



Appeal Decisions

by Peter Millman BA

an Inspector on direction of the Secretary of State for Environment, Food and Rural Affairs

Decision date: 26th September 2016

Appeal Ref: FPS/J1155/14A/12

- This Appeal is made under Section 53(5) and Paragraph 4(1) of Schedule 14 to the Wildlife and Countryside Act 1981 ("the 1981 Act") against the decision of Devon County Council not to make an Order under Section 53(2) of that Act.
- The Application, dated 28 April 2008, was refused by Devon County Council on 31 March 2016.
- The appellant, Mrs R Kimbell of the Ramblers, East Devon Group, claims that an Order should be made to add a footpath to Devon County Council's Definitive Map and Statement between the Road near Carpenter's Hill in Combe Raleigh and Greenway Lane near Greenway Manor in Luppitt.

Summary of Decision: The Appeal is dismissed.

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- This Appeal is made under Section 53(5) and Paragraph 4(1) of Schedule 14 to the 1981 Act against the decision of Devon County Council not to make an Order under Section 53(2) of that Act.
- The Application, dated 28 April 2008, was refused by Devon County Council on 31 March 2016.
- The appellant, Mrs R Kimbell of the Ramblers, East Devon Group, claims that an Order should be made to add a footpath to Devon County Council's Definitive Map and Statement between the Road near Carpenter's Hill in Combe Raleigh and Greenway Lane near Greenway Manor in Luppitt

Summary of Decision: The Appeal is dismissed.

Preliminary matters

1. I have been directed by the Secretary of State for Environment, Food and Rural Affairs to determine two appeals under Section 53(5) and Paragraph 4(1) of Schedule 14 to the 1981 Act.
 2. I have not visited the site of the claimed rights of way but I am satisfied that I can make decisions without the need to do so.
 3. Although there are two appeals, they relate to the same claimed right of way, part of which is in the parish of Combe Raleigh and part in the parish of Luppitt. I shall therefore treat the appeals as a single appeal.
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Main issues

4. Section 53(2)(b) of the 1981 Act gives surveying authorities (such as the County Council) the duty of making modification orders following certain events. The event in this case would be that described in Section 53(c)(i), *the discovery by the authority of evidence which (when considered with all other relevant evidence available to them) shows that a right of way which is not shown in the map and statement subsists or is reasonably alleged to subsist over land in the area to which the map relates...*
5. The test for 'subsists' is the balance of probabilities. The meaning of 'reasonably alleged to subsist' in cases such as this, where the principal evidence is documentary, was explained by Evans-Lombe J in the case of *Todd and Bradley v Secretary of State for Environment, Food and Rural Affairs* (2004). He said: *...whereas the latter test [reasonably alleged to subsist] imposes on the authority a lesser burden [than that of 'subsists'], namely one which obliges them only to be satisfied of the existence of facts which raise a prima facie case for the subsistence of the way... It is accepted that when the authority after consultation decides whether to make or not to make the order within paragraph 3(1)(b) of schedule 14 [of the 1981 Act] it is empowered to make the order even if it is not, on the material before it, able to conclude that the relevant right of way subsists, provided it is satisfied, on the material before it, that it can be reasonably alleged to subsist.*
6. The County Council should therefore have made an order if it had discovered evidence, or had evidence presented to it, which showed that it was reasonable to make an allegation that public rights of way exist over the appeal route.
7. Rights of way, unless created under statutory powers, come into existence as a result of dedication by the owners of the land which they cross. There is rarely any evidence of an express dedication (there is none in this case), but an implication of the dedication of a public right of way may arise if there is evidence from which it may be inferred that a landowner (if there is one with the capacity to do so) has dedicated a right of way and that the public has accepted the dedication.

Reasons

Background

8. The appeal route does not exist on the ground today, except for short distances where it is coincident with a road or track, nor has it done so for many years. All or parts of it are shown on some old maps, or referred to either directly or indirectly in documents, so there can be little doubt that it did exist at one time as a physical route. Its line is shown on the map attached at the end of this decision between points Y, Z and A1.
9. The Ramblers applied to the County Council in 2008 for an order to show the route on its Definitive Map as a footpath. The County Council considered the available evidence, which consisted of historical documents. No first-hand evidence of public use of the route was provided. The County Council decided that the evidence was insufficient to found a reasonable allegation of the existence of public rights and so refused to make an order. The Ramblers appealed. As part of the process, evidence and submissions in opposition to allowing the appeal were prepared by the County Council, by Rhoda Barnett, a countryside access consultant acting on behalf of a group of affected

landowners, and by Stephens Scown LLP on behalf of a further affected landowner. I have taken the evidence and submissions into account in deciding this appeal.

