



Order Decision

Hearing Held on 22 January 2020

by Helen Slade MA FIPROW

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

Decision date: 06 February 2020

Order Ref: ROW/3225818

- This Order is made under Section 257 of the Town and Country Planning Act 1990 and is known as the South Hams District Council (Footpath No. 10 Dartington) Public Path Diversion Order 2018.
- The Order was made by South Hams District Council and is dated 15 November 2018.
- It proposes to divert the public footpath at the Brimhay development, as shown on the Order plan and described in the Order Schedule.
- There were 13 statutory objections outstanding at the commencement of the Hearing, and one representation in support.

Summary of Decision: The Order is confirmed subject to modifications set out in the Formal Decision below.

Procedural Matters

1. I carried out an unaccompanied site visit on the afternoon before the Hearing when I was able to walk or view most of the affected parts of Footpath 10. I also walked around the general area to gain an overall impression of the setting. Parts of the lines of both the existing and the proposed routes lie within the current construction area and on that occasion I was unable to gain access.
2. I held a hearing at the offices of the South Hams District Council ('SHDC') at Follaton House in Totnes on Wednesday 22 January 2020. After the close of the Hearing I carried out a further site visit in the company of Mr Alan Fox (representing the developers) and Miss Trudy Turrell (one of the objectors). I was then able to walk the line of both the existing and the proposed routes including the sections within the construction area. I am therefore satisfied that I have a good understanding of the situation.

The wording of the Order

3. Following submission of the Order to the Planning Inspectorate, it was pointed out to SHDC that the basis for the Order as set out in the preamble was not in accordance with the wording set out in the appropriate regulations.¹ The Order as made refers to the Town and Country Planning (General Permitted Development) (England) Order 2015 instead of referring to planning permission granted under Part III of the Town and Country Planning Act 1990. At the Hearing I raised the matter and it was agreed that a modification to the preamble would be appropriate. No-one considered that there had been any prejudice caused by the error, but it is important to cite the correct reason for

¹ The Town and Country Planning (Public Path Orders) Regulations 1993

- the Order. If I confirm the Order I intend to make the necessary modification, which will not require advertising.
4. It was also pointed out to SHDC during the pre-Hearing correspondence that the description of the width of the proposed path included the word 'minimum'. Current government guidance on the issue of describing the width of paths in Orders of this nature states that the use of this word introduces an element of doubt and such imprecise terms should be avoided.² I am satisfied that the deletion of the word 'minimum' will have no impact on the accuracy of the Order and I intend to make the necessary modification if I confirm the Order. There was no dissent on this approach at the Hearing.
 5. I also note that, in the text of the schedule to the Order, the spelling for the word 'metre' has been mis-spelled as 'meter'. As it is correctly spelled on the Order plan, I propose to amend the spelling, if I confirm the Order, for the sake of consistency, although I do not consider that anyone will have been misled by the error.

The Main Issues

6. Section 257(1) of the Town and Country Planning Act 1990 provides for the stopping up or diversion of a footpath if it is necessary to do so in order to enable development to be carried out in accordance with planning permission already granted under Part III of the same Act.
7. In considering whether or not to confirm such an order, I have discretion to consider the advantages and disadvantages arising from the diversion of the path in general³, and also any disadvantage or loss which might be suffered either by the public entitled to use the route, or by those with properties near or adjoining the existing highway⁴. I must weigh any such disadvantages against the advantages of the proposed order.⁵
8. I must take account of relevant case law and guidance, and the advice in Defra's Rights of Way Circular 1/09. In this case, as some development has already taken place, I need to consider whether or not the development is substantially complete and, consequently, whether the provisions of Section 257 remain applicable.

Reasons

Whether there is a valid planning permission

9. The development which has prompted the making of the Order is the redevelopment of an area of Dartington referred to as the 'Brimhay' site. The work involved the demolition of some 18 bungalows providing accommodation now considered to be sub-standard; and the construction of 12 replacement apartments for South Devon Rural Housing Association; 8 flats for assisted living and 12 open market houses. An agreement under Section 106 of the 1990 Act provides a requirement to construct 10 parking spaces for the adjacent children's nursery which is otherwise unaffected by the development.

