

**Definitive Map Review
Parish of Kentisbury**

Report of the Chief Officer for Highways, Infrastructure Development and Waste

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

Recommendation: It is recommended that:

- (a) a Modification Order be made to modify the Definitive Map and Statement by adding a restricted byway to the Definitive Map and Statement between points A – B – C – D, as shown on drawing number HCW/PROW/17/34 (Proposal 1); and that**
- (b) no Modification Order be made in respect of Proposal 2.**

1. Introduction

This report examines the two proposals arising from the Definitive Map Review in Kentisbury.

2. Background

The original survey under s. 27 of the National Parks and Access to the Countryside Act 1949 revealed 12 footpaths and 3 bridleways, which were recorded on the Definitive Map and Statement with a relevant date of 1 September 1957.

The review of the Definitive Map, under s.33 of the 1949 Act, which commenced in the late 1960s but was never completed, produced several proposals for changes to the Definitive Map at that time, of which Proposal 2 of this report is the only one which is considered to have a valid case for further investigation during the current review. The Limited Special Review of RUPP's, carried out in the 1970s, did not affect the parish.

No previous orders and agreements have been made and confirmed in the parish.

The current Review was started in 2011 with informal consultation on the 2 proposals carried out in 2017 for modification of the Definitive Map and Statement.

This is the parish report for the Definitive Map Review in the parish of Kentisbury.

3. Proposals

Please refer to Appendix I to this report.

4. Consultations

General consultations have been carried out with the following results:

County Councillor Andrea Davis – no comment

North Devon Council	– no comment
Kentisbury & Trentishoe Parish Council	– comments included on specific proposals
British Horse Society	– no comment
Byways & Bridleways Trust	– no comment
Country Landowners' Association	– no comment
Devon Green Lanes Group	– no comment
National Farmers' Union	– no comment
Open Spaces Society	– no comment
Ramblers'	– no objection
Trail Riders' Fellowship	– no comment

Specific responses are detailed in Appendix I to this report and included in the background papers.

5. 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.

6. Legal Considerations

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

7. Risk Management Considerations

No risks have been identified.

8. Equality, Environmental Impact and Public Health Considerations

Equality, environmental impact or public health implications have, where appropriate under the provisions of the relevant legislation have been taken into account.

9. Conclusion

It is recommended that a Modification Order be made to modify the Definitive Map and Statement by adding to them a restricted byway between points A – B – C – D along Preston/Parsonage Lane between Preston Gate and the A39, east of Kentisbury Ford, but that no Modification Order be made in respect of Proposal 2.

Should any further valid claim with sufficient evidence be made within the next six months it would seem reasonable for it to be determined promptly rather than deferred.

10. Reasons for Recommendations

To undertake the County Council's statutory duty under the Wildlife and Countryside Act 1981 to keep the Definitive Map and Statement under continuous review and to progress the parish by parish review in the North Devon area.

Meg Booth
Chief Officer for Highways, Infrastructure Development and Waste

Electoral Division: Combe Martin Rural

Local Government Act 1972: List of Background Papers

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Background Paper	Date	File Ref.
Correspondence Files	Current	DMR/KENTISBURY

cg151018pra
sc/cr/DMR Kentisbury
04 021118

A. Basis of Claim

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.

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 32 states that a court or other tribunal, before determining whether a way has or has not been dedicated as a highway, or the date on which such dedication, if any, took place, shall take into consideration any map, plan, or history of the locality or other relevant document which is tendered in evidence, and shall give such weight thereto as the court or tribunal considers justified by the circumstances, including the antiquity of the tendered document, the status of the person by whom and the purpose for which it was made or compiled, and the custody in which it has been kept and from which it is produced.

The Wildlife and Countryside Act 1981, Section 53(3)(c) enables the Definitive Map to be modified if the County Council discovers evidence which, when considered with all other relevant evidence available to it, shows that:

- (i) a right of way not shown in the map and statement subsists or is reasonably alleged to subsist over land in the area to which the map relates.
- (ii) a highway shown in the map and statement as a highway of a particular description ought to be there shown as a highway of a different description.
- (iii) there is no public right of way over land shown in the map and statement as a highway of any description, or any other particulars contained in the map and statement require modification.

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.

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.

In relation to claims for byways open to all traffic (BOATs), Section 67 of the Natural Environment and Rural Communities Act 2006 (NERC) extinguishes certain rights of way for mechanically propelled vehicles except for the circumstances set out in sub-sections 2 to 8. The main exceptions are that:

- (a) it is a way whose main use by the public during the period of 5 years ending with commencement was use for mechanically propelled vehicles;
- (b) it was shown on the List of Streets;
- (c) it was expressly created for mechanically propelled vehicles;

- (d) it was created by the construction of a road intended to be used by such vehicles;
- (e) it was created by virtue of use by such vehicles before 1 December 1930.

Extinguishment of rights for mechanically propelled vehicles also does not apply if, before the relevant date (20 January 2005), an application was made under section 53(5) of the Wildlife and Countryside Act 1981, or such an application was determined by a surveying authority, for an order to modify the definitive map and statement as to show a BOAT.

The judgement in the case of *R. (on the application of Winchester College) v Hampshire County Council (2008)* however, found that for such exceptions to be relevant the application must fully comply with the requirements of paragraph 1 of Schedule 14 to Wildlife and Countryside Act 1981. It is appropriate therefore firstly to determine whether or not the claimed vehicular rights subsist and, secondly, whether or not any exceptions apply; if vehicular rights subsist but the exceptions are not engaged then the appropriate status is restricted byway. Such claims may also be considered for a lower status.

B. Definition of Ratione Tenurae, Public Accommodation and Occupation Roads

Research into Highway Board, Rural District Council and Parish Council minutes has indicated that '*ratione tenurae*' (accommodation/occupation) roads were, from the late 19th century types of road expected to be used by the public, but with the adjacent landowners/occupiers of the road/lane being responsible for the maintenance of the roads.

Section 25(2) of the Local Government Act 1894 enacted that if a person liable to repair a highway '*ratione tenurae*' failed to do so, after being requested by the relevant highway authority, the council could repair the highway and recover the expenses from the person liable.

In 1977, Roger Gash, County Solicitor for Devon County Council wrote to parishes in connection with the forthcoming General Review of the Definitive Map. The letter enclosed a list of highway definitions connected with the subject of public rights of way. The list defined Footpath, Bridleway, Road used as a Public Path and Byways Open to all Traffic but also proceeded to define Unclassified County Road, *Public Accommodation/Occupation Road* and Green Lane. Public Accommodation/Occupation Road was described as '*this is a very unusual sort of road and none was shown on the original Definitive Map. In Devon the term is used to describe a road over which the public has complete freedom of access but which the landowner rather than the County Council is liable to maintain.*

The definition does not state that a Public Accommodation Road is open to every type of traffic, but the phrase '*complete freedom of access*' would indicate higher rights than use as a footpath only.

1 Proposal 1: Proposed addition of a restricted byway, as shown between points A – B – C – D on plan HCW/PROW/17/34.

Recommendation: That a Modification Order be made in respect of Proposal 1 to modify the Definitive Map and Statement by adding to them a restricted byway between points A – B – C – D along Preston/Parsonage Lane between Preston Gate and the A39, east of Kentisbury Ford, as shown on drawing no. HIW/PROW/17/34.

1.1 Background

1.1.1 The proposal route was included in the consultation with the support of the Parish Council, as it appeared to be a missing link between Kentisbury Footpath No. 3 and the county roads at Preston Gate and the A39 at Higher Broomhill Cottage.

1.2 Description of the Route

1.2.1 The proposal route starts at the county road at the cross roads known as Preston Gate at point A and proceeds south westwards along Preston/Parsonage Lane, a concrete track, to Preston Farm at point B, where it becomes a track of stone and earth. It continues south westwards before turning southwards towards point C at the entrance to the property, Beachborough (formerly the Parsonage/Rectory), from where it continues to meet the A39 opposite Higher Broomhill Cottage at point D.

