

Regulatory Committee

Meeting to be held on 11 September 2013

Electoral Division affected:
Lancaster South East

Wildlife And Countryside Act 1981

**Claimed Public Footpath From Barton Road to Bowerham Road, Lancaster,
Lancaster City**

Claim No. 804/496

(Annex A refers)

Contact for further information:

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Executive Summary

The claim for a public footpath from Barton Road to Bowerham Road, Scotforth, Lancaster to be added to the Definitive Map and Statement of Public Rights of Way, in accordance with Claim No. 804/496

Recommendation

- (i) That the application for a public footpath from Barton Road to Bowerham Road to be added to the Definitive Map and Statement of Public Rights of Way, in accordance with Claim No. 804-496, be accepted.
- (ii) That an Order be made pursuant to Section 53(2)(b) and 53(3)(c)(i) of the Wildlife and Countryside Act 1981 to add to the Definitive Map & Statement a footpath from a point on Barton Road opposite Durham Avenue to a point on Bowerham Road Scotforth (A-G on the plan).
- (iii) That, not being satisfied that the higher test for confirming the said Order can be satisfied, the said Order, if objected to be submitted to the Secretary of State and the Order Making Authority remain neutral as regards confirmation

Background

A claim has been received to add to the Definitive Map & Statement a footpath extending from a point on Barton Road, opposite Durham Avenue to a point adjacent to the school playing field (A-F on the plan), a distance of approximately 350 metres, continuing a further 180 metres along a path at Moorside Primary School to Bowerham Road (point G.)

The County Council is required by law to investigate the evidence and make a decision based on that evidence as to whether a public right of way exists, and if so its status. Subsections 53(3)(b) and (c) of the Wildlife and Countryside Act 1981 set out the tests that need to be met when reaching a decision; also current case law needs to be applied.

An order to add a route will only be made if the evidence shows that:

- A right of way 'subsists' or is 'reasonably alleged to subsist' or
- 'The expiration... of any period such that the enjoyment by the public...raises a presumption that the way has been dedicated as a public path'

When considering evidence, if it is shown that a highway once existed then highway rights continue to exist ("once a highway, always a highway") even if a route has since become disused or obstructed unless a legal order stopping up or diverting the rights has been made. Section 53 of the Wildlife and Countryside Act 1981 (as explained in Planning Inspectorate Advice Note No. 7) makes it clear that considerations such as suitability, the security of properties and the wishes of adjacent landowners cannot be considered. The Planning Inspectorate's website also gives clear guidance about the interpretation of evidence.

The County Council's decision will be based on the interpretation of the evidence discovered by officers and documents and other evidence supplied by landowners, consultees and other interested parties produced to the County Council before the date of the decision. Each piece of evidence will be tested on the balance of probabilities. It is possible that the Council's decision may be different from the status given in the original application. The decision may be that the routes have public rights as a footpath, bridleway or restricted byway or byway open to all traffic, or that no such right of way exists.

The test for confirming an Order will also need to be considered. The test to confirm an Order to add a route under S53(3)(c)(i) is higher than that for making the Order. To decide that the Order Making Authority should promote an Order under S53(3)(c)(i) to confirmation, the County Council needs to be satisfied on balance that the route subsists as a highway in law. Orders do not have to be supported to confirmation if the evidence is insufficient.

Consultations

Borough Council

Lancaster City Council has confirmed they have no comments to make.

Parish Council

Scotforth Parish Council did not respond to the consultation and it is thus assumed it has no comments to make

Claimant/Landowners/Supporters/Objectors

The evidence submitted by the claimant/landowners/supporters/objectors and observations on those comments is included in 'Advice – County Secretary and Solicitor's Observations'.

Advice

Executive Director for the Environment's Observations

Description of Route

Points annotated on the attached plan.

Point	Grid Reference	Description
A	SD 4830 5984	Entrance to playing field from Barton Road opposite Durham Avenue
B	SD 4843 5979	Informal stepping stones over Burrow Beck
C	SD 4857 5976	Gap in hedge between rough grass and Moorside School playing field
D	SD 4858 5976	Fence around Moorside School playing field
E	SD 4865 5975	Gates at north-east corner of Moorside School playing field
F	SD 4865 5975	Tarmac path adjacent to gates into Moorside School playing field
G	SD 4881 5984	Junction of path with Bowerham Road

An inspection of the route was made in November 2011. Approximate lengths, given in metres, and compass directions.

The route:

- starts at Barton Road, opposite Durham Avenue, where it passes through a 2 metre wide gap in the hedge (point A on the plan);
- crosses the playing field in an east-south-easterly direction for 130m;
- crosses Burrow Beck via informal stepping stones (point B);
- continues east for 150m along a 1m wide well-trodden natural surface path across rough grass;
- passes through a gap in a hedge (point C);
- crosses a narrow (5m) strip of land ;
- passes through a 2m high security fence surrounding Moorside Primary School playing field (point D);
- continues east for 65m across the school playing field;
- there is a Lancashire County Council sign stating that the field is private property owned by the school giving no access for anyone to cross it, nor to play games or walk dogs or they will be prosecuted;
- passes through double gates, locked on the day of inspection, out of the school playing field (point E);
- meets a 3m wide tarmac path (point F);
- follows the tarmac path for 180m to end at Bowerham Road (G).

