

**Schedule 14 application
Parish of Newton Poppleford & Harpford**

Report of the Director of Climate Change, Environment and Transport

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

Recommendation: It is recommended that a Modification Order be made in respect of the proposal for a footpath between the county road at Lynch Head and Footpath No. 17.

1. Introduction

This report examines one proposal arising from a Schedule 14 application in the parish of Newton Poppleford & Harpford in East Devon district.

2. Background

A Definitive Map Review of the parish of Newton Poppleford & Harpford was started in March 2022. A Schedule 14 Application had been submitted by Mr Ted Swan in July 2020, and as per Devon County Council procedure was added to the register for determination during the forthcoming parish review. However, in July 2021 Mr Swan appealed to the Secretary of State requesting that DCC be directed to determine the application. In January 2022 the Secretary of State directed DCC to determine the application within twelve months. Due to the scheduling of committees, it is not possible to deal with this proposal during the parish review process and meet the 12-month deadline; it is therefore being brought forward.

3. Proposals

Please refer to the Appendix to this report.

4. Consultations

General consultations on the application were carried out in January to April 2022 with the following results:

County Councillor Jess Bailey	-	comments included in background papers.
East Devon District Council/AONB	-	no comment.
Newton Poppleford & Harpford 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.
Devon Green Lanes Group	- no comment.

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

5. Strategic Plan

The Council's Plan 2021 – 2025, <https://www.devon.gov.uk/strategic-plan/>, has, where appropriate under the provisions of the relevant legislation, been taken into account in the preparation of the report.

6. 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.

7. Legal Considerations

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

8. Risk Management Considerations

No risks have been identified.

9. 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.

10. Conclusion

It is recommended that a Modification Order be made in respect of Proposal 1 as evidence is considered sufficient to meet the requirements of the legislation. Details concerning the recommendation are discussed in the Appendix to this report.

11. 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 in the East Devon district area, as directed by the Secretary of State.

Meg Booth
Director of Climate Change, Environment and Transport

Electoral Division: Otter Valley

Local Government Act 1972: List of Background Papers

Contact for enquiries: Thomas Green

Room No: M8 Great Moor house

Tel No: (01392) 382856

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

tg210622pra
sc/cr/Schedule 14 Parish of Newton Poppleford & Harpford
02 210622

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 along Moor Lane, Southerton, between county road Lynch Head and Footpath No.17, points A-B on the proposal map HIW/PROW/22/08.

Recommendation: It is recommended that a Modification Order be made in respect of Proposal 1.

1.1 Background

1.1.1 Following initial contact and advice from Devon County Council, Mr Ted Swan, the volunteer Footpath Warden for Newton Poppleford & Harpford Parish Council, submitted a Schedule 14 application in July 2020. The application includes thirty user evidence forms and the route appears to have been well-used historically and known as Moor Lane. Although the parish review was imminent (it started in March 2022) Mr Swan applied to the Secretary of State to request DCC be directed to determine the application. Consequently, in January 2022 DCC were directed to determine the application within 12 months. Due to timings of committees and the consultation periods required during the parish review, it has been necessary to determine this application ahead of the parish review in order to meet the 12-month deadline directed by the Planning Inspector.

1.2 Description

1.2.1 The application route starts at Lynch Head, County Road C219, at point A on plan HIW/PROW/22/08. It proceeds in a generally easterly direction for a distance of approximately 270 metres, along an enclosed and slightly sunken track with hedgebanks on either side, with a small dogleg midway along, before joining Footpath No. 17 at point B. The surface of the route consists mostly of bare earth along the well-trodden central area with grass/weeds along the sides and there is generally a width of 2-3 metres available between the hedgebanks.



Point A - looking down the application route in an easterly direction from the junction with the county road at Lynch Head.



Point B - looking down the application route in a westerly direction from the junction with Footpath No.17.

1.3

The Definitive Map Process

- 1.3.1 The application route was not included in the survey of paths on behalf of Harpford Parish Council in 1950 and was not put forward for recording as a public right of way on the Definitive Map.

1.4 Documentary Evidence

1.4.1 Ordnance Survey Surveyor's Drawings 1806-7

The Ordnance Survey Drawings of 1806-7 show the application route in the same manner as other roads that are public today. A similar road is shown running roughly parallel just to the south of the Southerton Brook.

