HTM/11/21
Public Rights of Way Committee
11 November 2011

Schedule 14 Application
Deletion of Public Footpaths No. 8 Northleigh, No. 3 Farway, No. 6 Colyton and No. 10 Southleigh

Joint Report of the County Solicitor and Head of Highways and Traffic Management

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 application to delete the footpaths shown between points A–B–C–D and E-F-G-H on drawing number ED/PROW/06/187.

1. Summary

This report relates to a Schedule 14 application, made on behalf of the landowners, to delete footpaths recorded on the Definitive Map in the parishes of Northleigh, Farway, Colyton and Southleigh following a Public Inquiry in 2008. It is considered that the evidence provided is not sufficient to show that the routes were recorded wrongly following the Public Inquiry and it is, therefore, recommended that no Order be made to delete the footpaths from the Definitive Map and Statement, as applied for.

2. Background to the Application

The routes had been the subject of an informal claim on behalf of the Ramblers made during the Definitive Map Review process for the parish of Colyton between 1989 and 1992. The claim was not included in a report on the review of the parish to the then Public Rights of Way Sub-Committee in 1992 and deferred to a future meeting owing to the need for advice on aspects of the historical documentary evidence involved.

A formal Schedule 14 application for the addition of the routes was submitted in 1997 as part of the general review process for the parish of Northleigh, but withdrawn in favour of an application involving all of the parishes affected. A report on that application, investigated separately from any individual parish review and recommending not to make an Order to add the routes, was considered by this Committee in 2004, which members accepted and resolved that no Order should be made. An appeal by the applicant to the Government Office against that decision was successful and in June 2005 the County Council was directed by the Secretary of State to make a Modification Order adding the routes to the Definitive Map, on the basis of a report by an Inspector.

The direction to make the Order was reported to this Committee in September 2005. Members resolved then that clarification on aspects relating to the Inspector's report recommending acceptance of the appeal should be sought from the Government Office and reported back to a future meeting of the Committee. Following correspondence with the Government Office and legal advice, the matter was reported again to this Committee in November 2006, when Members resolved that the Secretary of State's direction should be accepted and to make the Order as directed.

The footpaths were added to the Definitive Map and Statement by a Modification Order made in December 2006, which received objections and resulted in a public inquiry held in

May and August 2008 for consideration of the evidence by an Inspector on behalf of the Secretary of State. The Order was confirmed in September 2008 and the Inspector's decision letter is included below as an Appendix to this report.

An application to delete the footpaths, dated 31 March 2010, was submitted with a large bundle of evidence and made on behalf of a group representing the owners of the land affected. The footpaths are as shown between points A–B–C–D and E–F–G–H on drawing number ED/PROW/06/187.

A consultation on the application took place in July 2011, with the following responses:

County Councillor Mrs Randall Johnston	- no comment;
East Devon District Council	- no comment;
Northleigh Parish Council	- no comment;
Colyton Parish Council	- support the deletion;
Farway Parish Council	- no comment;
Southleigh Parish Council	- no comment;
Byways and Bridleways Trust	- no comment;
Devon Green Lanes Group	- object to deletion;
Country Landowners' Association	- no comment;
National Farmers' Union	- no comment;
Open Spaces Society	- no comment;
Ramblers' Association	- do not believe that the evidence meets the test for deletion.

Responses were received from other individuals, either as local residents on their own behalf or representing amenity groups, who did not support the application and expressed a range of concerns about the proposed deletion of a recorded footpath if it was successful.

Copies of the application and its accompanying documents, with the correspondence from the consultations and other relevant material, have been made available in the Members' Lounge for inspection.

3. Matters for Consideration – Basis of Claim

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

Section 53 (3)(c) of The Wildlife and Countryside Act 1981 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:

> (iii) that there is no public right of way over land shown in the map and statement as a highway of any description …

In a Court of Appeal judgment on the case of Trevelyan v the Secretary of State for the Environment, Transport and the Regions in 2001 ("Trevelyan") it was held that there was an initial presumption that a route was correctly recorded, there having been evidence of it carrying public rights when it was put on the map. In determining whether or not to delete a right of way the initial presumption must be that the right of way exists. The standard of proof required to demonstrate that it does not exist is the 'balance of probabilities' and evidence of some substance that was 'clear and cogent' must be put in the balance to outweigh the initial presumption that it does exist. In the absence of evidence to the

contrary, it should be assumed that the procedures were followed properly in recording the route in the first instance.

The latest DEFRA guidance in Circular 1/09 sets out that the evidence needed to delete a public right of way will need to fulfil certain stringent requirements, which are that:

- the evidence must be new – an Order to remove a right of way cannot be based simply on the re-examination of evidence known at the time it was recorded on the Definitive Map;
- the evidence must be of sufficient substance to displace the presumption that the Definitive Map is correct; and
- the evidence must be cogent.

In an application to delete a public right of way, it will be for those who contend that there is no right of way to prove that the Definitive Map requires amendment due to the discovery of evidence, which when considered with all other relevant evidence clearly shows that the right of way should be deleted. It is not for the authority to demonstrate that the map reflects the true rights, but for the applicant to show that the Definitive Map and Statement should be modified to delete the way.

4. The Application and Supporting Evidence

The application to delete the footpaths was submitted with evidence said to have been discovered since the public inquiry in 2008 and therefore not seen by the Inspector in reaching his decision to confirm the Order. The new evidence is in four main subject areas, which are dealt with individually below, but submitted with the assumption that it should be examined in conjunction with the evidence already presented for consideration by the Inspector at the inquiry. In addition, it is suggested that the Inspector made errors in his legal understanding of several matters in reaching his decision to confirm the Order as a result of the inquiry.

5. Exeter, Dorchester, Weymouth Junction Coast Railway 1845 – Deposited Plans and Book of Reference

The Plans and Book of Reference were prepared and deposited in 1845 for a proposed railway line between Exeter and Weymouth that was never built. The plans show the proposed line following the valley of the River Coly through the four parishes in East Devon towards Dorset, with the boundaries for any possible variation in the line on either side as the 'limits of deviation'.

The land and features within those limits and just beyond are recorded, particularly for any possible engineering works needed for construction of the railway line and other measures that may have been needed for crossing public or private roads and rights of way, including bridges and level crossings, or to stop them up or divert them. Information about the land was recorded in a Book of Reference relating to its number in the plans, with a description and details of its owners and occupiers.

The applicants consider that because there is nothing shown in the plans and no reference to any footpath for the numbered plots crossed by the Order routes it is very strong evidence that they did not exist at that date, when considered with details of other roads and footpaths recorded in plots elsewhere within the boundaries of the limits. However, the footpath routes run parallel with the proposed railway line and are mainly beyond the limits of deviation to the north in Northleigh, Farway and Colyton parishes between points A–B–C and in Southleigh parish between points E–F–G, or otherwise only just within them in places.

