HCW/13/71
Public Rights of Way Committee
20 November 2013

Schedule 14 Application
Deletion of Public Footpaths No. 8 Northleigh, No. 3 Farway, No. 6 Colyton and No. 10 Southleigh – part 2

Joint report of the County Solicitor and Head of Highways, Capital Development and Waste

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

Recommendation: It is recommended that members note the direction on behalf of the Secretary of State to make a Modification Order following a successful appeal 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 and give authorisation for a Modification Order to be made to delete Footpaths No. 8 Northleigh, No. 3 Farway, No. 6 Colyton and No. 10 Southleigh.

1. Introduction – Summary

This report concerns a Schedule 14 application to delete footpaths recorded on the Definitive Map in the parishes of Northleigh, Farway, Colyton and Southleigh as the result of a public inquiry in 2008. A report on investigation of the evidence supporting the application was considered by this Committee in November 2011, with a decision not to make a Modification Order deleting the footpaths. An appeal to the Planning Inspectorate against that decision has been allowed and the County Council has been directed to make an Order for deletion of the footpaths.

2. Discussion – Background to the Application and Appeal

A report on an earlier application for the routes to be added to the Definitive Map, recommending not to make an Order adding the routes, was considered by the Committee in May 2004. Members accepted the recommendation and resolved that no Order should be made. An appeal by the applicant 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 on behalf of the Secretary of State.

The direction to make the Order was reported to this Committee in September 2005 and following correspondence with the Government Office and legal advice, the matter was reported again to the Committee in November 2006. Members resolved that the Secretary of State's direction should be accepted and authorised the Order to be made as directed.

The footpaths were added to the Definitive Map and Statement by a Modification Order made in December 2006. The Order 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. Following the inquiry, the Order adding the footpaths was confirmed by that Inspector in September 2008.

An application to delete the footpaths, made on behalf of a group representing the owners of the land affected, was submitted in March 2010. It was supported by a large bundle of evidence, including details relating to historical ownership and occupancy records from

property deeds, 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 was submitted with the assumption that it should be examined in conjunction with the evidence already considered by the Inspector at the inquiry. In addition, it was suggested that the Inspector had made errors in his legal understanding of several matters in reaching his decision to confirm the Order as a result of the inquiry.

A report on the application was considered by the Committee in November 2011, with a recommendation that no Order should be made as the evidence was considered not sufficient to meet the test for deletion. The recommendation was accepted by members, who resolved that no Order to delete the footpaths should be made.

An appeal by the applicants against the Committee's decision was made to the Planning Inspectorate in January 2012 and dismissed by an Inspector's decision in May 2012. The applicants challenged that decision by judicial review in the High Court, leading to it being quashed by a Consent Order in August 2012. The appeal was referred back to the Secretary of State for re-determination by another Inspector and a second decision was made in December 2012 dismissing the appeal again. That decision was also challenged by a further application for judicial review, which led to it being quashed in April 2013 by Consent Order as well, with the appeal referred back to the Secretary of State again for a second re-determination.

A third Inspector's decision was made in June 2013 allowing the appeal. That Inspector agreed with the applicants about the new evidence submitted with the application, when considered with the evidence examined by the Inspector at the public inquiry in 2008, together with all other available evidence. The latest Inspector's decision was that it showed, on the balance of probabilities, that public rights of way did not exist on the routes in December 2006, the relevant date of the Modification Order adding them to the Definitive Map. The decision means that the County Council has been directed by the Secretary of State to make an Order deleting the footpaths. A copy of the Inspector's decision is included as an Appendix to this report.

3. Conclusion and Recommendation

In line with the Inspector's decision the County Council is required to make a Modification Order deleting the footpaths as directed. Accordingly, it is recommended that members note the direction on behalf of the Secretary of State to make a Modification Order following a successful appeal in respect of the application to delete the footpaths and give authorisation for the Modification Order to be made to delete the footpaths.

