

# **Lancashire County Council**

## **Regulatory Committee**

**Wednesday, 29th January, 2020 at 10.30 am in Cabinet Room 'B' - The Diamond Jubilee Room, County Hall, Preston**

### **Agenda**

#### **Part I (Open to Press and Public)**

##### **No. Item**

##### **1. Apologies**

##### **2. Disclosure of Pecuniary and Non-Pecuniary Interests**

Members are asked to consider any Pecuniary and Non-Pecuniary Interests they may have to disclose to the meeting in relation to matters under consideration on the Agenda.

##### **3. Minutes of the last meeting** (Pages 1 - 6)

##### **4. Guidance** (Pages 7 - 30)

Guidance on the law relating to the continuous review of the Definitive Map and Statement of Public Rights of Way and certain Orders to be made under the Highways Act 1980 is presented for the information of the Committee.

##### **5. Amendments to the Terms of Reference - Regulatory Committee and Amendments to the Scheme of Delegation to Chief Officers - Delegation of Functions relating to dealing with Applications for Public Path Orders under the Highways Act 1980** (Pages 31 - 34)

6. **Wildlife and Countryside Act 1981** (Pages 35 - 56)  
**Definitive Map Modification Order Investigation**  
**Deletion and addition of part of Footpath**  
**Oswaldtwistle 287, Hyndburn**  
**File No. 804-612**
7. **Determination of Town and Village Green** (Pages 57 - 60)  
**Application VG107 relating to land at 'Waterbarn**  
**Recreation Ground', Waterbarn Lane, Stacksteads,**  
**Bacup**
8. **Action taken under the Urgent Business Procedure** (Pages 61 - 66)  
**- Highways Act 1980 - Section 25 Public Path**  
**Creation Agreement for a Public Bridleway at**  
**Dertern Lane, Bolton le Sands**

The Committee is asked to note the decision taken under the Urgent Business Procedure in relation to a proposed dedication by agreement of a publically maintained bridleway at Dertern Lane, Bolton le Sands.

9. **Urgent Business**

An item of urgent business may only be considered under this heading where, by reason of special circumstances to be recorded in the Minutes, the Chairman of the meeting is of the opinion that the item should be considered at the meeting as a matter of urgency. Wherever possible, the Chief Executive should be given advance warning of any Member's intention to raise a matter under this heading.

10. **Date of Next Meeting**

The next scheduled meeting will be held at 10.30am on Wednesday 11<sup>th</sup> March 2020 in Cabinet Room 'B' - the Diamond Jubilee Room at County Hall, Preston.

County Hall  
Preston

L Sales  
Director of Corporate Services

## Lancashire County Council

### Regulatory Committee

**Minutes of the Meeting held on Wednesday, 18th September, 2019 at 10.30 am in Cabinet Room 'B' - The Diamond Jubilee Room, County Hall, Preston**

#### **Present:**

County Councillor Jimmy Eaton BEM (Chair)

#### **County Councillors**

I Brown	J Parr
P Steen	T Aldridge
J Marsh	D Howarth
A Clempson	L Beavers
L Cox	B Yates

#### **1. Apologies**

Apologies were received from County Councillor Barron.

County Councillor Beavers replaced County Councillor Burns.

County Councillor Yates attended the meeting under Standing Order 13(1).

#### **2. Disclosure of Pecuniary and Non-Pecuniary Interests**

County Councillor Howarth declared a non-pecuniary interest in Items 5 and 6 as he was a South Ribble Borough Councillor.

#### **3. Minutes of the last meeting**

**Resolved:** That the minutes of the meeting held on 26<sup>th</sup> June 2019 be confirmed and signed by the Chair.

#### **4. Guidance**

A report was presented providing guidance on the law relating to the continuous review of the Definitive Map and Statement of Public Rights of Way and the law and action taken by the authority in respect of certain Orders to be made under the Highways Act 1980.

**Resolved:** That the Guidance as set out in Annexes 'A', 'B' and 'C' of the report presented, be noted.

**5. Highways Act 1980 - Section 25  
Proposed Public Path Creation Agreement for a Public Footpath  
adjacent to F2992 at 23 Elmsett Road, Walton-le-Dale, Preston**

A report was presented on the proposed dedication by agreement of a publically maintained public footpath adjacent to F2992 at 23 Elmsett Road, Walton-le-Dale, Preston, PR5 4JW, marked on the Committee plan A-B-C-D-A attached to the agenda papers.

The Committee noted that the land immediately to the east of F2992 sloped steeply down into the River Darwen and that, prior to 2013, this slope carried over it a footpath ((7-2-FP95). In 2013, a landslide had occurred, resulting in a significant length of footpath 7-2-FP95 being lost down the river embankment, and the adopted footpath (F2992) becoming unstable. F2992 has since partially collapsed and is therefore unsafe for public use, and has been temporarily closed since that time.

Prior to the collapse of footpath 7-2-FP95, and the subsequent closure of F2992 on safety grounds, the route had been well used and formed an important link in the network of public rights of way. Following the closure of the footpath, regular requests for the footpath to be reinstated had been received from local residents.

The Committee were informed that various options to address the situation had been considered. An opportunity had arisen for the county council to enter into an agreement with the owners of the adjacent property (23 Elmsett Road) to create a public footpath on the eastern boundary of their land that appeared to be sustainably more stable. The new footpath would bypass the collapsed and unstable section of F2992, and would provide a suitable footpath link for many years to come.

The Chair invited County Councillor Yates to ask a question whether the proposal only affected the top section at the Holland House end of the path, or whether there would be works on the steep path where the historical '40 steps' are. Officers confirmed that this dedication only affects the 15 metre section which is collapsing.

It was reported that, on investigating the title of the owners of the adjacent property, it was found that restrictive covenants were in place relating to using the area of land required only as a garden and reserving a 'protected strip' for the benefit of a statutory undertaker. However, discussions had taken place and both parties agreed in principle for the release of those covenants on the land to be dedicated.

It was noted that the proposal was considered to be of benefit to the public in providing a safe and convenient footpath that would be a link from the Holland Slack housing development to the network of public rights of way at Holland Wood, Mosley Wood and the River Darwen.

## **Resolved:**

(i) That the proposal for a Public Path Creation Agreement to dedicate a length of public footpath adjacent to F2992 at 23 Elmsett Road, Walton-le-Dale, be accepted, subject to the removal of the restrictive covenants which currently bind the landowner.

(ii) That, after removal of restrictive covenants affecting the land, a Public Path Creation Agreement be entered into under Section 25 of the Highways Act 1980 between the owners of 23 Elmsett Road, Walton-le-Dale and Lancashire County Council on the terms detailed in this report, to dedicate a length of public footpath as shaded pink on the map attached to the agenda papers and marked A-B-C-D-A.

### **6. Wildlife and Countryside Act 1981 Definitive Map Modification Order Investigation Upgrading to Bridleway of Footpath Longton 42 (Known as Six Acre Lane), South Ribble File No. 804-607**

A report was presented on an application received for Footpath Longton 42 (known as Six Acre Lane), to be upgraded on the Definitive Map and Statement of Public Rights of Way from footpath to bridleway, from Drumacre Lane East to Gill Lane, Longton, as shown between point A and point C on the Committee plan attached to the agenda papers.

A site inspection had been carried out in June 2019.

The Committee noted that there was no user evidence to consider for this application so it was necessary to look solely at the available map and documentary evidence.

The Committee were advised that the historical mapping evidence that the route was once used for public vehicular use was strong. Its initial status as a vehicular highway has not been affected by the more recent use as a footpath only as, once a highway has come into being, it continues indefinitely whether it is used or not. It was reported that there was no evidence to indicate that this historic vehicular highway status has been challenged, although the landowners state that it is a private road which they maintain but this is recent use by those landowners and does not call into question the historical evidence.

It was reported that the suitability, or otherwise, of the route for horses was not something that could be taken into account in determining whether highway rights exist.

The Committee were advised that if they concluded the evidence showed that, on the balance of probability, public carriageway rights existed on the application route, then it would be necessary to consider whether the Natural Environment

and Rural Communities Act 2006 would have extinguished public rights for mechanically propelled vehicles. Therefore, in the event that public carriageway rights were shown to exist, the appropriate status for Six Acre Lane to be recorded on the Definitive Map and Statement would be Restricted Byway, with public rights for non-mechanically propelled vehicles, horses or on foot.

**Resolved:**

- (i) That the application for the upgrading of Footpath Longton 42 to Bridleway, in accordance with File No. 804-607, be accepted, subject to a status of restricted byway, which includes bridleway rights.
- (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 upgrade Footpath Longton 42 to a Restricted Byway on the Definitive Map and Statement of Public Rights of Way as shown on the Committee plan attached to the agenda papers between points A-B-C.
- (iii) That being satisfied that the test for confirmation can be met, the Order be promoted to confirmation.

**7. Wildlife and Countryside Act 1981  
Definitive Map Modification Order Investigation  
Addition of Footpath from Kirkdale Avenue to Footpath Rawtenstall  
180 and Seat Naze  
File No. 804-608**

A report was presented on an application for the addition to the Definitive Map and Statement of Public Rights of Way, of a Footpath from Kirkdale Avenue, Newchurch to Footpath Rawtenstall 180, as shown on the Committee plan between points A-B-C-D-E, attached to the agenda papers.

A site inspection had been carried out in June 2019.

It was reported that the map and photographic evidence available from the 1840s through to the current time supported the view that the route physically existed and was capable of being used by the public on foot. In addition, it was identified as a 'public footpath' on a plan prepared in the 1930s for the construction of houses which abutted the route and from which a proposed link into the route was shown.

The Committee noted the evidence indicated that access to the route had been denied in May 2019, by the construction of a wall which, in turn, had triggered the application. It was not known who had built the wall and, looking at the substantial user evidence, it would appear that there had never been any clear actions by owners to prevent use by the public, and use by the public had continued for many years. In addition, the majority of users refer to having witnessed other users whilst using the route themselves and none of the users recalled having

ever been told that the route was not a public right of way, nor did any users refer to having been turned back or having to ask permission to use the route.

The Committee were informed that, taking all of the evidence into account, they may consider that the provisions of Section 31 of the Highways Act 1980 could be satisfied. In addition, or alternatively, Committee may consider that it can be reasonably alleged that there was sufficient evidence from which to infer dedication of a public footpath at common law.

