

**Definitive Map Review
Parish of Hemyock (part 3)**

Report of the 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 a Modification Order be made to add a public footpath to the Definitive Map and Statement in respect of Suggestion 3 shown on drawing number HTM/PROW/13/3.

1. Summary

The report examines the third of three proposals arising from the Definitive Map Review in the Parish of Hemyock in the District of Mid Devon. The claim, for the addition of a public footpath running from Congiar Lane through woodland to Tedburrow Lane, is dealt with in the Appendix to this report and is shown on drawing number HTM/PROW/13/3.

2. Background

The original survey under s. 27 of the National Parks and Access to the Countryside Act 1949 revealed 31 footpaths & 2 bridleways, which were recorded on the Definitive Map and Statement with a relevant date of 1 March 1958.

The following Orders have been made and confirmed:

Footpath No.34 Public Path Diversion Order 1972
Footpath No.37 Public Path Diversion Order 1977
Footpath No.25a Public Path Diversion Order 1991
Footpath No.33 Public Path Diversion Order 1992
Footpath No. 42b Public Path Diversion Order 1996
Footpath No.42 Public Path Diversion Order 1998
Bridleway No.22 Definitive Map Modification Order 1996
Footpath No.35 Public Path Diversion Order 2006
Footpath No.19 Public Path Diversion Order 2006
Footpath No.8a Public Path Diversion Order 2010

Legal Event Modification Orders for these changes will be made under delegated powers in due course.

3. Review

A public parish meeting held in Hemyock Village Hall in November 2005. Three proposals have been put forward for modifying the Definitive Map, along with several proposed diversions of existing rights of way. The diversions are being dealt with under delegated powers.

Informal consultations have been carried out with the following results:

Hemyock Parish Council	-	support (via Parish Paths Partnership)
Mid Devon District Council	-	no response
British Horse Society	-	no response
Byways and Bridleways Trust	-	no response

Devon Green Lanes Group	-	no response
Country Land and Business Association	-	no response
National Farmers' Union	-	no response
Ramblers' Association	-	no response
Trail Riders' Fellowship	-	no response

4. Conclusion

It is recommended that a Modification Order for a public footpath be made in respect of the suggestion 3 as shown on drawing no. HTM/PROW/13/3.

5. Financial Considerations

There are no implications.

6. Sustainability Considerations

There are no implications.

7. Carbon Impact Considerations

There are no implications.

8. Equality Considerations

There are no implications.

9. Legal Considerations

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

10. Risk Management Considerations

There are no implications.

11. Public Health Impact

Amendments to the Definitive Map will contribute to the County Council's health and well being agenda.

12. Reasons for Recommendation/Alternate Options Considered

To progress the parish by parish review of the Definitive Map in the Mid Devon area.

Lester Willmington
Head of Highways and Traffic Management

Electoral Division: Willand & Uffculme

Local Government Act 1972: List of Background Papers

Contact for enquiries: Emily Spurway

Room ABG, Lucombe House, County Hall, Exeter

Telephone No: 01392 382833

Background Paper	Date	File Ref.
Correspondence file	2004 – date	DMR/HEM

es240113pra
sc/cr/dmr hemyock part 3
03 hq 130213

A. Basis of Claim

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

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

The Highways Act 1980, Section 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 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:

(i) that 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 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.

Suggestion 3: Addition of a public footpath from the minor county road known as Congiar Lane through woodland to the county road called Tedburrow Lane, Hemyock

The route is shown between points A - B on drawing number HTM/PROW/13/3.

Recommendation: It is recommended that a Modification Order be made to add the route to the Definitive Map and Statement as a public footpath.

1. Description of Route

The route starts at the minor county road Conigar Lane, approximately 5 metres west of the start of Bridleway No.22, Hemyock. The path proceeds generally south westwards along a well defined and undulating track for approximately 110 metres through broadleaf woodland. It then levels following the contour along the side of the woodland for approximately 170 metres before going downhill to a gate on Tedburrow Lane.

The surface of the path is earth and stone and the width where undefined is 2 metres. The total length of the path is approximately 320 metres and is shown between points A - B on plan no. HTM/PROW/13/3.

2. Documentary Evidence

Ordnance Survey Maps

1880s 1st Edition and 1904-06 2nd Edition OS map 25 inch to 1 mile.
Only the first section of the route, approximately 45 metres, is shown on these maps.

Hemyock Parish survey 1950s

This route was not claimed at that time.

