

ROBIN CARR ASSOCIATES

Public Rights of Way Management & Consultancy Services

Wildlife & Countryside Act 1981, Section 53 & Schedule 14 Application for Definitive Map Modification Order Alleged Public Bridleway along Hawkhurst Road, Kenley

Client: Croydon Council

PART ONE: INTRODUCTION

1.0 Purpose of Report

- 1.1 This report seeks to assist Croydon Council in the determination of an application for a Definitive Map Modification Order (DMMO) to add a Public Bridleway to the Definitive Map and Statement for the area. The route which forms the application is known as being part of Hawkhurst Road, Kenley and is shown by a broken black line (B-C) on **Plan 1 [APP 1 pg. 1]**.
- 1.2 The section of Hawkhurst Road, shown by a broken black line (A-B-C) on **Plan 1 [APP 1 pg. 1]** is currently shown on the Council's List of Streets as a "Private Street"¹. This "Private Street" status is disputed by the Applicants for the DMMO, who claim that it is a bridleway only.
- 1.3 Given that as a matter of law a public highway cannot exist in a vacuum (i.e. it must have at least one point of public terminus), and the disputed "Private Street" status, the DMMO application would be likely to fail at the outset due to it not linking to any other acknowledged public highway.
- 1.4 In order to allow the application to run its course, rather than fail immediately on a technical point, the investigation and subsequently this report considers the status of that section of Hawkhurst Road shown by a broken black line (A-B-C) on **Plan 1 [APP 1 pg. 1]**. This mirrors

¹ The Highway Authority is of the opinion that this section of Hawkhurst Road is a public vehicular highway that is maintainable at private expense (i.e. a Private Street).

the section of Hawkhurst Road that is recorded in the Highway Authority's records as a "Private Street" and throughout this report is referred to as "the Application Route".

2.0 Format of Report

2.1 Whilst there is no statutory requirement to do so, as a matter of good practice, this report has been prepared in line with the principles of the Civil Procedure Rules so far as they relate to the production of expert reports.

2.2 The report is divided into eight parts, namely:

- Part One: Introduction
- Path Two: Background
- Part Three: Summary of Evidence
- Part Four: Consideration of User Evidence
- Part Five: Consideration of Documentary Evidence
- Part Six: Consideration of the Width of the Highway
- Part Seven: Maintenance Liability
- Part Eight: Conclusions

2.3 This report is accompanied by a document bundle containing copies of the documents referred to in the report. Where a document is referred to within the report, it will be referenced by Appendices and Page Number thus **[APP XX pg. xx]**.

3.0 Instructions

3.1 I am instructed by Anthony Graham, Highways Records Officer, on behalf of Croydon Council, Place Department, Highway Improvements, Bernard Weatherill House, Floor 6 Zone C, 8 Mint Walk, Croydon CR0 1EA

3.2 My instructions are to undertake an investigation into the status and extent of any public highway rights over the section of Hawkhurst Road, Kenley shown by a broken black line **A-B-C** on **Plan 1 [APP 1 pg. 1]**.

4.0 Consultant's Expertise

- 4.1 My name is Robin Carr. I am an independent consultant, specialising in Public Rights of Way and Highway matters. I am a Fellow of the Institute of Public Rights of Way & Access Management (IPROW), and a Registered Expert Witness.
- 4.2 My experience is based, most generally, on an expertise that has been developed over a thirty-year period as a Public Rights of Way & Highways practitioner.
- 4.3 I hold a post-graduate level certificate in Leisure Management from the Institute of Leisure and Amenity Management which was a dissertation-based management qualification which focussed on the "*Best Value*" in service delivery. I am also a former Treasurer and founding Director of the Institute of Public Rights of Way and Access Management (IPROW).
- 4.4 I have had papers published, on the subjects of: a) highway record management and b) rail crossing closures under the Transport and Works Act 1992, in the journal of the Institute of Public Rights of Way and Access Management. I also have a published Practice Guidance Note on Rights of Way Improvement Plans on the "LexisNexis" legal resource website.
- 4.5 Between 1987 and 2003 I was employed by a number of local authorities as a rights of way and highways practitioner, including six years at principal officer (management) level, during which time I was responsible for the management of the authority's statutory public rights of way functions as well as the maintenance of the authority's highway records.
- 4.6 Since 2003 I have worked as an independent consultant specialising in public rights of way and highway matters, and more specifically on matters relating to the existence, status and extent of public highways. In doing so I have prepared reports for various local authorities and private individuals, as well as giving evidence at local public inquiries, the Magistrates Court, County Court and High Court. I also represented Clients at local public inquiries, hearings and similar fora.
- 4.7 Since the mid-1990's I have been actively involved in the delivery of specialist training on public rights of way and highway issues. I have delivered training and CPD sessions to local authority staff and elected members, volunteers, government bodies (i.e. Natural England),

further education establishments (i.e. UCL Birkbeck) and the local government ombudsman. I was also invited to contribute towards the drafting and development of the Sheffield Hallam University MSc in public rights of way management.

5.0 Statement of Truth

5.1 I confirm that I have made clear which facts and matters referred to in this report are within my own knowledge and which are not. Those that are within my own knowledge I confirm to be true. The opinions I have expressed represent my true and complete professional opinions on the matters to which they refer. I understand that proceedings for contempt of court may be brought against anyone who makes, or causes to be made, a false statement in a document verified by a statement of truth without an honest belief in its truth.

PART TWO: BACKGROUND

6.0 Background

- 6.1 As mentioned above the Application Route has been shown within Croydon Council's highways records as a "Private Street" for a number of years, and has certainly been considered by the Council, and its predecessors as being of such status (i.e. a public highway of carriageway status that is maintainable at private expense).
- 6.2 In more recent years the status and extent of Section **B-C (on Plan 1 [APP 1 pg. 1])** of the Application Route has been challenged by local residents.
- 6.3 It is understood that on 21st April 2016 a number of local residents formed a Limited Company known as Hawkhurst Road Limited **[APP 2 pg. 2]** and that on 5th February 2018, The Company acquired the registered title to Section **B-C (on Plan 1 [APP 1 pg. 1])** of the Application Route **[APP 3 pg. 9]**.
- 6.4 Whilst various disputes and complaints have been lodged against the Council, some of which may still be ongoing, they are not matters for consideration as part of this report. However, on 11th September 2019 Hawkhurst Road Limited (the Applicants) submitted an application for a Definitive Map Modification Order seeking to record Section **B-C (on Plan 1 [APP 1 pg. 1])** of the Application Route as a Public Bridleway **[APP 4 pg. 12]**.
- 6.5 The Application **[APP 4 pg. 12]** was accompanied by thirteen User Evidence Forms **[APP 5 pg. 19 - 113]**; a Form CA16 Statement **[APP 7 pg. 115]**; a request that the Council's List of Streets be updated **[APP 8 pg. 122]**; a copy of a letter sent to Chris Philp MP dated 8th August 2019 **[APP 9 pg. 123]**; a written submission setting out the Applicants views and interpretation of various matters **[APP 10 pg. 141]**; and a copy of the Planning Inspectorate's Definitive Map Consistency Guidelines **[App 24 pg. 874-967]**.
- 6.6 A further 30 User Evidence Forms **[App 21 pg.386 - 801]** and supplementary submissions **[App 23 pg.804 - 873]** were subsequently submitted by the applicants.

6.7 Croydon Council has subsequently instructed Robin Carr Associates to assist them in undertaking the necessary investigations and interpretation of evidence etc. This report is the outcome of said investigations.

7.0 Legislative Context

7.1 Croydon 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 highways²; a duty to maintain those highways that are maintainable at public expense³; a duty to maintain a record (list) of all highways that are maintainable at public expense⁴; and a duty to maintain and continuously review the Definitive Map and Statement of Public Rights of Way⁵.

Highways - General

7.2 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.

7.3 Whilst topographical features may be attributed to, or provide evidence of, the existence of a public highway, the public right itself is not a physical entity, it is the right to pass and re-pass over (usually) private land.

7.4 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”⁶ 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.

² Highways Act 1980, Section 130

³ Highways Act 1980, Section 41

⁴ Highways Act 1980, Section 36

⁵ Wildlife and Countryside Act 1981, Section 53

⁶ *Harvey v Truro Rural District Council* (1903) 2 Ch 638, 644 and *Dawes v Hawkins* (1860) 8 CB (NS) 848, 858; 141 ER 1399, 1403

Types of Highway

7.5 As mentioned above, a highway is a way over which the public have a right to pass and re-pass. The nature and extent of the right (i.e. how it may be used) is dependent upon the specific type of highway status possessed by a given route.

Common Law

7.6 Under the common law there were, and indeed still are, only three types of highway. These are:

- Footpaths,
- Bridleways; and,
- Carriageways

7.7 The right to pass and re-pass on a public footpath is restricted to pedestrians with usual accompaniments (e.g. a pushchair).

7.8 The right to pass and re-pass on a public bridleway is restricted to pedestrians, horse riders (including people leading horses) and possibly the right to drive cattle.

7.9 The right to pass and re-pass on a public carriageway is open to all traffic, namely pedestrians, horse riders (including people leading horses), non-mechanically propelled and mechanically propelled vehicles.

Statute

7.10 Over time the legislature has brought into effect various statutes which restrict or extend the extent of use on certain types of highway. For instance, under the provisions of the Countryside Act 1968⁷ cyclists are granted a right to use bridleways. Other legislation provides for public carriageways to be subdivided into various categories which include motorways, cycle tracks, restricted byways and byways open to all traffic.

7.11 When determining the status of a specific route one must first consider the common law situation, and then apply any necessary restrictions to status imposed by statute in respect of

⁷ Countryside Act 1968, Section 30

restricted byways and byways open to all traffic. Motorways and cycle tracks can only be created by statutory order and are therefore not under consideration in this case.

How Highways Come into Being: Dedication and Acceptance

- 7.12 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”.

Section 31 of the Highways Act 1980

- 7.13 Section 31 of the Highways Act 1980 states:

“(1) Where a way over land, other than a way of such character that use of it by the public could not give rise at common law to any presumption of dedication, has been actually enjoyed by the public as of right and without interruption for a full period of twenty years, the way is deemed to have been dedicated as a highway unless there is sufficient evidence that there was no intention during that period to dedicate it.”

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

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

- 7.14 Section 31(1) has two ‘limbs’ the first provides that proof of twenty years continuous user “as of right” endorses a claim that a highway exists; the second (sometimes referred to as ‘the

proviso’) provides that proof of a lack of intention to dedicate the way as a highway defeats the claim. It is for those claiming the existence of rights to first discharge their burden of proof, before an objector is obliged to provide any evidence of lack of intention to dedicate.

