Regulatory Committee
Meeting to be held on 10 October 2007

Part I - Item No. 4

Electoral Division affected:
South Ribble Rural East

Wildlife And Countryside Act 1981
Claimed Public Footpath from Kellet Lane to Ranglet Road, Bamber Bridge, South Ribble Borough.

Claim No. 804/454
(Annex 'A' refers)

Contact for further information:
Ms J Blackledge, 01772 533427, County Secretary & Solicitor's Group
Mrs A Taylor, 01772 534608, Environment Directorate

Executive Summary

The claim for a Public Footpath from Kellet Lane to Ranglet Road, Bamber Bridge, South Ribble Borough, to be added to the Definitive Map and Statement of Public Rights of Way, in accordance with Claim No. 804/454.

Recommendation

i. That the claim for a Public Footpath from Kellet Lane to Ranglet Road, Bamber Bridge, South Ribble Borough, to be added to the Definitive Map and Statement of Public Rights of Way, in accordance with Claim No. 804/454, be accepted.

ii. That an Order be made pursuant to Section 53 (2) (b) and Section 53 (3) (c) (i) of the Wildlife and Countryside Act 1981 to add to the Definitive Map and Statement of Public Rights of Way a Footpath from Kellet Lane, Bamber Bridge to Ranglet Road, Bamber Bridge for a distance of approximately 52 metres (GR 5794 2504 to GR 5791 2508) and shown between points A – B on the attached plan.

Background

A claim has been received for a Public Footpath extending from a point at GR 5794 2504 on Kellet Lane, Bamber Bridge, running in a general north westerly direction for a distance of 52 metres adjacent to Total Cellar Systems, Unit 468 Ranglet Road, to a point on Ranglet Road, Bamber Bridge, at GR 5791 2508, and shown between points A – B on the attached plan, to be added to the Definitive Map and Statement of Public Rights of Way.

Lancashire County Council

Consultations

South Ribble Council

There has been no response from the Borough Council

Parish Council

There is no Parish Council for this area.

Claimant/Landowners/Supporters/Objectors

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

Advice

Executive Director of Environment's Observations

Description of claimed route

At point A on Kellet Lane (U10725) there is a dropped kerb approximately 2 metres wide, with a tar macadam surface leading back from the kerbs with two metal railing barriers in the line of the very mature highway hedge. These are approximately 1200mm apart and form a chicane to control access from the claimed path onto the extremely busy road where the visibility to both sides is exceptionally poor and restricted due to the close proximity of the hedges at the opening.

The surfacing to the claimed route is approximately 2 metres wide and continues through the wooded strip alongside of Kellet Lane. It is in good condition even though it has been excavated and patched up, presumably by a utilities contractor. Both sides of the claimed route are slightly overgrown by ivy and moss.

After a distance of approximately 23 metres the claimed route is obstructed by a 2-metre high timber fence at point C. This length of the claimed route is between the two adjacent industrial units, divided from Kellet Lane by the strip of woodland. The macadam surface is un-broken by the fence posts and the fence is slightly raised above the surface. The route can be seen to continue on the other side of the fence when looking underneath it.

Access to the length C - B has to be gained from the other end of the claimed route on Ranglet Road. The rest of the site description below begins from the far side of the obstruction at point C on the plan, continuing in a north westerly direction.

The claimed route continues over a macadam surface, which is also in a good condition. On the south westerly side there is a recently erected timber fence, approximately 2 metres high. This has been placed just to the side of the concrete kerbing of the surfaced path, with the fence and the fence posts within the car

parking area of the adjacent property. On this fence at point C there is a laminated notice fastened, as follows:

PUBLIC NOTICE
CLOSURE OF FOOTPATH
WITH EFFECT FROM
31ST AUGUST 2006

USERS OF THIS FOOTPATH ARE ADVISED THAT THE FOOTPATH RUNS THROUGH PRIVATELY OWNED PROPERTY, THE FOOTPATH HAS NO LEGAL STATUS, IT IS NOT PART OF THE ADOPTED HIGHWAY AND IS NOT A DEFINITIVE FOOTPATH.

THE LEGAL OWNERS OF THE LAND INTEND TO EXERCISE THEIR RIGHT TO FENCE OFF THEIR PROPERTY WHICH WILL RESULT IN THE PERMANENT CLOSURE OF THIS PATHWAY AFTER 31ST AUGUST 2006.

Signed
30th June 2006.

On the north side of the surfaced path there is a border approximately 2.5 metres wide, planted with mature shrubs. These have been maintained to allow for a mainly clear pathway. The surface of the claimed route is in a good condition although there have been trenches excavated and back filled on this section, as well as the section between points A and C.

After approximately 22 metres the timber fencing and the car park end at a low brick wall, which encloses a raised area with a mature tree in its centre and a gravel ground surface. This brick wall extends for approximately 10 metres to point B at the rear of the concrete kerbs of Ranglet Road. These kerbs, and the brick wall, then curve to form the entrance into the parking area.

On the north easterly side of the claimed route there is a macadam-surfaced footway to Ranglet Road running past the end of the planted border. The kerb then drops for the entrance into the adjacent industrial premises.

In summary, the whole of the length of this claimed route appears to have been provided as part of the development of the Walton Summit Industrial Estate by the predecessors of English Partnerships: - Central Lancashire New Town / Commission for New Towns. It is one of a number of similar paths provided through landscaped planted areas at the time of the development in this and other areas.

The metal barriers at Kellet Lane, point A, are in good condition and are an essential part of the path as they do provide some protection to any user of the claimed route from the fast moving traffic, using the busy lane. This access point offers virtually no visibility along the lane for pedestrians emerging. This is caused by the planting of the trees and hedges that extend right up to the kerb line.

The surface of the claimed path is in a good condition throughout and prior to the timber fence being erected over it at point C (and its posted closure on 31 August 2006) would have been easily available and appears to have provided a useful and convenient link into the estate.

The alternative route between points A and B, by the use of the roads, means a long and convoluted journey.

The claimed route would not form a link into the current Definitive Rights of Way network but would link two known adopted highways. Prior to the development taking place, the whole of this area had an extensive network of Public Footpaths and a RUPP (Road Used as Public Path, now partly extinguished with the remaining length reclassified as a Bridleway) included on the Definitive Map. Whilst there are some short, isolated lengths that remain in existence, the major part of the network in this area was extinguished under the New Towns Act, to allow the development to be undertaken. The powers available under New Towns Act allowed only for the extinguishment of any highways over new town land, There was no specific statutory power to create new routes for public use although as owner the Commission had legal power to dedicate highways as a freehold owner. Probably because of their limited statutory powers there are a large number of paths physically constructed through the various areas of development in Preston and South Ribble that have no formal dedication or adoption. As a consequence of this, these routes have no recorded legal status. This claimed route would appear to be typically one of these routes.

The notice displayed on the fence near point C reflects this situation.

The car parking area to the south west of the length C to B appears to have been open to that side of the claimed route, until the timber fencing was recently erected. It is assumed that this work was carried out as a security measure and it may have also prevented members of the public gaining access to the claimed route by crossing the car parking area.

The parking space numbers are still on the kerbs on the claimed path side of the timber fence.

As the fence obstructing the claimed route at point C has been constructed with supporting posts to the sides of the surfaced path, it means that a section of fence could be removed without damage to the surface of the path.

There have been excavations and reinstatement works carried out along the whole length of the claimed route and these seem to lead to a utility inspection chamber close to the junction with Ranglet Road and point B. It may be that this access has been by agreement or wayleave rather than by licence because the land is regarded as a highway with the associated rights of access that that status affords to the statutory undertakers.

Map and Documentary Evidence

A number of maps, plans and other documents were examined to find out when the claimed route came into being, and to try to determine what its status might be.

Early maps examined, including those produced by the Ordnance Survey, show the area as farmland, before the development of the New Town took place. All the old maps examined (from Yates' map of 1789) show Kellet Lane. The first edition of the 6-inch OS map, published in 1848, also shows Kellet Lane. No footpath is shown that corresponds with the claimed route. (There is a footpath from Kellet Lane, going northwards, which is to the west of Long Lane Farm, some 315 metres to the west of the claimed route, and now completely covered by development). All subsequent OS maps examined, both 6-inch and 25-inch, from 1893 to 1974, show the area of the claimed route as farmland, with no path or track corresponding to the claimed route. (The other path, referred to above, is shown however).

The 1988 Pathfinder map, revised for various changes in 1977, 1981 and 1986, and published in 1988, shows the start of the new town development with new road layouts. The area around the claimed route is still shown as agricultural land.

