

Regulatory Committee

Meeting to be held on 29th January 2020

Electoral Division affected:
Oswaldtwistle

Wildlife and Countryside Act 1981

Definitive Map Modification Order Investigation

Deletion and addition of part of Footpath Oswaldtwistle 287, Hyndburn

File No. 804-612

(Annex 'A' refers)

Contact for further information:

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Executive Summary

Investigation into the deletion and addition of part of Footpath Oswaldtwistle 287 from the Definitive Map and Statement in accordance with File No. 804-612.

Recommendation

(i) That an Order be made pursuant to Section 53 (2)(b) and Section 53(3)(c)(iii) of the Wildlife and Countryside Act 1981 to delete from the Definitive Map and Statement of Public Rights of Way part of Footpath Oswaldtwistle 287 through 186 Belthorn Road, and shown between points A-B on the Committee plan.

(ii) That being satisfied that the test for confirmation can be met, the Order be promoted to confirmation.

(iii) That an Order be made pursuant to Section 53 (2)(b) and Section 53 (3)(b) and/or Section 53 (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 Belthorn Road along Chapel Street to a point on Footpath Oswaldtwistle 287 as shown on the Committee plan between points C-B.

(iv) That being satisfied that the higher test for confirmation can be met, the Order be promoted to confirmation.

Background

The Public Rights of Way team at Lancashire County Council were contacted with regards to the results of a CON29 local authority search whereby a public footpath

was highlighted as affecting the property known as 186 Belthorn Road, Oswaldtwistle, Hyndburn, BB1 2NY.

The search showed that the recorded legal line of Footpath Oswaldtwistle 287 passed through the property known as 186 Belthorn Road along the line marked by a solid black line between points A-B on the Committee plan. When this was queried, it was explained to the property owner that as far as the county council's records showed, the footpath as recorded on the Definitive Map and Statement had not been subject to a legal Order to divert or extinguish any part of the footpath, and therefore, the legal line of the footpath remained along that line.

However, a thorough search conducted by the county council in regards to the history of the footpath which identified that all maps predating the publication of the Revised Definitive Map (First Review) and Statement recorded Footpath Oswaldtwistle 287 along Chapel Street (on the route shown as a thick dashed line between point C and point B).

The line of the footpath then changes at the Revised Definitive Map (First Review) stage (as detailed below in this report), and a 'kink' created which placed the footpath through the property along the route A-B.

The Investigating Officer was satisfied that, in this instance, the Revised Definitive Map (First Review) was incorrect due to a drafting error and that the correct line of the footpath should be recorded along Chapel Street (between point C and point B).

It was agreed with the homeowners – who were in the process of selling the property - that Officers recognised this as a drafting error and that, on the discovery of the evidence before them, a detailed report be presented to members of the Regulatory Committee seeking approval for a Definitive Map Modification Order to be made to delete the footpath through the property and for the addition of the footpath on its correct line.

The purpose of this report is therefore to explain the drafting error to Members and seek the necessary decision to make an order to correct the error, and record the deletion of part of Footpath Oswaldtwistle 287, shown between point A and point B on the Committee plan and the addition of a footpath along Chapel Street between point C and point B.

On the discovery of a drafting error, the county council is required by law to investigate all available evidence and make a decision based on that evidence as to whether a public right of way exists along the route recorded as a public footpath or whether it has been recorded in error. Section 53(3)(b) and (c) of the Wildlife and Countryside Act 1981 set out the tests that need to be met when reaching a decision; also current case law needs to be applied.

An order will only be made to add a public right of way to the Definitive Map and Statement if the evidence shows that:

- A right of way “subsists” or is “reasonably alleged to subsist”

An order for adding a way to or upgrading a way shown on the Definitive Map and Statement will be made if the evidence shows that:

- “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 or restricted byway”

An order for deleting a way shown on the Definitive Map and Statement will be made if the evidence shows that:

- That there is no public right of way over land shown in the map and statement as a highway as any description

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 unless a legal order stopping up or diverting the rights has been made. Section 53 of the Wildlife and Countryside Act 1981 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 and the evidence overall weighed on the balance of probabilities. 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. The decision may also be that the routes to be added or deleted vary in length or location from those that were originally considered.

