



THE LONDON BOROUGH
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DATE: 19 August 2010

To: Members of the
RIGHTS OF WAY SUB-COMMITTEE

Councillors Julian Grainger, Russell Mellor, Gordon Norrie, Richard Scoates,
Harry Stranger, Michael Turner and Stephen Wells

A meeting of the Rights of Way Sub-Committee will be held at Bromley Civic Centre
on **WEDNESDAY 1 SEPTEMBER 2010 AT 7.30 PM** *

MARK BOWEN
Director of Legal, Democratic and
Customer Services.

***PLEASE NOTE STARTING TIME**

Copies of the documents referred to below can be obtained from
www.bromley.gov.uk/meetings

A G E N D A

- 1 **APPOINTMENT OF CHAIRMAN AND VICE-CHAIRMAN**
- 2 **APOLOGIES FOR ABSENCE AND NOTIFICATION OF ALTERNATE MEMBERS**
- 3 **DECLARATIONS OF INTEREST**
- 4 **MINUTES OF THE MEETING HELD ON 5TH JANUARY 2010** (Pages 3 - 6)
- 5 **QUESTIONS BY MEMBERS OF THE PUBLIC ATTENDING THE MEETING**
To hear questions received in writing by the Director of Legal, Democratic and
Customer Services **by 5pm on Wednesday 25th August 2010** and to respond.
- 6 **PUBLIC FOOTPATH 41, CAMDEN PARK ROAD, CHISLEHURST** (Pages 7 - 10)
(Chislehurst Ward)

7 FOOTPATH 279 - AVENUE ROAD (TATSFIELD) TO MAIN ROAD, BIGGIN HILL, INCLUDING CLARENCE ROAD & PART OF BELVEDERE ROAD - APPLICATION FOR DEFINITIVE MAP MODIFICATION ORDER TO UPGRADE TO/RECORD AS BRIDLEWAY (Pages 11 - 48)

(Darwin Ward)

8 FOOTPATH 280 (PART) GRAYS ROAD TO BOROUGH BOUNDARY - APPLICATION FOR DEFINITIVE MAP MODIFICATION ORDER TO UPGRADE TO BRIDLEWAY (Pages 49 - 78)

(Darwin Ward)

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RIGHTS OF WAY SUB-COMMITTEE

Minutes of the meeting held on 5th January 2010

Present:

Councillors Bloomfield, Martin Curry, Gordon Norrie,
Michael Turner and Stephen Wells

Councillor Julian Benington was also present

1. APPOINTMENT OF CHAIRMAN FOR REMAINDER OF 2009/10 MUNICIPAL YEAR

RESOLVED that Councillor Bloomfield be appointed Chairman of this Sub-Committee for the remainder of the current Municipal Year.

(Councillor Bloomfield in the Chair)

2. APOLOGIES FOR ABSENCE AND NOTIFICATION OF SUBSTITUTE MEMBERS

No apologies had been received.

3. DECLARATIONS OF INTEREST

There were no declarations of interest.

4. MINUTES

The Minutes of the meeting held on 27th April 2005 were received.

The Director of Legal, Democratic and Customer Services' representative provided the Sub-Committee with an update in relation to Minute 11 (Public Footpath 41: Camden Park Road, Chislehurst). He reported that the Order had been made on 18th October 2005. Formal consultation with interested parties had been conducted between September and November 2006 as a result of which a number of objections to the Order had been received. Three of these had been made on the basis that Camden Park Road was a vehicular highway and the public rights should not be limited to a pedestrian right of way. A further objection had been made on the basis of dog fouling nuisance and another, by Camden Park Estates Limited, had been a technical objection that the Order plan did not properly reflect the Sub-Committee's decision as to the overall length of the footpath to be added to the definitive map. During this consultation process, other legal issues had come to light which had a bearing on whether or not the Order should proceed to confirmation. Correspondence with the solicitors acting for the estate company had ended in January 2008 and a further response from the solicitors to correspondence relating to the Order had never been received.

RIGHTS OF WAY SUB-COMMITTEE
5th January 2010

The Director's representative pointed out that there were legal issues which would need to be the subject of a further, confidential report to the Sub-Committee and a decision would need to be made whether or not a new Order was appropriate.

Members noted the updated position and, having been assured that the Minutes of the Sub-Committee's last meeting had previously been submitted to its "parent" committee, the General Purposes and Licensing Committee (18th May 2005),

RESOLVED that the Minutes of the meeting held on 27th April 2005 be confirmed.

5. QUESTIONS BY MEMBERS OF THE PUBLIC ATTENDING THE MEETING

The following questions had been received from Ms Jean Seager – Biggin Hill Riders' Group.

"(1) How many new bridleways, if any, have been created in this part of the Borough since Shire Lane in 2005?

(2) Can the officers confirm their commitment that all sections of the community – walkers, cyclists, horseriders and disabled people – should have equal access to the countryside?"

Chairman's response:

"(1) 5 new bridleways have been created in this part of the Borough since 2005.

(2) The Rights of Way Improvement Plan adopted by the Council and finalised in November 2007 includes in Section 7 (Objectives and Opportunities) as a second aim to 'Improve access to the Rights of Way network for all user groups to create a more socially inclusive network'.

In response to the questioner's further request, the Chairman undertook to ensure that she was provided with details of where the five new bridleways were situated and when they had been opened.

**6. FOOTPATH 275B JAIL LANE TO MAIN ROAD, BIGGIN HILL – APPLICATIONS FOR DEFINITIVE MAP MODIFICATION ORDER TO UPGRADE TO BRIDLEWAY
Report ES10002**

The Wildlife and Countryside Act 1981 required the Council, as the surveying authority for public rights of way, to keep the Definitive Map and

Statement under continuous review. The Director of Environmental Services reported that, under the above Act, two applications had been received for a Definitive Map Modification Order to upgrade Footpath (FP) 275B to bridleway status based on use by horseriders over a number of years. The route of FP275B was outlined and delineated on a coloured plan circulated at the meeting. Following the receipt of the two applications, a consultant, Sue Rumfitt Associates, had been appointed to carry out investigations into and analysis of the claims. The consultant's report containing conclusions and recommendation, attached to the report of the Director of Environmental Services, was considered by the Sub-Committee.

The two duly made applications for Definitive Map Modification Orders – one which had been submitted on behalf of the Tatsfield Bridleways Association and the other which had been received from a member of the Biggin Hill Riders' Group – both related to the same route and both had claimed that the route, presently recorded as a footpath, should be defined as a bridleway. The consultant had subsequently interviewed both applicants and witnesses who had submitted evidence and had considered all the map evidence available. Mindful that two options were open to the Authority in determining this matter, the consultant had recommended that, in respect of both the northern section of the route and the southern section of the route, there was a case for making a Definitive Map Modification Order to "upgrade" the public footpath in question to public bridleway status. Both the consultant's fees and the advertising costs had been met from within the Director of Environmental Services' budget.

In considering the implications of the proposal, in conjunction with the consultant's conclusions and recommendation, various questions were asked by Members, in particular, in relation to the standard that the footpath would be maintained if it were to be used as a bridleway. In response, the Director of Environmental Services' representative commented that the Council had an obligation to maintain all such ways, whatever their highway status, to a reasonable standard for all recognised users and that the level of maintenance in this case might have to be higher than it was at present if the footpath were to become a bridleway.

Having regard to all the available evidence and to the consultant's findings, the Sub-Committee was of the opinion that, on the balance of probabilities, sufficient evidence had been adduced in support of the claims to enable the Council to accede to the request to make the requisite Definitive Map Modification Order. As a consequence, it was unanimously

RESOLVED that the Director of Legal, Democratic and Customer Services, in consultation with the Director of Environmental Services, be authorised to make a Definitive Map Modification Order under Section 53 (c) (ii) of the Wildlife and Countryside Act 1981 to 'upgrade' Footpath 275B to a bridleway.

7. PROPOSED DIVERSION OF PART OF FOOTPATH 180 AT ITS JUNCTION WITH CROCKENHILL ROAD INCLUDING AN ADDITIONAL LENGTH OF FOOTPATH RUNNING PARALLEL TO CROCKENHILL ROAD
Report ES10003

A detailed report was received from the Director of Environmental Services which sought authority to enable the Council to make a Public Path Diversion Order under the provisions of Section 119 of the Highways Act 1980 for part of Public Footpath 180, the Order to include an additional length of footpath. The proposed diversion Order was required in order to formalise the change to the route of Footpath 180 that had taken place and the inclusion of the additional length of footpath in the Order would reinforce the status of that section of the route as public highway. Details were also submitted as to how the proposed diversion would meet the required criteria of Section 119 of the Highways Act 1980. The background and circumstances relating to this matter were outlined.

A local Ward Member (Councillor Curry), who was also a member of this Sub-Committee, commented that this proposal was fully supported by the local Ward Members and by local residents. In response to a Member's question, the Director of Environmental Services' representative indicated that, as part of the extensive consultation which had been carried out, the Ramblers' Association was content with the arrangement for the diversion as shown on drawing EHP/10254/1. It was pointed out that, provided no objections were received, the Order could be confirmed in six months. The Sub-Committee unanimously

RESOLVED that the Director of Legal, Democratic and Customer Services, in consultation with the Director of Environmental Services, be authorised to take the necessary steps to make a Public Path Diversion Order for part of Footpath (FP) 180 as shown on drawing no. EHP/10254/1 and, if no objections are received, or any such objections are withdrawn, to confirm the Order.

Chairman

The meeting started at 7.00pm and ended at 7.16pm.

Report No.
LDCS10154

London Borough of Bromley

Agenda
Item No. **6**

PART 1 - PUBLIC

Decision Maker: Rights of Way Sub-Committee

Date: 1st September 2010

Decision Type: Non-Urgent Non-Executive Non-Key

Title: PUBLIC FOOTHPATH 41, CAMDEN PARK ROAD,
CHISLEHURST

Contact Officer: Tony Tompkins, Senior Solicitor
Tel: 020 8313 4369 E-mail: tony.tompkins@bromley.gov.uk

Chief Officer: Mark Bowen, Director of Legal, Democratic and Customer Services

Ward: Chislehurst

1. Reason for report

To consider whether or not following objections made to the previous unconfirmed Definitive Map Modification Order made on 18th October 2005 it is necessary to make a new Order.

2. **RECOMMENDATION(S)**

In the light of the commentary the Sub-Committee is recommended not to authorise the making of a new Order.

Corporate Policy

1. Policy Status: N/A.
 2. BBB Priority: N/A.
-

Financial

1. Cost of proposal: N/A
 2. Ongoing costs: N/A.
 3. Budget head/performance centre: N/A
 4. Total current budget for this head: £N/A
 5. Source of funding: N/A
-

Staff

1. Number of staff (current and additional): N/A
 2. If from existing staff resources, number of staff hours: N/A
-

Legal

1. Legal Requirement: Statutory requirement.
 2. Call-in: Call-in is not applicable.
-

Customer Impact

1. Estimated number of users/beneficiaries (current and projected): All users of FP 41 and pedestrian users of Camden Park Road
-

Ward Councillor Views

1. Have Ward Councillors been asked for comments? No.
2. Summary of Ward Councillors comments: N/A

3. COMMENTARY

At its meeting on 27th April 2005 the Sub-Committee resolved that an Order should be made under S.53 (3)(b) of the Wildlife and Countryside Act 1981 to add a public footpath to the Definitive Map and Statement along the south side of Camden Park Road to link up with the existing FP 41 where it joins Camden Park Road. The rationale at that time for the proposed Order was that Camden Park Estate Limited had blocked public vehicular access by means of electronically controlled gates across the carriageway but leaving a manually operated side gate for pedestrian access. The then Director of Legal and Democratic Services considered that to protect future pedestrian access, a footpath as described should be added to the Definitive Map and Statement. Members were advised at the last meeting of the Sub-Committee on 5th January this year (the first time the Sub-Committee had met since the meeting in April 2005) that although the Order had been made in October 2005, it had not progressed to formal confirmation because of various objections to it which had not been withdrawn. As one of the objections challenged the validity of the Order itself, because of an error on the Order plan and description in the body of the Order of the length of the proposed footpath, the Order was defective and if it was to proceed further would have to be remade. However a six month time limit applies to the making of orders under the Act and the authority to make (remake) the Order had expired. More than five years have now passed and the Council has not received any complaint or other indication that pedestrian access has been denied or challenged in any way as originally feared. The Council now records Camden Park Road on its non-statutory list of unadopted highways as a highway restricted to pedestrian rights over the distance between the gates. In legal terms as a highway with that restriction there is no practical necessity or legal requirement to go to the time, trouble and expense of separately recording the footpath on the Definitive Map and Statement and for that reason the recommendation to Members is that no new Order should be made.

4. LEGAL IMPLICATIONS

These are set out in the commentary above.

Non-Applicable Sections:	Policy, Financial and Personnel
Background Documents: (Access via Contact Officer)	File for Camden Park Road, Proposed Amendment to Definitive Map and Statement

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Report No.
ES10125

London Borough of Bromley

Agenda
Item No. **7**

PART 1 - PUBLIC

Decision Maker: Rights of Way Sub-Committee

Date: 1st September 2010

Decision Type: Non-Urgent Non-Executive Non-Key

Title: **FOOTPATH 279 - AVENUE ROAD (TATSFIELD) TO MAIN ROAD, BIGGIN HILL, INCLUDING CLARENCE ROAD & PART OF BELVEDERE ROAD - APPLICATION FOR DEFINITIVE MAP MODIFICATION ORDER TO UPGRADE TO/RECORD AS BRIDLEWAY**

Contact Officer: Duncan Gray, Development Manager
Tel: 020 8313 4556 E-mail: duncan.gray@bromley.gov.uk

Chief Officer: Nigel Davies, Director of Environmental Services

Ward: Darwin

1. Reason for report

To determine an application for a Definitive Map Modification Order to upgrade FP 279 to/record the unnamed track running from The Grove to FP 279, Clarence Road and part of Belvedere Road as bridleway. The application has been made under the Wildlife and Countryside Act 1981 which places a duty on the Council, as the Surveying Authority for public rights of way, to keep the Definitive Map and Statement under continuous review.

