoS. These costs would be officer time which would be met by the respective staffing budgets.

6.0 Equalities Implications

- 6.1 The investigation and resolution of Definitive Map Modification Order applications is a statutory process which has no regard as to whether the outcome would benefit or prejudice owners, occupiers or members of the general public, and as such it is considered that equality and diversity issues are not relevant to the outcome of the

process. In any event, it is the view that the recommendations do not have an adverse impact on any of the protected characteristics identified in the Equalities Act 2010.

7.0 Legal Implications

- 7.1 The opposed Modification Order will be determined by an Inspector appointed by the SoS, and, as stated above, determination will most likely be by way of written representations.
- 7.2 The Inspector, on the basis of the evidence and the legal criteria will decide whether or not to confirm the opposed Modification Order. If he/she decides to confirm the Order, the routes will be amended on the Definitive Map and statement in accordance with the details within the Order.

8.0 Climate Change Implications

- 8.1 The proposal is to alter the public status of routes already recorded as public routes within the County Council's records. The confirmation of this order would have no positive or negative impact on climate change.

9.0 Current Decision to be made

- 9.1 The current decision to be made is which stance the County Council is to take within its submission of this opposed DMMO to the SoS. In submitting an opposed Order to the SoS the County Council needs to express whether, on the basis of the available evidence, it;
- supports confirmation of the Order,
 - believes the Order should not be confirmed, or
 - considers the evidence is either so finely balanced, or is particularly unclear and wishes to take a neutral stance.

10.0 Conclusions

- 10.1 The objections raised are seeking clarification within the Order in the expectation that it will be confirmed. The objections do not attempt to undermine the evidence that the existing bridleway should be upgraded in its status to that of restricted byway. Therefore no evidence has been put forward to suggest that the Order should not be confirmed.
- 10.2 No evidence has been submitted to suggest that the route should not be recorded as a restricted byway.
- 10.3 The evidence is sufficient to support, on the balance of probabilities, that the route is 'more likely than not' to carry higher rights than that of the existing bridleway rights. It is not disputed that motor vehicular rights have been extinguished by NERCA 2006.
- 10.4 Therefore there is no reason why the Authority should oppose the confirmation of the Order, nor take a neutral stance to the confirmation of the Order.

11.0 Recommendation

- 11.1 That the Corporate Director – BES, in consultation with the Executive Member for Open to Business authorises the Authority to support confirmation of the Order in its submission to the SoS, requesting the modifications to be made to correct the conflicts inadvertently made within the Order as described above.

MICHAEL LEAH
Assistant Director Travel, Environment and Countryside Services

Author of report: Ron Allan

Background papers: HAR/2005/05/DMMO Stonebeck Up (Scar House-Pott Moor High Rd)

North Yorkshire County Council

Executive Members

14 June 2021

**Opposed Modification Order to add Restricted Byways to the Definitive Map at
Stonebeck Up, Fountains Earth, & Ilton–Cum-Pott**

AUTHORISATION

I approve / do not approve the recommendation set out above

.....

ANY ADDITIONAL RECOMMENDATION or COMMENT:

.....

.....

Karl Battersby
Corporate Director - BES

Signed:Date:

North Yorkshire County Council

**Report to the Assistant Director – Transport, Waste and Countryside Services
18 August 2020**

**Application for a Definitive Map Modification Order to upgrade Bridleways no.s;
15.126/2/4 Stonebeck Up & 15.44/1/5 Fountains Earth, and Footpaths no.s 15.57/12/1
Healey & 15.63/3/1 Ilton cum Pot to Restricted Byways**

1.0 Purpose of report

- 1.1 To advise the Assistant Director of an application for a Definitive Map Modification Order to upgrade Bridleways no.s; 15.126/2/4 Stonebeck Up & 15.44/1/5 Fountains Earth, and Footpaths no.s 15.57/12/1 Healey & 15.63/3/1 Ilton cum Pot to BOAT. A location plan is attached to this report as **Plan 1**. The route is shown in detail as A - E on **Plan 2**.
- 1.2 To request the Assistant Director to authorise the making of a Definitive Map Modification Order to upgrade Bridleways no.s; 15.126/2/4 Stonebeck Up & 15.44/1/5 Fountains Earth, and Footpaths no.s 15.57/12/1 Healey & 15.63/3/1 Ilton cum Pot to Restricted Byways along the application route, on the basis of evidence of existing higher rights than Bridleway discovered during investigation into the application.