4. Financial Considerations

Financial implications are not a relevant consideration to be taken into account under the provision of the Wildlife and Countryside Act 1981. The Authority's costs associated with Modification Orders, including Schedule 14 appeals, the making of Orders and subsequent determinations, are met from the general public rights of way budget in fulfilling our statutory duties.

5. Sustainability Considerations

There are no implications.

6. Carbon Impact Considerations

There are no implications.

7. Equality Considerations

There are no considerations.

8. Legal Considerations

The implications/consequences of the recommendation have been taken into account in preparing the report. It is likely that the matter will go to a public inquiry, where all of those matters will be considered further.

9. Risk Management Consideration

There are no implications.

10. Public Health Impact

There are no implications.

11. Options/Alternatives

No options for any alternative recommendation are available for consideration.

12. Reasons for Recommendation/Alternative Options Considered

The County Council has been directed on behalf of the Secretary of State for Environment and Rural Affairs to make an Order following a successful appeal against the Committee's decision in November 2011.

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County Solicitor
David Whitton
Head of Highways, Capital Development and Waste

Electoral Division: Honiton St Michael's

Local Government Act 1972: List of Background Papers

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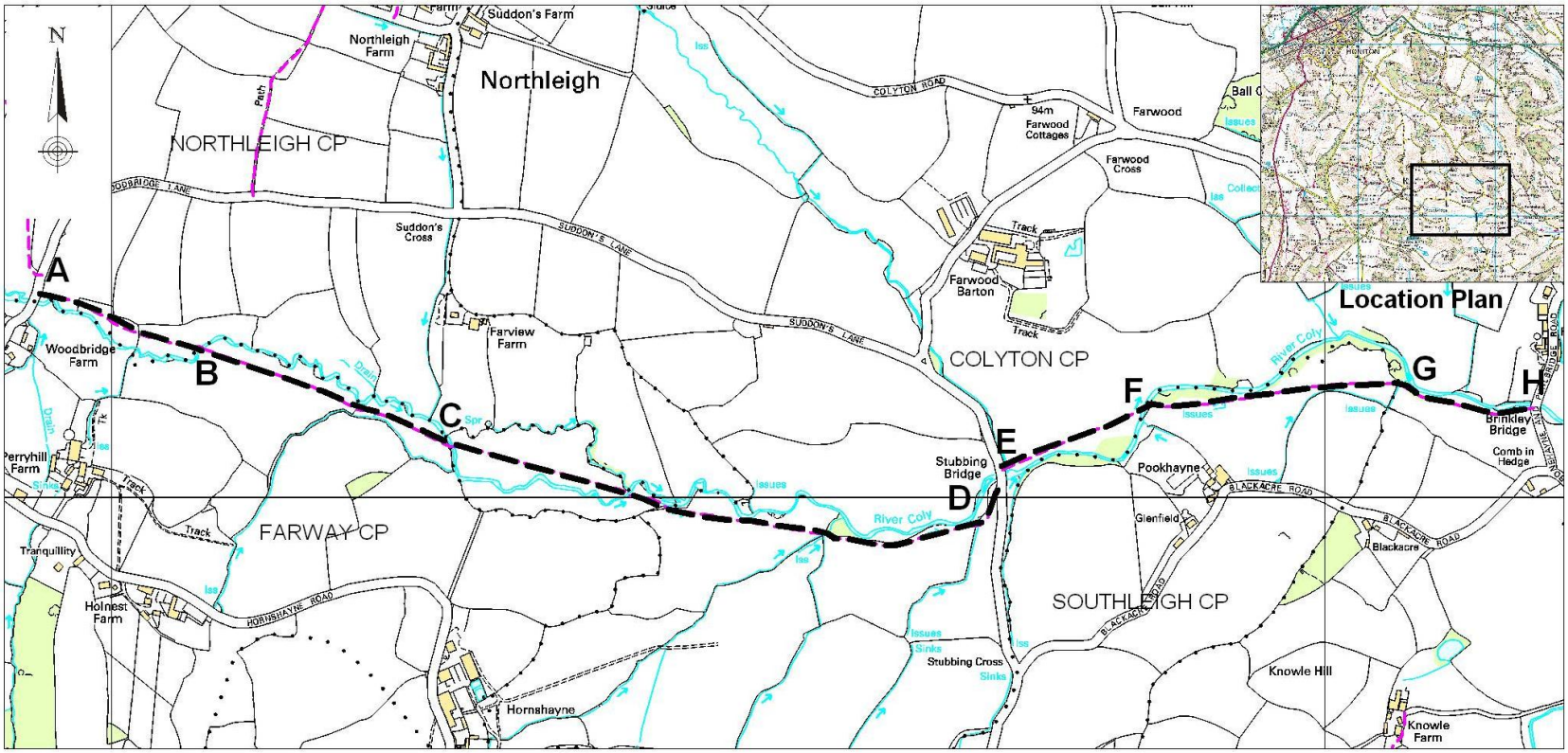
Background Paper	Date	File Ref.
Correspondence file	2010 to date	DMR/NOR/Sch14file

