



Order Decisions

Site visit made on 24 July 2018

by **D. M. Young BSc (Hons) MA MRTPI MIHE**

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

Decision date: 17 September 2018

Order Ref A: ROW/3188550

- This Order is made under Section 53 (2) (b) of the Wildlife and Countryside Act 1981 (the Act) and is known as the Devon County Council (Footpaths Nos. 60 and 61, Luppitt) Definitive Map Modification Order 2017.
- The Order is dated 17 March 2017 and proposes to modify the Definitive Map and Statement for the area by adding a footpath as shown in the Order Plan and described in the Order Schedule.
- There were 4 objections outstanding when Devon County Council submitted the Order to the Secretary of State for Environment, Food and Rural Affairs for confirmation.

Summary of Decision: The Order is not confirmed

Order Ref B: ROW/3188551

- This Order is made under Section 53 (2) (b) of the Wildlife and Countryside Act 1981 (the Act) and is known as Devon County Council (Footpath No. 62, Luppitt) Definitive Map Modification Order 2017.
- The Order is dated 17 March 2017 and proposes to modify the Definitive Map and Statement for the area by adding a footpath as shown in the Order plan and described in the Order Schedule.
- There was 1 objection outstanding when Devon County Council submitted the Order to the Secretary of State for Environment, Food and Rural Affairs for confirmation

Summary of Decision: The Order is not confirmed

Procedural Matters

1. As set out above there are two separate Orders which relate to three different routes within the parish of Luppitt in East Devon. As both Orders involve the consideration of similar evidence and are in the same geographical area, I have dealt with them in a single decision letter.
2. None of the parties requested an Inquiry or Hearing into the Orders. I have therefore considered the cases on the basis of the written representations.
3. The Council was directed to make the Orders following successful schedule 14 appeals¹ and has since taken a neutral stance. Despite that, its officer was present when I undertook my accompanied site visit in relation to Order A. No-one requested an accompanied site visit in relation to Order B, so my inspection was carried out unaccompanied.
4. The case for both Orders has been made by Rosemary Kimbell on behalf of the Ramblers' Association East Devon Group ('the supporter'). In the case of Order

¹ PINS Refs: FPS/J1155/14A/14, FPS/J1155/14A/15 & FPS/J1155/14A/18

A the objectors are represented by Mrs Rhoda Barnett. In Order B the objector is represented by Robin Carr of Robin Carr Associates.

5. Another recent Order decision in the area has been put to me². Although I have assessed these Orders on their individual merits, I recognise the importance of consistency in such matters. Accordingly, I have had regard to this decision insofar as it is relevant to my consideration of these Orders. I have also considered the Schedule 14 decision letters. Nonetheless, I am not bound by these which addressed a different issue, namely, whether an Order should be made.

Main Issues

6. The Orders are made under Section 53(2)(b) of the 1981 Act, relying on the occurrence of an event specified in Section 53(3)(c)(i) of the Act.
7. The case in support of the Orders relies upon historical documentary evidence rather than evidence of recent public use to demonstrate that the Order routes have been dedicated as public right of ways at some point in the past. The fact that there has been no public use of the routes in recent times does not preclude the possibility of a right of way being added to the Definitive Map bearing in mind the long established legal principle "once a highway, always a highway"³.
8. The main issue in both cases is therefore whether the new evidence is sufficient to infer that the dedication of a public right of way occurred at some point in the past. The burden of proof to be applied is the balance of probabilities.

Reasons

9. The 'new' evidence in both cases is that connected with the Finance Act 1910. It is common ground that this information was not available at the time that the Definitive Map and Statement (DMS) were first prepared in the early 1950s. I have therefore approached this decision on the basis that I am now entitled to take that information into account, together with all other evidence available, whether it has been previously considered or not. The Finance Act evidence is similar in both cases. I therefore intend to deal with this first before going on to look at the other evidence specific to each Order.

1910 Finance Act Records

10. The 1910 Finance Act was concerned with assessing various values in relation to land in order that a tax could be levied on the increase in the site value of land between its valuation as at 30 April 1909 and generally any sale or other transaction involving the land in question. The Act provided for certain deductions to be made in terms of the value of the land. Information regarding landownership is contained in the valuation book entries provided. However, none of the original 'Form 4s' that would have been completed on behalf of the landowners are available. It is also pertinent that the existence and recording of highways was incidental to the purposes of the Finance Act.
11. The Finance Act evidence for both routes is comprehensively set out by my colleague in respect of the Schedule 14 decision letters and it is not necessary for me to repeat all of that information again here.

