

## **FOOTPATH 52 KINGSWEAR**

Report of the County Solicitor

~~~~~

**Recommendation:** that in the light of all the evidence and representations now available members determine that in the vicinity of Old Mill Farm, Galmpton, Footpath 52 runs over the route depicted on the plan attached to this report: ED/PROW/05/66 and shown as Option 3

### **1. Background**

This report should be read in conjunction with the copy of the Inspector's report and subsequent material received from the interested parties which are attached at Appendix 1, 2 and 3. This material has been placed in the members' room and made available for consideration since receipt as proposed at the meeting of this committee on 07 June. References in the Inspector's report to Options 1, 2 and 3 are set out on the attached plan ED/PROW/05/66.

Footpath 52 Kingswear is shown on the Definitive Map and its route is described in the Definitive Statement. A dispute has arisen as to the precise route of this footpath on the ground in the vicinity of the property known as Galmpton Mill or Old Mill Farm. Shortly after the current owners purchased this property in 2000 they constructed a flight of steps leading to the foreshore which aligned the route away from the lane in front of their property and onto the foreshore. This was approved by the South Devon Coast and Countryside Service who managed the path on behalf of the County Council as it was believed at that time that such a route accorded with the Definitive Map and Statement. Some months later the owners erected a new five bar gate at the end of Mill Lane so that the public would use the flight of steps onto the foreshore and not walk along the lane in front of their property.

Following representations from members of the public the Definitive Map and Statement were examined more closely by officers of the Public Rights of Way Service at County Hall and it was considered that the historic route of this footpath, and the route actually recorded on the Map and Statement, was in fact along the lane in front of the property and not onto the foreshore by means of the new steps. This was confirmed by statements received from a number of members of the public as to the route they had previously used. The owners were requested to remove the gate and an old section of fencing to permit such access. A notice under S.143 Highways Act 1980 was subsequently served and acted upon. The landowners have consistently maintained that the route leads onto the foreshore and not along the lane in front of the property. The validity and authenticity of those statements relied on by officers has also been challenged.

As it appeared that the information held by the County Council might not represent the full picture and the statements received from some members of the public might be unreliable it was considered that the County Council should review this matter. This was also felt to be appropriate in view of the fact there is no right of appeal to a notice served under S.143 Highways Act and because there is no obvious statutory mechanism available in these circumstances to deal with the issue of a dispute as to the precise location on the ground of a route which appears on the Definitive Map and Statement. The County Solicitor's view was that a means should be found to enable as much relevant material and evidence as possible to be produced so that this could then be considered by members. Initially it was thought that this could be done by way of a members' site visit, with the landowners and members of the public making representations and giving evidence, however the landowners' solicitors suggested that a more formal approach was necessary and members agreed, following their own site inspection, to appoint an independent inspector to hold a non-statutory hearing. That hearing took place on 14 and 15 February 2005. Three possible routes were discussed at that hearing. They are set out on Plan ED/PROW/05/66 and are referred to by the Inspector as Options 1, 2, and 3 in his report. Members will be familiar with these routes having now carried out a site visit.

## **2. Purpose of the Hearing**

The hearing was intended to be a relatively informal affair which would elicit as much relevant evidence as possible, together with listening to representations, so that this authority could review the position it had previously adopted in the light of all relevant evidence including any new material that might be produced. The Inspector was asked to conduct the matter as an informal hearing rather than a Public Inquiry, and hopefully take a more inquisitorial role, in view of the fact that this authority would be taking a neutral stance and not actively promoting a particular position. It was recognised that a formal Inquiry would possibly not provide a suitable forum for members of the public to participate at, and it was hoped that the Inspector might be able to assist the members of the public who attended to give evidence.

Members will note from the post-hearing representations that many members of the public who attended have expressed dissatisfaction with the way in which the hearing was conducted. As the landowners' representative rightly points out [Further Opinion para 5] the expressions of dissatisfaction with the conduct of the hearing were largely made after the Inspector produced his report, and so those expressions of disquiet must be approached with a degree of caution. To the extent that members of the public may have felt that they were excluded from producing relevant evidence, there has since been an opportunity for them to comment on the Inspector's report and recommendation and to provide further evidence that was not brought forward at that hearing. It is considered that when looked at as a whole, the exercise has now provided a comprehensive opportunity for all concerned to put forward relevant material and to make representations to this authority so that they can be considered as a whole. That overall process is considered to have been worthwhile and of great assistance in enabling members to review this matter and to be able to come to a fully informed decision. There is now much more relevant material available to members than was the case previously when officers initially considered this matter.

