

## **Schedule 14 Application Amendment of Northlew Footpath No. 3**

Report of the Chief Officer for Highways, Infrastructure 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 no Modification Order be made to modify the Definitive Map and Statement in respect of the Schedule 14 application.

### **1. Introduction**

This report examines a Schedule 14 application made in 2018 to delete part of Northlew Footpath No. 3 between points A – B and add a footpath between points C – B.

### **2. Background**

The parish review was carried out between 1993 and 1996. This is the second such application from the applicant, Mrs Paton; the first application having been made in 2009 and refused when determined by the County Council in 2014. This application was received following the completion of the Parish Review in Northlew and was therefore deferred pending completion of the parish-by-parish review in the rest of the district, in line with County Council policy. However, in September 2019 the applicant applied to the Secretary of State requesting that DCC be directed to determine the application. In February 2020 the Secretary of State granted that request and directed the County Council to determine the application.

At its meeting of 4 March 2010, this Committee resolved that when a Schedule 14 application is received relating to a claim following an earlier determination by Committee under the general review, officers be authorised to determine that application in line with the Committee's previous decision unless the application is accompanied by substantially new and material evidence.

The applicants rely on all the evidence previously submitted in support of their previous application. However, as the applicant now refers to case law, which was not previously referenced, it was felt appropriate to again bring the matter to this Committee to ensure that it is given due consideration.

### **4. Consultations**

An informal consultation relating to the current application has been carried out with the relevant local authorities and landowners as required during August – October 2020. The responses are attached in the appendix to this report. A full public

consultation was also carried out on a previous and identical Schedule 14 application submitted by the applicants between March and May 2014. The responses to this consultation were reported in the relevant report to the Committee at their meeting in November 2014, as attached.

## **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 (including Climate Change) and Public Health Considerations**

Equality, environmental impact (including climate change) and public health implications have, where appropriate under the provisions of the relevant legislation, been taken into account in the preparation of the report.

## **9. Conclusion**

It is recommended that no Modification Order be made to modify the Definitive Map and Statement in respect of the Schedule 14 application.

## **10. Reasons for Recommendations**

To undertake the County Council's statutory duty under the Wildlife and Countryside Act 1981 to determine the schedule 14 application and to keep the Definitive Map and Statement under continuous review.

Meg Booth  
Chief Officer for Highways, Infrastructure Development and Waste

**Electoral Division: Hatherleigh & Chagford**

Local Local Government Act 1972 - List of Background Papers

Contact for enquiries: Caroline Gatrell

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Background Paper	Date	File Ref.
Correspondence file: Northlew Footpath 3	2018-2020	CG/DMR/NTW FP3

cg021120pra  
sc/cr/schedule 14 Amendment of Northlew Footpath No 3  
04 161120

**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.

**Schedule 14 application to alter part of the alignment of Northlew Footpath No. 3, by deleting between points A – B and adding between points C – B, as shown on plan HIW/PROW/19/51.**

**Recommendation: That no Modification Order be made in respect of the Schedule 14 application, to modify the Definitive Map and Statement by deleting between points A – B and adding between points B – C, as shown on plan HIW/PROW/19/51.**

## **1 Background**

- 1.1 In 2005 the land known as Glebe Yard in Northlew, crossed by Northlew Footpath No. 3 was sold for re-development. Subsequently, a dispute developed between the owners of Clome Cottage, Mr and Mrs Paton, adjacent to Glebe Yard and the Yard's new owners, Mr and Mrs Todd, caused by a Land Registry boundary error. This went to Court, where it was found that no-one owned the entranceway, shown as the red hatched area on drawing number HCW/PROW/14/28, into Glebe Yard from Queen Street, though the Todds have since transferred it to the Patons.
- 1.2 The Patons first contacted the Public Rights of Way Team in April 2009, disputing the definitive alignment of Northlew Footpath No. 3 between A – B. They were informed that if they believed the Definitive Map and Statement (DMS) to be incorrect the appropriate procedure would be to make an application for modification of the DMS under Schedule 14 application of the Wildlife and Countryside Act 1981. They subsequently made an application in July 2009. The effect of the application sought to delete the section A – B of Northlew Footpath No. 3 and add the section C – B under sections 53(3)(c)(iii) that “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 respectively”, and 53(3)(c)(i) “that a right of way not shown in the map and statement subsists or is reasonably alleged to subsist over land in the area to which the map relates”.
- 1.3 As the parish review had been completed between 1993-6, the application was deferred until the review had been completed for the rest of the district, in line with Devon County Council policy. The applicants were unhappy with this and made a formal complaint between June-August 2009 which was refused as the matter would be considered through the due legal process. An appeal to the Local Government Ombudsman in October 2009 was also refused.
- 1.4 The Patons subsequently applied to the Secretary of State, as permitted under the provisions of Schedule 14, as their application was not considered within 12 months of receipt. The Planning Inspectorate refused this appeal in November 2010, as Devon County Council policy had been followed.
- 1.5 In January 2011, in relation to the claimed route C – B, the Patons served notice on Devon County Council under Section 130(A) of the Highways Act 1980 to remove an obstruction from a highway. This was refused, as the alleged obstruction was not on a recorded public highway.
- 1.6 Again, in relation to the claimed route C – B the Patons then served notice

under Section 56 of the Highways Act 1980 that a highway which was maintainable at public expense was out of repair. This was refused by the County Council and the Patons appealed to Exeter Crown Court. A preliminary hearing was held in August 2011 with a full 3 day hearing in January 2012. Judgement was given in the Council's favour. The evidence used in the court case is the same as submitted by the Patons with this Schedule 14 application.

- 1.7 The Patons appealed to the High Court and a hearing was held in Bristol in January 2013. Judgement was again in the Council's favour.
- 1.8 In October 2013 the Patons again applied to the Secretary of State for the County Council to be directed to determine their Schedule 14 application. In February 2014 the Council was directed by the Planning Inspectorate to determine the application. An informal consultation on the application was carried out during April and May 2014. It was referred to the Public Rights of Way Committee on 14 November 2014 where it was resolved that no Modification Order be made in respect of that application. The report to that Committee is annexed to this report.
- 1.9 In June and August 2014, the Patons served second and third notices under Section 56 Highways Act 1980, in relation to the claimed route C – B, which were also refused by the County Council on the same grounds as previously.
- 1.10 In August 2018 the Patons made a second Schedule 14 application to again vary the alignment of Northlew Footpath No. 3 from A – B to C – B. However, it was returned, as it was not compliant. They remade the application in September 2018, quoting 3 new pieces of case law.
- 1.11 In September 2019 the Patons again applied to the Secretary of State for the County Council to be directed to determine their Schedule 14 application. In February 2020 the Council was directed by the Planning Inspectorate to determine the application. The Patons submitted an additional 35 pieces of case law in May 2020. These are summarised below.

## **2 Application Evidence**

- 2.1 The applicants have submitted 35 pieces of case law in support of their application, which is included in full in the background papers to this report. Some of this case law has previously been relied on by them.
- 2.2 The quoted case law is as follows, with pertinent point of each case in italics:-
  - *Absor v French (1689) – The right to trespass if the public highway is not passable.*
  - *Anisimic v Foreign Compensation Commission (1969) – The tribunal acted without jurisdiction and consequently its decision is a nullity.*
  - *Attorney-General v Ryan (1980) – A decision which offends natural justice is outside the jurisdiction of the decision making body.*
  - *Barlow v Wigan Metropolitan Borough Council (2020) – If a Highway Authority builds a highway, it is highway maintainable at public expense, even if it was not intended be on construction.*

- *Boddington v Transport Police (1999) – Subordinate legislation or an administrative act made under primary legislation was ultra vires.*
- *Chesterfield Poultry Ltd v Sheffield Magistrates Court (2019) – Halsbury’s Laws Volume 17 Current Edition Company & Partnership Insolvency – The definition of conclusive evidence.*
- *Dawes v Hawkins (1860) – The diversion of a public highway when impassable, and the legal presumption ‘once a highway always a highway’ application.*
- *Ernstbrunner v Manchester City Council and Another 2010 – It is possible for the Definitive Statement to omit information and not to be comprehensive. However, it is not necessarily inconsistent with information disclosed by the Definitive Map.*
- *Eyre v New Forest Highway Board (1892) – The legal presumption ‘once a highway always a highway’ application. The legal burden rests on the user throughout to prove dedication.*
- *Folkestone Corporation v Brockman (1914) – If a known road is used, then the road’s origin is in that user, which raises the legal presumption of dedication.*
- *Harvey v Truro District Council (1903) – The consent of a highway authority to an obstruction or encroachment is ineffectual for the purpose of legalising that obstruction or encroachment.*
- *JA Pye (Oxford) Ltd v Graham (2003) – The intention to possess disputed land was not proven; the facts must be proven with the manner of occupation and use of the land.*
- *LE Walwin and Partners Ltd v West Sussex County Council (1975) – The Definitive Map and Definitive Statement are not independent and must be read together. The applicants alleged quotation is not from the judgement.*
- *Loder v Gaden (1999) – The legal presumption ‘once a highway always a highway’ applies.*
- *London & Clydesdale Estates Ltd v Aberdeen District Council (1980) – The procedures were not followed.*
- *Nicholson v Secretary of State for the Environment (1996) – The legal burden shifts once the presumption of dedication has been raised.*
- *O’Reilly v Mackman (1983) – The tribunal asked itself the wrong question and therefore the decision is a nullity.*
- *Oxfordshire County Council v Oxford City Council and Another – Assumed (2004) – This was referred to in Paton Crown Court judgement.*
- *Paton v Devon County Council and Another (2013) – This disregarded the legal rules and was a miscarriage of justice. There was an alleged discrepancy between the Definitive Map and the Definitive Statement. When compared with the Ernstbrunner, Walwin and Norfolk judgements, the applicants consider this judgement to be inconsistent with them. The applicants imply that this judgement is unsound.*
- *Randall v Tarrant (1955) – The public have rights to use a highway prima facie, rights of passage to and from places.*
- *R (on the application of Mackay) (2019) – Due to a procedural error there was an irregularity and consequently the decision was quashed.*
- *R (on the application of Newhaven Port & Properties Ltd) v East Sussex County Council (2015) – Megarry & Wade’s The Law of Real Property 8th*

Edition (2012) – *The issue here was regarding the capacity of a landowner to dedicate.*

