

**Definitive Map Review 2017- 2019
Parish of Woodbury**

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

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

Recommendation: It is recommended that no Modification Order be made to the Definitive Map and Statement in respect of Proposal 1.

1. Introduction

This report examines the one proposal arising from the Definitive Map Review in the Parish of Woodbury, in East Devon District.

2. Background

The original survey, under s. 27 of the National Parks and Access to the Countryside Act 1949, revealed six footpaths and eleven bridleways in Woodbury, which were recorded on the Definitive Map and Statement, St Thomas Rural District with the relevant date of 1 June 1957.

The review of the Definitive Map, under s. 33 of the 1949 Act, which commenced in the 1970s, but was never completed, produced no proposals for change to the map in the parishes.

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

The following orders have been made and confirmed:

St Thomas Rural District Council Footpath No. 1 Diversion Order 1962

St Thomas Rural District Council Footpath No. 8 Creation and Diversion Order 1978

Devon County Council Footpath No. 7 Diversion Order 1997

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

The current Review began in May 2017 with a public meeting held in Church Rooms, Woodbury village, which was well attended by members of the public and parish councillors.

3. Proposal

Please refer to the appendix to this report.

4. Consultations

Public consultations for Woodbury Parish were carried out between September and November 2018. The review was advertised around the parish with notices placed in local notice boards, at the Parish Office, at each end of the proposal route and in the local press.

The responses were as follows:

County Councillor R Scott	- no comment on proposal
County Councillor J Trail	- no comment on proposal
East Devon District Council	- no comment
Woodbury Parish Council	- no comment on proposal
British Horse Society	- no comment
Byways and Bridleways Trust	- no comment
Country Land & Business Association	- no comment
Open Spaces Society	- no comment
Ramblers' Association	- no comment
Trail Riders' Fellowship	- supports proposal
Cycle UK	- no comment

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 recommendations have been taken into account in the preparation of the report.

7. Risk Management Considerations

No risks have been identified.

8. Equality, Environmental Impact (including Climate Change) and Public Health Considerations

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

9. Conclusion

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

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

10. Reasons for Recommendations

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

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Electoral Division: Exmouth

Local Government Act 1972: List of Background Papers

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Background Paper	Date	File Ref.
Correspondence files	2017 - date	AS/DMR/WOODBURY

as270919pra
sc/cr/DMR Parish of Woodbury
03 041119

Basis of Claim

The Wildlife and Countryside Act 1981, Section 53(2)(b) enables the surveying authority to make an order to modify the Definitive Map. The procedure is set out under WCA 1981 Schedule 15.

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.

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.

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 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 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.

Section 67 Natural Environment and Rural Communities Act 2006 (NERC Act) extinguished the rights for mechanically propelled vehicles to use public rights of way 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.

Section 69 of the NERC Act 2006 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.

1. Proposal 1: Proposed upgrade of Bridleway No. 8 to a Byway Open To all Traffic, as shown between points A - B - C on drawing number HIW/PROW/18/50.

Recommendation: That no Modification Order be made in respect of Proposal 1 as shown on drawing number HIW/PROW/18/50.

1.1 Background

1.1.1 A public meeting was held in Woodbury Church Rooms with local people, parish councillors and the local County Councillors.

1.1.2 Proposal 1 was one of a number of Schedule 14 applications made by local representatives of the Trail Riders Fellowship in 2005-06 prior to the Natural Environment & Rural Communities Act (NERC Act) 2006. The NERC Act would restrict the ways that rights of ways 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 had been made prior to 20 January 2005, that is compliant with the regulations for Schedule 14 applications under the Wildlife & Countryside Act 1981, or the surveying authority has made a determination of an application for a Byway Open to all Traffic (BOAT) before 2 May 2006.

1.1.3 This Schedule 14 Application to upgrade Bridleway No. 8, to a BOAT was made by TRF in February 2006, it has been on file awaiting the Definitive Map Review of Woodbury Parish. It was supported by ten users. As the application was made after 20th January 2005 and was not fully compliant with the regulations, as notice of the application had not been served on the landowners, it therefore did not meet the NERC Act exception for Schedule 14 Applications. However, as an application had been made, the claim was included in the parish review for investigation in compliance with the County Council's statutory duty to keep the Definitive Map and Statement under continuous review. As there are limited other exceptions in which vehicle rights may be preserved it would be likely that, subject to sufficient evidence, the route could only be upgraded to a restricted byway.

