

Regulatory Committee

Meeting to be held on 27th January 2021

Part I

Electoral Division affected:
Lancaster East

Wildlife and Countryside Act 1981
Definitive Map Modification Order Investigation
Addition of Footpath at Fenham Carr, Lancaster City
File No. 804-615
(Annex 'A' refers)

Contact for further information:

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Executive Summary

Application for the addition of a Footpath at Fenham Carr, Lancaster City, in accordance with File No. 804-615.

Recommendation

That the application for the addition of a Footpath at Fenham Carr, Lancaster City as shown on the Committee Plan between points A-B-C-D-E-F-G-H-J-K-C and H-I, be not accepted.

Background and Advice

An application under Schedule 14 of the Wildlife and Countryside Act 1981 has been received for the addition of a Footpath at Fenham Carr, Lancaster City on the Definitive Map and Statement of Public Rights of Way.

The county council is required by law to investigate the evidence and make a decision based on that evidence as to whether a public right of way exists, and if so its status. Section 53(3)(b) and (c) of the Wildlife and Countryside Act 1981 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”

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 the applicant, 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. It is possible that the council’s decision may be different from the status given in any original application. The decision may be that the routes have public rights as a footpath, bridleway, restricted byway or byway open to all traffic, or that no such right of way exists. 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

Lancaster City Council

Lancaster City Council confirmed the area of land in their ownership.

They went on to highlight that access to the park’s buildings is limited to certain days of the year (all days except Christmas Day, Boxing Day and New Year’s Day) and certain hours of the day when open (10am to 5pm between April and September and 10am to 4pm between October and March).

They noted that the main entrances to the land are gated and closed overnight however there are other pedestrian access points which are not closed off. Access is also denied to the whole or parts of the land when private events are held regularly throughout the year such as music or theatre events and weddings or parties.

Lancaster City Council also noted that there are development proposals for part of the area affected, shown below.



Lancaster City Council is concerned that if the footpath is deemed to have been used as an unobstructed footpath by the general public for more than 20 years then the modification order would frustrate any proposals before they could even be formally considered.

Lancaster City Council wishes to reserve its right to object to any Definitive Map Modification Order as it considers that the footpath has not been used as a public footpath but rather as a permissive path across the park to which access and use is controlled.

Applicant/Landowners/Supporters/Objectors

The evidence submitted by the applicant/landowners/supporters/objectors and observations on those comments are included in Advice – Head of Service – Legal and Democratic Services Observations below.

Advice

Head of Service – Planning and Environment

Points annotated on the attached Committee plan.

Point	Grid Reference (SD)	Description
A	4917 6170	Junction with Quernmore Road
B	4917 6169	Point on Footway on Parkgate Drive
C	4913 6168	Kissing gate
D	4916 6159	Application route meets another route from the west
E	4910 6138	Application route turns 90 degrees at entrance to walled reservoir
F	4907 6128	Application route leaves the side of the Walled reservoir
G	4892 6113	Sharp corner on application route adjacent to wall separating Fenham Carr from the original boundary of Williamson Park.
H	4902 6139	Spur forming part of application route leaves application route leading to gates into Williamson Park
I	4901 6139	Gates into Williamson Park
J	4916 6153	Another route meets the application route from the east
K	4911 6158	Another route meets the application route from the east

Description of Route

A site inspection was carried out on 21st January 2020.

Brief background:

Measuring approximately 6.3 hectares the area crossed by the application route is known as Fenham Carr and was formerly part of the grounds at Moor Park Hospital. Following closure of the hospital, Fenham Carr was incorporated into the adjacent Williamson Park in 1997.

Description of the route:

The application route commences at the junction with Quernmore Road (point A) and extends in a southerly direction along the tarmacked private road (Parkgate Drive) providing access to a large residential area incorporating the former hospital buildings and newly built residential properties.

The route leaves the drive after approximately 5 metres (point B) to follow a tarmac footway and then west uphill on a stone surfaced/compacted earth path across a grassed area to a kissing gate at point C.

Once through the kissing gate the application route follows a circuitous path around the area known as Fenham Carr following stone surfaced paths (muddy in places) with a series of information boards located around the route providing details of the history of the site and information on the local wildlife and a bird hide close to point K. Between point E and point F the application route goes round the western side of a small reservoir surrounded by a substantial wall with no public access. At point G the application route winds its way quite steeply uphill via some wooden steps and between point G and point K the route runs adjacent to a substantial wall separating Fenham Carr from Williamson Park.

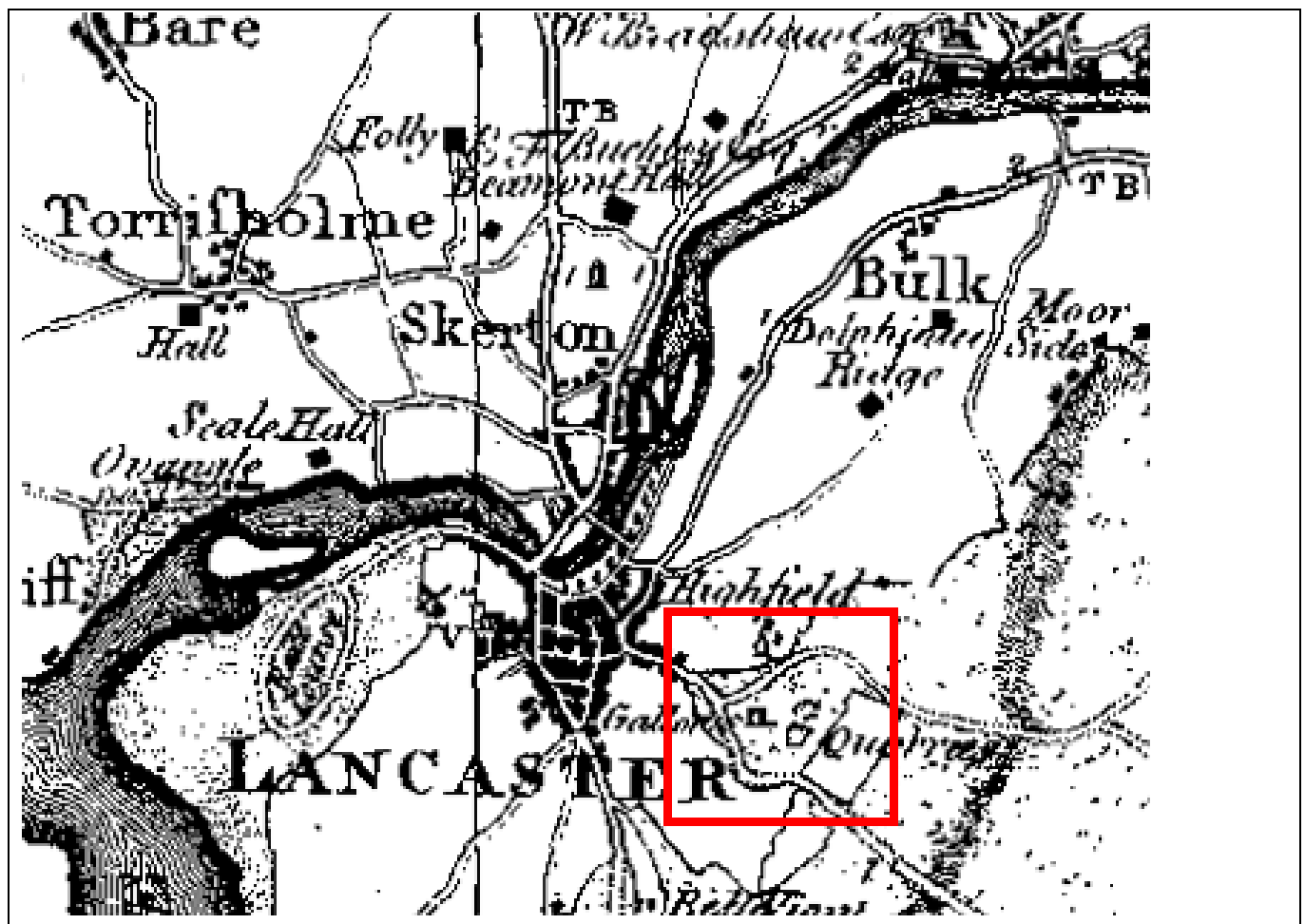
Included as part of the application route is a link into the formal park between point H and point I with gates (open on the day of inspection) at point I leading into the park.

The total length of the route is 1.4km.

Map and Documentary Evidence

A variety of maps, plans and other documents were examined to discover when the route came into being, and to try to determine what its status may be.


Document Title	Date	Brief Description of Document & Nature of Evidence
Yates' Map of Lancashire	1786	Small scale commercial map. Such maps were on sale to the public and hence to be of use to their customers the routes shown had to be available for the public to use. However, they were privately produced without a known system of consultation or checking. Limitations of scale also constrained the routes that could be shown.



Observations		The application route is not shown.
Investigating Officer's Comments		The application route may have existed in 1786 but due to limitations of scale is unlikely to have been shown.
Greenwood's Map of Lancashire	1818	Small scale commercial map. In contrast to other map makers of the era Greenwood stated in the legend that this map showed private as well as public roads and the two were not differentiated between within the key panel.