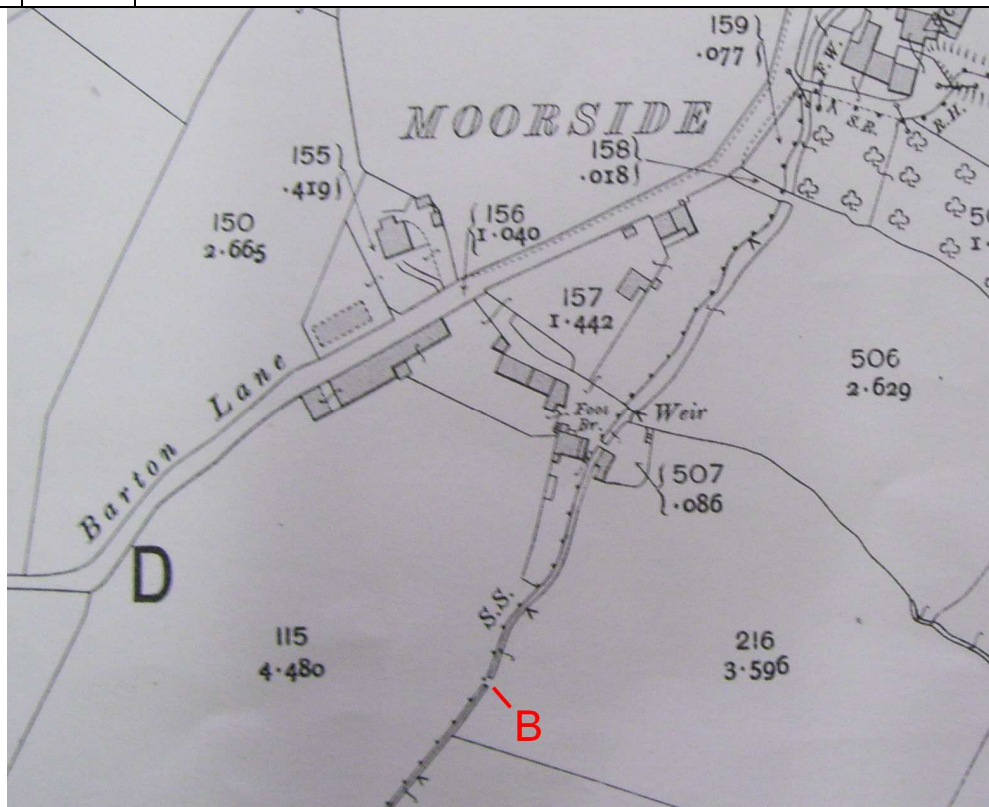
Map and Documentary Evidence

Various maps, plans and other documents were examined to see when the claimed route came into being and to try to determine what its status might be.

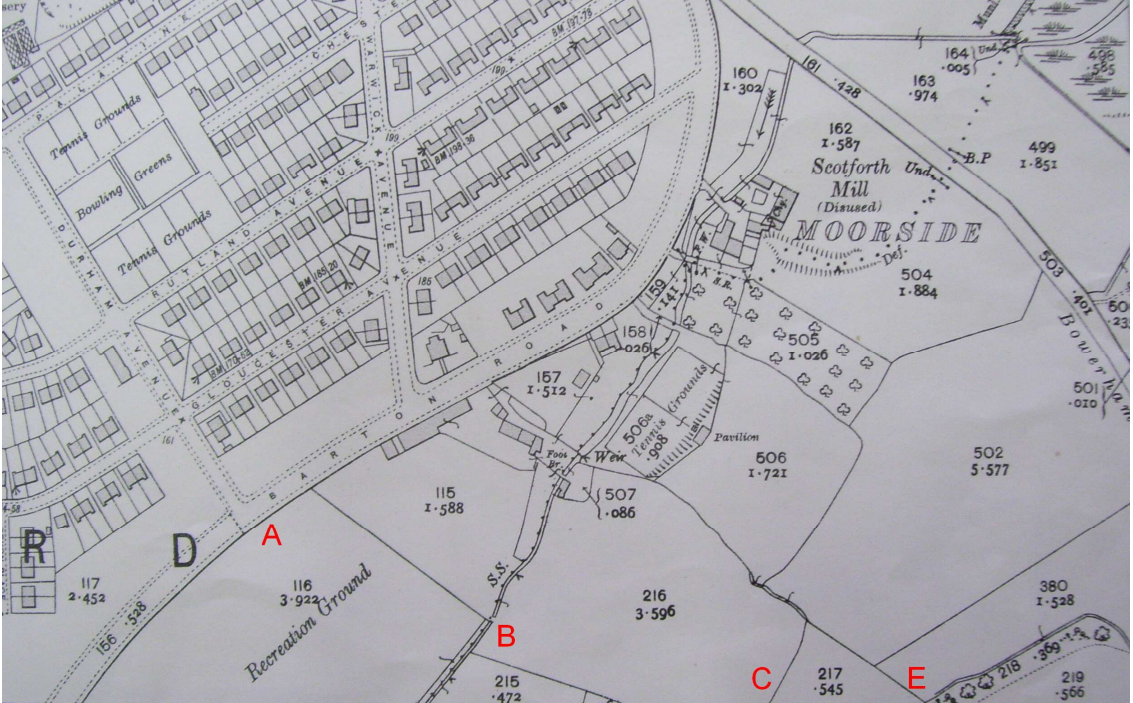
DOCUMENT TITLE	DATE	BRIEF DESCRIPTION OF DOCUMENT & NATURE OF EVIDENCE
Yates' Map of Lancashire	1786	Small scale commercial map. Such maps were on sale to the public and hence to be of use to their customers the routes shown had to be available for the public to use. However, they were privately produced without a known system of consultation or checking. Limitations of scale also limited the routes that could be shown.
Observations		The scale of the map means that the claimed route, if it did exist at the time, is not shown.
Investigating Officer's Comments		The route did not exist as a major route at the time.
Greenwood's Map of Lancashire	1818	Greenwood's map of 1818 is a small scale commercial map.
Observations		The scale of the map means that the claimed route, if it did exist at the time, is not shown.
Investigating Officer's Comments		The route did not exist as a major route at the time.
Hennet's Map of Lancashire	1830	Small scale commercial map.
Observations		The scale of the map means that the claimed route, if it did exist at the time, is not shown.
Investigating Officer's Comments		The route did not exist as a major route at the time.
Tithe Map and Tithe Award or Apportionment	1841	Tithe maps were produced under the Tithe Commutation Act of 1836 to record land capable of producing a crop and what each landowner should pay in lieu of tithes to the church. The maps are usually detailed large scale maps of a parish and while they were not produced specifically to show roads or public rights of way, the maps do show roads quite accurately and can provide useful supporting evidence (in conjunction with the written tithe award) and additional information from which the status of ways may be inferred.
Observations		No part of the claimed route is shown on the tithe map for Scotforth. The area is divided into fields and used for agriculture.
Investigating Officer's Comments		No inference can be drawn.
Finance Act 1910 Map	1910	The comprehensive survey carried out for the Finance Act 1910, later repealed, was for the purposes of land valuation and not recording public rights of way. However the maps can often provide very good evidence.