Consideration of the evidence

Ordnance Survey maps and plans

10. The appeal route is shown, annotated in places as 'F.P.' for footpath, on the 1st edition Ordnance Survey ("OS") 1:2500 plan surveyed in 1887 and the later 1:2500 plan, surveyed in 1887 but revised in 1901 and published in 1904. This shows that it existed as a feature, or line of features, on the ground at the time of survey. Because the criteria that surveyors employed when deciding which paths to include on such maps are not entirely clear, no more can be concluded from the annotation 'F.P.' than that it was clearly visible on the ground at the time of survey and was not traversable by horses or vehicles.
11. If a path on such a plan was shown running between public roads and not passing near any dwelling, it might be a reasonable supposition that it was rather more likely than not to have been considered a public path. If, like the appeal route, it was shown linking a number of dwellings – Windgate (once Wingate) Farm, Lake Cottage, Shapcombe Farm, Pulshays and Yarde (once Yard) Farm, it might be reasonable to suppose that it could have been used by farm workers and not carry public rights, although such a supposition from the map evidence alone would be extremely tenuous.
12. The earliest OS map of the area is the 1 inch to the mile (1:63360) map of 1809. This shows that what is today a cul-de-sac road passing Windgate Farm with acknowledge public vehicular rights ending near Lake Cottage or Allebeare Farm, continued in 1809 past Pulshays to join the road between Limers Cross and Luppitt Common. The appeal route follows this route for part of its length, and there is no doubt that it carries public rights where it is coincident with the cul-de-sac road to the south-east of Lake Cottage. The road shown on the 1809 map is not consistently shown on later maps as a through route.
13. The 1809 map, and later small-scale OS maps, do not show the appeal route where it does not coincide with the course of a road, which is not surprising, since maps at that small scale, at least until recent years, would not show all, or even many, of the footpaths which were in existence. The appeal route is, however, shown in full as a footpath on the 1948 OS 1:25000 map. The Ramblers' appeal implies that the footpath was in existence then. If that is the case, then I consider it mistaken. Such maps will have had important features, such as major roads, revised to within a few years of the date of publication, but they may well be based on a complete survey made up to 40 or so years previously. Information on revision is printed at the base of OS maps, but has not been copied by the Ramblers in the case of this map and so the date of survey cannot be ascertained.
14. I conclude from this evidence that the appeal route was in existence as a through route on the ground, most of it a footpath, around the end of the 19th century.

Tithe map evidence

15. Payment of tithes in kind, by giving a tenth of the annual produce of land to the church, was commuted to a money payment by the Tithe Commutation Act

of 1836. Commutation was carried out parish by parish. The maps which were needed for this process were either drawn up from fresh surveys or based on existing parish maps. Titheable plots of land were shown numbered on the maps, these numbers corresponding to entries in the Apportionment or Award, which noted the name of each plot, its ownership, state of cultivation and titheable value. Tithe maps usually show roads, but rarely show footpaths; the failure of the 1841 Combe Raleigh tithe map and the 1842 Luppitt tithe map to show any of the appeal route except where it is coincident with a road is therefore unsurprising. No significant conclusions may be drawn from this material.