1.4.2 Greenwood's Map 1827

Greenwood's map of 1827 shows the road to the south of the Southerton Brook but does not show the application route to the north.

1.4.3 Venn Ottery Tithe Map 1839 & Apportionment 1839

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'.

- 1.4.4 The application route is shown on the Tithe Map for Venn Ottery parish (as it then was), produced in 1839, as an enclosed track on the same route as exists today. 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. In this case the whole of the application route is shown excluded from titheable plots. Roads are very lightly coloured or shaded on this tithe map but there is no indication that this denotes any sort of status and it is not listed in the apportionment.

1.4.5 Ordnance Survey 1" maps 1809,1898, 1946, 1960 and 1967

All the Ordnance survey one inch to the mile maps show the application route as an enclosed track that also encompasses a short section of the current Footpath No. 17 at the eastern end. The 1898 edition shows it as an '*unmetalled road*' branching off from the '*second class road*' leading from Newton Poppleford to Venn Ottery. All the later editions show it in the category '*Minor Roads in towns, Drive or Track (unmetalled)*'.

1.4.6 Ordnance Survey 25" First Edition 1887

Surveyed in 1887, the Ordnance Survey 25" to a mile 1st edition map shows the application route as an enclosed tree-lined track that also encompasses a short section of the current Footpath No. 17 at the eastern end. It is labelled 'Moor Lane' and there are no obstructions or gates shown on the application route.

1.4.7 Ordnance Survey 25" Second Edition 1904, 1934; Finance Act 1910 map & records

The later edition of the Ordnance Survey 2nd edition 25" to the mile map revised in 1903 shows the application route in much the same way as the 1st edition map at the same scale. There is again a dashed line across the western end of the route where it joins the road from Newton Poppleford to Venn Ottery. The 1934 revision shows the application route in an identical manner. The 1904 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 excluded from surrounding hereditaments (assessment areas of land) throughout.

1.4.8 Ordnance Survey 6" to the mile maps 1889, 1906, 1935 and 1944

All of the Ordnance Survey 6" editions show the application route as an enclosed track with no obstructions or gates present.

1.4.9 Later Ordnance Survey A and B series maps 1949, 1961 and 1963

The later Ordnance Survey maps at varying scales all show the application route as an enclosed track with no obstructions, along with a path marked as FP that corresponds with what is now Footpath No. 17.

1.4.10 Bartholomew's Mapping 1902, 1923 and 1943

The application route is not shown on any of the Bartholomew's editions. These maps were produced mainly for the benefit of cyclists and their focus is therefore on routes suitable for bicycles at the time.

1.4.11 Aerial photography 1946, 1999-2000, 2006-7, 2010 and 2015

Aerial photography shows little change in the application route between 1946 and the twenty first century. It is consistently visible as an enclosed track, with varying degrees of hedge/tree growth adjacent which mostly obscures the surface. The 1999-2000 photos offer the best view of the surface of the route, especially of the western half, and it appears that the lane was particularly easily accessible at this date. There are no obvious obstructions visible in any

of the photography, but these would likely be obscured by vegetation in any case.

1.4.12 Google Streetview images

Google Streetview images from 2008-2021 show the western end of the application route (point A). It is shown in varying levels of hedge growth but in all the images it is clearly unobstructed, available for use and well-trodden.

1.4.13 Highway maintenance records, handover maps and List of Streets

Highway maintenance records from the 1960s and 1970s show that the application route was not at that time considered to be highway maintainable at public expense. The application route is left uncoloured and there are no notes or annotations relating to it. These maps did not show footpaths and bridleways, only public roads.

