



Report to Executive Director of Place

Date: May 2021

Report Title: Proposed Definitive Map Modification Order to modify the route of Footpath 92, Swanage

Portfolio Holder: Cllr D Walsh, Planning

Local Councillor(s): Cllr Gary Suttle, Cllr Bill Trite

Executive Director: J Sellgren, Executive Director of Place

Report Author: Sue Phillips

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Report Status: Public

Recommendation:

That:

- (a) An order be made to modify the definitive map and statement of rights of way to correct the route of Footpath 92, Swanage from the recorded route as shown A-B to that shown C-D on Drawing T548/21/1 (Appendix 1); and
- (b) If the Order is unopposed, or if all objections are withdrawn, it be confirmed by the Council.

Reason for Recommendation:

- (a) The available evidence shows, on balance, that the recorded route of Footpath 92, Swanage requires modification as described.
- (b) The available evidence shows, on balance, that the correct route of Footpath 92, Swanage is as proposed. Accordingly, in the absence of objections the Council can itself confirm the Order without submission to the Planning Inspectorate.

1. Executive Summary

This report considers the evidence relating to the recorded route of Footpath 92, Swanage and considers modifying the definitive map and statement to realign the entire length onto the claimed route.

2. Financial Implications

Any financial implications arising from this proposed modification are not material considerations and should not be taken into account in determining the matter.

3. Well-being and Health Implications

Any well-being and health implications arising from this proposed modification are not material considerations and should not be taken into account in determining the matter.

4. Climate implications

Any climate implications arising from this proposed modification are not material considerations and should not be taken into account in determining the matter.

5. Other Implications

None

6. Risk Assessment

Having considered the risks associated with this decision, the level of risk has been identified as:

Current Risk: LOW

Residual Risk LOW

7. Equalities Impact Assessment

An Equalities Impact Assessment is not a material consideration in considering this application.

8. Appendices

- 1** Drawing T584/21/1
- 2** Law
- 3** Documentary evidence
 - 1971 Public Path Diversion Order
 - 1971 Public Path Diversion Order Overlay
 - Swanage Parish Survey Map
 - Draft Map (1955)

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- Provisional Map (1964)
- First Definitive Map (1967)
- Revised Draft Map (1974)
- Definitive Map (sealed 1989)

9. Background Papers

The file of the Executive Director, Place (ref. RW/T584).

1 Background

- 1.1. The anomaly was identified in 2013 when the route of Footpath 92, Swanage was checked due to the sale of a nearby property.

Description of the route

- 1.2. The currently recorded route starts at Point A (on Drawing T584/21/1) at its junction with Footpath 74 and heads in a west north westerly direction passing through the garden fences of two private properties. The route continues in a south westerly direction, crossing through six private residences and the garden boundaries of a further three properties. The route ends at Point B at its junction with Footpath 73.
- 1.3. The proposed route starts at Point C (on Drawing T584/21/1) branching off Footpath 74, heading for approximately 26 metres in a west north westerly direction before bearing west, south west for a distance of approximately 4 metres then generally north west for the remaining distance of approximately 90 metres following the line of the tarmacked road and footway, to its junction with Footpath 73 at Point D. The proposed route is also the route currently available to the public.

2 Law

- 2.1 A summary of the law is contained in Appendix 2.

3 Issue to be decided

- 3.1 The issue to be decided is whether there is evidence to show, on the balance of probabilities, that public rights subsist, or are reasonably alleged to subsist, on the route proposed and if so, at what status the route should be recorded. It is not necessary for evidence to be 'beyond reasonable doubt' before a change to the Definitive Map can be made.
- 3.2 Any changes to the Definitive Map must reflect public rights that already exist. Decisions must not be taken for reasons of desirability or suitability. Before an order changing the Definitive Map is made, the Council must be satisfied that public rights have come into being at some time in the past. This might be demonstrated by documentary evidence and/or witness evidence.

3.3 Historical documentary evidence and user evidence has been examined to see whether depictions of the route point to it having acquired public rights as a result of deemed dedication in the past. Any such rights are not lost through disuse. Unless stopped up by due process of law, any rights previously dedicated will still exist even if they are no longer used or needed. It is unlikely that a single map or document will provide sufficient evidence to justify a change to the Definitive Map, the evidence must be assessed holistically. The Council has a duty to record any rights that are found to exist.

4 **Documentary evidence (Appendix 3) (copies available in the case file RW/T584)**

4.1 A table of all the documentary evidence considered during this investigation is contained in the case file. All documents considered relevant are discussed below.