2. **RECOMMENDATIONS**

2.1 **Subject to the view taken by the Sub-Committee on the merits of the evidence provided in support of the claim, either**

1. **Make no Order at all, or**
2. **The Director of Legal, Democratic and Customer Services, in consultation with the Director of Environmental Services, be authorised to make a Definitive Map Modification Order under section 53(c)(i) of the Wildlife and Countryside Act 1981 to add a bridleway to the Definitive Map and Statement for the routes shown from Z-Y and from V-X and make an Order under Section 53(3)(c)(ii) for the route shown Y-X-W on Plan 1a, or**

- 3. The Director of Legal, Democratic and Customer Services, in consultation with the Director of Environmental Services, be authorised to make an Order under Section 53(3)(c)(i) to add a bridleway to the Definitive Map and Statement for the route shown from A-B-C-D on Plan 1b and refuse to make an Order for the sections Y-X and X-V on Plan 1a, and**
- 4. Advise the applicant that the Council takes the view that on the balance of probability, the case in favour of some or all of the application has not been demonstrated and that the application has been refused in whole or in part and the applicant be advised of the right to appeal to the Secretary of State, and**
- 5. Where the making of an Order of under recommendation 2 or 3 above is agreed, authorise The Director of Environmental Services to seek delegated authority from Surrey County Council to include the section of the claimed route that lies within Surrey in the Order.**

Corporate Policy

1. Policy Status: N/A.
 2. BBB Priority: N/A.
-

Financial

1. Cost of proposal: Estimated cost £60
 2. Ongoing costs: Non-recurring cost.
 3. Budget head/performance centre: Transport & Highways - Advertising
 4. Total current budget for this head: £3300
 5. Source of funding: Existing 2010/11 Revenue Budgets
-

Staff

1. Number of staff (current and additional): 1
 2. If from existing staff resources, number of staff hours: 30
-

Legal

1. Legal Requirement: Statutory requirement.
 2. Call-in: Call-in is not applicable.
-

Customer Impact

1. Estimated number of users/beneficiaries (current and projected): All users of FP 279
-

Ward Councillor Views

1. Have Ward Councillors been asked for comments? Yes.
2. Summary of Ward Councillors comments: The Ward Member has been consulted and has not offered any comment owing to his involvement with the Sub-Committee

3. COMMENTARY

- 3.1 FP 279 runs in a south-easterly direction from Main Road, at the southern end of Biggin Hill, to the unmade and unnamed extension to The Grove (but sometimes referred to as Avenue Road/The Avenue/The Grove on maps and plans), to the north of the property known as 'The Hermitage'. Along its route it connects with Clarence Road, which in turn connects to Belvedere Road. A claim for upgrading the whole route of FP 279 to bridleway status and including that section of the unnamed track from The Grove to its junction with FP 279, Clarence Road and the north-eastern end of Belvedere Road, based on use by horse riders over a number of years, has been received by the Council.
- 3.2 Following receipt of the claim a consultant, Sue Rumfitt Associates, was appointed to carry out the investigations into and analysis of the claims and her detailed report is attached at **Appendix 1**. Due to the need for the Sub-Committee to reach a decision based on all the available evidence the consultant's report should be read carefully in order to gain an appreciation of the issues involved. A view then needs to be taken, on the balance of probabilities, as to whether sufficient evidence has been adduced in support of the claim to enable the Council to accede to the request to make the requisite Definitive Map Modification Order.

4. FINANCIAL IMPLICATIONS

The continuous review of the Definitive Map and Statement is a statutory requirement and thus the Council has to fund the exercise both in terms of assessing the claims and any subsequent maintenance/signing implications. The latter would be met from the existing highways maintenance budget.

The consultant's fees of £2000 have been met from the previous financial year's Transportation Planning's consultant's fees budget and the advertising costs of £60 would be met from Transportation Planning's advertising budget of £3300.

5. LEGAL IMPLICATIONS

- 5.1 These are fully explained in the consultant's report at paragraphs 4 -14, pages 5-7 of this report.
- 5.2 The Sub-Committee should note that should recommendation 1 or 3 be the outcome of consideration of this report, and any appeal to the Secretary of State were to be successful, a further report would need to be submitted to the Sub-Committee in order to determine how the Council should proceed throughout the subsequent Order process.

Non-Applicable Sections:	Policy; Personnel
Background Documents: (Access via Contact Officer)	File for FP 279

SUE RUMFITT ASSOCIATES

For London Borough of Bromley

Wildlife & Countryside Act 1981 – Section 53 Determination of an Application for Definitive Map Modification Order Alleged Bridleway – Clarence Road, Footpath 279, Avenue Road/The Avenue to The Grove

Introduction

1. This report seeks to assist the London Borough of Bromley, as Surveying Authority (“the Authority”) to determine an application for a Definitive Map Modification Order. The application seeks to record a public bridleway over Clarence Road, footpath No 279, The Avenue/Avenue Road to the Grove. The route is shown on Plan 1a (Annex 1).
2. During the investigation of the evidence it became apparent that a small part of the The Avenue/Avenue Road section of the claimed route (between B and C on Plan 1b, Annex 1) was in Surrey. At officer level it has been agreed between the two Authorities that the matter will be considered by London Borough of Bromley and should an Order need to be made a formal agreement will be entered into to delegate to the London Borough of Bromley the legal authority to make an Order that would modify the Definitive Map for the County Council of Surrey.
3. Copies of the application, supporting evidence forms and statements made by users on interview are held by the Council on file. The evidence in support of the application is largely that of alleged public use of the route on horse-back. If having considered all the relevant available evidence and on a balance of probabilities public bridleway rights are shown to exist over the route, the Authority will be obliged to make a Definitive Map Modification Order to “upgrade” the footpath to bridleway and to add a bridleway along The Avenue/Avenue Road.

Legislative Background

Legislative Framework

4. The application has been made under the Wildlife and Countryside Act 1981. Section 53 of the Act places a duty on the Authority to keep the Definitive Map under continuous review and to make any modifications to the Definitive Map as may be “requisite”. In determining the application the Authority is acting in a quasi-judicial manner and must weigh the evidence and apply the law accordingly.

Test to be Applied

5. When considering an application for a Definitive Map Modification Order to alter the status of a public right of way shown on the Definitive Map, or to include a public right of way on the Definitive Map over a route where no public rights are presently recorded, the burden of proof initially rests with the applicant to prove their case. If under Section 31 of the Highways Act 1980 a prima facie case in favour of the application is established, the burden then falls upon anyone opposing the application to provide evidence in rebuttal. The standard of proof to be applied to the evidence is the civil test of ‘on the balance of probability’.
6. In the case of the route presently recorded as Footpath 279, if the Authority is satisfied that, having taken into account all of the available relevant evidence, the alleged bridleway rights exist it has a duty to make a Definitive Map Modification

Order to “upgrade” the footpath to bridleway. In the case of the remainder of the application route, if the Authority is satisfied that bridleway rights can be reasonably alleged to subsist, it has a duty to make a Definitive Map Modification Order to record those rights on the Definitive Map

Evidential Tests

Highways Act 1980, Section 31

7. Section 31 of the Highways Act 1980 states:

“(1) Where a way over 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 twenty 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.”

“The period of twenty years referred to in subsection (1) above is to be calculated retrospectively from the date when the right of the public to use the way is brought into question whether by notice, such as is mentioned in subsection (3) below or otherwise.”

“Where the owner of the land, over which any such way as aforesaid passes has erected in such manner as to be visible by persons using the way a notice inconsistent with the dedication of the way as a highway; and has maintained the notice after the first January 1934, or any later date on which it was erected, the notice, in the absence of proof of a contrary intention, is sufficient evidence to negative the intention to dedicate the way as a highway”

8. Section 31(1) has two ‘limbs’ the first provides that proof of twenty years continuous user “as of right” endorses a claim that a highway exists; the second (sometimes referred to as ‘the proviso’) provides that proof of a lack of intention (by the owner) to dedicate the way as a highway defeats the claim. In determining a claim based on public use of an alleged highway under Section 31 it is therefore necessary first to establish whether or not there has been use by the public “as of right” for twenty years prior to the right of the public to use the route being brought into question and secondly to determine whether or not there is sufficient evidence of a lack of intention by the landowner to dedicate the way to the public during the period which would have the legal effect of overturning the presumption that the highway legally exists.

9. Section 31 is supplemented by Section 32 of the Highways Act 1980, which states:

“A court or other tribunal, before determining whether a way has or has not been dedicated as a highway, or the date on which such dedication, if any, took place, shall take into consideration any map, plan or history of the locality or other relevant document, which is tendered in evidence, and shall give 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.”

10. It is therefore appropriate in determining applications for Definitive Map Modification Orders for the Authority to consider what, if any, relevant documentary evidence exists.

Common Law

11. Highways may also be established under Common Law. At Common Law, a landowner must be shown to have intended to dedicate the right of way over his land. The question of dedication is purely one of fact and public user is no more than

evidence, which has to be considered in the light of all available evidence. Public use will not, therefore, raise the inference of dedication where the evidence in its totality shows that the public right of way status was not intended.

12. At Common Law, there is no specified period of user, which must have passed before an inference of dedication may be drawn. It is necessary to show, in order that there may be a right of way established, that the route has been used openly, "as of right", and for so long a time that it must have come to the knowledge of the owners of the fee simple that the public were so using it as of right.
13. If the landowner has done exactly what would be expected from any owner who intended to dedicate a new highway, the time may be comparatively short. However, as a matter of proof at Common Law, the greater the length of user that can be demonstrated, the stronger the inference of dedication will (usually) be.

Legally irrelevant matters

14. Factors such as desirability, suitability, financial viability, need or public safety, whilst genuine concerns, cannot be taken into account by the Authority when making a decision. Therefore, whilst there may be some genuine concerns about the possible damage to the surface of the alleged bridleway by use of the route for horse-riding, and concerns about possible conflict between walkers and riders these concerns cannot be taken into account when determining the applications to modify the Definitive Map.

Applications for a Definitive Map Modification Order

15. The Council has received a duly made application for a Definitive Map Modification Order. The application was received on the 30 January 2006 from Mrs Ann Hayes, on behalf of the Tatsfield Bridleways Association.
16. An interview day was arranged on 2 March 2010 and witnesses who had completed user evidence forms were invited to attend to clarify and expand upon their evidence. The evidence collected is considered below.
17. The landowners, where known, were contacted and given the opportunity to submit evidence. A plan showing landownership (where this has been ascertained) is at Plan 2 (Annex 2). Comments and evidence submitted by landowners is summarised at Annex 7. Consultations with user groups and statutory undertakers were carried out in accordance with the Rights of Way Review Committee Practice Guidance notes. Evidence collected from this process is considered below and a summary of consultation responses is included at Annex 3.

Consideration of Evidence

Documentary Evidence

18. The documentary evidence considered in the investigation of this application is summarised at Annex 4.
19. It is not possible to list exhaustively the documents that may be relevant in the matter of a claimed public right of way, but there are documents and records that are commonly considered to be core documents. A starting point is any Inclosure Award, and tithe map and apportionment for the area. In this case, however, there is no Inclosure Award or tithe map and apportionment for the area.
20. Avenue Road/The Avenue is a physical feature of long-standing but its origins and ownership are unknown. Historically, there was vehicular access to a scrap-yard on

the section claimed to be a bridleway and a number of adjoining landowners have private rights of access along it.

21. The 1910 Finance Act final record plan (held at the National Archive at Kew) shows that The Avenue/Avenue Road was excluded from the adjoining hereditaments. This suggests public vehicular rights were considered to have existed. But in the absence of other supporting evidence is not considered strong enough to record this part of the claimer route as a byway or restricted byway, especially since ownership of The Avenue/Avenue Road is unknown (and the exclusion from adjoining hereditaments may reflect uncertainty about ownership).
22. Other documents such as deeds, estate plans, quarter session records and highway maintenance records may also be relevant in any particular case, however a search of the online catalogues of the National Archive and of local repositories has not indicated any documents that appear to be relevant to this case.

Evidence of Use

23. The evidence of use from witnesses is analysed in Annex 5 and Annex 6 to this report. Each user is given a user reference number, which is used to identify them in the body of the report.
24. Twenty-nine user evidence forms were received in support of the Definitive Map Modification Order application. All witnesses were invited for interview, and nine attended for interview, one witness was unable to attend and was interviewed on the telephone.
25. After interviewing witnesses in March it became apparent that use of The Avenue/Avenue Road section of the claimed route differed markedly from use of the other sections of the claimed route. Eighteen witnesses who had not attended for interview (these being those whose forms were not clear as to whether or not the whole claimed route had in fact been used) were contacted to ask for clarification. Four of these witnesses responded with clarification of use.
26. As the user evidence varies in respect of different sections of the claimed route these are considered separately below.

The Avenue/Avenue Road (Z-Y on Plan 1a)

27. From user evidence forms and from those witnesses who were interviewed it is clear that the route from The Grove to Bridleway 639 (in Surrey) has been used by horse riders for a considerable length of time. User 6 first started using the route in 1949 and Users 12, 16, 17 and 26 started to use the route in the 1950s. Users 1, 8, 10 14 and 28 started to use the route in the 1960s, with Users 2, 4, 5, 7, 11, 18, 27 and 29 starting to use the route in the 1970s. Users 15, 20 and 22 started to use the route in the 1980s with the remaining users starting to use the route in the 1990s.
28. Many users continue to use the route and it remains open and available for use. No users report being turned back or challenged on this route and none report seeing any signs. This is consistent with the evidence of adjoining landowners, none of whom have raised any serious evidential objection to the status of the route as a bridleway. Although the application was only for the section Z-Y on Plan 1a it is clear that users have in fact used the whole route from A-B-C-D on Plan 1b.
29. Although rails and steps existed (as evidenced in the Council's records) at the junction of The Avenue/Avenue Road and The Grove they do not appear to have impeded horse riders and the rails appear to have been removed at some point.

Date of bringing into question for The Avenue/Avenue Road

30. In order to make out a case under Section 31 of the Highways Act 1980 it is first necessary to establish a date when the right of the public to use the route have been brought into question. In respect of The Avenue/Avenue Road there has been no physical interruption of use and no challenge to users by way of personal challenge or a sign. Section 69 of the Natural Environment and Rural Communities Act 2006 provides that an application for a Definitive Map Modification Order may be an action that brings into question the right of the public to use the way. The Definitive Map Modification Order application was made in 2006, so it is considered that the relevant twenty-year period for the purposes of Section 31 of the Highways Act 1980 is 2006 – 1986. User evidence for that period is analysed at Annex 6.1.

Clarence Road and Footpath 279 (V-X and Y-X-W on Plan 1a)

31. Although there is a prima facie case that Users have ridden Footpath 279 and Clarence Road, users themselves report that stiles were erected on Footpath 279. Users 1, 3, 4, 5, 8, 12, 14, 15, 18, 19, 20, 21, 24, 25 and 26 report stiles being erected at various points and at various times. Stiles and adjoining fencing are reported by Users to have been broken at various times. Some Users report 'getting around' stiles, stiles being broken and getting through broken fencing (Users 3, 18, and 25). There is no suggestion that any of the users themselves broke or damaged stiles or fencing.
32. It is not always clear from user evidence forms which part of the claimed route has been used and during which periods. It has been possible to establish from interview and through written clarification with some witnesses that there has been less use of the Clarence Road and Footpath 279 section of the claimed route than of The Avenue/Avenue Road. Users 4 and 16 used this section of route until the 1970s when a stile was erected. User 12 used this section of route until 1990 when a stile was erected. Users 5, 6, 9, 11, 22, and 23 mostly used The Avenue/Avenue Road. User 10 never rode this section of route. Additionally few users rode the top section of Footpath 279 between the end of Clarence Road and Main Road, use of this section was minimal; it is very narrow and barriers are known to have existed at the Main Road.
33. It has not been possible to clarify the user evidence in all cases. In some cases user evidence forms appear to have been circulated with the claimed route already completed, where this is the case and where it has not been possible to clarify further that Footpath 279 and Clarence Road as well as The Avenue/Avenue Road have been used by the user, then it is not possible to place great reliance on the evidence.
34. Of the users where evidence has been clarified by interview or written clarification: User 11 used the Footpath 279 and Clarence Road as a young woman and Users 12 and 24 have used the route regularly and frequently and have not been prevented from using it by stiles or fencing until the 1990s.
35. It has not been possible to identify who owns the majority of the land crossed by Footpath 279 or who owns Clarence Road. Mr Rudd owns some land crossed by Footpath 279 but other owners or suspected owners have not responded to consultation. Mr Rudd states that the footpath has always had stiles on it. Mr Williams erected stiles in 1966. Stiles and repairs to stiles are recorded in the Council's maintenance records in the period 1981 – 2003. Stiles and barriers are recorded on the Footpath in the original survey carried out for the Definitive Map and Statement under the National Parks and Access to the Countryside Act 1949. Mr Burridge, Mr D Reeks, Mr R S Reeks and Mr Parfitt all recall stiles, with Mr R S Reeks stating that stiles have always been in place in two sites on the footpath.

