

Agenda Item 7

Regulatory Committee

Meeting to be held on 15th March 2018

Electoral Division affected: West Lancashire East
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Wildlife and Countryside Act 1981

Claimed Public Footpath from Public Footpath No.39 Newburgh to Public Footpath No.40 Newburgh, West Lancashire Borough

Claim No. 804/491

(Annex 'A' and Appendix 'A' refers)

Contact for further information:

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Executive Summary

The withdrawal of support for "The Lancashire County Council Definitive Map and Statement of Public Rights of Way (Definitive Map Modification) (No.3) Order 2011", on the basis that although the County Council considered that there was sufficient evidence to satisfy the test to make the Order, information has come to light since that means the evidence will not be sufficient to meet the higher test that it subsists on the balance of probabilities.

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.3) Order 2011 to the Secretary of State for Environment, Food and Rural Affairs for formal determination, but notify the Secretary of State that it does not actively support the Order and adopts a "neutral stance" as regards confirmation of the Order.

Background and Advice

On 12th May 2010, the Authority gave consideration as to whether or not an Order should be made to add a Public Footpath, extending from a point on Public Footpath No. 39 Newburgh, to a point on Public Footpath No. 40 Newburgh, West Lancashire Borough to the Definitive Map and Statement of Public Rights of Way. Appendix A refers.

The decision of the County Council was that there was sufficient evidence that a Public Footpath was reasonably alleged to subsist or to subsist along the route.

A Definitive Map Modification Order was duly made on 12th January 2011. An objection was received to the making of the Order by the landowner. He refers to post and rail fencing replacing earlier chestnut paling and having witnesses regarding this and having evidence of work redirecting walkers. Statutory provisions state that where there are objections, the Order Making Authority should submit the Order to the Secretary of State for formal determination.

Although the Order Making Authority previously assessed the evidence and considered that there was sufficient evidence to satisfy the test to make the Order and also to promote it to confirmation, now in considering information that has come to light since, on the balance of probabilities, it is advised that officers no longer consider that the evidence will be sufficient to meet the higher test for confirming the Order that the route already subsists as a footpath on the balance of probabilities.

Interviews have been carried out with a number of the users that had filled in forms. As a result of the interviews, it is the view of Officers that there is insufficient evidence to promote the Order through to confirmation. Issues arose in the following areas:

- There was a low number of users prepared to give evidence and their evidence, credibility and recollections were not as expected from originally considering the written user evidence;
- there is better evidence of a short fence blocking the route several years ago indicating a lack of intention to dedicate by the previous owner and an interruption to use of the line;
- There is better evidence that this fence line was extended more recently indicating a lack of intention to dedicate by the present owner and again interrupting the line of any used route.

The actions of the owners, and the weak evidence of use, on balance, make it difficult to argue inferred or deemed dedication. It is felt therefore, that it would be difficult to justify promoting this Order to confirmation as originally thought. The Committee may therefore feel that the County Council as Order Making Authority should reverse its previous decision, in light of the new evidence, and agree that the order be submitted to the Secretary of State for formal determination, but notify the Secretary of State that it does not actively support the Order and adopt a "neutral stance" as regards confirmation of the Order.

It would be usual for the Applicant to be invited to promote the Order. The Objectors would make their own submissions.

Alternative Options

To decide to promote the Order to confirmation.

To decide to oppose the Order made

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

Paper	Date	Contact/Directorate/Tel
All documents on Claim File Ref: 804/491	15/03/2018	C Blundell, County Secretary & Solicitor's Group, 01772 533196

Reason for inclusion in Part II, if appropriate

N/A

Wildlife and Countryside Act 1981
Claimed Public Footpath from Public Footpath No. 39 Newburgh to Public
Footpath No. 40 Newburgh, West Lancashire District
Claim No. 804/491
(Annex 'A' refers)

Contact for further information:

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Executive Summary

The claim for a Public Footpath from Public Footpath No. 39 Newburgh to Public Footpath No. 40 Newburgh, West Lancashire District to be added to the Definitive Map and Statement of Public Rights of Way, in accordance with Claim No. 804/491.

Recommendation

- i. That the Claim for a Public Footpath from Public Footpath No. 39 Newburgh to Public Footpath No. 40 Newburgh, in accordance with Claim No. 804/491 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 Public Footpath 2 metres in width from Public Footpath No. 39 Newburgh to Public Footpath No. 40 Newburgh, West Lancashire District for a distance of approximately 330 metres (grid reference SD 4889 0906 to SD 4869 0931) and shown between points A – C on the attached plan.
- iii. That, being satisfied that the test for confirmation can be met, the Order be confirmed if no objections are received. If objections are received, that the Order be submitted to the Secretary of State and promoted for confirmation, if necessary at a hearing or public inquiry.

Background

An application has been made under section 53(5) of the Wildlife and Countryside Act 1981 for an Order to amend the Definitive Map and Statement of Public Rights of

Way in Lancashire by adding a public footpath extending from a point on Public Footpath No. 39 Newburgh to a point on Public Footpath No. 40 Newburgh, West Lancashire District shown between Points A and C on the attached plan.

