

**Definitive Map Review  
Parish of East Down – Part 2**

Report of the Chief Officer for Highways, Infrastructure Development and Waste

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

**Recommendation:** It is recommended that a Modification Order be made to modify the Definitive Map and Statement by adding to them a restricted byway between points E – F – G – X – H – I – J between Princes Gate and Shortacombe, and to upgrade part of East Down Footpath No. 20 between points J – K between Shortacombe and Shortacombe Corner as shown on drawing no. HIW/PROW/16/40a.

**1. Introduction**

This report examines the final proposal arising from the Definitive Map Review in East Down.

**2. Background**

This is the second report for the Definitive Map Review for East Down parish. The background to the Review in East Down was discussed in the first report of 2 March 2017.

**3. Proposals**

Please refer to the appendix to this report.

**4. Consultations**

General consultations have been carried out with the following results:

County Councillor Andrea Davis	– no comment
North Devon Council	– no comment
East Down Parish Council	– support the proposal
British Horse Society	– no comment
Byways & Bridleways Trust	– no comment
Country Landowners' Association	– no comment
Devon Green Lanes Group	– no comment
National Farmers' Union	– no comment
Open Spaces Society	– no comment
Ramblers'	– no comment
Trail Riders' Fellowship	– no comment

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

## **5. 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.

## **6. Legal Considerations**

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

## **7. Risk Management Considerations**

No risks have been identified.

## **8. Equality, Environmental Impact and Public Health Considerations**

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

## **9. Conclusion**

It is recommended that a Modification Order be made to modify the Definitive Map and Statement by adding to them a restricted byway between points E – F – G – X – H – I – J between Princes Gate and Shortacombe, and to upgrade part of East Down Footpath No. 20 between points J – K between Shortacombe and Shortacombe Corner.

Should any further valid claim with sufficient evidence be made within the next six months it would seem reasonable for it to be determined promptly rather than deferred.

## **10. 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 and to progress the parish by parish review in the North Devon area.

Meg Booth  
Chief Officer for Highways, Infrastructure Development and Waste

## **Electoral Division: Combe Martin Rural**

Local Government Act 1972: List of Background Papers

Contact for enquiries: Caroline Gatrell

Room No: ABG Lucombe House

Tel No: 01392 383240

Background Paper	Date	File Ref.
Correspondence Files	Current	DMR/EASTDOWN

cg031017pra  
sc/cr/DMR East Down  
04 301017

**A. Basis of Claim**

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 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.

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.

In relation to claims for byways open to all traffic (BOATs), 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 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.

Extinguishment of rights for mechanically propelled vehicles also does not apply if, before the relevant date (20 January 2005), an application was made under section 53(5) of the Wildlife and Countryside Act 1981, or such an application was determined by a surveying authority, for an order to modify the definitive map and statement as to show a BOAT.

The judgement in the case of *R. (on the application of Winchester College) v Hampshire County Council (2008)* however, found that for such exceptions to be relevant the application must fully comply with the requirements of paragraph 1 of Schedule 14 to Wildlife and Countryside Act 1981. It is appropriate therefore firstly to determine whether or not the claimed vehicular rights subsist and, secondly, whether or not any exceptions apply; if vehicular rights subsist but the exceptions are not engaged then the appropriate status is restricted byway. Such claims may also be considered for a lower status.

## **B. Definition of *Ratione Tenurae* Roads**

Research into Highway Board, Rural District Council and Parish Council minutes has indicated that '*ratione tenurae*' roads were, from the late 19<sup>th</sup> century types of road expected to be used by the public, but with the adjacent landowners/occupiers of the road/lane being responsible for the maintenance of the roads. Indictment for non-repair could only be brought by and on behalf of, the public.

Section 25(2) of the Local Government Act 1894 enacted that if a person liable to repair a highway '*ratione tenurae*' failed to do so, after being requested by the district council, the council could repair the highway and recover the expenses from the person liable.

**Proposal 3: Proposed addition of a bridleway and upgrade of part of East Down Footpath No. 20 to bridleway, as shown between points E – F – G – H – I – J - K on plan HCW/PROW/16/40a.**

**Recommendation: That a Modification Order be made in respect of Proposal 3, be made to modify the Definitive Map and Statement by adding to them a restricted byway between points E – F – G – X – H – I – J between Princes Gate and Shortacombe, and to upgrade part of East Down Footpath No. 20 between points J – K between Shortacombe and Shortacombe Corner as shown on drawing no. HIW/PROW/16/40a.**

## **1. Background**

- 1.1 The proposal route was included in the consultation with the support of the Parish Council, as it appeared to be a missing link between a cul de sac unsurfaced county road near Prince's Gate and Bridge and East Down Footpath No. 20 at Shortacombe, in the parish of East Down. During the course of the investigation, a variance in the alignment of the route was discovered. This report therefore deals with the route as proposed, and these variations, which are also shown on the attached plan.

## **2. Description of the Route**

- 2.1 The proposal route starts at the unsurfaced county road approximately 120 metres east northeast of Princes Gate and Bridge at point E and continues north eastwards along a hedged lane via point F towards the hamlet of Shortacombe at point G. It continues along a defined track between the various properties of Shortacombe, specifically Lower Court Barn, and Shortacombe Lodge, past points H and I to meet East Down Footpath No. 20 by Shortacombe Gate at point J, which it follows northwards to meet the county road at Shortacombe Corner, point K.

## **3. Documentary Evidence**

### **3.1 Race Ground & Churchill Downs Inclosure Act & Award, East Down, 1811-23**

- 3.1.1 Inclosure awards can be evidence of repute of highways at the time they were made. Their significance as evidence depends on the powers given to the relevant Inclosure Commissioners. Awards and maps may provide supporting evidence of other matters, such as the existence of status of a route adjacent to but outside the awarded area. Evaluation of such evidence is considered in the context of the relevant Inclosure Act.
- 3.1.2 An Act for Inclosing Lands in the Parish of East Down received Royal Assent on the 21<sup>st</sup> May 1811. It recited the 3<sup>rd</sup>, 4<sup>th</sup>, 6<sup>th</sup>, 7<sup>th</sup>, 8<sup>th</sup>, 10<sup>th</sup>, 14<sup>th</sup>, 18<sup>th</sup>, 19<sup>th</sup>, 22<sup>nd</sup>, and 35<sup>th</sup> sections of the 1801 Inclosure Consolidation Act.
- 3.1.3 The award of lands was completed in 1823 and deposited with the Clerk of the Peace in 1826.
- 3.1.4 The county road between Ashelford Gate and Princes Gate which connects with the proposal route is set out as a public carriage road (vehicular highway). The proposal route, however, is not included as it was outside the Downs, which was the area being enclosed.

### **3.2 East Down Surveyors of Highways Accounts, 1821-56**

- 3.2.1 Prior to the formation of District Highway Boards in the early 1860s and the later Rural District Councils from 1894, the responsibility for the maintenance of public highways generally belonged to the parish and was discharged by elected Surveyors of Highways. Relevant Acts of 1766, 1773 and 1835 included the provision for the use of locally available materials and there was a statutory requirement upon parishioners to fulfil a fixed annual labour commitment. The final responsibility for maintenance lay with the local Surveyor of Highways who was obliged to keep a detailed account of public monies expended.
- 3.2.2 In 1829 and 1836 there are references to the repair of the road at '*Kitnole*'. This is the continuation of the proposal route, southwards from Princes Gate and Bridge to Ashelford Gate. '*Kitnole*' is the large field through which the current unsurfaced county road runs between Ashelford Gate and Princes Gate and Bridge. These can be located on Committee Plan 2, HIW/PROW/16/40d.

### **3.3 East Down Tithe Map and Apportionment, 1840-3**

- 3.3.1 Tithe Maps were drawn up under statutory procedures laid down by the Tithe Commutation Act 1836 and subject to local publicity, limiting the possibility of errors. Their immediate purpose was to record the official record of boundaries of all tithe areas. Public roads were not titheable and were sometimes coloured, indicating carriageways or driftways. Tithe maps do not offer confirmation of the precise nature of the public and/or private rights that existed over a route shown. Such information was incidental and therefore is not good evidence of such. Public footpaths and bridleways are rarely shown as their effect on the tithe payable was likely to be negligible. Routes which are not numbered are usually included under the general heading of '*public roads and waste*'.
- 3.3.2 The East Down tithe map is a first class map, surveyed at a scale of 3 chains to 1" by John Woodmass of Alston, Cumberland, who did a number of tithe surveys in Devon and Cornwall. Being first class, it is a legal and accurate record of all matters shown. Land that was not subject to tithes was generally accepted to be either public, glebe or crown estates. In many cases public roads are coloured sienna as prescribed by Lieutenant Dawson, a military surveyor with the Ordnance Survey, to the Tithe Commissioners. The original document is held at the National Archives, with copies for the parish and diocese held locally.
- 3.3.3 The proposal route between points E – F - G and J – K is included in lot 920, the parish '*roads*'. The tithe map shows a slightly different alignment between points G – I, with it passing closer to Shortacombe House and between buildings, included in lot 400, which is described as the homestead of Shortacombe, owned and occupied by William Tamlyn. Its continuation west of point E, the unsurfaced county road is recorded heading westwards, south eastwards and southwards, passing through lot 351 '*Middle Land*' and lot 376 '*Kitten Knowle*' field, part of Race Down, but from which the road is excluded, and braced to lot 920.