Common Law

- 7.15 The establishment of highway rights under the common law is not bound by the “20-year rule” discussed above, with the courts having ruled⁸ that rights can be established in a very short period of time.
- 7.16 The common law position was described by Farwell J, and Slessor and Scott LJ in *Jones v Bates 1938*, both quoted with approval by Laws J in *Jaques v SSE 1994*, who described the former’s summary as *a full and convenient description of the common law*. Other leading cases that speak to dedication at common law are *Fairey v Southampton CC 1956*, *Mann v Brodie 1885* and *Poole v Huskinson 1843*. *Jaques* is a particularly helpful exposition on the differences between dedication at common law and under statute. Dyson J’s judgment in *Nicholson v Secretary of State for the Environment 1996* comments further on aspects of these differences.
- 7.17 Halsbury⁹ states – “Both dedication by the owner and user by the public must occur to create a highway otherwise than by statute. User by the public is a sufficient acceptance. And - An intention to dedicate land as a highway may only be inferred against a person who was at the material time in a position to make an effective dedication, that is, as a rule, a person who is absolute owner in fee simple; and At common law, the question of dedication is one of fact to be determined from the evidence. User by the public is no more than evidence, and is not conclusive evidence ... any presumption raised by that user may be rebutted. Where there is satisfactory evidence of user by the public, dedication may be inferred even though there is no evidence to show who was the owner at the time or that he had the capacity to dedicate. The onus of proving that there was no one who could have dedicated the way lies on the person who denies the alleged dedication”.

⁸ North London Railway Co v Vestry of St Mary, Islington (1872) 27 L.T. 672 – Dedication was found to have occurred within an 18-month period

⁹ Halsbury’s Laws of England (Volume 55 ‘Highways’)

7.18 The inference of dedication may arise in three ways:

- i) First, the inference may arise from the fact that the owner has done exactly what one would expect from any owner who intended to dedicate a new highway (e.g. express dedication). For example, in *North London Railway Co v Vestry of St Mary, Islington*¹⁰ the issue concerned a new bridge which the railway company had constructed alongside its newly opened Canonbury Station in Islington. The bridge was 50 feet wide and connected two existing streets on either side of the railway lines. Carriages used the bridge freely from the time it was completed, and a public taxi-cab rank had been established on part of the bridge. The Justices' conclusion that the way had been dedicated as a carriageway occasioned no surprise on the appeal to the Divisional Court, although the Justices had to decide the point when the bridge had been in use for only 18 months. In those circumstances, the fact that the company had put up barriers to prevent further use by carriages sometime after receiving notice of the proceedings before the Justices merely evoked the comment from Blackburn J. that "As to the erection of the barriers by the appellants, that was done too late to do away with the dedication".
- ii) Second, the inference has been 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 occurred¹¹.
- iii) Third, a dedication may be inferred from use and enjoyment by the public as of right, known by the owner and acquiesced in by him. The owner's recognition of the fact that the public is using the way as a highway may itself be a matter for inference, rather than clearly proven fact¹².

Natural Environment and Rural Communities Act 2006

7.19 Section 67(1) of the Natural Environment & Rural Communities Act 2006 extinguished, on commencement, public motor vehicular rights over every highway that is not already shown

¹⁰ (1872) 27 L.T. 672

¹¹ See e.g. *Williams Ellis v Cobb* [1935] 1 KB 310 (CA)

¹² See e.g. *Parker J in Webb v Baldwin and others* (1911) 75 JP 564 at p565

on the definitive map and statement, or is there shown as a footpath, bridleway, or restricted byway. In effect this means that public rights of way for mechanically propelled vehicles have been extinguished over every highway not already shown on the definitive map and statement as a byway open to all traffic.

7.20 In the absence of further qualification this provision would extinguish public rights of way for mechanically propelled vehicles over virtually the whole of the existing highway network. But subsection 67(2) introduces a series of exceptions to protect certain highways from such extinguishment under subsection 67(1). Any way that qualifies under any one, or more, of these exceptions would not have its public rights of way for mechanically propelled vehicles extinguished.

7.21 Because clause 67(1) explicitly extinguishes public motor vehicular rights over every highway that was not shown on 2nd May 2006 [in England] on the definitive map and statement as a byway open to all traffic, there is a clear presumption that this will be the case unless it can be shown that one (or more) of the five exceptions in subsections 67(2) or the transitional arrangements in subsection 67(3) apply.

A summary of the five exceptions

7.22 The five exceptions may be summarised as follows:

- *Subsection 67(2)(a)* excepts ways that have been lawfully used more by motor vehicles than by other users, e.g. walkers, cyclists, horse riders and horse-drawn vehicles, in the five years preceding commencement. The intention here is to except highways that are part of the 'ordinary roads network'.
- *Subsection 67(2)(b)* excepts ways that are both recorded on the "list of streets" as being maintainable at public expense and are not recorded on the definitive map and statement as rights of way. This is to exempt roads that do not have clear motor vehicular rights by virtue of official classification but are generally regarded as being part of the 'ordinary roads network'.
- *Subsection 67(2)(c)* excepts ways that have been expressly created or constructed for motor vehicles.
- *Subsection 67(2)(d)* excepts ways that have been created by the construction of a road intended to be used by mechanically propelled vehicles.

- *Subsection 67(2)(e)* excepts from extinguishment ways that had been in long use by mechanically propelled vehicles before 1930, when it first became an offence to drive 'off-road'.

7.23 Section 67(4) of the 2006 Act provides that where a public vehicular right existed but has now been extinguished by virtue of the provisions of the Act, a private right of way is retained, whether previously used or not.

Determining the Width of Highways

7.24 The 'highway' is not only the made-up strip (if such a strip exists at all), but also presumptively includes the margins to each side, between the fences/boundaries that enclose the highway. It is further understood that (in law) this presumption holds good unless it can be rebutted by other evidence, the evidence brought to rebut a presumption as to the width of a highway would have to be cogent to overturn the common law presumptions that are outlined below.

7.25 Halsbury's Laws state:

"At common law a highway may be of any width, but statutes such as the Inclosure Acts generally prescribe the width of highways to be set out in pursuance of their provisions. Apart from any special enactment, the width of a highway, that is the extent of land subject to the public right of passage, is a question of fact."

7.26 In cases where there is documentary evidence it may be possible to determine the width of the highway fairly readily, for example an Inclosure Awarded bridleway may be given a width of 8 feet and may still exist physically at that width between boundaries on the ground. Cases where there is no objective evidence as to width are more difficult to deal with, as are cases where the right of way has been encroached upon historically.

7.27 It is my understanding that the law has no concept of 'highway land': land is either highway, or not highway. If it is highway, then there is a right of passage over it. The purpose of enclosing any highway is to delineate the streetward private landholding from the public right of passage, *ergo* any land inside the enclosures is presumptively highway and the public has the right to pass and re-pass over it all. That the public chooses not to, or that circumstance persuades or constrains them not to, does not in any way diminish their right to pass over the

entire width “*at their own free will and pleasure*”, by any lawful mode, and to enforce that right against any encroachment or neglect of duty¹³.

- 7.28 If a highway runs between fences/walls/hedges the presumption is that the whole area between these has been dedicated to the public¹⁴ provided that the fence/wall/hedge was laid out by reference to the highway¹⁵, i.e. the evidence suggests that the purpose of erecting the fences/walls/hedges was to delineate the highway. This is often referred to as the “*hedge-to-hedge*” or “*boundary-to-boundary*” presumption. The presumption will be overturned if there is evidence that the fences/walls/hedges were not set out with reference to the highway¹⁶.
- 7.29 If the boundary-to-boundary presumption cannot be applied, or if it is rebutted, and the highway in question is a surfaced or constructed track/road there may be a reasonable presumption that highway rights extend over the full width of the surfaced track¹⁷.
- 7.30 Where a track or lane exists it may also be reasonable to argue that, even though there may only be private vehicular rights, in the absence of any evidence to the contrary, the owner has at some time dedicated public rights over the whole space involved. There is a prima facie presumption to this effect¹⁸.
- 7.31 In the absence of any evidence of physical boundaries, one would need to establish the width of the highway which has, as a matter of evidence been habitually used by the public. Where the way is defined on the ground by a well-worn track, and where no other boundaries are apparent, it will be presumed that the track defines the extent of the way. If no evidence exists as to a track or boundaries, then the presumption would be that the way is a “*strip of reasonable width*”¹⁹. In the case of a footpath, it may be argued that this would be a strip, which is sufficient for two walkers to pass. The difficulty then presented is to define what is reasonable as an actual measure to be prescribed in any particular case.

¹³ Foy v. Hertfordshire County Council - The Times 4th May 1990

¹⁴ Harvey v Truro District Council 1903

¹⁵ Attorney General v Benyon 1969

¹⁶ Hale v Norfolk County Council 2001

¹⁷ Easton v Richmond Highway Board (1871) LR7QB69, Elwood v Bullock (1844) 6QB383 at 409

¹⁸ A-G v Esher Linoleum Co Ltd 1901

¹⁹ Secretary of State for Defence v Percy 1998

Other Considerations

7.32 In reaching a conclusion (under both the common law or Section 31 of the 1980 Act) the decision-maker must take into account Section 32 of the Highways Act 1980, which states:

“A court or other tribunal, before determining whether a way has or has not been dedicated as a highway, or the date on which such dedication, if any, took place, shall take into consideration any map, plan or history of the locality or other relevant document, which is tendered in evidence, and shall give weight thereto as the court or tribunal considers justified by the circumstances, including the antiquity of the tendered document, the status of the person by whom and the purpose for which it was made or compiled, and the custody in which it has been kept and from which it is produced.”

