

CET/23/15

Public Rights of Way Committee
9 March 2023

Schedule 14 application Parish of Honiton

Report of the Director of Climate Change, Environment and Transport

Please note that the following recommendation is subject to consideration and determination by the Committee before taking effect.

1) Recommendation

It is recommended that no Modification Order be made in respect of Proposal 1.

2) Introduction

This report examines one proposal arising from a Schedule 14 application in the parish of Honiton in East Devon district.

3) Background

A Definitive Map Review of the parish of Honiton was conducted between 2005-2012. This proposal was not put forward during the programmed review and had not appeared in any previous reviews. A Schedule 14 Application was submitted by Honiton Town Council in May 2019, and as per Devon County Council policy was added to the register for determination once the parish-by-parish review had been completed. However, in May 2021 Honiton Town Council appealed to the Secretary of State requesting that DCC be directed to determine the application. On 7 June 2022 the Secretary of State directed DCC to determine the application within 10 months.

4) Proposals

Please refer to the Appendix to this report.

5) Consultations

General consultations on the application were carried out in July to October 2022 with the following results:

County Councillor Phil Twiss	- comments included in background papers;
East Devon District Council/AONB	- no comment;
Honiton Town Council	- comments included in background papers
Country Land and Business Association	- no comment;
National Farmers' Union	- no comment;
Trail Riders' Fellowship/ACU	- no comment;
British Horse Society	- no comment;
Cycling UK	- no comment;
Ramblers	- comments included in background papers;

Byways & Bridleways Trust	- no comment;
4 Wheel vehicle Users	- no comment;
Devon Green Lanes Group	- no comment

Specific responses are detailed in the Appendix to this report and included in the background papers.

6) Strategic Plan

The Council's Plan 2021 – 2025, <https://www.devon.gov.uk/strategic-plan/>, has, where appropriate under the provisions of the relevant legislation, been taken into account in the preparation of the report.

7) Financial Considerations

Financial implications are not a relevant consideration to be taken into account under the provision of the Wildlife and Countryside Act 1981. The Authority's costs associated with Modification Orders, including Schedule 14 appeals, the making of Orders and subsequent determinations, are met from the general public rights of way budget in fulfilling our statutory duties.

8) Legal Considerations

The implications/consequences of the recommendation have been taken into account in preparing the report.

9) Risk Management Considerations

No risks have been identified.

10) Equality, Environmental Impact (including climate change) and Public Health Considerations

Equality, environmental impact (including climate change) or public health implications have, where appropriate under the provisions of the relevant legislation, been taken into account.

11) Conclusion

It is recommended that no Modification Order be made in respect of Proposal 1 as evidence is considered insufficient to meet the requirements of the legislation. Details concerning the recommendation are discussed in the Appendix to this report.

12) Reasons for Recommendations

To undertake the County Council's statutory duty under the Wildlife and Countryside Act 1981 to keep the Definitive Map and Statement under continuous review in the East Devon district area, as directed by the Secretary of State.

Meg Booth
Director of Climate Change, Environment and Transport

Electoral Division: Feniton & Honiton

Local Government Act 1972: List of background papers

Background Paper: Correspondence File

Date: 2000 to date

File Reference: TCG/DMR/HONITON

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sc/cr/Schedule 14 application Parish of Honiton

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A. Basis of Claims

The Highways Act 1980, Section 31(1) states that where a way over any land, other than a way of such a character that use of it by the public could not give rise at common law to any presumption of dedication, has actually been enjoyed by the public as of right and without interruption for a full period of 20 years, the way is deemed to have been dedicated as a highway unless there is sufficient evidence that there was no intention during that period to dedicate it.

Common Law presumes that at some time in the past the landowner dedicated the way to the public either expressly, the evidence of the dedication having since been lost, or by implication, by making no objection to the use of the way by the public.

