

Application for a Definitive Map Modification Order to add a public bridleway to the Definitive Map and Statement for Bromley: Land at Hayes Street Farm.

Report for the London Borough of Bromley Council

Application for a Definitive Map Modification Order to add a public bridleway to the Definitive Map and Statement for Bromley: Land at Hayes Street Farm.

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## **Introduction**

1. This report covers the results of investigations into an application for a Definitive Map Modification Order to add a public bridleway to the Definitive Map and Statement for Bromley. It aims to assist the Council in determining the application for an Order to modify the Definitive Map and Statement for the London Borough of Bromley in accordance with the Council's statutory duty, under the Wildlife and Countryside Act, 1981.
2. The report is divided into the following sections:

### **Background**

### **Legislative Framework**

### **The evidence in support of the application**

### **Landowners' evidence**

### **Evaluation of the evidence against the tests in Section 31 of the 1980 Act**

### **Evaluation of the evidence at common law**

### **Status**

### **Width**

### **Limitations or conditions**

### **Recommendation**

## **Background**

3. On 14 March 2019 Ms Nicola Brown made an application for a Definitive Map Modification Order ("DMMO") to modify the Definitive Map and Statement for Bromley by adding a bridleway over land at Hayes Street Farm. The application was accompanied by 39 Public Rights of Way Evidence Forms ("Forms"), 37 of which had been completed by an individual member of the public, detailing their use the application path. Two Forms had been

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completed by two members of the public<sup>1</sup>. Additional documentary evidence has also been submitted to me by the applicant and supporters of the application.

4. The Council has been directed by the Secretary of State to determine the application within six months of 10 May 2022.
5. The claimed bridleway crosses land in the title SGL99668 in the ownership of the Rookery Estates Company and Stephen John Welch Norman (“the Landowners”). Evidence has been submitted on their behalf. The Landowners object to the application.
6. A plan showing the route claimed is at Appendix I.
7. The application appears to have been prompted by an application for planning permission to develop the Hayes Street Farm site; the proposed development having no provision for a public right of way along the claimed route, or for a diversion of any public right of way. The claimed existence of a public right of access through the development site appears to have been raised during the planning application consultation process. The Council refused the planning application by notice dated 27 March 2018. A subsequent appeal was successful and planning permission was granted<sup>2</sup>.
8. Hayes Street Farm is part of the Rookery Estate. Over the years the Landowners have developed a number of commercial activities, access for users to some of these were gained via the Hayes Street Farm site. Relevant activities are: a Farm Shop, commercial livery, Pick Your Own (“PYO”) fruit and vegetables, a regular car boot sale (held in the summer months,

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<sup>1</sup> Arun Bahal and Ami Taylor completed one Form; Barbara and David Carter completed one Form.

<sup>2</sup> Appeal decision dated 25 June 2019, reference APP/G5180/W/18/3206947

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up to 14 times a year under permitted development rights) and the letting of buildings for storage.

9. The applicant has made a number of other applications for routes across land in the ownership of the same Landowners.

### **Legislative Framework**

10. By virtue of the Wildlife and Countryside Act, 1981 ("the 1981 Act") the Council is the surveying authority for its area.

11. The 1981 Act places a duty on surveying authorities to keep the definitive map and statement under continuous review, and under s 53(2)(b), to make orders that make such modifications to the map and statement as appear to the authority to be requisite as a consequence of the occurrence of an event. The events referred to in s 53(2)(b) are specified in s 53(3) and include at s 53(3)(b):

*The expiration....of any period such that the enjoyment by the public of the way during that period raises a presumption that a way has been dedicated as a public path or restricted byway.*

And at s 53(3)(c)(i):

*The discovery by the authority of evidence which (when considered with all other evidence available 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, being a right of way such that the land over which the right subsists is a public path, a restricted byway or subject to section 54A, a byway open to all traffic.*

12. The courts have held that a Council may make an order under s 53(3)(c)(i) where the evidence relied upon is evidence of use; the Council is not constrained to considering the evidence only under s 53(3)(b)<sup>3</sup>. The courts have also held that in circumstances where there is conflict of evidence it is appropriate to consider whether a “*reasonable person having considered all the relevant evidence could reasonably allege a right of way to subsist*”. In cases where there is evidence of use, the courts have held that where the evidence of use is conflict with other evidence then if it is reasonable to accept the evidence of one side and reasonable to reject the evidence of the other that it is reasonable to allege that the right subsists. For an order to be made it is not necessary for the Council to reconcile the conflict in the evidence<sup>4</sup>.