- R (Norfolk County Council) v Secretary of State for the Environment, Food and Rural Affairs (2005) – *Where there is conflict between the Definitive Map and the Definitive Statement, there is no presumption that the map correct and the statement is not.*
- R v Oxfordshire County Council & Another, Ex parte Sunningwell Parish Council (1999) – *As per the Newhaven judgement regarding the capacity of a landowner to dedicate.*
- R v Petrie (1855) – *Open user as of right by the public raises a presumptive inference of dedication requiring to be rebutted.*
- R (Smith) v The Land Registry (Peterborough Office) (2010) – *A squatter cannot acquire a land title by adverse possession on which there is a public highway.*
- R (Williams) v Bedwellty (1997) – *As per the Mackay judgement.*
- Rouse v Bardin and Others (1790) – *The route on the Definitive Map and the route in the Definitive Statement are distinct and therefore it is physically impossible that they are the same route.*
- Secretary of State for Education and Science v Tameside MBC (1977) – *If there is an error of law, the decision being unlawful can be argued. It is not sufficient if a party to the action merely disagreed with it.*
- Stoney v Eastbourne Rural District Council (1927) – *If the evidence sufficient to establish the case for the party on whom the onus of proof lies, it can shift to another party.*
- Sturges v Bridgman (1879) – *Use which cannot be prevented raises no presumption of consent or acquiescence.*
- Suffolk County Council v Mason (1979) – *The legal presumption ‘once a highway always a highway’ applies.*
- Trevelyan v Secretary of State for Environment, Transport and the Regions – no date specified, either (2000) or (2001) – *The inclusion on the Definitive Map is some evidence of its existence.*
- Turner v Walsh (1881) – *The presumption of dedication rule.*
- Williams-Ellis v Cobb (1935)S – *The presumption of dedication rule. The identification of early landowners or dedication date is immaterial.*

### **3 Informal Consultation Responses**

3.1 As a full consultation has been previously carried out with regard to the applicants’ proposal, and is also not a requirement of the statutory Schedule 14 application process, a limited consultation was carried out between August and October 2020 with the landowners, Northlew Parish Council, and West Devon Borough Council.

3.2 No written responses have been received.

### **4 Landowner Evidence**

4.1 Mrs Todd responded to the informal consultation by telephone. Mr and Mrs Todd own the former depot site, also known as Glebe Yard. They would support the variation of Northlew Footpath No. 3, as they could then fence off

their land from Mr and Mrs Paton, following a dispute with them dating from 2005.

- 4.2 Mrs Paton emailed a statement in response to the consultation, which is included in the relevant backing papers.

## 5 Discussion

- 5.1 The applicants have submitted a large amount of evidence and want this to be considered along with all other relevant evidence discovered since the matter was first raised in 2009.
- 5.2 Evidence dated after the 14<sup>th</sup> September 1967 is not relevant in relation to the deletion part of the application, if, as the applicants claim an error occurred in the recording of Northlew Footpath No. 3, as this is the date when the Definitive Map for the Okehampton district became definitive. It is still however relevant to the addition part of the application.
- 5.3 It is the applicants' responsibility to carry the evidential burden and demonstrate that on the balance of probabilities an error occurred in the recording of Northlew Footpath No. 3 on the Definitive Map. In considering the evidence relevant to the application regarding Northlew Footpath No. 3, Section 32 of Highways Act 1980 must be taken into account, which permits the consideration of facts regarding the source of evidence, such as its creation, purpose and production procedures, including public participation and consultation.
- 5.4 Section 32 of the Highways Act 1980 indicates how documents should be evaluated as a whole and how the weight should be given to the facts derived from them. Once the evidence sources have been assessed individually, they are comparatively assessed as required by the balance of probabilities test.
- 5.5 Statute – Section 31 Highways Act 1980. Section 31(1) of the Highways Act 1980 states that if a way has actually been enjoyed by the public '*as of right*' and without interruption for a full period of 20 years, it is deemed to have been dedicated as a highway unless there is sufficient evidence that there was no intention during that period to dedicate it. The relevant period of 20 years is counted back from a date on which the public right to use the way has been challenged.
- 5.6 As there is no specific date on which the public's right to use the application route has been called into question, the Schedule 14 application is considered to call the public's right to use the route into question for the purposes of section 31 of the Highways Act 1980. The application was made in 2018, and therefore the relevant statutory period could be considered 1998-2018. However, because the applicants' submitted their first Schedule 14 application in 2009, which has been determined, that application acts as the calling into question. Therefore, the relevant period is 1989-2009.

- 5.7 The applicants have not submitted any evidence in support of this 2<sup>nd</sup> Schedule 14 application, either documentary or user, which dates from the relevant period. Consequently, the application fails at statute.
- 5.8 Additionally, the application may also be considered under 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.
- 5.9 Common Law. On consideration of the application at common law, the applicants have not submitted any additional historical documentary evidence in addition to that previously considered in the previous Committee report of 2014, supporting the alleged alignment between points C – B, or rebutting the definitive alignment between points A – B. Neither have they submitted any user evidence in relation to the alleged alignment between points C – B of Northlew Footpath No. 3 at any time. Due to this lack of user evidence, the applicants are unable to demonstrate acceptance of their alleged alignment, and consequently presumed dedication from user, as it is a legal requirement.
- 5.10 The applicants place great weight on the purpose and termini nature of the footpath to demonstrate that an error occurred in the recording of Northlew Footpath No. 3 on the Definitive Map, and the influence this would have on use regarding the alleged deviation from B – C to B – A. However, the alleged deviation has been unproven by the applicants twice previously, and the additional case law now cited does not alter the interpretation of the evidence on this point.
- 5.11 This historical documentary evidence relied by the applicants in this second application has been analysed and adjudged twice before, with the decisions from the two different legal procedures both being considered at the High Court. In both cases, the judgements decided against the applicants, Mr and Mrs Paton. It should be noted that the Section 56 action created case law for Northlew Footpath No. 3 supporting the definitive alignment between points A – B and rebutting the applicants' alleged alignment between points C – B. This case law has not been challenged or given negative judicial treatment.
- 5.12 The Patons' have submitted several statements citing 35 pieces of case law in support of this 2<sup>nd</sup> application, a number of which deal with the issue of whether a tribunal acted without jurisdiction – Anisminic (1969), Ryan (1980), Boddington (2020), London & Lydesdale Estates (1980), O'Reilly (1983), Paton (2013), Mackay (2019), and Tameside MBC (1977), and if so, any decision was a nullity (an act or thing that is legally void).
- 5.13 It appears from their statements that the purpose of this 2<sup>nd</sup> Schedule 14 application is to quash the High Court judgement in the Section 56 Highways Act 1980 case on the basis that they consider that judgement and also their first Schedule 14 application, to be unsound.
- 5.14 However, it is considered highly unlikely that such two independent processes

could both commit the alleged errors of law in relation to the same case and evidence. At High Court, no evidence of the mis-direction alleged by the applicants was found in either case. Consequently, the applicants' argument that these decisions are nullities is not considered valid.

- 5.15 Furthermore, any decision reached on this 2<sup>nd</sup> application could not quash either High Court judgment of 2013 or 2015. Any such quashing would have to be through the Court system, not by the making of a second Schedule 14 application.
- 5.16 A number of cases cited by the applicants, Dawes (1860), Eyre (1892), Loder (1999), and Suffolk (1979), refer to the legal maxim '*once a highway always a highway*'. The applicants have repeatedly claimed that this maxim applies to their alleged alignment between points C – B, but they have been unsuccessful twice previously. The alleged alignment C – B has to be proven to exist before the legal maxim can be applied.
- 5.17 The applicants also re-argue the alleged discrepancy between the Definitive Map and Definitive Statement for Northlew Footpath No. 3, citing the cases of Ernstbrunner (2010), Walwin (1975), Norfolk (2005), Rouse (1790), and Trevelyan (c. 2000 or 2001). This point, along with that of a claimed deviation due to an obstruction from the alleged alignment between points C – B to the definitive alignment between points A – B, have been argued unsuccessfully previously by the applicants, and the citation of the additional case law does not alter the analysis of the relevant evidence in relation to it.
- 5.18 The Patons also argue of the right of the public to use the '*highway*' as alleged by them, in line with the case of Stoney (1927). Yet the '*highway*' they refer to is their alleged alignment between points C – B, which they have failed to prove exists twice previously, based on the same evidence as now being relied upon. The additional case law now cited does not alter the interpretation of the relevant available evidence on this point.
- 5.19 The recent Barlow judgement is also not relevant because it has not been proven that a highway was ever created on the applicants' alleged alignment between points C – B, as was in that case.
- 5.20 The cases of Folkestone (1914), Nicholson (1996), Newhaven Port & Properties Ltd (2015), Oxfordshire (1999), Bedwelty (1997), Sturges (1879), Turner (1881), and Williams-Ellis (1935) cited by the applicants have previously been considered in the 2014 report and the 2011-13 Section 56 court action, and consequently need not be dealt with further.
- 5.21 The Patons rely on the case of Chesterfield Poultry (2019) for the definition of what is '*conclusive evidence*'. However, this case law does not alter the interpretation of the evidence being considered in relation to this application.
- 5.22 They re-argue that as the Definitive Statement refers to Northlew Footpath No. 3 as crossing Glebe Yard, it can only have crossed glebe land and therefore used their alleged alignment between points B – C and not passed over land in a potentially different ownership between points B – A. However, the traditional

access into Glebe Yard has always been along the alignment A – B, and public rights of way frequently pass over multiple ownerships. The applicants have not been able to prove this point twice previously and the additionally cited case law does not alter the interpretation of the evidence.

5.23 They also raise the point that the land crossed by their alleged alignment between points C – B, was acquired by the landowner by means of adverse possession. However, according to the case law they cite, adverse possession cannot occur if land is already occupied by a public highway. The applicants have not proven that their alleged alignment, as the additional case law cited does not alter the interpretation of the evidence, which does not support their alleged alignment. Because their case has not been proven with regard to this application, as in the two previous legal actions, they cannot shift the evidential burden.