The claimed public footpath is approximately 330 metres long extending from a point on the existing Public Footpath No. 39, Point A on the plan, to a point on the existing Public Footpath No. 40 Newburgh, Point C on the plan. On the date that the claimed route was inspected access was physically blocked by a wooden post and rail fence at Point C and it was also partially obstructed by a recently constructed drainage channel that crossed the claimed route near to Point B. Despite these obstructions it was still possible to walk the full length of the claimed route by deviating around the fence at Point C and climbing across the drainage ditch close to Point B.

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. Section 53(3)(b) and (c) of the Wildlife and Countryside Act 1981 sets out the tests that need to be met when reaching a decision; also current case law needs to be applied.

An Order should only be made if the evidence shows that:

- A right of way “subsists” or is “reasonably alleged to subsist”(to be satisfied that an Order to add a route can be confirmed it would be necessary to decide on balance of probabilities that the right of way subsists, that it can only “be reasonably alleged to subsist” is too low a test for confirmation of an Order – Committee are also asked to consider if the Order can satisfy the confirmation test when considering an addition of a route)
 - “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”
 - The status of a recorded right of way needs to be changed
 - There is no right of way over land as recorded on the Definitive Map and Statement
- or
- Details of the Definitive Map and Statement need to be changed.

When considering evidence, if it is shown that a highway existed, then highway rights continue to exist (“once a highway, always a highway”) even if a route has since become disused or obstructed; this is until a legal order stopping up or diverting the rights has taken effect. Section 53 of the Wildlife and Countryside Act 1981 (as explained in Planning Inspectorate’s 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 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, restricted byway or byway open to all traffic, or that no such right of way exists.

Consultations

West Lancashire District Council;

West Lancashire District Council has been consulted but has not responded to the consultation. It is therefore assumed they do not have any comments to make on the claim.

Newburgh Parish Council

Newburgh Parish Council is the applicant in this matter.

Executive Director of the Environment's Observations

Description of Route

A site inspection was carried out on 29th September 2009.

The claimed route commences at Point A on the plan (Grid Reference SD 4889 0906). Point A is a point on Public Footpath No. 39 Newburgh approximately 356 metres from Cobbs Brow Lane. Beyond Point A Public Footpath No. 39 Newburgh continues in an easterly direction crossing the brook which forms the boundary between the parishes of Newburgh and Parbold. It then continues in an east north easterly direction as Public Footpath No. 34 Parbold.

From Point A the claimed route extends in a general north westerly direction across a small area of rough grass (unfenced) to follow the edge of an arable field.

There are no signs indicating the existence or otherwise of the claimed route at Point A and no physical restrictions preventing access onto the claimed route. The route of Public Footpath No. 39 Newburgh is waymarked from the footbridge that forms part of the public footpath but the claimed route is not.

From Point A the claimed route follows the eastern edge of the field. There is no worn track apparent in the grass. After travelling a short distance a shallow hole has been dug in the ground which can easily be walked round. The claimed route is not fenced off from the field. To the east of the claimed route is an area of woodland within which runs the brook that marks the parish boundary. There is no access into the area of woodland from the claimed route.

In places a faint track can be followed in the grass. The grass along this section is quite long and doesn't appear to have been recently cultivated. Although the field to the west has been cultivated it appears that a wide strip had been left within which the claimed route runs.

Recent work has been carried out along the western side of the claimed route (in the field) to dig a substantial ditch approximately 1 metre deep and 2 metres wide. The ditch extends nearly the whole length between Point A and Point B and is part of a

land drainage scheme that is currently being completed. It appears likely that a large land drain will be inserted into the ditch which will then be filled and covered. The ditch only looks to have been dug in the past few months.

Close to Point B the drainage ditch crosses the claimed route. The ditch then continues into the woodland and down to the brook. It is possible to climb down into the ditch and then back out. It would also be possible to walk a route parallel to the claimed route on the other side of the ditch to get from Point A to Point B.

Beyond the drainage ditch the claimed route continues around the edge of the field. The ground is dry and compact with short grass and the claimed route follows what appears to be an unsurfaced vehicular access track. The unsurfaced track passes through Point B and continues in a north north westerly direction branching off the route of the claimed footpath just before Point C to join Public Footpath No. 40 Newburgh.

The claimed route continues to follow the edge of the field in a north north westerly direction towards Point C (SD 4869 0931). Just before reaching Point C the claimed route is blocked by wooden post and rail fencing. The existence of older palisade fencing suggests that the post and rail fencing is a more recent addition/repair. In addition, some tree branches have been cut and placed across the claimed route next to the fencing. It is possible to walk around the fencing to gain access to Public Footpath No. 40 Newburgh and Point C.

Beyond the fence the claimed route meets Public Footpath No. 40 Newburgh approximately 261 metres from its junction with Cobbs Brow Lane. At Point C, facing Public Footpath No. 40 Newburgh the words 'NO FOOTPATH AHEAD' have been written onto the wooden post and rail fencing with a black marker pen. The wording appears to refer to the route of the claimed footpath. The word 'FOOTPATH' with an arrow has also been written pointing in the direction of Public Footpath No. 40 Newburgh with the words 'TO COBBS BROW LANE ONLY'. At the end of the section of fencing a yellow public footpath waymark disc has been nailed onto the fence in the direction of Public Footpath No. 40.

As the route is a field edge path it is suggested that the width of said claimed route would be 2 metres, being sufficient width for 2 users approaching from opposite directions to pass each other comfortably where there are no immediate physical constraints.

