



## Order Decision

Site visit made on 14 December 2017

**by Alan Beckett BA MSc MIPROW**

**an Inspector appointed by the Secretary of State for Environment, Food and Rural Affairs**

**Decision date: 06 February 2018**

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### **Order Ref: ROW/3174227**

- This Order is made under Section 53 (2) (b) of the Wildlife and Countryside Act 1981 ('the 1981 Act') and is known as the Devon County Council (Footpaths No. 21, Combe Raleigh and No. 59, Luppitt) Definitive Map Modification Order 2016.
- The Order is dated 30 November 2016 and proposes to modify the Definitive Map and Statement for the area by adding a public footpath as shown in the Order plan and described in the Order Schedule.
- There were 4 objections outstanding when Devon County Council ('the Council') submitted the Order to the Secretary of State for Environment, Food and Rural Affairs for determination.

### **Summary of Decision: The Order is not confirmed.**

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#### **Procedural Matters**

1. None of the parties requested an inquiry or hearing into the Order. I have therefore considered this case on the basis of the written representations forwarded to me. I carried out an unaccompanied site visit on Thursday 14 December 2017.
2. The Council was directed to make the Order following a successful schedule 14 appeal and adopted a neutral position with regard to it. The case for the confirmation of the Order was put forward by Rosemary Kimbell on behalf of the Ramblers' Association East Devon Group ('the supporter'), and the objectors' case was put forward by Mrs Rhoda Barnett on behalf of her clients ('the objector').

#### **The Main Issues**

3. No evidence of use of the claimed footpath was submitted in support of the confirmation of the Order; the case for the Order relies upon the available documentary evidence to demonstrate that the Order route had been dedicated as a public right of way at some indeterminate point in the past.
4. The main issue in this case is therefore whether the evidence discovered is sufficient to show, on a balance of probabilities that a way not shown in the definitive map subsists over the land in question.

#### **Reasons**

##### ***Documentary evidence***

*Early nineteenth century maps*

5. The 1806 Ordnance Survey surveyor's drawing, the 1809 1 inch to 1 mile Old Series map and Greenwood's map of Devon of 1827 all show a means of access to Lower Shelvin Farm and to Ellishayes but provide no evidence of the existence at those dates of a way or path linking the two properties. These documents are of no assistance in determining the status of the Order route.

#### *Tithe maps*

6. The 1841 Combe Raleigh tithe map shows a means of access to Ellishayes from the Dunkeswell to Honiton road but does not show a means of access north-eastward from Ellishayes to the parish boundary; the apportionment records those fields crossed by the Order route as 'pasture'. The 1842 Luppitt tithe map reflects the early nineteenth century maps considered above in that it shows a means of access to Lower Shelvin Farm from the public road but no continuation south to the parish boundary. There is no indication in the apportionment detail of the existence of a footpath through the fields crossed by the Order route. The tithe documents are of no assistance in determining the status of the Order route.

#### *Ordnance Survey maps*

7. The 1889 25 inch to 1 mile Ordnance Survey ('OS') map shows the access track to Ellishayes and a double peck line feature running northward to the parish boundary which continues from the parish boundary to the track at Lower Shelvin Farm. The map does not separately identify the existence of a path through Ellishayes although there is nothing in the map to suggest that access through the property was not possible. The double peck line feature shown is consistent with the Order route and is annotated 'F.P.' just south of the parish boundary. There is no indication on the map of the existence of a means of crossing the brook which forms the parish boundary.
8. The supporter places some weight to the annotation of the route as 'F.P.' as evidence of the path's public status, drawing on the February 1883 instruction to surveyors that "*the object of... 'F.P.' being that the public may not mistake them for roads traversable by horses or wheeled traffic*". However, the objectors point out that since 1888 all OS maps have carried a disclaimer to the effect that the depiction of a track or way on a map was not evidence of the existence of a public right of way. Furthermore the objectors say that subsequent instructions issued by OS were that "*all clearly marked and permanent footpaths (i.e. gravelled, paved or with stiles or gates), whether public or private, should be shown*". The objectors view is that the annotation 'F.P.' does not indicate that the route shown in the 1889 map was a public route.
9. It is well established from the cases of *Attorney-General v Antrobus* [1905] 2 Ch 188 and *Moser v Ambleside UDC* [1925] 89 JP 118 that whilst OS maps provide good evidence of the physical features visible on the ground at the time of the survey, they do not provide evidence of the status of any way shown. Although it can reasonably be concluded that a path on the alignment of the Order route ran between Ellishayes and Lower Shelvin in 1889, the depiction by OS of that path does not assist with the determination of its status.