ns241013prw
sc/cr/deletion of public footpaths northleigh farway colyton southleigh
03 hq 111113



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

Appeal re-determination – Inspector's decision:

The Planning Inspectorate

Appeal Decision

by Alison Lea MA (Cantab) Solicitor

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

Decision date: 20 June 2013

Appeal Ref: FPS/J1155/14A/2R

- This Appeal is made under Section 53(5) and paragraph 4(1) of Schedule 14 to the Wildlife and Countryside Act 1981 against the decision of Devon County Council not to make an Order under section 53(2) of that Act.
- The Application dated 31 March 2010 was refused by Devon County Council on 5 December 2011.
- The appeal by Magna Law Limited, on behalf of the Stubbing Community Group, is dated 22 December 2011.
- The Appellant claims that the appeal route (one route formed by footpaths number 8 Northleigh, 3 Farway, 6 Colyton and 10 Southleigh) should be deleted from the Definitive Map and Statement for the area.

Summary of Decision: The appeal is allowed.

Preliminary Matters

1. I have been directed by the Secretary of State for Environment, Food and Rural Affairs to determine this appeal under Section 53(5) and Paragraph 4(1) of Schedule 14 to the Wildlife and Countryside Act (the 1981 Act).

2. This decision is a redetermination of the matter, following applications for judicial review of two previous decisions which were issued in May 2012 and December 2012. Both judicial review applications were granted by consent.

3. I have not visited the site but I am satisfied that I can make my decision without the need to do so.

Background

4. The appeal route runs on a roughly west to east alignment from Woodbridge Lane in Northleigh parish in the west to Brinkley Bridge in Colyton parish in the east. It follows the valley of the River Coly and also passes through Farway and Southleigh parishes. It is numbered separately in each parish, but forms one continuous route.

5. The appeal route has only recently been added to the County Council's Definitive Map, following a public inquiry in 2008. Subsequently the appellant applied to the County Council for a modification order to delete the route from the Definitive Map. This was refused by the County Council, on the basis that it did not believe that the tests for deletion had been met. The appellant has appealed against that decision.

The Main Issues

6. Section 53(3)(c)(iii) of the 1981 Act provides that an order to modify the Definitive Map and Statement should be made where evidence is discovered

which, when considered with all other relevant evidence available,, shows there is no public right of way over land shown in the map and statement as a highway of any description. Section 32 of the Highways Act 1980 (the 1980 Act) requires a court or tribunal to take into consideration any map, plan or history of the locality, or other relevant document which is tendered in evidence, giving it such weight as is appropriate, before determining whether or not a way has been dedicated as a highway.