1.2 Description of the Route

1.2.1 The Definitive Statement describes Bridleway No. 8 from point A, as shown on plan HCW/PROW/18/50 as follows:

The path is a Bridleway. It starts at County Road B3179 300 yards north west of Four Firs and proceeds north west along the boundary of Woodbury Common past its junction with Bridleway Nos. 9 and 10 to join County Road 341 north of Soldiers Well [Point B]. Woodbury Common, subject to a Deed of Declaration under the Law of Property Act, 1925.

1.2.2 Physically the route has a rough mud and pebble surface, and travels along the base of the scarp slope of Woodbury Common at the spring line, so it is wet in places. After passing Soldiers Well (at point B), the route enters a rough track that is bounded by low pebble walls.

1.2.3 The track is used by the landowners and their tenants in vehicles, to gain access to their fields and an area of ancient woodland.

1.3 Documentary Evidence

1.3.1 Ordnance Survey mapping

- 1.3.1.1 Ordnance Survey Drawings 1801. The drawings covering Woodbury Castle carefully drawn at the detailed scale of 3 inches to one mile. They were drawn by Thomas Budgen a highly regarded OS cartographer (British Library). The Map shows the area as un-enclosed common land. It does not show any depiction of the route. This early map does show other old roads that were in existence at the time of survey. A nearby example of this, is the depiction old road that bisects Woodbury Castle, the county road now known as the B3180.
- 1.3.1.2 The 1906 6" to the Mile OS mapping, and all subsequent large scale OS mapping, show the claimed route as an unfenced track.
- 1.3.1.3 The Ordnance Survey and other mapping do not provide evidence of the status of a route but can be evidence of its physical existence over a number of years.

1.3.2 Woodbury Tithe Map and Apportionments 1839

- 1.3.2.1 Tithe Maps were drawn up under statutory procedures laid down by the Tithe Commutation Act 1836 and subject to local publicity, limiting the possibility of errors. Their immediate purpose was to record the official record of boundaries of all tithe areas. Public roads were not titheable and were sometimes coloured, indicating carriageways or driftways. Tithe maps do not offer confirmation of the precise nature of the public and/or private rights that existed over a route shown. Such information was incidental and therefore is not good evidence of such. Public footpaths and bridleways are rarely shown as their effect on the tithe payable was likely to be negligible. Routes which are not numbered are usually included under the general heading of 'public roads and waste'.
- 1.3.2.2 The Woodbury Tithe Map shows the area around the route as un-enclosed area of common. This map does not show the line of the claimed route at all. It does however show the unfenced line of the road that bisects Woodbury Castle (current B3180).

1.3.3 Highway Handover Records

- 1.3.3.1 The Local Government Act 1888 brought County Councils into existence and these authorities, were charged with the maintenance of the major road network. The minor road maintenance being left with the district and urban councils. In 1930 County Councils became Highway Authorities and all roads (except trunk roads) were vested with them. As the result of this change in Devon, the Highway Handover Books were drawn up to show which roads the district councils and urban district councils had been maintaining. These consist of books of maps on which the highways were numbered, and the corresponding numbers listed in books. These records form the Highways Handover Records in Devon.
- 1.3.3.2 The route is not shown on the Highways Handover Records.

1.3.4 Finance Act 1910

- 1.3.4.1 The Finance Act Maps for Woodbury are missing, as are many from the Exeter District and therefore provide no evidence in respect of this route.

1.3.5 Woodbury Parish Files

- 1.3.5.1 Woodbury Parish Council put this route forward for inclusion on the Definitive Map as a Bridleway in the Original Parish submissions of 1950. In their submission, they write that the route *'has been used a bridleway by the public for 30 or 40 years prior to 1950'*. Giving bridleway evidence dating back to between 1910 and 1920. They stated that they had not repaired the route. There is no other evidence in the Parish files to suggest that the Parish Council considered it to have higher status than a bridleway.

