

CET/23/93

Public Rights of Way Committee
23 November 2023

Definitive Map Review Parish of Exminster

Report of the Director of Climate Change, Environment and Transport

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

1) Recommendation

It is recommended that:

- (a) A Creation Agreement be made between Devon County Council and Exeter City Council to add Proposal 1 to the Definitive Map as a Footpath.

Should a creation agreement not be practicable, it is recommended that

- (b) a Modification Order be made for Proposal 1 to add it to the Definitive Map as a Footpath.

2) Introduction

This report examines one proposal to resolve the anomaly of a short section of unrecorded footpath across a footbridge between the parishes of Exminster and Exeter City.

3) Background

The Definitive Map in Exminster Parish and Exeter City were compiled at different times. The statement for Exminster Footpath No. 1 sets out that this path continues across the parish boundary into Exeter City to the Topsham Ferry. However, this public footpath was erroneously omitted from the Exeter City parish map.

In December 2019, following a bridge inspection arranged by Exeter City Council, the path between the end of Exminster Footpaths nos.1 & 2 and the Exeter Footpath nos. 23 was closed. The bridge was no longer safe due to considerable erosion of the abutments at and below the waterline. The bridge closure resulted in significant concern from path users, especially as it became clear that public access rights were not recorded. Due to uncertainty over status of the bridge and when it would be re-opened for public use, substantial user evidence was submitted setting out that the public access rights should be recorded on the Definitive Map and Statement.

The Parish by Parish Definitive Map Review was carried out in Exminster in 1990. The issue of the missing section of footpath was not noticed at that time as the mapping was a paper-based system and did not allow enlargement. At 1:10,000 scale, this anomaly was not seen.

Up until 1994, Exeter City Council looked after the Definitive Map for the city area through an agency agreement with Devon County Council.

4) The Proposal

Please refer to the appendix of this report.

5) Consultations

General consultations have been carried out with the following results:

County Councillor Andrew Leadbetter (Topsham Ward)	- no comment
County Councillor Alan Connett (Exminster Ward)	- supports proposal;
Teignbridge District Council	- no comment;
Exeter City Council & Canal Authority	- agree in principle to Creation Agreement
Exminster Council	- supports proposal;
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 a Creation Agreement be pursued in the first instance with Exeter City Council. If this fails, a Modification Order should be made to add a public footpath as shown on plan No. CET/PROW/23/75

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.

Meg Booth

Director of Climate Change, Environment and Transport
Electoral Division: Exminster & Haldon

Local Government Act 1972: List of background papers

Background Paper

Correspondence file Exminster	2019 to date	AS/DMR/EXMINSTER
Parish records, Tithe Maps. Original OS Mapping, Canal Acts		Devon Heritage Centre
An Inland Haven Gill McLean Crossing the Exe Anna Adcock and Mark Dent		Topsham Museum
User evidence forms		Contact Alison Smith

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Appendix 1 to CET/23/93

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.

Proposal 1: Unrecorded Footpath between Exminster Footpaths nos. 1 & 2 and Exeter Footpath nos. 22 & 23 and Exminster Footpaths nos. 17 & 18 the Exeter Canal tow paths as shown between points A-B-C-D on the plan No. CET/PROW/23/75 Grid Ref: 96198790

Recommendation: It is recommended that:

- (a) a Creation Agreement be made between Devon County Council and Exeter City Council to add Proposal 1 to the Definitive Map as a Footpath.

Should a creation agreement not be practicable, it is recommended that:

- (b) a Modification Order be made for Proposal 1 to add it to the Definitive Map as a Footpath.