Standard of Proof

7.33 The standard of proof that applies to cases of this nature is the civil test of the balance of probabilities.

PART THREE: SUMMARY OF EVIDENCE

8.0 Summary of User Evidence

8.1 The Application [APP 4 pg. 12] was initially supported by thirteen user evidence forms [APP 5 pg. 19 - 113] claiming use over a thirty-four-year period (1985 – 2019). Key points in the user evidence forms [APP 5 pg. 19 - 113] are summarised in the table below, with a further “User-Graph” at APP 6 pg. 114

Name	Resident of Hawkhurst Road	Years Used	Foot	Cycle	Horse	Motor Vehicle	In exercise of Private Rights	Comments
	✓	2009 – 2019	✓	✓			✓	“Private” and “No Through Road” signs present. Structures/items within verges Locked Gate at southern end of application route (point C)
	✓	2009 – 2019	✓	✓			✓	“Private” and “No Through Road” signs present. Structures/items within verges Locked Gate at southern end of application route (point C)
	✓	1985 - 2019	✓				✓	Structures/items within verges
	✓	2010 - 2019	✓	✓			✓	“Private” and “No Through Road” signs present. Structures/items within verges Locked Gate at southern end of application route (point C)
	✓	2004 - 2019	✓				✓	Private Road/No through Route sign Barriers at southern end of application route (Point C)
	✓	2004 - 2019	✓				✓	
	✓	2003 - 2019	✓	✓			✓	Private Road/No through Route sign
	✓	2003 - 2019	✓	✓			✓	Private sign and locked gate at southern end of application route (Point C)
	✓	1985 - 2019	✓				✓	Barrier at southern end of application route (Point C)
	✓	2002 - 2019	✓	✓			✓	Locked Gate Private Road/No through Route sign
	✓	2002 - 2019	✓				✓	Locked gate at entry way to aerodrome Private Road/No through Route sign
	✓	2002 - 2019	✓	✓			✓	Locked Gate Private Road/No through Route sign
	✓	2010 - 2019	✓	✓			✓	Barrier at southern end of application route (Point C) Private Road/No through Route sign

8.2 The additional user evidence forms [APP 21 pg. 386 - 801] claim use over a thirty-four-year period (1985 – 2019). The forms include a preamble setting out the Applicant’s interpretation of the issue and includes some leading information regarding status and signage etc. Key points in these user evidence forms are summarised in the table below, with a further “User-Graph” at APP 22 pg. 802-803

Name	Resident of Hawkhurst Road	Years Used	Foot	Cycle	Horse	Motor Vehicle	In exercise of Private Rights	Comments
	X	2013 - 2019	✓				✓	Occasional use on foot, and extended periods of non-use
	X	2002 - 2019	✓					Was told route was not public
	X	2012 - 2019	✓	✓				Monthly on foot, once a year on a bicycle
	X	2015 - 2019	✓				✓	Occasional use to visit family
	X	2013 - 2019	✓				✓	Monthly on foot to access son’s house and was given permission to use the route
	✓	2000 - 2019					✓	Access to property
	✓	2000 - 2019					✓	Access to property
	X	1985 - 2019	✓	✓			✓	Both uses weekly visiting residents of Hawkhurst Road and access to the Common
	X	2002 - 2019	✓	✓			✓	On foot monthly, and on cycle every few months visiting family
	?	2013 - 2019	✓				✓	Monthly to access Hawkhurst Cottage and also the airfoiled to walk dogs
	X	2005 - 2019	✓					Use on foot every few month – resident of Wildwood Court
	?	1995 - 2019	✓				✓	Every few months for visit friends who live on Hawkhurst Road and was given permission
	X	1985 - 2019	✓				✓	Monthly on foot to visit relative on Hawkhurst Road
	X	1985 - 2019	✓				✓	Monthly on foot to visit friend living in Hawkhurst Road
	X	1994 - 2019					✓	To access property
	X	2013 - 2019	✓				✓	Every few months to visit family and to walk in the woods
	X	2015 - 2019	✓					Weekly walking to the air field. `Was told it was not public

Name	Resident of Hawkhurst Road	Years Used	Foot	Cycle	Horse	Motor Vehicle	In exercise of Private Rights	Comments
	X	2013 - 2019					✓	To visit family and walk in the woods. Was told it was not public
	X	1985 - 2019					✓	To visit family who live of Hawkhurst Road. Was told it was not public, and was given permission
	X	1995 - 2019	✓				✓	Monthly visits to friend who lived on Hawkhurst Road. Was told it was not public and was given permission
	X	2012 - 2019	✓				✓	Weekly when training and to visit friend living on Hawkhurst Road. Was told it was not public and was given permission
	X	2016 - 2019	✓				✓	Used one a year on foot. Was told it was not public and was given permission
	X	2014 - 2019	✓				✓	Used every few months on foot. Was given permission.
	X	2019	✓					Walking. Was told the route was not public
	X	2017 - 2019	✓					Walking with friends. Was told the route was not public
	X	2014 - 2019	✓				✓	Delivering Post
	X	2016 - 2019	✓					Every few months walking. Was told the route was not public
	X	2013 - 2019	✓				✓	Monthly on foot to visit people and walk to the airfield. Was told the route was not public
	X	2005 - 2019	✓	✓			✓	Monthly on foot and every few months on a bicycle to visit friend as exercise
	X	2013 - 2019	✓					On foot monthly dog walking. Was told the route was not public

9.0 Summary of Documentary Evidence

9.1 Within this section of the report I seek to objectively describe the documents under consideration without going into detailed matters of interpretation, which I deal with later.

Sales Particulars [APP 11]

9.2 The 1863 Sales particulars [APP 11 pg. 164 - 168] refer to the sale of the Kenley House Estate in June 1863. No reference is made to the Application Route. The accompanying plan [APP 11 pg. 168] shows that the Application Route did not physically exist over that part of the Kenley House Estate that the time.

9.3 The 1902 Sales plan [APP 11 pg. 169] shows that the Application Route had been set out and named as Hawkhurst Road. A number of building plots are shaded in pink/red on the plan as fronting onto the Application Route. The Application Route is not included within any of the plots that are shown for sale.

9.4 The 1922 Sales particulars [APP 11 pg. 171 - 180] refer to the sale of Kenley Estate and "Aldercombe" Caterham in June 1922. Item 12 of the sales conditions states "*Every purchaser of land abutting on the Welcome Road, Hermitage Road, Longwood Road or Hawkhurst Road shall from time to time on demand pay to the vendor the cost of keeping so much of the footpath and of one half of the width of such part of those roads as lies by the side of the land purchased, in proper and sufficient repair until the said roads and footpath shall be taken over by the Local Authority, the amount to be ascertained by the vendor's surveyor for the time being, whose certificates shall be conclusive.*". The accompanying plan [APP 11 pg. 172 - 173] shows that the Application Route has been physically set out, but is not included within the sale.

9.5 The 1934 Sales particulars [APP 11 pg. 181 - 191] refer to the sale of 42 acres of choice building land at Kenley in May 1934. The "Special Notes" in the sales particulars define Hawkhurst Road as a "Private Road". The accompanying plan [APP 11 pg. 182] shows the Application Route, with its continuation beyond Point C (on Plan 1 [APP 1 pg. 1]) colour-washed in brown.

1910 Finance Act Records [APP 12]

- 9.6 The 1910 Finance Act Index Plan uses an Ordnance Survey (25-Inches to one mile) County Series plan as its base map. The Application Route, and part of its continuation to the south, is shown edged in red and is excluded from the valuation of the surrounding land holdings.

Ordnance Survey Maps [APP 13]

- 9.7 A range of Ordnance Survey Maps dating from 1871 to 1967 have been consulted. The 1897 25 Inch County Series map [APP 13 pg. 203 - 205] shows that the Application Route did not physically exist at the date of its survey. The 1913 25 Inch County Series map [APP 13 pg. 206 - 208] shows that the Application Route has been set out by this time and was more substantial in proportion than many of the surrounding older acknowledged public roads. Later maps continue to show the Application Route but that by the second half of the Twentieth Century the southern part of Hawkhurst Road (beyond Point C on Plan 1 [APP 1 pg. 1]) appears to be less well defined.
- 9.8 The larger scale maps suggest the character of the route is that of a carriageway with verges in parts. The base map used the 1910 Finance Act Index Map [APP 12 pg. x192 indicates Guide Posts (G.P.) at Points A and C on Plan 1 [APP 1 pg. 1].
- 9.9 Using online mapping and measuring tools²⁰ it has been possible to measure the width of the Application Route between the physically mapped boundary features.

Local Byelaws [APP 14]

- 9.10 I have been provided with two sets of local authority bylaws dating 1912 [APP 14 pg. 215 - 219] and 1926 [APP 14 pg. 220 - 228] each of which specify the requirements for the setting out of streets within the area. Subject to certain exceptions streets are to be set out as carriageways, and have a width of 42 feet, or 36 feet if the buildings on the streets are to be at least 30 feet from the centre of the street.

²⁰ National Library for Scotland

1930 Town Planning Scheme [APP 15]

- 9.11 The plan [APP 15 pg. 237 - 242] attached to the 1930 Town Planning Scheme documents shows the Application Route defined as an “Existing Highway over which the public have a right of way (other than main roads and roads maintainable by the inhabitants at large)” and identifies a proposed widening scheme in the vicinity of Point C on Plan 1 [APP 1 pg. 1].

Building Notices [APP 16]

- 9.12 The 1900 Building Notice [APP 16 pg. 244 - 248] includes a plan (Plan 1563) which shows the first section of the Application Route in the vicinity of Point A on Plan 1 [APP 1 pg. 1]. It is defined as a “New Road” and appears to be set out, or proposed to be set out as a carriageway with verges or footways on each side.
- 9.13 The 1930’s Building Notice [APP 16 pg. 249 - 251] and the 1931 Building Notice [APP 16 pg. 252 - 254] both include plans which show the Application Route, but not in any level of detail.

1937 Private Street Works Scheme [APP 17]

- 9.14 The 1937 Private Street Works Plan [APP 17 pg. 255] shows proposals by the local Highway Authority to undertake works to improve the Application Route and bring it up to a standard to enable it to be “Adopted” as a publicly maintainable highway. It is understood that the scheme was never undertaken.

Committee Minutes [APP 18]

- 9.15 Rural District Council Committee Minutes from 1937-38 [APP 18 pg. 256 - 274] record discussions and decisions arising from the proposed Private Street Works scheme for Hawkhurst Road.
- 9.16 Minutes from Committee meetings in 1962 [APP 18 pg. 275] indicate that the Highway Authority declared the Application Route a prospectively maintainable highway.

Highway Authority Records [APP 19]

- 9.17 The Definitive Map and Statement for the area [APP 19 pg. 281 – 306] do not record the existence of public rights over any part of Hawkhurst Road.
- 9.18 The extract of the digitalised highway record map [APP 19 pg. 276] that I have been provided with depicts the Application Route in a manner that I am advised is used to depict “Private Streets” (i.e. Public highways that are not maintainable at public expense)
- 9.19 Other Highway record lists [APP 19 pg. 277 – 280] record Hawkhurst Road as being “Unadopted”.

Registered Title Documents [APP 20]

- 9.20 Copies of the Registered Title of properties adjoining and served by the Application Route have been consulted and none of them have any recorded access rights over Hawkhurst Road.

PART FOUR: CONSIDERATION OF USER EVIDENCE

10.0 General Considerations

10.1 Definitive Map Modification Orders do not extinguish or create any public rights of way, they simply seek to update the legal records to reflect the true and existing situation. As a result, issues such as desirability, suitability, need, property values and even public safety are not matters that can lawfully be considered as part of the decision-making process.

