

**Definitive Map Review
Parish of East Down – Part 1**

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

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

Recommendation: It is recommended that:

- (a) no Modification Order be made in respect of Proposal 1, as shown on drawing number HIW/PROW/16/38; and that**
- (b) a Modification Order be made to modify the Definitive Map and Statement by adding a bridleway between points C – D as shown on drawing number HIW/PROW/16/39 (Proposal 2).**

1. Introduction

This report examines two claims submitted by the Trail Riders Fellowship in February 2006 in the parish of East Down, one of which also affects Marwood parish.

2. Background

The original survey under s. 27 of the National Parks and Access to the Countryside Act 1949 revealed 30 footpaths and 3 bridleways, which were recorded on the Definitive Map and Statement with a relevant date of 1st May 1958.

The review of the Definitive Map, under s.33 of the 1949 Act, which commenced in the late 1960s but was never completed, produced a number of proposals for change to the Definitive Map at that time. The Limited Special Review of RUPP's, carried out in the 1970s, did not affect the parish.

The following orders and agreements have been made and confirmed:

Devon County Council (Footpath No. 19, East Down) Public Path Diversion Order 2003; and Devon County Council (Footpath No. 17, East Down) Public Path Diversion Order 2010.

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

The current Review was started in 2011 with informal consultation on a number of proposals carried out in 2016 for modification of the Definitive Map and Statement.

This is the first report for the Definitive Map Review in East Down parish. A further report will deal with a third modification proposal, with three further proposals for diversions and extinguishment being dealt with under delegated powers.

3. Proposals

Please refer to the appendix to this report.

4. Consultations

General consultations have been carried out with the following results:

County Councillor Davis	– no comment
East Down Parish Council	– comments included in report
Marwood Parish Council	– comments included in report
North Devon Council	– no comment
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	– support the proposals

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

5. Financial Considerations

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

6. Legal Considerations

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

7. Risk Management Considerations

No risks have been identified.

8. Equality, Environmental Impact and Public Health Considerations

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

9. Conclusion

It is recommended that no Modification Order be made in respect Proposal 1, but that a Modification Order be made in respect of Proposal 2.

10. Reasons for Recommendations

To undertake the County Council's statutory duty under the Wildlife and Countryside Act 1981 to keep the Definitive Map and Statement under continuous review and to progress the

parish by parish review in the North Devon area.

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Electoral Division: Combe Martin Rural

Local Government Act 1972: List of Background Papers

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Background Paper	Date	File Ref.
Correspondence Files	Current	DMR/EAST DOWN

cg070217pra
sc/cr/DMR Parish of East Down
05 240217

Appendix I To HIW/17/8

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.

The joint judgement for the cases of *R. (on the application of Godmanchester Town Council) v Secretary of State for the Environment, Food and Rural Affairs* and *R. (on the application of Drain) v Secretary of State for the Environment, Food and Rural Affairs (2007)* dealt with whether the landowners had shown "sufficient evidence" that they had no intention during the relevant 20-year period to dedicate the land as a public path. One of the issues for determination was whether the "intention" in s.31(1) had to be communicated contemporaneously to members of the public using the way, or whether an intention held by the landowner but not revealed to anybody could constitute "sufficient evidence".

This case law held that upon the true construction of s.31(1), "intention" meant what the relevant audience, namely the users of the way, would reasonably have understood the landowner's intention to be. The test was objective: the reasonable user would have to understand that the landowner was intending to disabuse him of the notion that the land was a public highway. Outside the criminal law and parts of the law of torts, it was common to use the word "intention" in an objective sense. The presumption of dedication at common law involved a dialogue between the landowner and the public. A landowner had to communicate his intention to the public in some way if he was to satisfy the requirements of the proviso.

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 places a duty on the County Council to keep the definitive map and statement under continuous review and to make such modifications as appear to be requisite.

Specifically, 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.

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

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

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

The judgement in the case of *R. (on the application of Winchester College) v Hampshire County Council (2008)* however, found that for such exceptions to be relevant the application must fully comply with the requirements of paragraph 1 of Schedule 14 to WCA 81. It is appropriate therefore firstly to determine whether or not the claimed vehicular rights subsist and, secondly, whether or not any exceptions apply; if vehicular rights subsist but the exceptions are not engaged then the appropriate status is restricted byway. Such claims may also be considered for a lower status.

B. Definition of Ratione tenurae Roads

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

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

1 Proposal 1: Claimed upgrade of Bridleway No. 22, East Down to a byway open to all traffic along Rookbear Lane between Gipsy Lane and the Marwood parish boundary, as shown between points A – B on plan HCW/PROW/16/38.

Recommendation: That no Modification Order be made in respect of Proposal 1.

1.1 Background

1.1.1 The claim is one of a number of Schedule 14 applications submitted by the Trail Riders Fellowship in response to the proposed Natural Environment and Rural Communities Act 2006 (NERC Act). The NERC Act would restrict the ways that new rights of way for motorised vehicles in the countryside could be created or recorded. A right for motor vehicles was preserved under the NERC Act if a Schedule 14 Application, that is compliant with the regulations for Schedule 14 applications under the Wildlife & Countryside Act 1981, had been made prior to 20 January 2005 or the surveying authority has made a determination of an application for a Byway open to all traffic (BOAT) before 2 May 2006.

1.1.2 The application in question was however made in November 2005 which was after 20 January 2005 and therefore does not engage this particular exception to extinguishment of rights for motorised vehicles.

1.1.3 In line with County Council policies, determination of the application was deferred, to be dealt with as part of the parish-by-parish Definitive Map Review, by which the County Council carries out its statutory duty to keep the definitive map and statement under continuous review. It was included in the parish review consultation as a proposal for the addition of a BOAT, as originally applied for, as there are other limited exemptions in which vehicle rights may be preserved.

1.2 Description of the Route

1.2.1 The route starts at point A, at its junction with Gipsy Lane and the county road also known as Rookbear Lane, and proceeds generally southwards along the enclosed lane passing northwest of Lower and Higher Viveham to meet the county road at the parish boundary with Marwood at point B.

1.3 Documentary Evidence

1.3.1 Ordnance Survey draft drawings, 1804-5. Ordnance Survey maps do not provide evidence of the status of this route but rather its physical existence over a number of years. Though these early Ordnance Survey maps did not carry the standard disclaimer, it applies retrospectively. It states that “the representation on this map of a road, track or footpath is no evidence of a right of way”.

1.3.2 On these early draft drawings at a scale of 2” to 1 mile, the route is shown as an enclosed lane running from the southern end of the unenclosed Race Ground and Churchill Downs (commons) passing to the northwest of Viveham and past West Gate to the Marwood parish boundary.

1.3.3 Ordnance Survey mapping, 1809-1962. Ordnance Survey maps do not provide evidence of the status of this route but rather its physical existence over a number of years. These early Ordnance Survey maps carried a disclaimer, which states that: "The representation on this map of a road, track or footpath is no evidence of a right of way".

- 1.3.4 From the 1" to 1 mile scale mapping of 1809 onwards, the proposal route, between points A and B, is shown.
- 1.3.5 From the 1st Edition 25" mapping of 1885 onwards, the proposal route between points A and B, annotated as Rookbear Lane, is shown as an enclosed lane with one boldened edge, verges, open and available, with no distinction in surface from the section of Rookbear Lane currently recorded as county road and the other roads meeting at Bowden Corner, and that heading to Muddiford in Marwood parish.
- 1.3.6 Race Ground and Churchill Downs Inclosure Act and Award, East Down, 1811 -23. Inclosure awards can be evidence of repute of highways at the time they were made. Their significance as evidence depends on the powers given to the relevant Inclosure Commissioners. Awards and maps may provide supporting evidence of other matters, such as the existence of status of a route adjacent to but outside the awarded area. Evaluation of such evidence is considered in the context of the relevant inclosure act.
- 1.3.7 An Act for Inclosing Lands in the Parish of East Down received Royal Assent on the 21st May 1811. It recited the 3rd, 4th, 6th, 7th, 8th, 10th, 14th, 18th, 19th, 22nd, and 35th sections of the 1801 Inclosure Consolidation Act.
- 1.3.8 The award of lands was completed in 1823 and deposited with the Clerk of the Peace in 1826.
- 1.3.9 The northern end of the route from point A is shown coloured and as a direct continuation of the public carriage road southwards from Bowden Corner set out and made up under the Inclosure Award, connecting with the proposal route and indicating that it was considered an existing public highway at that time.
- 1.3.10 Cary's Map, 1821. Besides the Ordnance Survey, Cary was the leading map publisher in the 19th century. He maintained a high standard of maps, using actual trigonometric surveys and other up to date source materials including parliamentary documents, which was reflected by his employment to survey the 9,000 miles of turnpike roads in 1794.
- 1.3.11 The route is shown as an enclosed uncoloured road running from the southern end of the unenclosed Race Ground and Churchill Downs (commons) passing to the northwest of Viveham and past West Gate to the Marwood parish boundary.
- 1.3.12 East Down Surveyors of Highways Accounts, 1821-37. Prior to the formation of District Highway Boards in the early 1860s and the later Rural District Councils (1894) the responsibility for the maintenance of public highways generally belonged to the parish and was discharged by elected surveyors of highways. Relevant Acts of 1766, 1773 and 1835 included the provision for the use of locally available materials and there was a statutory requirement upon parishioners to fulfil a fixed annual labour commitment. The final responsibility for maintenance lay with the local Surveyor of Highways who was obliged to keep a detailed account of public monies expended.
- 1.3.13 The parish roads are not frequently named in the records; however there are several references to West Gate Lane, which may be part of the claimed route, in 1829, 1831 and 1836, though no references to Rookbear Lane. Works carried out included general repairs and cleaning of the lane and its watertables.