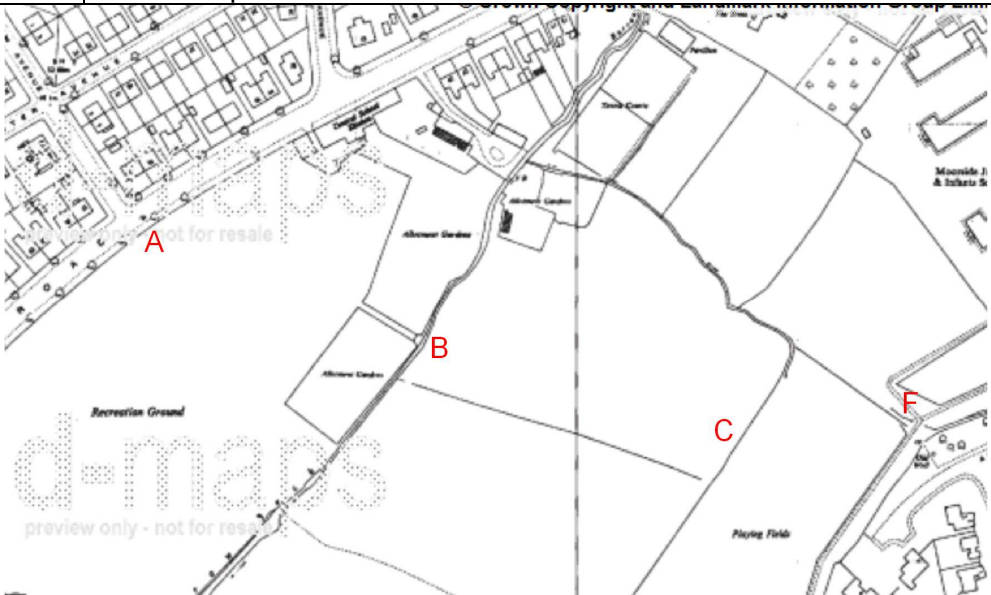
		Maps, valuation books and field books produced under the requirements of the 1910 Finance Act are sometimes examined. The Act required all land in private ownership to be recorded so that it could be valued and the owner taxed on any incremental value if the land was subsequently sold. The maps show land divided into parcels on which tax was levied, and accompanying valuation books provide details of the value of each parcel of land, along with the name of the owner and tenant (where applicable). An owner of land could claim a reduction in tax if his land was crossed by a public right of way and this can be found in the relevant valuation book. However, the exact route of the right of way was not recorded in the book or on the accompanying map. Where only one path was shown by the Ordnance Survey through the landholding, it is likely that the path shown is the one referred to, but we cannot be certain. In the case where many paths are shown, it is not possible to know which path or paths the valuation book entry refers to. It should also be noted that if no reduction was claimed this does not necessarily mean that no right of way existed.
Observations		The Finance Act valuation books do not record a claim for a reduction in tax due because the land carried a public right of way.
Investigating Officer's Comments		No public right of way was acknowledged across the land in the early 1900s.
Canal, Turnpike and Railway Plans		None relevant for this area.
The Authentic Map Directory of South Lancashire	1934	The Authentic Map Directory of South Lancashire was edited by James Bain FRGS and believed to have been published in 1934-35 by Geographia Ltd to show streets, railway stations, parliamentary and administrative divisions and a classified business directory. The introduction states that it was an entirely new publication specially designed to meet a demand for a large-scale detailed street map. It explains that many new districts had been opened up and new streets and trunk roads made and that the publishers had made every effort to incorporate all these developments into the directory with the assistance of the Municipal and District Surveyors.
Observations		The map directory does not cover this part of Lancashire.
Ordnance Survey Maps		The Ordnance Survey (OS) has produced topographic maps at different scales (historically one inch to one mile, six inches to one mile and 1:2500 scale which is approximately 25 inches to one mile). Ordnance Survey mapping began in Lancashire in the late 1830s with the 6-inch maps being published in the 1840s. The large scale 25-inch maps which were first published in the 1890s provide good evidence of the position of routes at the time of survey and of the position of buildings and other structures.

		They generally do not provide evidence of the legal status of routes, and carry a disclaimer that the depiction of a path or track is no evidence of the existence of a public right of way.
6 inch OS Map	1848	The earliest OS map examined.
Observations		The claimed route is not shown. The area is divided into fields and used for agriculture.
Investigating Officer's Comments		The route does not appear to have existed in 1848.
25 inch OS Map	1893	First Edition published at the larger scale showing the area in more detail was published in 1893.
Observations		The claimed route is not shown. The ditch or stream at point B is shown crossed by a bridge or culvert. The area is divided into fields and used for agriculture.
Investigating Officer's Comments		Access has been provided across the stream between two fields on the claimed route. Whether this was for people or for stock to move between fields is not known. No trodden path or track was recorded in the location by the OS.
25 Inch OS Map	1913	Further edition of 25 inch map published in 1913.



Observations		The claimed route is not shown. The ditch or stream at point B is shown crossed by a bridge or culvert. The area is divided into fields and used for agriculture.
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Investigating Officer's Comments		Access has been provided across the stream between two fields on the claimed route. Whether this was for people or for stock to move between fields is not known. No trodden path or track was recorded in the location by the OS
25 Inch OS Map	1933	Further edition of the 25 inch map revised in 1931 and published in 1933.
		
Observations		This is the earliest map to show Barton Road and the residential area although Moorside School on Bowerham Road had not been built. The claimed route is not shown. Land at the western end of the claimed route adjacent to Barton Road is shown as 'Recreation Ground'. The ditch or stream at point B is shown crossed by a bridge or culvert but no path or track is shown corresponding to the claimed route. The rest of the land crossed by the claimed route is divided into fields and presumably used for agriculture.
Investigating Officer's Comments		No path or trodden track was recorded by the OS along the claimed route. If people were walking between Barton Road and Bowerham Road it was not sufficient to wear the vegetation down along a defined route.
25 Inch OS Map	1939	Further edition of the 25 inch map revised in 1938 and published in 1939.
Observations		As 1933 map.
Investigating Officer's Comments		No route was apparent in 1938.
6 Inch OS Map	1955	This map was used as the base map for the Definitive Map, First Review, and was published in 1955 (although the date of revision was between 1930 and 1945).
Observations		This is the earliest map to show Moorside Primary School on Bowerham Road. The claimed route is not shown. At point B the beck to the east of the recreation ground is either bridged or culverted.

