

Schedule 14 Application

Addition of a public footpath between Sidmouth Road and Whitmore Way, Honiton

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 a Modification Order be made to modify the Definitive Map and Statement by adding a public footpath between points A – B as shown on drawing HIW/PROW/20/12.

1. Introduction

This report examines a Schedule 14 application made in September 2018 by Honiton Town Council for the addition of a public footpath in the town.

2. Background

A Definitive Map Review of the parish of Honiton was conducted between 2005-2012. This proposal was not put forward during the review and had not appeared in any previous reviews. A Schedule 14 Application was submitted by Honiton Town Council in September 2018, and in line with Devon County Council policy was added to the register for determination once the parish-by-parish review had been completed for the whole county. However, in September 2019 Honiton Town Council appealed to the Secretary of State requesting that the County Council be directed to determine the application. In February 2020 the Secretary of State granted that request and directed the County Council to determine the application.

3. Proposals

Please refer to the Appendix to this report.

4. Consultations

General consultations on the application were carried out in February to May 2020 with the following results:

Councillor Phil Twiss	-	comments included in background papers;
East Devon District Council/AONB	-	no comment;
Honiton Town Council (applicant)	-	comments included in background papers
Country Land and Business Association	-	no comment;
National Farmers' Union	-	no comment;
Trail Riders' Fellowship/ACU	-	no comment;

British Horse Society	-	no comment;
Cycling UK	-	no comment;
Ramblers	-	no comment;
Byways & Bridleways Trust	-	no comment;
4 Wheel vehicle Users	-	no comment;
Devon Green Lanes Group	-	no comment

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

5. Financial Considerations

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

6. Legal Considerations

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

7. Risk Management Considerations

No risks have been identified.

8. Equality, Environmental Impact (including climate change) and Public Health Considerations

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

9. Conclusion

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

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

Meg Booth
Chief Officer for Highways, Infrastructure Development and Waste

Electoral Division: Whimble & Blackdown

Local Government Act 1972: List of Background Papers

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

tg261020pra

sc/cr/schedule 14 Addition of a public footpath between Sidmouth Road and Whitmore Way,
Honiton

02 161120

A. Basis of Claims

The Highways Act 1980, Section 31(1) states that where a way over any land, other than a way of such a character that use of it by the public could not give rise at common law to any presumption of dedication, has actually been enjoyed by the public as of right and without interruption for a full period of 20 years, the way is deemed to have been dedicated as a highway unless there is sufficient evidence that there was no intention during that period to dedicate it.

Common Law presumes that at some time in the past the landowner dedicated the way to the public either expressly, the evidence of the dedication having since been lost, or by implication, by making no objection to the use of the way by the public.

The Highways Act 1980, Section 32 states that a court or other tribunal, before determining whether a way has or has not been dedicated as a highway, or the date on which such dedication, if any, took place, shall take into consideration any map, plan, or history of the locality or other relevant document which is tendered in evidence, and shall give such weight thereto as the court or tribunal considers justified by the circumstances, including the antiquity of the tendered document, the status of the person by whom and the purpose for which it was made or compiled, and the custody in which it has been kept and from which it is produced.

The Wildlife and Countryside Act 1981, Section 53(3)(c) enables the Definitive Map to be modified if the County Council discovers evidence which, when considered with all other relevant evidence available to it, shows that:

- (i) a right of way not shown in the map and statement subsists or is reasonably alleged to subsist over land in the area to which the map relates.
- (ii) a highway shown in the map and statement as a highway of a particular description ought to be there shown as a highway of a different description.
- (iii) there is no public right of way over land shown in the map and statement as a highway of any description, or any other particulars contained in the map and statement require modification.

The Wildlife and Countryside Act 1981, Section 53(5) enables any person to apply to the surveying authority for an order to modify the Definitive Map. The procedure is set out under WCA 1981 Schedule 14.

Section 69 of the Natural Environment and Rural Communities Act 2006 (NERC) amended the Highways Act 1980, to clarify that a Schedule 14 application for a Definitive Map Modification Order is, of itself, sufficient to bring a right of way into question for the purposes of Section 31(2) of the Highways Act 1980, from the date that it was made.

Schedule 14 application for the addition of a footpath between Sidmouth Road and Whitmore Way, Honiton, points A-B on the proposal map HIW/PROW/20/12.