7. In the case of *Trevelyan v Secretary of State for the Environment [2001] EWCA Civ 266* (*Trevelyan*) Lord Phillips MR stated that where the Secretary of State or an inspector appointed by him *"has to consider whether a right of way that is marked on a definitive map exists, he must start with the initial presumption that it does. If there were no evidence which made it reasonably arguable that such a right of way existed, it should not have been marked on the map. In the absence of any evidence to the contrary, it should be assumed that the proper procedures were followed and thus that such evidence existed. At the end of the day, when all the evidence has been considered, the standard of proof required to justify a finding that no right of way exists is no more than the balance of probabilities. But evidence of some substance must be put in the balance, if it is to outweigh the initial presumption that the right of way exists".*

8. Paragraph 4.32 of Defra's Rights of Way Circular 1/09 states that *"the evidence which is needed to remove what is shown as a public right from such an authoritative record as the definitive map and statement....will need to fulfil certain stringent requirements. These are that:*

   - *The evidence must be new – an order to remove a right of way cannot be founded simply on the re-examination of evidence known at the time the definitive map was surveyed and made*
   - *The evidence must be of sufficient substance to displace the presumption that the definitive map is correct*
   - *The evidence must be cogent.*

   While all three conditions must be met they will be assessed in the order listed".

9. The principal issues, therefore, are whether any new evidence has been produced and, if it has, whether it is of sufficient substance to displace the presumption that the Definitive Map and Statement is correct in showing that a public footpath exists on the appeal route. If new evidence is of sufficient substance the further question arises of whether, considered with all other relevant evidence it shows, on the balance of probabilities, that no public rights exist on the appeal route and that an order should be made to delete it from the Definitive Map.

Reasons

Whether any new evidence has been produced

10. The appellant submitted a number of documents with its application to the Council which it contends constitute new evidence. It includes the following:

    - The 1845 Coast Railway Deposited Plans and Books of Reference;

- Background to the 1932 Rights of Way Act and the associated unofficial Open Spaces Society Survey of 1934;
- Ownership and occupancy data for the properties crossed by the appeal route, which it is submitted shows an absence of persons with the capacity to dedicate a highway at the relevant time;
- Information relating to irregularities in the operation of the 1910 Finance Act in East Devon.

11. I have been provided with copies of the 2008 Inquiry documents and the Inspector's decision. Although the appellant refers to irregularities in the Finance Act documentation, it is unclear from the documentation exactly what the appellant considers to be new. The appellant's response to the Council's statement of reasons claims that the Inspector's attention was not drawn to inconsistencies in the field book entries, nor to the significance of the absence of the Form 4s nor to the guidance contained in the Consistency guidelines in this respect and that these matters are therefore new. However, detailed evidence relating to the claimed lack of reliability of Finance Act data was presented at the Inquiry and the Inspector's decision refers to the absence of any Form 4 and the reliability of Field Books.

12. Nevertheless, there is nothing to suggest that the other evidence referred to was before the Inspector at that time. The fact that the evidence existed at the time that decision was made is not relevant. In particular I am satisfied that the 1845 Coast Railway Deposited Plans and Books of Reference and the ownership and occupancy data has been discovered since that date and therefore constitutes new evidence. I shall therefore consider the substance of the new evidence.

1845 Exeter, Dorchester, Weymouth Junction Coast Railway Plans and Books of Reference (the Railway Documentation)

13. In order to obtain a Special Act of Parliament to construct a new railway it was necessary to draw up detailed plans of the proposed route, together with books of reference showing the ownership and occupation of the land to be crossed by it within the "limits of deviation". These limits are shown on the plans by parallel lines on either side of the proposed railway. The Exeter, Dorchester, Weymouth Junction Coast Railway was in fact never constructed, but plans were deposited in 1845.

14. The appeal route is not marked on the map extracts. Although it appears that part of it lies beyond the limits of deviation when compared with the line shown on the Definitive Map, it is clear that on some of the plots shown numbered on the railway plan and referred to in the book of reference it is within the limits of deviation.

15. The book of reference contains descriptions in relation to plots which include "private road", "arable and footpath", "pasture and footpath". The appellant states that "These exhibits show that where a plot containing a right of way of some kind falls within the limits of deviation the existence and nature of the way is recorded". The Council's view however is that as the appeal route runs generally parallel to the line of the proposed railway, partly within but predominantly outside the limits of deviation, the proposers of the railway may not have paid it much attention as no provision for a diversion or crossing would have been required.

