

**Research Report to the Assistant Director,
Environment and Place**

**Applications for a
Definitive Map Modification Order to: -**

**ADD A BYWAY TO THE DEFINITIVE MAP AND STATEMENT
IN THE PARISH OF CLIFFORD
[REF: M309]**

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EXECUTIVE SUMMARY

Herefordshire Council is the surveying authority for rights of way and has a duty under section 53 of the Wildlife and Countryside Act 1981 (WCA) to keep its Definitive Map and Statement under continuous review and to modify it by Order where evidence is discovered which shows: -

- That a route not recorded in the map and statement should be so recorded
- That a route of a particular description ought to be recorded with a different description
- That a route currently recorded is not a right of way and ought not to be shown at all

An application submitted in 2007 by Mrs G L R Smith seeks to add a byway to the Definitive Map and Statement in the parish of Clifford as shown between points A – B and to up-grade the existing footpath CL44 between point B-C on the plan at **FIGURE 1**. The application was supported by 37 user evidence forms showing public use for periods in excess of 20 years and in this case the Council must consider if it is requisite as a consequence of the occurrence of an event, to modify the Definitive Map. The events are specified in WCA s53(3):-

S53(3)(b) “the expiration, in relation to any way in the area to which the map relates, of any period such that the enjoyment by the public of the way during that period raises a presumption that the way has been dedicated as a public path....”

S53(3)(c)(i) “that a right of way which is not shown in the map and statement subsists or is reasonably alleged to subsist over land in the area to which the map relates, being a right of way such that the land over which the right subsists is a public path.....”

Under the Highways Act 1980, s31:-

“where a way over any land, other than a way of such character that use of it by the public could not give rise at common law to any presumption of dedication, has been actually enjoyed by the public as of right and without interruption for a full period of 20 years, the way is deemed to have been dedicated as a highway unless there is sufficient evidence that there was no intention during that period to dedicate it....this (20 year) period is to be calculated retrospectively from the date the right of the public to use the way is brought into question....”

Evidence of the existence or non-existence of a public right of way normally takes the form of documentary evidence, such as evidence from historical documents and maps and / or evidence of actual use by the public. The weight given to documentary evidence is a matter of judgement in each case and depends upon such matters as the antiquity of the document, the status of the person by whom it was compiled, the purpose for which it was prepared and the custody in which it has been kept and from which it is produced.

The Council is under a duty to consider all other relevant evidence as well as any provided by the applicant.

In this case little documentary evidence was discovered for the addition and upgrade of the route from A-B-C. Little or no user evidence was supplied to show that the route of footpath CL44 (B-C) should be upgraded to a byway and it is recommended that the application made by Mrs Smith should be rejected. However, there is evidence that a number of users (18) used the section between A and B through the yard of Llanerch-y-coed without force, secrecy or permission for a period of not less than 20 years, without interruption, prior to the calling into question of the route. Of the 18 users, the evidence supplied suggests that the majority were using the route on horseback as a bridleway to access the Little Mountain Common and so on the balance of probabilities it is concluded that the evidence in this case is sufficient to raise the presumption referred to in 53(3)b and that as a consequence the council should make and advertise an Order to add a bridleway to the definitive map for the route between points A and B.

DETAILS OF THE APPLICATION

1. On 29th January 2012 Mrs G L R Smith submitted an Application to Herefordshire Council as follows: -

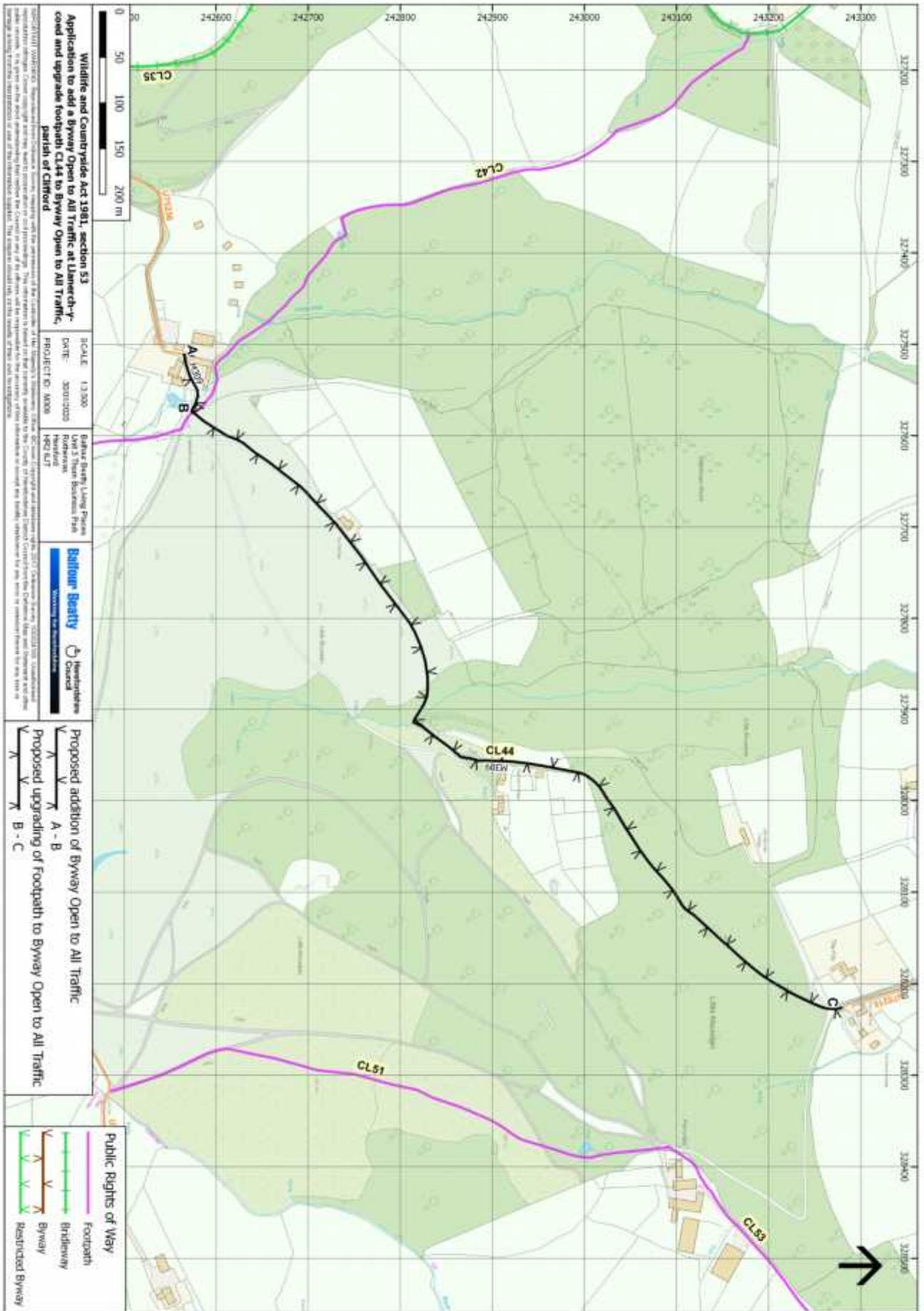
To add a byway to the Definitive Map and Statement in the Parish of Clifford (indicated as section A – B on the plan at **FIGURE 1**) and to upgrade footpath CL44 to a byway (B-C on the plan at **FIGURE 1**) (*File Reference: M309*)

2. The application is made under section 53(2) of the Wildlife & Countryside Act 1981.
3. The plan at **FIGURE 1** shows the claimed route which is all in the Parish of Clifford.
4. The route A-B passes through the land belonging to Llanerch-y-coed, the land over which B-C passes is registered as Little Mountain Common.

Note – the application is principally concerned with the addition of a route through the farmyard currently known as Llanerch-y-Coed. The Farm has historically been titled Llan-y-Coed, Llanygoed and Llan-Coed and all of these names are used within the report depending on how the farm is titled in the documentary evidence being referred to.

Although the applicant has applied for the Modification Order on the grounds of user evidence, by supplying 37 completed user evidence forms, the Council is under a duty to investigate all available evidence. The findings are set out below.

Figure 1
Location Plan



DESCRIPTION OF THE ROUTE

Points A B C are referenced to the map at Figure 1

5. The claimed route commences at the junction at the County Road U75236 at point A where a field gate exists between two buildings. The route then continues in an easterly direction through the yard area to the front of Llanerch-y-coed farmhouse passing for approximately 39 metres to a further field gate at point B. From this point the route follows the existing public footpath CL44 across the Little Mountain Common in a generally north-easterly direction for approximately 1057 metres to the County Road U75210 (point C on the map in Figure 1) Images of the claimed route taken in November 2018.



I. point A field gate between two buildings (shown open).



II. looking back westwards towards point A showing gate.



III. from Llanerch-y-coed yard area looking towards common and point B



IV. from point B following claimed route across common



V. view of claimed route continuing across common



VI. View from point C along existing footpath CL44

DOCUMENTARY EVIDENCE

6. *Section 32 of the Highways Act 1980* sets out how any 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.

Tithe Maps

7. Traditionally, tithes were one tenth of a farmer's annual produce which was taken to support the Church. Under the Tithe Commutation Act of 1836 this was converted to a money rate, which was simpler to administer. In each parish, Tithe Commissioners were appointed to oversee a survey to assess the productive value of each field and a map and schedule was drawn up to record the results of the survey. Each field was given a reference number on the map which referred to an entry in the schedule.
8. Although not directly concerned with recording highways or rights of way, important inferences can be made from Tithe maps and accompanying apportionments and schedules. For example, roads are frequently excluded from the tithable area because they were considered not to produce a tithable crop. This must be balanced up, however, by a consideration that there was no requirement to show private roads any differently from public ones.

9. The original maps and apportionments, sealed and approved by the commissioners were retained by the Tithe Commissioners kept at the National Archive. Two other copies were ordered to be made, one lodged with the parish and one with the Diocese. Experience suggests a high degree of accuracy in the production of these maps which were important for taxation purposes and prepared under a statutory process. In that sense they are valuable evidentially.

Clifford Tithe Map (1847)