Where recorded elsewhere within the limits, roads and footpaths appear to be mainly those identified as running across the possible line if built and potentially needing to be crossed rather than parallel to it and just being present within the land. However, what is now the minor road from Stubbing Cross leading to Stubbing Bridge at point E is not recorded and the River Coly is not identified in all numbered plots of adjoining land. Equally, other footpaths are recorded in individual plots and not in adjoining fields, with one highlighted by the applicants which could only refer to a section of the Order route leading to point D.

Elsewhere and much more significantly, a bridge is shown crossing the river at point B on the route which, although outside the limits and not needing to be recorded, provides contradictory evidence that could otherwise be used in support of the path's existence. Overall, these records do not provide any substantive evidence against the existence of the paths as claimed by the applicants.

6. Rights of Way Act 1932 and Survey of 1934

The applicants refer generally to the Parliamentary and legislative background of procedures resulting from the Rights of Way Act 1932, in connection with evidence considered at the public inquiry. It was related to a comment by the Rural District Council on the Parish Council's survey form for the route from the process for drawing up the Definitive Map. No substantive and specific new evidence was submitted in support, and it is considered to be an attempt to re-visit the interpretation of evidence already considered at the public inquiry.

7. Landownership and Occupancy Records

The applicants provided details of the historical ownership and occupancy of the land and properties on the Order routes in support of their view that, as the properties formed part of settled or entailed estates in the past and had been tenanted, there was nobody with the capacity to dedicate a public right of way for an inference of dedication under common law. Although not completely new evidence, as it was obvious at the inquiry that the land must have been owned and occupied by somebody, the only new element is the details of it having been held and occupied at various times in the past under strict settlement and tenanted.

Quotes from sections in Halsbury's Laws were highlighted, referring to the inability of leaseholders and limited holders to dedicate land as a public highway. However, there is a later reference from the same source which states that for the purposes of dedication of land to the public for those purposes, a tenant for life under the Settled Lands Act of 1925 is in the same position as if he were an absolute owner. A schedule in that Act contains retrospective amendments applying to earlier Settled Lands Acts of 1882 to 1890. The applicants have submitted counsel's advice on this aspect, as have the Ramblers' Association, which oppose this application. It does appear to be the case that from 1882 a tenant for life under a strict settlement would have been capable of dedicating a public right of way.

8. Irregularities of Finance Act 1910 operation in East Devon

The applicants have not submitted any substantive new evidence relating to the interpretation of Finance Act material considered by the Inspector at the public inquiry in support of their assertion that there were irregularities in the operation of its procedures in East Devon.

9. Discussion and Conclusion

The applicants have submitted several items of what they say is new evidence in support of their application to delete the footpaths. However, there is little that can be considered as strictly new in the sense of not having been considered at the public inquiry. The only items of new evidence not considered by the Inspector at the inquiry are the documentation for the Deposited Railway Plans and more substantial details relating to ownership and occupancy records from property deeds. On closer examination, neither is considered sufficiently cogent or compelling to support the view that the routes should not have been recorded on the Definitive Map and Statement by the Modification Order as made and confirmed by the Inspector through the public inquiry procedures.

Other evidence submitted is considered not to be new and appears to be more a re-examination of the evidence already presented to the Inspector at the inquiry. Although the evidence submitted is required to be examined with all other available evidence, it would need to be new as well as substantial and sufficiently compelling to justify revisiting the Inspector's interpretation of the evidence already considered at the inquiry. Similarly, the question of whether the Inspector erred in law, or misdirected himself, is a matter that should have been made in a legal challenge by an application to the High Court following confirmation of the Modification Order after the public inquiry.

The evidence submitted with the application is considered not to be sufficient to meet the requirements of the test for deletion, on the balance of probabilities. That is in accordance with the requirements set out in current guidance and the Trevelyan judgment, which is relevant even though concerning in that case the original procedures for recording routes on the Definitive Map and Statement rather than later additions. Accordingly, it is recommended that no Modification Order be made to delete the public footpaths recorded on the Definitive Map and Statement as a result of the Inspector's decision at the public inquiry.

10. Reasons for Recommendation/Alternative Options Considered

To determine the Schedule 14 application for deleting recorded public rights of way in the Parishes of Northleigh, Farway, Colyton and Southleigh.

11. Legal Considerations

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

12. Carbon Impact Considerations

There are no considerations.

13. Equality Considerations

There are no implications.

14. Sustainability Considerations

There are no implications.

15. Risk Management Consideration

There are no implications.

Jan Shadbolt
County Solicitor
Lester Willmington
Head of Highways and Traffic Management

Electoral Division: Honiton St Michael's

Local Government Act 1972: List of Background Papers

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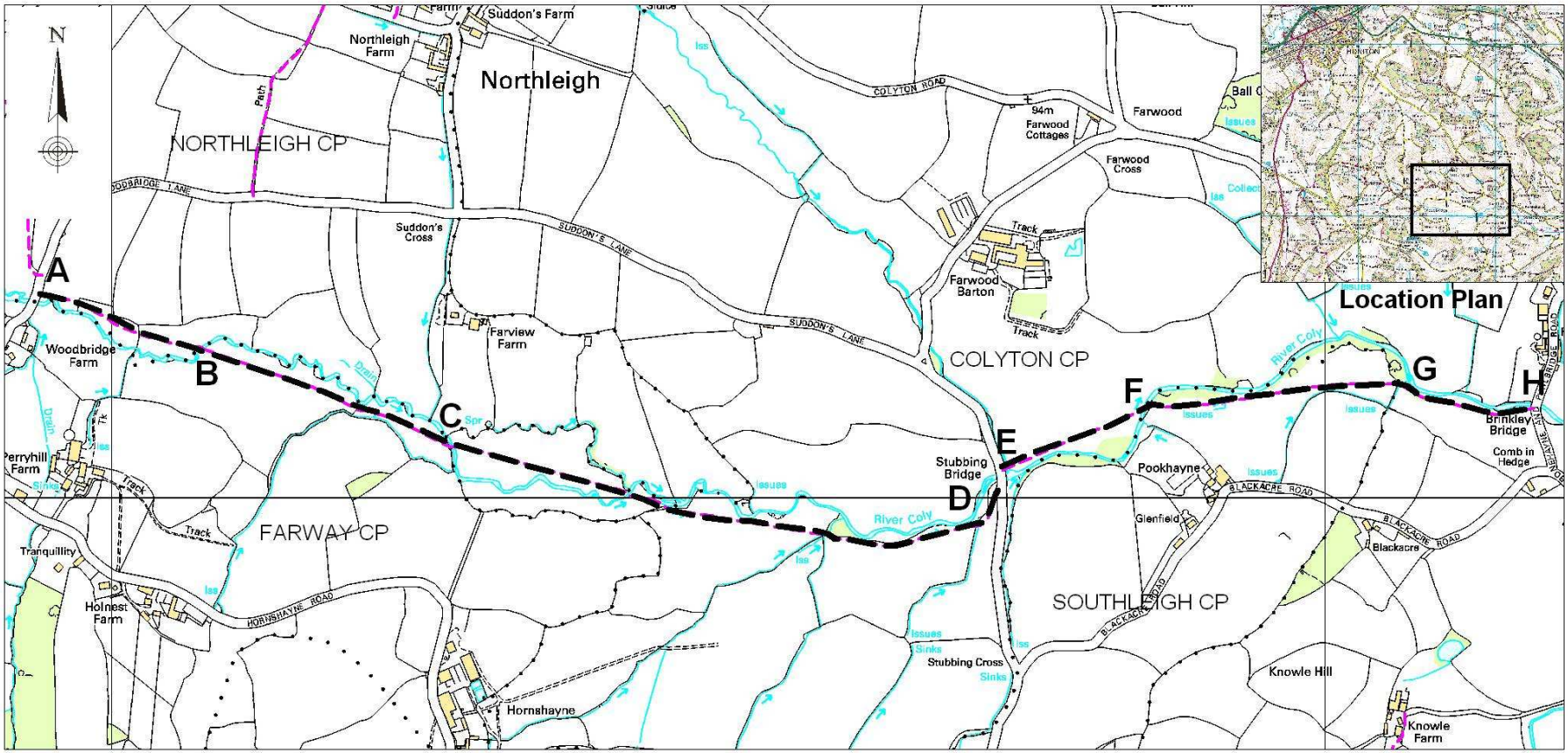
Background Paper	Date	File Reference
Correspondence File	2010 to date	DMR/NOR/Sch14 File

