
Order Decision

Inquiry held on 8 & 9 December 2015, Hearing held on 6 December 2016

Site visit made on 9 December 2015

by Susan Doran BA Hons MIPROW

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

Decision date: 20 April 2017

Order Ref: FPS/J1155/7/108M1

- This Order is made under Section 53(2)(b) of the Wildlife and Countryside Act 1981 and is known as the Devon County Council (Footpath No.2, Culmstock (part) & Bridleway No.38, Culmstock and Restricted Byway No.1 Hemyock) Definitive Map Modification Order 2012.
- Devon County Council submitted the Order for confirmation to the Secretary of State for Environment, Food and Rural Affairs.
- The Order is dated 6 January 2012.
- The Order proposes to modify the Definitive Map and Statement for the area by adding a length of public footpath, bridleway and restricted byway, and upgrading a length of public footpath to bridleway as shown in the Order plan and described in the Order Schedule.
- In accordance with paragraph 8(2) of Schedule 15 to the Wildlife and Countryside Act 1981 notice has been given of my proposal to confirm the Order with modifications.
- There were 2 objections outstanding at the commencement of the hearing.

Summary of Decision: The Order is confirmed subject to the modifications that I previously proposed

Procedural Matters

1. The effect of the Order if confirmed with the modifications that I previously proposed¹ would be to record the Order route between points A and C on the Order plan as a public footpath (rather than as a public bridleway), and between C and D as a restricted byway.
2. Two objections were made to the status of the route as proposed: the British Horse Society (BHS) supports the status of restricted byway for C-D and considers this is the correct status also for A-B-C; Mr Garrett supports the status of public footpath for A-B, but objects to any public status for B-C-D, although at the Hearing, Mr Firth (on behalf of Mr Garrett) indicated that he was prepared to accept a public footpath. A further objection from Mr Field was returned and not resubmitted.
3. I held a Hearing into the unmodified and modified parts of the Order when new material including case law and historical documentary evidence was adduced. At the end of the Hearing I agreed to accept new evidence from Mr Gray and from Devon County Council (the Council) by way of clarification. Accordingly, I adjourned pending receipt and circulation of these items for comment before closing the Hearing in writing. In the event, Mr Gray was unable to adduce the evidence he had referred to. I have taken all the oral and written evidence

¹ In my interim decision dated 11 January 2016

available to me into account in reaching my decision. This decision should be read together with my interim decision.

4. The Council maintained its neutral stance to the Order and the proposed modifications. However, its officers assisted where necessary at the Hearing.

The Main Issues

5. The main issues are whether there is any new evidence or argument which might cause me to reconsider my findings in respect of the unmodified part of the Order; and whether there is any evidence or argument which has a bearing on the modifications I proposed, and which might indicate that those modifications should be amended or not pursued.
6. Also relevant to my decision is the effect of the Natural Environment and Rural Communities Act 2006 (the 2006 Act) should I conclude that public vehicular rights exist. The 2006 Act extinguished public rights for mechanically propelled vehicles (MPVs), unless preserved by one or more of the exceptions set out in Section 67 of the Act.

Reasons

Documentary evidence

1829 Stopping up Order

7. I considered this document at paragraphs 8 and 9 of my interim decision. It concerns the Order route in Culmstock parish determining it was “unnecessary” and should be stopped up, *“reserving nevertheless to all persons a free passage for Persons, Horses, Cattle and Carriages over the land and soil of the said Public Highway to and from any Lands, Houses or Places respectively belonging to them according to the ancient useage in that respect”*.
8. However, the BHS argued that the enabling provisions contained in section XVII and Form XVIII of the Highways Act 1773, engaged by section II of the Highways Act 1815, were far narrower than the wording of the 1829 Justices’ Order. Accordingly, to make a valid order the Justices had to make any reservations to a named person or persons, and had to name any lands, houses or places to which a right of way was being reserved. No other form of wording was available to them. In this case, the reservation was made to “all persons” and to “any” land, house or place. Consequently, the whole Order² was void and full public highway rights remained.
9. Alternatively, the BHS said that the wording of the Order should be given its ordinary meaning in that it operated to save an existing public right of way: “all persons” held in case law to mean the public³. In this regard the public right was being retained whilst the maintenance burden on the parish was being reduced – an issue I considered in my interim decision.
10. I am not convinced by either argument. The Justices had determined the Order route (points A-C) was no longer needed: it was “unnecessary”. There is nothing in the wording to suggest to me that only a public maintenance liability was being stopped up. My reading is that the rights reserved were for those people with lands, houses or places customarily accessed from the route

