

**Definitive Map Review 2021
Parish of Whimble**

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 in respect of Proposal 1 (Claimed footpath between Station Road and The Withey, points A-B on the proposal map HIW/PROW/21/02. Grid Ref: SY0456 9737 – SY0465 9738). It is also recommended that no Modification Order be made in respect of Proposal 2 (Claimed footpath between Footpath 5 and Footpath 8, Bogmoor Lane, points C-D on proposal map HIW/PROW/21/02. Grid Ref: SY0376 9819 – SY0388 9816).

1. Introduction

This report examines two proposals arising out of the Definitive Map Review in the parish of Whimble in East Devon district.

2. Background

The original survey by Whimble Parish Council in 1950 under s.27 of the National Parks and Access to the Countryside Act of 1949 identified ten footpaths which were subsequently submitted to the County Council. All ten were recorded for consultations at the Draft Map stage in 1957 and for the Provisional Map, then recorded on the original Definitive Map, with the relevant date of 1 September 1957.

Reviews of the Definitive Map under s.33 of the 1949 Act commenced in the 1960s and 1970s but were never completed. These partial reviews produced no amendments to the Definitive Map.

The Limited Special Review of Roads Used as Public Paths (RUPPS), also carried out in the 1970s, did not affect this parish.

The following orders have been made and confirmed:

St Thomas Rural District Council (Whimble Footpath 1A) Public Path Extinguishment Order 1967

St Thomas Rural District Council (Whimble Footpath No.1) Public Path Diversion Order 1965

St Thomas Rural District Council (Whimble Footpath No.1) Public Path Extinguishment Order 1971

St Thomas Rural District Council (Whimble Footpath No.3) Public Path Extinguishment Order 1965

East Devon District Council (Whimble Footpath No.7) Public Path Diversion Order 1980

Devon County Council (Whimble Footpath No.8 & Clyst St Lawrence Footpath No.9) Public Path Diversion Order 1993

Devon County Council and Parish of Whimble (Footpath No.12) Public Path Creation Agreement 1996

Whimble Footpath No.13 A30 Trunk Road (Honiton to Exeter) Side Road Order 1996

East Devon District Council (Whimble Footpath no.14) Public Path Creation Agreement 2015

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

The current review began in November 2020 with a virtual meeting with Whimble Parish Council and a publicly available online presentation (using Microsoft Sway) which was advertised in the parish, in the local press and online.

3. Proposals

Please refer to the Appendix to this report.

4. Consultations

General consultations on the applications were carried out in August to November 2019 with the following results:

County Councillor Sara Randall Johnson	-	no comment;
East Devon District Council/AONB	-	no comment;
Whimble Parish Council	-	comments included in background papers
Country Land and Business Association	-	no comment;
National Farmers' Union	-	no comment;
Trail Riders' Fellowship/ACU	-	no comment;
British Horse Society	-	no comment;
Cycling UK	-	no comment;
Ramblers	-	comments included in background papers;
Byways & Bridleways Trust	-	no comment;
4 Wheel vehicle Users	-	no comment;

Specific responses, including from the owners of the land affected, are detailed in the Appendix to this report and in the background papers.

5. Financial Considerations

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

6. Legal Considerations

The implications/consequences of the recommendation have been taken into account in preparing 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) or public health implications have, where appropriate under the provisions of the relevant legislation, been taken into account.

9. Conclusion

It is recommended that no Modification Orders be made in respect of Proposal 1 and Proposal 2 as evidence is considered insufficient to meet the requirements of the legislation. Details concerning the recommendation are discussed in the Appendix to this report.

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

10. Reasons for Recommendations

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

Meg Booth
Chief Officer for Highways, Infrastructure Development and Waste

Electoral Division: Whimble & Blackdown

Local Government Act 1972: List of Background Papers

Contact for enquiries: Thomas Green

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Background Paper	Date	File Ref.
Correspondence File	2000 to date	TCG/DMR/WHIMPLE

tg251021pra
sc/cr/DMR Parish of Whimble
03 121121

A. Basis of Claims

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 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.

Section 69 of the Natural Environment and Rural Communities Act 2006 (NERC) amended the Highways Act 1980, to clarify that a Schedule 14 application for a

Definitive Map Modification Order is, of itself, sufficient to bring a right of way into question for the purposes of Section 31(2) of the Highways Act 1980, from the date that it was made.

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

- (a) it is a way whose main lawful use by the public during the period of 5 years ending with commencement was use for mechanically propelled vehicles;
- (b) it was shown on the List of Streets;
- (c) it was expressly created for mechanically propelled vehicles;
- (d) it was created by the construction of a road intended to be used by such vehicles;
- (e) it was created by virtue of use by such vehicles before 1 December 1930.

Proposal 1: Claimed footpath between Station Road and The Withey, points A-B on the proposal map HIW/PROW/21/02. Grid Ref: SY0456 9737 – SY0465 9738

Recommendation: It is recommended that no Modification Order be made in respect of Proposal 1.

1.1 Background

- 1.1.1 The route was put forward for informal consultation during the parish review as two Creation Agreements were made by East Devon District Council, in 1997 and 1998, to create a public footpath linking the new housing development at The Withey to Station Road. The path was intended to be part of the housing development on the former Whimble Goods Yard and prior to the construction of this in the late 1990s, the route did not physically exist. However, it appears that neither of these Creation Agreements were subsequently enacted and the route was not recorded as a public right of way. Despite this, the route has remained open and available for public use since it was constructed.