### **3.4 British Newspaper Archive, 1824 onwards**

- 3.4.1 This is a digital database of scans of newspapers across the country. It includes local newspapers such as the Exeter Flying Post and the North Devon Journal, except for the years 1825-6 which have not survived. The newspapers included reports on the proceedings of the Magistrates Petty Sessions, Quarter Sessions and Assizes, along with those of the various district Highway Boards and Vestry's.

- 3.4.2 20.11.1845 – County Magistrates Petty Sessions. The relevant landowners were summoned to the Petty Sessions for the non-maintenance of highway hedges. Most of the landowners agreed to comply, though *'on Mr Tamlyn an order was made with expenses'*. From later reports, this is known to include the proposal route.
- 3.4.3 10.02.1848 – County Magistrates Petty Sessions. An Order was made on Mr Tamlyn again for the non-maintenance of a road which was repairable *'ratione tenure'*, which *'he had promised at a former Special Session to put in repair forthwith, but had not done anything whatever to it'*. From later reports, this is known to include the proposal route.
- 3.4.4 21.11.1855 – County Magistrates Petty Sessions. Mr Passmore of Wigmore, Eastdown, was summoned for the non-maintenance of a road which was repairable *'ratione tenure'*, which passed through his estate. He, however, disputed liability. The matter was adjourned so that the case could be dealt with properly.
- 3.4.5 05.12.1855 – County Magistrates Petty Sessions. The hearing was resumed regarding the non-maintenance of the road through the Wigmore and Shortacombe estates, which was repairable *'ratione tenure'*. *'A map was produced of the locality, shewing the estates and the direction of the road in dispute, constructed from actual survey'*, and Mr Tamlyn gave evidence that when occupying Shortacombe, he had *'set up a gate for the purpose of preventing it [use by the public], but found he had no right to stop the way'*. *'The Bench having heard the evidence concluded that...it had been clearly established...that the road was a public highway'*. What was in dispute was who bore the maintenance liability. There had been no known repairs by the parish, only adjacent landowners and occupiers. The case was adjourned in order that the parties could attempt to reach an agreement.
- 3.4.6 19.12.1855 – County Magistrates Petty Sessions. The hearing was again resumed, though Mr Passmore of Wigmore had already consented *'to put the road in question in repair'*. The hearing was again adjourned.
- 3.4.7 30.01.1856 – County Magistrates Petty Sessions. The hearing was again resumed. It was reported by the Surveyor that Mr Passmore, *'the defendant in the late actions had not repaired the road'*. As the adjournment had lapsed, it was considered that therefore the case must be considered *'de novo'*(anew).
- 3.4.8 02.04.1856 – County Magistrates Petty Sessions. The hearing was again resumed. Mr Passmore now disputed that the road was a public highway, and that there was no authority to call for repairs.
- 3.4.9 *'On a former hearing this bench had decided that the road was a public highway, that subject was now to be opened again as it had been discovered and declared to be opened again as it had been discovered that the road now in use was not the one laid down on the maps on that occasion and declared to be a public highway. The road now in use was a diverted one, laid down by Mr Tamlyn at the time he occupied the estate [Shortacombe], and a far better piece of road than the old one for which it was substituted. But as this diversion was not taken into account at the last hearing, it was considered a sufficient reason for opening the whole question again.'*
- 3.4.10 *'Evidence was taken on the part of the Waywardens to shew from the termini – the road in question passing from one public highway to another – from its use by the public without interruption or leave asked for a great number of years, that it was a public highway'*.

- 3.4.11 *'The Chairman...had requested him to deliver the decision of the Bench, which was that the road was a Public Highway, for although the road had been diverted [without an Order from Quarter Sessions] the parish had concurred therein, and that the parish ought to repair it.'*
- 3.4.12 11.04.1865 – Ilfracombe District Highway Board. The Surveyor reported that the road through Wigmore and Shortacombe was in good repair. From later reports, this is known to include the proposal route. These places can be located on Committee Plan 2.
- 3.4.13 07.05.1867 – Ilfracombe District Highway Board. *'The road complained of in the parish of Eastdown [had] been repaired but not substantially. William Tamlyn, District Surveyor.'* From later reports, this is known to include the proposal route.
- 3.4.14 26.06.1867 – Ilfracombe District Highway Board. A notice was received calling on *'the Board to repair or caused to be repaired certain highways...one leading through Shortacombe Estate'*. It was resolved *'that the usual notices be given to get the same repaired'*. From later reports, this is known to include the proposal route.
- 3.4.15 Circa 22.08.1867 – Ilfracombe District Highway Board. *'The road in Eastdown referred to in the Surveyor's report, the repair of which devolved on [Mr Moore of Shortacombe] ratione tenurae, was partially repaired and the remainder of the work would be done in a few days'*. From later reports, this is known to include the proposal route.
- 3.4.16 Circa 29.08.1867 – Ilfracombe District Highway Board. *'A notice...to have a certain road, passing through Wigmore estate, in the parish of Eastdown, put in proper repair'*. It was resolved *'that the usual notice be given to the owner and occupier of Wigmore estate, to put the road in repair'*. From later reports, this is known to include the proposal route.
- 3.4.17 Circa 31.10.1867 – Ilfracombe District Highway Board. In accordance with his orders, the Surveyor had served *'notices to Messers Dyer and Passmore to repair a certain road leading through Wigmore estate...from Shortacombe Gate [at point J] to Princess Gate [west of point E]; the road [had] not been repaired.'* This is known to include the proposal route.
- 3.4.18 30.12.1867 – Ilfracombe District Highway Board. An application was made for summons against the liable parties to repair the road through the Wigmore estate, but no summons was taken out, as the Board Trustees thought other parties were liable for repair, and no further action should be taken. From earlier reports, this is known to include the proposal route.
- 3.4.19 Circa 26.03.1868 – County Magistrates Petty Sessions. Two connected cases were brought regarding the proposal route. The first case *'alleged that a highway...commencing at Shortacombe gate and passing through Wigmore Estate to a place called Prince's Gate...was out of repair for a distance of a quarter of a mile'* and that the Ilfracombe Highway Board was liable. The second case alleged that *'the owner...and occupier of Wigmore...were chargeable with the repairs'*. Both sets of defendants denied their liabilities. Complicating the matter was the fact that the Eastdown Waywarden was also the occupier of Wigmore Estate. It was estimated that the maximum cost of the road repairs required was considered to be £12-£15 (approximately £548-£685 in 2005). Evidence from several witnesses was given that *'the public were in the habit of using it [the route] at will and pleasure.'* Mr Tamlyn, the former owner of the Shortacombe Estate and now the Highway Board Surveyor was

also called to give evidence. The Bench considered that the road was a public highway, and that the issue in dispute was who should repair it. The hearing was adjourned so that the parties might be able to come to some arrangement. From later reports, this is known to include the proposal route.