10.2 It should be noted that I am considering the issue of dedication arising from modern use, under Section 31 of the Highways Act 1980, at this stage in my report because it is the case relied upon by the Applicants. If the documentary evidence indicates that public highway rights, of a higher status than those asserted in the user-based case, were established at some earlier time, then the principal of *“Once a Highway, Always a Highway”* will take precedent, and potentially negate the later user-based case.

10.3 The Applicant’s case is predominantly a “user-evidence” based case. Before considering the interpretation of the user evidence, it is perhaps useful to deal with the other documents submitted with the Application, namely²¹:

- a) the Form CA16 Statement [**APP 7 pg. 115 - 121**];
- b) the request that the Council’s List of Streets be updated [**APP 8 pg. 122**];
- c) the copy of a letter sent to Chris Philp MP dated 8th August 2019 [**APP 9 pg. 123 - 140**];
- d) the written submission setting out the Applicants views and interpretation of various matters [**APP 10 pg 141 - 163**];

Form CA16 Statement [**APP 7**]

10.4 The Commons (Registration of Town or Village Greens) and Dedicated Highways (Landowner Statements and Declaration) (England) Regulations 2013 introduced Form CA16 as the means of the submission of depositions pursuant to Section 31(6) of the Highways 1980. This is a

²¹ I have not included the Planning Inspectorate’s Definitive Map Consistency Guidelines in this list/commentary because this is an external publication which provided some guidance on the interpretation of evidence etc. The document has not been reviewed or updated for a number of years; and is known to contain some errors and outdated information. Notwithstanding this it does still remain a useful reference document.

means by which a landowner can demonstrate a lack of intention to dedicate any public rights over the land covered by the deposition. Its origins date back as far as the Rights of Way Act 1932.

- 10.5 As with the original Highways Act 1980, Section 31(6) process, Form CA16 requires the completion of a two-part process before it comes fully into effect. The first part of the process is the completion and submission of a “Statement” after which a subsequent “Declaration” must be completed and submitted. It is only once the “Declaration” is submitted that the “Statement has the effect of negating any presumption of dedication.
- 10.6 It should be noted that these documents do not have retrospective effect, which means that they do not negate or extinguish any public rights which may have come into being prior to their submission.
- 10.7 In this particular case the Form CA16 “Statement” **[APP 7 pg. 116]** was submitted on 26th November 2018 but the subsequent “Declaration” does not appear to have been submitted. If this is the case the “Statement” will not have come into effect. The Applicants do not however appear to be relying upon Form CA16 **[APP 7 pg. 115 - 121]** as evidence of any lack of intention to dedicate, but instead as evidence of the intention to dedicate Section **B-C (on Plan 1 [APP 1 pg. 1])** of the Application Route as a Public Bridleway.
- 10.8 The Form CA16 “Statement” **[APP 7 pg. 115 - 121]** may certainly be considered, under the common law, to be evidence of the intention of the landowner as of 26th November 2018, and such intention may reasonably be inferred to stretch back as far as 5th February 2018 when the Applicants purchased the land **[APP 3 pg. 9 - 11]**. It cannot have any earlier effect, nor does it negate the need for there to be evidence of acceptance of the dedication by the public. This would usually be demonstrated by evidence of use by “the public”, which is of a nature that may be defined as being “as of right”. The nature of the user evidence **[APP 5 pg. 19 - 113]** and its application under both Section 31 of the Highways Act 1980, and at Common Law are discussed below.

Request that the Council's List of Streets be updated [APP 8]

- 10.9 Section 36 of the Highways Act 1980 requires the Highway Authority to maintain a list of all “streets” within its area that are maintainable at public expense. This basically means that any highway²² that is maintainable at public expense should be recorded within the “List”. Whilst this is, in principal, relatively straight forward, these records are often misinterpreted as being a record of all public highways. This is not the case. There are a whole range of public highways which are not maintainable at public expense, and as such are not required to be included in the “List of Streets”. Such routes are known as “Private Streets”. This does not, in any way diminish their public highway status, it means they are privately maintainable public highways.
- 10.10 In common with many Authorities, Croydon Council includes “Private Streets” on its highway records as well as the highways that are maintainable at public expense. This is quite understandable since it provides a more transparent record of public highway rights rather than just concentrating on maintenance liability.
- 10.11 The issue of whether a highway is maintainable at public expense will depend upon a number of factors, including, but not restricted to, the date at which the public highway rights came into being. This is considered within Part Seven of this report.

Copy of a letter sent to Chris Philp MP dated 8th August 2019 [APP 9]

- 10.12 This letter sets out the various views and opinions of the author on a whole range of complaints and related issues. Whilst a lengthy document it offers little or nothing in terms of evidence regarding the matters under consideration within this report.
- 10.13 The only piece of information which may be of assistance in the interpretation of the user evidence are the comments in Section 3.1 which refer to the private rights of access to properties. If such rights do exist, then they will negate any user evidence submitted by residents of Hawkhurst Road.

²² Footpath, Bridleway, Restricted Byway, Byway Open to All Traffic, Cycleway or All Purpose Carriageway

The written submission setting out the Applicants views and interpretation of various matters
[APPs 10 & 23]

10.14 These documents are not so much evidence as submissions setting out the author's own views and interpretation of various matters. As such it is of limited assistance in this case. The only pieces of information which may be of assistance in the interpretation of the user evidence are the comments at paragraphs 20, 27, 35, 36, 42, 69 and 82 **[APP 10]** which allude to the private rights of access to properties. If such rights do exist, then they will negate any user evidence submitted by residents of Hawkhurst Road.

11.0 Consideration under the Highways Act 1980, Section 31 (Presumption of Dedication)

Character of the Way

11.1 The Application **[APP 4 pg. 12 - 18]** only seeks to record public bridleway rights over Section **B-C (on Plan 1 [APP 1 pg. 1])**. Given that the Applicant disputes the "Private Street" status of Hawkhurst Road on the Council's records, and that no public rights are recorded on the Definitive Map beyond Point **C (on Plan 1 [APP 1 pg. 1])**, this leaves the Application Route **(B-C on Plan 1 [APP 1 pg. 1])** with no apparent points of public terminus. As a result, such a route would not be of a character that would be capable of being defined as a public highway of any description, even though the Applicant (the owner of the land crossed by Section **B-C (on Plan 1 [APP 1 pg. 1])** asserts that bridleway rights subsist.

11.2 The Order Making Authority is, of course, obliged to determine the Application by reference to the evidence and not the Application itself. Amongst other things, this avoids the situation whereby an Application may fail due to a lack of understanding or knowledge on the part of an Applicant. Consideration of whether public rights have been established, as a result of modern public use under Section 31 of the Highways Act 1980, should therefore be undertaken for the route shown **A- B-C (on Plan 1 [APP 1 pg. 1])** as this links the Application Route to an acknowledged public carriageway.

11.3 If the above approach is adopted, it still potentially leaves the Application Route **(A- B-C on Plan 1 [APP 1 pg. 1])** as a cul-de-sac terminating at Point **C (on Plan 1 [APP 1 pg. 1])**. There is nothing (in law) which prevents a highway being a cul-de-sac although there is general

presumption against cul-de-sacs, especially in more rural settings. In this case it is possible that public rights also subsist over the continuation of Hawkhurst Road and/or Longwood Road, but such considerations are outside the scope of this report²³.

- 11.4 Taking all matters into consideration it would be reasonable to conclude that the Application Route **A- B-C (on Plan 1 [APP 1 pg. 1])** is of a character that is compatible with it being a public right of way.

Date of Bringing into Question & Relevant Twenty-Year Period

- 11.5 Before Section 31(1) of the Highways Act 1980 can take effect there must be an event which brings into question the existence of the public's right to use a way, and such an event must be of such magnitude as to bring it home to the public that their right to use the way is being challenged, thus allowing them the opportunity to respond (e.g. in modern times, submit a DMMO application). If no such event can be identified, then the date of the submission of an application for a Definitive Map Modification Order may be used instead.
- 11.6 There does not appear to have been any obvious events which would qualify as a "bringing into question" for the purposes of Section 31 of the Highways Act 1980, and despite substantial submissions on a range of matters, the Applicants have not identified any date upon which they seek to place reliance.
- 11.7 The earliest references to disputes and complaints appear to arise circa 2015 when problems arose with travellers, and then there are later references to disputes over alleged obstructions and nuisances within the alleged boundaries of the alleged highway. Later events include the advertising of the Form CA16 "Statement" **[APP 7 pg. 115 - 121]** which is understood to have taken place sometime around March 2019, and finally the submission of the application for the Definitive Map Modification Order **[APP 4 pg. 12 - 18]** in September 2019. If the earliest of these dates is taken, then the requisite twenty-year period would be 1995 – 2015, or if the Application **[APP 4 pg. 12 - 18]** is used the requisite period will be 1999 – 2019.

²³ Following the drafting of this report, I have been asked to prepare a supplementary report examining the status of the continuation of Hawkhurst Road and/or Longwood Road

Use by the "Public"

- 11.8 Section 31(1) of the Highways Act 1980 requires evidence of actual use by members of the public. Use cannot be restricted to a closed sector of the community, or such a small number of people that it cannot be considered to be representative of the public at large.
- 11.9 All of the user evidence forms in this case provide evidence of use of Section B-C (on **Plan 1 [APP 1 pg. 1]**). Such use cannot however have taken place in isolation, for instance they must have used Section A-B (on **Plan 1 [APP 1 pg. 1]**) to then proceed between Points B & C (on **Plan 1 [APP 1 pg. 1]**) or their properties. The evidential assessment has therefore been conducted on the basis that witnesses have used the whole Application Route (A-B-C on **Plan 1 [APP 1 pg. 1]**).
- 11.10 An assessment of the user evidence submitted with the Application [**APP 5 pg. 19 - 113**] reveals that everyone who completed a user evidence form is a resident of the Application Route itself. They are not therefore a representative cross section of the public, and would be considered to be a closed section of the community. For this reason, in my opinion, the user evidence is not acceptable for the purposes of Section 31 of the Highways Act 1980.
- 11.11 The supplementary user evidence forms [**APP 21 pg. 386 - 801**] have been provided via an electronic platform via Google. The forms include a preamble setting out the Applicant's views and additional information is included within the questionnaire which again leads the witness towards the conclusions the Applicant wishes. The form is far from impartially prepared and by and large only allows for quantitative as opposed to qualitative input. This inevitably has an effect on the interpretation of this evidence.
- 11.12 The majority of the witnesses [**APP 21 pg. 386 - 801**] provide evidence of use which is attributable to the exercise (at least in part) of private rights to access property when visiting friends or family. They may not therefore fall within the category of the general public. Furthermore, there is very little evidence of use that may be considered supportive of bridleway status, with most users claiming use only on foot.
- 11.13 Whilst there is no requirement for any user witness to have used the Application Route for a full period of twenty years the user-graph [**APP 5 pg. 19 – 113 & APP 22 pg. 802-803**]

shows only minimal evidence of use during the earlier part of the relevant periods. This may raise an issue with sufficiency of use over these earlier periods.