The Highways Act 1980, Section 32 states that a court or other tribunal, before determining whether a way has or has not been dedicated as a highway, or the date on which such dedication, if any, took place, shall take into consideration any map, plan, or history of the locality or other relevant document which is tendered in evidence, and shall give such weight thereto as the court or tribunal considers justified by the circumstances, including the antiquity of the tendered document, the status of the person by whom and the purpose for which it was made or compiled, and the custody in which it has been kept and from which it is produced.

The Wildlife and Countryside Act 1981, Section 53(3)(c) enables the Definitive Map to be modified if the County Council discovers evidence which, when considered with all other relevant evidence available to it, shows that:

- (i) a right of way not shown in the map and statement subsists or is reasonably alleged to subsist over land in the area to which the map relates.
- (ii) a highway shown in the map and statement as a highway of a particular description ought to be there shown as a highway of a different description.
- (iii) there is no public right of way over land shown in the map and statement as a highway of any description, or any other particulars contained in the map and statement require modification.

The Wildlife and Countryside Act 1981, Section 56(1) states that the Definitive Map and Statement shall be conclusive evidence as to the particulars contained therein, but without prejudice to any question whether the public had at that date any right of way other than those rights.

The Wildlife and Countryside Act 1981, Section 53(5) enables any person to apply to the surveying authority for an order to modify the Definitive Map. The procedure is set out under WCA 1981 Schedule 14.

Section 69 of the Natural Environment and Rural Communities Act 2006 (NERC) amended the Highways Act 1980, to clarify that a Schedule 14 application for a

Definitive Map Modification Order is, of itself, sufficient to bring a right of way into question for the purposes of Section 31(2) of the Highways Act 1980, from the date that it was made.

Section 67 of the Natural Environment and Rural Communities Act 2006 (NERC) extinguishes certain rights of way for mechanically propelled vehicles except for the circumstances set out in sub-sections 2 to 8. The main exceptions are that:

- (a) it is a way whose main lawful use by the public during the period of 5 years ending with commencement was use for mechanically propelled vehicles;
- (b) it was shown on the List of Streets;
- (c) it was expressly created for mechanically propelled vehicles;
- (d) it was created by the construction of a road intended to be used by such vehicles;
- (e) it was created by virtue of use by such vehicles before 1 December 1930.

Proposal 1: Claimed footpath between the A35 near Copper Castle and Springfield Road, Honiton, as shown on plan CCET/PROW/22/60.

Recommendation: It is recommended that no Modification Order be made in respect of Proposal 1.

1.1 Background

1.1.1 Honiton Town Council submitted a Schedule 14 application in May 2019, which appears to have been prompted by the erection of ‘private land no public right of way’ signs and barbed wire and padlocks on the gates at each end of the claimed path. The application included ten user evidence forms. As the parish review had been completed in Honiton between 2005-2012 the application was added to the public register for determination following completion of the countywide review. In May 2021 Honiton Town Council applied to the Secretary of State to request DCC be directed to determine the application. Consequently, on 7 June 2022 DCC were directed to determine the application within 10 months.

1.2 Description

1.2.1 The application route starts on the A35 (trunk road maintained by National Highways) fifty metres southeast of Copper Castle, at point A on plan CCET/PROW/22/60. It proceeds in a generally south easterly direction across a grass field for a distance of approximately 320 metres, before joining Springfield Road at point B. Approximately 150 metres to the southeast of point B is Manor House, which was formerly an independent school until its closure in 2010.

1.2.2 The application route offers a convenient off-road route past a series of bends at the bottom of the hill on the A35 (a trunk road operated by Highways England), known locally as ‘Devil’s Elbow’. This stretch of the A35 has poor visibility, steep banks on either side with no walkways, and heavy traffic, including a high number of HGVs. However, issues such as road safety cannot legally be taken into account when determining whether or not a public right of way subsists.



The gate at point A, November 2021, with green private sign visible.



The gate at point B, November 2021, with green private sign visible.

