

CET/24/10

Public Rights of Way Committee
7 March 2024

Definitive Map Review Parishes of Clawton 2022-23

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

It is recommended that a Modification Order be made to modify the Definitive Map and Statement by deleting part of Footpath No.7, Clawton between points A - B – C – D to resolve an error in its recording, as shown on drawing number CCET/PROW/22/103 (Proposal 1).

2) Introduction

This report examines the current proposal arising from the Definitive Map Review in Clawton.

3) Background

The original survey under s. 27 of the National Parks and Access to the Countryside Act 1949 revealed 6 footpaths and 2 bridleways, which were recorded on the Definitive Map and Statement with a relevant date of 1st September 1957.

The review of the Definitive Map, under s.33 of the 1949 Act, which commenced in the late 1960s but was never completed, produced a number of proposals for change to the Definitive Map at that time. The Limited Special Review of RUPP's, carried out in the 1970s, did not affect the parish.

The following Order has been made and confirmed:

Clawton Bridleway No. 8 Public Path Diversion Order 1996;

Clawton Footpath No. 4 Public Path Diversion Order 2000;

Clawton Footpath No. 4 Public Path Diversion Order 2006; and

Clawton Footpath No. 1 Clawton Footpath No. 4 Public Path Diversion Order & Definitive Map & Statement Modification Order 2012.

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

The current Review was started in 2022. An informal consultation was carried out in 2023 involving a proposal for modification of the Definitive Map and Statement.

This is the report for the Definitive Map Review in the parish of Clawton.

4) Proposals

Please refer to the appendix to this report.

5) Consultations

General consultations have been carried out with the following results:

County Councillor Morrish	– no comment
Torrige District Council	– no comment
Clawton Parish Council	– no comment
Auto Cycle Union	– no comment
British Horse Society	– no comment
Byways & Bridleways Trust	– no comment
Country Landowners' Association	– no comment
National Farmers' Union	– no comment
Open Spaces Society	– no comment
Ramblers'	– no comment
Trail Riders' Fellowship	– 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 have been taken into account in the preparation of the report.

8) Risk Management Considerations

No risks have been identified.

9) Equality, Environmental Impact and Public Health Considerations

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

10) Conclusion

It is recommended that a Modification Order be made to modify the Definitive Map and Statement by deleting part of Footpath No. 7 between points A – B – C – D, as shown on drawing number CCET/PROW/22/103 (Proposal 1).

This will address the dual status with the path also recorded as a county road (T Class, Maintenance Category 9) between Leworthy Cross and France also known as Southdown.

Should any further valid claim with sufficient evidence be made within the next six months it would seem reasonable for it to be determined promptly rather than 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 Torridge area.

Meg Booth

Director of Climate Change, Environment and Transport

Electoral Division: Holsworthy Rural

Local Government Act 1972: List of background papers

Background Paper: Correspondence Files

Date: Correspondence Files

File Reference: DMR/CLAWTON

Contact for enquiries:

Name: Caroline Gatrell

Telephone: 01392 383240

Address: Cleave Tor, Great Moor House, Bittern Road, Exeter

cg210224pra

sc/cr/DMR Clawton

03 210224

Appendix I To CET/23/10

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 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.

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.

In relation to claims for byways open to all traffic (BOATs), 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 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.

Extinguishment of rights for mechanically propelled vehicles also does not apply if, before the relevant date (20th January 2005), an application was made under section 53(5) of the Wildlife and Countryside Act 1981, or such an application was determined by a surveying authority, for an order to modify the definitive map and statement as to show a BOAT.

The judgement in the case of *R. (on the application of Winchester College) v Hampshire County Council* (2008) however, found that for such exceptions to be relevant the application must fully comply with the requirements of paragraph 1 of Schedule 14 to Wildlife and Countryside Act 1981. It is appropriate therefore firstly to determine whether or not the claimed vehicular rights subsist and, secondly, whether or not any exceptions apply; if vehicular rights subsist but the exceptions are not engaged then the appropriate status is restricted byway. Such claims may also be considered for a lower status.