## **6 Conclusion**

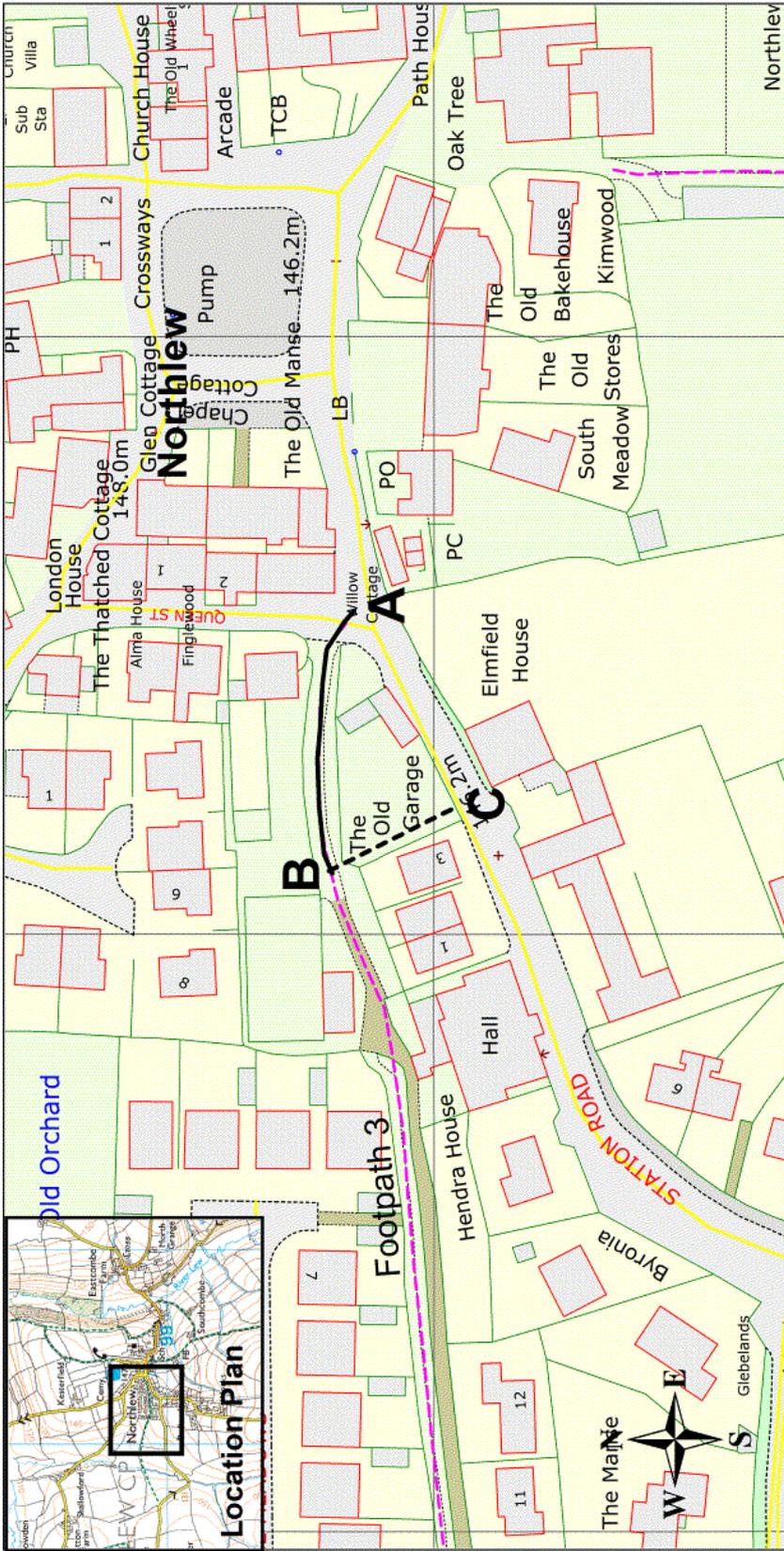
6.1 In this case the method by which the definitive alignment of Northlew Footpath No. 3 was added to the Map is clearly documented and the proper procedures shown to have been followed. There is no evidence that demonstrates the alleged variation of alignment. The public right of way also has its own case law in *Paton v Devon County Council* (2013), a High Court judgement. This case considered the same evidence as the applicants' 1<sup>st</sup> Schedule 14 application, which they rely upon yet again. This case law has not been challenged or overturned, and consequently is considered to be sound.

6.2 As set out in the report for the 1<sup>st</sup> Schedule 14 application, it is for the applicants who contend that there is no right of way, to prove that the Definitive Map requires amendment due to the discovery of evidence, which when considered with all other relevant evidence clearly shows that the part of Northlew Footpath No. 3 between points A – B should be deleted. It is not considered that the applicants have provided the required new, sufficient or cogent evidence.

6.3 By virtue of the same evidence and the applicants' failure to meet the tests for deleting part of Northlew Footpath No. 3 based on that evidence, they also fail to prove that "a right of way subsists or is reasonably alleged to subsist" between points B – C.

6.4 The documentary evidence for the Schedule 14 application is the same as that analysis and interpretation which is now set in case law, and the additional case law cited by the applicants does not alter the interpretation of that evidence.

6.5 It is, therefore, recommended that no Modification Order be made in relation to the this Schedule 14 application relating to the alignment of Northlew Footpath No. 3 on the Definitive Map and Statement.



map ref. **SX 5099**

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drawing number **HIDW/PROW/19/51**

date **August 2019**

scale **1:1,000**

drawn by **CLG**

**Devon County Council**  
**Definitive Map Review - Parish of Northlew**  
**2nd Schedule 14 application: Northlew Footpath No. 3**  
**Proposed alignment variation of Northlew Footpath No. 3**

**Notation**  
 Northlew Footpath No. 3 proposed deletion A - B (approx 46 metres) ———  
 Northlew Footpath No. 3 proposed addition B - C (approx 24 metres) - - - - -  
 Existing footpaths - - - - -

**Meg Booth**  
 Chief Officer for Highways,  
 Infrastructure Development  
 & Waste  


HCW/14/86

Public Rights of Way Committee  
14 November 2014

**Schedule 14 Application  
Variation of Footpath No. 3, Northlew**

Report of the 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 no Modification Order be made in respect of the schedule 14 application for the deletion and addition of Footpath No. 3, Northlew, as shown on drawing number HCW/PROW/14/28.**

**1. Summary**

This report examines a Schedule 14 application made in 2009 to delete part of Footpath No. 3, Northlew across land at Glebe Yard between points A – B and add part over an alternative alignment between points C – B. The application was received following the completion of the Parish Review in Northlew and was therefore deferred pending completion of the parish-by-parish review in the rest of the district, in line with County Council policy. However, Devon County Council has now been directed by the Secretary of State to determine the application out-of-turn.

The applicants have submitted a large amount of documentary evidence in support of their application, which is examined in the appendix to this report. It is considered that the evidence provided is not sufficient to show that Footpath No. 3, Northlew was recorded wrongly and it is, therefore, recommended that no Order be made to vary the line of the path on the Definitive Map and Statement, as applied for.

**2. Proposal**

Please refer to the appendix to this report.

**3. Consultations**

General consultations have been carried out with the following results:

County Councillor	– no specific comments on proposal
West Devon Borough Council	– no comment
Northlew Parish Council	– object to the proposal
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 comment
Trail Riders' Fellowship	– no comment

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

#### **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 the County Council's statutory duties.

#### **5. Legal Considerations**

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

#### **6. Risk Management Considerations**

No risks have been identified.

#### **7. Equality, Environmental Impact and Public Health Considerations**

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

#### **8. Conclusion**

It is recommended that no Modification Order be made in respect of the schedule 14 application.

#### **9. Reasons for Recommendations**

To undertake the County Council's statutory duty under the Wildlife and Countryside Act 1981 to determine the schedule 14 application and to keep the Definitive Map and Statement under continuous review.

David Whitton  
Head of Highways, Capital Development and Waste

**Electoral Division: Okehampton Rural**

Local Government Act 1972: List of Background Papers

Contact for enquiries: Caroline Gatrell

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Background Paper	Date	File Ref.
Correspondence file	2009 to date	NOR/SCH14/FP3

cg071014pra  
sc/cr/schedule 14 footpath 3 northlew  
04 041114

**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:

- (iv) 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.
- (v) 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.
- (vi) 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 56(1) states that the Definitive Map and Statement shall be conclusive evidence as to the particulars contained therein, but without prejudice to any question whether the public had at that date any right of way other than those rights.

The Wildlife and Countryside Act 1981, Section 53(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.

- 1 Schedule 14 application to delete part of Footpath No. 3, Northlew through Glebe Yard to Queen Street between points A – B and add a part to Footpath No. 3, Northlew through Glebe Yard to Station Road between points C - B, as shown on plan HCW/PROW/14/28.**

**Recommendation: That no Modification Order be made in respect of the above application.**

## 1.1 Background

- 1.1.1 In 2005 the land known as Glebe Yard in Northlew, crossed by Northlew Footpath No. 3 was sold for re-development. Subsequently a dispute developed between the owners of Clome Cottage, Mr and Mrs Paton, adjacent to Glebe Yard and the Yard's new owners, Mr and Mrs Todd, caused by a Land Registry boundary error. This went to court, where it was found that no-one owned the entranceway, shown as the red hatched area on drawing number HCW/PROW/14/28, into Glebe Yard from Queen Street, though the Todds have since transferred it to the Patons.
- 1.1.2 The Patons first contacted the Public Rights of Way Team in April 2009, disputing the definitive alignment of Northlew Footpath No. 3 between A – B. They were informed that if they believed the Definitive Map and Statement (DMS) to be incorrect the appropriate procedure would be to make an application for modification of the DMS under Schedule 14 application of the Wildlife and Countryside Act 1981. They subsequently made an application in July 2009. The applicants believe that an Order should be made to delete the section A – B of Northlew Footpath No. 3 and add the section C – B under sections 53(3)(c)(iii) that “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 respectively”, and 53(3)(c)(i) “that a right of way not shown in the map and statement subsists or is reasonably alleged to subsist over land in the area to which the map relates”.
- 1.1.3 As the parish review had been completed between 1993-6, the application was deferred until the review had been completed for the rest of the district, in line with Devon County Council policy. The applicants were unhappy with this and made a formal complaint between June-August 2009 which was refused as the matter would be considered through the due legal process. An appeal to the Local Government Ombudsman in October 2009 was also refused.
- 1.1.4 The Patons subsequently applied to the Secretary of State, as permitted under the provisions of Schedule 14, when their application was not considered within 12 months of receipt. The Planning Inspectorate refused this appeal in November 2010, as Devon County Council policy had been followed.
- 1.1.5 In January 2011, in relation to the claimed route C – B, the Patons served notice on Devon County Council under Section 130(A) of the Highways Act 1980 to remove an obstruction from a highway. This was refused, as the alleged obstruction was not on a recorded public highway.
- 1.1.6 Again in relation to the claimed route C – B the Patons then served notice under Section 56 of the Highways Act 1980 that a highway which was maintainable at public expense was out of repair. This was refused by the County Council and the Patons appealed to Exeter Crown Court. A preliminary hearing was held in August 2011 with a full 3 day hearing in January 2012. Judgement was given in the Council's favour. The evidence used in the court case is the same as submitted by the Patons with this Schedule 14 application.
- 1.1.7 The Patons appealed to the High Court and a hearing was held in Bristol in January 2013. Judgement was again in the Council's favour.
- 1.1.8 In October 2013 the Patons again applied to the Secretary of State for the County Council to be directed to determine their Schedule 14 application. In February 2014 the Council was directed by the Planning Inspectorate to determine the application.