13. The provisions of s 31 of the Highways Act 1980 (“the 1980 Act”) are also relevant. Section 31(1) provides that:

*Where a way over land, other than a way of such a 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 highway unless there is sufficient evidence that there was no intention during that period to dedicate it.”*

Section 31(2) provides that:

*The period of 20 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 a notice such as is mentioned in subsection (3) of otherwise.*

14. If a full 20 year period of user is not made out, a right of way may nevertheless be dedicated under the common law. This requires the use of the way and the actions of the landowner to

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<sup>3</sup> *O’Keefe v Secretary of State for the Environment and Isle of Wight County Council* (1997) EWCA Civ 2219

<sup>4</sup> *R v Secretary of State for the Environment ex parte Bagshaw* (1994) (QBD) 68 P&CR 402 as applied in *R v Secretary of State for Wales ex parte Emery* (1996) (QBD) 4 All ER 1998

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have been of such a nature that dedication of the way can be presumed, or deemed to have occurred. Evidence about the openness and frequency of user, and the knowledge and acquiescence of the landowner will be taken into account.

15. Section 32 of the Highways Act 1980 is also relevant, this 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 such weight thereto as the court or tribunal considers justified by the circumstances, including the antiquity of the tendered document, the status of the person by whom and the purpose for which it was made or compiled, and the custody in which it has been kept and from which it is produced.”*

16. The test to be applied to evidence for and against the public status of the claimed route is the civil test of ‘on balance of probability’.

### **The evidence in support of the application**

#### *User evidence in support of claimed bridleway status*

17. Forty-one people completed Forms that were supplied with the application; of these two pairs of people completed one Form between them. The earliest date of use of the application route is around 1959 (MJ Cricket [LBC 14]); this is on foot. The Forms are at Appendix II.

#### *Use by horse-riders*

18. Only three people give evidence of their use of the route while riding a horse (Sarah Jane Campbey [LBC7], Nicola Cole [LBC11] and Amanda Warren [LBC37]). Of these people, Amanda Warren used the route when her horse was stabled at livery in Bromley Common livery, a commercial enterprise run by the Landowners. In view of this, her evidence should be

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discounted. Sarah Jane Campbey [LBC7] used the claimed route between 2011 and 2018 and Nicola Cole [LBC11] used the route between 2011 and 2016.

*Use by bicyclists*

19. Fifteen people used the route on bicycle

- Arun Bahal and Ami Tyler [LBC3 and LBC37] – used sometimes on bicycle,
- Nicola Brown [LBC6],
- Sarah Jane Campbey [LBC7],
- David and Barbara Carter [LBC8/9],
- Nicola Cole [LBC11]
- Bernard Conmy [LBC12],
- Daniel Foster [LBC16],
- Katherine Goldsmith [LBC18],
- Danielle Langridge [LBC20],
- Stephen James Munday [LBC25],
- Nicky Scrivener [LBC31],
- Andrew Spencer [LBC33] and
- Margaret Stow [LBC33].

20. Arun Bahal and Ami Tyler state they asked the farmer before using the route; this may be considered use with permission and should be discounted – leaving 13 users claiming qualifying use of the route on bicycle.

21. For these 13 people, periods of use were:

- Nicola Brown [LBC 6] 1978-2018
- Sarah Jane Campbey [LBC7] 2011-2018

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- Barbara and David Carter [LBC8/9] 1980-2000
- Nicola Cole [LBC11] 2011-2016
- Daniel Foster [LBC16] 2014-2018
- Katherine Goldsmith [LBC18] 1999-2008
- Danielle Langridge [LBC20] 1995-2018
- Stephen James Munday [LBC25] 1984-1998<sup>5</sup>
- Nicky Scrivener [LBC31] 1994-2018
- Margaret Stow [LBC33] 1985-2018.

Andrew Spencer [LBC31] gives no time period but states his use is for 3 years. Bernard Conmy [LBC12] states his use is from the 1970s to recently, but that his use more recently was walking with his use on a bicycle in his youth and as an adult. He has clarified this by saying his use started in 1971, he moved away in 1975 and moved back in 1991. He used the route on bicycle between once every couple of months and once every four months.

