

**Definitive Map Review 2006–09
Parish of Braunton (Part 6)**

Report of the Executive Director of Environment, Economy and Culture

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

Recommendation: It is recommended that no Modification Order be made in respect of the claim for Route 16, to record a footpath from Rock Hill to Footpath No. 25, between points A–B shown on drawing number ED/PROW/08/99, but the continuation of North Street between points A–C be added to the records of maintainable highways as a public road.

1. Summary

The report examines an additional claim arising out of the Definitive Map Review in the parish of Braunton.

2. Review

The review process for Braunton parish was started in 2006, followed by consultations on proposals for suggested changes in respect of claims and formal applications for 15 routes, all of which have been considered in previous reports presented to the Committee since 2007. This report concerns the investigation of evidence for a claimed footpath submitted after the consultations.

3. Consultations

Responses to the consultations in August 2006 on the 15 routes were as follows:

County Councillor Jenkins	-	responded with no specific comments about individual routes;
North Devon District Council	-	responded with no objection to Route 2;
Braunton Parish Council	-	supports claims for Routes 1 & 2, with concerns about the claims for byways and willing to discuss creation of paths in connection with Route 14;
British Horse Society	-	supports suggestions for Routes 1 – 12 and submitting evidence collected for Routes 8 & 9;
Environment Agency	-	oppose addition of Route 2, pending flood defence scheme development;
English Nature	-	responded in connection with Route 6, with concerns about damage from vehicular use;
Byways and Bridleways Trust	-	no comment;
Country Landowners' Association	-	no comment;
National Farmers' Union	-	no comment;
Open Spaces Society	-	no comment;
Ramblers' Association	-	responded only in connection with Route 6, opposing its proposed upgrading to byway.

Responses to a further limited consultation in respect of the claimed footpath on Route 16 in March 2009 were as follows:

County Councillor Jenkins - supports the claim;
North Devon District Council - no comment;
Braunton Parish Council - supports the claim.

4. Conclusion

It is recommended that no Modification Order be made in respect of the claim to add a footpath on Route 16, but to record the adjoining road as a publicly maintainable highway. Details concerning the recommendation are discussed in Appendix I to this report.

There are no other recommendations to make concerning any further modifications. However, should any valid claim be made in the next six months it would seem sensible for it to be determined promptly rather than deferred.

5. Reasons for Recommendation/Alternative Options Considered

To progress the parish-by-parish review of the Definitive Map in North Devon.

6. Legal Considerations

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

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Electoral Division: Braunton Rural

Local Government Act 1972

List of Background Papers

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Background Paper	Date	File Ref.
Correspondence file	1995 to date	DMR/BRAU/1995/Parish File

ns050609pra
sc/dmr parish of Braunton
2 hq 260609

Background to the Suggested Changes Basis of Claims

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

The Wildlife and Countryside Act 1981, Section 53 (3)(c) enables the Definitive Map and Statement 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.

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 Schedule 14 of the Act.

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.

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.

In a House of Lords appeal judgment on R (Godmanchester Town Council) v Secretary of State for the Environment, Food and Rural Affairs in 2007, it was held that for such evidence of no intention to dedicate a way to be sufficient there must be evidence of some overt acts on the part of a landowner to show the public at large that there was no intention to dedicate.

The same judgment, in respect of R (Drain) v Secretary of State for the Environment, Food and Rural Affairs, upheld an earlier High Court decision that the phrase “during that period”, relating to Section 31 (1) as above, did not mean that a lack of intention had to be demonstrated “during the whole of that period”. It did not specify the period of time that the lack of intention had to be demonstrated for it to be considered sufficient. What was considered sufficient would depend upon the facts of a particular case, but if the evidence shows that the period is very short, questions of whether it is sufficiently long (‘de minimis’) would have to be resolved on the facts.

Common Law presumes that a public right of way subsists if, 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.

1. Route 16: Claimed footpath from Rock Hill to Footpath No. 25, between points A–B shown on drawing number ED/PROW/08/99

Recommendation: It is recommended that no Modification Order be made in respect of Route 16 to record a footpath on the claimed route, but the continuation of North Street between points A–C be added to the records of maintainable highways as a public road.