1910 Finance Act evidence

16. Section 1 of the Finance (1909-10) Act 1910 states: *Subject to the provisions of this Part of this Act, there shall be charged, levied, and paid on the increment value of any land a duty, called the increment value duty, at the rate of one pound for every complete five pounds of that value accruing after the thirtieth day of April nineteen hundred and nine...* To this end, the whole of England and Wales was surveyed, and information on which to base a valuation was obtained from the owners of land on various forms, including in particular Form 4. Almost all of these forms 4 have been subsequently lost or destroyed.
17. The necessary information was entered into Field Books, partly from completed forms and partly from surveys carried out on the ground by staff employed by the Valuation Office. The significance of this in relation to rights of way is first that, in valuing a holding (known as a hereditament) of land, account had to be taken of how much its value would be diminished if sold: *subject to any fixed charges and to any public rights of way or any public rights of user, and to any right of common and to any easements affecting the land...* (Section 25(3)). The location and extent of the hereditaments in each tax area were recorded on large-scale (usually 1:2500) OS plans. The appeal route crosses five of these hereditaments.
18. Field Books have a standard layout and devote 4 pages to each hereditament. On the first page, in addition to the name of the hereditament and details of its owner and occupier, there is a heading *Fixed Charges, Easements, Common Rights and Restrictions*. This clearly reflects the language of Section 25(3). The entries on this page are likely to have been copied, or at least paraphrased, from the relevant Form 4 in the Valuation Office.
19. On the second page there is a space at the top for notes made on inspection, which in the case of the entries which have been dated was carried out in 1913. Under that is a heading *Charges, Easements and Restrictions affecting market value of Fee Simple*. A note may be made here, for example, of OS parcel numbers crossed by a right of way. In the case of one of the five hereditaments, for example, that comprising Wingate Farm, it states 'Rt of way thro Ord Nos. 80 66 62 65 £2 x 25 - £50' The 'Ord Nos.' are the numbers given to individual fields or parcels of land on the OS plans on which hereditaments were shown. At the foot of the page there is a space for entering *Add for Additional Value represented by any of the following for which deduction may have been made when arriving at Market Value*, one of which is *Restrictions*. '£50' has been noted here in this example, and this probably relates to the entry under *Charges, Easements and Restrictions affecting market value of Fee Simple* near the top of the page. The third page is left for sketches and descriptions of the various farm buildings. The fourth page has a

number of headings, one of which is *Less deductions in respect of*-. A sub-heading under this is *Public Rights of Way or User*, against which might be a figure. In this example it is again '£50'.

20. It is the Ramblers' case that where a deduction was shown in respect of a footpath which may be clearly identified on the OS plans by means of the parcel numbers given in the Field Book entries, and the footpath is identified as a 'public right of way or user' on page 4, it will have been acknowledged as a public right of way by the landowner. The County Council and those acting for affected landowners dispute the Ramblers' conclusions. The five hereditaments crossed by the appeal route are, from south to north, Ellishayes, Wingate Farm, Lower Shelvin, Higher Shelvin and Greenway. The Ramblers provided copies of the Field Book entries for Wingate Farm, Higher Shelvin and Greenway. They did not provide copies of the other Field Book entries because, although these revealed that there were deductions in respect of public rights of way or user, the location of these rights could not be identified since either no OS parcel numbers were given or, if they were given they did not relate to any parcel crossed by the appeal route.
21. Rhoda Barnett, for a group of landowners, argued in respect of those hereditaments where the Ramblers believed that the position of an acknowledged public right of way could be identified, that there was no link between any deduction for *Public rights of way or user* and the recording of a right of way through particular numbered parcels of land. I do not agree. It is not certain, but in my view there is a clear link between the sum, which in the case of each of the three hereditaments where Field Book entries have been provided is identical, attributed to the right of way through various OS parcels, the sum attributed to Restrictions and the sum deducted for public rights of way or user on page 4. That the deduction was in respect of a public right of user seems extremely unlikely. Such a right would have been a non-linear public right of a sort – such as for public recreation – which it is difficult to envisage applying in the Devon countryside.
22. The Field Book entry for Ellishayes, across which the southern end of the appeal route passed, shows a deduction for rights of way or user without listing land parcel numbers. It was a fairly large hereditament and the underlying OS 1:2500 plan show several paths crossing it. No conclusions may be drawn about the landowner's acknowledgement of public rights on the appeal route from this evidence alone.
23. The four OS land parcels listed in the Field Book for Wingate (see paragraph 19 above) did not include two, 63 and 29, which were clearly crossed by the appeal route. The Ramblers argue that the landowner was under no obligation to claim deductions for rights of way or, in the alternative, that the valuer might have considered that there was an alternative to a path through 63 and 29 along the parallel public road. I accept these as possibilities, but neither seems particularly plausible, and the strength of the case that the landowner acknowledged a continuous public right of way on the appeal route through his property is diminished to some extent.
24. Copies of the Field Book entries for Lower Shelvin were not provided by the Ramblers, but the details provided by Rhoda Barnett are not disputed. In this case, OS parcel numbers through which a right of way ran were listed, but they do not coincide with the numbers of the parcels through which the appeal route ran. On the face of it, and accepting the Ramblers' interpretation of the Field