22. All those completing the Forms claimed use on foot as well as on bicycle except Margaret Stow [LBC 33] and Andrew Spencer [LBC31] whose use was on bicycle only.

23. Where frequency of the use was detailed, use varied from daily to less than weekly.

*Use on foot*

24. The majority of users used the routes on foot. While it is necessary to show use on foot *as well as* use on horseback in order for a presumption of dedication to be drawn, use on foot in and of itself does not demonstrate that the status of the route is a bridleway.

25. The following users give evidence of use on foot:

- Frances Alushani [LBC1] 2013-2018
- Pat Aste [LBC2] 1975-2018

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<sup>5</sup> His Form states 1984 to 2000, but also records a gap in use between 1998 and 2000



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- Dianna Baldwin [LBC4] 2007-2018
- Stella Ball [LBC5] 2005-2018
- Nicola Brown [LBC 6] 1978-2018
- Sarah Jane Campbey [LBC7] 2011-2018
- David and Barbara Carter [LBC8/9] 1980-2018
- Katharine Child [LBC10] 1998-2019
- Nicola Cole [LBC11] 2011-2016
- Lara Corkhill [LBC12] 2007-2018
- Sandra Deighton [LBC15] 1995-2017
- Daniel Foster [LBC16] 2014-2018
- Katherine Frater [LBC17] 1992-2018
- Katherine Goldsmith [LBC18] 1998-2018
- Jaime Lalley-Smith [LBC19] 2016-2019
- Danielle Langridge [LBC20] 1995-2018
- Ruth Mildwater [LBC21] 2012-2018
- V R Male [LBC21] 2012-2018
- Mary Mills [LBC24] 1975-2017
- Flavia Mouer [2012-2018]
- Stephen James Munday [LBC25] 1979-2018
- Sian Oliver-Gay [LBC26] 1991-2018
- Dave Price [LBC27] 2000-2018
- Victoria Rowe [LBC28] 2005-2018
- Nicky Scrivener [LBC29] 2006-2018
- Gary Smith [LBC30] 2005-2018
- Susan Steer [LBC33] 1976-2019
- Sara Jane Tetlow [LBC34] 1996-2018
- Della Tomlinson [LBC35] 1979-2017
- Alan Williams [LBC39] 1970-2018
- Josephine Wright [LBC39] 1986-2017

Bernard Conmy [LBC12] states his use is from the 1970s to recently, but, as noted above, he states that his use more recently was walking. (With his use on a bicycle in his youth and as an adult between once every couple of months and once every four months.) MJ Crickett [LBC14] states use for 60 years, Diane Tookey [LBC36] for 6.5 years; neither give any indication as to the period of their use.

26. Frances Alushani [LBC1] records on her Form that she sometimes stopped at the Farm Shop. Katharine Child [LBC10] records use to go to the PYO. Sandra Deighton [LBC15] records use in connection with fruit picking and the [car] boot fair. Katherine Goldsmith [LBC18] mentions

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on her Form visiting the Farm Shop. Della Tomlinson records that her husband was the bailiff on the trout lake on the Farm and mentions use in connection with the PYO and the [car] boot sales. Josephine Wright [LBC39] mentions use in connection with the PYO and the [car] boot sale.

27. This use may be considered as use with permission, because even though specific individual permission has not been granted or sought, use in connection with the access of commercial activities could be considered to be use under a deemed invitation.

28. However, even after excluding *all* use by these individuals entirely there remains a substantial body of use that appears to be wholly unconnected to the commercial or other activities of the Landowners. Ten people record use of 20 years or more within the period back from 2018 (Pat Aste [LBC2] 1975-2018, Nicola Brown [LBC 6] 1978-2018, David and Barbara Carter [LBC8/9] 1980-2018, Katherine Frater [LBC17] 1992-2018, Danielle Langridge [LBC20] 1995-2018, Stephen James Munday [LBC25] 1979-2018, Susan Steer [LBC33] 1976-2019, Sara Jane Tetlow [LBC34] 1996-2018 and Alan Williams [LBC39] 1970-2018).