- 1.3.14 Greenwood's Map, 1827. These well-made maps were produced using surveyors and a triangulation system, and are considered to be reasonably accurate.
- 1.3.15 The route is shown as a cross road running from the southern end of the unenclosed Race Ground and Churchill Downs passing to the northwest of Viveham and past West Gate to the Marwood parish boundary. Rights of way are generally not shown as the map is too small a scale.
- 1.3.16 East Down Tithe Map and Apportionment, 1840-3. 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 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 status. Public footpaths and bridleways are rarely shown as their effect on the tithe payable was likely to be negligible.
- 1.3.17 The East Down tithe map is a first class map surveyed at a scale of 3 chains to 1 " by John Woodmass of Alston, Cumberland, who did a number of tithe surveys in Devon and Cornwall. Being first class, it is a legal and accurate record of all matters shown. Land that was not subject to tithes was generally accepted to be either public, glebe or crown estates. In many cases public roads are coloured sienna as prescribed by Lieutenant Dawson, a military surveyor with the Ordnance Survey, to the Tithe Commissioners.
- 1.3.18 The route is included in lot 920, which includes all roads in the parish, though a short section prior to the Marwood parish boundary is not numbered.
- 1.3.19 East Down Vestry Minutes, 1843 onwards. The Minutes can provide information about the management and maintenance of a route and the Parish's views regarding the public highways in the parish. A public body such as a Vestry had powers only in relation to public highways through the appointed Surveyor of Highways, which they had a responsibility to maintain.
- 1.3.20 There are no references to the route, along Rookbear Lane, probably because separate records were kept by the Vestry's Surveyor of Highways, as dealt with above.
- 1.3.21 East Down Parish Council Minutes, 1894 onwards. The Minutes can provide information about the management of the route and the Parish's views regarding the public highways in the parish. A public body such as a Parish Council had powers only in relation to public highways which they had a responsibility to maintain.
- 1.3.22 There are no references to the proposal route, between points A – B along Rookbear Lane. It appears from these and other highway records that the majority of the parish's roads were repaired either as 'ratione tenurae' or occupation/accommodation roads. The word '*ratione*' is defined as meaning '*by reason of*' and the phrase '*ratione tenurae*' is likewise defined as '*by reason of one's tenure*', therefore adjacent landowners and tenants were responsible for their maintenance.
- 1.3.23 Barnstaple Rural District Council minutes, 1894-1974. As the minutes are a public record of the perception of the Council elected by the local community at that time,

they probably also represent the perception of local residents. Therefore they may carry significant evidential weight.

- 1.3.24 On the 24th May 1895 a letter was read from East Down Parish Council regarding the dangerous and disgraceful state of the highways in the parish and asking what steps could be taken to put them into repair. The matter was referred to the Surveyor to report back on.
- 1.3.25 On the 28th June 1895 the Surveyor reported on the state of the roads in East Down parish. He had viewed the roads repaired '*ratione tenurae*' and concluded that seven routes including that from '*Twist Head to West Gate*' which included the proposal route between points A – B, were in a very unsatisfactory state of repair. The remainder were in a fair state of repair. It was resolved that the persons responsible for repair of the listed roads should be given notice to put them into proper repair.
- 1.3.26 Ordnance Survey Object Name Books, 1903. A number of other documents were produced in connection with the production of Ordnance Survey maps which can be of assistance in providing supporting evidence of the existence and status of some routes. Information on named routes may be found in the relevant Object Name Books, which provided details of the authorities for named features.
- 1.3.27 The proposal route, Rookbear Lane is included, with its spelling confirmed by Mr Richards, the District Surveyor. It is described as '*a lane extending from Bowden Corner to the hamlet of Muddiford. It is kept in repair by the occupiers.*' An additional entry also described the route as an '*occupation road from Gipsy Lane to the river a few chains northwest from West Plaistow*'. However this latter description is struck through in favour of the former.
- 1.3.28 Finance Act records, 1909-10. The Finance Act imposed a tax on the incremental value of land which was payable each time it changed hands. In order to levy the tax a comprehensive survey of all land in the UK was undertaken between 1910 and 1920. It was a criminal offence for any false statement to be knowingly made for the purpose of reducing tax liability. If a route is not included within any hereditament there is a possibility that it was considered a public highway, though there may be other reasons to explain its exclusion.
- 1.3.29 A Form 4 was completed by landowners and the information copied into Field Books before valuers went into the field and inspect and assess the hereditaments. Information from the Field Books and notes was then transferred into the Valuation Books. The Form 4 records have generally not survived.
- 1.3.30 The proposal route between points A and B along Rookbear Lane is totally excluded from any hereditament.
- 1.3.31 Bartholomew's Maps, 1911-32. These maps were designed for *tourists and cyclists* with the roads classified for *driving and cycling purposes*. They were used by and influenced by the Cyclists Touring Club founded in 1878 which had the classification of First Class roads, Secondary roads which were in good condition, Indifferent roads that were passable for cyclists and other uncoloured roads that were considered inferior and not to be recommended. Additionally, Footpaths and Bridleways were marked on the maps as a pecked line symbol. Cyclists were confined to public carriage roads until 1968. The half-inch scale does not allow all existing routes to be shown, omitting some more minor routes. The purpose of these maps was to guide the traveller along the routes most suitable for their mode of transport.

- 1.3.32 The maps dating between 1924 and 1936 depicts the route along Rookbear Lane between points A and B consistently as an Inferior Road, which is the lowest category the maps show. The majority of those roads shown in the parish are included in that category.
- 1.3.33 Bacon's Maps, circa 1920s. The quarter-inch scale does not allow all existing routes to be shown, omitting some more minor routes. The purpose of these maps was to guide the traveller along the routes most suitable for their mode of transport.
- 1.3.34 The proposal route along Rookbear Lane between points A and B is shown as an '*Other road*'.
- 1.3.35 Aerial Photography, 1946-2007. The route between points A – B is open and available and has similar characteristics to other public highways in the parish particularly those parts which were pre-tarmacadam.
- 1.3.36 Handover Records, circa 1947. These records are considered to be a positive indication of what the highway authority believe the status of roads included to be, and are evidence of a highway authority's acceptance of maintenance responsibility, a commitment not normally undertaken lightly. The lack of a road's inclusion does not necessarily suggest it could not have been a public highway. However such records were for internal use and did not purport to be a record of rights.
- 1.3.37 The proposal route between points A and B along Rookbear Lane is not included. However, the connecting highways between Bowden Corner and Twisthead Cottage and the B3230 at Muddiford to the East Down/Marwood boundary stone near Westgate are shown.
- 1.3.38 East Down Parish Survey, 1950. The compilation process set out in the National Parks and Access to the Countryside Act 1949 involved a substantial amount of work and such records are considered a valuable source of information. The rights of way included in the process had to pass through a draft, provisional and definitive stages with repeated public consultations.
- 1.3.39 The proposal route along Rookbear Lane between points A and B was surveyed as a bridleway running along a private accommodation road and added as a bridleway by the County Surveyor after a Parish Council meeting held on the 16th May 1957.
- 1.3.40 UCR Mileage Register, circa 1950s-70s. This register was used in conjunction with the Handover Records once all delegated highways had been returned to the County Council from borough and district councils.
- 1.3.41 The lane from Bowden Corner to Twisthead and from Muddiford to the Marwood/East Down boundary stone south of Westgate are shown. The route between points A and B along Rookbear Lane is not included.
- 1.3.42 Definitive Map Review records, 1970s-80s. The route along Rookbear Lane between points A and B was the subject of correspondence from the Auto Cycle Union in 1974 to the Secretary of State objecting to the Limited Special Review to reclassify Roads used as public paths (RUPPs) because of the lack of upgrading of certain routes in Devon. They objected to the fact that the route along Rookbear Lane had not been upgraded to a byway, based on their motor vehicle user evidence.
- 1.3.43 Land Registry records, 2016. The route along Rookbear Lane between points A and B is not registered to any owner throughout its entire length.

1.3.44 Site Photographs, 1998 onwards. The photographs show the route along Rookbear Lane between points A and B is open and available, and usable by vehicles.

1.4 User Evidence

1.4.1 Three TRF run record forms were received in support of the application detailing use of the route on motorcycles, twice in 1986 and once in 1987. One of the riders recalled that the farmer was surprised when a bridleway finger post was erected.

1.5 Landowner Evidence

1.5.1 Landowner evidence forms were received from four adjacent landowners.

1.5.2 Messers NR and RW Bowden of Higher Viveham own most of the land adjacent to the route, and it has been in their family's ownership for 66 years. They believe that the route is public on foot and with horse, and see users on a daily basis. They have stopped motorists as they consider the lane to be unsuitable for motor vehicles.

1.5.3 Mr R Bowden of Westgate Willows has owned land adjacent to the route for 98 years and tenanted some for 71 years. He has seen the public using the route daily on foot and with horses. He has stopped motorists as the lane is unsuitable for motor vehicles. Any change of use will affect those living along the lane or using it.

1.5.4 Mr and Mrs Thomas of Westgate have lived adjacent to the route for 23 years, and see horse riders and walkers daily, and occasionally cyclists. They believe it is a bridleway and that it is unsuitable for normal vehicles, though useable with farm off road vehicles.

1.5.5 Mrs Baxter of Hillcrest, Twisthead has lived adjacent to the route since 1971 and believes it to be a public cart track. She has seen horse riders, motorcyclists, and 4x4 vehicles along with farm vehicles using the route for recreation and access. She does not consider it to be suitable for normal vehicles.