Map and documentary evidence relating to claimed addition

A variety of maps, plans and other documents were examined with reference to the claimed route.

DOC No.	DOCUMENT TITLE	Date	BRIEF DESCRIPTION OF DOCUMENT & NATURE OF EVIDENCE
1.	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

	Observations		<p>system of consultation or checking. Limitations of scale also limited the routes that could be shown.</p> <p>Cobbs Brow Lane and the watercourse forming the parish boundary are shown but the map does not show the claimed route (or the existing routes of Public Footpath Nos. 39 and 40 Newburgh).</p>
	Investigating Officer's comments		No inference can be drawn.
2.	Greenwood's Map of Lancashire Observations	1818	<p>Greenwood's map of 1818 is a small scale commercial map.</p> <p>Cobbs Brow Lane and the watercourse are shown; also a building that could be Balls Barn situated on Public Footpath No. 39 Newburgh is shown. The claimed route and the existing routes of Public Footpath Nos. 39 and 40 Newburgh are not shown.</p>
	Investigating Officer's comments		No inference can be drawn.
3.	Hennet's Map of Lancashire Observations	1830	<p>Small scale commercial map.</p> <p>Cobbs Brow Lane and the watercourse are shown but not the claimed route or recorded public footpaths.</p>
	Investigating Officer's comments		No inference can be drawn.
4.	Tithe Map and Tithe Award or Apportionm't Observations	1845	<p>Maps and other documents 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.</p> <p>A tithe map for Newburgh dated 1845 includes the area crossed by the claimed route. The map shows a double pecked line from Point A extending north along the claimed route for approximately 45 metres to the edge of the extent of the map on the parish boundary. It also shows a double pecked line signifying the existence of a track between Point B and Point C on the claimed route with the claimed route meeting a field boundary at Point B. The remainder of the claimed route is not shown.</p> <p>Note that Public Footpath No. 40 Newburgh is not shown from Cobbs Brow Lane to Point C. The property known as Mount Pleasant is shown but access to it is via a track south and east then following the claimed route between</p>

		<p>Points B and C and then continuing along what is now known as Public Footpath No. 40 Newburgh or via a track that leads towards Ball's Farm, then along part of Public Footpath No. 39 Newburgh to Point A, along a short section of the claimed route towards Point B and across the boundary into Dalton.</p> <p>The Schedule accompanying the Tithe Map describes the field over which section B-C of the claimed route passes as 'Richards Hey' which was owned by Thomas Woodcock and leased by James Taylor. It is described as plot 450 – fallow. The field over which section A-B of the claimed route passes is plot 452, also known as 'Richards Hey' and owned by Thomas Woodcock and farmed by James Taylor. It was described as being planted with potatoes and turnips.</p>
	Investigating Officer's comments	<p>This shows/suggests that at the time that the Tithe Map was produced there was movement between Point B and Point C along the claimed route and that access to Mount Pleasant appeared to be via that part of the claimed route at that time. There is no indication as to the status of this field edge path.</p> <p>The route shown from Point A but not on the claimed line, as far as the parish boundary (where the map ends) is presumed to have continued on the other side of the watercourse in the parish of Dalton as there was no apparent place of resort at the boundary. There is no indication as to the status of this route.</p>
5.	Finance Act 1910 Map Observations	<p>The comprehensive survey carried out for the Finance Act 1910, later repealed, was for the purposes of land valuation not recording public rights of way but can often provide very good evidence.</p> <p>No such map was found in the Lancashire Records Office.</p>
	Investigating Officer's comments	<p>No inference can be drawn but it is unlikely, even if a map did exist, that it would be possible to say with any certainty that any reference to a public right of way was to the claimed route and not to one of the other recorded public right of way across the land.</p>
6.	Inclosure Act Award and Maps Observations	<p>Inclosure Awards are legal documents made under private acts of Parliament or general acts (post 1801) for reforming medieval farming practices, and also enabled new rights of way layouts in a parish to be made. They can provide conclusive evidence of status.</p> <p>No inclosure award for Newburgh was made.</p>
	Investigating Officer's comments	<p>No inference can be drawn.</p>
7.	Ordnance Survey maps	<p>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</p>

			<p>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.</p>
	6 Inch OS map Observations	1848	<p>The earliest OS 6 inch map for this area.</p> <p>The claimed route is not shown. However, Public Footpath No. 39 is shown and a property titled Ball's Barn is shown to exist just off Cobbs Brow Lane. Public Footpath No. 40 Newburgh is also shown. Partway along the route is a property known as Mount Pleasant. Access to the property appears to have been from Cobbs Brow Lane along Public Footpath No. 40 with another route shown coming across the fields from Ball's Barn. Close to Point C on the claimed route and coming off Public Footpath No. 40 Newburgh there is a double pecked line shown extending south south east through the edge of the woodland running parallel to the claimed route up to Point B. From here it turns south west away from the claimed route towards Ball's Barn. Whilst the claimed route follows the field edge just to the west of the woodland this track is shown to exist parallel to it but just within the boundary of the woodland.</p>
	Investigating Officer's comments		<p>Both Public Footpaths No. 39 and 40 are shown, as is route near to and partly parallel to the claimed route, but not the claimed route therefore it can be inferred that the claimed route was not in use in 1848.</p>
	25 Inch OS map Observations	1894	<p>First Edition published at the larger scale showing the area in more detail.</p> <p>None of the claimed route is shown on this map and neither is the track parallel to the claimed route between Points B - C that had been shown on the earlier 6-inch edition. The routes of Public Footpath Nos. 39 and 40 are shown, as is Mount Pleasant but Ball's Barn is not shown. The claimed route meets a field boundary close to Point A and another at Point B.</p>
	Investigating Officer's comments		<p>It can be inferred that the claimed route was not in use in 1894.</p>
	25 Inch OS map Observations	1908	<p>Further edition of 25 inch map.</p> <p>The claimed route is not shown. The routes of Public Footpath Nos. 39 and 40 are shown, as is Mount Pleasant. The claimed route meets a field boundary close to Point A and another at Point B.</p>
	Investigating Officer's		<p>It can be inferred that the claimed route was not in use in</p>