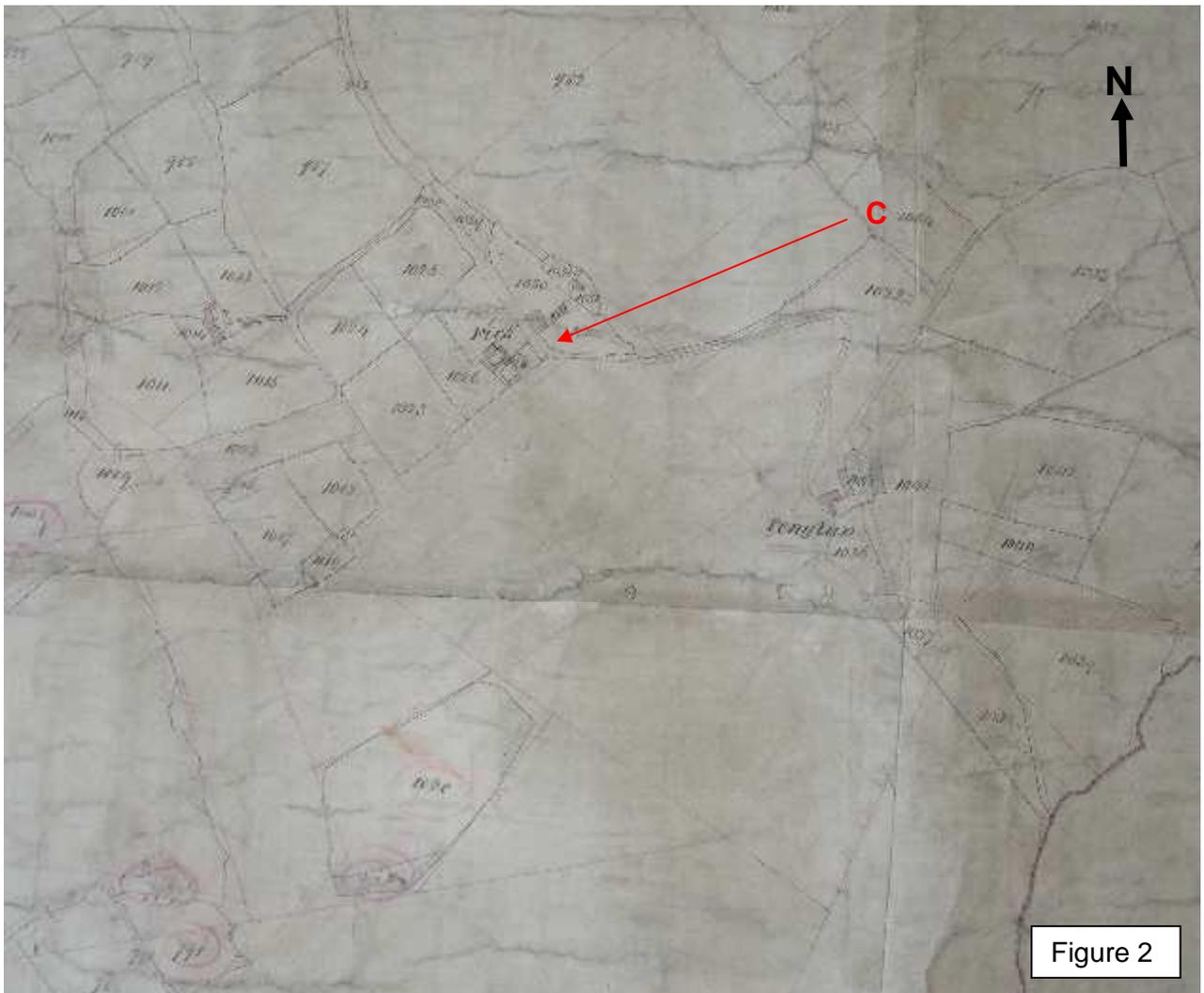


Figure 2

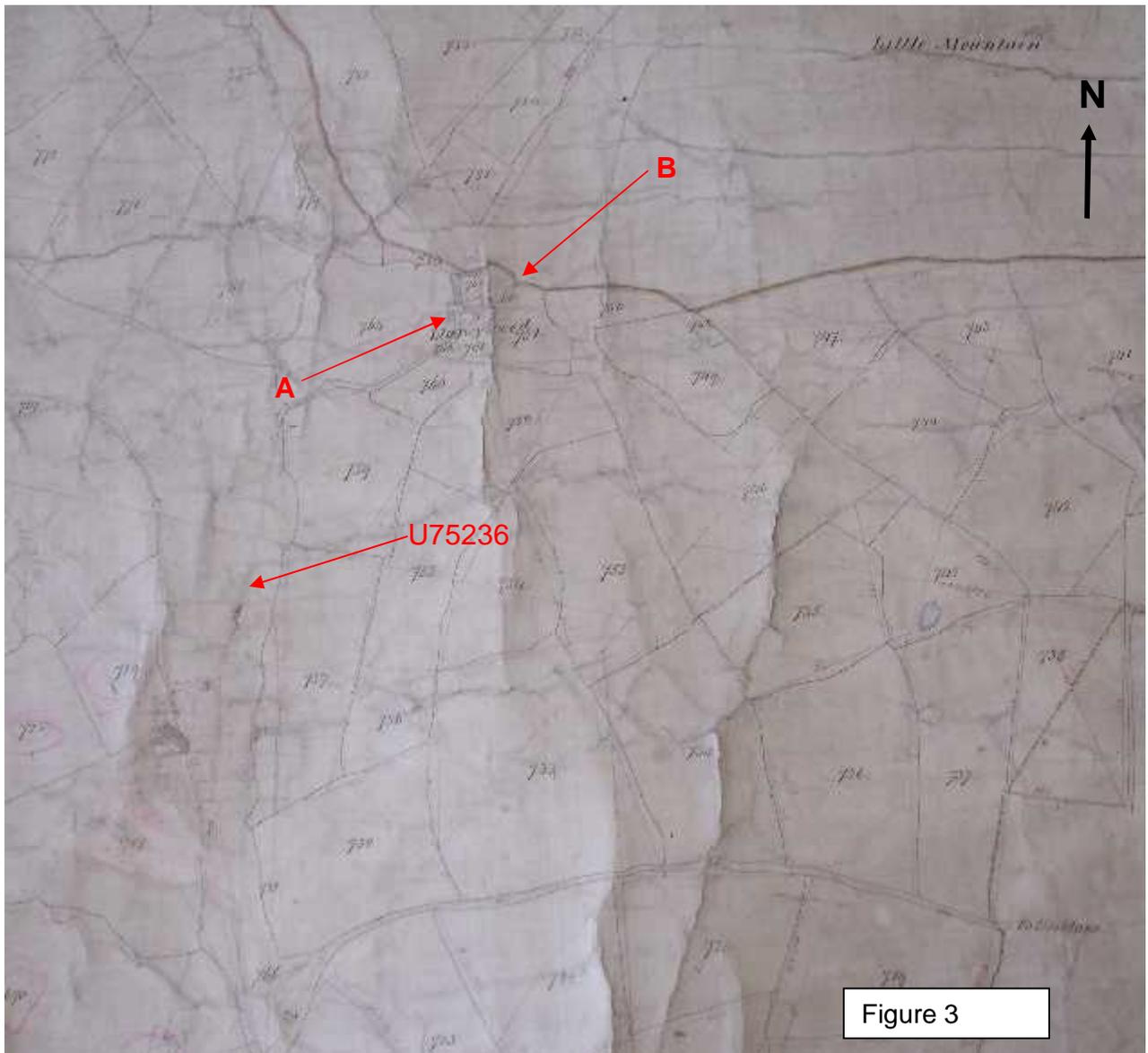


Figure 3

10. The Clifford Tithe map held in the Herefordshire Record Office (Figures 2 and 3) shows the existing road up to Llan-y-coed (U75236) as enclosed with a dashed line either side approaching the farmstead. This is numbered as 730. Where it is enclosed with solid black lines it is numbered 763, it then returns to dashed lines through the 'yard' of Llan-y-coed and either side is numbered as 762. See figures 2 and 3.
11. The apportionment book indicates the numbers and the parcel of land that they refer to.
12. 730 is marked as a 'road' within the road section of the apportionment (see Figure 4).
13. 763 is also marked as 'road'.
14. 762 is simply marked as 'homestead'.

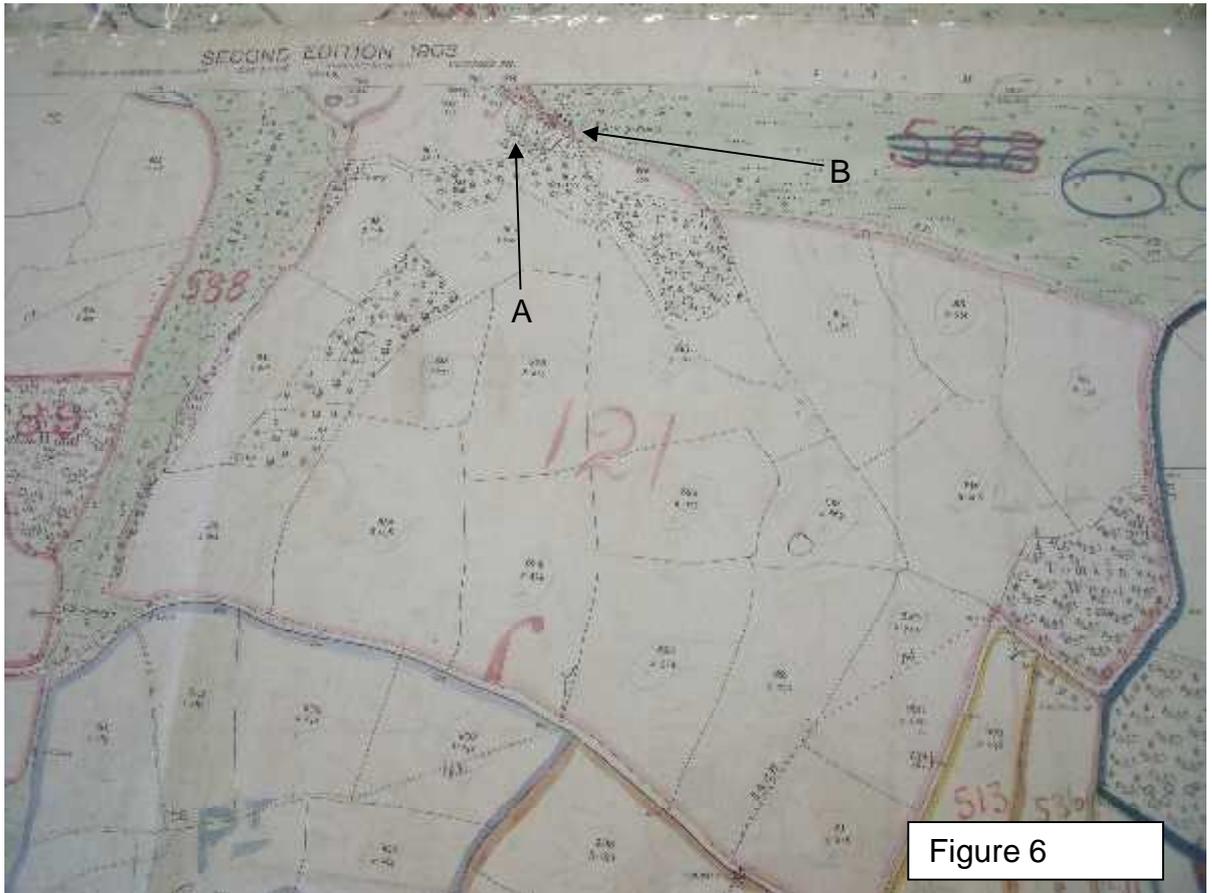
Inland Revenue		1	2	3
32				
33	From Road			
111				
304				
207a				
207				
211				
226				
230				
272				
281				
282				
285				
303				
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305				
441				
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621				
661				
680				
721				
734				
735				
740				
741				
104				

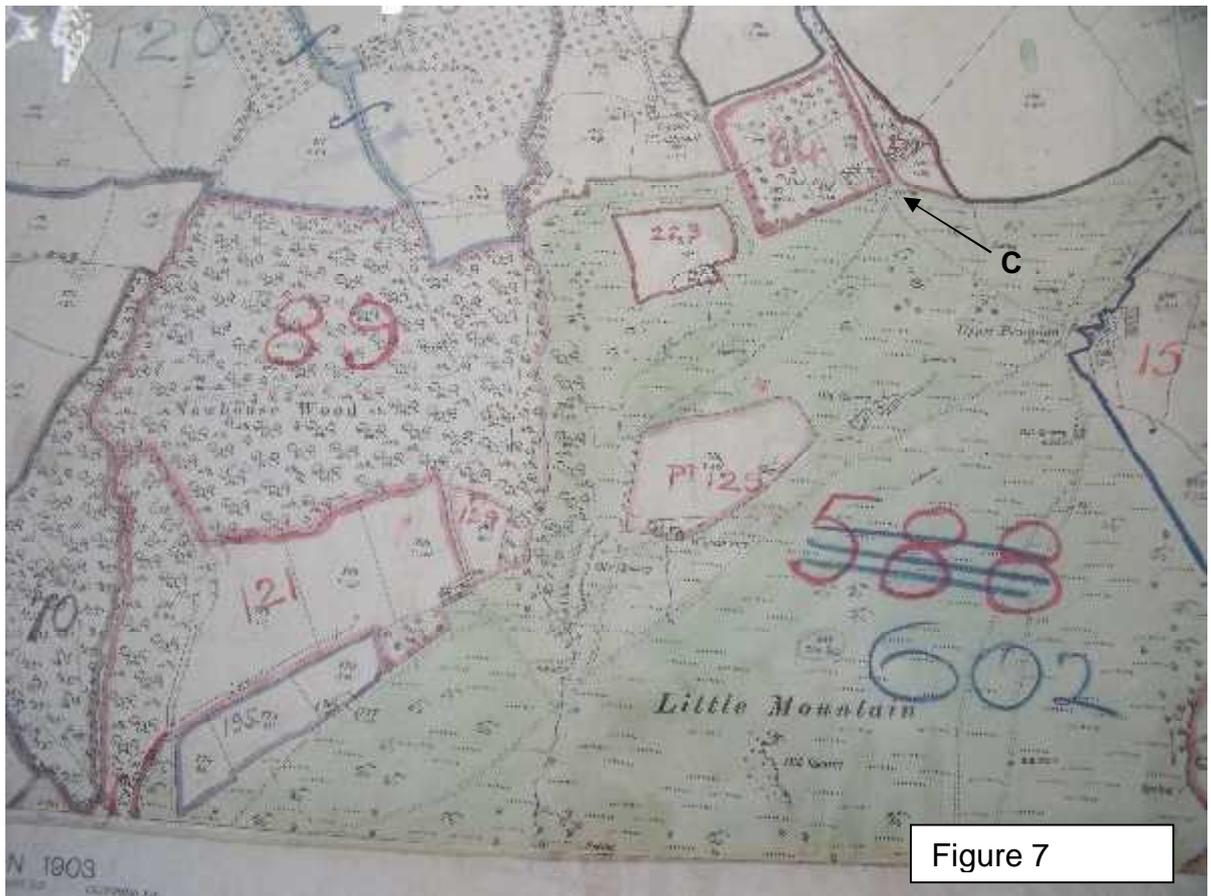
Figure 5

Finance Act Map (1910)

- 16. The 1910 Finance Act provided for the levying of a tax upon the incremental value of land. The tax was to be paid every time the land changed hands. Between 1910 and 1920 the whole country was surveyed. Every piece of land was recorded and given a holding number. Information regarding ownership and occupation was also recorded.
- 17. The survey was carried out under statutory authority by the Valuation Department of the Inland Revenue, which means there can be no argument about the authenticity or legal validity of the resulting plans and records. Tax relief could be given to land containing public rights of way. Deduction was made *inter alia* for the amount by which the gross value would be diminished if sold, subject to any public rights of way.
- 18. The plans were drawn on to the Ordnance Survey base maps of the time and show the land assessed by colouring and cataloguing by number. Valuation books would give details relevant to the individual valuation and show if any deductions were allowed for rights of way across the plots of land.

19. Public roads were generally not included as part of parcels of private land and were therefore untaxed. If a lane or track was excluded from the taxable land holding, it was probably considered as a public road at that time.





20. Figure 6 (above) shows the U75236 as not excluded from the apportionment plot of 588. Plot 588 is listed as Alt Common. It is possible that it is not excluded from the common because tax was not payable for common land, therefore there was no reason to indicate it as excluded from the plot.
21. Continuing north-east towards Llan-y-coed, the 'track' is not excluded from plot 121 which covers all the land belonging to Llan-y-coed. Plot 121 contained productive land and therefore tax was payable on it. However, the valuation book indicates that this plot did not have any deductions for public rights of way over its entirety.
22. Plot number 602 is listed in the index as 'Land at Little Mountain' (Figure 7) and the owners are listed as Various Commoners. This land is not rateable as it is common land. The claimed route has not been excluded from the plot.

County Maps of Herefordshire

23. In the 18th and 19th centuries map makers started to produce county maps. Individual surveyors saw an opportunity to produce small-scale maps of counties which could be purchased by individuals and were, effectively, the road atlases of their day. A surveyor was generally concerned to show on these maps only those routes which the traveller could use. These showed features such as turnpike roads, cross roads and lanes and bridleways. They can be useful supporting evidence in rights of way claims.
24. Although the major map makers of the time, Carey, Greenwood and Bryant, produced detailed maps of Herefordshire, none of them showed the claimed routes. This is to be expected if the ways are only footpaths as these tend not to be shown.

Bryant's Map (1835)

25. Bryant's Map, a copy of which is held by the Record Office, is to the larger scale of 1½ inches to the mile and includes a key. Bryant produced well-made maps – the Herefordshire map is based on an actual survey carried out between 1832 and 1834 – as opposed to copying or plagiarising other maps. The Planning Inspectorate's Consistency Guidelines refer to Bryant's use of surveyors and a triangulation system.