² ROW/3174227

³ Harvey v Truro Rural District Council (1903)

12. Although there are some discrepancies and omissions, particularly in relation to Order route A, the field books show that deductions were claimed in respect of "Public Rights of Way or User". The field book entries show that these claims generally correspond to the field numbers crossed by the Order routes. I therefore concur with my colleague that it seems to me more likely than not that the deductions made were in respect of a public right of way passing through the numbered fields.
13. This suggests that both routes were considered to be public right of ways at the time the Finance Act survey was conducted and this lends weight the supporter's view that public footpaths subsisted along the appeal routes.

Order A

The route

14. In Order A there are two intersecting routes. The first (FP61) starts at Stockers Farm (point U) passing through a number of fields and then turning uphill through Crown All Wood before terminating at point Q. The second route (FP60) is much longer and starts at Higher Wick Farm (point S). It then runs in a south-easterly direction through Common Land within the ownership of the National Trust. There is a locked gate at the end of this section. The route then turns southwards intersecting with FP61 at point Q and thereafter running through fields and a farm complex at Woodhayes before terminating at Dumpdon Lane at point R.

Historical Mapping Evidence

15. Only limited sections of the route are shown on the early 19th century Ordnance Survey (OS) maps. By 1889, the OS one-inch, first edition map shows the whole of the route along the line of FP60. The route is again shown on the 1946 one-inch map and the 1:25000 1948 provisional edition.
16. FP61 does not appear on any map until the 1946 one-inch map. Both sections of the Order route are marked F.P. on the 1948 edition map. However these initials were used for descriptive purposes to avoid such paths being mistaken for paved roads suitable for wheeled traffic and horses.
17. No part of the route FP60 is shown on the 1842 Tithe map for Luppitt parish. At Point U the map is annotated with the word "Road" however, there is no path shown along the length of FP61.
18. Overall, I find the historical mapping evidence in relation to Order route A to be patchy. Whilst there is strong evidence to suggest the physical existence of a route along the line of FP60 from 1889 onwards, the mapping evidence does not assist in identifying the status of that route. The case for the physical existence of the FP61 is at best highly questionable.

The Definitive Map Process

19. The appeal route is shown in various sections on the survey map and described on the survey form completed by Luppitt parish as part of the survey of public rights of way completed in the 1950s under the National Parks and Access to the Countryside Act 1949.
20. The grounds for believing sections of the route to be public include "*markings on old survey maps*" and "*used by general public for over 35 years*". However,

save for a section of FP60 through Woodhayes (known as path 37), the routes were not shown on the Draft DMS.

21. Following complaints the Council proposed in 1959 to add the section of FP60 between points Q-S as well as FP61 to the DMS. However there were objections to the proposals and following the consideration of further evidence, which the objectors suggest showed a lack of public use, the routes were never added to the DMS.
22. It is clear from reading the various submissions that the exact reasons why the routes were proposed and then omitted at the various stages is not fully known today. I have noted the Supporter's argument that there is nothing to suggest a lack of evidence or any other legal reason for the omission of the paths from the Definitive Map process. Whilst that may be so, neither is there any evidence of procedural impropriety.
23. Overall, the Definitive Map evidence in relation to the two routes is a consideration weighing against the confirmation of the Order.

Parish Council Minutes

24. There is no mention of the Order route in the Luppitt Parish Council minutes covering the first half of the 20th century.

Landowner evidence

25. This confirms that there has been no known public use of the route since 1944 at the earliest. When the route did exist it is contended that it was a private estate path.
26. The landowners also state that during the whole of the period 1824 to 1920 the Combe Raleigh Estate was the subject of a strict settlement and submit that during this time the land was held by a tenant for life who had no capacity to dedicate public rights of way over the land. Whilst this does not mean that there was no-one with capacity to dedicate, the objectors' detailed submissions on this matter weigh against the confirmation of the Order.
27. When I conducted my site visit, I was able to see the mature tree, referred to by the objectors, that blocks the route through Crown All Wood. It is claimed that this tree must be at least 150 years old.

Order B

The route

28. Order route B commences at point I on the edge of Luppitt village and traverses several fields until it terminates at a field gate adjacent to an unnamed road at Point J just north of Meadow Croft. There are numerous obstructions along the route and there is no evidence of recent use.