**Resolved:**

- (i) That the application for a Footpath from Kirkdale Avenue to Footpath Rawtenstall 180, in accordance with File No. 804-608, be accepted.
- (ii) That an Order(s) be made pursuant to Section 53(2)(b) and Section 53(3)(b) and/or Section 53(3)(c)(i) of the Wildlife and Countryside Act 1981 to add a footpath to Definitive Map and Statement of Public Rights of Way, as shown on the Committee plan between points A-B-C-D-E.
- (iii) That being satisfied that the higher test for confirmation can be met, the Order be promoted to confirmation.

**8. Urgent Business**

There were no items of Urgent Business.

**9. Date of Next Meeting**

It was noted that the next meeting would be held at 10.30am on Wednesday 20<sup>th</sup> November 2019 in Committee Room B – The Diamond Jubilee Room, County Hall, Preston.

L Sales  
Director of Corporate Services

County Hall  
Preston





## Regulatory Committee

Meeting to be held on 29 January 2020

Electoral Division affected:

All

## Guidance for the members of the Regulatory Committee

(Annexes 'A','B' and 'C' refer)

Contact for further information: Jane Turner, 01772 32813, Office of the Chief Executive, [jane.turner@lancashire.gov.uk](mailto:jane.turner@lancashire.gov.uk)

### Executive Summary

Guidance on the law relating to the continuous review of the Definitive Map and Statement of Public Rights of Way and the law and actions taken by the authority in respect of certain Orders to be made under the Highways Act 1980 is presented for the information of the Committee.

### Recommendation

The Committee is asked to note the current Guidance as set out in the attached Annexes and have reference to the relevant sections of it during consideration of any reports on the agenda.

### Background and Advice

In addition to any advice which may be given at meetings the members of the committee are also provided with Guidance on the law in relation to the various types of Order which may appear on an agenda.

A copy of the current Guidance on the law relating to the continuous review of the Definitive Map and Statement of Public Rights of Way is attached as Annex 'A'. Guidance on the law relating to certain Orders to be made under the Highways Act 1980 is attached as Annex 'B' and on the actions of the Authority on submission of Public Path Orders to the Secretary of State as Annex 'C'.

### Consultations

N/A

### Implications:

This item has the following implications, as indicated:

## **Risk management**

Providing the members of the Committee with Guidance will assist them to consider the various reports which may be presented.

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

Paper	Date	Contact/Directorate/Tel
Current legislation		Jane Turner, Office of the Chief Executive 01772 32813
Reason for inclusion in Part II, if appropriate N/A		

## **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 1<sup>st</sup> 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 6<sup>th</sup> 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.

July 2009

## **Revised basic Guidance on the law relating to certain Orders to be made under the Highways Act 1980**

- **Diversion Orders under s119**
- **Diversion Orders under s119A**
- **Diversion Orders under s119ZA**
- **Diversion Orders under s119B**
- **Diversion Orders under s119C**
- **Diversion Orders under s119D**
- **Extinguishment Orders under s118**
- **Extinguishment Orders under s118A**
- **Extinguishment Orders under s118ZA**
- **Extinguishment Orders under s118B**
- **Extinguishment Orders under s118C**
- **Creation Order under s26**

Committee members have received a copy of the relevant sections from the Highways Act 1980 (as amended). The following is to remind Members of the criteria for the making of the Orders and to offer some guidance.

DEFRA's Rights of Way Circular (1/09 version 2) sets out DEFRA's policy on public rights of way and its view of the law. It can be found on DEFRA's web site. Orders made under the Highways Act 1980 are considered in Section 5 where the Guidance says that "the statutory provisions for creating, diverting and extinguishing public rights of way in the Highways Act 1980 have been framed to protect both the public's rights and the interests of owners and occupiers. They also protect the interests of bodies such as statutory undertakers."

Often the legal test requires the Committee to be satisfied as to the expediency of something. It is suggested that for something to be expedient it is appropriate and suitable to the circumstances and may incline towards being of an advantage even if not particularly fair. Something which is expedient would seem to facilitate your achieving a desired end.

Whether something is as convenient or not substantially less convenient may need to be considered. It is suggested that convenient refers to being suitable and easy to use.

Under S40 of the Natural Environment and Rural Communities Act 2006, every public authority must, in exercising its functions, have regard, so far as is consistent with the proper exercise of those functions, to the purpose of conserving biodiversity.

Under Section 11 of the Countryside Act 1968 in the exercise of their functions relating to land under any enactment every Minister, government department and public body shall have regard to the desirability of conserving the natural beauty and amenity of the countryside.

## **Diversion Order s119**

### **TO MAKE AN ORDER**

To be satisfied that it is expedient in the interests of the owner, lessee or Occupier.

OR

To be satisfied that it is expedient in the interests of the public

To be satisfied that the Order will not alter a point of termination at all if it is a cul de sac route (ending at a beauty spot for example).

OR

If the route terminates at a highway to be satisfied that the termination point is only being moved to another point on the same highway or to another highway connected to it and the point is substantially as convenient to the public.

To have due regard to the needs of agriculture and forestry and the desirability of conserving flora, fauna and geological and physiographical features.

### **TO CONFIRM THE ORDER IF UNOPPOSED OR SEEK CONFIRMATION FROM THE SECRETARY OF STATE (AT A PUBLIC INQUIRY IF NECESSARY) IF THE ORDER IS OPPOSED**

To be satisfied that it is expedient in the interests of the owner, lessee or occupier

OR

To be satisfied that it is expedient in the interests of the public

To be satisfied that the route will not be substantially less convenient to the public.

That it is expedient to confirm it having regard to the effect the diversion would have on public enjoyment of the path or way as a whole.

That it is expedient to confirm it having regard to the effect on land served by the existing right of way (compensation can be taken into account)

That it is expedient to confirm it having regard to the effect on the land over which the "new" section runs and any land held with it (compensation can be taken into account).

Also having regard to any material provision of any Rights of Way Improvement Plan.

To have due regard to the needs of agriculture and forestry and the desirability of conserving flora, fauna and geological and physiographical features.

That there is no apparatus belonging to or used by statutory undertakers under, in, upon, over, along or across the land crossed by the present definitive route unless the statutory undertakers have consented to the confirmation of the Order (consent not to be unreasonably withheld).

### **GUIDANCE**

The point of termination being as substantially convenient is a matter of judgement subject to the test of reasonableness. Convenience would have its natural and ordinary meaning

and refer to such matters as whether the new point of termination facilitated the access of the highway network and accommodated user's normal use of the network.

That the diverted path is not substantially less convenient would mean convenience again being considered. The wording in the Statute allows the diversion to be slightly less convenient but it must not be substantially less so. The length of the diversion, difficulty of walking it, effect on users who may approach the diversion from different directions are factors to be considered.

The effect on public enjoyment of the whole route has to be considered. It would be possible that a proposed diversion may be as convenient but made the route less enjoyable (perhaps it was less scenic). Alternatively the diversion may give the route greater public enjoyment but be substantially less convenient (being less accessible or longer than the existing path).

It may be that the grounds to make an Order are satisfied but the Committee may be unhappy that the route can satisfy the confirmation test. It is suggested that in such circumstances the Order should be made but the Committee should consider deferring the decision on whether to confirm it (if there are no objections) or (if there are objections) whether to instruct officers not to even send the Order to the Secretary of State for confirmation or to instruct to submit the Order to the Secretary of State and promote the confirmation of same. The Council has a discretion whether to submit this type of Order to the Secretary of State. It is not obliged to just because it has made the Order.

Under amended provisions, the "new" section of route will "appear" on confirmation of the Order (or a set number of days thereafter) but the "old" route will remain until the new route is certified as fit for use. It would appear that the public could quickly have the use of a new section which is fit for use as soon as confirmed but if the new route is unfit for use for a long time, the old line of the Right of Way is still there for the public to use.

It is advised that when considering orders made under Section 119(6), whether the right of way will be/ will not be substantially less convenient to the public in consequence of the diversion, an equitable comparison between the existing and proposed routes can only be made by similarly disregarding any temporary circumstances preventing or diminishing the use of the existing route by the public. Therefore, in all cases where this test is to be applied, the convenience of the existing route is to be assessed as if the way were unobstructed and maintained to a standard suitable for those users who have the right to use it.

It would appear that a way created by a Diversion Order may follow an existing right of way for some but not most or all of its length.

The reference to having regard to needs of agriculture includes the breeding or keeping of horses.

Reference to having regard to the material provisions of the Rights of Way Improvement Plan refers to the RWIP prepared in June 2005. The full document is on the County Council's web site.

## **Diversion Orders under s119A**

### **TO MAKE AN ORDER**

To be satisfied that it is expedient in the interests of the safety of members of the public using or likely to use a footpath or bridleway which crosses a railway otherwise than by a tunnel or bridge

To be satisfied that the Order will not alter a point of termination at all if it is a cul de sac route (ending at a beauty spot for example).

OR

If the route terminates at a highway to be satisfied that the termination point is being moved to another point on the same highway or to another highway connected to it.

To have due regard to the needs of agriculture and forestry and the desirability of conserving flora, fauna and geological and physiographical features.

Whether the railway operator be required to maintain the diversion route.

Whether the rail operator enter into an agreement to defray or contribute towards compensation, expenses or barriers and signage, bringing the alternative route into fit condition.

### **TO CONFIRM AN ORDER IF UNOPPOSED OR SEEK CONFIRMATION FROM THE SECRETARY OF STATE (AT A PUBLIC INQUIRY IF NECESSARY) IF THE ORDER IS OPPOSED**

To be satisfied that it is expedient to do so having regard to all the circumstances and in particular to –

Whether it is reasonably practicable to make the crossing safe for use by them public; and

What arrangements have been made for ensuring that any appropriate barriers and signs are erected and maintained.

A rail crossing diversion order shall not be confirmed unless statutory undertakers whose apparatus is affected have consented to the confirmation (such consent not to be unreasonably withheld).

### **GUIDANCE**

The statutory provisions make it clear that the diversion can be onto land of another owner lessee or occupier

A change to the point of termination has to be onto a highway but the statutory provisions do not insist that the point has to be substantially as convenient (as is the requirement in S119).

The grounds for this type of diversion order refer to balancing the safety of continuing to use the level crossing and whether it could be made safe rather than divert the path. The information from the rail operator is therefore considered to be very important.