Consultations

- The householders who responded to the consultation support the application to correct the definitive map as the route to be added, C-B, is the route they have known since moving to Chapel Street in 1986.
- The United Reformed Church are unaware of their ownership over adjacent land and have offered no further comment.
- No other responses have been received.

District Council

- Hyndburn Borough Council noted planning permission for the garage at 186 through which route A-B runs and highlighted nearby land to show ownership, no other comment was made.

Parish Council

There is no Parish Council for this area.

Advice

Head of Service – Planning and Environment

Points annotated on the attached Committee plan.

Point	Grid Reference (SD)	Description
A	7178 2460	Unmarked point on Belthorn Road adjacent to the boundary between 184 and 186 Belthorn Road.
B	7180 2460	Point on Footpath Oswaldtsistle 287 on Chapel Street
C	7179 2459	Open junction of Belthorn Road and Chapel Street between 186 Belthorn Road and 2 Chapel Street

Description of Routes

The route to be deleted (A-B on the Committee plan)

The route to be deleted commences at an unmarked point on Belthorn Road (public vehicular highway) adjacent to the boundary between 184 and 186 Belthorn Road (point A on the Committee plan) and passes in an easterly direction through the building known as 186 Belthorn Road and to the rear of the garage of the property to pass through a wall and over a cobbled parking area to a point on Footpath Oswaldtwistle 287 on Chapel Street (point B on the Committee plan); a total distance of approximately 20 metres.

The route is not readily accessible and there is no evidence that it is used, could be used or that it has ever been used in the past.

The route to be added (C-B on the Committee plan)

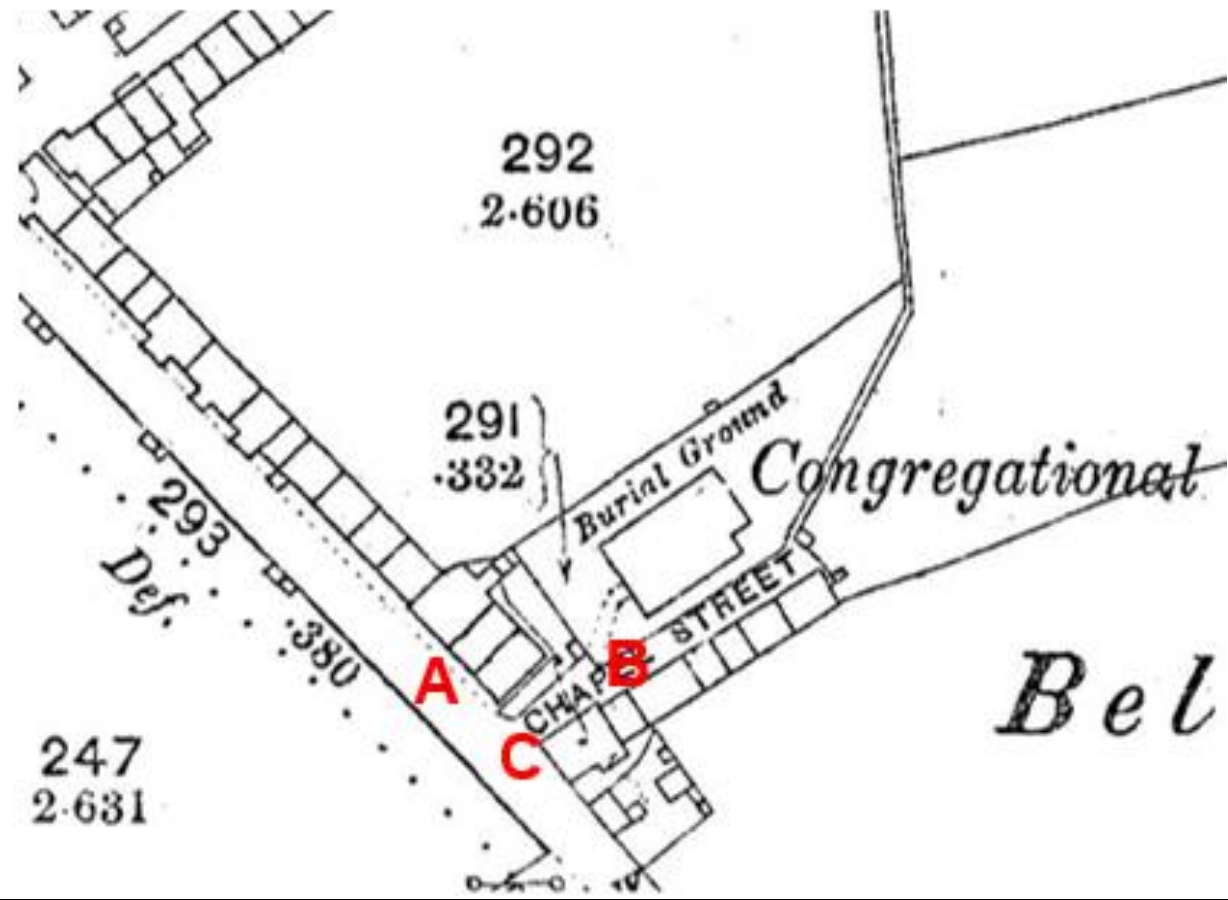
The route to be added commences at the open junction of Belthorn Road and Chapel Street between 186 Belthorn Road and 2 Chapel Street (point C on the Committee plan) and extends in a generally north easterly direction along the cobbled surface of Chapel Street to an unmarked point on Footpath Oswaldtwistle 287 at point B on the Committee plan, a total distance of 15 metres.