1.3 The Definitive Map Process and subsequent reviews

- 1.3.1 The application route was not included in the survey of paths on behalf of Honiton Town Council in 1950 and was not put forward for recording as a public right of way on the Definitive Map.
- 1.3.2 The application route was not put forward for inclusion during subsequent uncompleted reviews in the 1960s and 1970s. It was also not put forward for inclusion during the parish review that took place between 2005 and 2012.

1.4 Documentary Evidence

1.4.1 Ordnance Survey mapping – historic and modern; other historic mapping

1.4.1.1 The application route is not shown on any Ordnance Survey (OS) mapping, either historic or modern. Likewise, it is not shown on the Honiton Tithe Map, Greenwoods Map or Bartholomew's Maps.

1.4.1.2 Although the OS mapping does not show the application route, the First and Second Edition 25 inch to the mile maps (1888 and 1904) do show that the field that it crosses was formerly two fields; a hedge line and access track to the allotment gardens and a cottage (no longer in existence) is shown across the line of the application route just south of point A. No gap or gate is shown on these maps to suggest a route through that would correspond with the line of the application route.

1.4.2 Aerial photography 1946, 1999-2000, 2006-7, 2010 and 2015

1.4.2.1 Aerial photography from 1946 shows the two fields crossed by the application route but there is no evidence of a worn path corresponding with it. Two faint paths cross the southern field but appear to be agricultural access to fields beyond, or possibly caused by livestock.

1.4.2.2 Aerial photography from 1999-2000 shows the two fields are now one, with the remains of the hedge line/track visible on the ground. The field is pale yellow, either wheat/barley or newly cut hay and the trees are in full leaf suggesting the photographs were taken in the summer months. There is no visible track corresponding with the application route.

1.4.2.3 Aerial photography from 2006-7 shows that the field is now grass pasture and there is a clear worn path corresponding with the application route, passing in an almost completely straight line between points A-B. The trees on this photography are also in full leaf, suggesting it was taken in the summer months.

1.4.2.4 The 2010 aerial photography was taken during the winter months as the deciduous trees lack leaf cover. The application route is not visible on the ground in the same way as in 2006-7. However, there is a very faint line in the middle of the route that may correspond with the application route, though this is by no means certain.

1.4.2.5 Aerial photography from 2015 was also taken in the summer months and there is a visible worn path corresponding with the application route, as per the photography from 2006-7.

1.4.3 Google Streetview images

1.4.3.1 Google Streetview images from January 2009 show field gates in place at both points A and B, with vehicle wheel tracks visible. An image from June

2015 shows the gate at point A propped open (or possibly removed entirely) and very long grass in the field. The same view of point A from May 2017 shows a new metal field gate and the hedges either side have been cut back hard. The image from May 2018 shows the gate at point A propped open and very distinct tyre marks are visible leading into the field. In the image from June 2021 the gate at point A is closed and the green sign stating 'private land no public right of way' is clearly visible mounted in the centre of the gate. A chain and padlock are visible on the left-hand side of the gate and there is barbed wire wrapped around the top two rails of the gate. An image from November 2021 shows the gate at point B closed, with an identical sign visible, also mounted on the gate. There is also barbed wire around the top two rails and a chain and padlock on the left-hand side.