- 1 Proposal 1: Proposed deletion of part of Footpath No. 7 to resolve the dual status with the county road between Leworthy Cross and France also known as Southdown, as shown between points A – B – C – D on plan CCET/PROW/22/103.**

Recommendation: That a Modification Order be made in respect of Proposal 1, be made to modify the Definitive Map and Statement by deleting part of Footpath No. 7, Clawton, between points A – B – C – D between Leworthy Cross and France (Southdown), along Leworthy Lane, as shown on drawing no. CCET/PROW/22/103.

1.1 Background

- 1.1.1 The proposal was discovered during the course of the Definitive Map Review as an anomaly in the public highway network which required resolution.

1.2 Description of the Route

- 1.2.1 The proposal route starts at the junction of the county roads, Leworthy Cross, point A, and proceeds generally eastwards along the county road, Leworthy Lane, T1907, through the hamlet of Leworthy, point B, and then proceeding south eastwards to Leworthy Plantation at point C, through the plantation to the property known as France, formerly Southdown, at point D.

1.3 Documentary Evidence

1.3.1 Clawton Vestry Minutes, 1828-94 onwards

- 1.3.1.1 The Minutes provide information about the management of the route and the Council's views regarding the public highways in the parish. A public body such as a Parish Council had powers only in relation to public highways through the appointed Surveyor of Highways historically, which they had a responsibility to maintain.

- 1.3.1.2 Highways are rarely mentioned in the main Vestry minutes, and the Surveyors of Highways Accounts appear not to have not survived.

1.3.2 Ordnance Survey mapping, 1885 onwards

- 1.3.2.1 Ordnance Survey maps do not provide evidence of the status of this route but rather its physical existence over a number of years. These early Ordnance Survey maps carried a disclaimer, which states that: *'The representation on this map of a road, track or footpath is no evidence of a right of way'*.

- 1.3.2.2 On the later 1st Edition 25" scale mapping of 1885, the proposal route is shown as a mainly enclosed lane between points A – B – C, except from point C – to two thirds of the way to point D, which unenclosed through Leworthy Plantation.

- 1.3.2.3 On the 2nd Edition 25" of 1906, the proposal route is shown as a mainly enclosed lane between points A – B – C, except from point C – to two thirds of the way to point D, which is unenclosed through Leworthy Plantation.
- 1.3.2.4 On the Post War A Edition of 1954, the proposal route is shown as a mainly enclosed lane between points A – B – C, except from point C – to two thirds of the way to point D, which is unenclosed through Leworthy Plantation.

1.3.3 Clawton Parish Council Minutes, 1894 onwards

- 1.3.3.1 The Minutes provide information about the management of the route and the Council's views regarding the public highways in the parish. A public body such as a Parish Council had powers only in relation to public highways through the appointed Surveyor of Highways historically, which they had a responsibility to maintain. These references refer to the proposal route and its continuation to Westdown Gate.
- 1.3.3.2 3rd February 1899. It was 'proposed by William May seconded by Mr William Drown? that the Chairman see Mr Holman about the repair of a foot bridge across the River Deer against the farm called France'.
- 1.3.3.3 22nd September 1906. 'After a discussion of the Footpath Committee's recommendations and a show of hands, it was decided that the following paths be recommended to remain open...Post P. West Down Gate to South Down (otherwise France)'.
- 1.3.3.4 11th March 1971. 'Mr Cornish mentioned the need for a passing place in Leworthy Lane. Me Pennington agreed to take up this matter with the Divisional Road Surveyor'.
- 1.3.3.5 20th January 1992. 'A request by letter to be made to the Highways Department regarding the poor repair of the Leworthy road'.
- 1.3.3.6 21st February 1992. The 'Leworthy road has been repaired – only part way – Clerk to write to Highways dept to enquire about the remaining length'.
- 1.3.3.7 30th July 1993. 'The Leworthy road was reported to have had only some of the holes filled as the repairs stopped at Lower Leworthy and not at France'.
- 1.3.3.8 20th May 1994. 'It was brought to everyone's attention that the...Leworthy road had been resurfaced, although the Leworthy road had only been done as far as the Cornish's'[Lower Leworthy].