1.3 Documentary Evidence

1.3.1 Cary's Map, 1821

1.3.1.1 Besides the Ordnance Survey, Cary was the leading map publisher in the 19th century. He maintained a high standard of maps, using actual trigonometric surveys and other up-to-date source materials, including parliamentary documents, which was reflected by his employment to survey the 9,000 miles of turnpike roads in 1794.

1.3.1.2 The proposal route between points A – B – C – D is shown as an enclosed uncoloured road running past the Parsonage.

1.3.2 Kentisbury Tithe Map and Apportionment, 1839-40

1.3.2.1 Tithe Maps were drawn up under statutory procedures laid down by the Tithe Commutation Act 1836 and subject to local publicity, limiting the possibility of errors. Their immediate purpose was to record the official record of boundaries of all tithe areas. Public roads were not titheable and were sometimes coloured, indicating carriageways or driftways. Tithe maps do not offer confirmation of the precise nature of the public and/or private rights that existed over a route shown. Such information was incidental and therefore is not good evidence of such. Public footpaths and bridleways are rarely shown as their effect on the tithe payable was likely to be negligible. Routes which are not numbered are usually included under the general heading of '*public roads and waste*'.

1.3.2.2 The Kentisbury tithe map is a second class map, surveyed at a scale of 4 chains to 1" by G. Northcote, Barnstaple, who did a number of tithe surveys in Devon. Being second class, it is considered only to be a legal and accurate record of tithe matters. Land that was not subject to tithes was generally accepted to be either

public, glebe or crown estates. In many cases public roads are coloured sienna as prescribed by Lieutenant Dawson, a military surveyor with the Ordnance Survey, to the Tithe Commissioners. The original document is held at the National Archives, with copies for the parish and diocese held locally.

- 1.3.2.3 The proposal route is shown as a coloured road throughout, and is numbered 784 between points A – B. Between points B – C – D the route has no number and is braced to plot 75 between points C – D. Lot 784 is the parish roads and 75 is recorded as a plantation, part of the Glebe owned by the Reverend CB Sweet and occupied by the Reverend JJ Rowe. It is open ended to what are recorded county roads at either end.

1.3.3 Kentisbury Down Inclosure Award, 1848

- 1.3.3.1 Inclosure awards can be evidence of repute of highways at the time they were made. Their significance as evidence depends on the powers given to the relevant Inclosure Commissioners. Awards and maps may provide supporting evidence of other matters, such as the existence of status of a route adjacent to but outside the awarded area. Evaluation of such evidence is considered in the context of the relevant inclosure act.
- 1.3.3.2 The proposal route is depicted in the same manner as recorded public highways in the parish. The award map also bears a resemblance to the parish tithe map.

1.3.4 Lynton Railway Deposited Plan, 1887

- 1.3.4.1 Individual schemes were promoted by Special Acts. The statutory process required for the authorisation of schemes was exacting, having been set out by parliamentary standing order and the Railways Clauses Consolidation Act 1845. The book of reference and deposited plans made in the course of the process needed to be of a high standard, as they formed the basis for legislation and were in the public domain. Consequently, they were scrutinised by all relevant parties who would not unnecessarily cede ownership, rights or responsibilities, as the status of a way had an impact on the cost of the scheme.
- 1.3.4.2 The scheme was surveyed by Messers E Muir and EN Fell at a scale of 13” to 1 mile. Between miles 1 and 2, the proposed railway scheme crosses to the northern end of the proposal route between points A – B, which was within the limits of deviation of the scheme. It is shown as an occupation road owned by FEP Openshaw.

1.3.5 Lynton Railway Extensions Deposited Plan, 1892

- 1.3.5.1 The proposed railway plan shows the crossroads at Preston Gate and the top end of the proposal route for a short distance southward from point A. It is not numbered as it lies outside the limits of deviation of the proposed railway scheme. Down Lane northwards from point A at Preston Gate is shown as lot 59, a public road owned by the Ilfracombe District Highway Board.

1.3.6 Ordnance Survey mapping, 1809 onwards

- 1.3.6.1 Ordnance Survey maps do not provide evidence of the status of this route but rather its physical existence over a number of years. These early Ordnance Survey maps carried a disclaimer, which states that: *‘The representation on this map of a road, track or footpath is no evidence of a right of way’*.

- 1.3.6.2 The proposal route between points A – B – C – D is shown as a cross road on the 1809 Old Series 1" to 1 mile as a through route passing the 'Parson'.
- 1.3.6.3 On the later 1st Edition 25" scale mapping of 1889, 2nd Edition of 1904, and Post War A Edition of 1975, the route is shown as a continuous through route with a bold line on one side, with the dashed lines indicating changes in surface. There is a solid parcel line at point D, which may have been a gate as these were shown shut. It is annotated as 'Parsonage Lane'.

1.3.7 Kentisbury Vestry minutes, 19th century

- 1.3.7.1 Prior to the formation of District Highway Boards in the early 1860s and the later Rural District Councils (1894) the responsibility for the maintenance of public highways generally belonged to the parish and was discharged by elected Surveyors of Highways. Relevant Acts of 1766, 1773 and 1835 included the provision for the use of locally available materials and there was a statutory requirement upon parishioners to fulfil a fixed annual labour commitment. The final responsibility for maintenance lay with the local Surveyor of Highways who was obliged to keep a detailed account of public monies expended.
- 1.3.7.2 At a meeting on 10 June 1882, the Vestry were *'of opinion that all who use the roads should contribute towards their maintenance and cannot understand why the 33rd section of the Locomotives Amendment Act has not been adopted by Highway Boards generally. This meeting is also of opinion that roads maintained by occupiers 'ratione tenurae' (if the law would permit it) should be repaired at the cost of the district.'*

1.3.8 Kentisbury Parish Council Minutes, 1894 onwards

- 1.3.8.1 The Minutes provide information about the management of the route and the Council's views regarding the public highways in the parish. A public body such as a Parish Council had powers only in relation to public highways through the appointed Surveyor of Highways historically, which they had a responsibility to maintain.
- 1.3.8.2 10 July 1895. Mr Lerwill was requested to *'report to the District Council the bad state of Preston Road'*, the proposal route between points A – B – C – D.
- 1.3.8.3 29 September 1924. It was resolved that a letter should be written to the *'District Council asking them to repair the damage done'* by rainwater to Preston Lane, the proposal route.
- 1.3.8.4 3 November 1924. The damage to Preston Lane, the proposal route, was considered not to entirely be due to Mr Toms neglect and the District Council was to be requested to form a Committee to meet Mr Toms, and the complainant Mr Charley.
- 1.3.8.5 16 March 1925. The matter regarding Preston Lane, the proposal route, was *'reported satisfactory'*.
- 1.3.8.6 17 October 1944. *'The Rural District Council decision to seek the views of [the] Parish Council before forwarding their recommendation to the County Council'* regarding accommodation roads and unnecessary highways. Their proposals were... *'to take over Preston Lane (the proposal route A – B – C – D) as a public*

highway, [which] 'was agreed to' and to give up Sevenash Lane, which was not agreed to.