Dorset Council Records

4.2 The Swanage Parish Survey Map (1950's) shows a footpath numbered 36 as running roughly east to west linking Jubilee Road to Days Road.

4.3 The Parish Survey Statement describes the route of Footpath 36 as:

“First section between two stone walls approx. 4ft., last section between Council houses Days Road approx. 4ft”

4.4 The Draft Map (1955) shows the footpath on a similar route to the Parish Survey running roughly east to west linking Jubilee Road to Days Road.

4.5 Officer Comment: The original survey showed the current Footpath 92 numbered as Footpath 36. See Appendix 3

4.6 The Provisional Map (1964) and the First Definitive Map (1967) show the route in the same location as the Draft Map (1955).

4.7 Officer Comment: Between the production of the Draft Map and the Provisional Map (1964) the currently numbered Footpath 92 was changed from its original number Footpath 36 to Footpath 75.

4.8 Footpath 75 was, in 1971, subject to a Public Path Diversion Order (PPO) under the Town and Country Planning Act 1968 Section 94. The result was to divert part of the path in advance of a permitted residential development. This development was to include the

construction of Alderbury Close, the cul-de-sac through which the diverted route passes. Details of the Order are shown in Appendix 3.

- 4.9 Officer Comment: The route of the above 1971 Public Path Order was correctly created on the ground and the residential development with associated highways was built around this available route as per the 1971 Public Path Order overlay. See Appendix 3.
- 4.10 The Revised Draft Map (1974) reflects the 1971 public path diversion order. The path is now referred to as two separate Footpaths numbered 92 and 93 which are split at the junction with Footpath 73. There is no documentary evidence to explain the change of a single route (previously numbered Footpath 75) to two separate routes now numbered Footpaths 92 and 93 on the current Definitive Map (sealed 1989).
- 4.11 The current Definitive Map (sealed 1989) shows the routes in the same way as those recorded on the Revised Draft Map (1974).
- 4.12 Officer Comment: It should be noted that the residential development, which the route of Footpath 92 runs through, was completed during the 1970's but is not shown on the base map used for the Definitive Map.
- 4.13 Aerial photographs from 1972 show the area in the early stages of the residential development, with the route of Alderbury Close visible, and the completed development in 2020. See Appendix 3

5 **User evidence**

- 5.1 No user evidence was submitted

6 **Landowner correspondence (copies available in the case file RW/T584)**

- 6.1 The ownership of the land over which the proposed modification C-D travels has passed to Her Majesty's Treasury. The landowner did not respond to the consultation.

7 **Consultation responses and other correspondence (copies available in the case file RW/T584)**

- 7.1 A local resident of one of the properties affected by the current definitive route made contact to support the proposed modification.

Officer Comment: This indicates support for the proposal but does not provide any evidence.

8 Conclusions

- 8.1 In deciding whether or not it is appropriate to make an order it must be considered whether public rights subsist or are reasonably alleged to subsist on the proposed route. It is considered that there is sufficient evidence for the “reasonably alleged” test to be met.
- 8.2 The documentary evidence indicates that following the Public Path Order in 1971, the route of Footpath 92, known then as Footpath 75, should be recorded as shown between points C and D on Drawing T584/21/1. It would appear that on the balance of evidence, the route shown from points A-B arose as a result of a drafting error on the Revised Draft Map which was repeated when the Definitive Map was sealed in 1989 and the proposed route from points C-D is how the route of Footpath 92 should be recorded.
- 8.3 Therefore, it is recommended that the Definitive Map and Statement should be modified to delete Footpath 92 as shown A-B and instead add it as shown C-D on Drawing T584/21/1.
- 8.4 If no objections are received, then the Council can itself confirm the order provided the criterion for confirmation has been met. An order can be confirmed if, on the balance of probability, it is shown that the route as described does exist. It is considered that the evidence is sufficient to satisfy this test.