1.1 Background and Description of the Route

In 2003, before the review process had been started in Braunton, a report was made about fences with gates having been built across a path in front of a row of five houses numbered from 39 to 47 North Street, which were said to be preventing its use by the public. The route starts from the corner of the minor county road, North Street turning into Rock Hill (point A), running along a narrow path between the houses and their gardens, ending on the recorded Footpath No. 25 (point B) below steps leading up to the minor county road, Frog Lane on the continuation from Footpath No. 27.

The report was not followed up by any request for evidence forms relating to use by the public to submit with or without a formal application for it to be recorded as a public footpath. As no evidence of public use was submitted then, the route was not included with those put forward for the consultations in 2006. No further query was made about the route until November 2007, when a North Devon District Councillor passed on an enquiry from a local resident. He requested user evidence forms, nine of which were returned completed but without any formal application.

No information was supplied at that time or later with details of the owners of the properties affected, particularly for the house where the fences had been built, at 47 North Street. As the main full consultation for the review process had already taken place without including the route and reports on other claimed routes and applications were already going forward to the committee, there was a delay with a planned further consultation on the evidence submitted for the route. That consultation took place in March 2009, on a more limited basis involving the Parish and District Councils, the local County Councillor and the owners of the five properties affected.

1.2 The Definitive Map and Statement and Maintainable Highways Records

The claimed route was not included with those surveyed originally by Braunton Parish Council in 1950 for putting forward as public rights of way to record on the Definitive Map. Footpaths Nos. 25 and 27 were both surveyed then and recorded as public footpaths. Footpath No. 27 is described in the Statement as ending “in North Street by Scur Farm”, with the start of Footpath No. 25 described as starting from the end of Footpath No. 27 in the same way, from North Street.

The claimed route has been referred to more recently as the “top” path, presumably to distinguish it from the parallel continuation of North Street below the gardens of the affected properties to Footpath No. 27 at Scur (or ‘Skir’) Farm as the “bottom” path. That is wider, with a tarmac surface and the properties on it are even-numbered continuations from those on the same side of North Street. Other properties beyond those on the claimed route have higher odd-numbered North Street addresses. However, neither is recorded on the earliest, later and current maps of maintainable highways to indicate that they may have been considered as publicly maintainable, either as a footway for the claimed route or as a public road for the continuation of North Street.

1.3 Historical Maps and Aerial Photography

Earlier and later historical maps at smaller scales do not show enough detail to distinguish the claimed route clearly. Some historical maps at larger scales show it in more detail, with the network of routes later recorded as public roads and public footpaths.

1.3.1 Later 19th century historical mapping

Braunton Tithe Map & Award 1841

The claimed route is shown on the Braunton Tithe Map coloured in the same way as other roads and tracks in the parish, but it is braced in with the adjoining houses and gardens to indicate that it was considered to be included with them. The properties and gardens are all numbered individually and are all identified in the Tithe Award only as 'House and Garden' and 'Garden'. The claimed route is not numbered or labelled to suggest that it was separate from them, with nothing to identify that it might have been considered as anything other than private access for the properties.

The route now recorded as Footpath No. 25 on the steps up to Frog Lane is numbered separately and included in the Award under 'Waste' as not titheable, identified as a 'Lane' and 'Waste'. It continues from the route now recorded as Footpath No. 27 as a path running from the church and crossing the River Caen, before the railway and the A361 Ilfracombe road through Braunton village had been built. The bottom path is shown in the same way as other routes included in the road network as a wider continuation of North Road, which is named and connecting to the above paths with no indication of any obstruction or barrier.

Ordnance Survey 25"/mile 1st edition, late 1880s

On the earliest large-scale Ordnance Survey maps, surveyed in 1885, the claimed route is shown as a narrow path running between the houses and gardens, with a solid line across it at the end of the house now numbered 47 North Street. It suggests that there may have been a barrier or gate there at that time, separating it from the routes now recorded as Footpaths No. 25 and No. 27 and indicating that it may have been considered to provide no direct connection to or from them. The route of Footpath No. 27 is shown as a narrow lane crossing the railway line, continuing alongside the river and towards the church, named as 'Butt's Lane'.

