

## Order Decision

Inquiry held on 5 April 2016

Site visit made on 5 April 2016

**by Martin Elliott BSc FIPROW**

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

**Decision date: 28 April 2016**

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### **Order Ref: FPS/J1155/7/110**

- 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 (Footpath No. 173, Sidmouth) Definitive Map Modification Order 2014.
- The Order is dated 3 November 2014 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 was one objection outstanding at the commencement of the inquiry.

**Summary of Decision: The Order is confirmed subject to modifications.**

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### **Procedural Matters**

1. I held a public local inquiry at Sidmouth Methodist Church Hall on 5 April 2016. I carried out an unaccompanied site inspection of the Order route and the surrounding area on the afternoon of 4 April. I carried out a further accompanied site inspection following the close of the inquiry in order to confirm the widths specified in the Order. The widths did not accord with those specified in the Order and I consider the issue of width further at paragraphs 38 and 39 below.
  2. At the commencement of the inquiry the objector was not present. I asked the Council to make contact with the solicitor acting on behalf of the objector to ascertain their intentions. The Council advised that the objector understood that the Order was to be determined by way of written representations but had no objection to the inquiry proceeding in their absence. I was asked to take into account the statement of case produced by the objector.
  3. Although correspondence on file suggests that the objector was content for the Order to be determined by way of written representations, given the reliance on evidence of user, it was considered appropriate to hold a public inquiry to test the evidence. The objector was informed by the Planning Inspectorate, by letter dated 2 October 2015, that an inquiry would be held on 5 April 2016. A Notice of Order accompanied the correspondence setting out the date of the inquiry and a timetable for submitting documents. On 11 January 2016 the objector submitted a statement of case which, given that the deadline for the submission of statements of case was 12 January 2016, would appear to have been in response to the Notice of Order. The objector was subsequently provided with a proof of evidence from the Council which identified that it was in connection with the public inquiry. In my view the objector would have been
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aware that a public inquiry was scheduled and that the Order was not being determined by way of written representations.

4. Bearing in mind the above I considered it appropriate to continue with the public inquiry as scheduled. In reaching my decision I have had regard to the submissions of the objector and I also raised with the witnesses issues pertinent to the objection.
5. At the inquiry the Council submitted two additional evidence of use forms which had been produced in response to the notice of the public inquiry. Whilst the evidence was submitted outside the timescale set out in the notice of the Order the forms are relevant to my determination and I have had regard to these additional evidence of use forms in reaching my decision.

### **The Main Issues**

6. The Order has been made under section 53(2)(b) of the Wildlife and Countryside Act 1981 in consequence of an event specified in section 53(3)(c)(i) of the 1981 Act. The main issue is whether the discovery by the authority of evidence, when considered with all other relevant evidence, is sufficient to show that a right of way which is not shown in the map and statement subsists over land in the area to which the map relates.
7. The test to be applied to the evidence is on the balance of probabilities.
8. The Council relies on an inference of dedication at common law in consequence of the use of the way. Dedication at common law requires consideration of three issues: whether any current or previous owners of the land in question had the capacity to dedicate a highway, whether there was express or implied dedication by the landowners and whether there is acceptance of the highway by the public. There is no evidence of any express dedication. Evidence of the use of a path by the public as of right may support an inference of dedication and may also show acceptance by the public.

### **Reasons**

#### ***Background issues***

9. As noted at paragraph 8 the Council rely on an inference of dedication at common law. The Council had not considered a statutory dedication under section 31 of the Highways Act 1980 (the 1980 Act) as the view was taken that the right to use the way had not been brought into question such as to enable the application of the statutory provisions under the 1980 Act.
10. If the right of the public to use a particular route is to be effectively brought into question there must be some act that is sufficient to bring to the attention of at least some of those people using the way that the right to do so is being challenged so that they may be apprised of the challenge and have a reasonable opportunity of meeting it.
11. Having regard to the evidence before me I concur with the view of the Council that the right to use the way has not been brought into question such as to engage section 31 of the Highways Act 1980. In view of this it is appropriate to consider the inference of dedication at common law.
12. The Council has considered historical map evidence and aerial photographs and do not rely on this evidence to support the existence of public rights. In my

view the documentary evidence and aerial photographs show the physical existence of the route but do not provide any evidence as to status.