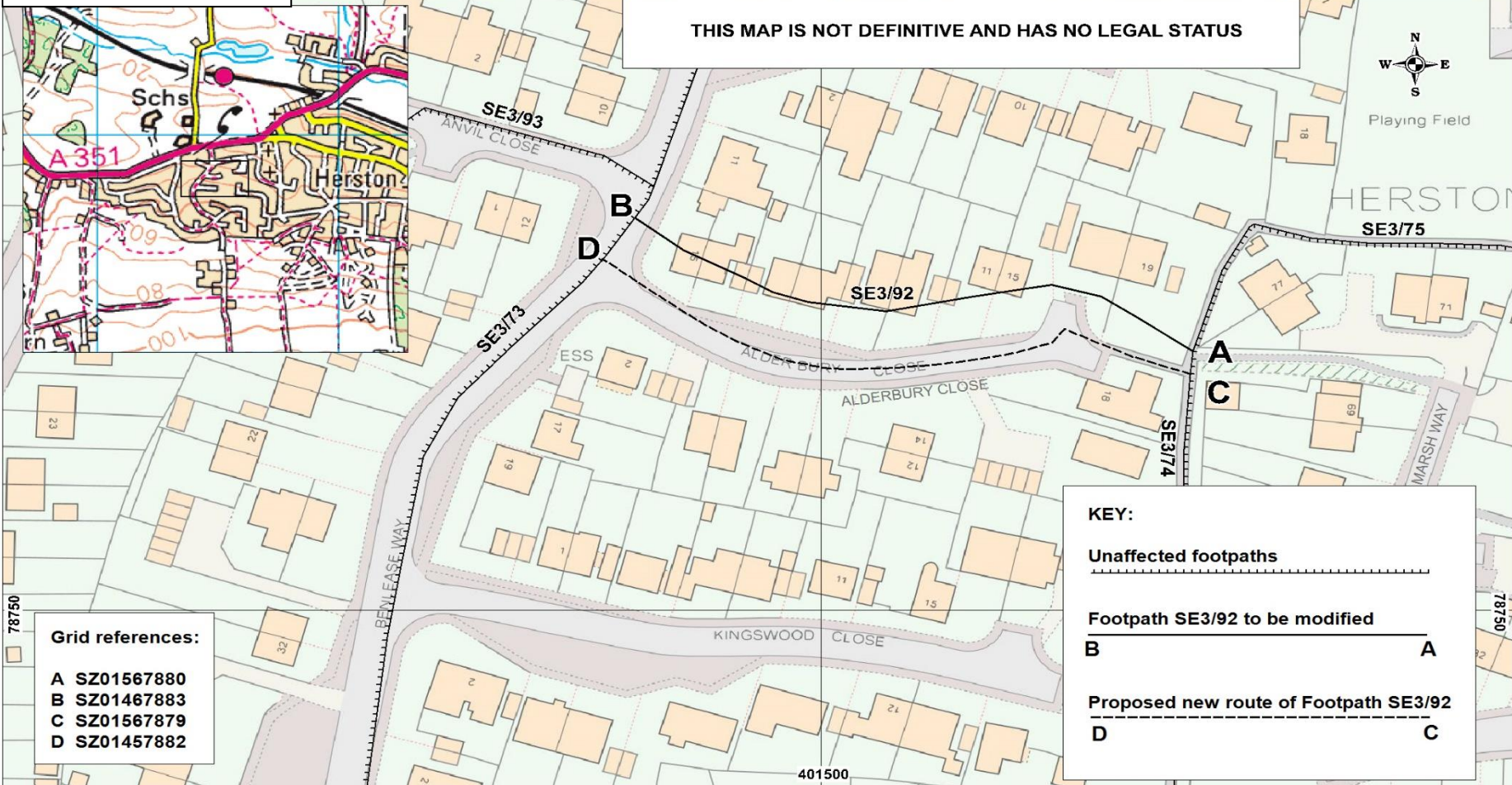
Date: 21 June 2021

Footnote:

Issues relating to financial, legal, environmental, economic and equalities implications have been considered and any information relevant to the decision is included within the report.

APPENDIX 1

Drawing T584/21/1



WILDLIFE & COUNTRYSIDE ACT 1981
 Proposal to modify the route of Footpath SE3/92 at Alderbury Close, Swanage Parish
 to correct a drafting error on the definitive map

Ref: T584/21/1
Date: 17/03/2021
Scale 1:1000
Drawn By: AB
Cent X: 401488
Cent Y: 78796

Dorset Council

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LAW

General

Wildlife and Countryside Act 1981

- 1.1 Section 53 of the Wildlife and Countryside Act 1981 requires that the Council keep the definitive map and statement under continuous review and in certain circumstances to modify them. These circumstances include the discovery of evidence which shows that a right of way not shown in the definitive map and statement subsists or is reasonably alleged to subsist.
- 1.2 Section 53 of the Act also allows any person to apply to the Council for an order to modify the definitive map and statement of public rights of way in consequence of the occurrence of certain events. One such event would be the discovery by the authority of evidence which, when considered with all other relevant evidence available to them, shows that a right of way not shown on the definitive map and statement subsists.
- 1.3 The Council must take into account all relevant evidence. They cannot take into account any irrelevant considerations such as desirability, suitability and safety.
- 1.4 For an application to add a right of way, the Council must make an order to modify the definitive map and statement if the balance of evidence shows either:
 - (a) that a right of way subsists or
 - (b) that it is reasonably alleged to subsist.