*1910 Finance Act records*

10. The Order route crossed two separate hereditaments, these being hereditament 45 (Ellishayes) in Combe Raleigh parish and hereditament 129 (Lower Shelvin) in Luppitt parish. A deduction of £50 in the value of the land attributed to 'public rights of way or user' was granted with regard to hereditament 45. With regard to hereditament 129, a reduction in value of £40 for a 'Ry of Way' was identified in the assessment of the property although this figure had been increased to £50 under the heading for deductions for Public Rights of Way or User.
11. Both hereditaments are shown on the base OS plan to be crossed by a number of tracks or paths so it is not readily apparent as to which path or paths gave rise to the reduction in site valuations. The supporter submits that the entries under the heading '*Charges, Easements and Restrictions affecting Market Value of Fee Simple*' provides an indication of which path was considered to be carry a public right of way. For hereditament 45 the entry reads '*of Way through Nos.175, 171, 73, 72 & 158*'; for hereditament 129 the entry reads '*Right of Way Ord Nos. 1281, 1280, 1207*'. The supporter points out that these OS parcel numbers correspond with the fields on the base plan and that the only path shown running through all these fields is the one which corresponds with the Order route.
12. The objector considers it relevant that the 'ways' through the OS field parcels were recorded under the heading of 'easements' as easements are private rights of way. However, it is to be noted that no deduction in site value was granted for the existence of any easements; the only reduction in value for either hereditament (other than for tithe or rent charge) was granted for the existence of 'public right of way or user'.
13. In my view, in the absence of any reduction in site value being attributable to the existence of an easement, it is more likely than not that the '*Right of Way*' and '*of Way*' identified in the field book gave rise to the reduction in value granted for the existence of a public right of way.
14. It is recognised that none of the background papers leading to the compilation of the field book or the valuation book have been submitted and it is not known whether these documents have survived. The objector considers that the information found in the field books is unreliable in the absence of the records of the landowners' responses to the valuer's inquiries. However, in the absence of evidence to the contrary, it has to be assumed that the procedures required under the legislation had been carried out and that the field book entries reflect the submissions made by the landowner in relation to his property together with the observations made about the property by the valuer as part of his inspection.
15. Although the Finance Act records are limited to the field and valuation books and the map, I consider that the field book entries suggest that the Order route was reputed to be a public right of way at the time the Finance Act survey was conducted.

## **Parish records**

### *Combe Raleigh parish meeting minutes*

16. The parish meeting minutes show that during 1913 proposals had been put forward for the compilation of a schedule of public footpaths within the parish and for the parish meeting to undertake such necessary 'wear and tear' repairs to the paths as was necessary. The paths were to be surveyed by a sub-committee with repairs being funded by a subscription rate. The 1914 minutes show that the survey had been undertaken and a schedule of paths in the parish drawn up.
17. The path identified as path 10 in the schedule was described as follows: "From road by Woodbine Cottage across field through Ellishayes Barton over three fields to stream leading to road by Shelvin Farm". Given the relative position of Woodbine Cottage and Lower Shelvin Farm, it is more likely than not that path 10 in the Combe Raleigh schedule relates to the Order route.
18. The supporter considers it significant that the proposal to compile the 1914 schedule was supported by Mr A F Bernard, a member of the parish meeting and who appears to be the same A F Bernard described in the Finance Act records as the owner of Ellishayes. There is nothing in the parish minutes to suggest that Mr Bernard disputed the inclusion in the parish schedule of a footpath running over his land.
19. The parish minutes also record that in 1934 the parish meeting gave further consideration to the existence of public rights of way within the parish in response to a request for such details from Honiton RDC in the light of the Rights of Way Act 1932. Included in the parish schedule of 1934 (as footpath 8) was the path which had previously been described in 1914 as path 10. Those paths which were no longer considered by the parish meeting to be public were removed from the list whilst other paths which had not appeared in the 1914 schedule but by 1934 were established as rights of way were added.
20. Although there was no statutory framework under which either the 1914 or 1934 schedules were produced, nonetheless the parish records show that during the early twentieth century consideration had been given to the question of the existence of public rights of way and in particular to whether a public right of way was considered to exist between Combe Raleigh and Luppitt via Ellishayes. The evidence from the Combe Raleigh parish minutes suggests that during the early part of the twentieth century the Order route had the reputation of a public footpath.