1.6 Rebuttal Evidence

1.6.1 East Down Parish Council do not support the claimed upgrade and wish the route to remain a public bridleway.

1.7 Discussion

1.7.1 Statute –Section 31 Highways Act 1980. The application for the route to be upgraded was not made in response to any specific event acting as a significant challenge to its use, particularly in vehicles. It was not submitted as the result of any specific action taken by a landowner to obstruct or prevent access to the route other than on foot and horseback from a particular date, but was made in advance of the effects of new legislation. There is, therefore, no evidence of any significant actions by a landowner having called into question use of the route other than as a bridleway at a specific time for consideration under statute law.

1.7.2 Under section 31(2) of the Highways Act 1980, as amended by Section 69 of the Natural Environment and Rural Communities Act 2006, the Schedule 14 application is sufficient to bring a right of way into question. It would provide the date of an event that can be taken as challenging the public's right to use a route, but only if there are no more significant earlier events or actions having done so at a specific earlier time

that may have led to or resulted in the application being made. There is no evidence of any previous significant actions in this case to provide an earlier date for consideration of evidence under statute law. It means that the period for considering the application on any evidence of use is the 20 year period from 1985 to 2005.

- 1.7.3 No user evidence forms have been submitted in support of the Schedule 14 application between points A – B along Rookbear Lane, only TRF run forms which contain limited information regarding the use which appears to be occasional at the most, during the 1980s. It is not known if they were challenged or saw any notices challenging their use.
- 1.7.4 No landowner claims to own the route between points A – B along Rookbear Lane and it is not registered on Land Registry. Evidence was received from four adjacent landowners who have knowledge of the proposal route between points A – B of over 70 years. Public use with motor vehicles, 4x4s and motorbikes has been seen, along with regular walkers, horse riders and cyclists. Several landowners have stopped motorists when seen as they consider the route to be unsuitable for normal motor vehicles. There is however, insufficient evidence of a lack of an intention to dedicate the route between points A – B with vehicular rights.
- 1.7.5 Vehicle use must be prior to 1930 to be considered legal and under the Natural Environment and Rural Communities Act 2006; the motor vehicular evidence does not satisfy any of the exceptions. Consequently, any unrecorded mechanically propelled vehicular rights have been extinguished. Therefore, the highest status the route between points A – B along Rookbear Lane could be considered to be is a restricted byway.
- 1.7.6 The Parish Council also does not support the application and wishes the route between points A – B along Rookbear Lane to remain as a public bridleway.
- 1.7.7 Though there has been no event prior to the Schedule 14 application to call the public's right to use the route between points A – B along Rookbear Lane into question and insufficient evidence of a lack of intention to dedicate, there is also insufficient evidence to demonstrate public rights higher than that of a bridleway during the statutory 20 year period. Consequently, the application fails under statute.
- 1.7.8 However, the claim for higher rights along the route may also be considered at common law. Evidence of dedication by the landowners can be express or implied, and an implication of dedication may be shown at common law if there is evidence; documentary, user, or usually a combination of both, from which it may be inferred that a landowner has dedicated a highway and that the public has accepted the dedication.
- 1.7.9 Common Law. On consideration of the application at common law, the historical mapping shows that the route has existed since at least 1804-5, as shown on the Ordnance Survey small scale mapping, and consistently shown as a cross road on Cary's map of 1821 and Greenwood's map of 1827
- 1.7.10 At Common Law, all highways existing prior to the Highways Act of 1835 were automatically repairable 'prima facie' by the parish unless the responsibility could be proven as lying elsewhere. This liability remained so long as the highway existed or until the liability was taken away or transferred by statute.
- 1.7.11 The East Down Tithe Map which is first class and considered as a true record of matters relating to the purposes for which the map was designed, includes the route

between points A – B along Rookbear Lane as included in the parish roads.

- 1.7.12 From the various highway authority records dating from 1821, it appears that many roads in the parish were considered '*rationae tenure*' or '*public occupation/accommodation roads*', and maintained by adjacent landowners and tenants.
- 1.7.13 In the past, public highways were generally named after places they went to or past, or their purpose. Though there are no references to Rookbear Lane specifically, there are references to West Gate Lane, which may be the southern section of the route southwest of Viveham approaching point B, in the Surveyors of Highways Accounts during the 1820s and 1830s, with a reference in 1895 to the serving of notice to those responsible for the repair of the '*rationae tenure*' road between Twist Head (north of point A) and West Gate (point B), and others, by the Barnstaple Rural District Council in the parish.
- 1.7.14 Ordnance Survey large scale mapping dating from 1885 shows the route shown in the same manner as other recorded public highways, with one side depicted with a boldened line. Early 20th century road maps such as Bartholomew's include the route as an inferior road, indicating its reputation as a road which the public could use. Most roads in the parish were annotated in this manner.
- 1.7.15 On the Finance Act mapping, the route between points A – B along Rookbear Lane is excluded from hereditaments, as it also is on modern Land Registry records.
- 1.7.16 The inclusion of the route between points A – B along Rookbear Lane on the Definitive Map as a public bridleway was delayed until 1957, though no reason is known for this and the Parish Council minutes do not give any indication.
- 1.7.17 No user evidence forms have been submitted in support of the Schedule 14 proposal between points A – B along Rookbear Lane, only TRF run forms which contain limited information regarding the use which appears to be occasional at the most, during the 1980s. It is not known if they were challenged or saw any notices challenging their use.
- 1.7.18 The TRF in their application state that this road has formally been recorded as a Road used as a Public Path (RUPP); however, this is incorrect.
- 1.7.19 No landowner claims to own the route between points A – B along Rookbear Lane and it is not registered on Land Registry. Evidence was received from four adjacent landowners who have knowledge of the route between points A – B of over 70 years. Public use with motor vehicles, 4x4s and motorbikes has been seen, along with regular walkers, horse riders and cyclists. Several landowners have stopped motorists when seen as they consider the route to be unsuitable for normal motor vehicles. There is however, insufficient evidence of a lack of an intention to dedicate the route between points A – B with vehicular rights.
- 1.7.20 As stated at para 1.7.5, any unrecorded mechanically propelled vehicular rights have been extinguished as a consequence of the NERC Act. Therefore, the highest status the proposal route between points A – B along Rookbear Lane could be considered to be is a restricted byway.
- 1.7.21 The TRF also raised the case of *Eyre v New Forest Highway Board (1892)* with regard to the route being a public road because it was a pre-1835 existing highway. However, the route between points A – B along Rookbear Lane is already recorded

as a public highway, though with the status of bridleway.

- 1.7.22 Their other point regarding the case relates to the route connecting with cul-de-sac county roads at both ends (points A and B) and that, therefore, the presumption is that a higher status than that of bridleway could be presumed of the route. However, the historic highway authority records evidence from the 19th century do not sufficiently demonstrate that it had the same status/maintenance liability as the routes it connected with at points at points A and B, though all could be used by the public and were considered to carry some public rights.
- 1.7.23 The Parish Council does not support the claim for a byway open to all traffic and wishes the route between points A – B along Rookbear Lane to remain as a public bridleway.

1.8 Conclusion

- 1.8.1 On consideration of all the available evidence, on the balance of probabilities, it is considered that the documentary evidence demonstrates that the route between points A and B along Rookbear Lane has existed since at least 1804-5. It has been open and available since that time, and appears to have been considered public and part of the parish highway network, as shown by the mapping evidence, 19th century highway authority records, and early 20th century records such as the Finance Act.
- 1.8.2 At Common Law, all highways existing prior to the Highways Act 1835 were automatically repairable 'prima facie' by the parish unless the responsibility could be proven to lie elsewhere. This liability remained, so long as the highway existed or until the liability was taken away or transferred by statute.
- 1.8.3 Research into Highway Board, Rural District Council and Parish Council minutes has indicated that '*ratione tenurae*' roads were from the late 19th century types of road expected to be used by the public, but with the adjacent landowners/occupiers of the road/lane being responsible for the maintenance of these roads. The majority of the parish's highways were maintained in this manner.
- 1.8.4 The highway authority records of the early 19th century refer to both the southern section of the route, from southwest of Viveham to point B, where it meets the county road at the Marwood and East Down parish boundary, as well as the whole of the route between points A and B, as a public highway repaired by adjacent landowners.
- 1.8.5 User evidence, such has been received, relates to use by motor vehicles, both 4x4 and motorcycles, but all of which is modern. Vehicle use must be prior to 1930 to be legal and under the Natural Environment and Rural Communities Act 2006, the motor vehicular evidence does not satisfy any of the exceptions, and therefore, any unrecorded mechanically vehicle rights are extinguished. Consequently, the highest status the route between points A – B along Rookbear Lane that can be considered to be is a restricted byway.
- 1.8.6 However, the evidence when taken as a whole, is not considered sufficient to show that a public highway shown in the Definitive Map and Statement of a particular description ought to be there as a highway of a different description.
- 1.8.7 It is therefore recommended that no Modification Order should be made in respect of Proposal 1, and that Bridleway No. 22, East Down remains on the Definitive Map and Statement unaltered.

2. **Proposal 2: Claimed addition of a byway open to all traffic between the county roads at Bowden Corner and Whitefield Hill, as shown between points C – D on plan HCW/PROW/16/39.**

Recommendation: That a Modification Order be made to add a bridleway to the Definitive Map and Statement between the county roads at Bowden Corner and Whitefield Hill, in respect of Proposal 2.

