

TRO Panel

Decision Maker: Director of Environment, Nasir Dad

Date of Decision: 19 January 2023

Subject: Definitive Map and Statement Modification Order

S53 – Wildlife and Countryside Act 1981. Claim to register a Public Footpath between Dobcross New Road and Mow Halls Lane, Dobcross

Report Author: Liam Kennedy PRow Officer

Ward: Saddleworth North

Reason for the decision: To determine an Application submitted under Schedule 14 of the Wildlife and Countryside Act 1981 (the 1981 Act), requesting that a Modification Order be made in respect of a route running between Dobcross New Road and Mow Halls Lane, Dobcross (the application route), which is shown on the attached location plan 764/A4/235/1.

Summary: The Council has a duty to investigate and determine applications for Modification Orders submitted under the 1981 Act.

The Application has been received in respect of the application route which is claimed as a Footpath through use of the route by the public for more than 20 years.

Applications based on use by the public for more than 20 years must meet the legal tests for use 'as of right', which means use without secrecy, without force and without the permission of the landowner.

The Application is supported by User Evidence Forms, completed by 34 individuals who claim to have used the application route for periods ranging between 23 and 70 years until the bridge closure in 2015 without challenge, although some

user evidence forms claim continued use until 2019.

The application route is not recorded on the Definitive Map and Statement for the area and was not identified on either the draft or provisional maps prepared in the early 1950's.

The evidence in support of and against the Application must be considered and the Application determined in line with legal requirements as described in paragraph 1.3 of this report.

Background

1. The application was submitted by John Walton of The Ramblers Association on 21st June 2022. The application is supported by 34 user evidence forms and maps.
2. The basis on which the Application needs to be considered

The evidence in support of the application comprises of user evidence which needs to be considered against the statutory provisions in section 31 of the Highways Act 1980 (the 1980 Act) concerning dedication of a highway through 20 years' usage.

Under section 31 of the 1980 Act, a way is deemed to have been dedicated as a highway after 20 years use by the public unless there is evidence of a contrary intention. In order to establish a presumed dedication under this section, each element in the wording of section 31(1) and (2) needs to be proved on the balance of probabilities.

“(1) Where a way over any land, other than a way of such a character that use if it by the public could not give rise at common law to any presumption of dedication, has been actually enjoyed by the public as of right and without interruption for a full period of 20 years, the way is to be deemed to have been dedicated as a highway unless there is sufficient evidence that there was no intention during that period to dedicate it.

(2) The period of 20 years referred to in subsection (1) above is to be calculated retrospectively from the date when the right of the

public to use the way is brought into question, whether by a notice such as is mentioned in subsection (3) below or otherwise”.

(3) Where the owner of the land over which any such way as aforesaid passes:-

(a) has erected in such a manner as to be visible by persons using the way a notice inconsistent with the dedication of the way as a highway; and

(b) has maintained the notice after the 1st January 1934, or any later date on which it was erected,

the notice, in the absence of proof of a contrary intention, is sufficient evidence to negative the intention to dedicate the way as a highway.”

To make a Modification Order to add the Claimed Footpath to the Definitive Map the Council needs to decide whether an event under section 53 of the 1981 Act has occurred. If so, a Modification Order should be made. The “events” which are relevant to this application are those in s53(3)(b) and s53(3)(c)(i) of the 1981 Act. These provisions can overlap. “The discovery of evidence which shows that a right subsists or is reasonably alleged to subsist” under s53(3)(c)(i) can include the discovery that the period of user required to raise a presumption of dedication has expired. Thus, where an application is made for the addition of a path on the grounds of user for a requisite period, the application can be for an Order either under s53(3)(b) and/or under s53(3)(c)(i). An important difference between s53(3)(b) and s53(3)(c)(i) should be noted. The former does not contain words “reasonably alleged”. Unless the period has without doubt expired, the subsection does not apply. Under the latter, it is sufficient if it is no more than reasonably alleged that the way exists as a public right of way.

Proposal

The claimed route is shown on the attached plan (764/A4/235/1).

The route leaves Dobcross New Road at Point A (OS GR SD98996, 06377) and follows the tarmac surfaced path south east (with playground and bench on your right) and then east for a distance of 226 metres running adjacent to the recreation ground where the path is narrower and includes a

bench to Point C (OS GR SD99213, 06367). The route then crosses the (currently closed) footbridge and follows a generally south-easterly direction to Point D (OS GR SD99535, 06264) at Mow Halls Lane for a distance of 380 metres. Along this section of route the car park at Newbank Garden Centre must be traversed where the pedestrian route is marked out on the tarmac leading to a stile.