### *Luppitt parish meeting minutes*

21. There is no record with the minutes of Luppitt parish meeting of a schedule of public footpaths being drawn up as occurred in Combe Raleigh. The minutes do however record that in February 1914, Mr Sage of Lower Shelvin Farm had written to the parish meeting stating that the footbridge between Lower Shelvin and Ellishayes had been washed away and requested that the parish meeting provide a new bridge.
22. The minutes note that a carpenter, Mr Palmer, was to accompany members of the parish meeting when they viewed the site at Lower Shelvin and the site of another footbridge at Week. The minute of February 26 1915 shows that Mr Palmer's bill of £1 10/- for the repair of footbridges was to be paid. Although

this minute does not indicate which bridges had been repaired, in the context of the earlier minute regarding the letter from Mr Sage it is likely that some of those repairs related to a bridge between Lower Shelvin and Ellishayes. A further minute of November 1924 notes that the footbridge at Shelvin had been removed by floods, that Mr Palmer had been asked to fix and repair the bridge and that such repairs had cost 16/6d.

23. There is no indication on any of the OS 25 inch to 1 mile plans of the existence of a footbridge on the path between Ellishayes and Lower Shelvin although the parish minutes are clear that such a bridge had been in existence and indicate that repairs had been undertaken to it on at least one occasion.
24. Although the objector contends that it would have been possible that the works to the bridge may have been carried out for the benefit of farm workers or for other workers on the Lower Shelvin and Ellishayes farms, it seems inherently unlikely that the parish meeting would agree to the expenditure of public funds on infrastructure that would only benefit a private need. The bridge over the stream many have only been a transient feature as there is no further reference to it in the parish minutes beyond 1925 but the references to it in the Luppitt parish meeting minutes supports the contention that in the early part of the twentieth century, the route had the reputation as one open for public use.

### ***Survey of public rights of way 1949***

25. Surveys of public rights of way were carried out by Combe Raleigh and Luppitt parish meetings in 1950 and 1951 respectively. The section of the Order route within Combe Raleigh was recorded by the parish meeting as path no. 12. Two grounds for believing the path to be public were given; the typewritten response (in common with other responses on the form) was the path had been shown on Ordnance Survey maps; another response (in longhand) was that the path had been in use by the public for over 20 years. With regard to the section of the path in Luppitt, the parish meeting recorded this as footpath 40 with the reason for believing the path to be public as being the "*records in old minute books*".
26. Although both parish meetings recorded the Order route as a public footpath as part of the survey, no part of the Order route was shown on the draft definitive map when it was published. Furthermore, no objection was made to the omission of the footpath at either the draft or provisional stages of the definitive map process. The Order route was not shown on the Definitive Map when it was published. The absence of any objection to the omission of the map from either the draft or provisional map stages of the process is in my view a significant factor which sits in the balance in favour of the objectors to the Order.
27. At the time of the survey, consideration would have been given by the County Council as the surveying authority to the question of whether the route claimed by the parish meetings was in fact a public right of way. The minutes of Luppitt parish meeting of 27 March 1956 records that the Assistant County Surveyor had attended the meeting to discuss the survey of public rights of way. The minute records that "*Many of the paths were considered to be now not used and were crossed off*". At a further meeting on 24 April 1956 it was recorded the "*Further footpaths were discussed, many were found to be of no public use and omitted*".

28. The 1956 minutes demonstrate that consideration had been given to the results of the parish survey both by the County Council and Luppitt parish meeting. It is likely that this would have included a consideration of all the relevant evidence which had been submitted to the County Council by the parish meetings in support of the contention that the route should be shown as a public right of way. The County Council's consideration of that evidence in consultation with the parish meeting resulted in a determination that the route was not a public right of way and should not be shown on the draft map.
29. No evidence of claimed use of the Order route has been presented in this case, either in the recent past or during the twenty year period prior to the survey under the 1949 Act being conducted. The landowners' evidence is that there has been no use of the Order route.