² The Stopping Up order concerned a further three lanes in addition to the Order route

³ Poole and Huskinson [1843] and R v the Inhabitants of Southampton [1887]

between those points that were to be stopped up. Here, between Pitt Farm and the parish boundary. Other documentary sources show that there were properties or dwellings situated to the north and south of Pitt Lane believed to exist into the 1840s (paragraph 14 of my interim decision), as well as other land and properties such as Clements Farm in Hemyock that are likely to have been accessed from the route. Further, Mr Field argued that rights of access would need to be retained for people to reach land that was subject to tithes. Mr Gray believed the land was held by Exeter Cathedral at this time and there would have been many individuals to name. Neither viewpoint was challenged.

11. Given the circumstances, it is unlikely that the Justices would have been in a position to name all those who benefited from "ancient useage", or to specify the individual lands, houses or places. Consequently, I consider they described the rights being retained as best they were able in accordance with the wording of the relevant Act. I consider that "all persons" is qualified by reference to land, houses or places in their ownership that they habitually accessed from the route that was the subject of the Justices' Order, rather than meaning everybody or all of the King's subjects. I further note there was no objection or appeal to the Justices' Order at the time, its effect not challenged until now.
12. I do not share Mr Garrett's view that the Justices' Order served also to stop up the Order route's continuation in Hemyock: there is nothing to indicate the Justices' jurisdiction extended there. I note Mr Garrett's comments that Blackwater Road to the south of the Order route provided a more convenient and easier alternative route for the public to use.
13. Having regard to the above, I am not persuaded to alter the conclusion reached in my interim decision as regards this document.

Weighing the documentary evidence

14. The BHS considered the synergy between various items of documentary evidence post 1829 showed strong and sufficient evidence of reputation that, by the early 20th Century and beyond, the Order route was regarded as a full public highway. For example, Bartholomew's 1902 map, which shows it as a 'good' secondary road, Bacon's 1905 map, where it is depicted as a 'Best Cycling Road', and the 1910 Finance Act records, when considered together tended towards the existence of public rights. Also, the 1944 accommodation roads exercise carried out by the Council, and the Order route's reputation as a 'public accommodation road', was consistent with its legal character following the 1829 Stopping Up Order.
15. I considered the 1902 and 1905 maps at paragraph 15 of my interim decision, the 1910 Finance Act evidence at paragraphs 21-24 and the 1944 exercise at paragraphs 25-28.
16. I do not disagree that the 'touring' maps were aimed at the public on pedal cycles and, or, with motor vehicles, and can provide some evidence of reputation. Further, it is evident that the public engaged with the map making process. There are examples of Bartholomew's maps (as cited by the BHS from the 1950s) aimed at map using motorists, including the sheet covering the Order route, that thank the public for their assistance towards producing accurate maps. Also, there are examples of maps for other parts of the country annotated with handwritten notes indicating that members of the Cyclist Touring Club provided information about routes to the map-makers; as

well as examples of letters from Club members detailing such information. Indeed, Bartholomew's maps were frequently revised and so were more up to date than Ordnance Survey (OS) maps. However, notwithstanding such involvement by the public, Bartholomew do not appear to have examined the legal status of the routes on their cycling maps before colouring them as suitable for use by cyclists; nor do they appear to have assessed the legal status of the roads on the motorists' maps before publication. Accordingly, I do not consider the maps can be regarded as positively identifying public carriageways for use by cyclists and motor vehicles.