Recommendation: It is recommended that a Modification Order be made in respect of the application.

1. Background

- 1.1 The route was first brought to the attention of Devon County Council in January 2018 when it was obstructed by caravans placed on the land that it crosses. The caravans were apparently placed there by someone who had purchased the land, but the sale subsequently collapsed, and the land remained in the same ownership. Honiton Town Council submitted a Schedule 14 Application to record the route in September 2018, accompanied by over 100 user evidence forms. In September 2019 Honiton Town Council applied to the Secretary of State requesting that the County Council be directed to determine the application. In February 2020 the Secretary of State granted that request and directed the County Council to determine the application within six months.

2. Description

- 2.1 The proposed route starts at Sidmouth Road, point A on the proposal plan, and follows a tarmac path through a long but thin area of green open space to come out on Whitmore Way at point B on the proposal plan. The open space is bordered on the south by a hedgebank that forms the boundary with the Tesco superstore, and to the north by residential properties on Whitmore Way.
- 2.2 The tarmac path was constructed when the estate was built in the early 1990s by Davies Homes. Other similar paths on the northern side of the estate were formally adopted as part of the street layout, and are now maintained footways, but the application route was not included in the adoption process or formally dedicated as a public right of way.

3. Documentary Evidence

Planning documents and Land Registry records

- 3.1 The plan submitted with the planning application 97/P0317 shows the application route in detail, with specifications and landscaping requirements. Whilst dated 'July 94' the plan has been date stamped 7th May 1997 by East Devon District Council. Although the plan shows that the area was intended to be an open space with a footpath through it, there is no direct mention of intended status. As such they are not conclusive evidence of express dedication. The plan contains a legend entitled: *Roads. To Devon County Council design, construction and adoption standards, the subject of a Section 38 agreement*. Paths are recorded in the legend as being constructed of pre-cast concrete slabs, rather than the tarmac that the application route is surfaced with. The only surfaces stated as being constructed from tarmac in the legend are shared vehicular areas, drives and parking bays. Devon

County Council Highways have no record of the application route ever having been the subject of a Section 38 agreement.

- 3.2 Likewise, the planning application itself and the associated comments on reserved matters describe the construction and location of the footpath but do not discuss the status. It includes the comment: *'The scheme provides for the footpath and open space link from the Sidmouth Road along the north side of Tescos to provide pedestrian access to the proposed kickabout area, and the footpath network and the remainder of the development as envisaged in the overall strategic layout that formed the basis of the outline application'*. Other similar paths on the neighbouring development to the north (Persimmon Homes and Wimpey Homes) that were constructed around the same time were later adopted to become linking footways maintainable at public expense via a Section 38 agreement.
- 3.3 The Land Registry deeds for the land over which the application route crosses (DN291841) are complex due to the nature of the development. Larger units of land were purchased by developers and subsequently parcelled up as the housing estate was constructed, leading to a multitude of covenants on this particular plot of land, many of which relate to the rest of the estate. The application route is not explicitly referenced in the deeds, but there are two particular covenants that are of interest. The first, dated 28th May 1997, simply states: *'The estate roads and footpaths are subject to rights of way'*. The second, dated 22nd May 1998 states: *'The common accessways and footpaths are subject to rights of way'*. There is no further explanation of the nature of these rights of way, who they apply to or where they specifically relate to.
- 3.4 Further Deeds (DN402057) provide useful information explicitly relating to the application route. Deeds of the Transfer of Part cover the transfer of the housing plots on Whitmore Way (DN219841, DN398961) from the developer to the new owners of the houses. Both contain the same plan, dated August 1997, that shows the application route, along with Whitmore Way itself, hatched and described in the key as *'area for adoption as Public Highway under a Section 38 Agreement'*. The deeds themselves are dated to June/July 1998 and provide strong evidence that at this time both the transferor (who owned the land over which the application route crosses) and transferee believed that the application route was intended to become a public highway at some point in the future. As mentioned above, the application route was never included in any Section 38 agreements.

3.5 Aerial photography

Aerial photography from 1999-2000, 2006-7 and 2015-17 show the application route, though much of it is obscured by tree growth from the hedgebank on the southern boundary and the shadows cast by it, particularly in the later photographs. In all the photos it is possible to distinguish the tarmac surface of the path where it is visible.