nc270911pra
sc/cr/northleigh farway colyton southleigh
03 hq 281011



map ref: **SY1895 - SY2195**

DEVON COUNTY COUNCIL
FOOTPATH NOS. 8 NORTHLEIGH, 3 FARWAY, 6 COLYTON & 10 SOUTHLEIGH
DEFINITIVE MAP MODIFICATION ORDER 2006

drawing number	ED/PROW/06/187
date	December 2006
scale	1:10,000
drawn by	MM

Notation

Claimed footpath A - B - C - D E - F - G - H

Edward Chorlton
DIRECTOR OF ENVIRONMENT ECONOMY & CULTURE

Devon County Council

Appendix
To HTM/11/21

Inspector's decision letter

Order Decision

Inquiry opened on 14 May 2008

by Peter Norman MA MRTPI(Rtd)

an Inspector appointed by the Secretary of State for Environment, Food and Rural Affairs

The Planning Inspectorate
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Temple Quay House
2 The Square
Temple Quay
Bristol BS1 6PN

☎ 0117 372 6372
email:enquiries@pins.gsi.gov.uk

Decision date:
23 September 2008

Order Reference: FPS/J1155/7/66

- This Order is made under section 53(2)(b) of the Wildlife and Countryside Act 1981 and is known as the Devon County Council (Footpath Nos. 8 Northleigh, 3 Farway, 6 Colyton & 10 Southleigh) Definitive Map Modification Order 2006.
- The Order is dated 14 December 2006 and proposes to add to the definitive map and statement a footpath from Woodbridge Lane, Northleigh to Brinkley Bridge, Colyton, as shown on the Order Map and Schedule.
- There were six objections outstanding at the commencement of the inquiry.

Summary of Decision: The Order is confirmed.

Preliminary Matters

1. The inquiry sat for two days, on 14 May and 6 August 2008.

2. Prior to the inquiry I made an unaccompanied visit to the area affected by the Order route, and walked small parts of the route to which I was able to gain access. No further inspection was made in the company of the parties because it was agreed that there is no evidence now to be seen on the ground relevant to my decision on the Order.

3. The Order Making Authority were directed to make the Order by the Secretary of State and do not support it; at the inquiry they argued against confirmation. The case for confirmation of the Order was made by Mr E Mawer, who in his capacity as a voluntary officer of the Ramblers' Association had applied for the Order to be made.

Adjournments

4. The Rights of Way (Hearings and Inquiries Procedure) (England) Rules 2007 came into force in October 2007, and apply to this inquiry. Rule 17 prescribes the dates by which statements of case are to be submitted, allowing objectors and others time to study the case for the authority before they have to submit their own. No provision is made in the Rules for objectors to have sight of an applicant's case before submitting their own statements. Therefore, where the case for confirmation is to be made by the applicant rather than the authority, strict application of the Rules will mean that an objector is not aware of the full case he has to meet when preparing his statement. The Inspectorate has published non-statutory procedural guidance which seeks to overcome this difficulty; it states that, where the applicant agrees to make the case in support of an order, he would be expected to submit his statement of case at

the time when the authority would have submitted theirs. Unfortunately in this instance Mr Mawer was not asked to do this.

5. Mr Blanchford appeared at the inquiry in accordance with Rule 19(d), having submitted a statement of case in due time although he had not made a statutory objection when the Order was published. At the outset he pointed out that he had not been aware of the full scope of the case for the Order when preparing his submissions, and sought leave to introduce further material, which he had made available to Mr Mawer a few days earlier. I agreed to this request and the inquiry proceeded. However, when the time came for Mr Blanchford to be questioned on his evidence, it became apparent that Mr Mawer had had insufficient time to study the additional material and was not in a position to cross-examine effectively. In order not to prejudice Mr Mawer's position, I therefore decided to adjourn the inquiry for some weeks. I gave directions that, if Mr Mawer wished to submit anything in writing by way of rebuttal of Mr Blanchford's additional material, he should do so by a certain date prior to the resumption, and that any further written comments by Mr Blanchford should also be submitted in advance.

6. Both submitted further material, and at the resumed inquiry Mr Mawer protested that some of that put in by Mr Blanchford amounted to completely new evidence rather than comment, and that he would need further time to consider it; he requested a second adjournment. I declined to adjourn again, because it seemed to me that the very small amount of new material from Mr Blanchford which might have a bearing on my decision could be dealt with adequately in questioning, including questioning by me. However, at the request of the parties I agreed to hold the inquiry open until 17 September so that any final comments could be submitted in writing. Comments were received from the Ramblers' Association (Mr Mawer and Mrs Kimbell) and from Mr Blanchford; they were circulated to all parties, and I have taken them into account so far as relevant.

Alleged Defect in the Order

7. The Order route crosses the River Coly four times as well as several ditches or streams, and a number of footbridges are shown on the maps and plans submitted by the applicant in support of his case. Bearing in mind that section 53(4)(b) of the Act says that modifications which may be made by an order shall include the addition to the statement of particulars as to any limitations or conditions affecting the public right of way, Mr Mawer submitted that the Order is defective because it makes no mention of any footbridges.

8. The Council's position was that it is not appropriate to classify a bridge as a 'limitation' of a right of way. It was pointed out that at the relevant date of the Order (14 November 2006) there were no bridges; indeed it was agreed that there is no evidence on the ground of the existence of the path. However the authority accepted that, if the Order were to be confirmed, the omission of bridges from the text of the Order would not absolve them from responsibility for providing bridges necessary for the right of way to be exercised.