The claim also consists of an additional branch leaving Dobcross New Road at Point B (OS GR SD99159, 06391) heading south east for a distance of 61 metres to join the rest of the claimed route at Point C (OS GR SD99213, 06367).

Photographs of the claimed route are attached at Appendix 1.

What are the alternative option(s) to be considered? Please give the reason(s) for recommendation(s):

Option 1: To approve the application and add the claimed route to the Definitive Map and Statement as a footpath.

Option 2: Not to approve the application.

Consultation: including any conflict of interest declared by relevant Cabinet Member consulted

Ward Councillors have been consulted and Councillor L Lancaster – In favour of Option 1. Councillor would like to address panel. Councillor P Byrne – In favour of Option 2.

Recommendation:

It is recommended that:

1. The application for a Modification Order in respect of a route running between Dobcross New Road and Mow Halls Lane, Dobcross to be recorded in the Definitive Map and Statement as a footpath be rejected, because use of the route has not been 'as of right', as part of the route has been used 'by right' i.e. with the permission of the landowner
- 2.. The Applicant be notified of the Council's decision and of his right of appeal under Schedule 14 of the 1981 Act.

The preferred option is Option 1 as the claim does not meet the required legal test of 20 years use of the whole of the claimed route 'as of right'.

Implications:

*What are the **financial** implications?*

Due to the decision to reject the application as detailed in the recommendations, there would be no cost to the Service for a modification order.

In the event of a successful decision in favour of the Applicant, annual maintenance costs for the footpath will be met from the Highways Public Rights of Way budget. If there are pressures in this area as the financial year progresses, the Directorate will have to manage its resources to ensure that there is no adverse overall variance at the financial year end.

(John Edisbury)

*What are the **legal** implications?*

Under section 53 of the 1981 Act, the Council is required to make a Modification Order amending the definitive map and statement where it appears requisite in consequence of the discovery by the Council of evidence which (when considered with all other relevant evidence available to them) shows that a right of way which is not shown in the definitive map and statement subsists or is reasonably alleged to subsist over land in the area to which the definitive map relates, being a right of way such that the land over which the right subsists is a public path (ie a footpath or bridleway) or a restricted byway.

The burden of proof on establishing that the application route is a footpath lies with the claimant. The evidence submitted by the claimant is sufficient evidence of 20 years usage of the claimed route by the public. However the evidence does not establish that usage of the whole of the claimed route has been 'as of right', as it passes through two areas of public open space which the public have been invited to use (ie usage with permission - 'by right'). The Supreme Court in the case of R. (on the application of Barkas) v North Yorkshire County Council and Scarborough Borough Council (2014) confirmed that a playing field which had been acquired by a local authority under the Housing Act 1936 and thereafter maintained as a recreation ground had been appropriated for the purpose of public recreation. Since the local authority had an express statutory power to maintain the field for recreation purposes, local inhabitants using the field had been doing so 'by right' and not 'as of right'

As the usage of the whole of the claimed route has not been 'as of right', the legal requirement for the presumption that a route should be considered to be a highway has not been met and the claim should be

rejected. The applicant has a right of appeal to the Secretary of State against the Council's decision not to make a Modification Order under Schedule 14 of the Wildlife and Countryside Act 1981. Any appeal must be made by the applicant within 28 days after service on him of notice of the Council's decision. (A Evans)

What are the **procurement** implications?

None

What are the **Human Resources** implications?

None

Equality and Diversity Impact Assessment attached or not required because (please give reason)

Not applicable

What are the **property** implications

None

Risks:

None

Co-operative agenda

Not applicable

Has the relevant Legal Officer confirmed that the recommendations within this report are lawful and comply with the Council's Constitution?

Yes

Has the relevant Finance Officer confirmed that any expenditure referred to within this report is consistent with the Council's budget?

Yes

Are any of the recommendations within this report contrary to the Policy Framework of the Council?

No

Analysis of Claim

The evidence submitted in support of the Application consists of User Evidence Forms completed by various individuals. In total 34 completed Right of Way Evidence Forms have been received in support of the Application.

It can be seen from the summary of User Evidence at Table A below that:-

A number of people claim to have used the application route, all are local people.