### **3. Inspector's report and recommendation**

A copy of the Inspector's report is set out in Appendix 1. This report should be read in full. In summary the Inspector reviews the evidence of historic rights for a route between the limekiln and Mill Lane, by which he means evidence of a route being in existence before the Definitive Map was compiled in the 1950s and concludes (paras 8.6 – 8.18) that there is insufficient historical evidence to show a public right of way of any description between these two points. He then reviews the Definitive Map and Statement (paras 8.24 – 8.27.5). He examines the Definitive Statement, and noting its very specific wording concludes that he can place significant weight upon this document as evidence of the precise line of this footpath running along the route of Option 1. The Inspector concludes that this wording is so specific that it would need other evidence of sufficient weight to defeat that conclusion. He then goes on in paras 8.32 – 8.41 to look at the user evidence and concludes that there is insufficient to weigh against the conclusion he has previously reached based on his analysis of the Definitive Statement. He therefore recommends that the footpath follows the route of Option 1, and is not satisfied that there is sufficient evidence to show that it should follow Option 2 or 3.

### **4. Material received since the Inspector's report.**

Material has been produced by members of the public since the Inspector's report was published, and this is found at Appendix 2. A common theme running through the representations is an expression of dissatisfaction with the way in which the Inspector conducted the hearing. As mentioned above, the expressions of dissatisfaction were largely made after the Inspector had produced his report, suggesting that his conclusions may have informed the dissatisfaction with the procedures. Moreover to be fair to the Inspector, this was always going to be a difficult hearing to run, with large numbers of the public in attendance as well as counsel for the landowners, and the County Council in a neutral role. It must be remembered that the paramount purpose of this exercise was to gather material that was not available to officers to consider at the time they made their initial assessment of the route. To that extent, the Inquiry and the subsequently received information meet this purpose.

Several letters refer to the Inspector's analysis of the wording of the Definitive Statement. Mr Stevens on behalf of Kingswear Parish Council (letter of 04 May); Mrs Mazumdar (letter of 03 May); Dr Tulloch (letter of 03 May) all express the view that the Inspector's analysis is incorrect.

There are letters which show use of and knowledge of Option 3 before and at the time of preparation of the Definitive Map and Statement: Mr Christopher Jackson (statement of 20 April); Mr N Grant (undated letter and statement); Mr R Luscombe (letter 02 May); Maureen Milne (letter 29 April); Mary Quick (letter 26 April); E.W Quick (letter 27 April); Simon Hooper (letter 20 April); RF Crocker (letter 20 April); Mrs Geraldine Maunder( undated letter received on 22 April).

One letter from Richard B Parkes (28 April) agrees with the Inspector's conclusions. His knowledge of the route is relatively recent.

Both Mr Newcombe and Mrs Brown in their letters of 7 May and 17 April produce some additional photographs showing Galmpton Mill and the general area in the 1930's.

## **5. Landowners' comments on new material**

The landowners were given an opportunity to comment on the material produced since the Inspector's report was published, and attention drawn specifically to material relevant to Option 3. The landowners have responded with the Further Opinion, which is attached at Appendix 3. Members will note that this deals primarily with procedural matters, and in particular alleged conflicts of interest or issues of bias. Members should be aware that they must consider this matter from an objective stand point and solely on the basis of the available evidence for the various options.

## **6. Analysis of Inspector's report, his recommendation and subsequent material received**

In view of the importance placed on the wording of the Definitive Statement by the Inspector it is necessary to examine it in some detail and in the light of the comments received from Mrs Mazumdar and Dr Tulloch. Mrs Mazumdar's letter contains a very detailed consideration of the wording of the Definitive Statement which requires careful analysis. Members should pay particular attention to pages 2,3 and 4 of Mrs Mazumdar's letter of 03 May 2005 and compare it with the Inspector's analysis at paras 8.24 – 30.