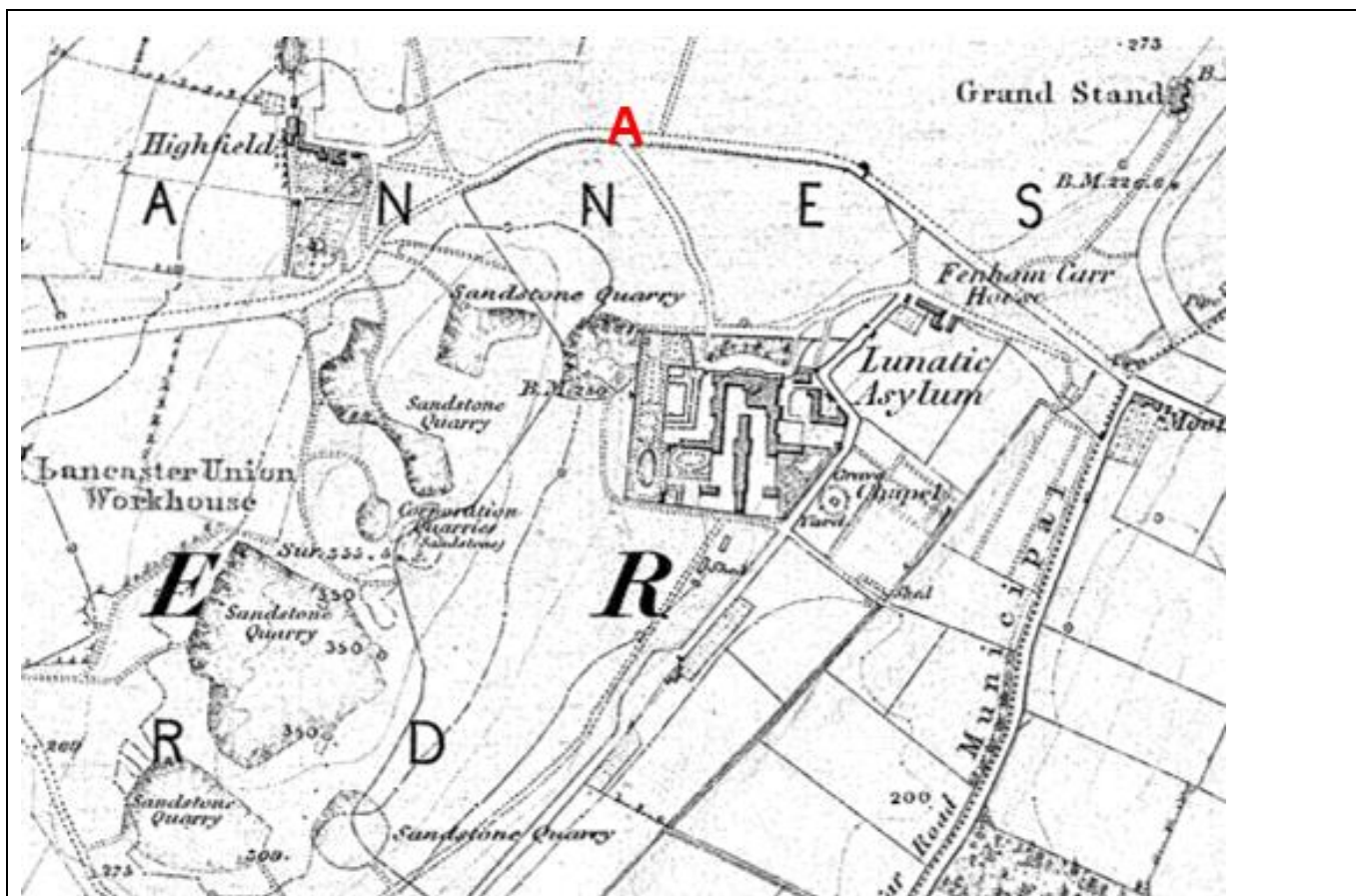


Observations		The Asylum (Moor Hospital) is shown with an area of parkland (coloured green) to the west. The application route is not shown although a faint double line can be seen extending from Quernmore Road at point A to the Asylum building.
Investigating Officer's Comments		The application route may have existed in 1818 but due to limitations of scale is unlikely to have been shown.
Hennet's Map of Lancashire	1830	Small scale commercial map. In 1830 Henry Teesdale of London published George Hennet's Map of Lancashire surveyed in 1828-1829 at a scale of 71/2 inches to 1 mile. Hennet's finer hachuring was no more successful than Greenwood's in portraying Lancashire's hills and valleys but his mapping of the county's communications network was generally considered to be the clearest and most helpful that

		had yet been achieved.
		
Observations		The application route is not shown.
Investigating Officer's Comments		The application route may have existed in 1830 but due to limitations of scale would not have been shown.
Canal and Railway Acts		Canals and railways were the vital infrastructure for a modernising economy and hence, like motorways and high speed rail links today, legislation enabled these to be built by compulsion where agreement couldn't be reached. It was important to get the details right by making provision for any public rights of way to avoid objections but not to provide expensive crossings unless they really were public rights of way. This information is also often available for proposed canals and railways which were never built.
Observations		The land crossed by the application route was not affected by the construction of a canal or railway.
Investigating Officer's Comments		No inference can be drawn with regards to the existence of public rights.
Tithe Map and Tithe Award or Apportionment	1845	Maps and other documents were produced under the Tithe Commutation Act of 1836 to record land capable of producing a crop and what each landowner should pay in lieu of tithes to the church.

CRO Ref: DRB1/121		The maps are usually detailed large scale maps of a parish and while they were not produced specifically to show roads or public rights of way, the maps do show roads quite accurately and can provide useful supporting evidence (in conjunction with the written tithe award) and additional information from which the status of ways may be inferred.
Observations		The Tithe Map of Lancaster was inspected but does not include the area of land crossed by the application route.
Investigating Officer's Comments		No inference can be drawn.
Inclosure Act Award and Maps		Inclosure Awards are legal documents made under private acts of Parliament or general acts (post 1801) for reforming medieval farming practices, and also enabled new rights of way layouts in a parish to be made. They can provide conclusive evidence of status.
Observations		No Inclosure Award or Map could be found for the area crossed by the application route.
Investigating Officer's Comments		No inference can be drawn with regards to the existence of public rights.
6 Inch Ordnance Survey (OS) Map Sheet 30	1848	The earliest Ordnance Survey 6 inch map for this area surveyed in 1844-5 and published in 1848. ¹

¹ The Ordnance Survey (OS) has produced topographic maps at different scales (historically one inch to one mile, six inches to one mile and 1:2500 scale which is approximately 25 inches to one mile). Ordnance Survey mapping began in Lancashire in the late 1830s with the 6-inch maps being published in the 1840s. The large scale 25-inch maps which were first published in the 1890s provide good evidence of the position of routes at the time of survey and of the position of buildings and other structures. They generally do not provide evidence of the legal status of routes, and carry a disclaimer that the depiction of a path or track is no evidence of the existence of a public right of way.



Observations		Access to the lunatic asylum (Moor hospital) is shown from point A but the application route is not shown.
Investigating Officer's Comments		The application route did not exist in 1844-45.
Harrison and Hall Map of Lancaster	1877	A commercial map published by Harris and Hall Land Agents, Architects and Surveyors in 1877 of the Township of Lancaster and part of Scotforth and Skerton. The Map includes details of the population of the township, public buildings, schools, hospitals, places of worship etc.



REFERENCE.

Lancaster Castle, covers within the walls 10,325 Sq. Yards.

The First Castle was built in the Year 124 A.D.

by the Emperor Adrian.

Town Hall & Public Offices, Market Street.

Built in 1781, and enlarged 1874 & 5.

Royal Grammar School, East Road mentioned in the

Corporation Books in 1475, Rebuilt in 1682; and again in 1852,

and greatly enlarged in 1875 and 6.

Ripley's Hospital, (for Orphan Children) founded by

M^{rs} Ripley of Springfield, Park.

County Asylum, (for Lunatics) — The Buildings

Grounds etc, cover 80 Acres, — contains 1,000 patients.

Royal Albert Asylum (for Idiots) Buildings & Estate

cover about 75 Acres, — Accommodation for 600 patients

Lancaster Cemetery, 21 Acres — opened in 1855

Places of Worship.

Parish Church, (St Mary's)

St John's, Chapel Str

St Anne's, Moor Lane

St Thomas's, Penny Str

Christ Church, The Moor

St Luke's, Skerton

St Paul's, Scotforth

St Peter's, (R.C.), East Road

Friends Meeting House

Wesleyan Chapel, Sullyard Str

Independent Chapel, High Str

Ind^t Methodist, Nelson Str

Observations

Access to the lunatic asylum (Moor hospital) is shown from point A but the application route is not

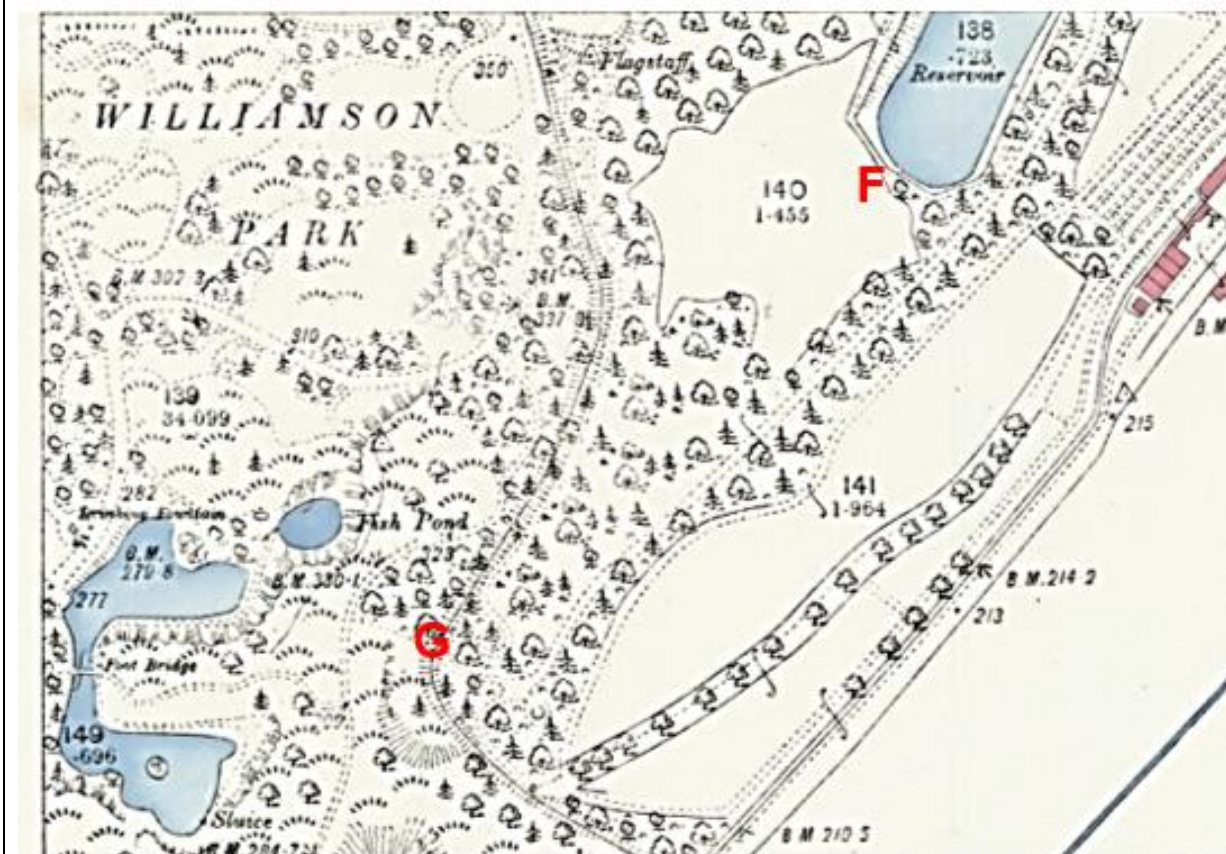
		shown and the area crossed by the application route is shown blank. The area to the west of the land crossed by the application route is shown fenced separately and is labelled as Lancaster Moor.
Investigating Officer's Comments		The application route probably did not exist in 1877.
6 inch OS Map Sheet 30	1893	Further 6 inch OS map surveyed 1891 and published in 1893.