Historical Mapping Evidence

29. There appears to be no dispute between the parties that the claimed route appears on a variety of OS maps dating from 1809 to 1937. It is also shown on the 1842 Luppitt Tithe Map. As to whether the Tithe Map was available when the DMS was prepared in the early 1950s, the evidence is unclear.

30. Nonetheless, I consider that the evidence strongly points to the physical existence of the path on the ground for over 100 years. However, this evidence cannot be considered to be new, as it was likely that it was available at the time when the DMS was being produced.
31. Moreover, despite its annotation on some maps as 'FP', I take this to relate to its physical characteristics rather than to its public status and note that since 1888 the OS maps have carried a disclaimer stating that the representation of a road, track or footpath is no evidence of the existence of a right of way. Overall therefore I find that the historical mapping evidence is of little assistance in determining the status of the Order route.

The Definitive Map Process

32. The route was shown on the survey map. The reasons for its inclusion are given as: "*mentioned in P.C. minutes*". The comments of the Rural District Council are recorded as: "*This footpath is shown on the map prepared under the Rights of Way Act 1932 as a public right of way. It is suggested that it should be retained as a public right of way. However, the claim schedule is further annotated with the words "omit"*".
33. It is not known why or who added these comments but the result was that it was not included at the Draft and Provisional map stages for recording on the DMS. As I understand it, there were no challenges to the Order route being omitted.
34. I have noted the Supporter's argument that no evidence has been found to show a lack of evidence or any other legal reason for the path's omission' from the DMS. Whilst that may be so, the supporter accepts that some of the evidence known at that time is unknown today. Overall, the absence of any objection to the omission of the route from the Definitive Map process is a consideration weighing squarely against the Order.

Luppitt Parish Council Minutes

35. The Parish Council minute books show a consistent record of public money being spent to repair/replace footbridges on the Order route up until prior to the preparation of the Definitive Map. As it is most unlikely that the Parish Council would have spent public money on a private route, I consider that during the early part of the twentieth century there was a widespread belief that the Order route was a public right of way. The objectors point out that following the removal of the Order route from the Definitive Map process no further public funds were spent on maintaining the route.
36. It is apparent given the reference to the 'P.C. minutes' that Parish Council's records would have been consulted at the time of the preparation of the Definitive Map. This inevitably leads me to the conclusion that the minutes are not new evidence and that their contents were properly taken into account in reaching the decision to omit the path from the Definitive Map process.

Landowners evidence

37. Landowner testimonies which date back to 1953, suggests that the public has not used the route during that time.

Conclusions on the evidence – Order Routes A and B

38. Section 53(3)(c)(i) requires that there be some discovered evidence, and the implication is that the new evidence may alter the way in which all the other available evidence is interpreted. Accordingly, it is not my role, particularly in the absence of any substantial evidence of procedural irregularity, to revisit the decisions that were made in the early 1950s as part of the Definitive Map process. The reason why the paths were omitted might not be readily apparent today, but I must assume the County Council carried out their duties with proper diligence and therefore the 'presumption of regularity' applies.
39. No evidence of claimed use of the Order routes has been presented either in the recent past or during the twenty year period prior to the survey under the 1949 Act being conducted. The landowners' evidence in both cases is that there has been no use of the Order routes in living memory.
40. The historical mapping evidence is ambiguous with regard to Order route A but supports the physical existence of a path along the line of Order route B during the first half of the 20th century and possibly before. However, it is not possible to state the status with any degree of certainty. In any event this and the Parish Council minutes in respect of Order route B would have been before the County Council when it made its decision to omit the route from the definitive map in the early 1950s.
41. Despite its limitations, the Finance Act evidence is new and indicates that Order route B and some sections of route A were reputed to be public right of ways during the first part of the 20th century. This therefore weighs in favour of the Orders. However in my view, the weight to be attached to this evidence is tempered by the fact that the routes would have been well known to local people, those carrying out the parish survey and where applicable, those involved in the decision to add/remove/omit the routes from the DMS.
42. In these circumstances, the Finance Act documents are not so persuasive that they fundamentally alter the way in which all the other available evidence, much of which would have been known in the early 1950s, is interpreted.