The applicants were informed that the matter would be referred to the Public Rights of Way Committee at this meeting. An informal consultation on the application was carried out during April and May 2014.

- 1.1.9 In June and August 2014 the Patons served second and third notices under Section 56 Highways Act 1980, in relation to the claimed route C – B, which were also refused by the County Council on the same grounds as previously.

## 1.2 Description of the Route

- 1.2.1 The Definitive Statement for Footpath No. 3 is given below, with the part relevant to the deletion application, A – B, underlined below:

*It starts at County Road C.463 opposite the Chapel in Northlew and proceeds westwards through the Glebe Yard and over a short length of private accommodation road (not repairable by the inhabitants at large) crossing fields and a brook (footbridge demolished) to join the Unclassified County road approximately 400 yards east of the entrance to Lake Farm.*

- 1.2.2 This is shown on the plan HCW/PROW/14/28 starting at Station Road at point A at its junction with Queen Street opposite the former chapel. It proceeds north westwards for a short distance along Queen Street turning westwards past Clome Cottage and along the traditional access into and through Glebe Yard towards point B, just east of the Northlew Band Hut.
- 1.2.3 The proposal for addition starts at the county road, Station Road at point C and proceeds northwards through a hedge bank and ramp into and through Glebe Yard towards point B.
- 1.2.4 From point B the definitive line continues westwards following a defined path through a development known as Kimblerlands then across fields to join the county road east of Lake Farm.

## 1.3 Matters for consideration

- 1.3.1 It should be noted that in an application for deletion, Department of the Environment Circular 1/09 applies; paragraph 4.34 states, that "*where there such an application, it will be for those who contend that there is no right of way...to prove that the map requires amendment due to the discovery of evidence, which when considered with all other relevant evidence clearly shows that the right of way should be...deleted.*"
- 1.3.2 In a case taken before the Court of Appeal is that of Trevelyan v. Secretary of State for the Environment, Transport and the Regions [2001]. Lord Phillips, M.R., stated, "*Where the Secretary of State or an inspector appointed by him has to consider whether a right of way that is marked on the Definitive Map in fact 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 existed, it should not have been marked on the map. In the absence of 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 a 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. Proof of a negative is seldom easy, and the more time that elapses, the more difficult will be the task of adducing the positive*

*evidence that is necessary to establish that a right of way that has been marked on a definitive map has been marked there by mistake."*

- 1.3.3 The applicants claim that Footpath No. 3, Northlew was wrongly recorded on the Definitive Map. Evidence after 1967 is not relevant in determining whether an error occurred in the recording of Northlew Footpath No. 3 between points A – B on the Definitive Map, as this is the date when the map was taken off deposit and became definitive. However, this evidence can still be considered in relation to the addition part of the application, C – B.

#### **1.4 Application Evidence**

- 1.4.1 The applicants have submitted a large amount of documentary evidence in support of their application. The evidence is detailed below with a summary of the applicants' main points in **bold** and the County Council's comments in response.
- 1.4.2 The applicants' correspondence is not direct evidence relevant to the determination of the application, and therefore cannot be taken into account. All evidence and correspondence is however included in full in the background papers to this report.
- 1.4.3 **Ordnance Survey mapping, 1809-2009. The applicants believe that the historic and current Ordnance Survey mapping shows the lawful and historic route origin of the footpath from Station Road (C – B) not Queen Street (A – B). The solid block of buildings along Queen Street means that there was no access or footpath. They claim that the working copy of the Definitive Map allegedly shows the unlawful diversion that occurred in 1950 and path starting from Queen Street through Clome Cottage to access Glebe Yard.**
- 1.4.4 **They believe that all scales of Ordnance Survey mapping show a great deal of detail and accuracy of information. The definitive footpath alignment was not a physical feature surveyed by the Ordnance Survey and was not the historic route with public rights claimed on the Definitive Map in 1950.**
- 1.4.5 Response: All Ordnance Survey maps after the surveyors draft drawings circa 1809 have 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"*. Therefore the mapping is only evidence of the physical existence and characteristics of features at the time when surveys were carried out, not of rights of way.
- 1.4.6 **Scale – 25" to 1 mile. The applicants state that on the 1<sup>st</sup> Edition 25" mapping of 1885 the footpath is shown ending at a boundary wall adjacent to Clome Cottage and not proceeding eastwards onto Queen Street between points A – B.**
- 1.4.7 Response: This mapping depicts a dashed track running west from the boundary of Glebe Yard with Queen Street at point X. A solid line at the junction with Queen Street at point X is a parcel boundary line and it cannot be said that it represents a wall rather than a gate, as gates were shown in the closed position. The entranceway area is shown in the same land parcel as Queen Street. No feature such as a track is shown on the claimed alignment C – B. The large scale 25" has the greatest amount of detail and accuracy of information depicted as features can be shown at actual scale, and therefore has more reliability than the 6" and especially the 1".

- 1.4.8 The same also applies for the 2<sup>nd</sup> Edition which was used for the Finance Act and Farm Survey records. The applicants also believe that the bench mark and spot height at the junction of the claimed alignment with Station Road confirm its local importance.**
- 1.4.9 Response: The 2<sup>nd</sup> Edition 25" of 1906 is essentially the same as the 1<sup>st</sup> Edition 25", though minor tracks are not shown including the track shown on the previous edition along X – B, along with other changes in detail shown. No feature such as a track is shown on the claimed addition alignment C – B.
- 1.4.10 Bench marks and spot heights are not considered to be indicative or confirmation of a public right of way or its local importance, as the surveyors had virtually unrestricted access and these features do occur on private land.
- 1.4.11 Later versions such as the Post War A Edition 25" mapping dated 1955, is essentially the same as the previous edition, along with other reductions in detail shown. No feature such as a track is shown on the claimed addition alignment C – B.
- 1.4.12 The Post War B Edition 25" mapping of 1978 depicts a dashed track with a different surface from the area around it west from point B. The boundary line at point X at Queen Street is also shown. No feature such as a track is shown on the claimed alignment C – B.
- 1.4.13 Scale – 6" to 1 mile. The applicants claim that throughout all the 6" mapping their correct alignment is shown between points C – B.**
- 1.4.14 Response: The 6" scale is the oldest series of Ordnance Survey mapping. The large scale mapping of 6" and 25" are considerably different from the 1" scale but are consistent with each other, though the 6" mapping has a greater degree of blocking buildings in urban areas, where buildings were below a certain size. Also less important features are put in the background giving greater effect to the more important ones. These standards may cause public rights of way and other information not to be shown in their true context, though this does not affect the actual rights.
- 1.4.15 A double dashed track is shown ending a parcel boundary line with Queen Street at point X on the 1<sup>st</sup> Edition, but it cannot be said if this line also represents a boundary wall or gate, which would have been shown closed. The entranceway area is shown in the same parcel as Queen Street. There is no dashed track or footpath shown on the claimed addition alignment C – B.
- 1.4.16 Throughout all the 6" mapping the applicants claim their addition alignment C – B is shown, but this is not the case. A copy of the Definitive Map they believe to be dated 1950 is actually circa 1990, and shows their claimed unlawful diversion A – B passing through a solid which block of buildings, which is an Ordnance Survey generalisation of the scale and does not affect the public's rights.
- 1.4.17 Scale – 2/2.5" to 1 mile. The applicants claim that this mapping shows a solid block of buildings along Queen Street with no access or footpath and that the 1803-7 Ordnance Survey field draft drawings show the existence of the claimed route from Glebe Yard westwards.**
- 1.4.18 Response: The Surveyors' Draft Drawings of 1803-7 only showed turnpike, enclosed or unclosed routes. As the plans were intended for military purposes, the maps showed all routes, regardless of whether public or private. This mapping only shows

a similar alignment to Northlew Footpath No.3 west of the disputed section A – B, and therefore is not relevant to the determination of the application. The draft drawings are considered to contain wide variations in accuracy and standards, as well as inherent projection inaccuracies.

- 1.4.19 Only the mapping dated 1948 and 1963 still shows Clome Cottage as an individual building, though the outbuildings on the southern side of Glebe Yard are blocked. Buildings on Queen Street follow suit by the late 1960s. No dashed tracks are shown on either alignment.
- 1.4.20 2.5" scale is hybrid mapping, using surveys such as the 6" and amalgamating features such as buildings, besides using other standard Ordnance Survey generalisations and reductions in detail. However these generalisations do not affect the public's rights.
- 1.4.21 **Scale – 1" to 1 mile. The applicants believe their claimed and lawful route C – B is shown in the same way as minor public roads pre-Highways Act 1835, and therefore is automatically a highway maintainable at public expense. On some maps the claimed route C – B is also alleged to be shown coloured like other roads.**
- 1.4.22 Response: The principal use of small scale mapping was to illustrate the communications network, and the value of the legend was more superficial than real. It was derived from the 25" mapping via the 6" mapping, with the large scale information edited significantly. The maps showed all routes regardless of whether public or private and there was no overt differentiation between them. On the Revised New Series, roads were classed according to character, not status.
- 1.4.23 The limitations of the 1" scale however made it necessary for the Ordnance Survey to simplify the representation of many surface features and deliberate exaggeration of other features. This scale was unsophisticated with extremely limited detail. It is the scale with the highest degree of generalisation and distortion e.g. blocking buildings together. Because of this, the route shown cannot be definitely said to be the claimed alignment C – B. Given the larger scale mapping and alignment of the footpath on the Definitive Map, there is more similarity to the definitive (A – B) rather than the claimed (C – B) alignment. This scale is not accurate and merely depicts the representation of features and their relative importance to others.
- 1.4.24 On some maps the claimed addition alignment C – B is also alleged to be shown coloured like other roads; however this is merely inaccurate printing of Station Road's colouration and inaccurate mapping interpretation.
- 1.4.25 It is perhaps the inaccurate portrayal of the private accommodation road over which Northlew Footpath No. 3 partly runs, on various scales of Ordnance Survey mapping, which has influenced the applicants' belief that the definitive alignment of Northlew Footpath No. 3 is incorrect.
- 1.4.26 **Ordnance Survey Instructions to Field Examiners, 1905. The applicants rely on extracts of the Instructions which relate to 1:2500 regarding roads and paths, and 1:500 mapping. The applicants do not rely upon the latter which did not exist for the Northlew area.**
- 1.4.27 Response: The purpose of the instructions was to draw attention to points that might get overlooked and lay down rules on doubtful points of detail where there was likely to be a variety of practice in examination. The Instructions state that "*the Ordnance*

*Survey does not concern itself with rights of way, and Survey employees are not to enquire into them”.*