17. As regards the Finance Act records, I concluded⁴ they did not demonstrate the Order route was a public road throughout, available to all classes of user. No further explanation of the manner in which it is depicted in these records has since been adduced to alter that conclusion. Further, if excluded from hereditaments as the BHS maintains, this would not be inconsistent with a route that accessed several different landholdings in different ownerships, as indicated by the effect of the 1829 Stopping Up Order.
18. It is arguable the Order route was considered to be a vehicular way further to the accommodation roads exercise. However, the Council confusingly described it as both a public and a private accommodation road, and there is no clear evidence that it was determined to be either. I note the 1957 Bartholomew's map shows it as a 'Serviceable Road' (not a 'Recommended Through Road', 'Other Good Road' or 'Other Roads & Tracks') only 13 years after the 1944 exercise. This coincided with the DMS process, Culmstock Parish Council having claimed their part of the Order route as a 'CRF' or public carriage or cart road or green unmetalled lane used mainly as a footpath⁵.
19. A 1977 Parish Map of Culmstock held by the Council and created for the General Review of the Definitive Map shows public rights of way. A key from another map indicates that footpaths are coloured purple, bridle paths in green, Roads Used as Public Paths by a broken green line and county roads with a brown line. The Order route is coloured brown. The BHS suggested this is likely to reflect a public accommodation road rather than a private one. Further, as Footpath 2 terminates on it, it is more likely to have been considered by the Council to be a publicly maintained rather than a private road. A comparison with modern mapping, they said, shows that nearly all the routes coloured brown are county roads. The purpose of the Review was to add routes that were not shown on the Definitive Map: the Order route was not added, suggesting it was regarded as a road in 1977.
20. Mr Field's father had been a Parish Footpaths officer for Culmstock Parish in the 1970s. A parish map provided to him (I understand) by the Council (and produced at the Hearing) included a key. On it footpaths are marked in purple and bridleways in green. There is no colouring against the categories 'byway' and 'county road', but a handwritten category, 'Withdrawn Paths' is represented in orange. The Order route is marked in orange with the number '17' against it. This is consistent with it having been withdrawn subsequent to its appearance on the Draft Definitive Map⁶, thus explaining the anomaly of Footpath 2 appearing without a continuation to join Pitt Lane to the west.

⁴ At paragraph 24 of my interim decision

⁵ Paragraph 29 of my interim decision

⁶ Paragraph 32 of my interim decision

21. It remains unclear, therefore, what status the Order route was considered by the Council to have in Culmstock parish both during and after the DMS process. The Council's 1977 Review indicated that public accommodation roads were a very unusual category of road, and one which did not appear on the original Map. The withdrawal of claimed path 17 could be explained by it being considered to be a county road, a public accommodation road or a private road.
22. Whilst there is a cluster of evidence in the early 20th century, as well as later sources of evidence that are contemporary, much of it evidence of reputation, I do not share the view that when considered together and as a whole it tips the balance in favour of a conclusion of the existence of higher rights. In my view the evidence pulls in different directions and remains inconsistent as regards the status of the Order route subsequent to the 1829 Order.

The 1946 aerial photograph

23. Mr Garrett expressed his concerns about the photograph which I considered at paragraph 38 of my interim decision. For clarity, the Council provided a copy of the original photograph without the digital Definitive Map information overlaid on it. Having re-examined it I do not draw any further conclusions.

Other evidence

24. Some additional OS maps were produced by the BHS dating to the early part of the 20th Century. However, given that they carry the OS disclaimer⁷, they do not take the issue of status any further.

Conclusions on the documentary evidence

25. Having had the opportunity to revisit and review the evidence in the light of the new evidence and argument I remain of the view that the existence of higher rights than those on foot has not been demonstrated over the Order route A-B-C. As regards the section C-D, nothing considered above leads me to conclude that my previous findings (of restricted byway status) should be amended.

