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## Order Decisions

Inquiry held on 12 February 2020

Site visit made on 12 February 2020

**by Alan Beckett BA MSc MIPROW**

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

**Decision date: 17 April 2020**

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### **Order Ref: ROW/3188550R ('Order A')**

- 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. 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 public footpath as shown in the Order plan and described in the Order Schedule.
- There were three objections outstanding at the commencement of the inquiry.

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

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### **Order Ref: ROW/318551R ('Order B')**

- This Order is made under Section 53 (2) (b) of the 1981 Act and is known as the Devon County Council (Footpath Nos. 60 & 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 two public footpaths as shown in the Order plan and described in the Order Schedule.
- There were two objections outstanding at the commencement of the inquiry.

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

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### **Procedural Matters**

1. I held an inquiry into the Orders at the Mackarness Hall, Honiton on Wednesday 12 February having viewed the claimed footpaths from public vantage points the previous afternoon. Following the close of the inquiry, and at the request of the objectors, I undertook an unaccompanied inspection of that part of claimed footpath 61 at the south-western edge of Crown All Wood and that part of claimed footpath 62 to the south of Luppitt Inn Farm where the claimed footpath crosses an access track leading to fields around Dolish Farm.
2. Devon County Council ('the Council') made the Orders at the direction of the Secretary of State following a successful schedule 14 appeal by the applicant for the Order, Mrs M Kimbell on behalf of the East Devon Group of the Ramblers Association ('the Ramblers'). Five objections to the Orders remained outstanding, and the Council adopted a neutral position in relation to them.
3. The inquiry was a re-determination of the Orders. The Orders had been considered previously in July 2018 by means of the written representation procedure. The Inspector's decision which resulted from that consideration had been quashed by the order of the High Court. At the inquiry, the case for the confirmation of the Orders was put on behalf of the Ramblers by Mrs Rumfitt; Mr Carr appeared on behalf of the objectors. I am grateful to both parties for

the helpful and courteous way in which they endeavoured to assist me in the course of the Inquiry.

### **The Statutory Framework**

4. The Orders were made in consequence of events specified in section 53 (3) (c) (i) of the 1981 Act which provides that the Definitive Map and Statement ('DM&S') should be modified where evidence has been discovered which shows that, when considered with all other relevant evidence available, a public right of way which is not currently shown in the DM&S subsists or is reasonably alleged to subsist over the land in question.
5. As noted above, the Council was directed to make the order following the Ramblers successful schedule 14 appeal. That direction was made on the basis that it was reasonable of the Ramblers to allege that the claimed footpaths subsisted. However, for the Orders to be confirmed, I must be satisfied that the evidence discovered demonstrates, on a balance of probabilities, that the claimed rights of way subsist (*Todd & Bradley v the Secretary of State for Environment, Food and Rural Affairs* [2004] EWHC 1450 Admin).
6. The Ramblers case relied on historic documents to demonstrate the subsistence of the claimed footpaths; no evidence of use of the claimed footpaths in recent living memory was adduced. In such a case, the provisions of section 32 of the Highways Act 1980 ('the 1980 Act') are relevant. Section 32 of the 1980 Act provides "A court or other tribunal, before determining whether a way has or has not been dedicated as a highway, or the date on which such dedication, if any, took place, shall take into consideration any map, plan or history of the locality or other relevant document which is tendered in evidence, and shall give such weight thereto as the court or tribunal considers justified by the circumstances, including the antiquity of the tendered document, the status of the person by whom and the purpose for which it was made or compiled, and the custody in which it has been kept and from which it is produced."
7. All three routes at issue had been claimed as public rights of way by the parish council as part of the initial survey of public rights of way conducted under the provisions of the National Parks and Access to the Countryside Act 1949 ('the 1949 Act'), but none had been included on the draft, provisional or definitive maps. It is common ground between the parties that new evidence (tithe commutation records, Finance Act 1910 records) had been discovered by the Ramblers which would not have been available to the surveying authority when these footpaths had originally been considered under the 1949 Act, and that the 'discovery of evidence' test under section 53 of the 1981 Act was satisfied. It is also common ground that the weight to be attached to the various strands of evidence will be a key factor in the determination of the Orders.

### **The Main Issue**

8. The main issue in relation to the Orders is whether the documentary evidence discovered, when considered with all other relevant evidence available, demonstrates, on a balance of probabilities, that the claimed footpaths subsist as public rights of way.

## Reasons

9. For the purposes of this decision, in considering Order A, I will refer to footpath 62 as 'the Order route'; in considering Order B, I will refer to footpath 60 as Order Route ('OR') 60 and footpath 61 as OR61.