- 1.4.28 According to the Instructions, footpaths in private yards or convenience paths were not to be shown. A clearly marked path on the ground was not itself sufficient to justify the depiction of a path, unless it was in obvious use by the public. In relation to the trees along Station Road, single trees that were shown as being landmarks were to be surveyed and shown accurately in position. There is such a tree on the claimed addition alignment at point C, indicating a hedgerow/bank.
- 1.4.29 This is not direct evidence relevant to the determination of the application, and is only a useful tool in the interpretation of the Ordnance Survey mapping.
- 1.4.30 Greenwood’s Map 1” to 1 mile, 1827. The applicants state that this mapping shows the origin and existence of the road from Glebe Yard at this date.**
- 1.4.31 Response: The map includes a route in a similar position to the alignment of A – B and the definitive alignment of Northlew Footpath No. 3. No route is shown on the claimed alignment of B – C.
- 1.4.32 Northlew Tithe Map & Apportionment, 1843. The applicants claim that the Glebe Lands area is separated by a boundary wall from the Queen Street properties, numbered 935, 936, 937 and 938 to the east, which also acts as a boundary between rectorial and manorial ownerships. Glebe’s entrance from the highway is from Station Road opposite Elmfield no 787.**
- 1.4.33 Response: 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. Roads were sometimes coloured and the colouring generally indicates carriageways or driftways. 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.
- 1.4.34 The Northlew tithe map is second class and is therefore only evidence of facts with direct relevance to tithe commutation. The original document is held at the National Archives, with copies for the parish and diocese held locally.
- 1.4.35 The only break in the boundary colouration of the glebe land on the tithe map occurs where a fence is depicted adjacent to Clome Cottage on the currently recorded definitive footpath alignment A – B. There is no such boundary break or fence on the claimed alignment, C – B. There is also a pond depicted on the claimed addition alignment.
- 1.4.36 Rectorial/manorial ownership is not relevant to the consideration of this application.
- 1.4.37 Northlew Manor sale catalogue, 1897. The applicants claim that Lot 8 is Clome Cottage sold freehold from the Northlew Manor as a freehold cottage and front garden, pig house and shed, called Clome Cottage, part of 508.**
- 1.4.38 Response: The sales particulars relating to Northlew Manor in 1897 should be treated with caution due to the possibility of advertising embellishments, along with the lack of

a plan. No public right of way is mentioned in the document, and it does not contain information relevant to the determination of the application.

**1.4.39 Finance Act, 1909-10. The applicants claim that the Valuation Office Survey Map of Northlew (2nd edition OS 25" County Series) indicates the boundary line of the cob wall between Clome Cottage and Glebe Lands no 207, across the alignment A – B. Clome cottage is number 18 and the line of the boundary wall is shown extending across to Clome's shed pt. 18. The map does not show Clome Cottage's second outbuilding, however it is mentioned in the accompanying field book listing and it was situated between the cottage and the shed against the boundary wall.**

1.4.40 Response: This legislation imposed a tax on the incremental value of land, payable each time it changed hands, and so 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.

1.4.41 The proposed addition is wholly within hereditament 207 while the proposed deletion is partially included in 207 and excluded for the remainder. There is no evidence that the boundary line at approximately point X is a cob wall.

**1.4.42 Bartholomew's Maps, 1921-7. The applicants claim that the ancient access into Glebe Yard is coloured red as a motoring road on the alignment C – B, and there is no access to Glebe road and Queen Street surveyed A – B.**

1.4.43 Response: Bartholomew's 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 classification of First Class roads, Secondary roads in good condition, Indifferent roads passable for cyclists and other uncoloured roads considered inferior and not to be recommended. The maps were reductions or copies of Ordnance Survey mapping and carried a disclaimer. Bartholomew's did not employ independent surveyors to carry out any surveys on the ground nor to determine the nature and legal status of the roads on their maps. Footpaths and Bridleways were marked as a pecked line symbol. Cyclists were confined to public carriage roads until 1968.

1.4.44 The small scale of ½" and 1" to 1 mile permitted only the most important routes to be shown. The purpose of these maps was to guide the traveller along the routes most suitable for their mode of transport, not to encourage trespass. The scale of the mapping is too small to show Footpath No. 3, the claimed alignment C – B or even Queen Street.

1.4.45 On the Bartholomew's map of 1921, the applicants state that their claimed addition route C – B is shown and coloured red, however there is no route shown on this alignment. It is merely inaccurate printing of the colouration of Station Road, which is a secondary motoring road. The map's small scale and lack of information regarding the application route renders them unhelpful.

**1.4.46 Aerial photography, 1930 onwards. The applicants claim that the aerial photography dated circa 1930 shows Glebe's entranceway to the yard and fields from Station Road at point C with a footpath sign beside it opposite Elmfield House. They also believe that the photography of 1946 and 1948 show a wall adjacent to Clome Cottage and across the definitive alignment of Northlew**

**Footpath No. 3, and that there is no path visible A – B. On the 1955 and 1960s aerial photographs the applicants admit that there are gates at the entranceway to Glebe Yard from Queen Street which they contribute to the unlawful diversion they claim occurred in 1950.**

- 1.4.47 Response: Deduction of traces of use such as characteristic wear patterns left by habitual use and vegetation erosion may provide evidence which can be measurable for establishing the use of a feature as an access or path. Some of the copies supplied are of insufficient quality to comment.
- 1.4.48 Aerial photography dated circa 1912 not 1930 is claimed to show Glebe's entranceway at point C with a footpath sign beside it opposite Elmfield House. Due to the oblique angle of the photograph, some features are obscured by shadows and other features such as buildings, besides being of a relatively poor quality. No footpath sign is visible. These factors affect the definitive (deletion part of the application) and claimed (addition part of the application) alignments of Northlew Footpath No. 3.
- 1.4.49 The applicants believe that the 1940s aerial photography shows a wall adjacent to Clome Cottage and across the definitive alignment of Northlew Footpath No. 3 at point X, and that there is no path visible. However, the 1946 RAF photograph has good clarity. Consequently, it can be seen that the feature adjacent to the cottage due to its characteristics of light colouration and shadow is more likely to be a gate rather than a substantial cob boundary wall, compared to other walls and gates in the photograph. There is also a substantial wear pattern from Queen Street along A – B, while there is none on the claimed alignment opposite Elmfield from point C. There is no wear pattern on the claimed alignment C – B in the 1948 photograph.
- 1.4.50 On later aerial photographs the applicants admit that there are gates at the entranceway to Glebe Yard from Queen Street at point X, which they contribute to the unlawful diversion they claim occurred in 1950. No wear pattern is visible of the claimed alignment C – B but is clear on the definitive alignment A – B. Aerial photography is only evidence that a route or feature is discernible on the ground on the date when a photograph is taken.
- 1.4.51 **Deeds and conveyances, 1897-1980. The applicants believe that these show the same boundary line adjacent to Clome Cottage, with no right of way shown from Queen Street and the footpath believed to be wholly on glebe land.**
- 1.4.52 Response: Deeds and conveyances deal with private rights of property and are not prepared with a view to defining public rights. The transfer of mutual private rights in such documents is not conclusive evidence that there are not public rights.
- 1.4.53 A reference to a public right of way within a conveyance would be of some evidential value. However, such documents are primarily concerned with private rights. The reference on the plan dated 1980 is only relates to "*right of way to Glebe Yard*", and therefore is most likely to be private given the nature of the document. There is no relevant evidence in the determination of the application to vary part of Northlew Footpath No. 3.
- 1.4.54 **Chapman postcard photographs, 1927-51. The applicants state that the postcard dated 1933 is purported to show the remnants of a pig housing area and boundary wall on the definitive alignment of Northlew Footpath No. 3, A – B and no footpath or entranceway adjacent to Clome Cottage from Queen Street. Another dated 1951 is purported to show the narrow width of the recently added**

**footpath through the pig area and boundary wall. It is claimed that there is no field gate at point X to the private accommodation road on the alignment A – B.**

1.4.55 Response: A postcard photograph dated 1933 is purported to show the remnants of a pig housing and boundary wall on the definitive alignment of Northlew Footpath No. 3 and no footpath or entranceway adjacent to Clome Cottage from Queen Street along A – B. The 1933 photograph angle limits what can be seen and though it shows part of the entranceway to Glebe Yard, dimensions cannot be ascertained. Features referred to by the applicants are outside the area of the photograph. Another dated 1951 is purported to show the narrow width of the footpath through pig area and boundary wall. It is claimed that there is no field gate at point X to the private accommodation road. However the photograph does show the pedestrian gate but also that the entranceway (area hatched red on the relevant plan) from Queen Street is much wider than it. The field gate on the parish survey and recalled by long standing residents is outside the area of the photograph. Another photograph dated 1927 photograph from the same collection shows the area of the claimed alignment from point C into Glebe Yard from Station Road and there is no wear pattern existing.

1.4.56 Rights of Way Act, 1932. According to the applicants the Northlew Parish Council submitted a map of parish public rights of way for this legislation as noted in their minute book, of which the Council and Ordnance Survey have refused to supply a copy. It would have been used with the Farm Survey map to produce the National Grid map. They state that there was also a definitive statement dated 1932.

1.4.57 Response: The Act's purpose was to introduce the procedure enabling landowners to deposit maps with authorities of admitted rights of way, now known as Section 31(6) deposits. Local authorities were encouraged to draw up public rights of way registers but not many did and these also had no legal status, unlike the current Definitive Map and Statement. No register was drawn up in Devon. The County Council has no record of a submission from Northlew Parish Council of their public rights of way at that time.

1.4.58 MAF Farm Survey, 1941. The applicants claim that the map of the National Farm Survey shows the junction of the accommodation road onto Station Road with a handwritten arrow, which was required to depict the junction of the access road from the highway. The base map used for the survey was the 1906 2<sup>nd</sup> edition as attached, to enable the comparison of the handwritten arrow, to the benchmark printed on the map.

1.4.59 Response: The Survey uses the 2<sup>nd</sup> Edition Ordnance Survey mapping and the applicants' evidence relates to that rather than the survey itself, and there is no direct relevant evidence to comment on. The survey also does not relate to the area crossed by the definitive or claimed alignments of Northlew Footpath No. 3.

1.4.60 Northlew Parish Survey, 1950. According to the applicants, following the National Parks and Access to the Countryside Act 1949, Devon County Council sent to the Northlew Parish Council a set of maps on which the routes of alleged public rights of way had already been plotted and numbered. It is believed these routes were taken from the maps prepared after the 1932 Act. The maps included the Glebe to Kimber route on the alignment A – B, but the original hand drawn arrow onto Station Road is visible on the map indicating the lawful route origin at point C from the original map before the diversion. The applicants believe the Northlew Parish Council returned the map, after having illegally

diverted the footpath on the alignment through Clome Cottage via point X to Queen Street altered from its point of origin from Station Road at point C.