1.3.4 Holsworthy Rural District Council Minutes, 1894-1974

- 1.3.4.1 The Minutes provide information about the management of the route and the Council's views regarding the public highways in the parish. A public body such as a District Council had powers only in relation to public

highways through the appointed Surveyor historically, which they had a responsibility to maintain. The records for 1898-99 have not survived.

- 1.3.4.2 There are a number of references to the highways but none of those surviving mention the proposal route.

1.3.5 Finance Act, 1909-10

- 1.3.5.1 The Finance Act imposed a tax on the incremental value of land which was payable each time it changed hands. In order to levy the tax a comprehensive survey of all land in the UK was undertaken between 1910 and 1920. It was a criminal offence for any false statement to be knowingly made for the purpose of reducing tax liability. If a route is not included within any hereditament there is a possibility that it was considered a public highway, though there may be other reasons to explain its exclusion.
- 1.3.5.2 The proposal route known as Leworthy Lane, between points A – B – C – D is included in hereditaments 40, Leaworthy and 33, France. Leaworthy, a farm and 2 cottages, was owned and occupied by J Hicks, has a deduction for 2 rights of way, to France and to 2 fields, initially listed as an easement worth £48 but then as a Public Right of Way or User of £50. France, a farm 1.5 miles in from roads, was owned by SH Pyworthy and occupied by R Gilbert. There is no deduction for a Public Right of Way or User.
- 1.3.5.3 The remainder of what is currently recorded as Clawton Footpath No. 7 is included within hereditament 71, Corphett, owned by M Ford and occupied by S Martin. There is no deduction for a Public Right of Way or User.

1.3.6 Handover Roads Records, 1929-47

- 1.3.6.1 These records are considered to be a positive indication of what the highway authority believe the status of roads included to be, and are conclusive evidence of a highway authority's acceptance of maintenance responsibility, a commitment not normally undertaken lightly. Such records were for internal use and did not purport to be a record of rights. The lack of a road's inclusion does not necessarily suggest it could not have been a public highway. Once returned to the County Council, these records were used in conjunction with the UCR Mileage Register.
- 1.3.6.2 The proposal route between points A – B – C – D, along Leworthy Lane, is shown as a UCR, an unclassified county road, now referred to a minor county road, though is not numbered.

1.3.7 UCR Mileage Register, 1950s-70s

- 1.3.7.1 This register was used in conjunction with the Handover Records once all delegated highways had been returned to the County Council in 1947.
- 1.3.7.2 The proposal route between points A – B – C – D, along Leworthy Lane, is included as an addition dated the 9th October 1963 no. 2644, under the Agricultural (Improvement of Roads) Act 1955 Scheme. It was described

as running from the county road C506 south of Brooks House, through Leworthy, Leworthy Plantation to Southdown Farm, also known as France.

1.3.8 List of Streets, 1970s onwards

1.3.8.1 This is the County Council's register of highways maintainable at public expense, which are assumed to be vehicular unless proven otherwise.

1.3.8.2 The proposal route between points A – B – C – D is shown as a UCR, an unclassified county road, now known as a minor county road.

1.3.9 Aerial Photography, 1946 onwards

1.3.9.1 The proposal route, currently recorded as part of Clawton Footpath No. 7, between points A – B – C – D is visible, in a similar manner to other public roads in the parish.

1.3.10 Definitive Map Parish Survey, 1950s

1.3.10.1 The compilation process set out in the National Parks and Access to the Countryside Act 1949 involved a substantial amount of work and such records are considered a valuable source of information. The rights of way included in the process had to pass through draft, provisional and definitive stages with repeated public consultations.

1.3.10.2 Clawton Footpath No. 7 was included in the Parish Survey and was described as a 'footpath from West Down gate by West Down Cottage (on the West Clawton to Holsworthy road) over the stream to 'South Down' (otherwise known as France)'. The Parish noted that the path had been used by the public, and chiefly the postman, with the foot bridge over the stream having been repaired by the Parish Council. The Survey was signed by Mr F Cole and dated 22nd September 1950. It was commented by the District Surveyor that it was 'purely an accommodation road for South Down'.