Observations		<p>A number of significant changes have occurred since the land was surveyed and the earlier map published. The area around the lunatic asylum (Moor hospital) has been developed and landscaped with significant areas of trees, laid out paths and the construction of the reservoir.</p> <p>From point A the application route can be seen following the access road to the Asylum building. In proximity of point B a double pecked line can be seen crossing the access road with the route extending west being consistent with the application route from point B to point C. A route largely consistent with the application route is then shown</p>
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		<p>extending south from point C to point D continuing south to the reservoir at point E. Whilst a more substantial (double pecked line) is shown to the east of the reservoir it also appears that a path may also have existed to the west of the reservoir consistent with the application route passing through point F and continuing to point G. From point G a route is then shown largely consistent with the application route through point H and continuing to point J and then on through point K and back round to point C. The application route between point H and point I is not shown. Williamson Park is shown – but not the buildings known as the Ashton Memorial – and the park appears to be separate from the area of land crossed by the application route with no links connecting the two.</p>
Investigating Officer's Comments		<p>The application route existed – with slight variations to the route at point B and point G in 1891 and appeared capable of being used on foot. It appeared to be separate from Williamson Park and formed part of the grounds of the lunatic asylum. It is not known whether public access would have been available to the route or whether access was restricted within the hospital grounds.</p>
25 Inch OS Map sheets 30-12 and 30-16	1893	<p>The earliest OS map at a scale of 25 inch to the mile. Surveyed in 1890 and published in 1893.</p>

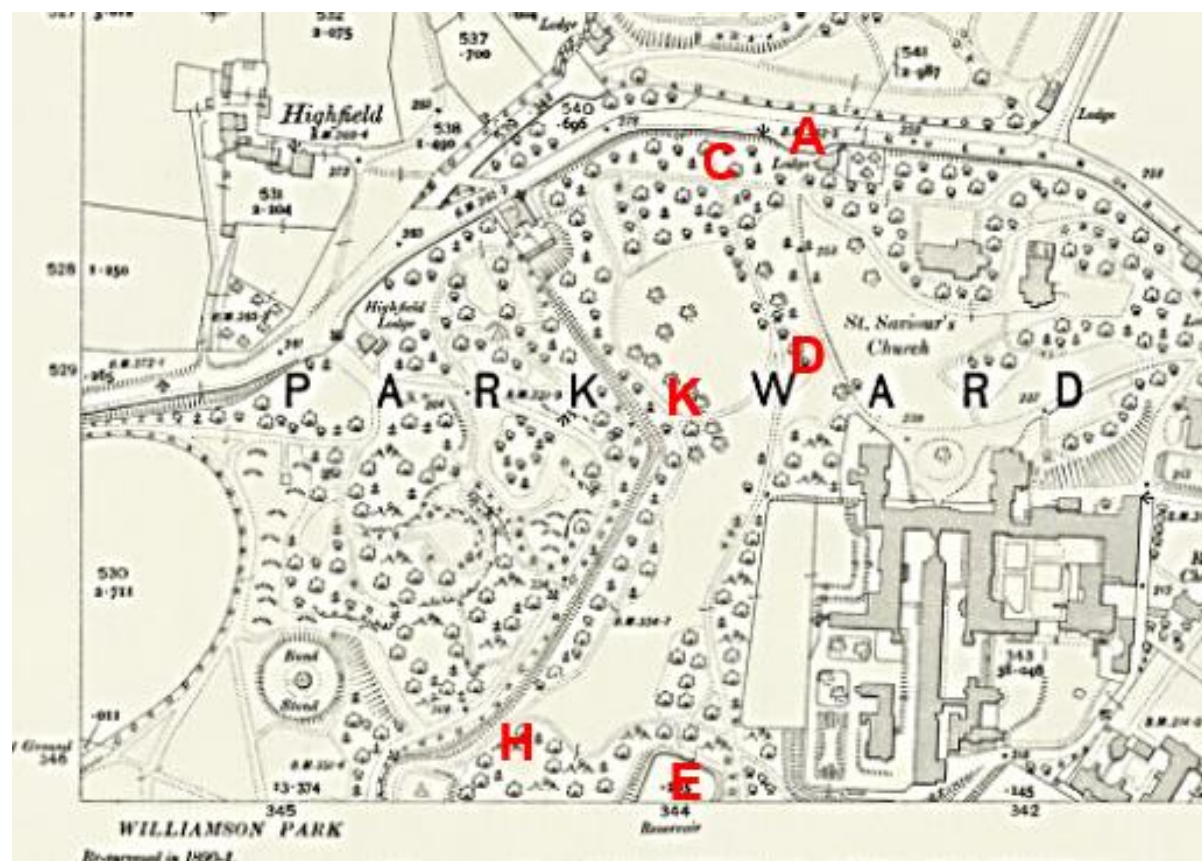


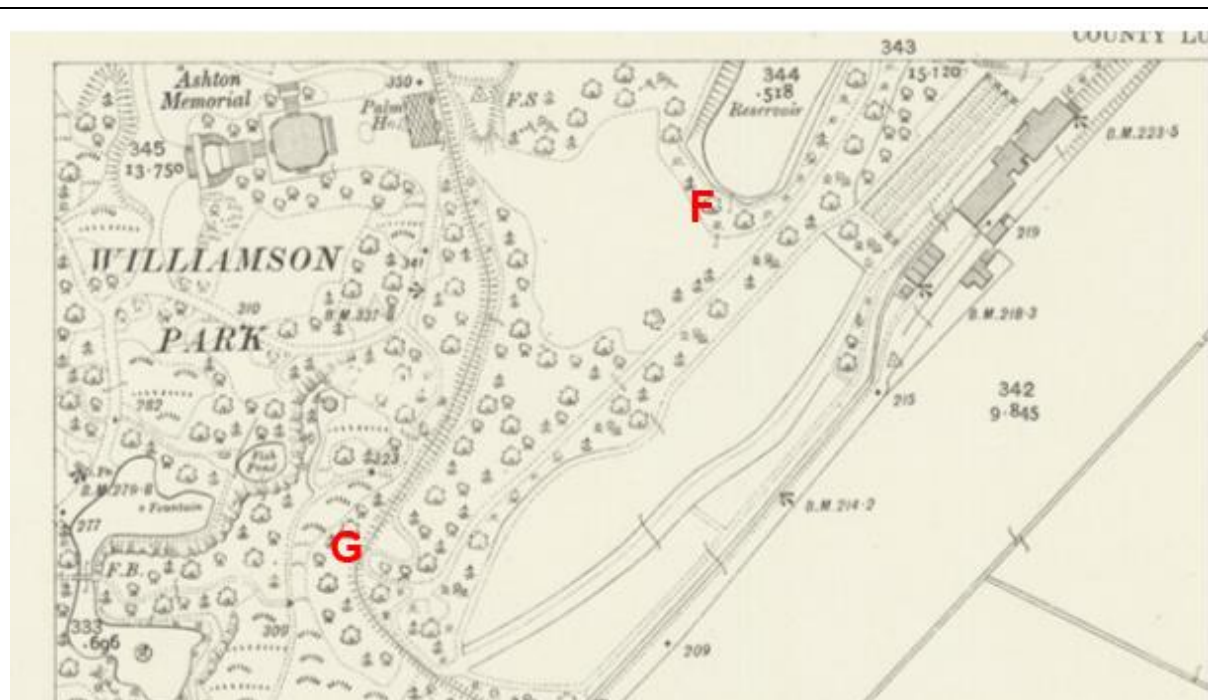


Observations

The whole of the application route is shown with the exception of the route around the western side of the reservoir between point E and point F and the link through to Williamson Park between points H-I. There is a clearly defined boundary running along the length of the site crossed by the application route separating it from the public park although between point G and point H there is an area of land to the west of the application route - which now forms part

		of Williamson park where a 'flagstaff' is marked – which is shown as part of the hospital grounds. There is also a route to the east – rather than the west of the reservoir shown as being the more obvious and direct route to be taken at that time.
Investigating Officer's Comments		The application route existed and appeared capable of being used with the exception of the link to the park between point H and point I which did not exist. Whilst it may have been possible to walk between point E and point F (west of the reservoir) the most obvious – and clearly defined route went along the eastern side.
25 inch OS Map Sheets 30-12 and 30-16	1913	Further edition of the 25 inch map surveyed in 1890, revised in 1910 and published in 1913.



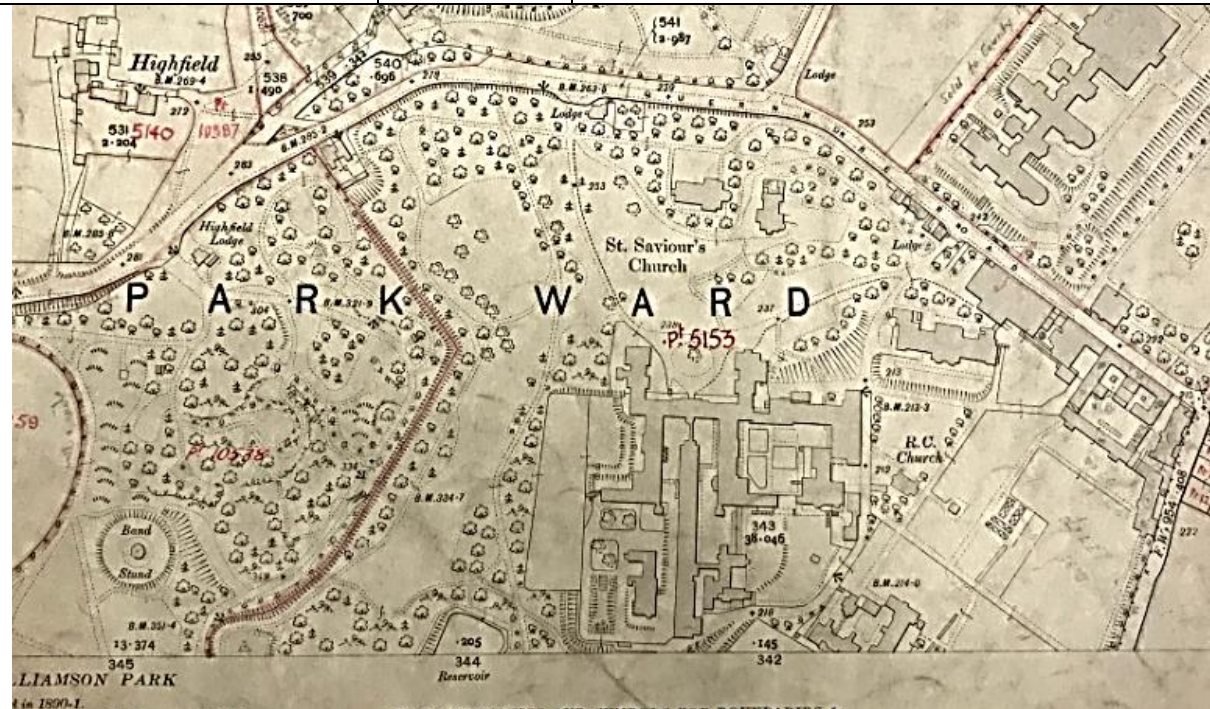


Observations		The application route is shown in the same way as it is shown on the earlier edition of the 25 inch map. The Ashton Memorial building is shown as well as the Palm House.
Investigating Officer's Comments		The application route existed in 1910 and appeared capable of being used with the exception of the link to the park between point H and point I which did not exist. Whilst it may have been possible to walk between point E and point F (west of the reservoir) the most obvious – and clearly defined route went along the eastern side.
Bartholomew half inch Mapping Sheet 5 – North Lancashire	1905	The publication of Bartholomew's half inch maps for England and Wales began in 1897 and continued with periodic revisions until 1975. The maps were very popular with the public and sold in their millions, due largely to their accurate road classification and the use of layer colouring to depict contours. The maps were produced primarily for the purpose of driving and cycling and the firm was in competition with the Ordnance Survey, from whose maps Bartholomew's were reduced. An unpublished Ordnance Survey report dated 1914 acknowledged that the road classification on the OS small scale map was inferior to Bartholomew at that time for the use of motorists.