3. User Evidence

Twelve User evidence forms have been submitted in support of this route as a public footpath and all the evidence relates to use on foot only. The range of use varies from a minimum of monthly to at least twice a week over a period of 51 years.

Two of the twelve users have used the path on foot between 1960 - 2011 (51 years) when they completed their forms. They state that they used the path weekly in the early years and now approximately 20 times per annum. They have used it as a circular walk for pleasure and have never been challenged or stopped from using it. They mention that there were no stiles or notices or gates until recently when a padlocked gate was erected on Tedburrow Lane (point B). They say on their evidence forms that they thought the landowner would have been aware that the public were using the route as it was "Evident from being well trodden".

Three further walkers have used the route since 1965, 1968 and 1970 to 2011 (46, 43, 41 years) respectively with a range of use from 12 to over 70 times a year. All of these walkers have used the path for leisure as part of a circular walk and have never been challenged or turned back. All three walkers say there were no obstructions on the route until 2010 when a gate was installed and padlocked on Tedburrow Lane. The walkers provide a grid reference for the location of the gate at point B.

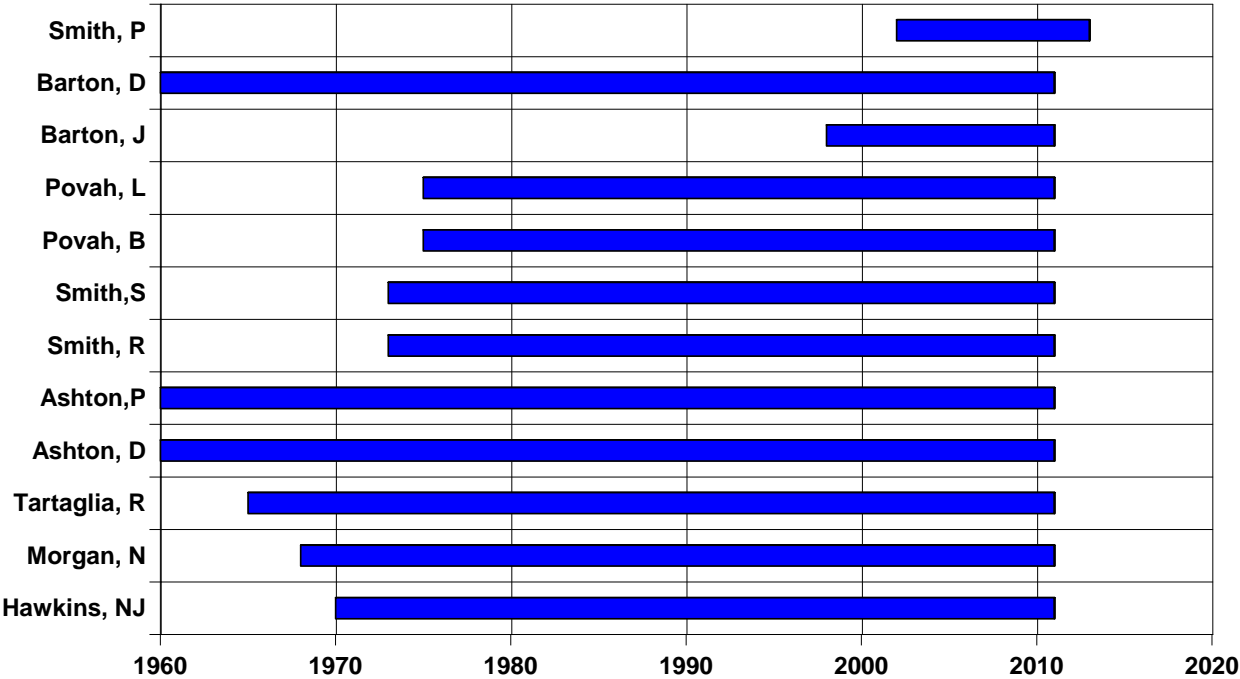
One of these walkers who has used the route since 1965 thought the owner/occupier was aware as "The path is visibly well trodden". This walker had not been given permission to walk the path nor had they been stopped or turned back. The walker who used the route from 1968 at least 52 times a year says "My family and I, as well as many others, have used this route for years, also the Brownies and Cubs as it is a safe route without traffic" She thought that the landowner was aware that the public used the path "because he/she must have seen people".

Four other local residents have used the path, two between the years 1973 and 2011. They used it twenty to thirty times a year for 38 years. The other two users walked the path for over 36 years from 1975 to 2011 a minimum of twice a week. None of the walkers was ever stopped or challenged, nor did they see any notices indicating the route was private. One walker states there have been no obstructions, notices or stiles until a "gate, posts and barbed wire put at entrance by Owleycombe, end 2010". None of these four walkers ever obtained permission to use the route nor were they given a private right to use the path.