- 3.4.20 22.04.1868 – County Magistrates Petty Sessions. The hearing was resumed regarding the *'question of liability to repair a certain highway...commencing at Shortacombe Gate and passing through Wigmore Estate...to Prince's Gate...out of repair for a distance of a quarter of a mile'* (approximately 402 metres). The issue was heard at great length as the parties involved had not been able to reach any agreement.
- 3.4.21 *'It was admitted that the road was a public highway and in a state of non-repair, but it was alleged that the owners of Wigmore and Shortacombe... were liable to repair it and not the Highway Board...a considerable portion of the highways of Eastdown is repaired ratione tenure; in fact, nearly the whole of them, only a few being kept in order by the parish'.*
- 3.4.22 It was submitted *'that the Bench had no alternative but to send the case to the Quarter Sessions'*. They were *'of the opinion that the Board had not acted as they ought to have done in settling the matter under the 34<sup>th</sup> section'* of the Highways Act 1862.
- 3.4.23 *'The Bench...made an order of indictment against the [Ilfracombe District Highway] Board, and the witnesses were accordingly bound over to appear at the next assizes'.*
- 3.4.24 11.05.1868 – Ilfracombe District Highway Board. The Board debated at length regarding the Indictment and whether it should be defended, or they repair the road. The Board appeared to be split as to what action to take. One member *'considered that the Board was placed in a very humiliating and undignified position. He had...endeavoured to impress on the minds of the Board that they ought to proceed under the 34<sup>th</sup> section, and if they had attended to his advice he did not hesitate to say that they would not have been in their present dilemma... The question...was whether they should defend the indictment which had been preferred, or repair the road'.*
- 3.4.25 It was reported that the Eastdown Vestry wanted the Indictment to be defended, though a memorial had been received from some of the ratepayers requesting the halting of the Indictment. Various compromises between the landowners and the parish were suggested, but no agreement could be reached and the discussion adjourned.
- 3.4.26 23.05.1868 – Eastdown Vestry. An important vestry meeting was convened for the purpose of ascertaining if a compromise could be reached regarding the repair of the road between Shortacombe and Prince's Gate (just west of point E), including the proposal route.
- 3.4.27 *'Expensive and irritating legal proceedings had been commenced, and an indictment would be preferred at the next assizes...unless some means could be devised for an amicable statement; and it would be unwise to squander a large sum in law if a basis could be found for a satisfactory adjustment of existing difficulties.'*
- 3.3.28 It was *'adopted by a majority of 8 to 4...that all matters be left to the Highway Board, to do as they shall think proper, provided the parties do not enter into a compromise before the next meeting'.*
- 3.4.29 30.05.1868 – Ilfracombe District Highway Board. The Board discussed the recent

resolution of the Eastdown Vestry regarding the repair of the road (the proposal route), and how to proceed on the matter. It was narrowly resolved *'that the Highway Board [should] defend the indictment, and do not repair the road'*.

- 3.4.30 11.03.1869. The Eastdown Highway case had been postponed to the summer Assizes.
- 3.4.31 12.04.1869 – Ilfracombe District Highway Board. The Highway Board was requested *'to name 2 inhabitants of Eastdown to appear at the next Assizes to be held at Exeter...to defend the indictment against the inhabitants of Eastdown for allowing a certain highway passing through Wigmore Estate...to be out of repair. The case was laid before the...vestry...who declined to act. The Board also declined to give the names required and the matter dropped'*.
- 3.4.32 Circa 13.05.1869 – Ilfracombe District Highway Board. In a discussion relating to a highways depot, it was noted that *'the road on which the depot abutted was up to a certain time repaired ratione tenure'*, and then *'conveyed to the parish, subject to a payment of £5 10s annually out of Shortacombe estate toward the repair'*. The location of the depot is unknown.
- 3.4.33 09.07.1869 – County Magistrates Petty Sessions. Mr Passmore of Wigmore and Mr Tamlyn jnr of Churchill *'were brought up in custody, apprehended upon a warrant charges with refusing to enter into a legal engagement to plead to a bill of indictment preferred against them as representatives of the parish of Eastdown, for non-repair of the road leading through Wigmore Estate.'* They were *'ordered to be bound in recognizances to appear and plead at the Assizes for Devon, on the 26<sup>th</sup> instant., at the castle of Exeter.'* The *'defendants were 'content' to be so bound, and having signed recognizances, each for £100' (£4,750 in 2005) 'were dismissed.'*
- 3.4.34 Circa 21.10.1869 – Ilfracombe District Highway Board. The minutes of a recent meeting of the Eastdown Vestry were read, when *'the parishoners assembled for the purpose of endeavouring to settle the action against the parish – The Queen v The Parish of Eastdown, in the matter of the road from Shortacombe to Princess Gate.'*
- 3.4.35 Letters were read from the prosecuting barrister *'offering to stop all proceedings, on the parish repairing the road in question'*, and it was resolved *'that £30 [approximately £1,370 in 2005] be collected, and that the disputed road be put into repair, and the balance be handed over to the Board for the future reparation of the same and toward the expenses incurred.'*
- 3.4.36 Circa 28.10.1869. *'The Highway Board agree to take the repair of the road on these conditions, and legal proceedings are now stopped.'*
- 3.4.37 23.06.1881 – County Magistrates Petty Sessions. In a case before the magistrates relating to a damaged gate, it was noted that the Prince's Gate road, including the proposed route, *'was formerly repairable by private persons, but which some years ago was made repairable by the parish.'*
- 3.4.38 09.02.1882 – Ilfracombe District Highway Board. The Board considered the question as to whether the occupier of the Wigmore estate in Eastdown had a right to keep the gates across the roadway, the proposed route, now that it was a parish road. It was resolved that a legal opinion be sought on the matter.
- 3.4.39 Circa 03.11.1898 – Barnstaple Rural District Council. *'Having looked into the question of Mr Chugg's' [of Shortacombe] 'liability for the maintenance of the road at*

*Shortacombe...the Clerk showed that under a magistrates' order in 1848 the road was taken over by the highway authority subject to William Tamlyn, the then owner, paying annually to the Surveyor the sum of £5 10s [£321 in 2005], a portion of the expense of repair', though it appears that such payments had been irregular particularly since the Highway Board had been dissolved. However, this 'did not get over the fact that the award was made against the estate, and was in existence.'* A Committee was appointed to investigate and report.

- 3.4.40 Circa 01.12.1898 – Barnstaple Rural District Council. *'The Special Committee reported that there could be no doubt that the order in 1840 [1848] by the old Ilfracombe Highway Board that the owner of the estate should pay the sum of £5 10s a year as part of the expenses', and 'that £22 [£1,255 in 2005] was now due from Mr Chugg, the present owner'. The Council accepted the Committee's report and called on Mr Chugg to make the payment, which he refused.*
- 3.4.41 Circa 02.02.1899 – Barnstaple Rural District Council. Mr Chugg refuted his *'liability for the cost of the repair [of the] road adjoining Shortacombe'*. The Council's Clerk was requested to seek out *'the original magistrates order relating to the matter and kept in the parish chest'*.
- 3.4.42 The Parish Clerk replied that *'he was unable to find the order'*, but *'what had become of it he, of course, did not know, and the only inference was that it had been extracted by somebody'*. The Clerk was to find out *'when the deed in question was last seen'*.
- 3.4.43 09.09.1899 – Ilfracombe District Highway Board. The Board again considered the question as to *'whether the occupier of the Wigmore estate in Eastdown had a right to keep the gates across the roadway known to be the route, now that it was a parish road'*. The committee had met and had difficulty in reaching a decision. It was proposed *'that they take legal advice'* on the matter.
- 3.4.44 Circa 16.02.1899 – Barnstaple Rural District Council. The Clerk reported that the parish rector remembered *'the document mentioned'* and recalled showing it to Mr Chugg in about 1894-5. *'He took it away with him after promising to return it on the following day. Since that time, [he had] repeatedly asked for it, by letter and in person, but it [had] not been returned'*. Mr Chugg denied having the document. After much debate, *'Mr Chugg paid the full amount due in respect of the repair of the road, unconditionally'*.
- 3.4.45 Circa 02.03.1899 – Barnstaple Rural District Council. Mr Chugg of Shortacombe requested that as he had paid the Council £22 (approximately £1,255 in 2005) for the repair of the road, known to include the proposal route, which had been maintained by the Council and the owner of Shortacombe, he *'applied that it should be taken over'*. The matter was referred to the Eastdown Committee.
- 3.4.46 Circa 30.03.1899 – Barnstaple Rural District Council. The Committee recommended *'that the Shortacombe occupation road' known to include the proposal route, 'which for some years had been kept in repair by the Council at the cost of the owners, be taken over on payment of £15 [£855 in 2005] by the present owner, Mr Chugg'*. The report recommending the road be taken over was adopted.
- 3.4.47 Circa 03.08.1899 – Barnstaple Rural District Council. The report adopting *'40 perches of road at Wigmore, Eastdown for £12' [£684 in 2005]* was accepted.
- 3.4.48 06.07.1905. It was reported that a *'public botanical walk was taken from Ilfracombe to Watermouth, Berrynarbor and Berrydown...walked back to Barnstaple, taking a route*

*by Shortacombe, Prince's Gate Bridge, Ashelford Corner...'.*

### **3.5 County Magistrates Petty Sessions, 1881**

- 3.5.1 Court records may provide conclusive evidence of the stopping up or diversion of highways. Presentments or indictments for the non-repair of highways may also be found here and may provide strong evidence of status where they are confidently identifiable. It should be borne in mind that such records are conclusive evidence of those matters the Court actually decided, but are not conclusive in relation to other matters.
- 3.5.2 In June 1881, Mr Burnell, the occupier of the Wigmore estate, East Down appeared before the local magistrates regarding the deliberate damage to a gate on the Prince's Gate road, the proposal route, which was noted as a *'public highway repairable by the parish'*.