The evidence necessary to satisfy (b) is less than that necessary to satisfy (a).
- 1.5 An order to add a route can be confirmed only if, on the balance of probability, it is shown that the route as described does exist.
- 1.6 For an application to change the status of an existing right of way, the Council must make an order to modify the definitive map and statement if the balance of evidence shows that it ought to be recorded with that different status.
- 1.7 The confirmation test for an order to change the status of an existing right of way is that same as the test to make that order.
- 1.8 An order to add a right of way and change the status of an existing

right of way as part of the same route should only be made if the balance of the evidence shows that the new route exists and the existing route should be recorded with a different status.

- 1.9 Where an objection has been made to an order, the Council is unable itself to confirm the order but may forward it to the Secretary of State for confirmation. Where there is no objection, the Council can itself confirm the order, provided that the criterion for confirmation is met.

2 Highways Act 1980

- 2.1 Section 31 of the Highways Act 1980 says that where a way has been used by the public as of right for a full period of 20 years it is deemed to have been dedicated as highway unless there is sufficient evidence that there was no intention during that period to dedicate it. The 20 year period is counted back from when the right of the public to use the way is brought in to question.

- (a) 'As of right' in this context means without force, without secrecy and without obtaining permission.
- (b) A right to use a way is brought into question when the public's right to use it is challenged in such a way that they are apprised of the challenge and have a reasonable opportunity of meeting it. This may be by locking a gate or putting up a notice denying the existence of a public right of way.
- (c) An application under Section 53 (5) of the Wildlife and Countryside Act 1981 for a modification order brings the rights of the public into question. The date of bringing into question will be the date the application is made in accordance with paragraph 1 of Schedule 14 to the 1981 Act.

- 2.2 The common law may be relevant if Section 31 of the Highways Act cannot be applied. The common law test is that the public must have used the route 'as of right' for long enough to have alerted the owner, whoever he may be, that they considered it to be a public right of way and the owner did nothing to tell them that it is not. There is no set time period under the common law.

- 2.3 Section 31(3) of the Highways Act 1980 says that where a land owner has erected a notice inconsistent with the dedication of a highway, which is visible to users of the path, and maintained that notice, this is sufficient to show that he intended not to dedicate the route as a public right of way.

- 2.4 Section 31 (6) of the Highways Act 1980 permits landowners to deposit

with the Council a map and statement indicating what ways over the land (if any) he admits to having been dedicated as highways. A statutory declaration can be made at intervals of not more than 20 years stating no additional ways have been dedicated since the date of the deposit. In the absence of proof to the contrary, this is sufficient to establish that no further ways have been dedicated. Prior to the Highways Act 1980 a similar facility was available under the Rights of Way Act 1932 and the Highways Act 1959.

- 2.5 Section 32 of the Highways Act 1980 says that the Council must take into consideration any map, plan or history of the locality. Documents produced by government officials for statutory purposes such as to comply with legislation or for the purpose of taxation, will carry more evidential weight than, for instance, maps produced for tourists.