9. In my view the Order is not defective. It seems to me that a bridge over a natural watercourse facilitates, rather than limits, the right of passage; it is not analogous to a stile or gate, which are obstructions in themselves although

they mitigate the obstructive effect which an unbroken hedge or fence would otherwise have.

Main Issues

10. The Order was made in accordance with section 53(3)(c)(i) of the Act, consequent upon the discovery of evidence which shows that a right of way which is not shown in the map and statement subsists or is reasonably alleged to subsist. The evidence is entirely documentary. If I am to confirm the Order I must be satisfied that the evidence discovered, when considered with all other relevant evidence available, is sufficient to show that, on the balance of probability, a public right of way on foot exists over the Order route.

11. I find that the following specific issues arise in assessing the value and evidential weight of the various documents, and I will consider them in turn:

    (a) how far the depiction of the path on Ordnance Survey maps with the annotation 'FP' supports the contention that it is a public right of way;

    (b) whether the deductions for public rights of way or user shown in the valuations under the 1910 Finance Act were made because the Order path is a public right of way, or because of some other form of right or easement (such as a customary way limited to certain users) which affected the land;

    (c) whether there is significance in the fact that the path is not included in highway records formerly maintained by Parish Surveyors of Highways;

    (d) whether apparent references to repairs affecting the path in local Council minutes dating from the 1920's support the contention that it is a public right of way;

    (e) what weight should be given to the claims made by Farway and Colyton Parish Councils when the first definitive map was in preparation, and the significance of the fact that neither Northleigh nor Southleigh Parish Councils claimed the Order path.

Reasons

Ordnance Survey Maps

12. The entire route is shown by double pecked lines annotated 'FP' on several Ordnance Survey maps and plans, including the 1880 25-inch plan, the Second Edition 25-inch plan dated 1905, and the 6-inch map of 1906. It is also marked on the First Series 2½-inch map; that map was published in 1950 but no information was available about the date of compilation, and I suspect that it was based on a much earlier survey. In the light of these plans, and the fact that part of the route is also shown on the Charles Gordon Wiscombe Estate map (circa 1850), all parties accepted that in the late nineteenth and early twentieth centuries a path existed on the line of the order route. It was also agreed that the use of the letters 'FP' on the Ordnance plans indicated the surveyor's view that the path was not usable by horses or wheeled traffic.

13. Whilst acknowledging that the standard disclaimer ("*The representation on this map of any road, track or path is no evidence of the existence of a right of*

way") means that Ordnance Survey maps cannot be used to prove that any path carries public rights, the applicant submitted that the OS did in fact try to differentiate between public and private ways. He mentioned No. 72 of the 1901 Instructions to One-Inch Field Revisers, which includes the statement *"Only footpaths that are habitually used by the public should be shown"*. However, as none of the maps in issue here are at the 1-inch scale that Instruction has little bearing on the matter, and Mr Mawer relied mainly on No. 96 of the 1905 Instructions to Field Examiners, which includes the words *"A clearly marked track on the ground is not in itself sufficient to justify showing a path, unless it is in obvious use by the public"*.

14. Instruction 96 is in several parts, but all of it relates to footpaths, and the map-maker is therefore likely to have had the whole of it in mind when deciding whether to show a particular path. Firstly, *"all clearly marked and permanent footpaths (ie gravelled, paved, or with gates or stiles), whether public or private, should be shown"*. It is possible that the subject path was shown because it met that physical description, but the Instruction itself makes it clear that such a path could be either public or private. In case the Examiner were in any doubt about whether he should investigate the matter, the Instruction firmly tells him *"The Ordnance Survey does not concern itself with rights of way, and Survey employés are not to enquire into them"*. There then follow clauses about paths in public parks and recreation grounds, market and allotment gardens, and private gardens or yards. There is no evidence or likelihood that the land crossed by the Order route was used for these purposes.

15. There follows a section which reads *"Mere convenience footpaths for the use of a household, cottage, or farm; or for the temporary use of workmen, should not be shown; but paths leading to any well-defined object of use or interest, as to a public well, should be shown"*. It is here that the words about obvious use by the public, upon which the applicant relies, appear. They are indented, which seems to me to indicate that they are subordinate to the clause immediately preceding, and relate to it alone; and they are preceded by the letters 'NB' which do indeed mean 'note well', as the applicant was at pains to point out, but also indicate that the words are by way of an explanatory note to what has gone before rather than a separate instruction. Instruction 96 then goes on to deal with paths in woodland, and temporary cart tracks, and finally calls for the letters 'FP' to be used to distinguish footpaths from ways useable by other traffic. From the way Instruction 96 is structured, I conclude that the reference to paths in obvious use by the public qualifies the instruction to show *paths leading to any well-defined object of use or interest, as to a public well*: even if *clearly marked on the ground*, such paths were to be shown only if *in obvious use by the public.*

16. The Instructions which the Field Examiners were required to observe a century ago were many and complex. It is not possible to be certain now how the Examiners interpreted them, or how closely they observed them: it seems likely that being ordered not to enquire whether there was a public right, but having to apply the criterion of obvious public use, would have led to difficulties in the field, and to inconsistencies in the mapping. But I do not accept that, from the rather tortuous wording of Instruction 96, one can draw the general inference that paths shown on the early Ordnance plans were necessarily in

obvious use by the public; even if a Field Examiner had observed a number of people using a path, and decided it should be shown, he could not have known whether they were doing so as members of the general public, or whether they had rights arising from their employment, a tenancy, occupation of neighbouring land, or in some other way. I conclude that the depiction of the Order path on Ordnance Survey maps provides no evidence to support the contention that it is a public right of way.

The 1910 Finance Act

Relevance of the Act

17. The Act introduced two taxes on land: a tax on increases in the value of land, to be paid whenever it changed hands, and an annual levy or duty on undeveloped land. To establish the site value of land for the purpose of the annual levy, and to provide the base line from which increases in value could be measured, a survey was carried out to ascertain the value of all land as at April 1909. The Act defined four different assessments which were to be made for each landholding, or hereditament, known as the gross value, full site value, total value and assessable site value. The calculation of total value is of relevance to the investigation of rights of way because it is defined (section 25(3)) as the gross value after deducting the amount by which the gross value would be diminished if the land were sold subject to a number of matters including "any public rights of way or any public rights of user"; the valuation records therefore indicate where such rights were found to exist. The process of valuing every piece of land as at a single date was a major task. It was carried out parish by parish by temporary valuation assistants supported by clerical staff, in accordance with detailed instructions from the Inland Revenue.