29. Where frequency of the use was detailed, use varied from daily to 2-3 times a year.

*Documentary evidence*

30. Supporters of the application have also put forward some documentary evidence in support of the claimed bridleway status of the route.

31. The supporters state that *Record of statute duty for highway maintenance 1840* [London Borough of Bromley Archives P/180/20/9] [Appendix III] shows that amongst the works executed on the highways under contract are the “drawing of 9 loads of flints from Miss Trail’s meadow to Hays Street Farm ¼ mile” and “drawing 2 loads of gravel from pit to the same place

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*being ¾ mile*". The records are stated to include a summary of the materials used and detailed reference to all roads repaired in Hayes, including repairs to Hayes Street and Hayes Lane; including a reference to repairs to Hayes Street which passes in front of Hayes Street Farm. The supporters argue that; *"It would be unusual to include and detail the word 'Farm' here unless the repairs were relating directly to Hayes Street Farm property and not the highways which are extensively repaired and accurately detailed also throughout this period."* No explanation for the basis of this conclusion has been provided.

32. The supporters further state that one of the occupiers of Hayes Street Farm as listed in the Hayes Tithe apportionment in 1839 is Thomas Twort [Appendix IV] and that in 1840 (if not before) Thomas Twort was the Surveyor of Highways. Evidence of Thomas Twort being the Surveyor of Highways has been provided by way of a copy of the Surveyor's accounts for 1840. [Appendix V]
33. The supporters have state that in 1847 one of the then landowners, George Norman, was a Justice of the Peace and signed the Hayes accounts in 1847. [Appendix VI]
34. The supporters have also provided an extract of an Ordnance Survey map. This appears to be the 25 inch survey Kent XV.8 sheet, surveyed between 1861 and 1867, published in 1868. [Appendix VII] A further copy of this map has been provided, described as a "commissioners" map and held under reference 4/24 at the National Archives, and dated 31 November 1868.
35. The supporters rely on the 1840 Hayes Tithe map [Appendix VIII] as showing numbered lines which the supporters consider to be consistent with the National Archives catalogue description for the Tithe map which mentions footpaths and bridleways.

## **Landowners' Evidence**

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36. Evidence has been submitted on behalf of the Landowners; this is in Appendix IX. The Landowners object to the application.
37. The Landowners made a deposit under Section 31(6) of the Highways Act 1980 in 2020. The intention of such a deposit is to provide sufficient evidence of a “lack of intention to dedicate” for the purposes of the proviso in Section 31(1). In any given circumstance it would be a matter of fact and law as to whether or not a deposit did provide sufficient lack of intention to dedicate. In this case the deposit post-dates the DMMO application and has no effect for the period leading up to the application.
38. The Landowners identify witnesses whose evidence of use they consider to be outside of use ‘as of right’. A number of these witnesses have already been excluded from consideration for the reasons given above. The Landowners say that Mr Conmy’s evidence [LBC12] should be considered to be permissive; this would appear to be in connection with his answer to Q2 on the Form, where he says: “*There is also the farm shop where customers would approach from both ways*”. However, there is no indication in this evidence that Mr Conmy himself was using the Farm Shop. Similarly, the Landowners suggest Mrs Stow’s evidence [LBC32] should be removed from consideration “*to the extent of fruit picking*”; however, Mrs Stow merely mentions that the land was previously used for fruit picking, not that she herself used the claimed route to access fruit-picking.
39. The Landowners say that Ruth Mildwater [LBC21] rents storage from them and therefore has permission to access the area in connection with her storage tenancy. The Landowners also say that Sue Steer [LBC32] has been given permission to use the claimed route.
40. The Landowners rely on evidence of signs which are contended to be sufficient to show a lack of intention to dedicate and “*to have been in place for a significant period of time and certainly*

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*well in excess of the relevant period*” (i.e., the 20 years leading back from 2018). The Landowners rely on the sworn evidence of Kerry Payton, Kreshnik Peka, Janet Knapp, Edward George Arnold and Christopher Atkins as to these signs. The Landowners also rely on evidence of the locking of the gate at the western end of the track (the entrance to the farm yard where the Farm Shop was located). It is contended that this was locked daily outside of the operating hours of the farm. Evidence about locked gates at the entrance to the farm is given by Christopher Atkins, Kerry Payton, Maire Hoeltshi and Edward George Arnold; Janet Knapp says that she “*understands*” that the gates were locked and Kreshnik Peta says that he locks the gate currently and had done so from when the late George Hoeltshi retired in 2016.