36. Although it is not clear who has erected the stiles (with the exception of the two Mr Williams erected in 1966 and those erected in replacement by the Council) it is likely that the stiles were not erected by the landowner. However, irrespective of this, stiles undoubtedly restrict or prevent use by horse riders.
37. The evidence about the stiles is in conflict. The Survey records stiles in 1950 and Mr R S Reeks recalls stiles always being present, but user witnesses from that period do not recall encountering stiles. Mr Williams recalls erecting two stiles in 1966, but user witnesses recall no stiles until the 1970s. Council maintenance records only date back to 1981, but these record erection/replacement and maintenance of stiles from that date. Other than the Survey and the Council records no written contemporary evidence seems to exist regarding the stiles.

Legal Considerations

The Avenue/Avenue Road

38. This route is not at present shown on the Definitive Map and Statement so consideration of the Definitive Map Modification Order application comes under Section 53(3)(c)(i) of the Wildlife and Countryside Act 1981. This provides that an Order should be made by the Authority on *“the discovery of evidence which (when considered with all other available evidence to them) shows 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....”*

These two separate tests were considered in R v Secretary of State for the Environment ex parte Bagshaw [1994] 68 P & CR 402 and R v Secretary of State for Wales ex parte Emery [1996] 4 All ER 1:

Test A: Does a right of way subsist?

The Authority must be satisfied on the balance of probabilities that there is clear evidence of public rights over the way, and no credible evidence to the contrary.

Test B: Is it reasonable to allege that a public right of way subsists?

If there is a conflict of credible evidence but no incontrovertible documentary evidence that a right of way cannot be reasonably alleged to subsist, then the Authority can find that a public right of way has been “reasonably alleged” and make an Order on that basis.

39. In this case it is the view of the Consultant that there is clear evidence of public rights over The Avenue/Avenue Road and that evidence suggests that rights of at least bridleway status subsist. There is no credible evidence that public bridleway rights do not subsist. There is some evidence that public vehicular rights may exist, but on balance, the evidence supports a public bridleway.
40. If an Order is made to add The Avenue/Avenue Road to the Definitive Map and Statement it will have to include a width for the route. There is no documentary evidence of width. The route is bounded by trees on both sides with some fencing. User evidence suggests that the width available for use has not changed and was always as it is now. The Authority’s attention is drawn to Advice Note 16 and the related letter of advice from Defra and should an Order be made it is recommended that survey measurements be taken to establish the present physical width of the route and that these should form the basis for any width included in any Order.

Clarence Road and Footpath 279

41. In respect of Clarence Road, this route is also not presently shown on the Definitive Map and Statement and therefore falls to be considered under Section 53(3)(c)(i) of the Wildlife and Countryside Act 1981 (as above). However, in practice use of this

route cannot be divorced from use of Footpath 279 and any inference of dedication as bridleway has to be considered for the route as a whole.

42. Footpath 279 is already recorded on the Definitive Map and Statement as a public footpath. Therefore this section of the claimed route falls to be considered under Section 53(3)(c)(ii) of the Wildlife and Countryside Act 1981. This provides that an Order should be made by the Authority on *“the discovery of evidence which (when considered with all other available evidence to them) shows that a highway shown in the map and statement ought to be there shown as a highway of a different description”*.
43. In cases where no right of way at all is shown in the Definitive Map and Statement Section 53(3)(c)(i) provides for a slightly lower test i.e. “Test B” to enable an Order to be made. There is no such provision in Section 53(3)(c)(ii).
44. Some riders have spoken of ‘getting around’ the stiles by using a slightly different route to access junction with The Avenue/Avenue Road. The use by riders of a variant of a route to get around obstacles (in this case gates) was considered in R v Secretary of State ex parte Blake 1984 JPL 101 the Court held that the gates were clearly physical interruptions to use and that it was not possible to add the user of two variant routes together to make out a claim of use for twenty years. Other riders have spoken of using the route when fencing next to the stiles was broken or the stiles themselves were broken. There is no suggestion that the riders themselves broke the fencing, but use when fencing or stiles were broken amounts to use by force and cannot be taken as use as of right, either at common law or under Section 31 of the Highways Act 1980.

Consultant's Comments

45. Applications for Definitive Map Modification Orders do not seek to create or extinguish public rights of way; they simply seek to record, on the Definitive Map, those routes, which already exist, at their correct status. In determining this application, the Authority can only take into account evidence relating to the existence, or otherwise, of public rights. Factors such as: desirability, suitability, privacy, private rights, financial viability, need or public safety; whilst genuine concerns, cannot lawfully be taken into account when making a decision.

Consultant's conclusions

The Avenue/Avenue Road

46. There is clear evidence of public use of this route as a bridleway for at least twenty years from the date of bringing into question in 2006 to 1986. There is no evidence that any landowner has taken actions that would amount to a lack of intention to dedicate the route during that period of time. Further use of the route by the public on horseback is evidenced from at least the 1950s, which is evidence of the public reputation of the route as a bridleway. There is no evidence that suggests that public bridleway rights do not exist. Use has been over the whole route as shown A-B-C-D on Plan 1b.

Footpath 279

47. Although this route has been used by the public on horseback, at times use has been despite the existence of stiles in various places. Stiles are documented to have existed in 1950, stated to have been erected and kept in place in 1966 and documented in the Council's records from 1981 onwards. There is evidence that some use of the route was prevented by the stiles in the 1970s and that some riders at least got around stiles or fencing clearly erected to prevent access.

48. Mr Williams challenged users in 1965.

49. Evidence of use is unclear from the user evidence forms, but there appears to be a limited amount of user of the route by users who have not been prevented by stiles and fencing or have 'got around' or 'got through' stiles or fencing. Although the evidence is not completely clear or consistent, it is the Consultant's view that use in such circumstances does not amount to enjoyment by the public as of right.

Decision Required

50. The Authority is required to determine the Definitive Map Modification Order application. It may:
- a) Refuse to make any Order at all.
 - b) Make the Order as applied for in which case it should resolve to make an Order under Section 53(3)(c)(i) to add a bridleway to the Definitive Map and Statement for the routes shown from Z to Y and from V to X and make an Order under Section 53(3)(c)(ii) for the route shown from Y to X to W on Plan 1a.
 - c) Make an Order under Section 53(3)(c)(i) to add a bridleway to the Definitive Map and Statement for the route shown from A-B-C-D on Plan 1b and refuse to make an Order for the sections Y to X to W and X to V on Plan 1a.
51. Where an Order is made it does not come into effect unless and until it is confirmed. Orders have to be published and advertised and the public may object to them, where objections or representations are received the Authority may not itself confirm the Order but must refer the Order together with the objections and representations to the Secretary of State for determination.
52. Where an application, or part of an application, for an Order is refused the applicant has a right of appeal to the Secretary of State who will review the evidence and may direct the Authority to make an Order.

Recommendation

It is recommended that the Authority:

Seeks delegated authority from Surrey County Council and on receipt of that authority:

Makes an Order under Section 53(3)(c)(i) to add a bridleway to the Definitive Map and Statement for the route shown from A-B-C-D on Plan 1b (which incorporates Z-Y on Plan 1a) and refuses to make an Order for the sections V-X and W-X-Y on Plan 1a.

That if no objections are received to the Order made, or any objections that are received are subsequently withdrawn, the Order be confirmed

That if any objections to the Order made are received, and not subsequently withdrawn, the Order be passed to the Secretary of State for determination.

In the event of an appeal being successfully lodged against refusal of part of the application, and the Secretary of State directing the Authority to make the Order requested, a further report be presented to enable the Authority to decide how to proceed throughout the Order process.

List of Annexes to the report:

- Annex 1 – Plans: Plan 1a showing the route of the claimed public bridleway
Plan 1b showing The Avenue/Avenue Road relative to authority boundaries
- Annex 2 – Plan 2 showing landownership
- Annex 3 – Consultation responses
- Annex 4 – Summary of map evidence
- Annex 5 – Summary of user evidence
- Annex 6 – Graph of user evidence
- Annex 7 – Summary of landowner evidence

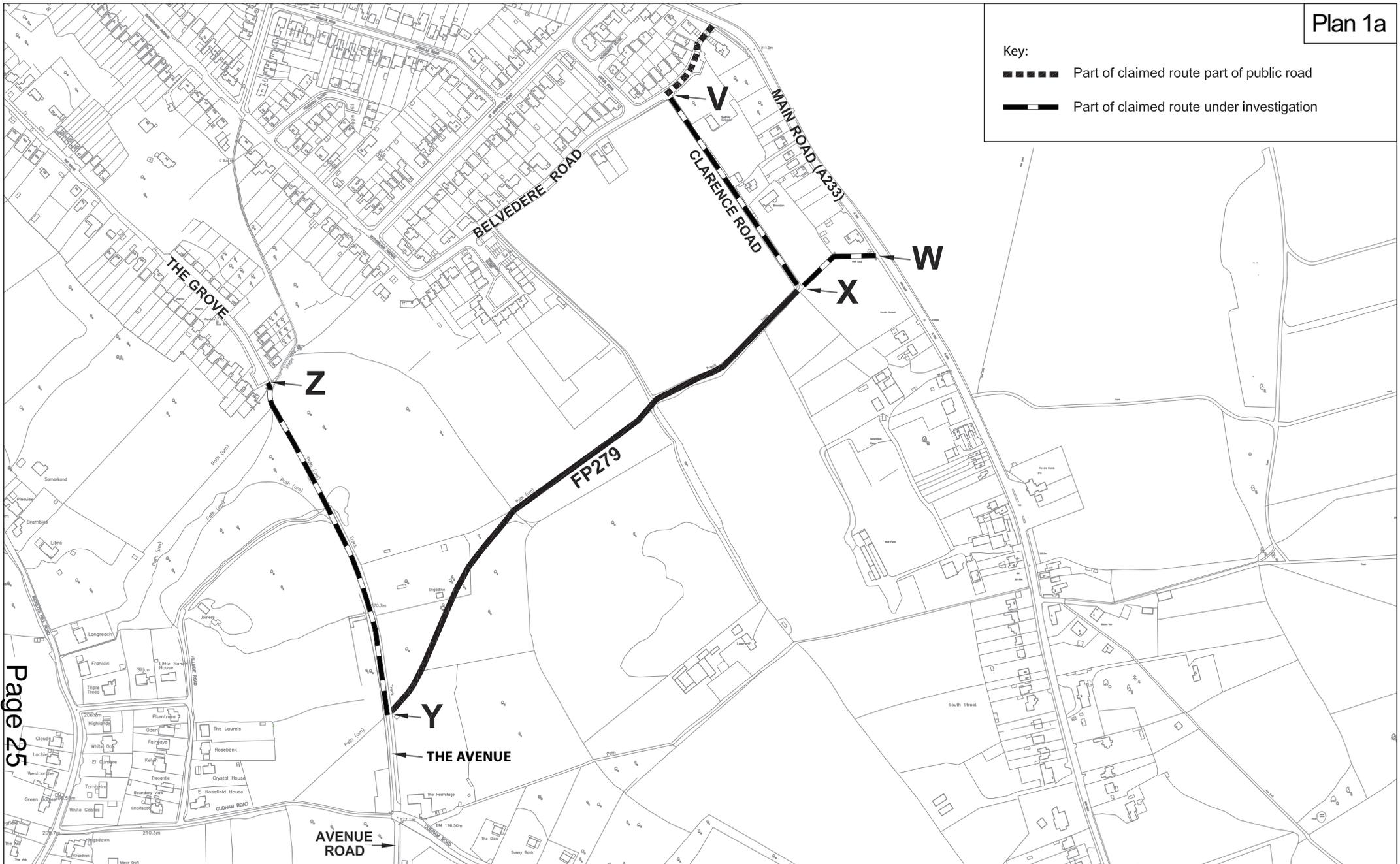
Other background papers

The applications with accompanying documents, additional user evidence forms and statements are held by the Council on file.

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Key:

- ▬▬▬▬▬ Part of claimed route part of public road
- ▬▬▬▬▬ Part of claimed route under investigation



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Nigel Davies
Director of Environmental Services

Bromley
THE LONDON BOROUGH

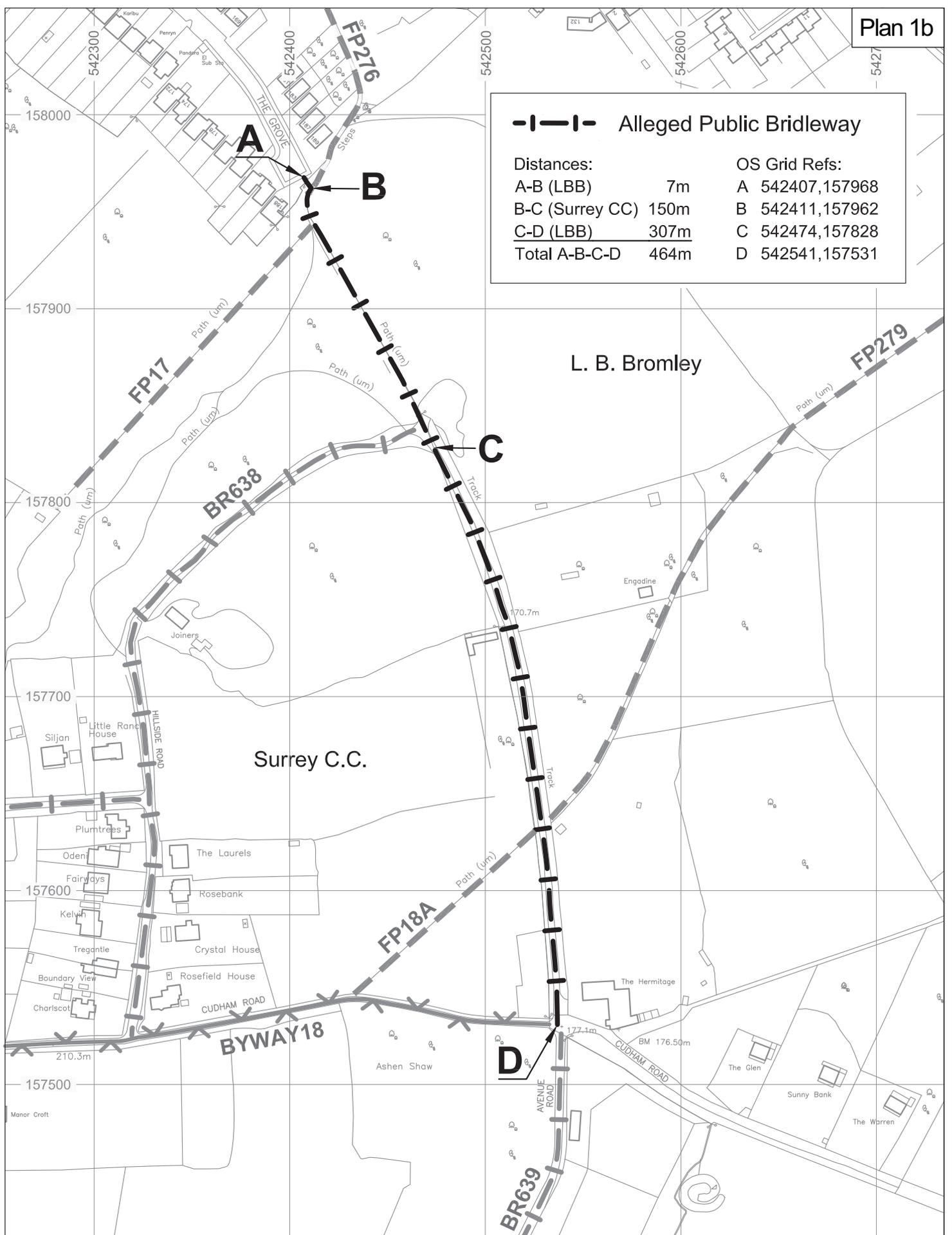
Environmental Services
Civic Centre, Stockwell Close,
Bromley, Kent, BR1 3UH
Tel : (020) 8464 - 3333