Aerial photographs taken in 1988 (and again between 1999 and 2000) show Ranglet Road, and that the area around the claimed route is fully developed, with industrial units, car parking and landscaping etc. Nearly all the claimed route is visible on the aerial photograph between points B and C, whilst the final southerly length of path to point A on Kellet Lane is hidden by trees.

The claimed route has never been shown on any map produced in preparation of the current Definitive Map. (The footpath referred to above, to the west running from Kellet Lane northwards to Bradkirk Lane and Brindle Road, Walton-le-Dale, was shown on the Draft Map for Walton-le-Dale Urban District, and on all maps produced in preparation of the current Definitive Map. It was extinguished under the New Towns Act in 1976, along with many other paths, to enable the Walton Summit industrial area to be developed).

The Central Lancashire New Town was developed following a feasibility study commissioned in 1966. During 1972 – 1973 the Development Corporation submitted proposals for an employment area of 98 hectares called Walton Summit, the approval for which was granted after a public inquiry in 1974 – 5. There is a very large deposit of material from the New Towns Commission in the Lancashire County Records Office, but despite an extensive search, no large-scale maps or plans were found relating to this site.

A copy of the conveyance by the Commission for the New Towns of the industrial unit (which includes the land crossed by the claimed route) in 1987 has been obtained from the Land Registry. There is clear reference to the purchase of the site by CNT being in 1974. In it the new purchaser covenants to take care not to damage the roads and footpaths on the estate indicating that there were footpaths as well as roads being constructed.

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In summary therefore, there is no evidence to show that any path or track existed along the line of the claimed route before Walton Summit was developed. Aerial photographs, and site evidence, show that the path has been provided for public use from Kellet Lane to join Ranglet Lane and associated industrial units, with surfacing and a pedestrian safety barrier at the kerb edge. The path is similar to others in the development which act as links between roads and buildings across the site. No specific evidence has been found however to show who provided the claimed route, and when the construction of the path took place.

County Secretary & Solicitor's Observations

Information from the Applicant

In support of the claim the Applicant has submitted 8 evidence of use forms indicating knowledge of the route for over 50 years (2); 30-39 years (1); 20-29 years (1); 10-19 years (3), and one unspecified period.

The forms indicate use of the route for over 50 years (1); 30-39 years (1); 20-29 years (1); 10-19 years (4); and one unspecified period of use.

The usage has been largely for leisure, dog-walking, and as a short cut. Frequency of use varies from daily to twice a month.

The users have never been challenged when using the claimed route and until June 2006 did not see any signs indicating that the way was private. Seven users have not encountered any gates on the route, although one user of the route for over 50 years states that the path was an old track to a farm and used to have a gate/stile/fence (unspecified) at the Kellet Lane end. There is now a metal giggle-gaggle where the claimed route meets Kellet Lane.

Information from others

The present owner purchased the land in 1998. Prior to 1987 the land was owned by the Commission for New Towns (now known for business purposes as English Partnerships). Although English Partnerships is unable to produce any evidence of dedication while the land was in its ownership, it has confirmed in writing that:-

"it has always been believed that the land in question formed a route of footpath during the period (at least) of the commercial development. We would have no objection to the route being deemed dedicated as a public footpath."

The land over which the claimed route passes is owned by the Trustees of the Total Cellar Systems Ltd Director's Retirement and Death Benefit Scheme.

The company state that although they have cut the vegetation back from the claimed route and removed large amounts of rubbish, they are confident that the pathway is not a right of way, and this was confirmed to them by South Ribble Borough Council. Since purchasing the land in 1998 they have given permission for BT and NORWEB to replace cables which lie under the footway and to South Ribble Borough Council, who confirmed that the land was private and there was no adopted right of way, to

remove a street lamp. While they have been quite happy to tolerate the unauthorised use of the route while the land was lying dormant, they now intend to expand their company buildings and in 2006 posted notices and took steps to block the claimed route. A planning application has been submitted for this expansion, which they claim could lead to employment for a further 60 people.

Total Cellar Systems Ltd point out that the route is unnecessary, with other safer routes available for people accessing the Walton Summit complex. The footpath joins Kellet Lane, which carries heavy traffic, on a bend with poor visibility due to adjacent vegetation and no footway on the northern side, and in any case there is little residential property surrounding the site, which is a light industrial area. The company points out that none of their 59 employees uses the claimed route, preferring to use safer alternative routes.

Assessment of the Evidence

The Law - See Annex 'A'

In Support of the Claim

User evidence
Ownership by Commission for New Towns 1974 until 1987 for large development
Clearly created on the ground by CNT as a path linking highways
Not a private access path
Information from English Partnerships

Against Accepting the Claim

Limited user evidence
No specific reference to a dedication
Present intention to close the route by present owners.

Conclusion

In this matter it is claimed that this route has already become a public footpath which means that it is claimed that dedication by an owner can be evidenced, deemed because there has been the qualifying twenty years use under S31 Highways Act or inferred from all the evidence.

There is no actual document referring to a dedication by the Commission for New Towns or any owner since.

Considering first the provisions of S31 Highways Act 1980. It is advised that the route has been called into question by the blocking of the route in 2006. The period of use to satisfy the statutory test is therefore 1986 to 2006. The user evidence in this matter is limited but despite some users thinking they used a route on this line in the 1940s or 50s (and it is suggested that they are mistaken and must have used one of the footpaths closed by the New Town Development) it is suggested that there has been use by them of this path by the public since it was made open and

available following construction in the 1970s. The Committee may consider that there has been as of right use for the twenty year period without any interruption and without any sufficient overt acts demonstrating an intention not to dedicate by the owners. The present owners say they tolerated use until 2006. The Committee may consider that they clearly knew of public use posting Notices of their intention to close the route. The notices were styled Public Notice.
Despite their closing the route recently it is suggested that the provisions of S31 may be satisfied and dedication of this route to the public be deemed to have happened.

The use by the public over several years and owner's acquiescence may also be circumstances from which to infer dedication at Common Law. In this regard the comments from English Partnerships are important as are their actions in constructing the route as a clear full-length link between highways. The Committee may consider that a dedication at Common Law may be able to be inferred to have happened even before 2006.

Taking all the evidence into account on balance the Committee may consider that there is sufficient evidence from which a dedication of this route as a public footpath can be deemed or inferred and that the claim be accepted.

Alternative options to be considered - N/A

Local Government (Access to Information) Act 1985
List of Background Papers

Paper	Date	Contact/Directorate/Ext
All documents on Claim File Ref: 5.28760(804/454)		J Blackledge, County Secretary & Solicitor's Group, Ext: 33427

Reason for inclusion in Part II, if appropriate

N/A

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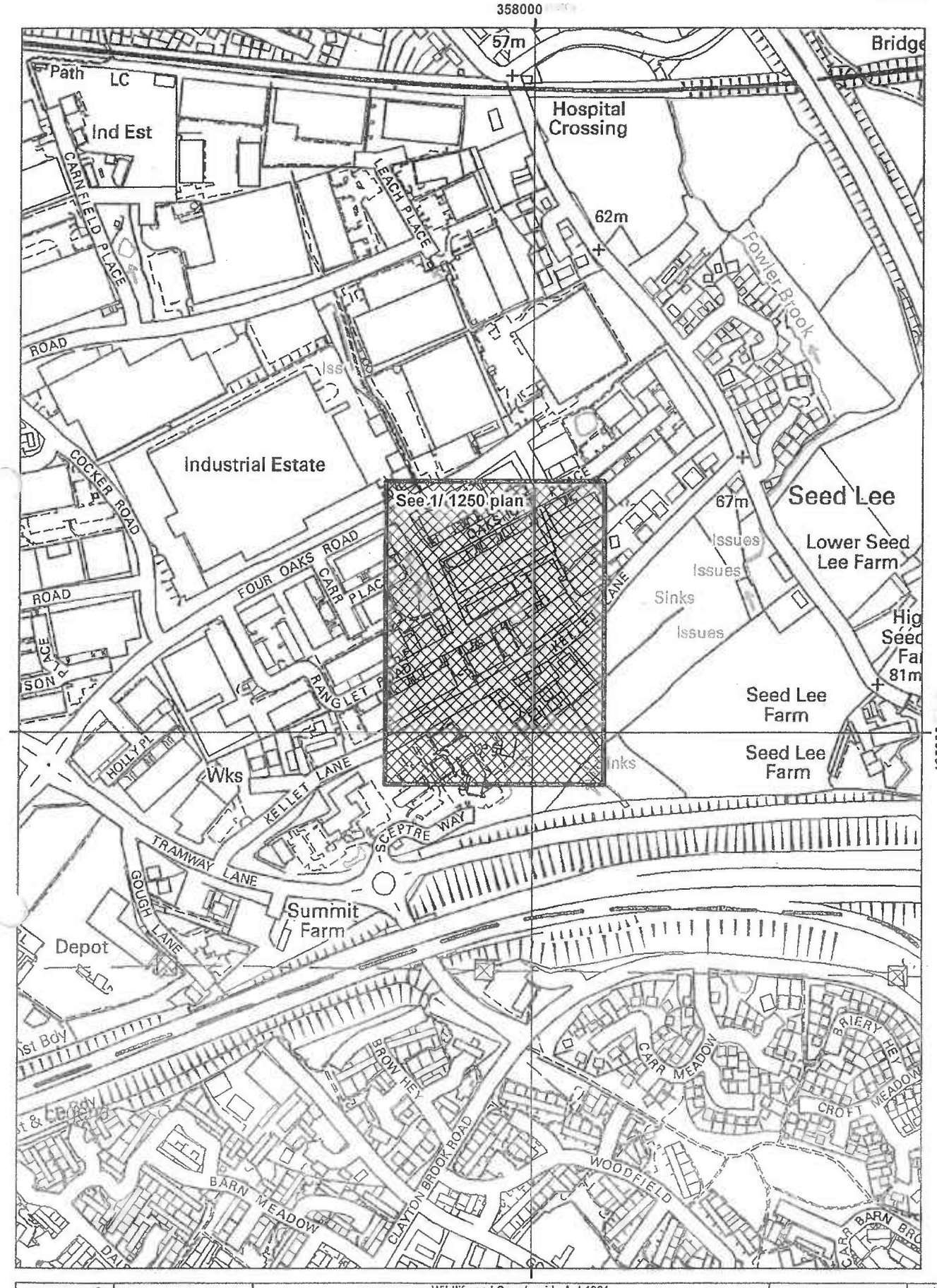