1.4.14 The application is also not shown as highway maintainable at public expense on the List of Streets.

1.5 Definitive Map Reviews and Consultations

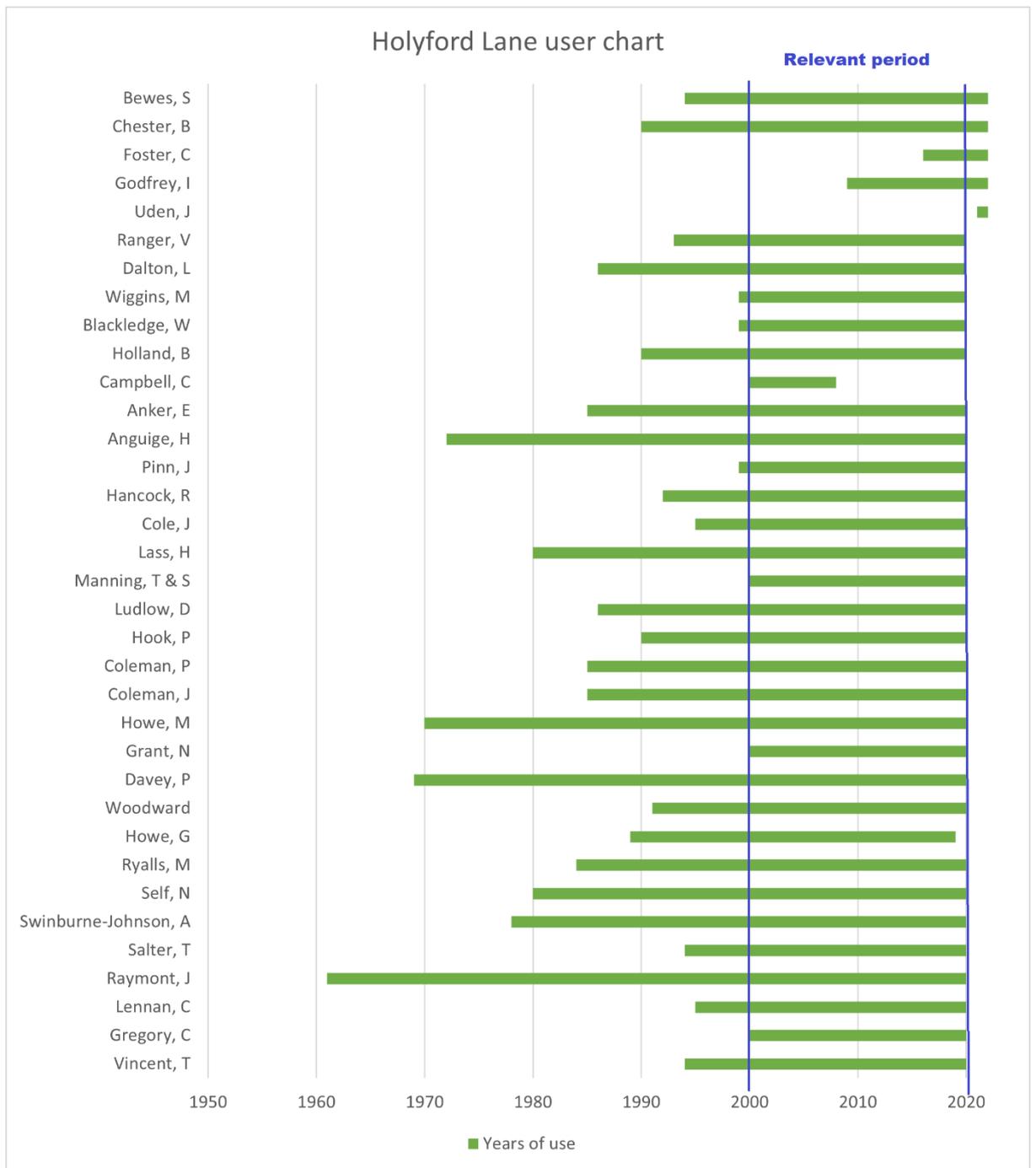
1.5.1 The application route was not included in the survey of paths on behalf of Harpford Parish Council in 1950.

1.5.2 Further reviews in the 1960's and 1970's were started but not completed. The application route was not formally put forward by the Parish Council, nor mentioned in correspondence with Devon County Council during these reviews.

1.6 User Evidence

1.6.1 Thirty user evidence forms were submitted with the Schedule 14 application and another five were received during informal consultations. Several other letters and emails were also received from people who had used the route and support the application.

1.6.2 The thirty user evidence forms submitted with the application are all from people who have used the route for twenty years or more. It appears that the applicant was under the impression that he had to collect forms only from those who had used it for more than twenty years, presumably a misunderstanding relating to the 20-year period required for statutory dedication. It is very likely that more forms would have been collected if the misunderstanding had not occurred, though they would obviously have covered a shorter period than those submitted. The chart below demonstrates the period of user evidence.



1.6.3 All 35 users state they have used the route on foot and all state that they have used it for pleasure apart from one who used it for both pleasure and walking to work. None of the users has ever been given, or asked, for permission to use the route, nor have any of them worked or been a tenant of the adjacent landowners. Very few know who the landowners are.