2.0 Scheme of delegation

- 2.1 Within the County Council’s scheme of delegation, it is delegated to the Assistant Director – Transport, Waste and Countryside Services to exercise the functions of the Council under Part III of the Wildlife and Countryside Act 1981 in relation to the power to make and advertise Definitive Map Modification Orders, including where an objection has been received from any person or body.
- 2.2 For routes which are already recorded on the Definitive Map and Statement, but where the application is to amend the status of the route, the evidence required must meet the higher “balance of probabilities” test.

3.0 The application

Applicant:	Mr B Thompson, Trail Riders Fellowship.
Date of application:	3/10/2005
Type of Application	Definitive Map Modification Order
Parish:	Stonebeck Up, Fountains Earth, Healey & Ilton cum Pot
Local Member:	Cllr Margaret Atkinson Cllr Stanley Lumley
Application supported by:	25 Evidence of Use Forms 1 Statutory Declaration
List of documentary evidence:	Historical Evidence <ul style="list-style-type: none"> • Fountains Earth Moor Inclosure 1854 • Greenwood’s map of Yorkshire 1834 • Thos. Jeffreys Map of Yorkshire 1775 • W & AK Johnstons “Readyfold Coloured Touring Map” 3 miles to 1 inch 1947 • Geographia Road Map 3 miles to 1 inch 1947

	<ul style="list-style-type: none"> • 1st edition 1" OS map 1846 • 1st Edition 6" OS map 1856 • 2nd Edition 6" OS map 1892
Applicant's grounds for making the application	Challenge to use in 1997 when a Statement made under S31 of the Highways Act was submitted to the County Council.

4.0 Relevant legal criteria

- 4.1 In deciding whether to make a Modification Order, the County Council must be satisfied that, in accordance with Section 53 of the Wildlife and Countryside Act 1981, the evidence discovered by the County Council, when taken into consideration with all other relevant evidence, is sufficient to show that on the "balance of probabilities" a public right of way subsists along the claimed route.
- 4.2 Although the original application was for a BOAT, significant changes have since been made to relevant legislation, which affect this application.
- 4.3 The Natural Environment and Rural Communities Act 2006 (NERCA 2006), Parliament legislated to extinguish certain unrecorded rights of way for mechanically propelled vehicles (motor vehicles) by a blanket provision, with a commencement date for the Act of 2 May 2006, subject to certain exceptions referred to below but acknowledged that there were inevitably applications for BOATs waiting to be investigated by highway authorities. Therefore, Section 67(3) allowed that any motor vehicular rights had not been extinguished by the blanket provision if:
- “(a) before the relevant date, an application was made under section 53(5) of the Wildlife and Countryside Act 1981 for an order making modifications to the definitive map and statement so as to show the way as a byway open to all traffic”.
- 4.4 The “relevant date” given within the Act was 20 January 2005. This, in effect, provided a backdated cut-off date for existing applications for BOATs.
- 4.5 This application was submitted after the relevant date of 20 January 2005, therefore, once investigated, if vehicular rights were proved to exist the route could only be recorded as a restricted byway (which excludes motor vehicle rights), unless it could be demonstrated that one of the exceptions as set out under Section 67(2) of the NERCA 2006 was applicable.
- 4.6 The only exception that was considered as potentially relevant to the application route is Section 67(2)(a). This provides that any motor vehicular right had not been extinguished by the Act if:
- “(a) it is over a way whose main lawful use by the public during the period of 5 years ending with commencement was use for mechanically propelled vehicles”.
- 4.7 “Commencement” is the date at which the Act became effective, that is, 2 May 2006.

- 4.8 After consideration of the evidence provided to the County Council it was considered that the application did not present evidence that that public use of the application route during the relevant period was predominantly by motor vehicle.
- 4.9 Officers concluded therefore, that the highest rights that could exist on the application route were those of restricted byway.