Lancashire County Council	G. Harding B.Eng., C Eng., FICE., FIHT., MCMI. Environment Director	Wildlife and Countryside Act 1981. Claimed public footpath from Kellet Lane to Ranglet Road, Walton-le-Dale, South Ribble Borough Council. 804/454.	1:5,000	

The digitised Rights of Way information should be used for guidance only as its accuracy cannot be guaranteed. Rights of Way information must be verified on the current Definitive Map before being supplied or used for any purpose.

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Lancashire County Council	G. Harding B.Eng., C Eng., FICE., FIHT., MCMI. Environment Director	Wildlife and Countryside Act 1981. Claimed public footpath from Kellet Lane to Ranglet Road, Walton-le-Dale, South Ribble Borough Council. 804/454.	1:1,250	N W E S

The digitised Rights of Way information should be used for guidance only as its accuracy cannot be guaranteed. Rights of Way information must be verified on the current Definitive Map before being supplied or used for any purpose.

Annex "A"

Regulatory Committee

Meeting to be held on the 10 October 2007

Guidance on the law relating to the continuous review of the Definitive Map and Statement of Public Rights of Way

Definitions

The Wildlife and Countryside Act 1981 gives the following definitions of the three public rights of way which are able to be recorded on the Definitive Map:-

Footpath – means a highway over which the public have a right of way on foot only ,other than such a highway at the side of a public road; these rights are without prejudice to any other public rights over the way;

Bridleway – means a highway over which the public have the following, but no other, rights of way, that is to say, a right of way on foot and a right of way on horseback or leading a horse, with or without a right to drive animals of any description along the highway; these rights are without prejudice to any other public rights over the way;

Byway open to all traffic (BOATs) – means a highway over which the public have a right of way for vehicular and all other kinds of traffic. These routes are recorded as Byways recognising their particular type of vehicular highway being routes whose character make them more likely to be used by walkers and horseriders because of them being more suitable for these types of uses

Restricted Byway – means a highway over which the public have a right of way on foot, on horseback or leading a horse and a right of way for vehicles other than mechanically propelled vehicles, with or without a right to drive animals along the highway. (Mechanically propelled vehicles do not include vehicles in S189 Road Traffic Act 1988)

Duty of the Surveying Authority

Section 53 of the Wildlife and Countryside Act 1981 provides that a Surveying Authority shall keep the Definitive Map and Statement under continuous review and as soon as reasonably practicable after the occurrence of any of a number of prescribed events by Order make such modifications to the Map and Statement as appear to them to be requisite in consequence of the occurrence of that event.

The prescribed events include –

Sub Section (3)

b) the expiration, in relation to any way in the area to which the Map relates, of any period such that the enjoyment by the public of the way during that period raises a presumption that the way has been dedicated as a public path or restricted byway;

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c) the discovery by the Authority of evidence which (when considered with all other relevant evidence available to them) shows –

(i) that a right of way which is not shown in the Map and Statement subsists or is reasonably alleged to subsist over land in the area to which the map relates, being a right of way such that the land over which the right subsists is a public path, a restricted byway or, a byway open to all traffic; or

(ii) that a highway shown in the Map and Statement as a highway of a particular description ought to be there shown as a highway of a different description; or

(iii) that there is no public right of way over land shown in the Map and Statement as a highway of any description, or any other particulars contained in the Map and Statement require modification.

The modifications which may be made by an Order shall include the addition to the statement of particulars as to:-

(a) the position and width of any public path or byway open to all traffic which is or is to be shown on the Map; and

(b) any limitations or conditions affecting the public right of way thereover.

Government Policy found in Circulars of the 1990s

D.O.E Circular 2/93

In considering the duty outlined above the Authority should have regard to the Department of the Environment Circular 2/93.

Paragraph 13 of Annex B of that circular states "Surveying Authorities, whenever they discover or are presented with evidence which suggests that a Definitive Map and Statement should be modified, are required to take into consideration all other relevant evidence available to them concerning the status of the right of way involved. Moreover before making an Order they must be satisfied that the evidence shows on the balance of probability that a right of way of a particular description exists or that a way shown on the Map is not in fact a public right of way. The mere assertion, without any supporting evidence, that a right of way does or does not exist would be insufficient to satisfy that test. In the case of deletions, the conclusive evidential effect of definitive maps and statements means that the evidence must show that no right of way existed as at the relevant date of the Definitive Map on which the way was first shown. If the evidence does support this, consideration should also be given to whether the way has acquired such rights in the intervening period.
Further advice on deletions is contained in DoE Circular 18/90" (see below).

In relation to byways open to all traffic (BOATs) Paragraph12 of Annex B provides:-

"12. By definition BOATs are vehicular rights of way which are used by the public mainly for the purposes for which footpaths and bridleways are used. The principle factor Surveying Authorities should bear in mind when deciding whether a way ought to be shown on Definitive Maps and Statements as a BOAT is therefore the purposes for which it is used. Thus if it is used mainly by vehicular traffic as opposed to walkers and horse

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riders it should as a general rule not be shown. Instances may occur where a way presumed to have been dedicated as a highway for all purposes under Section 31 of the Highways Act 1980 also satisfies the definition of a BOAT. In such circumstances, it would be open to Surveying Authorities to add the way to the Definitive Map and Statement under Section 53(3)(c)(i) of the Act. Section 53(3)(c) also allows for ways presently shown on Definitive Maps and Statements as footpaths and bridleways, but which enjoy vehicular rights, to be upgraded to BOATs."

DOE Circular 18/90

The circular explained that following the Court of Appeal decision in R v Secretary of State for the Environment ex parte Sims and Burrows, Authorities may consider applications to delete or downgrade rights of way on the basis that the evidence relating to events prior to the relevant date of the Definitive Map.
The circular continues:-

"4. However, in making an application for an Order to delete or downgrade a right of way
it will be for those who contend that there is no right of way or that a right of way is of a lower status than shown to prove that the map is in error by the discovery of evidence which, when considered with all other relevant evidence , clearly shows that a mistake was made when the right of way was first recorded. The Authority is required by Paragraph 3 of Schedule 14 to the Act to investigate the matters stated in the application. However, it is not for the Authority to demonstrate that the Map is correct but for the applicant to show that an error was made....

5. In making an Order the Authority must be able to say in accordance with Sections 53(3)(c)(ii) or (iii) that a highway of a particular description ought to be shown on the Map and Statement as a highway of a different description; or that there is no public right of way over land shown in the Map and Statement as a highway of any description....

7. Authorities will be aware of the need, as emphasised by the Court of Appeal, to maintain an authoritative Map and Statement of highest attainable accuracy. The evidence needed to remove a public right from such an authorative record will need to be cogent. The procedures for defining and recording public rights of way have, in successive legislation, been comprehensive and thorough. Whilst they do not preclude errors, particularly where recent research has uncovered previously unknown evidence, or where the review procedures have never been implemented, they would tend to suggest that it is unlikely that a large number of errors would have been perpetuated for up to 40 years without being questioned earlier."