1.4 Land Ownership

- 1.4.1 The area crossed by the route is owned by Clinton Devon Estates. Clinton Estates dedicated this area of Woodbury Common under a Deed of Declaration under the Law of Property Act, 1925 Section 193.
- 1.4.2 Section 193 of the Law of Property Act 1925 sets out the rights of the public over commons and waste lands:
- (1) Members of the public shall, subject as hereinafter provided, have rights of access for air and exercise to any land which is a metropolitan common within the meaning of the Metropolitan Commons Acts, 1866 to 1898, or manorial waste, or a common, which is wholly or partly situated within an area which immediately before 1st April 1974 was a borough or urban district, and to any land which at the commencement of this Act is subject to rights of common and to which this section may from time to time be applied in manner hereinafter provided:
 - (2) Provided that—
 - (3) (a) such rights of access shall be subject to any Act, scheme, or provisional order for the regulation of the land, and to any byelaw, regulation or order made thereunder or under any other statutory authority; and
 - (4) (b) the Minister shall, on the application of any person entitled as lord of the manor or otherwise to the soil of the land, or entitled to any commonable rights affecting the land, impose such limitations on and conditions as to the exercise of the rights of access or as to the extent of the land to be affected as, in the opinion of the Minister, are necessary or desirable for preventing any estate, right or interest of a profitable or beneficial nature in, over, or affecting the land from being injuriously affected, for conserving flora, fauna or geological or physiographical features of the land, or for protecting any object of historical interest and, where any such limitations or conditions are so imposed, the rights of access shall be subject thereto; and
 - (5) **(c) such rights of access shall not include any right to draw or drive upon the land a carriage, cart, caravan, truck, or other vehicle, or to camp or light any fire thereon;**

1.5 Trails Riders Fellowship Schedule 14 Application

- 1.5.1 In February 2006 Mr Cooke of the Trail Riders Fellowship (TRF) submitted a Schedule 14 Application to upgrade Bridleway No. 8, to a Byway Open to All Traffic (BOAT), in an attempt to try and avoid the guillotine that the NERC Act brought down on the claiming of vehicular rights on historical routes. The current

Devon TRF committee were asked if they would withdraw the application, but they wished it to be determined as part of the Definitive map Review in Woodbury. They had no further evidence to add.

1.6 User Evidence

- 1.6.1 The TRF application was submitted with the evidence of 10 users, on nine user evidence forms (Mr Burford & Mr Coats submitted a joint form). They provided evidence covering the period between 1975 and 2005. The evidence forms are included in full in the backing papers.
- 1.6.2 The evidence is summarised as follows:
- 1.6.3 Mr. Cooke has used this route between 1983 in 2005, 3 to 6 times a year as part of a circular ride for pleasure on his motorcycle. He thinks it is a byway open to all traffic because it is on old Maps and by its reputation. He states that the path has always run over the same route and it has not been diverted. Notices were put up that said bridleway in about 1995. He believes that other vehicles used it because there were tyre marks. He rode the route with a number of other members of the TRF between 1983 and 2005.
- 1.6.4 Ms. Putt has ridden the route between 2000 in 2005, 2 to 4 times a year as part of a circular ride on her trail bike, she believes its public because of frequent usage by vehicles. She has not been stopped or turned back.
- 1.6.5 Mr. White has used the route from 1975 to 2005, 4 to 5 times a year as part of a longer ride on his motorcycle for pleasure. He thinks it is a right of way because it is on the old Maps and by its reputation, he has seen motorcycle tyre marks and he has used the route with other trail riders fellowship members when they were on part of a longer circular ride.
- 1.6.6 Mr. Downes has ridden the route on a motorcycle between 1982 and 2005, 46 times a year. He's ridden it for pleasure, and he says it's on old Maps. He's not been stopped or turned back, and he said he's ridden this route when he's been on a ride with other members of the trail riders fellowship.
- 1.6.7 Mr. Sussex has ridden the route between 2002 10052 to 3 times a year as part of a circular ride with the trail riders fellowship. He has not been stopped or turn back or seen any notices and it's not a tenant of the owner. He said there were tyre marks in the track and this is an old route, it has been used by trail riders for decades without any problem.
- 1.6.8 Mr Harris has used the route between 1986 and 2005, 10 times a year ,as part of a scenic circular tour for leisure purposes on a quiet trail motorcycle. He said the route is always run over the same line and he has not had permission to ride it. He rode with a group of other trail riders.
- 1.6.9 Mr. Cumming has ridden the route between 2004 and 2005 about 6 times that a year on organised rides as a member of the trail riders fellowship.
- 1.6.10 Mr. Burford has used the route between 1993 and 2005 for pleasure on a vehicle as a member of the TRF. He said the route had always been there and has been public. He didn't know who owned it.