2.1 Background

- 2.1.1 As part of the Definitive Map Review in Marwood parish in 1999 a proposal was received to add a bridleway between Whitefield Hill in Marwood and Bowden corner in East Down parish (Proposal 2). This was included in an informal consultation and reported to the Public Rights of Way Committee in January 2000. Consequently, a Modification Order was made which received three objections including one from Mr Berry of Honeywell Farm.
- 2.1.2 The objected Order was sent to the Planning Inspectorate for determination, where it was considered by written representations and confirmed in May 2002. However, Mr Berry challenged the Inspector's decision on a technicality at the High Court. Consequently, the Order was quashed in October 2002.
- 2.1.3 As the Order was quashed on a technical consideration by the Inspector rather than the actual evidence, it was considered that the Order should be re-made. This was authorised by the Public Rights of Way Committee in January 2003.
- 2.1.4 The Order was re-made in February 2003 and again attracted the same objectors. It was submitted to the Planning Inspectorate in July 2003 for determination. It was considered that this should be by a local public inquiry which was held in February 2004.
- 2.1.5 The Inspector issued an interim decision in May 2004 confirming the Order subject to modifications requiring consultation, upgrading the Order from bridleway to byway open to all traffic. This also attracted objection from Mr Berry. The matter was decided by means of written representations, confirming the Order as originally made in July 2005.
- 2.1.6 Mr Berry appealed against the decision to the High Court and judgement was given in his favour, namely that there was a sufficient evidence of a lack of intention to dedicate within the relevant period, and the Order was quashed in September 2006.
- 2.1.7 In 2005 a Schedule 14 application was submitted by the Trail Riders Fellowship for the addition of the same route as a byway open to all traffic in response to the proposed Natural Environment and Rural Communities Act 2006 (NERC) to restrict the recording of rights for mechanically propelled vehicles.
- 2.1.8 As for proposal 1, the application was made after 20 January 2005 and therefore does not engage the particular exception to the extinguishment of rights for motorised vehicles in respect of certain schedule 14 applications.
- 2.1.9 Again, as with proposal 1, determination of the claim was deferred, to be dealt with as part of the parish-by-parish Definitive Map Review, by which the County Council carries out its statutory duty to keep the definitive map and statement under continuous review. It was included in the parish review consultation as a proposal for

the addition of a BOAT, as originally applied for, as there are other limited exemptions in which vehicle rights may be preserved.

2.2 Description of the Route

2.2.1 The route starts at point C at its junction with the county road, C592, at Bowden Corner and proceeds generally westwards along a track crossing Hewish Down and past the junction with the access to Honeywell Farm to point D, where it meets the county road, C460, Whitefield Hill.

2.3 Documentary Evidence

2.3.1 Ordnance Survey draft drawings, 1804-5. Ordnance Survey maps do not provide evidence of the status of this route but rather its physical existence over a number of years. Though these early Ordnance Survey maps did not carry the standard disclaimer, it applies retrospectively. It states that "the representation on this map of a road, track or footpath is no evidence of a right of way".

2.3.2 On these early draft drawings at a scale of 2" to 1 mile, an unenclosed route is shown along a similar alignment to the proposal route approximately between points C – D, which at the time was depicted as the only highway between Bowden Corner and Whitefield Hill. There is no highway shown between Bowden Corner and Indicott Cross.

2.3.3 Ordnance Survey mapping, 1809-1962. Ordnance Survey maps do not provide evidence of the status of this route but rather its physical existence over a number of years. These early Ordnance Survey maps carried a disclaimer, which states that: "The representation on this map of a road, track or footpath is no evidence of a right of way".

2.3.4 From the 1" to 1 mile scale mapping of 1809 onwards, the claimed route between points C – D is shown.

2.3.5 From the 1st Edition 25" mapping of 1885 onwards, the claimed route between points C – D is shown as an enclosed lane with one boldened edge, verges, open and available, with no distinction in surface from Whitefield Hill, and the other roads meeting at Bowden Corner, from Viveham via Rookbear Lane, from Ashelford Corner, and from Indicott Cross. The western end connecting with Whitefield Hill has been unenclosed until recent times.

2.3.6 Race Ground and Churchill Downs Inclosure Act and Award, East Down, 1811 -23. Inclosure awards can be evidence or repute of highways at the time they were made. Their significance as evidence depends on the powers given to the relevant Inclosure Commissioners. Awards and maps may provide supporting evidence of other matters, such as the existence of status of a route adjacent to but outside the awarded area. Evaluation of such evidence is considered in the context of the relevant inclosure act.

2.3.7 An Act for Inclosing Lands in the Parish of East Down received Royal Assent on the 21st May 1811. It recited the 3rd, 4th, 6th, 7th, 8th, 10th, 14th, 18th, 19th, 22nd, and 35th sections of the 1801 Inclosure Consolidation Act.

2.3.8 The award of lands was completed in 1823 and deposited with the Clerk of the Peace in 1826.

- 2.3.9 The eastern end of the proposal route from point C is shown coloured and as a direct continuation of the public carriage road between Ashelford Corner and Bowden Corner set out and made up under the Inclosure Award, between what were considered two existing public highways at that time. It would have not set out a public highway that did not connect with another or have some public purpose. The Award shows that a public carriage road was also set out along the northern section of Rookbear Lane to Bowden Corner at the junction with the proposal route, as well as a private road to the peat bogs south of what is now Dingles Farm. No route is shown at all from Bowden Corner towards Indicott Cross, along what is now a county road.
- 2.3.10 Cary's Map, 1821. Besides the Ordnance Survey, Cary was the leading map publisher in the 19th century. He maintained a high standard of maps, using actual trigonometric surveys and other up to date source materials including parliamentary documents, which was reflected by his employment to survey the 9,000 miles of turnpike roads in 1794.
- 2.3.11 A route is shown on a similar alignment to the proposal route running generally east to west along the southern edge of Hewish Down. No other route is shown connecting with Whitefield Hill.
- 2.3.12 East Down Surveyors of Highways Accounts, 1821-37. Prior to the formation of District Highway Boards in the early 1860s and the later Rural District Councils (1894) the responsibility for the maintenance of public highways generally belonged to the parish and was discharged by elected surveyors of highways. Relevant Acts of 1766, 1773 and 1835 included the provision for the use of locally available materials and there was a statutory requirement upon parishioners to fulfil a fixed annual labour commitment. The final responsibility for maintenance lay with the local Surveyor of Highways who was obliged to keep a detailed account of public monies expended.
- 2.3.13 There are frequent entries throughout the accounts regarding Whitefield Hill and its continuation northwards, Claw Lane, which linked the two turnpike roads in the area to Barnstaple and Ilfracombe. Between 1834 and 1837 there are several references to the Down, which may refer to the proposal route, but it is unclear as to the location or extent of this road.
- 2.3.14 Greenwood's Map, 1827. These well-made maps were produced using surveyors and a triangulation system, and are considered to be reasonably accurate.
- 2.3.15 The proposal route is shown as a cross road and is no longer the only route across Hewish Down from Bowden Corner, as the road between Bowden Corner and Indicott Cross is also depicted. Rights of way are generally not shown as the map is too small scale.
- 2.3.16 Marwood Vestry Minutes, 1827 onwards. The Minutes provide information about the management of a route and the Parish's views regarding the public highways in the parish. A public body such as a Vestry had powers only in relation to public highways through the appointed Surveyor of Highways historically, which they had a responsibility to maintain.
- 2.3.17 In 1888, a request was sent to the relevant Highway Board asking under what condition they would take over the parish's public occupation roads.
- 2.3.18 In 1891 it was resolved that the County Council and Parliament would be petitioned

for some redress for the grievance of repairing 15.5 miles of 'rationae tenure' roads. There is no specific reference to the proposal route.

- 2.3.19 East Down Tithe Map and Apportionment, 1840-3. 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 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.
- 2.3.20 The East Down tithe map is a first class surveyed at a scale of 3 chains to 1 " by John Woodmass of Alston, Cumberland, who did a number of tithe surveys in Devon and Cornwall. Being first class, it is a legal and accurate record of all matters shown. Land that was not subject to tithes was generally accepted to be either public, glebe or crown estates. In many case public roads are coloured sienna as prescribed by Lieutenant Dawson, a military surveyor with the Ordnance Survey, to the Tithe Commissioners.
- 2.3.21 The proposal route is not shown, but it would have passed through plot 368, listed as Common, which was part of Bowden, owned by John May Esquire and occupied by Charles Smyth. The absence of a route from a tithe map does not necessarily mean that no highway existed, but that its existence had no effect on the titheable value of the land. The roads in the parish were listed under plot number 920.
- 2.3.22 Marwood Tithe Map and Apportionment, 1840. 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 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.
- 2.3.23 The Marwood tithe map is a second class surveyed at a scale of 3 chains to 1 " by F. Cattlin, a solicitor of 39 Ely Place, Holborn, London, and is only a legal and accurate record of tithe matters. Land that was not subject to tithes was generally accepted to be either public, glebe or crown estates. In many case public roads are coloured sienna as prescribed by Lieutenant Dawson, a military surveyor with the Ordnance Survey, to the Tithe Commissioners.
- 2.3.24 The proposal route is not shown, though it would have crossed Hewish Down, plot 101 if in existence. All routes passing over Hewish Down except Whitefield Hill, which acted as a turnpike linking road, are not shown, including most of the access road to Honeywell Farm. The absence of a route from a Tithe Map does not necessarily mean that no highway existed, but that its existence had no effect on the titheable value of the land. Hewish Down is not listed as having any owners or occupiers. Roads are coloured and not numbered.
- 2.3.25 East Down Vestry Minutes, 1843 onwards. The Minutes provide information about

the management of the route and the Parish's views regarding the public highways in the parish. A public body such as a Vestry had powers only in relation to public highways through the appointed Surveyor of Highways historically, which they had a responsibility to maintain.