Definitive Maps

The process for the preparation and revision of definitive maps was introduced by Part III of the National Parks and Access to the Countryside Act 1949.

Information about rights of way was compiled through surveys carried out by Parish Councils (or District Councils where there was no Parish Council) and transmitted to the Surveying Authority (County or County Borough Councils) in the form of Survey Maps and cards.

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The Surveying Authority published a draft map and statement and there was a period for the making of representations and objections to the draft map. The Authority could determine to modify the map, but if there was an objection to that modification the Authority was obliged to hold a hearing to determine whether or not to uphold that modification with a subsequent appeal to the Secretary of State against the decision.

After all appeals had been determined the Authority then published a Provisional Map and Statement. Owners, lessees or occupiers of land were entitled to appeal to Quarter Sessions (now the Crown Court) against the provisional map on various grounds.

Once this process had been completed the Authority published the Definitive Map and Statement. The Map and Statement was subject to five yearly reviews which followed the same stages.

The Map speaks as from a specific date (the relevant date) which is the date at which the rights of way shown on it were deemed to exist. For historic reasons different parts of the County have different Definitive Maps with different relevant dates, but for the major part of the County the Definitive Map was published in 1962, with a relevant date of the 1st January 1953 and the first review of the Definitive Map was published in 1975 with a relevant date of 1st September 1966.

Test to be applied when making an Order

The provisions of the Wildlife and Countryside Act 1981 set out the tests which must be addressed in deciding that the map should be altered.

S53 permits both upgrading and downgrading of highways and deletions from the map.

The statutory test at s53(3)(b) refers to the expiration of a period of time and use by the public such that a presumption of dedication is raised.

The statutory test at S53 (3) (c) (i) comprises two separate questions, one of which must be answered in the affirmative before an Order is made under that subsection. There has to be evidence discovered. The claimed right of way has to be found on balance to subsist (Test A) or able to be reasonably alleged to subsist.(Test B)
This second test B is easier to satisfy.
Test B has been described in a recent case as imposing a "lesser burden, namely one which obliges the authority only to be satisfied of the existence of facts which raise a prima facie case for the subsistence of the way".

The case of Bagshaw and Norton seems by inference to accept that an Order made on presumed dedication under Statute can be made under s53(3)(b) or s53(3)(c)(i),

In the Court of Appeal case, R-v-Secretary of State for Wales, ex parte Emery, Lord Justice Roch found that in the case of a dedication deemed under statute;
Test A is satisfied if there is "clear evidence of 20 years user uncontraverted by any credible evidence to the contrary and no credible evidence that there was on the part of the landowner no intention during the period to dedicate the way to the public";
Neither Test A nor Test B will be satisfied if there is "no credible evidence of 20 years use or where there is incontrovertible evidence that the landowner had no intention during the period to dedicate the way to the public";

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Test B can be satisfied where "an applicant for a Modification Order produces credible evidence of actual enjoyment of a way as a public right of way over a full period of 20 years and there is conflict of apparently credible evidence in relation to one of the other issues which arose under Section 31 of the 1980 Act". This is because it is possible, even though there is conflicting evidence, that a reasonable person having considered all relevant evidence available could reasonably allege a right of way to subsist.
The Court in the Emery case asked Order Making Authorities to bear in mind that making an Order still leaves both parties with the ability to object to the Order when conflicting evidence can be heard and those issues determined following a public inquiry.

The statutory test at S53(3)(c)(ii) again refers to the discovery of evidence that the highway on the definitive map ought to be shown as a different status.

The statutory test at s53(3)(c)(iii) again refers to evidence being discovered that there is no public right of way of any description after all or that there is evidence that particulars in the map of statement need to be modified.

The O'Keefe judgement reminds Order Making Authorities that they should make their own assessment of the evidence and not accept unquestioningly what officers place before them.

All evidence must be considered and weighed and a view taken on its relevance and effect.

An Order Making Authority should reach a conclusion on the balance of probabilities. The balance of probability test demands a comparative assessment of the evidence on opposing sides. This is a complex balancing act.

Recording a "new" route.

For a route to have become a highway it must have been dedicated by the owner.

Once a route is a highway it remains a highway, even though it may fall into non use and perhaps become part of a garden.
This is the position until a legal event causing the highway to cease can be shown to have occurred, or the land on which the highway runs is destroyed, perhaps by erosion which would mean that the highway length ceases to exist.

Sometimes there is documentary evidence of actual dedication but more often a dedication can be inferred because of how the landowner appears to have treated the route and given it over to public use (dedication at Common law) or dedication can be deemed to have occurred if certain criteria laid down in Statute are fulfilled (dedication under s31 Highways Act).

Dedication able to be inferred at Common law

At common law dedication of a highway may be inferred if the evidence points clearly and unequivocally to an intention on the part of the landowner to dedicate. The burden of proof is on the Claimant to prove a dedication. Evidence of use of the route by the public and how an owner acted towards them is one of the factors which may be taken into account in deciding whether a path has been dedicated. No minimum period of use is necessary. All

the circumstances must be taken into account. How a landowner viewed a route may also be indicated in documents and maps

However, a landowner may rely on a variety of evidence to indicate that he did not intend to dedicate, including signs indicating the way was private, blocking off the way or turning people off the path, or granting permission or accepting payment to use the path.

There is no need to know who a landowner was.

Use needs to be by the public. This would seem to require the users to be a number of people who together may sensibly be taken to represent the people as a whole/the local community. Use wholly or largely by local people may still be use by the public. Use of a way by tradespeople, postmen ,estate workers or by employees of the landowner to get to work, or for the purpose of doing business with the landowner, or by agreement or licence of the landowner or on payment would not normally be sufficient. Use by friends of or persons known to the landowner would be less cogent evidence than use by other persons.

The use also needs to be as of right which would mean that it had to be open, not secretly or by force or with permission. Open use would arguably give the landowner the opportunity to challenge the use. Toleration by the landowner of a use is not inconsistent with user as of right. Recent case law would indicate that the use has to be considered from the landowner's perspective as to whether the use, in all the circumstances, is such as to suggest to a reasonable landowner the exercise of a public right of way.

The use would have to be of a sufficient level for a landowner to have been aware of it. The use must be by such a number as might reasonably have been expected if the way had been unquestioningly a highway.

Current use (vehicular or otherwise) is not required for a route to be considered a Byway Open to All Traffic but past use by the public using vehicles will need to be sufficiently evidenced from which to infer the dedication of a vehicular route.

Dedication deemed to have taken place (Statutory test)

By virtue of Section 31 of the Highways Act 1980 dedication of a path as a highway may be presumed from use of the way by the public as of right – not secretly, not by force nor by permission without interruption for a full period of twenty years unless there is sufficient evidence that there was no intention during the twenty year period to dedicate it.

The 20 year period is computed back from the date the existence of the right of way is called into question.

A landowner may prevent a presumption of dedication arising by erecting notices indicating that the path is private. Further under Section 31(6) a landowner may deposit with the Highway Authority a map (of a scale of not less than 1:10560 (6 inches to the mile) and statement showing those ways, if any, which he or she agrees are dedicated as highways. This statement must be followed by statutory declarations. These statutory declarations used to have to be renewed at not more than 6 yearly intervals, but the interval is now 10 years. The declaration would state that no additional rights of way have

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been dedicated. These provisions do not preclude the other ways open to the landowner to show the way has not been dedicated.

If the criteria in section 31are satisfied a highway can properly be deemed to have been dedicated. This deemed dedication is despite a landowner now protesting or being the one to now challenge the use as it is considered too late for him to now evidence his lack of intention when he had failed to do something to sufficiently evidence this during the previous twenty years.

The statutory presumption can arise in the absence of a known landowner. Once the correct type of user is proved on balance, the presumption arises, whether or not the landowner is known.

Guidance on the various elements of the Statutory criteria ;-

Use – see above as to sufficiency of use. The cogency, credibility and consistency of user evidence should be considered.

By the public – see above as to users which may be considered "the public"

As of right. - see above

Without interruption - for a deemed dedication the use must have been without interruption. The route should not have been blocked with the intention of excluding the users.

For a full period of twenty years - Use by different people, each for periods of less that twenty years will suffice if, taken together, they total a continuous period of twenty years or more. The period must end with the route being "called into question".

Calling into question - there must be something done which is sufficient at least to make it likely that some of the users are made aware that the owner has challenged their right to use the way as a highway. It is as yet unclear as to whether the application for an Order does this or whether it would be an objection that would be a calling into question in the absence of signage or a locked gate or barriers or challenges to users. It is not necessary that it be the landowner who brings the route into question.

