MATTER 9: ENVIRONMENT

Our response to Matter 9 is submitted on behalf of Plymouth Properties. In particular they raise concerns with regards to the designation of land at Dunraven Drive as Local Greenspace, under Policy SPT11. This Statement is intended to be supplementary to the representations submitted on the Joint Local Plan to date (Consultee ID no. 1094991 & 1017423).

Environment

Question 9.2 vii

b. Are the allocations/designations based on robust evidence and are they justified and consistent with national policy?

We have significant concerns over the evidence base that has led to the designation of sites in the Plan as Local Green Spaces. Our clients site is proposed to be allocated as Local Greenspace within the Plymouth, South West and Devon Joint Local Plan. This appears to be based on the Council’s assessment of green spaces which is contained within Appendix 2 of the Plymouth Policy Area Open Space Assessment (February 2017). The audit which relates to our clients site, land at Dunraven Drive (Site ID 409) was is dated April 2015. However, it is evident from the site photographs included in the site assessment section, that the survey which contributed to the audit findings was undertaken before this date.

Our consideration is based on the relevant sections of the NPPF which require that a thorough assessment of need and types of open space is undertaken (Para 73), gives circumstances where open spaces can be lost (para 74) and sets out the circumstances (para 77) where Local Designations should be made. In addition, it defines open space as “All open space of public value, including not just land, but also areas of water (such as rivers, canals, lakes and reservoirs) which offer important opportunities for sport and recreation and can act as a visual amenity.”

Based on the evidence prepared, the allocation of our clients site is not based on robust evidence and is not consistent or justified in line with national policy. We consider these points below.

Lack of need

The Council’s assessment of greenspace indicates that there is a significant surplus of this type of open space already in the area and across the City. The Plymouth Policy Area Open Space Assessment (February 2017) provides an analysis of open space across the Plymouth Policy Area. The document assessed 9 open space typologies and subdivides the City into 10 policy areas. The land at Dunraven Drive forms part of the ‘north’ policy area and is designated as ‘natural and semi-natural green space’. The primary purpose of natural and semi-natural green space as outlined in Table 6.1 of the document, is for ‘wildlife conservation, biodiversity and environmental education awareness’.

Paragraph 8.11 states that the current standard for provision is 2.5Ha of greenspace per 1000 of the population. In relation to the quantity of natural and semi-natural greenspace within the north policy area (where the subject site lies), Table 8.3 indicates that 287.43Ha is available for 40,122 people. This represents a significant surplus of 187.43Ha. Plainly, the land at Dunraven Drive is not required to contribute towards greenspace provision of this type in this area given the massive over provision that already exists. Furthermore, across the city as a whole there is a surplus of 593.75Ha of this type of greenspace.
Site assessment

In their assessment of the site (Site ID 409), the Council note that the land has been salvaged in light of a fungal infection, this reference in itself is misleading. The site was actually harvested of a planted coniferous (not broadleaf) forestry crop. The assessment further confirms that the site is not subject to any international or national designations (such as SPA, SAC, Ramsar, SSSI, AONB, Green Belt, NNR, SAM or Listed Building).

As outlined below, the Council’s assessment also indicates that the site does not meet the relevant criteria for a greenspace designation, as outlined within para. 77 of the NPPF.

Furthermore, the evidence base includes a number of errors which cannot be considered to be robust:

- Public access – it is indicated that there is pedestrian access in the assessment, this is incorrect, it is entirely private and there is no public access or any intention to provide public access (please refer to modification order decision FPS/N1160/7/2 within Appendix A);
- Informal recreation – it is indicated that it is available for informal access (including dog walking) however as noted above, the site is entirely private and there is no public access.
- Southway Valley Local Nature Reserve (LNR). The Council’s assessment incorrectly states that the site is within the LNR, in fact, the site falls to the south of the boundary of the LNR;
- TPO trees – The assessment incorrectly stated that there are TPO trees within the boundary;
- With regards to flood risk, only the northern edge of the site boundary is designated within the flood risk zone;
- Biodiversity - the Joint Local Plan Evidence Document ‘Biodiversity Network Creation Process 2017’ explains the process undertaken in creating the Plymouth and South West Devon Biodiversity Network. It is clear from this document that the purpose of the Biodiversity Network is to safeguard areas of important biodiversity and ecological value. As outlined previously, the site was cleared in 2015 and comprises wasteland, vacant of vegetation. It therefore no longer holds any biodiversity or ecological value, and cannot be considered to contribute towards the Plymouth and South West Devon Biodiversity Network.

The assessment also states that the site is part of a Landscape Character Area (LCA). The site is identified within Character Area CA09 (Southway Woods), type 7A (Wooded Valleys). The assessment undertaken in relation to the area summarises the key landscape sensitivities to development within this Character Area:

- The valued semi-natural habitats designated as part of Southway Valley Local Nature Reserve, including broadleaved woodland (including oak, hazel, ash and sycamore) and semi-natural grassland.
- The visually prominent and locally distinctive wooded skyline of the upper valley slopes – particularly when taken in combination with the similar ridgelines of CA 07 and CA 08.
- The role of the landscape as an undeveloped and naturalistic oasis amongst dense residential development.
- The use of the landscape for informal recreation.