- 1.4.61 The grounds for believing the path to be public was that it was dedicated to the public by usage many years ago, which although a true statement of the Glebe Yard to Kimber Road path from Station Road, was obviously not true of the illegal diversion through Clome Cottage from Queen Street A – B.
- 1.4.62 They state that as the parish described Northlew Footpath No. 3 as running from Glebe Yard, this means that that owner could not have dedicated the land between the yard and Queen Street, (the entranceway hatched red on the relevant plan) claiming the route does not meet the dedication test at common law.
- 1.4.63 Response: Messers Friend and Sanders, councillors on the Northlew Parish Council in 1950 described the path as *“Footpath to Kimber Road. Starts at the village, on through the Glebe Yard and, road to field gate no. 1. Along by a fence to field gate no. 2. Gate needs repair. The original path continues along by a bank fence to a brook, but now impassable owing to growth from bank fence. No footbridge is available to cross the brook. Continue across field to field gate no. 3 at the terminus at Kimber Road”*. The grounds for believing the path was public were that it had been *“dedicated to the public by usage many years ago prior”*. The form is dated 6<sup>th</sup> November 1950. The line drawn by the Parish Council on their survey map ran from the bottom end of Queen Street, opposite the chapel generally westwards along the alignment A – B.
- 1.4.64 Also written on the survey form by the District Surveyor was written ‘private yard and private road, which relates to Glebe Yard and vehicular access to fields on the same alignment as the definitive footpath.
- 1.4.65 Parish records have great importance especially those relating to the Parish Survey from which the Definitive Map was compiled. A public body such as a parish council had powers only in relation to public responsibilities. It would only devote time and effort to a route if it and its parishioners believed the route was a public highway.
- 1.4.66 **Definitive Map and Statement, 1958.** The applicants claim that the statement says that it starts at the county road C.463, which is Station Road, not Queen Street as shown on the map. According to the applicants, the line on the Map runs north from the chapel, not west with the road of origin being Queen Street, not Station Road, and through Clome Cottage’s pig housing and boundary wall to access Glebe Yard, not as described in the Definitive Statement. They believe that the Map contradicts the Statement on three points: the direction, start point, and the first property it goes through.
- 1.4.67 Response: The statement describes the definitive alignment of Northlew Footpath No. 3 as running between County Road C.463 and Unclassified County Road. *“It starts at County road C.463 opposite the Chapel in Northlew [point A] and proceeds westwards through the Glebe Yard [to point B] and over a short length of private accommodation road (not repairable by the inhabitants at large) crossing fields and a brook (footbridge demolished) to join the Unclassified County road approximately 400 yards east of the entrance to Lake Farm.”* The map accurately reflects this alignment, as surveyed by the Parish Council.

- 1.4.68 Mapping claimed by the applicants to be a 1950s version of the Definitive Map was actually produced by the County Council in the late 1980s and early 1990s. It can be dated by the base mapping and public rights of way line styles. It reflects the Definitive Map accurately.
- 1.4.69 List of Streets, circa 1970s onwards. The applicants claim their alignment C – B as public highway despite its acknowledged absence from the County Council’s List of Streets. They acknowledge that the “Glebe’s road” – Northlew Footpath No. 3 along the alignment A – B is however included.**
- 1.4.70 Response: This is the County Council’s record of highways maintainable at public expense, though it does show footpath diversions and private roads where such have been queried. It shows the definitive alignment of Northlew Footpath No. 3, A – B, in relation to the Kimberlands development to the west of point B. Devon County Council has chosen not to include routes included on the Definitive Map on the List of Streets, as it is only a record of maintenance liability. This record is not conclusive and has no legal status.
- 1.4.71 Land Charges Searches, 1978-91. The applicants state that these do not show the claimed deviated route between Clome Cottage via point X and its shed, as a highway maintainable at public expense. The answer was not accurate from the maps in its possession. The evidence indicates that the Council has not maintained either route, A – B or C – B.**
- 1.4.72 Response: The documents relating to the highways searches are not relevant evidence in the determination of the application. However, they show that the entranceway into Glebe Yard from Queen Street was not always claimed to be part of Clome Cottage property by the applicants (red hatched area on the relevant plan). Only in the searches dated 1991 and 2011 is the additional optional question regarding public rights of way answered, referring the searcher to the Definitive Map.
- 1.4.73 Land Registry information, 1990s onwards. The applicants claim this shows adverse possession of the addition alignment C – B. They claim that the sewer pipe for the Kimberlands development was laid through Glebe Yard along the alignment A – B by virtue of the unlawful diverted public right of way.**
- 1.4.74 Response: The documents relating to the Land Registry are not relevant evidence in the determination of the application to vary part of Northlew Footpath No. 3.
- 1.4.75 The Book of Northlew, 2002. The applicants state that the book extract demonstrates the affiliations of former Parish Council members who were also Glebe Yard’s owners.**
- 1.4.76 Response: The book by the local history group gives a detailed history of the village and parish. It was and still is common for local landowners to be parish council members and represent their communities. It is recalled that long standing residents Mr and Mrs Bater “*ran a substantial haulage business from their yard [Glebe Yard/Bater’s Yard] in Queen Street*”, from the 1940s using the entranceway beside Clome Cottage, which is described as being adjacent to the yard.

- 1.4.77 **Ordnance Survey error, 2009.** The applicants cannot see how the Ordnance Survey and the Definitive Map can be allowed to show different routes, and how Devon County Council can permit houses to be built on the site of the legal footpath origin.
- 1.4.78 **Response:** The Ordnance Survey showed the definitive alignment of Northlew footpath No. 3 incorrectly. However, they have a responsibility to accurately depict the public rights of way information supplied by Devon County Council from its Definitive Map. The applicants discovered the error in June 2009 and brought the issue to the Survey's attention. The Survey admitted their mapping showed a different alignment, C – B, but could not explain why this was. As they had no legal order from the County Council to change the alignment, they had to amend their mapping to match the Definitive Map A – B, and correct the error.
- 1.4.79 The Ordnance Survey error is not direct evidence relevant to the determination of the application.
- 1.4.80 **Patons' correspondence, 2009 onwards.** The applicants have submitted a considerable amount of correspondence, which reiterates their views on the application.
- 1.4.81 **Response:** There is no relevant or direct evidence pertinent to the determination of the application to vary part of Northlew Footpath No. 3, and whether the definitive alignment A – B was recorded in error and whether public rights exist on the claimed alignment from Station Road C – B.
- 1.4.82 **Planning documentation, 2009 onwards.** The applicants claim that the present owner of Glebe Yard's planning applications to build houses on the claimed stopped up but still remaining lawful footpath/highway from Station Road would be an illegal act. Proposals for the development of the land affecting the claimed illegally diverted public right of way give rise to the urgent need for the legal modification of the footpath before the decision on the planning application can be taken.
- 1.4.83 **Response:** These documents occasionally refer to the established definitive footpath (including A – B) across the old depot site and the existing private vehicular access from Queen Street into the old depot site and the band hut and fields beyond. However this is not direct relevant evidence pertinent to the determination of the application.
- 1.4.84 **Freedom of Information request responses, 2009.** The applicants submitted a considerable list of questions with responses.
- 1.4.85 **Response:** This is not relevant evidence pertinent to the determination of the application to vary part of Northlew Footpath No. 3, and whether the definitive alignment A – B is an error and whether public rights exist on the claimed alignment from Station Road C – B.
- 1.4.86 **User evidence.** The applicants rely on their interpretation of the 1950 Parish Survey form to demonstrate their user evidence of the claimed addition alignment C – B. They also contend that the use of the definitive alignment of Northlew Footpath No. 3 between points A – B since circa 1950 is not 'as of right' since it is based on an error.

1.4.87 Response: The applicants have not produced any actual user evidence from members of the public or acceptance of their claimed addition alignment C – B required to demonstrate presumed dedication.

## **1.5 Other Relevant Evidence discovered by the County Council**

1.5.1 This is evidence discovered by the Council in addition to that submitted by the applicants which is relevant to the determination of the application.

1.5.2 Northlew Waywarden Account Books, 1823-36 & Vestry minutes, 1842-65. The Vestry were the local highway authority of the time and organised waywardens to maintain its parish highways. There are entries for East Kimber Moor Lane/Road leading to Northlew town, the former name for what is now partly known as Station Road. There are no references regarding Queen Street or Back Street as it was also known, demonstrating that it has not always been a highway maintainable at public expense.

1.5.3 Handover Roads Records, circa 1947 onwards. These records relate to vehicular highways maintainable at public expense handed back to the County Council in 1947 after the delegation agreements with the Urban and Rural District Councils was ended. They were used as a working document until the 1970s in conjunction with the UCR Mileage Register. No route in the area of Glebe Yard is included. Queen Street and Station Road are included.

1.5.4 UCR Mileage Register, 1950 -70s. This register was used with the Handover Roads Records after the County Council took back highways management from the Rural District Councils in 1947. In July 1950 Queen Street in Northlew is added to the register, from which time it was considered adopted and to be a highway maintainable at public expense.

1.5.5 Northlew Parish Council Minutes, 1949 onwards. At the meeting on 1<sup>st</sup> June 1950, the Clerk presented the blank survey maps of public rights of way received from Devon County Council, and it was resolved to call a parish meeting on the matter.

1.5.6 A meeting was duly held on 5<sup>th</sup> September 1950 to discuss the surveying of the parish's rights of way, but as it was harvest time, turnout was low and the meeting was adjourned. It reconvened on 15<sup>th</sup> September 1950 with a committee formed to carry out the survey, with councillors pairing up to inspect the rights of way in the parish. Messers Sanders and Friend were responsible for path 3.

1.5.7 At the Parish Council meeting on the 2<sup>nd</sup> October 1950 the committee gave their survey report which was approved, and detailed the process by which the report had been achieved, with a different pairing of councillors transferring the handwritten surveys onto the prescribed forms and another drawing up the maps from notes after surveying the routes.

1.5.8 On the 6<sup>th</sup> November 1950 the survey committee met again and the clerk presented the maps numbered and marked for inspection. Footpath No. 3 was registered among 22 routes.

1.5.9 On the 15<sup>th</sup> November 1957 correspondence from Devon County Council asked where the 'draft map and statement' could be kept for inspection by the public. It was decided that they would be kept at the Chairman's house.

1.5.10 Further correspondence was received from the County Council regarding further amendments to the 'draft map' until the Definitive Map compilation process was almost

complete in 1967. Footpath No. 3 was not objected to at either the draft, modification or provisional stages, or thought to be on an incorrect alignment.