5.0 User evidence and NERCA 2006

- 5.1 25 qualifying evidence of use forms were submitted detailing motor vehicle use of the route from 1968 to 1997 of which 14 exceeded the required 20-year user period.
- 5.2 None of the user evidence forms record any challenge to the use.
- 5.3 Section 67 of the Natural England and Rural Communities Act 2005 deals with the ending of certain existing unrecorded public rights of way:
- 1) An existing public right of way for mechanically propelled vehicles is extinguished if it is over a way which, immediately before commencement—
 - (a) was not shown in a definitive map and statement, or
 - (b) was shown in a definitive map and statement only as a footpath, bridleway or restricted byway.
- 5.4 The commencement date is the 20th January 2005, therefore any mechanically propelled vehicular rights are extinguished unless any of the exemptions contained in subsection 2 and 3 of the Act apply.
- The exemptions are -
- (a) it is over a way whose main lawful use by the public during the period of 5 years ending with commencement was use for mechanically propelled vehicles,
 - (b) immediately before commencement it was not shown in a definitive map and statement but was shown in a list required to be kept under section 36(6) of the Highways Act 1980 (c. 66) (list of highways maintainable at public expense),
 - (c) it was created (by an enactment or instrument or otherwise) on terms that expressly provide for it to be a right of way for mechanically propelled vehicles,
 - (d) it was created by the construction, in exercise of powers conferred by virtue of any enactment, of a road intended to be used by such vehicles, or
 - (e) it was created by virtue of use by such vehicles during a period ending before 1st December 1930.
- (3) Subsection (1) does not apply to an existing public right of way over a way if:
- (a) before the relevant date, an application was made under section 53(5) of the Wildlife and Countryside Act 1981 (c. 69) for an order making modifications to the definitive map and statement so as to show the way as a byway open to all traffic,
 - (b) before commencement, the surveying authority has made a determination under paragraph 3 of Schedule 14 to the 1981 Act in respect of such an application, or
- 5.5 The evidence of use forms indicate that vehicular rights are likely to subsist but the application was submitted on the 30th of September 2005 which is after the cut-off date of 20th January 2005 laid down in the NERCA 2006.
- 5.6 A claim for motor vehicle rights could only be successful if one of the exemptions contained within S 67 of NERCA 2006 was found to apply and in this case none do so, therefore, in accordance with s 67 the highest status that can be achieved is Restricted Byway.

6.0 Documentary Evidence

- 6.1 The route or sections of it appear in the following historical documents:
- The 1854 Fountains Earth Inclosure Award covers the eastern end of the route and the route is clearly laid out and annotated with “to Masham” which would indicate a through route rather than a route solely used to access land. Inclosure awards were made under specific legal authority and are conclusive proof of the status of a highway. Although the Award does not cover the whole route it is unlikely that a public highway would be laid out which did not connect to another highway suggesting that it was a through route.
 - Greenwood’s map of Yorkshire 1834, Thos. Jeffreys Map of Yorkshire 1775, W & AK Johnstons “Ready-fold Coloured Touring Map” 3 miles to 1 inch 1947 and the Geographia Road Map 3 miles to 1 inch 1947 are all commercially available maps which show the claimed route. It is generally considered that such commercial maps would only show those routes which were available for the public to use.
 - The 1st edition 1” OS map 1846 – 1897, the 1st Edition 6” OS map 1856 and the 2nd Edition 6” OS map 1892 all show the route but do not assign any status to it.
- 6.2 Taken together the user and documentary evidence provide good evidence of the route having highway reputation or status.

7.0 Objections to the application

- 7.1 The owner of the section between points B and C on the plan states that a section 31 deposit was made in 1997 in respect of the Middlesmoor Estate (valid until 2013). Alleged usage evidence in respect of section B to C covering 1997 to 2013 should therefore be disregarded.
- 7.2 They also state that the historical evidence in the form of historical maps has not been provided and as such it has not been possible to assess its validity.
- 7.3 The objector states that of the 25 evidence of use forms provided as evidence, only 17 cover the full required 20-year time period. Only 2 refer to access on foot and only 7 to access by bicycle. The objector states that those forms which refer to use by motor vehicle should be excluded because such use would not be permitted if the application was successful. The objector also states that the alleged frequency of use, being only once per year for 10 of the 25 forms and under 10 times per year for 12 of the 25 forms, was very infrequent.
- 7.4 The objector also states that it is unclear if the evidence relates to the whole of the route and therefore should not be taken to apply to the whole route.
- 7.5 Evidence from three people countering that stated in the evidence of use forms is set out below-
- The owner of Middlesmoor Estate since 1991 and before that the son of the owner, the estate having been by the family for 101 years states that he has not seen any evidence of the use of the route by bicycles, horses or motorised vehicles. Walking on the route has been accepted under the CRoW Act 2000 since that Act came into force.
 - The Head Moorland Gamekeeper of Swinton Estate since 2006 states that he has challenged anyone who he has seen on the route in so far as it is on Swinton Estate.