### **Order A**

#### *Ordnance Survey mapping*

10. Ordnance Survey ('OS') drawings of 1806 and the first edition map of 1809 show a section of track on the alignment of the eastern end of footpath 1 Luppitt, but no continuation to the south-west on the alignment of the Order route is shown. An extract from the first edition 25 inch to 1-mile map shows a route which corresponds with the Order route by means of a double peck line and is annotated 'F.P.' in the sheet margin. The point where this path meets the public road (point J on the Order plan) is shown to be slightly to the south of a property described as Scottishayes Farm.
11. A route which corresponds with the Order route is shown on the OS 25-inch to 1-mile map of 1903 by means of a double peck line which is annotated 'F.P.' at three points along its route. This route is also shown to cross three watercourses with the path being carried over the streams or ditches by means of footbridges which are marked 'F.B.'.
12. One bridge is located to the south of Luppitt Inn Farm just north of the point where the path is shown to cross an enclosed access track. At the request of the objector, I visited the site of this crossing point and found that although the track was sunken below the level of the surrounding fields and its boundaries overgrown, the point at which the path was shown by OS to cross the track was marked by a definite and visible grading of the track boundaries which gave the impression that it would have been possible to enter and exit the sunken track from the surrounding fields. The remaining two footbridges are located to the north-east of point J and the buildings at Scottishayes Farm.
13. The path is also depicted on the one-inch map published in 1889, on the one-inch map of 1910 amongst those routes shown as 'Unmetalled Roads and footpaths', on the 1919 and 1927 one-inch maps amongst those routes shown as 'Bridle & Footpaths'. The 1937 and 1946 one-inch maps also show the Order route amongst those routes depicted as 'footpaths or bridlepaths'.
14. The Ramblers note that the route which subsequently became footpath No. 1 Luppitt appeared on the one-inch maps for the first time in 1937; it is submitted that this reflects a change in OS instructions to its surveyors which required 'less important paths' to also be added to the map in addition to those important footpaths habitually used by the public. The Ramblers view is that the depiction of footpath no. 1 in 1937 suggests that the Order route had been considered in the early decades of the 20<sup>th</sup> century to have been a path habitually used by the public and the more important of the two paths leading south-west from the village. The Ramblers are of the view that the depiction of the Order route in successive OS maps should be given some weight in the determination of the status of the route.
15. The objectors acknowledge that OS maps through the late nineteenth and early twentieth centuries show a path on the alignment of the Order route but

submit that whilst the maps can provide evidence of the physical existence of a path, they do not demonstrate its status.

16. It is well established from the cases of *Attorney-General v Antrobus* [1905] 2 Ch 188 and *Moser v Ambleside UDC* [1925] 89 JP 118 that whilst OS maps provide good evidence of the physical features visible on the ground at the time of the survey, they do not provide evidence of the status of any way shown. Since the late nineteenth century, OS mapping has contained a disclaimer that the depiction of any track or path is not evidence of the existence of a public right of way.
17. Although instructions to surveyors suggest that routes in use by the public should be recorded, other instructions made clear that OS was not concerned with the status of any route so shown. Although it can reasonably be concluded that a path on the alignment of the Order route ran between Luppitt Inn Farm and the public road near what used to be Scottishayes Farm, the depiction by OS of that path does not assist with the determination of its status.

#### *Luppitt tithe map*

18. The tithe map shows a path on the alignment of the Order route by means of a dotted line running from point I in a south-westerly direction to point J; the map shows that the path passes through field boundaries via a series of gates although there are no footbridges shown to carry the footpath over the streams and ditches shown in the 1903 OS map. A path on the alignment of footpath 1 Luppitt is also shown although the western end of that route is on a different alignment to the current footpath, and a further peck line track is also shown to the south of Luppitt Inn Farm.
19. The primary purpose of the tithe commutation process was to assess the productivity of titheable land to enable the conversion of tithe to an annual monetary payment. It is unlikely that the existence of a route used on foot (whether public or private) would have any significant impact upon the productivity of the land crossed by it and is unlikely to have been recorded as part of the commutation process. Whilst the tithe map provides evidence of the physical existence of an observable feature on the ground at the time of the survey, the tithe documents do not provide evidence of who may have been using the path shown.

#### *Finance Act 1910*

20. The Finance Act map is based on the second edition 25-inch to 1-mile OS plans which shows the Order route as passing through hereditaments 90 and 102 which formed part of Dolish Farm and hereditament 19 which was part of Greenways Farm. Under the heading '*Particulars, description and notes made on inspection*', the Field Book for hereditament 102 notes "*Rt of way nos. 686, 792, 794*" with the overall site value being reduced by £40 due to "*Public rights of way or user*". The field book entry for Greenways Farm notes "*Rt of Way nos. 1074, 1070, 964, 922, 949, 953, 961*" with an allowance of £50 being made against site value for "*Public right of way or user*". The route passing over OS parcels 686, 792, 794 and 922 corresponds with the Order route.
21. The Ramblers submit that the description of the position of the Order route together with the allowances made against site value for the existence of a "Rt

of way” suggests that the Order route was considered to be a public right of way in the early twentieth century.