### **3.6 Ordnance Survey Name Books, 1883-5**

- 3.6.1 These Ordnance Survey records contain information on named routes may be found in the relevant Object Name Books, which provided details of the authorities for named features.
- 3.6.2 Only Shortacombe is referred to in these records, though it is noted that these are not a complete record for the parish of East Down
- 3.6.3 Ordnance Survey maps do not provide evidence of the status of this route but rather its physical existence over a number of years. These early Ordnance Survey maps carried a disclaimer, which states that: *'The representation on this map of a road, track or footpath is no evidence of a right of way'*.
- 3.6.4 The proposal route is shown with a variation passing closer to what is now known as Lower Court Barn between points E – F – G – X – H – I – J – K, on the 1<sup>st</sup> Edition large scale 25" Ordnance Survey mapping of 1889 as an enclosed lane, open and available, part of the local highway network and shown in the same manner as other recorded public highways. It is shown in a similar manner on the 2<sup>nd</sup> Edition of 1904 and the Post War A Edition of 1961. The current track past Lower Court Barn is not shown.

### **3.7 East Down Vestry minutes, 19<sup>th</sup> century**

- 3.7.1 Prior to the formation of District Highway Boards in the early 1860s and the later Rural District Councils (1894) the responsibility for the maintenance of public highways generally belonged to the parish and was discharged by elected Surveyors of Highways. Relevant Acts of 1766, 1773 and 1835 included the provision for the use of locally available materials and there was a statutory requirement upon parishioners to fulfil a fixed annual labour commitment. The final responsibility for maintenance lay with the local Surveyor of Highways who was obliged to keep a detailed account of public monies expended. The relevant records relate to matters referred to in section 3.4 above.
- 3.7.2 26.03.1868. The Parish Vestry resolved to object to have anything to do with the repairs to the road between Shortacombe Gate at point J and Prince's Gate, just west of point E, the proposal route, or to take the road after it was repaired.
- 3.7.3 09.05.1868. The Vestry resolved to request the Highway Board to defend the indictment against the Parish, after the motion requesting the Highway Board to take

the necessary steps to repair the road without going to the Assizes was lost. It was the opinion of the meeting that the road in question, the proposal route, belonged to Wigmore and not the parish of Eastdown.

- 3.7.4 23.05.1868. The Vestry convened in order to see if a compromise could be reached regarding the Shortacombe Road, the proposal route, and avoid litigation and the expense of further legal proceedings. It was resolved that the matter be left to the Highway Board to act as they sought fit, provided the parties did not reach a compromise before the next meeting.
- 3.7.5 27.03.1869. A letter was read from the legal representative acting against the Vestry regarding the Princes Gate Road, the proposal route, asking for the names of 2 parishioners who would undertake to appear in answer to the Bench warrant at the summer assizes in Exeter.
- 3.7.6 17.07.1869. Letters were read from the legal representative acting against the Vestry, offering to stop all legal proceedings if the Parish repaired the road in question, the proposal route. It was resolved that £30 (approximately £1,370 in 2005) should be collected for the repair of the road, with the balance being handed over to the Highway Board for its future reparation, and expenses incurred.

### **3.8 East Down Parish Council Minutes, 1894 onwards**

- 3.8.1 The Minutes provide information about the management of the route and the Council's views regarding the public highways in the parish. A public body such as a Parish Council had powers only in relation to public highways through the appointed Surveyor of Highways historically, which they had a responsibility to maintain.
- 3.8.2 06.05.1897. The Parish Council decided to '*represent to the District Council that the roads repaired (ratione tenure) in the parish were in a worse state than when this Council made its former complaint, nothing having been done*', and requested a Committee be appointed to view these roads. The list of roads included the '*road by Shortacombe House as far as the Wigmore Estate*', including the proposal route, and from Shortacombe Estate through the Wigmore and Holwell Estates.
- 3.8.3 06.05.1897. It was resolved that a letter should be written to the District Council '*to draw their attention to [the] bad state of the road from Shortacombe to Ashelford at Kittaknowle field*', which included the proposal route.
- 3.8.4 28.07.1899. It was resolved that the Parish Council ask the District Council '*to get the necessary repairs to the said roads*' through the Holwell and Wigmore Estates, which included the proposal route.
- 3.8.5 19.03.1935. It was noted that the '*Kittaknowle field road*', which included the proposal route, was '*reported satisfactory*'.
- 3.8.6 29.10.1935. The Parish Council resolved to send a letter to the Rural District Council asking that the '*sign at Shortacombe be altered to unfit for motor traffic*'. This is considered to refer to the proposal route.
- 3.8.7 04.02.1936. A letter had been received from the Rural District Council notifying the Parish Council that instructions had been given for a sign post to be erected at Shortacombe stating that the road was '*unfit for heavy motor traffic*'. This is considered to refer to the proposal route.

- 3.8.8 07.11.1944. A letter was received from the Rural District Council regarding accommodation roads and unnecessary highways in the parish. The Parish Council agreed that the roads between Churchill and Ashelford Corner, and the Barton and Gratton should be taken over. However, they did not agree that the roads between Shortacombe – Ashelford Cross which included the proposal route, and Churchill – Oakwell Cross should be given up.
- 3.8.9 03.10.1968. *'A letter was read from the Barnstaple Rural District Council stating that an obstruction of the road between Shortacombe to Ashelford was being dealt with',* which included the proposal route.
- 3.8.10 17.04.1975. *'After discussion about complaints about the Bridge at Princess Gate between Shortacombe and Ashelford'* it was decided that the Parish Council should write to the District Council.
- 3.8.11 18.12.1984. The planning permission to convert a barn at Shortacombe was discussed. The Parish Council *'were concerned about the extra traffic using Shortacombe Lane and surrounding roads'*, though there is no specific reference to the proposal route.

### 3.9 **Barnstaple Rural District Council Minutes, 1893-1974**

- 3.9.1 The Minutes provide information about the management of the route and the Council's views regarding the public highways in the parish. A public body such as a District Council had powers only in relation to public highways through the appointed Surveyor historically, which they had a responsibility to maintain. The records for 1898-99 have not survived.
- 3.9.2 There are a number of references to the highways in East Down parish in these records, with a number specifically dealing with the proposal route.
- 3.9.3 26.04.1895. Concern was expressed about the drop adjacent to the road for about 20 metres near Princes Gate. The Surveyor recommended that posts and rails be erected at that location. This section is currently recorded as the unsurfaced county road connecting with the proposal route at point E, just east of Princes Gate Bridge.
- 3.9.4 10.05.1895. The committee appointed had inspected the dangerous piece of road at Princes Gate, which was at times only 8'6" wide, sloping, with an almost perpendicular drop on the lower side. It was resolved that the road should be cut away and levelled at a cost not exceeding £5 (approximately £299.65 in 2005).
- 3.9.5 24.05.1895. It was reported that the lowering of the road had been completed and that the rail would be fixed in a few days.
- 3.9.6 22.02.1935. The Surveyor reported that the road between Ashelford and Shortacombe, which included the proposal route, through 'Kittie Knowle' field, complained of by the East Down Parish Council was a grass track. He had found it slightly rutted and therefore had the ruts filled in with gravel. This section is currently recorded as the unsurfaced county road connecting with the proposal route at point E, just east of Princes Gate Bridge.
- 3.9.7 01.11.1935. It was resolved that a signpost should be erected at Shortacombe indicating that the road was unfit for motor traffic, as requested by the East Down Parish Council. This may refer to the proposal route

### **3.10 Devon County Council Main Roads Committee, 1894-1973**

- 3.10.1 The Minutes may provide information about the management of the route and the Council's views regarding the public highways in the parish. A public body such as a County Council had powers only in relation to public highways through the appointed Surveyor historically, which they had a responsibility to maintain.
- 3.10.2 Any issues relating to the proposal route referred to the County Council were not dealt with by the Committee.

### **3.11 Finance Act, 1909-10**

- 3.11.1 The Finance Act imposed a tax on the incremental value of land which was payable each time it changed hands. In order to levy the tax a comprehensive survey of all land in the UK was undertaken between 1910 and 1920. It was a criminal offence for any false statement to be knowingly made for the purpose of reducing tax liability. If a route is not included within any hereditament there is a possibility that it was considered a public highway, though there may be other reasons to explain its exclusion.
- 3.11.2 The route between points E – F – G – X – H – I – J – K is excluded from the surrounding hereditaments, with hereditament boundary lines stopping and restarting on either side of the route, between points E – F – G. The Field Book entry for hereditament 14 which is Shortacombe, there is a deduction for public rights of way, but this relates to East Down Footpath Nos. 19 and 20 where they cross fields.

