

Schedule 14 Application
Addition of a Public Byway Open to All Traffic from Footpath No. 6, Newton Abbot to Powderham Road

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 number HIW/PROW/20/17.

1. Introduction

This report examines a Schedule 14 application made in October 2016 for the addition of a byway open to all traffic in the town of Newton Abbot.

2. Background

A Definitive Map Review for the parish of Newton Abbot was carried out in 1995. This proposal was not put forward during the review and had not appeared in any previous reviews. A Schedule 14 application was first made in September 2015 but was withdrawn by the applicant shortly after. A further application was submitted (by the same applicant) in October 2016 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 November 2017 the applicant appealed to the Secretary of State requesting that DCC be directed to determine the application. In July 2018 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 have been carried out with the following results:

County Councillor Gordon Hook	-	no comment;
Teignbridge District Council	-	no comment;
Newton Abbot Town Council	-	no comment;
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(s) has/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 a Modification Order be made in respect of this proposal as evidence is considered sufficient

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 Teignbridge area, as directed by the Secretary of State.

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Electoral Division: Newton Abbot South

Local Government Act 1972: List of Background Papers

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Background Paper	Date	File Ref.
Correspondence File	2014 to date	DMR/Sch14/FP6 Newton Abbot

tg031120pra

sc/cr/schedule 14 addition of a public byway open to all traffic footpath no 6 Newton
Abbot to Powderham Road

04 161120

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.

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

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

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

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

The Wildlife and Countryside Act 1981, Section 56(1) states that the Definitive Map and Statement shall be conclusive evidence as to the particulars contained therein, but without prejudice to any question whether the public had at that date any right of way other than those rights.

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

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

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

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

Schedule 14 Application: Claimed Byway Open to All Traffic from Footpath No. 6, Newton Abbot to Powderham Road, between points A – B on plan no. HIW/PROW/20/17.

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 number HIW/PROW/20/17.

1. Background

- 1.1 In 2014 Dr Faizan Irshad of 34 Courtenay Road, Newton Abbot, contacted Devon County Council requesting the diversion of a section of Newton Abbot Footpath 6 around the perimeter of his property, an area he used for parking his vehicles. It was then discovered that the section proposed to be diverted was not recorded on the Definitive Map; there was a missing link between the end of the recorded footpath and Powderham Road. To resolve this anomaly, a creation agreement was drafted by Devon County Council to effect the formal dedication of a link, and Dr Irshad began construction of a wall separating the proposed new footpath from the rest of his land. The construction of this wall physically obstructed field gates to adjacent land, leading to complaints from the owners of the land and another local resident.
- 1.2 The adjacent landowners claimed that the whole area of land in question was part of the public highway, Powderham Road. In correspondence and discussion with the landowners, the County Solicitor confirmed that the land was not recorded on the County Council's records of highways maintainable at public expense (HMPE), the List of Streets. He advised that if they considered that unrecorded public rights existed, the appropriate procedure would be to make an application for modification of the Definitive Map and Statement.
- 1.3 A Schedule 14 application was submitted in October 2015 by Terry Ward of Powderham Lodge, but he subsequently withdrew this application in November 2015. A second application was made in October 2016 by Mr Ward and Mr Christopher Hickson for the addition of a Byway Open to All Traffic over the area of land. As the Definitive Map Review had already been completed in Newton Abbot, the application was added to the register to be dealt with once the countywide review had been completed, in line with the County Council's policies. In November 2017, the applicants applied to the Secretary of State for Environment, Food and Rural Affairs and in July 2018 Devon County Council was directed to determine the application within 20 months.

2. Description of the Route

- 2.1 The claimed route begins at the pedestrian gate where Newton Abbot Footpath No. 6 enters a small parcel of land used as a parking area at point A on the consultation map (HIW/PROW/20/17). It proceeds across the land in a east-southeasterly direction for approximately 14 metres to join the public road at Powderham Road at point B on the consultation map. The application seeks to add the whole width of the parcel of land as a Byway Open to All Traffic (shown hatched red on the attached plan for clarity).

3. The Definitive Map Process

- 3.1 Unlike in many parishes, the Definitive Map Process in Newton Abbot utilised six-inch-to-the-mile Ordnance Survey mapping from 1938. The area of land crossed by the application route is not distinguished from Powderham Road at this scale, indeed it appears as part of Powderham Road itself. Footpath 6 is marked on the parish survey map, terminating just beyond the solid line where it runs into what appears to be Powderham Road. The survey form records the eastern end of Footpath 6 as '*proceeding north of the boundary of "Highwood" to the junction with Powderham Road (a District Road). The Footpath terminates with a five-bar gate. Kissing gates en route.*' It is possible that this refers to a gate in the same location as the one that exists today. Instructions to those conducting the surveys included the requirement that proposed public paths link into the public highway network. This leaves two possibilities in this case; firstly, that the surveyors knowingly terminated Footpath 6 at this point as that was where they considered it to join the highway, in which case they considered the application route to be part of the highway; or secondly, that the gate was an obvious feature to terminate the route and the exact details of the extent of the HMPE were only considered in a very cursory manner, leading to an error.
- 3.2 The reason for believing the path to be public was stated as '*public use over a number of years*'.
- 3.3 There were no objections to the proposed Footpath 6 during the Definitive Map Process and it was included on the Definitive Map. Subsequent reviews during the 1970s and 1990s produced no proposals to modify Footpath 6 or to add the application route. Subsequent reviews were undertaken at times when rights of ownership were being exercised on the land and it is notable that no objections or errors were raised, either to the ownership of the land or to the right of way.