Overall Conclusion

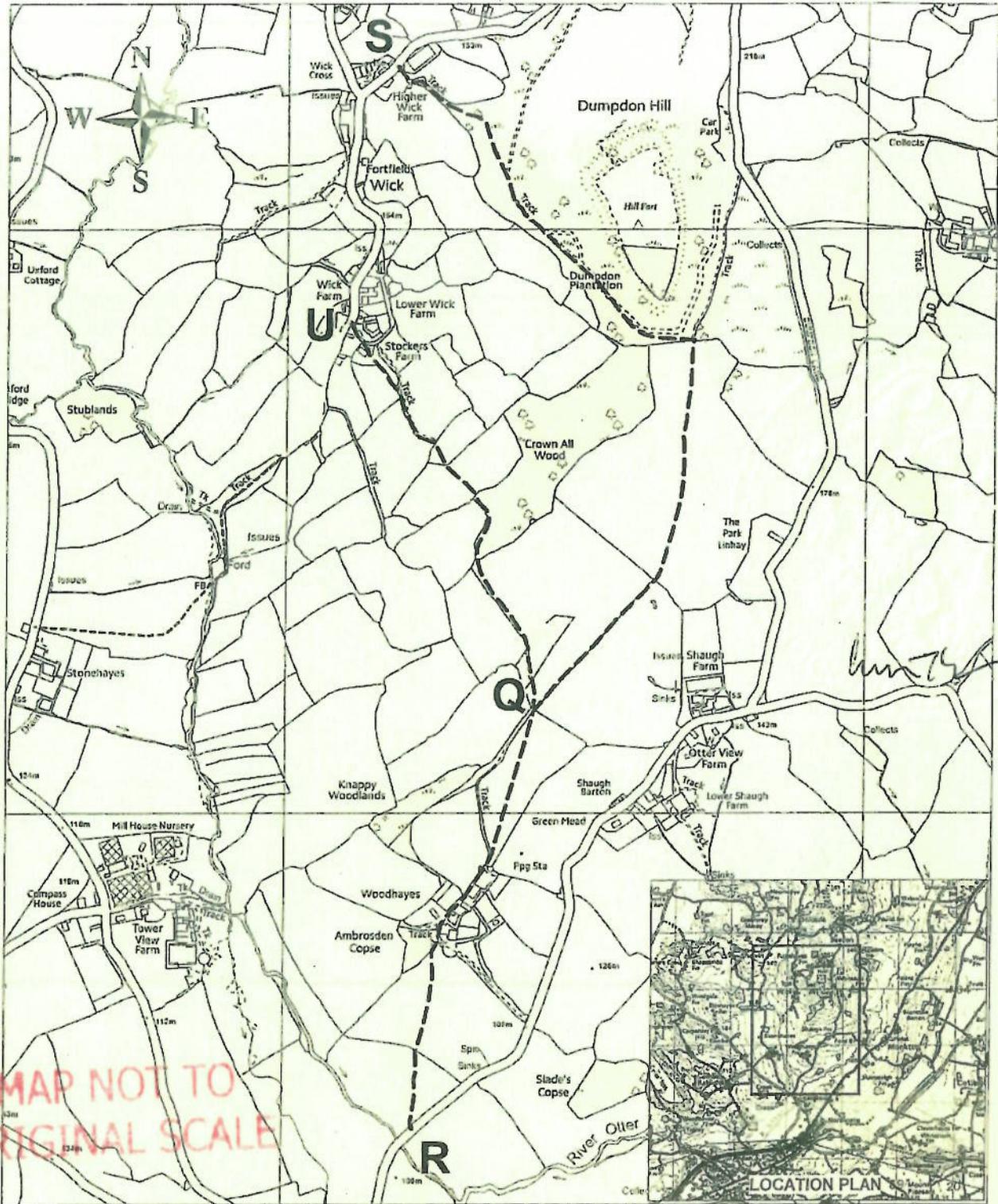
43. I do not consider that the 'new' evidence contained in the Finance Act 1910 is sufficient to displace the decisions reached by the County Council in the 1950s. No public footpaths were found to subsist at that time and no compelling evidence has been discovered to make it reasonable to allege that public footpaths subsist now. I therefore conclude that the Orders should not be confirmed.