1. Background

- 1.1. The unrecorded section of footpath crosses a bridge from Exminster Parish into Exeter City and then over the Exeter Ship Canal (the Canal) on a swing bridge to footpath, to the canal tow path, and Exeter FP no. 22, and Exminster FP no. 17 on the northeast side of the canal. This footpath is a very old and well documented route between the Topsham Passage Ferry and Exminster dating back to 1660, prior to the building of the canal extension in 1827.
- 1.2. The Definitive Map for Exminster Parish was compiled in the 1950's. Exeter Urban District Council did not compile their Definitive map until the 1960s. The Definitive Statement for Exminster Footpath No. 1 details that the footpath continues across the parish boundary into Exeter Urban District to the Topsham Ferry and Topsham. This footpath was erroneously left off the Exeter Urban District map.
- 1.3. The Parish by Parish Definitive Map Review of Exminster was carried out in 1990. The issue of the missing section of footpath across the bridge to Topsham Ferry was not discovered at that time.
- 1.4. In December 2019, the bridge between points A to B was closed by Exeter City Council, following a bridge inspection. At the inspection, the bridge was found to be unsafe due to erosion of the joints in the abutments on and below the waterline. This closure led to an outcry from walkers, and as a result, significant user evidence was submitted – initially in 2019, and then additional evidence was submitted during the informal consultations in 2023.
- 1.5. Informal consultations were carried and included Exminster Parish Council, and also Exeter City Council as the owners of the Exeter Ship Canal.
- 1.6. Exeter City Council are considering entering into a Creation Agreement under s 25 of the Highways Act 1980 with Devon County Council to add the Footpath to the Definitive Map. However, if this is not possible, the evidence (as summarised below) demonstrates that it would be appropriate to make a Modification Order.

1.7 In researching this matter, discussions have also included the Environment Agency to consider potential alternative options. Two different schemes have been considered, one for a large culvert to the west of point A, and the second for a standard wooden footbridge at a point either side of the old bridge. The indication is that the EA will only be able to support a scheme for a bridge is at the site of and at the same height as the original old bridge (A – B).

2. Description of the Route

2.1 The claimed route starts at the junction of Exminster Footpaths nos. 1 and 2 Exminster at point A, plan No. CET/PROW/23/75, crosses the bridge (which is currently closed) to point B, then to the canal tow path point C, Exeter FP no.23 and Exminster FP no 18, then continues across the canal on a swing bridge to the opposite canal tow path point D, Exeter FP no. 22 and Exminster no.17.



October 2019 before it was closed. Point A on right of photo



Current state of Bridge October 2023 point A on right of photo



Point B looking towards C and over the bridge to point D and Topsham Ferry



From point C looking towards D (near the bike) and across the River Exe to Topsham Passage Slipway in the distance.



Point D looking back towards point C and Exminster in the distance.

3. Documentary Evidence pre-existing Highway

- 3.1 The River Exe is a tidal estuary stretching from Exeter to Exmouth, with a few crossing places. There has been a bridge in Exeter since perhaps Roman times and a ferry between Exmouth and Starcross since 12th Century. Charles 1st was noted to have crossed the Exe at Topsham in 1625, and there are records of many people drowning whilst using Topsham Passage ferry in atrocious weather and floods.
- 3.2 1721 The Ferry Inn Topsham opened as a pub, later to renamed as the Passage House Inn. The Ferry Inn owner had the rights to run a passage ferry across the River Exe to Exminster.
- 3.3 In 1736 it is recorded in a Deed 5 May 1736 (re Ferry & Salt Marsh) (Devon Heritage Centre) that Waltham Savory, Lord of the Manor of Exminster, gave Benjamin Buttell and John Wear permission to make a 12 feet wide path, 'fit for man and horse', and a new landing place for passengers on the Newlands Salt Marsh (Exminster) from Topsham. They paid two shillings and sixpence yearly and made repairs to the landing place from time to time. Buttell and Wear were already the owners of a passage boat from Topsham to Exminster. The owner of the Passage House Inn had the rights to run the ferry and in the 1730's let these ferry rights to a ferryman for £80 a year (about £20,000 today). This was reduced to £30 in 1768 as the ferry lost the monopoly of crossing the River Exe, as the Countess Wear Bridge was opened by the Turnpike Trust to replace the dangerous and difficult ford.

