

CET/23/46

Public Rights of Way Committee
13 July 2023

Definitive Map Review Parishes of East Budleigh with Bicton

Report of the Director of Climate Change, Environment and Transport

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

1) Recommendation

Recommendation: It is recommended that no Modification Order be made for Proposal 1.

2) Introduction

This report examines one proposal that arose as a result of the Definitive Map Review in the parishes of East Budleigh with Bicton. The proposal was identified through the informal consultation process.

3) Background

In March 1952, during the original survey for the Definitive Map (carried out under s.27 of the National Parks and Access to the Countryside Act of 1949), East Budleigh Parish submitted a map and details of 16 paths in the parish. Bicton Parish Meeting submitted 1 bridleway and 2 footpaths and subsequently accepted 3 more paths that crossed into the parish from the adjoining parishes of East Budleigh and Colaton Raleigh. After several amendments and revisions during the draft and provisional stages, East Budleigh recorded 16 footpaths and Bicton recorded 5 footpaths and 2 bridleways on the Definitive Map and Statement with a relevant date of 8 March 1963.

East Budleigh with Bicton became a joint parish in the 1970's.

The general review of the Definitive Map (under s. 33 of the 1949 Act), was discussed at the parish council meeting 31st January 1978. The parish council at that time concluded that there were no omissions.

The Limited Special Review of Roads Used as Public Paths (RUPPS), which commenced in 1971, did not affect any rights of way in this parish.

The following Orders have been made and confirmed:

East Devon District Council (Footpath No's. 7) Diversion Order 1978

Devon County Council (Footpath No. 1) Public Path Diversion Order 1979

Devon County Council (Footpath No 10) Public Path Diversion Order 1980

East Devon District Council (Footpath No. 15) Public Path Diversion Order 1990

Devon County Council (Footpath No 10) Public Path Diversion Order 1995

Devon County Council (Footpath No 4) Public Path Diversion Order 1998

Where required, Legal Event Modification Orders will be made for these changes under delegated powers after the completion of the countywide parish by parish review.

The current Definitive Map Review began in July 2022, with a public meeting attended by approximately 20 members of the public and parish councillors. This was held in the Village Hall at East Budleigh. An online presentation was also made available for those unable to attend the event in person. The review and the public meeting were advertised in the parish, in the local press and online.

4) Proposals

Please refer to the appendix to this report.

5) Consultations

General consultations have been carried out with the following results:

County Councillor Christine Channon	- no comment;
East Devon District Council	- no comment;
East Budleigh with Bicton Parish 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;

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

6) Financial Considerations

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

7) Legal Considerations

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

8) Risk Management Considerations

No risks have been identified.

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

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

10) Conclusion

It is recommended that Members note that there are no proposals for modifying the Definitive Map in the parish of East Budleigh with Bicton. Should any valid claim with sufficient evidence be made in the next six months, it would seem reasonable for it to be determined promptly rather than be deferred.

11) Reasons for Recommendations

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

Meg Booth

Director of Climate Change, Environment and Transport

Electoral Division: Exmouth & Budleigh Salterton Coastal

Local Government Act 1972: List of background papers

Background Paper

Correspondence file

East Budleigh and Bicton Parish records, Tithe Maps. Original OS Mapping

User evidence forms

Date 2022 to date

File Reference

AS/DMR/BUDLEIGH

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Appendix I to CET/23/46

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.

Proposal 1: Footpath claim, for a path between Russel Drive and Oak Hill end of the Oakhill private estate road between points A-B-C on the plan CET/PROW/23/34 (Grid Ref: 0675 4500)

Recommendation: It is recommended that no modification order be made in respect of Proposal 1.

1.1 Background

- 1.1.1 Following on from the opening meeting that started the parish review, and associated informal consultation process, a claim was submitted by Mrs Moyle for a footpath. This was accompanied with 4 user evidence forms including her own, plus some photographs of the site. No documentary evidence was submitted with the application.
- 1.1.2 The route has not previously been brought to the attention of Devon County Council by the parish council or others, and is currently unrecorded.