### **Conclusions**

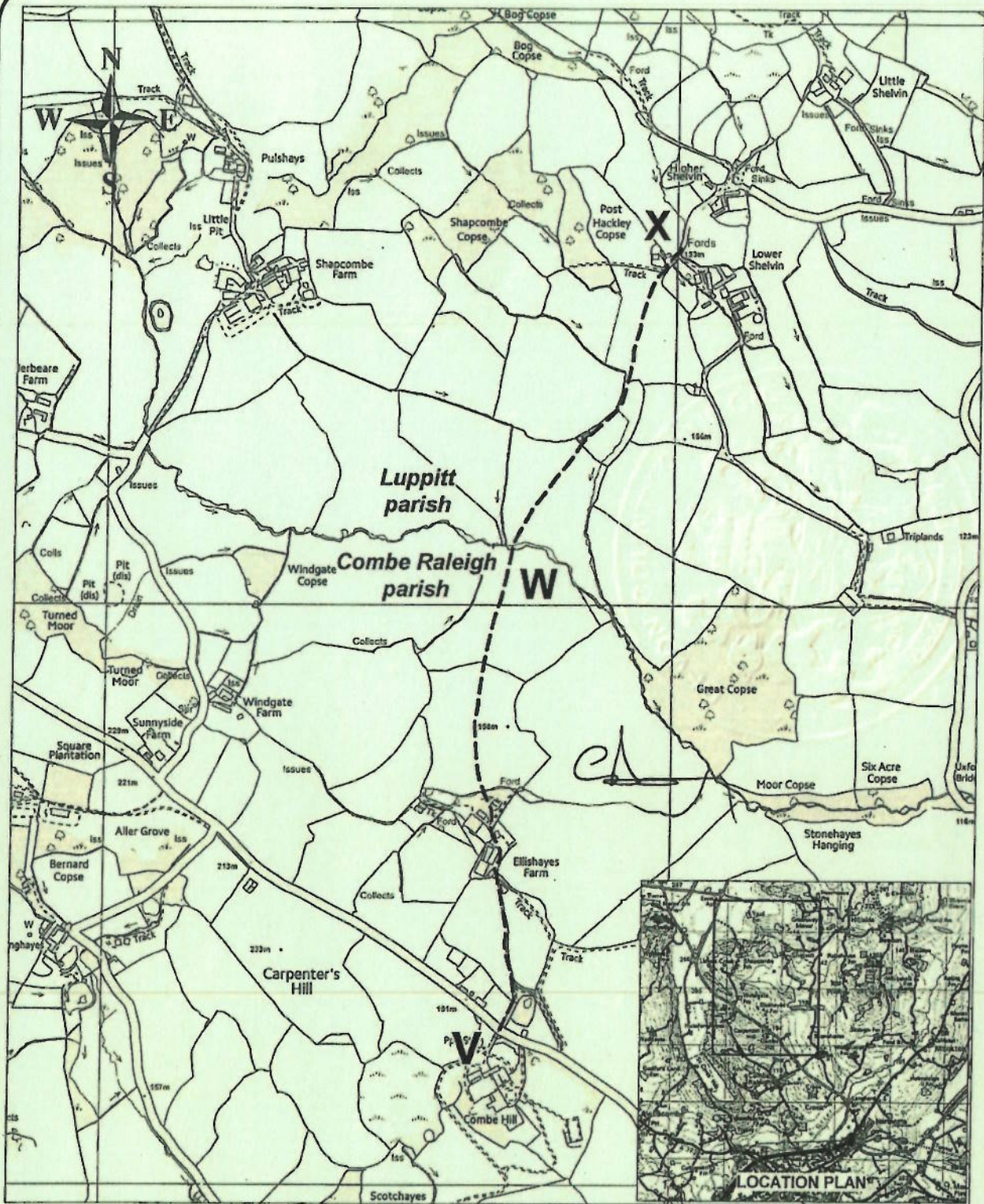
30. The parish survey notes show that the parish minutes had already been consulted with regard to the evidence to support the claim that the Order route was a public right of way; the parish minutes considered above are not therefore new evidence which satisfies the section 53 test regarding the discovery of evidence. Nor are the OS maps considered regarded as new evidence as the parish survey shows that Combe Raleigh had also given consideration to old maps in support of its contention that the route was a public right of way. The Finance Act documents were not released to the public archive until after the 1949 survey had been completed, so such records would not have been available for consideration at the time of the compilation of the definitive map.
31. Although the Finance Act documents and the parish minutes suggest that the Order route had the local reputation of a public right of way during the first part of the twentieth century, any reputation the Order route had would have been taken into consideration at the time of the parish survey and at the publication of the draft map. In my view the Finance Act documents do not add significant weight to what was understood about the route in the 1950s prior to the publication of the draft map.
32. There is evidence in the supporter's favour that the Order route had the local reputation as a public right of way, but in the opposite balance is the fact that, despite this apparent local reputation, no challenge was made to the omission of the path at either the draft or provisional map stage.
33. In my view, the evidence both for and against there being a public right of way over the Order route is evenly balanced; nothing of significant weight has been added to the scale in favour of the Order such that it demonstrates that a public right of way subsists over the Order route. It follows that I conclude that the Order should not be confirmed.

### **Formal Decision**

34. I do not confirm the Order.

*Alan Beckett*

Inspector



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**DEVON COUNTY COUNCIL**  
**(Footpaths No. 21, Combe Raleigh**  
**and No. 59, Luppitt)**  
**Definitive Map Modification Order 2016**

drawing number HIW/PROW/16/87  
 date Nov 2016  
 scale 1:10,000  
 drawn by NSC

**Notation** Footpaths to be added -----  
 (Combe Raleigh No. 21 V-W,  
 Luppitt No. 59 W-X)  
 Existing footpath -----

**David Whitton**  
 HEAD OF HIGHWAYS,  
 INFRASTRUCTURE DEVELOPMENT AND WASTE

