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| **Order Decision** |
| Inquiry opened on 26 March 2024 |
| **by Nigel Farthing LLB** |
| **An Inspector appointed by the Secretary of State for Environment, Food and Rural Affairs** |
| **Decision date: 30 April 2024** |

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| **Order Ref: ROW/3303694** |
| * This Order is made under Section 53(2)(b) of the Wildlife and Countryside Act 1981 (the 1981 Act) and is known as The Cornwall Council (addition of Bridleways together with the upgrade of Footpaths to Restricted Byway and Bridleways at Fir Hill and Nanswhyden in the parishes of Colan and St Colomb Major) Modification Order 2021. |
| * The Order is dated 25 July 2021 and proposes to modify the Definitive Map and Statement (DMS) for the area by adding bridleways and upgrading footpaths to a restricted byway and to bridleways as shown on the Order plan and described in the Order Schedule. |
| * There were two objections outstanding at the date of the commencement of the inquiry. |
| **Summary of Decision: The Order is not confirmed.** |
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Preliminary Matters

1. I held an inquiry at Victoria Offices and Conference Centre, Station Approach, Victoria, St Austell commencing on 26 March 2024. I made an unaccompanied site visit on the afternoon of 25 March. I made a further site visit on the morning of 27 March accompanied by representatives of Cornwall Council (“the Council”) and the Objectors.
2. This Order concerns what is in effect a single route which it proposes should be recorded on the DMS in part as a restricted byway and in part as a bridleway. Much of the Order route is currently recorded on the DMS as a footpath and the Order proposes that the relevant sections of this footpath should be upgraded as appropriate.
3. Two objections to confirmation of the Order were recorded which have not been withdrawn.
4. In this decision I have found it convenient to refer to the Order map and for ease of reference a copy is attached. The Order map is annotated with points A to I which I shall refer to in this decision.

**The Main Issues**

1. The Order has been made under sections 53(3)(c)(i) and (ii) of the 1981 Act which requires me to consider whether evidence has been discovered which, when considered with all other relevant evidence available, shows that a right of way which is not shown on the DMS subsists, or is reasonably alleged to subsist or that a highway shown on the DMS as a highway of a particular description ought to be shown as a highway of a different description.
2. At this confirmation stage a reasonable allegation is not sufficient, and the right of way must be shown to subsist. The standard of proof is the balance of probabilities.
3. The Council, in making the Order, rely in part upon a presumption of dedication arising further to the tests laid down in Section 31 of the Highways Act 1980 (the 1980 Act).
4. Accordingly, I must establish the date when the public’s right to use the Order routes was brought into question. The evidence must then be examined to determine whether there has been use by the public and that such use has been as of right and without interruption for a period of not less than 20 years ending on that date. Finally, it is necessary to consider whether there is sufficient evidence that there was no intention on the part of the landowners to dedicate public rights during this 20-year period.
5. In the event that the requirements for a presumption of dedication under the 1980 Act are not met, I will need to consider whether there is sufficient evidence for an inference of dedication at common law.
6. In relation to the section of the Order route which is sought to be recorded as a restricted byway, I shall need to consider whether the evidence shows that the route has the status of a vehicular highway but the right to use it with mechanically propelled vehicles has been extinguished by the provisions of the Natural Environment and Rural Communities Act 2006 (NERC).

