

Regulatory Committee

Meeting to be held on 24th January 2024

Part I

Electoral Division affected:
Pendle Rural

Wildlife and Countryside Act 1981
Definitive Map Modification Order Investigation
Addition of Footpath at Cotton Tree, Colne
(Annex 'A' refers)

Contact for further information quoting file reference 804-726:
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Brief Summary

Addition to the Definitive Map and Statement of Public Rights of Way of a Footpath from Cotton Tree Lane, Colne to 13-04-FP202.

Recommendation

- (i) That the application for the addition to the Definitive Map and Statement of Public Rights of Way of a Footpath from Cotton Tree Lane, Colne to 13-04-FP202 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 record a Footpath from Cotton Tree Lane, Colne to 13-04-FP202 on the Definitive Map and Statement of Public Rights of Way.
- (iii) That being satisfied that the higher test for confirmation can be met the Order be promoted to confirmation.

Detail

An application under Schedule 14 of the Wildlife and Countryside Act 1981 has been received for the addition to the Definitive Map and Statement of Public Rights of Way of a Footpath from Cotton Tree Lane, Colne to a junction with 13-4-FP202.



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.

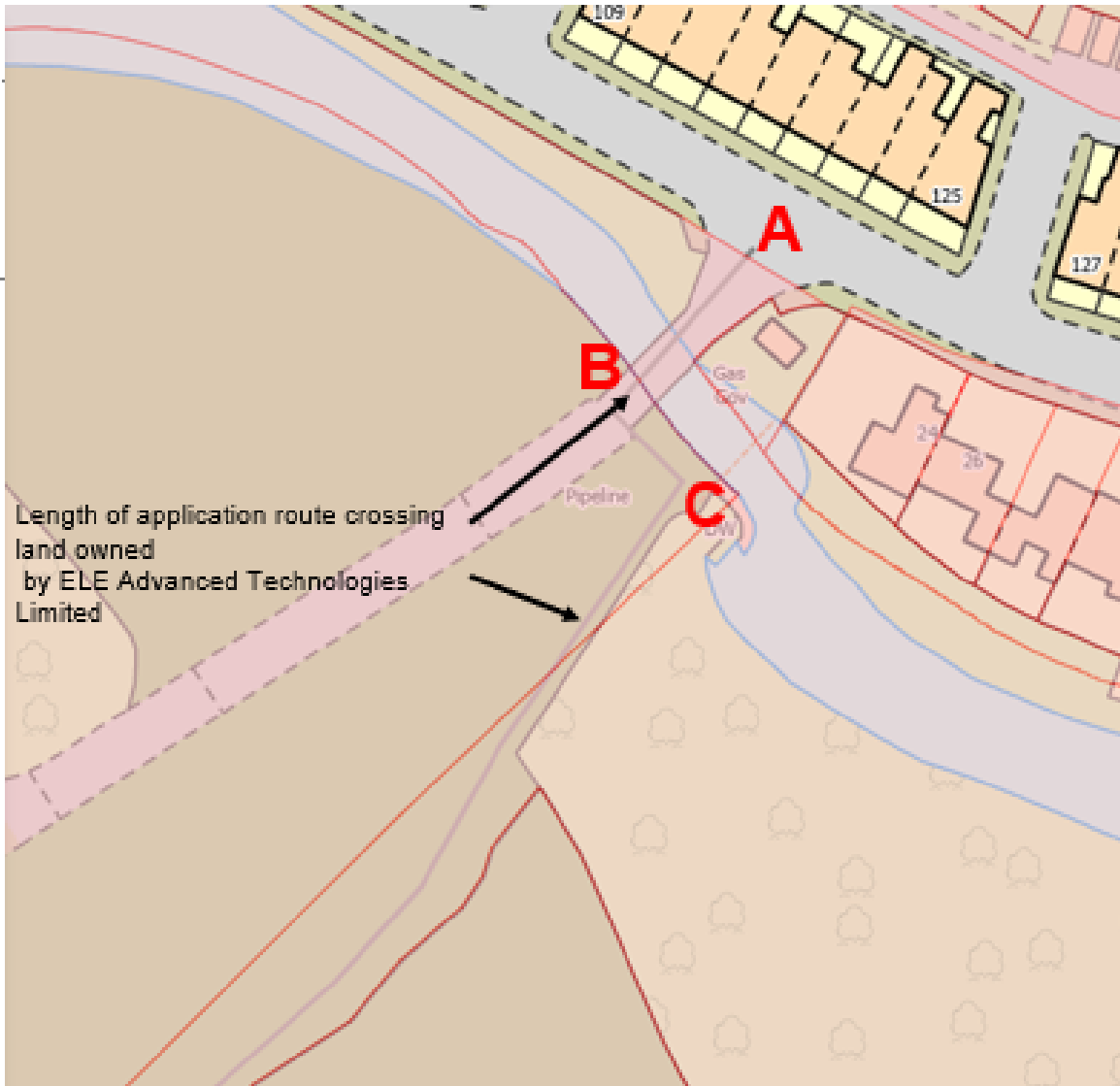
The county council’s decision will be based on the interpretation of the evidence discovered by officers and documents and other evidence supplied by the applicant, landowners, consultees and other interested parties produced to the County Council before the date of the decision. Each piece of evidence 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