#### **Evaluation of the evidence against the tests in Section 31 of the 1980 Act**

41. Section 31 provides that the 20 year period of use from which a presumption of dedication can be drawn runs back from the date at which the right of the public to use a route is brought into question. In this case the matter that appears to have brought into question the right of the public to use the land was the publicity and consultation over the planning application for the Hayes Street Farm site in 2018.

42. The relevant date for the purposes of Section 31 is therefore 2018. The relevant period is therefore 1999-2018.

*Is there a way over land?*

43. The application route is a clearly defined route sufficient to be a way over land.

*Is the way of such a character that dedication could occur at common law?*

44. The way is a physically defined linear route between terminal points; Hayes Street, a public vehicular highway, and public footpath 131. If the Council determines to make the Order applied for, then as things currently stand the bridleway would terminate on a public footpath;

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however, it is understood that the Applicant made a Definitive Map Modification Order Application for an order to 'upgrade' public footpath 131 to bridleway.

*Has the way been enjoyed by the public?*

45. Enjoyment in this context is held to mean used. The evidence discussed above shows that the public has used the application route.

*Is the use by the public 'as of right'?*

46. 'As of right' is defined as being without force, without permission and without secrecy. In this case there is no evidence of use by force, or that use is contentious. There is some use that might be regarded as with permission; but even excluding *all* use by *all* witnesses who *may* have used the route with permission or by deemed invitation there remains a quantity of evidence of use of the route by the public that cannot be characterised as use with permission.

47. There is no evidence of use with secrecy in the sense that use was with stealth, such as at night or when the owners and occupiers were known to be away. However, the level of qualifying bridleway use, as opposed to use on foot, is low.

*Has the use been for the full period of 20 years?*

48. As regards use as a bridleway as opposed to use on foot there is no qualifying use of a member of the public using the route 'as of right' riding a horse for the full period of 20 years. As noted above only two people used the route riding a horse 'as of right' within the 20 year period. (Sarah Jane Campbey [LBC7] used the claimed route between 2011 and 2018 and Nicola Cole [LBC11] used the route between 2011 and 2016.)

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49. Since 1968 the public have been permitted to use bridleway on bicycles<sup>6</sup>. Such use might be considered as use of a bridleway<sup>7</sup>. There is limited evidence of use by the public 'as of right' riding a bicycle. Clear evidence of use for the whole 20 year period is given by:

- Danielle Langridge [LBC20] of daily use,
- Nicola Brown [LBC32] of nearly daily use,
- Margaret Stow [LBC] of weekly use,
- Nicky Scrivener [LBC29] and Mr and Mrs Carter [LBC8/9] of less than monthly use.

My Conmy has clarified his evidence by saying his use started in 1971, he moved away in 1975 and moved back in 1991; with bicycle use once every couple of months or once every four months. The remaining periods of use riding either bicycles or horses do not overlap or 'add-up' to produce any additional 20 year periods.

50. In *Sunningwell*<sup>8</sup> Lord Hoffman referred to use that was: "so trivial and sporadic as not to carry the outward appearance of user as of right". The evidence of use that could be seen as asserting a right of bridleway in this case has the character of being trivial and sporadic.

51. There is a significant level of regular and frequent use on foot; this cannot be characterised as trivial or sporadic.

52. The Landowners' evidence is that throughout the 20 year period, and for some time before and after it, the gates at the entrance to the Farmyard were shut and locked in the late evenings and remained locked until the following early morning. The Landowners also contend that the gate at point 4 (on the Plan at Annex E to the landowner's evidence) was locked. It is suggested that this amounts to interruption to use and that there is therefore

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<sup>6</sup> By virtue of the Countryside Act, 1968.

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<sup>8</sup> [2000]1 AC 335 at 357

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no qualifying period of 20 years use. No user reports finding gates locked<sup>9</sup>. There is therefore a conflict of evidence on the matter of locked gates.

*Is there any evidence of a lack of intention to dedicate the routes to the public?*

53. The Landowners rely on the evidence provided of locked gates as being evidence of a lack of intention to dedicate the claimed route to the public. As noted above there is a conflict of evidence about the locking of gates.