1.2 Description

- 1.2.1 The proposed route starts at the end of the currently recorded highway maintainable at public expense (HMPE) at point A on the proposal plan (HIW/PROW/21/03), on the pavement of Station Road. Station Road itself is owned by Network Rail and is not HMPE. The route crosses the tarmac surface of Station Road in a generally westerly direction and enters a fenced alleyway between The Cydings and Station House. It proceeds along the gravelled surface of the alleyway for approximately 45 metres before emerging on to the shared driveway of 5, 6 and 7 The Withey. It continues in a westerly direction along the blockwork driveway for another 25 metres to meet the HMPE at The Withey, point B on the proposal plan. There are no gates or any other obstructions along the route.



Photograph showing the entrance to alleyway at the Station Road end, near point A. Station House is the building on the right, The Cydings is on the other side of the fence on the left.



Photograph showing the entrance to alleyway at The Withey, near point B. Behind the fence with the notices posted on is the railway track.

1.3 The Definitive Map Process

- 1.3.1 The proposal route was not included in the survey of paths on behalf of the Parish Council in 1950 for recording as a public right of way on the Definitive Map. At this time the route did not physically exist as the site was part of the railway goods yard under ownership of British Railways.

1.4 Documentary Evidence

1.4.1 Parish Council Minutes

Unfortunately, there are no surviving parish council minutes from the late 1990s/early 2000s, nor from earlier periods. Efforts to track them down within the parish have been unsuccessful and there are none held at the Devon Records Office.

1.4.2 Planning applications

Development of the former Goods Yard, on which this proposal is situated, began in embryonic form in the early 1990s with several planning applications submitted. The first application (07/49/91/P1057/00221) was submitted in 1991 for a residential development of three houses, with the access road of what is now The Withey extending all the way through to Station Road. This application was refused, and the subsequent appeal dismissed.

- 1.4.3 Application 7/48/93/P1101/00221 was submitted by Kingsgrove Developments in 1993 for a residential development consisting of five houses. The plans submitted with this application also appear to show an access road extending all the way through from The Withey to Station Road, but there is also a dashed line along the southern edge of this track between points C-D that is annotated as a '*proposed line of new public footpath subject to Section 106 Agreement*'. The application was approved subject to the applicant first entering into a legal agreement regarding connection to drainage and provision of public footpaths. It is mentioned in the report that the applicant had stated there would be a path of 1.8m width between points C-D.

- 1.4.4 An email sent on 23 March 2011 by Sulina Tallack, Section 106 Officer at East Devon District Council, confirms that '*the Section 106 agreement dated 2 August 1994 relating to Planning Application 7/48/93/P1101/00221 has been fully complied with.*'

- 1.4.5 Planning application 7/48/95/P1144/00221 was submitted by Estreeta Estates Ltd in 1995 for residential developments at multiple sites in Whimple, including the former Goods Yard. The associated plan depicts a 2m strip annotated as a highway/pedestrian rights of way '*as per Devon Highways requirement/agreement.*' The path appears to be depicted running along the vehicular access road. The application was refused, and the subsequent appeal dismissed.

- 1.4.6 Planning application 7/48/97/P0323 was submitted by Estreeta Estates Ltd and was a renewal of the application 7/48/93/P1101/00221 submitted in 1993 by Kingsgrove Developments, including the same plans as the previous application. The outline approval states that '*the details required by condition 3 of this permission shall include details of the proposed public footpath across the site*', which undoubtedly refers to the proposal route. Attached to the file on the planning portal is a copy of a memorandum dated 5 June 1997 from the Chief Executive of East Devon District Council to the C.E.P.O. (which is presumed to be an acronym of Chief Engineer and Planning Officer) which states: '*I write to inform you that the footpath agreement has been completed. I attach a copy for your use.*' A copy of the signed and sealed Creation Agreement is attached.

- 1.4.7 A further planning application (7/48/97/P1059) was submitted by Estreeta Estates Ltd in 1997, which was approved with conditions. The application was much the same as their previous one, including the same provision of a public footpath to Station Road, but with plans for 7 residential properties. It

also is the first application to show the proposal route as a dedicated pedestrian path rather than a pavement beside a vehicular route to Station Road. Attached to the application on the planning portal is a file named 'Section 106 Legal Agreement' which is a copy of the 1998 Creation Agreement. Someone has written the words 'Not reg? (For info only)' on this copy of the agreement.

- 1.4.8 A further application (7/48/98/P2029) was submitted by Estreeta Estates Ltd in 1998 seeking an amendment to condition 2 (mistakenly referred to as condition 3 on the application form), which was granted. The copy of the report on the application contains a comment which reads (in poor handwriting that is difficult to decipher): *'Details of new road which has been agreed with DCC – Footpath does not follow the line of the actual footpath agreement – Chief Exec has said that is up to us. Developer claims it cannot be against the railway.'* However, the application was approved subject to the same condition 3 as previously granted and shown on the same plan that was previously submitted.