- 1.3.8.7 14 May 1946. A letter was to be written to the 'Surveyor of [the] District Council asking that attention be given without delay to ... Preston Lane', the proposal route.
- 1.3.8.8 24 February 1947. 'The District Council intimation of October 1944 to take over Preston Lane and repairs at a public charge as nothing had been done and the same being in a very state of repairs'. The District Councillor was to be asked to bring attention to the Surveyor or the Council to the matter of the proposal route.
- 1.3.8.9 20 January 1948. 'It was reported that (Preston Lane, the proposal route) was in a very bad state of repair deep ruts and pits making it dangerous to traffic'.
- 1.3.8.10 16 March 1950. 'This road was on the County Council list to be taken over.' The County Council was to be asked if this could be done now.
- 1.3.8.11 19 April 1950. 'Mr Lovering (the County Councillor) was bringing [Preston Lane, the proposal route] to the notice of the County Council'.
- 1.3.8.12 21 November 1950. 'This lane (Preston Lane, the proposal route) has ... been seriously washed and damaged by the flood. A letter had been written to the Surveyor but no answer received'.
- 1.3.8.13 17 June 1952. It was resolved that 'a letter be written Mr FJ Richards (County Council) asking him to remind the County Surveyor of the proposal to take over this road (Preston Lane the proposal route), it being in a very bad state at present it should be attended to without delay'.
- 1.3.8.14 21 August 1952. It was resolved that 'a letter be written [to] the County Council pointing out the dangerous condition of Preston Lane (the proposal route) asking that repairs should be done, as Mr Charley [Preston Farm] was unable to get out with car or tractor'.
- 1.3.8.15 6 October 1952. 'An answer was received from the County Surveyor stating the County Council were not prepared to take over the road (the proposal route) and repair it at the public expense as there wasn't sufficient traffic to warrant this'.
- 1.3.8.16 30 March 1953. It was resolved that a letter should be written to the District Surveyor 'asking if there was any reason why the work on Rectory Lane damaged by the flood [had] not been completed'. The proposal route was also known as Parsonage or Rectory Lane.
- 1.3.8.17 16 March 1959. The owner/occupier Mr Shopland of Preston Lane, the proposal route, informed the Parish Council that a grant was available for putting occupation roads in such a condition that the County Council would be prepared to take them over and maintain at the public expense.
- 1.3.8.18 14 April 1959. 'A request was made that the Devon County Council be asked to take over this road (Preston Lane, the proposal route) and maintain it. The Barnstaple Rural District Council proposed to recommend this in 1944 but nothing further [had] been done, although repeated requests [had] been made. This road [served] 3 holdings and [was] also a Public Thoroughfare. It was learned that a special grant was available for roads such as this provided the County Council

promised to take them over'. A letter was to be written to the County Council asking them to do this and to the County Councillor to support it.

- 1.3.8.19 28 September 1959. A *'letter was read from the County Surveyor who had again approached the Ministry, with a view of getting a grant and adoption of the road'*, Preston Lane, the proposal route.
- 1.3.8.20 16 January 1961. *'Down Lane was damaged through the same course which had caused extensive damage to Preston Lane (the proposal route) and the Rectory. After considerable discussion it was agreed the District Surveyor be informed that this Council was getting tired of continually writing to him and no answer received, and nothing done and that a copy of the letter [would be] sent to our Member of Parliament'*.
- 1.3.8.21 27 February 1961. *'This matter (Preston Lane, the proposal route) could be dealt with by the Flood Relief Committee'*.
- 1.3.8.22 7 March 1962. *'The Rev Ayre reported that some improvement had been done'* to Preston Lane.
- 1.3.8.23 15 February 1965. *'The Clerk reported that Mr J Charley (Preston Farm) was worried about the state of his lane (Preston Lane, the proposal route), although it was a private road it was continually being used by heavy lorries and other vehicles. Mr Charley asked if the Parish Council could use their influence to have the surface of the lane repaired'*. The Clerk was asked to write to Mr Harwood about the matter.
- 1.3.8.24 15 March 1965. A letter was to be sent asking for *'information about the grant and the taking over the maintenance of the lane (Preston Lane, the proposal route) that was promised in 1963'*.
- 1.3.8.25 30 January 1967. A letter was received from Mr Charley stressing the *'failure of the Highways Authority to clear a number of gutters and culverts in Down Lane and at Preston Lane (the proposal route) with the result that flood water had seriously damaged the tarmac surface and washed out deep gullies at the verges'*. He asked for an inspection and attention to the damage, stressing the urgency.
- 1.3.8.26 5 September 1968. *'Mr Lewis asked if something could be done to the condition of the side of the lane (Preston Lane, the proposal route) in front of Preston Lodge... the Clerk said he would see Mr Jay the road foreman about this'*.
- 1.3.8.27 25 November 1968. The Clerk had written to Mr Jay regarding Preston Lane's condition (the proposal route) and had passed it onto Mr Hamilton.
- 1.3.8.28 10 March 1969. Mr Lerwill asked about Preston Lane, the proposal route, as the Chairman said nothing had been done and a blocked pipe in Down Lane would make matters much worse.
- 1.3.8.29 22 May 1969. A letter was written to Mr Hamilton asking if something could be done to the surface of Preston Lane, the proposal route.
- 1.3.8.30 5 September 1969. Mr Hamilton had replied to the Parish Council's letter, who did not like its tone, and the Clerk was asked to write again regarding the proposal route.

- 1.3.8.31 23 October 1969. Mr Hamilton, the Divisional Surveyor had replied again considering the damage to Preston Lane, the proposal route, to say that it was not the responsibility of his Council, and if the Parish thought differently, they should make a claim of damage, which they resolved to do.
- 1.3.8.32 9 February 1970. The Chairman stated that the damage to Preston Lane, the proposal route, was now in the hands of the County Council's insurance.
- 1.3.8.33 10 April 1975. Nothing had been done about the silted culvert at Preston House on the proposal route.
- 1.3.8.34 22 November 1979. It was resolved that the Clerk write to complain that heavy vehicles had damaged the drain at Preston Gate Cross, and that the west side of Preston Lane, the proposal route, was in a muddy state.
- 1.3.8.35 6 March 1980. The Chairman reported that nothing had been done about the bridge on Rectory Lane, the proposal route, and the Clerk was asked to write again.
- 1.3.8.36 6 June 1980. *'As nothing had been done about the state of Rectory Lane, [the] Clerk [was] to write again'*, regarding the proposal route.
- 1.3.8.37 4 September 1980. The state of Parsonage Lane, the proposal route, was again complained of. It was resolved that the Clerk write again and to the MP.
- 1.3.8.38 1 October 1980. The MP replied stating he would see what he could do regarding Rectory Lane, the proposal route, but in the meantime letters from the District and County Councils stated that *'the lane was not the responsibility of the highway authority'*. The Clerk was asked to write to the Diocesan Board of Finance stating that they were responsible and that *'those Councils should bring pressure to get the repairs done'*.
- 1.3.8.39 16 October 1980. A letter was received from *'Mr Wilson of Combe Martin complaining about the state of Rectory Lane'*, the proposal route.
- 1.3.8.40 6 November 1980. The Chairman had replied to Mr Michelmore, Solicitor to the County Council, *'requesting him to advise the appropriate Diocesan Department that it was responsible for the disrepair of over ¼ mile of the public occupation road known as Rectory Lane, where on the 9 October an accident occurred due to the state of the road to a motor car driven by a stranger, and that the car had to be towed away'*. The Diocesan Board had replied stating that *'the road belongs to nobody and is no-one's responsibility'* and refused to repair the proposal route. It was resolved that the North Devon District Council should be written to requesting *'the County Highway Authority 'to exercise the statutory obligation in the matter of getting the repairs to the road and bridge done by the Diocesan Board of Finance'*.
- 1.3.8.41 4 December 1980. The North Devon District Council had written to the Area Engineer, putting the matter of Rectory Lane, the proposal route, in his hands.
- 1.3.8.42 22 December 1980. A letter had been received from a Mr Pearson *'complaining about the condition of Rectory Lane'*, the proposal route, which was to be forwarded to the Area Engineer.
- 1.3.8.43 5 February 1981. A letter was received from North Devon District Council stating that *'the County [was] not aware that a public right of way [existed and that there*

was *'no publicly maintainable right of way [existing] over the route'*, the proposal route, and the District Council was unable to pursue the matter further. A response was to be sent repudiating the County Council's statement.