The Presumption of Regularity

18. The applicant submitted that, in evaluating the references to rights of way contained in the Finance Act records for hereditaments on the Order route, the legal presumption of regularity should be applied. That presumption is *"omnia praesumuntur rite esse acta"*, or *"everything is presumed to be done which should have been done"*. I understand that it normally applies where there is doubt, but little or no evidence, as to whether procedures laid down in legislation were properly followed, and that it has evolved in the interests of legal certainty to discourage people from reopening questions of fact decided decades or even centuries ago. As a legal presumption, it is rebuttable if evidence can be found to show that there were in fact procedural failings. Mr Blanchford pointed to several shortcomings in the way in which valuations were carried out; he stressed that rights of way matters were peripheral to what was in total a highly complex exercise, and ridiculed the suggestion that the presumption of regularity should apply to the valuers' findings about rights of way. The parties painted very different pictures of the general competence of the staff involved in making the valuations, although there is no information specific to the valuation of land on the Order route.

19. In view of the fact that so many valuations had to be made in a short space of time, it must follow that most of the work was not done by skilled, experienced valuers. That could be important in evaluating any aspect of the record which

required a judgement to be made. However the major part of the task was essentially a data collection exercise, collating information supplied by landowners and physical detail about such things as the size and use of buildings observed on site visits. I consider that the presumption of regularity should apply to the procedures followed, and that the surveyors should be presumed to have acted properly, unless there is evidence to the contrary, in that they collected and recorded information in the way the Act required and to the best of their ability. However the fact that procedures were properly followed does not necessarily mean that the information recorded is correct or complete in every detail. Moreover, since the valuers' statutory task was to establish the value of land, not to make definitive rulings about the legal status of paths and ways, any conclusions they came to about the existence of a right of way cannot affect the true status of the way one way or the other.

Field Book Evidence for the Order Path

20. Mr Mawer produced copies of the Field Books for each hereditament crossed by the Order path. The Field Books, which contained four pages for each hereditament, were compiled in the office from information supplied by landowners and taken into the field by valuation assistants when they visited individual holdings. Here further information was added, such as a plan or description of the house and buildings, and from all this information the various valuations were calculated, presumably back in the office. For each of the seven holdings in question deductions for 'public rights of way or user' are shown in the Field Book, with cross-references to the Ordnance Survey plot numbers affected, and it was agreed that the deductions almost certainly related to the Order route.

21. However the authority and Mr Blanchford argued that it does not follow that in 1909 the route either was or was believed to be a public right of way, in the sense of a highway open to all the King's people. Their case in outline was that (i) in the early twentieth century there existed many 'customary ways', which were neither public highways nor private easements; (ii) the phrase 'public right of user' encompasses customary ways; (iii) the Finance Act allowed for deductions for 'public rights of user' as well as 'public rights of way' and the Field Book records do not distinguish between them and are unreliable. They submitted that the deductions recorded in Field Books, including those in question here, therefore include deductions which were correctly made for customary ways as a type of 'public right of user', but which do not provide evidence of the existence of a public right of way. They also argued that some customary ways, here and elsewhere, were wrongly recorded as public rights of way because the temporary valuation staff were unaware of the legal distinction between a customary way and a highway. I will next consider these submissions.

Customary Ways

22. It was asserted that for hundreds of years, until well into the twentieth century, the countryside was crossed by a network of many short customary and private ways to support rural activity. The nature of customary ways is explained in *Halsbury's Laws* (paragraph 629), which says that rights may exist by custom which may affect the ownership of land; such rights partake of the nature of easements, and are sometimes called quasi easements; customary

Southampton case, to which I have referred, suggests that by the turn of the century customary ways were already a dead letter.

Meaning of 'Public Right of User'

26. It is abundantly clear from the definitions in Halsbury's Laws that a customary way was not eligible for a deduction under the Finance Act as a public right of way. It was argued, however, that the term 'public right of user' embraces not only a public right to use an area of land (for recreation, for example), but also other rights including linear rights of passage available only to a section of the public. Extracts from *Hansard* were put in in support of this proposition, such as a definition of 'highway' which includes the phrase 'or any other way over which the public have rights of user'. To my mind this is just a rather archaic phrase meaning 'which the public have the right to use', which could be used to describe ways, open land, or such things as wells or quarries.

27. In another extract from *Hansard*, this time from the debate on what was to become the 1910 Finance Act, a Member is reported as saying *"Surely the truth and justice of the case is that if there exists over the land a public right of passage, or a public right of user, or any public right which affects the land, … that ought to form the subject of consideration by the valuer…"*. On the basis of that, Mr Blanchford submitted that the term 'public rights of user' in section 25(3) embraces customary ways, being rights of passage over land limited to a certain section of the public.

28. Although the Courts may in some circumstances look at Parliamentary debates when a difficulty arises in interpreting a statute, I do not believe that it is open to me to do so. If it were, I would say that the debates drawn to my attention offer no support at all for the interpretation argued for by Mr Blanchford. In any event, I find the wording of section 25(3) perfectly clear in itself. The word 'public' appears in two successive phrases: "any public rights of way or any public rights of user". In ordinary speech the repetition of the same word so soon emphasises it, and impresses upon the listener that the same thing is being referred to again ('a healthy mind in a healthy body', 'the right place at the right time', 'policies to reduce energy use, reduce emissions and reduce the need to travel'). I find it impossible to believe that the Parliamentary draftsman would have used the same word twice in a single sentence, intending that the first use of it should convey a different meaning from the second, without explaining himself further. It is abundantly clear to me that, in this subsection of the Act, the reference is to two rights which differed in their nature, one being of way (or passage) and the other of user, but shared the common attribute of being exercisable by the public. As I understand it, the use of the word 'or' between the two indicates that the two types of right were separate, in other words that rights of user were rights to use for some purpose other than passage.

29. Whilst I have reached this understanding independently, for the reasons outlined above, I note that my understanding of section 25(3) coincides with the opinion of Edwin Simpson, of Counsel, submitted by Mr Mawer. My conclusion is that a customary way, being a form of right of way (albeit one limited to a section of the public), was not eligible for a deduction under the Finance Act as a public right of user.

Reliability of the Field Books with Regard to Public Rights of Way or User

30. So that the various assessments of value could be made, landowners were required to make returns giving information about their holdings. They or their agents did this by filling in Form 4, which at question (p) asked whether the land is subject to any …(ii) public rights of way; (iii) public rights of user. The information from the completed Forms 4 was used by the valuers in making their valuations as set out in the Field Books, but here the entry is simply a financial amount against the heading 'Public Rights of Way or User'. In the absence of the Form 4s, which do not survive for the hereditaments in question, there is therefore no evidence direct from the landowner as to whether his claim was for a public right of way or a public right of user. Moreover, as a single deduction in the assessment of total value was given in respect of 'Public Rights of Way or User' without distinction, and however many of each there may have been on the holding, it was suggested that valuers were not concerned to distinguish between them.

31. It was submitted that the Field Books as a whole are mere 'documentary hearsay', because the information they contain was copied into them by unknown clerks from other sources, including but not limited to the Forms 4, and that information about supposed rights of way or rights of user was added during site inspections although it would have been impossible, merely by inspection, for the surveyor to know that the supposed rights existed. As the record for a given hereditament typically includes entries in several different hands, it was also submitted that information about rights of way or user could have been added later, without reference to the landowner.