- The Moorland Gamekeeper of Swinton Estate since 2004 states that he has challenged anyone who he has seen on the route in so far as it is on Swinton Estate.

7.6 The objector has stated that they believe that the increased usage which would inevitably result from the change in the designation of the route would bring with it an increased risk of wildfire, trespass onto sensitive moorland wildlife habitats (which are designated as an SSSI) and increased maintenance costs for the landowners.

8.0 Conclusions regarding the evidence and objections to the application

8.1 The user evidence indicates use by motor vehicles during a qualifying period of 1977 to 1997. Whilst this use no longer contributes to the route being able to be recorded as a BOAT due to the effect of the NERCA 2006, as described in section 5 above, the NERCA 2006 does not prevent use of the route by motor vehicles being contributory evidence towards to the route being recorded as a restricted byway.

8.2 The route is shown in existence through most of its length on historic OS maps. Whilst this shows the route existed on the ground, it does not in itself indicate public highway status.

8.3 The objection raised on the basis of the section 31 deposit is not valid because it does not apply to the period of claimed use.

8.4 Whilst the objector states that he has not seen evidence of any use of the route by horses, bicycles or motor vehicles, this is not surprising as the route is fairly remote, and does not pass near to agricultural or residential properties, and the surface of the route is compact and would sustain vehicular use. The objector's comment relating to the CROW Act 2000 is incorrect as the route has been recorded in part as a public footpath, and part as a public bridleway, on the original Definitive Maps produced by the former North Riding and West Riding County Councils in 1961 and 1972 respectively, so their public status preceded the CROW Act 2000.

8.5 The challenges to users listed in para 7.5 since 2006 and 2004 fall outside the period for claimed user and are therefore not relevant.

8.6 No evidence has been provided by the landowners to indicate that any steps were taken to prevent vehicular access, or to bring to the attention of the public that vehicular access along the route was not permitted.

9.0 Representation made by the local member

9.1 None

10.0 Financial implications

10.1 In the event that an Order were to be made and was then opposed, there may be financial implications for the authority in covering any cost associated with any subsequent public inquiry. Such costs cannot be avoided where the Planning Inspectorate decides that a public inquiry should be held to resolve an application. If an Inquiry were to be held the Authority may need to appoint external advocacy.

11.0 Equalities implications

- 11.1 There is a statutory requirement to investigate applications for Definitive Map Modification Orders, regardless as to whether the outcome would benefit or prejudice owners, occupiers or members of the general public, and as such it is considered that equality and diversity issues are not relevant to the outcome of the process. In any event it is considered that the outcome would have no impact on the protected characteristics identified in the Equalities Act 2010.