- 1.3.8.44 5 March 1981. The Divisional Surveyor wrote that the Parish's request regarding Preston Gate and Rectory Lane, the proposal route, was being looked into. Correspondence was being sent to the Area County Engineer.
- 1.3.8.45 4 June 1981. A copy of the letter received from the DAPC was forwarded to the District Council regarding the proposal route.
- 1.3.8.46 2 July 1981. A response had been received from the County Solicitor which was considered unsatisfactory and was to be forwarded to the DAPC regarding the proposal route.
- 1.3.8.47 4 February 1982. The DAPC advised the Parish Council to forward correspondence explaining the situation regarding Rectory Lane, the proposal route.
- 1.3.8.48 4 March 1982. The Clerk had written to the County Councillor but was also requested to write to the County Solicitor again regarding the proposal route.
- 1.3.8.49 6 April 1982. The Chairman explained the controversy regarding Rectory Lane, the proposal route, to the County Councillor at the Parish Council meeting, who said they would study the papers and report.
- 1.3.8.50 3 June 1982. A letter was received from the DAPC saying they had been in touch with the County Councillor, and it was agreed that there should be a joint approach between the Parish and County Councils to the Diocesan Board regarding the proposal route.
- 1.3.8.51 2 September 1982. *'As nothing had been received regarding Rectory Lane'*, the proposal route, the Clerk was instructed to write to the County Councillor.
- 1.3.8.52 2 December 1982. The County Councillor wrote stating that he had received information about Rectory Lane, the proposal route.
- 1.3.8.53 6 January 1983. A letter from the County Councillor brought to light another letter. Another letter was to be written to the County Solicitor regarding the proposal route.
- 1.3.8.54 2 February 1983. The letter had been sent to the County Solicitor. A discussion was had about the matter of any expenses being incurred. It was resolved that the *'Parish Council would not be responsible for any costs'* regarding Rectory Lane, the proposal route.

1.3.9 Barnstaple Rural District Council Minutes, 1893-1974

- 1.3.9.1 The Minutes provide information about the management of the route and the Council's views regarding the public highways in the parish. A public body such as a District Council had powers only in relation to public highways through the appointed Surveyor historically, which they had a responsibility to maintain. The records for 1898-99 have not survived.
- 1.3.9.2 There are a number of references to the highways in Kentisbury parish in these

records, with a number specifically dealing with the proposal route between points A – B – C – D.

- 1.3.9.3 3 October 1924. A letter was read from the Parish Council *'relative to putting in repair an Occupation Road known as Preston (the proposal route)...which had been damaged by water flowing from the District Road...the Highway Surveyor stated that this was probably a recurrence of trouble experienced...before but...would look into the matter'*.
- 1.3.9.4 17 October 1924. The Surveyor, Mr Richards, made a report regarding Preston Lane, about water flowing from Mr Toms gateway *'along the District Road, and then onto Preston Lane'*, the proposal route. Mr Toms was requested to clean a water ditch in his field to prevent a recurrence.
- 1.3.9.5 14 November 1924. The Kentisbury Parish Council wrote to say that *'they were not satisfied that the damage to the above Lane (Preston Lane, the proposal route) was caused solely by water from Mr Toms' field and asking for a Committee to meet them'*.
- 1.3.9.6 25 November 1924. A *'Committee had met...they were of opinion that some damage had been done to the Lane'*. Mr Toms was requested to carry out remedial works, and *'the watercourse in Preston Lane (the proposal route) be cleaned out'*. The Committee's report was adopted.
- 1.3.9.7 7 August 1936. A request was made by Kentisbury Parish Council *'for the erection of a sign post at the top of Preston Lane (the proposal route) indicating the road to Kentisbury'*.

1.3.10 Devon County Council Main Roads Committee, 1894-1973

- 1.3.10.1 The Minutes may provide information about the management of the route and the Council's views regarding the public highways in the parish. A public body such as a County Council had powers only in relation to public highways, which they had a responsibility to maintain.
- 1.3.10.2 In 1944, the Council embarked on an exercise to establish which accommodation roads in the County were necessary for public use and should be taken over and maintained at public expense, and which County Roads had become unnecessary for public use. The help of the Rural District and Parish Councils was enlisted in this extensive task. A definition of accommodation roads is included at Part B of the appendix.
- 1.3.10.3 The 9th Report of the Special Sub-Committee appointed to consider accommodation roads in the county to be taken over as highways repairable by the inhabitants at large, which met at The Castle, Exeter, on 25 July 1952, was presented to the County Roads Committee at its meeting on 5 September 1952.
- 1.3.10.4 Preston Lane in Kentisbury, the proposal route A – B – C – D, was considered in the report. *'On consideration of a request from the Parish Council that this road be taken over as a highway repairable by the public, the County Surveyor reported that it was of little benefit to the general public', and therefore he 'recommended that no action be taken'*.

1.3.11 Ordnance Survey Name Books, 1903

- 1.3.11.1 These Ordnance Survey records contain information on named routes may be found in the relevant Object Name Books, which provided details of the authorities for named features.
- 1.3.11.2 The proposal route between points A – B – C – D, Parsonage Lane, is described as '*a road extending from Preston Gate in a s.w. direction to the junction of roads south of the Rectory*', with the name authorisation coming from the District Surveyor, Mr AA Richards.

1.3.12 Finance Act, 1909-10

- 1.3.12.1 The Finance Act imposed a tax on the incremental value of land which was payable each time it changed hands. In order to levy the tax a comprehensive survey of all land in the UK was undertaken between 1910 and 1920. It was a criminal offence for any false statement to be knowingly made for the purpose of reducing tax liability. If a route is not included within any hereditament there is a possibility that it was considered a public highway, though there may be other reasons to explain its exclusion.
- 1.3.12.2 The proposal route between points A – B – C – D, Parsonage Lane, is completely excluded from any hereditaments adjacent, numbered, 17 – Kentisbury Rectory and Glebe Lands, 18 – Preston Farm, 20 – Preston House, and 34 – Broomhills.

1.3.13 Bartholomew's ½" to 1 mile maps, 1920s onwards

- 1.3.13.1 These maps were designed for *tourists and cyclists* with the roads classified for *driving and cycling purposes*. They were used by and influenced by the Cyclists Touring Club founded in 1878 and had the then classifications of First Class roads, and Secondary roads which were in good condition, Indifferent roads that were passable for cyclists and other uncoloured roads that were considered inferior and not to be recommended. Additionally, footpaths and bridleways were marked on the maps as a pecked line symbol. Cyclists use was confined to public carriage roads until 1968. The small scale does not permit all existing routes to be shown, omitting some more minor routes. The purpose of these maps was to guide the traveller along the routes most suitable for their mode of transport.
- 1.3.13.2 On maps dating between 1924 and 1932 the proposal route between points A – B – C – D is depicted as being in the lowest category of 'other roads and tracks', or as an 'inferior road' and 'not to be recommended'.

1.3.14 Aerial Photography, 1946 onwards

- 1.3.14.1 The proposal route between points A – B – C – D is visible and has similar characteristics to the rest of the parish highway network particularly pre-tarmacadam.

1.3.15 Definitive Map Parish Survey, 1950s

- 1.3.15.1 The compilation process set out in the National Parks and Access to the Countryside Act 1949 involved a substantial amount of work and such records are considered a valuable source of information. The rights of way included in the process had to pass through draft, provisional and definitive stages with repeated public consultations.

- 1.3.15.2 There is no reference to the proposal route between points A – B – C – D in the Parish Survey, however the entry for Footpath No. 3 is relevant. The footpath was surveyed on 22 June 1950 by Messers Holmes, Lewis, Ayre, and Pickard (Clerk), as running from Sandpark Lane to Preston Farm. It was noted that at a meeting of the Parish Council on 27 March 1957 Mr Lewis informed them that the proposal route, Parsonage Lane, was mainly used by vehicles.
- 1.3.15.3 In the list of public rights of way agree with the Parish Council in May 1957, Footpath No. 3 was described as starting from the UCR, Sandpark Lane, near Lower Sandpark and continued '*due eastwards to Parsonage Lane, a public accommodation road (not repairable by the inhabitants at large), opposite Preston Farm*'.