54. The Landowners also rely on the existence of signs along the route evidencing a lack of intention to dedicate. Particular reliance is placed on a sign on a gate in the farm yard. (Photographs 3 and 28 at Landowners' evidence Annex D show a sign on a gate at point 3 on the Annex E plan in the Landowners' evidence.) The sign appears from the photograph to have been in place for some time. The application route does not pass through this gate.

55. The meaning of any sign needs to be considered objectively, namely in the way a reasonable person would interpret it.

56. In *Paterson*<sup>10</sup> signs which simply said 'Private' or 'Private, No Tipping' had been considered by an Inspector; he found that signs in such terms did not unambiguously provide sufficient evidence or notice that there was no intention that the right of way be dedicated to the public. In upholding the Inspector's decision as regards the effect of the signs, the court clearly considered that both wording and location or the context of a sign might be relevant considerations.

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<sup>9</sup> Although Gary Smith [LBC30] notes that if the gate at the farm was closed then they did not use this route

<sup>10</sup> *Paterson v Secretary of State for the Environment, Food and Rural Affairs* [2010] EWHC 394 (Admin)



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57. In this case, on balance, it seems that a sign hung on a closed gate that reads: “*Notice Any unauthorised person found on these premises will be prosecuted*” is likely to be interpreted as applying to unauthorised persons attempting to pass *through* the gate, rather than to people using a route at right-angles to the gate. The wording is also unclear, in that a person making lawful use of a public right of way cannot be considered to be an unauthorised person. The reference to prosecution is also misleading, since trespass on private land is not ordinarily a criminal offence. Overall, this sign does not, on balance, indicate a lack of intention to dedicate the claimed route to the public.

58. The Landowners’ evidence is that other signs were erected so as to be visible from the claimed route and in places where they would be interpreted objectively as applying to the route. In particular a stencil was made up which read “NO RIGHT OF WAY KEEP OUT and this was used in various places. The Landowners’ evidence is that there were specific signs on the gate at point 4 (on the plan at annexe E to the Landowners’ evidence).

59. Where user witnesses mention signs or notices in their evidence, they record that notices have been erected recently (Katherine Child [LBC10], Bernard Conmy [LBC12]), or that there were notices in other places but not along the claimed route. There is therefore a conflict of evidence about whether signs or notices were present on the claimed route.

### **Consideration of the evidence at common law**

#### *Documentary evidence put forward by the supporters of the application*

60. The tithe map and apportionment of 1839 shows that Thomas Twort was one of the occupiers of Hayes Street Farm [Appendix IV]<sup>11</sup>. In 1840 Thomas Twort was the Surveyor of Highways. It is reasonable to suppose that Thomas Twort was still in occupation of Hayes Street Farm in

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<sup>11</sup> Hayes Street Farm is apportionment number 62 as shown on the Tithe Map and the Tithe Apportionment lists number 62 as in the ownership of George Norman and in the occupation of Thomas Twort.

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1840. There is evidence that materials for the repair of the highways were transported to Hayes Street Farm. There is no evidence that any of this material was used to repair the claimed bridleway.

61. The proposition that the use of the word 'Farm' to describe Hayes Street Farm implies that roads and ways *on the Farm* were repaired by the parish/Surveyor of Highways appears to be unfounded. However, even if it has foundation there is still nothing to show that the claimed route in particular was repaired. On balance, it seems more likely that material was transported to Hayes Street Farm for use in the repair of Hayes Street and other roads in that part of the parish.

62. The tithe map has numbered construction lines across it; these are unconnected to any numbering system for roads or highways and are to do with the rendering of the survey into map form. [Appendix IV]<sup>12</sup>

63. The apportionment provides no evidence of the claimed route having bridleway status.

64. The current catalogue entry used by the National Archives is from "The Tithe Maps of England and Wales" by Roger J P Kain and Richard Oliver. The description of what the map shows is from the observations made by Kain and Oliver who recorded certain features from the maps after studying them. In this case, the map shows what Kain and Oliver considered to be footpaths or bridleways (not necessarily *public* footpaths or bridleways) and they recorded this. No route that might be a footpath or bridleway is shown in the vicinity of the claimed bridleway. The map therefore provides no evidence in support of the public status of the claimed bridleway, and no evidence in support of public footpath rights.