Pendle Borough Council

The Borough Council own all the land crossed by the application route with the exception of the bridge and a short section as shown below:





The Public Rights of Way and Countryside Access Officer has been in his current role at Pendle Borough Council since 1999 and as a result has explained that he has a good knowledge of access provision throughout the area.

He became aware of the footpath in question in recent years and has walked along it on a number of occasions – probably none of these more than 5 years ago. He explained that he had observed features of the path on Pendle Borough Council land which appeared to have been constructed for use as a footpath, for example bridges, stiles, steps and path edgings. He noted that these are old structures which are now in very poor condition and considers it likely to him that these features have existed since before he started as the Countryside Access Officer, both because they appear to be more than 23 years old and because in all likelihood he would have been aware of the construction work if it had taken place while he was in post.

He also commented that the footpath appeared to be well-used judging by the well-trodden paths and that he would be very surprised if use as of right as a footpath had been taking place for less than 20 years.



He checked a database which he keeps on public rights of way enquiries and the first such record for this path was relatively recent and consisted of an enquiry about adding the path to the Definitive Map.

The Borough Council have explained that the bridge crossed by the application route between point A and point B is owned by ELE Advanced Technologies Limited although it is on land owned by the Borough Council. The Borough Council received a planning application in 2022 (Ref 22/0453/FUL) for the erection of 50 residential dwellings which involves the use of the bridge as an access.

In addition to the above, Pendle Borough Council responded to formal consultation by providing a map showing the land in their ownership.

Colne Town Council

Colne Town Council provided no response to consultation.

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.

Advice

Head of Service – Planning and Environment

Points annotated on the attached Committee plan.

Point	Grid Reference (SD)	Description
A	9041 4012	Open junction with Cotton Tree Lane
B	9040 4011	Route turns southeast to leave the tarmac roadway which provides access to ELE Advanced Technologies Limited
C	9040 4010	Route turns southwest away from Colne Water to continue through woodland.
D	9018 3985	Junction with 13-04-FP202

Description of Route

A site inspection was carried out in April 2022.

The application route commences on the south side of Cotton Tree Lane (point A on the Committee plan) opposite a row of terraced houses 109-125 Cotton Tree Lane.

The route runs in a south westerly direction along the tarmac access road which crosses Colne Water via a substantial vehicular bridge and provides access to an industrial site currently owned by ELE Advanced Technologies Limited (ELE).



Access to the factory is controlled by gates but immediately prior to the gates (at point B on the Committee plan) a well-trodden footpath fenced off between the banking of Colne Water and the factory site runs in a south easterly direction parallel to Colne Water for a distance of approximately 10 metres before turning in a south west direction away from the watercourse (point C).

The well-trodden path then continues in a generally south westerly direction through an area of woodland with evidence in places that the path may have previously had work on it – as there are the remains of edging boards and some wooden steps up a shall slope.