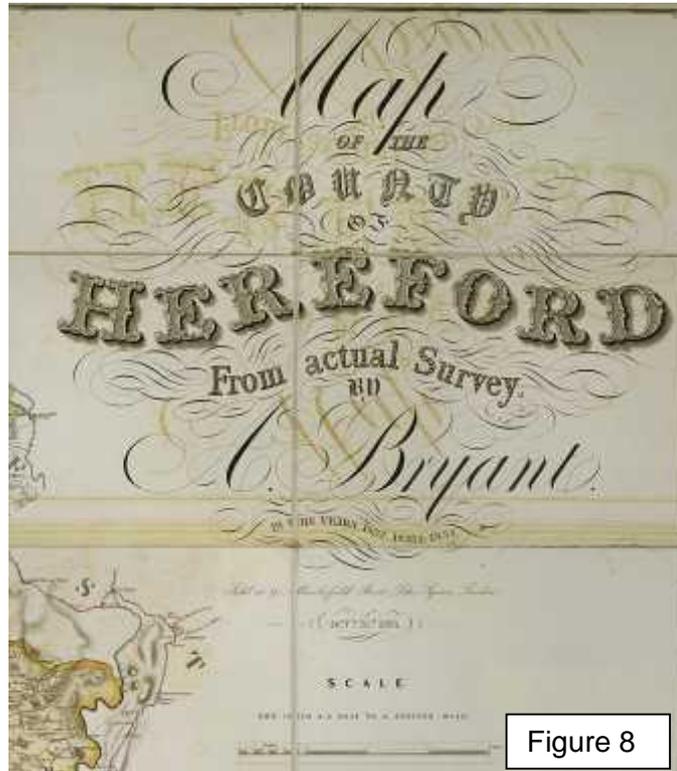


Figure 8

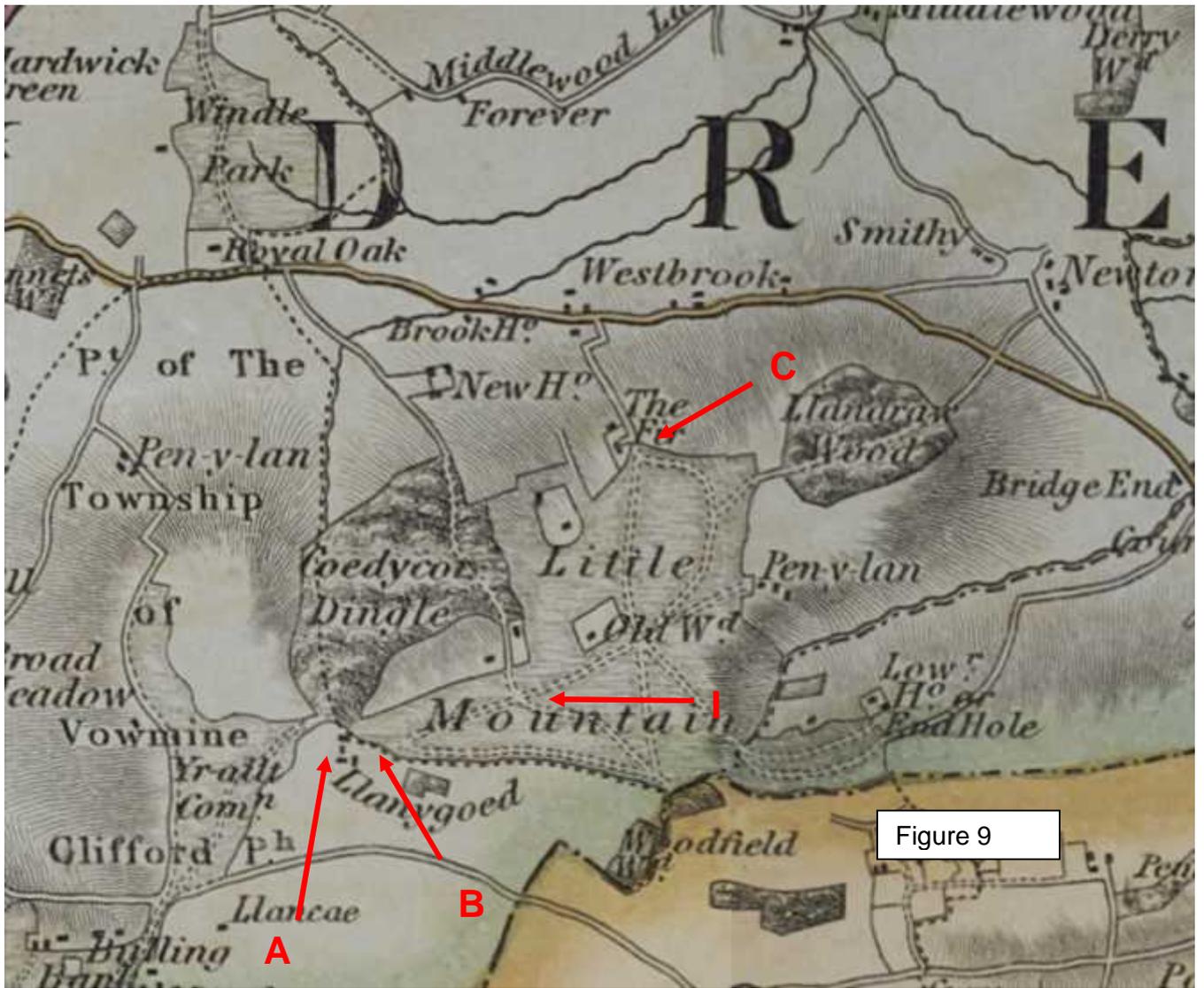


Figure 9



Figure 10

26. Bryant's map (Figure 9 above) shows 'Llanygoed' alongside a feature with double dashed lines which continues up over the common to The Fir this appears to be consistent with at least part of the claimed route (between B and I in Figure 9). There are a number of features marked in a similar manner across the common. The key (Figure 10) indicates that 'Lanes & Bridle Ways' are shown as being uncoloured. Part of the claimed route appears as double dashed lines indicating that it was a physical route that existed and that it was unenclosed, however the lack of B R notification suggests that it was not considered to be a bridleway. It is also worth noting that the feature with double dashed lines does not pass through Llanygoed farmstead on this map, but appears to pass to the north of it.

Ordnance Survey Maps

27. All editions of the Ordnance Survey County Series Maps contained a disclaimer to the effect that the representation of a path or track thereon was not indicative of the existence of a public right of way.
28. The 1905 'Instructions to Field Examiners' made it explicit that: -
- "A clearly marked track on the ground is not in itself sufficient to justify showing a path, unless it is in obvious use by the public".*
29. It is clear that the Ordnance Survey maps of this era are (in the absence of substantial additional evidence of public rights) only really of value in showing the physical existence of a route that was used at the time of survey but not as to whether that route was used by the public or privately.

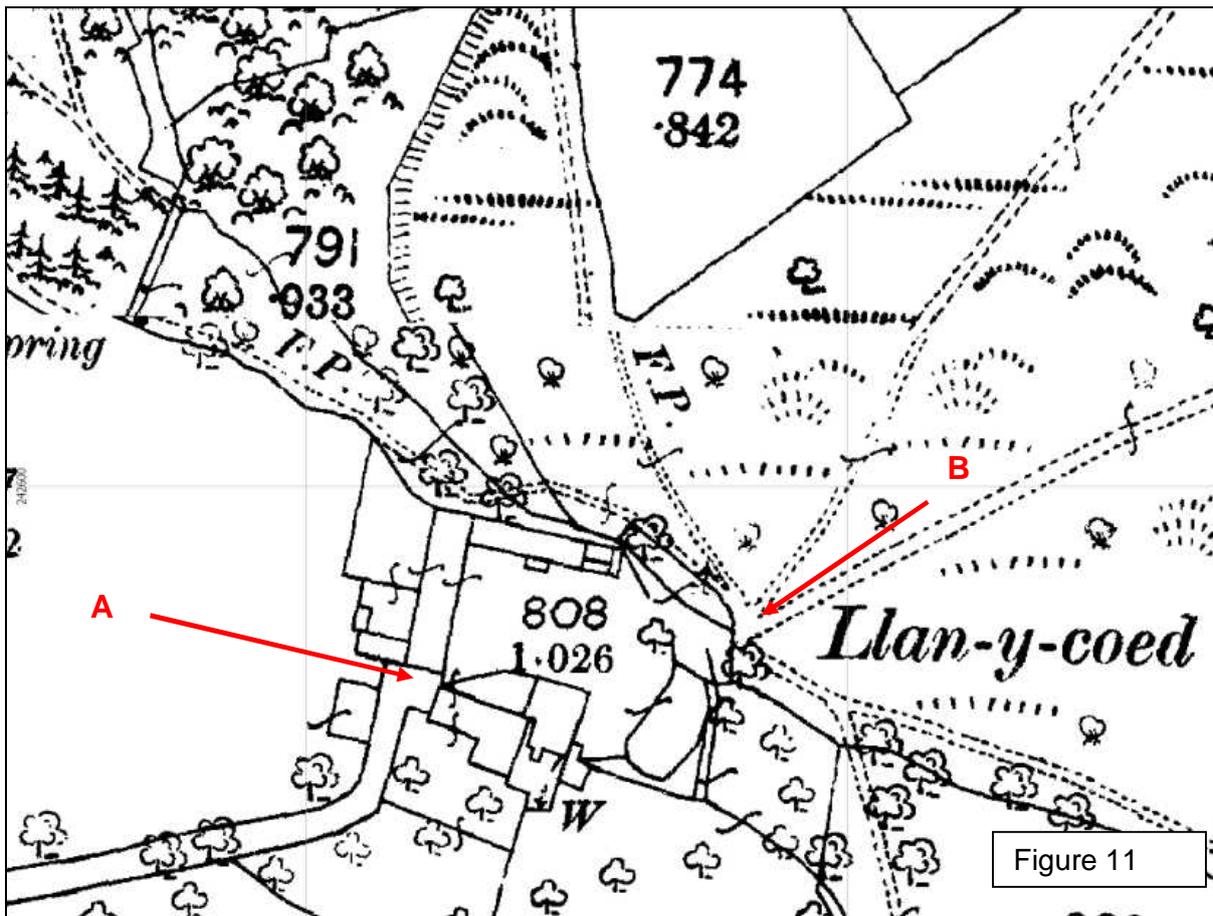


Figure 11

30. Figure 11 (above) indicates the claimed route from just north-east of point A to point B. It appears that the buildings at point A are linked together with a solid line indicating an enclosure.

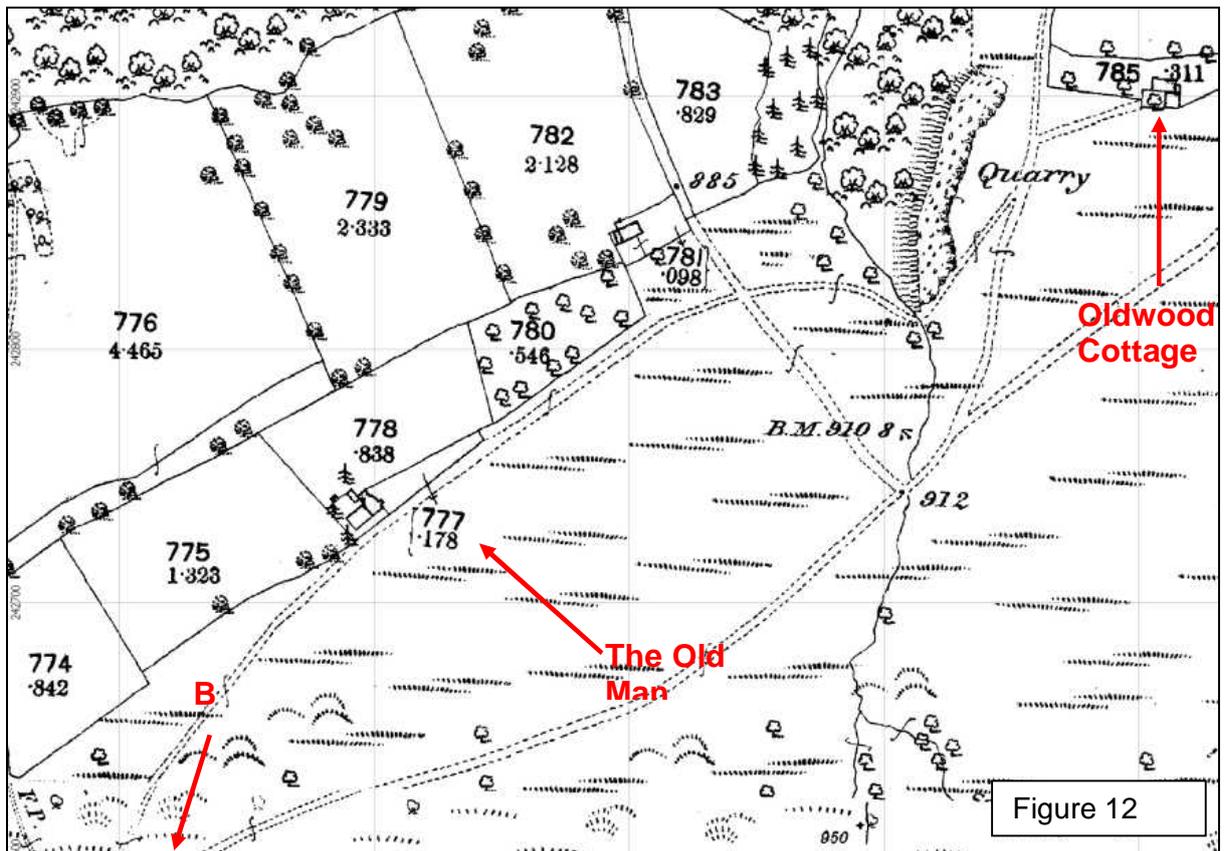


Figure 12

31. Figure 12 (above) indicates the line passing from point B at the edge of Llan-y-coed as a double dashed line (indicating it was an unenclosed route).