4. Documentary Evidence

4.1 Ordnance Survey Drawings 1806

Neither the application route, the currently recorded line of Footpath 6 or Powderham Road are shown on the Ordnance Survey Surveyor's Drawings. The area between Coach Road and Torquay Road/East Street is shown as agricultural fields.

4.2 Wolborough Tithe Map and Apportionment 1845

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

- 4.3 Neither the application route, the currently recorded footpath 6 or Powderham Road are shown on the Tithe map. The area is shown as agricultural fields with no discernible tracks or paths marked anywhere near the location of the application route.
- 4.4 Ordnance Survey 25" to a mile 1st edition map
Surveyed in 1887, this map shows Powderham Road and Courtenay Road. Powderham Road is defined by solid lines leading almost to the current extent of Footpath 6. Footpath 6 is defined by pecked lines and is named Leonard's Road, which is coloured yellow in the same manner as Powderham Road. There is a solid line at the junction with Footpath 6 indicating the presence of a barrier, such as a gate. There is no distinction between the area now recorded as HMPE and the area crossed by the application route. There is a mature hedge/copse on the boundary with Mr Hickson's field.
- 4.5 Ordnance Survey 25" Second Edition 1904; Finance Act 1910 map & records
The later edition of the Ordnance Survey 2nd edition 25" to the mile map revised in 1903 shows the application route in a similar way to the 1st edition map at the same scale. The mature hedge/copse on the boundary with Mr Hickson's land is not shown in this edition. There a solid line across the application route approximately at point A where the current Footpath 6 terminates. There is a pecked line turning the corner of Powderham Road, used on OS maps to show change of surface, possibly indicating the western extent of the road. The area crossed by the application route is braced with Powderham Road.
- 4.6 The same later maps were used as the basis for the 1910 Finance Act survey to ascertain the value of land for the purpose of taxation, copies of which were submitted with the application. The map shows the application route to have been excluded from surrounding hereditaments (assessment areas of land) throughout, as was Footpath No. 6.
- 4.7 Ordnance Survey 25" to a mile 1939 revision
This revision shows the area in the same manner as the 1904 edition, the only substantial difference being that Powderham Road and the land over which the application route crosses is no longer braced.
- 4.8 Ordnance Survey One Inch/mile 1898
Powderham Road is shown on this map as a second-class road, unfenced on the western side. There are two pecked lines in the vicinity of the recorded Footpath 6 but it is unclear exactly what these refer to as they cross over rather than running parallel. It is possible that this shows two footpaths or perhaps an unmetalled road, or even an error in the draughting of the map. There is no clear distinction shown between what is Powderham Road and what would likely be the land crossed by the application route.
- 4.9 Ordnance Survey 25" to the mile 1943
This map shows the application route in a similar manner to the second edition. There a solid line across the application route approximately at point A where the currently recorded Footpath 6 terminates. There is a pecked line turning the corner of Powderham Road, possibly indicating the western extent of the

road. The area crossed by the application route is not braced with Powderham Road.

4.10 Ordnance Survey One Inch/mile 1946

Powderham Road is shown, along with the extent of Footpath 6, which is shown to be in the category of 'minor roads in towns, drives and unmetalled road.' It is shown as partially fenced on the boundary with Highwood but otherwise unfenced. At this scale it is not possible to distinguish any features of the land over which the application route passes.

4.11 Ordnance Survey One Inch/mile 1961

This edition shows Powderham Road in the same way as the previous 1946 edition. Footpath 6 is shown on this edition as a 'footpath or track.'

4.12 Ordnance Survey 6 inch to a mile 1961

This map shows the area crossed by the application route, with a solid line across it at the approximate position of the current field gate at Point A, presumably marking the existence of a gate or other obstruction. There is a short, curved line that appears to represent the edge of Powderham Road where it turns the sharp bend, but it does not extend all the way around the boundary with the land crossed by the application route. 34 Courtenay Road is not shown on this map. Footpath 6 is labelled as 'FP'.

4.13 Ordnance Survey 6 inch to a mile 1968

This map shows the area in much the same manner as the 1961 edition. The only differences being that 34 Courtenay Road is shown on this map and the footpaths (including Footpath 6) are labelled 'path'.