The Definitive Statement reads:

**“The path is a footpath It starts at Greenway/Galmpton Road, County Road No. 13, 140 yards east of the drive to Lower Greenway and proceeds northwards following the boundary hedge of Ord. No. 445 on to a Private Accommodation Road (not repairable by the inhabitants at large), by Lower Greenway Farm and continues through Ord. Nos. 439 and 433 on to a Private Accommodation Road (not repairable by the inhabitants at large ) running parallel with the foreshore, which it follows to join the end of the Unclassified County Road by Galmpton Mill. (Stile and kissing gate on route).**

To aid members' understanding there is attached at Appendix 4 a 1:2500 digitised version of the 1905 Ordnance Survey 6 inch scale plan, which is the base map used for the Definitive Map, and which was available at the hearing. The O. S. field numbers referred to in the Statement are clearly shown. The end of Mill Lane has been marked on that plan, which was the point accepted at the hearing as being the correct location of its termination.

The Statement records that having started at a point 140 yards to the east of the drive to Lower Greenway the footpath follows the boundary of O.S. 445 “on to a Private Accommodation Road by Lower Greenway Farm”. This is considered to be the drive and road through that farm complex of buildings from which it emerges into

field 439 as noted by the Inspector at para 8.27.4. The footpath then continues, according to the Statement, “ through Ord. Nos. 439 and 433 on to a private accommodation road”. As has been pointed out by Dr Tulloch and Mrs Mazumdar, it does not say the path here runs on an accommodation road which is the construction given by the Inspector in paragraph 8.27.5 and the landowner (para 4.17). The Inspector here refers to the section through O.S. 439 and O.S. 433 as the “accommodation road” but as Mrs Mazumdar points at page 3 of her letter the O.S. map of 1905 shows that this cross-field section is no more than a footpath (FP), not a track or road which would be more consistent with an accommodation road. The accommodation road is only reached, according to the wording of the Statement, after the path has travelled through two fields: firstly O.S. 439 and then O.S. 433 (members should refer to Appendix 4 at this point). The path then follows the private accommodation road leading from the limekiln (at the northerly end of O.S. 433) and connects with the Unclassified County Road by Galmpton Mill.

It must be acknowledged that there is no clear evidence of a physically defined “accommodation road” along the foreshore from the limekiln to the end of Mill Lane. As to the need for such a road then there is much speculation, for example: the letter from Mrs Mazumdar at page 5, Mr Stevens’ letter 04 May 2005 at paragraph 14, and the Further Opinion paragraph 21. The Inspector’s comments at paragraph 8.16 are also relevant. The Further Opinion expresses the view that lime arrived by boat at the limekiln, was then burnt and then taken by horse and cart from the limekiln to Lower Greenway Farm. In support of that assertion it is stated that “maps show jetties by the quarry”, which they indeed do. But for horses and carts to take burnt lime to Lower Greenway Farm they would have to use the route shown as no more than “F.P.” on the 1905 plan, and there is no firm evidence that this was the exclusive practice. As the Inspector concludes at 8.10 the limekiln had ceased to operate by the 1880’s. There is no map evidence showing that the route to Lower Greenway Farm was previously anything other than the footpath subsequently recorded on the 1905 O.S. plan. Burnt lime could in fact have been moved from the kiln to the end of Mill Lane by horse and cart, using the firm shingle of the beach, and the stream would not have been any particular impediment. Some of the photographs supplied by Mr Newcombe and Mrs Brown and the photograph from the sales particulars of 1944 do appear to show a route available for pedestrians and vehicular use associated with such an accommodation road at least from the end of the County Road then passing in front of Mill Farm and then to the foreshore, and there is some evidence of vehicular use of this section in the post-hearing material. Moreover the 1905 O.S. plan appears to show a continuous route available from the limekiln to the end of Mill Lane, as recognised by the Inspector at para 8.11, though with some reservation on his part.