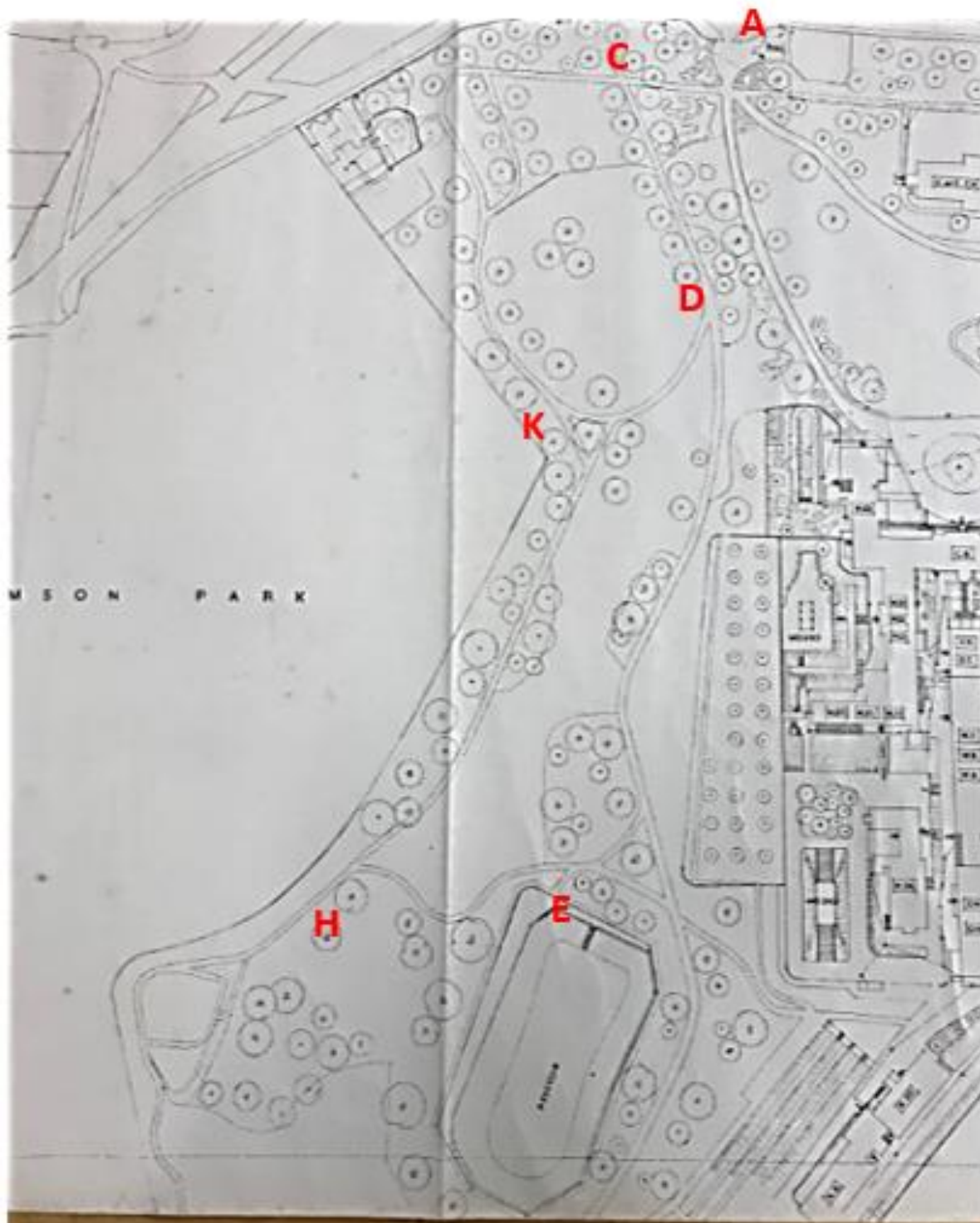
Observations		The application route is not shown. The map – which has been drawn at a small scale – appears to be inaccurate as to the position of the lunatic asylum (hospital) which is labelled as being to the north of Quernmore Road with the lunatic asylum labelled as a workhouse. Williamson Park is not shown.
Investigating Officer's Comments		The scale of the map means that only significant public vehicular highways appeared to be shown. No inference can be drawn regarding the existence or use of the application route.
Finance Act 1910 Map CRO Ref: DVLA2/1 XXX -12	1910	<p>The comprehensive survey carried out for the Finance Act 1910, later repealed, was for the purposes of land valuation not recording public rights of way but can often provide very good evidence. Making a false claim for a deduction was an offence although a deduction did not have to be claimed so although there was a financial incentive a public right of way did not have to be admitted.</p> <p>Maps, valuation books and field books produced under the requirements of the 1910 Finance Act have been examined. The Act required all land in private ownership to be recorded so that it could be valued and the owner taxed on any incremental value if the land was subsequently sold. The maps show land divided into parcels on which tax was levied, and accompanying valuation books provide details of the value of each parcel of land, along with the name of the owner and tenant (where applicable).</p> <p>An owner of land could claim a reduction in tax if his land was crossed by a public right of way and this can be found in the relevant valuation book.</p>

		<p>However, the exact route of the right of way was not recorded in the book or on the accompanying map. Where only one path was shown by the Ordnance Survey through the landholding, it is likely that the path shown is the one referred to, but we cannot be certain. In the case where many paths are shown, it is not possible to know which path or paths the valuation book entry refers to. It should also be noted that if no reduction was claimed this does not necessarily mean that no right of way existed.</p>
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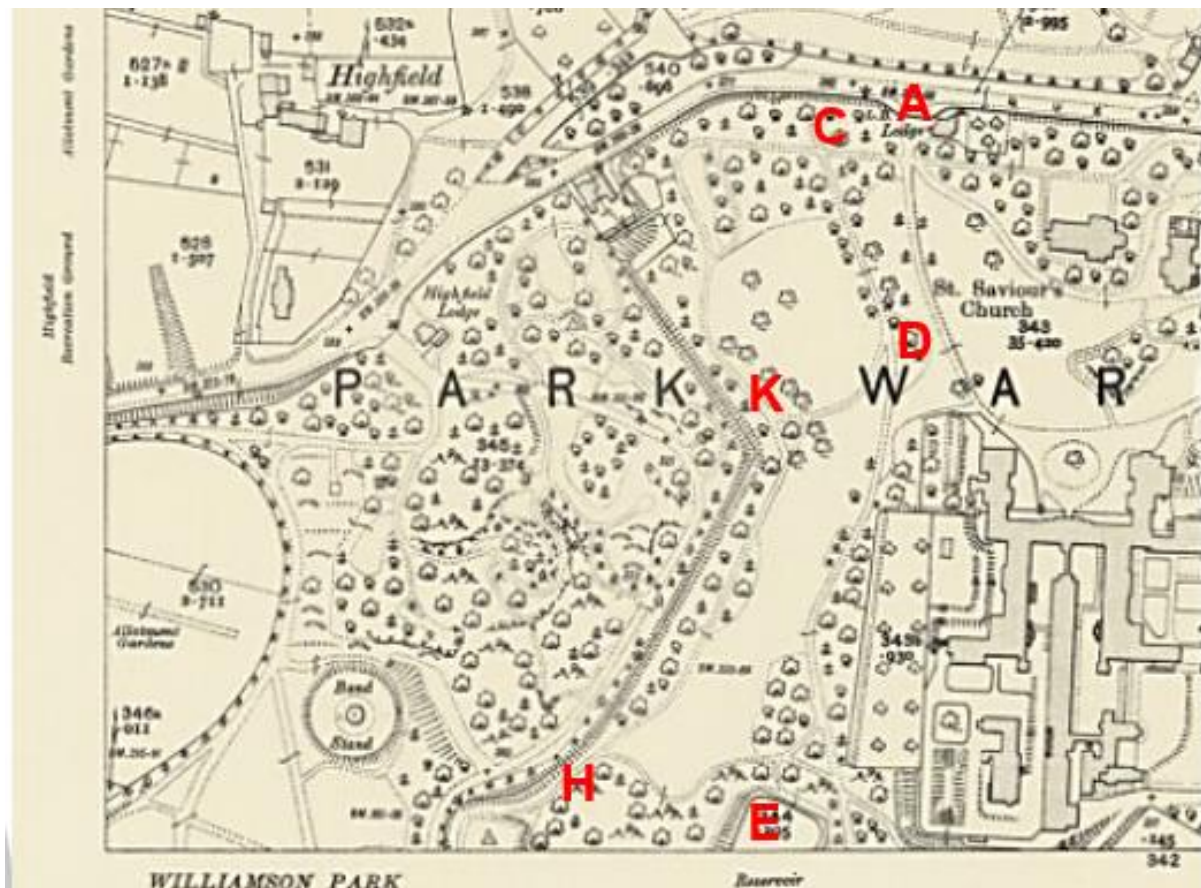
Observations		<p>The Finance Act District Valuation Maps and Books deposited at the County Records Office were inspected. Only one of the 25 inch OS sheets covering the area crossed by the application route is held by the CRO (Sheet XXX.12) so it was not possible to check details for all of the land affected. However, it can be seen that all of the land crossed by the application route on OS map sheet 30-12 is included in plot 5153 which appears to then continue onto the next map sheet covered by the application route. The Valuation Book lists the land being owned and occupied by the County Asylum Board. The land is described as a lunatic asylum at Fenham Carr and no deductions are listed for public rights of way or user.</p>
Investigating Officer's Comments		<p>The owners of the land did not acknowledge the existence of any public rights over the land crossed by the application route at the time of the valuation.</p>
Hospital Plan	Early-mid	<p>Large scale layout plan (possibly copied from an</p>

CRO 3148/7/7	Ref:	DDX	20 th century	Ordnance Survey map) showing the layout of Lancaster Moor Hospital and grounds as well as the edge of Williamson Park and the proposed by pass road A6.
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Observations		The plan shows the area crossed by the application route as part of the grounds of the hospital. The routes are shown in the same way as they are shown on the earlier OS 25 inch map published in 1913 with the route around the reservoir being to the east (not
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		west) and the route between point G and point H taking a more circuitous route just north of point H to include a loop around an area now built upon and within the more formal area of Williamson park.
Investigating Officer's Comments		The origin and exact date of the plan is not known. There is no indication whether the routes shown on the plan would have been available to the public although the fact that the plan does not include detail of Williamson park itself suggests that the two were quite separate and that the hospital grounds were not linked.
25 Inch OS Map Sheets 30-12 and 30-16	1933	Further edition of 25 inch map surveyed 1890, revised in 1831 and published 1933.