- 3.4 Benjamin Donn's A Map of the County of Devon 1765 This shows Topsham Passage Ferry, crossing the river Exe and landing on the salt marsh of Exminster, thus indicating an established ferry was carrying passengers between Exminster and Topsham prior to 1765.
- 3.5 Ordnance Survey, Surveyors' Drawings 1801, this was the first full topographical survey of the Country. This map shows the Topsham Passage passenger ferry in the same place as 1765 Donn map, and the linking track across the Exminster Marshes called Great Droveaway. This map predates both the Canal extension and the railway.
- 3.6 Greenwood's map published in 1827 shows the line of the canal extension in hashed markings as was still under construction when the survey was undertaken.
- 3.7 Exminster Tithe Map of 1842 surveyed by Robert Dymond (the first map surveyed after the Canal extension was finished and open) shows the Canal extension with a bridge over the canal ditch on the Exminster side between points A and B, and a bridge over the Canal between points C and D onto the tow path to Topsham Passage. Tithe maps were drawn up under statutory procedures laid down by the Tithe Commutation Act 1836 and subject to local publicity. This would potentially limit the possibility of errors on the map.
- 3.8 1825 to 1827 Exeter Canal and the Proposed Extension and Improvements by James Green Civil Engineer and approved by Thomas Telford Civil Engineer. The Exeter Canal was extended by two miles from its then exit point into the River Exe, to the west of Topsham, at about the point where the current motorway bridge crosses the River Exe. The canal extension was needed as the old canal was inaccessible at some stages of the tide and too shallow for the larger cargo ships of the day.
- 3.9 The extension was given parliamentary consent and works started in 1825. It was a huge engineering project involving teams of 250 men working day and night to dig the canal along very difficult ground at the edge of the Exminster Salt Marshes. They had to make two huge, battered earth banks of about 4.5m tall to avoid the tide overtopping, plus the associated stone works at Topsham Ferry Footpath and Turf, where they had to make sea locks, basin and reclaimed land for Turf Inn and Lock keepers' accommodation. The Exeter City Chamber spent over £100,000, of which £85,900 was borrowed, it hoped to recoup the costs through increased trade to the City. (This is equivalent to over £11 million today).
- 3.10 The canal extension radically changed the nature of Exminster Salt Marshes by enclosing them and changing the habitat into freshwater marshes. This was achieved with a series of new drainage ditches and sluices included in the construction works of the canal. Which included the drainage ditch between point A and B.
- 3.11 The effect of the Canal extension was to cut the long-established Topsham Passage ferry off from Exminster by building over its landing place and cutting the footpath to Exminster.

- 3.12 James Green's plans of 1825 show longitudinal sections for the canal extension, including the details of the works necessary for its construction. Those works include the provision a new ferry landing, abutments and bridges between points A and B and C and D were all drawn at the design stage.
- 3.13 Subsequently these structures were built as the canal works progressed to Turf Locks, thus allowing the continuation of a pre-existing foot highway across the canal and associated ditches. It is worth noting that the stone works at point A and B and C and D is the same as the stonework at Turf basin and locks, the rest of the canal has battered earth banks rather than stone banks.
- 3.14 The Canal was opened with great ceremony in 1827. This included a party of MP's and 40 other Gentlemen who boarded a barge at Exeter Quay and travelled through the improved waterway, accompanied by the ringing of cathedral and church bells, firing of cannon, artillery salutes and cheering crowds!
- 3.15 1845 The County Lunatic Asylum opened in Exminster, and many Topsham men and women were employed there. They are documented to have used the Topsham ferry to get to work as it was 'just 2 miles' rather than 4 miles each way if they used the Countess Wear Bridge.
- 3.16 1852 Exminster Railway Station opened nine years before Topsham Station. Rail passengers from Topsham caught the Topsham Ferry and walked to Exminster station to catch the new trains to London or Plymouth. This reduced the journey to London to a few hours rather than a day and a half in a stagecoach. This use continued even when Topsham station opened as it was quicker to catch a GWR train at Exminster to London than from Topsham as it was a different track and company.
- 3.17 1880 Agreement made between The Earl of Devon and Edward Harbottle (architect) 'to create a shorter & more easy Foot Path from Topsham Ferry to the station of the GWR at Exminster & Rt Hon Lawrence, Baron Haldon, has granted a right of way...to be a free way and no tolls.'
- 3.18 Ordnance Survey maps 25" editions 1888-1961, OS 6" editions 1889-1944, All show the canal bridge and ditch bridges in the same way with a well-worn track.
- 3.19 Exminster Parish Council Minutes
Exminster Parish Council was formed in 1896. At its first Parish Council meeting of 22nd July 1896, the Parish Council noted it needed to 'Inspect steps and wicket gate on the Topsham Ferry pathway, from Mr D's saltmarsh to Mr S's marsh.' Mr Dew undertook to speak to Mr Harbottle with respect to the condition of the path from Exminster Station to Topsham ferry.
- 3.20 The Exminster Parish Council minutes then detail numerous entries, often 4 in each year, for the maintenance and repair of the footpaths to the ferry crossing. They detail public money being spent on the (now known as Footpath 1 & 2) but do not spend public money on the Canal bridges.