CLAIMED BRIDLEWAY

Clarence Road, FP279, The Avenue/Avenue Road to The Grove, Biggin Hill

	Scale:	1:5000 @ A4
	Date:	13/08/10
	Dwg. No.:	ESD/10693/1/1a
	Drawn By:	ST

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--- Alleged Public Bridleway		OS Grid Refs:	
Distances:		A	542407,157968
A-B (LBB)	7m	B	542411,157962
B-C (Surrey CC)	150m	C	542474,157828
C-D (LBB)	307m	D	542541,157531
Total A-B-C-D	464m		

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Nigel Davies
 Director of Environmental Services



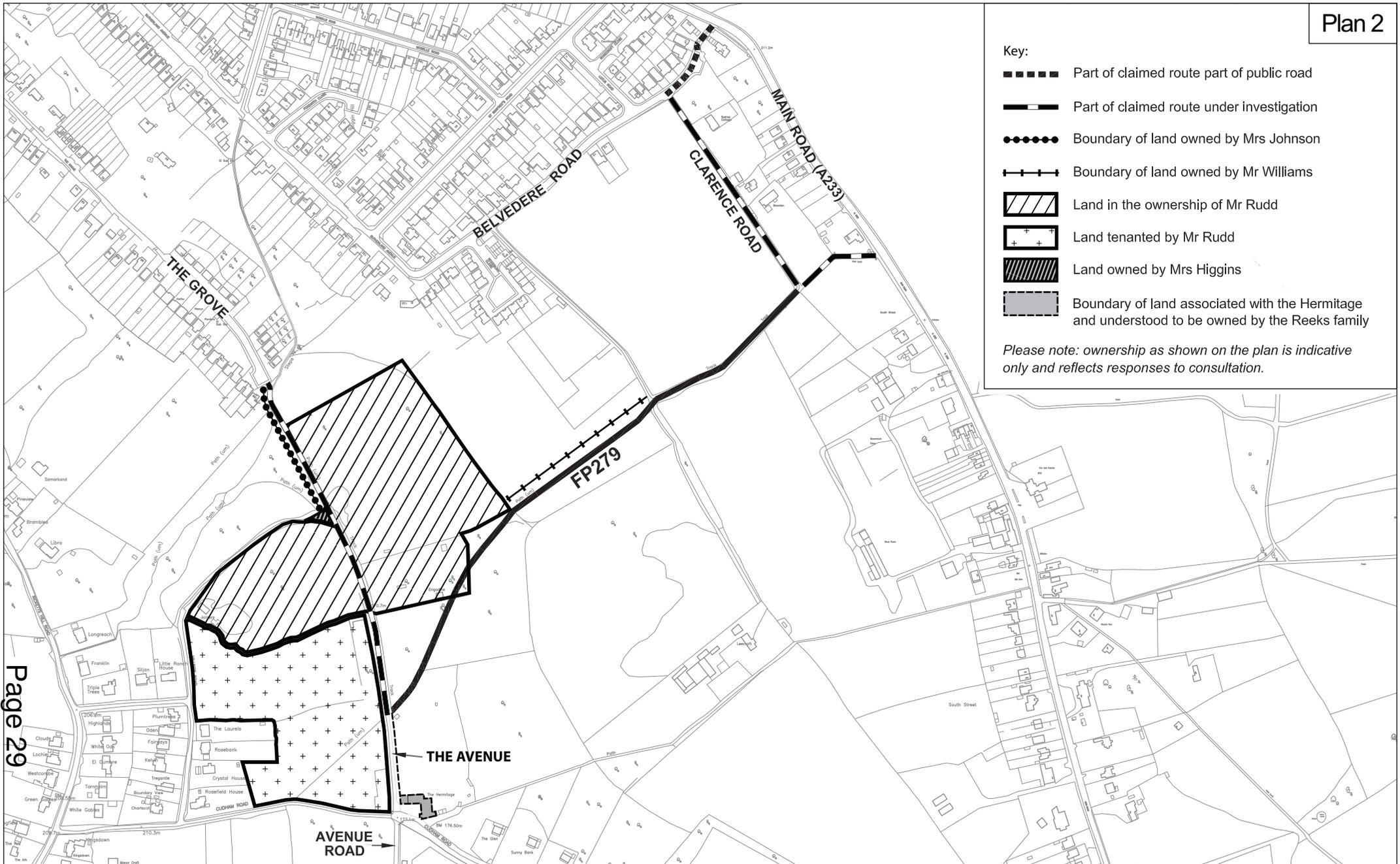
Environmental Services
 Civic Centre, Stockwell Close,
 Bromley, Kent, BR1 3UH
 Tel : (020) 8464 - 3333

Definitive Map Modification Order
AVENUE ROAD/THE GROVE, BIGGIN HILL



Scale:	1:2500 @ A4
Date:	22/06/10
Dwg. No.:	ESD/10623/1c
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Key:

- ■ ■ ■ ■ Part of claimed route part of public road
- ▬ Part of claimed route under investigation
- ● ● ● ● Boundary of land owned by Mrs Johnson
- ⊕ ⊕ ⊕ ⊕ ⊕ Boundary of land owned by Mr Williams
- ▨ Land in the ownership of Mr Rudd
- ⊕ ⊕ ⊕ ⊕ ⊕ Land tenanted by Mr Rudd
- ▩ Land owned by Mrs Higgins
- ▭ Boundary of land associated with the Hermitage and understood to be owned by the Reeks family

Please note: ownership as shown on the plan is indicative only and reflects responses to consultation.

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Nigel Davies
 Director of Environmental Services

Bromley
 THE LONDON BOROUGH

Environmental Services
 Civic Centre, Stockwell Close,
 Bromley, Kent, BR1 3UH
 Tel : (020) 8464 - 3333

CLAIMED BRIDLEWAY

Clarence Road, FP279, The Avenue/Avenue Road to The Grove, Biggin Hill



Scale:	1:5000 @ A4
Date:	13/08/10
Dwg. No.:	ESD/10693/1/2
Drawn By:	ST

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Summary of Consultation responses

Consultee	Response	Comments
Councillor Bloomfield	Is concerned that if the FP route is recognised as a bridleway this would intensify use to the detriment of the existing path surface and the Authority would need to provide a better surface.	Whilst this is a concern, this is not a factor the Authority can lawfully take into account when considering the DMMO application
Open Spaces Society	No objection	
Biggin Hill Riders Group	Supports the application, the route has been used by riders for many years without mishap	
British Horse Society	Supports the application	
Bromley Bridleways Access Group	Supports the application, the route has been used by riders for many years and is established	
BT	Apparatus not affected	
Virgin Media	Plant in Clarence Road	Plant will not be affected should an Order be made
Southern Gas	Apparatus not affected	
Thames Water	Apparatus not affected	
Tandridge District Council (Surrey)	The Council's officer level response to consultation is that there is no objection is raised providing that there is no resulting conflict between users of the route	
Tatsfield Parish Council (Surrey)	No objection	

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Application for a Definitive Map Modification Order
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British Driving Society	Would prefer the route (Avenue Road) to be recorded as a restricted byway but are unable to provide evidence in support of this at this time	
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Responses were not received from the Ramblers, Byways and Bridleways Trust, CTC, ACU or from any other statutory utility.

Summary of Documentary Evidence

Document	Evidence	Comments
LBB non statutory records	Clarence Road is considered to be a highway for all traffic	These are non statutory records and the evidence therein is of little weight.
LBB List of streets	SE end of The Grove is an adopted highway, maintainable at public expense. Belvedere Road is an adopted highway, maintainable at public expense, but subject to a traffic regulation order restricting its use to pedestrian use only.	This is good evidence that the routes are all purpose highway, as such The Grove and Belvedere Road are not included in the recommendation to make an Order
LBB Definitive Map records	Records Footpath 279 as a public footpath	Recording of rights on the definitive map and statement is without prejudice to other public rights existing over the same route.
LBB Rights of Way Records	<p>Survey carried out by Orpington UDC under National Parks and Access to the Countryside Act 1949</p> <p>The survey includes FP 248 (now LBB's FP 279) which describes the route as having a stile not far from its junction with Main Road and one at the point where the path meets the OUDC boundary - which was on the section of the route described previously as Avenue Road.</p> <p>The annotation associated with the FP survey text includes 4 'S' symbols, which were intended to indicate the presence of stiles, even though only 2 are referred to in the text.</p> <p>There is a Map associated with the survey that indicates a stile near the junction with Main Road and half way along its length, but not at the 'Avenue Road' junction.</p>	This is evidence that stiles existed on what is now FP 279, even if it is not completely clear where these were.

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Document	Evidence	Comments
LBB Rights of Way inspection Record for FP 279	<p>This contains references to barriers/rails at the junction with the main road in 1981, 1987 (specifically to stop horse riders, reported to be broken), 1989, (horses squeezing past barriers). A stile constructed by Mr Williams (in 1985), stiles in 1987, 1989 (Stile at Cudham Road in need of repair), 1990 (new stile erected), 1991 (stile replaced with additional step), 1998 (stile in need of repair, subsequently repaired by Council), 2002 (3 stiles inspected).</p> <p>The log also notes a complaint by Mr Williams in 1979 that horses were using the footpath to the rear of his property and that notices had been displayed to say that the permission of the owner has been given for horse riding use</p>	
Surrey County Council Definitive Map and Statement	The southern extent of Avenue Road (south of point D on Plan 1b) was the subject of a DMMO to add the route as a bridleway, this was confirmed in October 2004.	This route, plus other linking highways in Surrey, is shown on Plan 1b
Aperfield Estate Records		The estate did not extend to include the claimed route.
Valuation records prepared under the Finance Act (1909-1910) 1910	Avenue Road/The Avenue is shown unshaded and external to adjacent hereditaments on the final record plan.	<p>PINS Consistency Guidelines at Section 11, gives the following advice regarding unshaded routes, "...if a route in dispute is external to any numbered hereditaments, there is a strong indication that it is considered to be a public highway, normally, but not necessarily vehicular, since footpaths and bridleways were usually dealt with by deductions recorded in the forms and Field Books, however there may be other reasons to explain its exclusion. It has been noted, for example, that there are some cases of a private road set out in inclosure awards (see Section 7) for the use of a number of people but without its ownership being assigned to any individual, being shown excluded from hereditaments; however this has not been a consistent approach. Instructions issued by the Inland Revenue to valuers in the field deal with the exclusion of 'roadways' from plans, but do not spell out all the circumstances in which such an exclusion would apply."</p> <p>In this case, there is no inclosure award, so this evidence is suggestive that public rights, probably public vehicular rights, were considered to have existed at the date of the valuation survey.</p>

Summary of User Evidence

Ref	Name	User Evidence Form	Witness Interviewed	Statement	No of Years	Period of Use (Years)	User "As of Right"	Additional Information	Comments
1	Eileen Andrews	✓			20	1960-1980	✓	Stiles on FP 279 mentioned as appearing in the 1970s	
2	Harry Bull	✓			5	1975-1980	✓		
3	Mandy Chapman	✓			34	unclear	✓	Stiles - two in early 70s and one in early 90s but these are broken down at intervals. Stile at the end of the Grove and on FP 279	
4	Catherine Clayton	✓			unclear	1970s - 1988	✓	Used FP 279 until the 1970s when a stile was erected	
5	Michaela Cook	✓	✓	✓	24	1976-present	✓	Stiles - two in early 70s and one in early 90s. Mostly used The Avenue	

Wildlife & Countryside Act 1981
 Applications for a Definitive Map Modification Order
 Alleged bridleway Clarence Road, FP 279, Avenue Road/The Avenue to The Grove

Ref	Name	User Evidence Form	Witness Interviewed	Statement	No of Years	Period of Use (Years)	User "As of Right"	Additional Information	Comments
6	Patricia Crothers	✓	✓		33	1949-1981	✓	Mostly used The Avenue	
7	Caroline DeVivo	✓			4	1976-1980	✓		
8	Mrs J Garnham	✓			12	1968-1980		Stile on FP 279 erected in the 1970s	
9	Jennifer Gibbs	✓	✓			1972-2004	✓	Use part but not whole of FP 279. Period of none use 1969-1973 and for a year when each child born (25 and 28 years ago) Used The Avenue only	
10	Marian Godfrey	✓	✓	✓	c30	1960s-2008	✓	The Avenue used from at least 30 years ago till stopper riding in 2008 Never rode FP 279/Clarence Road, accompanied daughter whilst she rode	
11	Maisie Hart	✓			20	1975-2005		Mainly used The Avenue, used FP279 as a young woman	Additional form re use completed

Wildlife & Countryside Act 1981
 Applications for a Definitive Map Modification Order
 Alleged bridleway Clarence Road, FP 279, Avenue Road/The Avenue to The Grove

Ref	Name	User Evidence Form	Witness Interviewed	Statement	No of Years	Period of Use (Years)	User "As of Right"	Additional Information	Comments
12	Ann Hayes	✓	✓	✓	c45	1950s-2005	✓	Does not recall stiles on FP279 in the 50s. Last used FP279 in 1990s when a stile was erected. Last used The Avenue in 2005. Has used all of the route regularly and frequently, varying over time slightly	
13	Mrs K Jones	✓			7	1997-2005	✓		
14	Mrs J King	✓			c30	1960s - 1990s	✓	Stile halfway up FP279 c 1980s	
15	Ms K King	✓			10	1980 - 1990	✓	Stile halfway up FP279 erected in 1980	
16	Elizabeth Leslie-Smith	✓	✓*	✓	30	1958 - 1988	✓	Used The Avenue from 1958-1988, used FP 279 from 1962 to late 1970s, when a stile was erected. Used Clarence Road very occasionally.	* Telephone interview
17	T J W Lyle	✓			3	1959-1961	✓		
18	Kirsteen Mathews	✓			30	1978 - 2008	✓	Stiles on FP279, stiles broken, stiles put up on 1980s and 1990s	

Wildlife & Countryside Act 1981
 Applications for a Definitive Map Modification Order
 Alleged bridleway Clarence Road, FP 279, Avenue Road/The Avenue to The Grove

Ref	Name	User Evidence Form	Witness Interviewed	Statement	No of Years	Period of Use (Years)	User "As of Right"	Additional Information	Comments
19	Ross MacAdam	✓			20	1985-2005	✓	Stiles erected in late 1980s	
20	Sharon MacAdam	✓			20	1985-2005	✓	Stiles erected in late 1980s on Fp279 about halfway up	
21	Mrs C E Mortimer	✓			25	1980 - 2005	✓	Stile erected recently	
22	Christine Orchard	✓	✓	✓	14	1989-2003	✓	Did not use final section of footpath, used FP only on a few occasions, mainly used The Avenue. Did not use for a period about 13 years ago following riding accident	
23	Paul Orchard	✓	✓	✓	13	1990-2003	✓	Did not use final section of footpath, used FP only on a few occasions, mainly used The Avenue	
24	Gayna Phillips	✓			44	1956-2008	✓	FP 279 stiles put up periodically about from 1970	Additional form re use completed
25	Marion Randall	✓	✓	✓	2 and 8	1985-1987 1992-2010	✓	First used FP279 on horse in 1985 till 1987, then stopped riding. Started riding generally again in 1992. Found way around barbed wire onto footpath in about 1998. Recalls stile in middle of the footpath, but got around this. Has ridden The Avenue regularly in period 85-87 and in 92-2010	Additional form re use completed