Book entries, this would suggest that while the landowner acknowledged some public rights of way across his land, he did not acknowledge a public right of way along the appeal route. The Ramblers' response to this argument is that the appeal route through Lower Shelvin ran along what was acknowledged as a public road, which would not have been included in any hereditament, since public roads were excluded from hereditaments. They cite the 1809 map (paragraph 12 above) and the Luppitt Parish Survey map (paragraph 40 below). In any event, it is again argued, a landowner was under no obligation to claim any deductions in respect of public rights of way. I do not find these arguments convincing. Even though part of the appeal route ran along a route which might have been considered a public road at the time, other parts of the appeal route through Lower Shelvin ran along a line clearly labelled on the OS plan as 'F.P.'. It seems much more likely that the landowner at the time did not acknowledge that a public right of way existed on the appeal route.

25. Page 2 of the Field Book entry for Greenway lists under *Particulars, description, and notes made on inspection*, 'Rt of Way Nos. 1074, 1070, 964, 922, 949, 953, 961', and under *Charges, Easements and Restrictions affecting market value of Fee Simple* 'Rt of way £2 x 25 - £50'. At the bottom of page 2 there is an entry of £50 against *Restrictions*. On page 4 there is an entry of £50 against *Public rights of way or user*. The appeal route, according to the Ramblers, runs through only one of the listed land parcels, 949, which is the last field the route crosses before reaching the road at A1. The Ramblers argue that since the only path running through parcel number 949 is the appeal route, then it must have been acknowledged as a public right of way. I accept that that is possible, but it remains very puzzling that no reference is made to the numbers of the other parcels through which it passed and it cannot be concluded from this evidence that the landowner acknowledged the existence of a public right of way on the whole of the appeal route crossing his land.
26. Had the Field Books for all five hereditaments listed all the parcels or fields through which the appeal route ran, and shown, in each case, a deduction for public rights of way or user on page 4 which corresponded in amount to the sum noted on page 2, I would have considered it evidence of some strength in support of the view that the appeal route was an acknowledged public footpath at the time, despite the absence of copies of Form 4 which might have linked the information in the Field Book directly to that provided by the landowner. As it is, although the evidence provides some support for the view that at least parts of the appeal route were considered to be public footpaths in the early 20th century, it also suggests that other parts were considered not to carry public rights. Each one of the five Field Book entries is problematic. Taken as a whole, the weight to be given to these pieces of evidence in support of the Ramblers' case is extremely limited.

Parish Meeting minutes 1913 -1915

27. The Combe Raleigh Parish Minute Book from 1913 records the decision of the Parish meeting to *appoint a small committee... to make a schedule of the public footpaths in the Parish*. Money would be collected to repair those for which the Parish was liable. The Minute Book for 1914 records that a schedule was presented to the Parish Meeting. It described eleven paths under the heading *Schedule of Public Footpaths with remarks on the keeping in repair thereof*, and the explanation *appended is to the best of their knowledge and belief and observation a list of the Public Footpaths in the Parish of Combe Raleigh*. One of the paths listed is described as *From main road above Woodbine, across two*

field through Wingate mow barton [not 'now barton' as suggested by the Ramblers – a mow barton is a farmyard where hay or straw is stacked] *to a lane to Allebeare to stream leading to Pulshays*. This description is likely, I consider, to apply to at least part of the appeal route in Combe Raleigh, but the evidence would carry more weight were there a map to confirm this.