1.4.9 Creation Agreements

The first Public Path Agreement was made between East Devon District Council and Estreeta Estates Ltd on 4 June 1997. It is signed and sealed by both parties. It references the planning application 7/48/97/P0323 and uses the same plan. The agreement states that the owner dedicates for use by the public *'all that strip of and shown on the plan annexed running as shown on the plan from point C on the plan to point D on the plan and of a width of 2 metres to the intent that such strip of land shall be enjoyed by the public as a footpath.'*

- 1.4.10 Section 3 of the agreement states that *'the owner shall carry out prior to the occupation of the second dwelling the subject of planning application 7/48/97/P0323/00221 at his own expense and to the satisfaction of the Devon County Council all such works as are necessary to bring the proposed footpath into being for use by the public including the provision of sprung hunting gates and field gates as shown on the attached plan and the improvement of visibility at point D on the plan.'*

- 1.4.11 A second Creation agreement was made between the two parties on 21 January 1998. The text of the agreement is essentially identical, though it refers to planning application 7/48/97/P1059. The plan attached to the agreement is the one from this planning application and shows the development mostly as it was subsequently built, though the turning head is located further west in the plan than on the ground. The letters HG are annotated at point C on the plan, which is presumed to refer to a hunting gate. The agreement is signed and sealed by both parties.

- 1.4.12 Copies of both the Creation Agreements have been filed in our Order files and both have been marked as confirmed, with the dates marked as per they were made.

- 1.4.13 Estreeta Estates Ltd submitted a further planning application (7/48/98/P2029) in 1998 seeking amendment to condition 2. A report on delegated decisions by EDDC approved the application but contains the following hand-written comment: *'Details of new road which has been agreed with DCC – Footpath does not follow the line on the actual footpath agreement – Chief Exec has said that is up to us. Developer claims it cannot be up against the railway.'* However, despite this comment the application was approved along with the same plan as previously submitted.
- 1.4.14 Land Registry documents
The proposal route crosses or abuts several plots of land registered with the Land Registry. The title plans and registers themselves do not provide any reference to the proposal route. However, several subsequent Deeds of Transfer provide some useful information.
- 1.4.15 A Deed of Transfer of DN392286 dated 8 September 1997 between Estreeta Estates and Mr & Mrs Kendrew-Welton contains a covenant by the transferee that states: *'To provide and install to the satisfaction of the Transferor and East Devon District Council, a sprung hunting gate at the entrance of the public footpath at the point marked A on the plan.'*
- 1.4.16 A second transfer of DN392286 dated 30 July 1999 between Mr & Mrs Kendrew-Welton and Mr & Mrs Garratt contain no covenants directly concerning the proposal route. However, the associated plan shows the proposal route annotated as *'public footpath 2m wide.'*
- 1.4.17 A transfer of DN448153 (7 The Withey) dated 23 March 2001 between Estreeta Estates Ltd and Mr & Mrs Tingle contains a plan that shows part of the proposal route annotated as a *'public footpath'* and part annotated as *'public highway.'* It also contains a letter from the Land Registry confirming that a small triangle of land at the south of the plot does not fall within the vendors title and is not registered. It has therefore been excluded from the transferee's new title. A plan is attached showing the unregistered triangle of land that was excluded; It must be noted that this small triangle of land is crossed by the proposal route and it is of key importance to the outcome of this proposal.

1.5 Definitive Map Reviews and Consultations

- 1.5.1 The proposal route was not put forward for inclusion on the Definitive Map when the Parish Council carried out their survey in 1950. The site was a railway goods yard until 1991 when the land was transferred from the British Railways Board to Kingsgrove Developments for residential development. Therefore, it does not appear in any previous reviews of the Definitive Map in the 1960s and 1970s.

1.6 User Evidence

- 1.6.1 No user evidence forms have been submitted for this proposal route. The route appears to have been open and available since the construction of the residential development at The Withey and there is anecdotal evidence of public use.

1.7 Landowner and rebuttal evidence

- 1.7.1 All identifiable properties affected by the proposal route were sent details of the proposal, along with landowner evidence forms. None of the residential properties returned forms, though two did telephone to discuss the proposal. However, neither of these callers produced any relevant information.
- 1.7.2 Network Rail returned a landowner evidence form. In the form they claim ownership of the land crossed by the proposal route, '*for at least 50 years*' and that it is '*a footpath access to Whimble Railway Station*'. They have never erected any signs or obstructions on the route and never turned anyone back. They claim to have given permission to use the route, implying that this is given to rail users to access the station. Under the further comments section is written: '*This is a railway station access protected by statute from PROW claims. Relevant statute Sec57 British Transport Commission Act 1949.*'
- 1.7.3 It is not made clear exactly which parts of the proposal route fall with Network Rail ownership. Their land is largely unregistered with the Land Registry which makes it difficult to examine the exact extent of their land. A further document supplied by them shows the extent of their ownership of Station Road but does not show any ownership beyond this. It can be inferred from Land Registry documents (discussed above) that they also own a small section of the proposal route to the south of 7 The Withey.

1.8 Discussion

- 1.8.1 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. In the case of this proposal there is no evidence to suggest that the public right to use the way has been challenged since it was constructed. There is also a complete lack of user evidence (either in a relevant period or at any other time) to enable consideration under statute.
- 1.8.2 Common Law
The only other basis for its possible consideration as a highway is if there was any other significant supporting evidence from which an earlier dedication of

the route can be presumed or inferred under common law. At Common Law, evidence of dedication by the landowner can be express or implied and an implication of dedication may be shown if there is evidence, documentary, user or usually a combination of both from which it may be inferred that a landowner has dedicated a highway and that the public has accepted the dedication.