This route is readily accessible with evidence that it is capable of being used by the public.

Map and Documentary Evidence

Footpath Oswaldtwistle 287 was originally recorded on the Definitive Map and Statement of Public Rights of Way commencing from point C on Belthorn Road between 186 Belthorn Road and 2 Chapel Street and extending north east along Chapel Street through point B. When the Map was reviewed and published in 1975 as the Revised Definitive Map and Statement (First Review) the route was not shown

commencing at point C along Chapel Street but was shown to start at point A and pass through the property known as 186 Belthorn Road to point B. There does not appear to be any reason for it to be shown in this way other than a drafting error and no legal orders have been found suggesting that this part of the route was legally diverted or extinguished prior to the revision of the Definitive Map, or that its status as a public footpath had been challenged. Footpath Oswaldtwistle 287's inclusion on the First Definitive Map and Statement between point C and point B is conclusive evidence that it existed at the relevant date (1st January 1953). For this reason, it is not considered necessary to carry out the full range of historical map and documentary research associated with Definitive Map Modification investigations predating the inclusion of the routes on the First Definitive Map.

Document Title	Date	Brief Description of Document & Nature of Evidence
25 inch OS map Sheet 71.05	1893	The earliest Ordnance Survey (OS) map at a scale of 25 inch to the mile. Surveyed in 1891 and published in 1893.
		
Observations		<p>The route to be added is shown from point C to point B as part of Chapel Street providing access to a number of houses and the congregational chapel, and also an enclosed footpath leading from the north east end of Chapel street to Elton Road.</p> <p>The route to be deleted is not shown and the</p>

		buildings shown there correspond to similar outlines to those today.
Investigating Officer's Comments		The route to be added existed in 1891 but the route to be deleted did not. The outline of the buildings along Belthorn Road confirm that the 1 st Definitive Map was drawn correctly and also suggest that the continuity of the buildings there make it most unlikely that any right of way could have come into existence on the line A-B since then.
6 Inch OS Map	1965	6 inch OS map published in 1965 at a scale of 6 inches to 1 mile (1:10,560) and revised 1960.



Observations		The route to be added is shown as being accessible and the route to be deleted is not.
Investigating Officer's comments		The route to be added existed in the 1960s but the route to be deleted did not.
Aerial photograph	1960s	The black and white aerial photograph taken in the 1960s and available to view on GIS.



Observations		The route to be added can be seen to exist consistent to how it is shown on OS maps published both before and after the photograph was taken. The route to be deleted is not shown and does not appear to be accessible.
Investigating Officer's Comments		The route to be added existed in the 1960s but the route to be deleted did not.
1:2500 OS Map SD 7024-7124	1962	Further edition of 25 inch map reconstituted from former county series and revised in 1960 and published 1962 as national grid series.



Observations		The route to be added is shown as being accessible and named as part of Chapel Street but the route to be deleted does not appear to be available to use.
Investigating Officer's comments		The route to be added existed in 1960 but the route to be deleted did not. This confirms the interpretation of the 1953 Definitive Map and supports the assertion that the 1966 line was in error.
Google Street View Image	2009	Google street view image captured in 2009.