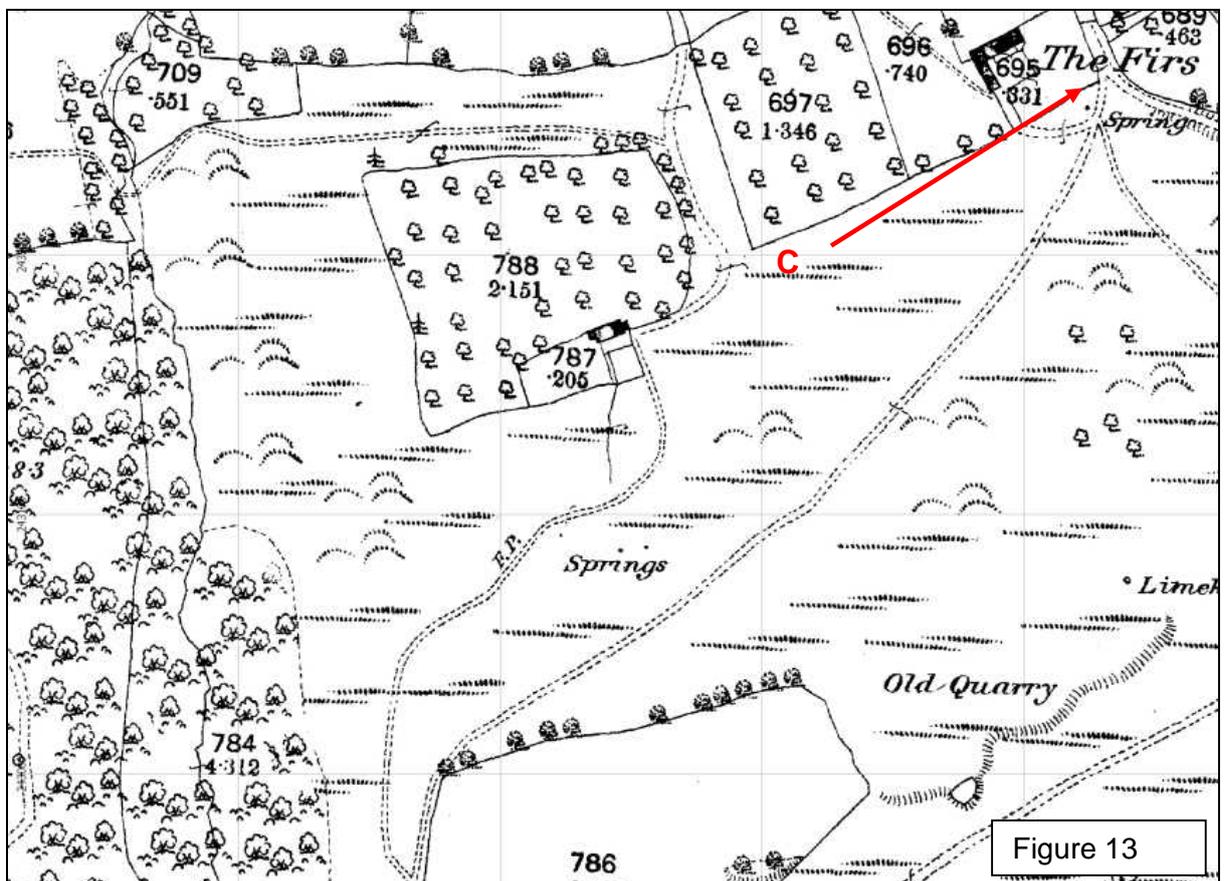
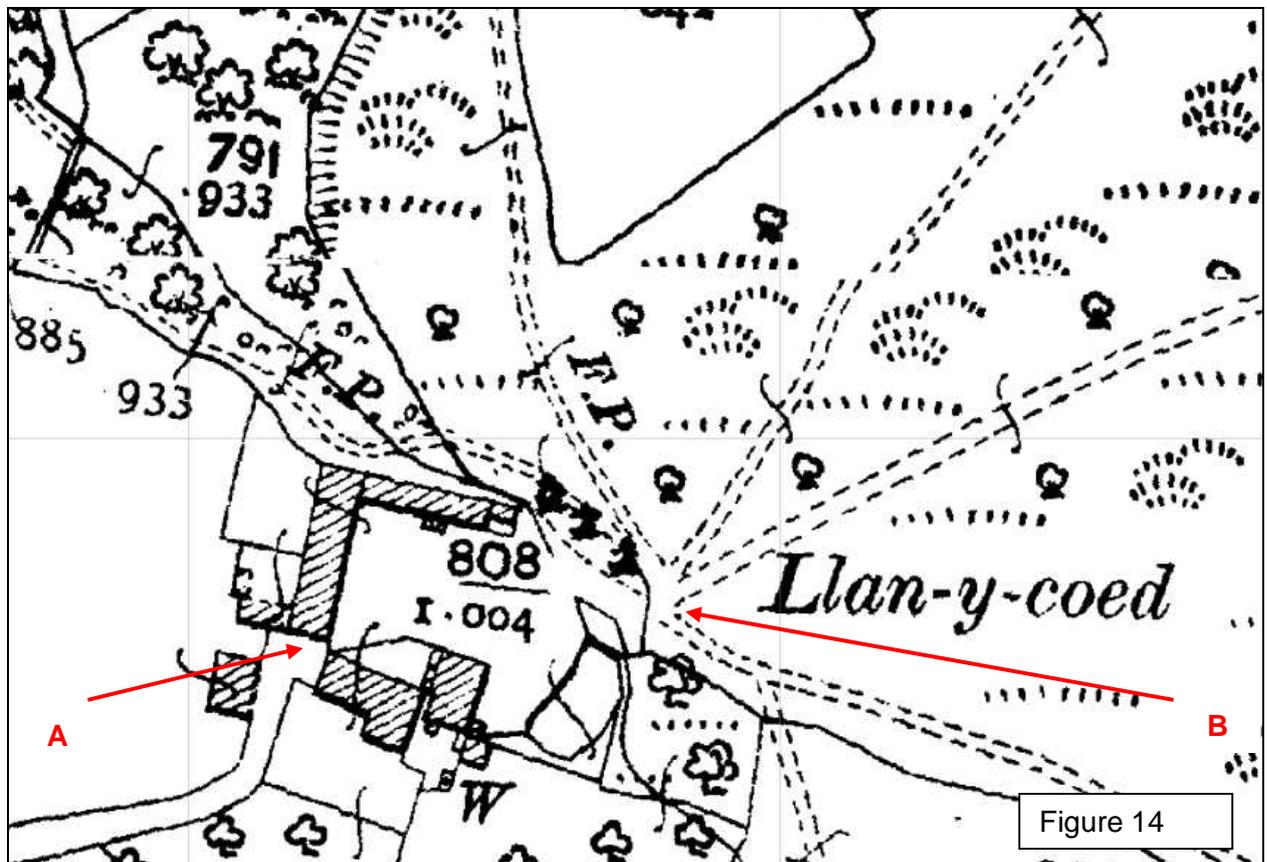


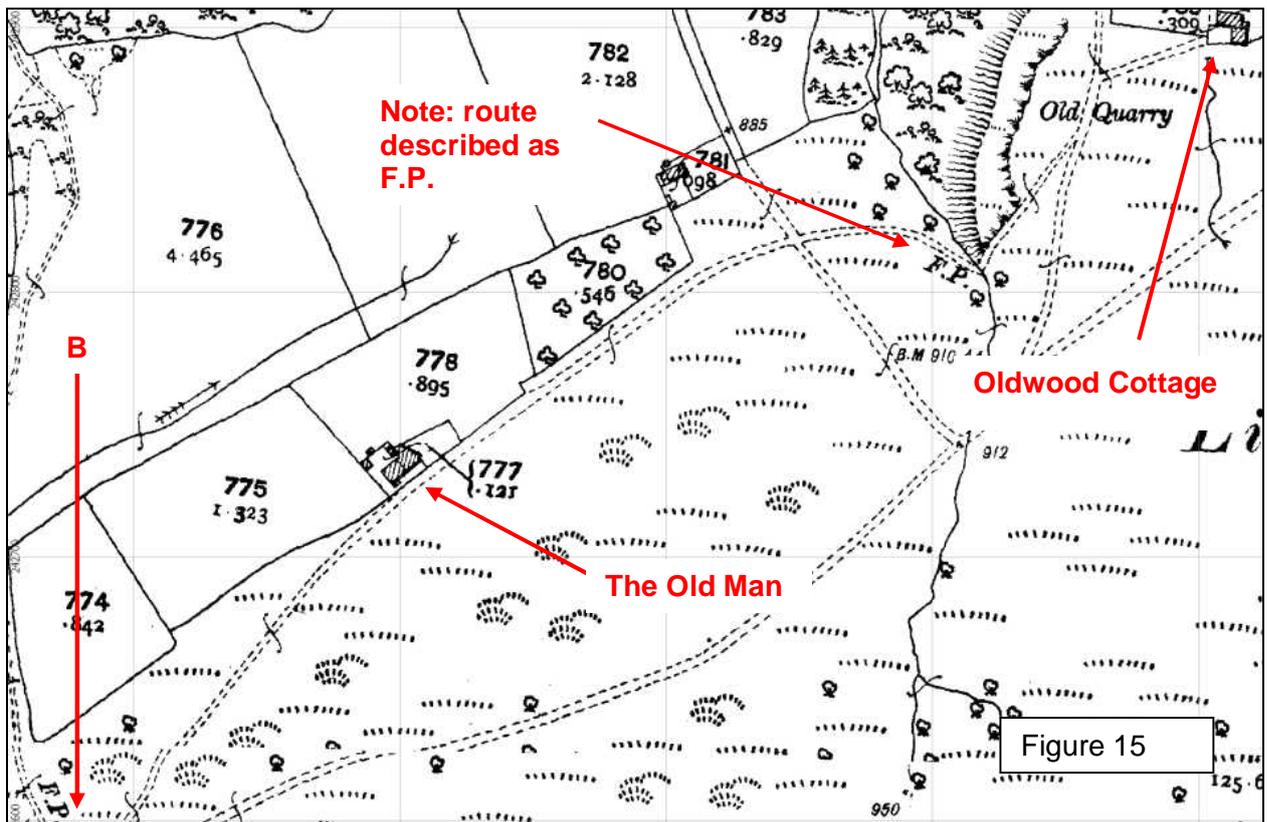
Figure 13

32. Figure 13 (above) indicates the route passing to point C along double dashed lines which indicate an unenclosed route.

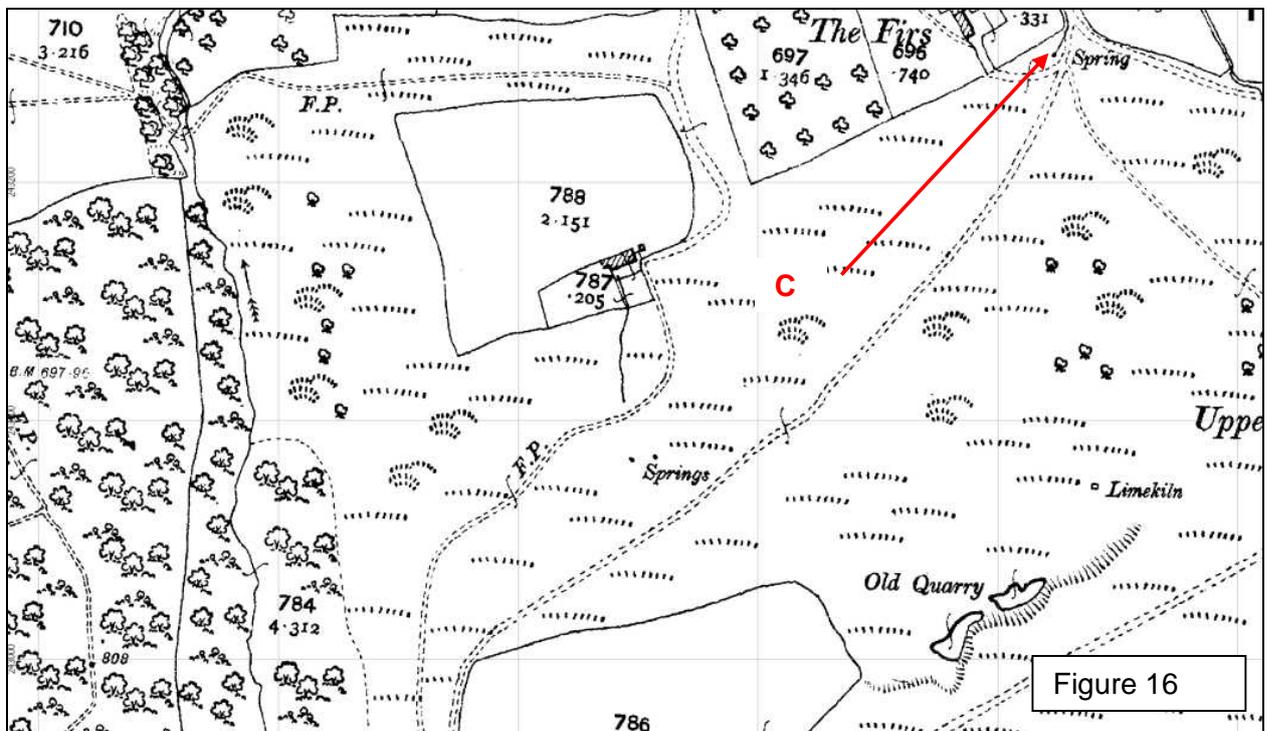
Ordnance Survey 2nd Edition (published 1903-1904), 1:2500



33. Figure 14 (above) indicates the claimed route from point A to point B. It appears that there is a solid line between the buildings at point A indicating an enclosure.



34. Figure 15 (above) indicates the claimed route as an unenclosed route with double dashed lines. It also has the notation 'F.P.' denoting the route as a footpath, which is an addition from the first edition.



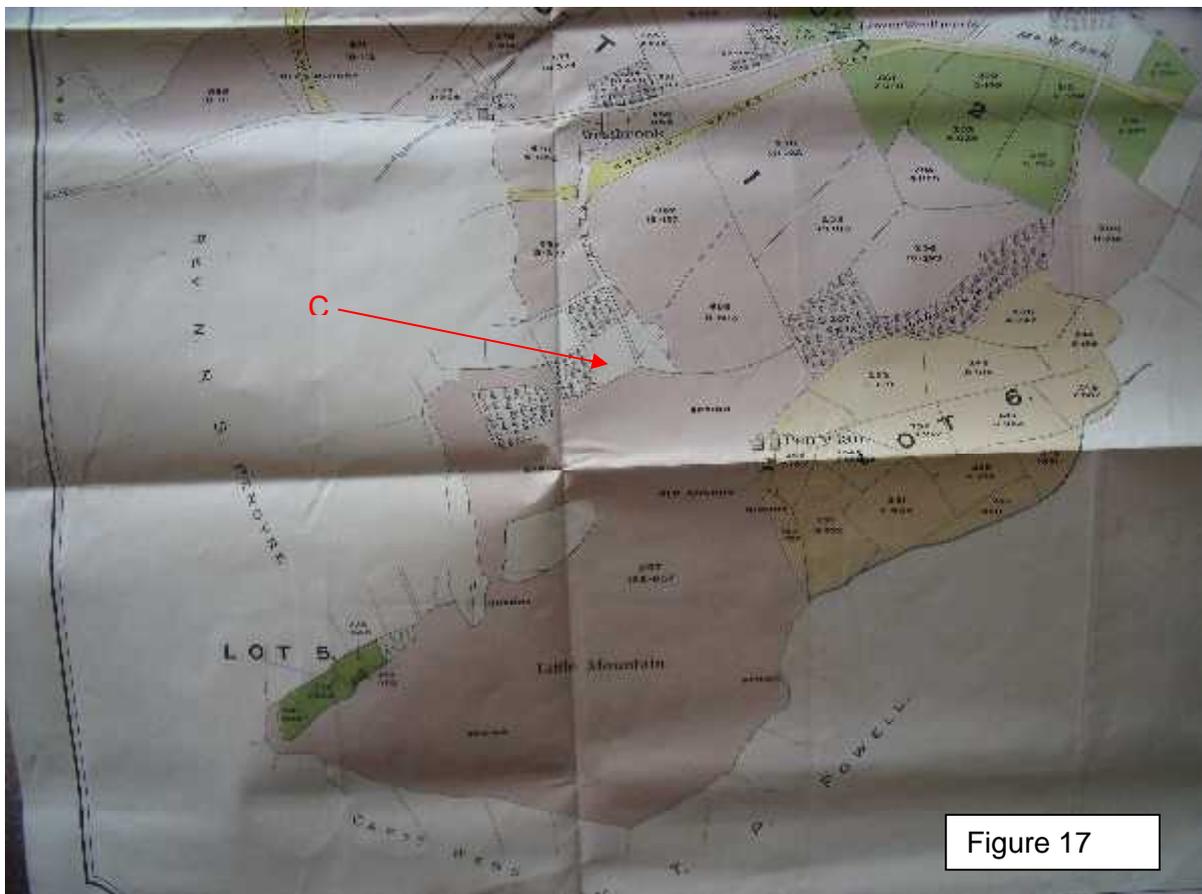
35. Figure 16 (above) shows the claimed route continuing across the common to point C at The Firs.