- 3.21 April 20th 1899, a letter was read from Mr Symonds in respect of the bad state of repair of the footpath from Station Road to the Topsham Ferry. It was resolved that a letter be written to GWR company pertaining to put the footpath into repair.
- 3.22 October 12th 1899, another letter written to directors of GWR asking them to cover a third of the cost of £11 for gravelling the path.
- 3.23 April 19th 1911, Clerk to write to Mr Harbottle (of Topsham, Owner of the Passage House Inn and Ferry operator) to draw his attention to the state of the path and bridges leading across the marshes to the Topsham Ferry.
- 3.24 1911 to Jan 1930, Numerous reference to the maintenance and repair of the footpath to Exminster with Mr Harbottle contributing to the expenses of keeping this footpath in good repair as it was “much used by very considerable numbers of people crossing the ferry.” 1919, Mr Harbottle was requested to contribute towards 30 loads of gravel , a cart, and a man to re-gravel the path.
- 3.25 January 7th 1930, bridges over marshes again damaged by flooding. Clerk had again contacted Mr Harbottle, who used to own the ferry rights together with the Passage House Inn. However, wrote saying he had sold the Inn and Ferry to Heavitree Brewery in 1928. So, the Parish Council wrote to Heavitree Brewery asking them for the contributions as Mr Harbottle used to make. The Parish Council got a quotation to replace wooden bridges with concrete ones. Brewery were asked for half the cost of £15.
- 3.26 References to maintenance of the bridges across the marshes, appear annually in the Exminster Parish Council minute books from 1930's until 1957, when the paths were recorded on the Definitive Map as Public Footpath Exminster Nos. 1 & 2. From that date, the County Council took over the maintenance and repair for the paths across the marshes.
- 3.27 The ferry rights were sold from the Heavitree Brewery to St Thomas Rural District Council for £30 in 1946. 1st April 1966 St Thomas RDC was incorporated into Exeter City Council thus taking over the ferry rights and the Canal. In 2020 the Port of Exeter, its canal and basin, was designated a Heritage Harbour. Exeter City and its associated charity the Exeter Canal and Quay Trust now owns and looks after the canal and its assets and liabilities.
- 3.28 RAF Aerial Photography 1946 clearly show the two bridges over the canal and ditch.

4. Definitive Map process

- 4.1 Original Definitive Map process
Exminster Parish Council recorded Footpaths Nos. 1 & 2 and 17 & 18 on the Definitive Map in 1957. The Definitive statement for Footpath No. 1 reads “It starts at the eastern end of the Unclassified County Road, Milbury Lane and proceeds in an easterly direction over a bridge crossing the railway line across pasture fields and marshes **to the Exminster Parish/Exeter City boundary and its junction with Path No.2 by Topsham Lock leading to the ferry to**

Topsham. Exeter Urban District Council did not compile their Definitive Map until the late 1960s. There are notes on file that suggest the City Council were not in favour of recording the canal tow paths, as they thought it a liability, as fuel barges were using the canal at the time. However, they did finally record the tow paths as Exeter Footpaths Nos. 22 & 23 but did not record claimed path linking from Exminster FP nos. 1 & 2 to Topsham Ferry.