Sufficient evidence of a lack of intention to dedicate - this would not need to be evidenced for the whole of the twenty year period. It would be unlikely that lack of intention could be sufficiently evidenced in the absence of overt and contemporaneous acts on the part of the owner. The intention not to dedicate does have to be brought to the attention of the users of the route such that a reasonable user would be able to understand that the landowner was intending to disabuse him of the notion that the land was a public highway.

Documentary evidence

By virtue of Section 32 of the Highways Act 1980 in considering whether a highway has been dedicated, maps plans and histories of the locality are admissible as evidence and must be given such weight as is justified by the circumstances including the antiquity of the document, status of the persons by whom and the purpose for which the document was made or compiled and the custody from which it is produced.

In assessing whether or not a highway has been dedicated reference is commonly made to old commercial maps of the County, Ordnance Survey maps, sometimes private estate maps and other documents, other public documents such as Inclosure or Tithe Awards, plans deposited in connection with private Acts of Parliament establishing railways, canals or other public works, records compiled in connection with the valuation of land for the purposes of the assessment of increment value duty and the Finance Act 1910. Works of local history may also be relevant, as may be the records of predecessor highway authorities and the information gained in connection with the preparation and review of the Definitive Map.

It should be stressed that it is rare for a single document or piece of information to be conclusive (although some documents are of more value than others eg. Inclosure Awards where the Commissioners were empowered to allot and set out highways). It is necessary to look at the evidence as a whole to see if it builds up a picture of the route being dedicated as a highway.

It should be noted that Ordnance Survey Maps (other than recent series which purport to show public rights of way and which derive their information from the Definitive Map) contain a disclaimer to the effect that the recording of a highway or right of way does not imply that it has any status. The maps reflect what the map makers found on the ground.

Synergy between pieces of highway status evidence – co-ordination as distinct from repetition would significantly increase the collective impact of the documents.

Recording vehicular rights

Historical evidence can indicate that a route carries vehicular rights and following the Bakewell Management case in 2004 (House of Lords) it is considered that vehicular rights could be acquired on routes by long user during years even since 1930. However, in May 2006 Part 6 of the Natural Environment and Rural Communities Act 2006 came into force. Public rights of way for mechanically propelled vehicles are now extinguished on routes shown on the definitive map as footpaths, bridleways or restricted byways. In essence mechanical vehicle rights no longer exist unless a route is recorded in a particular way on the Council's Definitive Map or List of Streets. There are a few exceptions but in effect the provisions of the Act curtail the future scope for applications to record a Byway Open to All Traffic to be successful.

It is certainly the case that any application to add a byway to the Definitive Map and Statement must still be processed and determined even though the outcome may now be that a vehicular public right of way existed before May 2006 but has been extinguished for mechanically propelled vehicles.

Downgrading a route or taking a route off the Definitive Map

In such matters it is clear that the evidence to be considered relates to whether on balance it is shown that a mistake was made when the right of way was first recorded. The Order Making Authority investigate the matter but have not to prove the Map is correct, but it is for the Applicant to show an error was made. The evidence needed to remove a public right from such an authoritative record will need to be cogent. It is suggested that cogent

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evidence would be compelling evidence, evidence which was forcefully convincing and therefore much stronger than evidence which just tipped the balance.

In the Trevelyan case (Court of Appeal 2001) it was considered that where a right of way is marked on the Definitive Map there is an initial presumption that it exists. It should be assumed that the proper procedures were followed and thus evidence which made it reasonably arguable that it existed was available when it was put on the Map. The standard of proof required to justify a finding that no such right of way exists is on the balance of probabilities and evidence of some substance is required to outweigh the initial presumption.

Taking one route off and replacing it with an alternative

In some cases there will be no dispute that a public right of way exists between two points, but there will be one route shown on the definitive map which is claimed to be in error and an alternative route claimed to be the actual correct highway.

There is a need to consider whether, in accordance with section 53(3)(c)(i) a right of way is shown to subsist or is reasonably alleged to subsist and also, in accordance with section 53(3) (c) (iii) whether there is no public right of way on the other route.

The guidance published under the Statutory provisions make it clear that the evidence to establish that a right of way should be removed from the authoritative record will need to be cogent.

In the case of R on the application of Leicester County Council v SSEFR in 2003, Mr Justice Collins said that there "has to be a balance drawn between the existence of the definitive map and the route shown on it which would have to be removed and the evidence to support the placing on the map of, in effect a new right of way." "If there is doubt that there is sufficient evidence to show that the correct route is other than that shown on the map, then what is shown on the map must stay."

The court considered that if it could merely be found that it was reasonable to allege that the alternative existed, this would not be sufficient to remove what is shown on the map. It is advised that, unless in extraordinary circumstances, evidence of an alternative route which satisfied only the lower "Test B" (see page 4) would not be sufficiently cogent evidence to remove the existing recorded route from the map.

Confirming an Order

An Order is not effective until confirmed.

The County Council may confirm unopposed orders. If there are objections the Order is sent to the Secretary of State for determination. The County Council usually promotes its Orders and actively seeks confirmation by the Secretary of State.

Until recently it was thought that the test to be applied to confirm an Order was the same test as to make the order, which may have been under the lower Test B for the recording of a "new" route. However, the Honourable Mr Justice Evans-Lombe heard the matter of Todd and Bradley v SSEFR in May 2004 and on 22nd June 2004 decided that confirming an Order made under S53(3)(c)(i) "implies a revisiting by the authority or Secretary of State of the material upon which the original order was made with a view to subjecting it to

a more stringent test at the confirmation stage." And that to confirm the Order the Secretary of State (or the authority) must be "satisfied of a case for the subsistence of the right of way in question on the balance of probabilities." ie that Test A is satisfied.

It is advised that there may be cases where an Order to record a new route can be made because there is sufficient evidence that a highway is reasonably alleged to subsist, but unless Committee also consider that there is enough evidence, on balance of probabilities, that the route can be said to exist, the Order may not be confirmed as an unopposed Order by the County Council. This would mean that an Order could be made, but not confirmed as unopposed, nor could confirmation actively be supported by the County Council should an opposed Order be submitted to the Secretary of State.

August 2007

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Regulatory Committee
Meeting to be held on 13 February 2013

Electoral Division affected:
South Ribble Rural East

Wildlife And Countryside Act 1981
Claimed Public Footpath from Kellet Lane to Ranglet Road, Bamber Bridge, South Ribble Borough.
Claim No. 804/454
(Annex 'A' refers)

Contact for further information:
Miss Jennifer Mort, 01772 533427, County Secretary & Solicitors Group
Jennifer.mort@lancashire.gov.uk

Executive Summary

That support for "The Lancashire County Council Definitive Map and Statement of Public Rights of Way (Definitive Map Modification) (No 11) Order 2007" continue and the Order be supported to confirmation on the basis that the County Council considers that the higher test for confirming the said Order can on balance be satisfied.

Recommendation

That the County Council as Order Making Authority should submit The Lancashire County Council (Definitive Map and Statement of Public Rights of Way (Definitive Map Modification) (No 11) Order 2007 to the Secretary of State for Environment, Food and Rural Affairs for formal determination, and said Order be promoted to confirmation.

Background and Advice

On 10th October 2007 the Authority gave consideration as to whether or not an Order should be made to add a Public Footpath extending from a point on Kellet Lane, Bamber Bridge, running in a general north westerly direction for a distance of 52 metres adjacent to Total Cellar Systems, Unit 468 Ranglet Road, to a point on Ranglet Road, Bamber Bridge, to the Definitive Map and Statement of Public Rights of Way. A copy of this report is attached at Appendix 'A'.

The decision of the County Council was that there was sufficient evidence from which to infer dedication at common law. The claim was accepted and it was resolved that an Order be made pursuant with Section 53 (2)(b) and Section 53 (3)(c)(i) of the Wildlife and Countryside Act 1981.
A Definitive Map Modification Order was duly made on 5th December 2007. An objection was received to the making of the Order and statutory provisions state that

Lancashire County Council

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where there are objections, the Order Making Authority should submit the Order to the Secretary of State for formal determination.

The Committee will note, that when the claim was considered at its meeting of 2007 they were not asked to formally confirm that the Order could be promoted to confirmation if necessary by submitting it to the Secretary of State.

The advice contained in the Report was to the effect that there was sufficient evidence to make an Order and confirm the same.

