

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

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**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**

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**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 1<sup>st</sup> 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.

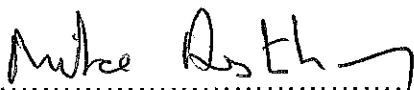
7. I have considered all of the evidence available. The documentary evidence and the results of the legal tests applied are set out and examined in Appendix B.

**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

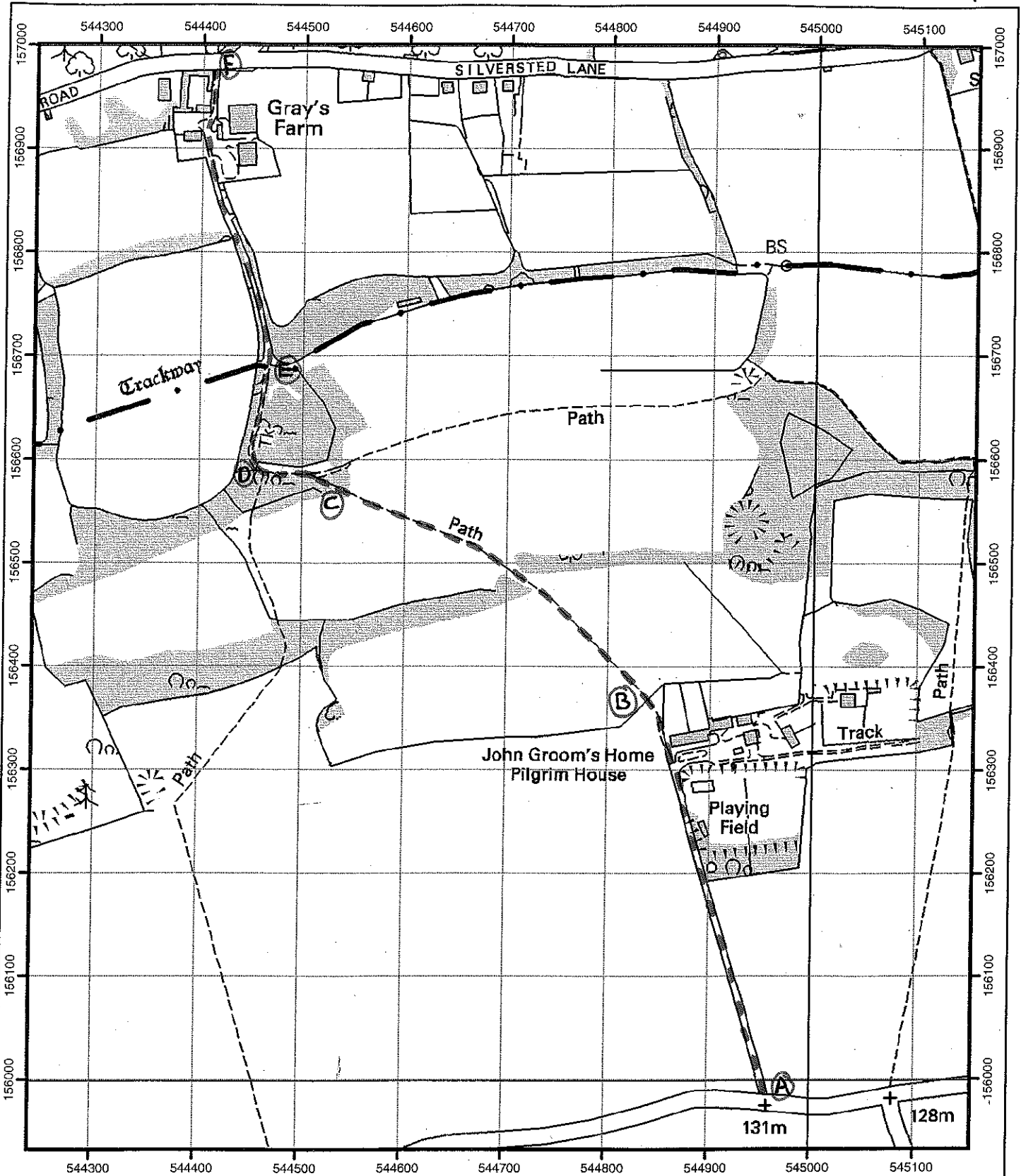
Date ..... 12 January 2010

**Background Documents:**

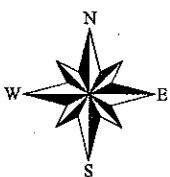
- APPENDIX A – Plan showing the claimed routes
- APPENDIX B – Main report
- APPENDIX C – Summary of user evidence in support of the application

**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 1<sup>st</sup> 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 1<sup>st</sup> 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 1<sup>st</sup> October 1970.

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

### **Definitive Map (Relevant date 1<sup>st</sup> 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 Squerryes 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**<sup>1</sup>, 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.

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<sup>1</sup> (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 permission<sup>2</sup>. 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**<sup>3</sup> 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.

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

<sup>3</sup> *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**<sup>4</sup>, 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**.

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

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

PROW/SE/C282

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	track.  Hacking	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 surrounding area. 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 1/4 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 CHAPMAN																																		2/3	1969 - 1971	
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	4	6	7	6	5	5	5	5	4	4	5	7	6	5	3	3	3	3	2	1	1	1	1	1			