1.3.16 Definitive Map Review records, 1950s-80s

- 1.3.16.1 It appears that the status of the proposal route between points A – B – C – D, Parsonage/Preston Lane, has arisen on several occasions.
- 1.3.16.2 On 24 November 1954, a letter was written by the Northern Area Surveyor, Mr Jackson, to the Rev. H Ayre of the Rectory, Kentisbury. In it, the proposal route, Parsonage/Preston Lane, is described not as a county road, but an accommodation road for which the adjoining landowners were responsible, which had been damaged in the 1952 floods, but which had not been made good, as it was too late to claim.
- 1.3.16.3 A petition regarding the proposal route, Preston/Parsonage/Rectory Lane, was received by the Kentisbury and Trentishoe Parish Council in March 1980, signed by 46 local residents, that the lane was a public accommodation road which was out of repair, and which required repairs.
- 1.3.16.4 In correspondence dated 1981 and 1983 from Mr C Openshaw to the Rev. HG Ayre, Mr Openshaw states that he lived at Preston House between 1936-56, and owned it post-war. He was born and lived most of his life at the Grange nearby. Mr Openshaw agrees that the proposal route, Preston/Rectory Lane, was a through public accommodation road, which he maintained between Preston Gate and Preston House gate.
- 1.3.16.5 The Rev. HG Ayre of the Rectory, Kentisbury, made a statement in 1983, in which he detailed his and his predecessor's maintenance of the proposal route, and the increased reluctance of the Diocesan authorities to be involved in the matter, despite earlier works being instigated by them. He also states that he always ensured the lane was '*kept in a reasonable state of repair*' and had public liability cover for it.
- 1.3.16.6 Statements were also submitted in 1983 from Mr FJ Tucker of Week Cottage, Mr RG Smyth-Richards of Patchole Manor, and Mr HG Ayre (jnr) of the Rectory.
- 1.3.16.7 Mr FJ Tucker of Week Cottage stated his family were long standing parish residents and had always known the proposal route to be a public accommodation road. His father, Mr J Tucker, was employed by the late Rev. JO Openshaw to maintain that part of the lane which was his responsibility. When he left school, he worked for the late Mr Charley of Preston Farm, who was responsible for maintaining the lane from the rear entrance of the Rectory to the entrance of Preston House, from which point to Preston Gate, it was maintained by the house

owner. Mr C Openshaw, when he lived at Preston house, maintained that part of the lane.

1.3.17 Definitive Map and Statement, 1957

1.3.17.1 The inclusion of a public right of way on the Definitive Map and Statement is conclusive evidence of its existence. However, this does not preclude that other rights which are currently unrecorded may exist.

1.3.17.2 The Definitive Statement for Kentisbury Footpath No. 3 is described as running continued 'due eastwards to Parsonage Lane, a public accommodation road (not repairable by the inhabitants at large), opposite Preston Farm'. This is the proposal route between points A – B – C – D.

1.3.18 Beachborough sale, 2000

1.3.18.1 Sales particulars should be treated with special caution, as the art of embellishment in advertising is not a newly acquired skill. Nevertheless, if a public right of way were admitted, a convincing reason for disregarding the entry would need to be provided before it could be entirely discounted.

1.3.18.2 The property known as Beachborough, formerly the parish Rectory/Parsonage, changed ownership in 2000. The proposal route between points C – D is acknowledged as the access to the property, but there is no further mention of the lane.

1.3.19 Route Photographs, 2017

1.3.19.1 Site photographs of the proposal route between points A – B – C – D show that it is open and available.

1.3.20 Land Registry, 2017

1.3.20.1 Preston Farm is not registered.

1.3.20.2 A caution against first registration was lodged in 2000 regarding the whole of the proposal route between points A – B – C – D, by Messers Ayre on selling the former Rectory which they had purchased from the Diocese in 1987. The property is now known as Beachborough.

1.3.20.3 Cautions are a means of protecting an interest in an unregistered estate affecting land. A caution can protect a wide variety of interests, such as rentcharges and franchises. For each caution there is a 'caution title' – a record, under a distinguishing number, of the details of the caution and of the declaration in support and of a plan showing the extent of the land affected by the caution. A caution is not an actual registration of any estate in land. It is merely a means to trigger notification to the person who lodged the caution when an application for first registration is made. There can be more than one caution in respect of the same property.

1.4 User Evidence

- 1.4.1 No user evidence has been received for the proposal route between points A – B – C – D.

1.5 Landowner Evidence

- 1.5.1 Responses were received from 4 landowners adjacent to the proposal route between points A – B – C – D.
- 1.5.2 Messers Ayre of Grattons, Kentisbury have owned land adjacent to the proposal route for over 30 years and been tenants prior to that time. They have known the route for over 60 years, as a 'public occupation road'. They have been aware of the public using the lane on foot, with horses and with motor vehicles, though note that such use has been less since the 1980s. They recall temporary gates erected on the route near point B when the occupants of Preston Farm have been moving stock, but which were not immediately removed after the operation, but had to be moved by those subsequently wanting to pass along the lane, including walkers and horse riders.
- 1.5.3 Mr Pile of Preston Farm, Kentisbury has owned land adjacent to the proposal route for almost 50 years and believes the route to be a restricted byway. He has seen the public using the route but has not required them to seek permission or challenged them. There have been no notices or obstructions.
- 1.5.4 Mr and Mrs Clout of Beachborough, Kentisbury have lived adjacent to the route for 18 years and do not believe it to be public, though they are aware of the public using the route following satellite navigation systems. They have not required anyone using the route to seek permission and have not challenged people or told them it was not public, nor erected any notices. They have never obstructed the route.
- 1.5.5 Mr and Mrs Friend of Preston House, Kentisbury have lived adjacent to the proposal route for 3 years and believe it to be an '*unadopted lane*'. They have not seen anyone using the route or required people to seek permission to use it. The only notice they are aware of is the road sign near Preston Gate stating that the route is unsuitable for motor vehicles.
- 1.5.6 They attached a statutory declaration made by a previous owner, Mr Coleman in 1995, who had purchased the property in 1987. It stated that the lane was unadopted, but that he and those connected to him had used the lane without hindrance at all times, without permission or payment, with such rights having been exercised since Preston House was built.

1.6 Rebuttal Evidence

- 1.6.1 The Parish Council supports the resolution of the missing link with Footpath No. 3, but object to the proposal for a restricted byway between points A – B – C – D '*on the grounds of safety for exit onto the A39 that the Parish Council would prefer to see it as a bridleway*'.

1.7 Discussion

- 1.7.1 Statute – Section 31 Highways Act 1980. There does not appear to be a specific date on which the public's right to use the proposal route known as Preston/Parsonage/ Rectory Lane, between points A – B – C – D has been called into question. The Definitive Map and Statement is conclusive evidence of the information it contains, that Footpath No. 3 exists. The public have continued to use the lane in conjunction with the public footpath. The Kentisbury Parish Council since its inception in 1894 has at no time suggested that Footpath No. 3 was not public nor was it disputed when surveyed for the Definitive Map in 1950. The Parish Council supports the resolution of the anomaly, although would prefer to see it recorded as a bridleway.
- 1.7.2 As there is no specific date of calling into question or user evidence, the proposal cannot be considered under statute law. However, the proposal route may still be proven to exist as a public right of way at common law. Evidence of dedication by the landowners can be express or implied and an implication of dedication may be shown at common law if there is evidence, documentary, user or usually a combination of both from which it may be inferred that a landowner has dedicated a highway and that the public has accepted the dedication.
- 1.7.3 Common Law. On consideration of the proposal at common law, the historical documentary evidence demonstrates the proposal route's physical existence and availability since at least 1809 as shown on the early Ordnance Survey and Cary's 1821 mapping. It is shown in a similar manner to other recorded public highways.
- 1.7.4 At the time of the 1840 Tithe Map, the proposal route is included partly in the acreage of '*parish roads*' and partly included within the acreage for an adjacent plantation. A requirement of the Highways Acts of 1773 and 1835 which were contemporary with the Vestry records was that all '*common highways*' (public) had to be named in order for indictment for disrepair, the names usually reflecting places they either went to, passed or were used for, e.g. Parsonage Lane, Preston Lane. As private roads were not liable in this way, they did not need to be named. A named highway may therefore carry some inference of public status, including those which were repairable '*ratione tenurae*', sometimes later referred to as 'public accommodation or occupation roads', by adjacent landowners and occupiers, a common occurrence in this part of North Devon.
- 1.7.5 The frequent references in the Kentisbury Parish Council records between 1895 and 1983, demonstrate their regard for the public highway network and in particular, the proposal route, known as Preston/Parsonage Lane. It was considered to be a 'public accommodation road' over which the public had full access, but which were maintained by adjacent landowners and occupiers. The records later document the agreement of the Barnstaple Rural District Council for the proposal route to be taken over, but which was postponed due to prioritisation and funding.
- 1.7.6 However, it appears that when the proposal route was submitted to the County Council to be taken over, the Council adopted a somewhat different view. Despite serving 3 properties and a public footpath, the proposal route was considered of little benefit to the general public as a vehicular road in 1952 by the County Surveyor. However, it is unlikely that the Surveyor envisaged that the public should lose their rights. The Finance Act records are also considered consistent with the route's public reputation, with the proposal route being totally excluded from hereditaments.