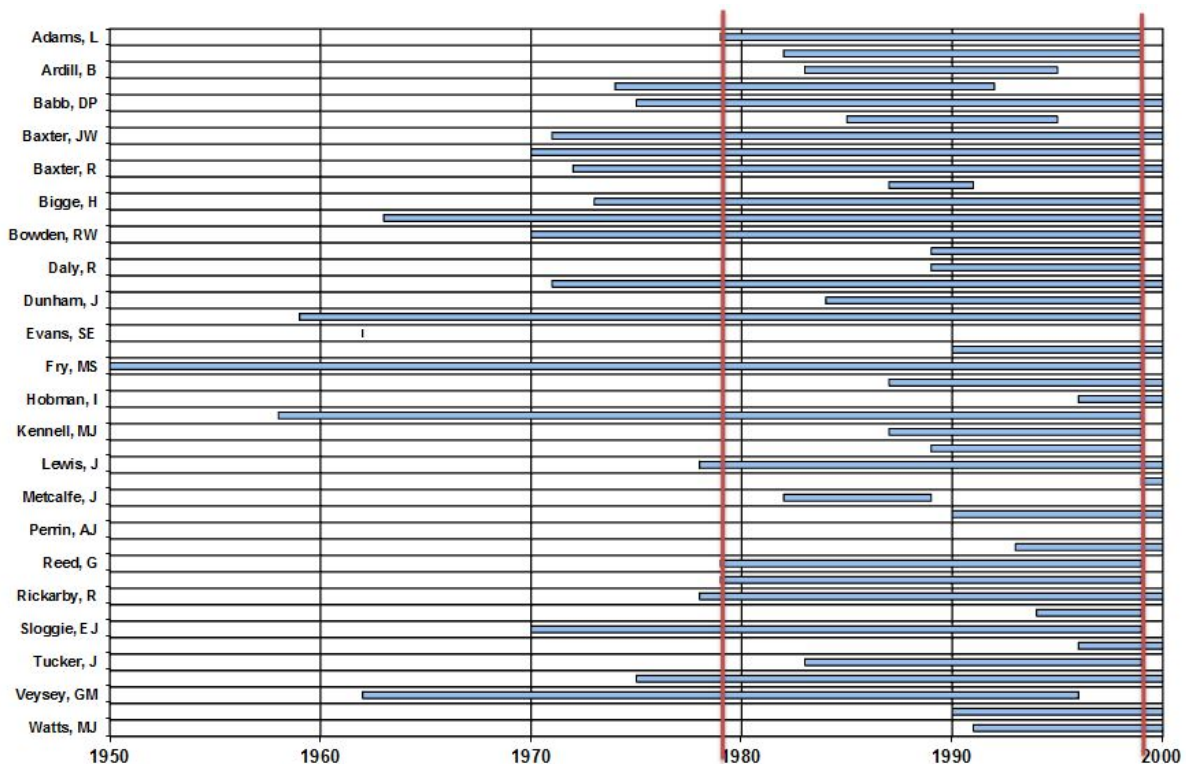
- 2.3.26 In 1848 it was discussed whether 'rationae tenure' roads should be taken over under the relevant Highways Act.
- 2.3.27 In 1850 the minutes list the lots of roads being let for repair, with lot 3 running between Bowden Corner to Ashelford. There is no reference to the proposal route, between Bowden Corner and Whitefield Hill, or its alternative to Indicott Cross.
- 2.3.28 Ordnance Survey Boundaries Branch records, 1883-5. These records contain hand-drawn strip sketch maps, remark books and journals prepared by the Ordnance Survey to record original information on public boundaries under the provisions of the Ordnance Survey Act 1841. The sketch maps (scale 12 chains to 1") and remark books describe boundary and related ground features, while the journals of inspection contain a copy of the formal notice announcing the public display of the sketch maps, together with press cuttings advertising the exhibition. They include the names and addresses of persons who inspected the maps, a record of which parts of the sketch maps were inspected, any plans with which they were compared (together with their date and nature), any differences found and the results of investigations into such differences.
- 2.3.29 The route is shown where it crosses the parish boundary between East Down and Marwood.
- 2.3.30 East Down Parish Council Minutes, 1894 onwards. The Minutes provide information about the management of the route and the Council's views regarding the public highways in the parish. A public body such as a Parish Council had powers only in relation to public highways through the appointed Surveyor of Highways, which they had a responsibility to maintain until handed over to the Rural Districts in 1888.
- 2.3.31 There are limited references to highways maintenance, though several relate to the road over Hewish Down, which may relate to the proposal route. In 1908 the very bad state of the road over Hewish Down from Bowden Corner, 'not fit for any kind of horse and cart to go over' was reported, which the District Council was requested to put into proper repair.
- 2.3.32 Marwood Parish Council Minutes, 1894 onwards. The Minutes provide information about the management of the route and the Council's views regarding the public highways in the parish. A public body such as a Parish Council had powers only in relation to public highways through the appointed Surveyor of Highways historically, which they had a responsibility to maintain until handed over to the Rural Districts in 1888.
- 2.3.33 There are limited references to highways maintenance, though several relate to Whitefield Hill and none to the proposal route. In January 1925 a great water accumulation on the road at Hewish Down was complained of, and the District Council requested to lay proper pipes to take it away.
- 2.3.34 Ordnance Survey Object Name Books, 1903. These records of the Ordnance Survey: Directorate of Field Survey contain information on object names depicted on Ordnance Survey 25-inch to a mile (1:2,500) and 6-inch to a mile (1:10,560) scale mapping of England and Wales, together with the authority for their spelling.

- 2.3.35 Hewish Down is recorded as a large expanse of cultivated land/district of fields. Some highways are listed but not all, and there is a mixture of public and private. Neither the proposal route nor the route between Bowden Corner and Indicott Cross, which is currently a county road, are included, though Bowden Corner is, and is described as a cross roads on the south side of Hewish Down.
- 2.3.36 Finance Act, 1909-10. The Finance Act imposed a tax on the incremental value of land which was payable each time it changed hands. In order to levy the tax a comprehensive survey of all land in the UK was undertaken between 1910 and 1920. It was a criminal offence for any false statement to be knowingly made for the purpose of reducing tax liability. If a route is not included within any hereditament there is a possibility that it was considered a public highway, though there may be other reasons to explain its exclusion.
- 2.3.37 A Form 4 was completed by landowners and the information copied into Field Books before valuers went into the field and inspect and assess the hereditaments. Information from the Field Books and notes was then transferred into the Valuation Books. The Form 4 records have generally not survived.
- 2.3.38 The majority of the route is excluded from hereditaments. It appears that initially the entire route was excluded, but that the western end has been altered where historically it, and adjacent waste land, was unenclosed, for the waste land to be included within hereditament 117. However, the hereditament boundary does not cross the route but stops on either side, in the same manner as it does for the county road, Whitefield Hill, indicating that it may have a similar status.
- 2.3.39 Hereditament 117 has a deduction for Public Right of Way or User, but this appears to relate to a private easement for the Hewish and Collacott Farms, included within hereditament 117.
- 2.3.40 Hereditaments 3, 37 and 106 adjacent to the route make no reference to it.
- 2.3.41 Bartholomew's Maps, 1911-32. These maps were designed for *tourists and cyclists* with the roads classified for *driving and cycling purposes*. They were used by and influenced by the Cyclists Touring Club founded in 1878 which had the classification of First Class roads, Secondary roads which were in good condition, Indifferent roads that were passable for cyclists and other uncoloured roads that were considered inferior and not to be recommended. Additionally, Footpaths and Bridleways were marked on the maps as a pecked line symbol. Cyclists were confined to public carriage roads until 1968. The half-inch small scale does not permit all existing routes to be shown, omitting some more minor routes. The purpose of these maps was to guide the traveller along the routes most suitable for their mode of transport.
- 2.3.42 The map dating from 1924 depicts both the proposal route and the road between Bowden Corner and Indicott Cross as Inferior Roads and not to be recommended, which is the lowest category the maps show. The majority of those roads shown in the parish are included in that category.
- 2.3.43 The map dated 1932 still shows the route as an '*Inferior Road*', whilst the road between Bowden Corner and Indicott Cross as an '*Indifferent Road*'.
- 2.3.44 The Revised map of circa 1936 depicts the route as an Inferior Road, whilst the road between Bowden Corner and Indicott Cross as an Other Good Road.

- 2.3.45 Bacon's Maps, circa 1920s. The quarter-inch small scale does not permit all existing routes to be shown, omitting some more minor routes. The purpose of these maps was to guide the traveller along the routes most suitable for their mode of transport.
- 2.3.46 The route is not shown, though the road between Bowden Corner and Indicott Cross is depicted as an '*Other road*'.
- 2.3.47 Aerial Photography, 1946-2007. The route between points C – D is open and available until the photography of 2006-7 on which the gate near point C at Bowden Corner can be seen and has similar characteristics to other public highways in the parish particularly those parts which were pre-tarmacadam.
- 2.3.48 East Down Parish Survey, 1950. The compilation process set out in the National Parks and Access to the Countryside Act 1949 involved a substantial amount of work and such records are considered a valuable source of information. The rights of way included in the process had to pass through a draft, provisional and definitive stages with repeated public consultations.
- 2.3.49 The route was not included.
- 2.3.50 Marwood Parish Survey, 1950. The compilation process set out in the National Parks and Access to the Countryside Act 1949 involved a substantial amount of work and such records are considered a valuable source of information. The rights of way included in the process had to pass through a draft, provisional and definitive stages with repeated public consultations.
- 2.3.51 The route was not included.
- 2.3.52 Definitive Map Review records, 1970s-80s. The route is not included.
- 2.3.53 Land Registry records, 2016. The majority of the route is not included in any of these records or shown belonging to any particular owner(s). The western end from point D to where the access track for Honeywell Farm turns off southwards is included in the ownership of Mr Berry of Honeywell Farm.
- 2.3.54 Site Photographs, 1998 onwards. The photographs show the route between points C – D, open and available between 1998 and 2004, while those from 2016 show the eastern end gated and now becoming overgrown, and not used by any traffic.