1.6.11 Mr. Coombs, rode with Mr. Burford and has used the route between 1993 and 2005, on pleasure rides motorcycle rides, he has not been stopped or turned back.

1.6.12 Mr. Cowing has ridden the route between 2004 and 2005, 12 times a year for pleasure on a motorcycle, he has not been stopped turned back and was not aware of who the owner was, he says there were never any notices or stile on the route.

1.7 Land Owners Evidence

1.7.1 The land crossed by the route is solely owned by Clinton Devon Estates who have completed a Landowner Evidence form in response to the consultation. This area has been held by Clinton Devon Estates for over 200 years. They regard the status of the route as a public bridleway.

1.7.2 In answer to the question "has someone on your behalf ever turned back or stopped anyone using the way?" the Estate has said "the Foresters and the Common Rangers, regularly stopped 4x4 users and motorcyclists and have turned them away. These people have been informed that this is not route for public vehicles." Clinton Devon Estates say they are "currently looking into putting a bar at both ends to stop the ongoing problems with Fly tipping and vehicles."

1.7.3 The Estate also objects to this proposal on the basis that this bridleway is located in Woodbury Common and is part of the Devon Pebblebed Heaths. It has national and international conservation designations, it is a Site of Special Scientific Interest, Special Protection Area and a Special Area of Conservation.

1.7.4 The Estate says "to enable access to this site for vehicles would not only cause disturbance to wildlife, but also erosion of the geology. The route also leads to a designated Ancient Woodland site, vehicle access would be detrimental. They state that they have already have issues with off road users, vehicles and motorcycles fly tipping and illegal camping.

1.7.5 In addition to objection from the landowners there have been numerous other emails and telephone calls from individuals saying that it would be great detriment to the bridleway if this were to be upgraded to a BOAT and motor vehicles allowed to use the route. They say these would cause considerable damage to the route and to the enjoyment and safety of horse riders and pedestrians.

1.7.6 However, such objections cannot be taken into account as it is not possible to consider the suitability or desirability of the route for public use under the legislation. Neither can the effect on land use or liability be considered.

1.8 Discussion

1.8.1 Bridleway No 8 Woodbury is subject to the Woodbury Common Deed of Declaration, under the Law of Property Act, 1925, as acknowledged in the Definitive Statement. The effect of this deed of declaration is that the public have had no right to draw or drive a vehicle on the common of Woodbury since 1925, making any public vehicular use over the common on routes that are not County roads unlawful.