Having passed to the north of a small, excavated pond the trodden route comes out of the woodland to cross an area of open grass to connect to 14-4-FP202 at point D.

On the day that the route was inspected several people were seen walking along it. There were no signs indicating whether the route was public or private and it was clearly very well used and linked into a network of well used public footpaths.

The total length of the route is 375 metres.

Map and Documentary Evidence

This application was submitted based on 'modern' user evidence and the route does not appear to have come into existence until a bridge was erected across Colne Water as shown between point A and point B on the Committee plan. Land Registry information suggests that the bridge was erected sometime after 1971 and no maps or photographs inspected prior to that time show the bridge.

For this reason, maps and documents predating the 1970s – whilst having been checked by the Investigating Officer – are not included in this report as the route cannot have existed until access was available across Colne Water and there is no evidence to suggest that before that time a different route to/from Cotton Tree Lane was being used.

Most of the land – except for a short stretch located from point B and shown on a plan inserted earlier in this report - is owned by Pendle Borough Council after the land was purchased by Colne Corporation in the late 1960s/early 1970s as part of a proposal to construct a road bypassing Colne through the valley. The purchase included the farm (Carry Heys) which was located at point D and which was demolished at some point before the 1990s. The road was never built and the land purchased by the council is now largely tenanted.

Following the initial purchase of the land it appears that part was sold to Mal Tool and Engineering Company who were given the right to construct and maintain a bridge to access their land from Cotton Tree Lane. The factory was built – together with the bridge across Colne Water – which was constructed on land now owned by the Borough Council but the bridge itself is in the ownership of the factory. At some point in the 1990s the council planted a woodland in the valley and a footpath, which was accessed via the entrance to the factory site and across the bridge now owned by ELE, was marked out and constructed presumably by the owner, the Borough Council, through the new woodland to provide a link from Cotton Tree Lane through



to the existing network of public footpaths converging at the site of Carry Heys (point D on the Committee plan). This work was it seems carried out by Pendle Borough Council but it predated the employment of the current Countryside Access Officer who has been unable to find any further details.

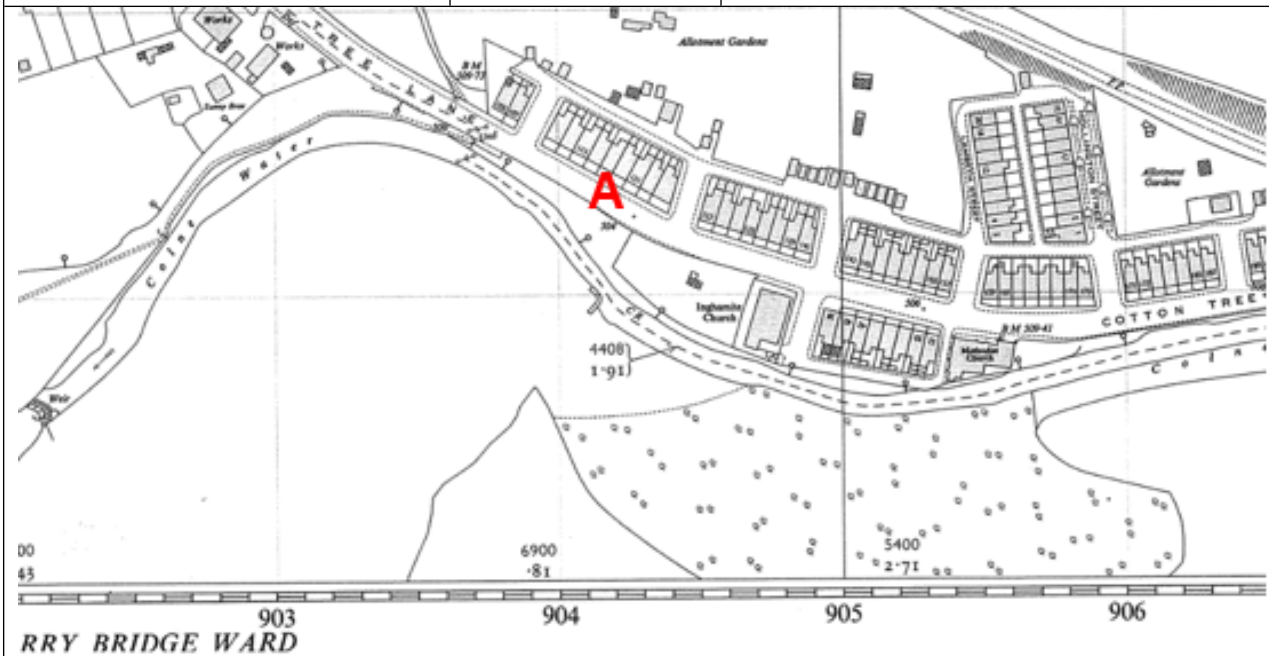
Document Title	Date	Brief Description of Document & Nature of Evidence
Aerial photograph	Circa 1963	Aerial photography flown during the 1960s. The coverage is a mosaic of various flight runs on the following dates: 12-13th May 1961, 1st Jun 1963, 3-4th June 1963, 11th June 1963, 13th June 1963, 30th July 1963, 13th June 1968. The majority of images are from 1963, with the 1961 images mainly covering West Lancashire district, and the 1968 images mainly covering Ribble Valley district.