	comments		1908.
	25 Inch OS map Observations	1928	Further edition of 25 inch map. The claimed route is not shown although Public Footpath Nos. 39 and 40 are shown, as is Mount Pleasant. The claimed route meets a field boundary close to Point A and another at Point B.
	Investigating Officer's comments		It can be inferred that the claimed route was not in use in 1928.
	6 Inch OS map Observations	1955	The Ordnance Survey base map for the Definitive Map, First Review, was published in 1955 (although the date of revision was before 1930) at a scale of 6 inches to 1 mile. This map is probably based on the same survey as the 1928 25-inch map. The claimed route is not shown although the routes of Public Footpath Nos. 39 and 40 are shown. The claimed route meets a field boundary close to Point A and another at Point B.
	Investigating Officer's comments		It can be inferred that the claimed route was not in use in the 1928 when the survey is believed to have been carried out.
	25 Inch OS map Observations	1960	Revised edition of 25 inch map. This edition does not show the claimed route. However, the routes of Public Footpath Nos. 39 and 40 Newburgh are shown. The claimed route meets a field boundary close to Point A and another at Point B. Mount Pleasant is shown as a 'ruin' and beyond it the route of Public Footpath No. 40 Newburgh has been enclosed between two field boundaries leaving a narrow strip of land (approximately 2 metres wide) as an enclosed footpath. Access onto the claimed route from Public Footpath No. 40 at Point C would pass through one of these field boundaries.
	Investigating Officer's comments		It can be inferred that the claimed route was not in use in 1960.
8.	Aerial Photographs Observations	1945	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. The earliest set available was taken just after the Second World War in about 1945. The clarity is generally very variable but in this case appears to be quite good. There is no track or walked route apparent along the length of the claimed route and it appears to meet a field boundary at Point B.
	Investigating Officer's comments		It can be inferred that the claimed route was not in use in 1945.

	Aerial photograph Observations	1960s	The black and white aerial photograph taken in the 1960's was not available to view in the Lancashire Record Office. It can be viewed on the County Council's computer mapping system (Mario or Map Zone) but the clarity is poor. A track does appear evident along the claimed route between Points B and C.
	Investigating Officer's comments		It can be inferred that part of the claimed route between points B and C was in existence in 1960s.
	Aerial photograph Observations	1988	Aerial photograph taken on 21 st May 1988 It is not possible to see the claimed route as it is obscured by trees.
	Investigating Officer's comments		No inference can be drawn.
	Aerial photograph Observations	2000	Aerial photograph taken on 8 th May 2000 There is a faint line between Point A and Point B which may indicate the claimed route but the route is again partly obscured by trees.
	Investigating Officer's comments		No strong inference can be drawn but there is some suggestion that part of the claimed route between points A and B was in use in 2000.
9.	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 Observations	1950-1952	The initial survey of public rights of way was carried out by the parish council in those areas formerly comprising a rural district council area and by an urban district or municipal borough council in their respective areas. Following completion of the survey the maps and schedules were submitted to the County Council. In the case of municipal boroughs and urban districts the map and schedule produced, was used, without alteration, as the Draft Map and Statement. In the case of parish council survey maps, the information contained therein was reproduced by the County Council on maps covering the whole of a rural district council area. There is no parish survey map for Newburgh. Newburgh formed part of Ormskirk Urban District and the initial maps were produced by Ormskirk Urban District Council automatically becoming the Draft Map and Statement of Public Rights of Way.
	Investigating Officer's comments		No inference can be drawn.
	Draft Map		The preliminary survey work was carried out in Lancashire