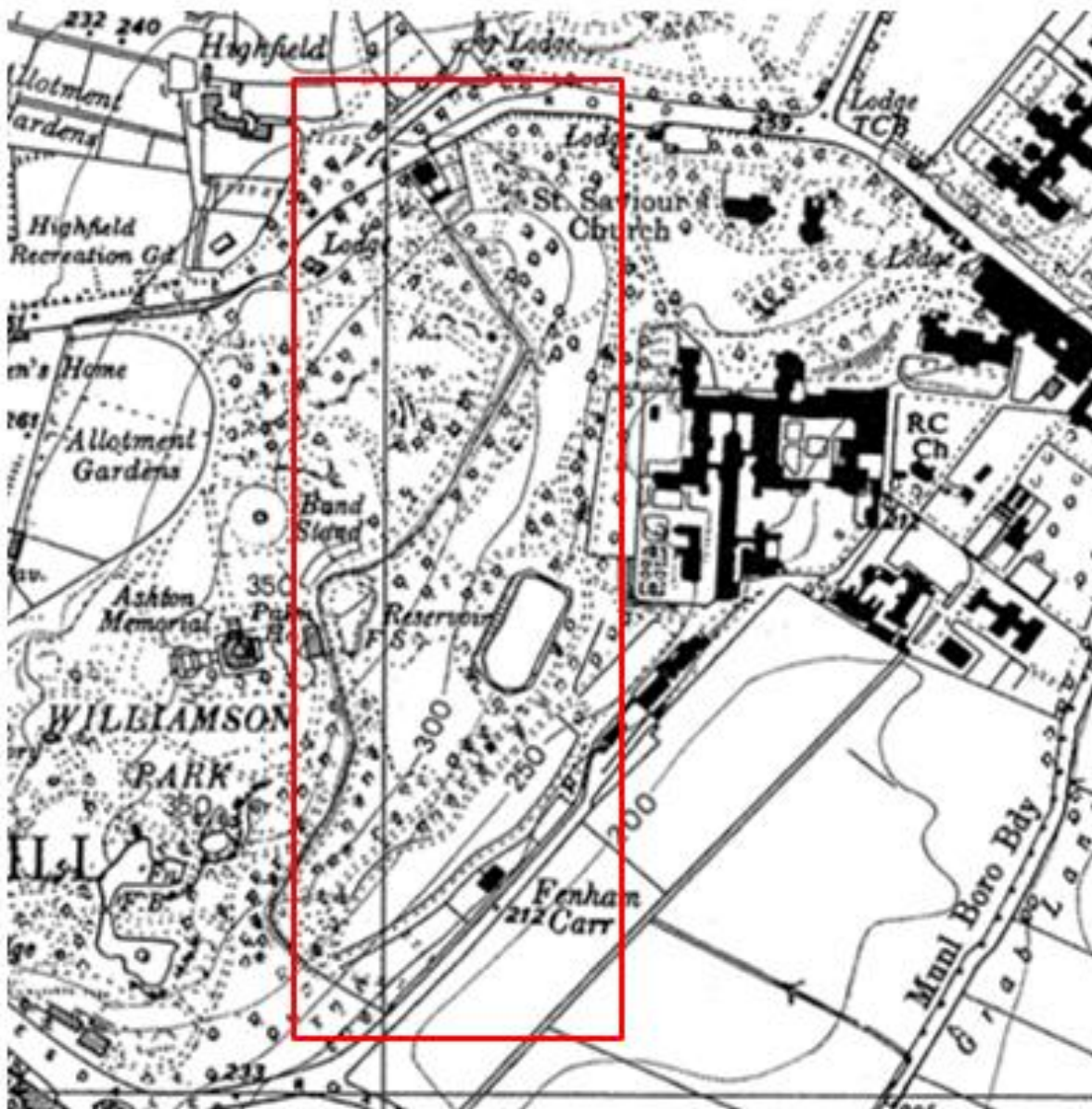
Observations		The application route is shown in the same way as it is shown on the earlier two editions of the 25 inch OS map. The route between point H and point I is not shown.
Investigating Officer's Comments		The application route existed in 1931 and appeared capable of being used with the exception of the link to the park between point H and point I which did not exist and a more circuitous route between point G and point H. Whilst it may have been possible to walk between point E and point F (west of the reservoir) there is no indication of it despite the map showing considerable detail within the park and it is unlikely to have existed.
25 inch OS Map Sheets 30-12 and 30-16	1946	Further edition of 25 inch map surveyed 1890, revised in 1838 and published 1946.



		
Observations		The application route is shown in the same way as it is shown on the earlier editions of the 25 inch OS map. The route between point H and point I is not shown.
Investigating Officer's Comments		The application route existed in 1938 and appeared capable of being used with the exception of the link to the park between point H and point I which did not exist and the more circuitous route between point G and point H. Whilst it may have been possible to walk between point E and point F (west of the reservoir) there is no indication of it despite the map showing considerable detail within the park and it is unlikely to have existed.
Aerial Photograph ²	1940s	The earliest set of aerial photographs available was taken just after the Second World War in the 1940s and can be viewed on GIS. The clarity is generally very variable.
Observations		No aerial photograph from the 1940s series was

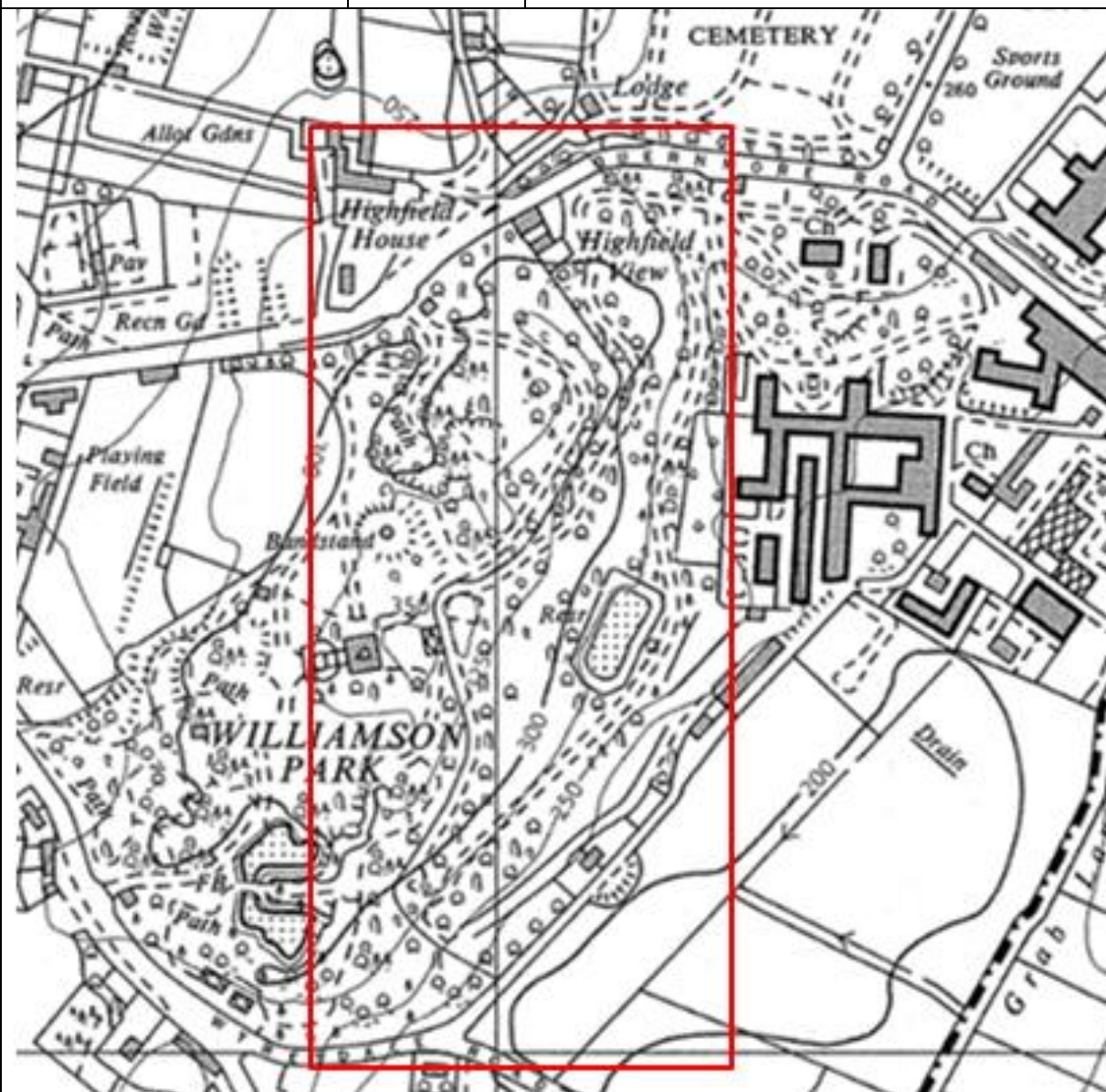
² Aerial photographs can show the existence of paths and tracks, especially across open areas, and changes to buildings and field boundaries for example. Sometimes it is not possible to enlarge the photos and retain their clarity, and there can also be problems with trees and shadows obscuring relevant features.

		available to view for the land crossed by the application route.
Investigating Officer's Comments		No inference can be drawn with regards to the existence of public rights.
6 Inch OS Map Sheet 40SE	1957	The OS base map for the Definitive Map, First Review, was published in 1957 at a scale of 6 inches to 1 mile (1:10,560). This map was revised in 1950.



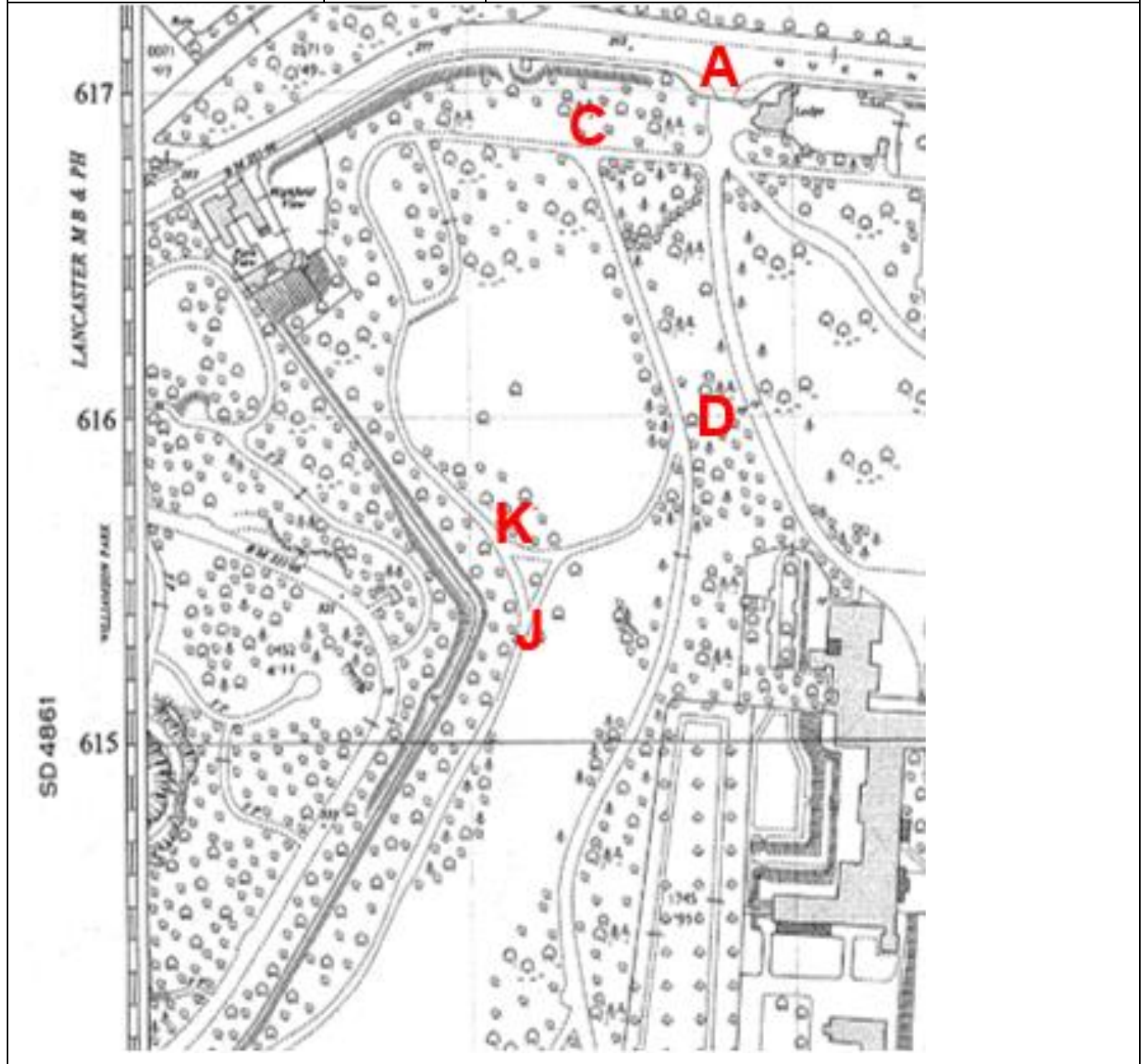
Observations		The application route is shown in the same way as it is shown on the 6 inch and 25 inch OS maps. The route between point H and point I is not shown and a more circuitous route existed between point G and point H.
Investigating Officer's Comments		Most of the application route existed in the 1930s and appeared capable of being used with the