² Planning Inspectorate Advice Note 16 and Letter to All Order Making Authorities in England dated 12 February 2007n from DEFRA

³ *KC Holdings Ltd v Secretary of State for Wales* [1990] JPL 353

⁴ *Vasilou v Secretary of State for Transport* [1991] 2 All ER 77

⁵ Paragraph 7.15 of Defra Circular 1/09

10. Although the original grant of permission was subject to a successful legal challenge, the matter was re-considered by SHDC and the current permission is extant. There was no dispute at the Hearing that the permission is valid. SHDC considers that the development has considerable public benefit in providing affordable accommodation for people in need of it. Mr Fox stated that the provision of some open market properties makes the project viable, together with grant aid from Homes England. The amount of the grant was calculated taking into account the sale of those properties.
11. I am satisfied that a valid relevant planning permission has been granted.

Whether it is necessary to divert the path to enable the implementation of the permission which has been granted

12. The development has already been commenced and the existing route of the public footpath is apparently the subject of a temporary closure order. Miss Turrell in particular was critical of the decision to commence the development in advance of the consideration of the order to permanently divert the footpath.
13. The provisions of Section 257 of the 1990 Act are only applicable where the development has not already taken place. The advice on Planning Permission and Public Rights of Way in Circular 1/09 is contained in Section 7. Paragraph 7.11 makes clear that the grant of planning permission does not entitle developers to obstruct a public right of way as it cannot be assumed that an order to divert or stop up a right of way under Section 257 will invariably be made or confirmed. Development in so far as it affects a right of way should not be started, and the right of way should be kept open for public use until the necessary order as come into effect.
14. The developers have apparently been granted temporary closure of the existing path under the provisions of Section 14(1) of the Road Traffic Act 1984. The reason for the temporary closure was presumably so that construction could commence, but I have not been provided with any documentation relating to the closure order. I did see, however, notices on site in relation to it. Given the advice in Circular 1/09 that the existing right of way should remain open until any public path order has been confirmed, I must assume that the developers were aware of the risk involved in pursuing this course of action.
15. Nevertheless, it would seem that, despite the development having been commenced, the existing definitive line of the path is just about available on the ground, although it is currently subject to obstruction by parked cars (outside the construction area) and unavailability due the temporary closure (within the construction site). For the avoidance of any doubt, I have not been influenced in reaching my decision by the fact that the development has commenced, but I am disappointed to note that the guidance in Circular 1/09 has not been followed.
16. The necessity to divert the route stems principally from the position of Plots 1, 2, and 3 (and to a minor extent Plot 4) which form part of the development of houses for sale on the open market. Whilst Miss Turrell was of the view that the development could have been designed to accommodate at least some of the footpath through green space, I must consider the matter in relation to the permission which has been granted. That permission shows that the existing line of Footpath 10 would pass through the house itself on Plot 1 and through the gardens of all four.

17. Paragraph 7.21 of Circular 1/09 states as follows:

"Where the development, in so far as it affects a right of way, is completed before the necessary order to divert or extinguish the right of way has been made or confirmed, the powers under Section 257 and 259 of the 1990 Act to make and confirm orders are no longer available since the development, which the order is intended to enable, has already been carried out. If such a development has already been completed, there is no basis for an order to be made."

18. Plots 1-4 have not yet been built, and indeed not even commenced. Although other parts of the development are well-advanced, in so far as the development affects the public right of way the development has not been substantially completed. The guidance in Circular 1/09 therefore indicates that the provisions of Section 257 are still available to be used to divert the path in this case.
19. In addition, there is a planning obligation on the developer to provide additional demarcated car parking spaces for the nursery school which would not be possible if the footpath were not diverted.
20. Consequently I accept that, in order to complete the development as agreed, it is necessary to divert the path to enable the permission to be implemented as granted.
21. Whether or not the path needs to be diverted to the extent shown in the Order is a matter to be considered in relation to the remaining factors I have set out in paragraphs 7 and 8 above.