1.5 User Evidence

- 1.5.1 Ten user evidence forms were submitted with the Schedule 14 application; no further forms were received during informal consultations. Most of the use appears to have been post-2000 but three users claim to have used the route for longer, with the earliest stating they had used it since the '1970s'. The forms are generally consistent in indicating that the private signs appeared around January 2018.
- 1.5.2 The longest claimed use is that of Mr Branch of Lower Lodge, Offwell. In the section asking which years he has used the path he has written '*54 years at above address 70s, 80s, 90s, 2000s*'. As to how many times a year he has used it he has simply written 'as the need' and that he was going to and from Honiton for pleasure. He states that the path has always followed the same route but that it needs to go around the edge of the field as it is farmland. Mr Branch never had permission to use the route and was only ever stopped from using the route when the gates were locked and signs erected. There is very little additional information provided, though Mr Branch states that gates and signs appeared at the top and bottom of the route in the '2000s', presumably referring to the signs erected in 2018 but he does not make it clear.
- 1.5.3 Mr Coombs states that he used the route between 1974 and 2017, on foot and for pleasure up to 12 times per year. He states that the two gates were always unlocked during this time and that the notices were erected on the gates in late 2017. He states that he has never had permission to use the route, nor has he ever been stopped or turned back. He mentions that a worn path was usually visible in the grass.
- 1.5.4 Mrs Broom states that she has used the route since 1994, at a frequency of '10+' times per year on foot for pleasure walks between Honiton and the Offwell area. She states that the path has always run over the same route and that she never sought or received permission to use the route. She refers to the gates as '*usually locked*' though does not specify whether this was pre-2018 or not.

- 1.5.5 Mr Squire states that he used the path from 2000-2018, between 12-15 times per year on foot as part of a circular walk with his dogs. As to why he believes the path to be public, he answers: '*as it has always been used as a path by people at houses at the top end of field*'. He states that he has never had permission to use the path and that it has always followed the same route. Mr Squire supplies some additional information on a separate sheet; he refers to using the field to avoid walking on the dangerous section of the A35 and that the field crossed by the application route never had any animals in, always being cut for silage.
- 1.5.6 Mrs Roberts submitted a user evidence form and an accompanying letter, detailing her use of the route on foot from 2015 until 2018, eighteen times per year, as part of pleasure walks from Honiton to Offwell. She states that she believed the route to be a public path as a neighbour, who had used it for 30 years, told her it was. She states that the top gate was '*in poor state and always open*' but also that she had to '*climb over top gate as tied with a lot of bailer cord/twine*'. She states that she has never had permission to use the route, never been stopped or turned back, and believes the owner was aware of the public using it due to the defined path being clearly visible. Like Mr Squire, she also states that the field has never had livestock in during the years she used the path.
- 1.5.7 Mrs Robert's accompanying letter contains some further information. She identifies the landowners and how they had spent a considerable amount of money laying the hedges around the field, felling trees and erecting stockproof fencing. Prior to this the gates were always left propped open. She states that she walked the route with her dog on one occasion when a tractor was working in the field and the driver did not challenge her. She also points out the safety benefits of the route and how the air ambulance has landed in the field on two occasions but cannot now do so due to the locked gates and barbed wire.
- 1.5.8 Mr Gilbert states that he used the application route between 2013-2019 on foot, for pleasure and at a frequency of around 12-15 times per year. He mentions that the private signs were erected, and the gates locked, on or about the 29 January 2018. He states that he has never had permission to use the route, never had a private right to do so and never been stopped or turned back. He states that he believes the path to be public as it is clearly visible on the ground, and he knows others who have used it. In the additional info section, he refers to the traffic-safety benefits of the route and the access it allows to the Offwell area. He also states that: '*I have been told the pupils of the Manor School (now closed) used to use it to and from school, and people living in Offwell to and from Honiton*'.
- 1.5.9 A Mrs Gilbert also completed a UEF and gives the same address as Mr Gilbert. She mostly provides the same information on use as Mr Gilbert, though claims to have used it slightly more frequently at 15-20 times per year. She likewise states the safety benefits as a major reason for using the route. Though she states that she has never been stopped or turned back

from using the route, she writes that in spring 2018 the '*man cutting the hedges said the owner did not regard the path as public access*'.