Reasons

***Site visit***

1. I made an unaccompanied site visit in the afternoon of 25 March. It had been raining very heavily all day and continued to do so throughout my visit.
2. I began my visit at point A at the southern end of the route near St Colan Church. The entrance to the route is on a right-angled bend of the C296. The route sets off in a north-north-easterly direction through a pair of brick pillars which have the appearance of gateposts, but there was no gate or other barrier. There was a gap to the west of the western pillar of sufficient size to permit comfortable pedestrian access.
3. Beyond the brick pillars the route has the appearance of a vehicular track with a stoned surface and raised banks on either side with trees growing on the banks. Between points A and B the track is broadly level. At point B the route turns gently to the east. On my unaccompanied visit I was unable to identify any feature to mark point B, but on the subsequent accompanied visit the landowner pointed out a small concrete pad which he believes was the base for a gate post that had been there at some time in the past.
4. From point B onwards the route slopes downwards. The extent of tree cover to the sides increases giving a sense of an enclosed lane. At point C the track deviates to the left, away from the line of FP 4 Colan (FP4). The deviation is very short with the track arcing back to the footpath alignment at point D. The footpath route is no longer apparent, and it is not clear why this deviation has arisen, but the Order map plots the route now in use.
5. From Point D the track continues downhill and narrows slightly. The surface still shows signs of stone but is generally muddier, especially after the Fir Hill development is passed. Shortly before point E is reached the track veers to a northerly direction and narrows further as it approaches the bridge across the stream. The bridge is in two parts, the older, narrow brick structure alongside which is a wooden footbridge which, at the time of my visit, was in a dilapidated state and was taped off to prevent use. Shortly beyond the bridge is a stile with a small five bar gate to the side. At the time of my visit the gate was closed but not locked.
6. Beyond the stile I encountered at point E a further stream which seemed to have arisen by reason of the main stream having broken its bank. At the time of my visist the main stream was in spate as a result of the exceptional rainfall, and the subsidiary stream was a torrent which I did not feel I could cross without it overtopping my wellingtons. Consequently, I returned to point A along the route I had come.
7. I made an accompanied visit on 27 March when I first repeated the route I had taken on my unaccompanied visit. By this time the stream had abated but it was still too wet to cross the subsidiary stream at point E. The section of the Order route north of the stream was thus accessed from Nanswhyden Farm.
8. From point E the route continues in a northerly direction over wet and boggy ground to point G where the Order route deviates from FP 45 St Columb Major (FP 45). FP 45 continues more or less due north in a straight line across rough grass which was being grazed by cows and calves. The FP 45 route is quite steep. The Order route in contrast deviates to the margin of the field with a more gentle incline to point H. Between points G and H The Order route is a distinct feature with a bank to the west on which trees and scrub grow. The Order route appears as a level track with the ground rising to the east, giving the route the impression of being a slightly sunken lane. The definition of the feature is lost as point H is approached, although there is evidence of some residual stone throughout the length of the route. At point H the Order route rejoins FP 45 for the short distance to point I where it meets the U6092.

***User evidence***

1. The application for a modification order was supported by 18 user evidence forms (UEFs). These gave evidence of use on horse and on foot over varying periods between 1951 and 2012. Subsequently a further 12 forms were submitted covering a period from 1973 to 2019. Evidence of pedestrian use is relevant only to the sections C to D and G to H as the remainder of the Order route is recorded on the DMS as FP 45 and such use was therefore by right.

Twenty-year period

1. For the purposes of a statutory presumption of dedication under section 31 of the 1980 Act it is necessary to establish when the right of the public to use the route as a bridleway was first brought into question. There was agreement between the parties that the date should be 1989, being the date when the stile was erected at point E. Other dates were considered including 1981, when the evidence suggests that a gate may have been in place on the route. The evidence for this or other possible dates is lacking in precision, and I am therefore content to adopt the date agreed by the parties and thus to define the relevant period as 1969 to 1989.

Use as of right

1. Use is only as of right if it is undertaken without force, secrecy or permission. In this case there is no suggestion that use was undertaken in secret, but one objector, who owns the land between points E and I, asserts that some users were given permission to ride over his land and that some others were challenged by him and his father, thus rendering their use contentious.
2. The objector states that permission was given to one user who claims to have ridden the route in the early years of the relevant period. That user was an employee on the objector’s farm at the time. The user does not acknowledge that his use was permissive, but he did not give oral evidence at the inquiry, and it was not possible to test the credibility of his evidence.
3. The objector also states that permission was given to various named individuals, the local hunt and various organised group rides to ride over his holding including the Order route.
4. The objector states that his father challenged two users who claim to have ridden the route throughout the full 20-year period. Both users deny being challenged, but neither gave evidence at the inquiry and it was therefore not possible to test the credibility of that evidence.