Advantages and disadvantages of the diversion to the public in general

22. The existing route of Footpath 10 was added to the definitive map and statement by a modification order dated 24 November 2016, which was confirmed on 16 March 2017. It was added on the basis of long use of a route which passed through the area between the former bungalows and across green space. The route was described to me as being free of traffic except for the area adjacent to the Humpty Dumpty nursery car park from which it was nevertheless separated by a fence. I note that this fence has now been removed, meaning that any use of the existing route offers no separation from moving vehicles.
23. Most of the arguments put forward by the objectors, and in particular by Miss Turrell, focus on the dissatisfaction with the change in the nature of the area and of the consequent change in the ambience of the path. As I explained at the Hearing, it is not my role to revisit the planning decision already made by SHDC for which they are the local planning authority. As pointed out by Mr Fox, I must therefore consider the advantages and disadvantages of the existing and proposed route in the context of the development which has been given permission.
24. Thus many of the points raised by the objectors to the Order are not relevant as they relate to the health and safety issues of having to use a footpath in proximity to vehicles, as opposed to being able to use a route through green space. For at least half of its length, the existing route, if it were to remain, would be subjected to the same level of co-existence with vehicles as the proposed route. Furthermore, it would be necessary to walk along the actual

- access road itself for part of the way, rather than along the pedestrian footway which is being provided. Mr Fox clarified that only one footway is being built and that will be on the line of the proposed diverted footpath. The feature on the opposite side of the road, which Miss Turrell thought was a footway, is in fact a narrow gully required for the provision of utility services.
25. If the path were to be retained on its current line, it would also be necessary to continue to walk through the car parking area of the nursery. With the removal of the separating fence it remains an open question as to how that path would be made obvious and kept clear of vehicles. In any case the Section 106 agreement is committed to providing a number of car park spaces which would not be possible if the existing path were to remain in place. The proposed route would provide a tarmac path clearly separate from the car park and slightly raised, with an appropriate kerb. This would provide the necessary separation from vehicles and would, in my view, make the route safer.
 26. If the northward continuation of the existing route were also to remain, it would not be possible for Plots 1, 2 and 3 to be constructed as planned, but there is no guarantee that any alternative planning application would provide a path through green space.
 27. The proposed alternative route may not be as attractive a proposition as the route which has been historically available to the public, but the decision to develop the area has already been made. Miss Turrell described it as an 'urbanisation' and I am sure that is a view held by other objectors. But in the face of that decision, it is necessary to consider the best outcome for the public who still need or wish to walk through the area. This includes the fact that there may be more traffic to contend with than was heretofore the case.
 28. It seems to me that the provision of a properly constructed footway alongside the carriageway is the safest way for pedestrians to traverse the area, and is no different in terms of health and safety from using any other footway in a similar location. The provision of a pedestrian path from the end of the access road to meet with Forder Lane will provide a short length of traffic-free path, and a crossing point slightly closer (approximately 10 metres) to the usual onward route for pedestrians past the Shinnars Bridge Centre. The alternative of walking on the existing route along a path not demarcated from the car parking area, and along a narrow estate access road, is unsupportable in my view.
 29. The proposed crossing point of Forder Lane is not significantly different from the existing point in terms of visibility, and will result in a slightly shorter walk along this narrow lane. I note that the speed limit is 30 mph but since the public already have to negotiate part of the lane using the existing route, the proposed route offers a slight advantage.
 30. The objectors have expressed concern at the need to cross the estate access road (Gidley's Meadow) near to a bend, which they consider is less safe than crossing it further along where the road is straighter. They raise the fact that there will be more traffic entering the area due to the increased number of dwellings. Mr Fox pointed out that the traffic entering the estate is likely to be travelling more slowly approaching the corner than it will be on the straight, notwithstanding that the speed limit on the road is likely to be the normal 30 mph for built-up areas.

31. I accept that it is unarguable that there will be extra traffic for pedestrians to contend with than at present, since the access road in question (Gidley's Meadow) did not previously impact on the existing line of the footpath. Nevertheless I note that the line of the existing footpath had to negotiate the turning head of Brimhay, in addition to crossing the nursery car park. Both of these hazards will be avoided on the proposed route.
32. It is also worth bearing in mind that the eventual adoption of the highway, in accordance with the Section 38 agreement with the Highway Authority, will mean that the entire length of the carriageway and footway will be available to the public to use as highway. As in any situation where a pedestrian has to traverse a carriageway, a degree of personal risk assessment has to be undertaken. There will be no defined crossing point of the access road on the line of the proposed footpath, and it will therefore be open to pedestrians to choose the crossing point which they themselves consider to offer them the best safety in the circumstances pertaining at that moment. That may, or may not, be on the line of the path proposed in the Order.