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<sup>12</sup> On the road to the north of Hayes Street Farm the letter P followed by 29-2353 is written against the construction line marked on the road. Similar numbers appear in the field numbered as apportionment 237 to the southeast of the Farm. Kain and Oliver (*ibid*) note the presence of construction lines on the Hayes Tithe Map.

65. In 1847 George Norman was a Justice of the Peace<sup>13</sup> who approved the highway accounts for Hayes. However, as the accounts provide no evidence of repair of the bridleway there can be no significance attached to them being signed by someone who had an interest in the land.
66. The first edition of the 25 inch Ordnance Survey Sheet for Kent (XV.8), surveyed from 1861 to 1867 and published in 1868 shows what are undoubtedly public roads shaded sienna. Other areas are also shaded sienna including tracks through the woodland opposite Hayes Street Farm, and other paths that would appear to be entirely private, including ones which are cul-de-sac. A track or path is shown shaded sienna to the rear of buildings at Hayes Street Farm. It is a cul de sac, ending at a field boundary. It is not on the same alignment as any part of the claimed route.
67. The meaning of sienna shading on first edition 25 inch Ordnance Survey is disputed. However, the shading used by the Ordnance Survey mirrors shading commonly used on estate maps of the period; blue shading for waters bodies, rivers and streams; red shading for occupied buildings (houses, pubs etc.); grey shading for unoccupied buildings (barns, outbuildings etc); and sienna shading for roads, and some paths or tracks. It is likely that when used on Ordnance Survey maps sienna shading was meant to indicate metalling rather than status. The statement '*The representation on this map of a road, track or footpath is no evidence of the existence of a right of way.*' has appeared on Ordnance Survey maps since 1888. It is usually presumed to apply to earlier mapping as well.
68. Overall, the Ordnance Survey map evidence does not support the bridleway or footpath status of the claimed route.

*Consideration of the user evidence at common law*

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<sup>13</sup> One of a number for Hayes.

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69. At common law any period of use 'as of right' by the public may amount to evidence from which an inference of dedication can be drawn. However, for a way to be lawfully claimed at common law, a landowner must be shown to have intended to dedicate the right of way over his land. As Parke B indicated in *Poole v Huskinson*:

*"In order to constitute a valid dedication to the public of a highway by the owner of the soil, it is clearly settled that there must be an intention to dedicate – there must be an animus dedicandi<sup>14</sup>, of which the use by the public is evidence."*

70. At common law, 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.

71. Dedication at common law was considered by the court in *Wild*<sup>15</sup>. Scott Baker LJ found it necessary to go back to older case law and to rehearse the authorities on the common law, which makes the judgment a very useful summary of the common law position. At paragraph 46 Scott Baker LJ neatly sets out the approach to be adopted in common law cases:

*"As the authorities make clear, it does not follow as night follows day that because there has been use there has been dedication by the owner; it is necessary to look at all the circumstances. There are various questions to be asked. Public user is the first question, then comes acquiescence and finally dedication."*

72. There is no evidence that the Landowners positively intended to dedicate the claimed route to the public. It is put forward on behalf of the Landowners that the circumstances of the

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<sup>14</sup> Intention to dedicate

<sup>15</sup> *Wild v Secretary of State for the Environment, Food and Rural Affairs and Dorset County Council 2009* EWCA Civ 1406

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busy farmyard in and of themselves are matter for consideration. On balance in such circumstances, and given the very low level of use by riders of horses and bicycles an inference of dedication of a bridleway at common law cannot be drawn.

### Status

73. Ms Brown's application was for an order to record the route as a bridleway. As discussed above, the level of use by riders of horses and bicycles is very low. Taken at its highest the amount of qualifying riding use within the 20 year period can be broken down as follows:

- Between 1999 and 2008: No horse use. Bicycle use amounts to two uses daily, two uses weekly, three uses less than monthly and one use twice a month.
- Between 2008 and 2010: No horse use. Bicycle use amounts to two uses daily, one uses weekly, three uses less than monthly and one use twice a month.
- Between 2010 and 2013: Horse use one daily and one weekly. Bicycle use amounts to two uses daily, one uses weekly, three uses less than monthly and one use twice a month.
- Between 2013 and 2016: Horse use one daily and one weekly. Bicycle use amounts to two uses daily, one uses weekly, three uses less than monthly, one use roughly fortnightly and one use twice a month.
- Between 2016 and 2018: Horse use one daily. Bicycle use amounts to two uses daily, one uses weekly, three uses less than monthly, one use roughly fortnightly and one use twice a month.