16. I agree that the exhibits show that some rights of way were recorded. In fact in relation to Colyton 6 the words "arable and footpath" appear but I accept that it is doubtful that the reference is to part of the appeal route as there is no record of it continuing in the adjoining plots. However, the fact that some rights of way are shown does not mean that all rights of way were recorded. No evidence has been produced to show whether there was a legal requirement to record rights of way and it is therefore difficult to make any assessment as to whether, if the route existed as a public right of way, it would have been recorded within the Railway Documentation.

17. The appellant contends that the Railway Documentation provides very strong evidence that a public right of way did not exist along the appeal route in 1845. However, although I accept that the evidence is consistent with there being no public footpath rights on the appeal route in 1845, it can be of little weight in showing that they did not exist at that time.

Ownership and occupancy data

18. The appeal route crosses the land of several landowners. Details of the history of 2 properties have been provided; namely Pookhayne (to the east of Stubbing Bridge) and Hornshayne (to the west of Stubbing Bridge). The evidence shows that Pookhayne was under settlement from 1740 until at least 1889 and was leased and tenanted from 1750 to 1921. Hornshayne was in settlement from at least 1728 to at least 1913 and tenanted from 1745 to 1946.

19. The appellant contends that the criteria for dedication could not have been met prior to the passing of the 1932 Rights of Way Act, in particular because these 2 properties formed part of entailed estates. In brief the argument is as follows. The appeal route was added to the definitive map on the basis of presumed dedication at common law. In order for there to be presumed dedication the user as of right must be asserted against a landowner with the capacity to dedicate. Where land is in strict settlement then, apart from an express power in the settlement or the statutory powers in the Settled Land Act 1925, there can be no valid dedication unless all parties interested under the settlement concur, or can be presumed to have concurred. This is because the landowner only has a life interest in the property and does not have the power to sell the land or grant rights over the land without the agreement of the heirs and trustees. The presumption of dedication at common law can therefore be resisted by demonstrating that the land was in settlement at the material time so there was no landowner competent to dedicate.

20. The Council submit that the retrospective provisions of the Settled Land Act 1925 (the 1925 Act) mean that a tenant for life within a strict settlement always had the capacity to dedicate a public right of way from which an inference of dedication could be drawn at common law. The Ramblers' Association have obtained a legal opinion from counsel on the question (the RA legal opinion) and the Council appear to rely upon this.

The Settled Land Act 1925 (the 1925 Act) and capacity to dedicate

21. In the RA legal opinion it is accepted that prior to statutory reform the position as regards dedication of highways was that unless the terms of the settlement conferred upon the life tenant the power to dedicate land as a public highway, the consent of all beneficiaries was required. However, the 1925 Act conferred

additional statutory powers on the tenant for life. Section 56 provides as follows:

"(1) On or after or in connection with a sale or grant for building purposes, or a building lease, or the development as a building estate of the settled land, or any part thereof, or at any other reasonable time, the tenant for life, for the general benefit of the residents on the settled land, or any part thereof –

(i) may cause or require any parts of the settled land to be appropriated and laid out for streets, roads, paths, squares, gardens or other open spaces, for the use, gratuitously or on payment, of the public or of individuals, with sewers, drains, watercourses, fencing, paving or other works necessary or proper in connexion therewith; .....

(2) In regard to the dedication of land for the public purposes aforesaid, a tenant for life shall be in the same position as if he were an absolute owner".

22. Section 56 of the 1925 Act does not have retrospective effect and does not therefore apply prior to 1926 which is when the 1925 Act came into force. Although paragraph 3 of Schedule 4 to the 1925 Act does have retrospective effect in that it deems the life tenant to have always had the power to consent to a driftway, private occupation road or private carriageway being declared as a public highway, it is not suggested by any party that the appeal route falls within the type of highways described. Although much of the RA legal opinion is an analysis of the retrospective deeming provision, it is accepted in the opinion that it is not applicable in this case.