It is clear that land at Dunraven Drive does not form part of the functions outlined above. It is not part of the Southway Valley Local Nature Reserve, does not form part of the upper valley slopes which contribute towards a wooded skyline, and is inaccessible to the public. Furthermore, it would appear that part of the assessment which contributed towards the designation of this area as a LCA
was undertaken prior to the site being cleared. In this regard, the audit form is dated April 2015, however it is clear from the site photographs included in the site assessment section, that the survey which contributed to the audit findings was undertaken before this date.

It is therefore considered that the land at Dunraven Drive does not positively contribute towards the Southway Woods Landscape Character Area. There is no intention to replant the site presently.

Summary

In light of the outdated information and errors within the evidence base, in addition to the significant over supply of open space within the local area, our clients land should be removed as a Local Greenspace designation within the emerging Local Plan. The site is not publicly accessible and does not provide an area for sport and recreation, nor does it contribute to visual amenity, as outlined within the Council’s own Green Infrastructure Audit. The site therefore does not provide open space of ‘public value’ as defined within the NPPF.

Given the above, we do not consider that the designation of the site as a Local Greenspace to be based on robust evidence, justified or consistent with national policy. Furthermore, none of the boxes were ticked that would support an allocation as a Green Space (which relate to NPPF para. 77 and we consider further under question c).

c. In relation to Local Green Space, paragraph 77 of the Framework states that this form of designation will not be appropriate for most green areas or open space and should only be used in certain circumstances. Do the designations meet the circumstances set out in the Framework?

Paragraph 77 indicates that such local designations should only be used where each of the following criteria are met:

1. where the green space is in reasonably close proximity to the community it serves;
2. where the green area is demonstrably special to a local community and holds a particular local significance, for example because of its beauty, historic significance, recreational value (including as a playing field), tranquillity or richness of its wildlife; and
3. where the green area concerned is local in character and is not an extensive tract of land.

The Council’s own assessment indicates that the site does not meet these criteria and therefore logically it is not suitable for such a designation in the context of the NPPF.

Whilst plainly the site is in close proximity to the local community, we note:

- it is not publicly accessible and does not provide any recreation (formal or informal) opportunities;
- there already exists a significant supply of similar open space in the area; and
- it has been cleared of the crop of timber and there are no plans to replant this area. Given its nature it cannot be argued to be special to a local community or hold any significance. The Council’s assessment confirms that it holds no special beauty, historic significance, recreational value, tranquillity or richness of wildlife.

The designation in respect of the land at Dunraven Drive therefore does not meet the circumstances set out in the Framework.
Point 4 of DEV29 seeks to address local deficiencies in the accessibility and quality of green space and play space. Is it clear that this only relates to the additional needs of new residents from development?

No, Policy DEV29 does not explicitly state that point 4 relates solely to new development. Furthermore, in light of the evidence above, it should be noted that in relation to the existing quantum of green space, the Plymouth Policy Area Open Space Assessment (February 2017) indicates that there is a total surplus of 187.46Ha of natural and semi natural greenspace within the ‘north’ policy area out of a total 287.46Ha. This massive surplus has been calculated based on the requirement of 2.5Ha of greenspace per 1000 of the population, for a total population of 40,122 people. It is evident that there is an overprovision of this type of greenspace in the relevant locality, with absolutely no requirement for further provision.

It is noted that there are however deficits in other types of open space, including allotments and play space. In bringing forward the site for development there would be an opportunity to consider whether an element of it could contribute towards qualitative shortfalls in the area and link in to the wider network. In this way the site could contribute positively towards the provisions of point 4 of DEV29.

**Conclusion**

In light of the evidence outlined above, the land at Dunraven Drive should be removed as a Local Greenspace designation within the emerging Local Plan. On this basis, it is considered that an alternative use for the site is appropriate. A residential allocation in this location could provide between 125 and 150 (25-30dph) dwellings to help meet Plymouth’s housing requirement. Furthermore, any future proposals would provide an opportunity to include an element of open space, for instance provision for allotments and play space, where there is a deficit in the area or planting that could contribute towards the wider aspirations of the Council. In this regard, our client, Plymouth Properties confirm that their interest at Dunraven Drive could be developed within a 5 year period for residential purposes.

*LRM Planning*
*January 2018*
Appendix A - Modification Order Decision FPS/N1160/7/2
Order Ref: FPS/N1160/7/2

- This Order is made under Section 53(2)(b) of the Wildlife and Countryside Act 1981 and is known as the Devon County Council (Footpath Nos. 32, 33 and 34, Plymouth) Map Modification Order 1996.
- Plymouth City Council submitted the Order for confirmation by the Secretary of State for Environment, Food and Rural Affairs.
- The Order is dated 29 January 1996 and proposes to modify the Definitive Map and Statement by adding to it three public footpaths as shown in the Order plan and described in the Order Schedules.
- There were 37 objections outstanding at the commencement of the public inquiry.