3 Human Rights Act 1998

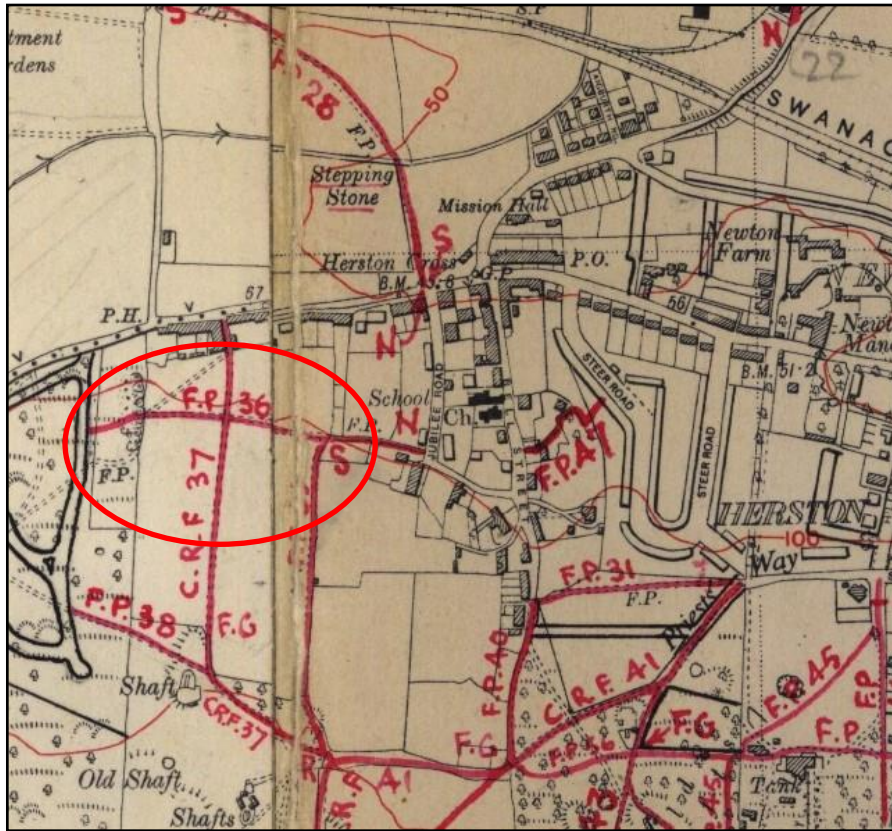
- 3.1 The criteria for definitive map modification orders are strictly limited to matters of fact and evidence. In all cases the evidence will show that the event (section 53) has already taken place. The legislation confers no discretion on a surveying authority or the Secretary of State to consider whether or not a path or way would be suitable for the intended use by the public or cause danger or inconvenience to anyone affected by it. In such situations where the primary legislation offers no scope for personal circumstances to affect the decision on the order, the Planning Inspectorate's recommended approach is to turn away any human rights representations.

- 3.2 A decision confirming an order made under the Wildlife and Countryside Act 1981 would be lawful (under domestic law) as provided by Section 6.2 of the Human Rights Act 1998 even in cases where the Convention was apparently infringed, where it was impossible to interpret the 1981 Act in such a way that it is compatible with the Convention rights (section 3 Human Rights Act 1998).

4 National Parks and Access to the Countryside Act 1949

- 4.1 The National Parks and Access to the Countryside Act 1949 required the County Council as "Surveying Authority" to compile the record of the public rights of way network and the District and Parish Councils were consulted to provide the County Council with information for the purposes of the survey.

Swanage Parish Survey Map



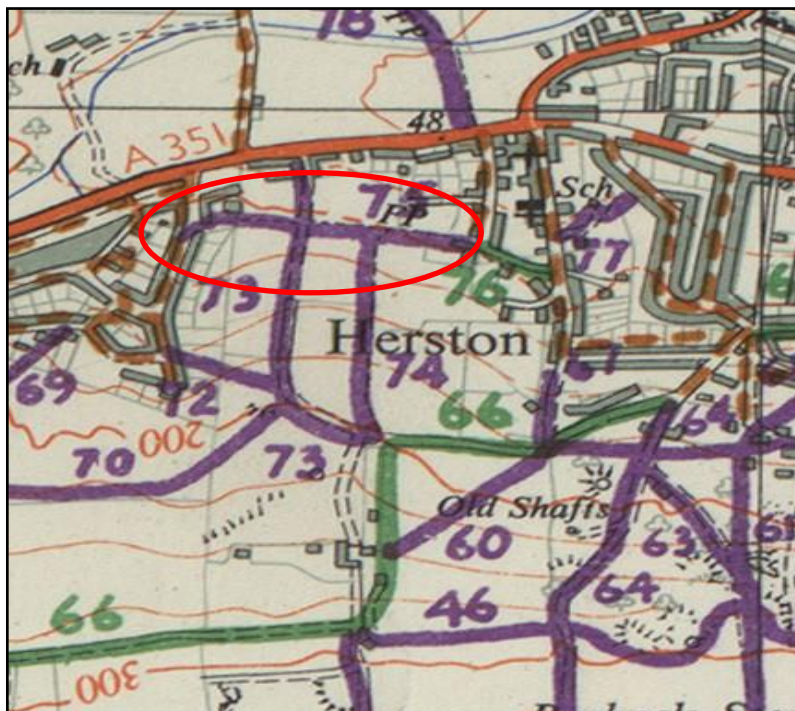
Draft Map (1955)



Provisional Map (1964)



First Definitive Map (1967)



Revised Draft Map (1974)



Definitive Map (sealed 1989)



1971 Public Path Diversion Order

COUNTY OF DORSET.