28. One of the members of the Parish Meeting was Mr A F Bernard. An A F Bernard is shown in the Field Book for Wingate (paragraph 23 above) as having been the owner of that hereditament. It seems likely that they were one and the same person.
29. There is a later manuscript annotation in the Minute Book 'up to Wingate only'. This may relate to the decision, made later, not to pay for the construction of two bridges (below at paragraph 31).
30. It seems unlikely to me that a Parish Meeting would take on lightly the responsibility for maintaining a path unless the members were confident that it was public, and I conclude that this is evidence of significant, but not great weight, that the appeal route from point A as far as the road at Windgate had the reputation of being a public footpath in 1913.
31. In 1915 it was reported in the Combe Raleigh Parish Minutes that *the question of putting a footbridge over the stream by Allebear leading to Pulshays* was raised by Mr Bernard. *After discussion it was not considered clear that it is a public footpath and that therefore the Parish Meeting should not too readily undertake the responsibility*. Later it was reported that the adjoining landowners had paid for the bridge. Because it is not entirely clear where this bridge was, this is evidence of only slight significance that part of the appeal route was considered private. It does not support, as the Ramblers suggest, the alternative view that this section of the route might have been considered a public road.

Parish Meeting Minutes 1934

32. The Rights of Way Act 1932 encouraged local authorities to compile schedules of footpaths and bridleways in their areas. Following the passing of the Act, Honiton Rural District Council asked Combe Raleigh Parish Meeting to provide information about its public paths. At a Parish Meeting in 1934, parish councillors considered the 1914 schedule (paragraph 27 above). Two of the eleven paths in the earlier list, not considered to be public, were removed from it, but one that remained was described as *From main road above Woodbine across two fields to Wingate*.
33. Rhoda Barnett, for the landowners, argues that *there was no statutory duty for the production of these lists and no record of what evidence was assessed when the lists were compiled or any consultation with interested parties*. She considers their evidential value to be low. The County Council takes a similar view. This evidence is, in my view, significant if not particularly weighty. The Parish Councillors were the people on the ground in the area, and more likely than others to be aware of the reputation as public or not of particular routes. It is clear that in this case they considered the paths with some care, otherwise they would not have added to and subtracted from the 1914 list. There is some doubt about the position of the path, however, since the appeal route would have crossed three, rather than two, fields to get from the road to the farmyard.

34. I conclude that this evidence is of significant, though not very great, weight in support of the view that the appeal route between point Y and the lane which runs past Wingate, had the reputation of being a public footpath in 1934.

Survey under the National Parks and Access to the Countryside Act 1949

35. Sections 27 to 32 of the National Parks and Access to the Countryside Act 1949 set out the process by which definitive maps were to be prepared. Information, in the form of a Map and Schedule of alleged public rights of way, was usually compiled by parish councils or meetings and provided to the relevant 'surveying authority', normally a county council, sometimes via a rural district council. Government advice on how to carry out the survey was sent to all parishes. From information in this Map and Schedule a Draft Map was required to be produced and published by the surveying authority. There was a statutory process for dealing with objections. Then a Provisional Map was produced, to which objections could again be made, and finally a Definitive Map was published.
36. In Combe Raleigh Parish, the base OS map on which the alleged public rights of way were marked had a publication date of 1906. It was at a scale of 1:10560, or 6 inches to a mile. The appeal route was shown (by the OS) on this map, annotated 'F.P.'. On this base map a line was drawn in ink, in two parts, first from point Y (see map below) to the eastern edge of Wingate Farmyard (but not to the road at Wingate) and then from a point on the road just north-west of Wingate to cut off a corner of the road and re-join it by Lake Cottage, just short of the parish boundary with Luppitt. The corresponding entry in the Schedule lists this two-part path as no. 13, states that it is unlikely to be disputed and that it would be required in the future. It is described as *From the Taunton Road across two fields to Wingate Farm and on to Lake Cottage*. On the second page of the Schedule under *Grounds for believing path to be public* is written *Shown on Ordnance Survey Map as a footpath*. Underneath that, however, is written in manuscript, 'Private used by reason of residence'. Then the names of the five men who carried out the survey is given, and next, under *Remarks*, has been typed *It is considered that this footpath should be maintained as such*, but a line has been struck through these words with ink. The Schedule was dated July 1950, and signed by Major Watson, Chairman of the Parish Meeting. Below that, under the space for *Comments of RDC*, is typed *This path is shown as a footpath on the Ordnance Survey map and also on the Map prepared under the Rights of Way Act 1932. Suggest that this footpath should be retained as a public right of way*.
37. The County Council commented on this schedule in an undated form, but clearly from the early 1950s, stating that there was *no evidence whatsoever of this path being used*. A more comprehensive description of the route was given, showing that it crossed six 5-barred gates, a gap in a hedge across which were two strands of barbed wire, and a ditch.
38. The County Council states that the path was then shown neither on the Draft, Provisional nor finally Definitive map, although no copies of these have been produced in evidence.
39. Given the County Council's description of the path and the obstacles to be crossed in walking it in the early 1950s, the manuscript comment that it was private (paragraph 36 above) and used by reason of residence seems surprising and at odds with the comment that there was no evidence whatsoever of it being used.