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

**Preliminary Matters**

1. As well as the statutory objections made following advertisement of the Order, 3 representations were made in support. Since the making of the Order, 12 objections had been withdrawn, and several persons who made objections or representations in 1996 had moved away. A number of those submitting user evidence forms ("uefs") had since passed away or left the area.

2. Devon County Council ("DCC") took no part in the proceedings. Plymouth City Council ("PCC") adopted a neutral stance, but assisted the Inquiry generally. The case in support of the Order was presented on behalf of Derriford Residents’ Group. The case against was presented with Mr Lippell acting as agent to the owners of land north of Dunraven Drive, objecting to the Order.

3. I closed the Inquiry on 11 December. I conducted the site visit in January accompanied by a representative of PCC, Mr Lippell for the Objectors and Mr and Mrs Harvey for the Supporters. Mrs Reeve attended for part of the visit. Where unable to walk the Order routes I viewed their locations. Elsewhere I walked the Order routes or routes approximating to them. I also walked a path lying to the east of the Order routes which did not form part of the Order.

4. Prior to the Inquiry, representations on behalf of the Objectors had been made to the Planning Inspectorate and to the Department for Environment, Food and Rural Affairs ("Defra") regarding the validity of the Order, and of proceeding with the Inquiry. These were rehearsed at the Inquiry and responded to by the Supporters and PCC. Having heard the arguments put forward by the parties, and received documents in their support, I decided I would give them further consideration in reaching my decision, but would continue with the Inquiry so as to hear the evidence of those present. The parties did not disagree with this course of action.
5. At the Inquiry, an application for a full award of costs was made against PCC on behalf of the Objectors. This is the subject of a separate decision.

**Legal Submissions**

6. The Objectors argued that a DCC definitive map modification order could not be confirmed so as to modify PCC’s Definitive Map and Statement; the Secretary of State\(^1\) does not have the power to confirm the Order in its present form; and the regulatory procedures governing the Inquiry had not been complied with.

7. The Objectors said the application to add the paths to the definitive map and statement had been made in 1993 and considered by DCC at its Public Rights of Way and Grants Sub Committee on 28 January 1994. Whilst it concluded that rights of way subsisted, as there was then no definitive map and statement for Plymouth, it was considered “inappropriate” that a modification order be made. On 31 March 1995 the Sub Committee considered the matter again and recommended that “in view of the failure to agree a compromise solution which is acceptable to both the landowner and the Residents’ Association, it is felt that the only way forward is to publish a Modification Order to record the routes. This will allow the landowner to object and an independent inspector to assess all the available evidence at a public inquiry”. It was recommended that a base map and blank statement for Plymouth be published under Section 55(3) of the Wildlife and Countryside Act 1981 (“the 1981 Act”). There are no minutes available for this meeting, and no evidence that a blank map and statement was published. Thus the Order made by DCC on 29 January 1996 sought to add footpaths falling within “the administrative City of Plymouth” to the “County of Devon Map and Statement”.

8. The Sub Committee Report of 28 January 1994\(^2\) stated as there was no Definitive Map, no order would be made to record the routes. It also noted the City Council should be advised of the Report’s contents. The Report’s recommendation as to the status of the routes was confirmed in a Minute of the Meeting\(^3\). The Sub Committee Report of 31 March 1995\(^4\) recommended the order be published together with the plain base map and statement which would become the Definitive Map and Statement if the order was subsequently confirmed, and this is referred to in what I consider to be an extract from the Minutes of that Meeting\(^5\) which resolved the base map and blank statement be prepared and the order made to record the routes as public footpaths on that map and statement, subject to consultation with PCC.

9. The former Plymouth Borough Council area was excluded from that covered by DCC’s definitive map and statement\(^6\). The 1981 Act required DCC to prepare a definitive map and statement for the former excluded area, although due to funding prioritisation to rural areas this did not happen. PCC’s website explains that there was no definitive map and statement when Plymouth Borough

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\(^1\) Or, by virtue of Paragraph 10(1) of Schedule 15, an appointed Inspector

\(^2\) DCC document reference EP/94/94/HQ submitted as document SCL/3 in the Objectors’ Proof of Evidence, and Section PCC_004 of the PCC submission

\(^3\) Copy contained in section 4 of the Supporters Statement of Case under ref *PR/23 (b) *(ii)

\(^4\) Copy contained in section 4 of the Supporters Statement of Case, and in Section PCC_004 of the PCC submission, DCC document reference ED/95/240/HQ

\(^5\) Copy contained in section 4 of the Supporters Statement of Case, annotated *PR/63(b) with an internal date stamp of 16 August 1995 and referring to the Report reference ED/95/240/HQ

\(^6\) The National Parks and Access to the Countryside Act 1949 enabled built up areas where a survey would not be expedient to be excluded from the original survey of public rights of way
Council became a unitary authority in April 1998, and Plymouth was considered to have a blank map and statement until such time as the first legal order was made. PCC began preparing its definitive map, and the first legal order was confirmed in July 2002, and the current definitive map and statement is dated 1 August 2006.