	Observations	<p>from the early 1950s. An accompanying description was usually written for each path. In this area it was undertaken by Ormskirk Urban District Council who produced a map of routes they believed to be public drawn onto a 6-inch Ordnance Survey map. It was given a "relevant date" (1st January 1953) and notice was published that the draft map had been prepared. The Draft Map was placed on deposit for a minimum period of 4 months on 1st 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.</p> <p>The claimed route was not shown on the Draft Map of Public Rights of Way. In this instance, there were no formal objections or other comments about the omission of the claimed route.</p>
	Investigating Officer's comments	<p>The claimed route was not considered to be public in the 1950s.</p>
	<p>Correspondence relating to the preparation of the Definitive Map</p> <p>Observations</p>	<p>Records were searched in the Lancashire Record Office to find any correspondence concerning the preparation of the Definitive Map in the early 1950s.</p> <p>In the 1990's the West Lancashire branch of the Ramblers Association archived a great deal of material with the Lancashire Record Office. Within the deposit are a number of Ordnance Survey maps at a scale of 6 inch to 1 mile which have been annotated by the Ramblers Association following a survey that they carried out to check the rights of way recorded by the Parish Councils and Urban District Councils following the completion of the parish surveys. The maps were complemented by a series of written reports which provided detailed descriptions of footpaths as they were circa 1927-1933.</p> <p>The maps and written reports were originally intended to be complementary and the maps are frequently annotated to indicate the precise location of features mentioned in the reports. Later the maps were used as working records of the Draft Map and finally of the Definitive Map and were extensively annotated.</p> <p>Within the Ramblers records there is a copy of Ordnance Survey Map Sheet SD 84SE which covers the area of the claimed route. Public Footpath Nos. 39 and 40 Newburgh are shown coloured red and have been numbered in purple. The claimed route is also shown in red but has been subsequently crossed out with a series of 9 crosses drawn with blue ink between Point A and Point C. It has</p>

		<p>been circled in pencil and the number 13 written next to it, also in pencil. The word 'claimed' has been written in pencil above the number 13.</p> <p>A further search of the Ramblers records found a letter dated 7th January 1953 from the Ramblers Association to Ormskirk Urban District Council. In the letter the Ramblers Association query the omission of two routes in Newburgh. The first path queried is the route that subsequently became Public Footpath No. 39 on the Definitive Map. The second path queried is parallel to the claimed route from Point A running north along the parish boundary to Point C and then a route continuing to a footbridge where it crosses the parish boundary (now recorded as part of Public Footpath No. 40 Newburgh).</p> <p>In response, a letter from Ormskirk Urban District Council to the Ramblers Association dated 20th January 1953 stated that a footpath shown on the Ordnance Survey map linking Public Footpath Nos. 39 and 40 was shown on the other side of the parish boundary in the Wigan Rural District area. A sketch map accompanying the letter shows the routes of Public Footpath Nos. 39 and 40 numbered and coloured red. It also shows a single dashed line on the east side of the parish boundary running parallel to the claimed route indicating the existence of a track but it does not indicate the status of the route.</p> <p>The Parish Survey Map for Dalton does not show this route as a public footpath and neither does the Draft Map or any other map associated with the preparation of the Definitive Map.</p> <p>It appears that following this response and the omission of the claimed route from the Draft Map the Ramblers Association annotated their schedule of 'Footpath Queries' by writing that the claimed route was not put on the Definitive Map. They accompanied this comment with the word 'claim'. No further correspondence relating to the claimed route could be found.</p>
	Investigating Officer's comments	<p>It appears that the West Lancashire group of the Ramblers Association surveyed the area in 1927-33 and carried out considerable work in the 1950's to check routes to be included on the parish surveys and Draft Maps. They queried the existence of the claimed route and whether it should be included on the Definitive Map. It did not get included on the Map but their correspondence could be taken to suggest that they thought that it should be claimed at some point in the future.</p>
	Provisional Map	<p>Once all these 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</p>

	Observations	to the Crown Court. The claimed route was not shown on the Provisional Map of Public Rights of Way and here were no formal objections or other comments about the omission of the claimed route.
	Investigating Officer's Comments	Landowners did not admit the claimed route to be a public right of way in the 1950s.
	The First Definitive Map and Statement Observations	The Provisional Map, as amended, was published as the Definitive Map in 1962. The claimed route was not shown on the First Definitive Map and Statement of Public Rights of Way.
	Investigating Officer's comments	The claimed route was not considered to be a public footpath in the 1950s.
	Revised Definitive Map of Public Rights of Way (First Review) Observations	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. 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 The claimed route is not shown on the Revised Definitive Map and Statement of Public Rights of Way (First Review).
	Investigating Officer's comments	The claimed route was not considered to have become a public footpath by the 1960s.
10.	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

	Observations	<p>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).</p> <p>A statutory deposit and declaration was made by the current landowner. The deposit was received on 12th March 2008 and acknowledges the existence of the routes already recorded on the Definitive Map but stated that no other land had been dedicated as highways. The statement was signed by Mr Martin John Ainscough, Giants Hall, Newburgh, Wigan WN8 7XA who stated that he had owned the land (affected by the claimed route) since 12th April 2007. No previous plans or deposits have been submitted by previous landowners.</p>
	Investigating Officer's comments	<p>The Statutory deposit and declaration was submitted approximately 6 months prior to the submission of the claim. The exact date of the calling into question of the status of the claimed route has been considered by the County Secretary and Solicitor.</p>

The land crossed by the route claimed for addition to the Definitive Map is not a biological heritage site or a site of special scientific interest.

Summary

In summary, early map evidence does not show that the claimed route existed as a worn track on the ground. The Tithe Map of Newburgh dated 1845 does show a route corresponding to the claimed route between Point B and Point C, suggesting that there was movement along the claimed route at that time. However, the first Ordnance Survey 6 inch map that was examined (dated 1848) does not show any part of the claimed route in existence although it does show a route running parallel to the claimed route between Point B and Point C within the boundary of the woodland. No further ordnance survey or privately produced map examined through to the 1960's shows the claimed route existing as a physical feature evident on the ground.