4. Definitive Map Review

- 4.1 A Definitive Map Review was conducted in Honiton parish between 2005-2012. The application route was not put forward for consideration during this review.

5. User Evidence

- 5.1 122 user evidence forms were submitted with the application, almost all dated to January 2018 at, or just after, the period the caravans appeared on the site. The user evidence covers the period 1998 (exact date unknown) to January 2018. The average period of use of the 122 users is 11.1 years. The forms demonstrate very frequent use of the route, with 83 (68%) of the 122 users stating that they used the path either daily or several times per week, with many stating that they used the path more than once a day. 29 users (23.7%) state that they used the path every 1-2 weeks, with only nine users (7.3%) stating that they used the path less frequently than fortnightly.
- 5.2 All the users stated that they used the route on foot, with only four stating that they also sometimes cycled along it. Seven users stated that they believed the path to be a bridleway, three believed it to be a restricted byway and 109 believed it to be a footpath. Three users left this question blank. A few users have provided additional information to say that they have seen many other people using the route, including people on bikes and mobility scooters. One user wrote: *'I often see cyclists using the path on their way to and from Tesco.'* 113 of the users record that they used the route for pleasure, with only 13 also stating they used it for work or business. 35 users specifically stated that they also used the route for 'shopping' with most using it to access the Tesco store nearby.
- 5.3 None of the users state they had ever seen any signs or notices on the route other than Tree Preservation Order notices erected by East Devon District Council on or around 12th January 2018. Likewise, none state that there have ever been any barriers or obstructions on the route other than the staggered railings at the Sidmouth Road end at point A. These railings appear to have been installed when the tarmac path was constructed, and they are on the boundary where the path joins the pavement of Sidmouth Road. The staggered construction suggests that they are intended to slow down pedestrians or bicycles that have come down the path before they join the pavement of Sidmouth Road.
- 5.4 None of the 122 users record that they have ever obtained permission or been stopped or turned back.
- 5.5 Many of the users have added additional comments on their forms that have provided further information on the history of the path. Many users indicated that they presumed the path to have been owned by 'the council' due to the fact that the grass and shrubs beside the path were regularly maintained. Neither Devon County Council, East Devon District Council or Honiton Town Council have ever owned or maintained the area. Some users mention having

seen contractors cutting the grass, with one referring to 'Goodwill Gardeners', which may be reference to Goodlife Gardeners, a small gardening company operating in the area. One user states that he believed the path was public because it was '*swept and gritted by council*'. Other users commented that they assumed the path was public because it looks the same as the other paths on the estate that are.

6. Landowner and rebuttal evidence

- 6.1 The application route itself crosses a plot registered with the Land Registry as DN219841, which at the time the informal consultation was published was showing as registered to Wessex (Somerton) Ltd. Subsequent investigation has discovered that Wessex (Somerton) Ltd was dissolved via compulsory strike-off in 2018, after which they were no longer the legal owners of the land. The land was subsequently disclaimed by the Treasury Solicitor in March 2020, becoming subject to escheat, and passed to the Crown Estate (assets subject to escheat are dealt with by Burges Salmon LLP on behalf of the Crown Estate). Legally the land now has no owner in fee simple, the Crown Estate merely arrange for it to be passed back into ownership. They accept no responsibility for the land and take no part in any management of the land. As such, they have not made any comment on the application as to do so could be deemed an act of management.
- 6.2 Properties in Whitmore Way beside the open space, through which the application route runs, were sent landowner evidence forms, having been served notice of the application by the applicant. Two returned forms, both stating that they do not consider that they own land adjacent to the route, helping establish with added certainty that the route passes solely through Land Registry plot DN219841. Both the residents who returned their landowner evidence forms also completed user evidence forms in 2018.

7 Discussion

- 7.1 Statute (Section 31 Highways Act 1980)
Section 31(1) of the Highways Act 1980 states that if a way has actually been enjoyed by the public 'as of right' and without interruption for a full period of 20 years, it is deemed to have been dedicated as a highway unless there is sufficient evidence that there was no intention during that period to dedicate it. The relevant period of 20 years is counted back from a date on which the public right to use the way has been challenged. The user evidence forms were all completed in January 2018, around or shortly after the period when the supposed new owner placed of caravans on the land crossed by the route. Although the Schedule 14 application was not submitted until September 2018 it seems reasonable to conclude that the date on which the public right to use the way was challenged was in January 2018. As such the user evidence falls fractionally short of the full 20 years of uninterrupted use and therefore is not sufficient for statutory dedication of the application route based on the date of the application. The route has remained open, available and well-used by the public since the application was submitted.