7824



PUBLIC PATH DIVERSION ORDER 1971

TOWN AND COUNTRY PLANNING ACT 1968 SECTION 94

THE DORSET COUNTY COUNCIL FOOTPATH NO. 75 SWANAGE

WHEREAS the County Council of the Administrative County of Dorset are satisfied that it is necessary to divert the footpath to which this Order relates in order to enable development to be carried out in accordance with planning permission granted under Part III of the Town and Country Planning Act 1962 or the enactments replaced by that part of that Act.

NOW THEREFORE the said County Council in pursuance of the powers in that behalf conferred by Section 94 of the Town and Country Planning Act 1968 hereby make the following Order.

1. The footpath over the land situate in Swanage shown by a bold black line on the map annexed hereto and described in Part I of the Schedule hereto shall be diverted as provided by the Order.
2. There shall be created to the reasonable satisfaction of the said County Council an alternative highway for use as a replacement for the Footpath referred to in Article 1 above as specified in and over the land described in Part II of the Schedule hereto and shown by bold black dashes on the map contained in this Order.
3. The diversion of the footpath referred to in Article 1 above shall have effect on the date on which it is certified by the said County Council that the provisions of Article 2 above have been complied with.
4. Where immediately before the date on which the highway is diverted in pursuance of this Order there is apparatus on under or over that highway belonging to statutory undertakers for the purpose of carrying out their undertaking the undertakers shall continue to have the same rights in respect of the apparatus as they then had.

The Order may be cited as the Dorset County Council Footpath 75 Swanage Public Path Diversion Order 1971.

SCHEDULE

Part I

DESCRIPTION OF SITE OF EXISTING PATH

The footpath is shown as part of Footpath No. 75 in the Urban District of Swanage on the Definitive Map of Public Rights of Way for Dorset and commences at the point marked "A" on the map contained in this Order which lies at approximately map reference O140 7883 and runs in an easterly direction for approximately 585 feet to the point marked "B" on the map at map reference O158 7883.

Part II

DESCRIPTION OF SITE OF THE ALTERNATIVE HIGHWAY

The alternative highway (hereinafter called the footpath) commences at the said point marked "A" on the map at approximately map reference O140 7883 and runs in an approximately North Easterly direction for 100 feet and then along a proposed estate road in an approximately South Easterly direction for 150 feet and then along the said estate road in a South Westerly direction for approximately 65 feet and then along the same in an approximately South Easterly direction for 110 feet and then along the same in an approximately Easterly direction for 210 feet and then from the estate road in an approximately South Easterly direction for 70 feet to the point marked "C" on the plan at approximately map reference O156 7880.

Dated this *Twenty eighth* day of *June* 1971

THE COMMON SEAL of the Dorset County Council was affixed hereto in the presence of:-

John Summers
Deputy Clerk of the County Council



The County Council of the Administrative County of Dorset in exercise of their powers confirm the foregoing Order.