2.4 User Evidence

- 2.4.1 A total of forty three members of the public completed user evidence forms relating to the route. The majority of these were received in support of the original claim for the route in 1999 and 2000, covering the period 1930 to 2000, and detailing use on foot, horse and with vehicles between 2 and 50 times a year. Two user evidence forms were submitted by the Trail Riders Fellowship in support of their Schedule 14 application in 2006 detailing use with vehicle up to that time. Four additional forms were received as part of the current East Down Parish Review informal consultation, detailing use up to 2006 when the route was gated and locked. Twenty six users have either full or part non-motorised use of the route. Forty one users fall within the statutory 20 year period. The evidence of a number of longstanding users is also summarised below.



- 2.4.2 The late Mr Fry of Berrynarbor used the route from 1930 with agricultural horses and riding horses for general farm work and pleasure an unspecified number of times a year. Mr Fry indicated that he may have been a tenant of, or working for, the owner or occupier of land crossed by the route when he used it during the war years, but gave no details. He was never told it was not public. He also recalled a notice saying “*Private Farm Road*”.
- 2.4.3 Mr Irwin of Ilfracombe believed the route to be public for more than 80 years, from his own knowledge and also that of his late father. He had used it from 1959 with a vehicle for business and work approximately 40 times a year. He believed that the owner was aware of the public using the route because it was regularly used, although the current landowner had told him some years ago that it was not public. He had seen a “*Private Road*” notice in July 1999.
- 2.4.4 Mrs Easton of Barnstaple had used the route intermittently for the last 40 years for pleasure, on foot for circular walks in the area. She said that she had not seen any notices on the route until 1999 and had not been challenged.
- 2.4.5 Mr Veysey of Bratton Fleming had used the route 100 times a year between 1962-96 for pleasure, on horseback going to and from Higher Muddiford Farm. He believed that the owner was aware of the public using the route as he had seen Commander Berry (current landowner’s father) on the route. He had not sought permission and had not seen any notices on the route.
- 2.4.6 Ms Sloggie of Muddiford believed the route had been public because people had always ridden and driven along it. She had used it about once a week since the 1970s, for pleasure on horseback, but less in later years, riding around from Muddiford. She believed that the owner was aware of the public using the route, but had never been challenged. She had seen a “*Private Road*” sign.
- 2.4.7 The late Mr Baxter of Twisthead stated that he had known the route since 1970 used

by farm traffic, horses and walkers. He used it frequently, at irregular intervals, all the years he had lived there from 1970, for pleasure on horseback and on foot and in a vehicle. He believed that the owner was aware of the public using the route and had often used it to visit him and help with the harvest and to hunt. He had seen an iron "Private Road" notice set up on the route at the Marwood end in August 1999. He said that it was possible to take a short cut across Hewish Dump (south of point D) when it was unfenced at the western end, between the Honeywell Farm access and Whitefield Hill.

- 2.4.8 Mrs Bigge of Marwood used the route a varying number of times a year since 1973, for pleasure on horseback riding from Hewish to Muddiford. She had not seen any notices and was never challenged.
- 2.4.9 Mr Ansdell of Muddiford stated that the route was always open and available, and nobody stopped him. He had used it 30 times a year between 1974-1992 for pleasure, on horseback, exercising horses on a circular route. He believed that the owner was aware of the public using the route as there were hoof marks and had not seen any notices.
- 2.4.10 Ms Reed of Muddiford believed the route had been public for 20 years as there were no signs dissuading or challenging use of the route. She used it more than 20 times a year since 1979, for pleasure on horseback riding from Muddiford to Whitefield Hill. She believed that the owner was aware of the public using the route as hoof prints were evident along the track and had not seen any notices.
- 2.4.11 Ms Adams of Braunton stated there were no signs to prohibit use of the route. She had used it more than 20 times a year since 1979, for pleasure on horseback riding from Muddiford to Whitefield Hill. She believed that the owner was aware of the public using the route as hoof prints were obvious.

2.5 Landowner and Rebuttal Evidence

- 2.5.1 Mr Berry of Honeywell Farm has owned land crossed by the route since 1989 and has believed that the route was not public since 1968. In January 1999, Mr Berry made a Section 31(6) deposit under the Highways Act 1980. He reiterated his stance in response to the informal consultation for the East Down Definitive Map Review informal consultation in 2016.
- 2.5.2 He states that he has required R Fry, J Baxter, R Bowden, Riding Stables [Dingles] to ask permission to use the route, and told people they used it at their own risk. When a car rally motor club erected directing signs on the route which he complained of and they were removed.
- 2.5.3 Mr Berry also states that he has told holiday makers with metal detectors and shovels digging on the tumulus and using the route when they complained about its muddy state, that it was not public.
- 2.5.4 Signs have been erected though have been accidentally destroyed or disappeared. Mr Berry had a sign awaiting erection in anti-theft manner in December 1998. He states that signs have been erected since 1970. He has also apparently obstructed the route with an electric fence when moving his livestock and sheep pens. He states that in the winter it has been gated for feeding sheep. Since approximately 2006 a gate has been erected and locked it at the eastern end of the route near point C at Bowden Corner.

- 2.5.5 He states that *"we have perused our deeds which date back to 1803 and earlier and found no mention of rights of way of any sort...The proposed bridleway would deposit horses on the very busy Combe Martin/Barnstaple main road. A very dangerous proposal indeed. If a bridleway was designated by DCC and subsequently any person or animal was injured or killed we hold DCC entirely responsible for creating a public access where previously none existed."*
- 2.5.6 Mrs Masters from Somerset assisted Mr Berry in his objection to the previous proposal during the Marwood review and is supporting him again, though she has since handed the case to a colleague, Mr Dunlop. She has raised technical issues about the validity of the schedule 14 application.
- 2.5.7 Mr Smith of Wayside Farm owns land adjacent to the east end of the proposal route on the south side and supports its existence as a public highway. He submitted user evidence forms in response to the Reviews in Marwood (1999) and East Down (2016).

2.6 Discussion

- 2.6.1 Technical issues were raised by Mrs Masters, on behalf of the landowner Mr Berry, about the validity of the TRF's schedule 14 application. However, these are not relevant as the County Council is considering the claim under its general statutory duty to keep the definitive map and statement under continuous review. If an Authority discovers relevant evidence which shows that the definitive map and statement require modification, it has a duty to make a Definitive Map Modification Order regardless of whether or not an applicant has made a "valid" Schedule 14 application, or indeed whether there is an application at all.
- 2.6.2 It is accepted that compliance with the requirements of schedule 14 is relevant to applications made for byways open to all traffic if they are to be considered as exempt, under 67(3) of the NERC Act, from extinguishment of mechanically propelled vehicle rights. However, as stated at para 2.1.8, the application does not meet the exception, by reason of being made after the cut-off date and therefore the issue of compliance is again not relevant.
- 2.6.3 The landowners have been consulted on the proposal through the current Parish Review process and have had an opportunity to put forward evidence in rebuttal. They would also have a right of objection to an Order, if it is agreed that one should be made.
- 2.6.4 Statute – Section 31 Highways Act 1980. There are several possible events which may be considered sufficient to call the public's use of the route into question and demonstrate a landowner's lack of intention to dedicate. The landowner, Mr Berry stated that notices were erected in 1970 and again in 1988, but none of the users recall any notices before 1999. – *"The notice referred to in section 31(3) must be "visible to persons using the way."* [Godmanchester & Drain, 2007].
- 2.6.5 He also states that he challenged users, although none of those who submitted evidence report being challenged. One user did say that Mr Berry informed them that the proposal route was not public, although not until 1999. The Landowner Evidence Form completed by Mr Berry in December 1998 in which he expressed his lack of intention to dedicate, is also considered insufficient to call the public's right to use the route into question, as it was a request by Devon County Council for information from the landowner, and would give it a purpose which the relevant legislation did not intend it to have.