Investigating Officer's Comments		The claimed route appears not to have existed in the late 1930s or early 1940s.
25 Inch OS Map	1971	Further edition of the 25 inch map revised at the eastern end only in 1969 and published in 1971.
		
Observations		The land at the western end of the claimed route (the Barton Road end) is shown as a recreation ground but no path or track is shown crossing it. Two plots of land on the eastern side of the recreation ground are shown as 'Allotment Gardens'. There is a narrow strip between them, corresponding to the claimed route, which leads to the beck. No bridge or culvert is shown crossing it (called 'Burrow Beck' on this map) at point B. Between points B and C the use of the land is not indicated, presumably it is used for agriculture. From point C to F the land is referred to as 'Playing Fields'. No path or track is shown crossing this land. From point F the claimed route follows a track which leads from the playing field in a north-easterly direction to a car park and then out onto Bowerham Road. The car park and track are shown adjacent to Moorside Junior and Infants School.
Investigating Officer's Comments		Part of the claimed route corresponds with the access track from the playing field past a car park to Bowerham Road (F-G). When the allotments were fenced access between the 2 parts was left clear but it is not known whether this access was private and/or public.
Aerial Photographs		Aerial photographs can show the existence of paths and tracks, especially across open areas, and changes to buildings and field boundaries for example. Sometimes it is not possible to enlarge the photos and retain their clarity, and there can also be problems with trees and shadows obscuring relevant features.
Aerial Photograph	1963	Black and white aerial photograph taken on 1 June 1963.
Observations		No path or track corresponding to the claimed route can be seen on this photograph other than the track between the playing field and Bowerham Road, F-G, although part of this track is obscured by

		trees. The recreation ground and the playing field both show signs of wear as would occur in front of football goal-mouths, and a running track appears to have been mown or marked out too. There is a worn area at point A at Barton Road corresponding to the entrance to the recreation ground.
Investigating Officer's Comments		The recreation ground and playing field are both used for sports but there is no evidence of a used route. If the claimed route was in use in 1963 it is not sufficient to be visible on the aerial photograph.
Aerial Photograph	1988	Colour aerial photograph taken on 20 May 1988.
Observations		A path corresponding to the claimed route can be seen on this photograph on the central section on the agricultural land between points B and C. There also appears to be another used path around the northern perimeter of the field (and two paths criss-crossing the adjoining field to the south). The track between the playing field and Bowerham Road, shown between points F and G is also visible, although part of this track is obscured by trees. No worn route is shown across the recreation ground or playing field. There are some signs that sports have taken place on the recreation ground. There is a worn area at point A at Barton Road corresponding to the entrance to the recreation ground and at point B, the point where the claimed route crosses Burrow Beck.
Investigating Officer's Comments		Although there is no evidence of the claimed route across the recreation ground and playing field on this photograph, marks on the grass across the 2 fields between the sports grounds show that there is considerable use in several directions between the two. There is access from the recreation ground to the field at point B across Burrow Beck. It is likely that any use of a path across the 2 playing fields would not show because they are tended.
Aerial Photograph	2000	Colour aerial photograph taken on 16 June 2000.
Observations		A path corresponding to the central section of the claimed route can be seen on this photograph on the land between points B and C. There also appears to be another used path around the northern perimeter of the field (and other paths criss-crossing the adjoining field to the south) as on the photograph taken 12 years earlier. The track between the playing field and Bowerham Road, shown between points F and G is also visible. No worn route is shown across the recreation ground or playing field, presumably because these are tended. There is a worn area at point B the approach to Burrow Beck.
Investigating Officer's Comments		Although there is no specific evidence of the claimed route across the recreation ground and playing field on this photograph, marks on the grass across the 2 fields between the sports grounds shows that there is considerable use in several directions between the two which is the same as was apparent 12 years earlier. There is evidence of access from the recreation ground to the field at point B across Burrow Beck.
Aerial photograph	2008	Aerial photograph taken on 8 June 2008.

Observations		Similar to the 2000 photograph.
Investigating Officer's Comments		Although there is no evidence of the claimed route across the recreation ground and playing field on this photograph, marks on the ground across the beck and between the sports grounds shows that there is considerable use between the two and by inference across them.
Definitive Map Records		The National Parks and Access to the Countryside Act 1949 required the County Council to prepare a Definitive Map and Statement of Public Rights of Way.
Parish Survey Map	1950-1952	In rural district council areas, the initial survey of public rights of way was carried out by the parish council and the maps and schedules were submitted to the County Council. In the case of urban districts and municipal boroughs the map and schedule produced, was used, without alteration, as the Draft Map and Statement.
Observations		At the time of the early surveys the claimed route was in Lancaster Municipal Borough which produced their own draft Map; there is therefore no equivalent of the parish survey map for this route.
Draft Map	1955	The Draft Map was given a "relevant date" (1 st January 1953) and notice was published that it had been prepared. The map was placed on deposit for a minimum period of 4 months on 1 st January 1955 for the public, including landowners, to inspect them and report any omissions or other mistakes. Hearings were held into some of these objections, and recommendations made to accept or reject them on the evidence presented.
Observations		The claimed route was not shown on the Draft Map of Public Rights of Way for Lancaster Municipal Borough. There were no formal objections or other comments about the omission of the claimed route
Provisional Map		Once all of the representations were resolved, the amended Draft Map became the Provisional Map which was published in 1960 and was available for 28 days for inspection. At this stage, only landowners, lessees and tenants could apply for amendments to the map, but the public could not. Objections by this stage had to be made to the Crown Court.
Observations		The claimed route is not shown on the Provisional Map of Public Rights of Way. No formal objections or other comments to the omission of the claimed route were made.
The First Definitive Map and Statement		The Provisional Map, as amended, was published as the First Definitive Map and Statement in 1962.
Observations		The claimed route was not shown on the First Definitive Map and Statement of Public Rights of Way.
Revised Definitive Map of Public Rights of Way (First Review)		Legislation required that the Definitive Map be reviewed, and legal changes such as diversion orders, extinguishment orders and creation orders be incorporated into a Definitive Map First Review. On 25 th April 1975 (except in small areas of the County) the Revised Definitive Map of Public Rights of Way (First Review) was published with a relevant date of 1 st September 1966. No further reviews of the Definitive Map have been carried out. However, since the coming