1.3.11 Definitive Map and Statement, 1957

1.3.11.1 The inclusion of a public right of way on the Definitive Map and Statement is conclusive evidence of its existence. However, this does not preclude that other rights which are currently unrecorded may exist. The final consultation stage for the Definitive Map and Statement for the Holsworthy Rural District area finished on the 6th September 1963.

1.3.11.2 The Definitive Statement for Clawton Footpath No. 7 is described as running from the 'county road at Westdown Gate and proceeds in a westerly direction through Westdown thence turning north-westerly crossing fields and streams to Southdown. (The footbridge across stream repaired by Parish Council). From Southdown the path continues in a north-westerly direction along a Private Accommodation Road (not repairable by the inhabitants at large) to Leworthy where it turns west to end at the County road half a mile north of Affaland Moor'. The Definitive

Map shows Footpath No. 7 as running from 50 metres south of Westdown Bungalow past France and Leworthy to Leworthy Cross.

1.3.12 Route Photographs, 2023

1.3.12.1 Site photographs of the proposal route, between points A – B – C – D show that it is open and available.

1.3.13 National Street Gazetteer, 2023.

1.3.13.1 The Gazetteer includes the proposal route A – B – C – D, Leworthy Lane, as a category 9 service road, T1907.

1.3.14 Land Registry, 2023

1.3.14.1 The proposal route between points A – B and almost to point C is unregistered. The remainder is registered to Leworthy Farm Equestrian Centre, the Forestry Commission, and Bridge Farm, North Tamerton.

1.4 User Evidence

1.4.1 No user evidence forms were received in support of the proposal.

1.5 Landowner Evidence

1.5.1 No responses were received from any of the adjacent landowners along Leworthy Lane.

1.6 Rebuttal Evidence

1.6.1 No rebuttal evidence has been received in relation to the proposal.

1.7 Discussion

1.7.1 In considering the evidence it is necessary to consider the evidential facts in the context of the whole of the documents in which they are contained. Section 32 of the Highways Act 1980 indicates how documents should be evaluated as a whole and how the weight should be given to the facts derived from them. Once the evidence sources have been assessed individually, they are comparatively assessed as required by the balance of probabilities test.

1.7.2 Statute – Section 31 Highways Act 1980. There does not appear to be a specific date on which the public's right to use the application route above that of a footpath has been called into question. The Definitive Map and Statement is conclusive evidence of the information it contains, that Clawton Footpath No. 7, the proposal route exists between points A – B – C – D, though it does not preclude that other unrecorded higher rights may exist or that errors exist requiring rectification.

1.7.3 As there is no specific date of calling into question or user evidence, the proposal cannot be considered under statute law. However, higher rights above that of a footpath may yet still be proven to exist along the application route at common law. Evidence of dedication of higher rights by the landowners can be express or implied and an implication of dedication may be shown at common law 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 of a higher status and that the public has accepted the dedication.

1.7.1 Common Law. On consideration of the proposal at common law, the historical documentary evidence demonstrates the proposal route's physical existence and availability since at least the late 19th century. It is shown in a similar manner to other recorded public highways, though not entirely an enclosed lane, as part of it passes through what it now Leworthy Plantation.

Since the early part of the 19th century the proposal route has physically existed as an enclosed lane. Records appear to indicate that the proposal route was a type of road which was open and available to the public since at least that time. In 1947 when the former District Councils handed back their delegated highways responsibilities, Leworthy Lane was included on the Handover Records as a district road, a public carriageway. However, when the Parish Council carried out its survey in 1950 it should have omitted the section of the footpath which runs along Leworthy Lane, which is now proposed for deletion under section 53(3)(c)(iii) of the Wildlife and Countryside Act 1980.

1.7.2 The Ordnance Survey 25" mapping from 1885 onwards shows the proposal route between points A – B – C – D shown in the same manner as public roads in the parish with no change in surface at Leworthy Cross. However, the Ordnance Survey mapping is not evidence of a right of way, only the existence of features on the ground at the time of the relevant survey.

1.7.3 The public vehicular nature of the proposal route along Leworthy Lane between points A – B – C – D, is first demonstrated by the minutes of the Clawton Parish Council, which are contemporaneously supported by the 1909-10 Finance Act records. These record a deduction of £50, an amount regularly used for public roads, rather than footpaths which commonly only attracting a deduction of around £12. The Parish Council minutes also are very clear on the extent of Clawton Footpath No. 7 only being between Westdown Gate and Southdown/France since at least 1906.