Wildlife & Countryside Act 1981
 Applications for a Definitive Map Modification Order
 Alleged bridleway Clarence Road, FP 279, Avenue Road/The Avenue to The Grove

Ref	Name	User Evidence Form	Witness Interviewed	Statement	No of Years	Period of Use (Years)	User "As of Right"	Additional Information	Comments
26	Mrs R Savery	✓	✓	✓		1955-2010	✓	Used FP 279 from around 1959 or so. Wire and stiles across FP279 from time to time from 1970s onwards. Fencing across the footpath at junction with the Avenue in 1970. Did not use Clarence Road after 1968	
27	Lyndsay Squires	✓			?	1979-2003	✓		Additional form re use completed. Evidence of use is confused. It appears that only the Avenue was used
28	Margaret Wickham	✓			25	1960-1985	✓		
29	Anna Wooleen	✓			20	1977-1997	✓	Used Clarence Road and did not use top section of FP 279	

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Wildlife & Countryside Act 1981
Applications for a Definitive Map Modification Order
Alleged bridleway Clarence Road, FP 279, Avenue Road/The Avenue to The Grove

Annex 7

Summary of Landowner's Evidence

Name	Evidence	Comments
Mr Fred Burridge	<p>Mr Burridge lives off Clarence Road. The ownership of Clarence Road itself is unknown. Mr Burridge has lived in Clarence Road for 40 years and lived locally before moving to Clarence Road. He fills in the potholes and is aware that its status is unadopted road. He sees horseriders using it very infrequently. There has been a long period where he has seen no riders at all, but more recently two riders have been using Clarence Road for about 3 months. A number of years ago Mr Harvey at Lincroft used to keep horses and he walked them along Clarence Road</p> <p>The footpath has been used by horses in the past, their use created a quagmire, particularly in the narrower sections. Posts were put up at the junction of the footpath and Main Road about 10 years ago, these stopped the horseriders from using the route and may have been put up by the Council. Mr Burridge has never seen horse riders on the very narrow top section of the footpath leading up to the road. The stile at the end of the bank also prevents horse riders from using the footpath.</p> <p>There have been residential properties in Clarence Road for over 100 years. Mr Burridge has no formal easement over the road. Mr Burridge is concerned that the registration of bridleway rights will adversely affect his ability to access his property</p>	Concerns about the effect on private access rights are not matters that can lawfully be taken into account in determining the DMMO application.
Mr David Brown	<p>Mr Brown lives off Clarence Road. His property used to belong to the Hallum family and the original house on the site was constructed c1897. Mr Brown bought the property over 40 years ago and re-built what was a rather derelict property. At that time Mr Hallum was alive, though very old, he and his sons still kept the farm.</p> <p>Mr Brown has lived in the area since 1963 and has seen the occasional horse rider use Clarence Road</p> <p>The barriers at the Main Road were in place when Mr Brown's sons were small (they are now 40 and 45)</p>	
Mr and Mrs Iain Cowie	<p>Mr and Mrs Cowie own 334 Main Road and have lived there 3 years. During this time they have seen no horses use the top section of the footpath. They are concerned that the registration of bridleway rights over the footpath will adversely affect the privacy of rear garden. The top section of the footpath is too narrow for horses to safely use.</p>	Concerns about privacy are not matters that can lawfully be taken into account in determining the DMMO application.

Wildlife & Countryside Act 1981
Applications for a Definitive Map Modification Order
Alleged bridleway Clarence Road, FP 279, Avenue Road/The Avenue to The Grove

Name	Evidence	Comments
Mr David Rudd	Mr Rudd owns some of the land crossed by the footpath. Stiles have been erected and repaired on the footpath and any gaps have been repeatedly blocked with barbed wire. This path has always been a footpath and is not a bridleway. Mr Rudd owns land either side of The Avenue and rents a further piece from an absentee landlord. He uses The Avenue to access his land and is concerned that recoding a bridleway over it will interfere with his access rights.	The evidence of repair to stiles and the blocking of gaps is discussed in the main report. The recording of a bridleway over The Avenue will not affect existing private access rights.
Mr Don Reeks	Mr D Reeks is executor for his late mother who owned The Hermitage. The deeds to The Hermitage date back to 1875. The Avenue was not called Avenue Road and is shown on old OS maps. The old county boundary ran along it to the extent that part of The Hermitage was in Surrey and part in Kent. The Avenue is a continuation of Hillside Road. Mr D Reeks has known The Hermitage since 1957 and has never seen horses riding on the footpath. Fencing adjacent to the stile at the junction of the footpath and The Avenue has been broken so horse riders may have taken advantage of this to use the footpath. He is concerned that horse use of the footpath would be dangerous to walkers.	Boundaries have been legally changed, this is discussed in the main report.
Mr R S Reeks	Mr R S Reeks presently lives in The Hermitage and has lived there since 1957. The footpath has always only been a footpath and there are three stiles presently in place on it, two of which have always been in place, additionally a metal chain was across the footpath. The section of route from Hillside Road to the Grove is also only a footpath. Part of the route is in Surrey.	The existence of stiles is discussed in the main report.
Mr Malcolm MacLeod	Mr MacLeod presently lives in The Hermitage, He was born there in 1966 and lived there until 1979, returning to live there in 2009. Between 1979 and 2009 he visited his grandmother who lived there regularly. He has never seen horseriders on the footpath.	
Mr R A Parfitt	Mr Parfitt owns 12A Woodbury Close, he does not own land crossed by or next to the footpath. Mr Parfitt has lived in Woodbury Close for 47 years in total and in that time the footpath has never been accessible for horseriders having two or three stiles on it. He has a 1975 Bromley and District Consumers Group map showing the footpath as a public footpath and is concerned that registration of bridleway rights over the footpath would cause problems for walkers.	Footpath 279 is registered as a public footpath on the LBB Definitive Map and Statement, however, this is without prejudice to other public rights. Concerns about the effect use by horseriders will have on walkers using the existing footpath are not matters that can lawfully be taken into account in determining the DMMO application.
Mrs Beryl Higgins	Mrs Higgins owns land adjacent to The Avenue and has private access rights over it. She considers that The Avenue is a public right of way and only has concerns that the recording of bridleway rights will adversely affect her private access rights. She has no comment to make about the Clarence Road or Footpath 279 section of the claimed route.	Concerns about the effect on private access rights are not matters that can lawfully be taken into account in determining the DMMO application, but in any case existing private rights will not be affected.
Mr John Williams	Mr Williams owns 132 Sutherland Avenue and his land abuts the footpath. He objects to the recording of bridleway rights over the	The stiles and challenges are discussed in the main report.

Wildlife & Countryside Act 1981
 Applications for a Definitive Map Modification Order
 Alleged bridleway Clarence Road, FP 279, Avenue Road/The Avenue to The Grove

	<p>footpath. In 2006 on receiving the notice of the DMMO application he wrote to the Council, in summary he said: the footpath is too narrow to be used by horses and horse use would make it muddy and be dangerous for walkers. In 1965 horse riders would sometimes use the footpath, but this was prevented by an obstruction and in 1966 by the erection of two stiles. One of these stiles was photographed and registered with the Footpaths Officer at LBB. In clarification Mr Williams confirms that he built the two stiles mentioned in 1966, one at the junction of the Footpath with The Avenue and one near to the southwestern corner of his land. A further stile was built near to the northeastern corner of his land. Mr Williams states that although he does not own the land crossed by the footpath he challenged horse riders who sometimes used it in the 1960s and built the stiles to prevent their use. He recalls challenging two or three riders who then stopped using the footpath, these exchanges were always courteous. He has not been able to find out who owns the land so the stiles he built were not built with the agreement or permission of the landowner</p>	
Mrs Peggy Johnson	Owns land adjacent to The Avenue. She has made no comment other than to confirm her landownership.	
Mr Henry Speer		Correspondence returned "not known at this address"
Mr Thomas Evans		Correspondence returned "gone away"
Mrs I E Young c/o Klocker and Foskett, solicitors		No reply
Mr Harvey		No reply
Chevening Estate		Do not own land crossed by the claimed route

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Report No.
ES10124

London Borough of Bromley

Agenda
Item No. **8**

PART 1 - PUBLIC

Decision Maker: Rights of Way Sub-Committee

Date: 1st September 2010

Decision Type: Non-Urgent Non-Executive Non-Key

Title: **FOOTPATH 280 (PART) GRAYS ROAD TO BOROUGH BOUNDARY - APPLICATION FOR DEFINITIVE MAP MODIFICATION ORDER TO UPGRADE TO BRIDLEWAY**

Contact Officer: Duncan Gray, Development Manager
Tel: 020 8313 4556 E-mail: duncan.gray@bromley.gov.uk

Chief Officer: Nigel Davies, Director of Environmental Services

Ward: Darwin

1. Reason for report

To determine an application for a Definitive Map Modification Order to upgrade FP 280 to bridleway. The application has been made under the Wildlife and Countryside Act 1981 which places a duty on the Council, as the Surveying Authority for public rights of way, to keep the Definitive Map and Statement under continuous review.

2. **RECOMMENDATION(S)**

2.1 **Subject to the view taken by the Sub-Committee on the merits of the evidence provided in support of the claim, either**

1. **The Director of Legal, Democratic and Customer Services, in consultation with the Director of Environmental Services, be authorised to make a Definitive Map Modification Order under section 53(3)(c)(ii) of the Wildlife and Countryside Act 1981 to 'upgrade' footpath 280 to bridleway, or**
2. **Advise the applicant that the Council takes the view that on the balance of probability, the case in favour of the application has not been demonstrated and that their application has been refused and the applicant be advised of their right to appeal to the Secretary of State.**

Corporate Policy

1. Policy Status: N/A.
 2. BBB Priority: N/A.
-

Financial

1. Cost of proposal: Estimated cost £60
 2. Ongoing costs: Non-recurring cost.
 3. Budget head/performance centre: Transport & Highways - Advertising
 4. Total current budget for this head: £3300
 5. Source of funding: Existing 2010/11 Revenue Budget
-

Staff

1. Number of staff (current and additional): 1
 2. If from existing staff resources, number of staff hours: 10
-

Legal

1. Legal Requirement: Statutory requirement.
 2. Call-in: Call-in is not applicable.
-

Customer Impact

1. Estimated number of users/beneficiaries (current and projected): All users of FP 280
-

Ward Councillor Views

1. Have Ward Councillors been asked for comments? Yes.
2. Summary of Ward Councillors comments: The Ward member has been consulted and has not offered any comment owing to his involvement with the Sub-Committee.

3. COMMENTARY

- 3.1 The relevant part of FP 280 runs in a southerly direction from Grays Road through Grays Farm for a distance of approximately 280m to the Borough boundary with Kent County Council. Two claims for upgrading this section of FP 280, and its continuation into Kent over their routes SR332 and SR331(part), (see Plan on page 7), to bridleway status, based on use by horse riders over a number of years, have been received, one by each of the respective Authorities.
- 3.2 This is effectively one claim for a complete route that crosses the boundary between the 2 Authorities, with the majority of the claimed route lying in Kent. Following discussion between the Authorities it was agreed that Kent would carry out the investigation and analysis of the claims in respect of the whole of the claimed route. Their detailed report is attached at **Appendix 1**. Due to the need for the Sub-Committee to reach a decision based on all the available evidence, that report should be read carefully in order to gain an appreciation of the issues involved. A view then needs to be taken, on the balance of probabilities, as to whether sufficient evidence has been adduced in support of the claims to enable the Council to accede to the request to make the requisite Definitive Map Modification Order for that part of the claimed route that lies within Bromley.
- 3.3 Kent's conclusion can be found at paragraph 9 on page 3 of their report, page 6 of this report.
- 3.4 A letter dated 3rd February 2010 received from Kent County Council is attached at **Appendix 2** for further clarification on consultation issues and to note that the claimant had advised Kent that it was her intention to appeal to the Government Office for the North East (GONE) against the decision of the County Council. The enclosures referred to in that letter will be made available in the members Room prior to the meeting.
- 3.5 The appeal was duly made and Kent have provided GONE with their comments on the appeal case set out by the Tatsfield Bridleways Association, after having contacted affected land-owners both in Kent and Bromley for comments. Kent's response is attached at **Appendix 3**.

4. FINANCIAL IMPLICATIONS

The continuous review of the Definitive Map and Statement is a statutory requirement and thus the Council has to fund the exercise both in terms of assessing the claims and any subsequent maintenance/signing implications. The latter would be met from the existing highways maintenance budget.

The only likely costs would be those of advertising any Definitive Map Modification Order should this Sub-Committee consider sufficient evidence in support of the claim has been made and the advertising costs of £60 would be met from Transport & Highways' advertising budget of £3300.

5. LEGAL IMPLICATIONS

- 5.1 These are fully explained in paragraphs 56 to 69 of Appendix B to Kent's report, pages 14-17 of this report.
- 5.2 The Sub-Committee should note that should recommendation 2 be the outcome of consideration of this report, and any appeal to the Secretary of State were to be successful, a further report would need to be submitted to the Sub-Committee in order to determine how the Council should proceed throughout the subsequent Order process.

Non-Applicable Sections:	Policy; Personnel
Background Documents: Access via Contact Officer	File for FP 280

From: Laura Wilkins (Senior Public Rights of Way Officer – Definition Team)
To: Executive Director of Environment, Highways and Waste
Subject: CLAIMED UPGRADING OF PUBLIC FOOTPATHS SR331 (PART) AND SR332 (PART) TO BRIDLEWAY STATUS AT WESTERHAM
File Ref: PROW/SE/C282 District: SEVENOAKS

Summary: To seek delegated authority to decline to make an Order to modify the Definitive Map and Statement by showing at bridleway status the existing public footpaths SR332 from Pilgrim's Way to its junction with SR332, and part of SR331 from its junction with SR332 to its junction with the London Borough of Bromley route 280.

FOR DECISION

Introduction

1. The County Council is the Surveying Authority for Kent and is responsible for producing a Definitive Map and Statement of Public Rights of Way. The current Definitive Map and Statement were published on 1st April 1987. Under the Wildlife and Countryside Act 1981, the County Council is under an obligation to keep the Map and Statement under continuous review.

Procedure

2. The Countryside Access Objectives and Policy document (dated July 2005) sets out the County Council's priorities for keeping the Definitive Map and Statement up to date. The main priorities are:
- A. Investigation and determination of outstanding applications to modify the Definitive Map
 - B. Resolution of anomalies and mapping errors where essential for the effective management of the PROW network
 - C. Publication of Definitive Maps and Statements for those areas excluded from the original Definitive Map

Definitive Map modification cases will normally be investigated in order of receipt, except in any of the following circumstances, where a case may be investigated sooner:

- Where it satisfies one of the key principles set out in paragraph 11.1 of the Countryside Access Policy,
- Where the physical existence of the route on the ground is threatened by development, or
- Where investigation of a case would involve substantially the same evidence as a route currently under investigation or about to be investigated.

3. The investigation of this particular issue has been carried out in accordance with the report to the Sub-Committee in February 1990, which outlined the procedures to be used for sources of evidence and the legal tests to be applied.

Legal Tests

4. (a) Section 53 of The Wildlife and Countryside 1981 states that where the County Council discovers evidence which, when considered with all other relevant evidence available to it, shows that a highway shown in the Map and Statement as a highway of a particular description ought to be there shown as a highway of a different description, it shall by Order, make such modifications to the Map and Statement as appear requisite.

(b) Section 31 of the Highways Act 1980 states that "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 twenty years, the way is to be deemed to have been dedicated as a highway unless there is sufficient evidence that there was no intention during that period to dedicate it". The period of twenty years referred to is to be calculated retrospectively from the date when the right to use the way is brought into question.