32. I accept that, in strict evidential terms, the Field Books can do no more than tell us whether a deduction was made for 'Public Rights of Way or User'. They do contain other notes, under the heading 'notes made on inspection', which include references to the existence and location of rights of way or footpaths. Such notes, made following an inspection, can only relate to what was seen on the ground, and therefore cannot be relied upon as evidence of the public or private status of a route. However they do indicate that the rights for which deductions were given were rights of way or passage (rather than a right to make some other use of the land), and where the notes are cross-referenced to OS plot numbers they indicate where the rights of way were.

33. I agree that, in the absence of the relevant Form 4, it is not possible to be certain that what is recorded in the Field Book accords exactly with the information given by the owner. I acknowledge that the valuers' instructions did permit them to give deductions for rights of way known to them even if they were not claimed. However, it is unlikely that the Revenue would knowingly have granted deductions to which landowners were not entitled, whilst owners had the opportunity to challenge valuations which in their view made inadequate allowance for the existence of rights of way or user, or other encumbrances. Copying errors could of course have occurred at any stage in the process, but no objector sought to argue that entries in the Field Books were simply made up, and in my view it is to be assumed that in general those who compiled them used their best endeavours to comply with their instructions. The Field Books can only show what the valuers and landowners at the time believed to be the case, but it seems to me that they are a very

much more valuable source of information than the phrase 'documentary hearsay' might imply.

Competence of the Surveyors to Distinguish Types of Public Right

34. It is highly unlikely that the valuation assistants who compiled the Finance Act records were familiar with the intricacies of highway law. Even if they had been, they would not have had the time or resources to investigate the status of any right of way or user for which a deduction was claimed. I accept that they must therefore have relied on the landowner's view of the legal status of a way or right, and in some cases that view might have been wrong.

Conclusions on the Finance Act Evidence

35. From the Finance Act records I have seen, and the submissions made about them, I draw the following conclusions. The Field Books cannot be regarded as definitive, and the information in them must be read in the context of any other information available. However in this case the fact that deductions for 'public rights of way or user' were made in the assessments for no fewer than seven separate but adjacent holdings provides strong evidence that in 1909 a right of way of some kind existed along the Order route. The way cannot have been a private easement because deductions for easements were made under a different heading. It must therefore have been either a customary way or a public right of way (a highway). If the way was a customary right rather than a highway, then the deductions ought not to have been made, because a customary right of way is neither a public right of way nor a public right of user.

36. Therefore the inference is that the way was a highway. However it is possible that landowners claimed the reductions in error, and that the way was in reality a customary way: an owner might have believed that the expression 'right of public user' embraced customary ways, or he could have mistakenly believed that the way was a highway. I will therefore consider the likelihood that the Order route was a customary way.

37. It is highly likely that in 1909 this route, like most other paths in the countryside at the time, was used almost entirely by local people going about their business, especially farm workers going to and from work. Oral evidence that this was probably so was given by two objectors whose fields the route crosses: Mr Hurford said that his grandfather had employed 17 men at Farwood Barton in the 1930s, all of whom walked to work, and Mr Skinner remembered being told by a former owner that in the 1930s there had been a path across his land at Purlbridge Farm, used exclusively by local people. However the *Southampton* case is authority for the proposition that a route used only by local people can be a highway rather than a customary way.

38. With reference to the criteria for customary ways set out in paragraph 636 of *Halsbury's Laws,* I note that the Order route, as the Schedule to the Order makes clear, passes through four parishes. The sections in Farway and Southleigh parishes do not link with any other paths or ways, and there is no evidence that they ever served any church, mill, hamlet, farm or house within those parishes; the section in Northleigh leads only from a metalled road to the parish boundary. That being so, if the way had been used by customary right, it is difficult to imagine what body or class of persons would have been

entitled to exercise that right. It could not have been restricted to any one of the four parishes, and it would be absurd to suggest that the inhabitants of each parish had the right to use only their own section. It also strains credibility to describe the four parishes through which the route happens to pass as a 'well defined district'. There was no submission that the route, or the several parts of it, served as access from a village to a church or a mill, although I understand that there was formerly a mill near Brinkley Bridge; if it served as a way to market at Colyton that would point to highway, rather than customary way, status.

39. It seems to me that the Order route could not have met two of the criteria for customary ways: *"A customary right of way may be enjoyed by any member of a fluctuating body or class of persons provided that body or class is itself certain"* and *"Rights of way of this kind may exist in favour of the inhabitants of a parish or a town or probably of any other district sufficiently well defined to be the local area of any customary right"*. I therefore conclude that, even if it is true that customary ways continued to exist in any number by 1910, this route is more likely to have been a public right of way than a customary way.

Parish Highway Records

40. Since the seventeenth century, successive authorities responsible for highways have kept records which can provide evidence about whether or not a route is public. Mr Blanchford pointed out that the applicant, who has the burden of showing that the Order route is a highway, had not adduced evidence from any of these records. He asserted that prior to the late eighteenth century only ways which led from town to town were regarded as highways, and that since the Highways Act 1835 a new way offered to the public had to be accepted by the parish before attaining highway status.

41. I agree that, with the exception of those to be considered in the next paragraphs, there are no references to the Order route in highway records, and there is nothing to indicate any formal 'acceptance' of the path by the parish councils. But in my view Mr Blanchford's reliance on the 1835 Act arises from a misconception. At common law a footpath may become a public right of way by virtue of dedication by the landowner and acceptance by the public. Use by the public is evidence of acceptance and there is no need for any formal act of acceptance by any body representing the public. The 1835 Highways Act was concerned with responsibility for the maintenance of highways, and Section 23 set out the procedure whereby a newly-dedicated road could become maintainable by the public. But section 23 did not apply to footpaths and the Act did not deal with, and had no bearing on, whether a route was public. The way in which a footpath could become a public right of way at common law therefore remained as before. I conclude that the fact that the Order route does not figure in historic highways records is no evidence that it does not carry public rights.

Council Minutes

Colyton Parish

42. The applicant relied on a Minute of the Colyton Parochial Sanitary Committee from July 1922. In May of that year the Footpaths Committee had resolved to inspect footbridges etc between Colyford and Purlbridge (that is, from the

eastern end of the Order route to and beyond Colyton). At the July meeting, the Footpaths Committee reported back on the state of footpaths and bridges from Chantry Bridge (in Colyton) to Farway. The village of Farway is well to the west of the western end of the Order route, but I note that the parish boundary with Farway marks the upstream limit of the Colyton section of the route (point C on the Order map). In September the Minutes record that the Council agreed to pay half the cost of repairs to stiles etc above Chantry Bridge. Mr Mawer submitted that the Minutes show that the responsible committee of Colyton Parish Council accepted that their part of the riverside path to Farway, which includes parts of the Order route, was a public path, to which they were prepared to commit public funds.