- 1.5.10 Mrs Harper of Manor House states that she used the application route from 2010-2018 as she was told by locals that it was public when she bought Manor House. She states that the gates at either end were open until 2017. She also states that the private signs were put up in 2017. She used the route on foot, 10-20 times per year, en route to Honiton town centre. She states that she never had permission to use the route, nor was ever stopped or turned back. Like Mr Squire and Mrs Roberts, Mrs Harper mentions that there have never been any animals in the field during the years of her use, it always being cut for silage. Attached to her form is an annotated aerial photograph, showing the application route as a worn path across a recently cut hay field. Also written on the aerial photo is: '*The path has been used since the 1960s (and possibly earlier) when the Manor House School was formed – cleaners, etc. The route was established and always clear*'. A further sheet provides additional comments on the traffic-safety benefits of the route and the convenience it provides for people walking from the Offwell area into Honiton. She again mentions that she has met cleaners who worked at the school who used to walk to work from Honiton.
- 1.5.11 Mr Kent completed a UEF but with very basic information. He states that he used the application route on foot 40-50 times per year between 2015-2019 as part of a circular loop that formed part of an exercise regime. He never had permission to use the route and was never stopped or turned back. He refers to the locked gates at either end of the route but not the private signs. He believes the path to be public due to the dangerous stretch of A35 that is the only alternative.
- 1.5.12 Several letters and emails were also received from people who support the application due to safe off-road route it offers as an alternative to the dangerous bends on the A35.

1.6 Landowner and rebuttal evidence

- 1.6.1 The application route crosses land owned by Rupert Kenlock and Kate Kenlock. No rights or easements relating to the application route are recorded in the title deeds. Mr Kenlock and Miss Kenlock completed a landowner evidence form via their agent Mr Guy Wilson of Stags. They have been freehold owners since 2004 and prior to this they state that Mr Charles Kenlock was the freehold owner between 1989 and 2004. They strongly contest the claim, stating that they have never dedicated, or intended to dedicate, a public right of way, it is not shown on any historic maps and has not been used unchallenged for more than 20 years.
- 1.6.2 The Kenlocks state that the grass keep was been taken by the Collins family between 2005-2019 and by the Tratt family from 2019 onwards. Under question 6 they state that they have seen people using the claimed route and provide a list of people who have stopped or turned back members of the public, with a summary of the encounters.

- 1.6.3 Miss Kate Kenlock is stated to have confronted a couple using the route in around March 2018, told them the land was private and asked them to refrain from using the route in future.
- 1.6.4 Mr Chris Atherton is stated to have been employed hedgelaying in the winters of 2017 and 2018, during which time he observed two individuals attempting to cross the land. He confronted both and advised them it was not a public right of way and asked them to refrain from using the route in future.
- 1.6.5 Mr Roy Collins and Mr Fred Collins, who took the grass keep between 2005-2019, are stated to have encountered people every year attempting to cross the field. They would approach them and advise that the land was private, there was no public right of way and that they should refrain from using the route in future.
- 1.6.6 Mr Wilfred Tratt, who has taken the grass keep since 2019, is stated to have confirmed that the gates have been padlocked shut during this time. He has not encountered anyone using the route but has seen signs of people having scaled the gates.
- 1.6.7 The Kenlocks state that a new gate was installed at point A in March 2019 and since then both gates have been padlocked shut, with barbed wire added along the top of the gates. They also state that prior to this both entrances to the field were obstructed with gates, that at point A being wired shut. The gates have remained locked at all times since the padlocks were installed.
- 1.6.8 The Kenlocks confirm that the 'Private Land No Public Right of Way' signs were installed in January 2018. They state that the original signs were installed using string and were subsequently removed by persons unknown, but replaced approximately one week later and fixed in position with wire, where they have remained ever since.
- 1.6.9 The Kenlocks state that they have never given anyone permission to use the application route, nor has anyone ever requested it.