Sufficiency of use

1. For a statutory presumption of dedication to arise the evidence must demonstrate, on a balance of probabilities, that the Order route was throughout the full 20-year period used without interruption by a sufficient number of people to bring to the attention of a reasonable landowner that a right to use the route on horseback was being asserted.
2. Analysis of the UEFs shows that in 1969 there were five claimed users. Of these the relevant objector states that the two claiming most frequent use were those who were regularly challenged by his father, a third was the user referred to in the preceding paragraph who worked on the farm and whose use is claimed to be permissive and a fourth has indicated that she used FP 45 rather than the Order route between points G and H. The final user claimed to have used the route 7 or 8 times per year in the period 1968 to 1971. In 1970 one further rider claims to have used the route regularly.
3. The level of claimed use increased throughout the twenty-year period such that by 1989 there were 13 users, but analysis of the UEFs shows that four (including the user referred to above) indicate use of a route other than the Order route between points G and H and one user has not indicated any route on the map. Two of the users at that time were the same two who the objector states were challenged by his father. The frequency of use varied significantly with one user claiming use only once or twice a year.
4. Two users gave oral evidence at the inquiry. One had ridden the route from 1974 to 2014 approximately 12 times per year, sometimes with others. She acknowledged that she sometimes followed the Order route between points G and H (which she referred to as ‘the coach road’) and sometimes rode the route of FP 45. She recalled a milestone at point E. She described crossing the stream using a ford just to the east of the bridge. She did not recall any signs on the route but did recall a gate at point A, which she understood had been installed at a time when Fir Hill was being used for illegal raves, but she was able to bypass this through the trees. She denied that she had ever been stopped or challenged.
5. The second witness gave oral evidence of use on horseback between 1972 and 2013, approximately 12 times per year, sometimes with others. She may have seen other riders on the route, but her memory was of it being a peaceful place. She had generally used the Order route between points G and H but had galloped along the FP 45 route although she thought this was mainly when she was older (she was a child riding with her mother when she began using the route). She had used both the bridge and the ford to cross the stream at point E. She remembered a gate at this point but not at point A. She said she had not been challenged when riding the route but had not encountered the landowners. She did not recall seeing any signs on the route.
6. Some witnesses refer to using the Order route from A but not continuing over the stream to Nanswhyden, instead either accessing the woods to the south of the stream or returning by the route they had come.
7. One objector disputed the extent of use claimed by some of those who had completed evidence forms. He also challenged the route taken by some, stating that one particular user, who was a neighbouring landowner, had been confronted when riding at various locations on the farm. He disputed her claim to have used the Order route 300 times and he was certain that she had not used the Order route between G to H, instead using the FP 45 route or any other route across the field as she chose. Her UEF refers to riding over the land for the purposes of “seeking livestock” and states that the landowner “allowed riding”, suggesting she believed her use was permissive. In contrast the objector says her use was challenged, rendering it contentious. Without being able to test the evidence through cross-examination it is not possible to reach any firm conclusions, although whether permissive or contentious the use would not be as of right.

Lack of intention to dedicate

1. Evidence of a lack of intention on the part of the landowner to dedicate the Order route as a bridleway would preclude any statutory presumption of dedication from arising. To constitute an effective demonstration of a lack of intention to dedicate the landowner, during the relevant twenty-year period, must have acted in a way which would have brought home to users of the route that he did not wish it to become a public bridleway.
2. There is evidence that the landowner of the section of the Order route E to I challenged horse riders on the route. This evidence is contested, although there appears to have been a recognition after the relevant twenty-year period had expired that horse riders were not welcome on this land.
3. There is photographic evidence of a sign that was displayed on a tree alongside the Order route in the vicinity of point A. The sign read:-

Hoblyn Estate

PRIVATE

No motor vehicles

Footpath only

One of the Objectors appears in the photograph and his evidence was that this was taken in 1983 or 1984. This evidence was not challenged other than by users stating they had not seen the sign. I accept that the sign was present within the relevant 20-year period.