4.14 Bartholomew's Mapping 1903, 1923 and 1941

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. Cyclists were confined to public carriage roads until 1968. The half-inch scale does not permit all existing routes to be shown, omitting some of the more minor routes. The purpose of these maps was to guide the traveller along the routes most suitable for their mode of transport. Bartholomew's Maps published between 1903 and 1941 do not show the main section of Powderham Road at all. However, they do appear to show Hill Road and the very southern section of Powderham Road leading into the application route and Footpath 6. This is shown in all three editions as an uncoloured road, which is deemed to be '*inferior and not to be recommended to cyclists*'.

4.15 Aerial photography – 1946-9

RAF aerial photographs from 1946-9 show the area crossed by the application route. However, a low sun casting deep shadows creates a chiaroscuro effect, making it difficult to distinguish any details. There appears to be a mature hedge or trees along the boundary between Highwood and the land over which

the application route crosses, which is casting a deep shadow to the northeast. There is also a mature hedge visible on the boundary between the land over which the application route passes and Mr Hickson's land, continuing to what is now the boundary with 1 and 2 Powderham Close.

4.16 2006-7

The area over which the application route passes is shown, with at least two cars parked there. A deep shadow is cast over the southern area by trees on Dr Irshad's property making it impossible to distinguish what is there. There appears to be a fence line or barrier of some sort on the boundary with Footpath 6. There is a clear distinction in surface between the tarmac of Powderham Road and the area over which the application route passes, and the low railing is just visible. The area of land in question appears to be gravel/dirt or possibly burnt-off grass as these photos were taken in the summer months.

4.17 2015-17

Aerial photography taken between 2015 and 2017 show the area over which the application route passes in considerable detail. The blockwork wall constructed by Dr Irshad is clearly visible, as is the boundary with the tarmac surface of Powderham Road. There appears to be a gap in the wall allowing users of Footpath 6 to continue straight on over Dr Irshad's land to join Powderham Road. There are three cars parked on the area of ground with the wall.

4.18 Google Streetview images

Images from Streetview are available from the years 2009, 2011 and 2014, the latter being shortly before the construction of the blockwork wall and fence. All three images show low metal railings either side of with a gap at point B, in line with the recorded Footpath 6. The Devon County Council finger post for Footpath 6 is visible next to the kissing gate near point A in all three images. The images show that the area was gravelled at some point between 2009 and 2011.

4.19 Highway maintenance records/Handover maps

Newton Abbot was formerly an Urban District Council and was therefore responsible for maintaining public roads in the district until 1974, when, following Local Government reorganisation, responsibility was handed over to Devon County Council. The 'handover map' from this period shows roads that were considered to be maintainable at public expense at that time as 'district roads'. They do not usually show footpaths and bridleways, only vehicular roads.

4.20 Powderham Road is coloured brown as a 'district road' according to the key on the front of the map. The area correlating with Dr Irshad's land is clearly coloured grey, which denotes 'private' according to the key. Footpaths are not marked on this map but a strip of land on the line of a continuation of the recorded Footpath 6 (between points A – B) is uncoloured and therefore not denoted as either private or HMPE.

- 4.21 A Newton Abbot Urban District Terrier shows Powderham Road marked in yellow as a public road. The land over which the application route crosses is coloured blue, which denotes private (and it appears to be annotated as such). On this map Footpath 6 is clearly shown extending across the blue area marked as private to meet Powderham Road, approximately on the line of the application route. The date of this map is unknown but the Ordnance Survey 25" base mapping suggests that it is later than the 1943 edition but before 34 Courtenay Road (built in the 1960s) appeared on the mapping. Though not conclusive on the matter, it is evidence that the highway authority at that time considered the application route to be an extension of Footpath 6 and that Dr Irshad's land was then considered to be private land.
- 4.22 Newton Abbot Urban District Council Records (1864 onwards), including Highway Committee reports
No information relating to the route have been discovered in these records, which are held at the Devon Heritage Centre.
- 4.23 Land Charges mapping/List of Streets
The application route is not shown as HMPE on the List of Streets. However, the extent of the HMPE of Powderham Road appears to partially extend onto the land crossed by the application route and which is now being used by Dr Irshad. The List of Streets shows Powderham Road marked in brown and where it turns the sharp corner near the application route it is demarcated by hand-drawn dashed lines over a solid line that appear to show the limit of the road, and correlates approximately with the boundary of land registered to Dr Irshad. The mapping upon which the List of Streets is marked is not consistent with earlier edition OS maps. However, it does provide clear evidence that at the time the List of Streets was digitised in 2005 the application route was not considered to be part of the public highway by Devon County Council.
- 4.24 Additional map books, believed to be working copies of the land charges records, used by the highway engineers in the 1970s and 80s, are also held by the County Council. Powderham Road is shown coloured blue on two of these maps, denoting an unclassified county road. The area crossed by the application route is included in the area coloured blue where Powderham Road turns a sharp corner, though on one map it is only partially coloured. It seems unrealistic to assume that the person marking Powderham Road in blue intended to differentiate the area crossed by the application route on a map of this small scale. As such, and given their uncertain provenance, these two maps provide little evidence as to the status of the application route.
- 4.25 Land Registry Documents
The parcel of land over which the application route passes (DN125973) has an unusual history of registration. Mr Mohammed Irshad, the father of the current registered owner Dr Faizan Irshad, purchased 34 Courtenay Road in 1979. In the conveyance, the vendor states that over the land in question (outlined in green on the attached plan and corresponding with the current registered plot) she had exercised rights of ownership without any claim ever having been made against her since 1970. The previous owner of 34 Courtenay Road declared likewise during their ownership between 1964 and 1970. Mr Irshad