		into operation of the Wildlife and Countryside Act 1981, the Definitive Map has been subject to a continuous review process.
Observations		The claimed route was not shown on the Definitive Map and Statement of Public Rights of Way (First Review). A claim has been submitted to add the route to the map as a public footpath and that claim is the subject of this report.
Investigating Officer's Comments		From 1953 through to 1975 there is no indication that the claimed route was considered to be public by the Surveying Authority, Municipal Council and public at large due to the extensive consultation process that lasted until 1975 when the Definitive Map of Public Rights of Way (First Review) was actually published. The primary school was built in 1951 and map evidence shows that most of the open land crossed by the claimed route was used during this period as a recreation ground and playing fields.
Statutory Deposit and Declaration made under Section 31(6) Highways Act 1980		The owner of land may at any time deposit with the County Council a map and statement indicating what (if any) ways over the land he admits to having been dedicated as highways. A statutory declaration may then be made by that landowner or by his successors in title within ten years from the date of the deposit (or within ten years from the date on which any previous declaration was last lodged) affording protection to a landowner against a claim being made for a public right of way on the basis of future use (always provided that there is no other evidence of an intention to dedicate a public right of way). Depositing a map, statement and declaration does not take away any rights which have already been established through past use. However, depositing the documents will immediately fix a point at which any unacknowledged rights are brought into question. The onus will then be on anyone claiming that a right of way exists to demonstrate that it has already been established. Under deemed statutory dedication the 20 year period would thus be counted back from the date of the declaration (or from any earlier act that effectively brought the status of the route into question).
Observations		There are no Highways Act 1980 Section 31(6) deposits lodged with the County Council for the area over which the claimed route runs.
Investigating Officer's Comments		There is no indication by a landowner under this provision of non-intention to dedicate a public right of way over the claimed route.
Ownership information		The County Council owns all the land crossed by the claimed route. The section A-B crosses land held as Barton Road Playing fields. The remainder forms part of the land held as Moorside Primary School
Observations		The Barton Road Playing field was originally acquired under a Compulsory purchase Order confirmed in 1920 to acquire land under the Housing of the Working Classes Act 1890. In 1925 consent was given by the Secretary of State to the appropriation for purposes under the Education Act 1921 namely playing fields for the scholars attending elementary schools in the Borough

		The site for the school and its playing fields was purchased by the County Council in 1948
Investigating Officer's Comments		The Barton Road Playing Field being held under the Education Act 1921 does not involve holding the land on statutory trust for public recreational use nor is the rest of the land held under statutory provisions whereby public use could be by right.

The claimed route does not cross a biological heritage site or a site of special scientific interest. It is not recorded as access land under the provisions of the Countryside and Rights of Way Act 2000.

Summary

Map and documentary evidence shows that the land crossed by the claimed route has been used for agriculture until the general area became developed and a recreation ground and allotments were provided and a school built. Ordnance Survey maps show that the recreation ground was in place in 1933 and consultations have revealed that the school was built in 1951. The earliest evidence for use of the claimed route comes from the 1988 and subsequent aerial photographs which show that the undeveloped and un-mown field between the recreation ground and the playing fields was used with paths apparent in several directions, including the claimed route.

If this application is approved by the Regulatory Committee, the Environment Director suggests that the addition to the Definitive Statement for should read: "Public footpath from a point on Barton Road opposite Durham Avenue at SD 4830 5984 in a south-south-easterly direction for 130m to informal stepping stones over Burrow Beck at SD 4843 5979; continuing in a generally easterly direction for 220m to end at the tarmac track at SD 4865 5975. (All lengths, in metres, and compass directions are approximate.) The width is 1.5 metres with a total length of 350 metres. There are no limitations to the public right of way"

County Secretary and Solicitor's Observations

Information from the Applicant:

In support of the application, the applicant has provided forty-five evidence of use forms.

The users indicate use of the route for up to:

60 years (1)	51-59 years (1)	41-50 years (3)	31-40 years (6)
21-30 years (13)	11-20 years (9)	0-10 years (12)	

The route has been used for a variety of purposes including walking the dog, recreational walks, visiting friends, accessing local amenities such as the shops, vet, pub, hair dressers and school.

The frequency of use varies with some users claiming to have used the route twice daily, daily, several times a week, once a week, regularly, 10, 40, 50, 60, 100, 150, 170, 180, 200, 250, 300 and 600 times a year. All the users claim to have used the route on foot only and by no other means.

Five users claim the route has not always run over the same line. However, these users do not provide any further information about how the route has varied.

Fourteen users report never having seen any gates, stiles and fences along the route, whereas the remaining users report having seen a gate along the route with almost all users stating the gate was erected in around May/June/July/August 2008. Some users state this was during March 2009 and the gate had been kept locked which prevented access.

Twenty-four of the users state the gate prevented them from using the route and they have been turned back as a result. None of the users report being employees or tenants of any of the landowners. None of the users report having ever been stopped by anyone when using the route, although they have been stopped from using the route because of the erection of the gates.

Twenty-one users report having seen notices along the route. Of these five users state the notices provide, "Trespassers may be prosecuted". Six of the users also state the notices were put up recently stating it was either late 2008 or around January/February 2009. One user states two signs were put up during 2008. None of the users report ever having sought permission to use the route.

The applicant has also advised that the school recently erected 2.1 metres security fencing and the installation was completed on 12 May 2010 and four gates had been padlocked on this date. The applicant also points out the gate which was locked was installed in July 2008 and this reflects what the users have stated above.

The applicant has also attached a letter from a local resident which was sent to the local newspaper in 2009 concerned about the notice saying Moorsides Fields is private land and suggesting the school meet with the County Council to identify specific playing areas and to introduce byelaws to restrict access and to introduce a right of way allowing members of the public to cross from Barton Road to Bowerham Road avoiding the designated sports areas. He refers to living in the area since 1960 and the crossing between these roads has been there since 1960. He urges decision makers to consider local community if the school is allowed to lock up this sizeable area of open space for weeks at a time in summer serving no useful purpose.