40. In the Luppitt Parish survey the section of the appeal route between Greenway Lane and Yard Farm was numbered 48 on the map. On the first page of the schedule it stated that the path was unlikely to be disputed and that it was required in future. Under the sparse description 'F.P. 48 to Greenway Lane' there is the single word in manuscript capitals 'OMIT'. On the second page the grounds for believing the path to be public were *Markings on old survey maps*. The names of those carrying out the survey were simply 'Parish Council'. Under the signature of the Parish Clerk and the date of February 1951 the comments of Honiton Rural District Council were identical to those for footpath 13 in Combe Raleigh.
41. The section of the appeal route between Yard Farm and a roadway northwest of Pulshays was numbered 45. The wording of the Parish Schedule was identical to that for 48, down to the manuscript 'OMIT', apart from the description of the path, which was simply 'F.P. to Yard Farm' and the note that it was doubtful that the path would be required in the future. There is no record of County Council comments on the Schedule, but in any event neither path was subsequently shown on either Draft, Provisional or Definitive Maps.
42. The Ramblers' supporting statement implies that the combined view of the Parish Meeting and Rural District Council should carry more weight than that of the surveying authority, the County Council. It is unfortunate that the reasoning (apart from perhaps some hints as to what it might have been on the amended schedules) behind the County Council's decision not to include these routes even on the Draft map seems no longer to be available and leave a number of unanswered questions, such as who stated that the path from the Taunton Road to Wingate Farm was private, or whether the County Council asked the Parish Meeting whether it could justify the inclusion of the paths other than on the clearly inadequate grounds that they were shown on old OS maps. In any event, however, there is no evidence that officers of the County Council acted in any untoward way in deciding to omit these paths. They must have been aware of the listing of the path in the schedules of 1934 for both Combe Raleigh and Luppitt, yet despite that decided to omit the appeal route. There is no evidence of an appeal, as might possibly have been expected from either Parish Meeting, against its omission from the Draft map.
43. I conclude that the evidence of the preparation of the first Definitive Map provides no support for the Ramblers' case.

Overall conclusions from the evidence

44. A summary of the picture which emerges from the evidence is this: at the end of the 19th century there was a route available and in use on foot (with some parts following vehicular routes) between Y, Z and A1. The evidence from that time does not show that it carried public rights. The evidence from the 1910 Finance Act documents does not show that the complete route was still in existence, but does suggest that the owners of some of the land crossed by parts of it acknowledged those parts as carrying public rights in 1913. Taken together, the Finance Act evidence with regard to public rights on the appeal route is confused and unclear. The Parish Meeting evidence from 1913/14 and 1934 as a whole is supportive, with some weight, of the view that the part of the appeal route from Y to Wingate Farm had the reputation of being a public footpath, but does not assist either the case for the Ramblers or that of the objectors with regard to the remainder of the route. Although the evidence of the Definitive Map process is incomplete it is clear that the surveying authority

did not consider that any part of the appeal route (where it is not coincident with a road) carried public rights. That it was considered but rejected must carry more weight than if the route had simply not been considered.

45. Given this somewhat perplexing picture, I do not consider that it would be reasonable, based on the evidence presented, to allege the existence of public footpath rights on the appeal route.

Conclusion

46. Having regard to these and all other matters raised in the written representations I conclude that both appeals should be dismissed.

