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Public Rights of Way Management & Consultancy Services

Wildlife & Countryside Act 1981

Application for Definitive Map Modification Order

Alleged Public Footpath (Petleys Farm) from Luxted Road, Down to Public Footpath 232

Client: London Borough of Bromley Council

1.0 Introduction

1.1 This report seeks to assist the London Borough of Bromley Council (**the Surveying Authority**) to determine an application for a Definitive Map Modification Order to add an alleged Public Footpath (**the Application Route**) to the Definitive Map and Statement for the area. The Application Route runs from Luxted Road to Public Footpath, No 232 and is shown by a broken red line (**A-B on Plan 1 [App 1 pg. 1]**) attached to this report.

2.0 Background

2.1 Between 2017 and 2022 the former site of Petleys Farm was redeveloped into housing with five units being sold. In 2019/20 the Application Route was blocked off with path users being challenged and told the way was not a public right of way. "Private Road" signs were also installed at the junction with Luxted Road.

2.2 In response to this, on 10th June 2020 the Surveying Authority received an application for a Definitive Map Modification Order [**App 2 pg. 2-3**], from the Downe Residents' Association [**The Applicants**]. The application sought to add the Application Route (**A-B on Plan 1 [App 1 pg. 1]**) to the Definitive Map and Statement for the area [**App 3 pg. 4**]. The application was supported by 88 witnesses who completed User Evidence Forms [**App 9-17 pg. 22 – 276**] claiming use of the Application Route over a ninety-year period (1930 – 2020).

2.2 Due to a combination of factors, including the Covid pandemic, the loss of rights of way expertise within the Council and an increasing backlog of work of this nature the Council did not determine the application within 12 months of receipt. Whilst there is no statutory requirement to determine an application within that timescale, an applicant is entitled to request that the Secretary of State direct the Surveying Authority to make a determination within a specified timescale. The right to seek such

a direction comes into effect 12 months after the receipt of a properly made application.

- 2.3 On 15th October 2021 the Applicants requested that the Secretary of State direct the Surveying Authority to determine their application. On 30th September 2022 the Secretary of State directed the Surveying Authority to determine the application within six months (by March 2023) [**App 4 pg. 5-6**]. In order to progress the case as expediently as possible the Surveying Authority has adopted the use of an independent specialist consultant (Robin Carr Associates) to undertake the work.

3.0 Legislative Context

- 3.1 The London Borough of Bromley Council are the Highway and Surveying Authority for their area. As a result, they are charged with various statutory duties with regard to public highways (within which include routes often described as public rights of way). This includes, but is not restricted to, a duty to assert and protect public highways; a duty to maintain those highways that are maintainable at public expense; a duty to maintain a record (list) of all highways that are maintainable at public expense; and a duty to maintain and continuously review the Definitive Map and Statement of Public Rights of Way.
- 3.2 A highway is a way over which the public have a right to pass and re-pass. The term is not restricted to public carriageways (roads). Footpaths, bridleways, restricted byways and byways open to all traffic, often referred to as public rights of way, are also highways. Not all highways are maintainable at public expense, nor is there any need for a way to have been “adopted” before it is either a highway or a highway maintainable at public expense.
- 3.3 Once a highway has come into being, no amount of non-user can result in the right ceasing to exist. The legal principle of “*Once a Highway, Always a Highway*” applies. Such rights, except in very limited circumstances, can only be changed by way of certain legal proceedings either by way of administrative order or a Court Order.

How Highways Come into Being: Dedication and Acceptance

- 3.4 With few exceptions, before any highway can come into being there must be an act of dedication on the part of the landowner, followed by an acceptance of the said dedication by the public. The act of dedication need not be express, it may be presumed or implied as a result of the actions (or inaction) of the landowner. Public acceptance is generally demonstrated through public use of the way. Such use must be of a nature that can be defined as being “as of right”.