Information from the school

The school objects to the application. The School was built in 1951 and makes use of the land for weekly sports lessons sports days nature investigations and Eco activities. Also PTA sports social and fundraising events. The field is also used by groups of children from other schools and the local School Sports Partnership and for evening training sessions and Sunday football club matches. Photographs were submitted.

The school has set strong objectives to make even greater use of the land. It has adopted the Forest Schools curriculum for the youngest children and Learning Beyond the Classroom has become a priority for all ages and all subjects at the school with use of the school grounds and attached woodland on a weekly basis.

The school confirms that dog owners have often been asked to remove themselves so that the normal business of the school can go ahead.

The school refers to the locked gate now at point E and signs displayed to deter trespassing and the school's concern about safeguarding of pupils. The problems of dog excrement, dilapidated hedging to the west of the school grounds and inefficient drainage had prompted the school to embark on a project to provide a cycletrack and to drain and fence. The school contends that to allow unmonitored access by the public runs contrary to all advice and regulation.

The school has met with the Moorside Fields Community Association who wished to negotiate a link on foot between Barton Road and the cycletrack and to have access to parts of the school land for a community nature resource. An offer of a discretionary route and an offer of combined community and school use on the "Allotments" had been made subject to consultation and the agreement of the land owner, the County Council.

Information from the landowner

Lancashire County Council (LCC), as Landowner and Education Authority and on behalf of Moorside School has lodged a long and detailed objection.

Part of the land owned by the County Council is the Barton Road Playing Field held for the use of local schools. The claimed route crosses its northern section. It also crosses one of the Gressingham Drive fields which were subject to a mowing and grazing tenancy between 1989 and 2001. These two fields are held by LCC for future educational provision by way of a new school facility. . The remainder of the land consists of Moorfield School's playing fields and the school land itself. The Moorside School playing field is used frequently by the school and is marked out with running lanes, football and rounders pitches. These are crossed by the claimed route. On a section of the school grounds there is a permissive path available to the public on foot and cycle where the last section of the claimed route runs

It is submitted by LCC as landowner that there is substantial evidence by the owner that is inconsistent with an intention to dedicate the claimed route. A gate was erected and locked on the route in July 2008 and called use of the route into question.

The inadequacies in the user evidence submitted by the applicant are highlighted to indicate insufficient use and enjoyment for the period 1988 to 2008 as of right. The objector's submission indicates that the users did not walk the claimed line, there is some variation of their routes and that this is supported by the lack of a line of path showing up on aerial photos. The stated reasons for the use of the route are questioned and reference made to use being with permission. It is also submitted

that signs and notices would have been visible on the land yet are said not to have been seen.

It is submitted that the use of the route would have been interrupted, in particular for a 9 month period from July 1989 to April 1990 by works in respect of the Bowerham Flood Relief Scheme, when part of the Barton Road Playing Field was fenced off. Additional interruptions by sports activities on the Barton Road Playing Field are detailed. Evidence of the pitches being used during the flood relief scheme is submitted along with evidence of sports lettings and in particular four groups using the Barton Road Playing Field for football with permission. The Gressingham Drive fields would have been mowed and grazed under their tenancy and interrupted use. There is significant evidence that school events have taken place on the school playing fields which would interrupt use including sports days and football tournaments during and after school hours, PE lessons, Parent Teachers Association events, science lessons, sponsored walks with permission, rounders and rugby training and matches. The claimed route crosses the football pitch.

Members of staff confirm use of the school playing fields and make reference to the challenging of unauthorised persons on the school playing fields on many occasions since 1995. Again there is reference to varying routes and never seeing a worn path. Most people left on being challenged but some did not. The Objector submits that their use would continue by force.

Submissions are made indicating that use has not been as of right. That use of the dual use path at the side of the school is permissive and at the end of the permissive route, at the entrance to the school playing fields, was a notice. The Grounds Maintenance Manager explains that further notices were also placed on the informal entrances to the Barton Road playing field, the Barton Road Youth and Community Club and the Playing Field gable end. The Objector states that the wording on the notice is consistent with a landowner wishing to assert control over the land in question. Permission was granted for football and other sports to take place on the Barton Road and School playing fields. It is also submitted that the applicant knew and understood that permission was required stating that in October 2008 an email was sent by the applicant requesting permission to use the land. It is also suggested that there is a general understanding in the community that the land was owned or controlled by the Council or the school as various requests for permission have been sought for different activities.

Information is given as to actions which demonstrate the owner's lack of intention to dedicate. Signs were erected at various points on the land in 2005 stating "Lancashire County Council. These premises/grounds are private and for the use only of authorised persons connected therewith. Persons trespassing or otherwise causing a nuisance or disturbance, including the playing or practising of games or sport, and the exercising of animals on these premises are committing an offence and may be liable to prosecution". Similar signs had been on the Community Centre (north of points A-B) for many years. Such signs make it clear that the landowner did not intend to dedicate a footpath. A further Notice confirming ownership and making it clear that permission was required to use the field was near point E as recalled by a member of staff who has been at the school since 1995.

It is submitted that any reasonable user would have been aware that the landowner would have no intention to dedicate the claimed route. The Applicant and the Community Group were aware permission was required to enhance Moorside Fields and requested same and the owner's use of the land, mowing and other activities would again demonstrate the owner's lack of intention to dedicate.

Further Response from Applicant

MFCG do not agree with the relevant period as defined by the objector and submit that signs first appeared on Barton Road field in August 2005 so the relevant period is July 1985 to July 2005. Evidence of use covers this period and for a much longer period. The user evidence is restated and how the users are genuine local people and the claimed route is widely recognised in the community is emphasised. MFCG have provided a number of aerial photos that show the path and they have also provided evidence from a Member of the Landscape Institute who states that there is clear evidence of the Claimed Route in the landscape.

MFCG state that the objector recognises that the Claimed Route is a footpath. In an objection to the Town Green application for a Town Green on Fields 1, 2, 3, 4a and 4b Lancashire County Council as owner wrote "... at first instance, the use in question would appear to the reasonable landowner to be referable to footpath use rather than for more general recreational purposes which would sustain a claim to a new green..."

To prove use is as of right the applicant states that users did not break locks on gates, cut barbed wire or use any force to access the Claimed Route. They used breaks in hedges which were maintained by the objector who would have had the opportunity during the relevant period to place obstruction in the breaks of the hedges if they wished to stop access.