13. The objector makes the point that the Order route was not recorded in the 1956 survey which supports a conclusion that the Order route is no more than a private way. Whilst the route was not included in the survey or recorded on the subsequent definitive map this does not preclude the existence of public rights existing at the time of the survey or being shown to exist at a later date.

### ***Dedication at common law***

#### *Evidence of use*

14. The twenty two evidence of use forms submitted by the Council indicate the use of the way on foot on a regular, often daily basis, with two using the way in a vehicle and one wheeling a bicycle. The earliest recorded use is from 1938 although the majority of use is from 1970 to 2012 when the forms were gathered. None of the forms identify that use of the way was interrupted or challenged although many refer to barriers at the end of Newtown to prevent vehicular access and a gate at the Salcombe Road end of the path which was on occasions said to be closed or locked. However, neither the barrier nor the gate prevented pedestrian use. Question 3 on the forms asks why the way is considered to be public with varying responses for example 'people have always used it', 'Because everyone uses it – no question', 'always in use' and 'Because the public use it constantly'.
15. The objector questions the weight to be accorded to the evidence of use form of Mr Counter. I accept that the responses to two of the questions are unclear. Nevertheless the form does indicate use of the way from 1938 to 2012 for a variety of purposes including pleasure. The evidence contained in the form is consistent with the information contained in the other evidence of use forms. As such some weight should be attached thereto.
16. It is also suggested that the weight to be accorded to the evidence of use forms which make no mention of the notice at the Salcombe Road end of the path should be reduced accordingly. It is accepted that whilst the evidence is clear as to the existence of notices some of those claiming use of the way do not make reference to the same. However, there is nothing to indicate that the information in the remainder of these forms is incorrect or unreliable. It is entirely consistent with the other evidence of use forms and the live evidence to the inquiry. It is noted that the landowner evidence form of Mr J King states that there were no notices applying to foot users but that signs were present relating to vehicular access. It is possible that the evidence of use forms make no reference to a notice because it was not considered relevant to the use of the way on foot.
17. The objector also asserts that those who indicate use for business or work were likely to have been doing so as invitees of the relevant business or workplace. Mr Counter used the route for pleasure business and work. However his form indicates that he was not employed by the owner or tenant of the land. Mrs Gibson-West used the route for pleasure and business but her evidence to the inquiry is that she did not use the route in consequence of private rights. Mr Pidgeon, Mrs Watson and Mr Watson used the route for business and pleasure, none worked for the owner or tenant of the land. Having regard to the above, there is nothing to indicate that those using the way for business or work

purposes did so as invitees of the landowner or tenant in connection with employment by the landowner or tenant. Their use of the way was therefore as of right.

18. A number of individuals gave evidence to the inquiry as to their use and knowledge of the way.

- i) Mr Coombes referred to his use of the route from 1949 to 1952 when he used the route as a child. After 1952 he did not use the way much until 1970 when he came back to Sidmouth with his wife. After 1970 he used the route between 10 and 24 times a year. He saw others walking the route.
- ii) Mrs Gibson-West first used the route in 1972 when she came to Sidmouth for holidays. When her mother moved to Russell Street, Sidmouth in 1986 she would use the route when visiting. She moved to Russell Street in 1992 and used the route alone or with her children. Her daughter used the route twice a day to and from school. She came across others using the route and she was never deterred from using the route.
- iii) Mr Pidgeon first used the route in 1987 when on holiday. He moved to Newtown in 2007 and used the route on a daily basis, now around twice a day. He indicated that he saw others using the route including shoppers and dog walkers.
- iv) Mrs Spiers has lived in Sidmouth for 34 years although has only lived at 6 Barrington Mead for the last 6 years. She has used the route since moving to Sidmouth.
- v) Ms Stephens used the route from 2004 around 365 times a year although since 2012 she has used the route around 600 times a year.
- vi) Mr Dyson used the route from 1996 when he initially had a holiday property. Between 1996 and 2004 he used the route twice a day but less after that. He was of the view that the route had been clearly recognised as public and had undoubtedly been used by the public for many years.