**Diversion Orders under s119ZA****Diversion Orders under s119B****Diversion Orders under s119C****Diversion Orders under s119D**

Guidance under these specific sections will be made available when required

**Extinguishment Order under s118****TO MAKE AN ORDER**

To be satisfied that it is expedient that the path be stopped up on the ground that the footpath or bridleway is not needed for public use.

To have due regard to the needs of agriculture and forestry and the desirability of conserving flora, fauna and geological and physiographical features.

**TO CONFIRM THE ORDER IF UNOPPOSED OR SEEK CONFIRMATION FROM THE SECRETARY OF STATE (AT A PUBLIC INQUIRY IF NECESSARY) IF THE ORDER IS OPPOSED**

To be satisfied that it is expedient to do so.

To have regard to the extent to which it appears that the path would be likely to be used by the public.

To have regard to the effect which the extinguishment would have as respects land served by the path (compensation can be taken into account).

Where the Order is linked with a Creation Order or a Diversion Order then the Authority or Inspector can have regard to the extent to which the Creation Order or Diversion Order would provide an alternative path.

That there is no apparatus belonging to or used by statutory undertakers under in, upon, over, along or across the land crossed by the present definitive route unless the statutory undertakers have consented to the confirmation of the Order (consent not to be unreasonably withheld).

**GUIDANCE**

Temporary circumstances preventing or diminishing the use of the path shall be disregarded. These include obstructions, which are likely to be removed. Trees and 4 feet wide hedges have been held to be temporary and even an electricity sub station. Many obstructions seem therefore to be able to be disregarded but this does make it difficult to assess what the use of the path would be if the obstruction were not there.

To be satisfied that it is expedient to confirm means that other considerations other than use could be taken into account perhaps safety, perhaps cost.

An Order can be confirmed if it is thought that, despite the fact that it was likely to be used, it is not needed because of a convenient path nearby.

Councils are advised to take care to avoid creating a cul de sac when extinguishing only part of a way.

The reference to having regard to needs of agriculture includes the breeding or keeping of horses.

### **Extinguishment Orders under s118A**

#### **TO MAKE AN ORDER**

An Order under this section can be made where it appears expedient to stop up a footpath or bridleway in the interests of the safety of members of the public using or likely to use a footpath or bridleway which crosses a railway, other than by tunnel or bridge.

#### **TO CONFIRM AN ORDER IF UNOPPOSED OR SEEK CONFIRMATION FROM THE SECRETARY OF STATE (AT A PUBLIC INQUIRY IF NECESSARY) IF THE ORDER IS OPPOSED**

The Order can be confirmed if satisfied that it is expedient to do so having regard to all the circumstances and in particular whether it is reasonably practicable to make the crossing safe for use by the public and what arrangements have been made for ensuring that, if the Order is confirmed, any appropriate barriers and signs are erected and maintained.

#### **GUIDANCE**

It is noted that there is not the same requirements as under S118 to consider need for the route. Instead it is safety which is the reason for the Order being made to close the right of way.

### **Extinguishment Orders under s118B**

Section 118B enables footpaths, bridleways, restricted byways or byways open to all traffic to be extinguished permanently by two types of Special Extinguishment Order.

#### **TO MAKE THE FIRST TYPE OF S118B ORDER**

The highway concerned has to be in an area specially designated by the Secretary of State.

To be satisfied that it is expedient that the highway be extinguished for the purpose of preventing or reducing crime which would otherwise disrupt the life of the community.

To be satisfied that premises adjoining or adjacent to the highway are affected by high levels of crime and

That the existence of the highway is facilitating the persistent commission of criminal offences.

TO CONFIRM THE ORDER IF UNOPPOSED OR SEEK CONFIRMATION FROM THE SECRETARY OF STATE (AT A PUBLIC INQUIRY IF NECESSARY) IF THE ORDER IS OPPOSED

The Order can be confirmed if all the reasons for making the Order (above) are still satisfied and also

That it is expedient having regard to all circumstances

Also having regard to whether and to what extent the Order is consistent with any strategy for the reduction of crime and disorder prepared under S6 Crime and Disorder Act 1998 and

Having regard to the availability of a reasonably convenient alternative route or, if no such route is available, whether it would be reasonably practicable to divert the highway rather than stopping it up, and

Having regard to the effect the extinguishment would have as respects land served by the highway account being taken of the provisions available for compensation.

TO MAKE THE SECOND TYPE OF S118B ORDER

To be satisfied that the highway crosses land occupied for the purposes of a school.

That the extinguishment is expedient for the purpose of protecting the pupils or staff from violence or the threat of violence, harassment, alarm or distress arising from unlawful activity or any other risk to their health or safety arising from such activity.

TO CONFIRM THE ORDER IF UNOPPOSED OR SEEK CONFIRMATION FROM THE SECRETARY OF STATE (AT A PUBLIC INQUIRY IF NECESSARY) IF THE ORDER IS OPPOSED

The Order can be confirmed if all the reasons for making the Order (above) are still satisfied and also

That it is expedient having regard to all circumstances

That regard is had to any other measures that have been or could be taken for improving or maintaining the security of the school

That regard is had as to whether it is likely that the Order will result in a substantial improvement in that security

That regard is had to the availability of a reasonably convenient alternative route or, if no such route is available, whether it would be reasonably practicable to divert the highway rather than stopping it up, and

Having regard to the effect the extinguishment would have as respects land served by the highway account being taken of the provisions available for compensation.

GUIDANCE

Under S118B there are specific criteria to be satisfied before an Order can take effect and to remove a highway from the network of rights of way. It should be noted that an Order extinguishes the footpath (or other type of highway) permanently. Members of the Committee may also be aware of the power, since April 2006, of the Council to make Gating Orders whereby highway rights remain but subject to restrictions which are reviewed annually and will eventually be lifted.

### **Extinguishment Orders under s118ZA**

Guidance under this section will be made available when required

### **Extinguishment Orders under s118C**

Guidance under this section will be made available when required

### **Creation Order under s26**

#### **TO MAKE AN ORDER**

To be satisfied that there is a need for the footpath or bridleway and

To be satisfied that it is expedient that the path be created

To have regard to the extent the path would add to the convenience or enjoyment of a substantial section of the public, or

To have regard to the extent the path would add to the convenience of persons resident in the area

To have regard to the effect on the rights of persons interested in the land, taking compensation provisions into account.

To have due regard to the needs of agriculture and forestry and the desirability of conserving flora, fauna and geological and physiographical features.

#### **TO CONFIRM THE ORDER IF UNOPPOSED OR SEEK CONFIRMATION FROM THE SECRETARY OF STATE (AT A PUBLIC INQUIRY IF NECESSARY) IF THE ORDER IS OPPOSED**

The same test as above.

#### **GUIDANCE**

Again there is convenience to consider.

There may also need to be some consensus as to what constitutes a substantial section of the public.

Persons interested in the land may include owners and tenants and maybe mortgagees.

The reference to having regard to needs of agriculture includes the breeding or keeping of horses.

Regulatory Committee  
Meeting to be held on the 29 January 2020

## **Guidance on the actions to be taken following submission of a Public Path Order to the Secretary of State**

### **Procedural step**

Once an Order has been made it is advertised it may attract objections and representations. These are considered by the Authority and efforts made to get them withdrawn. If there are any objections or representations duly made and not subsequently withdrawn the Authority may -

1. Consider that information is now available or circumstances have changed such that the confirmation test would be difficult to satisfy and that the Order be not proceeded with;
2. Consider that the Order should be sent into the Secretary of State with the authority promoting the Order and submitting evidence and documentation according to which ever procedure the Secretary of State adopts to deal with the Order; or
3. Consider that the Order be sent to the Secretary of State with the authority taking a neutral stance as to confirmation

### **Recovery of Costs from an Applicant**

The Authority may only charge a third party if it has power to do so. We can charge an applicant for a public path order but only up to a particular point in the procedure – in particular, once the Order is with the Secretary of State we cannot recharge the costs incurred promoting the Order at a public inquiry, hearing or by written representations.

The power to charge is found in the - **Local Authorities (Recovery of Costs for Public Path Orders) Regulations 1993/407**

### **Power to charge in respect of the making and confirmation of public path orders**

(1) Where—

- (a) the owner, lessee or occupier of land or the operator of a railway requests an authority to make a public path order under section 26, 118, 118A, 119 or 119A of the 1980 Act, or
- (b) any person requests an authority to make a public path order under section 257 or 261(2) of the 1990 Act, and the authority comply with that request, they may impose on the person making the request any of the charges mentioned in paragraph (2) below.

(2) Those charges are—

(a) a charge in respect of the costs incurred in the making of the order; and

(b) a charge in respect of each of the following local advertisements, namely the local advertisements on the making, on the confirmation, and on the coming into operation or force, of the order.

### **Amount of charge**

(1) Subject to paragraphs (2) and (3) below, the amount of a charge shall be at the authority's discretion.

(3) The amount of a charge in respect of any one of the local advertisements referred to in regulation 3(2)(b) shall not exceed the cost of placing one advertisement in one newspaper

### **Refund of charges**

The authority shall, on application by the person who requested them to make the public path order, refund a charge where—

(a) they fail to confirm an unopposed order; or

(b) having received representations or objections which have been duly made, and have not been withdrawn, the authority fail to submit the public path order to the Secretary of State for confirmation, without the agreement of the person who requested the order; or

(c) the order requested was an order made under section 26 of the 1980 Act and proceedings preliminary to the confirmation of that order were not taken concurrently with proceedings preliminary to the confirmation of an order made under section 118 of the 1980 Act; or

(d) the public path order is not confirmed by the authority or, on submission to the Secretary of State, by him, on the ground that it was invalidly made.

Policy Guidance on these Regulations is found in Circular 11/1996. Administrative charges can be charged up to the point where the order is submitted for determination and thereafter for advertising the confirmation decision and any separate notice of the Order coming into operation or force.

### **Careful consideration of stance**

Recently there has been careful analysis of all the work officers do and the cost of these resources and how to best use the resources.

The above Regulations have been considered and it is advised that the test as to when an Order should be promoted be clarified and applied consistently.

It is advised that consideration needs to be given to whether the diversion is of such little or no real public benefit such that resources should not be allocated to promoting the Order once submitted although where there is no substantial disbenefits to the public the applicants be able to promote the Order themselves.