Use that is "As of Right"

11.14 For use to be considered to be "as of right" it must be without force, without secrecy and without permission. Such use may be described as being trespassory in its nature.

11.15 As mentioned above an assessment of the user evidence [**APP 5 pg. 19 – 113 & APP 21 pg 386 - 801**] reveals that the vast majority of the user witnesses are either residents of the Application Route or their friends and family. In addition, many of the users claim use of the Application Route is in the exercise of private rights or permissions that they have been granted. If this is correct, then their use would be of a nature that would be defined as being "by right" (i.e. in the exercise of an existing right) rather than "as of right". For this reason, in my opinion, the user evidence is not acceptable for the purposes of Section 31 of the Highways Act 1980.

Use "without Interruption"

11.16 Interruption within the meaning of Section 31 of the Highways Act 1980 means actual interruption with the intent of preventing the establishment or the acquisition of public rights (e.g. locking a gate at night for the purposes of preventing sheep escaping from a field would not constitute an interruption to use).

Interim Conclusion

11.17 Taking all relevant matters into consideration, it is my opinion that the user evidence is not representative of use of the Application Route by members of the public. It is more akin to use by a closed section of the community (i.e. residents of Hawkhurst Road). Furthermore, the nature of the use is more in keeping with the exercise of private rights (i.e. use "by right") rather than use which may be defined as being "as of right". As a result, I do not consider that the user evidence [**APP 5 pg. 19 – 113 & APP 21 pg. 386 - 801**] is sufficient to give rise to a prima facie presumption of dedication pursuant to Section 31 of the Highways Act 1980.

Evidence of Lack of Intention to Dedicate

11.18 Whilst I have concluded above that the Applicants have failed to produce evidence which gives rise to any presumption of dedication pursuant to Section 31 of the Highways Act 1980, I

should still consider it expedient to consider whether there is any evidence which may demonstrate a lack of intention to dedicate public rights.

- 11.19 In this context I should clarify that even if the user evidence [**APP 5 pg. 19 – 113 & APP 21 pg. 386 - 801**] had been sufficient to give rise to a presumption of dedication, that presumption could still be overturned if there was evidence that during the requisite twenty-year period the landowner, or any person acting on their behalf, had carried out sufficiently overt acts, directed at actual users of the way, which conveyed the landowners lack of intention to dedicate public rights.
- 11.20 Within their user evidence forms the user witnesses refer to signs stating: “Private Road” and “No through Road” signs in the vicinity of No 19 Hawkhurst Road (near to Point **B** on **Plan 1 [APP 1 pg. 1]**). No information has been provided over when these signs were erected but there are some suggestions that they have been in place for up to 10 years. The “No through Road” sign is of little assistance in this matter. The “Private Road” sign may be considered evidence of a lack of intention to dedicate public rights for vehicles, but only if it was erected prior to any dedication taking place.
- 11.21 Witnesses also refer to a locked gate at Point **C** (on **Plan 1 [APP 1 pg. 1]**). This gate would prevent use by vehicles beyond Point **C** (on **Plan 1 [APP 1 pg. 1]**) but not other users who can still gain access around the side. The gate would however only really serve to demonstrate a lack of intention to dedicate vehicular rights over the Application Route to those approaching from the south. It would have little or no impact for those approaching from the north because they would have to use the Application Route before reaching the gate (Point **C** (on **Plan 1 [APP 1 pg. 1]**)).
- 11.21 A number of witnesses [**APP 21 pg. 386 - 801**] also claim that they were told that the Application route was not public, however no information has been provided as to who told them this or when.
- 11.22 Finally, there is the Form CA16 “Statement” [**APP 7 pg. 115 - 121**] that the Applicants submitted with their Application. Whilst the “Statement” has been submitted, I am not aware, as of the date of this report, that the landowners have followed this up with the required

“Declaration”. If this is the case the Form CA16 “Statement” does take effect and does not therefore constitute evidence of any lack of intention to dedicate.

12.0 Consideration of User Evidence Under the Common Law (Implied Dedication)

- 12.1 It should be noted that I am considering the issue of dedication arising from modern use, under the Common Law, at this stage in my report because it is the case relied upon by the Applicants. If the documentary evidence indicates that public highway rights, of a higher status than those asserted in the user-based case, were established at some earlier time, then the principal of “*once a highway, always a highway*” will take precedent, and potentially negate the later user-based case.
- 12.2 Under the Common Law dedication may be implied over a relatively short period of time, depending on the facts of the individual case. Furthermore, the onus rests with those asserting that public rights subsist to discharge the burden of proof.
- 12.3 In this particular case, it is clear that the owners of the land (since 2018) consider that Section **B-C** (on **Plan 1 [APP 1 pg. 1]**) of the Application Route is a public bridleway, and have to all intent and purposes expressly dedicated it as such. Such dedication could only take place within the period of the current owner’s tenure (post 2018); and is still subject to evidence. The event which may be considered to be evidence of dedication would be the completion of the Form CA16 **[APP 7 pg. 115 - 121]** In November 2018.
- 12.4 Dedication is however only one half of the equation. It is also necessary to demonstrate acceptance by the public. This would usually be demonstrated by evidence of use by the public in a manner that would be defined as being “as of right”. As discussed above, in reference to any presumption of dedication pursuant to Section 31 of the Highways Act 1980, the user evidence that has been submitted is not considered to be representative of use by the public, nor is it of a nature that would be defined as being “as of right”. Any implied dedication may be further thwarted by the fact the majority of the user evidence pre-dates the act from which dedication may be implied. In my opinion the act of “acceptance” must follow the act of “dedication”, in other words the public cannot accept something before it is offered.

12.5 In view of the above considerations, it is my opinion that, as of the date of the Application **[APP 4 pg. 12 - 18]** (11th September 2019), public bridleway rights cannot be said to have been established under Common Law as a result of modern use. It is, of course, possible that such rights may come into being at some point after September 2019 if “acceptance” by the public can be adequately demonstrated, but I have not seen any evidence to suggest that this has occurred. I must, of course, again stress that this would only be the case if public bridleway or higher public rights are not shown to have come into being at some earlier date.

CONSIDERATION OF DOCUMENTARY EVIDENCE

13.0 General Considerations

- 13.1 As discussed in reference to the user evidence, Definitive Map Modification Orders do not extinguish or create any public rights of way, they simply seek to update the legal records to reflect the true and existing situation. As a result, issues such as desirability, suitability, need, property values and even public safety are not matters that can lawfully be considered as part of the decision-making process.
- 13.2 The consideration of the evidence may be considered analogous to piecing together a jigsaw, where each document (or piece of evidence) is an individual piece of the jigsaw. It is only when all of the pieces are put together that the true picture can be seen, albeit it does not necessarily require every piece to be in place.
- 13.3 The approach to considering the evidence was also considered in *R v Exall and Others* (1866) 4 F & F 922: *"It has been said that circumstantial evidence is to be considered as a chain, and each piece of evidence as a link in the chain, but that is not so, for then if any one link broke the chain would fall. It is more like the case of a rope composed of several cords. One strand of a cord might be insufficient to sustain the weight, but three stranded together maybe of quite sufficient strength."* Whilst "*Exall*" was a criminal case, requiring a higher standard of proof (beyond reasonable doubt) there is no reason why the same principles cannot be applied to the consideration of evidence in a civil matter with the lower (balance of probability) test being applied. The analogy points to the consideration of the totality of the evidence and that a sustainable conclusion can still be drawn if some evidence is contradictory.
- 13.4 At the end of the day, the civil test of the balance of probability is to be applied when considering the evidence, however at this stage of the process Section 53(3)(c)(i) of the Wildlife and Countryside Act 1981 provides that an Order should be made upon the discovery of evidence which (when considered with all other relevant evidence) shows that a right of way which is not shown in the map and statement subsists or is reasonable alleged to subsist.

13.5 The lower (reasonable allegation) test is all that needs to be applied at this time. In *R (Roxlena Ltd) v Cumbria County Council [2019]* the Court of Appeal 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 satisfactorily sustained when the Order comes to be confirmed, but that does not mean an Order cannot be lawfully made at this juncture.

13.6 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.

14.0 Comments on Documentary Evidence

Sales Particulars [APP 11]

14.1 Property sales particulars rarely include express details regarding public highways, because they are not a particularly saleable item. In fact, it is the inclusion/exclusion of routes from the land and plots that are subject to sale that are perhaps of greatest value.

14.2 The 1863 Sales particulars [**APP 11 pg. 164 - 168**] assist in this case simply by confirming that the Application Route had not been set out at this time. In a similar respect the 1902 Sales plan [**APP 11 pg. 169**] shows that the Application Route had been set out and named as Hawkhurst Road but is not included within any of the plots that are shown for sale. We therefore know from these documents that the Application Route had been physically set out by 1902, and did not form part of the land subject to the sale.

14.3 The 1922 Sales particulars [**APP 11 pg. 171 - 180**] refer to maintenance arrangements that are to be in place until such a time as the road as taken over by the Local Authority. When considering such a provision it must be understood that before a road can be “taken over by the local authority” (i.e. the highway authority takes over responsibility for maintenance), it must first have been dedicated as a public highway. In my opinion, this would suggest that by 1922 the Application Route was already considered to be subject to public highway rights, but that maintenance liability had not been accepted by the local highway authority.

14.4 The 1934 Sales particulars **[APP 11 pg. 181 - 191]** do, of course, define Hawkhurst Road as a “Private Road” but this must be treated with caution. The reference to “Private” may refer to maintenance liability only. Furthermore, the documents must not be considered in isolation, they must be considered along with all other available and relevant evidence.

1910 Finance Act Records **[APP 12]**

14.5 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.

14.6 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.

14.7 The interpretation of such documents was considered in some detail at paragraphs 65-80 in the judgement in “*Fortune & Ors v Wiltshire Council & Anor [2012] EWCA Civ 334*” where it was confirmed that, when considered alongside other available and relevant evidence, the exclusion of a way from valuation was not only good and strong evidence of public highway status, but that it was also most likely supportive of public carriageway status.