Estate Maps and Surveys

36. These maps were produced for a wide range of purposes including the sale or exchange of land and the management and running of the estate. These maps are of variable quality with some resembling little more than sketch plans whereas others are at a very large scale with considerable detail. Each should be assessed on its merits set against the purposes for which it was produced.

The Sale of Westbrook and Penylan 1904

37. The plan within the sale particulars for the Westbrook and Penylan estate is shown below (Figure 17). There is no depiction of the claimed route on the plan and no mention of it within the particulars of the description of Lot 1 (the area highlighted pink/buff on the plan).



Sale particulars for Llanerch-y-coed 1962

38. Jesus College, Oxford once owned Llanerch-y-coed but sold the farm in 1962. Figure 18 (below) shows an extract of the sale particulars which they hold in their archives.

HILL FARMING GRANTS. Subsidy for 16 Breeding Cows is enjoyed with the farm.

TITHE. This amounts to £23 11s. 3d.

APPROACH. The farm is approached from the Council Road over Allt Common which is maintained by the Council. There is a right of way over the farm road and yard to several Small Holdings on the other side of "Little Mountain".

Figure 18

39. It is noted that the particulars describe 'a right of way over the farm road and yard to several small holdings'. It is interesting that it describes the farm road and yard as separate entities. The approach over Allt Common is mentioned as being 'maintained by the Council' but it does not state to Little Mountain Common (ie through the yard).
40. The sale particulars also mention that there is a chapel in OS plot 809 which is excluded from the sale. This is shown in Figure 19 (below). Which would suggest that the chapel was owned by someone other than Jesus College, Oxford at this time.



Sale Particulars for Llanerch-y-coed 1996

41. The sale of Llanerch-y-coed by Knight Frank and Rutley in 1996 (on behalf of Col. Barnaby) sets out a section titled 'Rights of Way' in the sale particulars (see Figure 20 below).

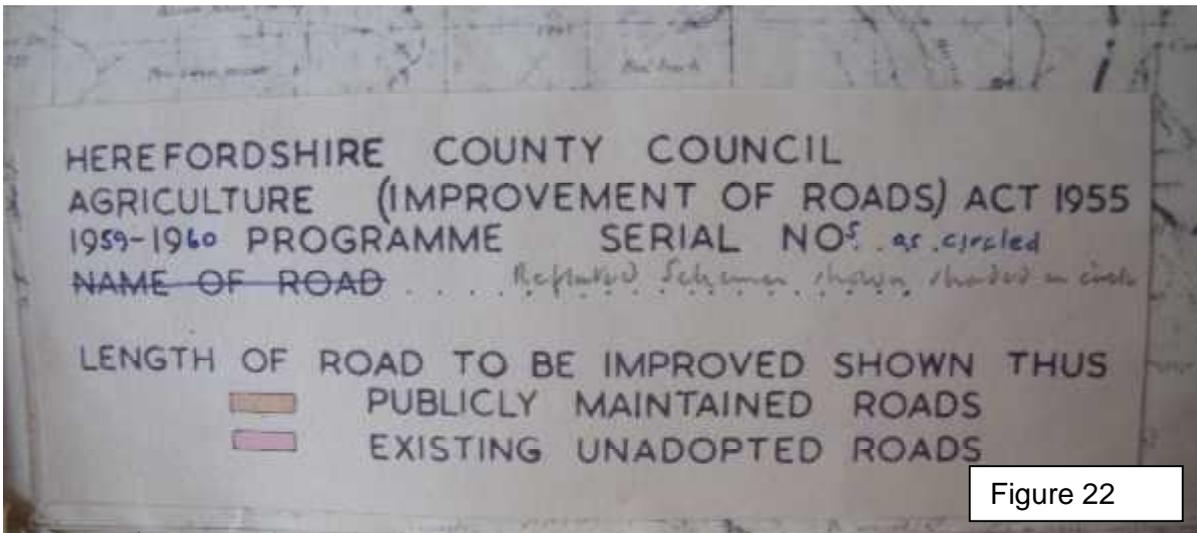
THE COTTAGE	In NGR No. 7074 is a cottage known as The Old Man. It is presently derelict having been the subject of a fire about 6 years ago.
COMMON RIGHTS. <i>Fareilly bought shares in common rights N/A</i>	The property has registered common rights on Little Mountain to graze 20 sheep or 14 cows or 27 colts.
RIGHTS OF WAY	The yard fronting the house and belonging to Llanerch-Y-Coed is sold subject to a right of way for access to Little Mountain Common. Apart from The Old Man there is one other cottage off the Common. The yard is also traversed by a registered public footpath which runs across the Common and through part NGR No. 6181 and 5283.
SERVICES	Mains electricity. Water from private supply from a borehole on adjoining property. This supply feeds the main farmstead. There is a separate well (presently out of use) at

Figure 20

42. The particulars describe a 'right of access to Little Mountain Common' traversing the yard. This appears to suggest that it was a private right of access for the common rather than a general public right of way. However, the particulars also mention a 'registered public footpath' traversing the yard. Clearly this would indicate that the owner at the time, Col. Barnaby considered that there was a public right of way with the status of footpath through the yard of Llanerch-y-coed. Col. Barnaby owned the property between 1964 and 1996.

Agriculture (Improvement of Roads) Act 1955

43. The Agriculture (Improvement of Roads) Act 1955 was introduced to provide grants in order to improve smaller, unclassified roads to allow for greater access to farms for agricultural purposes.
44. The following plans (Figures 21 and 22 below) show that the U75236 was included in this scheme.



45. The following letter from the County Surveyor (Figure 23 below) suggests that the road passed as far as Llan-y-coed farm gate because it was access to the old quarry, not the farm.

30th December, 1959.

Dear Sir,

Clifford Parish Council.
Llan-y-coed Road.

I know the road to which you refer in your letter of 18th December which was, in fact, the subject of an application for a grant under the Agriculture (Improvement of Roads) Act, but which was not accepted by the Ministry as the work called for related more to maintenance than to improvement operations. Our records, such as they are, show that the road is not on the adopted roads list, but its history, nevertheless, indicates that its maintenance is the responsibility of the Highway Authority. I think, therefore, you are quite in order to keep the road from the Class III road 207 as far as the gate to Llan-y-coed Farm in a condition commensurate with the traffic using it. Such a responsibility will not, I expect, call for any more work than the limited patching you have been accustomed to do during the last few years.

As a comment I would suggest that its original acceptance as a public road stems from the fact that it appears to have been used as an access to an old quarry which, perhaps, was worked by the erstwhile Highway Authority for road stone.

Yours faithfully,

B
County Surveyor.

Figure 23

Parish Submission

46. The National Parks and Access to the Countryside Act 1949 set out the procedure for preparing the first Definitive Maps. Parish Councils were required to hold a meeting for the purpose of providing information to Herefordshire County Council on the public footpaths, bridleways and roads used as public paths which they believed to exist in their area. This usually involved the parish carrying out a survey of the ways they regarded as public. The information provided took the form of submission statements and a parish map, showing all routes the parish wished to claim.
47. An extract of the Parish Submission Map for Clifford is shown in Figure 24 (below).



48. It can be seen that Clifford originally claimed the route of the U75236 as a bridleway, given the number '39' (Figure 24 above). However, it did not traverse the yard of Llan-y-coed, but passed to the north-west of the buildings as shown on the above plan and as described on the statement (Figure 25 below) as follows: 'Leaves BR35 N.E. corner of Cot Wood proceeds to Old Quarry & turns E for 100yds then N.E. of Llan-y-coed & continues N.E. to with[in] 100yds of S.E. of New House Wood leaves N tho[ugh] wood crossing FP 43 past New House Farm by CR7 & to Westbrook Rd 80 yds N.E. of Royal Oak Farm.'
49. The statement shows that the bridleway was part-rejected (Figure 26) because it was an 'accommodation farm path or cart road to New House & Llan-y-coed Farms'. Thus it was removed from the plan by marking it over with a black pen ie no 39 is now the U75236.
50. Route 44/45 is the registered footpath which is now claimed to be a byway by the applicant, Mrs Smith.

F.P. 4. COUNTY OF HEREFORD
National Parks and Access to the Countryside Act, 1949 - Survey of Rights of Way.
SCHEDULE OF INFORMATION. SEPARATE COPY FOR EACH WAY TO ACCOMPANY MAP.

INFORMATION IN THESE THREE COLUMNS TO BE FILLED IN BY THE PERSONS SUPPLYING THE INFORMATION AND ALL ANSWERS TO BE COMPLETED IN FULL.

(1) DESCRIPTION OF RIGHT OF WAY	(2) REASON FOR STATEMENT THAT WAY IS PUBLIC (Delete words not applicable)	(3) DOCUMENTS & RECORDS CONSULTED AND/OR NAMES AND ADDRESSES OF WITNESSES.
No. of Way on map <u>39</u> Type <u>Public B.R. or other</u> Please cross out 3r see Note 1 (a) below. From: <u>BR 35</u> To: <u>Westbrook RD.</u> Via (this should be a written description of the route shown on the 6in. map, and related to recognisable points on the plan, with distances in yards and direction by compass points):- <u>Leaves BR 35 N.E. corner of Old Wood proceeds to Old Quarry & runs E. for 100 yds then N.E. of lane & end recrosses N.E. to with woods of S. edge of New House Wood, turns N. the Wood Crossing & P.H. Road New House Farm by R.F. to Westbrook RD. & up N.E. of Royal Oak Lane</u>	(a) Inclosure Award. Yes, / not known. (b) Deposited map by owners. Yes, / not known. (c) Proof of use to include— (i) Public use for 20 years. Yes, / No. (ii) Use as a Right (e.g. not private or or permitted use by owner). Yes, / No. (iii) Has the public use of the Way been interrupted or obstructed? Yes, / No. <u>without</u>	(a) If "yes" where is Award— (b) If "yes" where is map— (c) If "yes" to each, name and addresses of witnesses (preferably three) who will state this. State full particulars and location of any documents supporting (c)— To be filled in by persons completing the foregoing information. Signed <u>P.H. Watkins</u> Address <u>Newton, Westbrook, Dorchester</u> Signed <u>H. Curran</u> Address <u>Clifford Vicarage, Hereford</u>
The <u>Gloucester</u> Parish Council / Meeting have considered the foregoing information and approve / do not approve. Date of Meeting <u>17-9-51</u> Signed <u>P.H. Watkins</u> Date <u>21-9-51</u>	The Dore and Breckwilde Rural District Council have considered the foregoing information and relying on information given by the Parish Council / Meeting approve / do not approve. Date of Meeting <u>10th. JANUARY, 1952.</u> Signed <u>J. G. G. G.</u> (Clerk) Date <u>10 JAN 1952</u>	
NOTE 1. These abbreviations may be used :- (a) Abbreviations of Type— Footpath - F.P. Footbridge - F.B. Stepping Stones - S.S. Fieldgate - F.G. Bridge (or Hürting) Gate - B.G. Wicket Gate - W.G. Kissing Gate - K.G. Turnstile - T. Stile - S. Direction Post - D. Hurdle - H. Post - P. Rails & Bars - R. Low Fence-F. Obstruction-O. Notice Board-N. Barbed Wire-B.W. NOTE 2. <u>N.A. Part</u> (a) Any information which anyone may wish to raise should be written on the back of this Form. (b) If space given above is insufficient to give any answer, continue on back.		

Figure 25

39. BR. BR 35 N.E. corner of Old Wood. Leaves BR 35 N.E. corner of Old Wood proceeds to Old Quarry & runs E. for 100 yds then N.E. of lane & end recrosses N.E. to with woods of S. edge of New House Wood, turns N. the Wood Crossing & P.H. Road New House Farm by R.F. to Westbrook RD. & up N.E. of Royal Oak Lane

Not Accepted
Parts Inspected

Accommodation Farm Path or Cart Road
To New House or Slaw-y-coed Farm.

NOT Approved for 6th Map
 HRK 2 Oct 1952
 HRK
 Chairman

Figure 26

FP. 4. COUNTY OF HEREFORD
National Parks and Access to the Countryside Act, 1949 - Survey of Rights of Way.
SCHEDULE OF INFORMATION. SEPARATE COPY FOR EACH WAY TO ACCOMPANY MAP.

INFORMATION IN THESE THREE COLUMNS TO BE FILLED IN BY THE PERSONS SUPPLYING THE INFORMATION AND ALL ANSWERS TO BE COMPLETED IN FULL.

(1) DESCRIPTION OF RIGHT OF WAY	(2) REASON FOR STATEMENT THAT WAY IS PUBLIC (Delete words not applicable)	(3) DOCUMENTS & RECORDS CONSULTED AND/OR NAMES AND ADDRESSES OF WITNESSES.
No. of Way on map <u>44</u> . Type (F.P. or B.R. or C.R.P. or C.R.B.) Please cross out 3, see Note 1 (a) below. From: <u>CB 42</u> To: <u>Upper Westbrook</u> Via (this should be a written description of the route shown on the 6in. map, and related to recognisable points on the plan, with distances in yards and direction by compass points):- <u>From CB 42 NE corner of buildings at Llan-y-coed runs N.E. to Woodhouse continuing in same direction past junction with CB 43 then to Public Road approx 60 yds SE of Upper Westbrook at junction with BR 54</u>	(a) Inclosure Award. Yes, / not known. (b) Deposited map by owners. Yes, / not known. (c) Proof of use to include— (i) Public use for 20 years. Yes, / No. (ii) Use as a Right (e.g. not private or permitted use by owner). Yes, / No. (iii) Has the public use of the Way been interrupted or obstructed? <u>not known</u> Yes, / No.	(a) If "yes" where is Award— (b) If "yes" where is map— (c) If "yes" to each, name and addresses of witnesses (preferably three) who will state this. State full particulars and location of any documents supporting (c)— To be filled in by persons completing the foregoing information. Signed <u>J. A. Watkins</u> Address <u>Newton Westbrook, Deane Affr</u> Signed <u>H. C. Curtis</u> Address <u>C. L. I. Vicarage, Henllys</u>
The <u>Blifford</u> Parish Council / Meeting have considered the foregoing information and approve / do not approve. Date of Meeting <u>17-9-51</u> Signed <u>D. H. Watkins</u> Date <u>21-9-51</u>	The Dors and Bredwardine Rural District Council have considered the foregoing information and relying on information given by the Parish Council / Meeting approve / do not approve. Date of Meeting <u>10th. JANUARY, 1952.</u> Signed <u>[Signature]</u> (Clerk) Date <u>10 JAN 1952</u>	
NOTE 1. These abbreviations may be used:- (a) Abbreviations of Type—Footpath - F.P. Bridleway - B.R. or as Bridleway - C.R.B. (b) Abbreviation of Description—Cartbridge - C.B. Footbridge - F.B. Stepping Stones - S.S. Fieldgate - F.G. Bridle (or Hunting) Gate - B.G. Wicket Gate - W.G. Kissing Gate - K.G. Turnstile - T. Stile - S. Direction Post - D. Hurdle - H. Post - P. Rails & Bars - R. Low Fence - F. Obstruction - O. Notice Board - N. Barbed Wire - B.W. NOTE 2. (a) Any information which anyone may wish to raise should be written on the back of this Form. (b) If space given above is insufficient to give any answer, continue on back.		