- 1.5.11 Definitive Map compilation records, 1950-69. The records relating to the compilation of the original Definitive Map show the legal process in detail, from the guidance followed and the frequent communication between the County, Rural/Urban District and Parish Councils. They demonstrate the awareness of landowners and the public by the objections to inclusions and omissions from the draft, modification, and provisional map stages. There were issues with other public rights of way in Northlew parish but not with Footpath No. 3.
- 1.5.12 Route photographs, 1980s onwards. Site photographs demonstrate that the Definitive Map and Statement are accurate through the location of features. They show that the definitive alignment has a reasonable surface and not constantly flooded, though the surface has deteriorated since the yard has not been in constant use. The misleading and obstructive notices erected by the applicants on their garden fence adjacent to the definitive alignment in 2010 can be seen in situ, along with the result of the enforcement action. The gate post for the cottage's former pedestrian gate is still in place and by its close proximity to the cottage it would have been unlikely to have been used by the public on the footpath, besides being off the definitive alignment. The photographs also demonstrate the dogleg of the definitive footpath at its eastern end along A – X – B and how the end of the footpath where it meets Station Road is opposite the former chapel at point A.
- 1.5.13 The comparison of the 1927 Chapman photograph with that taken in 2014 from almost the same location show the same hedge bank in which it is claimed both the private vehicular and public footpath access ran into Glebe Yard from point C. There is no evidence of such access.

## **1.6 Landowner Evidence**

- 1.6.1 There are 2 landowners affected by the Schedule 14 application: Mr and Mrs Paton who are the applicants, and Mr and Mrs Todd.
- 1.6.2 Mr and Mrs Todd. The Todds' have owned Glebe Yard since 2005, and they object to the application to alter the alignment of Northlew Footpath No. 3. They own the land west of the red hatched entranceway area shown on the relevant plan.
- 1.6.3 Mr and Mrs Paton. A landowner evidence form was received from the applicants. Mr and Mrs Paton state they have owned land crossed by Northlew Footpath No. 3 for 33 years though not formally until 2013 (red hatched area on the relevant plan). They have only believed the definitive alignment of Footpath No. 3 A – B not to be public since 2009. They have not made a Section 31(6) deposit. They rely on all their previous evidence and correspondence.
- 1.6.4 They have seen people weekly on foot and have advised people of their belief of the incorrect definitive footpath alignment A – B. Users with vehicles have also been stopped by the Patons though these are private access rights and do not relate to the public footpath.
- 1.6.5 Mr and Mrs Paton erected notices in 2010 stating "*No Trespassing. This is not a public right of way*" on the definitive footpath alignment, east of point X. However, these were removed after the Public Rights of Way Warden took enforcement action against the misleading and obstructive notices on a public right of way under Section 143 of the

Highways Act 1980. The only gate they acknowledged is a small pedestrian gate that used to be adjacent to Clome Cottage.

- 1.6.6 What the Patons often refer to as the 1950 definitive statement/submission is actually the Parish Council survey submission for the Definitive Map. It is not definitive or conclusive, and does not have any legal status, although it shows the definitive alignment and is good evidence of what it contains. They also use the term 'parcel 342' which is misleading as both Northlew Footpath No. 3, X – B, and the claimed alignment, C – B, pass over this parcel area. The description of the footpath passing 'through a hedged track' is also incorrect. It is believed that this is a reference to the Ordnance Survey 25" mapping which shows a double dashed track across Glebe Yard, which was the Survey's method of distinguishing it from the surrounding area.
- 1.6.7 They claim that as the parish described Northlew Footpath No. 3 as running from Glebe Yard, this means that that owner could not have dedicated the land between the yard and Queen Street – the entranceway (red hatched area). They also believe that it is clear from the parish survey that only Glebe land was intended to be dedicated.
- 1.6.8 They state that the definitive alignment A – B has only been available for use from the 1950s by way of an error on the Definitive Map and that subsequent use has not been 'as of right'. They believe that there were issues with the capacity for dedication at the time the Definitive Map was being compiled in the 1950s.

## **1.7 Rebuttal Evidence**

- 1.7.1 Northlew Parish Council. The Council objects to the Schedule 14 application proposal to alter part of the definitive alignment of Northlew Footpath No. 3.
- 1.7.2 In correspondence with the applicants in 2009, the Parish Council set out its stance against the application. They consulted older members of the community aged between 75 and 91 years for their memories of Glebe Yard and its access; some could recall the area back to the 1930s. The residents agreed that there had been no wall adjacent to Clome Cottage, but rather 2 gates, one small and another large farm type leading from Queen Street at point X into Glebe Yard and beyond. There was no recollection of a footpath from Station Road along the claimed alignment C – B.
- 1.7.3 Northlew Parish Council user statements, 2009. Following contact from the applicants, a member of the Parish Council contacted 7 long standing local residents for their memories of Glebe Yard and the footpath, making 5 statements of what they recalled.
- 1.7.4 Mr and Mrs Adams' knowledge dated back to the 1940s. According to their recollections, the entranceway into Glebe Yard had always been from Queen Street and there had never been a wall at the claimed location, point X. There was no entrance into the yard from Station Road at point C.
- 1.7.5 Mr and Mrs Gratton's knowledge dated back to the 1930s. According to their recollections, there were always 2 gates at the Queen Street entrance into Glebe Yard, one small one and a field gate at point X. They did not recall there ever being a wall at that location. There was no entrance from Station Road at point C.
- 1.7.6 Mr Luxton's knowledge dated back to the 1930s. He used the definitive alignment of the footpath daily to go to school. There was a 7 foot gate at the Queen Street entrance into Glebe Yard at point X and adjacent to it was a small gate which belonged to Clome

Cottage. He did not recall an entrance from Station Road at point C, but rather a bullock shed and pond which he used to skate on.

- 1.7.7 Mr Spry's knowledge dated back to the 1940s. He had no recollection on any entrance from Station Road into the yard point C, but did recall skating on the pond at that location. There were 2 gates at the entrance into the yard from Queen Street at point X, a little one, then a post, and then a larger gate. There was never a wall there.

## **1.8 Discussion**

- 1.8.1 The applicants have submitted a large amount of evidence and want this along with all their correspondence to be considered in support of their Schedule 14 application. However, the correspondence is not evidence relevant to the consideration of the application. Additionally, some of the evidence itself such as planning documentation and land charges searches is not relevant; evidence dated after the 14<sup>th</sup> September 1967 is not relevant in relation to the deletion part of the application, if, as the applicants claim an error occurred in the recording of Northlew Footpath No. 3, as this is the date when the Definitive Map for the Okehampton district became definitive. It is still however relevant to the addition part of the application.
- 1.8.2 It is the applicants' responsibility to carry the evidential burden and demonstrate that on the balance of probabilities an error occurred in the recording of Northlew Footpath No. 3 on the Definitive Map. In considering the evidence relevant to the application regarding Northlew Footpath No. 3, Section 32 of Highways Act 1980 must be taken into account, which permits the consideration of facts regarding the source of evidence, such as its creation, purpose and production procedures, including public participation and consultation.
- 1.8.3 The applicants believe that the mapping demonstrates that their claimed alignment C – B is the historic alignment of Northlew Footpath No. 3, not the current definitive alignment A – B. However, the Ordnance Survey mapping carries the disclaimer that it is not evidence of rights of way, while the Northlew Tithe Map shows a pond on the applicants claimed alignment C – B. The Greenwood's and Bartholomew's Maps are also too small scale to show either of the application alignments or even Queen Street, while the Finance Act records partly exclude the definitive alignment A – X and totally include the claimed alignment C – B, with no deduction for any right of way. MAF Farm Survey documents included in the application do not relate to the area of the disputed and claimed alignments.
- 1.8.4 The Northlew Manor sale and other deeds are concerned with private rather than public rights, with such information being incidental to the documents' original purposes. None contain information regarding either the definitive or claimed alignments, and consequently they shed little light on the application alignments.
- 1.8.5 Aerial photography from 1912 onwards shows that the main access into Glebe Yard was from Queen Street along A – B and not Station Road opposite Elmfield along C – B as claimed by the applicants, with no characteristic wear patterns or access point on the latter alignment. Postcard photographs from 1927 also demonstrate this.
- 1.8.6 No records were compiled by Northlew Parish Council or submitted to Devon County Council under the 1932 Rights of Way Act.
- 1.8.7 Records relating to Northlew Parish Council and Devon County Council from the compilation of the Definitive Map during the 1950s and 1960s demonstrate the extensive nature of the legislation and guidance. They also show considerable

thoroughness and diligence by both public authorities in relation to this task. There is no evidence that any unlawful diversion of the footpath took place.

- 1.8.8 The applicants also contend that the use of the definitive alignment of Northlew Footpath No. 3 along A – B since circa 1950 is not ‘as of right’. They state that as the parish described Northlew Footpath No. 3 as running from Glebe Yard, this means that that owner could not have dedicated the land between the yard and Queen Street, claiming the route does not meet the dedication test at common law. The Parish Survey dated 1950 however demonstrates that the definitive alignment was used well prior to 16<sup>th</sup> December 1949 as ‘*dedicated to the public by usage many years ago*’ and therefore is a highway maintainable at public expense, along with the recollections of long standing local residents gathered by the Parish Council.
- 1.8.9 Where there is satisfactory evidence of public user such as the various Northlew Parish Council records, Parish Survey, and user statements, which demonstrates public use ‘*as of right*’, dedication can be inferred even though there may be little or no evidence to show who the owner was at the time of the alleged dedication, or that they had the capacity to dedicate. The onus and burden of proof to prove otherwise rests on the applicants, who have not met the legal requirements in relation to the definitive (A – B) or claimed (C – B) alignments of Northlew Footpath No. 3 as per their application.
- 1.8.10 Parish records especially those relating to the compilation of the Definitive Map in the 1950s are of great importance and evidential weight. No evidence has been produced to demonstrate otherwise, and given the considerable time period that has elapsed since, the law would apply the presumption of regularity; that everything was presumed to have been done which should have been done. Living memory at that time would have gone back into the late 19<sup>th</sup> century.
- 1.8.11 Vestry and later highway authority records demonstrate that until July 1950 Queen Street was not a highway maintainable at public expense. The Northlew Parish Council minutes show that during the process of the compilation of the Definitive Map, the Parish Council was not aware that Queen Street had been adopted by the County Council as a county road, and so recorded Northlew Footpath No. 3 as starting from Station Road opposite the chapel at point A and running for a short length across the southern end of Queen Street before heading through Glebe Yard. Therefore the Definitive Map and Statement is not incorrect but accurately reflects the alignment of Northlew Footpath No. 3 recorded in 1950.
- 1.8.12 The Parish Council minutes also explain the difference between the number of gates on the Parish Survey form and map at point X, as two different sets of councillors completed the maps and the forms using notes taken on the survey. The difference does not lessen the weight of this evidence. The applicants often refer to the Parish Survey form as the definitive statement, however this is incorrect. It has no legal status unlike the Definitive Map and Statement, but is good evidence of what it contains. As the minutes are a public record they consequently carry significant evidential weight. The Council was a public body representing its community and would not have admitted to or spent money on things which were not a public responsibility.
- 1.8.13 There is no evidence in any of the records that an error or unlawful diversion occurred in the recording of Northlew Footpath No. 3 on the Definitive Map, whose compilation was subject to extensive public consultations throughout the process. This is supported by the user statements taken by Northlew Parish Council with living memory and knowledge of the footpath and the area dating back to the 1930s, and the local history group, along with the Definitive Map and Parish Council records. There was no access into Glebe Yard from point C on Station Road, and a pond and animal shed

existed on the claimed alignment C – B. Prior to 1950 Northlew Footpath No. 3 ran from Station Road opposite the chapel at point A, across the bottom end of Queen Street and into Glebe Yard via the large field gate at point X, across the yard to point B and beyond.