Observations		The application route is not shown. There is no access across Colne water from point A and the factory that exists today is not shown. Carry Heys Farm is shown at point D with a farm access track leading from the farm in a north easterly direction broadly consistent with part of the application route but a route through to point A is not shown.
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Investigating Comments	Officer's		The application route did not exist in 1963.
Ordnance Survey (OS) 1:2,500 Maps SD 9039 and SD 9040	1963		Further edition of 25 inch map reconstituted from former county series and revised in 1962 and published in 1963 as National Grid Series.



Observations			OS map revised and published around the same time as the aerial photograph above. The application route is not
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		shown and there is no access across Colne Water from point A.
Investigating Officer's Comments		The application route did not exist in 1963.
OS 1:50,000 Map Landranger 103 Blackburn, Burnley & surrounding area	1989	OS Map revised 1989, reprinted with selected changes 1990-93 and major roads revised 1994.
		
Observations		The factory and roadway – including the bridge – which provided access to the factory are shown. The application route is not shown, and Carry Heys Farm is not marked on the map.
Investigating Officer's Comments		Access across the river from point A was available by 1989 but the application route probably did not exist at this time.
Aerial Photographs	2000-2018	Aerial photograph available to view on Google Earth Pro.





2000



2002





2009



2011





2018

<p>Observations</p>		<p>The aerial photographs show that by 2000 the factory and bridge providing access to it from point A had been built. The woodland crossed by the application route looks to have been planted and the farm at point D no longer existed. A faint route consistent with a route used on foot can be seen sporadically between point A and point D.</p> <p>By 2002 the woodland was beginning to grow and a route consistent with footpath use can be more clearly seen between point A and point D.</p> <p>In 2009 and 2011 the route can again be seen through the woodland but by 2018 the woodland had matured and the route was no longer very visible.</p>
<p>Investigating Officer's Comments</p>		<p>The application route may have existed by 2000.</p>
<p>Google Street View Images</p>	<p>2008-2018</p>	<p>Google Street View Images available to view online.</p>





Point A – 2008



Point A – 2009





Point A - 2016



Point A – 2018

Observations		Photographs taken between 2008 and 2018 all show the application route from point A with access unrestricted across the bridge to point B.
Investigating Officer's Comments		Access onto the application route at point a was available between 2008 and 2018 and appears not to have altered during that time.
Ordnance Survey 1:25 000 Outdoor Leisure 21 South Pennines	1996	OS map 1:25 000 map revised and published in 1996.