1. There was broad agreement that the sign had the appearance of age, but there was no evidence of when or by whom it was installed or how long it was present. In my judgement the wording of the sign was sufficient to demonstrate that the landowner sought to prevent any use of the Order route other than by pedestrians.
2. There is evidence that at some point in time there was a gate or barrier at the entrance to the Order route at point A and that this was locked, but a gap was maintained at the side to afford pedestrian access. It would seem that this gap was not sufficient to allow a horse rider to pass as various users refer to having by-passed the barrier using a route through the trees to the east of the track. No evidence was available as to the date when the barrier was installed, who by or for what purpose. It was generally thought this was in the 1990s, thus outside the twenty-year period, and at a time when illegal raves took place at Fir Hill.
3. Whilst there is some evidence of a gate or barrier at point B there is no clarity about its nature, when it was in place or what impact it had upon use of the Order route and accordingly, I can attach little weight to this.

Conclusions on user evidence

1. There are a number of issues with the user evidence. In absolute terms the user in the early years of the twenty-year period, when taken at face value, is barely sufficient to represent use by the public. This level of qualifying use is then diminished when the issues of use by permission, contentious use and use of differing routes between G and H and through the ford are brought into account. I recognise that the questions of permission and challenge are contentious, and it would have been helpful for the user evidence to have been tested through cross-examination.
2. The fact that only two users gave evidence at the inquiry prevented me from having a meaningful opportunity to reach a conclusion as to the reliability of the evidence presented in the UEFs. I am mindful also that these contentious issues were apparent from the objections and the statements of case. I am further mindful that the burden of proof is with those proposing confirmation of the Order. Given the lack of clarity over these issues I am driven to conclude that there is insufficient evidence of qualifying use to give rise to a presumption of dedication under section 31 of the 1980 Act.
3. Given my finding in the previous paragraph it is not necessary for me to reach a conclusion on the question of lack of intention to dedicate but for completeness I will address that evidence. I have concluded that the sign at point A was capable of demonstrating a lack of intention to dedicate a bridleway on the part of the owner of the land between points A and E. Whilst the evidence in relation to the sign is lacking in some detail, I have accepted that the sign was in place in1983 or 1984 and that it had probably been there for some time. In my view that would be sufficient to demonstrate a lack of intention to dedicate during the relevant 20-year period. I do not find the evidence in relation to gates or barriers sufficiently precise to be relied upon for this purpose.

***Documentary evidence and common law***

1. The Order was made under section 53(3)(b) of the 1981 Act and relies upon both user evidence and historical documentary evidence.

Greenwood’s Map(1827)

1. The earliest representation of the Order route is on Greenwood’s map of 1827. The scale of the map and available surveying techniques mean that this map does not show the detail of later mapping, but a route is shown which corresponds closely with the Order route. It is shown as a through route from Colan to Nanswhyden and is depicted in the same manner as other roads which are now part of the local highway network. A separate route is depicted in the same manner running due west from point E. This route is not today recognised as a public right of way of any description.

Ordnance Survey (OS) Maps 1810 - 1961

1. A series of OS maps from 1810 to 1961 have been produced in evidence. All show the Order route as a defined feature with the section A to E depicted in the main with solid line boundaries and the section E to I with one solid and one pecked line boundary.
2. The 1888 and 1907 6” editions show the C296 with one thickened boundary line, usually regarded as indicating a metalled surface. In contrast, no part of the Order route is shown with similar thickening. Interestingly, FP 45 is also shown with double pecked lines and is annotated “FP”. Both editions show benchmarks on the Order route, and both (and the 1951 edition) are annotated “MS” at point E which is the parish boundary. “MS” indicates a milestone. The maps state that the milestone was inscribed “St Colomb Major 3 Colan Church 1”. Various witnesses recalled the milestone and mentioned it in their evidence. One witness thought it might still be in situ, but it was not apparent on the site visit.