23. However, Section 56 of the 1925 Act is a re-enactment of Section 16 of the Settled Land Act 1882 (the 1882 Act) and section 60 of the Law of Property Act 1922 (the 1922 Act). Section 16 as originally enacted in 1882 only applied "in connexion with the sale or grant for building purposes or a building lease" and the words "development as a building estate.....or at any other reasonable time" were added by section 60 of the 1922 Act. Paragraph 3 of schedule 4 to the 1925 Act required that section 16 of the 1882 Act should always be deemed to have had effect subject to those amendments and the appellant accepts that from 1882 the tenant for life was empowered to dedicate a right of way such as to bind the remainderman in accordance with Section 16 as amended. It is therefore necessary to consider whether dedication could have taken place in accordance with that section.

24. Although the section clearly refers to building purposes it is unclear what is meant by the words "or at any other reasonable time". The RA legal opinion states that since 1882 section 16 is deemed "always to have enabled dedication ....at any reasonable time, not merely where the tenant for life was selling or leasing land for business purposes". However, it seems to me that if the words "at any other reasonable time" have no relationship to the building purposes etc mentioned in the section, then there would be little purpose in specifying the various building purposes. It is far from clear what circumstances would be covered by the words "at any other reasonable time" but in my opinion it is more likely that they relate to the other works specifically mentioned in the section than not.

25. In any event, the power to lay out streets, roads, paths etc. must be exercised "for the general benefit of the residents on the settled land". I note the various

extracts from conveyancing texts provided which tend to the view that dedication could only occur where there was an immediate benefit to the settled land and in particular I note the commentary to the 1925 Act which states that *"it is clear that the "general benefit" of the residents is the only, or at least the principal, object to be kept in view; and it is conceived that such benefit must be such as to bring in a sufficient pecuniary compensation to recoup to the settlement the loss of the land so dedicated; also that any proposed scheme must be such as is usual with regard to similar undertakings. There is nothing to authorise a scheme for the benefit of the public generally, though there is no reason why the public should not incidentally obtain a benefit, provided that it be not such as to deteriorate the estate".*

26. The RA legal opinion accepts that any dedication must be of immediate benefit to the settled land but does not deal with the point in any detail. Indeed the opinion concludes that "a tenant for life has had legal capacity since 1882 to dedicate land for the purposes and in the circumstances set out in S16 SLA 1882 as retrospectively expanded by S60 (1) LPA 1922 and S3(1) of Schedule 14 to the SLA 1925." This point does not therefore appear to be disputed. However, the opinion goes on to state that "I see no reason why it cannot be presumed that this power was exercised in the past in the same way that it can be presumed that an absolute owner has exercised his or her power to dedicate land to the public". The Council also puts forward this view.

27. I do not accept that the power is comparable. An absolute owner is not constrained by the statutory provisions and has power to dedicate at common law for any purpose and whether or not the land benefits from that dedication. In my opinion a statutory dedication under S16 cannot be presumed in the same way as a common law dedication as in order to comply with the wording of the section there would need to be evidence that the dedication benefitted the land. It may also need to have some relationship with building puproses. In this case, the appeal route crosses agricultural land and it is difficult to see, in the absence of any documentation, how dedication would have benefitted the settled land. I do not accept the Council's suggestion that it could be presumed that the dedication could benefit the residents of the settled land "by facilitating access and recreational facilities".

28. I conclude therefore that prior to 1926 the tenant for life was not capable of dedicating a public right of way except in the limited circumstances set out in S16 of the 1882 Act and there is no evidence that those limited circumstances applied in this case. The effect of this is that given that the 2 properties were in strict settlement between 1740 and 1889 and 1728 to 1913 respectively, dedication could not have taken place during those periods due to lack of capacity.

29. The appellant also submits that due to the 2 properties being tenanted from 1750 to 1921 and 1745 to 1946 respectively, the person in occupation during those times would have lacked capacity to dedicate and there is no evidence that the owners consented to or acquiesced in any dedication. The Council has not provided any legal support for its view that the consent or concurrence of the freeholder should be presumed and in the absence of any evidence regarding consent or acquiescence I tend towards the appellant's view. In any event during the periods when the land formed part of a settlement I have already concluded that the tenant for life did not have capacity to dedicate at common law.