Two other walkers used the path up to 3 times a month as a walk through the woods. One of the walkers mentioned that he initially used the path in 1960, but then from 1998 – 2011 when he completed his form. He said the route was a visible footpath and he had not been stopped, turned back or given permission to use the path. His wife used the path between 1998 - 2011, two to three times a month for pleasure walking the dogs. She says she had not seen any stiles, or gates or notices. In response to question "Do you believe the owner or occupier was aware the public was using the path? both users replied that a gate and a padlock were added recently.

A further evidence form was submitted in January 2013, giving evidence of use of the path on foot from 2002 - 2013 stating use of more than twice a week on average as a circular walk to and from Hemyock. In response to question "Why do you think the path is public?" he said "Have spoken to local people who state they know people walked the path for over 25 years". In addition, this user mentions that there were no notices or gates along the route until recently; "not until mid 2012, locked & barbed wire gate at west end". He goes on to mention "Notice erected east end 2012 stating 'Private land do not remove horse jumps in constant use'". In reply to the question "Do you believe the owner or occupier was aware the public was using the path?" he replies "Yes, because it is obvious that the public have used the path by the way useage has kept it clear". He says he has not seen any notices along the route indicating it was not a public right of way.

User Evidence Chart: Walkers



As additional information this walker adds "The footpath has the appearance of been in use for tens if not hundreds of years. The nature of the hedgerows, position of trees, cut/depth of the path in the land all supports this view".

In an attempt to clarify what was in place before the gate was erected on Tedburrow Lane, two walkers offered the following information:

One walker who has used the route from 1975 to 2011 says "Many years ago there was just a gap in the hedgerow/bank. When the Bickerton's purchased the land a short length of timber post and rail fence was erected with gaps at both sides with enough space for pedestrians to pass through but not enough for horses. Recently this fence fell into disrepair and the present padlocked gate with barbed wire each side was installed".

The second more recent user who has used the route since 2002 adds "Prior to the gate being erected there was just the opening into the wood that is an unobstructed way approximately the width of a motor vehicle accessing the wood".

None of the walkers give any details of who owns the land involved.

All User Evidence is for use on foot.

4. Landowner Evidence

Mr Neil McLean of Bubhayne Farm owns the woodland from Conigar Lane to approximately half way along the path. Mr McLean has recently erected a notice on his land saying "PRIVATE LAND PLEASE DO NOT MOVE THE JUMPS - THEY ARE IN CONSTANT USE"



Picture taken from point A

This notice was placed close to point A in November 2012 as a result of someone removing the small jumps on the path. As a walker it was possible to walk around these jumps and they were only placed on Mr McLean's land.

In his Landowner Evidence form, Mr McLean says that he regards the route as a footpath or bridleway and has always thought it to be public. In response to question "How long have you held this belief?" Mr McLean writes "1959 ever since then I have walked & ridden the path believing it to be a public right of way. I have owned the shaded area on the map and have no objection to people walking & riding it."

Mr McLean also says that he has never required people to ask permission to use the route, nor has he stopped or turned anyone back. With regard to gates along the route, Mr McLean adds "The gate has been erected since the new owners have acquired their part of the wood. Before then ever since 1959 there was only a gap in the hedge which many people in the area used the path as a public right of way". Mr McLean highlights point B on his plan confirming the location of the locked gate.

The joint owners of the section of woodland off Tedburrow Lane are Alan, Rachel and Claire Bickerton. In a letter from their solicitor, Adams Burrows Solicitors, they state that they are deeply opposed to a public footpath being recorded across their land. The woodland was purchased by their parents in the late 1980s and the title was transferred to them in March 2005 following the death of their parents. This woodland holds a special significance for the family as their parents are laid to rest in the woods. However, the path is well away from their parent's resting place.

The Bickerton's Solicitor has also completed a Landowner Evidence Form on their behalf. It states that the wood has been in the family's ownership since 1995 (which contradicts the information provided in the letter) and they do not regard the route as a public right of way. In reply to question "Have you seen, or been aware of, members of the public using this way?" the reply is "Yes - Occasional evidence of footprints, riding of horses". They also mention that they challenged two people using the path; "Approx 2 years ago advised 2 people crossing land that it was not a public right of way. They understood & apologised".