- 3.5 Claims for the establishment of public rights of way based upon modern user evidence usually rely upon the provisions of Section 31 of the Highways Act 1980 (the 1980 Act) which provides that where a has been used by the public, as of right and without interruption for 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 twenty-year period is calculated back for the date in which the existence of the claimed rights is brought into question.
- 3.6 Public rights can however also be established under the common law based upon evidence of public use and reputation. Under such circumstances the onus rests upon those asserting that the alleged rights subsist to prove an intention to dedicate on the part of the landowner. There is no requirement for a period of twenty years use under such circumstances.
- 3.7 In cases which rely primarily on historic documentary evidence, the need for any modern-day usage does not apply, nor is there any requirement to demonstrate any twenty-year period from which dedication may be inferred. In historic documentary evidence cases the inference *is* drawn mainly from evidence that the way was already recognised as being a highway by the start of the period covered by living memory, coupled with the absence of anything to show that the public recognition was misplaced. In this class of case the common law approach simply recognises that the facts all point one way, and that it is immaterial that the claimant cannot identify the early owners or show the actual date when dedication was likely to have occurred.

Definitive Map Modification Orders

- 3.8 The making of applications for Definitive Map Modification Orders, and any subsequent legal orders which may arise from such applications is governed by Section 53, Schedule 14 and Schedule 15 of the Wildlife and Countryside Act 1981 (the 1981 Act).
- 3.9 Section 53(3)(c)(i) of the 1981 Act places a statutory duty on the Surveying Authority to make a Definitive Map Modification Order upon the discovery of evidence that a public right of way that is not shown on the Definitive Map and Statement subsists, or is reasonably alleged to subsist. This is not a discretionary function.
- 3.10 The initial, and lowest, trigger test (a reasonable allegation) is a relatively low evidential threshold, and even when there is a conflict of credible evidence on both sides, the Surveying Authority is obliged to make an Order to allow it to be tested

through the full order process. Notwithstanding this, an Order that has satisfied the “reasonable allegation” test cannot be confirmed (come into effect) unless the case in support of such an Order can be proved using the civil law test of the “balance of probability”. The evidential burden is therefore often greater at the point of confirmation, than it is at the point of making the Order.

- 3.11 Schedule 14 of the 1981 Act sets out the application procedures and provides an applicant with a right to seek a direction, from the Secretary of State that the Surveying Authority determine their application within a specified time frame. This right comes into effect 12 months after an application is properly lodged.
- 3.12 Schedule 14 also allows an applicant a right to appeal to the Secretary of State if the Surveying Authority refuses their application. Under such circumstances the Surveying Authority may be directed to make an Order.
- 3.13 Schedule 15 sets out various provisions relating to the making and confirmation of Definitive Map Modification Orders, and is supported by a set of regulations which prescribe the forms of Orders etc.

4.0 Consultations

- 4.1 As part of the investigation process informal (non-statutory) consultations have been carried out. Consultees include all known landowners; user group representatives (e.g. Ramblers); the Parish Council; and, the local Councillor(s) for the area. All consultation responses have been given due consideration, and where appropriate/relevant, they have been considered within the body of this report.

5.0 Summary of Historical Documentary Evidence

Downe Tithe Map (1840) [App 5 pg. 7]

- 5.1 The purpose of tithe maps and their accompanying apportionments was to record the commutation (transfer or convert) of the payment of tithes (taxation paid to the Church) from goods into monetary payments. The tithe commutation process was not interested in the status of roads, only in whether land was, or was not productive (and therefore subject to tithe). Notwithstanding this, tithe maps and their accompanying apportionments do provide some of the earliest large-scale mapping and land use/ownership/occupancy detail that is available today.
- 5.2 The Tithe Commutation Act 1836 required three maps to be produced: an original and two statutory copies. The original was retained by the Tithe Commissioners; one copy was for the relevant diocesan office and the second copy was for local deposit in the

tithe district. The original map may be less colourful than the copies produced for local use and there may be variations between the maps. Some of the variations may be due to copying error and some may be deliberate (for example the use of extra colour or adornment). It is therefore important to establish the status of a particular map.