This is not the same as considering whether the Order can be confirmed as set out in the statute. It is consideration of what actions the Authority should take on submitting the Order. It is not an easy consideration but officers will be able to advise in each particular matter.





## Regulatory Committee

Meeting to be held 29 January 2020

### Part I

Electoral Division affected:  
All

## **Amendments to the Terms of Reference – Regulatory Committee and Amendments to the Scheme of Delegation to Chief Officers - Delegation of Functions relating to dealing with Applications for Public Path Orders under the Highways Act 1980**

Contact for further information:

Jane Turner, 01772 532813, Office of the Chief Executive

David Goode, 07917 836629, Planning and Environment

### **Executive Summary**

This report relates to the addition of restricted byways into the terms of reference of the Committee and possible amendments to the Scheme of Delegation, the effect of which would provide for the delegation of functions relating to dealing with applications for public path orders for the diversion or extinguishment of footpaths, bridleways and restricted byways under the Highways Act 1980.

### **Recommendation**

The Committee is asked:

(i) To approve that Section 2 of the terms of reference of the Regulatory Committee be amended to reflect the powers in connection with restricted byways and therefore read:

2. To exercise the following functions, duties and powers of the Council under the Highways Act 1980:
  - (a) to authorise creation of footpaths, bridleways or restricted byways by agreement under Section 25;
  - (b) to decide whether to make and promote to confirmation Orders for the creation of footpaths, bridleways and restricted byways under Section 26;
  - (c) to decide whether to make and promote to confirmation Orders for the extinguishment of footpaths, bridleways and restricted byways in accordance with Section 118;
  - (d) to decide whether to make and promote to confirmation rail crossing extinguishment orders under Section 118A;
  - (e) to decide whether to make and promote to confirmation special extinguishment orders for the purpose of preventing or reducing

- (f) crime or of protecting school pupils or staff under Section 118B; to decide whether to make and promote to confirmation public path extinguishment orders (Section 118ZA) and special extinguishment orders (Section 118C);
- (g) to decide whether to make and promote to confirmation Orders for the diversion of footpaths, bridleways and restricted byways in accordance with Section 119;
- (h) to decide whether to make and promote to confirmation rail crossing diversion orders under Section 119A;
- (i) to decide whether to make and promote to confirmation special diversion orders for the purpose of preventing or reducing crime or of protecting school pupils or staff under Section 119B;
- (j) to decide whether to make and promote to confirmation SSSI diversion orders under Section 119D;
- (k) to decide whether to make and promote to confirmation public path diversion orders (Section 119ZA) and a special diversion order (Section 119C(4));

(ii) Whether it would wish to delegate the power to refuse to make public path diversion or extinguishment orders under Sections 119 and 118 of the Highways Act 1980, to the Head of Service for Planning and Environment in the circumstances as set out within the report.

(iii) That, if approved, the decision to not make an Order in the circumstances listed below be no longer a function power or responsibility solely reserved to the Regulatory Committee, but instead able to be made by the Head of Service for Planning and Environment under the county council's Scheme of Delegation to Heads of Service (Appendix B in the Constitution), noting that the power to decide to make such an Order would still rest only with Regulatory Committee.

(iv) That, if approved, Section 2 of the terms of reference of the Regulatory Committee be further amended to read:

2. To exercise the following functions, duties and powers of the Council under the Highways Act 1980:

(c) to decide whether to make and promote to confirmation Orders for the extinguishment of footpaths, bridleways and restricted byways in accordance with Section 118, **with the exception of those which are delegated to the Head of Service for Planning and Environment.**

(g) to decide whether to make and promote to confirmation Orders for the diversion of footpaths, bridleways and restricted byways in accordance with Section 119, **with the exception of those which are delegated to the Head of Service for Planning and Environment.**

(v) That Full Council be asked to ratify the necessary changes to the Constitution as a result of the above.

## **Background and advice**

Some specific county council functions rest with Regulatory Committee which can, under the Highways Act 1980, decide whether to approve agreements or make or not make Orders under the sections of the Highways Act 1980 referred to in its terms of reference. At present, the terms of reference refer to these various powers only referring to footpaths and bridleways. Since 2006, the various statutory provisions have also referred to restricted byways. Restricted byways are a type of highway introduced by the Countryside and Rights of Way Act 2000 being a right of way on foot, on horseback or leading a horse and a right of way in or on vehicles other than mechanically propelled vehicles.

It is therefore advised that the various powers in respect of restricted byways be added to the terms of reference.

In addition to the above change, a further change is suggested in connection with the powers in paragraphs (c) and (g) of Section 2 of the terms of reference, in connection with the power to decide to not make Orders under Sections 118 and 119 of the Highways Act 1980. Sometimes, applications raise significant difficulties in meeting the statutory and policy requirements for public path orders, and therefore would be unable to be recommended for approval by Committee in any case. It has previously been unclear at what point requests becomes applications which the current terms of reference require the Committee to consider these anyway. It is proposed that duly made applications (i.e. those made by submitting a completed current Lancashire County Council application form) raising any of the issues listed below, be properly considered instead by the Head of Service for Planning and Environment, and that he be delegated to decide that an Order not be made, if he considers it appropriate after taking relevant officer advice. As is currently the case, only Committee would be able to decide to make an Order. Any duly made application for which the Head of Service does not decide not to make an Order would be decided by Committee following a report by officers. The change removes unnecessary bureaucracy, without impacting on the Committee's powers to exercise its responsibilities and provides clarity for applicants.

The issues referred to above are as follows:

- Where a new route for a diversion under S119 would be, for a significant distance, less than Lancashire County Council's standard minimum width of 2m for footpath, 3m for bridleway or restricted byway;
- Where a new route for a diversion under S119 would be subject to the right to have unnecessary structures or unnecessarily restrictive structures;
- Where a new route for a diversion under S119 would be substantially less convenient in terms of alignment or gradient;
- Where a new route for a diversion under S119 would result in the enjoyment of the path as a whole being significantly reduced because a feature visible from the old route would no longer be visible;

- Where a footpath, bridleway or restricted byway proposed to be extinguished under S118 is currently used to more than a trivial extent and no new public route is proposed as an alternative;
- Where a footpath, bridleway or restricted byway proposed to be extinguished under S118 has only recently become available to the public and no new public route is proposed as an alternative;
- Where a footpath, bridleway or restricted byway proposed to be extinguished under S118 is unavailable to the public or there has been significant deterrent to public use and no new public route is proposed as an alternative.

**Implications:** e.g. Financial, Legal, Personnel, Human Rights, Crime and Disorder or Other

## **Legal**

Any decision taken by the authority can be challenged but many decisions are delegated to the appropriate officer, and so long as matters are properly considered there is no increased risk for decisions being taken by a Head of Service.

If the Head of Service had any concerns about using this proposed delegation he could refer the matter to the Committee in any event.

## **Local Government (Access to Information) Act 1985**

### **List of Background Papers**

Paper	Date	Contact/Directorate/Ext
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None		
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Reason for inclusion in Part II, if appropriate
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N/A
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## Regulatory Committee

Meeting to be held on 29<sup>th</sup> January 2020

Electoral Division affected: Oswaldtwistle
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### 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:

Jayne Elliott, 07917 836626, Public Rights of Way, Planning & Environment Group,  
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Simon Moore, 01772 531280, Paralegal Officer, County Secretary and Solicitors  
Group, [simon.moore@lancashire.gov.uk](mailto:simon.moore@lancashire.gov.uk)

### 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.

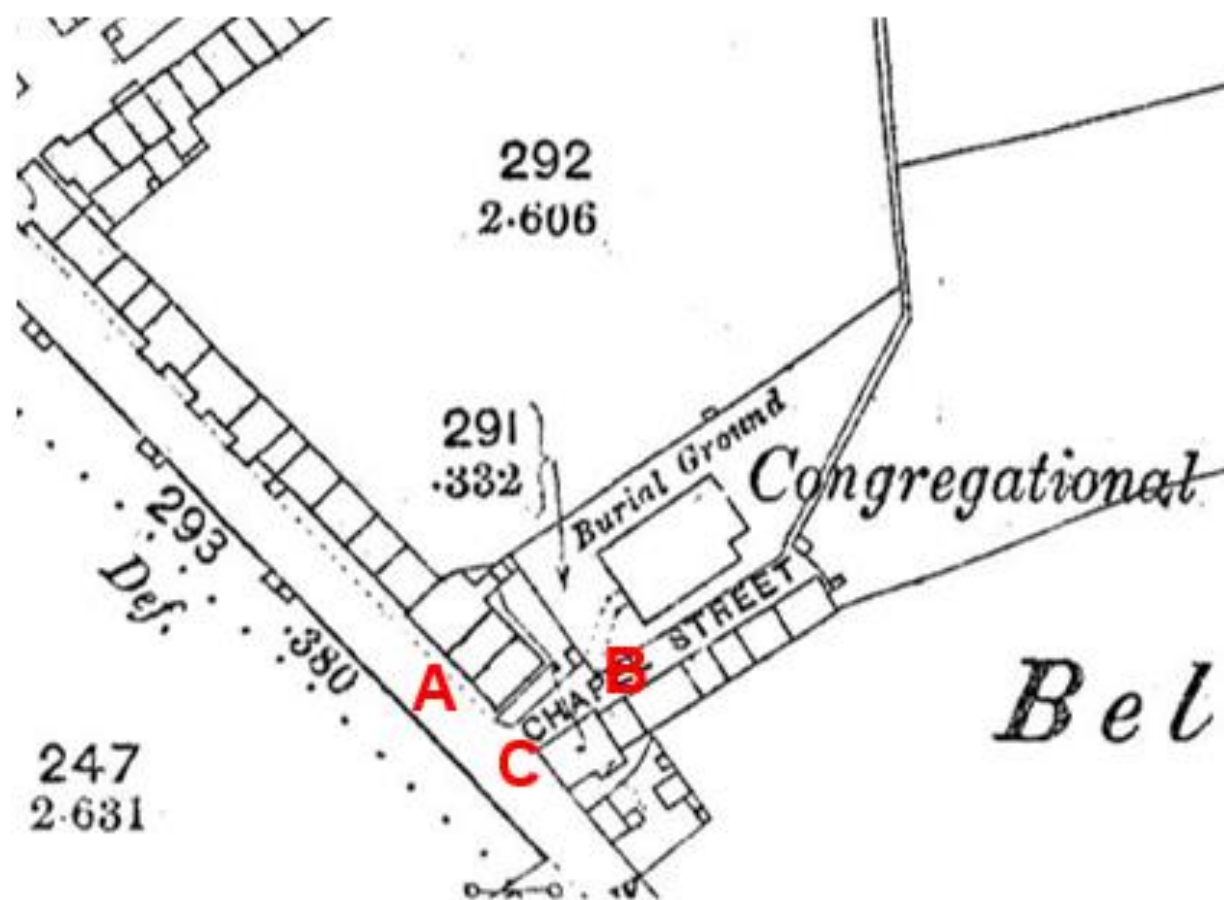
This route is readily accessible with evidence that it is capable of being used by the public.