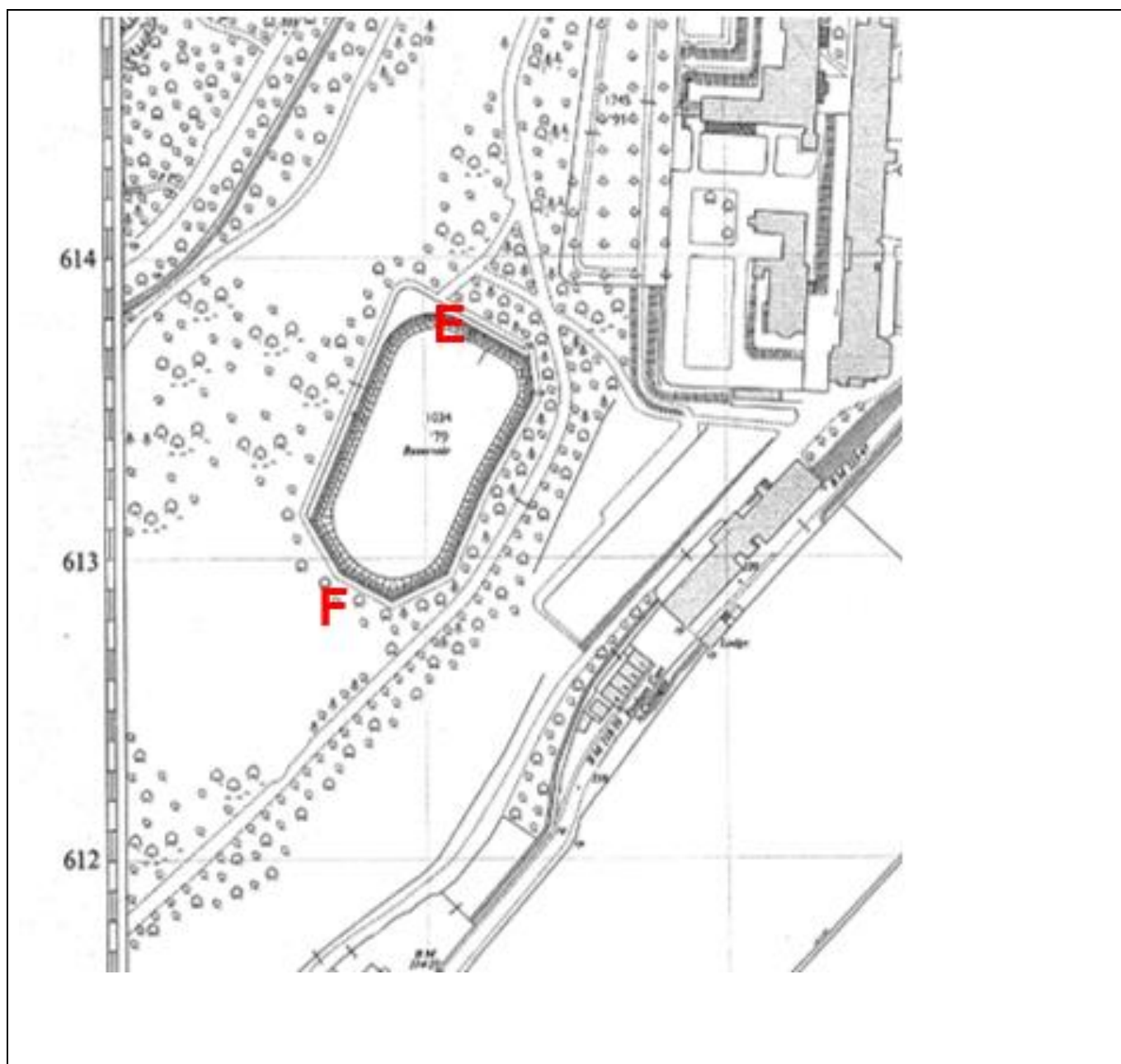
		exception of the link to the park between point H and point I which did not exist. Whilst it may have been possible to walk between point E and point F (west of the reservoir) there is no indication of it despite the map showing considerable detail within the park and it is unlikely to have existed.
6 inch OS Map Sheet 40SE	1967	Further edition of the 6 inch OS map revised 1957-61 and published 1967.




Observations		The application route is again shown in the same way as it was shown on earlier OS mapping.
Investigating Officer's comments		Most of the application route existed in 1957-61 and appeared capable of being used with the exception of the link to the park between point H and point I which did not exist. Whilst it may have been possible to walk between point E and point F (west of the reservoir) there is no indication of it despite the map

		showing considerable detail within the park and it is unlikely to have existed.
1:2500 OS Map SD 49 61	1967	Further edition of 25 inch map reconstituted from former county series and revised in 1955 and published 1967 as national grid series.



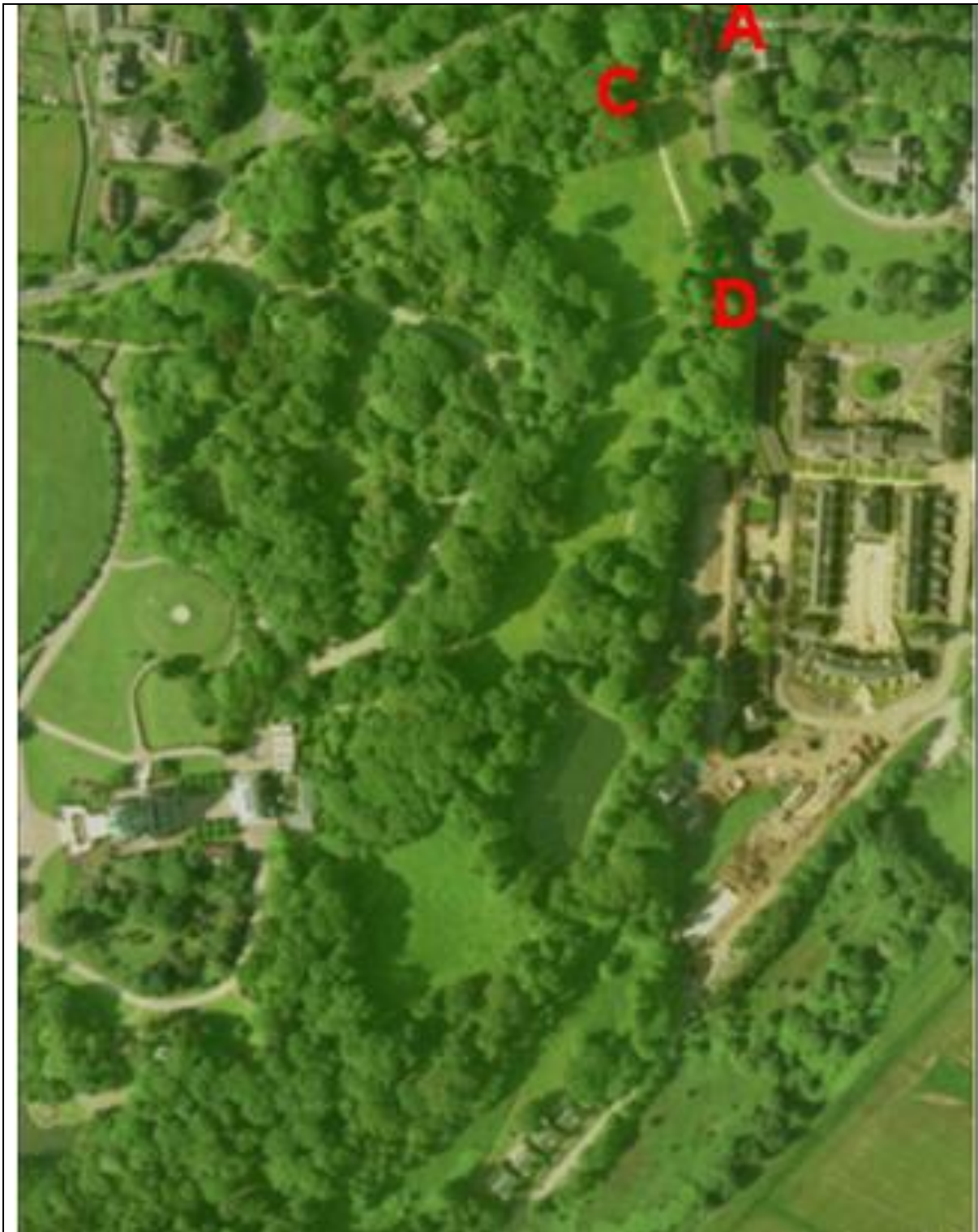


Observations		The application route is again shown similar to the earlier OS mapping although the adjacent sheet covering part of the south east corner of the route could not be found (SD 48 61). However it does show a path on the west of the reservoir which corresponds to the application route except for a section near point F.
Investigating Officer's Comments		The application route existed in 1957-61 and appeared capable of being used with the exception of the link to the park between point H and point I which did not exist and a section near point F (south end of the reservoir). Although the map showing the bottom south west corner of the route was unavailable to view map and photographic evidence from before and after that

		date suggest that most of this route existed although it is not known whether the application route in its entirety between point G and point H at this time.
Aerial photograph	1960s	The black and white aerial photograph taken in the 1960s and available to view on GIS.
		
Observations		Only parts of the application route can be seen although this is due mainly to the fact that the trees are in full leaf. A route can be clearly seen from point A-B-C-D.