The Bickerton's also mention that there have been four or five signs in place since 1992 stating the land is "private".

In reply to the question "State whether those notices or signs were ever defaced or destroyed" they responded "They have fallen down & been reinstated". No location of the signs was indicated on the plan returned by the Solicitor.

In response to question "Have there, to your knowledge, ever been on the way any stiles or gates?" they replied "Yes - Gate installed at point B on 25/9/2010 (to replace existing damaged fence)". The Solicitor also states on behalf of his clients "As particular evidence of our client's interpretation of the situation we confirm that he [Mr Alan Bickerton] installed a locked gate at Point B on the enclosed plan to replace the fence that had fallen into disrepair. Our client was anxious to make it clear to members of the public that they could not enter the woodland at that point which to some extent the broken fence invited."



Google Street View Image
March 2009 of Point B

A further question on the Landowner Evidence form asks "Have you ever obstructed the way?" to which the answer was "No". The form then asks "If yes, state where, how and when": which resulted in the reply "There is no way which is recognised".

Land Registry details state that the freehold land was registered 9 February 1993 and the Title Absolute was transferred to Rachel, Claire and Alan Bickerton on 7 February 2005.

This information has been clarified by plans indicating the extent of the family's ownership. In her letter of 9 February 2013 Rachel Bickerton says "As part owner of the woodland that lies 1.25km s.west of Hemyock on the northern slope of Hackpenhill, I strongly object to the establishment of a public footpath through our private woodland and do not give permission for this to happen. This woodland was bought as 'private property' and on the understanding after lengthy research by my father that it remained private property. It has never had a path through it. The woodland has been tended and maintained by our family since its purchase in February 1993. My father repaired fences, placed private property signs on trees, wrote to the local hunt requesting that they not use this private woodland as a hunting ground. She goes on to say "On my father's death his wishes to be buried in the woodland were carried out and my mother now rests with him. This makes the woodland a very special, tranquil, safe and supportive place for our family". Included with her letter is a copy of a survey from the Devon County Sites and Monuments Register which highlights old boundary banks and

features. She also includes a map indicating the extent of their woodland. These can be seen in the backing papers accompanying the report.

Clare Bickerton based in Co Clare, Ireland has also submitted a letter of objection dated 5 February 2013. It states "I am writing as part owner of the above woodland to lodge my objection to the establishment of a public footpath through the wood". She explains "This woodland has been in my family for the last twenty years and there has been no formal or informal application to us to establish a footpath". She continues "I am aware that my brother has replaced the wooden fence with the intention of ensuring that the wooded area looks managed. This was in response to damage to trees, with name carving and evidence of fires being lit and drink cans and other refuse being left in the wood. Since the erection of the gate the temporary wire fence has been cut on two occasions. As we do not live locally, increased activity in the wood would be of great concern to us". In her last paragraph she states "My concern is that if this alleged 'path' is made public therefore advertised as a walking area the risk of damage and disruption by both people and their dogs will considerably increase, impacting on the conservation of this plot and our privacy. The area owned by us is at the commencement of the proposed footpath (point B) running adjacent to the road, across approximately 70 metres of land. I would request that as this proposal is for consideration that an alternative entrance be established. Please present my concerns to the committee".

The third part owner is Alan Bickerton who is based in Bristol. In his letter of 8 February 2013 he states "The basis for this application is that local residents claim that they have walked this path for twenty years openly and freely without stealth or secrecy. I dispute these claims for the following reasons: There was a fence in place on the Tedburrow Lane entrance ever since the land was purchased by my family in 1992" (point B).

Mr Bickerton continues "I consider this fence to be a barrier which is intended to provide an obstruction to block the entrance to the land. Any person that crossed this barrier without permission has therefore trespassed and not been walking on the land freely". He goes on to say "I have endeavoured to maintain this fence and boundaries in good order over the years but have found that they have frequently been damaged and gaps have opened up. These gaps appear to have been made by people deliberately interfering with them in order to gain access to the land". Mr Bickerton concludes by saying "It is therefore reasonable to say that I have taken steps to prevent people from walking freely on this land and this application should therefore be rejected. Please ensure that this letter and its associated attachments are passed to the Public Rights of Way Committee at their review in February". The letter and supporting documents are included in the backing papers.

No landowners have deposited a statement and statutory declaration under section 31(6) of the Highways Act 1980.