Figure 27

North PP

CB 42 to Upper Westbrook
 From FP 42 at Llan-y-coed to City Rd, to City Rd 1/2 S. East of Upper Westbrook.
 (Note amended route on map)

Accepted.

R. B. Hamling 24/9/52

Approved for draft Map
 2 Oct-1952
H. R. R.
 Chairman

Figure 28

- 51. The parish submission for no 44 is claimed as a footpath. It is described as passing from footpath no 42 at the NE corner of the buildings at Llan-y-coed (Figures 27 and 28 above).
- 52. None of the claimed paths, whether they were accepted or rejected, showed rights passing through the yard of Llan-y-coed.

Land registry search

- 53. The land registry search for title number HW176078 (Oldwood Cottage) states that there are rights and easements for the owners of the cottage as set out in Schedule 2. These include the right to pass and repass with or without vehicles at all times over the tracks 'coloured brown' on the filed plan.
- 54. The tracks include the claimed route. However, the 'brown' track stops to the east of Llanerch-y-coed yard and it is not then coloured brown through the farmyard to link with the U75236.

55. The area through the farmyard is not coloured which is confusing as if no rights across the yard exist (either public or private) then the owners of Oldwood Cottage would not have a legal right to gain access to their property from the U75236 which was evidently the intention of the 'brown tracks'.
56. The old chapel which has been referred to by a number of users in their user evidence forms existed in title number HE13886. However it is not titled separately to the remainder of the plot, nor are there rights or easements listed over this plot of land. The title is silent on the question of rights or easements for access to the old chapel.

Chapel

57. Local residents of Little Mountain used to gather for Chapel in the farmhouse of Llanerch-y-coed until the landowner at the time built a small tin structure to the south east of point B. Mrs Scott-Lee of Broadmeadow, Archenfield, has provided an undated letter (Appendix 3) which suggests that there were services in the farmhouse for around 32 years prior to the chapel being built in 1922 due to a growing congregation and Sunday school. The letter states that Mr James Williams of Hole Farm, formerly of Llanerch-y-coed had given the ground for the chapel. Mrs Smith (applicant) has stated that the Little Mountain Chapel was consecrated by the Bishop of Hereford in 1922 and was known as the 'Tin Tabernacle'. The Diocesan Office does not hold any records regarding the Chapel on Little Mountain Common and no reference can be found of it within Herefordshire Records Office. Mrs Scott-Lee and Mrs Lane consider that the chapel was used until the late 1950's-1960's.
58. Mrs Smith has provided a copy of a photograph claimed to be the chapel on Little Mountain Common in the 1920's, although the document cannot be independently verified.

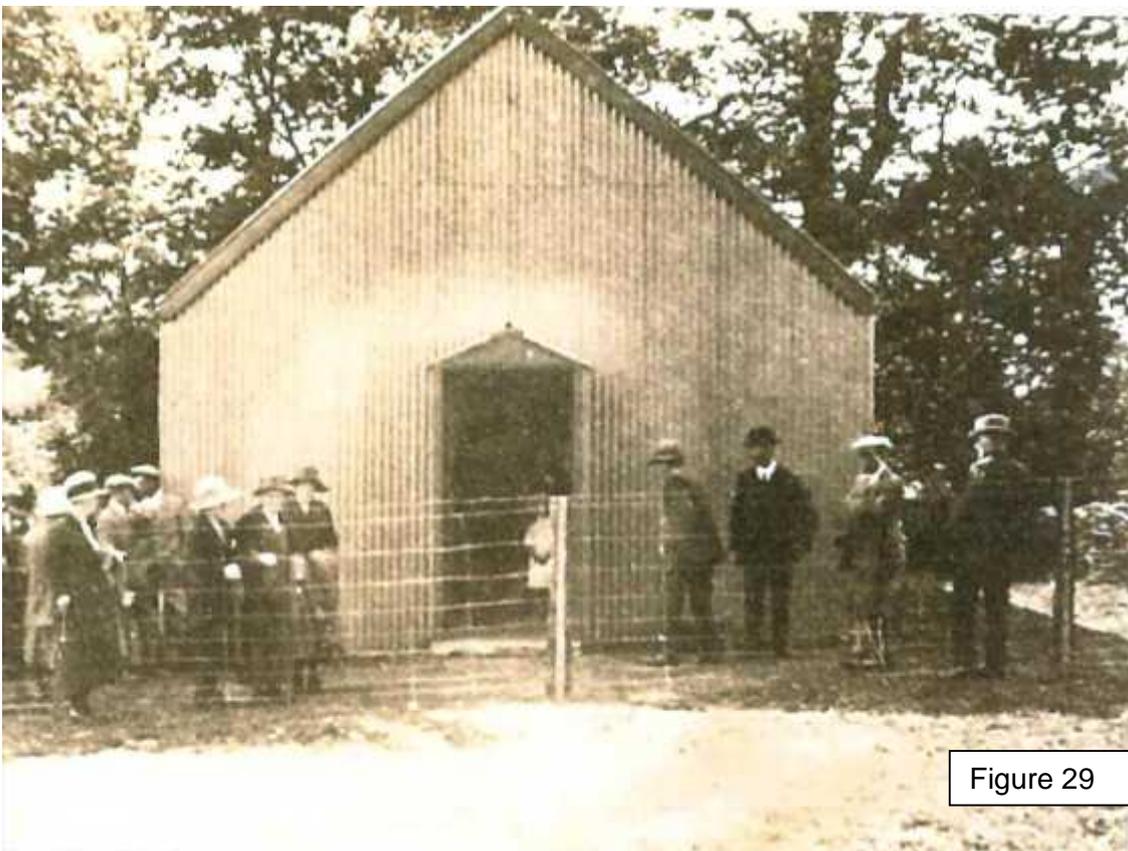


Figure 29

59. The chapel was subsequently no longer used and fell into disrepair. It is no longer in existence. As mentioned earlier the Hereford Diocese Office has no record of the Chapel. The land on which the chapel stood is now included in the title of Llanerch-y-coed to the south-east of point B on the order plan.

Common

60. The common was purchased by Herefordshire Council on the 27th of March 1920 along with the farms and lands forming the Westbrook Estate from William Henry Vaughan. The council purchased the Lord of the Manor of Newton and Foxbrook and Little Mountain formed part of the waste of the Manor.
61. In 1920 there were grazing rights by the tenants within the manor of Newton and Foxbrook to graze on the waste land of the manor, that being Little Mountain.
62. In 1965 Little Mountain Common was registered formally with application to register the land area, the registration of common rights and the landowner. In all cases this was undisputed.
63. The Countryside and Rights of Way Act in 2000 established the public's rights to access the common on foot.
64. Herefordshire Council Land Agent has stated that there are no bylaws on the common but that there was no public access to the Common until 2000. She has also stated that although horse-riding is not technically allowed on the Common, the Council was aware that the public were riding on the common and did nothing to prevent it. The Land Agent is of the opinion that there has always been public access through the yard of Llanerch-y-coed onto Little Mountain Common.

USER EVIDENCE

65. Section 31 of the Highways Act 1980 gives a statutory framework for the consideration of user evidence, in addition to the Common Law. For a path to be deemed to be dedicated as a highway under this section, the following tests must be applied:
- *It must have been used or enjoyed by the public, not merely by the landowner, his friends, tenants, relatives or employees.*
 - *Use must not have relied upon permission, secrecy or force.*
 - *Use must have been for a full period of at least 20 years prior to the date on which the public right to use the way is first brought into question.*
 - *Use must be without interruption, i.e. there must be continuous use throughout the 20-year period.*
66. If these criteria are met then the way will be deemed to have been dedicated as a highway unless there is sufficient evidence that during the period, the landowner had no intention to dedicate it. Sufficient evidence means that it must be made clear to the users of the path that there is no intention to dedicate the way as a highway. This is normally done by means of erecting prohibitive notices, periodic challenges to users or obstructing the route; the classic method being to lock a gate across the way once each year.

Section 31(6) of the Highways Act 1980

67. *Section 31(6) of the Highways Act 1980* allows landowners to protect themselves further against deemed dedication. Firstly, if prohibitive notices are torn down or defaced then a notice may be given to the highway authority that the way is not dedicated as a highway and this is evidence of a lack of intention to dedicate. Secondly, a map and statement describing the ways admitted as highways can be deposited with the Authority (a 'Section 31 deposit'). Any actions taken by the owner of the land to prevent the deemed dedication of a public right of way, ought to be 'overt' in the sense that it brings home to the public that the way in question has not been dedicated as a public right of way.
68. Mr and Mrs Linklater (previous landowners of Llanerch-y-coed) completed a s31(6) deposit for Llanerch-y-coed on the 8th of September 1997 which was valid until 2003. They further submitted a Statutory Declaration on the 30th of August 2003 to renew their deposit which would last until 30th of August 2009. Mr Smolas (the subsequent and current landowner) then also made a s31(6) deposit on the 21st of December 2011 which is valid until 2021.
69. Mr and Mrs Smolas (current landowners of Llanerch-y-coed) have provided an affidavit (see appendix 1) signed by Mr and Mrs Linklater (previous landowners) which provides their opinion that they believed there not to be a right of way through the yard of Llanerch-y-coed. They also state that the owner previous to them, Col. Barnaby, used to lock the gate periodically to indicate that he also believed it not to be a right of way (this is discussed further in paragraph 83). However, the sale particulars of 1996 at the time Mr and Mrs Linklater bought the property from Col Barnaby listed a public footpath running across the yard (as shown in paragraphs 40 and 41).
70. The affidavit mentions a letter which Mr and Mrs Linklater received from the Council stating that the '*road ends at the part indicated by the bar and does not link with the public footpath*' (Figure 30). The author of the letter was correct in that they were stating the knowledge of the public rights at the time (notwithstanding any further rights which may become claimed).



Hereford and Worcester County Council

County Offices, Bath Street, Hereford HR1 2HQ

Dr. Martyn Hayes
Director of Environmental Services

Woolsey Morris & Kennedy
Solicitors
100 Station Road
Sidcup
Kent
DA15 7DT

Telephone Hereford (01432) 352211 (Switchboard)

Direct Line Hereford (01432) 36 3303 *Highways*

Fax (01432) 363300

Your reference JN.EMH.LINKLATER

My reference WA/OC/KP

Please ask for Mrs O Curtis

Date 12th February 1996

Dear Sirs

LLANERCH-Y-COED, CLIFFORD, DORSTONE, HEREFORDSHIRE

Thank you for your letter sent to South Herefordshire District Council and forwarded to me for reply.

We have checked our records and the search submitted to you is correct.

The road ends at the part indicated by the bar and does not link with the public footpath.

If you require any further information please let me know.

Yours sincerely

Figure 30

71. The applicant has submitted 37 user evidence forms. Ranging from one year of use to 66 years of use.
72. As the previous owners of Llanerch-y-coed (Mr and Mrs Linklater) are known to have lodged a s31(6) deposited with the Local Authority on 8th of September 1997, this would be the relevant date which called into question the existence of the claimed route within the meaning of Section 31 of the Highways Act 1980. Therefore the reckoning period will be 8th of September 1977 – 8th of September 1997, thus any evidence supplied after the date of the 8th of September 1997 can be discounted for the purposes of this report.

Analysis of the User Evidence

(Figure 31)

Name	Year from	Year to	Total number of	A-B	B-C	Marked route on Map?	Different route	Common rights?	Notes	Does this have 20 years through	Is route through	Frequency (no of	Use
1. Grace Smith	1957	2012	80	yes	no	no	no	yes		yes	yes	h/v	h/v
2. David Morgan	1908	2012	44	yes	no	no	no	yes		yes	yes	48	h
3. Pamela Fairweather	1994	2000	12	yes	no	no	no	yes		yes	yes	12	h
4. Amanda Sweeney	2002	2008	8	yes	no	no	no	yes		no	yes	30-40	h
5. Candia Provis	1990	2005	15	yes	no	no	no	yes		no	yes	2	f
6. Graham Lloyd	1942	1995	53	yes	no	no	no	yes		yes	yes	numerous'	f/h/v
7. Isabel Thompson	1986	1995	9	yes	no	no	no	yes		no	yes	numerous'	h
8. Amanda Hughes	2002	2012	32	yes	no	no	no	yes		no	yes	18	f/h
9. Shaunagh Addinell	1974	2012	38	yes	no	no	no	yes		yes	yes	frequently	h
10. Mrs J. Beaton	1996	2000	2	yes	no	no	no	yes		no	yes	32	f/h
11. Finn Beales	1985	2004	15	yes	no	no	no	no		no	yes	30-40	f/h
12. Hattie Hughes	1992	2000	8	yes	no	no	no	no		no	yes	20	f/h
13. Rhodri Jones	1994	2012	18	yes	no	no	no	no		no	yes	2	f
14. Sophie Harding	2005	2012	5	yes	no	no	no	no		no	yes	10	f
15. Slobhian Maguire	? ?	? ?	? ?	yes	no	no	no	no		2	yes	4-5	f
16. Kate Powell	1985	2012	27	yes	no	no	no	no		no	yes	10	f/h/v
17. Peter Archer	2011	2012	3	yes	no	no	no	no		no	yes	2-3	f/h
18. Mr & Mrs Staley & Family	? ?	? ?	? ?	yes	no	no	no	no		? ?	yes	2-3	f/h/v
19. Glenys Powell	1950	2012	62	yes	no	no	no	no		yes	yes	50+	f/v
20. Jolien Smith	1985	2012	47	yes	no	no	no	yes		yes	yes	150	h/v
21. Sophie Robinson	1994	2010	16	yes	no	no	yes	no		no	yes	52	h
22. Elizabeth Lane	1971	1990	25	yes	no	no	no	yes		yes	yes	<1	f
23. Sila Bulmer	2002	2012	10	yes	no	no	yes	no		no	yes	8	h
24. Ann Howells	? ?	? ?	? ?	no	no	no	no	no	no route marked on map and no dates	? ?	no	a lot'	f
25. John Hughes	1992	2012	20	yes	no	no	no	yes		? ?	yes	8	y
26. S.A. Savestingham	1983	2012	19	no	no	no	no	yes		no	no	regularly	f/v
27. Bernice Ballinger	1937	1990	59	yes	no	no	no	yes		yes	yes	variable	f/h/v
28. Graham Pritchard	1971	2012	41	yes	no	no	yes	yes		yes	yes	12	f/v
29. Diana Joyce	1955	2005	50	no	no	no	no	no		yes	no	20	h
30. John and Margaret Jeffs	1959	2010	31	yes	no	no	yes	yes	Had private rights to 'olewood'	yes	yes	12	f/v
31. Brian Taylor	1984	1998	12	no	no	no	yes	yes		no	no	hundreds	f/v
32. Andrea Williams	2002	2012	10	no	no	no	yes	no		no	no	2-30	f
33. Mrs M Scott-Lee	1900	1990	30	yes	no	no	no	no	visited chapel until 1903	yes	yes	20	f/h/v
34. Dr Derek Wilson	1942	1982	40	yes	no	no	no	no		yes	yes	2	f
35. Irene Wilson	1970	1982	12	yes	no	no	no	no		no	yes	many	h
36. Henrietta Silver	1980	1981	1	no	no	no	yes	no		no	no	305	f/h/v
37. Vanessa Hembling	1981	2013	32	yes	no	no	no	no		no	yes	1-2	f/h