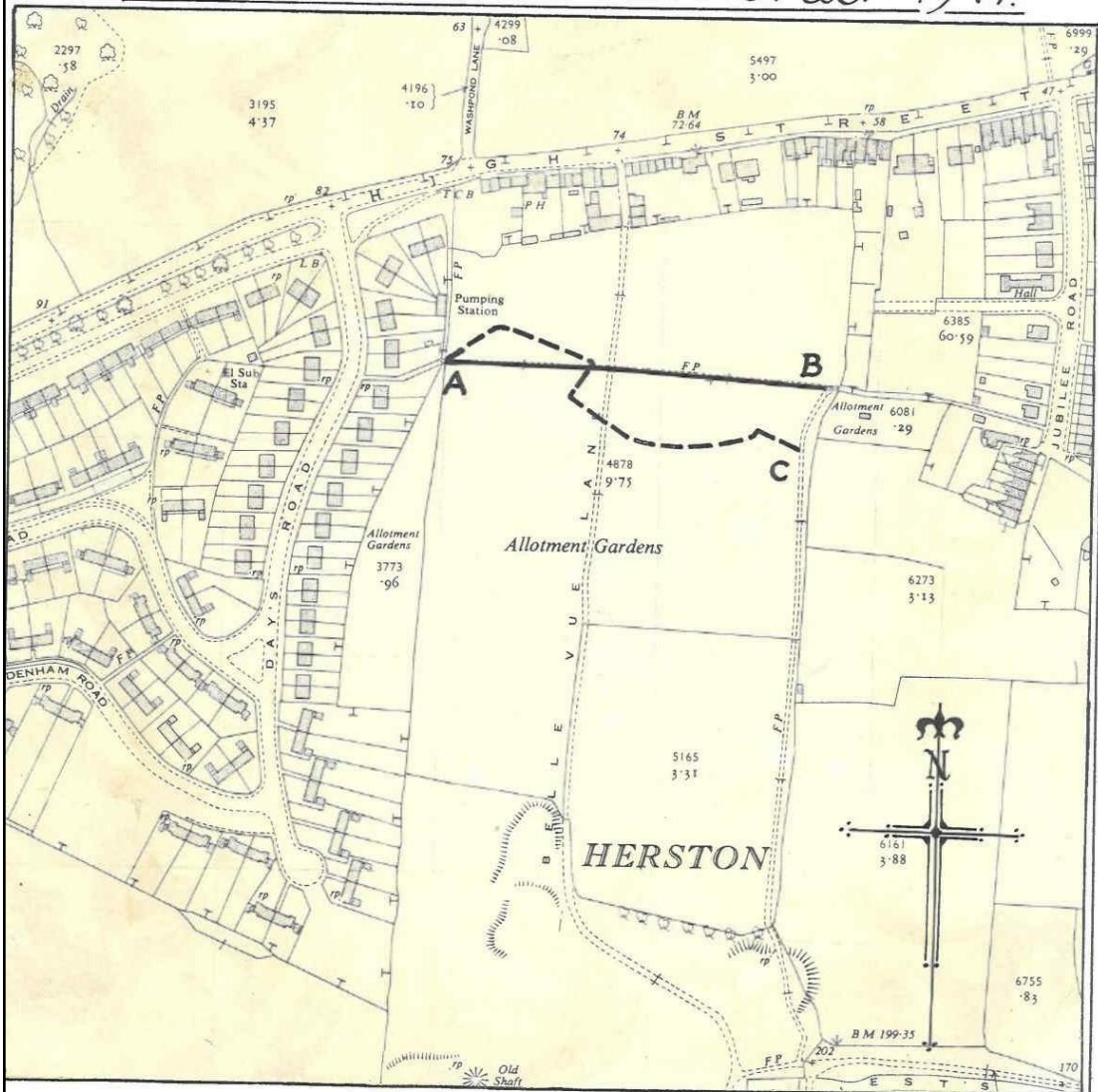
Dated this _____ day of _____ 1971

THE COMMON SEAL of the Dorset County Council was affixed hereto in the presence of:-

John Summers
Deputy Clerk of the County Council



*Public Path Diversion Order.
Town & Country Planning Act 1968 Section 9A.
The Dorset County Council.
Footpath N^o 75 Swanage U.D.C. (part).
Public Path Diversion Order 1971.*



————— Length to be diverted.

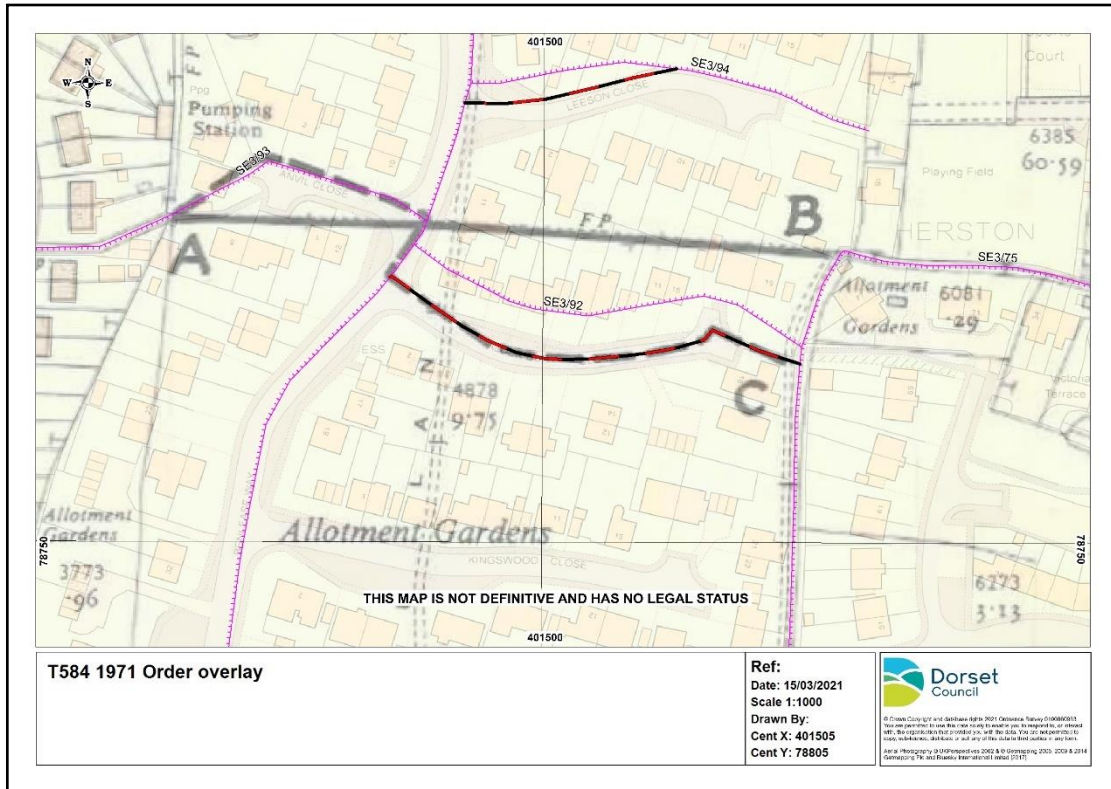
- - - - - Alternative Highway.