10. The Objectors maintained that when in 1998 PCC became a unitary authority and a surveying authority for the purposes of the 1981 Act, the land to which the Order relates no longer fell within the area of DCC. There was no definitive map and statement to inherit and PCC began to prepare its own. Therefore, even if a blank map and statement had been prepared, it would have been superseded by their definitive map and statement confirmed in 2002. Since the Order provides that the "County of Devon Map and Statement shall be modified" by adding the paths, and the publicity and notification of the Order remains unchanged, the Order map and the definitive map and statement to be modified do not match – being a 1996 Order and a 2002 Definitive Map. This is contrary to the requirements of Section 53 and regulation 7, and Schedule 4, paragraph 3 of the Wildlife and Countryside (Definitive Maps and Statements) Regulations 1993. Such errors are beyond the modification of the Secretary of State. The matter was further compounded by PCC taking a neutral stance at the Inquiry, having made no resolution on the issue, the Order only recently discovered, passed to an Officer for progression, and subsequently submitted to the Secretary of State for determination.

11. In response, both PCC and the Supporters cited Regulation 8 of the Local Government Changes for England (Miscellaneous Provision) Regulations 1996, whereby the functions of DCC as the surveying authority became the functions of the newly formed PCC. In addition, the Supporters relied upon Regulation 4 of the Local Government Changes for England Regulations 1994, whereby the Order made by DCC in exercise of its function as surveying authority for the area in

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7 Here the Objectors rely on Planning Inspectorate guidance and an analogous point about the limited power to modify enforcement notices in Clive Payne v the National Assembly for Wales and Caerphilly County BC
8 Regulation 8 refers to 'Definitive Maps and Statements' and states, "Where on the reorganisation date, the functions of a surveying authority under Part III of the Wildlife and Countryside Act 1981 (public rights of way) in relation to any area become functions of another local authority – (a) that authority shall be deemed to have prepared that part of any definitive map and statement (within the meaning of that Part) which relates to that area on that date; (b) that part shall be deemed to be the definitive map and statement for that area; and accordingly (c) that authority may resolve that its own name be included in the title of that definitive map and statement, whether or not in substitution for the name of any other authority.
9 Regulation 4 refers to the 'Continuity of matters' and states, "(1) Anything which, at the reorganisation date, is in the process of being done by or in relation to a transferor authority in the exercise of or in connection with any of its functions in relation to a transferred area may be continued by or in relation to the transferee authority. (2) Anything done by or in relation to a transferor authority in the exercise of or in connection with any functions in relation to a transferred area shall, so far as is required for continuing its effect on and after the reorganisation date, have effect as if done by or in relation to the transferee authority. (3) Paragraph (2) applies in particular to – (a) any decision, determination, declaration, designation, agreement or instrument made by a transferor authority; (b) any regulations or byelaws made by such an authority; (c) any licence, permission, consent, approval, authorisation, exemption, dispensation or relaxation granted by or to such an authority; (d) any notice, direction or certificate given by or to such an authority; (e) any application, request, proposal or objection made by or to such an authority; (f) any condition or requirement imposed by or on such an authority; (g) any fee paid by or to such an authority; (h) any appeal allowed by or in favour of or against such an authority; or (i) any proceedings instituted by or against such an authority. (4) Any reference in this regulation to anything done by or in relation to a transferor authority includes a reference to anything which by virtue of any enactment is treated as having been done by or in relation to that authority. (5) So far as is required for giving effect to the provisions of this regulation, any reference in any document to a transferor authority shall be construed as a reference to the transferee authority. (6) The foregoing provisions of this regulation are – (a) without prejudice to any other relevant provision made in respect of any particular functions; and (b) shall not be construed as continuing in force any contract of employment made by a transferor authority.
question, owing to the need for it to have continuing effect after the local government reorganisation date, is deemed to have been made by PCC. By the operation of these regulations, it was argued, the Order is deemed, at the date of the local government reorganisation that created PCC, to have been made by PCC to affect the PCC Definitive Map and Statement.

12. It seems to me that Regulation 4 of the 1994 Regulations gave PCC the powers to continue with the Order made by their predecessor authority DCC, as if it were their own, notwithstanding the references in the Order to DCC.

13. PCC argued it had followed the necessary administrative steps in submitting the Order for determination as the successor surveying authority on discovery of the Order. Regulation 4(1) of the 1994 Regulations indicates that a successor authority may continue with a decision made by a predecessor authority, and this is what PCC did rather than return the Order to the archives as the Objectors suggest they should have done. Furthermore, the 1981 Act requires that a definitive map modification order, to which objections are received and not withdrawn, be submitted to the Secretary of State for determination. It seems to me that the statutory requirements would be covered by Regulation 4, and thus complied with in relation to the submission of the Order for determination.

14. PCC argued that under the terms of Regulation 8 of the 1996 Regulations, as the legitimate successor authority it was entitled and empowered to deal with orders made by the predecessor authority. Furthermore, the Definitive Map proposed for modification by the Order is the logical and legal extrapolation of the wider Definitive Map operated by DCC until local government reorganisation in 1998. PCC also said that it had inherited the blank map and statement from DCC, which they expanded in 2002 and 2006.