- 1.8.3 The two Creation Agreements between Estreeta Estates Ltd and East Devon District Council made in 1997 and 1998 are conclusive evidence of the intention of the two parties to expressly dedicate a public right of way. The multiple planning applications associated with what now forms The Withey all suggest that a route through to Station Road was intended (initially vehicular but amended to be only pedestrian/footpath access). These agreements are signed and sealed and there is no evidence to suggest that they were withdrawn by the developer or East Devon District Council. Likewise, although there is no positive record of them having been advertised in a local newspaper, it is to be assumed, based on the presumption of regularity, that East Devon District Council did so.
- 1.8.4 Although the Creation Agreements initially appear to have legally created a public footpath the Deed of Transfer (DN448153) from 2001 casts considerable doubt as to the ownership of a very small section of the proposal route. The small triangle of land that was removed from the registered plot (and at the time was referred to as being unregistered) can be deduced to be owned by Network Rail. Even though the unregistered triangle does not correspond to any physical boundaries or features on the ground, it cannot be disputed that it is located across the route of the footpath shown in the Creation Agreements. As such it creates a situation where Estreeta Estates Ltd dedicated a public footpath on land they did not own. The effect is therefore that the Creation Agreements cannot themselves be conclusive evidence of dedication under common law as they were not made by all owners of land crossed by the route.
- 1.8.5 Land owned by Network Rail (and their predecessors) is protected from public right of way claims but the British Transport Commission Act 1949. Section 57 of the 1949 act states: *'no right of way as against the Board shall be acquired by prescription or user over any road footpath thoroughfare or place now or hereafter the property of the Board and forming an access or approach to any station goods-yard wharf garage or depot or any harbour premises of the Board.'* This would apply to Station Road itself but more importantly would also apply to the small triangle of land that the proposal route crosses in the alleyway section. This effectively means that there is no way for any use of the path by the public (of which there has been none forthcoming during consultation) to be considered as evidence of acceptance of a dedication under common law.

1.9 Conclusion

- 1.9.1 In the absence of any direct user evidence of public rights, their existence cannot be considered under Section 31 Highways Act 1980. Under common

law, the documentary evidence shows that the landowner, Estreeta Estates Ltd, intended to dedicate a public footpath across their land via a Creation Agreement. However, it later came to light that they were not the sole landowner of the land crossed by the route, which means the dedication was not lawful and the Creation Agreements did not lawfully create a public footpath.

- 1.9.2 Despite the Creation Agreements failing to provide conclusive evidence of express dedication, it is possible under common law for dedication to be implied. The fact that Network Rail own a small portion of the land crossed by the proposal route essentially severs the route as their land is protected from public rights of way claims by the British Transport Commission Act 1949. There is no evidence to suggest that Network Rail have ever expressly dedicated the route as a public right of way. Public rights cannot be acquired by prescription or user on their land and therefore without any evidence of the public having accepted an implied dedication the proposal falls short of the requirements needed to meet the test for dedication under common law.
- 1.9.3 From this assessment of the evidence, in conjunction with other historical evidence and all evidence available, it is considered insufficient to support the claim that any public rights subsist on the balance of probabilities. Accordingly, the recommendation is that no Order be made to record a Footpath in respect of Proposal 1.

Proposal 2: Claimed footpath between Footpath 5 and Footpath 8, Bogmoor Lane, points C-D on proposal map HIW/PROW/21/02. Grid Ref: SY0376 9819 – SY0388 9816.

Recommendation: It is recommended that no Modification Order be made in respect of Proposal 2.

2.1 Background

- 2.1.1 The route was included for consultation during this review after being highlighted by the Ramblers. Ramblers' representatives claimed to have used the route for many years, including leading group walks along it. At the time of this review the path was open and available and clearly well-used; this seems to have been particularly the case in wet weather when it provides a much easier route to bypass the section of Footpath 8 that is frequently waterlogged. The proposal route was also highlighted on the 1950s parish submission as the route of Footpath 8, suggesting the possibility of an error during drafting of the Definitive Map.

2.2 Description

- 2.2.1 The proposal route starts at point C on the plan HIW/PROW/21/08 on Footpath No. 8. It proceeds in a west-southwest direction along an enclosed track (with a hedge on the northern boundary and livestock fence on the southern boundary) for approximately 110 metres to join Footpath No. 5 on Bogmoor Lane at point D. The surface of the route is grass/earth throughout. When consultation notices were posted on site there were no gates or obstructions present on the proposal route.



Photograph showing the proposal route from point C, taken from the junction with the existing Footpath No. 8.



Photograph showing point D of the proposal route, taken from the existing footpath No. 5 that continues through the field gate with the waymarker on the right.

2.3 The Definitive Map Process

- 2.3.1 The proposal route was shown on the map submitted by the parish in 1956 as forming the southernmost section of Footpath No. 8, linking into Footpath No. 5 on Bogmoor Lane at what is point D on the proposal plan.
- 2.3.2 The survey form returned by the parish contains a description, though it is rather confusing as it appears to describe the route as starting from Knowle Cross. It reads: *'Follow from Knowle Cross, as given in description of path no. 5, but continue along it when it turns sharply to the left. Another turn, this time to the right, leads to a gate into a field.'* Though it is impossible to be certain, the use of the phrase *'turns sharply to the left'* more accurately describes the proposal route than the recorded Footpath 8. The grounds for believing the path to be public are stated as: *'marked on Ordnance Survey and has been long in public use.'* *'Owners of the land through which it runs'* are noted to have repaired the path in the past. It is also noted that *'like no. 5'* the path is impassable during the winter months *'owing to mud and flooding'*. There are no comments from the Rural District Council on the form.
- 2.3.3 The survey form was completed by Mary D. Stewart, who completed 8 of the 10 forms submitted. There are no marks or annotations on the submission map to suggest who completed it.