7.2 Common Law

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

7.3 Despite the planning application and associated documents appearing to indicate that the path was intended for adoption as a highway, this never occurred. Land Registry records paint a similar picture, with several references to '*rights of way*' and to the application route being '*for adoption as Public Highway*', though stopping short of anything conclusive. As such, there is insufficient evidence to conclude that express dedication occurred. Whether through oversight or intention, the path was never adopted as a public highway. However, these documents certainly suggest that the path was indeed intended to become a public footpath by the company who constructed it, as well as by the people who purchased the houses adjacent to the route. As such, they provide very strong evidence from which dedication may be inferred.

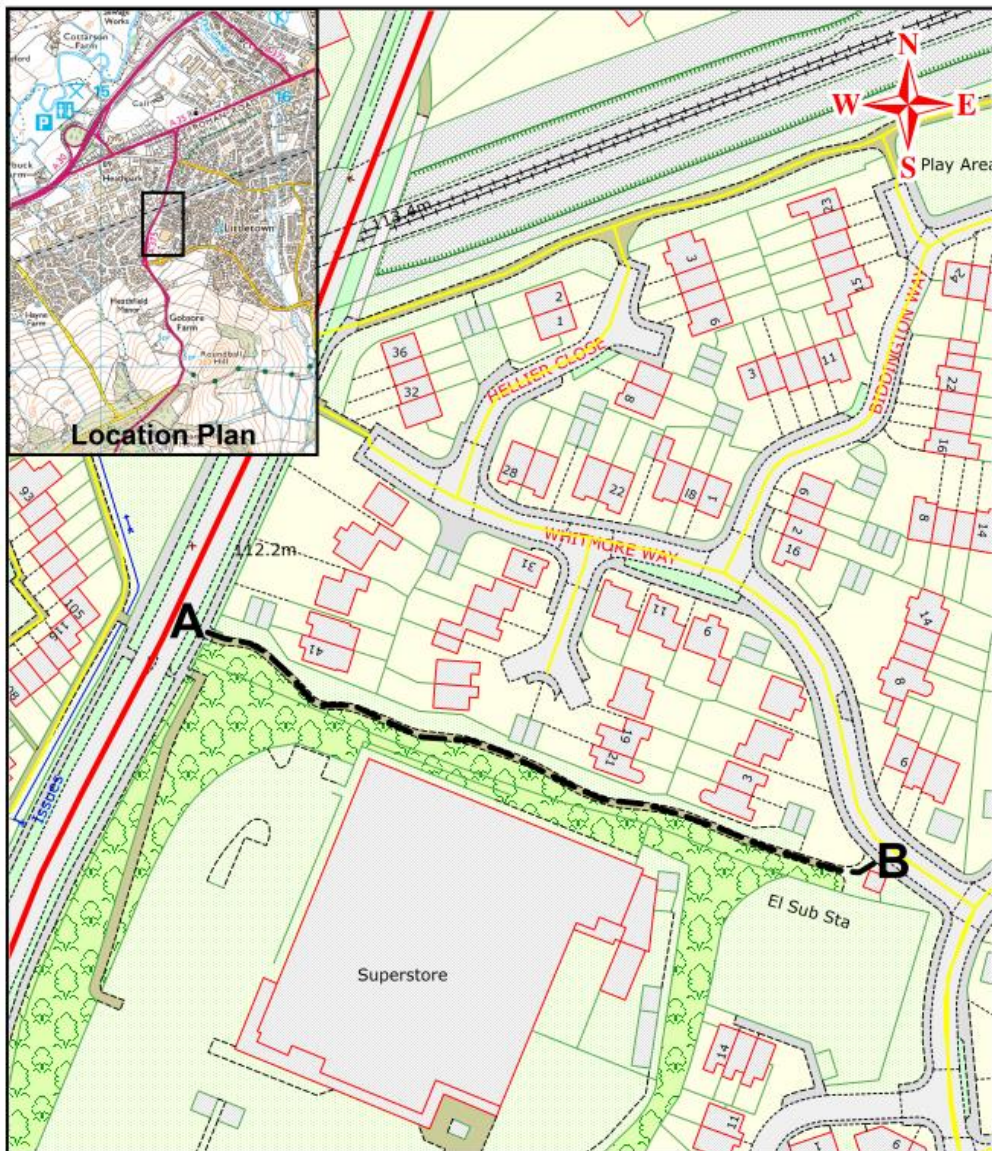
7.4 The user evidence shows that the path is heavily used and has been since it was first constructed. Most of those who completed user evidence forms have used the path very frequently, suggesting that it is a key pedestrian route to enable people to access the Tesco superstore as well as the residential areas to the west of Honiton, where there is a nursery and pub as well as access to the Heathpark Industrial Estate. Not a single user evidence form (from 122 forms) records any actions, overt or otherwise, taken by the landowner to suggest that the route was not public. It also appears that during the period from its construction up until late 2017 the landowner maintained the grass and trees on the open space through which the path runs. It therefore seems safe to conclude that the landowner was not only aware of the public using the route but took positive action to assist them to do so in comfort and safety.