Users have said they used the Claimed Route at all times of the day and they did not hide their use. The objector was well aware that people were using the Claimed Route and did not make any attempts to stop them doing so. A retired school teacher from Moorside School stated "I was never instructed by a Headteacher to order anyone off the land and I am certain that they were aware that people walked across". MFCG submits that the reason the public were not challenged was that the objector believed the Claimed Route to be public.

It is submitted that there were no signs on Barton Road Field until August 2005 (after the relevant period). This is confirmed in an e-mail of 19th August 2005 – when a senior officer at the County Council said "there are no prohibition signs on the field; consequently the Police are powerless to take action against trespassers."

There were no signs on Moorside Fields until December 2008 when a sign was placed at point N on the plan after a gate was locked. There is clear photographic evidence of this. This is further confirmed by the evidence provided by the objector. The three photos in the objector's evidence marked "Sports Day 15 July 2006" clearly show that no sign is present on the field.

There were no signs on the path from point G to B on the plan as confirmed by the objector.

As there were no signs on any part of the Claimed Route until after the relevant period MFCG submits that a reasonable user would never have assumed that they has permission to walk on the Claimed Route and that they were doing so 'as of right'.

The recent questionnaire asks the users about the signs on the Community Centre and the users were of the view that it applied to the premises not the field.

The objector has raised three areas which they feel shows interruption to the Claimed Route – the Bowerham Flood Relief scheme, mowing and the presence of sports pitches. However in the applicant's view case law in the courts shows that none of these can be used to demonstrate this as he believes that interruption must be with the intent to prevent public use of the way and it is not sufficient if the interruption is shown to have been for some other purpose e.g. the conduct of longstanding building works.

MFCG conducted a questionnaire to find out what users could remember of the flood relief scheme, all the users said that they could still use the Claimed Route and they remember earthworks but none have said that the Claimed Route was fenced off. They all said they could use the Claimed Route. Following his understanding of the case law, since the scheme was for the purpose of Flood Relief and was not to prevent members of the community using the Claimed Route, it does not constitute evidence for interruption of the Claimed Route.

Mowing: In *R (Beresford) v City of Sunderland* (2001), the House of Lords held that the mowing of grass did not, for the purpose of section 22(1A) of the Commons Registration Act 1965, constitute implied permission for members of the public to use the land. Therefore the objector's evidence of mowing does not constitute an interruption to the route.

Sports : the presence of sports use does not stop a right of way from being claimed and does not provide evidence of interruption. Lord Walker in *R (Lewis) v Redcar and Cleveland Borough Council* (2010) said that "civility towards members of the golf club who were out playing golf" did not preclude the use from being as of right. Therefore the objector's evidence of sports use does not constitute an interruption to the route.

The actual position of the pitches on Barton Road Field and on the school playing field have been confirmed by a retired PE teacher for Greaves School, and can still be seen in the Landscape . This shows that the Claimed Route does not cross any of the pitches on Barton Road Field or the school playing field until 2009.

Intention to Dedicate: MFCG and its members have been acting as stewards of Barton Road and Moorside Fields for many years. They have been acknowledged in this role by a number of authorities. Most notably, the objector provided a grant to MFCG to pay for Heavy Duty Loppers, a Heavy Duty Strimmer, Railway sleepers, Hardwood logs and administration / room hire / website. This equipment was for maintenance of Moorside Fields. In other words the objector provided funds for MFCG to manage the land on their behalf. MFCG submits that this shows that the objector does not consider the land to be private and supported MFCG's efforts to

manage the land. At no point when the grant was awarded did the objector instruct us to seek permission to use the land.

There are many other instance of MFCG acting as stewards of the land. MFCG initiated a relationship with Lancaster City Council to collect rubbish collected by members of the community on the land. MFCG has managed health and safety on the land e.g. arranging the removal of hazardous Rediffusion cable with Lancaster City Council and a dangerous vent pipe and manhole with United Utilities. MFCG liaised with LCC regarding biodiversity on the land and with Moorside School regarding their damaging mowing procedures. MFCG members have long been organising litter picks on the land, initially with the 'Barton Barkers' and more recently with MFCG organised events. MFCG has dealt with fly-tipping incidents and has worked with Lancaster City Council to restore Barton Road Field following a visit from a Traveller group.

MFCG submits that if the objector could have taken various opportunities to inform the public that they should not have been on the Claimed Route. The fact that they did not take any of the many opportunities available to do so over a significant number of years indicates that the objector intended to dedicate the Claimed Route. The objector has provided facilities for the public who use the land, e.g. a waste bin, the bin was regularly emptied and MFCG submits that this demonstrates that the objector was encouraging the public to use these facilities and had an intention to dedicate the Claimed Route.

MFCG submits that this extensive body of evidence shows that all of the tests in the Highways Act 1980 are made out and therefore the Claimed Route should be dedicated as a right of way and be included on the definitive map.

Assessment of the Evidence

The Law - See ANNEX 'A'

In Support of the Claim

User evidence

Possible ineffective challenges

Possible ineffective signs

Possible not sufficient interruptions

Possible lack of sufficient evidence of lack of intention to dedicate

Against Accepting the Claim

User evidence inconsistencies

Possible effective challenges

Possible effective signs

Possible difficulties with use being as of right

Possible interruptions to use

Possible sufficient evidence of lack of intention to dedicate

Difficulties in proving intention to dedicate in Common Law

Conclusion

The claim is that the route A-G has been used such that it has become a right of way in law.

The documentary evidence is relevant in that it shows the crossing point of the watercourse and routes shown on the aerial photographs but it is advised the documentary evidence does not of itself indicate dedication of this route as a public footpath.

User can be circumstances from which to infer a dedication at common law but for use in this matter to result in an Order able to be confirmed an actual intention to dedicate by the County Council as landowner would need to be proved on balance. Given the detailed objection filed by the County Council as landowner it is suggested that showing this intention existed in the past would be difficult and it is advised that dedication is on balance unable to be shown at Common Law. The reference to possible use of lines of routes rather than use of open ground in connection with the town green claim does not refer to this particular route and will not be sufficient from which to infer an intention to dedicate this claimed route

It is therefore suggested that the information is considered to assess whether the provisions of S31 Highways Act can be satisfied on balance and dedication deemed to have happened despite what the owner now says.