### 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



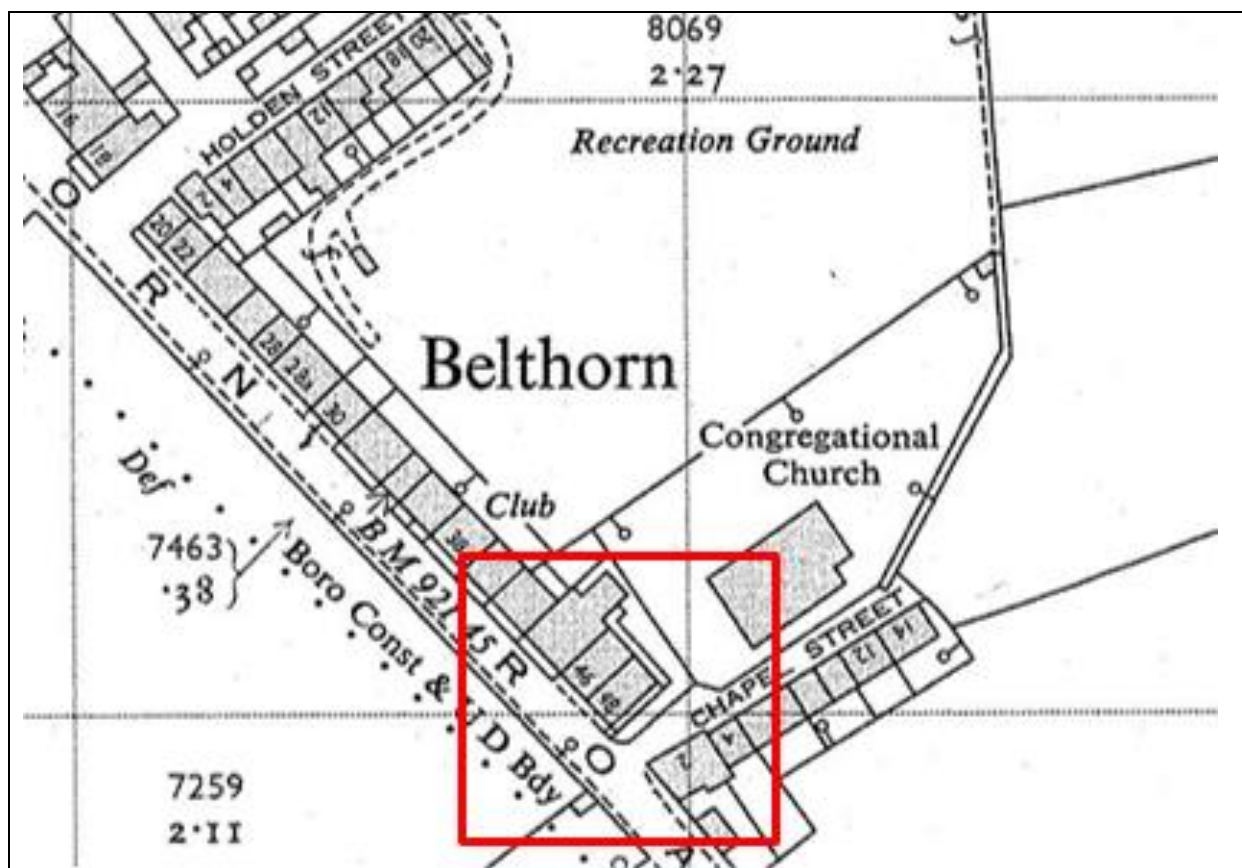
commencing at point C along Chapel Street but was shown to start at point A and pass through the property known as 186 Belthorn Road to point B. There does not appear to be any reason for it to be shown in this way other than a drafting error and no legal orders have been found suggesting that this part 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 (1<sup>st</sup> 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
<b>25 inch OS map Sheet 71.05</b>	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 <sup>st</sup> 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.
<b>6 Inch OS Map</b>	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.
<b>Aerial photograph</b>	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.
<b>1:2500 OS Map SD 7024-7124</b>	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.
<b>Definitive Map Records</b>		<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>
<b>Parish Survey Map</b>	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” (1<sup>st</sup> 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 1<sup>st</sup> 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
<del>288</del>		<del>Deleted</del>		
<del>289</del>		<del>Retained</del>		
Observations		The route numbered 287 is shown as leaving Belthorn Road and extending in a north easterly direction along Chapel Street consistent with the		

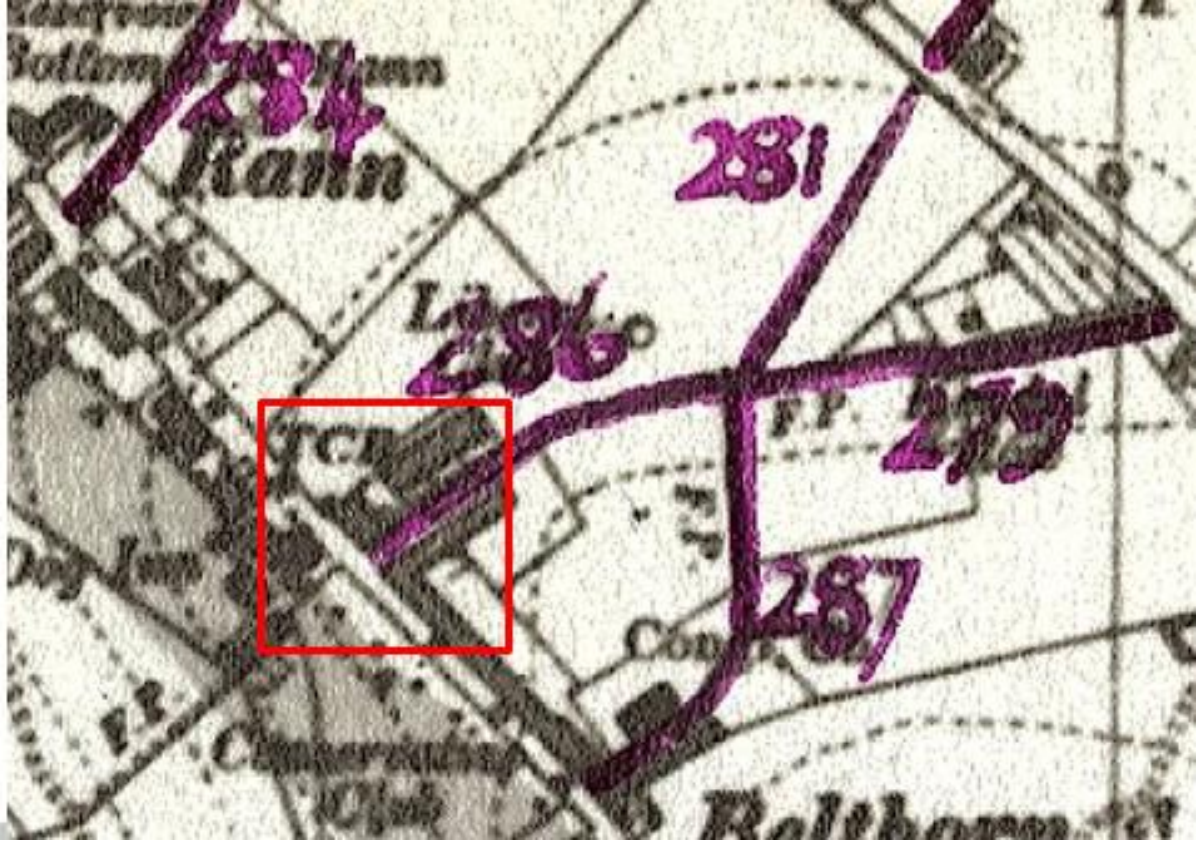
		<p>route to be added between point C and point B. The route to be deleted is not shown.</p> <p>The Draft Statement describes the route as being 'From Chapel Street'.</p> <p>No objections or representations were made relating to the fact that the route was shown to be along the line B-C and the fact that the route between point A-B was not shown.</p>
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<b>Provisional Map</b>		<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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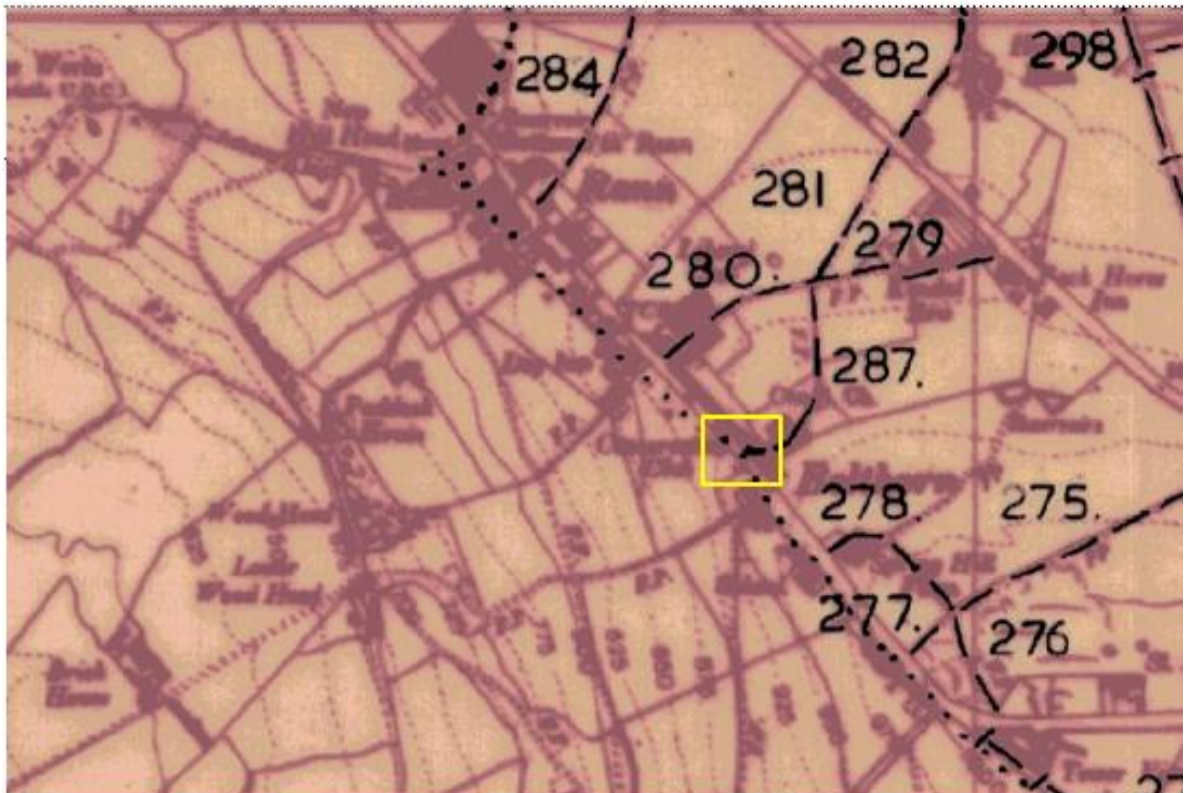
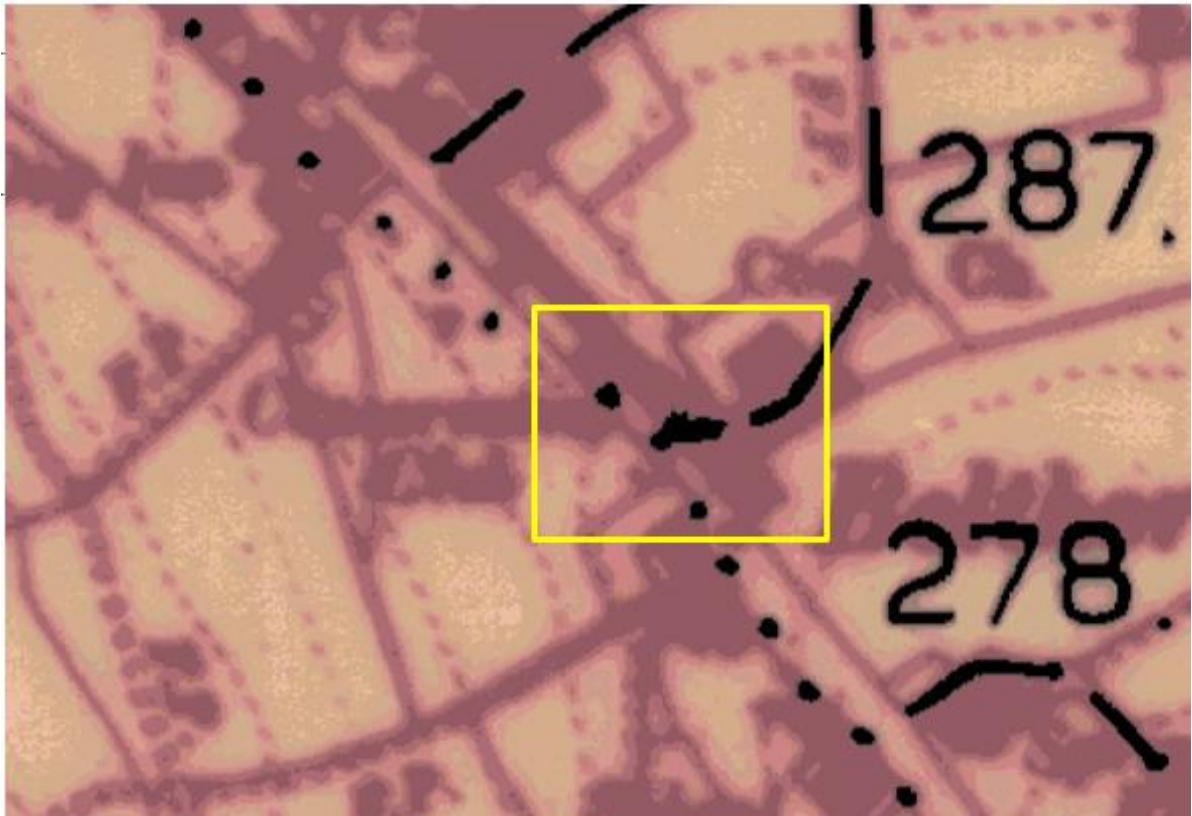