1.2 Description of the Route

- 1.2.1 The claimed route starts from the pavement of Russell Drive at point A and follows some overgrown, old concrete and wooden steps between two bungalows, to a high, old fence at point B and a relatively recent 'Private Keep Out' sign. At this point, the route enters the garden of a house (Westering). Close to point B are the remains of a brick structure, with a concrete slab. From here, the route is indistinct in the garden of Westering. It is claimed to have followed a hedge bank, through a shrubbery, and onto the northern spur of Oakhill at point C, this being a private road, maintained by and for the residents of the Oak Hill estate.



Point A steps at Russell Drive



Point B from inside the gate



B1 remains of water tank



Point C at Oak Hill

1.3 Documentary Evidence

- 1.3.1 Early historical mapping – early 19th century: Ordnance Survey, Surveyors' Drawings 1806-7 and Cassini 1st edition 1"/mile map 1809 and later (Old Series); Greenwood's map 1827
Early historical maps at smaller scales, particularly the OS drawings and 1st edition map, do not show the claimed path. The area is marked as undeveloped fields. Oakhill House is shown.
- 1.3.2 Later historical mapping at smaller scales: OS 1" editions 1892-1950's Bartholomew's Mapping 1903-1943. Middle Town Lane is shown (which became Russell Drive after the development of the bungalows). Oakhill House is also shown. The claimed path is not shown.
- 1.3.3 Later historical mapping at larger scales: OS 25" editions 1888-1961, OS 6" editions 1889-1944. The area is shown as a field. The claimed path is not shown.
- 1.3.4 East Budleigh Tithe Map & Apportionment 1842 Tithe maps were drawn up under statutory procedures laid down by the Tithe Commutation Act 1836 and subject to local publicity, which would be likely to have limited the possibility of errors. Roads were sometimes coloured, and colouring can indicate carriageways or driftways. Public roads were not titheable. Tithe maps do not offer confirmation of the precise nature of the public and/or private rights that existed over the routes shown. Public footpaths and bridleways are rarely shown as their effect on the tithe payable was likely to be negligible. Routes which are not included within an individual apportionment are usually included under the general heading of 'public roads and waste'.
- 1.3.5 East Budleigh Tithe Map produced in 1842, shows Oakhill House in a separate parcel of land. It also shows MiddleTown Lane. No linking path or track are shown on the claimed route.

- 1.3.6 Aerial Photography 1946. Aerial photography from 1946 shows Oakhill House and its garden, and Middle Town Lane with undeveloped fields between. No path is apparent.
- 1.3.7 Aerial Photography from 1999 shows Oakhill Housing Estate has been developed, as has Russel Drive. No path is apparent.
- 1.3.8 Highways maintainable at public expense. Russel Drive is an adopted highway. The Oak Hill Estate roads are not adopted highways. They are maintained by a Residents Association Limited company, for the sole use of the residents and their visitors.
- 1.3.9 Parish Council Minutes 1905, 1906, 1907 East Budleigh Water Supply. The Parish Council minutes indicate, that in 1879, the Rt Hon Mark Rolle installed 8 water taps in East Budleigh to supply water from springs to the village. The minutes go on to note that in 1905, 1906, and 1907, villagers were worried about their supply, as the Exmouth water company had started pumping and the springs were not reliable. Header tanks were built in various places around the village to hold more water, one appearing to being at around point B on the plan. Mains water was finally piped into the village in 1962. A collapsed brick tank like structure is still just visible near point B.

1.4 Definitive Map process

1.4.1 Original Definitive Map process

The route was not put forward by East Budleigh Parish Council for inclusion on the Definitive Map in the 1950s.

1.4.2 Devon County Council Definitive Map of 1970 (not completed)

In a letter from October 1970, the Parish Council responded to the Survey of Rights of Way under the Countryside Act 1968 and state "in reply to your letter of August 1970 a Parish Meeting was held in the Village Hall on 27th inst., and at which your map was showing the public footpaths was discussed. It was agreed that this was correct except for the following:- Footpath No.15 this path is now non-existent," (however it was subsequently diverted) and Footpaths No. 16 has been changed in a road realignment. The Claimed path was not put forward by the Parish Council for consideration during this review even though the recently submitted User Evidence claims it was in use at this time.