Observations		Access across Colne Water to the factory is shown from Cotton Tree Lane but the application route is not shown.
Investigating Officer's Comments		Access to the application route existed at point A but the route through to point D is not shown suggesting that even if access was available, it did not exist as a trodden route at that time.
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>
Observations		There is no evidence to suggest that the application route existed in the 1950s or the 1960s when the Definitive Map was prepared and published. It is therefore not surprising to find that the route was not included on the Draft, Provisional and Definitive map.
Revised Definitive Map of Public Rights of Way (First		Legislation required that the Definitive Map be reviewed, and legal changes



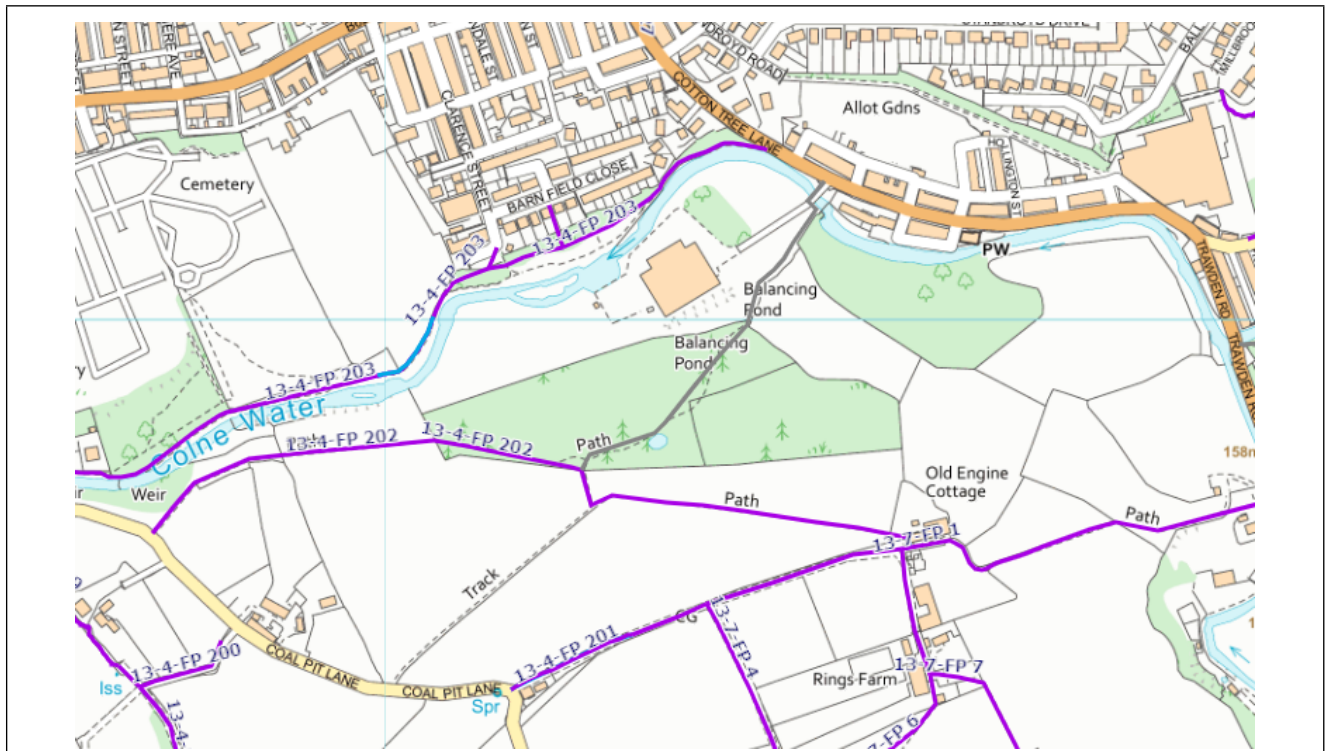
Review)

such as diversion orders, extinguishment orders and creation orders be incorporated into a Definitive Map First Review. On 25th 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 1st 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.