Observations		<p>The route to be deleted is not shown. The route of Footpath Oswaldtwistle 287 is shown as being along Chapel Street consistent with the route to be added between points C-B.</p> <p>No objections or representations were made relating to the fact that the route was shown to</p>
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		be along the line B-C and the fact that the route between point A-B was not shown.
<b>The First Definitive Map and Statement</b>		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.
<b>Revised Definitive Map of Public Rights of Way (First Review)</b>		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 <sup>th</sup> 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 <sup>st</sup> 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 1<sup>st</sup> 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 law<sup>1</sup>. 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.

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<sup>1</sup> 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 1/09<sup>2</sup> 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 1<sup>st</sup> 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 25<sup>th</sup> April 1975 with a relevant date of 1<sup>st</sup> 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 1<sup>st</sup> 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.

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<sup>2</sup> 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

371800 000000

**Graveyard**

FP 287

**CHAPEL ST**

A B

C

2

FW

83

83a

158

FW

286.6m

176

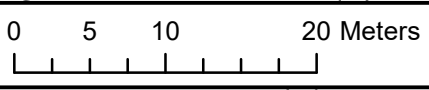
180




14

75

77

79



-  Length to be deleted A-B
-  Footpath to be added C-B
-  Existing Public Footpath

371800 000000



Andrew Mullaney  
Head of Planning and Environment

Wildlife and Countryside Act 1981

Deletion of part of Footpath Oswaldtwistle 287 and addition of Public Footpath  
along Chapel street, Oswaldtwistle, Hyndburn

**1:500**

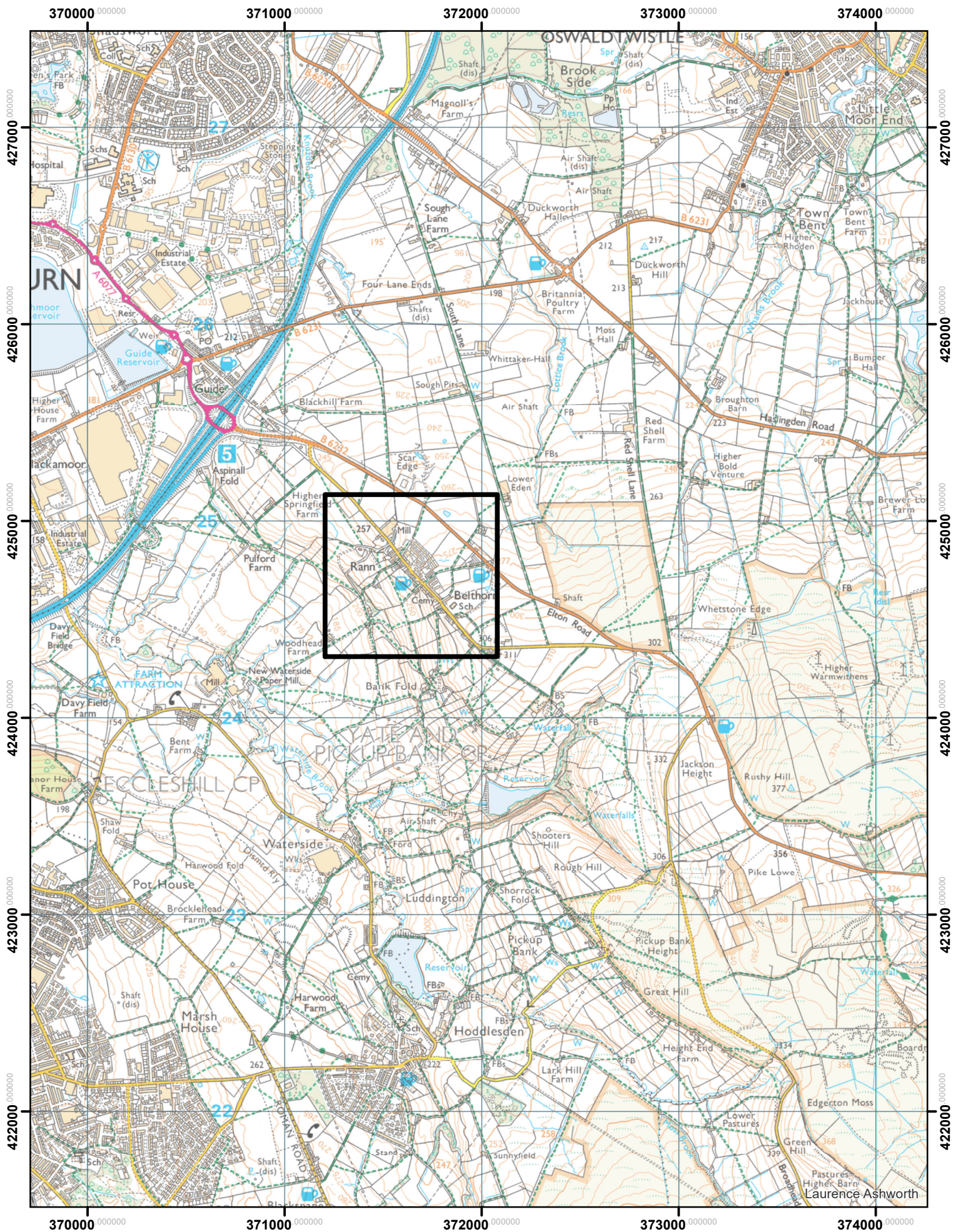


The digitised Rights of Way information should be used for guidance only as its accuracy cannot be guaranteed. Rights of Way information must be verified on the current Definitive Map before being supplied or used for any purpose.