Formal Decisions

44. Order A - I do not confirm the Order.
45. Order B – I do not confirm the Order.

D. M. Young

Inspector



MAP NOT TO ORIGINAL SCALE

map ref ST1602-04/1702-04/1802-04

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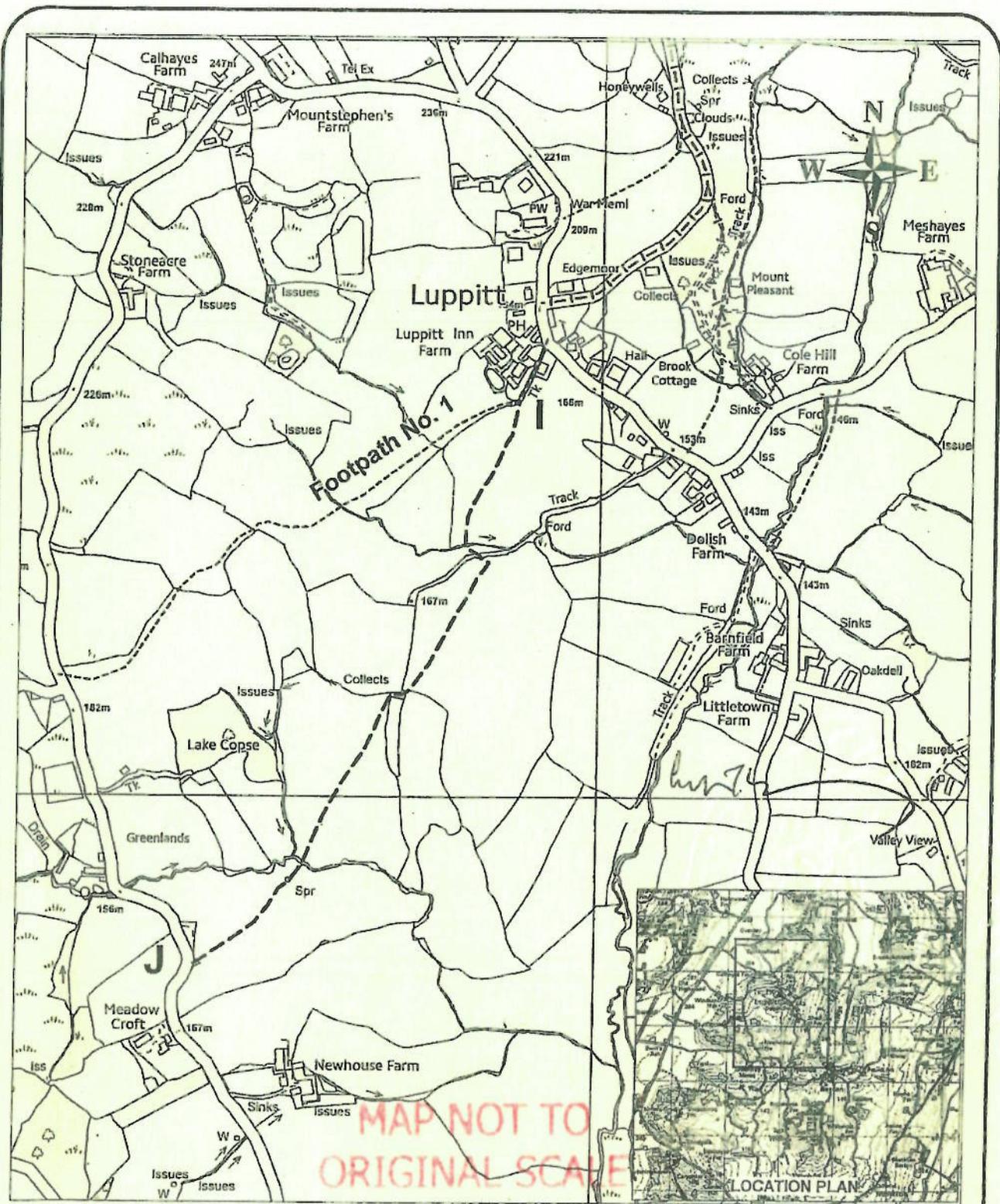
DEVON COUNTY COUNCIL
(Footpath Nos. 60 & 61, Luppitt)
Definitive Map Modification Order 2017

drawing number HIW/PROW/17/02
 date Jan 2017
 scale 1:10,000
 drawn by NSC

Notation Footpaths to be added
 (Luppitt No. 60 R-Q-S;
 Luppitt No. 61 U-Q)
 Existing footpath

David Whitton
 HEAD OF HIGHWAYS,
 INFRASTRUCTURE DEVELOPMENT AND WASTE





map ref ST1605- 06/1705-06

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DEVON COUNTY COUNCIL
(Footpath No. 62, Luppitt)
Definitive Map Modification Order 2017

drawing number	HIW/PROW/17/05
date	Jan 2017
scale	1:7,500
drawn by	NSC

<u>Notation</u>	Footpath to be added (Luppitt No. 62, I-J)	-----
	Existing footpaths	-----
	Existing bridleways

David Whitton
 HEAD OF HIGHWAYS,
 INFRASTRUCTURE DEVELOPMENT AND WASTE