(c) In *R v. Secretary of State for the Environment ex parte Norton and Bagshaw (1994)*, it was held that there is a distinct difference between the wording of section 53(3)(c)(i) and that in deciding whether a Public Right of Way exists, two tests must be applied. Firstly, where it is considered that a right of way which is not shown on the Definitive Map and Statement subsists (known as 'test A') and secondly a lesser test to establish whether or not a right is reasonably alleged to subsist (known as 'test B'). For the requirements of test A to be met, it is necessary to show that, on a balance of probabilities, a right of way actually subsists. However, for test B to be proven all that is necessary is to show that a reasonable person, having considered all the relevant evidence, could reasonably allege a right of way to subsist.

(d) Alternatively, a Public Right of Way may be established over a shorter period of time under Common Law. In *Mann v. Brodie (1885)*, Lord Blackburn considered that where the public had used a route "for so long and in such a manner that the [landowner]... must have been aware that members of the public were acting under a belief that the right of way had been dedicated and had taken no steps to disabuse them of them belief, it is not conclusive evidence, but evidence which those who have to find the fact may find that there was a dedication by the owner whoever he was", i.e. the dedication of a way as a Public Right of Way can be implied by evidence of use by the public (no minimum period is required) and of acquiescence of that use by the landowner.

The Case

5. A plan showing the claimed route is included as Appendix A to this report and a detailed description of the case can be found in Appendix B to this report. The analysis of the User Evidence can be found at Appendix C to this report.

Investigation

6. Investigations have included the inspection of County Council records and documents available from other sources.

7. I have considered all of the evidence available. The documentary evidence and the results of the legal tests applied are set out and examined in Appendix B.

Conclusion

8. Investigations have been carried out in accordance with procedures and proper legal tests have been applied to the evidence gathered during the investigation. The result of the investigation is that a Public Bridleway is not found to be reasonably alleged to subsist.

Recommendation

9. I recommend that the County Council declines to make an Order to modify the Definitive Map and Statement by upgrading public footpaths SR332 and part of SR331, as shown on the attached plan marked **Appendix A**.

Signature 
Executive Director of Environment, Highways and Waste

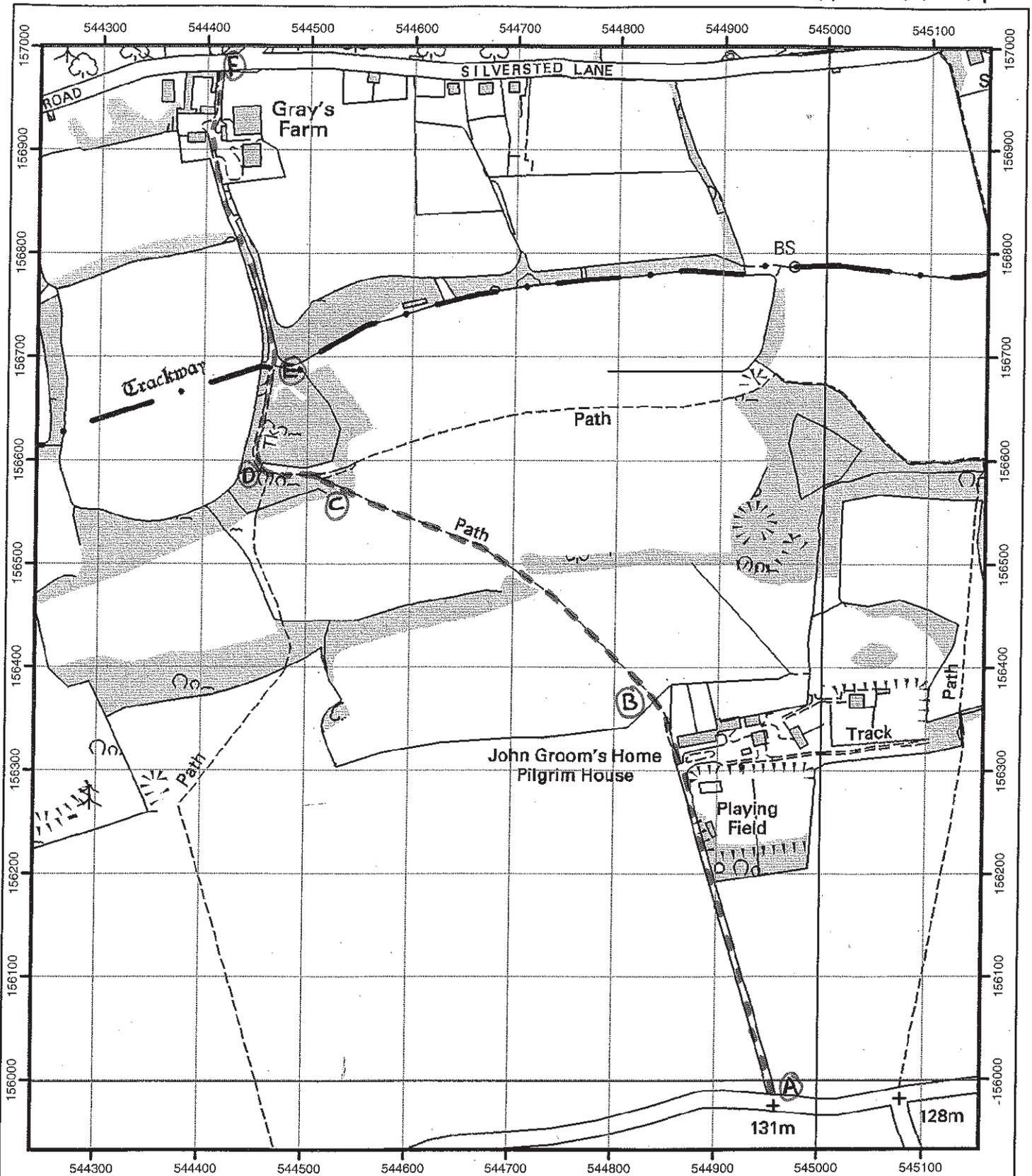
Date 12 January 2010

Background Documents:

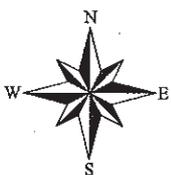
- APPENDIX A – Plan showing the claimed routes
- APPENDIX B – Main report
- APPENDIX C – Summary of user evidence in support of the application

Contact Officer:

Laura Wilkins (x1517)



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Scale 1:5,000

**Wildlife & Countryside Act 1981
Kent County Council
Consultation Plan**

Drawing No. SR332/02

Linda Davies
Director - Environment and Waste



APPENDIX B

Case Title: Claimed bridleway along the route of public footpath SR331 (part) and SR332 at Westerham

Ref: PROW/SE/C282

Applicant's Submission

10. Mrs A Hayes of Tatsfield, Surrey applied for an order on 29 November 2005, under Section 53(2) of the Wildlife & Countryside Act 1981 to modify the Definitive Map and Statement for the area by showing at bridleway status the existing footpath numbered SR332 running in a north by north-westerly direction from its junction with Pilgrim's Way to its junction with SR331 and also by showing at bridleway status the existing footpath SR331 from its junction with SR332 running in a northerly direction to its junction with a route in the London Borough of Bromley.
11. In support of the application Mrs Hayes submitted evidence forms by 7 people that describe how they have used the routes in question. Also attached was a map indicating the claimed routes. The claimant also declared that she had on 29 November 2005 served notice on the unknown landowners and occupiers of the land affected by the Order. However, authority had not been sought from the County Council to post these notices. Mrs Hayes therefore sought authority to post such notices from the County Council on 13 December 2005 and the notices were consequently re-posted on 15 December 2005.

Description of route

12. The claimed route (shown on the plan at **Appendix A**) commences from the junction of SR332 with the Pilgrim's Way (Point A on the attached plan) following the definitive line of SR332 in a north by north-westerly direction up a metalled road and to the West of Pilgrim House whereupon it enters a pasture (Point B on the attached plan) and turns to run in a north-westerly direction up a steep escarpment and into a wooded area (Point C on the attached plan) and in a short length forms a junction with SR331 (Point D on the attached plan), turning to run in a northerly direction to Kent's boundary with the London Borough of Bromley (Point E on the attached plan).
13. An application is also lodged with the London Borough of Bromley between points E and F on the attached plan. Much of the evidence referred to within this report and in particular the user evidence also includes the route numbered FP280 within the jurisdiction of Bromley.

Mapping Evidence

In order to build up a history of the claimed route, the following historical maps have been interrogated:

Tithe Map

14. Tithe Maps were produced by the Tithe Commissioners, under the 1836 Tithe Commutation Act, to record all parcels of land, which generated titheable produce. These maps can sometimes prove useful in identifying public or private rights of way. In

this case the Tithe map kept at the Centre for Kentish Studies yielded no information that could assist in determining the application.

First Edition Ordnance Survey 1:2500 Map and Book of Reference (circa 1860)

15. The First Edition 25" Ordnance Survey Maps and accompanying Area Reference Books were produced by Ordnance Survey in an effort to map the entire country at 1:2500 scale. They were essentially topographical surveys and were not concerned with landownership and rights, but do provide useful information as to the existence of the routes on the ground at that time.
16. The First Edition OS Map 1:2500 map and the Book of Reference for Cudham and Westerham Parishes show nothing that gives clear help in the determination of this application. Reference is made to a Private Road of 0.511 acres that runs from the Pilgrim's Way to John Groom House. As this route forms part of the public footpath SR332 it is not helpful to draw any helpful conclusions from this fact.

Finance Act 1910 and Valuer's Field Book

17. The Finance Act 1910 Maps and Valuer's Field Books were documents which recorded the value of land holdings. The Act provided for the levying of a tax upon the incremental value of the land, and between 1910 and 1920 (when it was repealed), the whole country was surveyed in order to produce a comprehensive record of the site value of all land. Individual (private) land holdings were shown on the map in different colour wash with boundaries marked and hereditament numbers accorded to different parcels. The Valuer's Field Books recorded details about every parcel of land and listed categories for which a reduction in the amount of tax payable on the land holding could be sought. One such category was for Public Rights of Way admitted to exist at the time by the landowner.
18. In this case, the Finance Act map shows a plot numbered 675. Inspection of the field books for the Finance Act records this plot as 'Westerham Hill Stud Farm owned by a Mr J Musker and comprising 360 acres with a footpaths allowance of £600'. Although this is a very significant amount there is no further indication of the location of these routes or their status.

Westerham Parish Maps (Circa 1950)

19. In consequence of the National Parks and Access to the Countryside Act 1949, which required County Councils to prepare a Definitive Map of Public Rights of Way, Parish Councils submitted maps and statements showing the rights of way within their parish. Following consultation with the District Councils, the County Council then prepared a Draft Map from the information contained in the Parish Map.
20. The Parish Map shows footpath SR332 as route number 12 running from 'Pilgrims Road by school to Grays Farm joining No.11. The Statement records the route as a CRF to the school and thereafter as a footpath. The description reads 'this is a well-used path or cart track and its lower portion is the asphalt drive to the school.
21. Footpath SR331 is recorded as a footpath from 'Keepers cottage (London Road) to Grays Farm (joins No.12). The description within the Statement reads 'is signposted at London Road "Footpath to Cudham" but is little used from there to Pilgrim's Road. In the large

field beyond Pilgrim's Road sections of the field have been ploughed. Well used in woods beyond and from its junction with No.12 is virtually a drive to Grays farm'.

Westerham Draft Map

22. The County Council then prepared from the information contained in the Parish Map and this was advertised with the opportunity for objection. There are no significant differences indicated between the Parish Map and the Draft map and therefore this does not assist in determining the application.

Provisional Map

23. The Provisional Map for Sevenoaks RDC with a relevant date of 1 December 1952 was produced by the County Council and advertised with the opportunity for landowners, lessees and tenants to object to the rights indicated. As no changes have been included on the Provisional map for this route it is fair to conclude that no objections were received and the routes remained as before.

Definitive Map (Relevant date 1st December 1952)

24. The National Parks and Access to the Countryside Act (1949) required County Councils to survey all land over which a Public Right of Way was alleged to subsist and prepare a map showing these routes. The first Definitive Map and Statement of Public Rights of Way for the County of Kent was published with a relevant date of 1st December 1952.

25. The County Council's original Definitive Map, with a relevant date of 1 December 1952, shows no changes since the Provisional Map.

Review of survey (1970)

26. Following the publication of the Definitive Map in 1952, the County Council, under the National Parks and Access to the Countryside Act 1949, had a duty to produce a revision of the original map. Consequently, and following broad consultation, the County Council published a Draft Revised Map with a relevant date of 1st October 1970.

27. The Draft Revised Map of 1970 shows no changes since the 1952 Definitive Map.

Definitive Map (Relevant date 1st April 1987)

28. The current Definitive Map of Public Rights of Way shows the routes as footpaths SR331 and SR332 and the routes are shown on the same alignment as previous maps.

Deposited Plans under Section 31(6) of the Highways Act 1980

29. Section 31(6) of the Highways Act 1980 allows a landowner to deposit with the County Council a map and statement showing the ways (if any) they recognise as being rights of way and the status of those ways. Before the expiry of 10 years from deposition of the map and statement a statutory declaration must be lodged with the County Council, stating that no additional ways/rights have been dedicated since the deposit of the map.

This is sufficient, in the absence of proof to the contrary, to establish that no additional rights/rights of ways have been dedicated.

Records exist showing that Mr Warde of Squerries Court first lodged deposited plans with the County Council on 10 November 1994 and renewed on 20 November 2000. No Statutory Declarations were received and the time for submitting the Statutory Declaration has now lapsed.

Land Registry

30. An enquiry was lodged with the Land Registry for a copy of the register entries for the land over which the routes run. Several separate owners have been found with an interest in at least part of the route.
31. The only owner of land across which the route passes that could be found in Land Registry records relates to title numbers SGL 139068 and K 434618. Each parcel is owned by Mr John Warde (and associates) at Squerries Court and in them is encompassed the great majority of the routes.
32. Of the land owned by Mr Warde a small part of the claimed route from Grays Road for a distance of approximately 90 metres along the route of Bromley route number 280 has a private right of access granted to The Grays. Other private rights may also exist but these have not been traced.
33. At the southernmost end of the claimed route, SR332 that runs from Pilgrim's Way northwards to Pilgrim House along a metalled road has no ownership ascribed to it. An enquiry was made with the Land Registry for historical records but the land has never been registered.
34. However, several properties have a private right of access over this part of the route. The Land Registry records 12 properties each with potential private access rights. It is possible that others may exist. Only one or two of these property details were sought from Land Registry to ascertain the flavour of the content. This wording has a phrase similar to:-

"A right of way so far as the Vendor is able to grant the same at all times and for all purposes over and along the roadway which is coloured brown on the said plan".

There is no indication of any public rights of way within the titles of those pieces of land at this location received from the Land Registry.

Consultations

Consultations have been carried out as required. The following responses have been received:

Sevenoaks District Council

35. Sevenoaks District Council responded to the effect that they had no comments to make on the application.
36. County Member Mr Parry and Councillors Bracken, Bloomfield & Maskell were consulted and no responses were received.

Westerham Parish Council

37. Westerham Parish Council was consulted and no response was received.

Ramblers' Association

38. The local Ramblers' Association Representative, Mr. R. Wilkes, was consulted and stated that he has no problem with the route from Grays Road up until SR332 leads off from SR707 at MR446566 at the top of the hill from the gate. From there the route goes down a very steep hill to MR447565 through a copse and down through a field to Pilgrim House at MR 448564 where there is a metalled road. Mr Wilkes's view is that the route from the top of the hill to Pilgrim House would have to be hard surfaced in some way to be suitable for horses. He also feels that the first part of this section may be too steep for safe horse handling and suggests contacting the British Horse Society for advice.