14.8 At paragraph 11.7 of The Planning Inspectorate’s Definitive Map Consistency Guidelines **[APP 21]** the following advice is provided on the matter of interpretation of these records:

“11.7 Working copies of the plans are normally found in Local Record Offices. Most final record plans are in the National Archive. They are based on large-scale Ordnance Survey plans. The 1910 Act required all land to be valued, but routes shown on the base plans which correspond to known public highways, usually vehicular, are not normally shown as included in the hereditaments [my emphasis], i.e. they will be shown uncoloured and unnumbered. It is possible, but by no means certain, that this is related to s.35(1) of the Act: No duty under this

*part of the Act shall be charged in respect of any land or interest in land held by or on behalf of a rating authority. The practice would also be compatible with s.25(3) which states that The total value of land means the gross value after deducting the amount by which the gross value would be diminished if the land were sold subject to... any public rights of way. **So if a route in dispute is external to any numbered hereditament, there is a strong possibility that it was considered a public highway, normally but not necessarily vehicular, since footpaths and bridleways were usually dealt with by deductions recorded in the forms and Field Books [my emphasis];** however, there may be other reasons to explain its exclusion. It has been noted, for example, that there are some cases of a private road set out in an inclosure award (see section 7) for the use of a number of people but without its ownership being assigned to any individual, being shown excluded from hereditaments; however this has not been a consistent approach. Instructions issued by the Inland Revenue to valuers in the field deal with the exclusion of 'roadways' from plans, but do not explicitly spell out all the circumstances in which such an exclusion would apply".*

- 14.9 In this case the Application Route was excluded from valuation, and this is considered to be very good evidence of the existence of public highway rights at that time (i.e. circa 1910). Given the way in which the Application Route was physically set out (e.g. a relatively wide carriageway with verges), it would be reasonable to conclude that the Application Route was considered to be a public carriageway at the time of survey. The only anomaly in respect of these documents is that the Application Route is not considered to be maintainable at public expense, and therefore the surface is not vested in the Highway Authority.

Ordnance Survey Maps [APP 13]

- 14.10 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 matter of issues 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 Report made it clear that the Ordnance Survey was not concerned with matters of highway status.

14.11 Ordnance Survey maps in rural areas were surveyed at a scale of 1:2500²⁴ and 1:1250 in urban areas. The 1:10,000 scale maps are derived from the larger base scales.

14.12 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.

14.13 The Ordnance Survey measures accuracy in three ways:

- a) **Absolute accuracy** – a measure which indicates how closely the coordinates of a point in Ordnance Survey map data agree with the true National Grid coordinates of the same point on the ground.
- b) **Relative accuracy** – this compares the precise distance between features measured in the real world to the distance between the equivalent features in the data.
- c) **Geometric fidelity** – this concerns the trueness of features to the shape and alignment of the real-world objects they represent. Since the UK boundary system does not require boundaries to be related to the National Grid the absolute accuracy of Ordnance Survey mapping is seldom of concern when analysing the position of a disputed boundary. The geometric fidelity of a boundary feature may need to be considered, but it is the relative accuracy of the OS mapping that is crucial.

Ordnance Survey large scale source survey accuracy information

Survey Scale Relative accuracy	At a confidence level of 99%
1: 1,250 (Urban)	< ± 1.1 metres (valid over a distance of up to 60 metres)
1: 2,500 (Rural) Resurvey or reformed	< ± 2.5 metres (valid over a distance of up to 100 metres)
1: 10,000 (Mountain & moorland)	< ± 10.1 metres (valid over a distance of up to 500 metres)

²⁴ Although some areas are known to have been surveyed originally at a scale of 1: 10,560 (6 inches to one mile)

- 14.14 Ordnance Survey maps cannot show features that are closer together than 1m on 1:1,250 maps, or closer than 2m on 1:2,500 maps.
- 14.15 The Ordnance Survey does not record, on its maps, what the feature is that has been drawn. All that can be gleaned is that a solid line signifies a feature that is higher, vertically, than 0.3m and that a pecked line signifies a feature that is lower, vertically, than 0.3m. Thus, typically, a solid line on an Ordnance Survey map will represent a fence, a wall, a hedge trunk-line or a ditch, and a pecked line will represent a kerb, the edge of a road or path or a significant change of land surface (e.g. concrete/grass).
- 14.16 The 1897 25-Inch County Series map [APP 13 pg. 203 - 205] shows that the Application Route did not physically exist at the date of its survey and the 1913 25-Inch County Series map [APP 13 pg. 206 - 208] shows that the Application Route had been set out by this time and was more substantial in proportion than many of the surrounding older acknowledged public roads. These earlier maps suggest that the Application Route was set out as a carriageway with verges.
- 14.17 The Later maps continue to show the Application Route but that by the second half of the Twentieth Century the southern part of Hawkhurst Road (beyond Point C on Plan 1 [APP 1 pg. 1]) appears to be less well defined. Any change in character and use after the initial dedication of public rights would not result in public rights being lost. The legal principle of “Once a Highway, Always a Highway” will apply.
- 14.18 Using online mapping and measuring tools²⁵ it has been possible to measure the width of the Application Route between the physically mapped boundary features. Subject to any limitations to scale, this exercise suggests that the Application Route was set out to a width of 38-42 feet (11.6 – 12.8 meters). I would however like to undertake some actual measurements on site before relying on the findings of the measurement exercise.

²⁵ National Library for Scotland

Local Byelaws [APP 14]

- 14.19 A bylaw is a regulation made by a local authority. They have local, rather than national effect, and are administered and enforced by the local authority.
- 14.20 It is important to note that both sets of bylaws post-date the original setting-out of the Application Route (circa 1900) and as such they cannot have been relied upon at that time. It is however likely that they would have been applied if the Application Route had been made up to an “adoptable” standard at any time that the bylaws were in force (which of course did not happen).
- 14.21 As mentioned above, using online mapping and measuring tools I have ascertained that the Application Route was set out to a width of 38-42 feet wide between the physical boundaries. Whilst I must accept that it is somewhat speculative, I do not consider it a mere coincidence that the Application Route was set out in such a way that appears to comply with the later bylaws. This suggests to me that either there were earlier bylaws in place that required the setting-out of streets to specific widths, which were later replicated in the 1912 and 1926 bylaws; or that there was some other form of set standard or guidance in force that had to be adhered to if a street was proposed for future “adoption”.

1930 Town Planning Scheme [APP 15]

- 14.22 The 1930 Town Planning Scheme was a scheme undertaken under the provisions of the Town Planning Act 1925 and was a scheme approved by the Minister for Health. The documents relating to the proposed scheme will likely have been on public deposit and open to scrutiny and objection.
- 14.23 The plan [APP 15 pg. 237 - 242] attached to the Scheme shows the Application Route defined as an “Existing Highway over which the public have a right of way (other than main roads and roads maintainable by the inhabitants at large)” and identifies a proposed widening scheme in the vicinity of Point C on Plan 1 [APP 1 pg. 1].
- 14.24 From these documents it is possible to ascertain that by 1930 the local authority considered the Application Route to be a Public Highway, but that it wasn’t maintainable by the inhabitants at large (maintainable at public expense).

14.25 Whilst I acknowledge that the term “highway” is generic and must be further qualified to confirm the type of highway referred to, it is my experience that the term is often misused or misquoted in the context of referring to public carriageways only, with routes subject to lower rights being referred to as public rights of way. This is especially the case within local authorities. This is contemporaneously exemplified by provisions within the Local Government Act 1929 which separated highway authority and rights of way functions and suggests that, at that time, there was a distinction between Highways and Public Rights of Way²⁶. Taking these matters into account, along with the physical character of the Application Route, which was set out 30 years prior in the manner of a carriageway, it is my opinion that the reference to “Highways” in this document refer to what would be more properly defined as public carriageways.

Building Notices [APP 16]

14.26 Building Notices formed part of the planning process and were documents that were required to be submitted as part of any development process. In my experience they can provide some useful background information but are rarely of any great assistance in determining the status of public highways.

14.27 In this case the 1900 Building Notice **[APP 16 pg. 244 - 248]** (Plan 1563) shows the first section of the Application Route in the vicinity of Point A on **Plan 1 [APP 1 pg. 1]** and defines it as a “New Road”. Furthermore, it appears to be set out, as a carriageway with verges or footways on each side. The document will therefore assist in identifying when the Application Route was set out, and also in what form it was set out.

1937 Private Street Works Scheme [APP 17]

14.28 In highway management terms a “Private Street” is a public highway that is maintainable by a party other than the Highway Authority, the term “Private” referring to the maintenance liability rather than status. A “Private Street Works Scheme” is a scheme whereby an existing privately maintainable public highway is made up “improved” to such a standard that the Highway Authority will subsequently accept the future maintenance liability (i.e. the road will be “adopted”).

²⁶ “Unclassified County Roads a Study into their Status” [2005] Trail Riders Fellowship) pg. 19 & 20)

14.29 Whilst the 1937 Scheme was never undertaken these documents still provide evidence that the Application Route was considered to be a public highway of carriageway status. The cross-section detail confirms a width of 40 feet to include a 24 feet wide carriageway with verges and or footways etc extending to 8 feet on either side. In my opinion these documents clearly indicate that the Application Route was considered to already be subject to public carriageway rights.

Committee Minutes [APP 18]

14.30 The minutes of Council Committee meetings can provide a valuable insight into the business of the local authority and have the benefit of being in the public domain and open to public scrutiny.

14.31 The minutes from the meetings in 1937-8 [APP 18 pg. 256 - 274] confirm the Private Street Works Scheme for the Application Route, and therefore further support my comment set out above. The 1962 minutes [APP 18 pg. 275] further confirm that the Highway Authority considered the application Route to be a privately maintainable public highway.

Highway Authority Records [APP 19]

14.32 The Definitive Map and Statement are the legal record of public rights of way in an area, and provide conclusive evidence of the existence of the rights recorded therein. This conclusive status is however without prejudice to the existence of other higher or unrecorded public rights of way. The original Definitive Maps for most of the Country were prepared under the provisions of Part IV of the National Parks and Access to the Countryside Act 1949, and are now kept under a state of continuous review using the procedures set out within the Wildlife and Countryside Act 1981.

14.33 The Application Route is not currently recorded on the Definitive Map and Statement for the Croydon Council area [APP 19 276 – 279]. This may change as a result of the outcome of the current Application [APP 4].