19. In my view the evidence of use forms and the evidence to the inquiry demonstrates regular use by the public since 1938 as of right and without interruption or challenge.

#### *Private rights of access*

20. The properties on Barrington Mead enjoy a private right of access along the Order route. In considering the Order the Council have excluded the evidence of use of the adjoining property owners. In my view, given that these properties enjoy a private right of access, which will include a right of way on foot, the use would not be as of right. Consequently the evidence of use of Mrs E King of 10 Barrington Mead and Mrs S King of 9 Barrington Mead should not be counted in any assessment. In respect of Mr J King his landowner evidence form indicates that he did not move into 9 Barrington Mead until 2007 although using the way since 1997. As such his use before 2007 would have been as of right. I have no information as to whether Mrs S King moved into 9 Barrington Mead in 2007 and I am therefore unable to draw the same conclusion in respect of her use.

21. Notwithstanding the above, the evidence of use form of Mrs E King indicates that she considers the way to be public because it is 'always in use'. Mr J King has never known the route not to be a public right of way and states that the route is a commonly used right of way. Mrs S King considers the route to be public 'because the public use it constantly'. She also comments that the landowner would be aware that the public were using the route because 'they see people using it every day'. However, Mrs S King does indicate that she obtained permission to use the route from Parsons<sup>1</sup>. No further information is provided in this respect but in any event her evidence of use has not been taken into account. Ms I Seutemann, although using the route for other purposes, also used the route to visit a friend in Barrington Mead. Although the property she was visiting is not identified it may also be the case that some of her use when visiting her friend was not as of right.
22. Mrs Spiers lives at 6 Barrington Mead, although at the inquiry she stated that she has only lived at the property for the last 6 years. In 2012 when she completed the evidence of use form she had used the way for 17 years although at the inquiry she said that she had used the Order route ever since moving to Sidmouth some 34 years ago. She therefore used the route before moving to Barrington Mead and such use would have been as of right.
23. The objector raises two issues. Firstly that when witnesses report use of the route by other people it is likely that some of those people would have benefitted from a private right and use would therefore be over-reported. Secondly given the existence of private rights it is argued that a significant level of use would be necessary in order for the owner to become aware that the public were using the route.
24. As regards over reporting, it is quite possible that some of those seen using the Order route enjoyed a private right of access. However, it is of note that the occupiers of the properties on Barrington Mead who have completed evidence of use forms observed use by the public. Mrs Spiers said that there were about 30 to 50 people using the route on foot each day. Whilst the evidence of use forms, including those handed in at the inquiry, only identify 18 members of the public, using the way it is clear that the route was used by other members of the public; that use was observed by adjacent occupiers. In my view the evidence of use indicates levels above what might be expected from the 10 properties on Barrington Mead enjoying private rights of access. I have no evidence from Parsons as to their knowledge of use and the objector accepts that their own knowledge is limited. However, having regard to my analysis of the evidence of user and being mindful as to the existence of private rights I consider that the evidence of use is sufficient for the landowner to have been aware that the public were exercising a right to the enjoyment of the way.

### *Gate*

25. The objector contends that a gate was erected at the Salcombe Road end of the Order route in 1998. A number of evidence of use forms refer to the existence of the gate, some never found the gate to be closed or locked, others refer to the gate being locked or rarely locked. The forms indicate that whilst the gate may have been closed or locked it did not prevent pedestrian access. Evidence to the inquiry is that access was not prevented when the gate was locked as it was possible to use the adjacent gap. Mr Coombes thought the

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<sup>1</sup> Parsons Bros. Builders Ltd. the landowner.

gate was erected in the late 1990s but cannot remember the gate being locked. Mrs Gibson-West also thought that the gate was erected in the late 1990s but she did not recall the gate being shut. Mr Pidgeon advised that the gate was erected in the 1990s. He said that the gate was open during the day but that after 5:00 pm and at weekends it would be locked. The gate did not prevent pedestrian use. Ms Stephens, using the route daily between 2007 and 2008 just noticed that the gate was locked. She made the point that if the intention was to stop pedestrians then the gap at the side would have been locked. Mrs Spiers remembered the gate was locked in the evenings and at weekends.