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## Regulatory Committee

Meeting to be held on Wednesday, 29 January 2020

### Part I

Electoral Division affected:  
Rossendale East;

## Determination of Town and Village Green Application VG107 relating to land at 'Waterbarn Recreation Ground', Waterbarn Lane, Stacksteads, Bacup

Contact for further information:

Lindsay Campy, Tel: (01772) 533439, Solicitor, Legal and Democratic Services  
lindsay.campy@lancashire.gov.uk, joanne.mansfield@lancashire.gov.uk

### Executive Summary

The appointment of an Inspector to hear the evidence and report in respect of Application No. VG107 relating to land at 'Waterbarn Recreation Ground', Waterbarn Lane, Stacksteads, Bacup.

### Recommendation

That the Registration Authority hold a "public inquiry" as prescribed under the Commons Registration (England) Regulations 2014 (the Regulations) in particular Part 3 thereof to appoint an Inspector to hold the inquiry and to provide a report and recommendation to the determining authority in connection with the Application VG107 relating to land at 'Waterbarn Recreation Ground', Waterbarn Lane, Stacksteads, Bacup.

### Background and Advice

At the meeting on 25 July 2001, the Committee established the Commons and Town Greens Sub-Committee with power to act in connection with decisions to alter the Commons Registers including determination of applications to add land as a town or village green. This Sub Committee no longer exists and the power for these matters now rests with the Regulatory Committee.

The Commons and Town and Green Sub-Committee at its meeting on 24 October 2008 resolved that the primary preference for the future determination of applications was:

That the Registration Authority could arrange its own hearing of oral evidence and submissions requesting parties to follow directions as given and to cross examine the evidence. This would be non-statutory and no Statutory Regulations prescribe procedure. Information given would be taken into account by the Sub-Committee.

The Sub-Committee could hear the evidence, cross examinations and submissions and then assess the application of the law. This would not incur a fee for an inspector. A report would be prepared by the advising officer with assistance from Counsel, if required.

It was also resolved that when the above primary procedure was considered unsuitable an alternative procedure for the determination of an application would be agreed.

At the meeting of the Regulatory Committee on 26<sup>th</sup> June 2019, a report was presented on the establishment of a Special Sub-Committee with power to act in respect of Application No. VG107, relating to land at Waterbarn Recreation Ground, Waterbarn Lane, Stacksteads, Bacup.

The Committee were advised that Application VG107 required that oral evidence be heard and tested through cross examination, and that this would require arranging a hearing at which members of the Special Sub-Committee would listen to the evidence and then determine the application.

At the time of the meeting of the Regulatory Committee, it was advised that the preferred way of proceeding was not of concern and the Committee were informed that should they consider the primary procedure as agreed by the Commons and Town Greens Sub-Committee on 24 October 2008 to be unsuitable at the present time, and that an alternative way of dealing with the determination would be appropriate, then Committee were advised they could authorise that the Registration Authority hold a public inquiry, as prescribed under the Commons Registration (England) Regulations 2014, appointing an Inspector to hold the Inquiry, and to provide a report and recommendation to the Special Sub-Committee.

The Committee subsequently resolved as follows:

'(i) Approved the establishment of a Special Sub-Committee to determine Application No. VG107 relating to land at Waterbarn Recreation Ground, Waterbarn Lane, Stacksteads, Bacup.

(ii) Agreed that, subject to the above, the membership of the Special Sub-Committee for VG 107 be drawn from 3 members of the Regulatory Committee, on the basis of 2 members of the Conservative Group and 1 member of the Labour Group.

(iii) Agreed that nominations to serve on the Special Sub-Committee be submitted by the respective political group secretaries.

(iv) Agreed that the quorum for the Special Sub-Committee be 2 members.'

Following the meeting of the Regulatory Committee on 26<sup>th</sup> June 2019, the legal representatives of the current landowners (TMJ Contractors Limited) have raised concerns with regards to the Authority's proposed use of a "hearing before members" to test the evidence which is a procedure sitting outside the statutory provision for an Inquiry before an Inspector. Whilst it is advised that the non-statutory

procedure is a lawful and proper procedure, a challenge to its use will involve the authority in expense and officer time.

The documents in this matter are also becoming large by number and size and significant new decisions dealt with by the senior courts in connection with Town green law have recently been handed down.

In view of the above, it is advised that the primary preference to deal with this application to hold a non-statutory hearing in front of members is now considered less suitable in this matter.

It is advised that VG107 is a contested application with the landowner, TMJ Contractors Limited having an interest in the land. The landowner strongly opposes the application and disputes the evidence of the applicant. There is also a large amount of local interest in the land.

It is therefore felt that having a full report from a suitably qualified Barrister, and their recommendation following them hearing the evidence and giving a full consideration of the documents with good knowledge of the law would best protect the Authority.

In the circumstances, it is advised that a public Inquiry be held, as prescribed under the Regulations, appointing an inspector to hold the inquiry and to provide a report and recommendation to the determining authority. Members could attend the inquiry and listen if they so wish but it would be the Inspector who would prepare a report and recommendation.

It is believed that the cost of appointing an Inspector and holding an inquiry is justifiable, to ensure the Authority is able to determine the matter shortly and have an expert hear the evidence and evaluate same and thereby put the Authority at a reduced risk of challenge in this particular matter.

Following the public inquiry, the independent Inspector will then make a recommendation as to whether the application meets the statutory criteria under Section 15 of the Commons Act 2006. Once the Inspector's report and recommendation has been received, the officer will prepare a report for consideration by the Special Sub-Committee and include all relevant documents. The Special Sub-Committee will also have received relevant information and training.

## **Consultations**

N/A

## **Implications:**

This item has the following implications, as indicated:

## **Risk management**

The risk to the Authority in not accepting the recommendation and instead proceeding to deal with this matter with a Special Sub-Committee hearing evidence would be that the Authority may well be left open to legal challenge.

## **Legal**

Both procedures discussed above are lawful procedures for the determination of an application to register land as a Town Green. However, the appointing of an Independent Inspector at an inquiry has a clear procedure under the Regulations and would enable the complexities of the law on Town Green registration to be effectively applied in this matter in the near future with a reduced risk of challenge.

## **Financial**

It is estimated that the cost of the inquiry would be in the region of £12k. The costs of the inquiry will be met from within legal services budget.

## **Local Government (Access to Information) Act 1985**

### **List of Background Papers**

Paper	Date	Contact/Directorate/Tel
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None		
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Reason for inclusion in Part II, if appropriate		
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N/A		
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## **Regulatory Committee** **Urgent Business Procedure**

Electoral Division affected: <b>Morecambe North;</b>
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### **Highways Act 1980 - Section 25 Public Path Creation Agreement for a Public Bridleway at Dertern Lane, Bolton le Sands.** (Appendix A refers)

Contact for further information:

Jill Anderson, Tel: (01772) 532284, Senior Solicitor, Legal and Democratic Services  
jill.anderson@lancashire.gov.uk

#### **Executive Summary**

Proposed dedication by agreement of a publically maintainable bridleway at Dertern Lane, Bolton le Sands.

#### **Reason for the use of the Urgent Business Procedure**

Dertern Lane was on 7 October 2019 stopped up to vehicular traffic by an order made by Lancaster magistrates court. The Lane retains bridleway rights which means that pedestrians, equestrians and cyclists can use the route, however Dertern Lane is gated to prevent vehicular use by the public and a small by pass route around the gate is to be dedicated as bridleway. The landowner has signed the dedication agreement but until the agreement is completed could technically ask for this back leaving the county council in a vulnerable position. The next meeting of the Regulatory Committee is the 20 November 2019 which is too long a period to leave this matter unresolved.

#### **Recommendation**

Subject to the views of the Chair and Deputy Chair of the Regulatory Committee, the Director of Corporate Services proposes to approve:

That a Public Path Creation Agreement be entered into under Section 25 of the Highways Act 1980, between the owners of land at Dertern Lane, Bolton le Sands and Lancashire County Council, to dedicate as bridleway an area of land 2.5 x 6.5 metres shown edged and hatched pink on the plan attached at Appendix A.

#### **Background and Advice**

Dertern Lane runs from the A6 north of Bolton le Sands to the shoreline. It is not a through route for vehicles as it has no connection to another vehicular highway. The land through which Dertern Lane runs is now a caravan and holiday park and the owners of that caravan and holiday park applied to the county council to stop up

Dertern Lane to vehicular traffic, reserving rights as a bridleway, enabling the route to still be used by pedestrians, equestrians and cyclists.

The caravan park is gated so vehicles not accessing the park cannot gain entrance. In order that the public can use Dertern Lane as a bridleway, the landowner has signed a dedication agreement for a small piece of land 2.5 x 6.5, shown edged and hatched pink on the plan at Appendix A which by passes the gate and allows pedestrian and horses to pass but not vehicles.

On 7 October 2019, the magistrates court sitting at Lancaster made a stopping up order under Section 116 of the Highways Act 1980 to remove vehicular rights on the land hatched black on the attached plan. The landowner has signed the dedication agreement for the bypass route around the gate so now the county council needs to complete that agreement, in order to ensure that the bypass route is dedicated as public bridleway.

### **Consultations**

Extensive consultations on both the stopping up and the proposal to dedicate the bypass route as a bridleway have taken place in accordance with the appropriate statutory requirements. Lancaster City Council, Bolton le Sands Parish Council and statutory undertakers have been consulted. The proposal has been advertised in the local press as required by statute and notices erected on site. There have been no objections received.

### **Financial Implications:**

The landowner has met the county council's costs of preparing the dedication agreement and processing the stopping up order. The land which it is proposed to be dedicated will be maintainable at public expense but is to replace land that has been stopped up as highway. Therefore there are no financial implications for the authority.

### **Risk management**

If the Public Path Creation agreement is not entered into by the county council the authority will not be able to guarantee that pedestrians, equestrians and cyclists can continue to use Dertern Lane.