1.7 Discussion

- 1.7.1 Statute (Section 31 Highways Act 1980)
Section 31(1) of the Highways Act 1980 states that if a way has actually been enjoyed by the public 'as of right' and without interruption for a full period of 20 years, it is deemed to have been dedicated as a highway unless there is sufficient evidence that there was no intention during that period to dedicate it. The relevant period of 20 years is counted back from a date on which the public right to use the way has been challenged. User and landowner evidence forms suggest that the 'private land no public right of way' signs were erected in January 2018, with the gates being locked shut at the same time. It therefore seems reasonable to accept that the date on which the

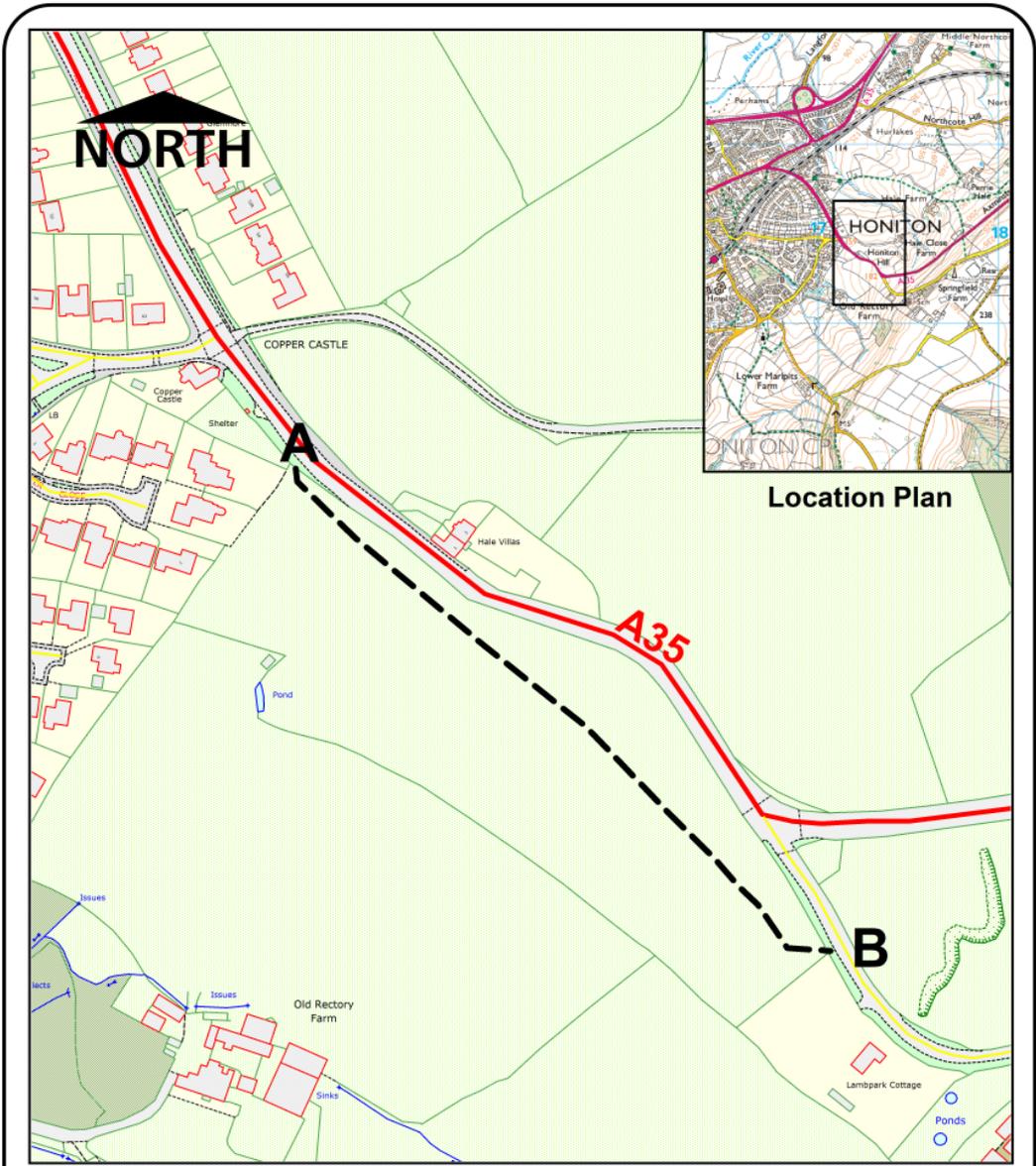
public right to use the way was challenged was January 2018 and that the relevant period is from January 1998 to January 2018.