1.7.4 This continues with the County Council's Highway Handover records dated 1929-47, UCR Mileage Register of the 1950s-70s, and List of Street from the 1970s onwards, a continuous record of public highway responsibility since at least 1929. The UCR Mileage Register in particular shows that the proposal route having been a '*private accommodation road*' as noted by the Divisional Surveyor at the time of the 1950 Parish Survey was taken

over as a county road in 1963 under the Agricultural (Improvement of Roads) Act 1955 Scheme. The 1940s RAF aerial photography shows the proposal route in a similar manner to other parish roads, as does the large scale Ordnance Survey mapping.

- 1.7.5 The Parish Council minutes consistently show that the parish did not consider the footpath to continue through Leworthy to Leworthy Cross and that the proposal was always a road, which the public used, despite its status of a '*private accommodation road*' prior to 1963.
- 1.7.6 Consequently, the Divisional Surveyor was correct to extend Clawton Footpath No. 7 to Leworthy Cross in the 1950s but should have removed the proposal route from the Definitive Map and Statement in 1963, when it was included in the Agricultural (Improvement of Roads) Act 1955 Scheme.
- 1.7.7 Under NERC Act 2006 section 67(1) where there are dual status routes, any vehicular rights are thought to be extinguished. However, under section 67(2)(a) of the same Act, vehicular rights are retained if the main use of the highway in the 5 years prior to the commencement date of the Act was with mechanically propelled vehicles. It is clear from the highway authority records that this proposal route was adopted in 1963, though the property owners have relied on it for access since at least 1906, and its main use has been with vehicles since that time.

1.8 Conclusion

- 1.8.1 On consideration of all the available evidence, on the balance of probabilities, the documentary evidence demonstrates that the proposal route, currently recorded as part of Clawton Footpath No. 7, along Leworthy Lane, between points A – B – C – D has probably existed since at least 1885, when the commons were enclosed. It has been open and available and appears to have been considered public since that time.
- 1.8.2 The vehicular nature of the proposal route along Leworthy Lane between points A – B – C – D, is demonstrated through the documentary evidence since the 1909-10 Finance Act, and the Clawton Parish Council minutes from 1906, and supported by the County Council's Highway Handover records, UCR Mileage Register, and List of Streets, a continuous record of public highway responsibility since at least 1929. These show that the proposal route was always considered to be a type of road, which was taken over by the County Council in 1963.
- 1.8.3 The evidence when taken as a whole is considered sufficient to show that particulars contained in the map and statement require modification, that the extent of the highway currently recorded as Clawton Footpath No. 7 requires modification. It demonstrates that the proposal route between points A – B – C – D was considered historically as an all-purpose public highway, and is considered sufficient to demonstrate that the proposal route was recorded in error on the Definitive Map and Statement.

- 1.8.4 It is therefore considered to be sufficient under Common Law to demonstrate that an error occurred when Clawton Footpath No. 7 was included on the Definitive Map and that the section between points A – B – C – D should not have been included as it was already included as a county road on the List of Streets.
- 1.8.5 It is therefore recommended that a Modification Order should be made to delete the section of Clawton Footpath No. 7 between points A – B – C – D on the Definitive Map and Statement, as shown on drawing no. CCET/PROW/22/103. If there are no objections, or if such objections are subsequently withdrawn, that it be confirmed.