Rights of Way Act 1932

30. Extracts from the debates in parliament from around 1911 onwards which led eventually to the passing of the Rights of Way Act 1932 have been provided. The extracts provided are concerned, to a large extent, with the difficulties of establishing public rights of way across settled estates caused by nobody being in a position to dedicate land for many years. Although providing background information, they do not deal with the point in any detail and I do not find them of particular assistance in considering the case before me.

31. The appellant also suggests that the documentation demonstrates that many of the rights of way used by local people at that time were in fact not public rights of way open to all of the Queen's people. The 1932 Act contains provisions which allowed landowners to negate usage of ways as public rights of ways and it is suggested that this provision would not have been necessary if there had not been many convenience paths or customary ways in existence at that time. The appellant suggests that the appeal route was a customary way and I shall deal with this point later.

Is the new evidence of sufficient substance to displace the presumption that the definitive map is correct

32. I start with the presumption that the definitive map is correct. However, that presumption is rebuttable and I accept that there are some differences between the position in this case and that in *Trevelyan*. In particular, in this case the appeal route was first shown on the definitive map in 2008 and, although I have not had the benefit of hearing the oral evidence given at the 2008 Inquiry, I do have copies of all the written evidence provided to the Inspector and a copy of his decision. The basis on which he reached his decision is therefore clear.

33. One of the main pieces of evidence upon which the Inspector relied in coming to his conclusion that the appeal route was a public right of way were the field book entries for the 7 hereditaments crossed by the appeal route. His overall conclusion, having considered all the evidence, states that "the 1910 Finance Act records provide strong evidence that in 1909 a right of way of some kind existed along the route" and the way is "more likely to have been a public right of way than a customary way".

34. I do not find the Railway Documentation or that relating to the Rights of Way Act 1932 to be of great assistance. However, I have concluded that the ownership and occupancy data, which is cogent and unchallenged, shows that there were no landowners with capacity to dedicate the entire appeal route from 1728 until after the date of the Finance Act documentation. I consider that this has a material and significant impact on the evidence considered at the Inquiry and, in the particular circumstances of this case, is sufficient to displace the presumption that the definitive map is correct.

35. I am therefore required to consider whether the new evidence considered with all other relevant evidence shows, on the balance of probabilities, that no public rights of way exist on the appeal route.

Finance Act and other evidence

36. In reaching his conclusions the Inspector at the 2008 Inquiry considered many of the arguments now put forward by the appellant in relation to the Finance

Act data, including the nature of customary ways, the meaning of public right of user and the reliability of Field Books with regard to public rights of way and user. The Inspector's decision was not challenged and although the appellant submits that there are defects in that decision, my role is not to determine whether there are any such defects. However, in considering whether there is sufficient evidence to show that no public right of way exists, I must consider all relevant evidence.

37. The purpose of the 1910 Finance Act was not to record public rights of way, but to establish a benchmark valuation for all properties. Accordingly a survey of all property was initiated. This included information regarding access rights as it was recognised that the existence of such rights could have a negative impact on the value of property. Information relating to public rights of way and other matters which reduce the value of land was provided by landowners on Form 4. This information was then transcribed by Valuation Office staff onto Page 1 of the Field Book. No Form 4s are available for any of the 7 hereditaments crossed by the Appeal route, and I accept that we do not know whether precise wording was copied by the valuer or whether an extract or summary of the answer was transcribed. I also note that for some of the hereditaments no information has been included in the relevant section on page 1 and that in the case of 2 hereditaments the words "These may exist but are not known to me" appear. I accept that for the majority of the hereditaments crossed by the appeal route it appears that very little information was provided directly by the landowners.

38. Nevertheless deductions were made in respect of "Public Rights of Way or User" in respect of all 7 hereditaments. The appellant contends that the appeal route could have been a customary way, which it is suggested would fall within the words "public right of user" or a private, permissive, convenience or informal way used by some members of the public with the tolerance of the landowner for certain purposes.