subsequently claimed the possessory title to the land through adverse possession in October 1981.

- 4.26 During the 1981 registration process a small strip of land that connects the existing Footpath 6 to Powderham Road was left unregistered, as had been the case in the previous conveyance documents. Land subject to highway rights cannot be claimed by adverse possession so it seems logical to conclude that the unregistered strip was taken to be the continuation of Footpath 6 during the registration process, something that Dr Irshad confirms in his statutory dedication. There appear to have been no objections to the original claimed possession at the time. The possessory title was upgraded to absolute in November 2003.
- 4.27 In 2015, following the construction of the wall on the land, Mr Hickson applied to the HM Land Registry for alteration of the register under schedule 4(5) Land Registration Act 2002, for closure of Mr Irshad's title on the grounds that this title cannot have been legally claimed by adverse possession in 1981. Dr Irshad objected to the application and a tribunal was arranged. However, Mr Hickson subsequently withdrew his application and the tribunal did not take place.

5. User Evidence

- 5.1 No user evidence forms have been submitted with this application. However, one form was submitted with the withdrawn application by the applicant Mr Ward. Several letters from local residents were included with the application, mostly objecting to the fence and wall erected by Dr Irshad. These all mention crossing the application route on foot to access Footpath 6, particularly for dog-walking. None mention any use suggestive of higher rights, though private rights of access to land are mentioned, along with many comments on the erection of the blockwork wall. Many of the letters and statements submitted with the application appear to have been originally intended to support Mr Hickson at the Land Registry Tribunal.
- 5.2 Mr Ward submitted a user evidence form along with his Schedule 14 application (subsequently withdrawn). The form is dated 28th June 2016 and Mr Ward states that he has used the application route on foot since 1978. He believes the route to be a Byway Open to All Traffic. He states that the path has always run over the same route and never been diverted, with gates that were not locked. He states that he believes the land crossed by the route is owned by the Highway Authority. He states that he has been stopped or turned back from using the way '*briefly in Nov 14*'.
- 5.3 Mr Ward's withdrawn application was also accompanied by a petition against the wall and fence erected by Dr Irshad, signed by 31 people. Only one person has noted on the petition that they have used the route; it is not clear whether the people signing it were objecting to the appearance of the wall or the issue with the right of way.

- 5.4 A letter from M J Dyer states that he has walked footpath 6 '*on a daily basis for some 35 years*' and that there has never been any obstruction of any sort to the line of the footpath.
- 5.5 A statement of objection from Mr D Clarkson states that he has regularly used the footpath since 1983 and that the path has never been obstructed and that there '*has always been access for farm, or other vehicles*'. He refers to Mr Rew using the gated entrance to his land for access and moving livestock. He also states that access was used by the builder of Highwood Grange during construction of that property.
- 5.6 A statement from Linda Stanbury of 8 Hill Road states that she has known the route for 33 years and the public have always had open access across the application route to join Footpath 6. She mentions that there was once a DCC finger post sign near point B, but that this has been uprooted and is now tied to the post beside the kissing gate at point A. The statement refers to five-barred gates to both Mr Rew's and Mr Hickson's land but does not state whether they have been used for access or not.
- 5.7 A statement submitted by Mrs J Thompstone states that she has lived in the vicinity of the application route for 48 years and that until 2014 '*access across the disputed open space was used daily by ramblers and dog walkers*'. She states that the wall erected by Dr Irshad completely blocked access to Footpath 6 as well as the access to the land belonging to Mr Rew and Mr Hickson.
- 5.8 A letter from Mary Coleman states that since 1972 there has been '*free access to the site*' and that cars have sometimes been parked there.
- 5.9 A letter from M Semey (?) states that they have lived in Powderham Close for 35 years and walked their dog daily '*across the fields. Entering the fields by the public footpath over the land in question which was never ever fenced off*'.
- 5.10 A letter from Mr Terry Ward (applicant) to Dr Irshad states that he has '*used the existing right of way for 35 years*' presumably referring to the application route linking into Footpath 6. This letter was in addition to the user evidence form that Mr Ward submitted with the application that he withdrew.
- 5.11 A Mrs Jane Coleman of 32 Courtenay Road emailed stating that she has lived there since 1998 (and also lived in the area as a child) and that the application route has always been used as pedestrian access to the 'The Common' but not for vehicles. She states that the land has been used a car park for the occupants of 6 Powderham Road and that she believes they are the owners of it.