### **3.12 Bartholomew's maps, 1920s onwards**

- 3.12.1 These maps were designed for *tourists and cyclists* with the roads classified for *driving and cycling purposes*. They were used by and influenced by the Cyclists Touring Club founded in 1878 which had the classification of First Class roads, Secondary roads which were in good condition, Indifferent roads that were passable for cyclists and other uncoloured roads that were considered inferior and not to be recommended. Additionally, footpaths and bridleways were marked on the maps as a pecked line symbol. Cyclists were confined to public carriage roads until 1968. The small scale does not permit all existing routes to be shown, omitting some more minor routes. The purpose of these maps was to guide the traveller along the routes most suitable for their mode of transport.
- 3.12.2 Maps dating from 1924 and 1932 show the route between points E – F – G – X – H – I – J – K, and is shown as an Inferior Road and not to be recommended. The majority of those roads shown in the parish then are included in that category.

### **3.13 Aerial Photography, 1946 onwards**

- 3.13.1 The route between points E – F – G – X – H – I – J – K is visible and has similar characteristics to the rest of the parish highway network particularly pre-tarmacadam.

### **3.14 Definitive Map Parish Survey, 1950s**

- 3.14.1 The compilation process set out in the National Parks and Access to the Countryside Act 1949 involved a substantial amount of work and such records are considered a valuable source of information. The rights of way included in the process had to pass through draft, provisional and definitive stages with repeated public consultations.

- 3.14.2 There is no reference to the proposal route in the Parish Survey, however it appears that the Parish Council may have considered it to be a public highway and did not consider that it should be included. Footpath No. 20 is shown on the Survey map as ending just northeast of Shortacombe Lodge on the proposal route, where it now turns northwards towards Shortacombe Corner, between points J – K.

### **3.15 Definitive Map and Statement, 1957**

- 3.15.1 The inclusion of a public right of way on the Definitive Map and Statement is conclusive evidence of its existence. However, this does not preclude that other rights which are currently unrecorded may exist.
- 3.15.2 The Statement for East Down Footpath No. 20 describes it as running from *‘Shortacombe Corner southwards along a private accommodation road (not repairable by the inhabitants at large) keeping to the east of Shortacombe...’* between points J – K.

### **3.16 Devon County Council North Devon & Torridge Highways Sub-Committee, 1970s-90s.**

- 3.16.1 The Minutes may provide information about the management of the route and the Council’s views regarding the public highways in the parish. A public body such as a County Council had powers only in relation to public highways through the appointed Surveyor historically, which they had a responsibility to maintain.
- 3.16.2 Any issues relating to the proposal were not dealt with by the Committee.

### **3.17 Shortacombe planning papers, 1994-96**

- 3.17.1 Planning records have to be interpreted carefully, with particular attention paid to the meanings of words within the given context. Usually they will provide suggestive, rather than conclusive, evidence.
- 3.17.2 Lower Court Barn was developed under planning permission given in 1994 (application nos. 19481 & 19482), with no amendment of the track through Shortacombe which carries the route. The track was altered however, under planning permission given in 1996 (application nos. 21263 & 21264). It includes plans showing the proposed alteration in relation to the pre-existing track from the historic alignment G – X – H to the current alignment G – H, and the extent of the property, which did not include any part of the track or proposal route.

### **3.18 Shortacombe House sale, 1996**

- 3.18.1 Sales particulars should be treated with special caution, as the art of embellishment in advertising is not a newly acquired skill. Nevertheless, if a public right of way were admitted, a convincing reason for disregarding the entry would need to be provided before it could be entirely discounted.
- 3.18.2 The route between points E – F – G – X – H – I – J – K was not included in the sale.

### **3.19 Route Photographs, 2009 and 2014**

- 3.19.1 Site photographs of the route between points E – F – G – H – I – J – K show that it is open and available.

### 3.20 Land Registry, 2017

3.20.1 Only the property now known as Lower Court Barn includes part of the route as proposed, between points G – H within its land holding. The remainder of the route is excluded.

## 4. User Evidence

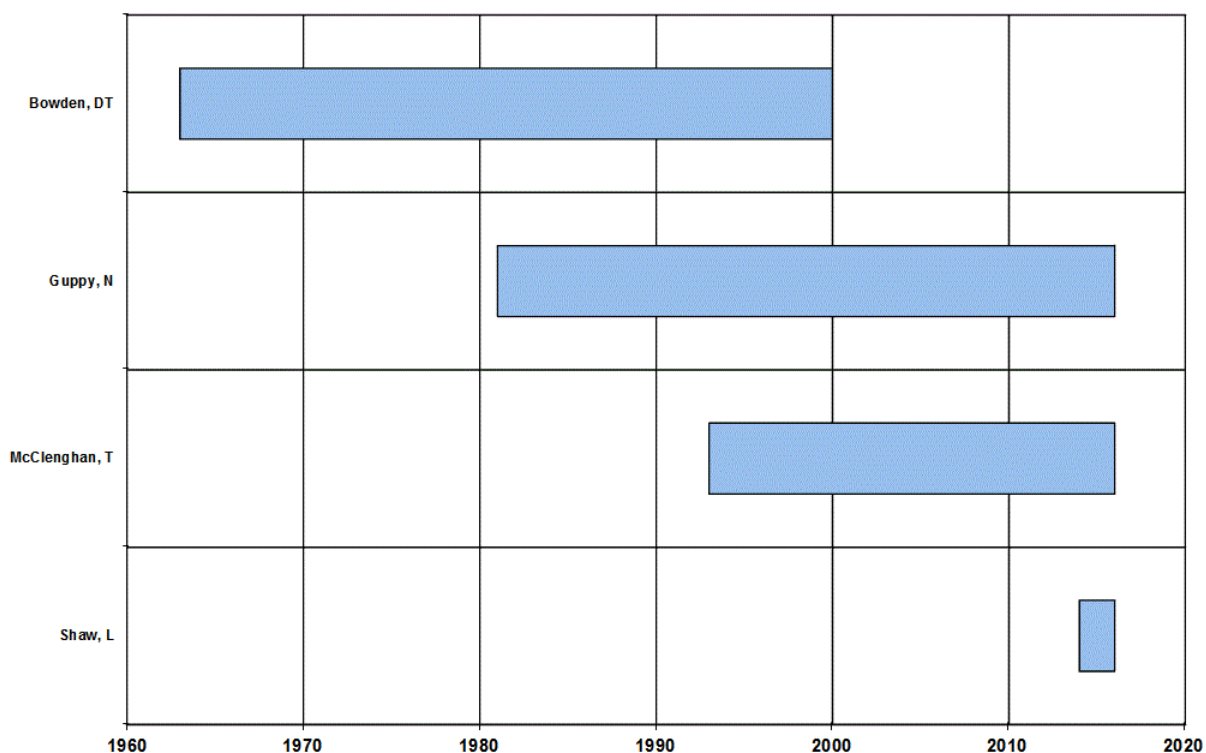
4.1 Four user evidence forms were received in response to the informal consultation detailing use on foot, horse and with vehicles between 1963 and 2016.

4.2 Mr Bowden has used the route on horseback and with vehicles for access to fields without challenge since 1963 on a regular basis, and has not been aware on any notices. He and three previous generations of his family have used the proposal route. He recalls Mr Fry of Wigmore Farm erected a gate near Prince's Gate about 10 years ago but it is not locked. This gate is located approximately halfway between Princes Gate and Bridge and point E.

4.3 Mrs Guppy has used the route on horseback since 1981 without challenge and has never been told it was not public. It has been ridden by her family for several generations.

4.4 Mr McClenaghan used the route on foot since 1993 as part of a running circuit, and only recalls 'private' notices being erected in 2016. He has never been challenged or turned back. He recalls that the route has been used as a bridleway for many years.

4.5 Mrs Shaw has used the route on horseback since 2014 on a fortnightly basis without challenge until October 2016, when she was told it was not public. The route has not been obstructed and only recently has she seen 'private road' notices.