The British Horse Society

39. The local British Horse Society representative Mr A Tuckwell stated that the British Horse Society supports the application. He further added that he is going to contact the Tatsfield Bridleway Association to offer his support.

User Evidence

40. In support of the application, 7 user evidence forms were submitted. A further 2 user evidence forms were submitted by the applicant during the course of the investigation. These 9 forms are summarised at **Appendix C**. The initial 7 witnesses were invited formally to be interviewed. A total of 4 users were interviewed and 2 witnesses completed a detailed user evidence form. With the remaining 3 witnesses their original user evidence form has been analysed. The earliest evidence of use dates back to 1950.

41. Use of the route has been nearly always for recreational purposes and a few of the users refer to using the route when out riding with The Retreat or Westerham Riding Schools. Of the 9 witnesses, 3 used it on a weekly basis, 4 monthly and 2 of the witnesses used the route less frequently than monthly. The majority of witnesses predominantly used the route on horseback, although 2 had also used the route on foot on some occasions.

42. Mention is also made of the presence of two gates along the claimed path during the relevant period. Later these gates were locked (approx. mid – late 1970's) thereby preventing access on horseback. Some witnesses also refer to the fact that the route was obstructed by logs prior to the locking of the gates causing them to follow a different route in order to deviate around the obstruction.

Landowner Evidence

43. There was just one landowner who could be found who owned any part of the route and that was Mr Warde of Squerrys Court. He was interviewed in June 2008 and declared ownership of the land since 1977. Since that time he has no knowledge of equestrian use and has ensured gates at three locations were locked to prevent entry onto the land by the Traveller community. Two of these gates have been maintained regularly but no notices have been erected to deter use of the route. Mr Warde has never given instructions to any of his employees to deter equestrian use.

44. Mr Warde noted that the land had been given over to dairy farming since before the war and the presence of cows can deter use by equestrians. The operation of the farm as a modern dairy unit commenced during the 1960's when buildings were erected to accommodate such a function.
45. Mr Warde provided the County Council with an e-mail from Mr John Greenlees. Mr Greenlees states within his e-mail that he was involved in the running of Grays Farm in minor to major ways from 1955 to 1970. During this time he has no recollections of horses being allowed on any of the land and definitely not with his permission. He further states that if his Uncle Jim had allowed anyone to use the route, it would have been as a one off and never a regular thing. The banks which his uncle cleared are unique in their ability to run cattle all year with minimum supervision, to allow horse access would destroy that. Lastly Mr Greenlees states that from his memory the track which runs diagonally across the banks from the top of the downs to Pilgrims was made to access the flint quarry, not as a bridle path.
46. There are a number of properties that have access along the route (both at the southern and northern ends of the route) in order to reach their properties. All properties were consulted and two interviews were carried out. In addition to this, many of the householders responded to the consultation with their views on the application. These are summarised below.
47. Mr & Mrs Saunders of Pilgrims House were interviewed. The focus of their interest lie in that portion of the route from Pilgrim's Way to Pilgrim House. They have lived at the property since 1995 and there has been no evidence of equestrian use during their ownership of the property.
48. Mrs Whittaker of Hill View has lived at the property since 1999 long after equestrian access was prevented and therefore does not have the knowledge to dispute the application. Since 1999, Mrs Whittaker is aware of use on foot but is not aware of evidence of use on horseback.
49. Mr & Mrs Gibson of Pilgrims dispute the application on the basis that the route is unsuitable for horses because of the traffic, the banked sides and the poor sight lines which will make it dangerous to both users and the residents. Part of the route forms the access way to a group of houses. That section of the route from Pilgrims Road to the houses is surfaced and maintained at the expense of the residents and Mr Warde. Mr & Mrs Gibson stated that if horses are to use the southern section of the route then the residents will incur the extra expense of repairing any damage they might cause. Mr & Mrs Gibson further state that they are aware that the County Council is unable to consider issues of suitability and danger, but that the County Council must be able to consider issues of safety and the legal matters which may arise.
50. Mr Ringrose of Treetops has resided at the property since 1975 and at the time of purchasing the property, the solicitor's searches revealed it was only a footpath. Mr Ringrose contacted a previous farm worker (76 years of age) who has knowledge of the area. He worked on the land since the age of 14 and assured Mr Ringrose that the route had never been a bridleway. Mr Ringrose further adds that his wife owned and stabled horses at Treetops between 1987 and 1999 and only ever used the main drive to the properties for access, she never used or thought the footpath was a bridleway.

51. Mr Ringrose of The Warren has resided there since 1975 and he has no recollection of the route ever having been anything other than a footpath. Mr Ringrose worked for the Squerry's Estate for 10 years and during this time there was never any mention that the route had been used as a bridleway. Most of the fields surrounding the North Bank were woodland when he first moved to the area and were only cleared in the late 1970's/early 80's for grazing land. Mr Ringrose further adds that he is concerned that upgrading the footpath to a bridleway will attract not only horses but vehicles, motorbikes, flytipping, antisocial behaviour and will be generally detrimental to the countryside and the farmland it crosses.
52. Mr & Mrs Humphreys have resided at Pilgrims Coach House since 2006. They believe that upgrading the footpath to a bridleway along the access route to their property is a dangerous idea as there are 6 houses and one commercial property, all of which have cars. There are also lorries coming to and fro for deliveries. They further add that the bridleway would cause severe disruption to all concerned and would not be at all safe for horse riders.
53. Mr Severs has resided at The Grays since 2004. The concerns Mr Severs would have regarding the upgrading is one of security. At present the track through Grays Farm is a public footpath and can only be accessed by people on foot. Certain people have a vehicular right of way along the track; however there is a gate which is kept locked to prevent other people from using it. Mr Severs has been burgled in the past as was Stud Cottage and therefore opening up the track would create a real security risk by providing rear access to the properties which currently does not exist.
54. Ms Kentish has lived at Stud Cottage since 2001. The issue that concerns Ms Kentish is whether or not changes would have to be made to the steel gate which is currently erected across the route. Any change to the gate which would facilitate easy access, especially for vehicles would be of serious concern to Ms Kentish.
55. As the application is clearly rooted in the period prior to mid-late 1970's it is felt to be unlikely that any of the owners of the properties in this locality will be able to assist with use of the route during the relevant period.

Common Law

56. A public right of way may be established over a shorter period of time under Common Law. However there is no evidence to show that the routes were laid out in such a way as to suggest dedication under common law especially in light of the fact that the route has been officially recorded at public footpath status since the first definitive map was produced in 1952.

Statute and Legal Tests

57. Section 53 of the Wildlife and Countryside Act 1981 states that where the County Council discovers evidence which, when considered with all other relevant evidence available to it, shows a right of way which is not shown on the Definitive Map and Statement subsists or is reasonably alleged to subsist over the land in the area to which the map relates, it shall, by Order, make such modifications to the Map and Statement as appear requisite.
58. Section 31 of the Highways Act 1980 states that '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 twenty years, the way is to be deemed to have been dedicated as a highway unless there is sufficient evidence that there was no intention during that period to dedicate it'. The period of twenty years referred to is to be calculated retrospectively from the date when the right of the public to use the way is brought into question.

59. Alternatively, a Public Right of Way may be established over a shorter period of time under Common Law. In the case of **Mann v. Brodie**¹, Lord Blackburn considered that where the public had used a route '*for so long and in such a manner that the [landowner]... must have been aware that members of the public were acting under a belief that the right of way had been dedicated and had taken no steps to disabuse them of their belief, it is not conclusive evidence, but evidence which those who have to find the fact may find that there was a dedication by the owner whoever he was*', i.e. the dedication of a way as a public right of way can be implied by evidence of use by the public (no minimum period is required) and of acquiescence of that use by the landowner.

Conclusion

60. As there is little mapping or documentary evidence in support of the application, the application rests solely on user evidence. Hence, in determining whether or not equestrian rights are reasonably alleged to subsist, it is necessary to have regard to the provisions contained within section 31 of the Highways Act 1980 (outlined above).

The 'date of challenge'

61. The first step is to identify the date upon which the right of the public to use the route was first brought into question ('the date of challenge'). There is no precise definition of what constitutes 'bringing into question' the public's right to use a particular route, but generally speaking the public's right is brought into question when there is some sort of overt and identifiable challenge to such use, for example, by way of the erection of a notice telling the public to 'keep out' or the locking of a gate to physically prevent access.

62. In this case, many of the witnesses recalled during the 1970's the route was blocked by the locking of a gate. Also at this time a number of users noted that a log had been placed across the definitive route, which for some users presented an effective barrier to the passage of horses. There is some uncertainty surrounding the actual year during which the route was blocked by a gate and there is also uncertainty surrounding which of the gates were actually locked. Mr Warde, the landowner who acquired the land containing the claimed route in 1977, states that he erected and locked gates at the locations mentioned by a number of users. This would have been no earlier than 1977. Mr Warde locked gates to challenge travellers but at the same time it was a message to equestrians that they did not have a right to use the route, as pedestrians were catered for by the erection of stiles. In the absence of evidence to the contrary the date of 1977 has been taken as the date of challenge, so the 20-year period ("the relevant period") that has been carefully considered for this route is between 1957 and 1977.

¹ (1885) 10 App Cas 378

'as of right' use for a full period of 20 years

63. For use to have been 'as of right', it must have taken place without force, without secrecy and without permission². There is no suggestion from the user evidence in this case that use has ever been with force (i.e. by breaking down barriers to gain access) or that those using the path have done so in a subversive manner. None of the witnesses refer to any such permission being sought or obtained. Therefore, it is possible to conclude that use of the claimed route has been 'as of right'.
64. In relation to the length of use, the earliest use of the route was 1950 and 3 witnesses refer to use of the route prior to 1957 (the start of the relevant period) with one witness stating use of the route until 1981 after the gates were locked. There is also evidence from 3 witnesses that during the relevant period, logs were placed across the route thereby preventing use on horseback. One witness stated that a small diversion was necessary in order to avoid the obstruction. Another witness stated that the way was closed in the early 1970's by a log and then locked gates in the late 1970's which caused them to stop using the route.
65. There is also an issue with regard to the sufficiency of the user evidence presented. As can be seen from the table at Appendix C, there are only 9 users of the route. Of these 9 users, only 1 used the route throughout the relevant period and one used the route for 19 years. There is little use throughout the relevant period with 4 of the witnesses only using the route for between 2 and 6 years.

Evidence of non-intention to dedicate

66. Even if all the legal tests relating to quality and quantity of use have been met, a public right of way cannot come into being where there is evidence that the landowner demonstrated a lack of intention to dedicate the claimed route. This lack of intention must be communicated to the users of the claimed route, as confirmed by Lord Hoffman in the recent **Godmanchester**³ case: *'I think that upon the true construction of s 31(1), 'intention' means what the relevant audience, namely the users of the way, would reasonably have understood the landowner's intention to be. The test is, as Hobhouse LJ said, objective: not what the owner subjectively intended nor what particular users of the way subjectively assumed, but whether a reasonable user would have understood that the owner was intending... to 'disabuse [him]' of the notion that the way was a public highway'*.
67. In this case, none of the users recall any prohibitive notices; however 3 of the 9 witnesses recall the placing of logs across the route. Experience shows that when equestrians use a route, this usage is evident on the ground and indeed, it does not take much use by equestrians in order to notice that they have used a route. Therefore, the landowner would probably have been aware of this use and over the years indicated to those users, that he had no intention to dedicate equestrian rights by the placing of logs and later the locking of gates. The landowner erected stiles next to the locked gates so pedestrians could continue to use the footpaths. The placing of logs across the route shows a clear lack of intention to dedicate higher rights during the relevant period.

² *R v. Oxfordshire County Council, ex p. Sunningwell Parish Council* [1999] 3 WLR 160

³ *R (Godmanchester) v Secretary of State for the Environment* [2007] 4 All ER 273 at page 284

Whether a right of way is 'reasonably alleged to subsist'

68. The tests contained in section 31 of the Highways Act 1980 (set out above) are to be considered in conjunction with the requirement in section 53 of the Wildlife and Countryside Act 1981 that a right of way must be shown to 'subsist' or is 'reasonably alleged to subsist'. This issue was considered in the case of **Norton and Bagshaw**⁴, in which the judge distinguished between the two tests to be applied and stated that in deciding whether or not to make a Definitive Map Modification Order the question to be asked is thus: '*does the evidence produced by the claimant together with all the other evidence available show that either (a) a right of way subsists? [known as 'test A'], or (b) is it reasonable to allege that a right of way subsists? [known as 'test B']*'. The test to be applied is not therefore whether it is reasonable for the claimant to allege that a right exists, but rather whether a reasonable person, having considered all the relevant evidence available, could reasonably allege a right of way to subsist.
69. In the present case, there is no documentary evidence to support the upgrading of these routes. On the basis of the evidence provided, the evidence is weak. The County Council has considered whether or not equestrian use is reasonably alleged to subsist, but has reached the conclusion that there is not enough user evidence to substantiate the lesser test. Having given careful consideration and on a very fine balance the County Council considers that bridleway rights could not be reasonably alleged to subsist bearing in mind that during the relevant period, various witnesses refer to other obstructions placed across the route indicating a lack of intention by the landowner to dedicate higher rights.

Recommendation

70. I therefore recommend that the County Council declines to make an Order to modify the Definitive Map and Statement by upgrading to bridleway status the existing public footpaths SR332 from Pilgrim's Way to its junction with SR332, and part of SR331 from its junction with SR332 to its junction with the London Borough of Bromley route 280 as shown on the attached plan marked **Appendix A**.