- 2.3.4 Despite this initial survey, Footpath 8 was recorded on its current line on the subsequent Draft, Provisional and Definitive Maps. There are no recorded objections or comments.

2.4 Documentary evidence

2.4.1 Ordnance Survey Surveyor's Drawings 1806-7

The proposal route does not appear to be depicted on the Surveyor's Drawing, though a road is shown that corresponds with Bogmoor Lane which is now Footpath No. 5.

2.4.2 Ordnance Survey First Series One Inch to the Mile 1809

The proposal route is not shown on this map, although, as in the earlier Surveyor's Drawings, Bogmoor Lane (what is now Footpath No. 5) is shown with a small triangular area at the junction where it meets what is now Footpath No. 8.

2.4.3 Whimble Tithe Map 1834 and Apportionment 1842

Tithe maps were drawn up under statutory procedures laid down by the Tithe Commutation Act 1836 and subject to local publicity, which would be likely to have limited the possibility of errors. Roads were sometimes coloured, and colouring can indicate carriageways or driftways. Public roads were not titheable. Tithe maps do not offer confirmation of the precise nature of the public and/or private rights that existed over the routes shown. Public footpaths and bridleways are rarely shown as their effect on the tithe payable was likely to be negligible. Routes which are not included within an individual apportionment are usually included under the general heading of 'public roads and waste'.

- 2.4.4 The proposal route is not shown as a track or path of any description on the Tithe Map produced for Whimble parish. The route of the recorded Footpaths Nos. 5 and 8 are shown as tracks and coloured yellow. Roads were not labelled or identified in the Apportionment as public and included those which were obviously public, as well as others more likely to have been private tracks for access to fields and some not now existing. The proposal route crosses plot 121 which is recorded as being an arable plot on the Tithe Apportionment.

2.4.5 Ordnance Survey 25" First Edition 1887

Surveyed in 1887, the Ordnance Survey 25" to a mile First Edition map shows the proposal route as a partially enclosed track, with a hedge/tree line to the north and a pecked line showing the southern boundary. There are solid lines across either end of the proposal route that most likely denote gates. The track up which the recorded Footpath 8 runs is shown as an enclosed track. A path is shown running alongside this route in the field to the west and is marked F.P.

- 2.4.6 Ordnance Survey 25" Second Edition 1904; Finance Act 1910 map & records
The later edition of the Ordnance Survey Second Edition 25" to the mile map revised in 1903 shows the proposal route in the same way as the First Edition map at the same scale. The same later maps were used as the basis for the 1910 Finance Act survey to ascertain the value of land for the purpose of taxation, copies of which were submitted with the additional material for the applications. The map shows the proposal route to have been included within hereditament number 170 throughout and no deductions were recorded for public rights of way by the landowner or surveyor.
- 2.4.7 Ordnance Survey One-Inch and Bartholomew's maps
Bartholomew's map editions from 1910 to the later 1940s, does not show the proposal route at all. These maps were produced for the benefit of cyclists and were not concerned with showing footpaths.
- 2.4.8 The Ordnance Survey one-inch mapping from 1898 and 1946 does not show the proposal route at all but does show the lower ends of Footpaths Nos. 5 and 8. The 1960 and 1967 one-inch maps show the proposal route as a track, with the 1967 edition also showing the recorded lines of Footpaths Nos. 5 and 8 as dotted red lines.
- 2.4.9 Highway maintenance records/Handover maps
Highway maintenance records from the 1960s and 1970s show that the proposal route was not at that time considered to be maintainable at public expense, though these records relate to roads rather than footpaths.
- 2.4.10 Aerial photography
Earlier RAF aerial photography from 1946–9 shows the proposal route as a clear track with a mature hedge along the northern boundary. It is impossible to make out details at either end of the proposal route as they are in shadow cast by mature trees.
- 2.4.11 More recent aerial photography from 1999-2000, 2006-7 and 2015-17 shows the proposal route in much the same way as those from the late 1940s. The route is shown throughout this period as a well-defined track, clearly used by agricultural vehicles. The small field to the south of the proposal route is shown as agricultural land up to 2010 but by 2015 it appears to be being used for equine purposes, with the stable that is currently on site being visible.
- 2.4.12 Parish Council Minutes
For reasons unknown, no parish council records survive, either at the Devon Records Office or locally within the parish. As such, there is no evidence of what, if any, public rights or reputation the proposal route may have had historically within the parish.
- 2.4.13 Definitive Map Reviews and Consultations
Further reviews in 1970 and 1978 were started but not completed. The proposal route was not mentioned by the Parish Council in correspondence with Devon County Council during either of these reviews.

2.5 User evidence

- 2.5.1 No user evidence forms have been submitted for this proposal route. Comments via email from Mrs Kimbell, a representative of the Ramblers, states use for approximately twenty years, including leading group walks down the proposal route, though use is stated to be very infrequent – approximately once per year on average, occasionally up to three times per year. Mrs Kimbell states that her use of the proposal route has not always been to avoid the waterlogged section of Footpath No. 8 and that she often used the proposal route *‘because it was there’*. She also states that she has walked the route when there has been a person tending to their horses in the adjacent field and she has never been stopped or challenged.