- 1.7.2 The user evidence provided by the forms indicate that there may have been some use as of right, being without force, secrecy or permission, and that this was exclusively on foot. Many of the users refer to the route being well-trodden, which is corroborated by the aerial photography, though none refer to seeing others using the route. User and landowner evidence is rather contradictory on this point, but it seems likely that the gates were at least sometimes propped open prior to 2018 and that when they were closed during this period it did not prevent use as they were easy to scale. From at least 2010 it appears that there was never livestock in the field crossed by the route. Several users took dogs with them when using the route.
- 1.7.3 The users all refer to the dangerous conditions for pedestrians on the A35 as the main reason for their using the application route. Two users refer to the former Manor House School, an independent preparatory school that closed in 2010. It is suggested that staff (specifically cleaners) and pupils used the route to get to the school, but this appears to be second hand information and lacks any detail.
- 1.7.4 The quantity of user evidence is not large, especially considering the application route is located on the fringes of the town of Honiton. Only two of the nine users claim to have used the route for the whole of the relevant period, while half only used it since 2013 or later.
- 1.7.5 The landowners' evidence is consistent with some public use of the application route, though they (and those on their behalf) appear to have challenged this on numerous occasions during the relevant period.
- 1.7.6 Though there is some evidence of use as of right on foot by the public, covering the relevant period without interruption, it is of a limited quantity. It is also clear that not all use was as of right as the landowners took direct action by telling people using the route that it was not public. It is difficult to justify the user evidence as being representative of the public at large, which ultimately leads to the user evidence being insufficient to support statutory dedication of the route. It also appears that the landowners have sufficiently demonstrated that they had no intention to dedicate the route during the relevant period.
- 1.7.7 Common Law
The only other basis for its possible consideration as a highway is if there was any other significant supporting evidence from which a dedication of the route can be presumed or inferred under common law. At Common Law, evidence of dedication by the landowner can be express or implied and an implication of dedication may be shown if there is evidence, documentary, user or usually a combination of both from which it may be inferred that a landowner has dedicated a highway and that the public has accepted the dedication.

- 1.7.8 There is no documentary evidence to support the existence of public rights along the application route. The limited amount of user evidence available suggests that the application route has been used since the 1970s, possibly associated with the former Manor House School on Springfield Road. Some of the use has undoubtedly been as of right and the worn path across the field would have been obvious to the landowner. However, the user evidence available is limited in quantity and not representative of the public at large in a location on the outskirts of a town, meaning that it is difficult to claim that they have accepted a dedication. In any case, the landowners have taken positive action to demonstrate to users that the route is not a public right of way since at least 2005, possibly as early as 1989.
- 1.7.9 The evidence when taken as a whole is therefore not sufficient to support a claim for dedication under common law.

1.8 Conclusion

- 1.8.1 From this assessment of the evidence, in conjunction with all evidence available, it is considered insufficient to support the claim that public rights subsist on the balance of probabilities. Accordingly, the recommendation is that no Order be made to record a Footpath in respect of this application.



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DEVON COUNTY COUNCIL
 Honiton parish
 Informal Consultation:
 Schedule 14 application: claimed footpath from
 Copper Castle to Springfield Road, Honiton

Drawing number: CCET/PROW/22/60
 Date: June 2022
 Scale: 1:2,500 @A4
 Drawn by: TCG

Notation Claimed Footpath - - - - - (320m)

Devon County Council 
 Meg Booth
 DIRECTOR OF CLIMATE CHANGE, ENVIRONMENT & TRANSPORT