5. User Evidence

- 5.1 User Evidence Forms have been submitted from 38 people since 2019. This evidence shows frequent use of Proposal 1 since 1945, until the bridge A to B was closed when it was found to be unsafe in 2019. Some examples of the longest use are shown below;
- 5.2 Mr Ponsford, has lived in Exminster all his life and has walked the route weekly to get to the canal and Topsham Ferry (if not flooded) since 1945 (only stopping between 1980 and 84 when he was away from home). He continued to walk it on his return to the village. He is aware of the history behind this route and said it has been used by generations of people who have used the Topsham ferry, and the bridges were built by the Canal Company to allow the continuation of this old route as part of the New Canal extension in 1825. He says a significant part of passenger traffic at Exminster Railway station came from Topsham via this path.
- 5.3 Mr Scott as used has used the proposal monthly to get to the canal and Topsham since 1962 except when flooded.
- 5.4 Mrs Dyson has walked it since 1960's 20 times a year to get to the canal tow path and Topsham Ferry.
- 5.5 Mrs Moore has walked the proposed route since 1970 several times each year to get to Topsham and the canal until it was closed.
- 5.6 Mr Kukor has walked the route weekly since 1972 to get to the Canal and Topsham via the ferry until the bridge was closed.

There are many more user evidence forms detailing frequent and continued use of the path, until its closure in 2019.

6. Landowner and rebuttal evidence.

- 6.1 Exeter City Council (ECC) has not provided any rebuttal evidence. However, ECC closed the bridge between point A and B in December 2019 after an inspection found the bridge abutments to be unsafe. They did not close the bridge to bring the right of way into question. Alongside DCC, ECC has negotiated an informal diversion to ensure the public could still access the canal paths and the Topsham Ferry.

It was only after the bridge was closed in December 2019 that a close inspection of the Definitive Map took place, and the omitted section of path was discovered.

7 Discussion

- 7.1 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.

However, in this case the evidence has not been lost and does not need to be presumed, as the Deed of 5 May 1736 (re Ferry & Salt Marsh) the Waltham Savory, Lord of the Manor of Exminster, gave Benjamin Buttell and John Wear permission to make a 12 feet wide path, 'fit for man and horse', and a new landing place for passengers on the Newlands Salt Marsh Exminster from Topsham. This shows the express dedication of at least a footpath from the ferry across the Salt marshes to Exminster, predating the building of the canal by 91 years. In addition, there is substantial and robust evidence of many people using this route from Exminster to Topsham. There are records from 1852 of people walking this path from the Topsham ferry to Exminster Station to catch trains to Exeter and London.

- 7.2 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.

- 7.3 The Exeter Canal Extension and Improvement of 1825 was approved in Parliament, giving it the plans and longitudinal sections the highest status in the terms of documentary evidence. This set out Topsham Passage Ferry landing and provided bridges over the new canal and associated ditch to allow the continuation of an established highway with the classification of a Footpath. The bridges were built by the Canal Company and belong to them and their successors now Exeter City Council. (In the same way that Railway Bridges remain Network Rails property for bridges provided by the rail companies as they bisected the highway.)