1.6.4 The earliest use stated by any of the users dates to 1961 – J. Raymont having used the route for 59 years. P. Davey states that they have used the route since 1969 for a total of 51 years. Four other users have used the route for more than 40 years and another ten have used it for more than 30 years. In total 31 users state that they have used the route for a period of 20 years or

more, and all of them appear to have done so at the date the use was called into question.

- 1.6.5 Frequency of use varies between users, as expected, but is consistent with a route being used for pleasure. Six users state that they have used the path on a weekly basis, with one using it three times per week. Seven users state that they have used it once or twice per year. The remaining users state that they have used the route at frequencies ranging from fortnightly to bi-monthly.
- 1.6.6 Two users suggest that DCC have may have been involved in maintaining the route in the past. Vincent states that '5 or 6 years ago' he reported the route to DCC as it was overgrown and the path was subsequently strimmed. DCC have no record of this and it seems likely that it was done by Ted Swan, the applicant and Parish Council footpath warden who undertakes such work within the parish. Lass states the reason that he believes the path to be public is that it '*has had maintenance by public bodies & vol. orgs*'. He also mentions that Frank Burke, '*a keen Southerton walker*', organised a clearance working party after the lane had become overgrown. No exact details are recalled but it may have been done under the umbrella of the Otter Valley Association.
- 1.6.7 Only one user, Pinn, states that they were challenged over use of the lane. Having used the route since 1999 she writes that she: '*was shouted at after questioning tree felling after April – told I shouldn't use path – from field owned by Chris Drake*'. Two other users, Salter and Cole, state that they had heard of others being challenged but neither provided any further details.
- 1.6.8 Anker states that a five bar gate was fastened back across the application route at point B for about a week when work was being done in the adjacent field (owned by Mr Drake) sometime around May 2020. She also states that Mr Drake '*got multiple signs erected*' at point B, though it appears that the signs referred to are the waymarkers for the existing Footpath No. 17, albeit the fingerpost was furnished with three additional waymarker arrows. Mr Drake's company, Land Solutions, undertake maintenance work on the PROW network on behalf of DCC and so it is likely that he was responsible for erecting these. However, these waymarkers do correctly sign the existing public footpath and although somewhat over the top they do not actively discourage or suggest that use of the application route is prohibited.
- 1.6.9 Mr Swinburne-Johnson states that until approximately 2005 the farmer at Hoppins Farm, Mr Kenny Brake, used to drive his cattle down the application route.

1.7 Landowner and rebuttal evidence

- 1.7.1 The application route itself is shown as unregistered on the Land Registry. There are five adjacent plots and the owners were all sent details of the application along with landowner evidence forms.
- 1.7.2 The only landowner evidence form submitted during consultation was from Mr Thomas Coleman of Harlens, the bungalow situated at the western end of the application route. Mr Coleman states that he has owned the property since

October 2014 and believes it to be a public right of way – he considers it to be a *'green lane traditionally used by all to access Footpath 17'*.

- 1.7.3 Mr Coleman states that he has seen people using the route, writing *'I witness people using the path on a daily basis, usually walkers, dog walkers and folk wishing to go to Harpford village'*. In the further information section, he writes that *'I witness small numbers walking on a daily basis and suspect there are a lot more I don't see'*. He has never stopped or turned anyone back, never given or received permission to use the route and never obstructed the route or seen/noticed any signs on the route. He has used the route himself, it being his preferred route to Harpford Church and Harpford Hall, especially in the drier months of the year.
- 1.7.4 Mr Chris Drake, whose company Land Solutions undertake maintenance work on the PROW network for DCC, owns the land adjacent to the south of the application route. Though it appears that he briefly challenged public use of the application route in 2020 he has not done so since and has not returned his landowner evidence form to offer any evidence of rebuttal prior to his initial challenge.

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. User evidence forms suggest that Mr Drake challenged some users in May 2020 and possibly physically obstructed the route (at least temporarily) at point B by fastening a field gate back across the route. Although the challenge does not appear to have been particularly strong, with many users not being exposed to it, it quickly became known to Ted Swan, the Parish Council volunteer footpath warden, who rapidly spread news of it and gathered user evidence, promptly submitting a Schedule 14 application in June 2020. It therefore seems reasonable to accept that the date on which the public right to use the way was challenged was May 2020 and that the relevant period is from May 2000 to May 2020.