22. Reference is also made to two academic studies which appeared in *Rights of Way Law Review*; the first describes the general process undertaken by the Inland Revenue whereas the second considers the question of the weight to be attributed to a reduction in site value in the absence of evidence that the landowner made a positive claim for a reduction arising from the existence of a public right of way. It is submitted that the valuer was instructed to make such allowances for rights of way known to them even if no such claim had been made in the landowner’s own returns on Form 4 or Form 7.
23. It is submitted that there is no evidence available to suggest that the process of notifying the landowner of the provisional valuation was not followed prior to the final valuation entry being made in the Valuation Book which showed that an allowance had been made against site value due to a public right of way crossing the land. It is considered that the Finance Act records are strongly supportive of public rights along the entirety of the Order route.
24. No evidence regarding the returns made to the Inland Revenue by individual landowners as part of the valuation process has been submitted and it is not known whether these documents have survived. In the absence of evidence to the contrary, it has to be assumed that the procedures required under the legislation had been carried out and that the field book entries reflect both the submissions made by the landowner in relation to his property together with the observations made about the property by the valuer as part of his inspection.
25. Although the Finance Act records are limited to the field and valuation books and the map, I consider that the field book entries suggest that the Order route was reputed to be a public right of way at the time the Finance Act survey was conducted.

#### *Parish council records*

26. There are several references in the parish minutes which refer to a footpath between Luppitt village and ‘Scotshaye’ or ‘Scotshayes’<sup>1</sup>. In 1899 concerns were raised about the condition of the “*dangerous state of the bridge & stiles leading from the School to Scotshaye*” a matter which was referred to the Rural District Council for attention.
27. In October 1907 the Parish Council noted the dangerous state of many of the bridges in the parish with tenders being invited for their repair. One of the bridges tendered for was “To Scotshayes” with the tender from a Mr Mansfield being accepted. Mr Mansfield’s work was considered satisfactory and his bill paid in April 1908.
28. In December 1918 the condition of the Scotshayes footbridge was again raised with a Mr Palmer being contracted to undertake the necessary works with payment being made for the same in May 1919. The Scotshayes footbridge required further repair in 1924, 1928, 1932, 1942 and 1948 with repair being undertaken at the Parish Council’s cost. The minutes also note that in July

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<sup>1</sup> It is highly likely that ‘Scotshaye’ or ‘Scotshayes’ is the late 19<sup>th</sup> century and early 20<sup>th</sup> century name for ‘Scottishays’ shown on earlier mapping. There is little doubt that these place names refer to the same farm.

1959 the bridge was again found to be in need of repair, but *“that nothing be done until it was found whether the path was now on the provisional map”*.

29. The Ramblers submit that it is reasonable to assume that these minutes refer to the repair of one of the bridges on the Order route shown by the 1903 Ordnance Survey map. Furthermore, the expenditure of public money on seven different occasions on the repair of a bridge suggests that the parish council of the day regarded the Order route as a public footpath; a contrary conclusion would require a conclusion to be drawn that on each of these seven occasions the parish council's actions had been ultra vires.
30. As noted above, the 1903 Ordnance Survey map shows there to have been three footbridges present on the route between Luppitt Inn Farm and Scotshayes and although the minutes do not specify which bridge was the subject of the repairs, it is highly likely that at least one of the bridges present along the Order route at the time were repaired using parish money.
31. I concur with the Ramblers that the expenditure of public funds on the repair of a bridge (irrespective of which bridge was repaired) on the Order route by the parish council supports the contention that the Order route had the reputation as a public footpath.
32. However, the objectors point out that although the works undertaken to repair the bridge were consistent with the parish council considering the route to be public, and consistent with the original parish claim under the 1949 Act (see below), no further expenditure was made beyond 1948. It was submitted by the objectors that this demonstrated that the parish council's original understanding had been mistaken. The Ramblers contention is that by virtue of section 47 of the 1949 Act, responsibility for the maintenance of public rights of way had passed from parish councils to County Councils and that the reluctance of the parish council to expend further funds could be explained by this transfer of liability.
33. Whether in 1959 the parish council was fully conversant with the transfer of liability under the 1949 Act is unknown; but contemplating withholding further repairs until the outcome of the definitive map process was known would suggest that was not the case; had the parish council thought that the responsibility for repair lay elsewhere in 1959 the minutes could have easily reported that fact.

#### *Rights of Way Act 1932*

34. Although there was no statutory provision for the preparation of a map under the Rights of Way Act 1932 ('the 1932 Act'), the parish minutes of 1933 show that the parish council had given consideration to the new legislation, had purchased a map of an appropriate scale and had marked on it those routes it considered to be public. This map was sent to the RDC and although now missing, in response to the Council under the 1949 Act survey, the RDC had noted that footpath 52 (the Order route) had been shown on the 1932 map and should be retained.
35. The depiction of the Order route on the map prepared by the parish council in 1933 is consistent with the parish minutes which show public expenditure on the route and consistent with the Order route being considered a public right of way in the early 20<sup>th</sup> century.