Scale R.F. 1:2500 O.S. Plan N^o SZ 0178.

Crown Copyright, Based on the Ordnance Survey Map with the sanction of
the Controller of H.M. Stationery Office.

Shown exactly as above

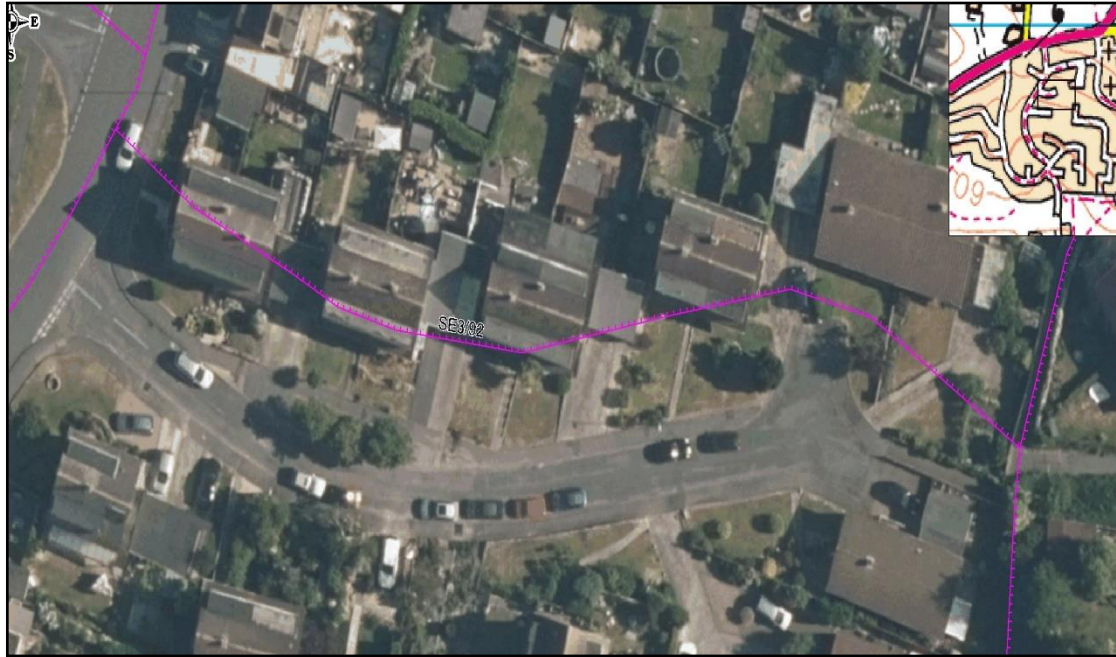
1971 Public Path Diversion Order Overlay



Aerial Photo 1972



Aerial Photo 2020



Page 20 Proposal to modify the route of Footpath SE3/92, Swanage to correct a drafting error on the definitive map

Recommendations Accepted

Signed:

Redacted

Date:.....23 June 2021.....

Vanessa Penny

Definitive Map Team Manager

Spatial Planning