- 2.6.6 Consequently, it is only the notice erected in July 1999 by Mr Berry, the landowner of the west end of the route at point D, at the junction with Whitefield Hill which is considered sufficient to call the public's use of the whole proposal route into question. Therefore, the relevant period to be considered is July 1979 – July 1999.
- 2.6.7 User evidence forms from forty three members of the public were received in support of the route, between points C – D, detailing regular use of the route particularly on horse, but also on foot, and with vehicles, both cars and motorbikes, often with other family members between several and 100 plus times a year. The amount of user evidence is representative of the local community in a predominantly rural area.
- 2.6.8 Thirty four of the users are included within the relevant statutory 20 year period. The majority of users used the route for pleasure though several used it for work, usually with vehicles. They never saw any notices against the public's use of the proposal route before July 1999, nor were they ever challenged. Users appeared to have considered the notice near point D at the west end of the route to relate only to the access for Honeywell Farm itself. One user was told that the proposal route was not public but, this appears to have been in 1999 after the sign at the west end of the route at point D was erected. Consequently, such use is considered 'as of right'.
- 2.6.9 Mr Berry has owned Honeywell Farm on the south side of the route since 1998, after inheriting it from his father, who purchased it in 1970. In 1989 his family purchased the area known as the Hewish Dump as well as land on the north side of the route which included the west end of the route between the access track to Honeywell Farm and Whitefield Hill at point D. In 2002 he also purchased land on the south side at the east end.
- 2.6.10 Mr Berry states that he gave several individuals and the local riding stables permission to use the proposal route, including one of those who completed a user evidence form, Mr JC Baxter, although he stated on his user evidence form that he had never sought permission.
- 2.6.11 Mr Berry states that he had an electric fence across the route and had sheep pens along a section of it for farming purposes, obstructing it. However, none of the users recalled encountering any obstructions, which would have also potentially hampered others who had a private right of way to fields along the proposal route. It appears that such alleged obstructions were for livestock management and not with the specific purpose of obstructing the public. Their use appears not to have been threatened with obstruction until 2006, when a gate was erected near the east end at point C.
- 2.6.12 However, Mr Berry made a Section 31(6) deposit in January 1999, an event which under statute demonstrates a sufficient lack of intention to dedicate from that time onwards, for at the very least, the west end of the proposal route, towards point D on Whitefield Hill over what is known by locals as Hewish Dump. This interrupts the statutory 20 year period to July 1999. The period of 6-7 months cannot be considered '*de minimis*', and be set aside or disregarded. Consequently, the proposal route fails the test for presumed dedication under statute.
- 2.6.13 However, a claim for a right of way along the proposal route between points C – D may also exist at common law. Evidence of dedication by the landowners can be express or implied and an implication of dedication may be shown at common law if there is evidence, documentary, user or usually a combination of both from which it may be inferred that a landowner has dedicated a highway and that the public has

accepted the dedication.

- 2.6.14 Common Law. On consideration of the proposal at common law, the historical mapping shows that the proposal route has existed since at least 1804-5, as shown on the Ordnance Survey small scale mapping. Until Greenwood's map of 1827, the proposal route is the only route existing between Bowden Corner and Whitefield Hill across an unenclosed Hewish Down.
- 2.6.15 The Race Ground and Churchill Downs were subject to an Inclosure Act and Award between 1811 and 1823, which shows the start of the claimed route at point C but no route between Bowden Corner and Indicott Cross. It would have been logical that any new public roads created by the Inclosure Act and Award would connect with existing public highways. It appears that an alternative to the route was constructed between 1823-7 by the private inclosure of Hewish Down, though no documentation is known to have survived. There is no evidence to suggest that the claimed route was stopped up or declared non-publicly maintained highway.
- 2.6.16 As the only route connecting these two points, it is unlikely that the claimed route would not have some sort of public status, particularly as Whitefield Hill was part of an important linking road between the Barnstaple and Ilfracombe turnpike roads.
- 2.6.17 The East Down and Marwood Tithe Maps of the 1840s do not show the claimed route or its alternative to Whitefield Hill. Only Whitefield Hill, crossing an unenclosed Hewish Down, the road linking the Barnstaple and Ilfracombe turnpike roads, is shown.
- 2.6.18 At Common Law, all highways existing prior to the Highways Act of 1835 were automatically repairable 'prima facie' by the parish unless the responsibility could be proven as lying elsewhere. This liability remained as long as the highway existed or until the liability was taken away or transferred by statute.
- 2.6.19 From the various highway authority records of the Vestry and Parish Councils dating from 1821, it appears that many roads in the relevant parishes were considered '*rationae tenure*' or '*public occupation roads*', and maintained by adjacent landowners, as supported by the minutes of the Barnstaple Rural District Council. It would appear that roads under the responsibility of the parish were let for maintenance. Neither the proposal route nor its alternative to Whitefield Hill is specifically referred to in lots for maintenance and is therefore more likely to have been considered '*rationae tenure*' or '*public occupation roads*'.
- 2.6.20 Ordnance Survey large scale mapping dating from 1885 shows the route shown in the same manner as other recorded public highways, with one side depicted with a boldened line. It also shows Hewish Down as enclosed and divided into fields for the first time. Early 20th century road maps such as Bartholomew's include the route as an inferior road, indicating its reputation as a road which the public could use.
- 2.6.21 On the Finance Act mapping, the route is excluded from hereditaments, though it appears that there was an alteration to include the waste land at the west end, near point D, to be included within hereditament 117. However, the hereditament boundary does not cross the route but stops on either side, in the same manner as it does for the county road, Whitefield Hill, indicating that it may have been considered to have a similar status.
- 2.6.22 Neither Parish Council claimed the route in 1950 or in the incomplete Review of the 1970s.

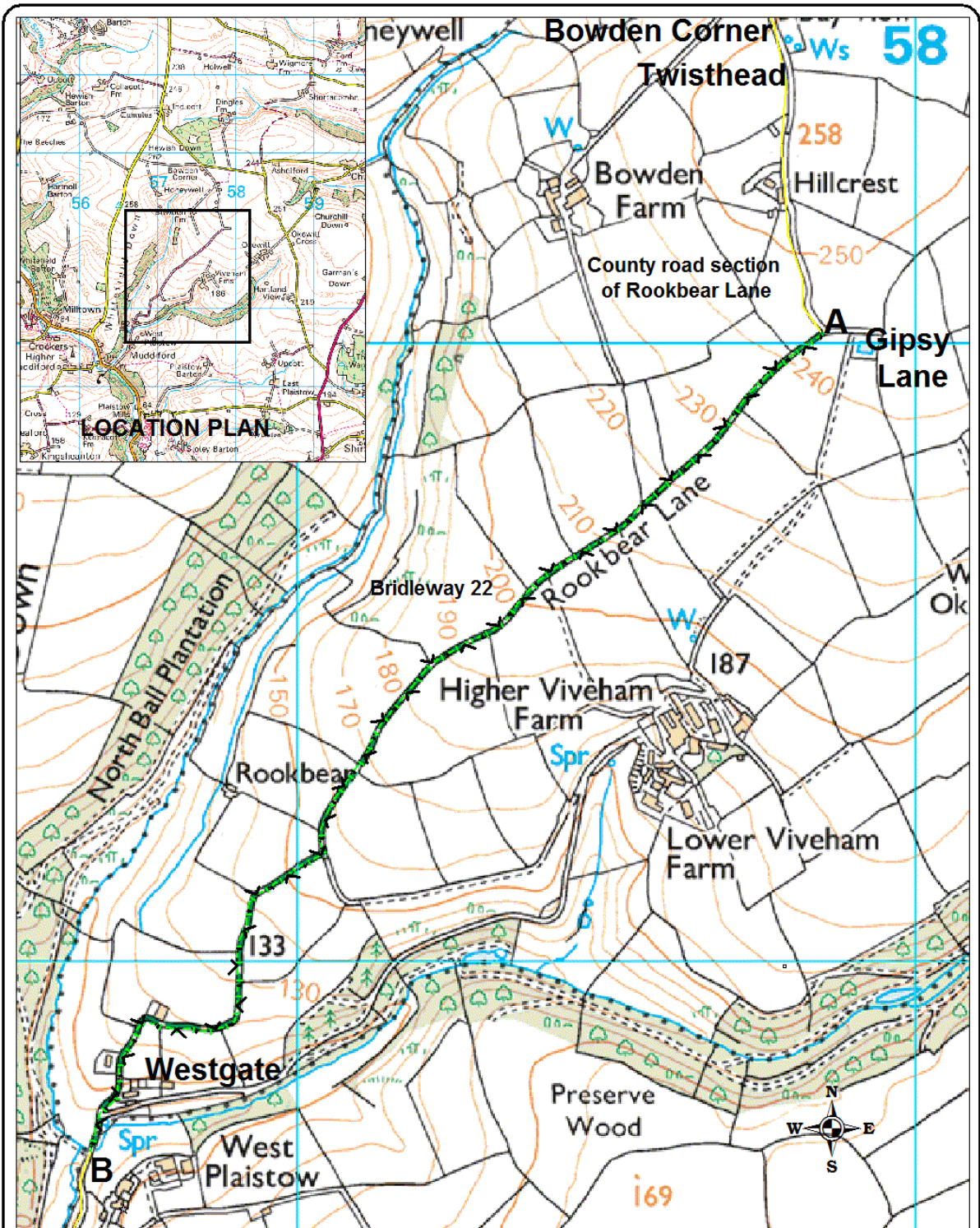
- 2.6.23 Land Registry records show that the route is only included within a land holding at the west end from approximately where the access track is for Honeywell Farm to Whitefield Hill, the area known as Hewish Dump. This was purchased by the Berry family in 1989. The remainder of the route is not included within any landholding, though since 2002 Mr Berry has owned virtually all the land on either side of it.
- 2.6.24 User evidence forms from forty three members of the public were received in support of the route, between points C – D, detailing regular use of the route from 1930 particularly on horse, but also on foot, and with vehicles, both cars and motorbikes. Often such use involved other family members between several and 100 plus times a year. Nineteen users used the proposal route for 20 years or more, with 1 user during 1930-1950, 3 during the 1950s, 5 during the 1960s, 17 during the 1970s, 32 during the 1980s, and 40 during the 1990s. The amount of user evidence is representative of the local community in a predominantly rural area.
- 2.6.25 The majority of users used the route for pleasure though several used it for work, usually with vehicles. They never saw any notices against the public's use of the proposal route before July 1999, nor were they ever challenged. Several met Mr Berry's father (Commander Berry) whilst using the route and he did not challenge their use or give permission, whilst others users who knew Commander Berry also did not recall any objection from him to their use. Several used a variation at the west end towards point D, until Hewish Dump was enclosed.
- 2.6.26 Aerial and site photographs show that until 2006, when a gate was apparently installed near point C at the east end, Bowden Corner, there were no structures affecting users along the proposal route.
- 2.6.27 Users appeared to have considered the notice near point D at the west end of the route to relate only to the access for Honeywell Farm itself. One user was told that the proposal route was not public but this appears to have been in 1999 after the sign at the west end of the route at point D was erected.
- 2.6.28 Consequently, such use of the claimed route is considered 'as of right', as it has been without force, secrecy or permission.
- 2.6.29 Mr Berry has owned Honeywell Farm on the south side of the route since 1998, after inheriting it from his father, who purchased it in 1970. Prior to this, it was owned by the Fry family, and in particular, Mr RW Fry. In 1989 Mr Berry's family purchased the area known as the Hewish Dump as well as land on the north side of the route which included the west end of the route between the access track to Honeywell Farm and Whitefield Hill at point D. In 2002 he also purchased land on the south side at the east end.
- 2.6.30 Mr Berry states that he gave several individuals and the local riding stables permission to use the route, including one of those who completed a user evidence form, Mr JC Baxter, although he stated on his user evidence form that he had never sought permission.