12.0 Recommendation

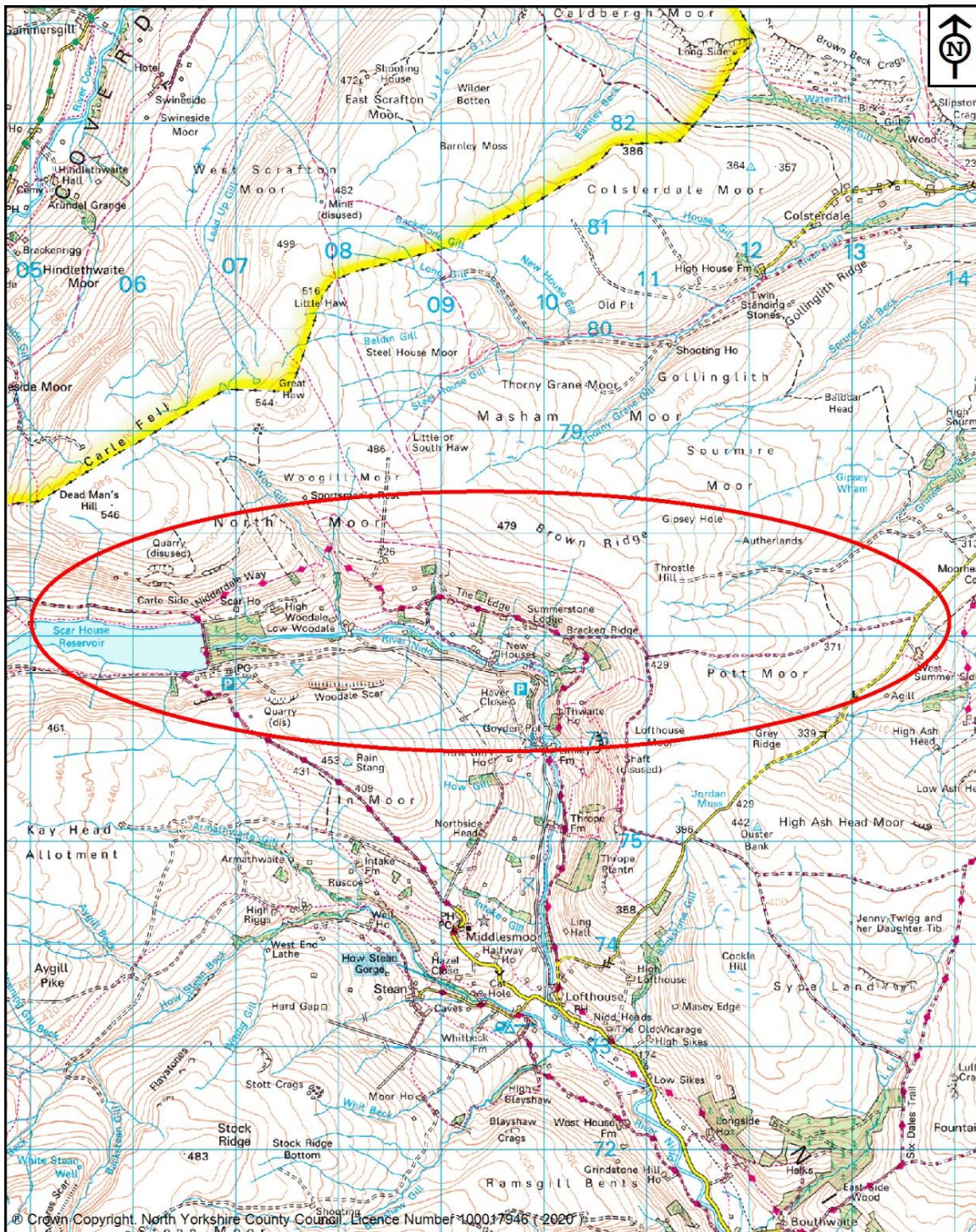
- 12.1 It is therefore recommended that: the Assistant Director, Transport, Waste and Countryside Services, authorises the making of a Definitive Map Modification Order for the route shown as A – E on Plan 2 of this report to be recorded on the Definitive Map as a Restricted Byway.


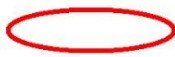
Author of Report: Ron Allan

Background Documents:

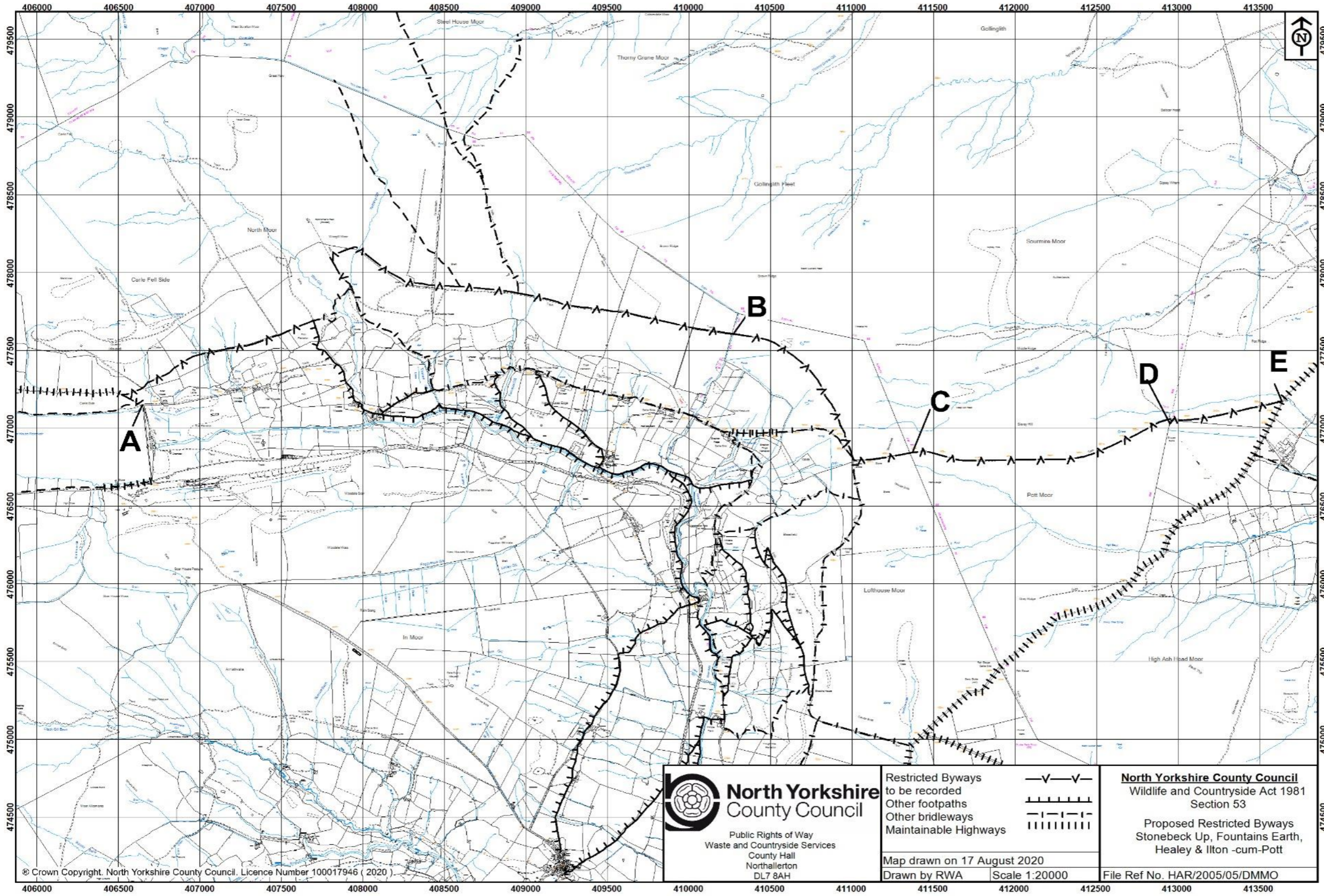
N:\bes-data\WACS\PRoW\DMT\Applications\02 DMMO\03 Harrogate\HAR-2005-05-DMMO Stonebeck Up (Scar House-Pott Moor High Rd)


Plan 1


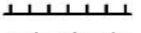




 <p>North Yorkshire County Council</p> <p>Public Rights of Way Waste and Countryside Services County Hall Northallerton DL7 8AH</p>	<p>Location </p>	<p>North Yorkshire County Council</p> <p>Scar House to Pott Moor Road</p>
	<p>Map drawn on 11 February 2020</p> <p>Drawn by RWA</p>	<p>Scale 1:50000</p>

Plan 2



 **North Yorkshire County Council**
 Public Rights of Way
 Waste and Countryside Services
 County Hall
 Northallerton
 DL7 8AH