74. This level of use can be characterised as trivial and sporadic and insufficient riding use to meet the test of 'as of right'. There being no supporting documentary evidence it would not be reasonable to allege that bridleway rights subsist.

75. The Council may consider that the level of use, by the public on foot is sufficient to meet the test of 'enjoyment' for the qualifying period of 1998-2018. Excluding witnesses whose use is

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or is suggested to be permissive and excluding Alan Williams [LBC39] whose use is minimal (two-three times a year), nine witness give evidence of regular and frequent use on foot for the whole 20 year period, with a further 14 witnesses giving evidence of regular and frequent use for a lesser period of time within the period.

76. As noted above the Landowners' evidence is that gates were locked and that this constituted an interruption to the use, thus defeating any 20 year period and that sufficient, clearly worded signs were visible from the claimed route to show that the Landowners did not intend to dedicate the route to the public. There is a conflict of evidence between what the public say is the case and what the Landowners say is the case. In such circumstances the guidance given in the *Emery*<sup>16</sup> case applies.

77. In *Emery* it was held that: "*In determining, for the purposes of s 53(3)(c)(i) of the 1981 Act, whether a right of way was reasonably alleged to subsist over land, the question to be considered by the local authority and by the Secretary of State on appeal, was whether the evidence produced by the claimant together with all the other relevant evidence available showed that it was reasonable to allege a right of way. If the evidence from the witnesses as to user was conflicting, but reasonably accepting one side and reasonably rejecting the right would be shown to exist it was reasonable to allege such a right.*"

78. In this case there is no objective evidence that enables the conflict between the evidence of user witnesses and the witness evidence provided by the Landowners. Applying the test as set out in *Emery*, it is reasonable to allege that a public footpath subsists over the claimed bridleway. It is not for the Council at this stage to attempt to resolve the conflict in the evidence.

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<sup>16</sup> *R v Secretary of State for Wales, ex parte Emery* [1997] 4 ALL ER 1998

79. On the question of status, there is insufficient evidence to support a reasonable allegation that the claimed route is a bridleway; but applying the test in *Emery*, a footpath can be reasonably alleged to subsist.

## Width

80. The Planning Inspectorate's Rights of Way Advice Note 16 advises that all DMMOs should contain a width. (Additional advice on specifying widths in Orders was issued to English local authorities by Defra on 12 February 2007.) See Appendix X for these documents.
81. In this case there is insufficient evidence from which to determine a used width. Where witnesses<sup>17</sup> have been asked how wide the path is and an answer has been given there is a variety of answers. Three witnesses say they do not know; two give a range (1-6m; 900mm to 3m), one witness says 2m, one witness says 5m and one says "about 10ft, varies".
82. Advice in the 2007 Defra letter for cases where there is no or little evidence of the width of a route is as follows: "*There will be a small number of cases where there is little if any evidence, either documentary or user, as to the width of the route. In such cases the OMA [Order-Making Authorities] should include a width that appears appropriate having regard to all relevant factors which may include, for instance, the type of user, location and the nature of the surface and other physical features. OMAs should bear in mind that such a width should be the minimum necessary for the reasonable exercise of the public right in these circumstances, enough for two users to pass in comfort, occasional pinch points excepted.*"

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<sup>17</sup> Here 'witnesses' means those whose evidence has been considered and accepted in relation to the footpath being 'reasonably alleged to subsist'.

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83. It is suggested that this case falls to be considered in this way, and that a reasonable width would be 2m.

#### **Limitations or Conditions**

84. There is insufficient evidence on which to determine whether or not there were any limitations. As any Order that is made would be on the basis of having applied the *Emery* test to the evidence it is suggested that any Order be made without limitations or conditions.

#### **Recommendation**

85. The application should be refused.

86. An Order should be made to record a footpath along the application route, on the basis that it can be reasonably alleged that a footpath subsists.