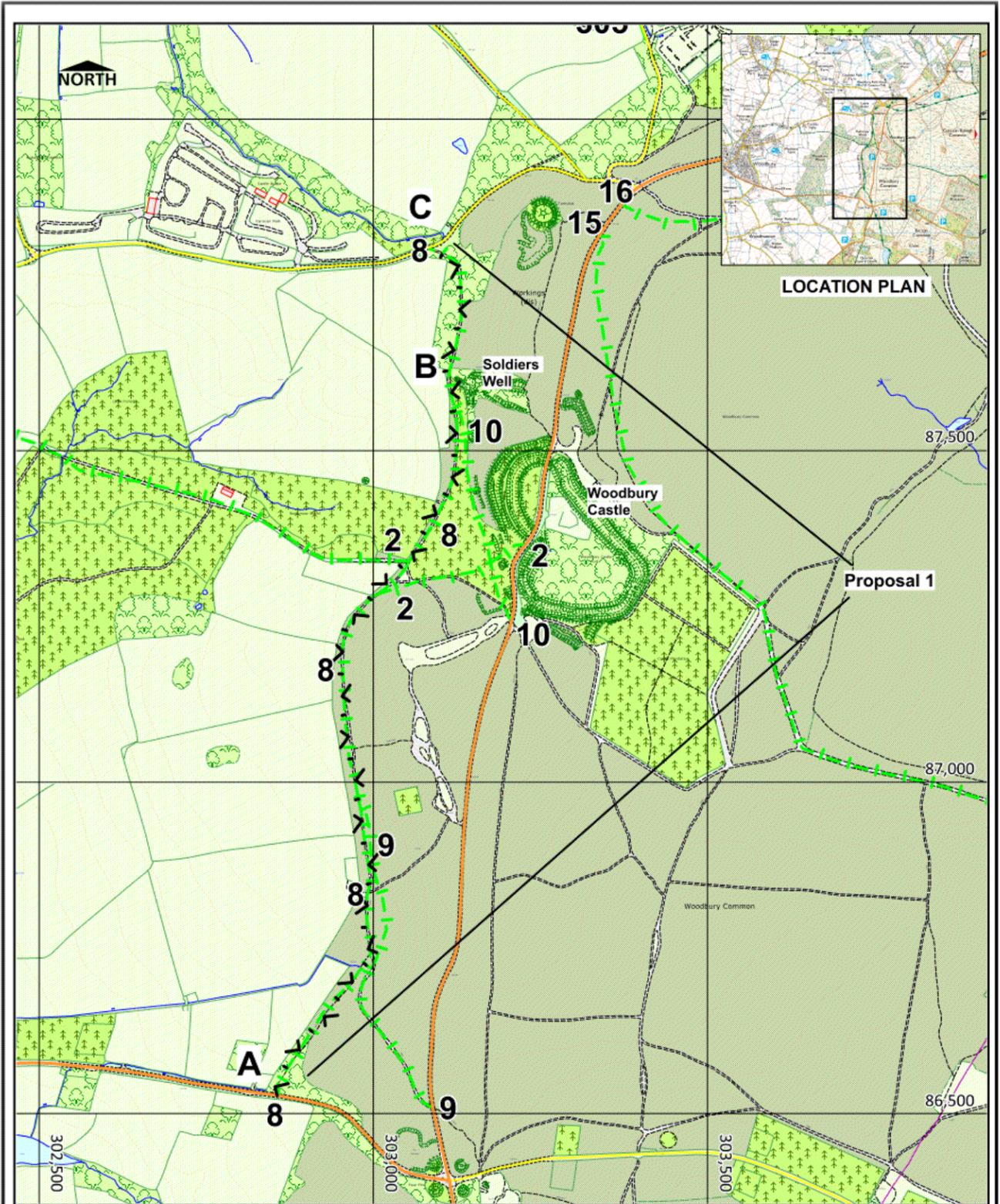
- 1.8.2 Furthermore, use of footpaths and bridleways by mechanically propelled vehicles has been illegal since the 1930s (under the Road Traffic Acts of 1930 and 1988). Therefore, any public use of Bridleway No. 8 by motor vehicles dating from 1957 or later, when the route was recorded as a public bridleway, would be an offence, unless with the permission of the landowner. The passing of the NERC Act in 2006 put a stop to the implied creation of new public rights of way for mechanically propelled vehicles, preventing post-1930 use of a way by a mechanically propelled vehicle from giving rise to any future public right of way. Motor vehicle user evidence can therefore no longer be used as evidence to support the creation or upgrading of a public right of way to a byway open to all traffic.
- 1.8.3 Notwithstanding the above, evidence of use by motor vehicles was provided in good faith to support the claim, prior to the introduction of the NERC Act. It is summarised in this report for completeness, and to give a full explanation for the record of how this recommendation was reached. Proposal 1 was supported by evidence of use by 10 individual motorbike riders. They used it with motor vehicles between 1975 and 2005, because they believed the route was a Byway Open to All Traffic and used it as such. Indeed, prior to the NERC Act, with the user evidence from the motorcyclists, it would have fitted the description for a Byway Open to All Traffic, which was a route that was mainly used on foot and horseback but had been used by vehicles.
- 1.8.4 The NERC Act extinguished the right to use mechanically propelled vehicles unless one of a few exceptions to this general extinguishment applies. These are set out below, with reference to Proposal 1:
- (a) a way whose main lawful use by the public during the period of 5 years ending with commencement (2006) was by mechanically propelled vehicles. For this exception to apply, the evidence would have to show that the route was lawfully used more by vehicles than by other users, e.g. walkers, cyclists, horse riders, horse-drawn vehicles, between 2001 and 2006. This is not the case; the user evidence shows it was used occasionally by small groups of motorcycle riders, rather than as a through road for all mechanically propelled vehicles and, crucially, such use of the bridleway is not lawful. This exception therefore does not apply.
- (b) a way that is not recorded on the Definitive Map but is recorded on the List of Streets of highways maintainable at public expense. Clearly this does not apply to Bridleway No. 8, which is shown on the Definitive Map. It is also not shown on the List of Streets.
- (c) a way that was expressly created for mechanically propelled vehicles. From the historical mapping the route of Bridleway No. 8 has existed for at least 130 years. It may have been used by the traffic of the day; on foot, packhorses, horse and carts and finally motor vehicles (albeit as explained above, vehicular use since 1925 would have been unlawful). It was therefore not expressly created for motor vehicles because the route physically existing before mechanically propelled vehicles were the norm.
- (d) a way created by the construction of a road intended to be used by such vehicles. As above, the route of Bridleway No. 8 was not constructed solely for use by mechanically propelled vehicles; it pre-existed these.
- (e) a way created by virtue of long use by such vehicles before 1 December 1930, when it first became an offence to drive a mechanically propelled vehicle “off-road”. The public rights over Bridleway No 8 were not created by mechanically propelled