- 1.7.7 In 1950 the Parish Council recorded Footpath No. 3 as part of their Parish Survey for the compilation of the Definitive Map as ending at the '*public accommodation road*' opposite Preston Farm, which was carried over to the footpath's Definitive Statement, as agreed with the Parish Council in 1957. The proposal route itself was not included on the Definitive Map because its use was considered to be mainly vehicular. The Parish Council and Definitive Map Review records demonstrate the route's public and vehicular reputation right up to modern times, which is corroborated by the Bartholomew's Maps of the 1920s.
- 1.7.8 The classification '*public accommodation road*' has no legal standing but use of the term in Devon infers that the public may have had full use of the proposal route known as Preston/Parsonage Lane. This must be considered with all the other available evidence.
- 1.7.9 Evidence from landowners adjacent to the proposal route for between 3 and 60 years and seen use of it by the public on foot, with horse, and motorised vehicles. Some consider it to be a restricted byway. They have never challenged such use or told users that the route was not public. There is no evidence of any obstructions or notices, except the modern '*unsuitable for motor vehicles*' sign. In the sale of Beachborough in 2000, (the former rectory/parsonage), the proposal route was not included.
- 1.7.10 The Land Registry information also appears to reflect the public reputation of the proposal route.
- 1.7.11 The Kentisbury and Trentishoe Parish Council support the proposal and the resolution of the anomaly, though would prefer the status of bridleway to restricted byway. The difference between these designations is whether or not non-mechanically propelled vehicles can use the route.

1.8 Conclusion

- 1.8.1 On consideration of all the available evidence the documentary evidence demonstrates that the proposal route between Preston Gate and the A39 between points A – B – C – D has existed since at least 1809. It has been open and available, and considered public since at least that time.
- 1.8.2 At Common Law, all highways existing prior to the Highways Act of 1835 were automatically repairable '*prima facie*' by the parish unless the responsibility could be proven as lying elsewhere. This liability remained as long as the highway existed or until the liability was taken away or transferred by statute, such as '*ratione tenure*'. The records of the Vestry, Parish Council, and Rural District Council demonstrate that the repair liability for many public highways in Kentisbury and North Devon generally were '*ratione tenure*', by the adjacent occupiers to the highways. This did at one time include the proposal route, Preston/Parsonage Lane, before it was suggested by the Parish and subsequently, the Rural District Council, that it be taken over and maintained by the relevant highway authority in the 1940s. The legal presumption, '*once a highway always a highway*' applies.
- 1.8.3 There is some suggestion of the proposal route having been used with motor vehicles by the public. Vehicle use must be prior to 1930 to be legal and satisfy any of the exceptions under the Natural Environment and Rural Communities Act *NERC) 2006 to protect vehicular rights from extinguishment. However, the limited vehicle evidence is not sufficient to satisfy any of the exceptions set out in

the legislation. Consequently, any unrecorded rights for mechanically propelled vehicles are, as such, extinguished. Therefore, the highest status the route could now be considered to have is that of a restricted byway.

- 1.8.4 The documentary evidence when taken as a whole is considered sufficient to show that a public right of way not shown in the Definitive Map and Statement subsists or is reasonably alleged to subsist. It demonstrates that the proposal route, known as Preston/Parsonage Lane, was considered historically an all-purpose public highway, maintained by the adjacent landowners and occupiers, accepted to be taken over and maintained by the relevant highway authority by both the Parish and former Rural District Councils. The evidence is considered sufficient to demonstrate that historic vehicular rights exist and consequently to record the route as a restricted byway.
- 1.8.5 The evidence is therefore considered to be sufficient under Common Law to demonstrate that a public highway of restricted byway status exists between points A – B – C – D.
- 1.8.6 It is therefore recommended that a Modification Order should be made to add a restricted byway between points A – B – C – D to the Definitive Map and Statement, as shown on drawing no. HIW/PROW/17/34. If there are no objections, or if such objections are subsequently withdrawn, that it be confirmed.

2 Proposal 2: Proposed upgrade of Footpath No. 8 to bridleway, as shown between points E – F – G – H on plan HCW/PROW/17/35.

Recommendation: That no Modification Order be made in respect of Proposal 2.

2.1 Background

- 2.1.1 The proposal to upgrade Footpath No. 8 to bridleway was included in the consultation with the support of the Parish Council, as following up on its proposal from the uncompleted review of 1978.

2.2 Description of the Route

- 2.2.1 The proposal route starts at the county road at West Kentisbury at point E and proceeds through the former West Kentisbury Farm, to a stile at point F. It continues across a field to a stile and footbridge at point G and through Ley Wood to the county road, Ley Lane, B3229, at point H.

2.3 Documentary Evidence

2.3.1 Kentisbury Tithe Map and Apportionment, 1839-40

- 2.3.1.1 Tithe Maps were drawn up under statutory procedures laid down by the Tithe Commutation Act 1836 and subject to local publicity, limiting the possibility of errors. Their immediate purpose was to record the official record of boundaries of all tithe areas. Public roads were not titheable and were sometimes coloured, indicating carriageways or driftways. Tithe maps do not offer confirmation of the precise nature of the public and/or private rights that existed over a route shown. Such information was incidental and therefore is not good evidence of such. Public footpaths and bridleways are rarely shown as their effect on the tithe payable was likely to be negligible. Routes which are not numbered are usually

included under the general heading of *'public roads and waste'*.

2.3.1.2 The Kentisbury tithe map is a second class map, surveyed at a scale of 4 chains to 1" by G. Northcote, Barnstaple, who did a number of tithe surveys in Devon. Being second class, it is considered only to be a legal and accurate record of tithe matters. Land that was not subject to tithes was generally accepted to be either public, glebe or crown estates. In many cases public roads are coloured sienna as prescribed by Lieutenant Dawson, a military surveyor with the Ordnance Survey, to the Tithe Commissioners. The original document is held at the National Archives, with copies for the parish and diocese held locally.

2.3.1.3 The proposal route is shown as a coloured road and a continuation of the county road through Kentisbury Town between points E – F. No route is shown between points F – G – H. The section F – G passes through lot 14, West Meadow, West Kentisbury, owned by John Nott Esquire and occupied by Richard Toms. The section G – H passes through lot 534, Coppice, Ley Estate, owned and occupied by James Richards.

2.3.2 Ordnance Survey mapping, 1809 onwards

2.3.2.1 Ordnance Survey maps do not provide evidence of the status of this route but rather its physical existence over a number of years. These early Ordnance Survey maps carried a disclaimer, which states that: *'The representation on this map of a road, track or footpath is no evidence of a right of way'*.

2.3.2.2 The proposal route is not shown on the 1809 Old Series 1" to 1 mile.

2.3.2.3 On the later 1st Edition 25" scale mapping of 1889, the section E – F is shown as a continuation of the county road from Kentisbury Town. Between points F – G – H, a double dashed track is depicted crossing a ford at point G.

2.3.2.4 The 2nd Edition of 1904 shows almost the same as the 1st Edition except that a footbridge is now depicted at point G.

2.3.2.5 The Post War A Edition of 1975 depicts the section E – F as previously, whilst the remainder of the route between points F – G – H is not shown.