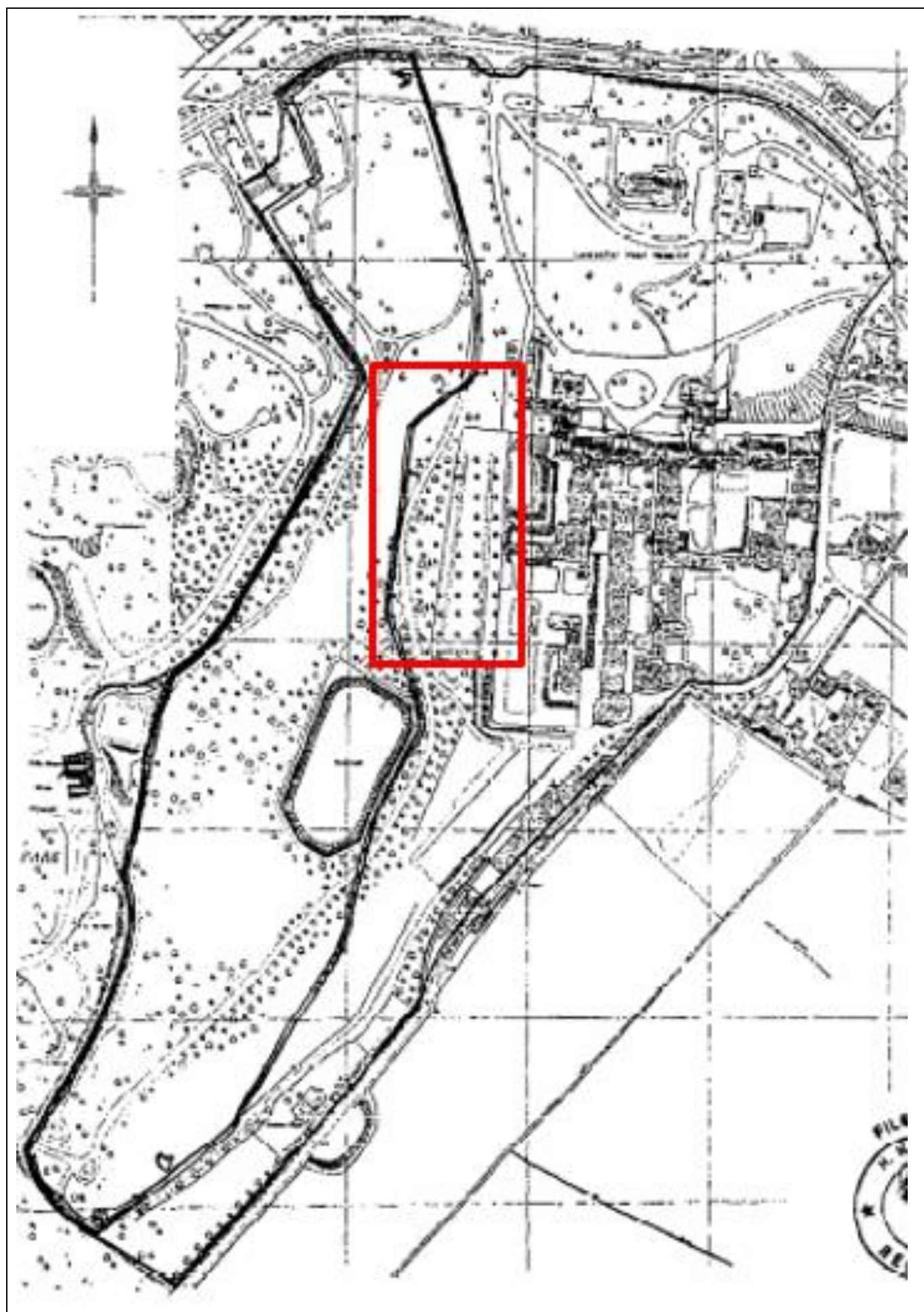
Investigating Comments	Officer's		No inference can be drawn.
Ordnance Pathfinder 648 Lancaster Morecambe SD 36/46	Survey and	1988	1:25 000 OS map compiled from larger scale surveys dated between 1955 and 1976, revised for selected changes 1988.
Observations			The map shows most of the application route. It does not show the route to the west of the reservoir between points E-F and does not show the link into Williamson Park at point I and a more circuitous route existed between point G and point H.

Investigating Officer's Comments		Most of the application route existed in 1988 and appeared capable of being used with the exception of the link to the park between point H and point I which did not exist and part of the route between point G and point H which varied from the route applied for. Whilst it may have been possible to walk between point E and point F (west of the reservoir) the most obvious – and clearly defined route went along the eastern side.
Aerial Photograph	2000	Aerial photograph available to view on GIS.




Observations		It is not possible to see much of the land crossed by the application route on this photograph due to tree cover. A clear route can be seen between point C and point D but the rest of the route can't be seen.
Investigating Officer's Comments		No inference can be drawn.
Records relating to Moor Lane Hospital deposited in the		A search of records relating to Moor Lane Hospital.

County Records Office		
Observations		A search through the list of documents deposited in the County Records Office was made but nothing was identified which indicated whether or not the hospital grounds were open to the public to use.
Investigating Officer's Comments		No inference can be drawn.
Section 106 agreement	1997	The applicant made reference to a Section 106 agreement dated 20 th February 1997 which was made between Lancaster City Council, the Secretary of State for Health (the owner of the former Lancaster Moor Hospital site) and Raven Close Nominees Limited (the developer of the hospital site).



3. THE COUNCIL covenants with the Owner (and will enter into the same covenant as transferee in the transfer of the Woodland pursuant to Clause 2.2 hereof) that the said Woodland will be retained by the Council as public amenity land and that the Council will provide free and unrestricted access to the Woodland for all of the occupiers of the Site and that access will initially be given at reasonable points on the boundary between the Woodland and the land to be retained by the Developer

Observations		<p>A copy of the agreement made in relation to the granting of planning permission in 1996 for the redevelopment of the hospital site was obtained from the City Council. The agreement provided for the transfer to the City Council of an area of woodland described as being an area of sloping wooded area abutting Williamson Park and described as being shown bounded by a red line on a Land Registry plan contained within the agreement.</p> <p>The agreement included a covenant that the woodland would be retained by the Council as public amenity land and that the Council would provide free and unrestricted access to the woodland for all occupiers of the site (Lancaster Moor Hospital) which now forms part of Standen Country Park Limited and that access would initially be given at reasonable points on the boundary of the woodland and land to be retained by the Developer.</p> <p>A further clause in the agreement states that nothing in the agreement is to be construed as prohibiting or limiting any right to develop any part of the site in accordance with a planning permission.</p>
Investigating Officer's Comments		<p>The section 106 agreement relates to all of the land crossed by the application route with the exception of the route between points A-C and part of the route between point D and point E.</p> <p>The agreement refers to the retention of the land by the council as public amenity land with access rights for the occupiers of the adjacent land to be provided.</p> <p>The wording of the section 106 agreement suggests that only when the land was transferred to the City Council would there be a requirement to 'provide' free and unrestricted access to occupiers of the former hospital site inferring that such access did not</p>

		already exist. From the agreement coming into operation in 1997 (at least) it therefore appears that the site crossed by most of the application route was public amenity land.
Lancaster City Consultation on future development of Fenham Carr	October 2019	Consultation referred to by the applicant in their application as being the reason why the application to record the route as a public footpath was made.
		
Observations		<p>In 2019 Lancaster City Council carried out consultations seeking people's initial views on proposals for a new woodland adventure playground in Williamson Park. The proposed playground was to be based in the southern tip of Fenham Carr, and comprised of a series of woodland structures connected by a variety of raised walkways, bridges and tunnels with integrated play equipment such as slides, nets, tunnels and ladders.</p> <p>Details of the proposals and indicative designs were</p>

		<p>put on display in the Ashton Memorial <u>and online</u>.</p> <p>The proposals envisaged around a fifth of Fenham Carr being used for the adventure playground, and it was stated that the remainder of the site would still be available for dog walkers, park run, nature lovers and other park user groups.</p> <p>A plan indicated that the area to be developed would require the existing route around Fenham Carr (the application route) to be rerouted at the southerly end (down to point G).</p> <p>The playground would be a paid-for attraction and while details of the entrance fee had not yet been agreed, it was stated that it was likely that it would also include entry to the Butterfly House and Mini Zoo.</p> <p>Subject to further consultation and planning permission, it was proposed that the attraction would open in May 2021.</p>
Investigating Officer's Comments		<p>The consultation process acknowledged the existence of the application route as a walkway and as part of the weekly 'Parkrun' course. There was no reference to public rights being required to be legally diverted suggesting that the city council acknowledged the importance of the loop to the public using the park but that they did not consider it to be a designated public right of way.</p>
Definitive Map Records		<p>The National Parks and Access to the Countryside Act 1949 required the County Council to prepare a Definitive Map and Statement of Public Rights of Way.</p> <p>Records were searched in the Lancashire Records Office to find any correspondence concerning the preparation of the Definitive Map in the early 1950s.</p>
Parish Survey Map	1950-1952	<p>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</p>

		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 application route is within Lancaster which was a former municipal borough for which no parish survey map was compiled.
Draft Map		The Draft Maps were given a “relevant date” (1 st 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 st 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.
Observations		The application route was not shown on the Draft Map of Public Rights of Way and no representations or objections were made relating to it.
Provisional Map		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.
Observations		The application route was not shown on the Provisional Map of Public Rights of Way and no representations or objections were made relating to it.
The First Definitive Map and Statement		The Provisional Map, as amended, was published as the Definitive Map in 1962.
Observations		The application route was not shown on the First Definitive Map and Statement.
Revised Definitive Map of Public Rights of Way (First Review)		Legislation required that the Definitive Map be reviewed, and legal changes such as diversion orders, extinguishment orders and creation orders be incorporated into a Definitive Map First Review. On 25 th April 1975 (except in small areas of the County) the Revised Definitive Map of Public Rights of Way (First Review) was published with a relevant date of

		1 st September 1966. No further reviews of the Definitive Map have been carried out. However, since the coming into operation of the Wildlife and Countryside Act 1981, the Definitive Map has been subject to a continuous review process.
Observations		The application route is not shown on the Definitive Map of Public Rights of Way (First Review).
Investigating Officer's Comments		From 1953 through to 1975 there is no indication that the application route was considered to be a public footpath by the Surveying authority. There were no objections or representations made regarding the route from the public when the maps were placed on deposit for inspection at any stage of the preparation of the Definitive Map.
Highway Adoption Records including maps derived from the '1929 Handover Maps'	1929 to present day	<p>In 1929 the responsibility for district highways passed from district and borough councils to the County Council. For the purposes of the transfer, public highway 'handover' maps were drawn up to identify all of the public highways within the county. These were based on existing Ordnance Survey maps and edited to mark those routes that were public. However, they suffered from several flaws – most particularly, if a right of way was not surfaced it was often not recorded.</p> <p>A right of way marked on the map is good evidence but many public highways that existed both before and after the handover are not marked. In addition, the handover maps did not have the benefit of any sort of public consultation or scrutiny which may have picked up mistakes or omissions.</p> <p>The County Council is now required to maintain, under section 31 of the Highways Act 1980, an up to date List of Streets showing which 'streets' are maintained at the public's expense. Whether a road is maintainable at public expense or not does not determine whether it is a highway or not.</p>
Observations		The application route is not recorded as being publicly maintainable on the List of Streets by the county council.
Investigating Officer's Comments		No inference can be drawn regarding public rights.
Statutory deposit and declaration made under section 31(6) Highways Act 1980		The owner of land may at any time deposit with the County Council a map and statement indicating what (if any) ways over the land he admits to having been dedicated as highways. A statutory declaration may then be made by that landowner or by his successors

		<p>in title within ten years from the date of the deposit (or within ten years from the date on which any previous declaration was last lodged) affording protection to a landowner against a claim being made for a public right of way on the basis of future use (always provided that there is no other evidence of an intention to dedicate a public right of way).</p> <p>Depositing a map, statement and declaration does not take away any rights which have already been established through past use. However, depositing the documents will immediately fix a point at which any unacknowledged rights are brought into question. The onus will then be on anyone claiming that a right of way exists to demonstrate that it has already been established. Under deemed statutory dedication the 20 year period would thus be counted back from the date of the declaration (or from any earlier act that effectively brought the status of the route into question).</p>
Observations		No Highways Act Section 31(6) deposits have been lodged with the county council for the area over which the application route runs.
Investigating Officer's Comments		There is no intention by a landowner under this provision of non-intention to dedicate public rights of way over their land.