15. The Supporters submitted that the discovery of some information not known to the surveying authority when the earlier Definitive Map was prepared enabled a member of the public to take steps to correct a previously mistaken decision, here the decision by PCC in 2002 to adopt a Definitive Map and Statement for the area that did not show the Order routes.

16. I have had regard to the submissions and the judgements cited in support of them, and consider the arguments are finely balanced. I find that Regulation 4 of the 1994 Regulations enabled PCC to continue with the DCC Order as made, inheriting it as if it was their own. The documented evidence available to me indicates that when the Order was made a blank map and statement was also to be made further to the Recommendation and Minute of the DCC’s 1995 Sub Committee Meeting (paragraph 8), under Section 55(3) of the 1981 Act. The PCC website (paragraph 9) suggests its definitive map process began in 1998 when it became the surveying authority, culminating in the 2002 Definitive

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10 Schedule 15, paragraph 7(1) to the 1981 Act
11 The Supporters relied on the duty of the surveying authority to keep its definitive map and statement under continuous review and the judgement in Mayhew v Secretary of State for the Environment which relied on earlier judgements in R v Secretary of State for the Environment (ex parte Riley), R v Secretary of State for the Environment (ex parte Burrows and Simms) and Fowler v Secretary of State for the Environment and Devon County Council.
12 Section 55(3) provides, “Where, in relation to any area, no such survey has so begun or such a survey so begun is abandoned, the surveying authority shall prepare for that area a map and statement such that, when they have been modified in accordance with the provisions of this Part, they will serve as the definitive map and statement for that area.”
Map. This might imply that, as the Objectors argue, no map was inherited by PCC from DCC in 1998 from the 1995 decision. Regulation 8 of the 1996 Regulations indicates that a successor authority would inherit any existing definitive map\textsuperscript{13}, which would then become its own by virtue of the provisions of the Regulation, and could be renamed. It is arguable that if no such blank map and statement had been prepared then there would have been no map for PCC to inherit and modify, and thus Regulation 8 could not be relied upon, there being no definitive map and statement which relates to that area at the date of reorganisation.

17. Clearly the Order was made further to the Sub Committee Recommendation and Minute of 1995, and I can see no reason to presume that the blank base map and statement would not have been prepared also. PCC says it inherited the blank map and statement from DCC (paragraph 14). It follows I accept that the blank map and statement was made. If the Order had been confirmed at the time, it would have added the footpaths to the blank map and statement by virtue of the Order itself made under Section 53 of the 1981 Act, the blank map and statement then becoming the definitive map. I consider the circumstances are unusual in that some 13 years have passed in which the existence and earlier determination of the Order have been overlooked in the consideration of PCC’s Definitive Map. However, on the balance of probabilities it seems to me that by virtue of the Regulations considered above PCC was entitled to progress the opposed Order to its determination as if it were their own, and that in the event of its confirmation it would thus modify PCC’s Definitive Map and Statement. Consequently I believe that it is open to me to consider the Order for confirmation.

**The Main Issues**

18. The Order has been made in consequence of the occurrence of an event specified in Section 53(3)(b) of the 1981 Act, being 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; and Section 53(3)(c)(i) which requires me to consider whether the evidence discovered by the Authority (when considered with all other relevant evidence available) is sufficient to show, on the balance of probabilities, that footpaths which are not shown in the Definitive Map and Statement subsist, and that the Map and Statement require modification. The evidence was of use by the public considered sufficient by DCC to raise a presumption of dedication as required by the tests set out in Section 31 of the Highways Act 1980 (“the 1980 Act”).

19. This requires me to consider the date on which the right of the public to use the claimed footpaths was brought into question; whether they were used by the public as of right and without interruption for a period of not less than 20 years ending on the date on which their right to do so was brought into question; and whether there is sufficient evidence that there was during this 20 year period no intention on the part of the landowner to dedicate them.

\textsuperscript{13} Section 53(1) of the 1981 Act provides that, “In this Part “definitive map and statement”, in relation to any area, means, subject to section 57(3), ... (c) where no such map and statement have been so prepared, the map and statement prepared for that area under section 55(3)”. 
20. Should the tests of Section 31 of the 1980 Act not be met, I shall consider the evidence under common law, that is whether as a whole it shows that the owners of the land over which the Order routes pass have dedicated them as footpaths to the public. There is no evidence of express dedication in this case. An implication of dedication at common law may be shown if there is evidence from which it may be inferred that the landowners have dedicated rights of way and that the public has accepted the dedication. Such acceptance is usually shown through use of the routes by the public.

Reasons

Background

21. Land to the north of the stream passing through Southway Woods and land to the north of Dunraven Drive marked Goodwin Park on the Order map is in the ownership of PCC. The greater part of the land between the stream and Dunraven Drive, including the area known as 'the gap' between Nos. 140 and 150 Dunraven Drive, points A, F, and G, is owned by the Objectors.