Of those persons completing Evidence Forms the existence of various signage is noted including 'no dog fouling', 'no horse riding', 'Tameside Trail',

'Unsafe Bridge' as well as surface painted pedestrian signs at Newbank Garden Centre Car Park.

None of the persons who completed a User Evidence form have indicated that they ever sought or were granted permission to use the application route. No User Evidence forms indicate users having being stopped or turned back from using the claimed route.

The periods of use range from 23 to 70 years, with the earliest use being 1949. For those persons who have used the application route, the frequency of their use is high.

Mr Walton has queried the Council's recommendation that the application be refused on the grounds that use of the claimed route has been 'by right' rather than 'as of right'. He has submitted further evidence identifying 18 definitive paths created under what he alleges are similar circumstances to those which apply to his claim.

However, every addition to the Definitive Map must be considered on its own merits against the relevant legal tests. It has not been possible to comment on historical additions to the Definitive Map as we are unaware of the circumstances under which these additions were made. This current claim has been assessed against the legal tests, using the evidence provided.

The Applicant has applied for an Order to be made to add the application route of the Definitive Map and has submitted user evidence. The Council has to decide what it considers are the correct facts, and on the basis of those facts, whether an event under s 53(3)(c)(i) has occurred.

Use of the way is not in itself enough – it is the nature of such use that has to be established. All the provisions of section 31 of the 1980 Act, together with the common law rules need to be carefully considered.

a) "use by the public"

Whilst the user evidence submitted comes mainly from residents who live in the area that does not mean that the use cannot be regarded as "use by the public"

In the case of R v Inhabitants of Southampton 1887 it was held that use by the public "must not be taken in its widest senses; it cannot mean that it is a use by all the subjects of the Queen, for it is common knowledge that in many cases it is only the residents in the neighbourhood who ever use a particular road"

Use by those persons who completed User Evidence forms should be regarded as “use by the public”.

(b) “use as of right”

There has been signage in place (precise dates unknown) informing people ‘no dog fouling’ and ‘no horse riding’ indicating that the route is in use by users. This can be considered to be evidence of control of the use of the route.

None of those persons who completed User Evidence Forms have indicated being challenged themselves, except for being prevented from walking the route upon the closure of the footbridge in 2015.

Sections at the western and eastern ends of the claimed route run through land owned by Oldham Council (Asset 554 ‘Woolpack Playing Fields’ to the west and Asset 1918 Site of former Brownhill Nature Gardens to the east) which is laid out for recreation purposes. The presence of leisure facilities (i.e. play facilities, benches, and laid out paths) is indicative of permissive use granted by the landowner.

The recreation ground (Asset 554) and laid out path including benches is immediately to the rear of the properties 1-49 Dobcross New Road on OMBC Asset Number 554. It is noted that there is no barrier or fence line to delineate the claimed route from the existing recreation ground therefore it can be reasonably assumed the already laid out paths are part of the recreation ground for which there is permissive use to the public. The crushed stone surfaced path continues through Asset 1918 along which there is also evidence of bins provided for public use. Environmental Services confirm both Assets to be public open spaces which the public are permitted use.

Consequently the public has been invited by the Council to use the land through which the claimed route passes i.e. the use of the land by the public has been with the consent of the landowner – ‘by right (with permission) rather than ‘as of right (without permission). Therefore, although the use by those who completed User Evidence Forms appears to have been open and without force, in respect of part of the claimed route, the use has been with the permission of the landowner. Therefore the legal test for use of the whole claimed route ‘as of right’ has not been met. This is the case for the route A-C-D which passes through the public open space at both ends of the route and also for the route B-C-D which passes through the public open space at western end of the route (point D).

(c) “period of 20 years to be calculated retrospectively from the date when the right of the public to use the way is brought in question, whether by a notice such as is mentioned in subsection (3) below or otherwise”

It is considered that the date when the public’s right was first called into question was when the footbridge was closed in 2015. The period of consideration (for the purposes of presumed dedication under section 31 of the 1980 Act) has, therefore, been taken from 1995 to 2015.

The use described in the User Evidence Forms extends throughout that period.

(d) “without interruption”

An interruption has been defined as the actual and physical stopping of the use of a way by the landowner or their Agent. Moreover, such interruption must be with the intention to prevent public use. It is not sufficient if the interruption is for some other purpose.