- 2.6.31 Mr Berry states that he had an electric fence across the route and had sheep pens along a section of it for farming purposes, obstructing it. However, none of the users recalled encountering any obstructions, which would have also potentially hampered others who had a private right of way to fields along the proposal route. It appears that such alleged obstructions were for livestock management and not with the specific purpose of obstructing the public. Their use appears not to have been threatened with obstruction until 2006, when a gate was erected near the east end at point C.
- 2.6.32 Mr Berry made a Section 31(6) deposit in January 1999, an event which demonstrates a sufficient lack of intention to dedicate from that time onwards, for at the very least, the west end of the proposal route, towards point D on Whitefield Hill over what is known by locals as Hewish Dump.
- 2.6.33 There is no evidence that any landowner prior to Mr Berry in 1999 has challenged the public's use of the route or demonstrated a lack of intention to dedicate it as a public highway.
- 2.6.34 Marwood and East Down Parish Councils do not support the proposal to add a byway open to all traffic, however East Down support the addition of the route as a bridleway.

2.7 Conclusion

- 2.7.1 On consideration of all the available evidence the documentary evidence demonstrates that the claimed route across Hewish Down between points C – D has existed since at least 1804-5. It has been open and available since that time (until 1999). It appears to have been considered public since at least that time, and part of the highway network, as shown by the documentary mapping, at one period being the only route between Bowden Corner and Whitefield Hill, connecting to the linking road, Whitefield Hill, between the two turnpikes in the area to Barnstaple and Ilfracombe. When the present county road was created between Bowden Corner and Indicott Corner, which appears to have been made as an alternative and improvement, there is no evidence that this route was stopped-up.
- 2.7.2 At Common Law, all highways existing prior to the Highways Act of 1835 were automatically repairable 'prima facie' by the parish unless the responsibility could be proven as lying elsewhere. This liability remained so long as the highway existed or until the liability was taken away or transferred by statute.
- 2.7.3 Whilst there is evidence that the route has latterly been considered to be a private track, included within land holdings and not maintained at public expense, there is no evidence of a stopping up order or declaration of non-maintainable highway at public expense. The legal presumption, '*once a highway always a highway*' applies.
- 2.7.4 Almost half the use of the route has been with motor vehicles, the earliest of which dates back to 1958. Vehicle use must be prior to 1930 to be legal and satisfy any of the exceptions under the Natural Environment and Rural Communities Act 2006. Consequently any unrecorded rights for mechanically propelled vehicles are extinguished. Therefore, the highest status the route could be considered to be is a restricted byway.

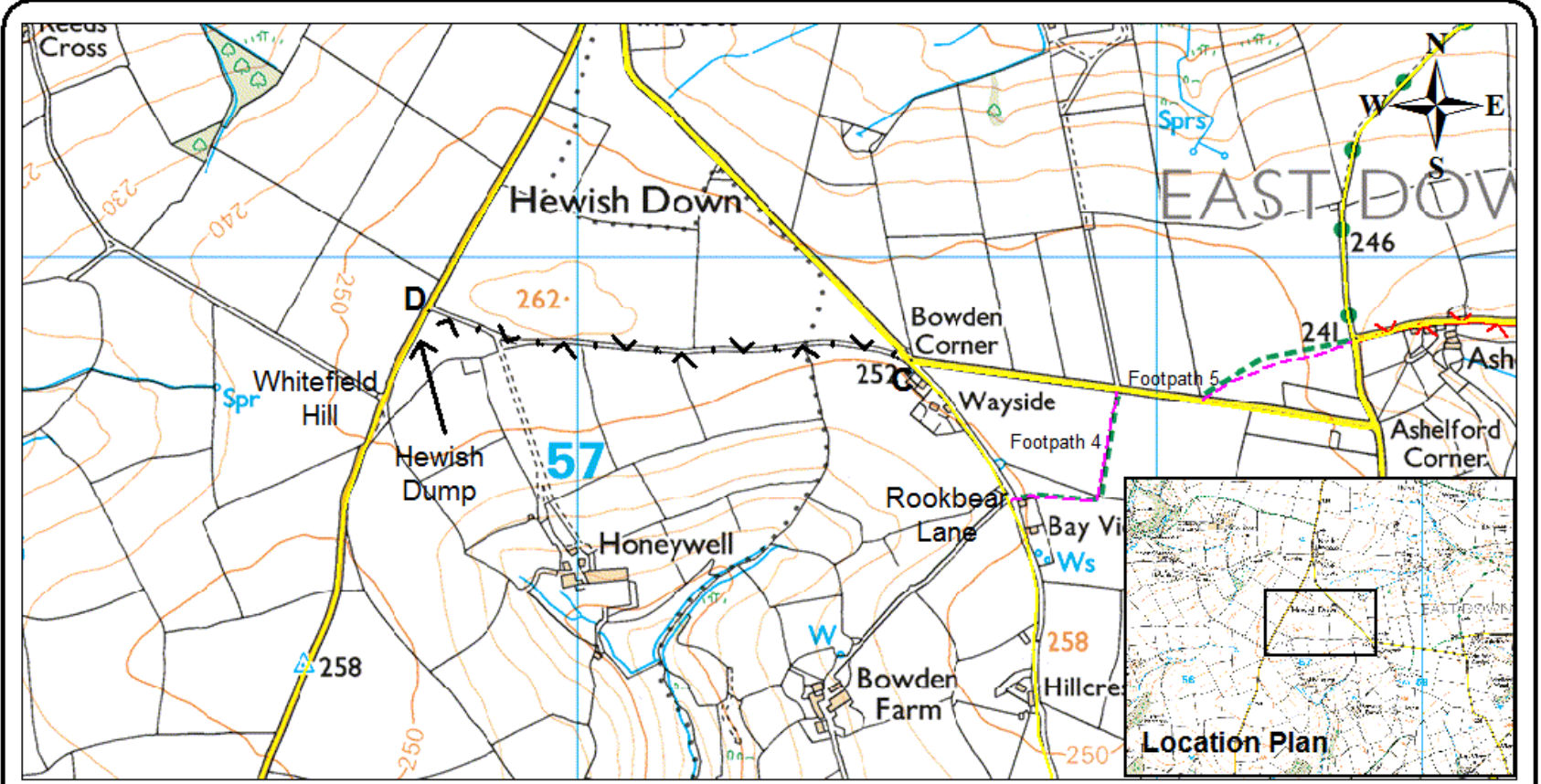
- 2.7.5 The user evidence details use on horse and foot since at least 1930, which was not challenged until 1999, by Mr Berry of Honeywell Farm. The use has been frequent and regular, 'as of right', and considered representative of the public in a predominantly rural area. Users had encountered previous landowners whilst using the proposal route without challenge. The long use of the route between points C and D across Hewish Down on horse and foot is considered sufficient to demonstrate that there is a public right of way of that status.
- 2.7.6 The historical documentary and user evidence when taken as a whole is considered sufficient to show that a public right of way not shown in the Definitive Map and Statement subsists or is reasonably alleged to subsist.
- 2.7.7 Historic documentary evidence suggests that the route may have been considered an all-purpose highway. However, without more detail regarding the level of public status it carried, the available evidence is considered insufficient to demonstrate that vehicular rights exist and consequently is not sufficient to record the route as a restricted byway. User evidence since the 1930s supports at least public bridleway status.
- 2.7.8 It is therefore recommended that a Modification Order should be made to add a bridleway between points C – D to connect between Bowden Corner and Whitefield Hill across Hewish Down to the Definitive Map and Statement. If there are no objections, or if such objections are subsequently withdrawn, that it be confirmed.



map ref: SS 5638, 5639, 5739 & 5740

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<p align="center">Devon County Council Definitive Map Review - East Down Proposal 1 - Schedule 14 application: Claimed upgrade of Bridleway No. 22 to byway open to all traffic along Rookbear Lane</p>		<p>drawing number HCW/PROW/16/38 date July 2016 scale 1 : 6,000 (at A3 only) drawn by CLG</p>
<p>Notation Claimed upgrade of Bridleway No. 22 to byway A - B (approx 1,931 m) Existing footpaths Existing bridleways </p>		<p>David Whitton Head of Highways, Capital Development & Waste</p>



map ref: SS 5640 & 5740

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Devon County Council
Definitive Map Review - East Down
Proposal 2 - Schedule 14 application: Claimed addition of a byway at Hewish Down

drawing number	HCW/PROW/16/39
date	July 2016
scale	1:10,000
drawn by	CLG

Notation

Claimed addition of a byway C - D (approx 841 m) - - - ^ . v

Existing footpath - - -

David Whitton
 Head of Highways,
 Capital Development
 & Waste