An aerial photograph taken in the 1960's shows a track visible along the route of the claimed footpath between Point B and Point C. The most recent aerial photograph taken in 2000 shows a faint line along the claimed route between Point A and Point B which could indicate a walked route. The remainder of the route between Point B and Point C is obscured by trees.

The claimed route is not shown on the Definitive Map or on any of the maps prepared as part of the preparation of the Original Definitive Map or Definitive Map (First Review). However, the West Lancashire group of the Ramblers Association queried whether the route existed in the 1950's and whether it should be included on the map. Although no official application was made by them to have it added to the

Definitive Map correspondence on their files suggests that they believed that it should be claimed at some point in the future.

County Secretary & Solicitor's Observations

Information from the Applicant

Twenty-two user evidence forms have been submitted in support of the claim. These forms indicate knowledge and use of the route as follows - for 72 years (1) 61-70 years (1); 51-60 years (0); 41-50 years (2); 31-40 years (3); 21-30 years (7); 11-20 years (7); 0-10 years (1). The route has been predominantly used for leisure walking and running.

The range of use varies from being used 4 times per annum, every week to over 250 times per annum. All the users agree the route has only been used on foot and has always run over the same route.

One user says that there is a stile on the footpath from Newburgh Village past Derby House. All other users state that there are no stiles and gates across the route. One user states at the end of year 2007 he was prevented because of a fence/hedge from using the route. All users except for one states he was stopped from using the route and turned back from using the footpath and in 2008 witnessed someone being told by an employee of the land owner they could not use the path in future and a notice stating 'private' was displayed. There is no indication from the form where along the route this notice was situated. All the users state there has never been any gates locked along the route.

The applicant, Newburgh Parish Council, has provided in support of their application a leaflet and map produced by the Footpath Committee of Newburgh Parish Council dated February 1986. This leaflet attempts to explain the official and unofficial footpaths there are in the area.

The leaflet details that there is an 'unofficial' footpath which is not on the Definitive Map which continues south along the edge of the woods, down to Public Footpath No. 39. This illustrates the fact that the footpath had been recognised by the Footpath Committee when the leaflet was produced.

Information from Others

A land owner, Mr Ainscough who has tenanted the land to Martin Ainscough Farms Limited in which he is a shareholder and director has stated he has a significant amount of evidence to refute this claim and he would be instructing solicitors to represent him to prevent the claim from going any further. However, despite writing to Mr Ainscough he has not provided any evidence to refute this claim at this moment in time.

Assessment of the Evidence

The Law - See Annex 'A'

In Support of the Claim

- Evidence of use
- Aerial photograph 1960 and 2000
- West Lancashire group of the Ramblers Association queries
- No contrary intention from owner until 2007/8

Against Accepting the Claim

- The majority of the Map and Documentary evidence indicates that the claimed route was not in use nor considered to be public prior to 1960
- Statutory deposit and declaration made and received 12 March 2008

Conclusion

The claim is that this route is an existing Footpath and should be added to the Definitive Map and Statement of Public Rights of Way.

It is therefore advised that the Committee should consider, on balance, whether there is sufficient evidence from which to have its dedication inferred at common law from all the circumstances or for the criteria in Section 31 Highways Act 1980 for a deemed dedication to be satisfied based on sufficient twenty years "as of right" use to have taken place ending with this use being called into question.

Statutory inference of dedication under section 31 Highways Act 1980 is satisfied where 20 years as of right use of a way has occurred without interruption unless there is sufficient evidence of a contrary intention by the landowner. The period of 20 years is to be calculated retrospectively from the date when the right of the public to use the way is brought into question. Often it is the application to have the route recorded which brings the path into question but here the new owner seems to have begun to challenge use and take some action in 2007 and 2008. In particular a statutory deposit and declaration received under section 31(6) of the Highways Act 1980 provides sufficient evidence to negative the intention of the owner to dedicate any such additional way as a highway and further inclusion on the County Councils register brings about knowledge among landowners, users of rights of way, and the general public about applications concerning ways which landowners do not intend to dedicate as public rights of way. The date the way was brought into question is when the statutory deposit and declaration was received on 12 March 2008.

Considering initially the criteria for a deemed dedication under Section 31 of the Highways Act, that use needs to be "as of right" and also sufficient for the period 1988-2008. Twenty-two user evidence forms indicate knowledge and use of the route for many years. Fourteen users of the twenty-two state they have used the route claimed for 20 years or more for leisure and recreation purposes providing strong user evidence. One user states at the end of 2007 he was prevented from using the path, another user in 2008 witnessed someone being told by an employee

of the land they could not use the path in future and a notice stating 'private' was displayed but these incidents may not in isolation have brought the route into question. It is advised that even if the route was called into question in 2007 there is still sufficient evidence of qualifying use 1987- 2007.

It is to be noted that current landownership is claimed by Mr Ainsworth since 13 April 2007 evidenced by a copy of a transfer signed as a deed, however land registry documentation does not currently reflect this landownership detail. Mr Ainsworth has written to the Order Making Authority and stated his landownership and also that he does have a significant amount of evidence to refute the claim and whilst he advised he would be instructing a solicitor to put his evidence together no evidence has been received by the County Council to date. Although the current owner submitted a statutory deposit and declaration dated 12 March 2008 no previous plans or deposits have been submitted by previous landowners. The transfer indicates that the land was previously held on trust and the trustees have been consulted on the claimed route and no observations or comments have been received. Trustees of land held on trust for sale generally have power to dedicate rights of way and, although in this case the powers of the trustees are unknown it is presumed that they did have such capacity.