Presumed dedication under Section 31 of the Highways Act 1980

The date on which the right of the public to use the claimed footpaths was brought into question

22. The Objectors' land was fenced off with locked gates in 1991 and signed to prevent public access, thus affecting the access points from Dunraven Drive. I consider the fencing and gating of the land to have been sufficient to bring to the attention of the public that their right to use the claimed footpaths was being challenged and thus to bring into question that right.

23. Evidence was given to the Inquiry by Mr Lippell that in 1988 trenches had been dug across the route of claimed Footpath 32 at 2 locations aimed at preventing public passage, one on the Objectors' land, the other on land held by PCC. At the same time a route was established from point G to the east of the claimed paths, which he referred to as a permissive path. Some local people had been present at the time, although none of those giving evidence to the Inquiry. I heard that the public continued to use Footpath 32 following this work. In my view, the location of the trenches beyond point C would have had no effect on access to the other claimed paths in the woodland from points C or D. On balance, I do not consider the digging of the trenches to have been sufficient to bring into question the right of the public to use the claimed footpaths. It follows that I find the date of bringing into question is 1991 and therefore the 20 year period is 1971 to 1991.

Whether the claimed footpaths were used by the public as of right and without interruption for a period of not less than 20 years ending on the date on which their right to do so was brought into question

24. Evidence of use had been provided in 42 uefs with the earliest claimed use dating back to 1958, and the most recent 1993. I heard evidence from 7 of these witnesses. Whilst I take into account the evidence of use of the

14 For ease of reference I have referred to this route as 'the permissive path' in this decision
remaining witnesses, the weight that I am able to attach to it is reduced as it has not had the benefit of being tested.

25. The use of 4 of the witnesses giving oral evidence covered periods before and during the relevant 20 years. Mr Collier had known the area since 1966 and used a route equating to the claimed Footpath 32 from Stokesay Avenue (opposite the gap) to reach the school at Southway until 1971. He also accessed the shops, and from 1973 walked his dog. He went from A-C-E, from F or any point on the open land of the gap across the valley to E (Pendeen Crescent). His use was occasional, that of his wife much more frequent. He passed to one or other side of a builders’ compound at the gap in the 1960s/70s. He had also used the permissive path.

26. Mr Elson had moved to the area in 1969 and used the path E-D-C-G since then almost daily to the shops on Dunraven Drive, for dog walking, or for business, although the path had varied across Goodwin Park when it was being constructed. The original route via C had moved. The map attached to his uef indicated his use was of the permissive path and he confirmed to the Inquiry that it was the only path he was using at the time. He recalled walking through the builders’ compound; also that land levels had been raised by dumped material which had not interfered with the path as the bulldozers had re-flattened it. He said he had walked in the woods, crossing the stream, using a bridge on occasions, then continuing up a steep path.

27. Mrs Jefferson said she had used all the paths since 1965 regularly, and the open space, and had never been challenged crossing the valley (her map included the permissive path). She had used a partly steep route from A beside No.150 Dunraven Drive following a concrete post and wire fence, across the stream and over the valley. She made a circular route by entering the woods behind Dunraven Drive, west through the wire fence and back to Looseleigh Lane and Powisland Drive to the south west. She used the route G-E to get to the shops 3-4 times a week. Her husband and son had also used it. She often used to access Goodwin Park. She recalled trenches dug across the path in 1988 (paragraph 22) which she climbed over or passed around. She believed the path had moved due to the builders’ compound, but could be used from G. She recalled jumping across the gully (between H-O and C-N).

28. Mrs Reeve had used the path to the shops at Southway since 1965 once or twice a week. Her children played in the woods and her son used a path to get to school from 1979. She also walked up and down the valley to the ford (J) across the stream and back through the woods. Although the map attached to Mrs Reeve’s uef showed no marked paths, she explained that she had used A-B, E-B, around C and occasionally C-G. The route had been diverted by earth dumped there and when the permissive path was created. She vaguely recalled the builders’ compound which it was possible to go around.

29. Use by the other witnesses fell within the 20 year period. Mrs Harvey had used all the claimed paths (plus some others) daily with her dogs and in 1982 taking her children to school. The paths were well established and obviously walked by lots of people. She was aware of the trenches in 1988, but it was possible to pass around the side near C. They had been filled in by residents. Although the permissive path had been provided, access between G-C was available. She entered the gap at G or F, occasionally A, then C-D-E, or C-N to get into the
woods. Path C-E had deviated slightly to the east when the earth had been dumped raising the land. She had seen no ‘private land’ signs prior to 1991 nor had she been challenged. She recalled I-D had become steep as a result of soil dumping. She believed I-J was used by many residents as there was no path to the north of the stream until the Nature Park (on PCC land) was developed in the early 1990s, only a rough boggy track. She recalled the gulley could be crossed but that later storm damage made this more difficult, although it could be accessed between O-H. She had received permission from the land owner to use J-K-L. The path J-K-L had become overgrown and a resident had prevented the public passing behind his house. Points L-M had become overgrown at the same time and she had stopped using the paths here in the late 1980s.