Looking East at Point A

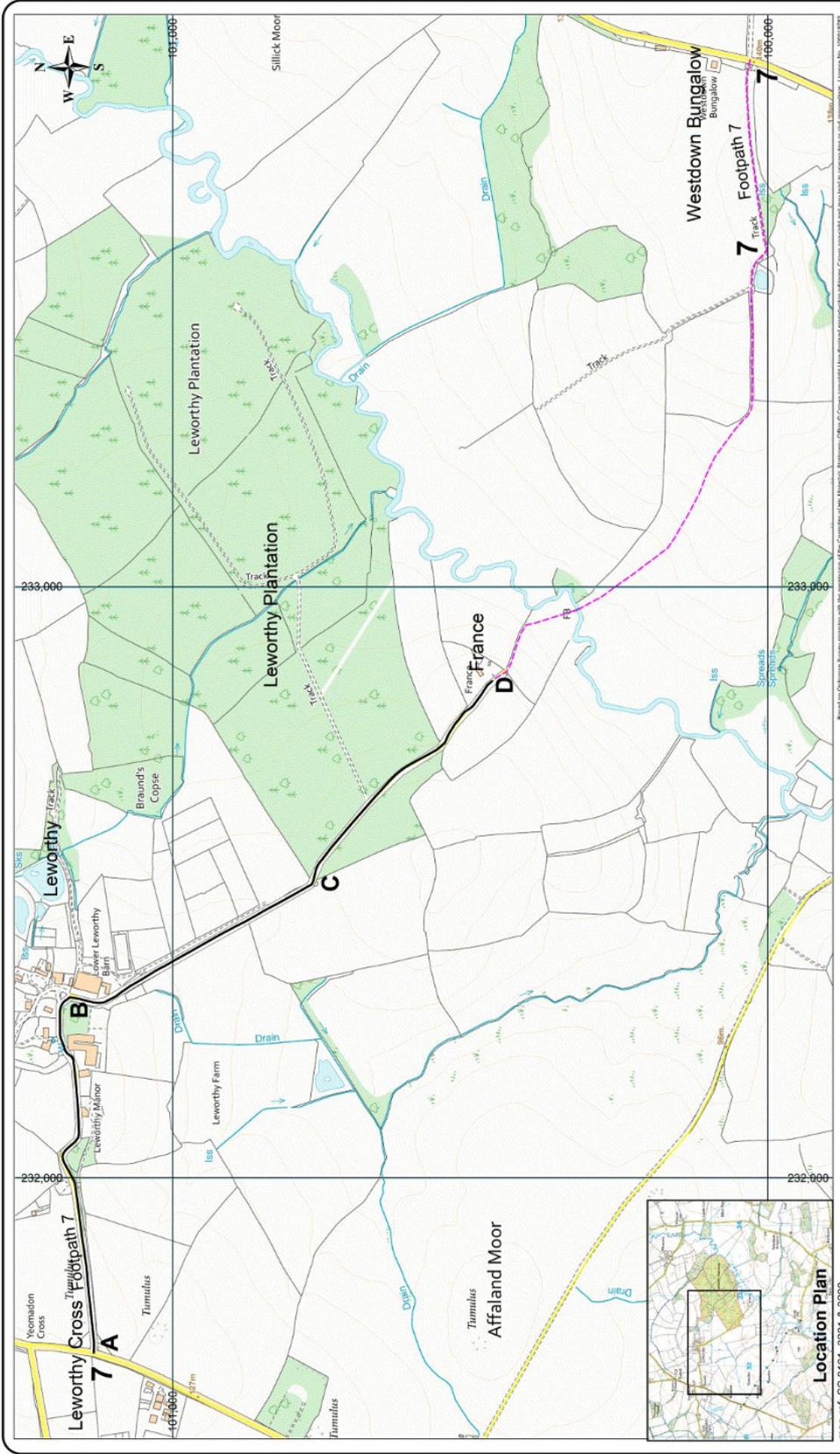


Looking Southeast at Point D



Looking Northwest at Point D





map ref: SS 3101, 3201 & 3200
 Based on Ordnance Survey maps with the permission of the Controller of Her Majesty's Stationery Office. © Crown Copyright. Used under reproduction licence. Crown copyright and may not be reproduced in full or part. Licence No. 100191920

Devon County Council
 Definitive Map Review - Parish of Clawton
 Informal Consultation

Proposal 1 - Proposed part deletion of Footpath No. 7 to remove dual status

drawing no. CCET/PROW/22/103
 date December 2022
 scale 1:6,000 at A3
 drawn by CLG

Notation
 Proposed deletion A - B - C - D (approx 1,561metres) ———
 Existing footpath ———

Meg Booth
 Director of Climate Change,
 Environment & Transport

Devon County Council