Observations		The route to be deleted is not accessible but passes through a residential property that appears to have existed for some considerable time. The route to be added is shown as being open and accessible.
Investigating Officer's Comments		The route to be added existed in 2009 but the route to be deleted did not.
Definitive Map Records		<p>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.</p> <p>Records were searched in the Lancashire Records Office to find any correspondence concerning the preparation of the Definitive Map in the early 1950s.</p>
Parish Survey Map	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. Survey cards, often containing considerable detail exist for most parishes but

		not for unparished areas.
Observations		The route under investigation is within Oswaldtwistle which was a former urban district in the 1950s so a parish survey map was not compiled.
Draft Map		<p>Maps and Statements were prepared for Oswaldtwistle by the urban district council and used by the county council as the Draft Map for that area.</p> <p>The Draft Maps were given a “relevant date” (1st January 1953) and notice was published that the draft map for Lancashire 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 these objections, and recommendations made to accept or reject them on the evidence presented.</p>



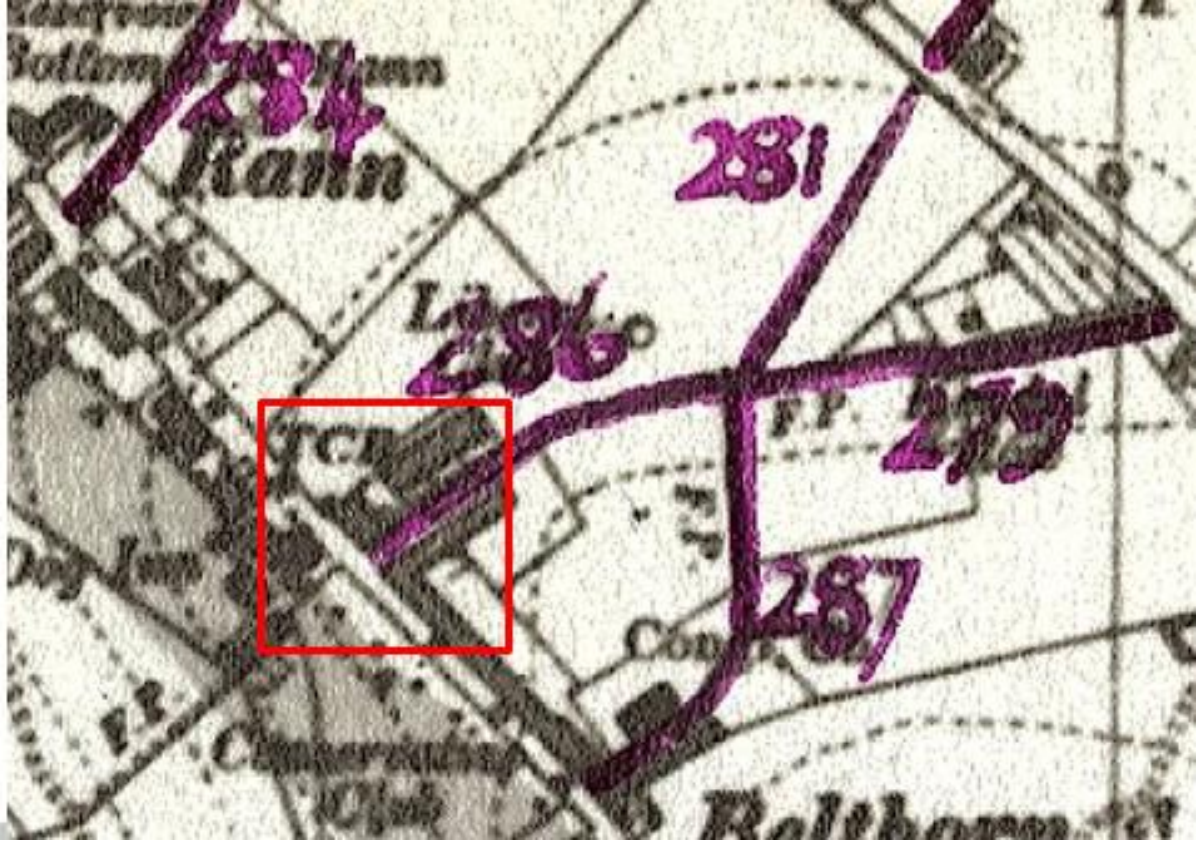
287	Footpath	Spew Spout. Path from Chapel Street, Belthorn to junction with path No's 279/280	0.13 0.08	None Known None Known
288		Deleted		
289		Deleted		
Observations		The route numbered 287 is shown as leaving Belthorn Road and extending in a north easterly direction along Chapel Street consistent with the		