5. Discussion

The twelve User Evidence forms that have been submitted in support of this path as a footpath is consistent and cogent, demonstrating frequent and regular use for up to 51 years. None of the walkers state that they have seen any notices in the woodland and none appear to have been attached to the wooden fence at point B on plan HTM/PROW/13/3. Only one walker mentions a private notice close to point A which states "PRIVATE LAND PLEASE DO NOT REMOVE THE JUMPS - THEY ARE IN CONSTANT USE" This notice does not deny anyone access to the path from this point, neither does it indicate that the path is not public. The route was not obstructed by the jumps and they are only placed on land belonging to Mr N McLean in November 2012. The path follows a clear track from point A and then continues along the contour of the hill and it is clearly worn and defined despite being in deciduous woodland.

None of walkers say that they have been challenged by landowners, although the Bickerton's Solicitor states on their Landowner Evidence form that approximately two years the owners

advised two people crossing the land that it was not a public right of way. However it is unclear if this challenge was made on the claimed footpath or elsewhere in the woodland. There is however, a conflict in the evidence with regard to the placing of notices in the Bickerton's woodland. The users state that there have not been any notices in the woodland, except the recent jumps notice, whilst the Bickerton's landowner form states that four or five notices have been in place in since 1992 and whilst they have fallen down, they have been replaced.

Alan Bickerton's letter of 8 February 2013 says a notice was erected on the land in 1993 saying "Private Property". No indication is given as to the location of the notice on the five and a half acre woodland. Furthermore, it is considered that the wording of the notice is insufficient to deter the public from walking through the woods as case law has shown that notices to deter public access must be explicit. Indeed, Mr McLean, the other landowner who regards the route to be a public right of way has erected a notice with the words "PRIVATE LAND" (see above photo).

Mr Bickerton submitted a photograph with what he purports shows the remains of a private notice stating that the route is not public. However, no wording is visible and the notice was not observed on previous visits to the wood by the researcher and two colleagues. In addition, the origins of the "historic barbed wire" are unknown and it is unclear when it was erected or for what purpose e.g. stock control. In addition, it is not on the line of the claimed path.

Prior to the woodland being bought by the Bickerton family in 1993 a gap existed at point B. The wooden fence shown in the above photograph was erected sometime after this date and one user recalls that a gap was left which allowed enough space for pedestrians to pass through, but not enough for horses. The possibility therefore exists that the fence was erected to prevent motor vehicles and perhaps random campers from driving into the woodland and parking. There is no evidence to indicate that there was ever a notice placed on the fence denying public access. It should also be noted that there are other places where walkers can easily gain access to these woodlands through the old boundary banks and none have notices or gates.

The gate referred to by Mr Bickerton on the Devon County Sites and Monuments plan has no relevance as it is nowhere near the claimed path.

The wooden fence at point B fell into disrepair and was replaced in September 2010 with a locked metal gate with barbed wire each side. This had the effect of clearly calling the route into question.

The judgement in the case of Regina (Godmanchester Town Council) v Secretary of State for the Environment, Food and Rural Affairs, Regina (Drain) v same, heard in the House of Lords in May 2007, considered in great depth the nature of acts or actions required by a landowner to satisfy the requirements of Section 31 of the Highways Act 1980. The House of Lords were unanimous in considering that sufficient evidence of no intention on the part of a landowner to dedicate a way as a highway, required evidence of overt acts coming to the attention of users of the way, demonstrating that he/she had no such intention. It was said that 'intention' means what the relevant audience, namely the users of the way, would reasonably have understood the owner's intention to be, by the actions taken.

The test is objective: not what the owner subjectively intended nor what particular users of the way subjectively assumed, but whether a reasonable user would have understood what the owner was intending, as Lord Blackburn put it in Mann v Brodie (1885), to 'disabuse' (him) of the notion that the way was a public highway".