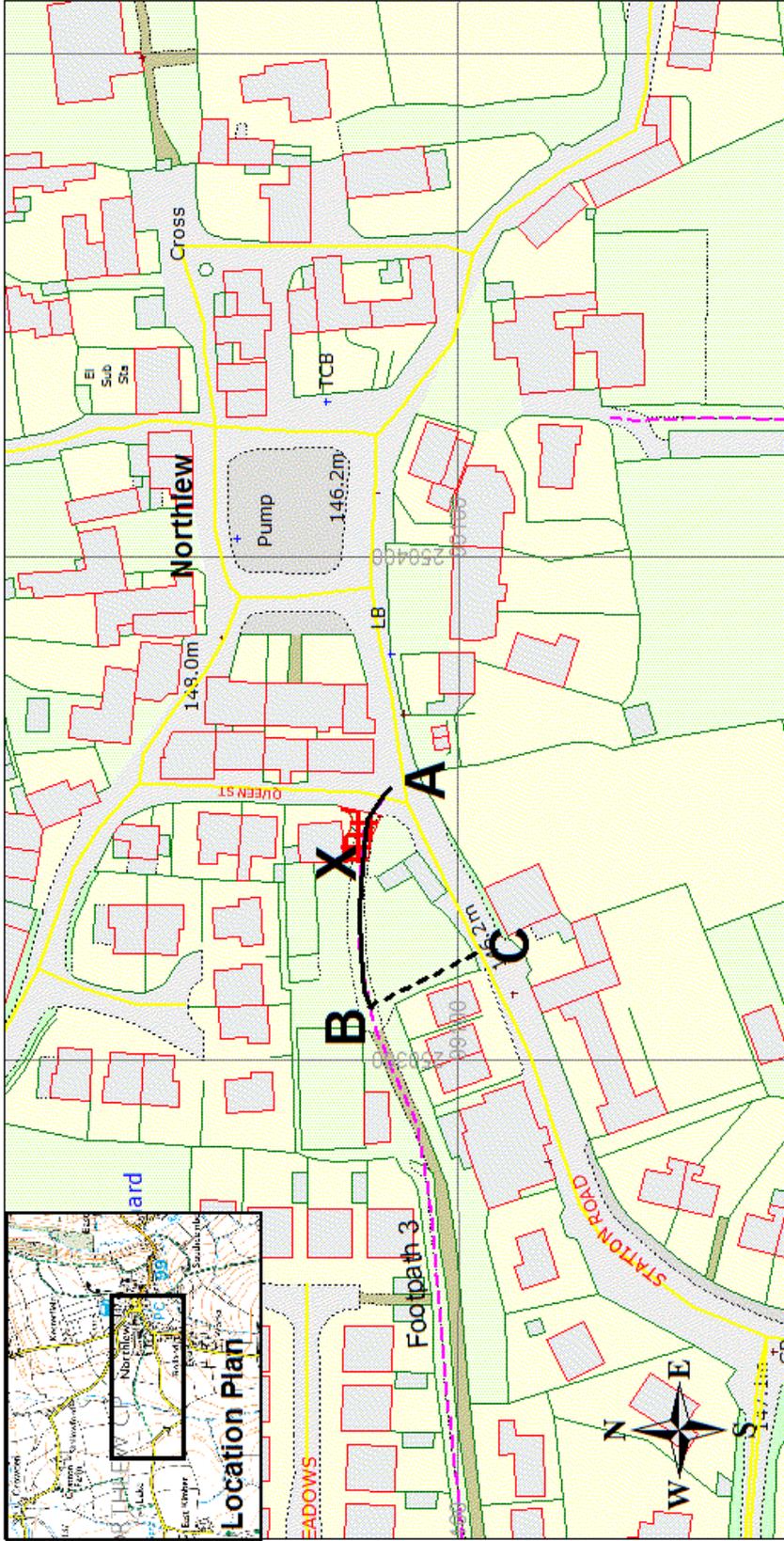
- 1.8.14 The applicants have not produced any actual user evidence of their claimed alignment C – B at any time, nor objections regarding any inaccuracy regarding the definitive footpath's alignment A – B since its inclusion on the 'draft' Definitive Map published on 24<sup>th</sup> January 1958. They rely on their interpretation on the 1950 Parish Survey form for their evidence of use, which is insufficient and also a misinterpretation of the records.
- 1.8.15 Land Charges information demonstrates that the applicants have not always claimed the entranceway into Glebe Yard as part of their property and have only done so since about 1994, but shows nothing relevant to the determination of the application. This also applies to the Land Registry records.
- 1.8.16 While the Ordnance Survey error is unfortunate, all such mapping carries their standard disclaimer that it is not evidence of rights of way and demonstrates their duty to accurately reflect Devon's Definitive Map.
- 1.8.17 The applicants' correspondence, planning documentation and Freedom of Information request responses are not evidence and therefore are not relevant to the determination of the application. The applicants' opinions of people involved in the compilation process of the Definitive Map in the 1950s is not evidence and therefore not relevant to the determination of the application.
- 1.8.18 The applicants have lived adjacent to the definitive alignment of Northlew Footpath No. 3 along A – B for 33 years but have not disputed its alignment until 2009. Prior to that time, they had reported obstructions on the definitive footpath alignment by the current yard owners. The entranceway in Glebe Yard has only been registered to them since 2013, though it was found in 2102 by a High Court judge in the Land Registry dispute that no-one owned the entranceway.
- 1.8.19 Since 2009 the applicants have challenged the public users on the definitive alignment of Northlew Footpath No. 3, A – B, besides other parties who have private access rights along a similar alignment to the definitive footpath. They also erected notices in 2010 stating "no trespassing no public right of way" on their garden fence adjacent to Footpath No. 3. Such notices are considered obstructive and misleading under the Highways Act 1980. Consequently enforcement action was taken by the Public Rights of Way Warden.
- 1.8.20 The only gate they acknowledge is the former pedestrian gate into the yard belonging to the cottage; however this is rebutted by the Parish Council who object to the application and their records, as well as the recollections of long standing residents with memory dating back to the 1930s that there was also a field gate adjacent to it at point X providing the main access into the yard from Queen Street along the A – B alignment, seen on the aerial photography. There was no cob wall blocking the definitive alignment as claimed.
- 1.8.21 Mr and Mrs Todd the owners of Glebe Yard object to the Schedule 14 application. They accept the definitive alignment of Northlew Footpath No. 3 A – B.
- 1.8.22 The Definitive Map Review was open in the parish during 1993-96 and was the subject of much local interest and debate, lasting until 2008. There were a large number of

proposals in the Review but none related to Footpath No. 3, except a diversion west of point B to enable the Kimberlands development to take place. It is unlikely that an error would have existed for over 60 years without being discovered, or that it would not have been discovered during the Definitive Map Review of the parish.

- 1.8.23 Additionally, the same evidence submitted in support of the Schedule 14 application and subsequently, was included in the Section 56 Highways Act 1980 court action started by the applicants in 2011. This evidence has been considered by Exeter Crown Court and the High Court in Bristol. Consequently, its analysis and interpretation are now enshrined in case law, with the judgement in the County Council's favour.

## 1.9 Conclusion

- 1.9.1 In *Trevelyan v. Secretary of State for the Environment, Transport and the Regions* [2001], Lord Phillips, M.R., stated that, *"If there were no evidence which made it reasonably arguable that such a right existed, it should not have been marked on the map. In the absence of evidence to the contrary, it should be assumed that the proper procedures were followed and thus that such evidence existed."* In this case the method by which the definitive alignment of Northlew Footpath No. 3 was added to the Map is clearly documented and the proper procedures shown to have been followed. There is no evidence that demonstrates the claimed illegal diversion.
- 1.9.2 He further states that, *"the standard of proof required to justify a finding that no right of way exists is no more than a 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."*
- 1.9.3 As set out in Circular 1/09 it is for the applicants who contend that there is no right of way, to prove that the Definitive Map requires amendment due to the discovery of evidence, which when considered with all other relevant evidence clearly shows that the part of Northlew Footpath No. 3 between points A – B should be deleted. It is not considered that the applicants have provided new, sufficient or cogent evidence, considered in line with the Planning Inspectorate's Consistency Guidelines, to tip that balance, according to the advice in the Department of the Environment, Food and Rural Affairs Circular 1/09, especially since the Definitive Map Review has been completed for Northlew parish.
- 1.9.4 By virtue of the same evidence and the applicants' failure to meet the tests for deleting part of Northlew Footpath No. 3 based on that evidence, they also fail to prove that "a right of way subsists or is reasonably alleged to subsist between points B – C. It is *"unlikely that a situation would have lain undiscovered over...many decades without having been previously brought to light"* as set out in Circular 1/09.
- 1.9.5 The evidence for the Schedule 14 application is the same as that whose analysis and interpretation is now set in case law.**
- 1.9.6 It is, therefore, recommended that no Modification Order be made in relation to the Schedule 14 application relating to the alignment of Northlew Footpath No. 3 on the Definitive Map and Statement.



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**Devon County Council**  
**Definitive Map Review - Parish of Northlew**  
**Schedule 14 application: Northlew Footpath No. 3**

**Notation**  
 Northlew Footpath No. 3 proposed deletion A - B (approx 46 metres) ———  
 Northlew Footpath No. 3 proposed addition B - C (approx 24 metres) - - - -  
 Existing footpaths Existing footpath line X  
 Entranceway area

drawing number **HCDW/PROW/14/28**  
 date **March 2014**  
 scale **1:2,500**  
 drawn by **CLG**

**David Whitton**  
 Head of Highways, Capital Development & Waste

**Devon**  
 County Council  
 Capital Development & Waste