- 5.3 The Tithe Act Amendment Act 1837 established two classes of tithe map. First class maps had the Commissioners' seal attached, showing them to be reliable as a true record of all matters relating to the purposes for which the map was designed. However, second class maps, which failed in some, often minor, way to meet the stringent test for first class status, are not necessarily inferior from a cartographic point of view.
- 5.4 Following the amendment to the 1836 Act, the Tithe Commissioners revised their instructions on the form of maps, setting out that the most acceptable plans would be the plain working plans containing little ornamentation and colour. Whilst First Class Maps still had to conform to the prescribed technical specifications in terms of surveying techniques, the Commissioners no longer considered it essential for a system of conventional signs to be used.
- 5.5 The depiction of a road or track with colour washing in sienna is not, as some parties may claim, evidence of public highway status. It does however provide very good evidence of the physical existence of the feature shown as of the date of survey and the sienna colouring is indicative that the land in question was not subject to tithe payments (i.e., it was non-productive).
- 5.6 The Tithe Map for the parish of Down (now Downe) **[App 5 pg. 7]** was produced by Newton and Woodrow of Norwich in 1840 and was a second-class map. The Application Route **(A-B on Plan 1 [App 1 pg. 1])** is shown uncoloured/unshaded unlike the roads through the village which appear to have some forms of colouring/shading. This may be indicative that it was considered to be of a different status (e.g. perhaps private?) to the other routes. The route is shown running to fields and is a cul-de-sac in character.
- 5.7 The Application Route **(A-B on Plan 1 [App 1 pg. 1])** also does not appear to have been allocated a parcel number, and as such is not listed in the Tithe Apportionment. This would indicate that it was not considered to be productive land, and therefore not subject to tithe assessment. Overall, the document provides good evidence of the physical existence of the Application Route **(A-B on Plan 1 [App 1 pg. 1])** in 1840, but it provides no clear evidence as to its status.

Ordnance Survey Maps [App 6 pg. 8-9]

- 5.8 Ordnance Survey maps and plans provide excellent evidence of the existence of any physical features included on them, as of the date of their survey. They are however silent on the matters such as the existence of public highway rights. Since 1888 they have carried a disclaimer to the effect that the showing of any path, track or way is not to be considered evidence of the existence of a public right of way. I also consider it likely that such an approach existed prior to the inclusion of the disclaimer as well. Certainly, various instructions to surveyors, and the Dorrington Report¹ (1893) made it clear that the Ordnance Survey was not concerned with matters of highway status.
- 5.9 Ordnance Survey maps in rural areas were surveyed at a scale of 1:2500² and 1:1250 in urban areas. The 1:10,000 scale maps are derived from the larger base scales.
- 5.10 Ordnance Survey maps never show legal boundaries, nor do they show ownership of physical features. Whilst some legal boundaries may be coincident with surveyed map features, no assumptions should be made in these instances and consequently it is not possible to be entirely sure of the position of a legal boundary from an Ordnance Survey map alone.
- 5.11 Given that the Application Route (**A-B on Plan 1 [App 1 pg. 1]**) is shown, by reference to the Tithe Map [**App 5 pg. 7**] to have physically existed in 1840, and it still exists today, it is little surprise that it is shown on the earlier editions of the Ordnance Survey maps for the area [**App 6 pg. 8-9**].
- 5.12 The 1871 6-Inch County Series Map [**App 6 pg. 8**] shows a solid line across the Application Route in the vicinity of Point **A** on **Plan 1 [App 1 pg. 1]**) and another a short distance to the west just after the entrance to Landway House. This would suggest the existence of gates across the track at these locations. It is not however possible to ascertain whether such gates were locked. The 1896 25-Inch County Series Map [**App 6 pg. 9**] shows a solid line across the Application Route in the vicinity of both Points **A** and **B** on **Plan 1 [App 1 pg. 1]**). This would again suggest the existence of gates across the track at these locations. It is not however possible to ascertain whether such gates were locked.
- 5.13 Whilst the existence of gates across a track or lane may be indicative that it was not open to public vehicular traffic, it is not possible to be certain about this because, there

¹ Report of the Departmental Committee appointed by the Board of Agriculture to Inquire into the Present condition of the Ordnance Survey [1893]

² Although some areas are known to have been surveyed originally at a scale of 1: 10,560 (6 inches to one mile)

are instances of public gated roads. The existence of gates across footpaths or bridleways is even more common and it is not possible to draw any inference as to status as a result of their existence.

- 5.14 Whilst the Ordnance Survey maps provide excellent evidence of the continued physical existence of the Application Route, they provide no indication as to its status.