On balance therefore it is considered that the interpretation of the Definitive Statement suggested by Mrs Mazumdar and Dr Tulloch is more likely to be what was intended by the words used, than the interpretation suggested by the Inspector. He has in effect concluded that the footpath joins the edge of Mill Lane by his depiction of it on his plan showing Option 1, rather than what would properly be described as “the end” which is what the Statement refers to, and which is more consistent with Options 2 or 3. The implication of the Inspector’s conclusion is that pedestrians would walk along the foreshore and scramble up a bank with no steps to join the edge of Mill Lane, which seems unlikely when a route along the beach and in front of Galmpton Mill, Option 3, would be available to them as appears to be shown

on the photographs referred to above. The Definitive Map is also relevant here. Whilst acknowledging the scale at which it was produced, it does appear to show a route consistent with Option 3, and not Option 1, which would have to show the deviation referred to by the Inspector (para 8.27.7). The Definitive Map shows the route clearly terminating at “the end” of Mill Lane as referred to in the Statement. The Inspector makes no comment at all about what the Map actually shows, which is somewhat surprising. A copy of the Definitive Map is at Appendix 5.

There is significant post-hearing evidence that is consistent with public use of and knowledge of Option 3 at the relevant time i.e. before and during the 1950s when the Definitive Map and Statement were being prepared, and members are specifically referred to the statements of:

Mr Christopher Jackson (statement of 20 April); Mr N Grant (undated letter and statement); Mr R Luscombe (letter 02 May); Maureen Milne (letter 29 April); Mary Quick (letter 26 April); E.W Quick (letter 27 April); Simon Hooper (letter 20 April); RF Crocker (letter 20 April); Mrs Geraldine Maunder ( undated letter received on 22 April).

Members will note that Mr R F Crocker was actually born at (Old) Mill Farm in 1931 and his parents lived there from 1929 – 1944, and his evidence is that the disputed section follows Option 3.

It is important to note that this evidence has not been tested by cross examination and so is to be given less weight than if it had. Nevertheless it does suggest that at the time the Definitive Map and Statement were being prepared, Option 3 was not only available (as the Inspector accepts at para 8.20) but actually being used. Significantly there is almost no actual independent or direct evidence of any use by members of the public of Option 1 during the relevant period. The Inspector refers to the available evidence of use of Option 1 at paras 4.21 and 4.22, but makes no reference in his analysis of the user evidence at paras 8.32 – 8.38 to the fact that evidence of use of Option 1 is very limited. Presumably he does not feel the need to do so because of the weight which he has already given to his interpretation of the wording of the Definitive Statement, which is considered to be incorrect for the reasons stated above. The landowners’ representative at para 17 of the Further Opinion can point to only one witness who gave evidence of use of Option 1 at the hearing, but that evidence is not even referred to by the Inspector and no dates are given as to when such use took place .

It is clear from the evidence that emerged at the hearing and subsequently that the pillar and gates in front of the property were erected in around 1965 and the “no entry” sign affixed to the gates in 1972. The wooden fence further along the route was put up in 1989 by Mr Duncan. Option 2 therefore only came into being from 1965 at the earliest, and would not have been in use at the time the Definitive Map and Statement were being prepared in the 1950s, as the pillar and gates which resulted in Option 2 route being defined on the ground were not in existence at that time. The Definitive Map is relevant here too, and again whilst making allowances for the scale at which it was produced, it does not appear to show a route consistent with Option 2.

The Inspector makes reference at para 8.23 (and this is picked up in the Further Opinion para 9) to inferences that can be drawn about Mr Wildy's actions when he was owner. He was the owner during the relevant time, owning the property from 1951 to 1972. The suggestion made is that Mr Wildy would not have accepted a route across his land when subsequently he erected gates and allegedly then told subsequent owners to keep them closed (it should be noted that the reference to the alleged statement about keeping gates closed is in the statutory declaration of the subsequent owner's sister). The statutory declaration from Mr Wildy is silent on what happened when the Definitive Map and Statement were being compiled and so there is no clear evidence to confirm his views or actions at that time, or the Inspector's inferences at para 8.23.

## **7. Conclusion**

Consideration of all the available evidence and representations now available leads to the conclusion that members should not follow the Inspector's recommendation. This course of action is not recommended lightly but it is considered that, taking into account all the relevant material and further analysis, the preponderance of material points to the route of the disputed section of Footpath 52 in the vicinity of Galampton Mill following the route shown by Option 3 on the attached plan, and members should so conclude.

**Electoral Division: Dartmouth Rural**

Roger Gash