2.6 Landowner and rebuttal evidence

- 2.6.1 The proposal route itself falls within the Land Registry plot DN502562, which is registered to Mr and Mrs Chard of Knowle Farm, Whimble. Mr Chard has provided extensive information in the form of a statement produced by his solicitors, a map showing his land ownership and a statement from a Mrs June Wall who rents the above plot from him.
- 2.6.2 Mr Chard states that he has owned the land since 2003 and before that his father owned it since 1942. He states that he has occasionally seen people use the proposal route on foot and that has been aware of intermittent use by his neighbours. He has not given permission to anyone to use the route, nor has anyone ever asked for permission.
- 2.6.3 Mr Chard states that when his father was alive, he *‘would regularly prevent members of the public from using the track’* and that *‘he would ask anyone he found using it to turn back and use the public footpaths.’*
- 2.6.4 Mr Chard states that he has regularly obstructed the proposal route, through leaving a tractor parked there *‘for a number of hours during the day/overnight’* and herding cows along it twice per day when he was dairy farming prior to 2006. He also states that he is aware that his tenant, Mrs Wall, has *‘erected horse tape to prevent the public accessing the private land.’*
- 2.6.5 Mr Chard refers to the poor condition of the existing footpaths as being the reason people have used the proposal route. His statement refers to the case *(R(on the application of Gloucester County Council) v Secretary of State for the Environment, Transport and the Regions and another [2000])* as being relevant to this proposal. However, this case relates to the physical loss of a public right of way due to riverbank erosion and not merely to a seasonally waterlogged path that may be inconvenient but has never physically ceased to exist. As such, this piece of case law is not considered to be of relevance to the proposal route.

- 2.6.6 June Wall submitted her own statement in support of Mr Chard's objection to the proposal route. Miss Wall states that she has rented the field to the south of the proposal route since 2013, during the first five years of which she kept horses there. She details several electric fences and 'pole' gates that have at various times been erected alongside and across the proposal route (as well as at other locations on Footpaths Nos. 5 and 8) to contain livestock and horses. Miss Wall states that: *'apart from during the lockdown periods, I do not recall ever having seen many people use the track when I was at the fields. It tends to be extremely quiet and is not well used as an access way.'* As per Mr Chard, she states that she believes the only reason people use the route is due to the poor condition of Footpath Nos. 5 and 8.
- 2.6.7 The field adjacent to the proposal route to the north is owned by Mr Francis Manley who returned a landowner evidence form. He states he has owned the land since 1975. Mr Manley states that it *'has always been a derelict lane'* and *'not used for agriculture.'* He has written that it *'always has been a right of way'* but does not elaborate on whether he means private or public.
- 2.6.8 Mr Manley states that he has seen people using the proposal route *'usually on foot, sometimes on horseback, occasionally bicycles, rarely in a motor vehicle'* and that he has never stopped or turned back anyone using the route. Likewise, he is not aware of anyone else stopping people using the route. He states he has never obstructed the route or erected any signs or notices on the route.

2.7 Discussion

2.7.1 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. There is no conclusive evidence to suggest a date when public use of the proposal route was called into question. The current landowner has occasionally obstructed the route and there is some evidence to suggest his predecessor challenged members of the public using the route, though dates of when this occurred are not known. This absence of a defined calling into question, along with an almost complete lack of direct user evidence makes it impossible to enable consideration under statute.

2.7.2 Common Law

The only other basis for its possible consideration as a highway is if there was any other significant supporting evidence from which an earlier dedication of the route can be presumed or inferred under common law. At Common Law, evidence of dedication by the landowner can be express or implied and an implication of dedication may be shown if there is evidence, documentary, user or usually a combination of both from which it may be inferred that a

landowner has dedicated a highway and that the public has accepted the dedication.