The bottom path is shown as a continuation of North Street, with one of the lines drawn bold in the same way as for other routes now recorded as public roads, suggesting that it had the same surface and was perhaps considered then to be of the same status and included in the public road network.

1.3.2 Later historical mapping, from early 20th century:

- **Ordnance Survey 25"/mile 2nd edition early 1900s**
- **Finance Act map & records 1910**
- **Bartholomew's mapping 1924–44 and later Ordnance Survey maps 1920s–1970s**

The later edition of the Ordnance Survey 2nd edition 25"/mile map revised in 1903 records the routes in the same way as in the 1st edition, but without the bold highlighting on the bottom path or any of the other routes now recorded as public roads. The 1910 Finance Act maps drawn up for a survey to ascertain the value of land for the purpose of taxation show the claimed route not excluded from adjoining hereditaments, or assessment areas of land, with the individual houses and gardens. The routes of the bottom path and the recorded footpaths are excluded, in the same way as all other routes now recorded as public roads. The inclusion of the claimed route with the adjoining houses and gardens does not support any suggestion that it may have been considered as a public right of way at the time.

Details of the associated Field Books for adjoining hereditaments do not record any deduction for Public Rights of Way or User that can be related specifically to the claimed route, or any other information that might have been in connection with it. It provides further evidence to suggest that the route was not considered at that time to be anything more than a private path for access by the owners to and from the properties.

Other maps at smaller scales from the earlier 20th century, including Ordnance Survey and Bartholomew's editions from the 1920s to the 1940s, do not show the route in any detail, as in other villages and towns. Some of the later maps show the routes of footpaths and bridleways, but the claimed route is not recorded in that way. Later Ordnance Survey larger-scale mapping from 1960 and 1968 shows the route at those dates in the same way as in earlier editions. Other detail is shown relating to the steps on Footpath No. 25, with Footpath No. 27 shown continuing from the bottom path, crossing the railway by a level crossing and alongside the river to and beyond the A361 road towards the church.

The showing of the route on early and later maps records its physical existence at those times and until more recently. They do not indicate on their own the existence of a public right of way, which would require other more significant supporting evidence. That is in accordance with the disclaimer carried by Ordnance Survey maps since 1889, which states that: "The representation on this map of a road, track or footpath is no evidence of a right of way" and may be presumed to apply to earlier and other commercial maps as well.

1.3.3 Aerial photography

Earlier aerial photography from 1946–9 shows the claimed route as a clear narrow path between the houses and gardens, with the bottom path as a wider continuation of North Street leading into a narrower path on Footpath No. 27 crossing the railway line. More recent aerial photography between 1999–2000 and 2007 shows the routes in the same way, with more vegetation growth in the gardens and the bottom path wider and more clear as a road leading to the path continuing across and beyond the line of the former railway.

1.4 Definitive Map Reviews and Consultations

Braunton Parish Council did not include any reference to the route with their suggestions in May 1978 for changes in the parish for the Definitive Map review started at that time but not completed. The claimed addition was not included in the consultations in 2006, but was the subject of a further limited consultation earlier in 2009 with the Parish Council, the local County Council Member and the owners of the properties affected.

The Parish Council and local Member responded in support of the claim, but without submitting any additional supporting evidence. The responses from the property owners were mainly objecting to the claim, saying that it was a path providing access to the properties that had only been used by the owners and people visiting the houses, but not by the wider public. They provided more information relating to their knowledge and experiences relating to their own use of the path, its history and the background, including in connection with the putting up of the fences and gates, details of which are considered below as landowner evidence.

1.5 User Evidence

No application or evidence was submitted following the first query about the fence being put up on the route in 2003. It was only several years later following a request for evidence forms to be sent out that eight forms completed in November 2007 were submitted to support the claim, with another one completed in December, but not accompanying a formal application at that time.

There is evidence of use by nine people. All of them said that they had used the route on foot, with two indicating use on a bicycle as well. Most of them believed it to be public, as a footpath, although some believed that it was a bridleway or byway and one did not specify any status. The main basis for their belief was that the path had always been known as public, open and used and never closed off until more recently when the fence was put up.