(e) “unless there is sufficient evidence that there was no intention during that period to dedicate it”

There have in recent years been numerous legal rulings on what constitutes “sufficient evidence” that there was no intention to dedicate a highway. The leading case is *Godmanchester*, which was considered by the House of Lords in 2007. In that case the House of Lords ruled that the words “unless there is sufficient evidence that there was no intention during that period to dedicate” in s31(1) of the 1980 Act requires landowners to have communicated to users their lack of intention to dedicate and that must have been communicated at some point(s) during the 20 year period of use by the public.

For dedication at common law to arise the onus is on the Applicant to prove that intention.

It is noted that on the Conveyance document relating to the purchase of the parcel of land at the western end of the route (known as ‘Woolpack Playing Fields’) in 1955, Oldham Council (then Saddleworth Urban District Council) specifically purchased this plot of land ‘for the purposes of a park and playing fields in pursuance of their powers under the Physical Training Act 1937’.

It is also noted on the Conveyance document relating to the purchase of the parcel of land to at the eastern end of the route (known as ‘Brownhill’) in 1988 that Oldham Council purchased this plot of land and ‘the said land shall be used as amenity land for the benefit

of the general public and for no other purpose whatsoever’.

As both land purchases were made under the condition of their use as ‘recreation’ and ‘amenity’ land, this evidence further supports the existing permissive use by the public of sections of the claimed route at both the eastern and western ends. Walking on the land along specifically laid out paths would constitute use by the public in accordance with the terms on which the land was acquired.

Further evidence of the permissive use can be found documented on a bridge inspection report of the now closed footbridge (BR459) from 1996 by David Martin. On page. 7 of the inspection report it is noted by (then) Public Rights of Way Officer Terence Cavanagh that the structure is on a permissive path and the responsibility of (then) Leisure Services.

Table A

Summary of User Evidence

User	Usage From-To	Years	Frequency p/a	Purpose	Permission
1	1984-2015	31	3	Recreation	No
2	1987-2015	28	40	Recreation	No
3	1981-2015	34	104	Recreation	No
4	1955-2015	60	104	Recreation	No
5	1986-2015	29	365	Recreation	No
6	1986-2015	29	365	Recreation	No
7	1991-2015	24	40	Recreation	No
8	1982-2015	33	30	Recreation	No
9	1982-2015	33	30	Recreation	No
10	1993-2015	22	50	Recreation	No
11	1960-2015	55	20	Recreation	No
12	1985-2015	30	12	Recreation	No
13	1985-2015	30	12	Recreation	No
14	1988-2019	31	4	Recreation	No
15	1970-2019	49	4	Recreation	No
16	1993-2019	26	6	Recreation	No
17	1981-2019	38	26	Recreation	No
18	1953-2015	62	52	Recreation	No
19	1970-2019	49	20	Recreation	No
20	1960-2019	59	20	Recreation	No
21	1995-2015	20	365	Recreation	No
22	1982-2014	32	365	Recreation	No
23	1986-2015	29	50	Recreation	No
24	1979-2019	40	12	Recreation	No
25	1979-2019	40	12	Recreation	No
26	1968-2019	51	100	Recreation	No
27	1949-2019	50	104	Recreation	No
28	1985-2015	30	Regularly	Recreation	No
29	1972-2019	47	25	Recreation	No
30	1995-2015	20	Frequently	Recreation	No

31	1969-2019	50	20	Recreation	No
32	1992-2015	23	365	Recreation	No
33	1970-2015	45	100	Recreation	No
34	1980-2015	35	52	Recreation	No

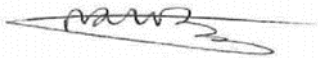
There are no background papers for this report