It is felt that no additional information contained within the objection to the Order causes concern as to whether the Order is capable of confirmation. The sole objection is from the Landowner who makes observations on the user evidence and states that there is sufficient evidence during the relevant 20 year period to establish that there was no intention to dedicate the route. They state that they closed the path once a year, on Christmas Day and Boxing Day and also that the route was stopped up by utilities companies on two occasions while works were carried out. However this argument was not put by the owner in their initial objection and the Council would argue that the actions taken by the landowner to close the route have to be sufficient to negative any intention to dedicate and must be done on a day which would attract the public's attention. Closing the route on Christmas and Boxing Day would be unlikely to attract the attention of the public and this is supported by the fact that none of the users have any recollection of the route being closed and were not interrupted by the utility company work either. It is also argued by the landowner that the route shown on ancient maps when the property was only fields is not in any way related to the claimed footpath. It is accepted that this is possibly the case as the claim relates to a footpath constructed in the 1970's when CLDC constructed the Walton Summit Estate.

It is felt that it would be appropriate to promote this Order to confirmation. The Committee may therefore feel that the County Council as Order Making Authority should submit the Order to the Secretary of State for formal determination, and notify the Secretary of State that it does actively support the Order and would attend at a Public Hearing or Inquiry as required.

Alternative Options

The Order must be submitted to the Secretary of State for determination, but the Council may wish to:

- decide not to promote the Order to confirmation.
- decide not actively support the Order and take a 'neutral stance'

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Local Government (Access to Information) Act 1985
List of Background Papers

Paper	Date	Contact/Directorate/Tel
All documents on Claim File Ref: 804/445		J Mort, County Secretary & Solicitor's Group, 01772 533427

Reason for inclusion in Part II, if appropriate
N/A

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Lancashire County Council	G. Harding B.Eng., C Eng., FICE., FIHT., MCMI. Environment Director	Wildlife and Countryside Act 1981. Claimed public footpath from Kellet Lane to Rangiet Road, Walton-le-Dale, South Ribble Borough Council. 804/454.	1:1,250	N W E S

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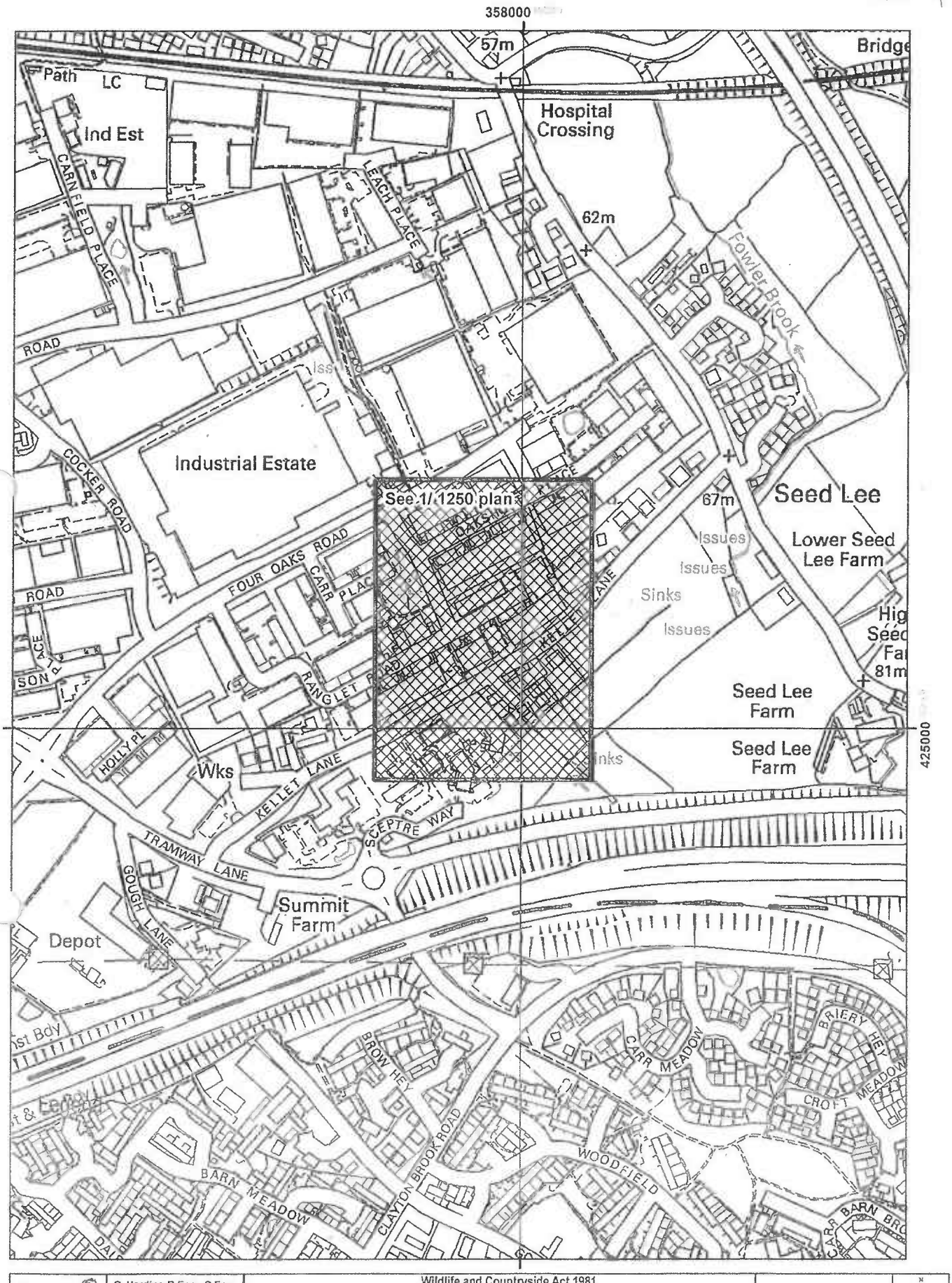
Item 4



Lancashire County Council	G. Harding B.Eng., C Eng., FICE., FIHT., MCMI. Environment Director	Wildlife and Countryside Act 1981. Claimed public footpath from Kellet Lane to Ranglet Road, Walton-le-Dale, South Ribble Borough Council. 804/454.	1:5,000	N

The digitised Rights of Way information should be used for guidance only as its accuracy cannot be guaranteed. Rights of Way information must be verified on the current Definitive Map before being supplied or used for any purpose.

Annex 'A'

Regulatory Committee

Meeting to be held on the 13 February 2013

Guidance on the law relating to the continuous review of the Definitive Map and Statement of Public Rights of Way

Definitions

The Wildlife and Countryside Act 1981 gives the following definitions of the public rights of way which are able to be recorded on the Definitive Map:-

Footpath – means a highway over which the public have a right of way on foot only, other than such a highway at the side of a public road; these rights are without prejudice to any other public rights over the way;

Bridleway – means a highway over which the public have the following, but no other, rights of way, that is to say, a right of way on foot and a right of way on horseback or leading a horse, with or without a right to drive animals of any description along the highway; these rights are without prejudice to any other public rights over the way;

Byway open to all traffic (BOATs) – means a highway over which the public have a right of way for vehicular and all other kinds of traffic. These routes are recorded as Byways recognising their particular type of vehicular highway being routes whose character make them more likely to be used by walkers and horseriders because of them being more suitable for these types of uses

Restricted Byway – means a highway over which the public have a right of way on foot, on horseback or leading a horse and a right of way for vehicles other than mechanically propelled vehicles, with or without a right to drive animals along the highway. (Mechanically propelled vehicles do not include vehicles in S189 Road Traffic Act 1988)

Duty of the Surveying Authority

Section 53 of the Wildlife and Countryside Act 1981 provides that a Surveying Authority shall keep the Definitive Map and Statement under continuous review and as soon as reasonably practicable after the occurrence of any of a number of prescribed events by Order make such modifications to the Map and Statement as appear to them to be requisite in consequence of the occurrence of that event.

Orders following "evidential events"

The prescribed events include –

Sub Section (3)

b) the expiration, in relation to any way in the area to which the Map relates, of any period such that the enjoyment by the public of the way during that period raises a presumption that the way has been dedicated as a public path or restricted byway;

c) the discovery by the Authority of evidence which (when considered with all other relevant evidence available to them) shows –

(i) that a right of way which is not shown in the Map and Statement subsists or is reasonably alleged to subsist over land in the area to which the map relates, being a right of way such that the land over which the right subsists is a public path, a restricted byway or, a byway open to all traffic; or

(ii) that a highway shown in the Map and Statement as a highway of a particular description ought to be there shown as a highway of a different description; or

(iii) that there is no public right of way over land shown in the Map and Statement as a highway of any description, or any other particulars contained in the Map and Statement require modification.

The modifications which may be made by an Order shall include the addition to the statement of particulars as to:-

(a) the position and width of any public path or byway open to all traffic which is or is to be shown on the Map; and

(b) any limitations or conditions affecting the public right of way thereover.