The earliest claimed use was from 1939 by one person, with two specifying use only from the 1930s to the 1960s or only during that period when younger and one only from 1986. Three did not specify dates, saying that they had used it 'from the year I was born' or 'until it

was blocked off'. The route is claimed to have been used by seven people during the 1980s and 1990s and by only three people for the 40 years since the 1960s, although including some who did not give specific dates. The frequency of use varied from 'several' or about 50–100 times a year, once or twice a week, to 'several' times a week and every day, 'continual' or not specified at all. Some of the users indicated that they had used the route for pleasure, or to get to school, nursery and church, or to work and walking the dog. Two specified that it was to visit friends and occupants of the properties, with one indicating that his parents owned one of the houses.

Some indicated that they had used the route to and from Rock Hill, specifying only the school and nursery, or shops and other parts of Braunton. Most of the users reported that they had not been stopped or turned back when using the route, with only one having been told that it was not public. Most of them believed that the owners were aware of the public using it and one reported having been given permission by the occupants to use the route as a child. Another said that he had been a tenant, or worked for the owner and occupier, with relations living in one of the properties and had a private right to use it. Several others also said that they used to live in one of the properties on the path and others were resident in the immediate vicinity of North Street and had used the path to visit relatives or friends in one of the houses on the claimed path.

None of the users reported that there was a stile on the route, with three referring to gates and the fence built across the path more recently. None had seen any notices on the route saying that they should not use it. Some of them considered it as a useful and safer alternative to using the bottom path to avoid traffic, although one referred to the claimed path having been used once or twice by cars.

1.6 Landowner and Rebuttal Evidence

Following the consultations, completed landowner evidence forms were sent in by most of the owners of properties on the claimed route. Some of them indicated that they owned the path, although where their ownership is not registered, it may be presumed that their ownership includes it as the owners of the land on each side. Almost all of the owners believed that the path was not a public right of way and was for use only by residents of the houses, although two indicated that some local residents had used it on foot.

Most of them had not stopped people from using the route or turned anyone back, but one reported having stopped use by cyclists before the fence was built and putting up a notice saying 'Private property' about 15 years ago. They referred to gates and the fence built across the path more recently, reported by one to have been about ten years ago. In further information, one reported other obstructions at various times by vehicles and other equipment, particularly during alterations and building, which made it unavailable for anyone other than the residents to use continuously on a regular basis.

References were made by two of the owners in additional information to other issues, such as the potential negative effects of use by the public on safety and security for the residents, particularly as a safe playing area for children. They also referred to their belief that the claimed path had been used only by the owners and by other people for access, including local residents, to visit them or by invitation, or for services and deliveries. One indicated that the gates had not always been locked until more recently, with other residents having keys. They believed that the wider public used the bottom path to get to other places nearby or to other parts of the village and were surprised that it was not recorded as a public right of way or public road. One referred specifically to the residents having been served notice to cut back the hedges from their gardens adjoining the bottom path, which they believed would only have been required officially if that was considered to be a public right of way or a public road.

1.7 Highways Inspection and Maintenance

The bottom path is wider than the claimed path and with a tarmac surface, from the corner of North Street and Rock Hill, with dashed white lines across it and an official road sign indicating that it is a dead end. It provides access for vehicles to the driveways and garages of adjoining properties with even-numbered North Street addresses and beyond, as far down as Skir Farm. The local Highway Officer from the Area North Highway Management Office reported that it was on their inspection register for maintenance purposes and it had been completely resurfaced within the previous year. The tarmac surface continues on the routes of Footpath No. 25 and Footpath No. 27 to and beyond the cycleway and Footpath No. 78 along the old railway line, which are all inspected, maintained and repaired by the Area Highways team as 'urban' footpaths. It was confirmed as well that the owners of the properties on the claimed path had been served formal notice previously to cut back the hedges in their gardens adjoining the road to prevent encroachment.

1.8 Summary and Conclusions Under Statute and Common Law

Statute Law

The user evidence for the claim that the route should be recorded as a public footpath was not submitted with a formal application. It was submitted in 2007 to support a claim as the result of a previous action taken by a landowner that had prevented access to and use of the route, with the putting up of the fence and gates. The specific date of that action is not known, but was reported initially in 2003, so the claim appears to have been made in response to a specific event acting as a significant challenge to use of the route, although not soon after but some years later. There is, therefore, evidence of a significant action by the landowner having called into question use of the route, to provide a date for consideration of the user evidence under statute law during the previous 20 years, from 1983–2003.