Report Author Sign-off:	
Liam Kennedy	
Date:	
4 January 2023	

Please list and attach any appendices:-

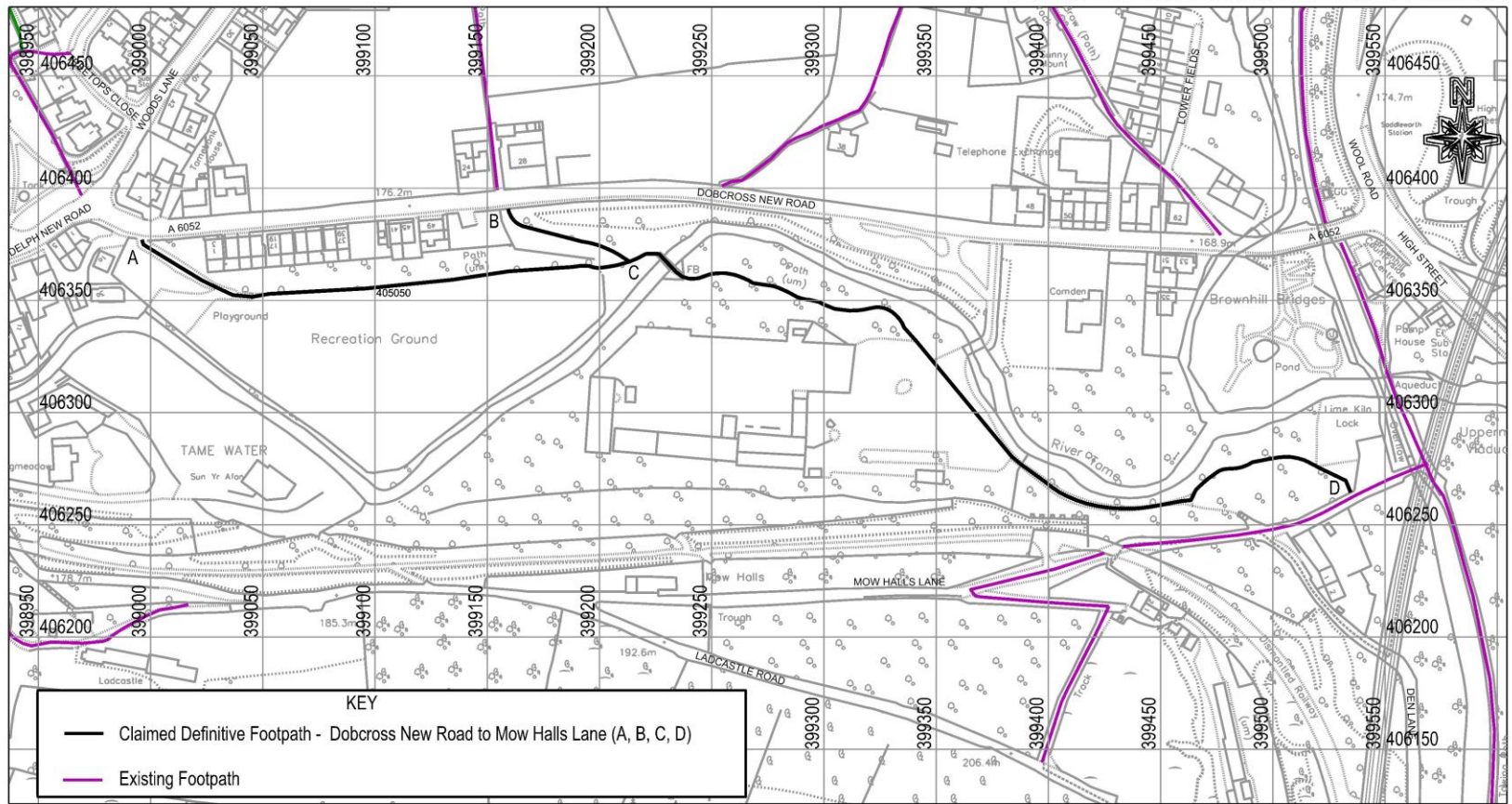
Appendix number or letter	Description
1	Photographs of claimed route

In consultation with Deputy Chief Executive/Executive Director/ Director



Signed :

Date: 9 January 2023



KEY	
	Claimed Definitive Footpath - Dobcross New Road to Mow Halls Lane (A, B, C, D)
	Existing Footpath

<p>Oldham Council</p> <p>Place and Economic Growth HIGHWAYS & ENGINEERING Henshaw House, Cheapside, Oldham OL1 1NY</p>				Client		Title	
				Project		Route of Claimed Footpath	
				Drawn by	Date	Purpose of issue	
				RW	08/22	Information	
Checked by	Date	Scale at A4 size					
LK	08/22	1:2500					
Approved by	Date	Drawing No.					
		764/A4/235/1					
Rev	Revision details		By	Chk	App	Date	Rev.