39. Halsbury's Laws states that *"Rights of way existing by custom are to be distinguished both from public rights of way, or highways.....and from private rights of way which are easements properly so called. 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.....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".* It is clear that a customary way is not a public right of way. It also seems to me that it is unlikely that it would fall within the term "public right of user" as one would expect the word "public" to have the same meaning whether referring to a public right of way or public right of user. Without any further explanation it would seem strange for the word "public" to mean all the monarch's subjects in respect of a right of way but only a limited defined class in respect of user. It therefore seems that a deduction should not be made in respect of customary way. Any of the other ways referred to by the appellant would also not qualify for a deduction under the heading "public right of way or user".

40. However, as I have concluded that there was no-one with capacity to dedicate the entirety of the appeal route since 1728, the route would have had to have been dedicated as a public right of way prior to that date. I note the Inspector's finding that the appeal route did not meet the criteria for customary ways set out in Halsbury's laws, in particular as it crosses a number of parishes

and that it is difficult now to identify a defined body or class of user. However he also found that in 1909 it was highly likely that the route was used almost entirely by local people going about their business, especially farm workers going to and from work and he refers to oral evidence which supported that finding. There is no evidence of use of the appeal route or even of its existence in 1728 and it seems to me that, if it did exist prior to the land being settled, it may at that time have been a customary right of way, or indeed any of the other ways suggested. After that time it could not have become a public right of way prior to the date of the Finance Act documentation.

41. In my opinion the fact that the route would have had to have been dedicated prior to 1728 and the lack of direct evidence from landowners lessens the weight which can be attributed to the evidence in the Field Books. It may be the case that the valuer made an error in making a deduction for "public right of way or user".

42. In reaching his decision the Inspector also refers to the actions of 2 Councils in authorising expenditure of public money on the route in the 1920s which he finds lends strong support to the proposition that it was open to the public. However, even if it had that reputation at that time it does not provide direct evidence of dedication having taken place after the date of the Finance Act documentation and I note that in relation to the fact that no claim for the path was made in the 1950s by either Northleigh or Southleigh parishes the Inspector states "it does suggest that any path which may once have existed has been out of use for so long that local memory of it had faded". The appeal route was not recorded on the draft Definitive Map. There is no other evidence referred to in the Inspector's conclusions as supporting his finding that the appeal route is a public right of way.

Conclusions on the evidence

43. I have found that dedication could only have taken place at the time the land was in strict settlement in the very specific circumstances contained in S16 of the 1882 Act and that there is no evidence of those circumstances applying in this case. I therefore conclude that, for the appeal route to have been dedicated by 1909, it must have been dedicated prior to 1728.

44. There is no evidence to show that the route existed as a physical entity at that time; the first evidence of its physical existence on the ground being the Ordnance Survey's 1st edition of 1880. I accept that evidence from Field Books may provide good evidence of the reputation of a way as public, but in this case little information appears to have been provided by the landowner, and the only use of which there is any evidence may have been by a class of people. These matters reduce the weight which can be given to the Finance Act material. The fact that Councils spent money in the 1920s is also evidence of reputation at that time but is of little assistance in considering whether dedication had taken place prior to 1728. It is also of insufficient weight to lead to the conclusion that dedication took place after 1913 when the land was no longer held in strict settlement. Indeed I note that Hornshayne was tenanted until 1945 and that by the 1950s the route appears to have faded from local memory.

45. I conclude therefore that the new evidence, together with the evidence already available, shows that, on the balance of probabilities, a public right of way did

not exist over the appeal route in December 2006 (the relevant date of the Order).

Conclusion

46. Having regard to these and all other matters raised in the written representations I conclude that the appeal should be allowed.

Formal Decision

47. In accordance with paragraph 4(2) of Schedule 14 to the 1981 Act, Devon County Council is directed to make an order under section 53(2) and schedule 15 of the 1981 Act to modify the definitive map and statement for the area to delete the route formed by footpaths number 8 Northleigh, 3 Farway, 6 Colyton and 10 Southleigh. This decision is made without prejudice to any decisions that may be issued by the Secretary of State in accordance with his powers under Schedule 15 of the 1981 Act.

Alison Lea

Inspector