*Survey of public rights of way under the 1949 Act*

36. A survey of public rights of way was conducted by the parish council under the provisions of the 1949 Act. With regards to the Order route, the parish council included it in the survey as footpath 52 out of a total of 56 paths which it considered to be public. The grounds for believing the path to be public were "mentioned in P.C. minutes".
37. Although the parish council had recorded the Order route as part of the survey, and although the comment of the RDC was that the path should be retained, the word "OMIT" was entered on the survey card and no part of the Order route was shown on the draft map when it was published, nor was it shown on the provisional map. Furthermore, no objection was made to the omission of the footpath at either the draft or provisional stages of the definitive map process. The Order route was not shown on the Definitive Map when it was published.
38. The objectors consider that the omission of the Order route from the draft map and the absence of any objection to that omission to be of significance as despite the references in the parish council minutes to the repair of a bridge at Scotshayes, and to the depiction of the route on the 1932 Act map, a conscious decision was made by the surveying authority of the day to not show the route on the draft map, which suggested that the parish council's understanding had been incorrect and that the surveying authority had not found sufficient evidence for a reasonable allegation of the existence of public rights to have been made.
39. The reasoning behind the decision to omit the Order route from inclusion in the draft map is not known and the evidence relating to that decision appears to have been lost in the intervening 70 years. However, it is likely that a consideration of the parish council's claim would have included an assessment of all the relevant evidence which had been submitted to the County Council by the parish.
40. Whilst the Ramblers submit that there is no evidence that the references to maintenance were specifically considered by the surveying authority of the day. However, in arriving at the decision to omit the Order route from the draft map, it is highly likely that the references to past maintenance of a bridge would have been taken into account as the principle reason for the parish council considering the Order route to have been public was that it had been "mentioned in P.C. minutes".
41. In addition, the parish council and the surveying authority would have been able to draw upon the experience of the oldest residents then alive within the parish who could have provided evidence of use to augment and confirm the reputation of the path which the parish council considered it to have. However, there is no evidence of use of the Order route at the time of the survey or of evidence of use having been presented to support the parish council's claim.
42. Furthermore, there was no objection to the omission of the Order route from the draft map made by either the parish council or any pedestrian user group. From that it can be concluded that the parish council accepted that the route was not in fact a public right of way, despite having authorised repairs to a footbridge on several occasions.

43. The absence of any objection to the omission of the map from either the draft or provisional map stages of the process is in my view a significant factor which sits in the balance in favour of the objectors to the Order.

### Conclusions

44. My attention was drawn by the parties to the decision I made in ROW/3174227 which concerned a claimed footpath which crossed the parish boundary between Luppitt and Coombe Raleigh. The objectors considered that there were similarities between that case and the current case in that the parish minutes recorded expenditure on the maintenance of a bridge on the claimed route; the Finance Act documents set out reductions in site value due to public rights of way or user with field numbers crossed by the footpath being specified; and that the definitive map process led the parish council to claim a footpath which was omitted from the draft, provisional and definitive maps. The objectors submitted that given the similarities between these two cases, they had a 'legitimate expectation' that a consistent approach would be taken in determining a case where cases shared significant similarities.
45. The Ramblers submitted that although a consistent approach to evidence is to be expected, two cases are rarely so similar that the relevant evidence is the same. The Ramblers draw attention to the differences in the evidence they have noted between this case and that considered in ROW/3174227; (a) the tithe map shows the entirety of the Order route whereas only part of that route was shown in the earlier case; (b) the parish council expended public funds on seven occasions in the current case compared with three in the earlier case; (c) OS had marked three bridges on the Order route where none had been shown by OS in the earlier case; (d) the RDC had confirmed that the Order route had been shown in a map prepared under the 1932 Act; and (e) it was not apparent from the earlier decision that the role and responsibilities of the inland revenue valuer had been taken into account.
46. As noted above, the tithe evidence in this case does show the entirety of the Order route between Luppitt Inn Farm and Scotshayes, however although the tithe map provides evidence of the physical existence of an observable feature at the time of the survey, it does not demonstrate the status of the route shown. All that can be drawn from the tithe map is that a route on the general alignment of the Order route was visible on the ground at the time of the survey.
47. I also acknowledge that in the current case the parish council expended money on the maintenance of a bridge on a greater number of occasions than it did in ROW/3174227. However, irrespective of the frequency of repairs being made, that evidence would have been considered by the surveying authority prior to the decision being made to omit the Order route from the draft map. The surveying authority would also have been aware of the inclusion of the Order route in the 1932 Act map by the parish council as attention was drawn to that inclusion by the RDC at the time of the survey. These sources of evidence would therefore have been taken into account by the surveying authority at the time of the decision made under the 1949 Act.
48. The depiction by OS of bridges on the Order route in this case does not assist with a determination of the status of the route. The position of these bridges was shown on the map used by the parish for the 1949 Act survey and



evidence regarding the bridges and their maintenance set out in the parish minutes did not result in the Order route being shown on the draft map.