1910 Finance Act [App 7 pg. 10-19]

- 5.15 The purpose of the 1910 Finance Act was to place a valuation on all land and property as of a specified date (1909) with a view to levying a tax, upon sale, based upon any increase in value. Whilst a huge amount of work was undertaken as part of the valuation process, the legislation was repealed before it ever took full effect. The working papers for the valuation process are so comprehensive that the valuation process is often referred to as a second Domesday survey.
- 5.16 The benefit for public rights of way and highway research are twofold. Firstly, a landowner could claim tax relief in respect of the existence of public rights of way across his land. Secondly, land vested in a rating authority (which would include a highway authority) was excluded from valuation.
- 5.17 The 1910 Finance Act Index Plan [**App 7 pg. 10-11**] shows that the Application Route (**A-B on Plan 1 [App 1 pg. 1]**) was not excluded from valuation but was included within Hereditament No 1243 along with most of the land surrounding the route. The Field Book entry for Hereditament 1243 [**App 7 pg. 12-14**] shows that a deduction of £25 was claimed in respect of public rights of way or user. It is not however possible to attribute this claim to a specific public right of way and it is noted that Definitive Map Footpath 232 also passes through the land holding. The £25 deduction may, or may not, relate entirely to Footpath 232. The existence of this acknowledged public right of way through the land holding effectively neutralises the value of this evidence.

6.0 Summary of User Evidence in Support of the Application

- 6.1 A total of 88 witnesses completed user evidence forms [**App 9-17 pg. 22-276**] in support of the Application. These forms provide evidence of public use over a period of up to ninety years, from circa 1930 to 2020. The user evidence is summarised in **Appendix 8 [pg. 20-21]** to this report and provides evidence of regular use by many of the witnesses. However, eight of the witnesses (9%) also recall the locking of gates or fences across the Application Route at times prior to the more recent events circa 2019/20.

7.0 Summary of Evidence Submitted in Objection to the Application

7.1 The objectors can be divided into two separate groups, namely the owners of the land adjoining the Application Route (South Darenth Farms & Cold Store Ltd) and the residents of the new Petley's Farm development (Petleys Residents Ltd). Both groups are working together, but for conveyance the evidence is summarised and discussed in the two component parts.

South Darenth Farms & Cold Store Ltd (SD Farms) Submissions

7.2 SD Farms have submitted six Statutory Declarations and one Statement of Truth [**App 18 pg. 277-338**]. These confirm that they purchased the land in December 2006 and that they consider the Application Route to be a private access. They further refer to a locked gate in the vicinity of the Petleys Farm development, challenges to unauthorised use and signage stating the private nature of the route.

Submission by the Residents of the Petleys Farm Development (Petleys Residents Ltd)

7.3 The Residents have submitted nine user evidence forms [**App 19 pg. 339-373**] which they completed early in the process. These forms basically confirm the resident's belief that the Application route is private, and they were advised as such by the landowners.

7.4 The Residents have also submitted:

- a) a covering email [**App 20 pg. 374**],
- b) a letter from a previous landowner providing evidence dating back the 1940's [**App 20 pg. 377-378**]
- c) a letter from the previous occupiers of Landway House confirming that they were always advised the route was private [**App 20 pg. 379**],
- d) a photograph of the sign located at the village end of the Application Route (Point A on **Plan 1 [App 1 pg. 1]**) taken in 2018 [**App 20 pg. 380**].
- e) photographs of the gate at the golf course end of the Application Route (Point B on **Plan 1 [App 1 pg. 1]**) taken in 2023 [**App 20 pg. 381**]
- f) emails exchanged with the golf club [**App 20 pg. 383-386**] indicating that the gate at Point B (on **Plan 1 [App 1 pg. 1]**) has been locked for at least the last 15 years (since 2008)

8.0 Discussion

- 8.1 The decision to make a Definitive Map Modification Order is quasi-judicial in nature. This means that the decision-maker(s) act in a manner that is comparable to a court of law. In doing so the decision-maker(s) must take into account all available and relevant evidence and allow all interested parties a reasonable and fair opportunity to put their case. Ultimately the decision must be made based upon consideration of all available and relevant evidence, and not simply the recommendation of a third party.
- 8.2 When considering whether or not to make a Definitive Map Modification Order the Surveying Authority should be minded of the fact that such Orders do not extinguish or create any public rights of way. They do nothing more than amend the legal record to reflect the current and legal situation. By way of example, if an Order is made to add a footpath to the Definitive Map, the footpath must, as a matter of evidence, be shown to already exist/have come into being. As a result, issues such as desirability, suitability, need, anti-social behaviour, security, crime prevention, privacy and even public safety, whilst all undoubtedly genuine concerns, are not matters that can lawfully be considered as part of the decision-making process. They are, of course, matters that may have to be addressed if the alleged public right of way is shown, on balance of probability, to subsist.