30. Mrs Bere had lived opposite the gap since 1973 and used paths across the valley to the shops at Southway from 1974. She usually took the most direct route from G, following the permissive path about 20 times a year. She recalled the builders’ compound, but that it was not large and did not fill the whole of the gap. She commented that the path was used by hundreds of school children. The route A-B which everyone had used had been diverted to the permissive path, although people, especially children, walked anywhere across the gap. The map attached to her uef showed the permissive path, A-B, B-F then to C-D-E (together with an unclaimed route to the west joining the path between I-D). Mrs Bere confirmed her use of paths other than the permissive path was occasional, and that before the spoil dumped in the 1980s the path across the valley had been straighter.

31. Mr Harvey had regularly walked the paths shown on the map attached to his uef since 1975, mostly at weekends. He had usually walked them with his wife and had never been stopped or told the land was private. Between L-K-J the landowner had no objection to people walking the route. He recalled the trenches near C were not deep and were subsequently filled in. He believed the gap was open space and the woodland was amenity land. He recalled the gulley had become deeper than it was originally but had been easy to cross between C-N and H-O, although C-N could not now be used.

32. Witnesses for the Objectors also provided some evidence of use of the valley both before and during the 20 year period. Mr Greeno had accessed it at G, followed the permissive path, crossed to C, then H-O across the gully to continue to J and beyond. He did not recall paths at A or F-B, but said the path had been realigned when the builders’ compound was there. Mr Leeworthy had moved to the area in 1977 and walked his dog in the valley since then. He recalled passing 2 builders’ huts before cutting across to the woods although there was no path as such. He did not recall A-B, but recalled some people walking diagonally from G. He walked daily and used all the paths in the woods, often cutting back brambles and extending the paths. The ‘top path’ was most used by dog walkers down to J. He put steps in at the gulley around 1990 (between H-O) although it had been possible to cross before. He had crossed the valley by other routes when earth was tipped there.

33. Mr Lippell had known the land since the 1960s. It had been fenced near C and alongside the stream (I-J), a wall or bank with a fence and gate posts divided the woodland in two. People could not walk across the valley when the tip was active during the late 1960s. Later, access to the land was possible from various points along Dunraven Drive during the construction of the houses. He
recalled a large builders’ compound which blocked G-C and F-B, and did not recall a path from A-B. The profile of the land had changed over the years and the course of paths had moved. Gradients between I-D had altered by 4-5 metres, and east of the gully had been raised by 15 metres. Access across the valley had been east of C. There had been a direct route due south from Pendeen Crescent across to No.140 Dunraven Drive, or from Pendeen Crescent via Goodwin Park to openings in the fence where there are now houses. The alignment of the path across the valley had changed when a conservation area was developed. He did not recall paths in the woodland during the 1970s and early 1980s and later paths he said were not on the alignment of the claimed routes. A path had been made by a developer east-west through the woods with access for forestry purposes.

34. To satisfy the test, public use must be as of right that is without force, secrecy or permission. It is clear from the evidence that use was open. By and large it was without permission, although 2 witnesses indicated their use of paths in the woodland at J-K-L was permissive. None of the witnesses themselves had used force to access the Order routes, but reference was made by one to passing through the builders’ compound which it was said was fenced.

35. In addition, use must be without interruption. The trenches cut across claimed Footpath 32 it is said were dug to prevent public use. Users indicated they found a way round them and the trenches were subsequently filled in. The landscape at the eastern side of the claimed routes has changed considerably over the years. In the 1960s part of the land was used as a tip, and in the 1980s to dump material excavated during road building works, thus raising the ground level and increasing gradients. A builders’ compound was in place at the gap during part of the 20 year period. The witness evidence indicates that whilst use continued across the valley despite these events, the alignment of the routes used varied as a result of them.

36. In considering the user evidence I do not doubt that the public have accessed the gap, the land between Dunraven Drive and Pendeen Crescent, and the woodland between Dunraven Drive and the stream. However, I heard from some whose use related primarily to the permissive path and not to the claimed Footpath 32, that some people accessed a path from C to E from any point at the gap rather than following a defined way, or used a more direct route that later disappeared. Within the woodland, it was acknowledged that use of routes at J-K-L-M ceased in the late 1980s when they became overgrown; and people used parts of the claimed woodland paths to access open land beyond to the north and west. Due to the limitations of the forms, and despite the maps accompanying most of them\textsuperscript{15}, it is difficult in many cases to establish with any degree of certainty which route or routes were used by the witnesses, during which period(s) and at what frequency, since the level of detail was insufficient. For the remainder, and for the same reasons, it is not clear that all the routes claimed to have been used were used throughout the periods and frequency claimed; or, that use depicted on the maps showed combinations of parts of the Order routes with other routes not shown on the Order map. On balance, and having given careful consideration to the user

\textsuperscript{15} None of the original uefs were available to me. Some of the maps accompanying the uefs appeared unmarked whilst others referred to routes marked, for example in coloured pen or pencil, the colours having been lost during the photocopying process
evidence as it is available to me, I am not satisfied that it is sufficient, even when considered as a whole, to establish use of any of the Order routes in the woodland (claimed Footpaths 33 and 34), or indeed of claimed Footpath 32 for the relevant 20 year period. Although I do not doubt that the public has taken a short cut between Dunraven Drive and Pendeen Crescent, the evidence indicates several routes and, or permutations of routes, suggesting a more general access across the land during the 20 year period. It follows that, on the balance of probabilities, the user evidence fails the test for the reasons given.