2.3.3 Kentisbury Vestry minutes, 19th century

2.3.3.1 Prior to the formation of District Highway Boards in the early 1860s and the later Rural District Councils (1894) the responsibility for the maintenance of public highways generally belonged to the parish and was discharged by elected Surveyors of Highways. Relevant Acts of 1766, 1773 and 1835 included the provision for the use of locally available materials and there was a statutory requirement upon parishioners to fulfil a fixed annual labour commitment. The final responsibility for maintenance lay with the local Surveyor of Highways who was obliged to keep a detailed account of public monies expended.

2.3.3.2 These records give little information on individual routes in the parish, and there is no mention of the proposal route.

2.3.4 Kentisbury Parish Council Minutes, 1894 onwards

2.3.4.1 The Minutes provide information about the management of the route and the Council's views regarding the public highways in the parish. A public body such as

a Parish Council had powers only in relation to public highways, which they had a responsibility to maintain.

- 2.3.4.2 11 June 1923. *'A petition was presented to the meeting protesting against the action of Mr R Jones of West Kentisbury removing a gate and walling up the entrance', (at point F) who 'objected to the right of way'. A resident, Mr Rees stated he has used the path for 65 years and his children for 20 years. It was resolved to refer the matter to the District Council.*
- 2.3.4.3 30 June 1923. *'A Parish Meeting was called by Messers J Causey and J Bowden re [the] footpath on West Kentisbury Farm' and the petition read. Mr Jones stated that he had erected notices and challenged those he considered 'trespassing', including Mr Ashton. 'Mr Causey thought the path would cost the parish about £50 if it were declared a public path'. 'Mr Harris put to the meeting the question of 'Is there a right of way across West Kentisbury?' [and] the show of hands decided there was not'. A letter was sent to the District Council informing them of the Parish's decision regarding the proposal route between points E – F – G – H.*
- 2.3.4.4 15 April 1946. With regard to the footpath at West Kentisbury Farm, it was resolved at the meeting *'that enquiries be made as to whether this is a public footpath?'*
- 2.3.4.5 14 May 1946. Regarding the matter of the footpath at West Kentisbury Farm, it was resolved *'that the Church Council make enquiries if they are responsible for the maintenance of church paths'*.

2.3.5 Barnstaple Rural District Council Minutes, 1893-1974

- 2.3.5.1 The Minutes provide information about the management of the route and the Council's views regarding the public highways in the parish. A public body such as a District Council had powers only in relation to public highways, which they had a responsibility to maintain. The records for 1898-99 have not survived.
- 2.3.5.2 There are a number of references to the highways in Kentisbury parish in these records, with a number specifically dealing with the proposal route between points E – F – G – H.
- 2.3.5.3 15 June 1923. *'Letters were read from the Kentisbury Parish Council and the inhabitants of Kentisbury, drawing attention to the fact that the footpath (the proposal route) across part of West Kentisbury Farm had been stopped up by the removal of a gate and the walling up of the gateway.' 'It was resolved that the Clerk take the necessary steps for the re-opening of the footpath'.*
- 2.3.5.4 29 June 1923. The Clerk had received a letter from the landowner's solicitor asking for the matter regarding the proposal route to stand over until they were able to meet with their client.
- 2.3.5.5 13 July 1923. *'A letter was read from the Clerk to the Kentisbury Parish Council stating that a Parish Meeting had decided, by a show of hands, 'that there was no right of way over West Kentisbury Farm'. Another letter was read from the landowner's solicitors stating that as there was another footpath nearby and having seen their client's evidence, which was inconsistent with a claimed public footpath, they were unable to advise their client to remove the obstruction at point F on the proposal route. However, they were willing to reach an amicable arrangement with the Council.*

- 2.3.5.6 27 July 1923. The Clerk reported upon the evidence he had obtained and submitted 32 letters in support regarding the proposal route. It was resolved he should write to the solicitors communicating the purport of the evidence, and that as the Council considered it was ample, that they would proceed unless the obstruction was removed’.
- 2.3.5.7 24 August 1923. The landowner had informed his solicitor *‘that those who used the path [had] now made an entrance elsewhere’*. The matter regarding the proposal route was deferred until the next meeting.
- 2.3.5.8 7 September 1923. *‘The Clerk reported that he had had an interview [with the solicitor and the landowner] was willing to allow the footpath to be used as hitherto; he was also willing to put stepping stones on each side of the wall he had erected at the entrance to keep cattle from straying, the gates to be occasionally fastened’*. The matter was left with the Clerk to ‘settle the matter on the best possible terms’ regarding the proposal route.
- 2.3.5.9 21 September 1923. *‘It was reported that some sort of stile had been placed where the wall had been erected (on the proposal route), but that it was not entirely satisfactory’*.
- 2.3.5.10 5 October 1923. The landowner had now *‘put 2 posts and 3 rails across the gap in the fence, and he was bound to do something to keep the cattle in, as the ‘stopping’ put in the gap was removed every night’*. The Clerk was to write to the landowner asking him to place the necessary steps to the stile on the proposal route.
- 2.3.5.11 19 October 1923. The steps had now been attached to the stile. A Sub-Committee was to view and report.
- 2.3.5.12 2 November 1923. The Sub-Committee reported *‘that a right of way had been acquired by use’*. The stile *‘was a very awkward one’* on the proposal route and the landowner was requested to remove it and install a kissing gate, failing which he should meet with the Committee *‘with a view to settling the whole affair’*.
- 2.3.5.13 16 November 1923. Following their meeting, the landowner had ‘agreed to at once take the ground down to its original level, to erect an ordinary gate which would shut itself, and to place inside the gate a post to prevent it being opened more than is sufficient’ on the proposal route.
- 2.3.5.14 30 November 1923. The arrangements were confirmed with the landowner and his solicitor regarding the proposal route.

2.3.6 Finance Act, 1909-10

- 2.3.6.1 The Finance Act imposed a tax on the incremental value of land which was payable each time it changed hands. In order to levy the tax a comprehensive survey of all land in the UK was undertaken between 1910 and 1920. It was a criminal offence for any false statement to be knowingly made for the purpose of reducing tax liability. If a route is not included within any hereditament there is a possibility that it was considered a public highway, though there may be other reasons to explain its exclusion.

2.3.6.2 The proposal route is included within hereditament 44 between points E – F – G and hereditament 27 between points G – H. There are no deductions for *'public right of way or user'*.

2.3.7 Aerial Photography, 1946 onwards

2.3.7.1 The proposal route is mainly visible between points E – F and with difficulty between points F – G – H. The section E – F has similar characteristics to the rest of the parish highway network particularly before the use of tarmacadam.

2.3.8 Definitive Map Parish Survey, 1950s

2.3.8.1 The compilation process set out in the National Parks and Access to the Countryside Act 1949 involved a substantial amount of work and such records are considered a valuable source of information. The rights of way included in the process had to pass through draft, provisional and definitive stages with repeated public consultations.

2.3.8.2 The proposal route is included in the Parish Survey as footpath 8. It was noted that it was overgrown, with a new footbridge required at point G, and new rails and steps required at the fence at point F. The continuation of the county road between points E – F was considered to be a private accommodation road.

2.3.9 Definitive Map records, 1970s

2.3.9.1 In response to the incomplete Definitive Review of the 1970s, the Kentisbury and Trentishoe Parish Council proposed that Footpath No. 8 should be upgraded to bridleway between points E – F – G – H.

2.3.10 Definitive Map and Statement, 1957

2.3.10.1 The inclusion of a public right of way on the Definitive Map and Statement is conclusive evidence of its existence. However, this does not preclude that other rights which are currently unrecorded may exist.

2.3.10.2 The Definitive Statement for Kentisbury Footpath No. 8 is described as running from the *'county road B3229 at Ley Wood and continues eastwards along a private accommodation road (not repairable by the inhabitants at large) through West Kentisbury to the end of the short length of unclassified road'*.

2.3.11 Route Photographs, 2017

2.3.11.1 Site photographs of the route between points E – F – G – H show that it is open and available, but only to walkers.

2.3.12 Land Registry, 2017

2.3.12.1 The land is registered to 3 different owners. There is no information relevant to the proposal route.

2.4 User Evidence

- 2.4.1 A user evidence form was received for the proposal in 1978 with the Parish Council's claim, though it is not clear how the route was used, and there appears to be some confusion between Footpath No. 8 and Bridleway No. 4.