Historic Documentary Evidence

- 8.3 The historic documentary evidence demonstrates that the Application Route (**A-B on Plan 1 [App 1 pg. 1]**) has physically existed for over 180 years, but there is no clear evidence from which it might be inferred that it was subject to any form of public right of way. Given its starting point at Petley's Farm and central location within the land holding (see 1910 Finance Act Index Plan red line boundary [**App 7 pg. 10**]) it has the appearance of being a spinal route leading to the surrounding fields and is entirely consistent with it being a private farm occupation road.
- 8.4 Notwithstanding the above, it must be noted that the Application Route (**A-B on Plan 1 [App 1 pg. 1]**) does link with Footpath No 232 in the vicinity of Point **B** (on **Plan 1 [App 1 pg. 1]**) albeit the historic line of that path [**App 6 pg. 8-9**] appears to have altered slightly over the years and now differs from that shown on the Definitive Map [**App 3 pg. 4**]. It does not, however, automatically follow that public rights must exist over the Application Route (**A-B on Plan 1 [App 1 pg. 1]**).

8.5 In conclusion, when all the available historic documentary evidence has been considered, there is insufficient to give rise to even a reasonable allegation in favour of such rights.

Highways Act 1980, Section 31

8.6 It is perhaps most appropriate to first consider the user evidence under the statutory scheme set out within Section 31 of the 1980 Act. This provides that where a way is used by the public, in a manner which may be defined as being as of right and without interruption for a full period of twenty years, a presumption of dedication will arise. Such a presumption may be overturned if there is evidence that the owner of the land has carried out sufficiently overt acts aimed at those using the way, that he/she had no intention to dedicate. The abovementioned twenty-year period is to be calculated back from the date upon which the existence of the alleged public right of way is brought into question (challenged).

Date of Bringing into Question and the Relevant Twenty-Year Period

8.7 Before the provisions of Section 31 of the Highways Act 1980 come into effect there must be some action or event which brings into question the existence of the alleged public right of way (e.g. the locking of a gate or the erection of notices advising that there is no public right of way). The requisite twenty-year period is then calculated back from that date of challenge. Where no such challenge has occurred, Section 31 (7A & 7B) allow for the date of the submission of an application for a Definitive Map Modification Order to be used instead.

8.8 Based upon the information available, the instances and combination of obstruction, challenges and signage in or around 2019/2020 appear to be sufficient to bring into question the existence of public rights over the Application Route (**A-B on Plan 1 [App 1 pg. 1]**). These events are referred to by many of the use witnesses [**App 9-17 pg. 22-276**] and subsequently caused the submission of the application [**App 2 pg. 2-3**] to register the route. If this is the case the requisite twenty-year period would be 1999-2019.

Use by the Public

8.9 The user evidence forms [**App 9-17 pg. 22-276**] suggest use by the public, as opposed to any closed section of the community. There is a considerable amount of user evidence in support of use of the Application Route over the full twenty-year period (See **App 8 pg. 20-21**).