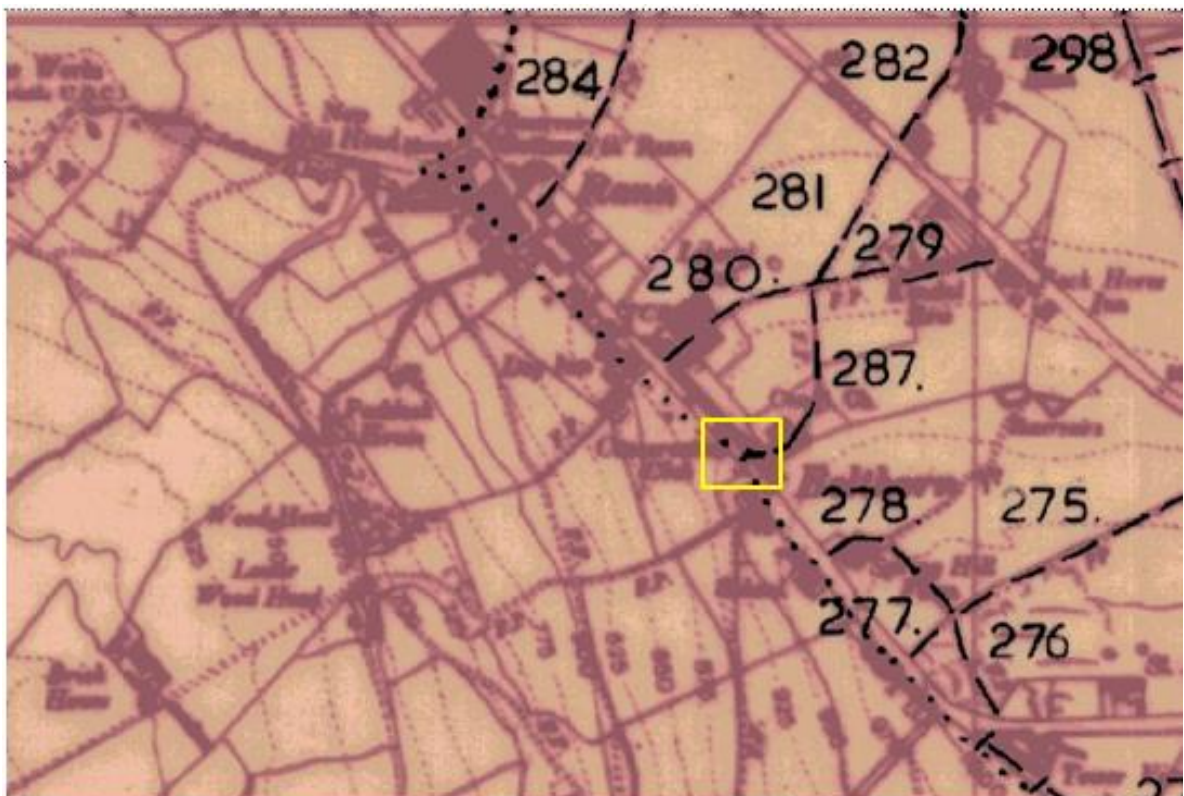
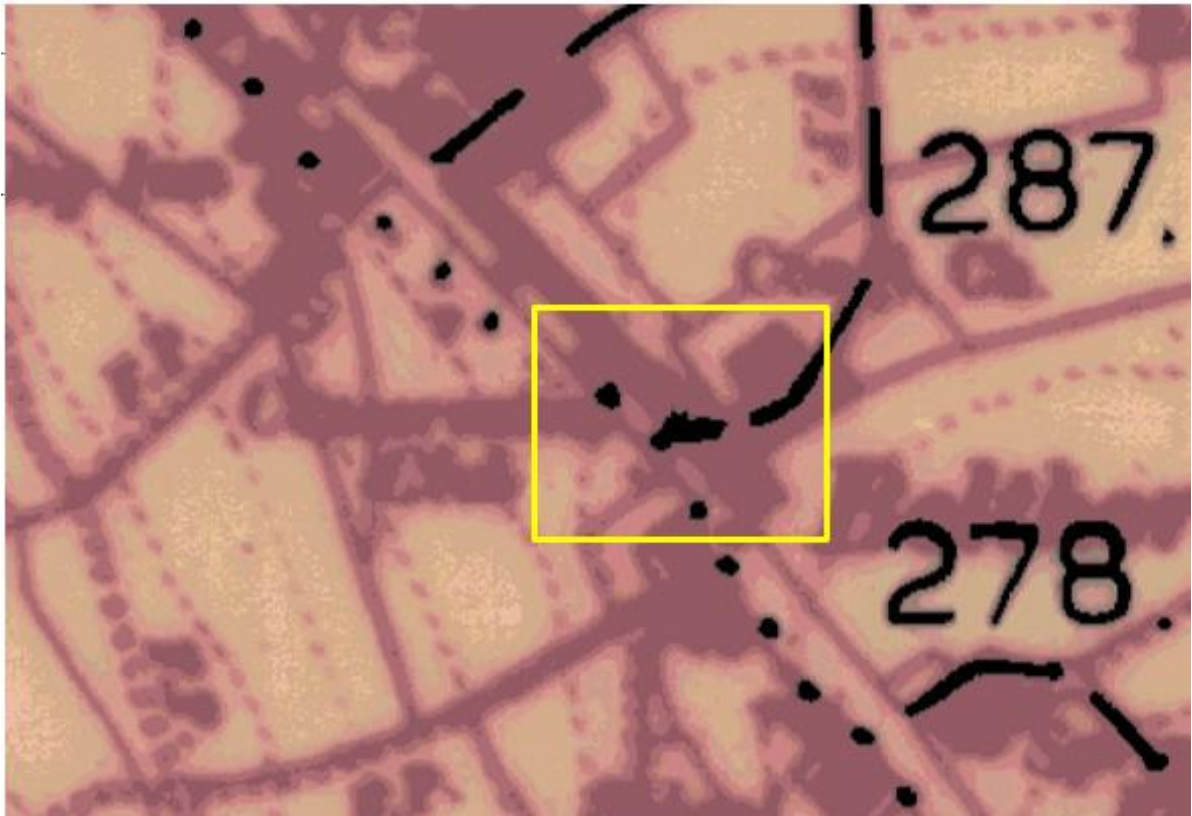
		<p>route to be added between point C and point B. The route to be deleted is not shown.</p> <p>The Draft Statement describes the route as being 'From Chapel Street'.</p> <p>No objections or representations were made relating to the fact that the route was shown to be along the line B-C and the fact that the route between point A-B was not shown.</p>
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Provisional Map		<p>Once all representations relating to the publication of the Draft Map were resolved, the amended Draft Map became the Provisional Map which was published in 1960, and was available for 28 days for inspection. At this stage, only landowners, lessees and tenants could apply for amendments to the map, but the public could not. Objections by this stage had to be made to the Crown Court.</p>
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Observations		<p>The route to be deleted is not shown. The route of Footpath Oswaldtwistle 287 is shown as being along Chapel Street consistent with the route to be added between points C-B.</p> <p>No objections or representations were made relating to the fact that the route was shown to</p>
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		be along the line B-C and the fact that the route between point A-B was not shown.
The First Definitive Map and Statement		The Provisional Map, as amended, was published as the Definitive Map in 1962.
		