The User evidence

26. I addressed the user evidence at paragraphs 46 to 64 of my interim decision, determining that the 20 year period for the purposes of Section 31 of the Highways Act 1980 was 1948 to 1968. The beginning of the 20 year period was thus 4 years after the Council had been conducting its investigations into 'accommodation roads', a point I noted at paragraph 55 of my interim decision.
27. The synergy of these two events – the reputation of Order route in the Council's investigations and the use being made of it then or soon after – was a matter the BHS considered required further consideration.
28. As previously explained⁸, in 1944 the Council began establishing which accommodation roads in Devon should be taken over and maintained at public expense, and which were no longer needed for public use. Culmstock Parish Council's response has not been found, but Hemyock Parish Council's list proposed the "Road from Clements to Pitt Farm, Culmstock" be made into a

⁷ Paragraph 16 of my interim decision

⁸ At paragraphs 25-28 of my interim decision

highway. There is no documented outcome regarding whether or not Pitt Lane was 'adopted' as a result of this exercise⁹.

29. When the Definitive Map and Statement was being compiled in the 1950s (which also falls within the 20 year period), the Council appears to have considered there was vehicular use of the Order route. However, as stated above, it was described both as a 'public accommodation road' and as a 'private accommodation road' (the former being a route that should not be included in the records). Therefore, it is unclear whether any vehicular rights that were considered to exist were public or private.
30. Claimed use extended back to 1925 and was described as on foot, horseback, bicycle, pony and trap and tractor, with use by horses reported, vehicles seen and that the Order route was well used by locals. Some of this use had been witnessed. Accordingly, there is evidence of use contemporary with both the 1944 exercise and with the later production of the Definitive Map, as well as with some of the commercial maps considered above. With few exceptions, however, claimed use could not be tested or had not been clarified in the evidence forms to establish its frequency, nor more importantly, whether it was in a public or private capacity. Furthermore, the evidence that was tested (at the previous Inquiry) revealed one witness had ridden the Order route only around a dozen times in the 1960s, and another witness described use not of this but of an entirely different route. Of the untested evidence, most was on foot and of those claiming use on horseback one had subsequently stated (in writing) he could not remember if he had in fact used the Order route. Other use described with horses was infrequent or (as stated above) had not been clarified as use in either a public or private capacity. As regards reported use with vehicles, none indicated the frequency with which the different modes were used, and all such claimed use was very limited in extent.
31. Mr Garrett reiterated his concerns regarding the reliability of the user evidence as a whole, as expressed at the previous Inquiry.

Conclusions on the user evidence

32. Having now had the opportunity to revisit the user evidence and to consider it further in particular in light of the Council's investigations that were taking place around the same time (1944 onwards), and with other documentary evidence in mind, including the cyclists and motorists maps, it is my view that whilst there is some suggestion that higher rights may exist over the Order route, the evidence remains contradictory and, or, unsubstantiated, and falls short of my concluding that public bridle or vehicular rights subsist.

Other matters

33. Mr Garrett queried the extent of the publicly maintainable highway at point A, and whether it should in fact extend further to the east, between A and B.
34. Documents provided by the Council, comprising a land charges map of highways maintained at public expense, an extract from their digitised working public rights of way mapping overlain with the land charges map information, Handover map 1929-1948 with accompanying book of mileage and road numbers, and Definitive Map Statements for Footpaths 1 and 2 Culmstock, are

⁹ Notwithstanding that there is no evidence the status of the Order route in Hemyock as a full public highway had changed since 1829

all consistent. They all show and, or, refer to the extent of the public highway at Pitt Farm terminating at point A. This point coincides with the position of a boundary stone. It is up to this stone that Mr Garrett confirmed the Council had maintained the public highway during the time he had been there.

35. However, I do not share Mr Garrett's view that there is a "no-man's land" between the boundary stone (or point A) and the court gates of Pitt Farm. The 1829 Order stopped up "...a certain highway in the parish of Culmstock...at and from the North Western Corner of the Barn by the Court Gate of Pit Farm...", rather than from the court gate itself as Mr Garrett suggests. My reading of the Stopping Up Order is that it refers to a location to the north-west of the court gate, and thus, on balance, consistent with the boundary stone and point A on the Order plan. Therefore, I do not consider that any further modification of the Order is necessary.