vehicles before 1 December 1930. The evidence shows that the public were using the route as a bridleway. The Parish Council's submission for its inclusion on the Definitive Map describes the route as having been ridden from 1910.

- 1.8.5 Therefore, as discussed, none of the NERC Act exceptions are considered to apply in this case and consequently any public rights for mechanically propelled vehicles have been extinguished.
- 1.8.6 The highest status that can be considered is that of Restricted Byway, i.e. for non-mechanically propelled vehicles, if public vehicular rights can be shown to subsist, until NERC Act extinguished those for motor vehicles. However, section 193(c) of the Law of Property Act 1925, Commons and Waste Lands, which applies to the land crossed by the route, says such rights of access shall not include any right to draw or drive upon the land a carriage, cart, caravan, truck, or other vehicle thereon. Therefore, the public cannot even have been lawfully driving or drawing horse-drawn carts along this route since 1925. There is no evidence of earlier public vehicular use, only evidence of riding from 1910 as shown on the Parish Council's submission.
- 1.8.7 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.
- 1.8.8 In this case the application made by the TRF in 2006 could be considered sufficient to be the required calling into question under Section 31 of the Highways Act 1980 for the upgrading. However, because of the Woodbury Common Deed of Declaration, under the Law of Property Act 1925, no use with vehicles can be considered post 1925. And compounding this since 1957, when the route was recorded as a public bridleway, use with vehicles would have also be unlawful under the relevant Road Traffic Acts.
- 1.8.9 A claim for a right of way or for upgrading an existing public right of way may also be considered under common law. At Common Law, evidence of dedication by the landowners can be express or implied and an implication of dedication may be shown if there is evidence, documentary, user or a combination of both from which it may be inferred that a landowner has dedicated a highway of the higher status in the past and that the public has accepted the dedication by continuing to use it.
- 1.8.10 This route is recorded on the Definitive Map as a bridleway. There is no historical evidence available to demonstrate higher rights and the Deed of Declaration under the Law of Property Act 1925 shows that the landowner did not intend to dedicate higher rights. The Parish Council have known it to be a bridleway since 1910 and have not spent any public money on it.

1.9 Conclusion

- 1.9.1 In the absence of sufficient, lawful, user evidence the existence of higher rights cannot be considered under section 31 of the Highways Act 1980. The evidence when taken as a whole, on the balance of probabilities, is also considered insufficient to show that higher rights exist at Common Law over Bridleway No. 8, Woodbury. It is therefore recommended that no Modification Order be made in respect of Proposal 1.



Map Ref SX 994 840

Grid 500m

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DEVON COUNTY COUNCIL
Woodbury Proposal 1
Schedule 14 Application for Byway Open To all Traffic

drawing no. HCW/PROW/18/50
 date September 2019
 scale 1:1250 at A4
 drawn by AS

Notation



Proposed byway open to all traffic
 Existing bridleways

Meg Booth



CHIEF OFFICER FOR HIGHWAYS INFRASTRUCTURE
 DEVELOPMENT & WASTE