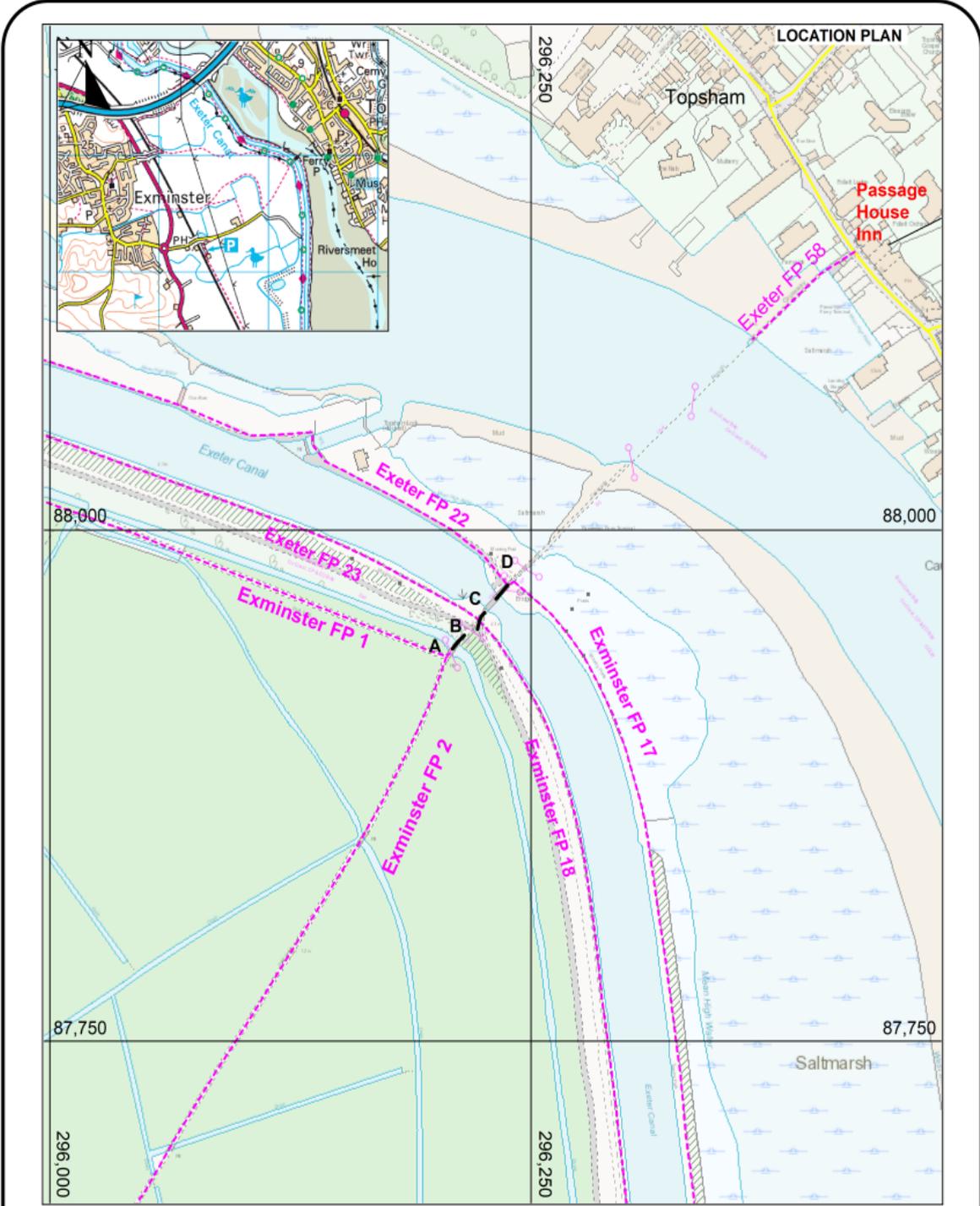
- 7.4 The historical evidence shows the public have accepted and used the bridge built by the Exeter Canal Company as it bisected the established footpath when the Canal was constructed, and the public have continued to do so for 192 years until the bridge become unsafe.

There is a mass of user evidence between 1999 and 2019. Therefore, it is considered there is sufficient evidence under Common Law and Statute Law.

8. Conclusion

- 8.1 From this assessment of the conclusive historical evidence, and the user evidence, it is considered sufficient to support the claim that public rights subsist

on the balance of probabilities. Procedurally, subject to agreement by Exeter City Council, a creation agreement is the simplest way in which to add this Path. However, a Modification Order to add this route to the Definitive Map and Statement as a Public Footpath is considered appropriate if a Creation Agreement with Exeter City Council should not be feasible.



map ref 9619791006

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DEVON COUNTY COUNCIL
 Exminster and Exeter
 Proposal 1 claimed footpath between
 Exminster FP 1 & 2 and Exeter FP 22 & 23,
 Exminster FP 17 & 18

drawing number CET/PROW/23/75
 date October 2023
 scale 1: 1,750
 drawn by AS

Notation

- Claimed path A-B-C-D
- Existing Public Footpaths



MEG BOOTH Director of Climate Change, Environment and Transport