## 5. Landowner/Rebuttal Evidence

- 5.1 Three responses were received in response to the parish informal consultation including objections from 2 landowners at Shortacombe.
- 5.2 Mr Rolfe of Shortacombe Barton has owned land adjacent to the route since 2012. He believes the route is a byway open to all traffic, and sees continuous use by members of the public. He has never challenged anyone using the route.
- 5.3 Mr and Mrs Lancey of Shortacombe Lodge (formerly Nos. 1 and 2 Shortacombe Cottages) have lived there since 2007. During the purchase process they were informed that the proposal route was a private lane (owned by the owners of Lower Court Barn but with all legal right of way claimants helping with the upkeep) with no public access. In the years since, nothing has changed and they take exception to the proposal for change. Over the years they have challenged people and told them it was not a public right of way, including motocross riders who repeatedly use it, and a local riding stable who continue to use it. Mr and Mrs Lancey have concerns for their daughter who is a permanent wheelchair user, when she is using the lane.
- 5.4 Mr and Mrs Hardman of Lower Court Barn have owned the property since 2010. They do not believe the proposal route to be public and are not aware of any permissive use. They have stated that it is privately owned and has never been subject to a public right of way. People seen using the proposal route have been challenged. Mr and Mrs Hardman describe the track as being gated where it meets the '*restricted byway*' at grid reference 'SS 5897 4201' (Shortacombe Corner), and state that neither of the public footpaths pass through the former gateway pillars (GR SS 5891 4180).
- 5.5 They have submitted copies of documents to support their view that the track between Shortacombe Corner on Dudmoor Lane towards Princes Gate and Bridge, which includes East Down Footpath Nos. 2 and 20, and the proposal route, is private. The evidence they have presented, Mr and Mrs Hardman believe, confirms that the track including the proposal route is private and has been closed to the public for the last 20 years. They state that a lack of a byway application means that the public do not believe there is a public right of way. Mr and Mrs Hardman's rebuttal evidence is as summarised below:
- 5.5.1 Track ownership and statutory declaration. Mr R Kent-Smith, a previous owner, completed a Statutory Declaration in 1978 regarding his ownership of part of the proposal route. This was apparently part of a dispute with Mr Roberts, a previous owner of Lower Court Barn, who had apparently wanted permission to repair the track through Shortacombe. Mr & Mrs Hardman also completed a Section 31(6) deposit in 2016.
- 5.5.2 Evidence from Devon County Council. They refer to East Down Footpath Nos. 2 and 20 as being the only public rights of way affecting the '*track*' and that no formal byway application has been made for it.
- 5.5.3 Conveyancing. When Mr and Mrs Hardman purchased their property in 2010, the searches did not reveal any public rights of way, either through or abutting the property.
- 5.5.4 Landowner track maintenance. Mr and Mrs Hardman state that the track including the proposal route has been closed for a variety of periods ranging from one day a year, to several hours a year, and other periods for various maintenance tasks. No-one has complained about such closures. Neither the Parish Council nor County Council has

carried out any maintenance on the track.

- 5.5.5 Change of track route. The alignment of part of the proposed route was altered as part of the re-development planning application for Shortacombe in 1986 to move it away from running directly past what became Lower Court Barn (from the alignment G – X – H to G – H).
- 5.5.6 Lack of continuous access over the last 20 years. They state that public access to the track has not been possible over the last 20 years, except in relation to the public footpaths.
- 5.5.7 Permitted access to the track. Mr and Mrs Hardman state that any access to the track has been in secret, without permission, and at times, with force. Requests for permissive use of the track including the proposal route have been refused, and several user groups have been notified of its private status. Besides challenging users themselves, they have also seen their neighbours at Shortacombe Lodge challenging users.
- 5.5.8 Private road signage. They state that signs have been erected since 2010, which have been periodically removed or vandalised. The Public Rights of Way Warden agreed to improve the footpath signage.
- 5.5.9 Historic data. Mr and Mrs Hardman have consulted a copy of the East Down Tithe Map and Apportionment. They comment that part of the route was included within lot 400 – Shortacombe Homestead. This is the same as the land now registered as Lower Court Barn. The remainder was included in plot 920 ‘road’, not part of Shortacombe or the ‘byway track’. They consider this shows the origins and use of this form of track is as an ‘*occupation road*’, similar to that joining the byway from Wigmore Farm.

## **6. Discussion**

- 6.1 Statute – Section 31 Highways Act 1980. It is considered that the notices erected in 2016 by Mr and Mrs Hardman of Lower Court Barn, at points G and K, are sufficient to call the public’s use into question. Therefore, the relevant period to be considered is 1996-2016.
- 6.2 User evidence forms were received from four members of the public detailing regular use on horseback and on foot dating back to 1963. They never saw any notices until 2016, nor have they been challenged. There is no evidence that this use has been used in secret, with permission or with force. The only gate they recall on the route at the west end near point E. This is a modern gate known to have been erected by Mr Fry of Wigmore Farm about 10 years ago, for stock control purposes. Since the perceived challenge in 2016, the public have apparently continued to use the route.
- 6.3 Current landowner evidence received from three landowners dates back to 2007. They were told that the route was a private lane except for East Down Footpath No. 20. The owners of Shortacombe Lodge (formerly 1 and 2 Shortacombe Cottages) and Lower Court Barn state they have challenged users of the route. The user evidence demonstrates however, that use has not been secretive, with permission or force. Any reported challenges by previous landowners can only be considered hearsay.
- 6.4 The owners of Lower Court Barn state that ‘*private road*’ signage was erected at points G and K before 2016, though site photographs from 2010 and 2015 demonstrate that there were no such notices in place at those times. Users also do not recall any

notices before 2016.

- 6.5 Mr and Mrs Hardman also state there have been a number of brief closures of the route for maintenance purposes. Such works were carried out for the benefit of the residents of Shortacombe, not to hinder use of the public right of way or proposal route.
- 6.6 There is limited documentary evidence relating to the statute period, primarily planning, land ownership, and sale records. On the sale of Shortacombe House in 1996, the route was not included.
- 6.7 Planning records show that as part of the redevelopment of Lower Court Barn, the alignment of the route was altered from the alignment G – X – H to its current alignment G – H in 1996. However, the user evidence demonstrates that users transferred their use from the old alignment to the current one.
- 6.8 Land Registry shows that the proposed route is completely excluded from any land holding except Lower Court Barn between points G – H.
- 6.9 It is considered that the actions of landowners did not bring the public's use of the route into question and did not show a lack of intention to dedicate until 2016, though as only 4 user evidence forms were received for the relevant period of 1996-2016, this is considered insufficient to demonstrate presumed dedication under statute.
- 6.10 However, a claim for a right of way may also exist at common law. Evidence of dedication by the landowners can be express or implied and an implication of dedication may be shown at common law 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.
- 6.11 Common Law. On consideration of the route at common law, the historical mapping shows that a route has physically existed between points E – K since at least 1823.
- 6.12 The continuation of the route between Ashelford Gate and Princes Gate (see Committee plan 2), just west of point E, was formally set out as a public carriage road under an Inclosure Award enacted by Parliament has been recorded as an unclassified county road since the Handover Roads Records of 1947, and appears as a parish road through the East Down Vestry Records and Surveyors of Highways records since at least 1829, which are consistent with what is shown on the 1840s Tithe Map. The current unsurfaced county road set out in the Inclosure Award was included in lot 920 which is the parish roads, along with the major part of the proposed route.
- 6.13 The Inclosure Award provides supporting evidence of other matters over land adjacent to but outside the awarded area. The continuation of the proposed route from just west of point E to Ashelford Gate was formally set out as a public carriage road under an Act of Parliament, it is likely that the public were considered entitled to proceed on from Princes Gate and Bridge towards Wigmore and Shortacombe, the latter of which was described as a village in a report from the British Newspaper Archive. In such a situation, the principle set out in the case of *Eyre v New Forest Highway Board* (1892) would be invoked; that where a short section of uncertain status exists, it can be presumed that its status is that of the highways linked to it.
- 6.14 As reported in the British Newspaper Archive, at Petty Sessions in 1868 it was acknowledged that it was '*undisputed on all hands that the piece of road in question is a highway*' repairable '*ratione tenure*'. In 1869 it was then accepted and handed over

as a parish road by the East Down Vestry and Ilfracombe District Highway Board, and publicly maintainable. This status was also acknowledged and accepted during the court cases relating to the route in 1881, 1882, and 1898. Comparison between these reports and other documentary evidence sources, show the newspaper reports to be accurately detailed accounts.