- 14.34 Whilst the Council is required, by virtue of Section 36 of the Highways Act 1980 to maintain a list of all highways in its area that are maintainable at public expense, the records do not enjoy the same conclusive status as the Definitive Map. Notwithstanding this, they are still a statutory record maintained pursuant to the provisions of an Act of Parliament.
- 14.35 Whilst there is no requirement for the Highway Authority to maintain a record of “Private Streets” (privately maintainable public highways), it is common practice for Highway Authorities to keep such records. The records maintained by Croydon Council [APP 19 pg. 276 – 279] indicate that the Application Route is considered to be a “Private Street” which means that the Highway Authority consider the Application route to be a public carriageway that is maintainable at private expense. In my opinion, given the reason why these records are maintained, and who they are maintained by, they cannot be lightly disregarded, especially when they are consistent with other documentary evidence.

Registered Title Documents [APP 20]

- 14.36 Title documents are rarely of any great assistance in proving the existence or otherwise of public rights of way. They are however of some use in identifying which parties have capacity to dedicate, and therefore also capacity to demonstrate a lack of intention to dedicate, or possibly the extent of any private rights. These documents do however have their limitations because they do not necessarily show the full extent of land ownership. For instance, it has been the practice of the Land Registry not to include within the Registered Title any publicly maintainable highways despite the sub-soil being in private ownership.
- 14.37 A further important consideration is that the omission of reference to public highway rights within the Registered Title or deeds to a property is not evidence that such rights do not exist. In fact, land ownership can be a bit of a “red herring” because the highway right is not a physical entity, it is the right to pass and repass over (usually) private land.
- 14.38 In this particular case the Application Route is not included in the Registered Titles [APP 20] of the adjoining properties. This is not surprising given that it was excluded from sale in the various sale documents [APP 11] discussed above.

14.39 In my opinion, it would be reasonable to surmise that the properties served by the Application Route must have rights of access of some description, otherwise there would be no means of lawful ingress or egress. Such rights of access must be either in the exercise of public rights, or the exercise of private rights. There is no third option. Given the age and history of the Application Route (i.e. it was set out specifically to serve proposed housing) it is somewhat surprising that if the intent was access via private rights, such rights were not granted and recorded within the property title. There is, of course, a very reasonable and rational explanation why private rights were not included in the property deeds, and that is because, from the very outset the intention was that the Application Route would be a public carriageway that would eventually be made up, then “adopted” by the local Highway Authority.

15.0 Discussion

15.1 Having considered and evaluated the individual sets of documents above, the next stage is to consider all of the available and relevant evidence together.

15.2 The 1863 Sales particulars [**APP 11 pg. 164 - 168**] and the 1897 Ordnance Survey County Series map [**APP 13 pg. 203 - 205**] both confirm that, as of their dates of survey/publication, the Application Route did not physically exist. In contrast, the 1900 Building Notice [**APP 16 pg. 244 - 248**] (Plan 1563) and the 1902 Sales plan [**APP 11 pg. 169**], show that the Application Route had been set out as a carriageway²⁷ with verges or footways on each side by 1900, and named as Hawkthirst Road by 1902. Taking these documents together it would be safe to conclude that the Application Route was physically set out on the ground at some point between 1897 and 1900. The Application Route is not therefore particularly historic in nature; but has physically existed for approximately 120 years²⁸.

²⁷ It is unlikely to have been set out as anything less than a carriageway as this would restrict access to the proposed properties.

²⁸ It is perhaps also of some importance to note that route(s) that were set out go beyond the extent of the Application Route, and link to other public highways of varying status. i.e. the routes were not necessarily set out as cul-de-sacs.

- 15.2 No evidence has been discovered which suggests that the Application Route was gated, or that any other means were employed to physically prevent use of the way by the public; nor is there any evidence to suggest that signage was present which may negate any presumption or implication of dedication. The provisions whereby a map and statement could be lodged with the local Highway/Surveying Authority to negate dedication did not exist at this time²⁹.
- 15.3 The setting out of the road, as a carriageway, and throwing it open to the public would therefore constitute evidence of overt actions by the landowner from which dedication may be inferred. Given that the Application Route was set out in a period that is now beyond living memory, it is not necessary to demonstrate actual public use for the purposes of the “acceptance” of the dedication. Evidence of the reputation of the way as a public highway may be relied upon instead.
- 15.4 The 1910 Finance Act Index map **[APP 12 pg. 192]** shows that the Application Route was excluded from the valuation process, which is strongly indicative that it was considered to be a public highway, and taking into account its physical characteristics a public carriageway. It would therefore be reasonable to conclude that the Application Route was, by reputation, already a public highway (public carriageway) by the time the 1910 Finance Act surveys were undertaken. No evidence has been discovered to suggest any alternative interpretation of these documents.
- 15.5 Whilst the 1912 Bylaws **[APP 14]** obviously came into effect after the Application Route had already gained the reputation of being a public carriageway, albeit maintainable at private expense, it is likely that they would still have applied if Hawkhurst Road had been made-up and accepted as a publicly maintainable highway in the manner referenced in the 1922 Sales particulars **[APP 11 pg. 171 - 180]**. It is important to note at this point that these sales particulars only refer to maintenance liability, they are not therefore inconsistent with the proposition that by 1910 the Application was already established as a (privately maintainable) public carriageway.

²⁹ They were first introduced within the provisions of the Rights of Way Act 1932

- 15.6 In my opinion, the fact that the Application Route had been set out in a manner (i.e. width) that is entirely consistent with the 1912 Byways **[APP 14]**, albeit the setting-out took place approximately 12 years before the Bylaws came into effect, suggests that either there were earlier Bylaws or other set standards in place at the time.
- 15.7 The same principles would have applied to the 1926 Bylaws **[APP 14]** if the Application Route had been made-up and “adopted” while they were in force.
- 15.8 The 1930 Town Planning Scheme documents **[APP 15 pg. 229 - 243]** are the first documents which expressly acknowledge the (public) highway status of the Application Route, by identifying it as a highway that is not maintainable by the inhabitants at large. In my opinion the reference to “highway” (albeit technically incorrect) in this instance should be interpreted as meaning a public highway of carriageway status (i.e. a vehicular highway). My reasoning is twofold, firstly contemporaneous legislation was, at that time, differentiating between highways (meaning vehicular routes) and public rights of way (footpaths and bridleways). Secondly, at the time, any public highway of a status less than public carriageway was automatically maintainable by the inhabitants at large. Therefore, if the Application Route was a highway, but not maintainable by the inhabitants at large, in terms of status it could only be a highway of carriageway status (i.e. a vehicular highway).
- 15.9 Given the available evidence which pre-dates the 1934 Sales particulars **[APP 11 pg. 181 - 191]** it is my opinion that the reference to the Application Route being a “Private Road” is either mistaken, misunderstood or a reference to the private maintenance liability that is referred to elsewhere. The document is ambiguous and inconsistent with all of the evidence that pre-dates it.
- 15.10 The 1937 Private Street Works Scheme **[APP 17]** and related Rural District Council Committee Minutes from the same period **[APP 18 pg. 256 - 274]** and from 1962 **[APP 18 pg. 275]** further evidence the fact that the Application Route was considered to be a privately maintainable public carriageway and are entirely consistent with the majority of the other available evidence.

15.11 When all of the evidence discussed above is taken into consideration it is not surprising that the current highway authority records [APP 19 pg. 276 - 279] include the Application Route as a “Private Street”, as not being “Adopted”, and considered to be a privately maintainable public carriageway. The Highway Authority has, after all and by reference to the 1930 Town Planning Scheme [APP 15] acknowledged this status for at least the last ninety years.

15.12 Finally, the Registered Title Documents [APP 20] for the properties served by the Application Route do not contain any details of private access rights, and are therefore entirely consistent with the proposition that the Application Route is a public carriageway. Any suggestion of private rights is not supported by evidence.

16.0 Interim Conclusion re: Status

16.1 When all of the available and relevant evidence is taken into consideration, I have reached the following conclusions:

- a) The Application Route was physically set out at some point between 1897 and 1900;
- b) The Application Route was physically set out as a carriageway with verges and/or paths at either side;
- c) By 1910 public carriageway rights (i.e. public rights for vehicles etc) had come into being over the Application Route;
- d) Throughout the Twentieth Century the Application Route was not considered to be maintainable at public expense.

16.2 In view of my conclusion that the Application Route is a public vehicular highway it is necessary to consider that status against the provisions of the Natural Environment and Rural Communities Act 2006.

17.0 Application of the Natural Environment & Rural Communities Act 2006

- 17.1 As discussed in Section 7 above, Section 67(1) of the Natural Environment & Rural Communities Act 2006 (the 2006 Act) extinguished public motor vehicular rights over every vehicular highway other than those shown on the definitive map and statement, as a byway open to all traffic. In the absence of further qualification this provision would extinguish public rights of way for mechanically propelled vehicles over virtually the whole of the existing highway network. A series of exceptions to protect certain highways from such extinguishment were therefore also put in place.
- 17.2 It is important to note that if the extinguishment provisions do apply to this case, Section 67(4) of the 2006 Act creates private rights of way for access to land and property. As a result, no properties will be left landlocked, and property owners should be encouraged to register these private rights in their registered Title.

Consideration of the Exceptions

- 17.3 Subsection 67(2)(a) excepted ways that have been lawfully used more by motor vehicles than by other users, e.g. walkers, cyclists, horse riders and horse-drawn vehicles, in the five years preceding commencement.
- 17.4 Guidance issued by Defra³⁰ suggests that local authorities should adopt a pragmatic approach and arrive at a judgement as to what has been the main use of the way by the public in the five years leading up to 2 May 2006. The only other way that this exception can be reasonably assessed would be to have actual survey data relating to the types of use which was collected during the relevant time period. The guidance goes on to advise that any use that is considered must be user by “the public”. This would probably exclude any use by the residents of properties served by the Application Route.
- 17.5 In my opinion, the exception provided by Subsection 67(2)(a) of the 2006 Act cannot be met.