Overall Conclusions

36. Having regard to these and all other matters raised both at the Hearing and in written representations, I conclude that the Order should be confirmed subject to the modifications I previously proposed in paragraph 71 of my interim decision dated 11 January 2016.

Formal Decision

37. The Order is confirmed subject to the modifications previously proposed and advertised, as follows:

- References to Bridleway in the Order and on the Order plan be replaced with the word "Footpath"
- In the preamble to the Order, delete "(ii)" in line 5, and delete "that 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" in lines 9 to 11

In Part I of the Schedule to the Order

- under the modified heading "Footpath No.38, Culmstock" delete "with cross bars in the intervals" in the last sentence of the description
- under the heading Restricted Byway No. 1, Hemyock, replace the word 'Bridleway' with "Byway" in the first sentence
- delete the heading "Description of Path to be Upgraded" and the paragraphs beneath

In Part II of the Schedule to the Order

- under the heading "Footpath No.2, Culmstock", after the word "From" delete "Bridleway No.38" and insert "The county road at Pitt Farm,"; and, in line one of the description after the words "It starts at" delete "Bridleway No.38, Culmstock" and replace with "the county road at Pitt Farm and proceeds south eastwards to where the path continues north through a gate into a field"; and, in line five, after the word "approximately" insert "120 metres long and 2.5 – 4 metres wide as defined by the farm track, then"

- under the modified heading "Footpath No.38, Culmstock", after the word "From" delete "minor county road" and insert "GR (ST 1104,1437); and, in line one of the description after the words "It starts at" delete "the minor county road" and insert "Footpath No.2, Culmstock at GR (ST 1104,1437)"; and, in line five, delete "335" and replace with "215"
- On the plan attached to the Order (drawing Number HTM/PROW/11/76) amend the notation for modified Footpath No.38 to a broken line

S Doran

Inspector

APPEARANCES

Statutory parties:

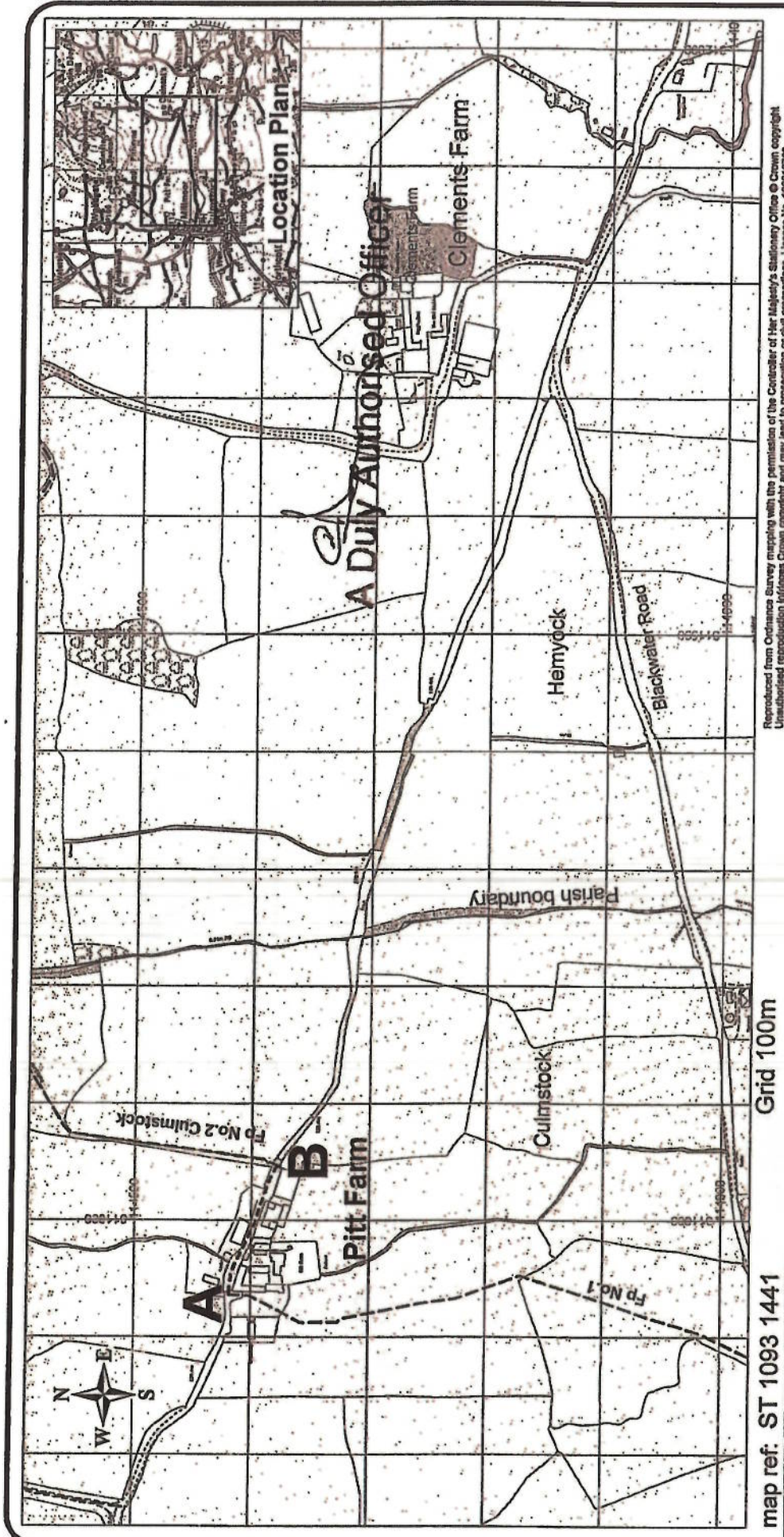
Mr A Kind	<i>representing</i> the British Horse Society
Mrs J Parsons	Mid-Devon Access and Bridleways Officer for the British Horse Society
Mr R Garrett	Landowner <i>assisted by</i>
Mr I Firth	Bondstones Planning & Design