6. Photographs

- 6.1 Numerous photographs have been supplied both by Mr Hickson and Dr Irshad, in support and rebuttal of the application respectively. Mr Hickson submitted three photographs labelled 'File 4' with his application. Two of the photographs show the application route at point B, with a wooden fence visible and the 'private property no parking' sign mounted on it. The kerbstones at the edge of

Powderham Road are clearly visible. The third photograph shows the whole of the application route from point B towards point A. The blockwork wall and fence erected by Dr Irshad are clearly visible, along with the two 'private property no parking' signs. The interior of the walled area is gravelled. There is a gap in the wall through which the gates at point A marking the start of the current Footpath 6 are visible. On this photograph a red line has been drawn on and the area within it labelled 'HMPE'.

7. Landowner Evidence

- 7.1 Dr Irshad completed a landowner evidence form with plan, along with numerous accompanying documents. His form states that he has owned the land over which the application route passes for 14 years and has always believed that a footpath has crossed it. He states that he has seen the public using the application route and has never stopped or turned anyone back from using the route or told them that it was not public. He states that he has erected two signs stating, 'private land – no parking' and that these have never been defaced or destroyed. He states that there are gates on the route which are locked but the pedestrian foot entrance is open. This presumably refers to where Footpath 6 currently terminates at point A on the consultation map.
- 7.2 Dr Irshad also provided further information in a letter submitted with his landowner evidence form. In the letter he outlines several issues relating to access over the land. He states that in the early 2000s a developer called Woodvale was given permission to go over his land into the neighbouring field to install services for the development at Highwood Grange. He states that he has never witnessed Mr Rew driving tractors or vehicles over his land to access his fields or driving cattle over his land. He states that his mother gave Mr Hickson temporary permission to have access over the land so that Mr Hickson could landscape his land.
- 7.3 Dr Irshad has also provided a statutory declaration dated 1st June 2015 containing a detailed account of the issues summarised in his covering letter. It essentially reiterates that his family hold the title absolute and have always used the land as if they were the owners, maintaining it and parking their cars on it. He declares that the public have always crossed on foot to access Footpath 6 and that other than this all access granted to neighbouring landowners has been on a temporary basis. Also, that no cars have been parked on the land without permission from his family. Dr Irshad also states that prior to the installation of the field gate at point A in the early 2000s there was only a solid wooden fence, with only a small gap to allow pedestrian access to Footpath 6.
- 7.4 Mr Hickson has also submitted a landowner evidence form as well as being the joint applicant. He states that he has owned the adjacent land for 25 years but has seen, or been aware of, members of the public using the way for '*walking and dog walking*' during the 50 years he has lived in the area. He believes the application route to be public and the status to be Byway Open to All Traffic. He states he has never stopped or turned anyone back from using the way, never told anyone that it was not public or erected any signs stating as much,

nor ever obstructed the way. He states that there is a kissing gate where '*Footpath 6 meets Powderham Road*' as well as a '*gate into my land*'.

7.5 Mr Anthony Rew provided a statutory declaration in February 2015, in support of Mr Hickson's application to the Land Registry. Mr Rew subsequently submitted this statutory declaration to Devon County Council during informal consultation for this application. Mr Rew states that his family have owned or occupied the land over which Footpath 6 crosses since the 1920s and up until the erection of the blockwork wall by Dr Irshad they have accessed this land over the application route, including in agricultural vehicles. Mr Rew also states that members of the local community have parked on the land whilst using Footpath 6 for dog-walking.

8. Discussion

8.1 Statute (Section 31 Highways Act 1980)

Section 31(1) of the Highways Act 1980 states that if a way has actually been enjoyed by the public 'as of right' and without interruption for a full period of 20 years, it is deemed to have been dedicated as a highway unless there is sufficient evidence that there was no intention during that period to dedicate it. The relevant period of 20 years is counted back from a date on which the public right to use the way has been challenged. Where there has been no such challenge the date of the Schedule 14 application is to be used instead.

8.2 In this case, the building of the blockwork wall to define a 'diverted' footpath link around the perimeter of Dr Irshad's land triggered the application. It appears that some members of the public took the construction of the blockwork wall by Dr Irshad as intending to block the footpath. However, the draft creation agreement with Devon County Council clearly points to the intention being to formalise the footpath on an alternative alignment, rather than block it. The adjacent landowners, Mr Hickson and Mr Rew also contested that the wall blocked vehicular access to their land and that the area of land carried public vehicular rights.