⁴ *R v Secretary of State for the Environment, ex parte Norton and Bagshaw* (1994) 68 P&CR 404 at page 408

Name	Description of Path	Dates Way Used	Regularity of Use	Reason for Use	By what means	Use by others	Restriction/obstructions
Maneley Chapman (Form submitted with application)	From Gray's Farm, Gray's Road, Westerham, Hill to Pilgrims Way, Westerham	1969 - 1971 TOTAL 2/3 YEARS	Monthly	Pleasure	On horseback		There were several gates which after the early 1970's were locked
Patricia Crothers (interviewed)	From Gray's Farm to the Pilgrims Way	1950 - 1981 TOTAL 31 YEARS	3 times per week. Generally used the route, Tuesdays, Thursdays and Saturdays due to the livery yard.	Used the route as part of a circular ride for pleasure. Worked at the riding stables and so would use route to exercise horses (1971 - 1979).	On horseback	Most times between 1950 and 1981. Saw usage mostly on horseback and sometimes saw people on foot.	
Mrs C Devivo (Form submitted by Applicant during investigation)	Grays Farm, Grays Road (Footpath 280) to border with Kent Footpath SR332 to Pilgrims Way, Westerham	1968 - 1970 TOTAL 3 YEARS	Weekly	With Retreat Riding School and Westerham Riding School	On horseback		The way was obstructed by logs in 1970's (early) and then locked gate obstructed the path from 1980 onwards. Was unable to use the path as obstructed so stopped using it.
Ann Hayes (interviewed)	From Gray's Road behind farm through the farmyard passing barns on left opening to a wide track, through woodland bearing left. Diagonal track through woodland onto field (or continuing on the farm track to the gate) turning right to edge of wood to follow track through field, continuing diagonally through field to gate	1952 - 1958 Moved away from area in 1958 until 1969. However still rode route every 6 months until 1960. 1964 - 1969 - lived in New Zealand From 1969 -	1950's - weekly 1958 - 1960 every 6 months 1970's weekly. Initially used during the School holidays but probably more at weekends, sometimes early	Pleasure, There was a bridleway sign at Gray's Road end.	On horseback	Certainly during the 1950's and 1960's, but not during the 1970's. Saw usage occasionally - use was on foot and horseback.	There was a small diversion along the route as a log was placed across the route blocking the way. Originally followed route to the south and after the route was obstructed was necessary to follow the path through the gate which is to the north. Stopped using the route when it was blocked in the 1970's, initially by a log which caused the above diversion and then the farm gate was locked by Gray's Farm in the mid 1970's and stiles were

	through woodland across another field to a field edge with a track beside Pilgrims House leading onto driveway down to Pilgrims Way.	Mid 1970's until it was blocked TOTAL 16 YEARS USE	in the morning				erected at either end of the route. Also the bridleway sign was replaced with a footpath sign.
T J W Lyle (Form submitted by Applicant during investigation)	From junction with London Borough of Bromley (Footpath 280) from Gray's Farm Road, Westerham Hill to Pilgrims Way (Footpath SR322), Westerham, Kent	1959 - 1961 TOTAL 2/3 YEARS	15 - 20 times per year	Local exercise on horse	On horseback		
Gayna Phillips (interviewed)	From Gray's Road through the farmyard along a well defined track then curled round through some attractive woodland, down a fairly steep slope through several fields finally following the track down to Pilgrims Way.	1958 - 1971 TOTAL 13 YEARS	Monthly. Used any time of the day or week	Pleasure First bit was a well defined track, well worn across the fields and another track down to Pilgrims Way	Foot and horseback	Not aware of others in the very early days but later on there were visits with the riding school. Saw usage occasionally on foot and horseback	There were two gates along the route which were closed but not locked. After about 1970 gates closed and locked.
Regine Savery (interviewed)	Through farmyard, across a small area of woodland into open fields which were steep, down to access track to the John Groom's House to Pilgrim's Way.	1952 - 1968/9 TOTAL 16/17 YEARS	Approx 6 times per year Used mainly at weekend during the day	Hacking for pleasure From Gray's Farm was a farm access track to the steep field. A worn track was visible down to the John Groom's House access	On horseback	Since 1952, have ridden it in company possibly up to 12 people, later on got own horse and rode alone. Mostly used route along during later years.	Mrs Savery moved away in 1970 and when she returned in 1976 she tried to use the route only to find that the gate just north of the playing field had been wired up. This prevented use.

Elizabeth Smith (In-depth user evidence form completed by the witness)	From Footpath 280 to Footpath 322	1959 until the mid – later 1970's TOTAL 19 YEARS	At least once a month, usually once every 2 – 3 weeks. Use varied	Hacking track.	On horseback	Saw usage on horseback From 1950's to late 1970's. From 1959 – early 1970's saw other riders on a regular basis also usually rode with the local riding stables. Saw usage on horseback	Closed in the early 1970's by a log and then locked gates in the late 1970's. In the late 1970's the way through became difficult to pass through.
Margaret Wickham (In-depth user evidence form completed by the witness)	From Silverstead Lane there was a track dropping down to an open view over Westerham and the track continued across two fields then dropped down to go past the John Grooms Home where it joined Pilgrims Way. There was a gate at the entrance at Gray's Farm and across the two fields.	1960 – 1965 TOTAL 5 YEARS	Approx. 4 times per year Did not use in bad weather as it was bleak in the winter Use was seasonal and at weekends	Recreational, it made a nice circular ride taking about 1 ¼ hours from Westerham Rising School and The Retreat Riding School	On horseback	Sometimes saw people on foot and horseback between 1960 and 1965	There were two gates along the route but they were not locked. Believe that the top was blocked off possibly in the 70's or 80's after stopped using it.

Claimed Upgrading of Public Footpaths SR331 and SR332 from Gray's Road to Pilgrims Way, Bromley

User	49	50	51	52	53	54	55	56	57	58	59	60	61	62	63	64	65	66	67	68	69	70	71	72	73	74	75	76	77	78	79	80	81	Total Years	User Period	
MANELEY																																	2/3	1969 - 1971		
CHAPMAN																																				
PATRICIA CROTHERS																																		31	1950 - 1981	
Mrs C DEVIVO																																		3		
ANN HAYES																																		16	1952 - 1960 1969 - 1975	
T J W LYLE																																		2/3	1959 - 1961	
GAYNA PHILLIPS																																		13	1958 - 1971	
REGINE SAVERY																																		17	1952 - 1968/9	
ELIZABETH SMITH																																		19	1959 - 1975	
MARGARET WICKHAM																																		5	1960 - 1965	
Total per year	1	1	3	3	3	3	3	3	3	4	6	7	6	5	5	5	5	4	4	5	7	6	5	3	3	3	3	2	1	1	1	1	1			



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Our Ref: **PROW/SE/C282**
 Date: 3 February 2010

Dear Duncan

The Wildlife and Countryside Act 1981
Claimed Upgrading of Public Footpaths SR331 (part) and SR332 to Bridleway status at Westerham

Further to my e-mail of 28 January 2010, please find enclosed the user evidence forms as requested. Having looked through the forms they cover the entire route from Grays Farm to the Pilgrims Way. For your information, I have enclosed all of the user evidence forms which includes:-

- 7 user evidence forms which were submitted as part of the application by Mrs Hayes
- 2 extra forms submitted by Mrs Hayes during the investigation
- 4 forms completed by KCC Rights of Way Officers and 2 KCC in-depth forms which were completed by the witness due to the location of the witness.

In relation to the consultation letter which Stewart sent out, this clearly refers to both the section within Kent and Bromley and indeed the response from the Ramblers' Association refers to the entire length of the route. Stewart also consulted with Bromley Cllr Peter Bloomfield, although no response was received.

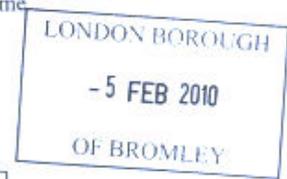
I have also received a letter from Mrs Hayes dated 1 February 2010, stating that she is going to appeal to the Government Office of the North East against the decision of the County Council.

Should you require any further information, please feel free to contact me.

Yours sincerely

Laura Wilkins
 Mrs Laura Wilkins

Senior Public Rights of Way Officer - Definition



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INVESTOR IN PEOPLE

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KENT COUNTY COUNCIL

STATEMENT

**WILDLIFE AND COUNTRYSIDE ACT 1981
APPEAL UNDER PARAGRAPH 4(1) OF SCHEDULE 14
KENT COUNTY COUNCIL'S REFUSAL TO MODIFY THE DEFINITIVE MAP
AND STATEMENT TO UPGRADE FOOTPATHS SR331 (PART) AND
SR332 IN THE COUNTY OF KENT AND ROUTE 280 IN THE LONDON
BOROUGH OF BROMLEY TO BRIDLEWAY STATUS**

For ease of reference I have numbered the paragraphs within Mrs Hayes's Grounds of Appeal 1 – 6 and the County Council has the following comments to make on those paragraphs:-

- 1 Mrs Hayes states that 'the earliest use of the routes by claimants is 1949 but the route was used before this time by individuals and Riding Schools'. However, the County Council found during its investigation, that the earliest date of use was 1950. The applicant produced a number of user evidence forms with the application, of which one user did state that their earliest use of the routes was 1949. However, when this witness was formerly interviewed by the County Council using a more detailed evidence form, the witness stated that they had used the routes since 1950 and it is therefore this date that has been taken as the earliest date of use.

- 2 The further two witnesses, Mrs Sally Lyle and Mrs Eileen Andrews referred to by the applicant, are additions to the case and whose details were not provided to the County Council either initially with the application or at any time during the investigation. The County Council is not therefore able to comment on their use of the routes in question. This evidence from two new users did not form part of the original investigation and this is not the forum for producing new evidence which the County Council has not previously had the opportunity to consider. Indeed the County Council is of the opinion that this new evidence cannot form part of the appeal but instead should if necessary be evidence which is only considered as part of a new application.

- 2.1 Mrs Hayes states that the routes were definitely used regularly in the 1950's, 1960's and 1970's by the Westerham Riding School and the Retreat Riding School. In relation to this point many of the witnesses did recall using the route when out riding with these schools; however a group of people passing through on one occasion maybe seen as one visit and as such maybe missed by

the owner or occupier. It would also appear from the evidence, that Mrs Hayes was not organising these rides, but being lead by another(s). It cannot therefore be said with any certainty that such rides were not with the permission of the owner of the land. As Mrs Hayes was being lead, she would not have been party to that information and makes no reference either way to this point in her evidence.

- 3 Mrs Hayes states that there was a bridleway sign at the Grays Road end of the track in the 1950's. At that time, Parish and District Councils would erect such signs on an informal basis, records of which the County Council does not hold. It was not until the Countryside Act of 1968 that County Councils were given a duty to signpost rights of way where they leave a metalled road.
- 3.1 In addition, Grays Road lies within the London Borough of Bromley and I have been informed by Bromley that the survey carried out from June 1950 to November 1951 under the provisions of the National Parks and Access to the Countryside Act 1949 records this section of the route as FP 264. It is described clearly at the Parish and Draft map stages as a 'footpath through the main entrance to farmyard, well defined rough track to Orpington Urban District Council boundary'. The Parish survey was carried out at the start of the 1950's and clearly at this time the surveyor deemed that this section of path was a footpath. Similarly no objections were received to the status of footpath when the Draft map was published for public comment in circa 1953. There is no mention within this Statement of any erected signposts. Furthermore it is interesting to note that many other paths within the Statement do make reference to the presence of signposts. Therefore it is reasonable to infer that had there been any signs at the time of the survey they would have been recorded.
- 3.2 Mrs Hayes refers to the fact that the previous occupier (owner?) of Grays Lodge had stated that it was a pity the track had been downgraded. However, in response to this, the routes have only ever been formally recorded on the Definitive Map of Public Rights of Way as public footpaths. I am aware that Westerham Parish Council in 1959 lodged an objection to the Kent County Councils Draft map on the basis part of the route had been shown as a CRF (Cart Road Footpath). This objection was upheld and the route was subsequently recorded as a footpath for its entire length. Technically therefore, since the common understanding of a CRF at that time was set out in the Open Spaces Society's memorandum (to assist in the surveying and mapping of a right of way prepared in January 1950) as being a private road over which the public had a right of way on foot only, it does not appear therefore to have been recognised with higher rights at any time. In addition, there would of course have been the opportunity for landowners and occupiers

to object at the provisional mapping stage to the status of a footpath; none it would appear were made.

- 3.3 No evidence was provided to the County Council from the previous occupier (owner?) of Grays Lodge. However, just because the previous occupier thought the track had been downgraded - due to farm machinery being stolen and therefore the farmer having been compelled to lock the end gates – this in itself does not confirm the route was formerly a bridleway. The locking of the gates occurred in 1977 and at this time the routes were formally recorded as public footpaths as indeed they had been since 1952.
- 4 The County Council is not aware that the Wildlife & Countryside Act 1981 states anywhere that fewer than 20 claimants could be cited on a Section 53 rights of way application and guarantee the successful upgrading of a route. The 1981 Act does not refer to the number of users that are required to establish this. Section 53 (3)(c)(ii) states that ‘where the County Council discovers evidence, which when considered with all other relevant evidence available to it, shows that a highway shown in the Map and Statement as a highway of a particular description ought to be there shown as a highway of a different description, it shall by order make such modifications to the Map and Statement as appear requisite. Likewise Schedules 14 and 15 of the same Act also remain silent on the number of users which are required to successfully upgrade a route. This purely comes down to a question of fact and degree of evidence.
- 4.1 Section 53 applications are in the main resolved in conjunction with Section 31 of the Highways Act 1980; again no mention is made to the number of users within this Act. Section 31, states that ‘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 to be deemed to have been dedicated as a highway unless there is sufficient evidence that there was no intention during that period to dedicate it’ The key parts of this section are **‘as of right’...‘use by the public’...‘for a full period of 20 years’**. Within this investigation the County Council considered the period from 1957 to 1977 as locked gates were erected in 1977 (date of challenge) which prevented equestrians from using the route. The County Council concluded that use was ‘as of right’; it was the sufficiency of use for a full period of 20 years which was in question. As stated within the County Council’s Report which is attached at **Appendix A**, there were only 9 users of the route and of those only 1 had used the route for a full period of 20 years. There is little use throughout the relevant period with 4 of the witnesses only using the route for between 2 and 6 years. There is also evidence from 3 witnesses that during the relevant period logs were placed across the route

thereby preventing use on horseback. One witness stated that a small diversion was necessary in order to avoid the obstructions. The placing of these logs shows a clear lack of intention by the landowner to dedicate higher rights during the relevant period.

- 4.2 There is no documentary evidence to support the application and therefore the case rests solely on the user evidence, copies of which are attached at **Appendix B**. (Please note that 7 user evidence forms were submitted with the application and a further 2 were submitted during the course of the investigation. Of these 9 witnesses, 4 were formally interviewed and 2 completed a detailed user evidence form. In each of these cases it is this form that was analysed and has been attached at **Appendix B**. With the remaining 3 witnesses their original user evidence form was analysed and copies of these are attached at **Appendix B**). The user evidence was not sufficient to substantiate that the rights are reasonably alleged to subsist.
- 4.3 The County Council is not able to consider the desirability of the route and the fact that it makes 'possible a safe circular home and back ride'. All that can be considered is whether or not the rights subsist or are reasonably alleged to subsist.
- 5 The County Council carried out a 28 day consultation process and the replies from all those who responded are detailed within the report. However, in this respect, the County Council was not able to consider the suitability of the route as part of the investigation. Comments expressed in such a manner have therefore been ignored.
- 5.1 In relation to the placing of logs across the route, the County Council would disagree that this is 'barely relevant' as stated by Mrs Hayes. This is due to the fact that 3 of the witnesses referred to the logs as obstructing the way and whilst in other locations equestrians may have jumped them; here witnesses stated that the logs challenged their use. As stated above at paragraph 4.1, one witness mentioned a small diversion and 2 others stated that the way was closed in the early 1970's firstly, by a log. Therefore in this case the County Council takes the view that the placing of logs was very relevant to the decision it has reached.
- 6 Within the Report the County Council made mention of the Section 31(6) deposit which was submitted by the landowner, however as this was not formally completed by the submission of a Statutory Declaration as required by the Act, this was not taken into consideration when assessing the actions of the landowners and occupiers.

In summary therefore there is no documentary evidence to support the upgrading of these routes and on the basis of the evidence provided, the

evidence is weak. The County Council considered whether or not equestrian rights subsist or are reasonably alleged to subsist, but has reached the conclusion that there is not enough user evidence to substantiate either test. In addition to the lack of user evidence, during the relevant period, various witnesses refer to other obstructions placed across the route indicating a lack of intention by the landowner to dedicate higher rights.

Finally, as stated above part of the route is included within the London Borough of Bromley. When the investigation was carried out, the County Council considered the whole route as user evidence forms relate to the entire route. In addition the consultation also referred to both sections and relevant consultees for both Kent and Bromley were consulted. I note however from Mrs Hayes letter that Bromley have not as of yet sent a copy of their Notice of Decision to Mrs Hayes. I have spoken with Mr Gray of the London Borough of Bromley and he has informed me that the case must be put before their appropriate sub-committee, but unfortunately this has been delayed on several occasions and will still not be put before the Committee until at least September. Although, as stated above the research conducted by the County Council does cover both sections and this has been sent to the London Borough of Bromley for their information.

The landowner (Mr J Warde) and two of the adjacent landowners (Ms E J Kentish and Mr L Ringrose) have detailed their comments to the appeal and these are attached at **Appendices C, D & E**.

Mrs Laura Wilkins
Senior Public Rights of Way Officer
PROW/SE/C282
9 August 2010

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