Use that is As of Right and Without Interruption

- 8.10 The term “as of right” means: without force, without secrecy and without permission. No evidence has been forthcoming which would suggest that use has been either forceable or secretive. With the exception of one witness whose father farmed the land, there is no evidence to suggest that any of the use was in the exercise of permissions. Overall, the use would appear to be of a character that may be considered to be “as of right”.
- 8.11 The majority of the user evidence [**App 9-17 pg. 22-276**] suggests that there has not been any interruption to public use during the requisite twenty-year period. However, eight of the user witnesses do refer to the occasional locking of gates, with one witness specifically recalling a locked gate in 2015. These instances may constitute an interruption to use or demonstrate a lack of intention to dedicate. It may be further argued that anyone climbing over a locked gate would not be using the way “as of right” because such use may be considered to be by force.
- 8.12 For the purposes of Section 31 of the 1980 Act the requisite twenty-year period is 1999 – 2019. This means that consideration may have to be given to the effect of the Foot and Mouth Disease outbreak in 2001, which in turn resulted in the blanket closure of public access to land, and whether such closures resulted in an “interruption” to public use.
- 8.13 The Planning Inspectorate’s “Rights of Way Section Advice Note 15 – Breaks in user caused by Foot and Mouth Disease” (15th August 2023) concludes at paragraph 4.1 that: *“4.1. The temporary cessation of use of ways resulting solely from the implementation of measures under the Foot and Mouth Disease Order 1983 should be considered on the basis of all the evidence available but, unless particular circumstances apply, is unlikely to be considered a relevant interruption under section 31(1) of the 1980 Act.”*
- 8.14 Only one witness refers to stopping using the Application Route (**A-B on Plan 1 [App 1 pg. 1]**) as a result of the Foot and Mouth outbreak in 2001. No other evidence has been forthcoming to suggest that there are any particular circumstances to be applied in this case, therefore any break in use arising from land closures during the Foot and Mouth Disease outbreak might not be considered to constitute an interruption for the purposes of Section 31 of the Highways Act 1980.

Interim Conclusion re: Presumption of Dedication

- 8.15 The user evidence [**App 9-17 pg. 22-276**] suggests that the existence of public rights was brought into question in 2019/2020 when barriers and signs were erected, and path users were challenged. The requisite twenty-year period would therefore be 1999 to 2019.
- 8.16 The user evidence [**App 9-17 pg. 22-276**] further indicates that public use extended over and for a significant period beyond the above twenty-year period and that the majority of that use was as of right. However, eight user witnesses (9%) provide evidence relating to the occasional locking of gates with one also referring to fencing across it. If these events are considered sufficient to cause an interruption to public use, it may be fatal to the application. Notwithstanding this, there is a substantial body of user evidence which is indicative of uninterrupted use.
- 8.17 The Court of Appeal has in *R (Roxlena Ltd) v Cumbria County Council [2019]* said that the consideration of evidence at this stage of the Modification Order process was “necessarily less intense” than at confirmation stage. The evidence might or might not be satisfactory sustained when the Order comes to be confirmed but that does not mean an Order cannot be lawfully made at this juncture.
- 8.18 Furthermore in *R v Secretary of State for Wales ex parte Emery [1998]* it was held that where there is a conflict of apparently credible evidence, and a public right of way is reasonably alleged to subsist, an Order should be made to allow that evidence to be tested through the Order making process.
- 8.19 In view of the above, it may be considered reasonable to conclude that, at this stage in the process, there is sufficient evidence to give rise to a “reasonable allegation” in favour of a presumption of dedication, yet still recognise that there is a conflict in the evidence.

Evidence of Lack of Intention to Dedicate (on behalf of SD Farms Ltd)

- 8.20 The above reasonably alleged presumption of dedication can be overturned if there is sufficient evidence of a landowner’s lack of intention to dedicate public rights over the Application Route. Such evidence must be of overt acts directed at actual users of the way, and which indicate a lack of intention to dedicate) e.g. direct challenges or the locking of gates etc).
- 8.18 The Statutory Declarations [**App 18 pg. 277-338**] submitted by SD Farms Ltd confirm that they purchased the land in December 2006, and that various Officers and operatives of the Company have challenged unauthorised use whenever they have

encountered it. Unfortunately, there is no detail as the time periods during which such challenged has taken place, but they appear to centre around the period that the Petleys Farm development was taking place (2017-2020) with perhaps an earliest date of 2015 and is broadly consistent with the user witnesses reports of challenges circa 2019/20.