Considering also whether there are circumstances from which dedication could be inferred at common law, early map evidence does not show that the claimed route existed on the ground as a through route. Only the Tithe Map of Newburgh dated 1845 shows a route corresponding to the claimed route between Point B and Point C, suggesting that there was movement along that part of the claimed route at the time. The claimed route is not shown on the Ordnance Survey maps and there is no documentary evidence of its existence as a through route until aerial photography in 1960's shows a track visible along the route of the claimed footpath between Point B and Point C suggesting that part of the route was in existence and further aerial photography in 2000 shows a faint line along the claimed route between Point A and Point B, the route between Point B and Point C being obscured by trees. The West Lancashire group of the Ramblers Association queried in the 1950s whether it should be included on the Definitive Map: this suggests it was believed by the group that the now claimed route should be claimed at some point in the future.

It is suggested that the way this route is recorded on documentary evidence is not itself sufficient circumstances from which dedication could be inferred, however, sufficient as of right use acquiesced in by the owners may also be circumstances from which dedication can be inferred. The use as evidenced corroborated by the documentary evidence outlined above would suggest that on balance there are sufficient circumstances to infer at common law that the owners in the 1960s to 2007, in acquiescing in the use and taking no overt actions actually intended dedicating the claimed route as a footpath and it had become a footpath accepted by the public.

Taking all the evidence into account, the Committee on balance may consider that the provisions of S31 Highways Act can be satisfied and there is also sufficient evidence on balance from which to infer dedication at common law of a footpath in this matter and that the claim be accepted.

Risk

Consideration has been given to the risk management implications associated with this claim. The Committee is advised that the decision taken must be based solely on the evidence contained within the report, and on the guidance contained both in the report and within Annex A included in the Agenda Papers. Provided any decision is taken strictly in accordance with the above then there are no significant risks associated with the decision making process.

Alternative options to be considered - N/A

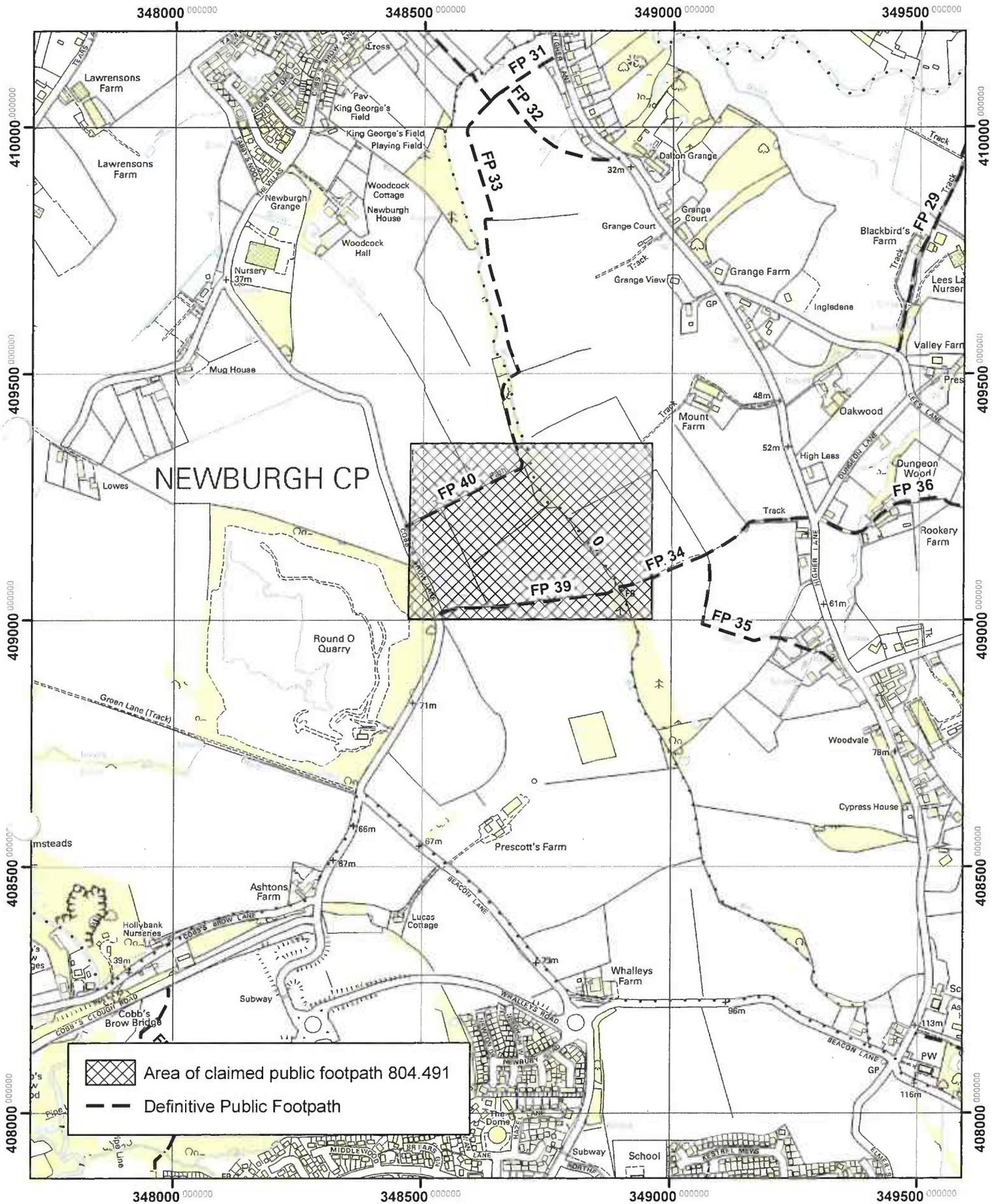
**Local Government (Access to Information) Act 1985
List of Background Papers**