49. As regards the Finance Act evidence, whilst the valuer may have assessed the hereditaments crossed by the Order route based on his understanding and knowledge, the manner in which the allowances were recorded in the field books in this case and in ROW/3174227 are identical in that OS parcel numbers were used to describe the fields which the "Rt of Way" crossed and for which the reduction in site value was being granted.
50. The documentary evidence therefore demonstrates the existence of a route running from the village south west to Scotshayes which in the first half of the twentieth century was considered to be a public footpath. The parish council commissioned repairs to a footbridge on that route as it was considered to be public. That reputation is reflected in the Finance Act field book where a reduction in site value is granted for a "Rt of Way" on the alignment of the Order route.
51. However, the reputation which the route appears to have had during the early part of the twentieth century does not survive into the latter part of that century. Although the Order route was claimed by the parish council as part of the parish survey, the route was not included in the draft, provisional or definitive maps, despite the expenditure of parish funds on maintenance and repair of a footbridge. Furthermore, the parish council does not appear to have been able to produce any evidence of use of the route by the public to support its inclusion on the draft map.
52. To conclude, there is evidence of reputation in one side of the scale which supports the Ramblers contention that the Order route is a public right of way. However, much of that evidence (save for the tithe and Finance Act records) is likely to have been considered and rejected at the time of the 1949 Act survey. In the opposite scale is the fact that, despite this supposed reputation, no challenge was made to the omission of the path at either the draft or provisional map stage.
53. In my view the evidence presented in this case is evenly balanced, and whilst that evidence is sufficient to support a reasonable allegation being made as to the existence of a public right of way, it does not, in my view, show on a balance of probabilities, that the claimed public right of way subsists. It follows that I conclude that the Order should not be confirmed.

## **Order B**

### *Ordnance Survey maps*

54. The OS 25-inch to 1-mile map of 1903 shows routes on the same general alignment of OR60 and OR61 by means of double peck lines; both routes are annotated 'F.P.' at various points. OR61 is also shown on the 1948 1:25000 scale map and the 1946 one-inch map.
55. The 1910 and 1919 one-inch maps show by means of a double peck line, a path from point S to the southern part of Dumpton Hill but do not indicate that the path continued south to and beyond Woodhayes. The 1946 one-inch map shows a route from S to Woodhayes.

56. Whilst OS maps provide good evidence of the physical features visible on the ground at the time of the survey, they do not provide evidence of the status of any way shown. Since the late nineteenth century, OS mapping has contained a disclaimer that the depiction of any track or path is not evidence of the existence or a public right of way.
57. Although instructions to surveyors suggest that routes in use by the public should be recorded, other instructions made clear that OS was not concerned with the status of any route so shown. Although it can reasonably be concluded that a path on the alignment of the Order routes were sufficiently visible on the ground for the OS surveyor to note them, the depiction by OS of those paths does not assist with the determination of their status.

*Luppitt Tithe 1842*

58. The Order routes are not depicted on the tithe map except for a short section of OR61 in the vicinity of Stockers Farm which is shown as an enclosed track annotated 'road'. The apportionment shows that except for plot 1384 (which was in the ownership of Rev Cabell) most of the land crossed by OR60 was in the ownership of the Barnard family. The Barnard family are also recorded as being the owners of the land crossed by OR61, except for plot 1482 which is owned by the Feoffees of the Honiton Charity; no ownership details are given for the enclosed 'road'.
59. No conclusions as to the status of OR60 or OR61 can be drawn from the tithe documents.

*Finance Act 1910*

60. The Finance Act map is based on the second edition 25-inch to 1-mile OS plan. OR60 is shown as passing through hereditaments 1 and 16; OR61 is shown as passing through hereditaments 1, 157, 9 and 31. Hereditaments 1 and 157 are in the ownership of Arthur J Barnard, a life tenant. Hereditament 9 was owned by James Gear (a life tenant); hereditament 31 was owned by the Trustees of the Honiton Charity (a life tenant).
61. A reduction in site value of £50 was made for hereditament 1 for "Rt of Way Nos 1378, 1389, 1408 and 1417"; the site value of hereditament 31 was reduced by £10 on account of "Rt of way 1350, 1308" and the site value of hereditament 9 was reduced by £25 on account of "Rt of Way 1347 and 1349". It is not disputed that the numbers referred to accord with the OS field parcel numbers shown on the base map. The Ramblers contend that the reduction in site values was supporting evidence of a public right of way over OR60 and OR61; the Finance Act evidence suggesting that the valuer conducting the survey considered the routes shown to be public rights of way.

*Will of Rev James Bernard November 1822 and settlement of lands in Luppitt*

62. Settlement was a means whereby a landowner could protect the ownership of land for future generations, with the land passing to the eldest son as a tenant for life. The tenant for life could benefit from the rental income generated by the land but was unable to dispose of the land or grant rights over it without the agreement of the remaindermen or unless the provision to do so had been made in the entailing deed.