37. Had I found 1988 to be the date of bringing into question, my conclusions would be similar. This would have required a 20 year period dating back to 1968. For the same reasons given above, I do not consider there is sufficient evidence of use of any or all of the claimed footpaths during this period.

38. Since I have reached these conclusions, it is not necessary for me to consider the remaining test under Section 31 of the 1980 Act.

**Implied dedication at Common Law**

39. None of the parties argued a case for dedication at common law. Having considered the evidence I do not find that it is sufficient for me to conclude that the landowners have dedicated the Order routes as through routes to the public, or that the public has accepted them. The evidence shows the routes have changed over time, use of them is difficult to quantify from the uefs, access at the gap reflects wandering, and some use of part of claimed Footpath 33 has been permissive.

**Other matters**

40. Issues were raised in objections about possible crime, vandalism and acts of anti-social behaviour that would result if the Order were to be confirmed. I understand the importance of these concerns to those raising them. However, I am unable to take such matters into account in determining the Order under the legislation, and it follows that I have not done so.

41. The Supporters indicated their belief that the land behind Dunraven Drive was intended to be amenity land. However, that is a not a matter before me, the issue for me being to determine whether or not public rights of way have been acquired over the land in accordance with the tests above.

**Human Rights**

42. For the Objector it was suggested that contrary to Article 6 of the Human Rights Act 1998, there had been a failure to determine the civil rights of the landowner within a reasonable time and that if the Order were to be confirmed, it would restrict the landowners’ enjoyment of their possessions. Since I have decided that the tests have not been met and thus the Order should not be confirmed, I do not consider it is necessary for me to deal with these matters.

**Conclusions**

43. Having regard to these and all other matters raised both at the Inquiry and in the written representations I conclude that the Order should not be confirmed.
Formal Decision

44. The Order is not confirmed.

*S M Doran

Inspector
APPEARANCES

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For The Supporters:

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representing Derriford Residents Group

He called
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Mrs D Jefferson  47 Upland Drive, Derriford, Plymouth PL6 6BE
Mr M Collier  66 Upland Drive, Derriford, Plymouth PL6 6BE
Mrs P D Reeve  67 Upland Drive, Derriford, Plymouth PL6 6BE
Mr B F Elson  59 Pendeen Crescent, Southway, Plymouth
Mr A Harvey  70 Upland Drive, Derriford, Plymouth PL6 6BE
Mrs J Harvey  70 Upland Drive, Derriford, Plymouth PL6 6BE

For The Objectors:

Mr W Upton  of Counsel instructed by Clarke Willmott, Blackbrook Gate, Blackbrook Park Avenue, Taunton TA1 2PG

He called
Mr S Lippell  20 Caradon Close, Derriford, Plymouth PL6 6AJ
agent for A Ferrary and Y Hanamji (landowners)
Mr P M Shea  24 Gillian Crescent, Romford, Essex RM2 6NU
Mr P Greeno  78A Upland Drive, Derriford, Plymouth PL6 6BE
Mr J H Leeworthy  138 Dunraven Drive, Derriford, Plymouth PL6 6AT

Interested Persons who spoke opposing the Order:

Mrs P P Leeworthy  138 Dunraven Drive, Derriford, Plymouth PL6 6AT
DOCUMENTS
Legal Submissions
1 On behalf of the Objectors:
   - Legal Submissions concerning the validity of the Order
   - extract from Plymouth City Council website concerning Plymouth’s definitive map and statement (www.plymouth.gov.uk/dms)
2 On behalf of the Supporters:
   - Legal Submissions
   - Local Government Changes for England Regulations 1994
   - R v Secretary of State for the Environment (ex parte Bagshaw/Norton) (QBD) [1994]
   - R v Secretary of State for the Environment (ex parte Riley) (QBD)[1990] 59 P & C.R. 1
   - Fowler v Secretary of State for the Environment and Devon County Council (CA) [1992] 64 P & C.R. 16
   - Mayhew v Secretary of State for the Environment (QBD) [1993] 65 P & C.R. 344

Other documents
3 Copy of Landowners’ Proof of Evidence together with document SCL1, submitted by the Objectors
4 Opening Statement on behalf of the Supporters
5 A3 copy of Order plan, submitted by the Supporters
6 Witness statement of Mr P M Shea
7 3 maps showing landownership, extent of Southway Valley Local Nature Reserve and description, submitted by the Objectors
8 2 maps showing local area and street layout in Southway and Derriford, submitted by the Objectors
11 Closing Submission on behalf of the Objectors