Observations		The route to be deleted is not shown. The route of Footpath Oswaldtwistle 287 is shown as being along Chapel Street consistent with the route to be added between points C-B.
Revised Definitive Map of Public Rights of Way (First Review)		Legislation required that the Definitive Map be reviewed, and legal changes such as diversion orders, extinguishment orders and creation orders be incorporated into a Definitive Map First Review. On 25 th April 1975 (except in small areas of the County) the Revised Definitive Map of Public Rights of Way (First Review) was published with a relevant date of 1 st September 1966. No further reviews of the Definitive Map have been carried out. However, since the coming into operation of the Wildlife and Countryside Act 1981, the Definitive Map has been subject to a continuous review process.



286	Bridleway	Blackdill Farm, from Sough Lane to U.D. Boundary	0.27
287	Footpath	From Lottice Lane to Lower Spew Pout	0.13
		Path from Chapel Street, Belthorn to jct. with Path Nos. 279/280	0.08
Observations		The route of Footpath Oswaldtwistle 287 is shown hand drawn on this small scale OS 6 inch map- which does not show Chapel Street between the buildings shown – as starting on Belthorn Road and curving round in such a way as to pass through the building numbered as 186 Belthorn Road consistent with the route to be deleted between point A and point B. The route to be added is not shown.	
Investigating Officer's Comments		There is nothing in the county council records to explain why the route of Footpath 287 is shown differently on the Revised Definitive Map (First Review). The scale of the map (1:10,560) and the fact that it was hand drawn and difficult to interpret, even by someone who knows the location, suggests that the fact that the route is shown passing through a house rather than along Chapel Street is a drafting error.	
Highway Stopping Up Orders	1835 - 2014	Details of diversion and stopping up orders made by the Justices of the Peace and later by the magistrates court are held at the County Records Office from 1835 through to the 1960s. Further records held at the County Records Office contain highway orders made by Districts and the county council since that date.	
Observations		No record of the route of Footpath Oswaldtwistle 287 ever being diverted or extinguished has been found.	
Investigating Officer's Comments		The route under investigation was erroneously drawn along the line A-B on the Revised Definitive Map (First Review).	

Landownership

The land crossed by the route proposed to be deleted A-B is in the registered ownership of 186 Belthorn Road. The land crossed by the route proposed to be added is on land that is unregistered and ownership is unknown. Although the owner of 2 Chapel Street has indicated that they believe that they own part of the width of the lane this is not shown on the title plan for their property.

Summary

The Investigating Officer was of the view that all the map and documentary evidence examined as part of the detailed research carried out by the county council, shows that the route to be deleted had, on a balance of probabilities, never existed. It also showed that there had consistently been a way available on the route to be added.

Taking all available map and documentary evidence into consideration, it is considered that the route to be deleted was wrongly recorded and that the route of the footpath is that shown available on the various Ordnance Survey maps and aerial photographs and described in the Definitive Statement as being 'From Chapel Street' and not the route to be deleted.

No evidence examined supported the view that the route to be deleted A-B existed or had existed in the past or that the route has moved or been altered by a diversion, dedication or otherwise.

Head of Service – Legal and Democratic Services Observations

As there is no applicant for this matter and we have had no response from the unknown landowner, no further evidence has been received.

Assessment of the Evidence

The Law - See Annex 'A'

In support of making an Order for the *addition* of footpath between C-B:

- Documentary evidence of route being available.
- Footpath shown running on the line C-B on the Draft, Provisional and Original Definitive Map.
- Footpath described in all versions of the Definitive Statement as being "From Chapel Street".

Against making an Order for the addition of footpath between C-B:

- No particular evidence against.

In Support of making an Order for the *deletion* of footpath A-B:

- Lack of any historical and documentary evidence of any footpath on the line A-B.
- This line impossible to use because of the presence of buildings.
- Alternative route (C-B) in existence.
- This line not depicted on the Draft, Provisional or First Definitive Map.

Against making an Order for the deletion of footpath A-B:

- No objections to A-B being included on the Definitive Map (First Review).

Conclusion

In this matter, it is suggested that the section of Footpath Oswaldtwistle 287 shown on the Revised Definitive Map (First Review) between point A-B should be deleted and instead a new section of footpath should be added between point C-B.

To remove a route from the Definitive Map, it is necessary to show on balance that it was put on the Definitive Map in error. In this matter, the line of the route to be deleted (A-B) was first shown on the Revised Definitive Map (First Review) dated 1975 but with a relevant date of 1st September 1966. The error therefore needs to be shown to have been made in the preparation of this map.

Committee is advised to first consider whether section C-B is already a footpath in law and should be added to the Definitive Map, and then whether this means that it was the correct route of the footpath network in 1966 when the route was recorded on the Definitive Map along A-B, meaning that A-B should now be deleted from the record.