43. The Order Making Authority acknowledged that the Colyton Committee had considered the path to be public, but submitted that this is merely evidence of reputed status, and that the Parish Councillors would have had no sure means of knowing whether the way was public or not. Mr Blanchford pointed out that the path leaves Colyton parish at point G, not far from the eastern end of the Order route, and inferred that the Committee were not concerned with paths west of Purlbridge.

44. It is true that at point G the path crosses from Colyton into Southleigh parish, but it re-enters Colyton further upstream and the main central section of the Order route, between F and C, is in Colyton. The description 'from Chantry Bridge to Farway', used in the July Minute, is not absolutely clear but as the term 'to Farway' cannot have meant 'to the village of Farway', because the village is way beyond the limit of Colyton Council's jurisdiction, I consider that the most logical interpretation is 'to the Farway boundary', which is where Colyton's responsibility ended. As to the possibility that the Parish Council were wrong about the status of the path, I agree that this cannot be entirely discounted but in the absence of any evidence of a mistake, or indeed of evidence that the status of the path was ever queried, discussed, investigated or challenged, the action of the Parish in spending public money on the path lends strong support to the proposition that it was open to the public.

Axminster and Honiton RDCs

45. The applicant also placed reliance on Minutes of the Axminster and Honiton Rural District Councils. In December 1926 Axminster RDC received a letter from Honiton RDC about a footbridge over the Coly between Farway and Pookhayne which had been washed away, and decided to replace the bridge if Honiton would pay half the cost. In the following month Honiton agreed to that, and to Axminster carrying out the work. I understand that the boundary between Southleigh and Colyton parishes was the boundary between the two former districts, and it was agreed at the inquiry that the bridge referred to was probably at point F on the Order map.

46. The Order Making Authority pointed out that, although the expenditure was authorised, there is no evidence that the work was ever done; moreover, although the District Councils' agreement to spend money on the path indicates its reputed status at the time, there is no evidence of its inclusion on the maps prepared a few years later under the Rights of Way Act 1932. Mr Blanchford drew attention to the meeting of the Honiton Council which had authorised the initial approach to Axminster. That meeting had discussed the washing away

of a footbridge from Far**wood** (not Far**way**) to Pookhayne. Farwood Barton is a farmstead to the north of the river near point F and Pookhayne is just to the south. Mr Blanchford therefore suggested that the bridge could well have existed to serve a north-south route rather than the Order route which runs east-west.

47. I accept that a bridge at point F could have served a north-south path, an east-west path, or both. The 1880 and 1905 25-inch OS plans do show a path northwards from point F to Farwood Barton, but not one southwards to Pookhayne, and the northern path is not recorded as a right of way today. I conclude that the action of the two Councils in authorising the expenditure of public money on a replacement bridge shows that a path which they believed to be public crossed the river at this point. It may be that the path linked Farwood and Pookhayne; however the fact that no maps show a path leading southwards strongly suggests that, though there may have been a public path to Farwood, there was also one which ran east-west along the riverside.

Claims Made when the First Definitive Map was in Preparation

48. No mention was made of the Order route in the returns made by Northleigh and Southleigh parishes under the National Parks and Access to the Countryside Act 1949. The Colyton return gives details of a path from the town to Brinkley Bridge, which then continued (though very little used) on the right-hand side of the Coly to Stubbing Bridge where it entered Southleigh parish. The Order route is mostly on the south side of the river, which is the right bank in strict geographical terms, but would have been the left-hand side to anyone walking out to Brinkley Bridge from the town of Colyton. Moreover, the Order route crosses from Colyton to Southleigh parish shortly after leaving Brinkley Bridge, and then re-enters Colyton before reaching Stubbing Bridge; beyond Stubbing Bridge it remains in Colyton (the stretch C to D on the Order map), but this stretch is not mentioned in the Colyton return. It was suggested that the 'Stubbing Bridge' mentioned in the parish return may have been, not the present road bridge of that name, but the bridge at point F where repairs were authorised in 1926; however a path from Colyton town which entered Southleigh at that point would have had to follow the north bank of the river from Brinkley Bridge, but no such path is shown on any map.

49. The Farway return appears to relate to the whole stretch of path between Woodbridge and Stubbing Bridge (points A to D), of which only about a quarter (B to C) is in Farway parish. Two bridges, presumably on the parish boundary at B and C, are reported as having been washed away, and the return continues "anyone wishing to use the path would have to ford the river". The return gives the grounds for believing the path to be public as "marked FP".

50. The fact that no claim for the path was made by either Northleigh or Southleigh does not indicate that no right of way existed when the returns were made in the early 1950s. However it does suggest that any path which may once have existed had been out of use for so long that local memory of it had faded. The destroyed bridges reported by Farway, and the phrase "anyone wishing to use the path *would have to* ford the river" suggest that the section of path referred to was very little used – otherwise the return would have said something like "when using the path one has to ford the river" – and the Colyton return states in terms that the section between Brinkley and Stubbing Bridges was very little

used. The fact that use was very limited could explain why those who compiled the Northleigh and Southleigh returns were apparently unaware of the existence of the path.

51. I note that the Farway return gives no valid grounds for believing the path to be public, and the description of the route of the path given in the Colyton return is impossible to reconcile with map evidence of where paths physically existed on the ground, or with the alignment of parish boundaries, and does not mention at all the lengthy stretch in Colyton parish between points D and C. On the whole, therefore, I consider that the returns under the 1949 Act do not provide strong evidence in support of the Order route although, taken together, the Farway and Colyton returns indicate a belief on the part of those who compiled them that a public path of some kind ran generally along the riverside between Woodbridge and Brinkley Bridge. However, when the County decided not to show the route on the draft map prepared under the Act, no objections were made to its omission, which may indicate that the Parish Councils as a whole had no strong opinion that the path existed.

Conclusions

52. Although the depiction of the Order path on Ordnance Survey maps provides no evidence to support the contention that it is a public right of way, I find that the 1910 Finance Act records provide strong evidence that in 1909 a right of way of some kind existed along the route. The way must have been either a customary way or a public right of way (a highway). Strictly speaking, if the way was a customary right rather than a highway, it should not have been taken into account for valuation purposes under the Finance Act because a customary right of way is neither a public right of way nor a public right of user. More important, the Order route could not have met two of the definitive criteria for customary ways. The way is therefore more likely to have been a public right of way than a customary way.

53. The actions of Colyton Parish and the Axminster and Honiton Rural District Councils in authorising the expenditure of public money on the path in the 1920s lend strong support to the proposition that it was open to the public. Although the returns made by parish councils under the 1949 Act do not provide strong corroborative evidence in support of the Order route I conclude, having regard to all the considerations I have set out above, and all other matters raised at the inquiry and in writing, that the Order should be confirmed.

Formal Decision

54. I confirm the Order.

Peter Norman

Inspector

APPEARANCES

For the Applicant:

Mr Eric Mawer	Access Officer, East Devon Group of The Ramblers' Association, 4 Bishop Court, Colyton, Devon EX24 6RQ.
Mrs Rosemary Kimbell	33 Marker Way, Honiton, Devon EX14 2EN.