C:\PROW\PROW diversion\Claimed Route Dobcross New Road\Claimed Route Dobcross New Road.dgn

Appendix 1



Entrance on Dobcross New Rd to claimed route (point A Plan 764/A4/235/1 contained in report)



Play area on your right as heading down the sloped bitmac path approaching playing field

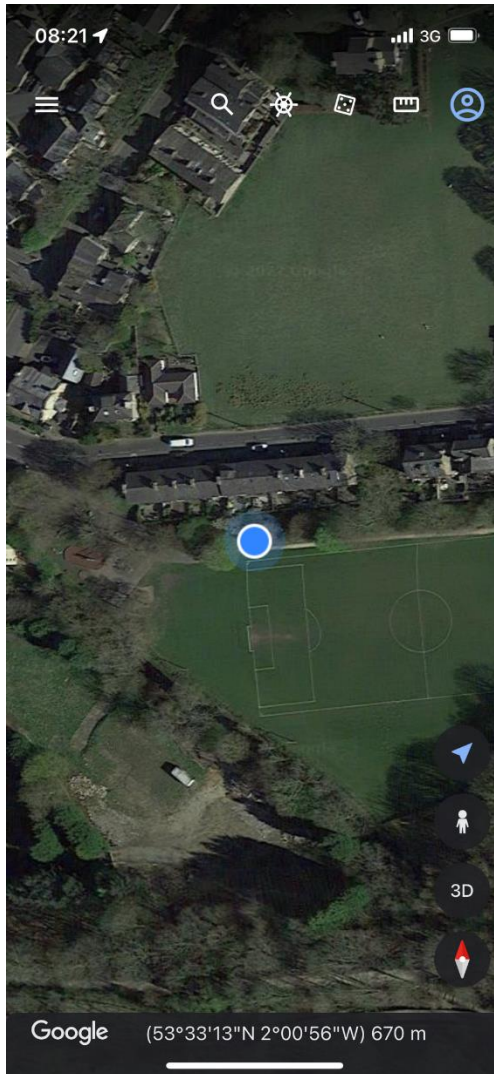


OMBC Signage

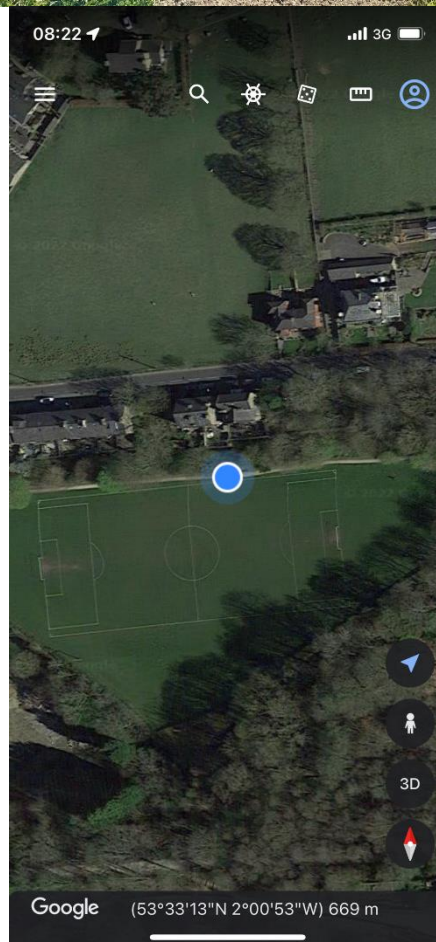


End of sloped bitmac surface. Playing field on right, claimed route continues East as gravel track.