The route C-B is shown on the Ordnance Survey maps from 1893 onwards as available for the public to use on foot. This route was also shown as a public footpath on all versions of the Definitive Map produced between 1953 and 1962 and received no objections which would suggest an acceptance by the landowners and the public of the existence of the right of way along that line. The Definitive Statement relating to the footpath read "*Path from Chapel Street*".

The route C-B disappeared from the Definitive Map when it was reviewed in 1966 but the description of the path provided in the Statement remained unchanged.

Guidance on interpreting a discrepancy between the Definitive Map and Definitive Statement has been provided through case law¹. Ordinarily, the Map takes precedence over the Statement in respect of the existence of the public footpath but the Statement takes precedence in respect of the position, width, limitations and conditions. However, in the case of irreconcilable conflict between the Map and the Statement, there is to be no evidential presumption that the Map is correct and the Statement not correct. The conflict is evidence of error in the preparation of the Map and Statement which displaces the presumption that the Map takes precedence. Each should be accorded the weight an analysis of the documents themselves and the extrinsic evidence, including the situation on the ground at the relevant date, demonstrates is appropriate.

Committee is advised that the evidence points strongly towards the conclusion that the footpath has always run along the line C-B, as described in the Statement and shown in previous versions of the Map. Accordingly, it is recommended that greater weight be given to the Statement than to the Revised Map (First Review). In those circumstances, the route C-B can be considered to subsist as a public footpath.

¹ R (oao) Norfolk County Council v SSEFRA (QBD) [2005] EWHC 119 (Admin), [2006] 1 WLR 1103, [2005] 4 All ER 994

With regards to the deletion of the footpath between A-B, the DEFRA Rights of Way Circular 1/09² advises that *"The evidence needed to remove what is shown as a public right from such an authoritative record as the definitive map and statement ... will need to fulfil certain stringent requirements."* The requirements are that the evidence must be (a) new; (b) of sufficient substance to displace the presumption that the Definitive Map and Statement is correct; and (c) cogent.

On the historical Ordnance Survey maps from 1893 to 1972 and aerial photograph from the 1960s, there appears to be no route between A-B which was accessible to the public on foot. In fact, the route appears to run through a building(s).

A-B is not depicted as a public right of way on the Draft Definitive Map and Statement (dated 1st January 1953), the Provisional Definitive Map and Statement (published in 1960) nor the First Definitive Map and Statement (published in 1962). The route of Footpath Oswaldtwistle 287 was shown on these Maps and described in the Statements as running from Chapel Street (i.e. along the line of C-B).

When the Revised Definitive Map (First Review) was published on 25th April 1975 with a relevant date of 1st September 1966, the line of Footpath 287 shown on the Map had shifted from C-B to the line A-B. However, the description of the footpath contained in the accompanying Statement remained the same as in the previous records. Had the footpath been intended to start at point A, one would expect the Statement to have described the path as being "from Belthorn Road", not from Chapel Street.

Post-1966 evidence in the form of a Google Street View image from 2009 shows the property that section A-B runs through. This property has the appearance of having been there quite some time and looks to have a footprint consistent with the building depicted on the documentary evidence pre-dating 1966.

Overall, the evidence supports the conclusion that on 1st September 1966 no public right of way existed along the section of Footpath Oswaldtwistle 287 depicted between A-B and that a simple drafting error with regard to the recording of the exact line of the footpath resulted in the path being drawn on the Revised Map (First Review) along the line A-B instead of C-B.

With regards to the criteria for removing a right of way from the Definitive Map, the Committee is advised that evidence of the drafting error is "new" in the sense that it was previously unknown to the county council and was only discovered when the Public Rights of Way team were contacted by the proprietors of 186 Belthorn Road after the results of a local authority search revealed a public footpath running through their property. The evidence is of sufficient substance to rebut the presumption that the Definitive Map correctly records the right of way and is cogent.

Committee may consider that on balance the route C-B subsists as a public footpath and should be added to the Definitive Map and Statement and the route A-B did not exist on the ground in 1966 and was recorded in error.

² Version 2, paragraph 4.33, issued October 2009

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

Paper	Date	Contact/Directorate/Tel
All documents on File Ref: 804-612	Various	Simon Moore, Legal and Democratic Services, 01772 531280

Reason for inclusion in Part II, if appropriate

N/A