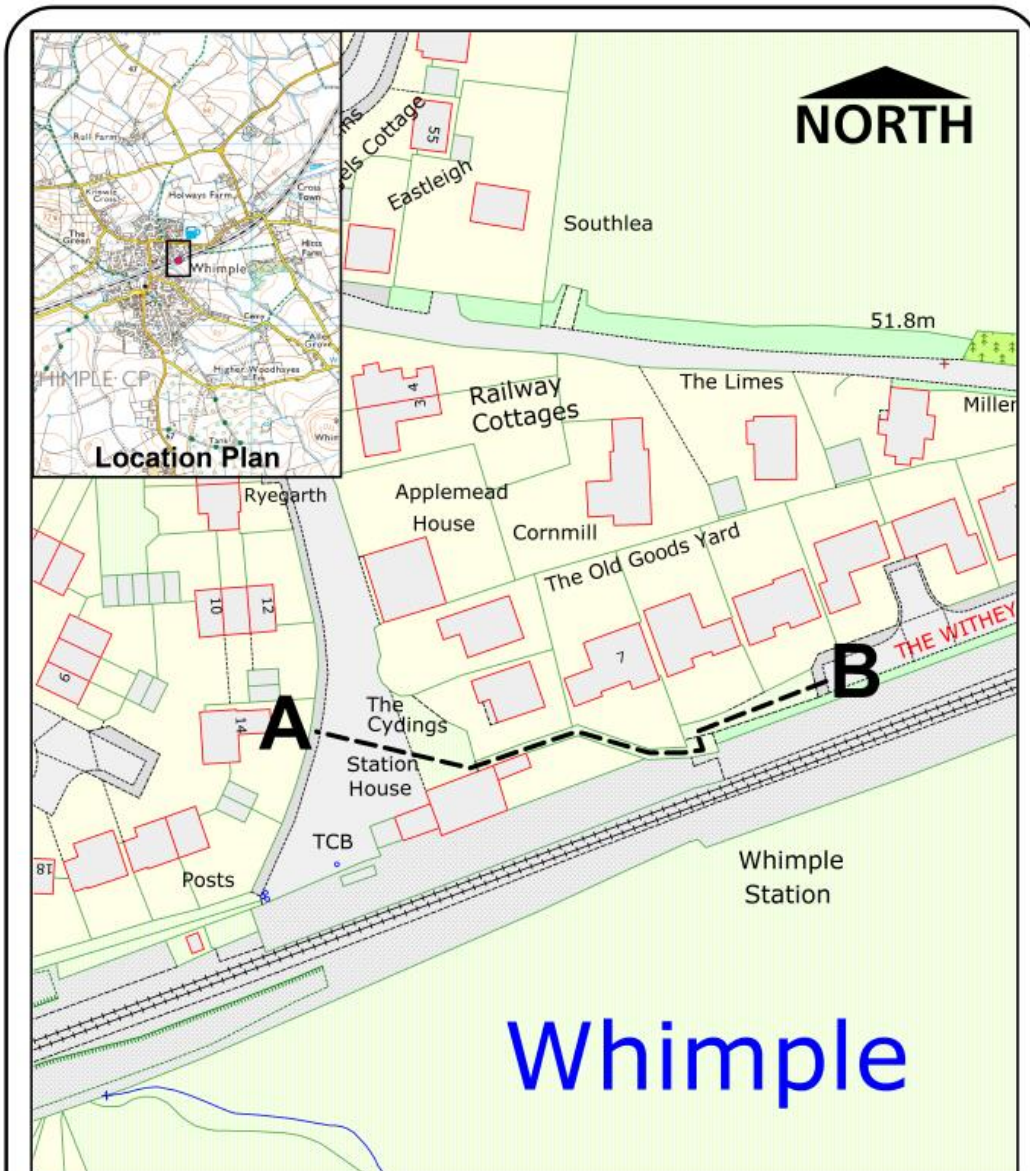
- 2.7.3 The proposal route appears in the Ordnance Survey mapping record in the late 1880s, though it is not consistently shown, particularly at the one-inch scale. The mapping evidence suggests that the route has physically existed as a track since it first appeared on the First Edition 25" OS map in 1888. While the maps confirm the physical existence of the route, they offer no evidence of status.
- 2.7.4 The proposal route was not excluded from surrounding hereditaments on the Finance Act 1910 map and so it was unlikely that the route was considered a public highway of bridleway status or higher at that time. The lack of any deductions for public rights of way from hereditament number 170 also suggests it is unlikely that the proposal route was considered to be a footpath at that time.
- 2.7.5 The lack of any surviving historic minute books from Whimble Parish Council is unfortunate. As a result, it is not possible to determine whether the parish council considered the proposal route to have any public status or reputation. It is also not known whether the proposal route was included in any lists drawn up in response to the provisions introduced by the Rights of Way Act 1932.
- 2.7.6 The survey form and map submitted by Whimble Parish Council in 1950 during the original Definitive Map process both suggest that the proposal route was considered a public footpath at that time. It is not known who completed the submission map but the fact that Mary D. Stewart completed 8 out of the 10 survey forms submitted suggests that she was heavily involved in the process and may have had input into the map. This would certainly explain the correlation between the map and survey form. However, this was only the very initial stage in the Definitive Map process and so the evidential weight that can be placed on it is consequently limited.
- 2.7.7 Despite the initial survey form and map, the proposal route was not included on the Definitive Map. The final Definitive Statement for Footpath No. 8 also did not refer to the proposal route, despite the original parish submission doing so. There is no evidence to throw light on why the change occurred. As a result, going on the presumption of regularity it can be assumed that the initial survey showed the proposal route in error and this was corrected during revisions at the draft/provisional stages.
- 2.7.8 Evidence supplied by Mr Chard, who owns the land crossed by the proposal route, suggests that his father actively prevented the public from using the route and turned back people doing so between 1942-2006. If this was indeed the case, then it would be strong evidence that Mr Chard senior had no intention to dedicate the route during this period and conveyed this to the public. Mr Chard, since owning the farm himself from 2006, has not taken any steps to conclusively convey a lack of intention to dedicate; the parking of tractors on the route and driving of cattle along it, whilst temporarily blocking

or making access difficult, are activities that occur on many public footpaths in rural areas and would not be construed by users as an attempt to disabuse them of their rights. However, even though this is the case it is not possible to infer a dedication without sufficient evidence of use.

- 2.7.9 Evidence of use of the proposal route is limited. Information from the Ramblers suggests that they have used it for approximately twenty years, though this use has been very infrequent. No user evidence forms were received during informal consultations, though the affected landowners claim to have seen people using the route. When consultation notices were posted on site the proposal route was open and available to the public; the trampling of the route showed that it was regularly used. Evidence from the Ramblers and landowners suggest the proposal route as being used partly due to it being a more commodious route than the existing southern part of Footpath No. 8 (Footpath Nos. 5 and 8 are known to be waterlogged during wet weather, due to which remedial work by DCC is scheduled). Although there is no evidence, it could be speculated that it was this that led to the proposal route appearing on the parish submission in the original Definitive Map process. In summation, while there is some evidence that the route has been used by the public, particularly at certain times of year, the quantity and quality of the user evidence is below the threshold required to meet the test of dedication under common law.