Colan & St Colomb Major Tithe Maps c.1840

1. The Tithe Maps for the parishes of Colan and St Colomb Major depict a route corresponding with the Order route. It is shown as a defined track with a combination of solid and pecked line boundaries and braced into the parcels of land being crossed which are stated to be in private ownership. The route is not coloured and thus is shown as subject to tithe payment.
2. The depiction of the Order route on the Tithe Maps would indicate that the route was not considered to be a vehicular highway but is consistent with either a private accommodation way or possibly a public right of way of a lower status. The physical characteristics of the route depicted suggest a route capable of carrying vehicular traffic.

Finance Act 1910

1. The district valuation maps prepared pursuant to the Finance Act 1910 show the section of the order route A to B uncoloured and thus excluded from taxable hereditaments. The remainder of the route is shown within coloured, and thus dutiable, hereditaments although in respect of each such hereditament a deduction is made for public rights of way.
2. The Provisional Valuation forms (Form 37) do not particularise the rights of way for which deductions are made, nor their status. The only relevant reference in the Field Books is in relation to hereditament 20 in the parish of Colan where under “Charges, Easements, and Restrictions affecting market value of the Fee Simple” it records “Footpath”.
3. The depiction of the section A to B is relied upon by the Council to support that part of the Order which seeks to record this as a restricted byway. The exclusion of a road from taxable hereditaments can be good evidence that at that time the route in question was considered to be a vehicular highway. Other explanations are however possible, one being that the route was an occupation road used in common to access private land or properties.

Highway Maintenance Records

1. No evidence has been produced to suggest that any part of the Order route has been maintained at public expense.

Definitive Map Record

1. The Parish Survey, carried out in 1951 shows that the Order route A to E was initially claimed by Colan Parish Council (PC) as a bridle path, but this was subsequently amended to a footpath. The reason for the change in attribution is unknown.
2. The survey undertaken by St Colomb Major PC shows that the route now recorded as FP 45 was claimed as a footpath. This route coincides with the Order route between points E and G and between H and I. No claim was made in respect of the remainder of the Order route lying within this parish, being the section G to H.

Reputation

1. Some witnesses referred to the Order route, specifically the section E to I, as ‘the coach road’ or a ’cart road’ and suggested anecdotally that it had been used by the local clergyman to travel by carriage from Nanswhyden to St Conan church for services.
2. The presence of the milestone on the route is an interesting feature of the evidence. No authority was given as to the implications of this. I understand that the parties accept it would be unusual for a milestone to be present on a route which was not a public right of way. The evidence of the OMA was that they had not encountered a milestone on a footpath but there was no evidence that prevented such an occurrence, and as a matter of common sense it is just as important for a pedestrian to know the distance to their destination as it is for a horse rider or carriage driver. Nonetheless I accept that the presence of the milestone might be suggestive of a public right of way at a status higher than footpath.