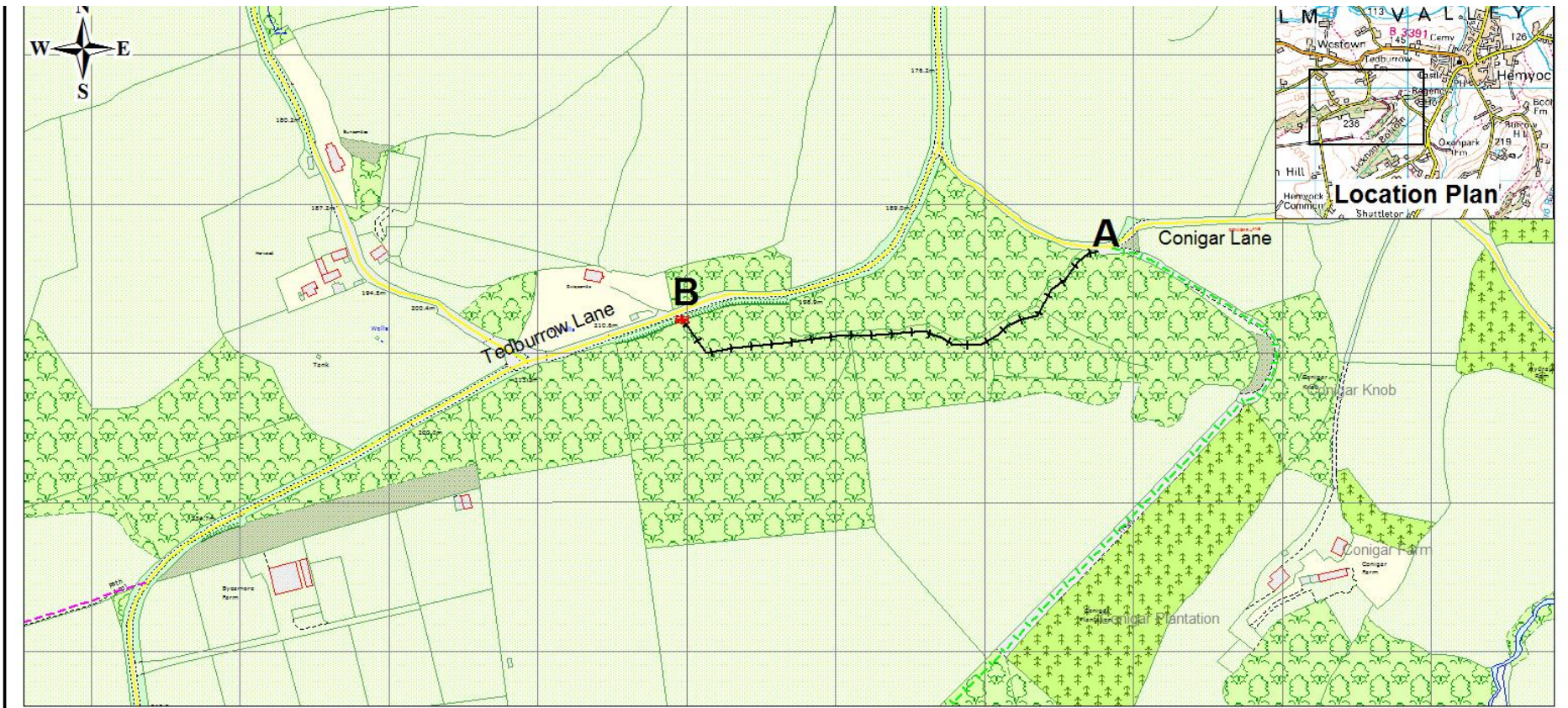
To that end, it is reasonable to suggest that the post and rail fence had not been taken as a sufficient lack of intention to deter members of the public from using the path. In addition, there is sufficient public use of the route in the twenty year period from 1990 to 2010 when

the route was brought into question to raise the presumption that it had been dedicated as a public footpath.

The Landowner Evidence from Mr McLean supports the user evidence that the path has been regarded as a public right of way for over fifty years. Mr McLean has been in the area since 1959 and has always known walkers and riders to have been through the woods on this path. Mr McLean has not mentioned deliberate damage to banks caused by walkers trying to gain access to the woods. The notice he erected near point A on plan HTM/PROW/13/3 is concerned only with the jumps and not to deter walkers. He acknowledges that the public use the route over his land freely and without permission.

7. Conclusion

In light of the above, it is recommended that a Modification Order be made to add a public footpath along the line A – B shown on plan no. HTM/PROW/13/3 to the Definitive Map and Statement.



map ref: ST 126,128

Grid 100m

Reproduced from Ordnance Survey mapping with the permission of the Controller of Her Majesty's Stationery Office © Crown copyright
 Unauthorised reproduction infringes Crown copyright and may lead to prosecution or civil proceedings. Licence No. 100019783

DEVON COUNTY COUNCIL
Definitive Map Review - Hemycok
Proposed footpath
Conigar Lane through woodland to Tedburrow Lane

drawing number HTM/PROW/13/3
 date Jan 2013
 scale 1:4000 at A4
 drawn by ES

Notation	
Proposed addition	A - B
Existing public footpath	
A - B approx	320m
Existing public bridleway	
	locked gate

Leter Willmington
 Head of Highways & Traffic Management