Extract from the Revised Definitive Map (First Review)





Digitised working copy of the Definitive Map showing routes recorded as public footpaths denoted by a purple line and the approximate line of the application route shown with a grey line

<p>Observations</p>		<p>The application route is not recorded as a public right of way on the Revised Definitive Map (First Review). It will be noted that part of 13-4-FP202 extending east to Carry Heys and continuing to the parish boundary is not shown on the Revised Definitive Map either. That route was found to have been omitted in error and was added to the Definitive Map by a Definitive Map Modification Order made in 2016 and confirmed the following year (2017). The full length of 13-4-FP202 is shown on the digitised working copy of the Definitive Map.</p>
<p>Investigating Officer's Comments</p>		<p>The application route was not considered to be a public right of way which should be recorded on the Definitive Map during the preparation of the First Definitive Map in the 1950s through to the 1960s.</p>
<p>Highway Adoption Records including maps derived from the '1929 Handover Maps'</p>	<p>1929 to present day</p>	<p>In 1929 the responsibility for district highways passed from rural district councils, and later from urban district and borough councils, to the County</p>



		<p>Council. For the purposes of the 1929 transfer, public highway 'handover' maps were drawn up to identify all of the rural district maintained 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 a highway maintainable at public expense in the county councils' records.
Investigating Officer's Comments		The fact that the route is not recorded as a publicly maintainable highway on the List of Streets does not mean that it does not carry public rights of access so no inference can be drawn.
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 records relating to the stopping up, diverting or creation of public rights along the route were found.



Investigating Comments	Officer's	If any unrecorded public rights exist along the route they do not appear to have been stopped up or diverted.
Statutory deposit and declaration made under section 31(6) Highways Act 1980		<p>The owner of land may at any time deposit with the County Council a map and statement indicating what (if any) ways over the land he admits to having been dedicated as highways. A statutory declaration may then be made by that landowner or by his successors in title within ten years from the date of the deposit (or within ten years from the date on which any previous declaration was last lodged) affording protection to a landowner against a claim being made for a public right of way on the basis of future use (always provided that there is no other evidence of an intention to dedicate a public right of way).</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 1980 Section 31(6) deposits have been lodged with the county council for the area over which the application route runs.
Investigating Comments	Officer's	There is no indication by the landowners under this provision of non-intention to dedicate public rights of way over this 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.



Summary

The application route did not appear to have existed until the 1990s although access from Cotton Tree Lane over Colne Water may have been available before that time. The aerial photographs, Google Street View photographs and site evidence all support the user evidence submitted.

Head of Service – Legal and Democratic Services Observations

Landownership

Pendle Borough Council own all of the land crossed by the application route with the exception of a short section across the bridge and from point B to just after point C, which is owned by ELE Advanced Technologies Limited.

Information from the Applicant

The Applicant provided the following supporting information:

1. A map showing the application route.
2. 10 photographs of the application route at various points.
3. Three user evidence forms (completed in 2021).
4. A further five user evidence forms (completed in 2022)

Duration of Use

The user evidence forms collectively provide evidence of use going back to 1990 and up to 2022.

It must be noted that three user evidence forms were submitted in 2021 and a further five were submitted in 2022. The relevant period for this matter is 20 years from when the application was submitted (2021). Therefore, although there is evidence of use in 2022, this cannot be considered when looking at the 20 year period as the application was the calling into question of the route in 2021.

The relevant period for this matter is 2001-2021. Two of the users used the route for over 20 years, which includes using the route for the full duration of the relevant period. The remaining six users all used the route during these 20 years. During this period, the use varied from one year to 15 years.

Frequency of Use

All eight users stated they used the route on foot. Two stated they used the route monthly, one said they used the route bi-weekly, four stated they used the route weekly (one said this was less frequent during winter) and one said they used the route daily.



Reasons for Use

The majority of the users stated their purpose of use was pleasure. Other more specific reasons for use included, dog walking, jogging, exercise and an alternative route to Colne Town centre.

Other Users of the Route

All users recorded having seen others using the route. Two users said they regularly saw other users and most users said they saw walkers and dog walkers.

Consistency of the Route

Six of the eight users said the route had always followed the same route and the two other users said they did not know.

Unobstructed Use of the Route

None of the eight users recalled having been prevented from using the route. One user stated there was a locked gate, but they climbed over it.

All of the users had seen no signs or notices restricting or prohibiting access on the route.

Three users stated there had been stiles on the route. One user said there was a gate on the route, at the top of the field. None of the eight users recalled any barriers on the route.

Information from Others

Cadent Gas responded to consultation to state that they had no objection to the application.