26. Although the gate was locked on occasions, and keys issued to those who had a private right to use the way, a gap was present adjacent to the gate which pedestrians could use. None of those who found the gate locked considered that the actions were to prevent use by pedestrians and the public continued to use the gap when the gate was locked. It was understood that the locking of the gate was for the security of Parsons who had a yard at the end of the track. There is nothing to indicate that those using the route on foot understood that the erection and locking of the gate in the evenings and weekends, particularly given the adjacent gap, was to disabuse the public of the notion that the way was a public footpath. Had this been the intention of the landowner then it is likely that challenges would have been made to the public. I do however accept that, given the existence of private rights, the only practical way would have been by the erection of notices; I consider the effect of the notice below.

#### *Notice*

27. It is understood that around the time the gate was erected on the Salcombe Road end of the Order route a notice was also erected. The notice stated 'Private Drive No Parking Access for authorised users only'. It is asserted by the objector that the sign is inconsistent with the dedication of the way as a highway.
28. I note the suggestion of the objector that those who have completed evidence of use forms form a very specific and narrow sample of people and in my view it must be accepted that the forms only provide information from those who were prepared to complete them. I also note the point that persons who understood the notice to demonstrate a lack of intention to dedicate the way would not have used the track and be unlikely to complete an evidence of use form. However, I have no evidence before me that the notices deterred the use of the way, the evidence is that use continued, after the erection of the notice. A number of those who have completed evidence of use forms commenced their use of the way after the notice had been erected which would suggest that the notice had no effect on pedestrian use.
29. At the inquiry Dr Atkinson, who did not complete an evidence of use form, did not think that the notices referred to pedestrians who had, in his view, used the route for a long time. Mr Coombes considered that the notices only referred to vehicles and made the point that there were no notices at the Newtown end of the path. In any case he thought that the notices had been erected too late to have any effect on any public right of way. Mrs Gibson-West did not consider that the notices applied to pedestrians but thought they were there for to improve the security of Parsons' yard. Ms Stephens said that Parsons made no effort to prevent pedestrian use and also pointed out that

there was nothing to indicate that the route was private at the Newtown end of the path.

30. The Council refer to *Burrows v SoS [2004] EWHC 132 (Admin)* and *Paterson v SoS (and others) [2010] EWHC 394 (Admin)* in relation to the effect of the notice and a number of Inspector's decisions which address issues relating to the wording of notices. In my view the effect of the notice needs to be considered in the context of the Order route.
31. There is no dispute as to the erection of a notice at the Salcombe Road end of the Order route, the issue to be considered is whether the wording of the notice was sufficient to disabuse those using the way of the notion that the way was a public footpath. The evidence before me indicates that those using the way did not understand the notice to be an attempt to prevent public use on foot. Use of the way continued following the erection of the notice. It is also significant that although the notices and a gate were erected at the Salcombe Road end of the path, a gap which allowed pedestrian access was also present. Had the landowner wished to prevent pedestrian access it would seem unlikely that the landowner would have left such a gap. Further, given the levels of pedestrian use it is more likely than not that the landowner would have taken further action to prevent use by the public on foot if they did not wish pedestrians to use the route.
32. As to the wording of the notice, whilst it does state access for authorised users only, the notice is in my view ambiguous in its intentions. The notice clearly seeks to prohibit unauthorised vehicular access and this is how the notice was understood by those who gave evidence to the inquiry. However, the notice makes no specific reference to use on foot. Bearing in mind the continued and increasing use of the way I do not consider that the wording is sufficient to disabuse those using the way of the notion that the route was a public footpath. I note the point that it would have been unreasonable for the landowner to have tried to stop members of the public from using the Order route other than by signage. However, the notices did not convey an unequivocal message that the route was not a public footpath.
33. Although not determinative it is of note that no prohibitive notices have been erected at the end of Newtown, a point made by some of the witnesses. Again, given the apparent levels of use of the Order route, had the landowner wished to prevent access it would seem likely that the landowner would have erected appropriately worded notices at the end of Newtown. There is nothing to suggest that pedestrians were prevented from gaining access to the Order route from Newtown; the barrier at this location has gaps either side which do not restrict pedestrian access. Mr Pidgeon explained that the barrier at the end of Newtown was erected to prevent heavy vehicles using Newtown to access Parsons' yard.
34. Bearing in mind the above I do not consider that the notice erected in 1998 serves to indicate that the landowner did not wish to dedicate the way as a public footpath.