KEY

- Commonier
- Outside of ownership
- no dates

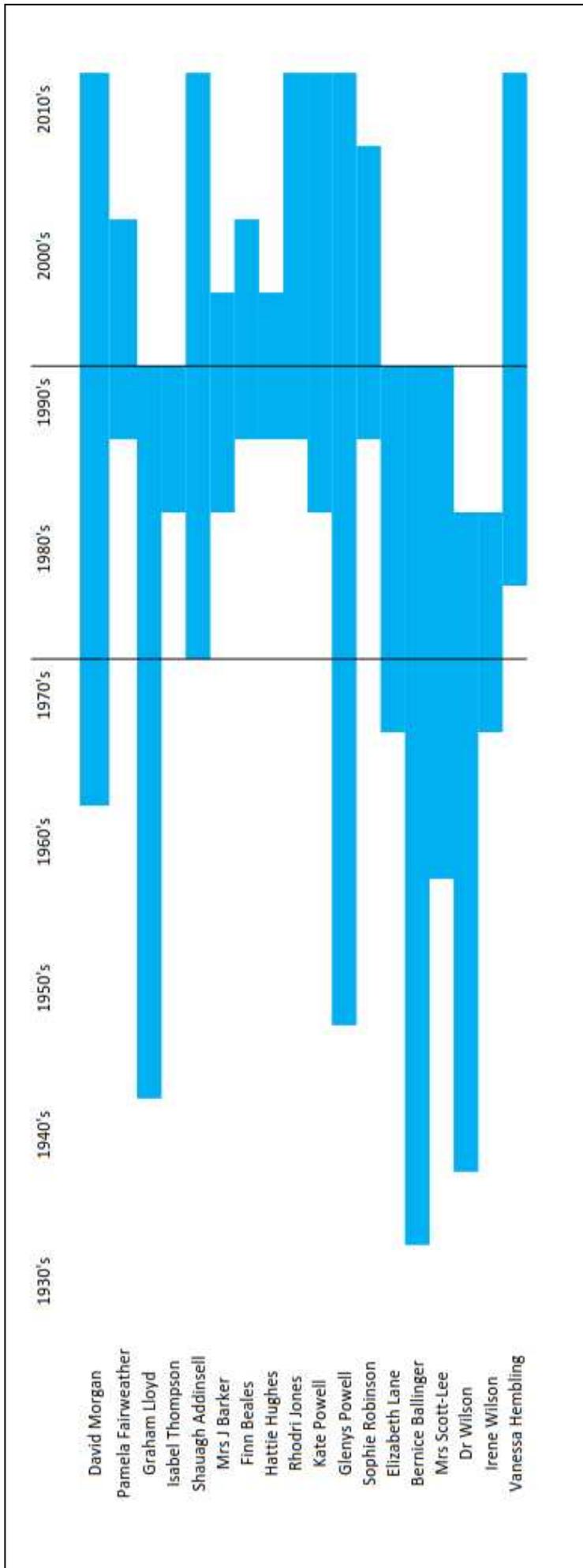


Figure 32 chart showing only those users who are within the time frame and do not have common rights.

73. Of those that supplied evidence, numbers 15 and 18 did not specify dates when they used the route and must therefore be discounted. Numbers 4, 8, 14, 17, 23, 24 and 32 provided evidence of usage of the route that was outside of the relevant period and thus also must be discounted.
74. There were 8 evidence forms completed by people who have (or had) a known right to graze Little Mountain Common. It is possible that graziers have established a private right of access to Little Mountain Common through Llanerch-y-coed yard. I.E. 'by right' rather than 'as of right'. To err on the side of caution, the evidence forms of the commoners (1, 5, 20, 25, 26, 28, 30 and 31) have been discounted for the purposes of this report.
75. The evidence provided by the remaining 20 users differs in route marked up on the accompanying plans. Many of the plans were marked up in the same orange felt-tip. Of those 20 remaining users one (no 29) did not mark a route at all and should therefore be discounted.
76. The remaining 19 users all indicated a route through Llanerch-y-coed farmyard (section A-B of claimed route) but none of them indicated the route carrying on following the existing registered footpath CL44 across the common. Number 36 did not indicate the route through the farmyard, but did indicate an alternative route across the common.
77. Because of the complete lack of any evidence from the 19 users for any upgrade of footpath CL44, the only section of route that can be considered is the small section through Llanerch-y-coed farmyard from U75236 to the gate onto the common. For this reason, user 36 must also be discounted as they did not indicate this section of route.
78. This leaves 18 users with relevant user evidence. This includes numbers 2, 3, 6, 7, 9, 10, 11, 12, 13, 16, 19, 21, 22, 27, 33, 34, 35 and 37.
79. All 37 of the participants who completed a user evidence form were invited to an interview to discuss the evidence and to gain more information and insight into the use of the claimed route. 9 users accepted the invitation. Of those 9, only numbers 2, 22 and 34 were not commoners and therefore their information is more relevant to this report.
80. Some of the relevant user evidence is discussed in more detail below.
81. Mr David Morgan (no 2) stated in his user evidence form that he used the route between the U75236 to the Common through Llanerch-y-coed yard from 1968 to 2012 using it approximately 48 times a year for business and pleasure, on horseback. He stated in the interview that he used the route for pleasure and as part of the hunt. On both his user evidence form and in the interview he has indicated a route through Llanerch-y-coed yard to join Little Mountain Common but no further. He has stated that he has never been stopped from using the route and the gates were never locked. He also states that he was never given permission by the landowners to use the route. Mr Morgan does not have commoner rights.
82. Mrs J Barker (no 10) stated that she used the route from Llanerch yard onto Little Mountain to Pen Lan by horse and on foot between 1988 and 2000. She indicated on the user evidence form that no one gave her permission to use the route and her plan is marked though Llanerch-y-coed yard in orange pen.

83. Mrs Elizabeth Lane (no 22) stated that she used the route through Llanerch-y-coed yard to Little Mountain Common from 1971 to 1996 on foot for pleasure both on her user evidence form and in an interview. She has stated on the form that Col. Barnaby gave her 'permission' to walk this route but that Mrs Linklater told her the route was not a public right of way. In the interview however, Mrs Lane stated that no one gave her permission to use the route. It is possible that Mrs Lane misunderstood the question on the user evidence form.
84. Mrs Irene Wilson (no 35) completed a user evidence form stating that she used the route from the U75236 to Little Mountain Common through the yard of Llanerch-y-coed on horseback for pleasure between 1970 and 1982. She was never given permission to use the route and was not challenged or stopped. She ceased to use the route when she moved away. Mrs Wilson confirmed these points in her interview and stated that Col. Barnaby (previous landowner of Llanerch-y-coed) used to wave as they passed through the yard.
85. Shaunagh Addinsell (no 9) provided a user evidence form in which she stated that she used the route from 1974 on horseback, for pleasure and believed the route to be a bridleway. There is a route drawn on the plan attached to her form which indicates the route through Llanerch-y-coed yard to meet Little Mountain Common. Sadly Ms Addinsell passed away prior to the interviews.
86. Glenys Powell (no 19) stated on her evidence form that she used the route from 1950 onwards on foot and by vehicle more than 50 times per year. She stated that she used the route for pleasure from Broadmeadow Farm to visit friends and to attend the chapel at Llanerch-y-coed. She asserts that she was never stopped from using the path and that the gate was not locked. She indicated a route through Llanerch-y-coed yard to the Common only. Mrs Powell did not volunteer to be interviewed.
87. Graham Pritchard (no 28) filled in a user evidence form and was interviewed (accompanied by his wife). He explained that he has used the route approximately 12 times per year for pleasure and business from 1971/1972 to the present day. He indicated a route through Llanerch-y-coed yard onto the Common on his user evidence form and in the interview, this route was described as passing through the yard, then following the footpath CL44 to the Council road U75210 at The Firs. He has used this route on foot approximately 12 times per year from Little Mountain Common to Allt Common without challenge. Mr Pritchard stated that he was also a private snow contractor for Herefordshire Council for 25 years and cleared the U75236. He explained that he drove his snow plough up to the gate that led to Little Mountain Common, not the gate entering Llanerch-y-coed yard where the U75236 is currently thought to end. At this point he turned around and retraced his route. Mr and Mrs Pritchard do have commoners' rights to Little Mountain Common and Allt Common. Although Mr and Mrs Pritchard's evidence has been discounted as they have commoner rights, the evidence that Mr Pritchard has supplied that he ploughed the yard is worth noting.
88. Graham Lloyd (no 6) was not interviewed but completed a user evidence form. He stated that he used the short route through Llanerch-y-coed yard between 1942 and 1995. He stated on the form that he used this route on foot, by horse and vehicle to access the chapel at Little Mountain when he was a boy. He also states that his uncle was the tenant farmer prior to Mr Smith owning Llanerch-y-coed.
89. Bernice Ballenger (no 27) stated on her evidence form that she used to visit the Chapel on the common. Sadly Ms Ballenger passed away prior to the interviews being conducted.

90. Mr and Mrs Smolas (current owners of Llan-y-coed) have provided a letter from Mr R F Staley (a neighbouring landowner) stating that 'Col Barnaby always locked that gate on Christmas day only allowing the residents living on Little Mountain access onto the Mountain' (appendix 2). Mr and Mrs Smolas have stated that Col. Barnaby used to be a land agent and so would understand that locking the gate to the farmyard would indicate a negative intention to dedicate a right of way across his land. However, Mr Staley is the only member of the public to claim that the gate was locked. The Staley family also completed a user evidence form (no 18) indicating that there was an 'unlocked gate' on the way and that they considered the route to be a restricted byway through the yard of Llanerch-y-coed. This appears to contradict the letter that Mr Staley sent to Mr and Mrs Smolas. The Staley family evidence form was discounted for the purposes of this report analysis as they did not state a time period for the use of the path and did not attend an interview so could not be queried on this matter.

CONSULTATION

91. The draft investigation report was sent to the affected landowners, the applicant and Parish Council and Local Member for their comments.
92. Clifford Parish Council responded, "The Parish Council supports both recommendations but has no further information to offer".
93. Mrs Grace Smith (applicant) telephoned to support the proposed recommendation.
94. Helen Beale, Senior Estate Manager for Herefordshire Council stated in an email that Herefordshire Council has owned the common since the 1920's when they acquired the smallholdings at Westbrook. There were never any deeds to the property as the site was conveyed as lord of the manorship. The land registry accepted the first registration for a possessory title which will become final in 2023. Since the Council have occupied the land, there have never been any bylaws and nothing restricting access. George Thompson who was the County land Agent from 1991 to 2018 and Helen Beale (2005) were aware that the public were accessing the common with horses and that although this was not technically allowed, the Council did nothing to stop it as it was always believed that there was a bridleway.
95. Mr and Mrs Smolas engaged the services of Mike Taylor, Access Countryside Consultancy Limited who provided a lengthy response on their behalf (Appendix 4).
96. Some of Mr Taylor's points were accepted and the draft report duly altered. However, a number of points are refuted below.
97. Mr Taylor considers that the above report gives undue weight to the historical evidence (Appendix 4, points 4.1- 4.5) however, it is clear that although there is some evidence of public rights over the claimed route (either in total or in part), on its' own, the historical evidence would probably not provide sufficient evidence for a reasonable person to reasonably allege that a right of way existed. However, the user evidence added to the historical evidence adds to form a picture such that it is considered that sufficient evidence does exist.
98. In Mr Taylor's report (point 4.6) it is his opinion that the brown tracks (indicated on the Land Registry particulars for Oldwood Cottage) which end at the gate to Llanerch-y-coed cannot support the view that there must be public rights through Llanerch-y-coed yard. However, it is hard to conceive why else there would be private rights that end at the gate if not to continue to the County Road.
99. Mr Taylor states (points 4.7-4.8) that the fact that Col. Barnaby had passed away by the time the property was sold, prevents the mention of a right of way through the

yard being attributable to the landowner. However, he does not carry forward this argument to the affidavit of Mr and Mrs Linklater who had bought the property and signed the affidavit stating that Col Barnaby locked the gate once a year to prevent the establishment of a right of way. They could not have first-hand knowledge of this from Col. Barnaby himself as he had passed away before they bought the property. The sale particulars are evidence that 'someone' considered there to be public rights through the yard, whether that was Col. Barnaby or not we cannot say. The affidavit again is evidence that 'someone' told Mr and Mrs Linklater that the gate was locked, however it cannot have been Col. Barnaby and it was clearly not listed in the deeds or documents passed to them at the point of purchase or they would have been mentioned in the affidavit. Thus, this is only third-party hear-say.