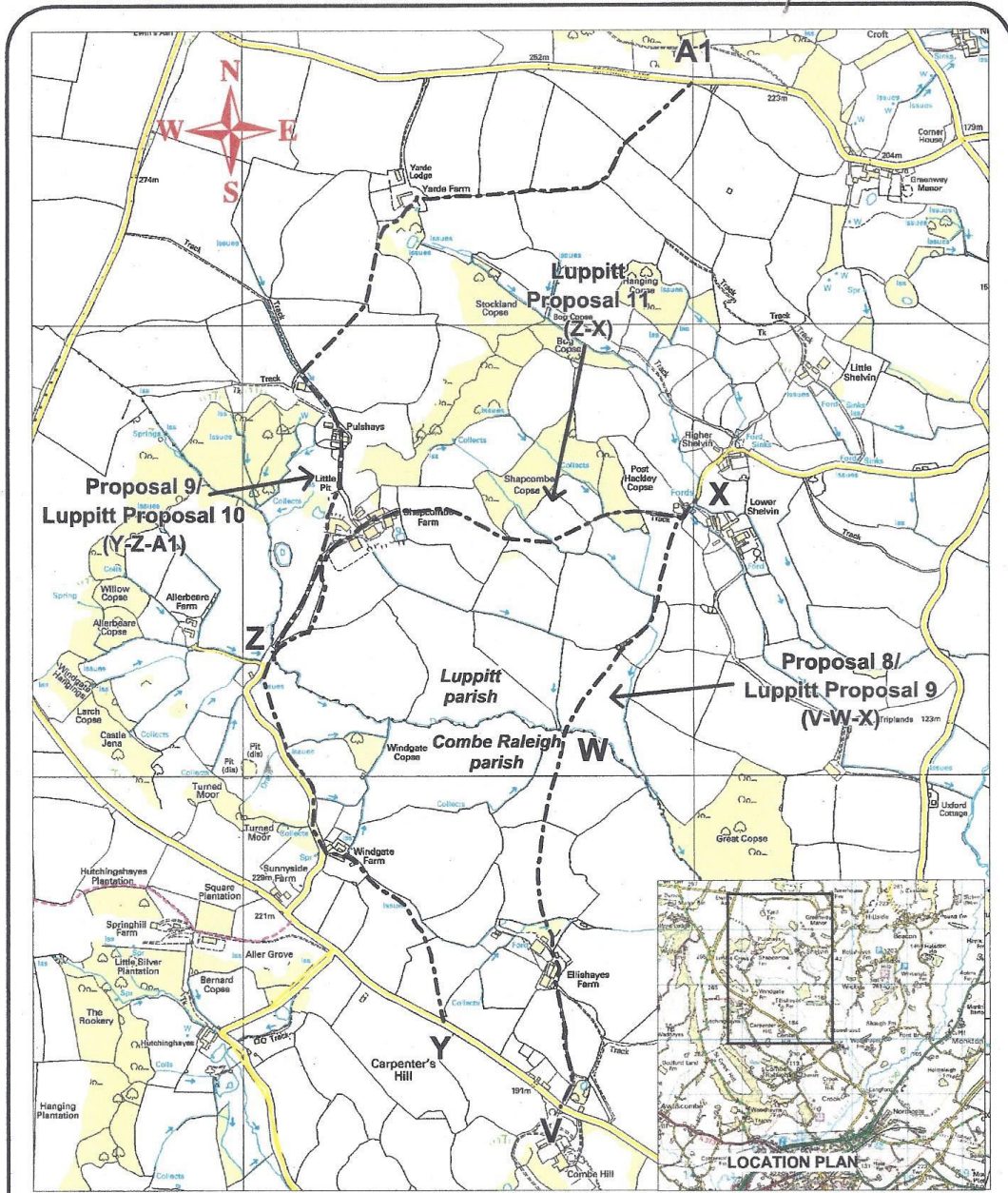
Formal Decision

47. I dismiss both appeals.

Peter Millman

Inspector

9.A



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DEVON COUNTY COUNCIL
 Definitive Map Review, Combe Raleigh parish
 Informal Consultations, Proposals 8 & 9
 Claimed addition of footpaths

drawing number	HTM/PROW/14/83
date	Jul 2014
scale	1:12, 500
drawn by	NSC

Notation

Claimed footpaths (8 & 9
 with Claims 9, 10 & 11 in Luppitt parish)
 Existing footpaths

David Whitton
 HEAD OF HIGHWAYS, CAPITAL DEVELOPMENT & WASTE