#### *Conclusions on dedication at common law*

35. Having regard to all of the above, there is nothing to indicate that the landowner did not have the capacity to dedicate a public right of way. The way has been used on a regular basis by the public as of right and without

interruption or challenge since 1938. That use is sufficient, on the balance of probabilities, for the landowner to have been aware that the public were exercising a right of way and to demonstrate acquiescence by the landowner. The inference to be drawn from the evidence is that the landowner has dedicated the Order route as a public footpath. The evidence of use also demonstrates acceptance by the public. As such I conclude, on the balance of probabilities, that dedication of the Order route at common law is made out.

36. Given my conclusion it is appropriate to consider whether the gate at the Salcombe Road end of the Order route serves as any limitation to the dedication.
37. The evidence is that the gate was erected in 1998, leaving a gap on its eastern side which was used by the public when the gate was closed or locked. However, whilst there is evidence that the gate was locked in the evenings and at weekends there is no evidence that the gate was locked such as to constitute a limitation on the dedication. Evidence indicates that at times the gate was not closed or locked. In any event, the evidence is that the way was used to such an extent prior to 1998 that, on the balance of probabilities, any dedication can be inferred before that date. I conclude therefore that the gate does not constitute a limitation on the dedication.

#### *Width*

38. The objector contends that the Order identifies the full width of the track as being the full extent of the Order route. However, the Council clarified that the width of the Order route only extends over the surfaced part of the land and not the land formerly occupied by a leat and now used for the parking of vehicles. There is no evidence before me that any dedication includes the land to the west side of the Order route now used for the parking of vehicles.
39. Notwithstanding the above, measurements taken on the accompanied site visit following the close of the inquiry revealed that the surfaced width of the track varies between 3.4 and 4.5 metres, not the width specified in the Order of between 4 and 5 metres. As such the widths specified in the Order exceed the dedicated width and in view of my conclusion as to dedication at common law I propose to modify the Order accordingly. It was also noted that the gaps to the side of the barrier at the end of Newtown are 1 and 0.9 metres which varies from the 1 metre specified in the Order for both gaps. Again, given my conclusions I propose to confirm the Order accordingly.

#### **Conclusions**

40. Having regard to these and all other matters raised at the inquiry and in the written representations I conclude that the Order should be confirmed subject to modifications.

#### **Formal Decision**

41. The Order is confirmed subject to the following modifications:
- At Part 1 of the Schedule to the Order at line 1 of the second paragraph delete '*4 and 5 metres ... towards point B*' and insert '*3.4 and 4.5 metres defined by the surfaced track*' and at line 4 after '*reduced to one metre*' insert '*and 0.9 metres*'.



- At Part II of the Schedule to the Order at line 5 delete '*4 and 5*' and insert '*3.4 and 4.5*' and after '*one metre*' insert '*and 0.9 metres*'.