1.4.3 Devon County Council Definitive Map Review 1977 (Not completed)

As a result of The General Review of the Definitive Map in 1977, the Parish Council wrote to DCC: "In replay to your letter of 9th November 1977. East Budleigh and Bicton public meeting was held in the Village Hall on 31st January 1978 when the parish footpaths were individually considered. It was agreed that the maps you sent were correct at the time, but the following diversions have or are being made:" They went on to list those change and continue "All other footpaths to remain on the map." They gave no new additions. This is significant, as the claimed path had been called into question by 1977.

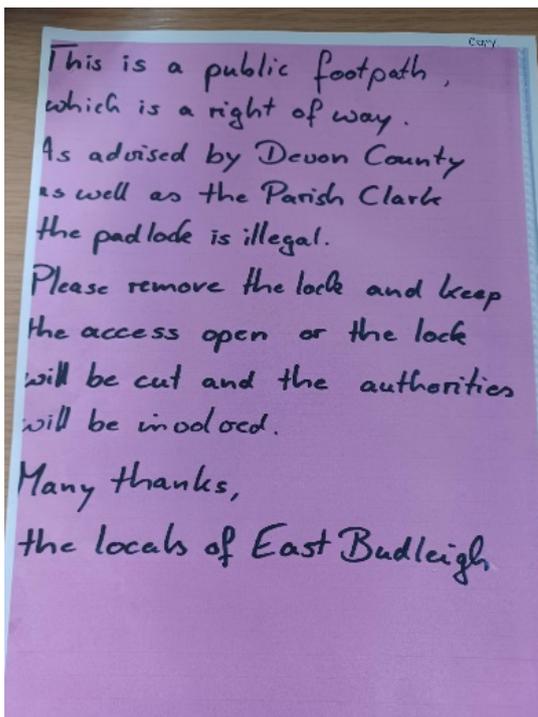
1.5 User Evidence

Five user evidence forms, and a letter were submitted with the claim. These are as follows:

- 1.5.1 Mrs Moyle has given her own evidence (and has also gathered the other user evidence forms). She walked the path between the 1960's and 1972, sometimes weekly or monthly. She states that it was nice to walk with children and dogs. She has not used it since the iron gate was erected and locked in 1972.
- 1.5.2 Mrs Pratt gives her evidence in a letter. She had lived in East Budleigh from childhood but has since moved away. She describes the route as "The path to 'Oakhill' which was from the bottom of the lane through a green door and up across the meadow to the House. This path was used by the village ladies during the 1914-18 war as they made medication for the wounded soldiers in the Moss Room at Oak Hill House and would have had a much longer journey around the village. As far as I can remember the path was there for a shorter route to 'Oak Hill House' long before Russell Drive or the large houses were there. There was often a Village Fete at Oak Hill which we all attended via this path."
- 1.5.3 Mrs Richter first attempted to use the path in 2021, when she went up the steps but could go no further. She says "I had recently moved into Orchard Close; I took an afternoon walk and discovered the footpath. However, it was not accessible as it was overgrown. I refrained from using it again."
- 1.5.4 Mrs Russell (nee Sage) used the path from 1945 to 1950, once a year to attend Mrs Russell's annual garden fete at Oakhill House, but she did not use it at any other time. She can remember lots of people attending the fete and says they 'mostly likely walked up the short cut through the field to go to the fete.'
- 1.5.5 Mrs Turner has never used the path. She says the locked gate prevented her from using it. She gives more information in her follow sheet. "We bought a house on the Oak Hill Estate in 1971. We were told by the previous owners that there was a footpath down to the village which went through the garden of Westering. The footpath was gated, and locked, and certain residents had access to the keys of the gate. When we asked if we could have a key, we were denied. This was a blow because it would have made trips to the village shorter and safer. Actually, when my children were older they used this path to get home from school by climbing the gate surreptitiously."
- 1.5.6 Mrs Woodland is visually impaired and so her user evidence form was completed on her behalf by Mrs Moyle. Mrs Woodland used the route once a month between 1963 and 1971. She thought it was public because people used it. She thought the field was owned by Mr Bolt, sometimes there were cows in the field. She thinks the owner was aware that the public were using the route as so many people used it at different times. People couldn't use it after 1972.