63. By his last will and testament, the Rev Bernard left his real estate in trust for the benefit of his successors as tenants for life. A copy of the will, proved on 20 February 1824, together with evidence of the further resettlement of the family estates in 1870 was provided by the objectors. With the exception of the parcel of land owned by the Honiton Charity and the land at Dumpton Hill, the land crossed by OR60 and OR61 formed part of the Bernard family estates from at least 1842 until at least 1910 (as demonstrated by the tithe apportionment records and Finance Act records considered above).
64. It was the objectors' contention that part of the land crossed by OR60 and OR61 was in strict settlement from 1824 until the sale of the Coombe Raleigh Estate in 1920 and that during this period the dedication of public rights over the land would not have been possible as a tenant for life had no capacity to dedicate.
65. The Ramblers case was that even if the land had been in strict settlement between 1824 and 1920, this would not preclude the dedication of a footpath prior to the land becoming settled. Furthermore, the Ramblers contend that the terms of Rev. Bernard's Will which allowed the Trustees to "*make sale alien and dispose of or to convey in exchange for or in lieu of other messuages lands or hereditaments*" demonstrated that the land bequeathed to Mary Bernard was land the Trustees acting on her behalf could sell and was not land subjected to any form of settlement.
66. I am not persuaded by the Ramblers submission on this point. The Will makes clear that the property bequeathed to Mary Bernard was left in trust to her as a life tenant with that life tenancy interest being entailed to succeeding male heirs: "*to the use of my dear Wife Mary Bernard and her assigns during the term of her natural life and from and after the decease of my said Wife to the use of my eldest Son James Bernard and his assigns....*".
67. Although the Trustees may have been able to sell or exchange land such activities would have been undertaken with the best interests of the life tenant in mind. Irrespective of this clause, there is no evidence that the land crossed by OR60 and OR61 was alienated at any time; the evidence from the tithe apportionment, Finance Act and plan of the eventual sale of the Coombe Raleigh Estate show that from 1842 until 1920 the land crossed by OR60 and OR61 remained the property of the Bernard family. On the evidence available to me, I consider it more likely than not that the land at issue remained settled land during that time either under the terms of Rev Bernard's will or under the resettlement of 1870.
68. The tithe and Finance Act records demonstrate that the land crossed by OR61 not in the ownership of the Bernard family was owned by the Honiton Charity. The terms on which the Charity held its land is not known and no conclusions can be drawn as to the ability of the Trustees of the Charity to dedicate a public right of way over its land.
69. It follows that during the period 1824 to 1920 there was no landowner with the capacity to dedicate a public right of way over much of the land crossed by OR61 and over most of the land crossed by OR60.

### *Survey of public rights of way under the 1949 Act*

70. OR60 was not claimed to be a single public right of way by the parish council under the survey, although parts of other routes claimed by the parish can be aggregated to show that OR60 was considered to be a public route. The paths which the parish council showed on its survey map which correspond with OR60 are paths 33, 36 and part of path 37.
71. Path 33 ran from point S to point Q and then on to Woodhayes Farm. The reason for claiming the route was public was given as "marked on old survey maps"; the parish survey card contains the word "Omit". Path 36 ran from Woodhayes to the road at point R. The reason for claiming the route was public was given as "marked on old survey maps"; the parish card contains the word "Omit". Path 37 was described as running from Shaugh Farm to the Coombe Raleigh parish boundary via Woodhayes; the parish council claimed that this route had been used by the public for 35 years.
72. The County Council of the day initially proposed that path 33 should be added to the draft map and that part of path 37 should be deleted from the draft map. The result of this proposal was for a route to run from point S to point Q, but which then ran south-west to the parish boundary via Knappy Woodlands. The routes claimed by the parish council to have run through Woodhayes were deleted from the draft map. It was also proposed to add a footpath from Wick to Shaugh Farm via Crown All Wood which would equate to OR61.
73. It is not known when or by whom the word "Omit" was added to the parish survey cards although it would seem that this took place at some point in 1960 as a letter dated 22 February 1960 from the County Council to the then occupier of Woodhayes states that the parish council were not proceeding with its claim regarding paths 33 and 34 (part of OR60 and all of OR61) and that the Ramblers Association and a Mrs E A Davey had failed to produce evidence of public use. In consequence the County Council had revoked its determination to add the paths to the draft map.
74. The basis of the parish council's claim that part of OR60 between point S and point Q was that the route was shown on old survey maps. It is highly likely that this refers to OS maps as opposed to the survey map prepared by the parish council under the 1932 Act as it is known that these routes were not included in that map.
75. No objection to the omission of OR60 or OR61 from the draft map was made by either the parish council or any pedestrian user group. From that it can be concluded that the parish council accepted that the routes were not in fact public rights of way.
76. The absence of any objection to the omission of the map from either the draft or provisional map stages of the process is in my view a significant factor which sits in the balance in favour of the objectors to the Order.

### *Other matter*

77. It was part of the objectors' case that use of OR61 along the western edge of Crown All Wood would not have been possible due to the presence of well-established trees which would have hindered passage. I saw from my site visit that the western boundary of the wood was marked by a hedge and ditch with several substantial trees growing on the wood side of the ditch. Whilst these

trees would prevent access if the claimed route was immediately to the east of the ditch, the 1903 OS map shows a double peck line path to be located away from the boundary. I found that it was possible to pass along the inside of Crown All Wood avoiding the trees on the edge of the boundary ditch. Irrespective of this, there is no evidence before me of OR61 having been used by the public.