Others who spoke:

Mrs E Spurway	Definitive Map Review, Devon County Council
Mr J Field	
Mr W Gray	

DOCUMENTS

1. Consolidated 'Inquiry Speaking Note' to the Objection and Statement of Case by the British Horse Society, submitted by Mr Kind on behalf of the British Horse Society
2. Extracts from 'A Collection of the Reports of Cases, The Statutes and Ecclesiastical Laws relating to Tithes' by F K Eagle and E Younge, Vol. IV, 1826, and 'A Treatise on the Law of Tithes' by William Eagle, Vol. I, 1830, submitted by Mr Field
3. 'Inquiry Speaking Note' to the Objection and Statement of Case by the British Horse Society – Jenny Parsons, submitted by Mr Kind on behalf of the British Horse Society
4. Improved quality copy of 1977 Culmstock Parish Map, submitted by Mr Kind on behalf of the British Horse Society
5. Extract from 1910 Ordnance Survey map, submitted by Mrs Parsons on behalf of the British Horse Society
6. Extracts from a c.1977 map of the Parish of Culmstock, submitted by Mr Field
7. Closing remarks on behalf of the British Horse Society



map ref: ST 1093 1441

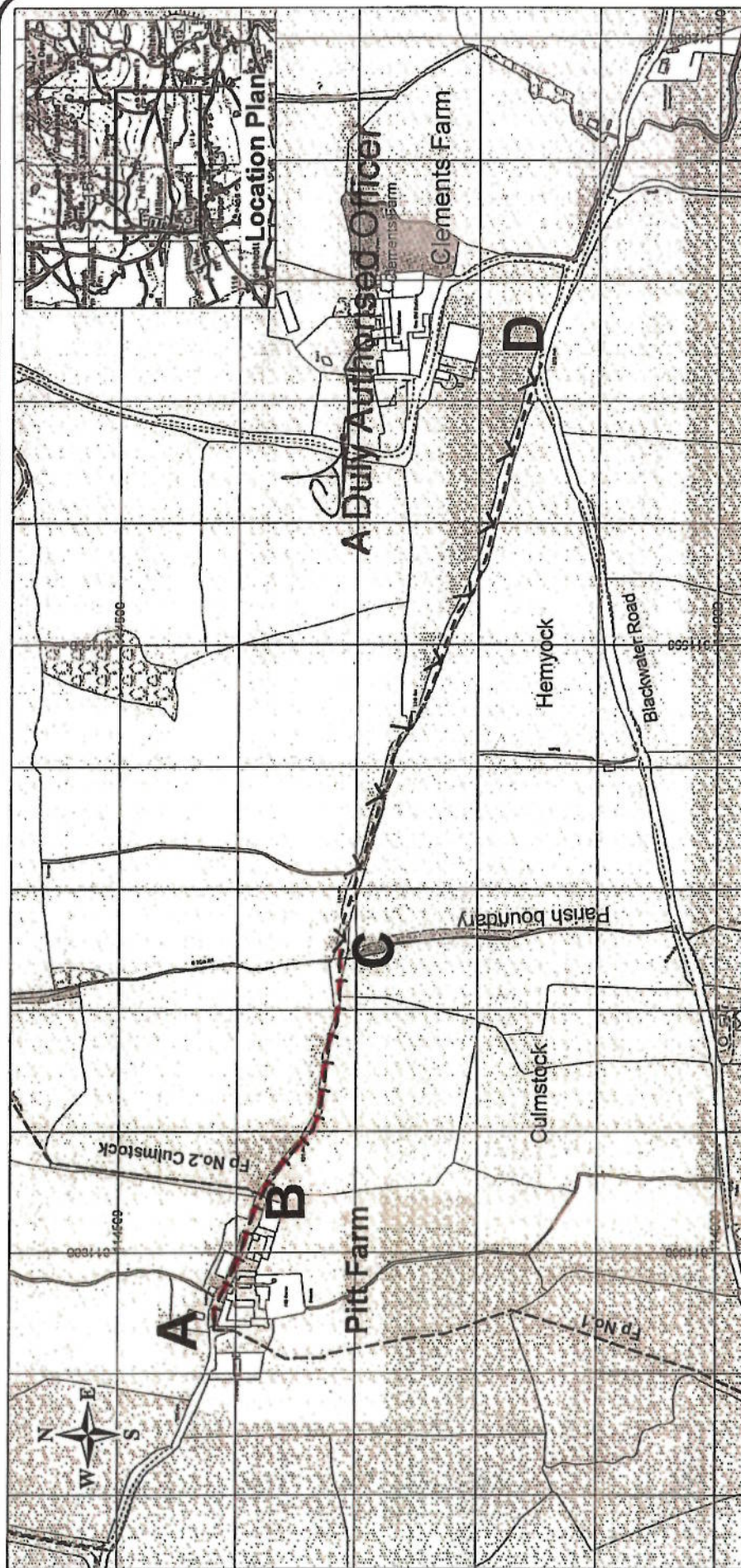
Grid 100m

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DEVON COUNTY COUNCIL
(Footpath No. 2, Culmstock(part), Bridleway No. 38, Culmstock
and Restricted Byway No. 1, Hem-yock)
Definitive Map Modification Order 2012

drawing number HTM/PROW/11/80
 date June 2011
 scale 1:5000 at A4
 drawn by ES

Notation
 Footpath No.2, Culmstock A - B (addition) approx 120 metres map correction
 Existing footpaths -----



DEVON COUNTY COUNCIL
(Footpath No. 2, Culmstock(part), Bridleway No. 38, Culmstock
and Restricted Byway No. 1, Hemyock)
Definitive Map Modification Order 2012

drawing number HTM/PROW/1176

date June 2011

scale 1:5000 at A4

drawn by ES

Notation

Bridleway No.38, Culmsrock: A - B (approx 120 m) B - C (approx 215 m)

Restricted Byway No.1, Hemyock: C - D (approx 525 m)



Devon
County Council

Lester Willmington
Head of Highways & Traffic Management