The affected land is not designated as access land under the Countryside and Rights of Way Act 2000 and is not registered common land. Much of the land crossed by the application route is however within the boundary of Williamson Park and has been held as public amenity space since 1997.

Land ownership

The land crossed by the application route between point A and point C and part of the length between point D and point E has been owned by Standen Country Park Limited since 2012 under Title LA795488.

The rest of the application route crosses land owned by Lancaster City Council under Title LA797749. It has been within their ownership since 1997. The land within this title is subject to a restrictive covenant not to be used except as "public amenity land" and there is a right reserved for the adjacent land (LA795488) to free and unrestricted access to enjoy its use as public amenity land.

Summary

There is no map or documentary evidence to support the view that public rights existed over the application route prior to 1997 when most of the land crossed by the route was transferred to the ownership of Lancaster City Council. However, much

(but not all) of the application route existed as a substantial route prior to this time which may have been available to the public and would support any user evidence submitted whose use pre-dated 1997.

Since 1997 most of the land crossed by the application route has been managed as public open space by Lancaster City Council and use of the application route would have been "by right" (not "as of right").

Head of Service – Legal and Democratic Services Observations

Information from the Applicant

In support of the application the following information was supplied by the applicant:

- Three user evidence statements.
- A modern map taken from the county council's MARIO mapping system on which the applicant had marked the route claimed.
- Undated copies of photographs taken showing sections of the route claimed and photographs of the information boards located adjacent to the route.
- A type written background statement.

Within the background statement the applicant explained it was their understanding that Lancaster City Council made Fenham Carr available for public access after it was acquired in 1998 by making it publicly accessible from Williamson Park via the gate at point I on the Committee plan.

They state that prior to – and since that time – it could already be easily accessed from Parkgate Drive (point A) and that residents of Standen Country Park Estate had a right of access into Fenham Carr under the terms of a Section 106 agreement dated 20 February 1997 made between the City Council, the Secretary of State for Health and Raven Close Nominees Limited.

The applicant drew attention to the fact that the agreement provided for the transfer to the City Council of the woodland (defined as a sloping area abutting Williamson Park) and included a covenant that the woodland would be retained by the Council as public amenity land and that the Council would provide free and unrestricted access to the woodland for all occupiers of the land at Lancaster Moor Hospital which now forms part of Standen Country Park Estate.

The applicant explains that in 2018 the City Council carried out public consultation on a development proposal which would comprise of wooden play structures and walkways and would be a pay to enter facility restricting access to parts of Fenham Carr and cutting across the application route and for that reason the application was made.

As already noted, three user evidence forms were submitted in support of the application, this user evidence is summarised below.

Duration of Use

Two of the users noted using the route from 1998 to the present day (forms were signed in November 2019) and the third recorded using the route from 1989 to 2019 (again, form signed in November 2019).

Frequency of Use

Two of the users recorded daily use of the route, the third recorded weekly use.

Reasons for Use

All three users recorded dog walking as a reason for using the route, one made additional mention of walking the route with their grandchildren.

Other Users of the Route

All users noted seeing others using the route on foot. In addition, one recorded others using the route on horseback, another noted use by cyclists and by park staff in motor vehicles.

Consistency of the Route

All three users specified that the application route had always followed the same route.

Unobstructed Use of the Route

All three users noted gates along the length of the route but did not record having been obstructed or having seen signs or notices restricting access.

Information from Others

Several statutory undertakers responded to consultations to state they had no objection to the application.

One, Stephen Townson, Right to Ride representative of Cycling UK, provided additional information based on his experience as a former NHS employee in the Works/Estates Department, based at the Lancaster Moor Hospital for several years. He notes familiarity with the route having walked the paths when a member of staff.

He stated that there has never been a public footpath over this land. The land was part of the Moor Hospital and when the Moor Hospital started to close the 'Old Side' was retained by the Department of Health and eventually was sold to a developer

who converted the listed buildings, demolished the remaining buildings and built new houses.

He went on to explain that the developer passed the remaining land, which could not be built on, to Lancaster City Council who used the land as an extension to Williamson Park, although it is his understanding that the 'Top Gate' (access onto Quernmore Road) and all of the drive now called Parkgate Drive remained in the ownership of the developer.

Mr Townson stated that most of the application route was in existence as a walk for patients and staff when the hospital was open, explaining that the path on the east side was a wide cobbled path that ran from the drive near the 'Top Gate' to the end of Fenham Carr and passed on the south east side of the fire reservoir. Mr Townson went on to note that it was possible to drive a maintenance vehicle from the 'Top Gate' all the way down to the end of Fenham Carr on this path and that the land at that time was private property.

Information from the Landowner

Lancaster City Council's response to our initial consultation is noted above. However, they subsequently provided further information to our legal officer.

They advised that the land forming the adjoining Williamson Park was appropriated by the City Council on 21st November 1878 to be a public pleasure ground under section 7 of the Public Health Act 1875.

Fenham Carr was acquired by the City Council on 20th February 1997. Minutes from the City Council's Planning Committee held on 11th November 1996 confirm an intention that Fenham Carr become an extension to Williamson Park.

The City Council's Adopted Policies Map shows Fenham Carr as being Open Space and their Local Plan confirms that Fenham Carr is designated as a Local Green Space due to its recreational value.

Williamson Park and Fenham Carr are jointly managed by Williamson Park Limited.

No information was provided by Standen Country Park Limited.

Assessment of the Evidence

The Law - See Annex 'A'

In Support of Making an Order:

- Map and other documentary evidence supporting the physical existence of the route
- User evidence of long use
- Absence of action taken by landowners to prevent use of the route

Against Making an Order:

- Volume of user evidence very low
- Use not 'as of right'
- Lack of intention to dedicate by landowners

Conclusion

As there is no express dedication, Committee is required to consider whether there is sufficient evidence from which a dedication of the application route can be deemed under section 31 of the Highways Act 1980 and/or inferred at common law.

For both tests, there is a requirement for any public use of the route being considered to be 'as of right', which is interpreted as being use by the public that is not by force, does not take place in secret and is not on the basis of permission of any kind.

With regards to deemed dedication under section 31, the route was called into question with the submission of the DMMO application form on 3rd January 2020. The retrospective twenty year period of use under consideration is therefore January 2000 – January 2020. All three users claim to have used the route for the vast majority of this period - up to the point they signed the user evidence forms in November 2019. Whilst there is evidence of use covering more or less the entire statutory period, the volume of users providing evidence is extremely low considering the location of the route within a public park. In the circumstances, the evidence of use is advised to be too low to be considered representative of the public at large and to evidence sufficient use beyond trivial and sporadic from which to deem dedication by the owners.

In the event that the volume of user evidence was considered sufficient, the requirement for that use to be 'as of right' is more than likely to prevent a finding of deemed dedication in any event.

Advice that use of the route was 'by right' stems from the evidence discovered from Lancaster City Council regarding the way in which the land crossed by the majority of the route is held by them. Williamson Park, which is adjacent to Fenham Carr, is held by the City Council as a public pleasure ground under the Public Health Act 1875. Fenham Carr was acquired by the City Council more than a century later, in 1997. We know from contemporaneous minutes of a meeting from that period that it was acquired to act as an extension to Williamson Park and has been subsequently managed as one with Williamson Park by Williamson Park Limited. We also know that the City Council intends for Fenham Carr to be used like a public pleasure ground as it has designated it as a local green/open space due to its recreational value. It is advised that it would be reasonable to infer from this information that Fenham Carr is most probably held by the City Council like its counterpart, Williamson Park, under the Public Health Act 1875 or, alternatively, under the Open

Spaces Act 1906. In either case, any use of the application route by the public on foot will have been 'by right', that is by virtue of the permission granted to them as a member of the public through the relevant legislation. Therefore, irrespective of the quantity of evidence from users, the use claimed cannot qualify for the purpose of establishing a public right of way through 'as of right' use.

Consideration must then be given to whether a dedication by the landowner can be inferred at common law.

It is suggested that during the period of Lancaster City Council's ownership of the land, pedestrian use of the route was 'by right' not 'as of right', as discussed above. Furthermore, documentary evidence from this period of ownership does not indicate that the owners intended dedicating highway routes. Accordingly, it is advised that no inference of a dedication of highway under common law can be drawn during the period since 1997.

It is suggested that the Committee ought next to consider whether the existence of a public footpath may be inferred under common law from all the circumstances prior to the City Council's acquisition of the land in 1997.

A relevant circumstance can be use of the route but here only one user claims to have used the route prior to 1997. That user had used the route for weekly dog walks from 1989 when the land was owned by Moor Hospital. She states that the porters in the porters' lodge on Quernmore Road never used to stop her accessing the grounds and that many hospital staff and patients also used the grounds. As we have only been presented with one user evidence form for the period pre-1997 and we have seen representations from an ex-employee of Moor Hospital which suggests a lack of intention to dedicate by the landowner, it would be very difficult to draw a reasonable inference that in the past the landowners intended to dedicate the route as a public footpath and that the public accepted it as such.

Historical documentary evidence prior to 1997 is considered above and it is advised that there is insufficient evidence from which to infer dedication by the owners.

Committee is therefore advised that none of the circumstances support an inference of a dedication of highway under common law at any point prior to the submission of the application.

In conclusion, and having considered all of the evidence discovered, a dedication of a public footpath along the application route can neither be deemed under section 31 of the Highways Act 1980 nor inferred at common law. Accordingly, Committee is advised to reject the application and not make an Order adding a public footpath to the Definitive Map and Statement.

Risk management

Consideration has been given to the risk management implications associated with this claim. The Committee is advised that the decision taken must be based solely on the evidence contained within the report, and on the guidance contained both in the report and within Annex 'A' included in the Agenda Papers. Provided any

decision is taken strictly in accordance with the above then there is no significant risks associated with the decision making process.

Alternative options to be considered - Accept the application and make an Order recording a public footpath over some, or all, of the application route.

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

Paper	Date	Contact/Directorate/Tel
All documents on File Ref: 804-615		Simon Moore, 01772 531280, County Secretary and Solicitors Group

Reason for inclusion in Part II, if appropriate

N/A