100. Paragraph 4.9 points out that there is no analysis of the impacts related to the common. This has now been incorporated into the investigation report above.
101. Mr Taylor considers that only 3 witnesses appear to be free of conflicting reasons for use and have established in excess of 20 years use. However, it was established in *Davis v Whitby (1974)* that use of a way by different individuals, each for periods of less than 20 years is sufficient if, taken together use covers a continuous period of 20 years or more. The use by the 18 users who have relevant evidence all adds to ensure that the 20 year period prior to the 'calling into question' date provide sufficient evidence that a reasonable person could reasonably allege that a public right of way exists.
102. Paragraphs 6.1-6.6 consider the use of the claimed route to access the Chapel which was built on the common in 1922. Mr Taylor is incorrect in 6.2 that the chapel was in the same land ownership as Llanerch-y-coed for a considerable period of time. From the letter in Appendix 3, it is clear that the land for the Chapel was gifted by the landowner at that time. This is then supported by the fact that the chapel was excluded from the sale of the land in 1962 by Jesus College Oxford. It is currently included in the title of Llanerch-y-coed and it is unknown at what date it was included within this title.
103. Mr Taylor is incorrect in his assumption that the landowner of Llanerch-y-coed must have a given permission for access to the chapel and thus the use is by right (conferred by the landowner) rather than as of right. The landowner of Llanerch-y-coed did not own the chapel as it was gifted. The landowner did not own the common so could not give permission across this land either, so it seems illogical that the argument that the use of the route through the yard was 'by permission' rather than by full knowledge and acceptance of that route as a public right (ie a dedication of the route to the public by the landowner). If a landowner were to construct an attraction on their land then Mr Taylor is correct that the public access may be by permission, however, the Chapel is not an attraction that permission could be rescinded. The Chapel was given freely and would be available for public use at all times as and when required by the public at large. Not on condition or for a time-limited period.
104. There is no evidence found that supports the view that the access to the Chapel was by permission and no evidence to indicate to the public that this was the case.
105. In paragraph 6.6 Mr Taylor opines that as the 'Chapel was consecrated in 1922 that this changes the legal standing of the land such that it ceases to be land over which a right of way arises'. Although this might be true, there is no evidence that the Chapel was consecrated, other than Mrs Smith (applicant) stating that it was. The Chapel came into existence in 1922, however the Hereford Diocese hold no evidence of the Chapel and it seems likely that it was never consecrated being a non-conformist chapel. However, even if it were to be found that the Chapel had

been consecrated, the land excluded from the 1962 sale provides evidence that only the land in the footprint of the chapel was part of that 'gifting' and that then the claimed route was not therefore consecrated and could not be considered to fall under this legal point.

106. Mr Taylor also considers the route to access the chapel to be a 'churchway'. However, in *Farquhar v Newbury RDC (1909)*, Farewell L.J. established that 'a churchway is one which exists by custom and the custom being for the inhabitants of the parish and arising from user from time immemorial, cannot now be created anew.' Cozens-Hardy M.R. also stated in the same case, that 'When you find that state of facts – long user coupled with the existence of persons competent to dedicate – I decline to look into what was or was not said to be actually in the mind of the person so dedicating. I think the presumption of law follows arising from the long user that that took place which was necessary to give the public any right at all, namely, a dedication to the public not as a church path, but as an ordinary highway.' Therefore, firstly, the claimed route could not be a churchway as the chapel came into existence in 1922 not time immemorial. Secondly, it is impossible to know what was in the mind of the landowner(s) between 1922 and the date of 'calling into question', but the length of user evidence and the existence of a landowner that had the ability to dedicate gives the presumption that a public right of way now exists.
107. In paragraph 6.7 of Mr Taylor's report he correctly states that the result of an order made as proposed will be to add a bridleway which will link the U75236 to the edge of the common. In *Attorney General & Newton Abbot RDC v Dyer (1945)* it was stated that it is 'clearly settled not to be a requisite of a public right of way that it must lead from one public highway to another.'. *Para 3 of Halsbury's Laws of England (Vol 55, 5th edn. 2012)* states that 'Dedication of a cul-de-sac as a highway is unlikely to be inferred merely from user by the public.... However, if there is some kind of attraction at the far end which might cause the public to wish to use the way, that may be sufficient to justify the conclusion that a public highway has been created.' It is clear from the user evidence forms and the interviews that a large number of users were utilising the common as a place of resort.
108. In response to Mr Taylor's points 6.8-6.10 - The common did not appear to have general right of public access until the 2000 CROW Act, however, there was no criminality involved in accessing the common as there are no bylaws or legislation apparent that have prevented public access. The Council although not giving permission to the public to use the common prior to 2000 or post 2000 on horseback, were aware that the common was being used for public access on horseback and did nothing to prevent it. The route that is suggested therefore could have continued across the common with the level of user evidence, however it is obvious that the users, once reaching the common, diverged and spread across the common ie not using a defined, linear route making it impossible to substantiate a claim across the common as was established in *AG V Antrobus (1905)*. However, the route is well defined between A and B to the gate onto the common. Once there, users have a legal right to roam under CROW Act 2000. Obviously the same cannot be said for equestrian use. There is currently no legal right to exercise a horse on the common. Thus, the bridleway rights will be limited to the gate.

CONCLUSIONS

Documentary Evidence

109. The Tithe map, although appearing to indicate the route in question up to and through Llanerch-y-coed yard as a 'road' (as indicated in the apportionment book as

number 763 under Llan-y-coed entry) does not list the route in the 'road' section in the back of the apportionment book. The reason for this is not documented. The tithe map shows no evidence of the route across the common from Llanerch-y-coed yard to The Firs. However, routes across commons were frequently not shown on Tithe maps within Herefordshire.

110. The Finance Act valuation map does not indicate any deductions for public rights of way on Llanerch-y-coed land and does not exclude the route of the claim from the land. Therefore the Finance Act does not provide evidence of any public rights across Llanerch-y-coed land.
111. Bryants map of 1835 shows a feature in a similar but not identical line to the route claimed across the common. It appears that Bryant considered the route to be an unenclosed 'lane or bridle way' however the map is silent on whether there were considered to be public rights conferred on the route and the section through the farmyard does not appear to be shown.
112. The first and second edition of the Ordnance Survey maps indicate a feature in the general position of the claimed route. The first edition does not attach any status to the route, the second edition states 'F. P.' for footpath across the route from The Firs to Llanerch-y-coed yard. Both maps show a series of tracks diverging across the common from the gate out of Llanerch-y-coed yard but do not indicate anything through the yard itself.
113. The sale particulars for Westbrook and Penylan do not show any public right of access over the common and indicate that this land was in separate ownership to Llanerch-y-coed.
114. The sale particulars for Llanerch-y-coed dated 1996 (when the property was sold by the then owner, Col. Barnaby) sets out a section entitled 'rights of way' this mentions that there is a right of access to 'The Old Man' across the yard and common. But it also mentions that the yard is traversed by a 'registered public footpath which runs across the common'. Presumably the footpath across the common is referring to CL44, however, the definitive line of this path terminates near the gate into Llanerch-y-coed yard (on the Common side). This appears to indicate that Col. Barnaby has accepted that there were also public rights across the yard of Llanerch-y-coed (A-B of the claimed route). However, Mr and Mrs Smolas (current owners) have stated that Col. Barnaby had died prior to the sale and his estate was sold on, therefore the sale particulars may not have expressed his belief regarding the status of the route. It is clear that when the particulars were written someone connected to the estate thought that the route had public rights through the farmyard.
115. Mr and Mrs Linklater bought the property in 1996 and then made a s31(6) deposit on the land, stopping the public from accruing access rights across the yard to the common.
116. The sale particulars for Llanerch-y-coed (dated 1962) states that 'there is a right of way over the farm road and yard to several small holdings on the other side of Little Mountain common'. This appears to indicate that the rights were private, for the owners of the dwellings, not public rights.
117. The letter from the County Surveyor included in the Agriculture (Improvement of Roads) Act 1955 bundle states that the road leading up to Llanerch-y-coed was accepted as maintainable by the authority, possibly due to the quarry on the western side of Llanerch-y-coed being used by the authority for road-stone. It states that the road 'ends at the farm gate'. This document provides no evidence of there being a public right of way across Llanerch-y-coed farm-yard at this time.

118. The parish submission originally claimed the route of CL44 as a bridleway but then it was downgraded to a footpath. There are many routes across the common which were claimed at the time, however, none were indicated to traverse the yard of Llanerch-y-coed and it therefore provides no evidence of a public right of way across the yard area.
119. In conclusion there is some small amount of documentary evidence to suggest that public rights subsist or can reasonably be alleged to subsist for section A-B of the claimed route with regard to the sale particulars in 1962. However, no evidence was discovered for the upgrade of part B-C of the claimed route (current registered footpath CL44).

User evidence

120. Mr and Mrs Linklater provided an affidavit (Appendix 1) stating that the previous owner, Col. Barnaby used to lock the gate to Llanerch-y-coed once a year (on Christmas Day) to negate the dedication of a right of way through the yard. Mr Staley has also provided a letter (appendix 2) stating that Col. Barnaby locked the gate 'leading onto the Little Mountain yard area at Llanercoed Farm' on Christmas Day, only allowing access to the residents of Little Mountain. This is contradicted in Mr Staley's family user evidence form (signed by the same Mr Staley) in which it is stated that the gate was not locked and that they were not told that the route was not public and that they believed that the owner was aware that the public was using the way. The form also indicates that Mr Staley was never prevented from using the way. Mr Staley indicates on his form that he believed the way to be public.
121. Christmas Day could be considered to be a day when most people would not be out walking. As many of the users stated that they used to talk to Col. Barnaby on the way through the yard and none of them were aware that he did not consider the route to be a public right of way, it is not considered that this evidence holds much weight. It also conflicts with the sale particulars when Col. Barnaby sold Llanerch-y-coed, which stated that the 'yard is traversed by a registered public footpath which runs across the common' – this appears to suggest that 'someone' accepted public rights across the yard linking with footpath CL44. However, we have no direct evidence from Col. Barnaby himself.
122. Mr and Mrs Linklater must have purchased the property according to the particulars that were advertised at the time indicating that there was a public way across the farmyard. The current owners have stated that Col. Barnaby was already deceased at the time of the sale, therefore Mr and Mrs Linklater could not have received the information regarding the locked gate from Col. Barnaby himself. This makes their affidavit less useful in terms of providing evidence in that their belief could not be born from evidence. However, the user evidence forms have been completed using the users' own first-hand experience of using the route.
123. 37 users completed user evidence forms, 7 of these can be excluded as their evidence falls outside of the relevant period (8th September 1977 – 8th September 1997). Of the remaining number at least 8 hold Common rights to Little Mountain Common. Although access arrangements are not written into the Common Register it could be considered that Commoners have a separate, private right of access to Little Mountain Common through Llanerch-y-coed yard. It is not within the scope of this report to consider whether the commoners have private right of access, however, to err on the side of caution, the evidence from commoners has been excluded from consideration.
124. Two further users were discounted as they did not provide dates to describe the period of path useage. One user did not mark a route on their plan accompanying

the evidence form and was therefore also discounted. One user, although indicating a path across the common, did not include the section across the farmyard. As there was insufficient evidence of the route across the common, only through the farm-yard, this user was also discounted.

125. The remaining 18 relevant user's evidence appears to be in agreement that it was possible to pass through Llanerch-y-coed yard from the U75236 to the gate onto Little Mountain Common (A-B of the claimed route).
126. The frequency that the route through the farm-yard was used varied between less than once per year, to daily. However, the approximate mean frequency is around 20 times per year (it is difficult to gauge an accurate figure as some users expressed their frequency of use as 'a lot' or 'frequently').
127. The 18 users accessed the common by a variety of means – foot, horse and vehicle. Mrs Smith made the application for byway rights, however due to the rulings under the 2006 Natural Environment and Rural Communities Act (NERC Act), it could only ever be considered as a restricted byway. (Section 67 of NERCA introduced a cut-off date of 20th January 2005, on which date any mechanically propelled vehicular rights which had not already been recorded on the Definitive Map and Statement were extinguished. The Act contained exceptions to this. This application does not meet the exceptions; therefore, the application can only be considered for restricted byways.)
128. 18 relevant users claim to have used a route through Llanerch-y-coed yard either for the entirety of the relevant period (8 users) or part of the relevant period (10 users).
129. There is no evidence for the upgrade of the footpath CL44 (section B-C on the plan) to byway status as applied for by Mrs Smith as users have, in the majority, indicated the route through Llanerch-y-coed (section A-B) but not across the common. Indeed, even Mrs Smith did not highlight the route across the common on her user evidence form.
130. The user evidence through the provision of user evidence forms and interviews appears to show consistent usage through Llanerch-y-coed yard for a period of time sufficient to establish that the route was being used openly 'as of right' and without force, secrecy or permission.
131. Of the 18 relevant respondents whose evidence is deemed valid, 12 have stated that they have used the route on foot, 15 stated that they have used the route on horseback and 5 have used the route in a vehicle (some accessed the route using more than one method). The majority of users therefore stated that they used the route as a bridleway and there is only a small amount of evidence that it was used by vehicles.
132. It is necessary to consider whether the evidence of use in support of the application is sufficient to show that the route subsists or is reasonably alleged to subsist. It is considered that the amount of use of the section of claimed route between the U75236 and the gate to Little Mountain Common (section A-B), through the farmyard of Llanerch-y-coed is sufficient to show that dedication of a public bridleway has taken place under section 31 of the Highways Act 1980. It is considered that the making of a s31(6) deposit under the Highways Act 1980 by Mr and Mrs Linklater in September 1997 brought the public's right to use the way into question and that there is sufficient evidence of use of the way during the previous 20 years by the public. Although there is a suggestion that the owner of the land prior to Mr and Mrs Linklater (Col. Barnaby) took action to prevent the public from using the way during the period 1977-1997, it is not considered that this is consistent reliable evidence

and the act of locking the gate once a year on Christmas Day would be considered insufficient to demonstrate to the public at large that this route was not considered to be a right of way by the landowner. There is no direct evidence from Col. Barnaby himself as to his intentions.

133. Lord Denning in *Fairey v Southampton County Council (1956)* stated that in order for the rights of the public to have been 'brought into question' the landowner 'must challenge it by some means sufficient to bring it home to the public that he is challenging their right to use the way, so that they might be apprised of the challenge and have a reasonable opportunity of meeting it'. In order for there to be 'sufficient evidence that on the part of the landowner such as to show the public at large – the public who used the path that he had no intention to dedicate'. It appears that locking the gate on Christmas Day once a year was not sufficient for Col. Barnaby to indicate to the public at large that he had no intention to dedicate the route through Llanerch-y-coed yard as public.
134. There is little clear indication of a width from the user evidence. Here, the question is what width are the public likely to have used, and what is considered a reasonable width for a public bridleway. For the purposes of establishing a new public bridleway, for example by diversion or creation order, Herefordshire Council has a policy that such a bridleway shall have a minimum width of three metres, on the basis that this provides sufficient width for users of the route. In the absence of evidence to indicate that this route has a greater or lesser width, it is proposed that a width of three metres adequately reflects the width of bridleway that the public are likely to have used when accessing this route. In addition, such a width would also protect the interests of bridleway users in the event that use of the land should change at some time in the future.

RECOMMENDATION

135. That the Director, Economy and Place reject the application to make an order to modify the definitive map to add a byway and upgrade CL44 (section C-D) footpath to a byway.
136. That the Director, Economy and Place make an order to modify the definitive map to add a bridleway from point A to point B on the location plan (Figure 1) having a width of 3 metres.

APPENDICES

APPENDIX 1

APPENDIX 2

APPENDIX 3

APPENDIX 4