1.6 Landowner and rebuttal evidence.

- 1.6.1 The Woodthorpe's have owned Westering Oak Hill since 1998 and have provided background knowledge of the property. Mr Bolt a local farmer bought the land 1959-1960 and put up the fence around it and gated it. The first owner of their property was Mr Shorto, who bought the land from Mr Bolt and built Westering. The Woodthorpe's understand that the gate at point B, was padlocked by 1971. This gate was in place when they bought the property in 1998, they have maintained the same locked gate since.
- 1.6.2 Mr Woodthorpe, in a letter to the Resident's Association and to East Budleigh Parish Council of 4th May 2022 provided a detailed account of what had happened to the locked gate at point B, on his property. On 28th April 2022 he noticed a large hole had been cut in the bottom of the gate with wire cutters, large enough for an adult to crawl through. He mended the gate with heavy wire and blocked it with a strong crate. On 2nd May 2022 "I decided to check the gate and luckily saw someone trying to attach the notice shown below to the gate" at Point B. He asked who she was, and she said she said she working on behalf of East Budleigh Villagers. The notice attached to the gate is shown below.



Mr Woodthorpe removed and retained the notice. He is of the opinion that this notice is untrue, and somewhat threatening. On 5th of May 2022, he reported the criminal damage to the gate to the police and gave them a copy of the notice. He explains that the steps in Russell Drive historically gave maintenance access to the manhole cover serving a former water tank. He maintains the locked gate and says it is not a public right of way.

1.7 Discussion

1.7.1 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. Use has to be without force, without secrecy, without permission. This route was brought into question in 1971 by the locking of the gate at point B, as detailed by Mrs Turner who moved into a property on Oak Hill. She had never been able to use the route as it already padlocked in 1971 and she was denied a key. Her children, who had on occasions climb the gate to come home, had done so with secrecy and stealth. The relevant 20-year period to show use is therefore between 1951 and 1971.

1.7.2 Of the 6 users, only 2 had used it as a footpath; Mrs Woodland used it for 8 years to 1971 and Mrs Moyle states that she used it for around 9 years until 1972. However, it would appear that the gate was locked in 1971, giving an 8-year period of use.

1.7.2 Of the other 4 people, who gave evidence;

Mrs Russell walked the path once a year between 1945 and 1950, only to attend the Annual Fete at Oakhill House. Mrs Pratt also only used the route to attend the Annual Fete at Oakhill House. Because these users were allowed access by the landowner for the specific purpose of attending the Fete, the use can be deemed as permissive use. Mrs Turner never used the path as the gate was already locked in 1971, her children climbed the gate surreptitiously. Mrs Richter was unsuccessful when she tried to use the route for the first time in 2021 as the claimed path was overgrown, and the gate locked.

1.7.3 The current landowner has said the gate was locked when he bought the property in 1998. He has kept the gate locked. Mrs Turners' user evidence indicates that the gate was locked in 1971.

1.7.4 Devon County Council Definitive Map reviews took place in 1970 and 1977. East Budleigh Parish Council commented fully in response to these consultations, however, did not put this path forward for consideration. This is significant, as it is contemporaneous with the apparent use and the locking of the gate and calling the route into question.

1.7.5 Therefore, as the locked gate brought the route into question in 1971 and only 2 users gave evidence of walking the route for 8 years prior to that, the statutory test has not been met.