For the Order Making Authority:

Mr Michael Martyn, Solr	Definitive Map Review Officer, Environment Directorate, Devon County Council.

Objectors

For Colyton Parish Council:	Feoffees Town Hall, Market Place, Colyton, Devon EX24 6JR.
Mr Bob Collier	Parish Councillor.

Individuals

Mr David Hurford	Farwood House, Colyton, Devon EX24 6DZ.
Mr Peter Beard	Pookhayne Farm, Blackacre Road, Southleigh, Devon EX24 6SE.
Mr Julian Hurford	Farwood Barton, Colyton, Devon EX24 6DZ.
Mr G Skinner	Purlbridge Farm, Colyton, Devon EX24 6SQ.
Mr P G Blanchford	Old Ford Farm, Wilmington, Honiton, Devon EX14 9JU.

Supporter

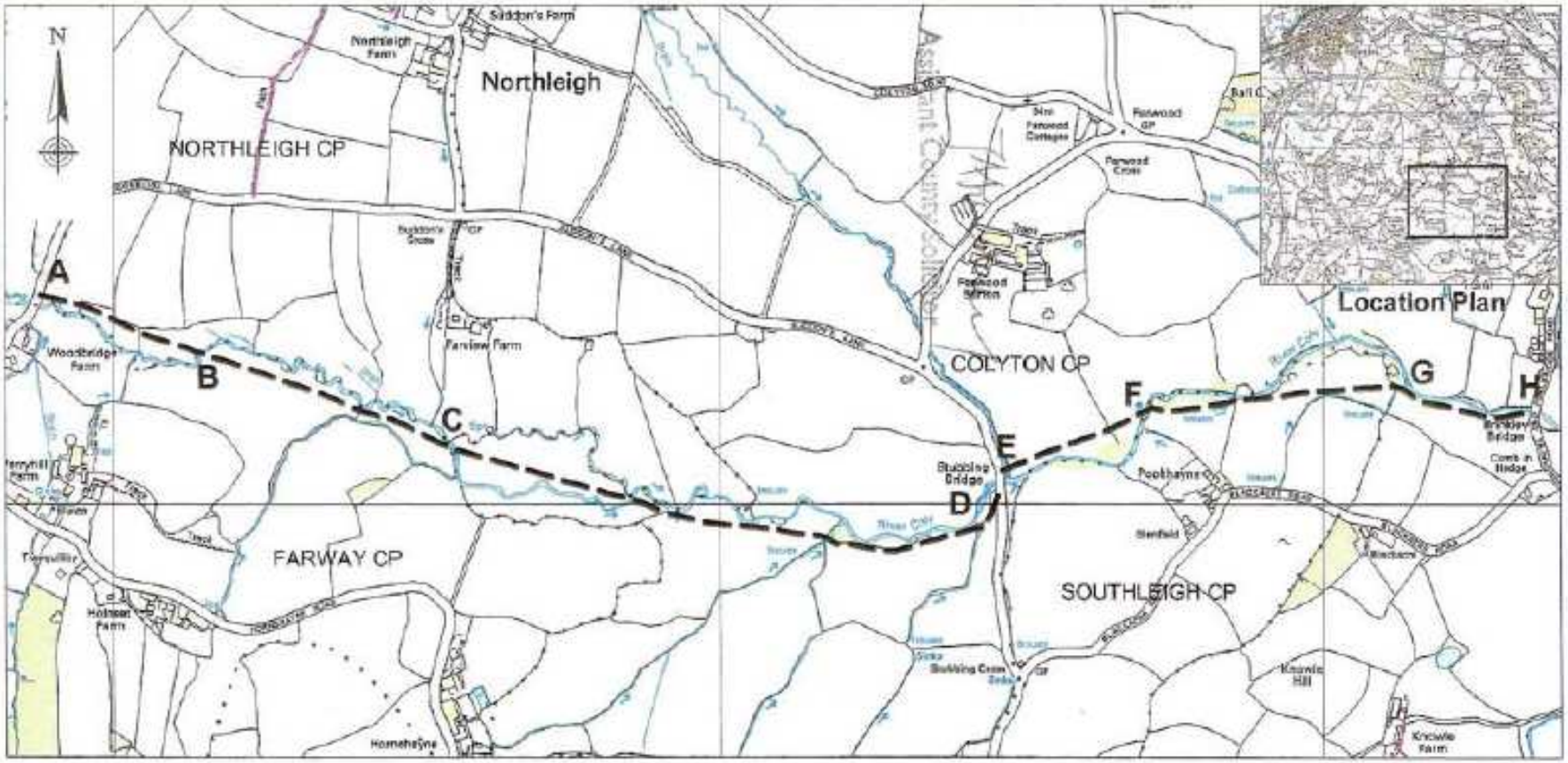
For The Devon Green Lanes Group:

Mr Roy Coombs	9 Hill Crescent, Honiton, Devon EX14 2HY.

DOCUMENTS SUBMITTED AT THE INQUIRY

1 Extract from Ordnance Survey Instructions to One-Inch Field Revisers, 1901.
2 Paragraphs 629 and 636 to 639 of *Halsbury's Laws*.
3 Section 5 of the Open Spaces Act 1906.
4 Extracts from Finance Act 1910 Field Books for Part of Shumon and Burgh Island, put in by Mr Mawer.
5 Additional Submission by Mr Mawer dated 11 July 2008.

6 Opinion on section 25(3) of the Finance Act 1910 and evidence of the existence of public rights of way, by Edwin Simpson of New Square Chambers, put in by Mr Mawer.
7 *Brocklebank v Thompson* [1903] 2 Ch 344.
8 Written comments by Mr Mawer and Mrs Kimbell on Document 11.
9 Bundle of papers put in by Mr Blanchford to show that Mr Mawer's evidence had not been copied to him.
10 Supplementary Statement of Case and Proof of Evidence of Mr Blanchford dated 8 May 2008, with covering letter of 14 May.
11 Additional Submission by Mr Blanchford dated 28 July 2008, with covering letter.
12 Comments on Mr Mawer's Exhibits 24, 25, 26, 27 and 29 (submitted prior to the inquiry) by Mr Blanchford.
13 Annotated extracts from the Highway Act 1835 and the Highways and Bridges Act 1891, put in by Mr Blanchford.
14 Written comments by Mr Blanchford on Document 8.
15 Extract from the Charles Gordon Wiscombe Estate map, circa 1850, put in by Mr Coombs.



map ref: **SY1895 - SY2195**

DEVON COUNTY COUNCIL
FOOTPATH NOS. 8 NORTHLEIGH, 3 FARWAY, 6 COLYTON & 10 SOUTHLEIGH
DEFINITIVE MAP MODIFICATION ORDER 2006

Notation

Claimed footpath A - B - C - D E - F - G - H

drawing number	ED/PROW/06/187
date	December 2006
scale	1:10,000
drawn by	MM

Edward Chorlton
DIRECTOR OF ENVIRONMENT ECONOMY & CULTURE

Devon County Council