8.3 There is no evidence to suggest that Dr Irshad has challenged the right of the public to use the way as a public footpath, merely wishing to divert it around the perimeter of his parking area instead of across the front of his house. Dr Irshad quickly reinstated the access to the application route rather than the intended diversion and so the relevant period can reasonably be deemed to be the 20 years prior to the date of the application: October 1995 - October 2015.

8.4 Although the application was submitted with numerous letters and statements in support, direct user evidence submitted by users themselves via user evidence forms has not been forthcoming. As such there is little to discuss concerning evidence of use during the relevant period. All the inferences of use in the letters and statements submitted with the application are suggestive of use on foot. This is perhaps to be expected considering the application route links into the existing Footpath 6 and that anyone using this path during the relevant period can be assumed to have passed along the application route. Due to this situation, those using Footpath 6 during the relevant period can be

assumed to have passed along the application route and that this can be weighed as evidence.

- 8.5 There is no evidence of use by the public during the relevant period to suggest that the application route is of a higher status than a footpath. There are references to agricultural vehicles accessing Mr Rew's land, but this is not considered sufficient evidence of public vehicular use as of right. There is also reference to members of the public parking their vehicles on Dr Irshad's land while walking their dogs. However, this would not constitute passing and re-passing along a defined route and so cannot be considered as evidence of use when assessing whether a public right of way exists.
- 8.6 There is no evidence to suggest that the owner of the land did not intend to dedicate the route as a footpath during the relevant period. On the contrary, it appears that the Irshad family acknowledged the existence of footpath rights along the application route, believing it to be part of Footpath 6, to the extent that they applied to divert the route around the perimeter of their property. Land Registry documents suggest that the Irshad family and previous occupants acknowledged the existence of the footpath, such that a strip for the footpath was not registered within their ownership. The existence of signs stating 'private property, no parking' suggest that the landowner did not intend to dedicate any vehicular rights across his land, though these were only erected in late 2014/early 2015.
- 8.7 Land Registry documents suggest that since 1964 the owners of the adjacent property (now 34 Courtenay Road) have exercised rights of ownership over the area crossed by the application route, a status made official in 1981 following Mr Irshad claiming adverse possession. Whilst technically possible, exercised rights of ownership and public vehicular rights seem implausible bedfellows on the land in question; the application route is a dead end and the only feasible reason that the public would have used it was as a parking area, which is not consistent with being use of a public right of way.
- 8.8 In summary, evidence of uninterrupted use by the public on foot across the land in question on a line A – B, to connect to the recorded Footpath 6, during the relevant period is strong and persuasive. There is no evidence of a lack of intention to dedicate on the part of the landowner, at least as far as footpath rights are concerned. Evidence of the public passing over the application route on bicycle, horseback or vehicle, either on a defined route or over the full extent of the area in question, during the relevant period has not been discovered. As such, although statutory dedication of vehicular rights is not met, there is clear and strong evidence that the test for statutory dedication has been met in relation to footpath rights.
- 8.9 Common Law
The only other basis for its possible consideration as a highway is if there was any other significant supporting evidence from which an earlier dedication of the route can be presumed or inferred under common law. At Common Law, evidence of dedication by the landowner can be express or implied and an implication of dedication may be shown if there is evidence, documentary, user

or usually a combination of both from which it may be inferred that a landowner has dedicated a highway and that the public has accepted the dedication.

- 8.10 For dedication to be inferred requires a landowner to be identified. Land Registry documents show that the land has been owned by the Irshad family since 1981. They also show that previous owners of 34 Courtenay Road have exercised rights of ownership over the land between 1964 and 1979. Mr Irshad purchased 34 Courtenay Road in 1979 and continued using the attached land as if he was the owner until successfully claiming the possessory title through adverse possession in 1981. Land over which a public highway passes cannot be claimed through adverse possession and it is significant that a strip of land linking Footpath 6 with Powderham Road was left unclaimed. These land registry documents implicitly acknowledge the existence of a public footpath across the land and therefore are strongly supportive of implied dedication in that no owners during this period objected to the use of the way by the public.
- 8.11 Ownership of the land crossed by the application route is unclear prior to 1964. Ordnance Survey mapping shows that the route existed at least as early as 1887, when it was shown as a track called Leonards Road that joined Powderham Road. Powderham Road is not shown at all in the Tithe Map of 1845 and so it can be deduced that it came into existence at some point between these dates. Ordnance Survey mapping does not provide any conclusive evidence of status. However, the fact that the area of land crossed by the application route is indicated as braced with Powderham Road does raise the possibility that it may have been considered within the curtilage of the highway. However, bracing to larger plots was also used as a convenient way of measuring smaller areas of land, regardless of ownership. The application route and the rest of the route named Leonards Road (now recorded as Footpath No. 6) are shown as a mostly unenclosed track, suggesting that it would have been wide enough for wheeled traffic. However, twentieth century Ordnance Survey mapping is consistent in showing a gate or obstruction across the route at point A which is somewhat incongruous with public vehicular rights.
- 8.12 Exclusion from the Finance Act plan, although not conclusive on the matter, suggests that the application route may have been considered public at the time it was produced. However, taxation of private property was the ultimate remit of the Act and any inference drawn from the plans regarding rights of way cannot be considered conclusive.
- 8.13 The Definitive Map survey recorded Footpath 6 as terminating at a gate in the approximate location of point A. There were no objections to the proposed Footpath 6 during the Definitive Map process, and it was included on the Definitive Map for Newton Abbot in 1963. Presumption of regularity applies to the survey process and so it can be assumed that Newton Abbot Urban District Council, as well as Devon County Council, believed that Footpath 6 joined the highway at the point recorded on the Definitive Map. At no point during the process was Footpath 6 purported to be of a higher status than footpath.
- 8.14 Subsequent reviews during the 1970s and 1990s produced no proposals to modify Footpath 6 or to add the application route. The fact that the error did not