- 6.15 A barrister in the 1868 case at Petty Sessions reported in the North Devon Journal stated that 'a considerable portion of the highways of Eastdown is repaired *ratione tenure*; in fact, nearly the whole of them, only a few being kept in order by the parish'. This statement is supported by the records of the East Down Vestry, British Newspaper Archive, and Barnstaple Rural District Council.
- 6.16 The law presumes that where a liability '*ratione tenurae*' has been created, that it was for the benefit of the public and that there was an obligation to the public which could be enforced by indictment. The obligation to repair became attached to the occupation and tenure of certain lands. There is a presumption that a road repaired '*ratione tenurae*' was public as an indictment could only be brought in the name of the public. Those liable for repairs *ratione tenurae* were exempt from payment of the highway rate, Section 33 of the Highways Act 1835 and later under Section 25(2) of the Local Government Act 1894.
- 6.17 The route was considered a public road by the Parish Council up until at least 1935 and this may be the reason why it was not included in the Definitive Map Parish Survey in 1950.
- 6.18 Any gaps that there may be considered to be in the evidence are bridged by the legal presumption, the maxim, '*once a highway, always a highway*', as set out in the case of *Dawes v Hawkins* (1860). This presumption must prevail unless some legal event causing the highway to cease can actually positively be shown to have occurred. Additionally, it is the norm that the legal maxim '*once a highway always a highway*' would be considered to apply. However, as set out in the case of *Eyre v New Forest Highway Board* (1892), where a landowner has altered the route of a public highway without a quarter sessions order, dedicated it to the public, put it in good order, and it has been acquiesced to and accepted by the public, then such an alteration is acceptable.
- 6.19 Though no evidence source which specifically locates Shortacombe Gate, it is believed to be at point J where a pair of imposing gate pillars are situated, which are of a similar nature to those at Prince's Gate and Ashelford Gate, seen in the route photographs in the backing papers.
- 6.20 Ordnance Survey mapping is not evidence of a right of right, only the existence of features on the ground at the time of the relevant survey.
- 6.21 Direct landowner evidence was received from 3 of the 5 landowners at Shortacombe and dates from 2007. One supports the proposal, while the other 2 object, believing it to be a private lane with no public access, and have challenged people using it.
- 6.22 Mr and Mrs Hardman, the owners of Lower Court Barn submitted evidence in rebuttal of the proposal. Until their property was registered, no part of the proposal route was registered to any specific landowner. They place considerable weight on the absence of a Schedule 14 application. However this is misplaced, as proposals to modify the Definitive Map and Statement can also be made under Schedule 15 of the Wildlife and Countryside Act 1981. Also, the existence of East Down Footpath Nos. 2 and 20 on the Definitive Map does not preclude that other rights may exist but are not currently

recorded. Any issues relating to the use of those public rights of way are a separate issue to the consideration of this proposal.

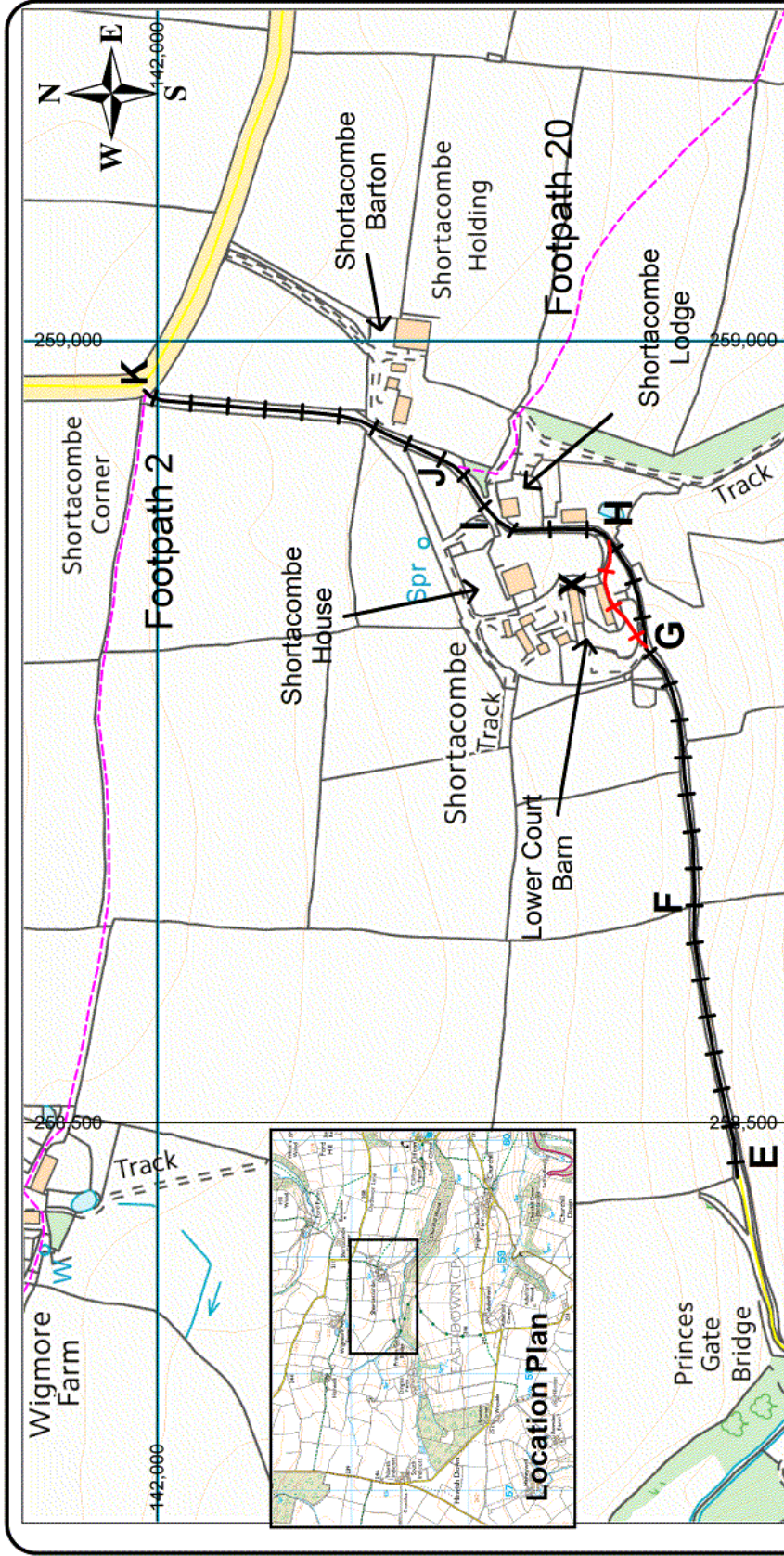
- 6.23 *'Private road'* signage has apparently been periodically erected. However, guidance and case law appears to infer that this wording may only be interpreted as applying to mechanically propelled vehicles. Mr and Mrs Hardman also refer to a gate on the proposal route, but none exists, though one did historically at the entrance into Shortacombe hamlet at point J. However, a gate is an authorised limitation on a public highway, and would only be an issue if locked. There is no evidence of a locked gate on the proposal route.
- 6.24 Mr and Mrs Hardman state that private maintenance closed the proposal route on numerous occasions, and that this has been assumed to relate to the section between Shortacombe Corner and Lower Court Barn. However, the track appears to have been closed for extremely short periods of time. It would not have been the purpose of any such maintenance to disrupt the use of the route by the public.
- 6.25 A lack of maintenance by either the Parish or the County Councils is not necessarily rebuttal evidence against the public status of the proposal route, which is currently partially recorded as East Down Footpath No. 20 between points J - K.
- 6.26 Presumed dedication is considered to have taken place many years prior to those events, and consequently the legal maxim *'once a highway, always a highway'* applies. The evidence when considered as a whole also does not support a lack of access for the public to the route. The user evidence demonstrates that any such closures of the proposal route did not affect the public's use of the route, as although limited, the user evidence demonstrates use has continued without any perceived interruptions. It also does not support the viewpoint that use has been with secrecy, permission, or force. A user continuing along the route after being challenged by a landowner is not use by force, as defined by the law.
- 6.27 Alleged modern trespass also has little weight, as the evidence demonstrates that presumed dedication had taken place by at least the early 19<sup>th</sup> century. Mr and Mrs Hardman's Section 31(6) deposit is the only one which relates to the proposal route. It was made in 2016 and does not apply retrospectively. Land Registry records show that until the property now known as Lower Court Barn at Shortacombe was first registered, the proposal route was not registered at all throughout its entire length.
- 6.28 Mr and Mrs Hardman also refer to the alteration of the alignment of the route between points G – H, under planning permission granted in 1986. The planning permission for the alteration of the track alignment from G – X – H to G – H through Shortacombe was not in fact granted until 1996. There is insufficient user evidence after 1996 to demonstrate presumed dedication of the modern track between points G – H. Although the modern user evidence is limited, public use has continued along the track between points G – H.
- 6.29 However, the same does not apply to the track alteration which occurred between 1843 and 1856. Normally the legal maxim *'once a highway always a highway'* would be considered to apply. Where a landowner has altered the route of a public highway without a quarter sessions order, but there is sufficient evidence it was dedicated to the public, put in good order, and it has been acquiesced to and accepted by the public, then such an alteration is acceptable, as set out in *Eyre v New Forest Highway Board* (1892).