Considering evidence of use by the public during that period, there appears to be only a limited amount relating to claimed use on foot from seven people and the dates of use for four of them were not specified sufficiently to provide evidence of use during the whole 20 years. Other evidence is for use from a limited period well before that time. Only one relates to use of the route for the whole of the 20 years, with the others for different periods that cannot be ascertained for evidence of continuous use. In addition, all but two of the users indicated that they had either lived previously in one of the properties on the claimed path, or lived in nearby properties and had used it to visit family or friends in those houses, with one having been given permission to use it. All such use is considered to be private or permissive and cannot be interpreted as public use. That would require use by a much wider section of the public, rather than limited mainly to people who had lived in properties on the route or very close nearby and for use more than just access to those houses, but for getting to destinations further away and for other purposes.

The user evidence is, therefore, considered insufficient to support the recording of the route as a footpath by presumption of dedication from use. There is no need to consider whether there were actions taken by the landowners during that period to provide evidence of any lack of intention to dedicate the route as a footpath. However, there is evidence from the users and landowners that owners had previously turned back people walking as well as cycling and had put up a notice to indicate that it was private within those 20 years.

Common Law

Considering the claim in relation to common law requires taking into account the historical and other documentary evidence discovered, in conjunction with the evidence of use. Larger scale historical mapping shows that a path has existed physically on the whole claimed route from at least the first half of the 19th century. Later Ordnance Survey and other mapping with aerial photography show that it has continued to exist on its current line up to the present.

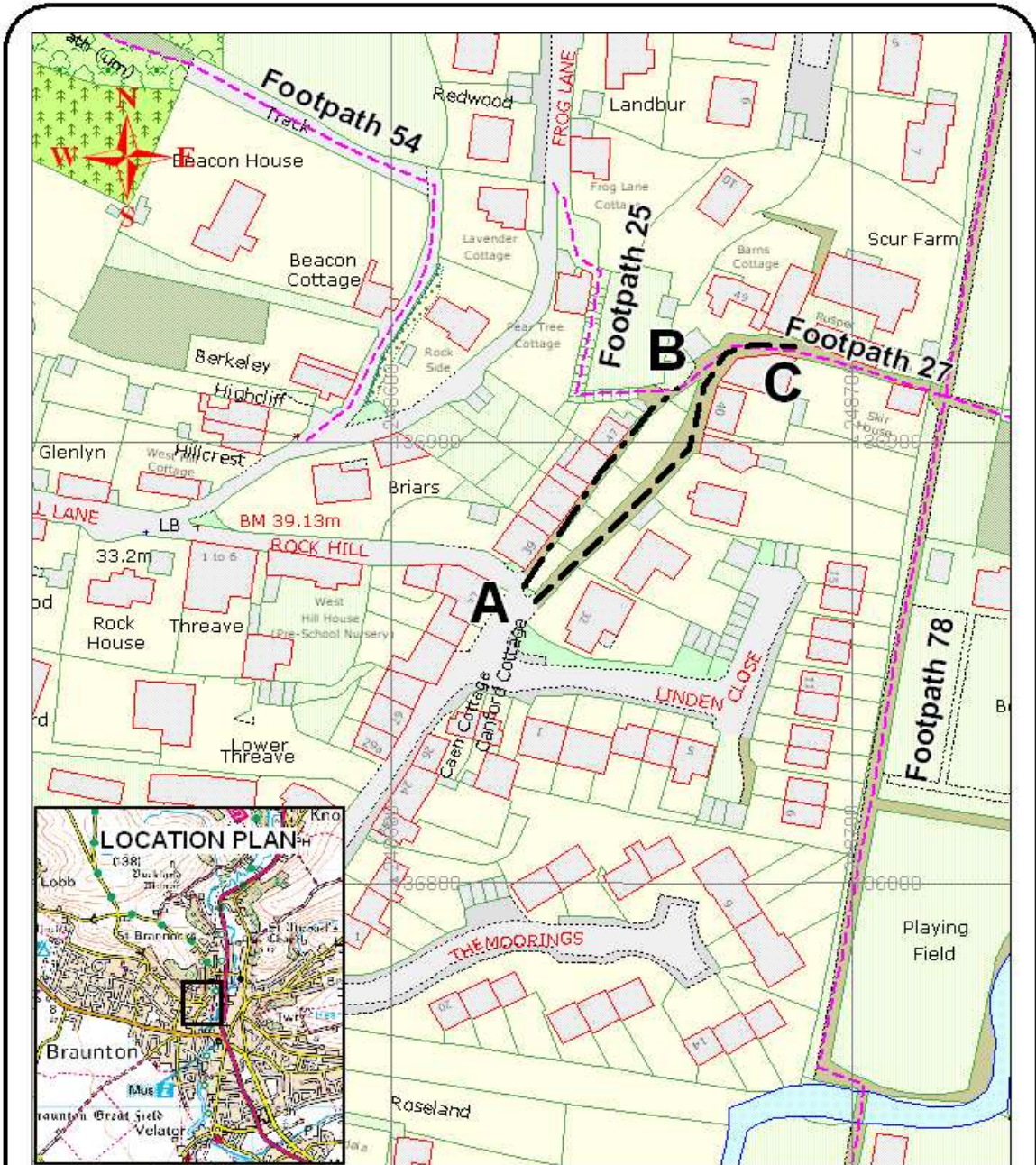
It is significant that the Tithe Map in 1841 and Finance Act 1910 records indicate that the path was considered at those dates to be included with the properties and gardens and more likely to be for private access only and not part of the public highway network. No deduction was recorded under the Finance Act for Public Right of Way or User to indicate that it may have been considered then to be a public footpath. Later Ordnance Survey maps indicate that the bottom or lower path is more likely to have been considered as a public road, as a continuation of North Street, providing a more likely route for public access on foot to other destinations than just to the properties. That is supported by the bottom path being recorded on the County Council's inspection records for maintenance as a public road for use in vehicles, which will also have been available for use on foot to connect with the wider network of recorded public footpaths and roads.