Orders following "legal events"

Other events include

"The coming into operation of any enactment or instrument or any other event" whereby a highway is stopped up diverted widened or extended or has ceased to be a highway of a particular description or has been created and a Modification Order can be made to amend the Definitive Map and Statement to reflect these legal events.

Since 6th April 2008 Diversion Orders, Creation Orders, Extinguishment Orders under the Highways Act 1980 (and other types of Orders) can themselves include provisions to alter the Definitive Map under the new S53A of the Wildlife and Countryside Act 1981 and be "combined orders" combining both the Order to divert and an order to alter the Map. The alteration to the Definitive Map will take place on the date the extinguishment, diversion or creation etc comes fully into effect.

Government Policy - DEFRA Circular 1/09

In considering the duty outlined above the Authority should have regard to the Department of the Environment Food and Rural Affairs' Rights of Way Circular (1/09). This replaces earlier Circulars.

This Circular sets out DEFRA's policy on public rights of way and its view of the law. It can be viewed on the DEFRA web site. There are sections in the circular on informing and liaising, managing and maintaining the rights of way network, the Orders under the Highways Act 1980 and also sections on the Definitive Map and Modification Orders. Many aspects are considered such as -

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When considering a deletion the Circular says-

"4.33 The evidence needed to remove what is shown as a public right from such an authoritative record as the definitive map and statement – and this would equally apply to the downgrading of a way with "higher" rights to a way with "lower" rights, as well as complete deletion – will need to fulfil certain stringent requirements.

These are that:

- the evidence must be new – an order to remove a right of way cannot be founded simply on the re-examination of evidence known at the time the definitive map was surveyed and made.
- the evidence must be of sufficient substance to displace the presumption that the definitive map is correct;
- the evidence must be cogent.

While all three conditions must be met they will be assessed in the order listed.

Before deciding to make an order, authorities must take into consideration all other relevant evidence available to them concerning the status of the right of way and they must be satisfied that the evidence shows on the balance of probability that the map or statement should be modified."

Where a route is recorded on the List of Streets as an Unclassified County Road the Circular says –

"4.42 In relation to an application under the 1981 Act to add a route to a definitive map of rights of way, the inclusion of an unclassified road on the 1980 Act list of highways maintained at public expense may provide evidence of vehicular rights.

However, this must be considered with all other relevant evidence in order to determine the nature and extent of those rights. It would be possible for a way described as an unclassified road on a list prepared under the 1980 Act, or elsewhere, to be added to a definitive map of public rights of way provided the route fulfils the criteria set out in Part III of the 1981 Act. However, authorities will need to examine the history of such routes and the rights that may exist over them on a case by case basis in order to determine their status."

Definitive Maps

The process for the preparation and revision of definitive maps was introduced by Part III of the National Parks and Access to the Countryside Act 1949.

Information about rights of way was compiled through surveys carried out by Parish Councils (or District Councils where there was no Parish Council) and transmitted to the Surveying Authority (County or County Borough Councils) in the form of Survey Maps and cards.

The Surveying Authority published a draft map and statement and there was a period for the making of representations and objections to the draft map. The Authority could determine to modify the map, but if there was an objection to that modification the Authority was obliged to hold a hearing to determine whether or not to uphold that modification with a subsequent appeal to the Secretary of State against the decision.

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After all appeals had been determined the Authority then published a Provisional Map and Statement. Owners, lessees or occupiers of land were entitled to appeal to Quarter Sessions (now the Crown Court) against the provisional map on various grounds.

Once this process had been completed the Authority published the Definitive Map and Statement. The Map and Statement was subject to five yearly reviews which followed the same stages.

The Map speaks as from a specific date (the relevant date) which is the date at which the rights of way shown on it were deemed to exist. For historic reasons different parts of the County have different Definitive Maps with different relevant dates, but for the major part of the County the Definitive Map was published in 1962, with a relevant date of the 1st January 1953 and the first review of the Definitive Map was published in 1975 with a relevant date of 1st September 1966.

Test to be applied when making an Order

The provisions of the Wildlife and Countryside Act 1981 set out the tests which must be addressed in deciding that the map should be altered.

S53 permits both upgrading and downgrading of highways and deletions from the map.

The statutory test at S53(3)(b) refers to the expiration of a period of time and use by the public such that a presumption of dedication is raised.

The statutory test at S53(3)(c)(i) comprises two separate questions, one of which must be answered in the affirmative before an Order is made under that subsection. There has to be evidence discovered. The claimed right of way has to be found on balance to subsist (Test A) or able to be reasonably alleged to subsist. (Test B).

This second test B is easier to satisfy but please note it is the higher Test A which needs to be satisfied in confirming a route.

The statutory test at S53(3)(c)(ii) again refers to the discovery of evidence that the highway on the definitive map ought to be shown as a different status.

The statutory test at S53(3)(c)(iii) again refers to evidence being discovered that there is no public right of way of any description after all or that there is evidence that particulars in the map of statement need to be modified.

The O'Keefe judgement reminds Order Making Authorities that they should make their own assessment of the evidence and not accept unquestioningly what officers place before them.

All evidence must be considered and weighed and a view taken on its relevance and effect.

An Order Making Authority should reach a conclusion on the balance of probabilities. The balance of probability test demands a comparative assessment of the evidence on opposing sides. This is a complex balancing act.

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Recording a "new" route

For a route to have become a highway it must have been dedicated by the owner.

Once a route is a highway it remains a highway, even though it may fall into non use and perhaps become part of a garden.

This is the position until a legal event causing the highway to cease can be shown to have occurred, or the land on which the highway runs is destroyed, perhaps by erosion which would mean that the highway length ceases to exist.

Sometimes there is documentary evidence of actual dedication but more often a dedication can be inferred because of how the landowner appears to have treated the route and given it over to public use (dedication at Common law) or dedication can be deemed to have occurred if certain criteria laid down in Statute are fulfilled (dedication under s31 Highways Act).

Dedication able to be inferred at Common law

A common law dedication of a highway may be inferred if the evidence points clearly and unequivocally to an intention on the part of the landowner to dedicate. The burden of proof is on the Claimant to prove a dedication. Evidence of use of the route by the public and how an owner acted towards them is one of the factors which may be taken into account in deciding whether a path has been dedicated. No minimum period of use is necessary. All the circumstances must be taken into account. How a landowner viewed a route may also be indicated in documents and maps

However, a landowner may rely on a variety of evidence to indicate that he did not intend to dedicate, including signs indicating the way was private, blocking off the way or turning people off the path, or granting permission or accepting payment to use the path.

There is no need to know who a landowner was.

Use needs to be by the public. This would seem to require the users to be a number of people who together may sensibly be taken to represent the people as a whole/the local community. Use wholly or largely by local people may still be use by the public. Use of a way by trades people, postmen ,estate workers or by employees of the landowner to get to work, or for the purpose of doing business with the landowner, or by agreement or licence of the landowner or on payment would not normally be sufficient. Use by friends of or persons known to the landowner would be less cogent evidence than use by other persons.

The use also needs to be "as of right" which would mean that it had to be open, not secretly or by force or with permission. Open use would arguably give the landowner the opportunity to challenge the use. Toleration by the landowner of a use is not inconsistent with use as of right. Recent case law would indicate that the use has to be considered from the landowner's perspective as to whether the use, in all the circumstances, is such as to suggest to a reasonable landowner the exercise of a public right of way.

The use would have to be of a sufficient level for a landowner to have been aware of it. The use must be by such a number as might reasonably have been expected if the way had been unquestioningly a highway.

Current use (vehicular or otherwise) is not required for a route to be considered a Byway Open to All Traffic but past use by the public using vehicles will need to be sufficiently evidenced from which to infer the dedication of a vehicular route. Please note that the right to use mechanically propelled vehicles may since have been extinguished.

Dedication deemed to have taken place (Statutory test)

By virtue of Section 31 of the Highways Act 1980 dedication of a path as a highway may be presumed from use of the way by the public as of right – not secretly, not by force nor by permission without interruption for a full period of twenty years unless there is sufficient evidence that there was no intention during the twenty year period to dedicate it.

The 20 year period is computed back from the date the existence of the right of way is called into question.

A landowner may prevent a presumption of dedication arising by erecting notices indicating that the path is private. Further under Section 31(6) a landowner may deposit with the Highway Authority a map (of a scale of not less than 1:10560 (6 inches to the mile) and statement showing those ways, if any, which he or she agrees are dedicated as highways. This statement must be followed by statutory declarations. These statutory declarations used to have to be renewed at not more than 6 yearly intervals, but the interval is now 10 years. The declaration would state that no additional rights of way have been dedicated. These provisions do not preclude the other ways open to the landowner to show the way has not been dedicated.