arise in subsequent reviews suggests that the public were continuing to use the route on foot during this period without any dispute from adjacent landowners. Likewise, from 1964 (the date at which evidence suggests rights of ownership have been exercised over the land) through until the current application, there has been no proposal or complaint about the loss of vehicular rights over the application route. The Irshad family have used the land registered to them for the parking of vehicles since 1979, as did previous owners since 1964, without challenge until recently.

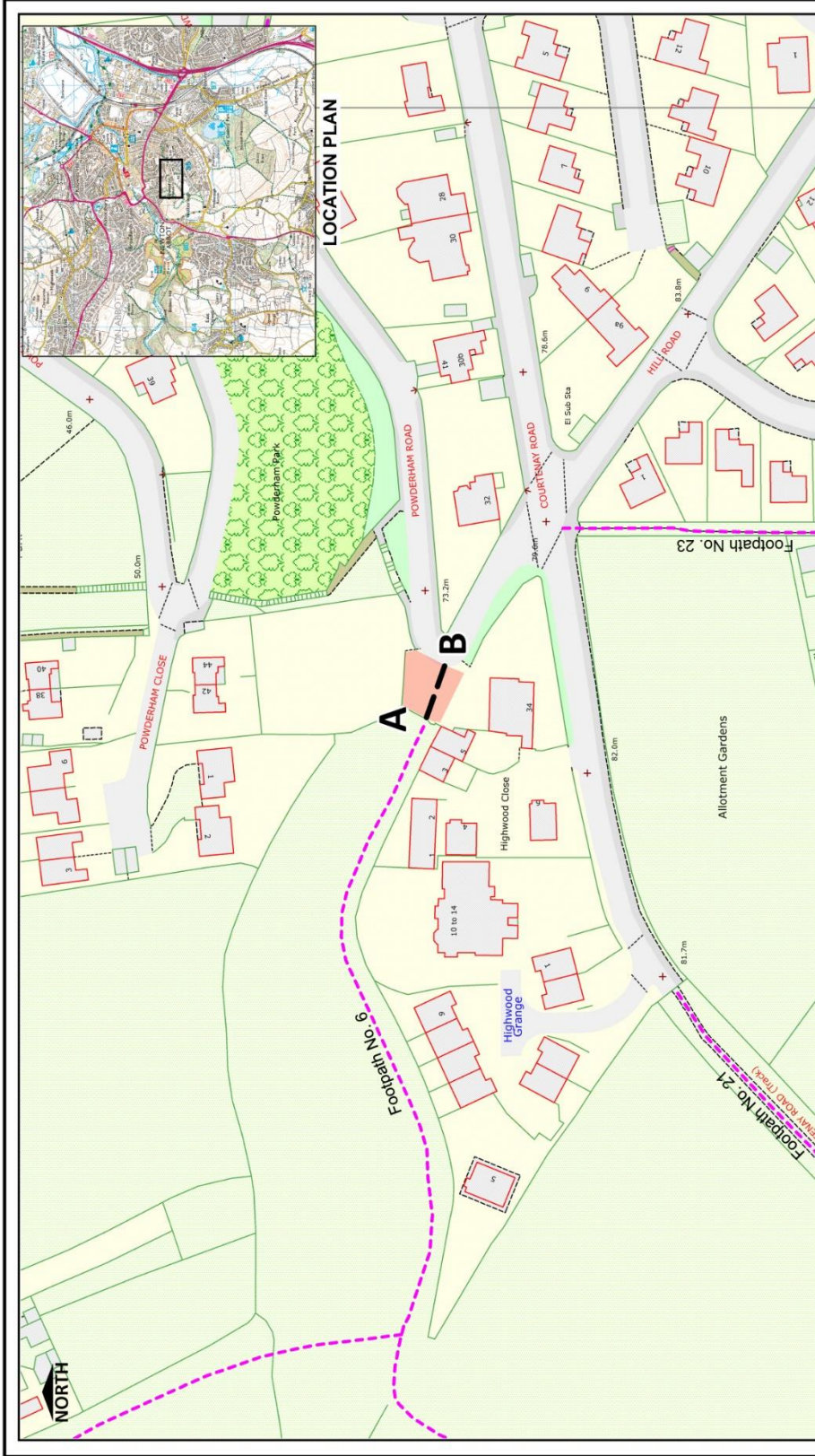
- 8.15 The highway maintenance records all show Powderham Road as a public road but only the handover map from the 1970s and the Newton Abbot Urban District Terrier show the area crossed by the application route in any detail. These maps provide strong evidence that at this time the area now owned by Dr Irshad was considered to be private property. The Terrier also suggests that at this time Footpath 6 was believed to cross the area on the approximate path of the application route to join Powderham Road. The other highway maintenance records throw very little light on the status of the application route due to their smaller scale and unknown provenance.
- 8.16 For an application to be successful under common law it is necessary for there to be evidence that the public has accepted a dedication. There is a dearth of evidence of the public passing along the application route in vehicles of any kind. Likewise, there is no evidence of the public using it on horseback or bicycle. Logically, it is safe to assume that anyone walking Footpath 6 would pass across the land which forms the application, there being no other way of accessing the start of the recorded footpath from Powderham Road, other than over the area crossed by the application route. The evidence points clearly to this having been the case since the original Definitive Map process, with nothing to suggest this has been interrupted since. Letters and statements from members of the public that were supplied with the application or submitted during consultation are wholly consistent with the application route being used on foot.