- 8.19 The Statutory Declarations **[App 18 pg. 277-338]** also refer to the existence of a locked gate, which is again corroborated by the user witnesses circa 2019/20 and by two user witnesses indicating an earlier locked gate circa 2015 **[App 13 pg. 150-152]**.
- 8.19 Finally there is reference to signage which is alleged to confirm that no public rights of way existed over the Application Route. The wording of the signage is not confirmed in the Statutory Declaration **[App 18 pg. 277-338]** but the Residents company have submitted a photograph taken in 2018 **[App 20 pg. 380]** which shows the sign in place at that time. A sign stating “Private Road Access Only to...” is somewhat ambiguous as to its intention, and is open to interpretation. In many instances the public will consider this to refer to vehicular access rather than to be seeking to deny any intention to dedicate public rights of way over the Application Route.
- 8.20 In conclusion, the Statutory Declarations **[App 18 pg. 277-338]** are somewhat vague when it comes to matters of essential details such as the dates that challenged have taken place. However, when considered alongside the user evidence **[App 9-17 pg. 22-276]**, it would appear that, on balance these challenges and locking of gates took place circa 2019/20. It is possible that they occurred as early as 2015, which is again substantiated by two users **[App 13 pg. 150-152]** who refer to a locked gate that the time. If that is proved to be the case, it may simply move the twenty-year period to 1995-2015.
- 8.21 It should be noted that the Objector was offered the opportunity to clarify dates etc but has not done so.

Evidence of Lack of Intention to Dedicate (on behalf of Petleys Residents Ltd)

- 8.22 The Residents have submitted nine user evidence forms **[App 19 pg. 339-373]** which they completed early in the process. These forms basically confirm the resident’s belief that the Application route is private, and they were advised as such by the landowners **[App 20 pg. 374-386]**.
- 8.23 The fact that landowners told them that there was no public right of way over the lane is not disputed, but this does not preclude the possible existence of such rights.

Furthermore, it is unlikely that any land charge searches undertaken as part of the property purchase would disclose the existence of the Application Route. This is because such searches only reveal what is already included in the Surveying Authority's records. The current application is seeking to amend those very records by adding the Application Route to them.

- 8.24 The letter dated 19th May 2021 [**App 20 pg. 377-378**] from the former owner of the land provides details of the route from the 1940's, when his father was asked to farm the land, and then later (from 1957) when the farm passed into his family's ownership. The letter provides evidence of the existence of gates at this time, but no indication whether they were locked.
- 8.25 The letter [**App 20 pg. 377-378**] further advises that from the 1970's and during the 1980's a number of people, including the local school were given permission to use the Application Route and that a locked gate was installed, albeit with a stile adjacent to it to allow those with permission to continue to use it. No evidence is provided to clarify how the general public were disabused of the notion that they were permitted to use the Application Route at that time.
- 8.26 The letter from the previous tenant of Landway House [**App 20 pg. 379**] covers the period 2014-2018. As tenants they were made aware that the Application route was private. However, the letter provides no indication of how this information was transmitted to them, or more importantly, how it was transmitted to members of the public who were actually using the Application Route.
- 8.27 With regard to the sign at Point **A** (on **Plan 1 [App 1 pg. 1]**), as discussed above in paragraph 8.19, a sign stating "Private Road Access Only to..." is somewhat ambiguous as to its intention and is open to interpretation. In many instances the public will consider this to refer to vehicular access rather than to be seeking to deny any intention to dedicate public rights of way over the Application Route. So, whilst the signs may go some way to demonstrating a lack of intention to dedicate, they may not be overt enough or clear enough to defeat a presumption of dedication.
- 8.28 The photographs of the gate at the golf course end of the Application Route (Point **B** on **Plan 1 [App 1 pg. 1]**) taken in 2023 [**App 20 pg. 381-382**] are useful in confirming the current position, as the Application Route was significantly overgrown with seasonal vegetation at the time of the site visit. They do not however provide evidence of the gate being locked during the relevant period.

- 8.29 The email from the Golf Club [**App 20 pg. 383-386**] does however confirm that the gate at Point B (on **Plan 1 [App 1 pg. 1]**) has been locked since at least 2008, this being the extent of the current Green Keeper's knowledge. It may have been locked before that time but that would be before he started working there.
- 8.30 In conclusion the residents are at a disadvantage due to them only having an interest in the matter since circa 2019/20 when the Petleys Farm development was completed. From that point onwards there is clear evidence of challenges and blockages. The residents have however provided evidence which indicates that the gate at Point B (on **Plan 1 [App 1 pg. 1]**) has been locked for a considerable time, and if people climbed over the locked gate, their use would not be "as of right".