- 1.8.2 The user evidence provided by the forms undoubtedly shows that use was as of right. During the relevant period the user evidence is clear that use was exclusively without force, secrecy or permission. Many of the users refer to the route being well-trodden and seeing other people using it, which is corroborated by the one landowner who returned their landowner evidence form. Use was of a quantity and frequency to be expected for a route of this character – rural though not remote – and there is no evidence that use was interrupted during the relevant period. User evidence extends back to the 1960s and is continuous up until May 2020 and then beyond and has been exclusively on foot.

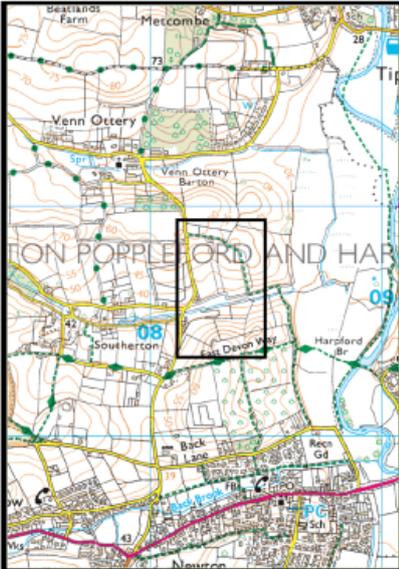
- 1.8.3 No evidence has been provided or discovered to suggest that any landowners displayed any intention not to dedicate the application route. On the contrary, the only landowner to respond has done so in support of the application, having believed the route to be public since purchasing his property in 2014.
- 1.8.4 The plentiful evidence of use as of right on foot by the public, covering the relevant period without interruption, and the lack of any evidence of intention not to dedicate, strongly supports the conclusion that statutory dedication has occurred.
- 1.8.5 Common Law
The only other basis for its possible consideration as a highway is if there was any other significant supporting evidence from which a 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.
- 1.8.6 Historic mapping shows that the application route has physically existed since at least the early 1800s. Ordnance Survey 1" mapping consistently shows the application route in the same manner as other minor roads and tracks, though they do not provide any evidence of public status. The application route is shown excluded from titheable plots on the Venn Ottery Tithe Map and is again shown excluded from surrounding hereditaments on the Finance Act Plans of 1910. Both of these indicate that the route was considered likely to have some sort of public status at the time, most likely at bridleway status or higher.
- 1.8.7 Mapping at a larger scale, from the Ordnance Survey First Edition 25" up until the present day, shows the route as an enclosed track with no obstructions present. It is shown as having the same physical characteristics as it does today, with aerial photography also depicting it as an enclosed track with varying levels of hedge/tree growth. Highway maintenance records and handover maps show that from the second half of the twentieth century the route has not been considered to be, or recorded as, a public highway by any of the highway authorities. The application route is also missing from the Definitive Map Process and Parish Council or DCC records. It can therefore be concluded that the documentary evidence alone is not strong enough to support the existence of public rights along the application route. However, from the historic mapping it appears likely that the route has been open and available for use by the public since the early nineteenth century.
- 1.8.8 The user evidence available shows that the application route has been used by the public since the early 1960s – evidence stretching back earlier is unlikely to be forthcoming simply because of the required age of the user. Use has been unequivocally as of right and would have been obvious to the landowner(s). Historic mapping shows no obstructions to the route and so raise the possibility that it has always been open and available for use. Tithe map and Finance Act evidence supports the claim that the route was considered to be public (or at least not considered privately owned) and therefore available for use by the public in the nineteenth and early twentieth centuries. In the almost 60-year

period covered by the user evidence there is no evidence to suggest any landowner took any actions that could be construed as demonstrating a lack of intention to dedicate. At the same time, the user evidence suggests that public use along the enclosed and physically well-defined track would have been highly visible to the landowners.