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

Paper	Date	Contact/Tel
File ref:5.35147		Mrs T Kellett 01772 533585



Reason for inclusion in Part II, if appropriate

N/A

**Decision Taken: Declaration**

**Chair and Deputy Chair of the Regulatory Committee**

**Highways Act 1980 – Section 25 Public Path Creation Agreement for a Public Bridleway at Dertern Lane, Bolton le Sands**

Original recommendation as set out in the report be supported

Yes\*/No\*

.....  
Chair \*/Deputy Chair \* of the Regulatory Committee

.....  
Chair \*/Deputy Chair \* of the Regulatory Committee

**Executive Director**

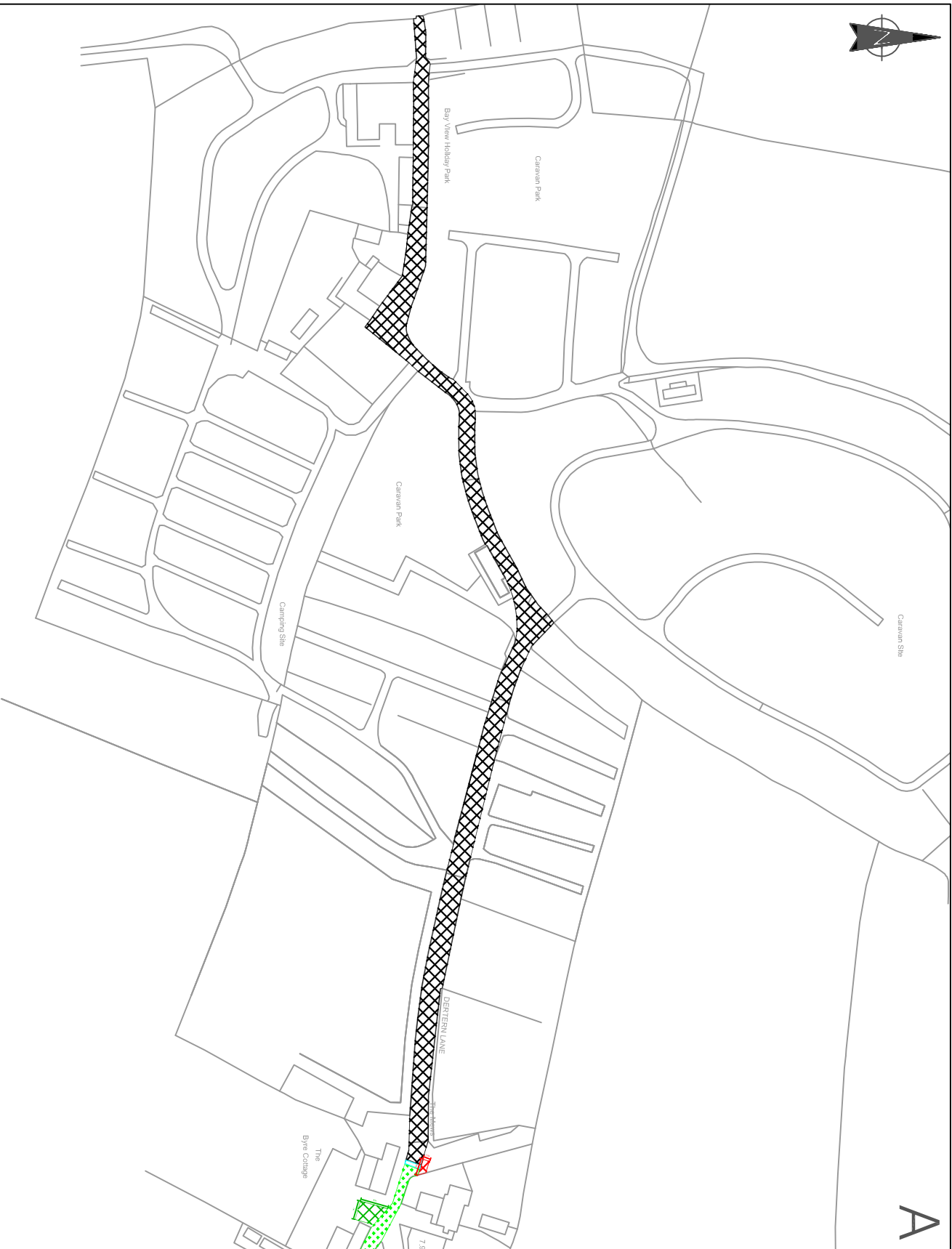
The following action has been agreed under the Urgent Business Procedure and after consultation with the Chair and Deputy Chair of the Regulatory Committee:

**Highways Act 1980 – Section 25 Public Path Creation Agreement for a Public Bridleway at Dertern Lane, Bolton le Sands**

That a Public Path Creation Agreement be entered into under Section 25 of the Highways Act 1980 between the owners of land at Dertern Lane, Bolton le Sands and Lancashire County Council to dedicate as bridleway an area of land 2.5 x 6.5 metres shown edged and hatched pink on the plan attached at Appendix A.

.....  
Director of Corporate Services

6/11/19  
.....  
Date



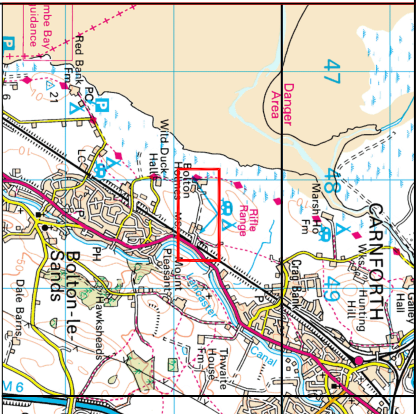
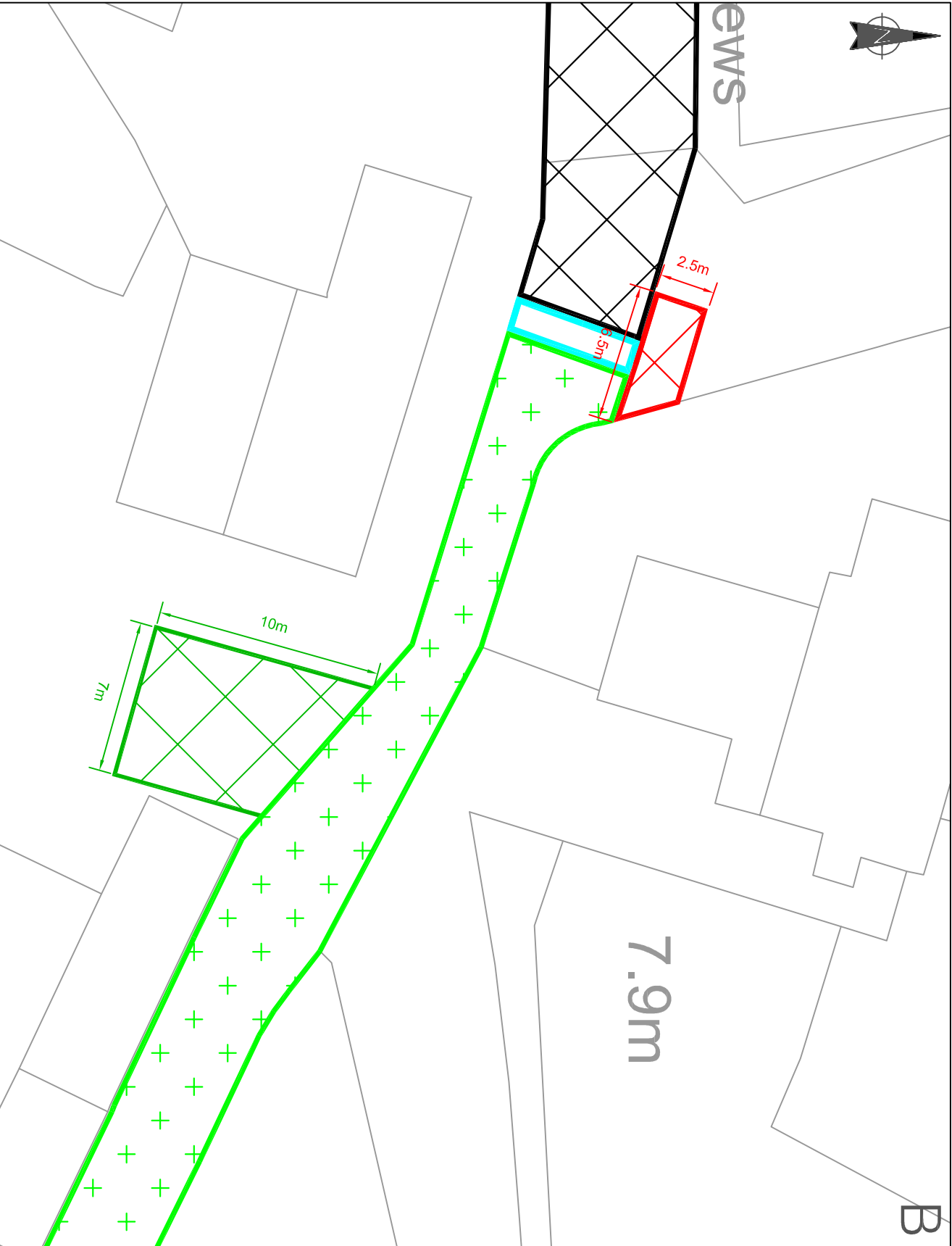
Existing vehicular  
highway

Proposed permissive turning point

Proposed highway to  
be stopped up

Proposed highway to be stopped up subject to reservation of a bridleway (pedestrian, equestrian and cyclist rights)

Proposed bridleway  
to be dedicated



# KEY

- Existing vehicular highway
- Proposed permissive turning point
- Proposed highway to be stopped up
- Proposed highway to be stopped up subject to reservation of a bridleway (pedestrian, equestrian and cyclist rights)
- Proposed bridleway to be dedicated

<b>Lancashire</b> County Council		<b>Community Services</b>		PROJECT TITLE DERTEN_LANE_BOLTON-LE-SANDS PROPOSED_HIGHWAY_STOPPING UP_ORDER		DRAWN BY MH		CLIENT No.		Based on Ordnance Survey mapping with the permission of the Controller of Her Majesty's Stationary Office. © Crown copyright. Unauthorised reproduction infringes Crown copyright and may lead to prosecution or civil proceedings. Lancashire County Council Licence No. 1A100023320	
ISSUE PURPOSE		SCALE BAR (PLOTTED mm) 0 5 10 20 30 40 50		DRAWING TITLE STOPPING_UP_DRAWING		CHECKED BY DB		SCHEME NO.		NO. Date Amendment Details	
ISSUE PURPOSE		SCALE BAR (PLOTTED mm) 0 5 10 20 30 40 50		DATE OCTOBER 2017		DRAWING No. 1		SHEET No. 2 OF 2		REVISIONS	
ISSUE PURPOSE		SCALE BAR (PLOTTED mm) 0 5 10 20 30 40 50		SCALE @ A4 1:250		REVISION		Drawn by:		Checked by:	