³⁰ Part 6 of the Natural Environment and Rural Communities Act 2006 and Restricted Byways A guide for local authorities, enforcement agencies, rights of way users and practitioners (Version 5) [May 2008]

- 17.6 Subsection 67(2)(b) excepted ways that are recorded on the “list of streets” as being maintainable at public expense but are not also recorded on the definitive map and statement as rights of way.
- 17.7 In this case the Application Route is not shown on the Definitive Map and Statement **[APP 19 pg. 281 - 306]** for the area. Whilst the Application Route is shown on the Council’s Highway Records **[APP 19 pg. 276 - 279]** it is not recorded as being maintainable at public expense.
- 17.8 The issue of “Private Streets” being included in “list of Streets” type documents and the effects of the 2006 Act was considered in *“Slough CC v SoS for EFRA [2018] EWHC 1963 (Admin)”* where the Court clarified that where a “Private Street” is included in the “List of Streets” the exception provided by Subsection 67(2)(b) of the 2006 Act does not apply.
- 17.9 In my opinion, the exception provided by Subsection 67(2)(b) of the 2006 Act cannot be met.
- 17.10 Subsection 67(2)(c) excepts ways that have been expressly created or constructed for motor vehicles.
- 17.11 This exception is designed to save public vehicular right where the right has been expressly created either by primary or secondary legislation. There is no evidence to suggest such statutory creation in this case.
- 17.12 In my opinion, the exception provided by Subsection 67(2)(c) of the 2006 Act cannot be met.
- 17.13 Subsection 67(2)(d) excepts ways that have been created by the construction of a road intended to be used by mechanically propelled vehicles.
- 17.14 Whilst it is clear that the Application Route was set out as a carriageway, it is unlikely that it was set out expressly for the purpose of use by mechanically propelled vehicles. According to the National Motor Museum Trust³¹ the first motor cars were used on British Roads around 1895 and that by 1900 there were approximately 700-800 motor cars in the

³¹ <https://nationalmotormuseum.org.uk/story-of-motoring/motoring-firsts/>

country. It is therefore clear that the majority of vehicles at the time were drawn by horses or similar. Under the circumstances it is far more likely that the Application Route was set out as a carriageway for use by horses and carriages as opposed to motor vehicles.

17.15 In my opinion, the exception provided by Subsection 67(2)(d) of the 2006 Act cannot be met.

17.16 Subsection 67(2)(e) excepts from extinguishment ways that had been in long use by mechanically propelled vehicles before 1930, when it first became an offence to drive 'off-road'.

17.17 No evidence had been provided which suggests that the Application Route was subject to long use by mechanically propelled vehicles before 1930.

17.18 In my opinion, the exception provided by Subsection 67(2)(e) of the 2006 Act cannot be met.

18.0 Conclusion re: Status

18.1 Having first concluded that the Application Route was a public highway of carriageway status; and secondly that none of the exceptions found within Section 67(2) of the 2006 Act apply, I conclude that the correct and current status of the Application Route is that of Restricted Byway.

18.2 For the purposes of determining the Application for the Definitive Map Modification Order I recommend that Croydon Council resolve:

- a) To make a Definitive Map Modification Order to add the route shown **A-B-C** on **Plan 1 [APP 1 pg. 1]** to the Definitive Map and Statement for the area as a Restricted Byway.
- b) If no objections are duly lodged, or if objections are duly lodged and then subsequently withdrawn, the Order be confirmed; or
- c) If objections are duly lodged, and not subsequently withdrawn, the Order be referred to the Secretary of State via the Planning Inspectorate for confirmation.

18.3 It should be noted that if the above proposed course of action is approved, the Applicants are not entitled to a right of appeal in the same manner as if their application was completely refused. Instead, if they wish to challenge the decision, they must submit duly lodged objections when the Order is made and advertised.

PART SIX: CONSIDERATION OF THE WIDTH OF THE HIGHWAY

19.0 Defining the width of the Application Route

- 19.1 In this particular case it is important to address the issue of the extent or width of the public highway for two reasons. Firstly, there is a requirement that the width is defined within any Definitive Map Modification Order that might be made; and secondly, I am aware that it is a further matter of dispute between the Council and the owners of some of the properties fronting onto the Application Route.
- 19.2 Earlier within my report, at paragraphs 7.24 – 7.31, I have set out some of the general principles which apply when seeking to determine the width of a public highway. These principles form a hierarchy of principles which are generally rebuttable. This means that they can be considered to apply unless there is evidence to the contrary, the onus resting on the person who disagrees or challenges the principle to prove their case. If they cannot, then the principle will stand.
- 19.3 In summary, when determining the width of a highway one should:
- a) consider the “Boundary to Boundary” principle; if this does not apply,
 - b) then consideration of whether rights extend over the full width of any made-up surface; if this does not apply,
 - c) then consider evidence of use by reference to actual use; if this cannot be ascertained,
 - d) identify a reasonable width that would allow the exercise of the public right of way.

The “Boundary to Boundary Principle”

- 19.4 In possibly overly simplified terms the so called “boundary to boundary principle” arises from the fact that if a landowner is going to erect a fence or wall between his private land and a public highway, then he will do so on the boundary between the two. It is unlikely that he will set his fence or wall back from the boundary because it would mean that he then has a piece of land that has been segregated from the rest of the land by a physical boundary which effectively renders the land unusable.

- 19.5 It should be noted that when considering the “boundary to boundary principle” there is no need to demonstrate actual use of the entire area of highway. It is often the case that areas of verge are not actually used, yet they still form part of the public highway.
- 19.6 In this case we have a public carriageway that was set out approximately 120 years ago and the contemporaneous Ordnance Survey Mapping **[APP 13]** shows that boundary features of some description were installed. We also know that these boundary features (whatever they were) also formed the boundary between the road and adjoining land holdings which were to be sold for housing **[APP 11]**. Finally, and perhaps most significantly the Application Route was excluded from valuation under the 1910 Finance Act. The Index map **[APP 12]** indicates that the boundary of the exclusion from valuation (and therefore the highway boundary) is consistent with the physical boundary shown on the Ordnance Survey mapping **[APP 13]**.
- 19.7 Having considered the above factors, and having seen no evidence to the contrary, I am of the opinion that the so called “boundary to boundary principle” does apply to this case. It is not therefore necessary to consider the other options listed above.
- 19.8 Using online mapping and measuring tools³² I have measured the width of the application between physical boundaries and subject to the limitations of the mapping, it would appear that the route varied between 38 and 42 feet. I would however like to undertake a measurement checking exercise on site to confirm the likely accuracy of the online mapping exercise before committing to a width within any Definitive Map Modification Order.
- 19.9 When defining the width of the Application Route in the Definitive Map Modification Order I would recommend, subject to the above site survey, specifying a route as varying between 38 and 42 feet and define the extent of the highway by showing it cross hatched or shaded on an extract of the Ordnance Survey County Series base mapping used for the 1910 Finance Act Index map, or similar which can be included in the Order.

³² National Library of Scotland

PART SEVEN: MAINTENANCE LIABILITY

20.0 Background

20.1 At common law the inhabitants of a parish were bound to repair the highways within their area unless it could be shown that responsibility had attached to an individual or a corporate body by reason of tenure, inclosure or prescription. The Highway Act 1835 modified the position by providing that no road or occupation way made after 1835 was to be repairable by the inhabitants at large unless it was expressly adopted by the highway authority under the formal procedure laid down in the Act. All footpaths, whether created before or after 1835, remained the responsibility of the inhabitants at large until December 1949, when the National Parks and Access to the Countryside Act 1949 ("NPACA") applied certain provisions of the Highway Act 1835 to public paths. After 1835 it was possible for roads to be created which did not become the liability of any person or persons to repair. Apart from such roads as these, repair of highways by inhabitants at large remained the underlying principle of the law until the enactment of the Highways Act 1959 which provided that no duty with respect to the maintenance of highways was to lie on the inhabitants at large of any area³³.

20.2 Since the Highways Act 1959, as regards liability to repair, highways fall into three main classes: (1) highways repairable at the public expense; (2) highways repairable by private individuals or corporate bodies; and (3) highways which no one is liable to repair³⁴.

21.0 Application to the Current Case

21.1 It is clear from the above information that the date upon which a public highway came into being is key to the determination of maintenance liability. In this case there is no doubt that the public carriageway rights came into being after 1835, indeed, they were established between 1900 and 1910. As a result, the Application Route is not maintainable at public expense, and will not be so maintainable unless and until such time it is "adopted" by the local highway authority. In terms of maintenance liability, the Council's Highway Records do accurately record the route, and should not be changed other than to record Restricted Byway status.

³³ Para 24 Fortune & Ors v Wiltshire Council & Anor [2012] EWCA Civ 334

³⁴ Para 25 Fortune & Ors v Wiltshire Council & Anor [2012] EWCA Civ 334

PART EIGHT: CONCLUSIONS

22.0 Conclusions - Status

User Evidence

22.1 Taking all relevant matters into consideration, it is my opinion that the user evidence is not representative of use of the Application Route by members of the public. It is more akin to use by a closed section of the community (i.e. residents of Hawkhurst Road). Furthermore, the nature of the use is more in keeping with the exercise of private rights (i.e. use “by right”) rather than use which may be defined as being “as of right”. As a result, I do not consider that the user evidence is sufficient to give rise to a prima facie presumption of dedication pursuant to Section 31 of the Highways Act 1980.

22.2 For similar reasons to those specified above, it is my opinion that, as of the date of the Application (11th September 2019), public bridleway rights cannot be said to have been established under Common Law as a result of modern use. It is, of course, possible that such rights may come into being at some point after September 2019 if “acceptance” by the public can be adequately demonstrated. I have not seen any evidence to support such a proposition.

22.3 It must, of course, be stressed that the above findings only apply if public bridleway or higher public rights are not shown to have come into being at some earlier date.

Documentary Evidence

22.4 When all of the available and relevant evidence is taken into consideration, I reach the following conclusions:

- a) The Application Route was physically set out at some point between 1897 and 1900;
- b) The Application Route was set out as a carriageway with verges and/or paths at either side;
- c) By 1910 public carriageway rights had come into being over the Application Route;
- d) Throughout the Twentieth Century the Application Route was not considered to be maintainable at public expense.

Natural Environment & Rural Communities Act 2006

- 22.5 The Natural Environment & Rural Communities Act 2006 extinguished public rights for mechanically propelled vehicles over all routes unless certain exceptions can be met.
- 22.6 None of the above-mentioned exceptions are considered to apply to the Application Route. Public rights for mechanically propelled vehicles are therefore extinguished.
- 22.7 The correct status for the Application Route is therefore Restricted Byway and a Definitive Map Modification Order should be made to record the Application Route on the Definitive Map and Statement.
- 22.8 This status preserves/creates a private right of way for the purposes of accessing land and property served by the Application Route.

23.0 Conclusions: Width

- 23.1 Having considered all of the available evidence, and having seen no evidence to the contrary, I am of the opinion that the so called “boundary to boundary principle” does apply to the Application route.
- 23.2 Using online mapping and measuring tools³⁵ I have measured the width of the application between physical boundaries and it varies between 38 and 42 feet. I would however like to undertake a measurement checking exercise on site to confirm the likely accuracy of the online mapping exercise.

³⁵ National Library of Scotland

24.0 Conclusions: Maintenance Liability

- 24.1 The Application Route became a public carriageway between 1900 and 1910.
- 24.2 As a public carriageway dedicated after 1835 it does not automatically become maintainable at public expense.
- 24.3 Until such a time as it is “adopted” the Application Route will continue to be maintainable by whoever has maintained it in the past.

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