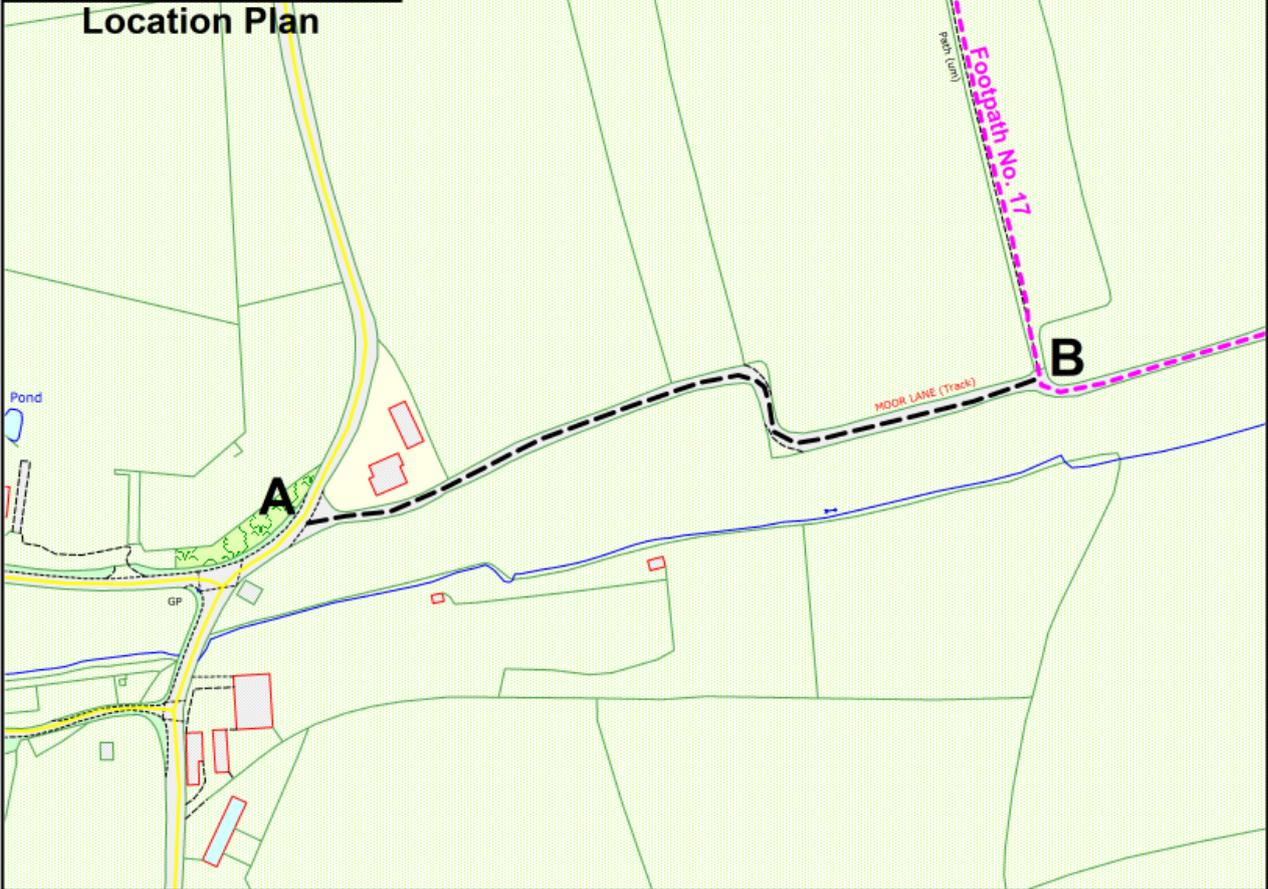
- 1.8.9 The evidence when taken as a whole is therefore supportive of implied dedication at common law having occurred, with the landowners making no objection to use of the application route by the public on foot over more than half a century and likely much longer.

1.9 Conclusion

- 1.9.1 Assessment of the evidence, in conjunction with other historical records, is considered sufficient to support the claim that public rights subsist on the balance of probabilities. Accordingly, the recommendation is that an Order be made to record a Footpath in respect of this application.



Location Plan



Map ref: SY 0817 9056/SY 0842 9061

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DEVON COUNTY COUNCIL
 Newton Popleford & Harford parish

Informal Consultation:
 Schedule 14 application, claimed footpath at
 Moor Lane, Southerton

Drawing number: HIW/PROW/22/08

Date: Jan 2022

Scale: 1:2,500 @A4

Drawn by: TCG

Notation	
Claimed Footpath	----- (270m)
Existing Footpath	-----

Meg Booth

CHEIF OFFICER FOR HIGHWAYS, INFRASTRUCTURE DEVELOPMENT AND WASTE