## Conclusions

78. OR60 and OR61 are not shown on the tithe map and are first depicted on OS maps published in the early twentieth century. Although the Finance Act valuer may have considered that a public right of way crossed the land on the alignments of OR60 and OR61, the majority of that land was subject to a strict settlement or was otherwise owned by those with only a life interest in the land and therefore unable to dedicate a public right of way. In these circumstances, the Finance Act records cannot be evidence of dedication at common law as the Bernard lands had been settled since 1824. An inference of dedication prior to that date cannot be drawn as no evidence has been submitted to show that OR60 or OR61 existed or were in use by the public prior to that date.
79. Although it would have been possible for dedication of a public right of way to have arisen after the ending of the strict settlement in 1920, there is no evidence of use of these routes by the public. The Ramblers were unable to adduce such evidence as part of the survey process under the 1949 Act and the case in support of OR60 and OR61 is notable for the absence of any evidence of recent public use.
80. Although the Finance Act evidence provides evidence of the reputation of OR60 and OR61 as public rights of way, that evidence of reputation must be considered in the light of the fact that between 1824 and 1910 there had been no-one with the capacity to dedicate such rights. Any local reputation the Order routes had as public footpaths does not appear to have survived into the latter part of the twentieth century. Despite the parish council's initial claims, no evidence of use could be found to give substance to that claim.
81. Whilst the evidence adduced by the Ramblers is sufficient to support a reasonable allegation being made as to the existence of a public right of way over the Order routes, it does not, in my view, show on a balance of probabilities, that the claimed public rights of way subsist. It follows that I conclude that the Order should not be confirmed.

## Formal Decisions

### **Order A**

82. I do not confirm the Order

### **Order B**

83. I do not confirm the Order.

*Alan Beckett*

Inspector

## APPEARANCES

### For the Ramblers

Mrs Sue Rumfitt

Sue Rumfitt Associates, 161 Spring Road,  
Kempston, Bedford, MK42 8NR

### Who called:

Mrs Rosemary Kimbell

### For the objectors:

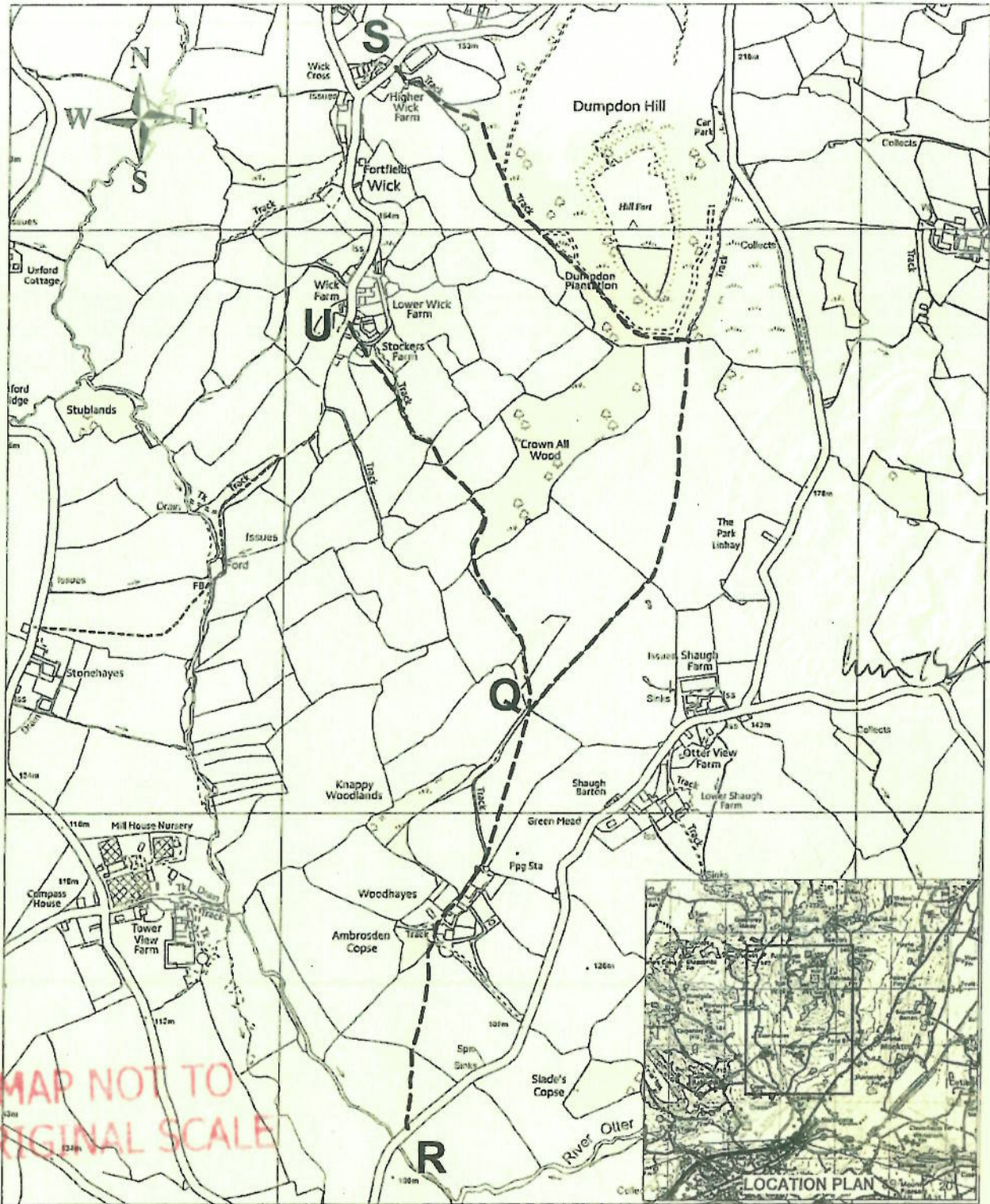
Mr Robin Carr

Robin Carr Associates, Meadow Barn, Main Street,  
Kneesall, Nottinghamshire NG22 0AD