The disadvantages or loss to the public or adjacent property owners/occupiers

33. At the Hearing and in her submissions, Miss Turrell expressed concerns that, in her view, the number of vulnerable people living in and using the area crossed by the footpath warranted greater attention to health and safety issues than had been given to the matter by SHDC. She also felt that the people most affected by the changes were people who, by their very nature, were least likely to engage in the process and to object if necessary. She considered that the vulnerable residents, and the children using the nursery, were the users most disadvantaged by the proposals.
34. Given that the development has been approved, is being constructed, and that no challenge has been made to the present planning permission, I must conclude that the proper processes were followed and that due consideration was given to material considerations. It is not for me to reconsider matters relating to planning policy, into which category the types of issues highlighted by Miss Turrell fall.
35. With respect to matters which I can consider, it was open to groups or organisations which specifically represent the range of vulnerable persons identified by Miss Turrell to engage in the public path order making process and make any comments, positive or negative. None has done so.
36. It seems to me that, given the nature of the development, the provision of a footway adjacent to the carriageway is a perfectly sensible and safe option for any pedestrians, including vulnerable users. The width quoted in the Order conforms to the usual standard required for footways by highway authorities, and in fact slightly exceeds it for much of its length. I am satisfied that the vulnerable users referred to by Miss Turrell will be no worse off than they would be if the path remained where it is, and would in fact be safer on the proposed route. I recognise that the existing route, before development, might have been more attractive but that situation no longer pertains. I must make my decision in the light of the land-use which has been granted permission.

Conclusions

37. Having concluded that it is necessary to divert the path to enable the implementation of the appropriate planning permission, I am satisfied that the proposed route offers the public a safe pedestrian route through the development. I am not persuaded that there is any significant disadvantage to the public, but any issues relating to the crossing point of the access road are outweighed by the fact that there will flexibility based on personal preference, on completion of the development.
38. 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 the modifications I referred to earlier in this decision.

Formal Decision

39. I confirm the decision subject to the following modifications:

- In the preamble to the Order, delete the words '*Town and Country Planning (General Permitted Development) (England) Order 2015 namely the*' and after the words 'planning permission' insert '*granted under Part III of the Town and Country Planning Act 1990 by South Hams District Council namely the*';
- In the preamble to the Order, delete the words '*associated with the*';
- In Part II of the Schedule to the Order, in the column headed 'Width' delete the word '*minimum*';
- In both Parts I and II of the Schedule to the Order delete all references to the width being in '*meters*' and substitute the word '*metres*'.

Helen Slade

Inspector

APPEARANCES

FOR THE ORDER MAKING AUTHORITY:

Rob Sekula	South Hams District Council
Becky Fowlds	Legal Representative, South Hams District Council

FOR THE APPLICANT:

Alan Fox	Rural Homes Limited
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STATUTORY OBJECTORS:

Trudy Turrell	'Don't Bury Dartington Under Concrete'
Karin Jordan	

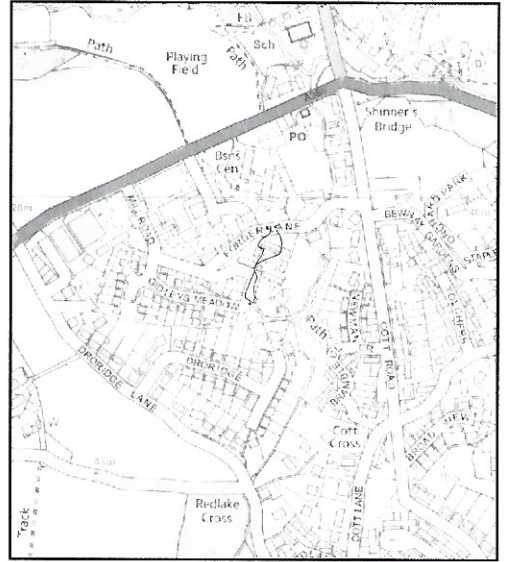
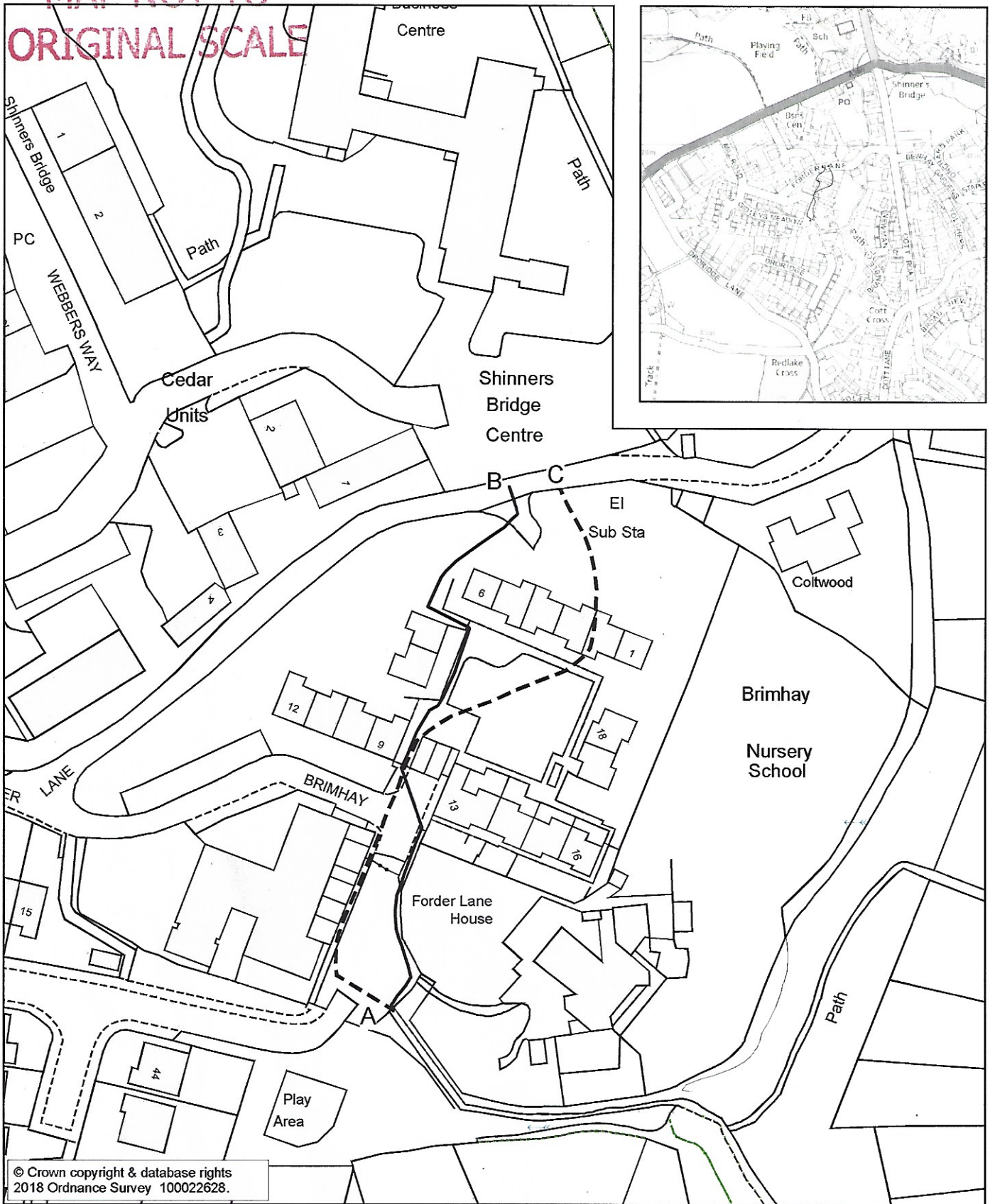
INTERESTED PARTY IN SUPPORT:

Tessa King

DOCUMENTS

- 1 Submission Statement in support of the Order from South Hams District Council
- 2 Statement of case in support from Alan Fox, Rural Homes Limited
- 3 Statement of Case from Trudy Turrell
- 4 Supplementary statement from Trudy Turrell

MAP NOT TO ORIGINAL SCALE



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2018 Ordnance Survey 100022628.

South Hams District Council
Proposed Public Path Diversion Order
Footpath No. 10 Dartington

Drawing No: 001
Scale: 1:1000
Date: 14/11/2018
Drawn by: RS



South Hams District Council

Sophie Hosking
Chief Executive

Notation	To be extinguished	To be created
	A - B (110 metres)	A - C (125 metres)

Map Reference: SX 7861