No other more significant historical maps or references in historical documentary material have been found to indicate more specifically that the claimed route may have had the reputation of being a public footpath in the past or more recently. No section of the route has been shown on the past and current records of maintainable highways to suggest that it may have been considered more recently to be public. The absence of the bottom path from those records appears to be an anomaly, given that the County Council has accepted responsibility for its maintenance and repair, taking actions to undertake maintenance and serving notice on adjoining landowners to cut back vegetation from the gardens.

Considering the historical mapping and landowner evidence, with the limited evidence of public rather than private or permissive use, dedication at common law cannot be implied for the claimed route. The evidence does not support the claim that there is any historical basis to the route being considered as public, or having the reputation of being available for use by the public as a footpath. The evidence is not sufficient to suggest that the owners of the properties intended to dedicate the route as a public footpath, or that the public accepted any dedication and used it on that basis.

The user evidence submitted in respect of the claimed route is, therefore, not sufficient to support the recording of a public right of way on the claimed route by presumption of dedication from use, or in conjunction with historical evidence. It is in the light of this assessment of the evidence submitted, with all other evidence discovered and available, that it is not considered reasonable to allege that a public right of way subsists and it is not sufficient for the addition of a footpath on the claimed route as a footpath.

From consideration under statute and common law there is, therefore, insufficient basis for making an Order in respect of the claim and, accordingly, the recommendation is that no Order be made for addition of a footpath on the Definitive Map in respect of Route 16, between points A–B. However, as the County Council has accepted responsibility for maintenance of the lower route as a road between points A–C, the additional recommendation is that the bottom path should be added to the records of maintainable highways. That would clarify its status as a public route that has been available for the public to use on foot, historically and more recently, rather than the claimed route.



map ref SS 4836

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Devon County Council
Definitive Map Review - Braunton parish
Claimed footpath, Rock Hill to Footpath No. 25

drawing number EEC/PROV/08/99
 date Nov 08
 scale 1:1250
 drawn by NSC

Notation

- Claimed footpath, A - B**
- Existing footpaths**
- Unrecorded public road, A - C**

Edward Chorlton
 COUNTY ENVIRONMENT,
 ECONOMY & CULTURE DIRECTOR