### Inquiry documents

1. Opening remarks on behalf of the Ramblers.
2. Closing remarks on behalf of the objectors.
3. Closing remarks on behalf of the Ramblers.

QUASHED



MAP NOT TO ORIGINAL SCALE

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

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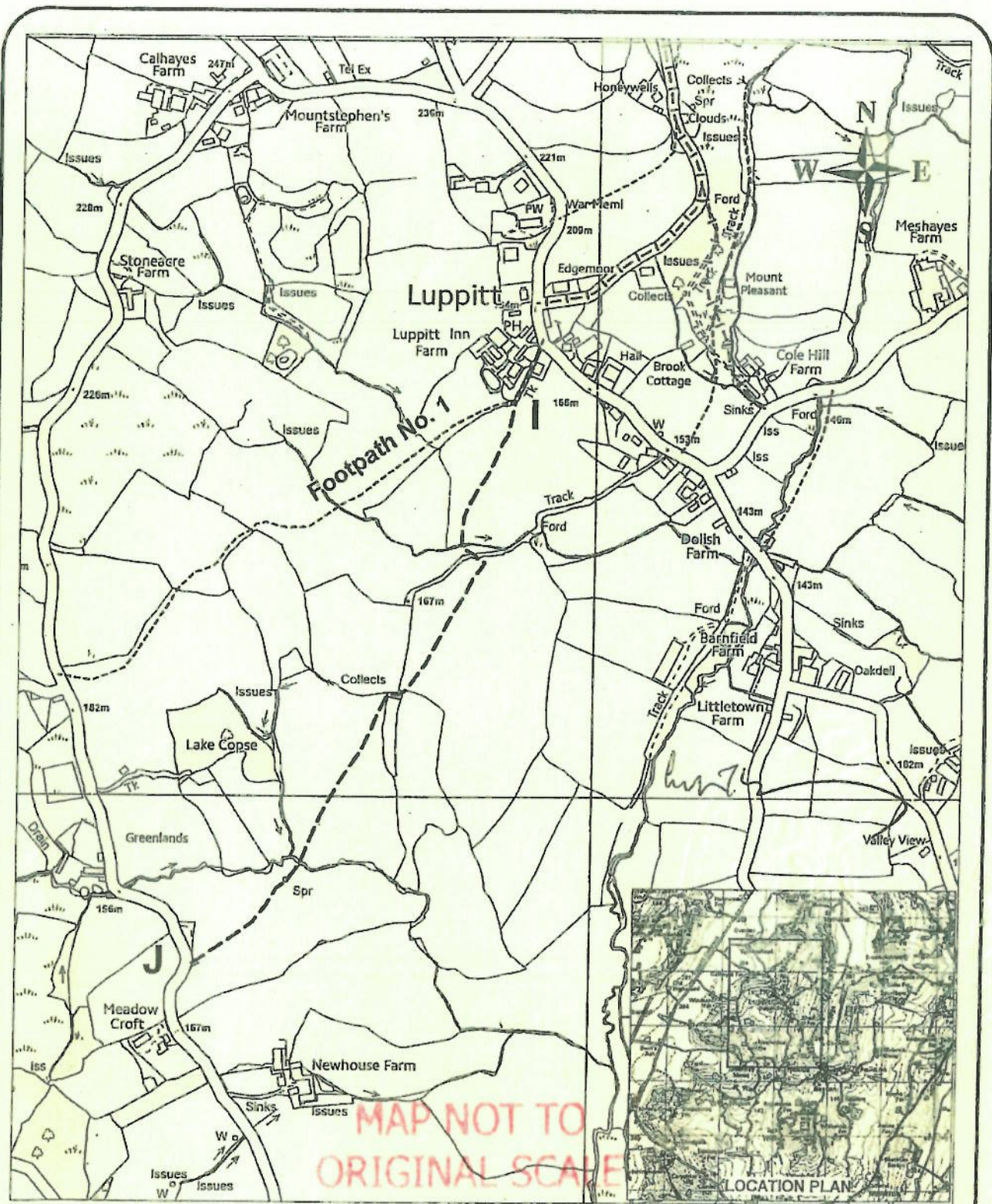
**DEVON COUNTY COUNCIL**  
**(Footpath Nos. 60 & 61, Luppitt)**  
**Definitive Map Modification Order 2017**

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

**Devon**  
 County Council



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