Openreach responded to consultation by requesting more information. They were informed there were no works taking place and a nearby postcode to the route was provided.

Atkins (working on behalf of Vodafone) responded to consultation to state Vodafone does not have apparatus within the boundary of the application route.

Information from the Landowner

In addition to being the Borough Council for the area, Pendle Borough Council are also landowners for this application, their response to consultation and comments have already been noted earlier in the report under 'Consultations'.

The other landowner, ELE Advanced Technologies Limited, provided no response to consultation.

Assessment of the Evidence

The Law - See Annex 'A'



A highway can be created following dedication by an owner. Where there is no such express dedication, as is the case here, Committee is asked to consider whether there is sufficient evidence, on balance, from which dedication can be inferred at common law or if the criteria in Section 31 of the Highways Act 1980 are met.

By virtue of the test under Section 31 of the Highways Act Committee is advised to look to see whether dedication can be inferred from use of the way by the public, as of right and not secretly, not by force or with permission without interruption for a full period of 20 years, immediately prior to the route being called into question. This presumption can be rebutted if there is sufficient evidence that there was no intention on the part of the landowner during this period to dedicate the route as a public right of way.

Committee is referred to the details of and assessment of the documentary evidence concerning this route and the summary prepared by officers in the Public Rights of Way Team. The evidence submitted by the applicant, users and Pendle Borough Council, the landowner for the majority of the application route, are supportive of the existence of the route. There is some modern user evidence which supports use of the route which covers the relevant 20 year period immediately preceding the application; of which 2 have used for the full 20 year period and the remaining 6 have used for varying lengths of between 1-15 years. The maps exhibited support the existence of a route which can be seen to varying degrees through the developing woodland. There is no evidence that anyone has encountered any locked gates, barriers or signage along the route to indicate any evidence that the landowner had no intention to dedicate this route.

Use of the route must be by a sufficient number of people who together may sensibly be taken to represent the public at large. Committee may consider that a low number of users have provided evidence for the full 20 year period and that these users of the route are not representative of the public at large and therefore the evidence does not raise a presumption of dedication of a footpath and fails to satisfy the statutory test. However, Committee should note the evidence of more historical use by virtue of the existence of old bridges, stiles, steps and path edgings and the route is described as being well trodden indicative of a wider use and weight attributed accordingly. Evidence of use from a trodden line is difficult but there is some public use of the route to indicate that the trodden line is on balance likely to be other members of the public and that this use is likely to have been for many years.

Turning next to looking at dedication of a highway at common law; it is advised that Committee must consider whether evidence from the maps and other documentary evidence, coupled with the evidence on site and user evidence, indicates whether it can be reasonably inferred that in the past the landowners intended to dedicate the route as a public right of way and the public have accepted it. Use of the route by the public must be as of right and there is no fixed period of use or particular date from which use must be calculated retrospectively. Committee will note the construction of the route through the Borough Council woodland to join other public rights of way which suggests an intention and no action taken by the owners to stop public use of this route. Common law inference of a dedication can be difficult to prove but given the knowledge of Pendle officer and the construction and trodden line evidence,



Committee may consider that it can be reasonably alleged that the owners intended a public footpath on this line.

In conclusion, taking all of the evidence into account, the Committee on balance may consider that the provisions of section 31 of the Highways Act 1980 can be satisfied. In addition, or in the alternative, Committee may also consider that it can be reasonably alleged that there is sufficient evidence from which to infer dedication of a public footpath at common law. Committee are asked to consider whether they are satisfied there is sufficient evidence from which to infer dedication as outlined above and if so to make the Order as set out within the Recommendation at the beginning of the report.

Committee is also asked to consider whether they are satisfied that the footpath dedication evidence is such that a footpath can on balance be found to subsist and that it be promoted to confirmation in due course. It is suggested in this matter that Committee may be satisfied and officers be instructed to promote any Order made to confirmation.

Implications

This item has the following implications, as indicated:

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.

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

Paper	Date	Contact/Directorate/Tel
All documents on File Ref: 804-726		Annabel Mayson, 01772 533244, Legal and Democratic Services

Reason for inclusion in Part II, if appropriate

N/A