2.8 Conclusion

- 2.8.1 In the absence of sufficient direct user evidence of public rights, their existence cannot be considered under Section 31 Highways Act 1980. Under common law, the documentary evidence shows that the route has physically existed since at least the late 19th century. While the documentary evidence indicates that the route may have had some sort of public reputation at certain times, there is insufficient evidence to enable a dedication to be implied. Likewise, without any evidence of public use to imply or infer dedication (or to demonstrate acceptance of an implied or inferred dedication) the proposal falls short of the requirements needed to meet the test for dedication under common law.
- 2.8.2 From this assessment of the evidence, in conjunction with other historical evidence and all evidence available, it is considered insufficient to support the claim that any public rights subsist on the balance of probabilities. Accordingly, the recommendation is that no Order be made to record a Footpath in respect of Proposal 2.



Map ref: SY 0456 9737/SY 0465 9738

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DEVON COUNTY COUNCIL
Definitive Map Review, Whimble parish
Informal Consultations, Proposal 1:
Claimed Footpath, Station Road/The Withey

Drawing number: HIW/PROW/21/03

Date: Feb 2021

Scale: 1:1,000

Drawn by: TCG

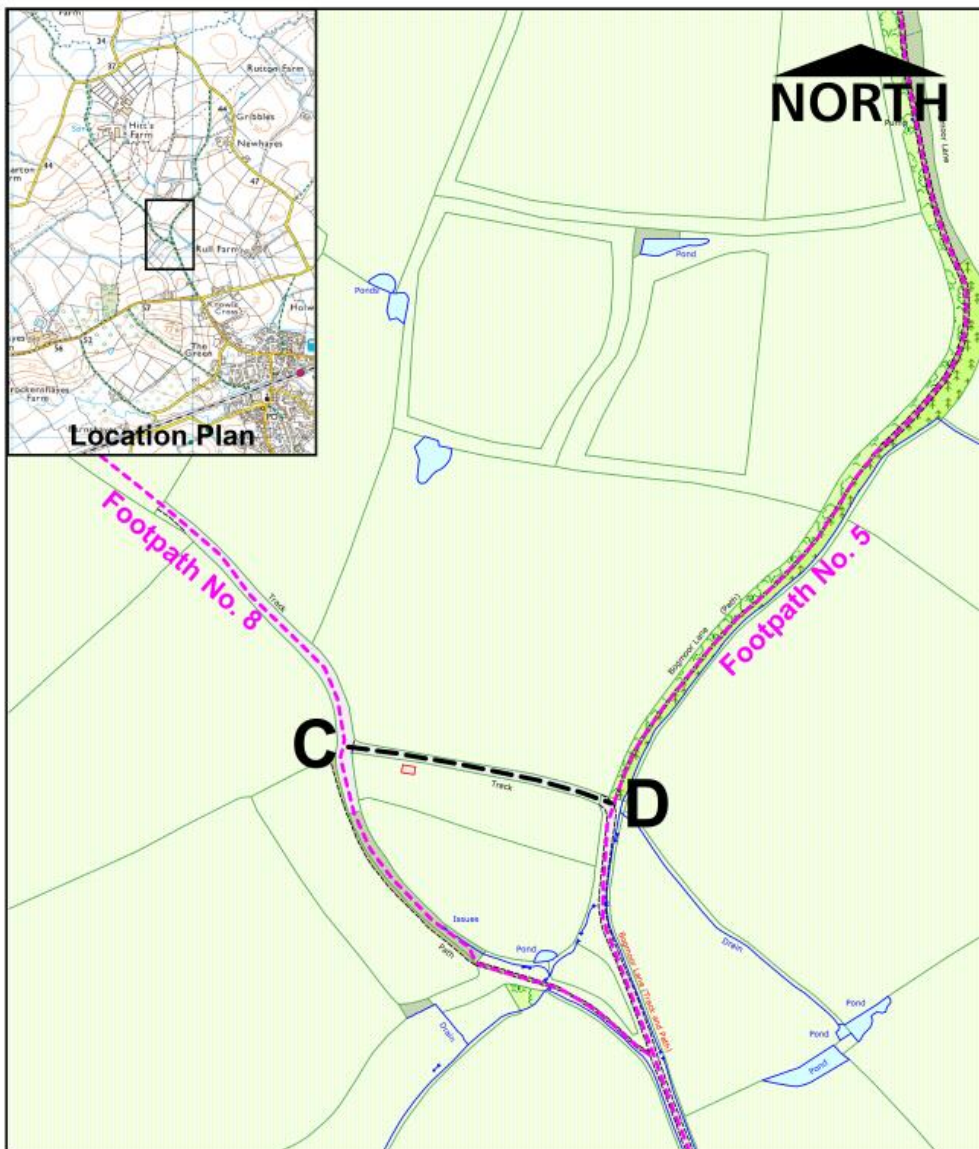
Notation

Proposed Footpath - - - - - (95m)

Meg Booth

CHIEF OFFICER FOR HIGHWAYS, INFRASTRUCTURE DEVELOPMENT AND WASTE





Map ref: SY0376 9819 – SY0388 9816

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DEVON COUNTY COUNCIL
Definitive Map Review, Whimble parish
Informal Consultations, Proposal 2:
Claimed Footpath between Footpath No. 8 and
Footpath No. 5

Drawing number: HIW/PROW/21/08

Date: March 2021

Scale: 1:2,500

Drawn by: TCG

Notation

Proposed Footpath - - - - - (120m)

Meg Booth

CHIEF OFFICER FOR HIGHWAYS, INFRASTRUCTURE DEVELOPMENT AND WASTE