2.5 Landowner Evidence

- 2.5.1 Only 1 landowner responded to the informal consultation regarding the proposal route.
- 2.5.2 Mr Dunn of Valley View, Kentisbury has owned land crossed by the proposal route for 20 years between points F – G and believes it to be a footpath. He has seen the public using the route over the years. There are currently 2 stiles and a footbridge on the route.

2.6 Rebuttal Evidence

- 2.6.1 The Parish Council had no specific comment on this proposal.

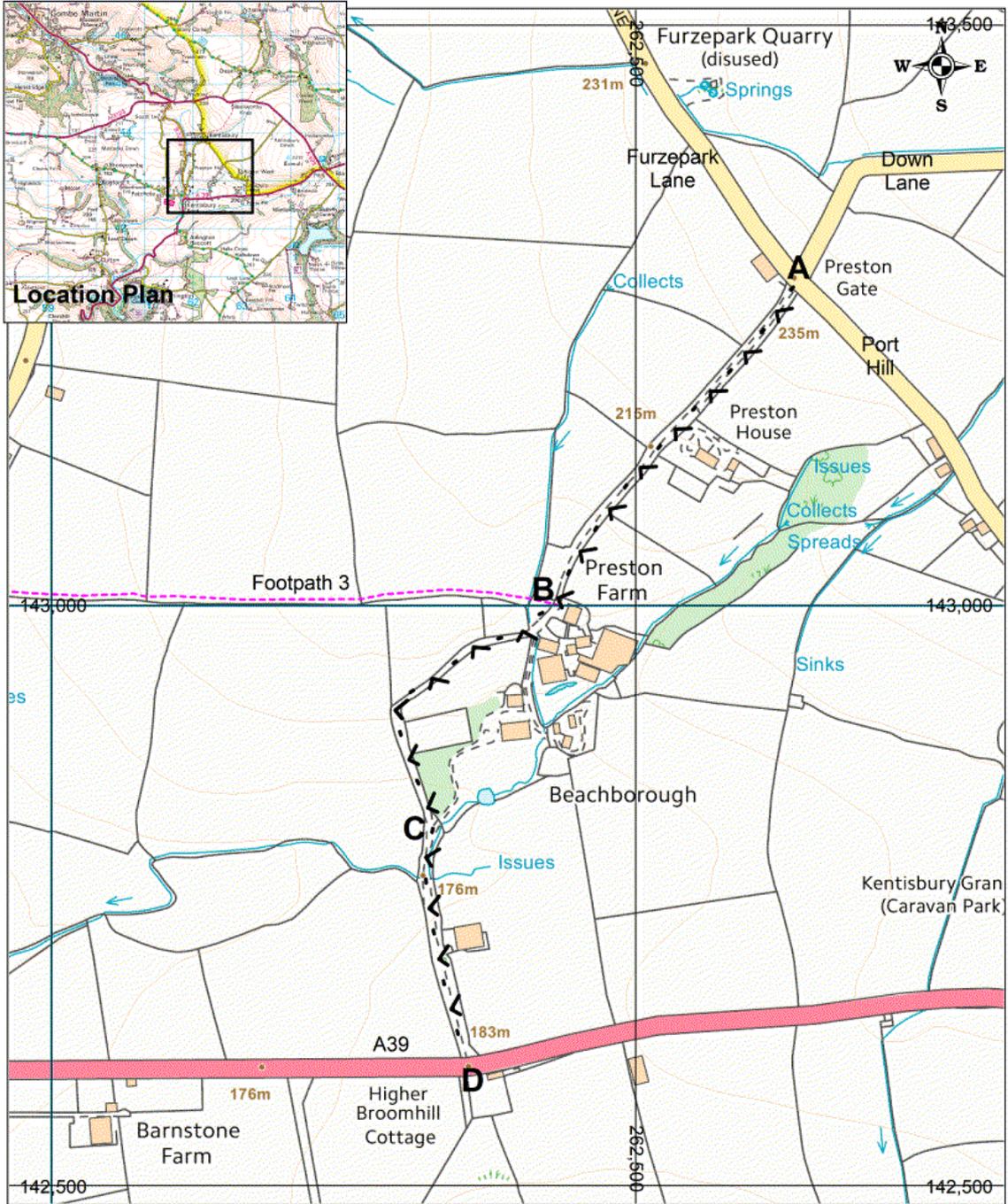
2.7 Discussion

- 2.7.1 Statute – Section 31 Highways Act 1980. There does not appear to be a specific date on which the public's right to use the proposal route has been called into question. The Definitive Map and Statement is conclusive evidence of the information it contains, that Footpath No. 8 exists.
- 2.7.2 As there is no specific date of calling into question or user evidence, the proposal cannot be considered under statute law. However, the proposal route may still be proven to exist as a public right of way at common law. Evidence of dedication by the landowners can be express or implied and an implication of dedication may be shown at common law if there is evidence, documentary, user or usually a combination of both from which it may be inferred that a landowner has dedicated a highway and that the public has accepted the dedication.
- 2.7.3 Common Law. On consideration of the proposal at common law, the historical documentary evidence demonstrates the proposal route's physical existence and availability since at least 1889 as shown on the Ordnance Survey large scale mapping. The section between points E – F is shown in a similar manner to other recorded public highways.
- 2.7.4 At the time of the 1840 Tithe Map, the proposal route is included partly in the acreage of '*parish roads*' between points E – F. However, it was a requirement of the Highways Acts of 1773 and 1835 which were contemporary with the Vestry records was that all '*common highways*' (public) had to be named in order for indictment for disrepair, the names usually reflecting places they either went to, passed or were used for, e.g. Parsonage Lane. As private roads were not liable in this way, they did not need to be named. A named highway may therefore carry some inference of public status. The proposal route is not named.
- 2.7.5 It appears from the historical mapping, particularly that of the Ordnance Survey that the proposal route may have been able to carry more than foot traffic, being depicted in 1889 as a double dashed track through the field and wood with a ford at point G. However, later mapping indicates a footbridge at the same location.

- 2.7.6 The references in the Kentisbury Parish Council records indicate their regard for the public highway network, including the proposal route in 1923 and 1946, which demonstrate the route's historic availability to more than just walkers. However, disputes regarding the right of way created obstructions on the route which may have prevented other users.
- 2.7.7 Affected landowners have known the proposal route for at least 20 years and seen use of it by the public on foot only. They are not aware of other types of users attempting to use the route. The Kentisbury and Trentishoe Parish Council had no comment on the proposal.

2.8 Conclusion

- 2.8.1 On consideration of all the available evidence the documentary evidence demonstrates that the route at West Kentisbury between points E – F – G – H has existed since at least 1889. It has been open and available since that time to the public at least on foot.
- 2.8.2 The historical documentary and user evidence when taken as a whole is considered insufficient to show that the proposal route has a higher status than that of a public footpath on the Definitive Map and Statement. It suggests that the route was available at times in the past to users other than walkers but is considered insufficient to demonstrate that equestrian rights exist and consequently to record the route as a bridleway.
- 2.8.3 The evidence is therefore considered to be insufficient under Common Law to demonstrate that a public highway higher than footpath status exists between points E – F – G – H.
- 2.8.4 It is therefore recommended that no Modification Order should be made to upgrade Kentisbury Footpath No. 8 to a bridleway.



map ref: SS 6242 & 6243

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<p>Devon County Council Definitive Map Review - Kentisbury & Trentishoe Proposal 1: Proposed addition of a restricted byway along Preston/Parsonage Lane</p>	<p>drawing number <u>HIW/PROW/17/34</u> date <u>June 2017</u> scale <u>1:5,000</u> drawn by <u>CLG</u></p>
<p><u>Notation</u> Proposed restricted byway A - B - C - D (approx 823m) - . - . - . - . Existing footpaths - - - - -</p>	<p>Meg Booth Chief Officer for Highways, Infrastructure Development & Waste</p> 