9. Conclusion

- 9.1 The evidence clearly shows that a track has existed on the route of Footpath 6 since at least the 1880s, linking up with Powderham Road where it turns a sharp corner on the hillside. Before the Definitive Map was created the status of the route is unclear, though the Finance Plans suggest that it may have been considered public in 1910. The Definitive Map process led to Footpath 6 being recorded without objection. The evidence since then overwhelmingly supports the existence of public footpath rights linking Footpath 6 to Powderham Road over the area which is subject of the application. The question then remains as to the extent (width) of the route and whether any higher rights exist over it.
- 9.2 Letters and comments from members of the public submitted with the application all support the existence of footpath rights, consistent with the Definitive Map process. Historic mapping appears to show that Footpath 6 itself was wide enough to be available to wheeled traffic, something that is supported by the Finance Plans which show Footpath 6, and its continuation over the land which is the subject of this application, excluded from surrounding

hereditaments. Whilst there is evidence that alludes to the possibility of higher rights, there is no evidence of their existence that is more than suggestive, unlike the solid evidence of footpath rights. The only vehicular use that is alleged, has been by the two adjacent landowners to access their land. Dr Irshad in rebuttal, states that any such use has been with his family's permission only and is not therefore 'as of right'. He also states that prior to the field gate into Rew's land there was a solid fence preventing vehicle access, with just a small gap for pedestrian access to Footpath 6. With no more significant evidence to demonstrate existing public vehicular rights this is therefore considered a private matter between the three landowners concerned. Further, as a consequence of the Natural Environment and Rural Communities Act 2006, use by mechanically propelled vehicles can no longer give rise to a public right of way.

- 9.3 The full extent of the area of land claimed is not consistent with a defined right of way to pass and re-pass; there being no reason why, or evidence of, the public using the whole area, instead taking the direct link to connect with Footpath 6 at point A. Further, evidence shows that the landowner has controlled this area for their own use, by parking vehicles over it and demarcating access from Powderham Road with a metal rail prior to the recently-constructed fence, with only a gap for access in line with the start of the recorded footpath at point A. The gap corresponds to the unregistered strip of land, not included within Dr Irshad's title.
- 9.4 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, over a strip of land between points A – B of a width consistent with the unregistered land to connect with the line of Footpath 6 as recorded. It is therefore recommended that a Modification Order be made to modify the Definitive Map and Statement by adding a footpath between points A and B on plan HIW/PROW/20/17 and if there are no objections to the Order, or if such objections are subsequently withdrawn, that it be confirmed.



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DEVON COUNTY COUNCIL
SCHEDULE 14 APPLICATION: ADDITION OF A BYWAY OPEN TO ALL TRAFFIC FROM FOOTPATH NO. 6, NEWTON ABBOT TO POWDERHAM ROAD

Notation
 Claimed Byway Open to All Traffic A - B
 Existing footpaths

Meg Booth
 CHIEF OFFICER FOR HIGHWAYS AND TRANSPORT DEVELOPMENT AND WASTE
Devon County Council

drawing no. **HIW/PROW/20/17**
 date **February 2020**
 scale **1:1250 at A4**
 drawn by **HC**