If the criteria in section 31are satisfied a highway can properly be deemed to have been dedicated. This deemed dedication is despite a landowner now protesting or being the one to now challenge the use as it is considered too late for him to now evidence his lack of intention when he had failed to do something to sufficiently evidence this during the previous twenty years.

The statutory presumption can arise in the absence of a known landowner. Once the correct type of user is proved on balance, the presumption arises, whether or not the landowner is known.

Guidance on the various elements of the Statutory criteria;-

Use – see above as to sufficiency of use. The cogency, credibility and consistency of user evidence should be considered.

By the public – see above as to users which may be considered "the public"

As of right - see above

Without interruption - for a deemed dedication the use must have been without interruption. The route should not have been blocked with the intention of excluding the users.

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For a full period of twenty years - Use by different people, each for periods of less that twenty years will suffice if, taken together, they total a continuous period of twenty years or more. The period must end with the route being "called into question".

Calling into question - there must be something done which is sufficient at least to make it likely that some of the users are made aware that the owner has challenged their right to use the way as a highway. Barriers, signage and challenges to users can all call a route into question. An application for a Modification Order is of itself sufficient to be a "calling into question" (as provided in the new statutory provisions S31 (7a and 7B) Highways Act 1980). It is not necessary that it be the landowner who brings the route into question.

Sufficient evidence of a lack of intention to dedicate - this would not need to be evidenced for the whole of the twenty year period. It would be unlikely that lack of intention could be sufficiently evidenced in the absence of overt and contemporaneous acts on the part of the owner. The intention not to dedicate does have to be brought to the attention of the users of the route such that a reasonable user would be able to understand that the landowner was intending to disabuse him of the notion that the land was a public highway.

Documentary evidence

By virtue of Section 32 of the Highways Act 1980 in considering whether a highway has been dedicated, maps plans and histories of the locality are admissible as evidence and must be given such weight as is justified by the circumstances including the antiquity of the document, status of the persons by whom and the purpose for which the document was made or compiled and the custody from which it is produced.

In assessing whether or not a highway has been dedicated reference is commonly made to old commercial maps of the County, Ordnance Survey maps, sometimes private estate maps and other documents, other public documents such as Inclosure or Tithe Awards, plans deposited in connection with private Acts of Parliament establishing railways, canals or other public works, records compiled in connection with the valuation of land for the purposes of the assessment of increment value duty and the Finance Act 1910. Works of local history may also be relevant, as may be the records of predecessor highway authorities and the information gained in connection with the preparation and review of the Definitive Map.

It should be stressed that it is rare for a single document or piece of information to be conclusive (although some documents are of more value than others e.g. Inclosure Awards where the Commissioners were empowered to allot and set out highways). It is necessary to look at the evidence as a whole to see if it builds up a picture of the route being dedicated as a highway.

It should be noted that Ordnance Survey Maps (other than recent series which purport to show public rights of way and which derive their information from the Definitive Map) contain a disclaimer to the effect that the recording of a highway or right of way does not imply that it has any status. The maps reflect what the map makers found on the ground.

Synergy between pieces of highway status evidence – co-ordination as distinct from repetition would significantly increase the collective impact of the documents.

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Recording vehicular rights

Historical evidence can indicate that a route carries vehicular rights and following the Bakewell Management case in 2004 (House of Lords) it is considered that vehicular rights could be acquired on routes by long use during years even since 1930. However, in May 2006 Part 6 of the Natural Environment and Rural Communities Act 2006 came into force. Public rights of way for mechanically propelled vehicles are now extinguished on routes shown on the definitive map as footpaths, bridleways or restricted byways unless one of eight exceptions applies. In essence mechanical vehicle rights no longer exist unless a route is recorded in a particular way on the Council's Definitive Map or List of Streets or one of the other exceptions apply. In effect the provisions of the Act curtail the future scope for applications to record a Byway Open to All Traffic to be successful.

The exceptions whereby mechanical vehicular rights are "saved" may be summarised as follows-

1) main lawful public use of the route 2001-2006 was use for mechanically propelled vehicles
2) that the route was not on the Definitive Map but was recorded on the List of Streets.
3) that the route was especially created to be a highway for mechanically propelled vehicles
4) that the route was constructed under statutory powers as a road intended for use by mechanically propelled vehicles
5) that the route was dedicated by use of mechanically propelled vehicles before December 1930
6) that a proper application was made before 20th January 2005 for a Modification Order to record the route as a Byway Open to All Traffic (BOAT)
7) that a Regulatory Committee had already made a decision re an application for a BOAT before 6th April 2006
8) that an application for a Modification Order has already been made before 6th April 2006 for a BOAT and at 6th April 2006 use of the way for mechanically propelled vehicles was reasonably necessary to enable that applicant to access land he has an interest in, even if not actually used.

It is certainly the case that any application to add a byway to the Definitive Map and Statement must still be processed and determined even though the outcome may now be that a vehicular public right of way existed before May 2006 but has been extinguished for mechanically propelled vehicles and that the route should be recorded as a restricted byway.

Downgrading a route or taking a route off the Definitive Map

In such matters it is clear that the evidence to be considered relates to whether on balance it is shown that a mistake was made when the right of way was first recorded.

In the Trevelyan case (Court of Appeal 2001) it was considered that where a right of way is marked on the Definitive Map there is an initial presumption that it exists. It should be assumed that the proper procedures were followed and thus evidence which made it reasonably arguable that it existed was available when it was put on the Map. The standard of proof required to justify a finding that no such right of way exists is on the balance of probabilities and evidence of some substance is required to outweigh the initial presumption.

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Authorities will be aware of the need, as emphasised by the Court of Appeal, to maintain an authoritative Map and Statement of highest attainable accuracy. "The evidence needed to remove a public right from such an authoritative record will need to be cogent. The procedures for defining and recording public rights of way have, in successive legislation, been comprehensive and thorough. Whilst they do not preclude errors, particularly where recent research has uncovered previously unknown evidence, or where the review procedures have never been implemented, they would tend to suggest that it is unlikely that a large number of errors would have been perpetuated for up to 40 years without being questioned earlier."

Taking one route off and replacing it with an alternative

In some cases there will be no dispute that a public right of way exists between two points, but there will be one route shown on the definitive map which is claimed to be in error and an alternative route claimed to be the actual correct highway.

There is a need to consider whether, in accordance with section 53(3)(c)(i) a right of way is shown to subsist or is reasonably alleged to subsist and also, in accordance with section 53(3) (c) (iii) whether there is no public right of way on the other route.

The guidance published under the statutory provisions make it clear that the evidence to establish that a right of way should be removed from the authoritative record will need to be cogent.

In the case of R on the application of Leicestershire County Council v SSEFR in 2003, Mr Justice Collins said that there "has to be a balance drawn between the existence of the definitive map and the route shown on it which would have to be removed and the evidence to support the placing on the map of, in effect a new right of way." "If there is doubt that there is sufficient evidence to show that the correct route is other than that shown on the map, then what is shown on the map must stay."

The court considered that if it could merely be found that it was reasonable to allege that the alternative existed, this would not be sufficient to remove what is shown on the map. It is advised that, unless in extraordinary circumstances, evidence of an alternative route which satisfied only the lower "Test B" (see page 4) would not be sufficiently cogent evidence to remove the existing recorded route from the map.

Confirming an Order

An Order is not effective until confirmed.

The County Council may confirm unopposed orders. If there are objections the Order is sent to the Secretary of State for determination. The County Council usually promotes its Orders and actively seeks confirmation by the Secretary of State.

Until recently it was thought that the test to be applied to confirm an Order was the same test as to make the order, which may have been under the lower Test B for the recording of a "new" route. However, the Honourable Mr Justice Evans-Lombe heard the matter of Todd and Bradley v SSEFR in May 2004 and on 22nd June 2004 decided that confirming an Order made under S53(3)(c)(i) "implies a revisiting by the authority or Secretary of State of the material upon which the original order was made with a view to subjecting it to a more stringent test at the confirmation stage." And that to confirm the Order the

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Secretary of State (or the authority) must be "satisfied of a case for the subsistence of the right of way in question on the balance of probabilities." i.e. that Test A is satisfied.

It is advised that there may be cases where an Order to record a new route can be made because there is sufficient evidence that a highway is reasonably alleged to subsist, but unless Committee also consider that there is enough evidence, on balance of probabilities, that the route can be said to exist, the Order may not be confirmed as an unopposed Order by the County Council. This would mean that an Order could be made, but not confirmed as unopposed, nor could confirmation actively be supported by the County Council should an opposed Order be submitted to the Secretary of State.

July 2009