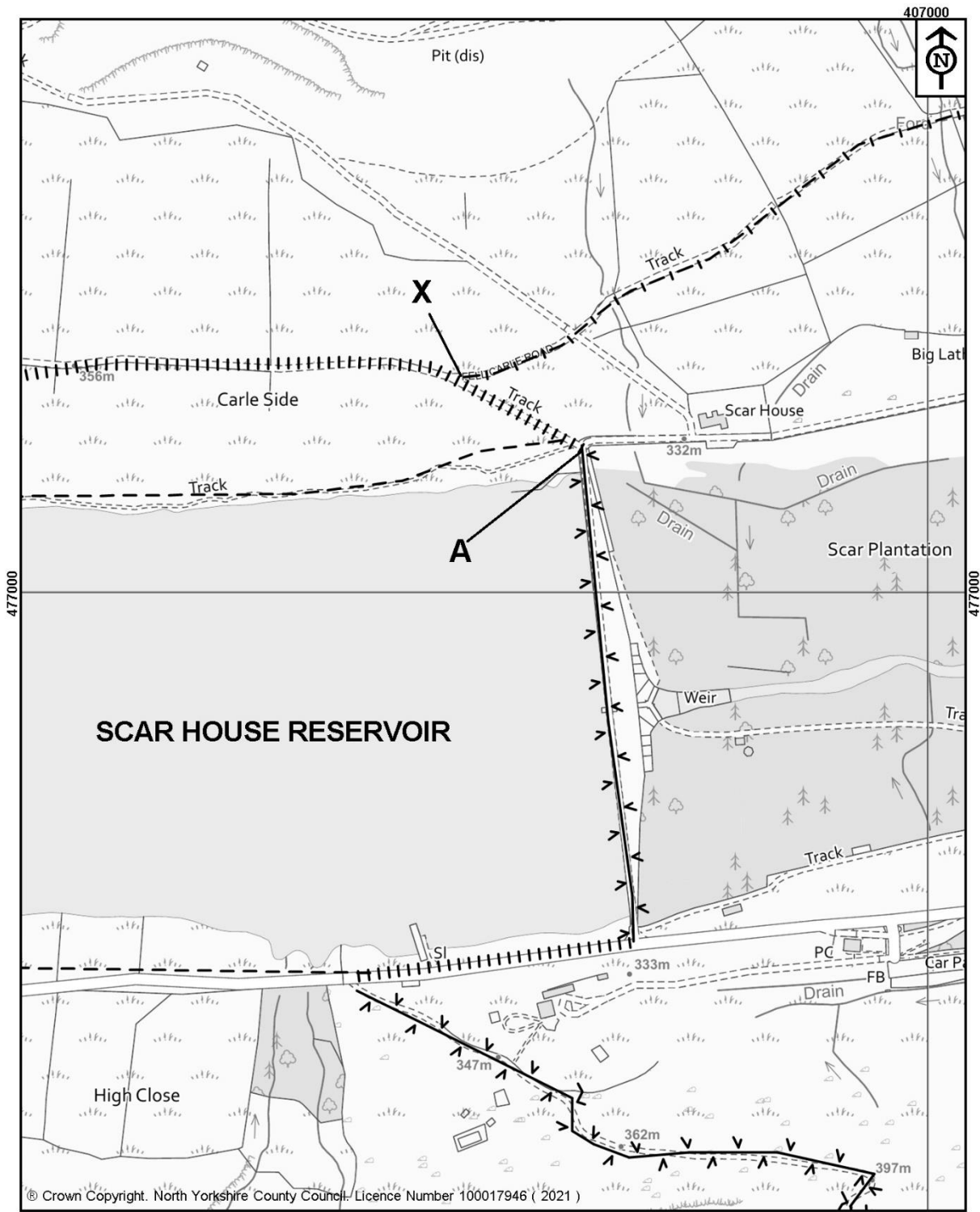
Restricted Byways to be recorded	
Other footpaths	
Other bridleways	
Maintainable Highways	

Map drawn on 17 August 2020
 Drawn by RWA Scale 1:20000

North Yorkshire County Council
 Wildlife and Countryside Act 1981
 Section 53
 Proposed Restricted Byways
 Stonebeck Up, Fountains Earth,
 Healey & Ilton -cum-Pott

File Ref No. HAR/2005/05/DMMO

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North Yorkshire County Council
 Public Rights of Way
 Waste and Countryside Services
 County Hall
 Northallerton
 DL7 8AH

Key:
 Public Footpath ———
 Public Bridleway - - - -
 Byway Open to All Traffic ∇ ∇ ∇
 Unclassified road ||| ||| |||

Map drawn on 2 June 2021
 Drawn by _____ Scale 1:5000

North Yorkshire County Council

PLAN 3

File Ref No. refno