*Martin Elliott*

Inspector

## APPEARANCES

### **Devon County Council:**

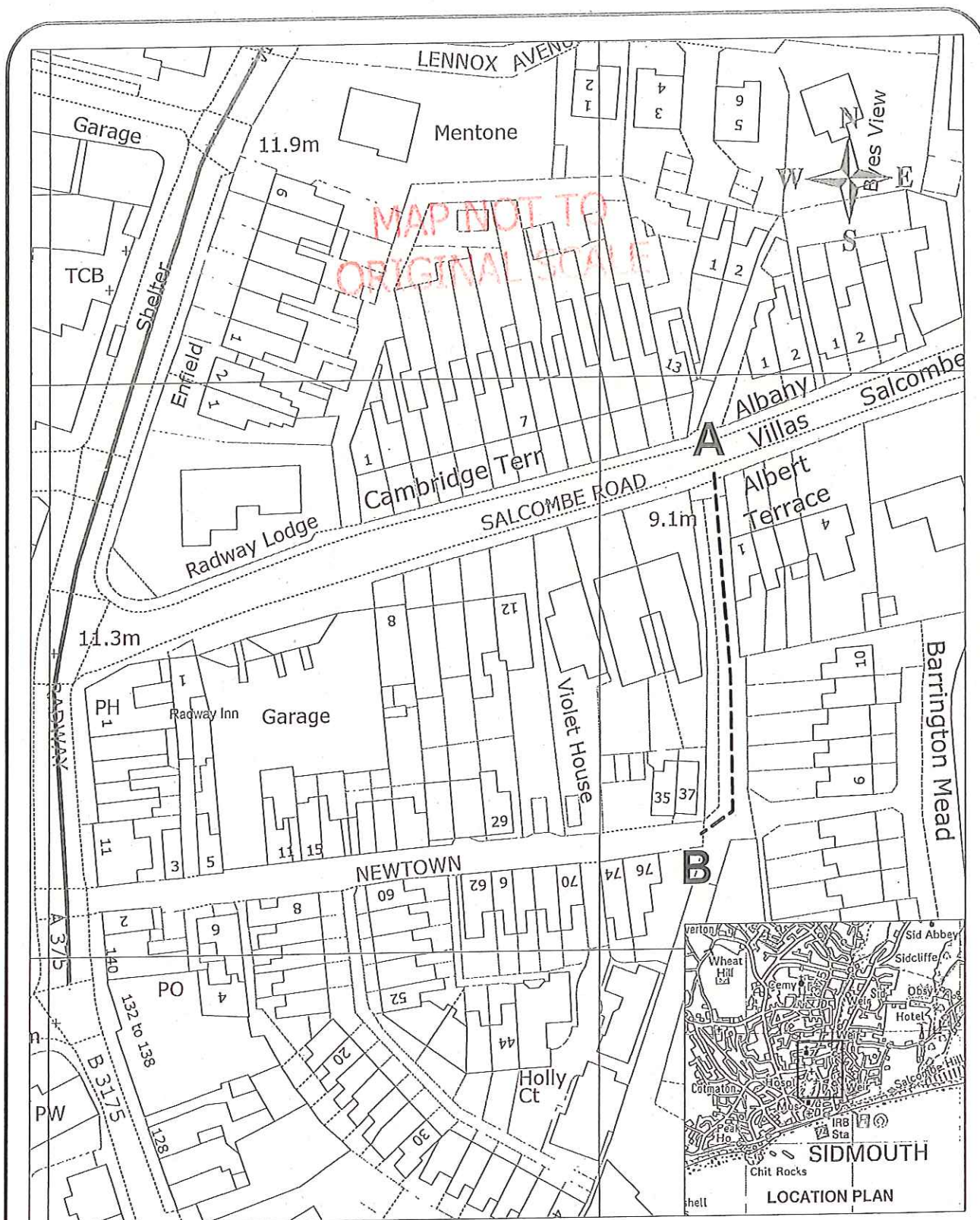
|                     |                               |
|---------------------|-------------------------------|
| Miss E Bryant       | Solicitor                     |
| who called          |                               |
| Mr N Steenman-Clark | Definitive Map Review Officer |
| Mr J Coombes        |                               |
| Mrs O H Gibson-West |                               |
| Mr E Pidgeon        |                               |
| Mrs J Spiers        |                               |
| Ms J Stephens       |                               |

### **Also in support of the Order:**

|               |                       |
|---------------|-----------------------|
| Dr P Atkinson |                       |
| Mr J Dyson    | Sidmouth Town Council |

## DOCUMENTS

- 1 Evidence of use forms Mr and Mrs Coombes
- 2 Statement of Dr P Atkinson



map ref SY1287

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# **DEVON COUNTY COUNCIL** **(Footpath No. 173, Sidmouth)**

## **Definitive Map Modification Order 2014**

drawing number **HCW/PROW/14/98**

date **Aug 2014**

scale **1:1000**

drawn by **NSC**

### Notation

Footpath to be added A - B (65 metres) — — — — —

Existing footpaths — — — — —

**David Whitton**

HEAD OF HIGHWAYS, CAPITAL DEVELOPMENT & WASTE

**Devon**  
 County Council