7.5 Use of the path by the public has been mostly on foot, with only four out of 122 (3.3%) stating that they had cycled the route. Other users have also commented that they regularly see cyclists using the route. Evidence of use on bicycle could suggest that bridleway rights may exist on the route, though this would depend on the level of use being sufficient to justify bridleway status. Although only four users claim to have used a bicycle on the route, ten users stated that they believed the path to be of bridleway or restricted byway status. Those users who have used the route on bicycle have done so frequently (between twice daily and weekly) and since 1998. The presence of the staggered railings at the western end of the route (at the bottom of the slope where it joins Sidmouth Road) suggest the path may have been constructed with cyclists in mind. However, the plans and documents submitted with the planning application for the estate do not refer to this, it being annotated as '*footpath route through POS*' (public open space) and staggered railings are also used to slow down pedestrians (small children

being the obvious example) in other locations. The planning documents also use the phrase 'pedestrian access' when referring to the path. The National Traffic Survey 2018 (commissioned by the Department for Transport) shows that of the journeys made on foot or bicycle nationally, bicycle journeys account for 7.4% and foot journeys 92.6%. The 3.3% of bicycle use on the application route is therefore below what may be expected, though of course it is difficult to apply quantitative data across different paths and locations. Taking all this into account, it appears that the evidence is insufficient to conclude that the application route is of bridleway status and that the evidence is overwhelmingly consistent with it being a footpath.

8. Conclusion

- 8.1 In the absence of the full period of 20 years user evidence of public rights, their existence cannot be considered under Section 31 Highways Act 1980. Under common law, the documentary evidence shows that the route has physically existed since 1998, having been constructed as part of the Whitmore Way housing development. Whilst no single piece is conclusive evidence of an express dedication, collectively they do infer that the path was intended to be a public footpath in the future. Despite an express dedication not taking place or the path being adopted by DCC, the public have used the route as of right. There is no evidence to suggest that the landowner has ever objected to this use. On the contrary, it appears that the landowner encouraged public use by maintaining the grass and trees alongside the path. Therefore, the evidence shows that a dedication can be implied and that the public accepted the dedication, with use being overwhelmingly on foot.
- 8.2 From this assessment of the evidence, in conjunction with other historical evidence and all evidence available, it is considered sufficient to support the claim that public rights subsist or are reasonably alleged to subsist. Accordingly, the recommendation is that an Order be made to modify the Definitive Map and Statement by the addition of a public footpath between points A – B as shown on drawing number HIW/PROW/20/12, and if there are no objections to the Order, or if such objections are subsequently withdrawn, that it be confirmed.



Map ref: SY 1530 9979/SY 1545 9974

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DEVON COUNTY COUNCIL

Honiton parish

Informal Consultation:

Schedule 14 application, claimed footpath from
Sidmouth Road to Whitmore Way, Honiton

Drawing number: HIW/PROW/20/12

Date: Feb 2020

Scale: 1:1,250 @A4

Drawn by: TCG

Notation

Claimed
Footpath

----- (160m)



Meg Booth

CHIEF OFFICER FOR HIGHWAYS, INFRASTRUCTURE DEVELOPMENT AND WASTE



Point A



Point B