Paper	Date	Contact/Directorate/Ext
All documents on Claim File Ref: 804/491	Various	S Khalid, County Secretary & Solicitor's Group, (01772) 533427

Reason for inclusion in Part II, if appropriate

N/A

Wildlife and Countryside Act 1981 - Location plan
 Claimed Public Footpath from Public Footpath No. 39 Newburgh to Public Footpath No. 40 Newburgh, West Lancashire District
 Claim No. 804/491



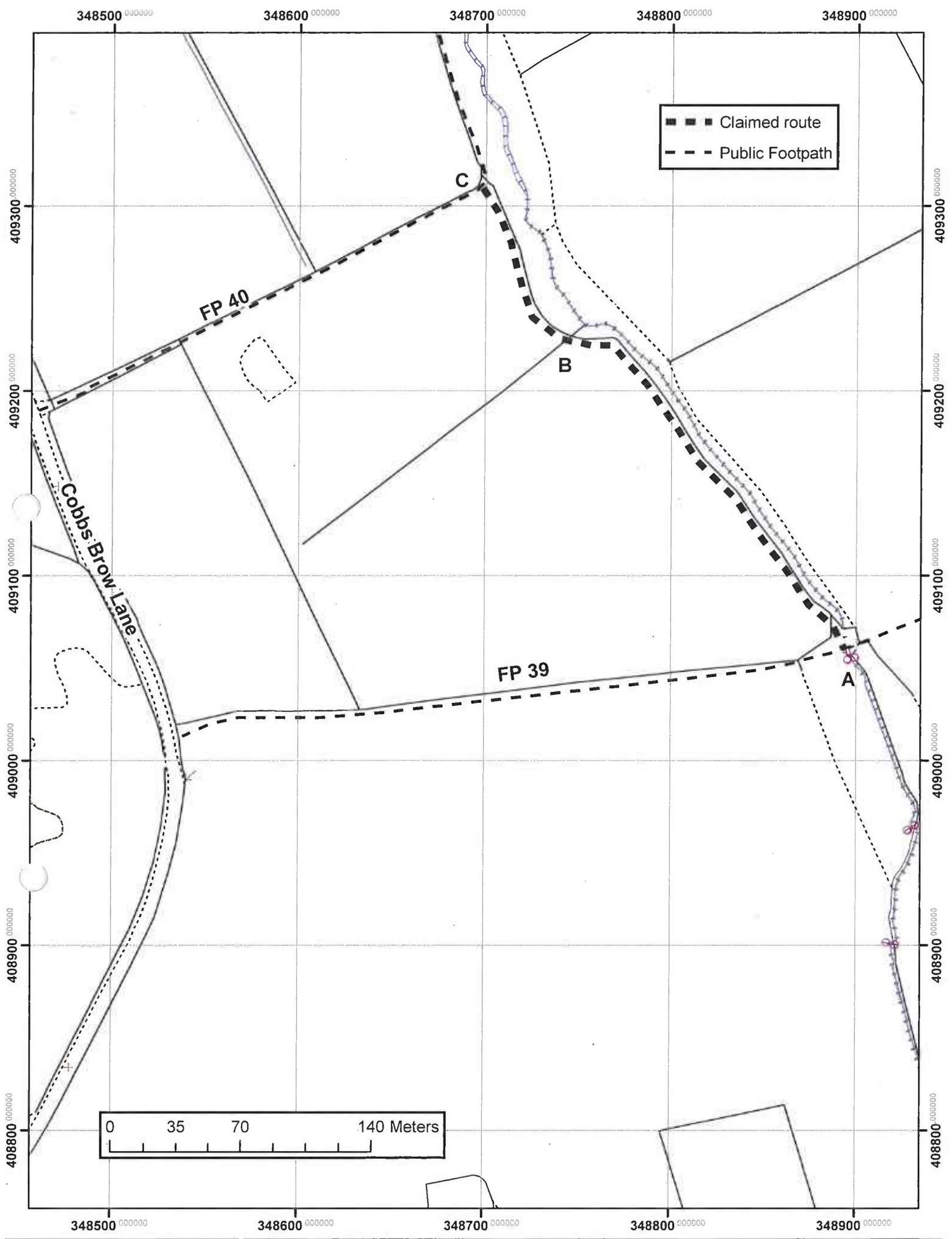
Jo Turton,
 Executive Director
 for Environment.

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.

1:10,000

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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;

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)

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;

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 -

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.

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.

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. 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 31 are 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 than 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.

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.

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 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.

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