Interim Conclusion – Lack of Intention to Dedicate

- 8.31 Overall the evidence submitted in objection to the application lacks any amount of detail on the key issues under consideration. In respect of signs, challenges and blockages etc, it is however broadly consistent with, and supported by, the user evidence [**App 9-17 pg. 22-276**] which confirms such actions taking place in 2019/2020 but not particularly before that.
- 8.32 Notwithstanding the above, two user witnesses [**App 13 pg. 150-152**] confirm the locking of a gate circa 2015 and another four user witnesses [**App 12, 14 & 15 pg. 120-122. 182-184 & 191-193**] confirm the periodic locking of gates over a period of up to 33 years (back to 1990). In addition, the Golf Club's Green Keeper reports that the gate at Point B (on **Plan 1 [App 1 pg. 1]**) has been locked for the last 15 years (since 2008). There is therefore, to some extent, a consistency in the evidence of both supporters and objectors regarding the locking of gates. Cumulatively this may be considered sufficient to overturn any presumption in favour of dedication.

Common Law

- 8.33 Under the common law the onus rests on those asserting that the alleged public right of way subsists to prove an intention on the part of the landowner to dedicate it. Whilst such an intention to dedicate may be inferred from public use, that use must be sufficiently notorious that the landowner was aware of it and had the opportunity to disabuse the public of the notion that the way was dedicated as a public right of way. In addition, a number of factors may have some bearing on whether the landowner had a lawful capacity to dedicate. If he did not, then this could be a complete bar to the establishment of public rights. Such instances might include, but not be restricted to, the land been tenanted or mortgaged.

8.34 The user evidence [**App 9-17 pg. 22-276**] suggests public use of the Application Route (**A-B on Plan 1 [App 1 pg. 1]**) since around 1930, however the letter from the previous landowner [**App 20 pg. 377-378**] indicates that from the early 1940's the land was tenanted, with his father only taking ownership of land in 1954. If this is correct, then it is unlikely that the landowner would have had capacity to dedicate for the period of the tenancy (1940's – 1954). The letter goes on to explain that permission to use the Application Route was given to various people in 1970's and 1980's. Whilst any use in the exercise of such a permission would not be "as of right" and therefore not qualifying use, the overt act of giving permission to use way may also be considered to be inconsistent with a landowner's intention to dedicate a public right of way. Once the instances of the periodic locking of gates referred to by the user witnesses [**App 12, 14 & 15 pg. 120-122. 182-184 & 191-193**] is also factored into the equation it may be difficult to conclude in favour of any inference of dedication on the part of the landowner.

9.0 Conclusions

9.1 In conclusion:

- a) The available and relevant evidence initially appears to be supportive of a reasonable allegation in favour of presumption of dedication pursuant to Section 31 of the Highways Act 1980, however there is a conflict in some of the evidence which cannot be reconciled at this time;
- b) There is however a reasonable body of evidence that is supportive of the landowner's lack of intention to dedicate, and this may overturn any initial presumption in favour of dedication;
- c) There is insufficient evidence to support any inference of dedication under the common Law.

10.0 Decision Options

10.1 If the Surveying Authority is satisfied the evidential tests set out above have been met and the alleged public right of way subsists, or is reasonably alleged to subsist, they should resolve to:

- a) make a Definitive Map Modification Order to add the route shown by a broken black line (**A-B**) on **Plan 1** to the Definitive Map
- b) if no objections are received in response to the making of the Order, or if any objections received are subsequently withdrawn, the Order be confirmed; or

- c) if objections are received in response to the making of the Order, and they are not subsequently withdrawn, the Order be referred to the Secretary of State (Planning Inspectorate) for determination.

10.2 If the Surveying Authority is not satisfied the evidential tests set out above have been met and therefore the alleged public right of way does not subsist, or is not reasonably alleged to subsist, they should resolve to refuse the application, and advise the applicant of their right of appeal.

11.0 Recommendation

11.1 Whilst it is the investigating Consultant's view that a Definitive Map Modification Order should **NOT** be made, and the decision set out in paragraph 10.2 above should be adopted, given the quasi-judicial nature of the decision-making process, it is a matter for the Surveying Authority to make their own decision.

Signed



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Date: 21st November 2023

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