## 7. Conclusion

- 7.1 On consideration of all the available evidence the documentary evidence demonstrates that the route between Princes Gate and Shortacombe Corner between points E – F – G – X – H – I – J – K has existed since at least 1823. It has been open and available since that time. It appears to have been considered public since that time.
- 7.2 At Common Law, all highways existing prior to the Highways Act of 1835 were automatically repairable '*prima facie*' by the parish unless the responsibility could be proven as lying elsewhere. This liability remained so long as the highway existed or until the liability was taken away or transferred by statute. The newspaper reports of the Ilfracombe Highway Board meetings and Petty Sessions demonstrate that the repair liability for most public highways in East Down was '*ratione tenure*', by the adjacent occupiers to the highways. This did at one time include the route before it was taken over by the Parish and subsequently, the Highway Board after a court case in 1869.
- 7.3 Whilst there is evidence that the route has latterly been considered to be a private track, included within land holdings and not maintained at public expense, there is no evidence of a legal stopping up order or declaration of non-maintainable highway at public expense of the proposal route. The legal presumption, '*once a highway always a highway*' applies.
- 7.4 The user evidence details use on horse and foot since the 1960s, which does not appear to have been challenged until 2016, by the owners of Shortacombe Lodge and Lower Court Barn. The use has been frequent and regular, '*as of right*', and considered representative of the public in a predominantly rural area.
- 7.5 There is some suggestion of the proposal route having been used with motor vehicles. Vehicle use must be prior to 1930 to be legal and satisfy any of the exceptions under the Natural Environment and Rural Communities Act 2006. However, the limited vehicle evidence does not satisfy any of the exceptions set out in the legislation. Consequently, any unrecorded rights for mechanically propelled vehicles are extinguished. Consequently, the highest status the route could be considered to be is a restricted byway.
- 7.6 The historical documentary and user evidence when taken as a whole is considered sufficient to show that a public right of way not shown in the Definitive Map and Statement subsists or is reasonably alleged to subsist, and that part of highway of a particular description ought to be shown as a highway of a different description. It demonstrates that the route was considered an all-purpose public highway, and is considered sufficient to demonstrate that vehicular rights exist and consequently can be recorded as a restricted byway. User evidence since the 1960s supports at least public bridleway status.
- 7.7 Regarding the several variations of the alignment of the route, it is considered that the evidence sufficiently demonstrates that the alteration of the alignment of the proposal route between 1842 and 1856 had been dedicated by the landowner and accepted by the public. This was acknowledged by the County Magistrates Petty Sessions. However, it is not considered sufficient to demonstrate the same for the alteration circa 1996.
- 7.8 The evidence is therefore considered to be sufficient under Common Law to demonstrate that a public highway of restricted byway status exists between points E – F – G – X – H – I – J, and that the public highway currently recorded between points J

– K as East Down Footpath No. 20 should be upgraded to restricted byway.

- 7.9 It is therefore recommended that a Modification Order should be made to add a restricted byway between points E – F – G – X – H – I – J and upgrade East Down Footpath No. 20 between points J – K to restricted byway to the Definitive Map and Statement, as shown on drawing no. HIW/PROW/16/40a. If there are no objections, or if such objections are subsequently withdrawn, that it be confirmed.
- 7.10 Should members approve the recommendation, prior to making the Order, it is proposed that discussions and an informal consultation with interested parties will be carried out to consider the making of a Public Path Diversion order to divert the route to follow the current track alignment between points G – H. If agreeable, such an Order could be made concurrently.



map ref: SS 5841 & 5842

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# Devon County Council Definitive Map Review - East Down Proposal 3 - Committee plan

drawing number **HCW/PROW/16/40a**

date **October 2017**

scale **1:3,750**

drawn by **CLG**

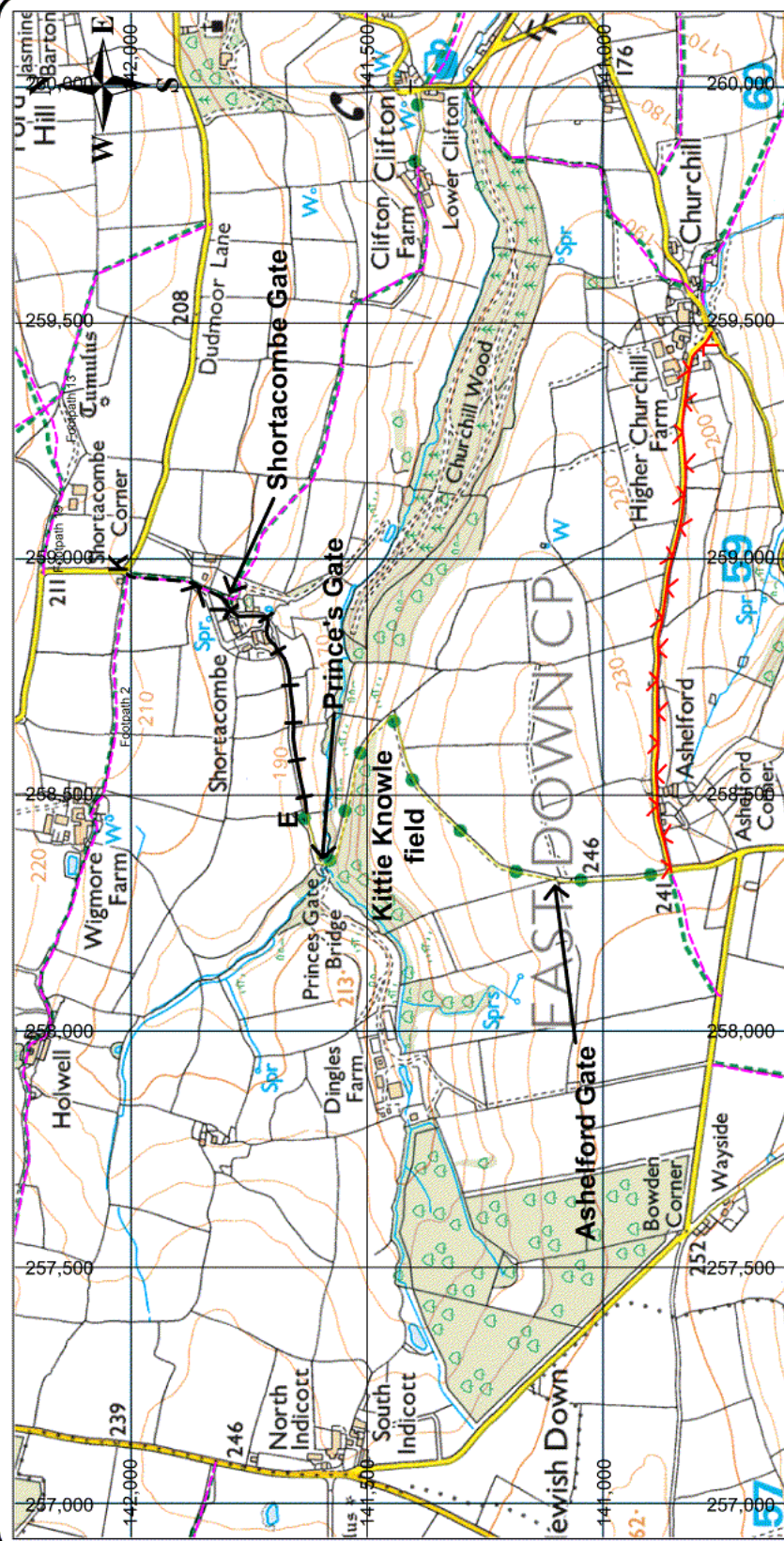
**Meg Booth**  
Chief Officer for  
Highways, Infrastructure  
Development & Waste



## **Notation**

Proposed bridleway addition (inc current alignment) E - F - G - H - I - J - K (approx 543 m)  
Proposed upgrade of Footpath No. 20 to bridleway J - K (approx 209 m)  
Historic alignment 1856 onwards G - X - H (approx 77 m)

Existing footpath



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Devon County Council

## Definitive Map Review - East Down

**Proposal 3 - Proposed addition of a bridleway & upgrade of part of Footpath No. 20 between Princes Gate Bridge and Shortacombe Corner**

drawing number HCW/PROW/16/40d

date **September 2017**

scale  
**1:12,500**

drawn by **CLG**

### Notation

**Proposed route (approx 756 m)**

Existing footprint Existing byway

**Meg Booth**  
Chief Officer for  
Highways, Infra-  
Development