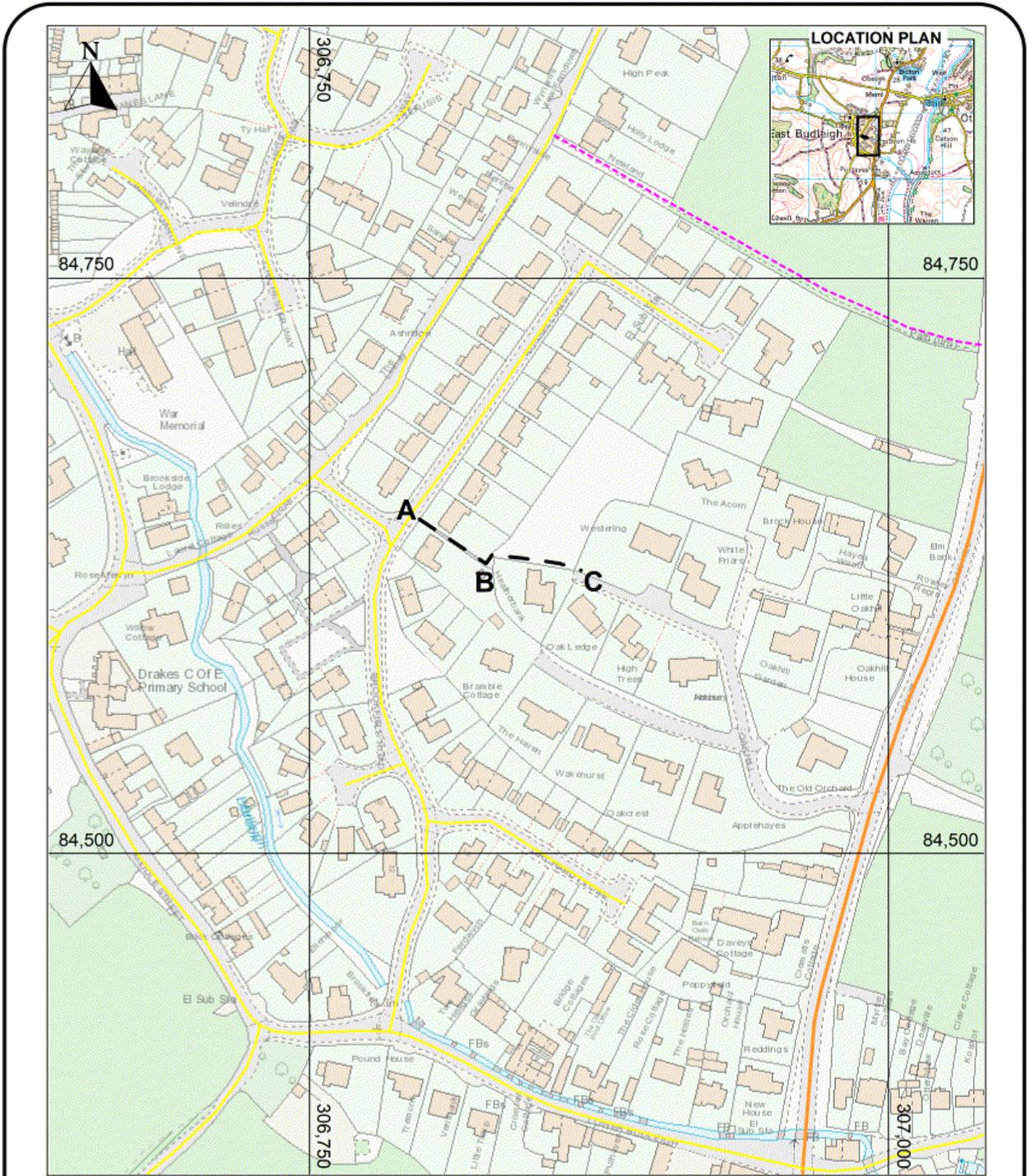
1.8.1 Common Law

The only other basis for possible consideration as a footpath is if there was any other significant supporting evidence from which an earlier dedication of the route as such can be presumed or inferred 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 usually a combination of both from which it may be inferred that a landowner has dedicated a highway and that the public has accepted the dedication.

1.8.2 There is no evidence in the historical mapping that a route physically existed. Nor is there any evidence that a path was historically maintained by the parish or highway authority, nor any evidence to show that it was previously dedicated by a landowner and accepted by the public.

1.9 **Conclusion**

1.9.1 From assessment of the user evidence, in conjunction with the lack of any historical evidence, it is considered that there is insufficient evidence to support the claim that this route is a public footpath; and that a public footpath does not subsist on the balance of probabilities. Accordingly, the recommendation is that no Order be made in respect of this route.



map ref 0675 4500

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DEVON COUNTY COUNCIL

East Budleigh
 Proposal 1 claimed footpath
 Oakhill Estate to Russell Drive

drawing number CET/PROW/23/34

date May 2023

scale 1: 2,500

drawn by AS

Notation

Claimed path A-B-C 

Existing Public Footpath 



MEG BOOTH Director of Climate Change, Environment and Transport