Conclusions on documentary evidence

Bridleway

1. The documentary evidence shows that the Order route has existed as a physical feature since at least the early nineteenth century and that the route has had the physical characteristics commensurate with something more than a footpath, and possibly capable of carrying vehicular traffic.
2. None of the evidence considered is conclusive as to the status of the Order route. My task is to weigh all the evidence, some of which is conflicting, and to determine whether, on a balance of probabilities, it demonstrates that the Order route B to I has the status of a bridleway. The burden of proof rests with the OMA who propose confirmation of the Order.
3. Greenwood’s Map depicts the Order route in the same manner as other routes known as vehicular highways and for this reason can provide supporting evidence of status and I must give some weight to this. However, Greenwood also included, in the same manner, routes which today have no public status and this must limit the weight that I can attach.
4. OS mapping is regarded as an accurate record of physical features but generally carries a disclaimer that it does not purport to distinguish public rights of way. The OS evidence demonstrates that the route has been in existence since at least the early nineteenth century and had characteristics consistent with vehicular use.
5. Tithe Maps can provide supporting evidence of status, but in this case the depiction of the Order route is counter-indicative of public vehicular status and is more suggestive of the Order route existing as a private accommodation way, although with the possibility of lesser public rights.
6. The depiction of the Order route B to I on the Finance Act map as within taxable hereditaments, with only a deduction made for public rights of way, suggests that the route was not considered to be a vehicular highway. The deductions made cannot be specifically attributed to the Order route and do not indicate the status of the route for which the deduction was made. Insofar as this evidence gives any clues as to status, the Field Book refers to “Footpath” which would not support the claimed bridleway status.
7. The evidence of reputation is not consistent. The description of the route as a ‘coach road’ is not supported by any of the documentary evidence except perhaps Greenwood’s map and that is dated only 13 years before the Tithe maps which do not support vehicular status for any part of the route. The presence of the milestone may be suggestive of a public right of way of higher status than a footpath but the evidence relating to the compilation of the first DMS shows that by the mid-twentieth century the Order route A to E was considered to be a footpath (an initial attribution of bridleway status to the section A to E having apparently been considered and rejected). The Order route G to H was considered not to be a public right of way of any description.
8. There is no direct documentary evidence suggesting specifically that the Order route is a bridleway. Having concluded that the evidence of use is insufficient to give rise to a statutory presumption of dedication, it is appropriate to consider that evidence along with the documentary evidence when considering the position at common law. In this case I do not find that the user evidence assists me. Only five people give evidence of use prior to 1969, three of whom the objector states were challenged, one whose map suggests that the Order route was not used between points G and H, and the final user having commenced use in 1968. Accordingly, the evidence does not provide me with any picture of bridleway use of the route prior to the period previously considered. The fact that the first DMS recorded the route either as a footpath or not at all suggests that any use at that time other than by pedestrians was no more than negligible.
9. I conclude that there is insufficient evidence for me to find on a balance of probability that the Order route B to I has any status higher than that currently recorded on the DMS.

Restricted Byway A to B

1. The only evidence which supports the section of the Order route A to B having the status of a vehicular highway (and thus by virtue of the NERC Act now a restricted byway) is the depiction on the Finance Act map. Save for Greenwood’s map there is no other documentary evidence suggesting the Order route as a whole has vehicular highway status, and there is no evidence suggesting a different status for the section A to B from the remainder of the route.
2. Confirmation of the Order would create a cul-de-sac section of restricted byway terminating at point B. When considering the Finance Act map evidence, it is necessary to have regard to the context and to seek an explanation for a cul-de-sac highway terminating at point B. There is no obvious explanation for this to be a vehicular highway, although such cul-de-sacs do exist. The 1881 and 1907 OS sheets show a spur from the Order route at point B, apparently serving to give access into the parcel of land to the east. It is difficult to interpret from the evidence whether the various parcels of land at point B were in the same, or different ownership or occupation but there is the possibility that the route A to B was used in common for the purposes of vehicular access to these adjoining lands.
3. There is no evidence of public vehicular use of A to B other than one witness who refers to having driven ‘down to the bridge when courting’ and a second witness who refers to having driven from point A ‘as far as the ruins of the old farmhouse on the right’. Neither refers to using it as a through route, and neither refers to there being any difference between the route A to B and the remainder of the route.
4. I recognise that the treatment of A to B on the Finance Act map could be good evidence of public vehicular status and if other evidence were consistent with that status the argument would be compelling. In this case however the other evidence is not suggestive of public vehicular status. There are other possible explanations for the exclusion of this section of the route from the Finance Act map and I am not satisfied, on a balance of probability, that the status of the route is incorrectly recorded on the DMS