Taking each element of the provision –

Twenty years use has to end with a calling into question of that use of the route. The Owner submits that the calling into question was in 2008 and the Applicant submits it was 2005. For an event to call use of a route into question the landowner must challenge it by some means sufficient to bring it home to the public that he is challenging their right to use the way, so that they may be apprised of the challenge and have a reasonable opportunity of meeting it. It is very clear that the locking of the gate in 2008 challenged use of the route but the earlier erection of notices may have been a slightly earlier calling into question and this must be considered as the twenty year period to be considered gets "shifted backwards". Whether there has been such an act so that at least some users potentially asserting a public right are aware that the owner has challenged their right is a question of fact. Some kinds of physical acts interrupting use may also bring use of routes into question.

However from the user evidence information it would appear that neither the signs erected in 2005 nor earlier signs nor physical use of the land for sports and school activities did not bring home a challenge to significant numbers of users. Very few recall these signs nor have considered their use as challenged before the gates. The gates may be considered the more likely calling into question and so the twenty years under consideration would be 1988 to 2008. However the Applicant now submits that the signs of 2005 did sufficiently bring the route into question.

To make a decision on the calling into question of use of a route is important as any landowner's actions taken in those twenty years previously are important. Ones taken at the same time or after a calling into question are too late.

Use has to be of the line.

There is always some lack of clarity from written user forms. Users have not been interviewed but attach plans to their user evidence forms. A significant number of the users indicate use of the line being claimed. A town green has also been claimed over land crossed by the section B-F of the claimed route and some users of the claimed route also give user evidence in the town green matter which may indicate use in a different way from footpath use. Taking the information on balance indicates sufficient use relating to the claimed line.

Use has to be by sufficient numbers

It is suggested that in this matter evidence of sufficient use has been produced

Use has to be without interruption

For an interruption it has to be effective and as a result of some positive and physical act preventing the use. It is advised that it is not necessary for an interruption to be intended to prevent public use and the applicant is not correct with his interpretation of case law although intention can relate to whether an action was sufficient to be an interruption. In this matter the landowner's use of the land for its own purposes by enabling the sports facilities and playing fields to be used may still render use interrupted although it is not clear whether actual pitches crossed the line. The Applicant is looking at case law relating to as of right use and the drainage works over 9 months may or may not act as interruptions of public use. On looking at the information provided about the effect of the flood management scheme there is reference by a user that it caused a deviation of the line. One user refers to climbing over piles of earth or walking around them with his dog.

Use has to be "as of right"

To be with permission would usually require notice being given to this effect. Implied permission is more difficult to demonstrate but may be there if the landowner still uses the land for his purposes whilst use of the claimed line has to wait for such use to end. The case law on mowing activities by the landowner not constituting implied permission is noted but each case has to be considered on its own facts.

The case law relating to users still being "as of right" when sharing the golfcourse when the activities of the owner going on is noted but it is still the case that it is the use which needs to be considered and was it in such manner as a reasonable landowner should have regarded it as being the assertion of a public right. In the case of the golfcourse the two uses were considered compatible and the users were found to have been just acting naturally. In this matter there may be an issue as to whether public use of a way across the land of a primary school could be as compatible as the dog walking across the golf course. Each case has to be considered on its own merits. It is difficult to allege clear permission without evidence of it sufficiently communicated but it is the case that the applicant was aware that permission was going to be needed for working on the Moorside Fields and it may be the case that sports activities and other school use deterred use of the route not as normal behaviour but making it difficult for the landowner to appreciate that the use really could be regarded as the assertion of public right.

As of right use has not to be by force.

It may be by force if it is known to be against the wishes of the landowner. This may be use despite signs making the owner's position clear or following challenges to use. There is reference to signs and one at point E pre 2005 and the challenges by staff members.

Evidence of landowner's lack of intention to dedicate

S31 provides the opportunity for a landowner to demonstrate that notwithstanding there is evidence of 20 years use yet there is evidence that they had no intention to dedicate. The evidence has to be sufficient. The landowner must have taken some overt action such that the reasonable user would have to understand that the landowner was intending to disabuse him of the notion that the land was a public highway.

A landowner has to communicate his intention to the public in some way if he was to satisfy the requirements of the proviso.

A view needs to be formed as to what the users would reasonably have understood the landowner's intention to be.

There could potentially be examples of the notices which are evidence of contrary intention but these in 2005 have possibly failed to call use of the route into question. Notices erected which do not make the reasonable user think his use is being challenged are unlikely to be sufficient communication of contrary intention. However, all the facts are to be taken together. In this matter the knowledge that C-E is school playing field and E-G is a track at a school may be relevant when also looking at the understanding of the users of actions taken by the County Council and the school and tenants. The use of the land by the owner, the challenges by staff, the recalled earlier sign at point E are all relevant information. All actions taken together may be that there has been sufficient action taken to negative the intention to dedicate at a school during the twenty years of use.

Making of an Order and stance on confirmation.

The test for making an Order under 53(3)(c)(i) is a low test of whether a footpath can be reasonably alleged. If there is sufficient evidence to satisfy this, an Order should be made notwithstanding that an authority may consider that there is not sufficient evidence to establish that the right of way does exist.

The test is that if there is a conflict of credible evidence, and no incontrovertible evidence that a way cannot reasonably be alleged to subsist, then the answer must be that it is reasonable to allege that one does exist.

It is therefore suggested that there is sufficient evidence in this matter to make an Order.

It may reasonably be considered that all available evidence has been presented in this matter and that the test for confirmation can be considered and the stance the Order Making Authority should take. Given the conflicting evidence and evidence of some substance in connection with whether use is as of right, interrupted, sufficient, whether there is sufficient evidence of a lack of intention to dedicate it is suggested

that the Committee may like to consider that a neutral stance is taken in connection with the confirmation of any Order made and to which objections are received.

Alternative options to be considered -

To not make an Order

To make an Order but require a further report in connection with confirmation test

To make an Order but resolve that the Order making Authority support or oppose the Order

Local Government (Access to Information) Act 1985

List of Background Papers

Paper	Date	Contact/Directorate/Tel
All documents on Claim File Ref: 804//496	various	Megan Brindle County Secretary & Solicitors Group 01772 533427

Reason for inclusion in Part II, if appropriate

N/A