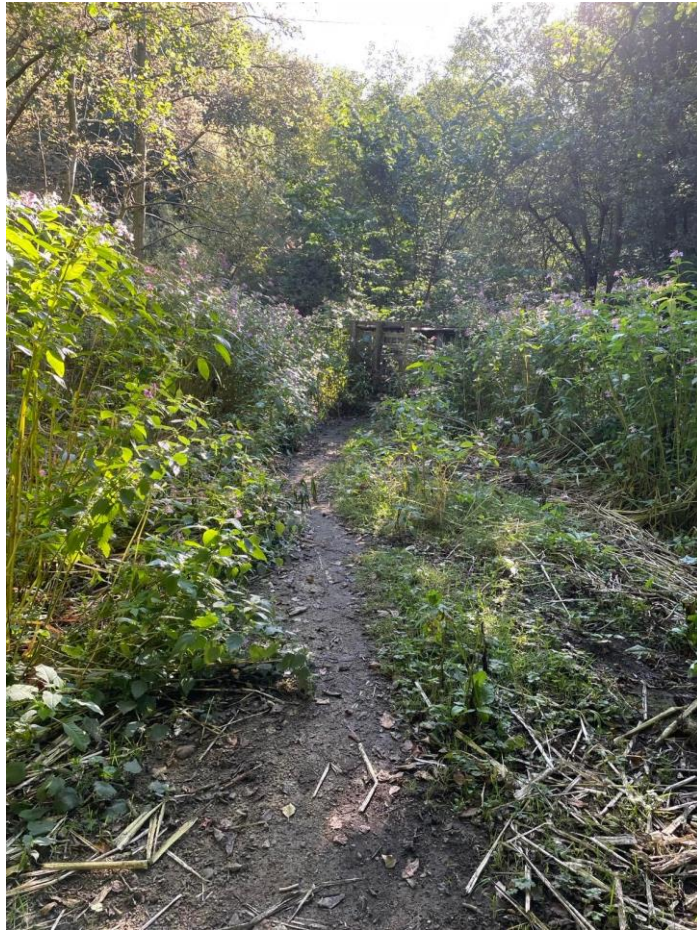




Bench No.1 and GPS location (OMBC land Asset No. 554)



Bench No.2 and GPS location (OMBC land Asset No. 554)



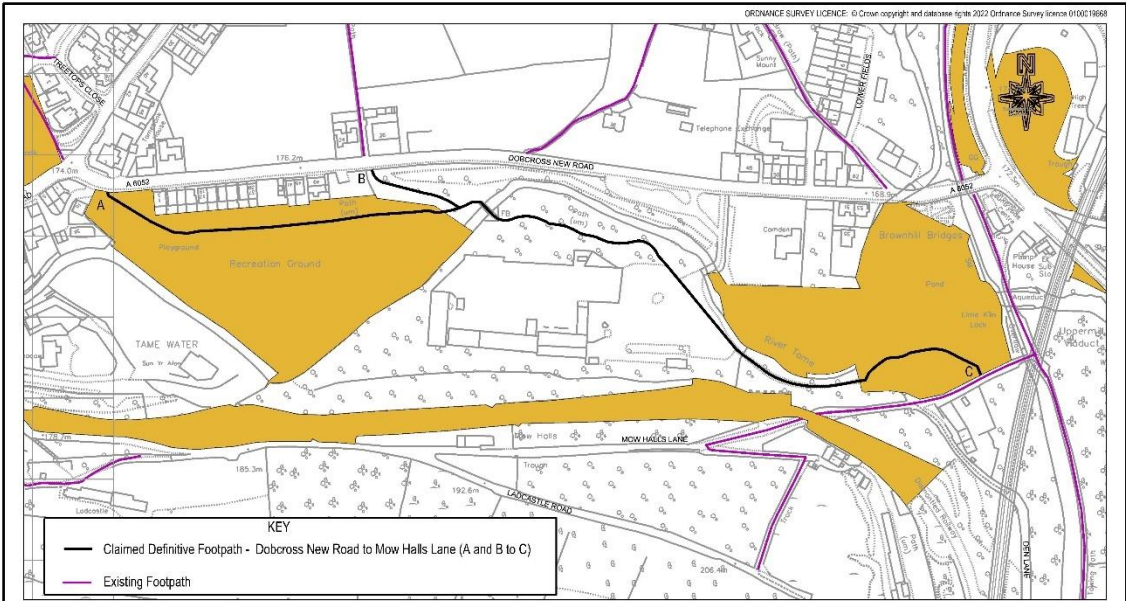
Path to closed footbridge




Footbridge currently closed due to safety concerns



OMBC Signage on footbridge



 <p>Oldham Council</p>		<p>Client: _____</p> <p>Title: _____</p>	
<p>Place and Economic Growth HIGHWAYS & ENGINEERING Hershow House, Chesapeake, Oldham OL1 1NY</p>		<p>Project: Claimed Footpath Route - Dobcross New Road to Mow Halls Lane, Dobcross</p> <p>Route of Claimed Footpath</p>	
<p>Drawn by: RW</p> <p>Checked by: LK</p> <p>Approved by: _____</p>	<p>Date: 07/22</p> <p>Date: 07/22</p> <p>Date: _____</p>	<p>Purpose of issue: Information</p> <p>Scale at A4 size: 1:2500</p>	<p>Drawing No. _____</p> <p>Rev. _____</p>
<p>Revision details: No. Date </p>		<p>C:\PROW\PROW diversion\Claimed Route Dobcross New Road\Claimed Route Dobcross New Road.dgn</p>	

Plan showing claimed route (black) in relation to Council Asset (orange)