**Overall Conclusion**

1. Having regard to these and all other matters raised I conclude that the Order should not be confirmed.

**Formal Decision**

1. I do not confirm the Order.

Nigel Farthing

**Inspector**

**APPEARANCES**

For the Council Mr Bradbear, who called:-

Mrs E Walker

Mrs C Wilson

Mrs J Heane

For Mr C Baker Mr C Tofts who called:-

Mr C Baker

Mrs N Gale

Mrs E Knight

Mr C Hoblyn

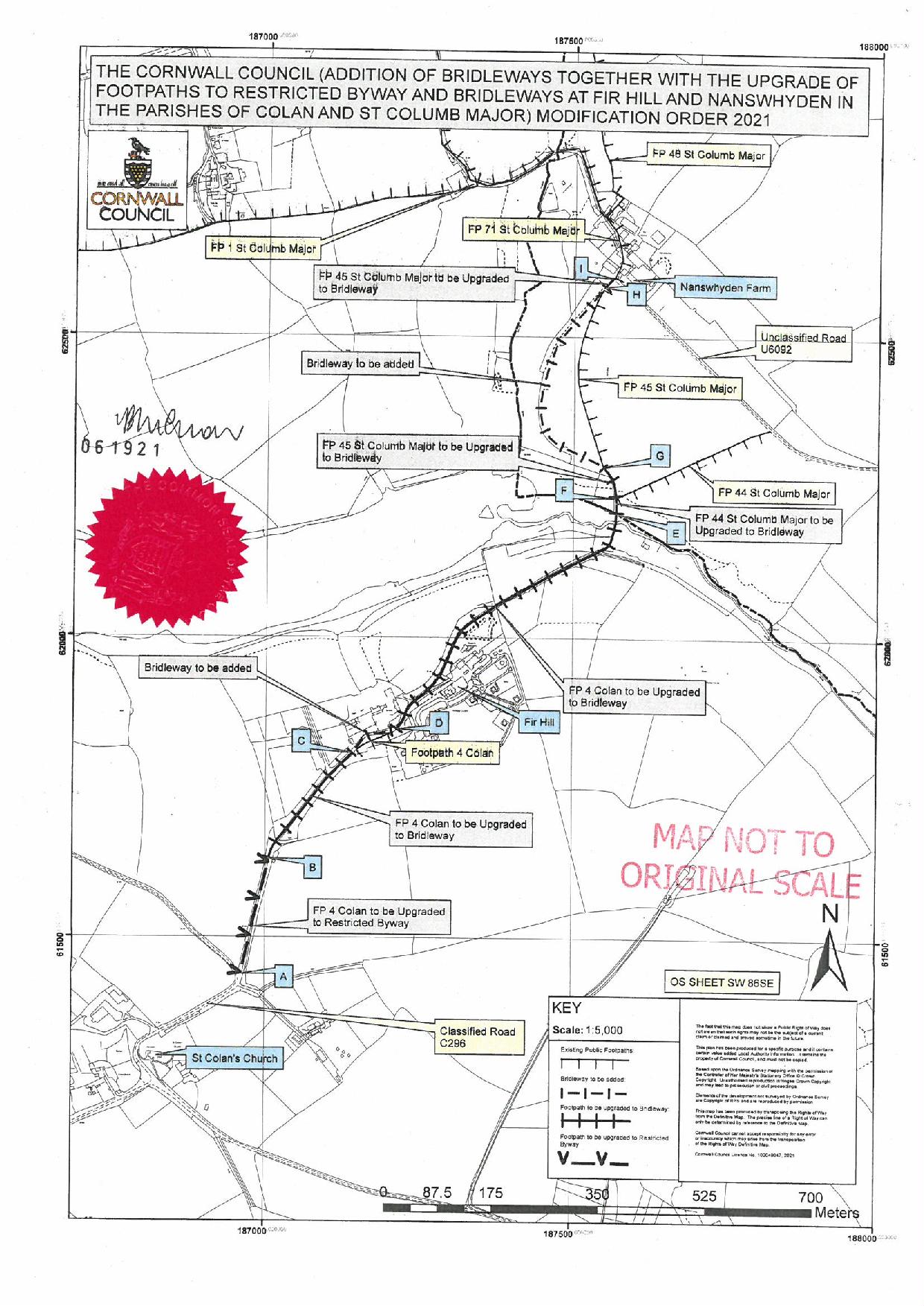
**DOCUMENTS PRODUCED AT THE INQUIRY**

Inquiry bundle

Council opening statement

Objector’s closing submissions

Council closing submissions

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