

**COMMONS AND RIGHTS OF WAY COMMITTEE  
4 OCTOBER 2019**

**AGENDA ITEM:**

**APPLICATION FOR A MODIFICATION ORDER FOR A LENGTH OF PUBLIC  
BRIDLEWAY & ADDITIONAL SPUR AT THE KNOLL, CRANHAM,  
GLOUCESTERSHIRE**

**REPORT OF THE LEAD COMMISSIONER COMMUNITIES & INFRASTRUCTURE**

**1. PURPOSE OF REPORT**

To consider the following application: 573/11/68(3)

**Nature of Application:** A length of public bridleway plus additional spur  
The Knoll, Cranham

**District:** Stroud, Gloucestershire

**Name of Applicant:** Mrs L Hayden, Cranham Common Management  
Committee

**Date of Applications:** 22 June 2018

**Landowner:** Unregistered

**Witness Evidence forms:** Total of 13 PPEFs submitted by 12 individuals.

**2. RECOMMENDATIONS OF THE CASE OFFICER**

That no order be made to add a length of public bridleway to the Definitive Map of Public Rights of Way between points A-F & B-G.

That an order be made to add a length of public footpath to the Definitive Map of Public Rights of Way between points A-F & B-G.

**3. RESOURCE IMPLICATIONS**

Average staff cost in taking an application to the Committee- £5,000. Cost of advertising Order in the local press, which has to be done twice, is approximately £500 per notice. In addition, the County Council is responsible for meeting the costs of any Public Inquiry associated with the application. If the application were successful, the path would become maintainable at the public expense.

**4. SUSTAINABILITY & EQUALITY IMPLICATIONS**

No sustainability implications have been identified.

**5. DEPARTMENTAL CONTACT**

Jaci Harris, Asset Data Officer (Definitive Map), Highway Authority.  
Telephone Gloucester (01452) 328981  
E-mail: [jaci.harris@gloucestershire.gov.uk](mailto:jaci.harris@gloucestershire.gov.uk)

6.

### **STATUTORY AUTHORITY**

Section 53 of the Wildlife and Countryside Act 1981 imposes a duty on the County Council, as surveying authority, to keep the Definitive Map and Statement under continuous review and to modify it in consequence of the occurrence of an 'event' specified in sub section [3]. Any person may make an application to the authority for a Definitive Map Modification Order on the occurrence of an 'event' under section 53(3) (b) or (c). The County Council is obliged to determine any such application that satisfies the required submission criteria in accordance with schedule 14 of the Act.

Section 53(3)(c)(i) relates to the discovery by the Authority of evidence that shows that a right of way that is not shown on the map and statement subsists, or is reasonably alleged to subsist, over land in the area to which the map relates.

**HIGHWAYS ACT 1980 - Section 31:** Dedication of a way as highway presumed after public use of 20 years.

- a) Where a way over any land...has been actually enjoyed by the public as of right and without interruption for a full period of 20 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.
- b) The period of 20 years...is to be calculated retrospectively from the date when the right of the public to use the way is brought into question, whether by a notice...or otherwise.

### **PRESUMED DEDICATION AT COMMON LAW**

Use of a way by the public without secrecy, force or permission of the landowner may give rise to an inference that the landowner intended to dedicate the way as a highway appropriate to that use, unless there is sufficient evidence to the contrary. Unlike dedication under S.31 Highways Act 1980, there is no automatic presumption of dedication after 20 years of public use, and the burden of proving that the inference arises, rests with the claimant. There is no minimum period of use, and the amount of user which is sufficient to imply the intention to dedicate will vary according to the particular circumstances of the case. Any inference rests on the assumption that the landowner knew of and acquiesced in public use.

## **REPORT**

### **7. BACKGROUND**

- 7.1** A location map at scale 1:30,000 is attached (**JH1**) showing the position of The Knoll, Cranham. It lies approximately 5.5km south east of Gloucester (as the crow flies) and is found within Ordnance Survey Grid Square SO9012.
- 7.2** The Definitive Map Modification Order ("DMMO") application made by Mrs Hayden on 22 June 2018, included Form 1 and an accompanying plan, drawn at 1:2500 scale, of the claimed path which is highlighted in pink. Form 3 was also supplied, certifying that the application had been served upon:-

Mr B Pockett of Yew Tree Cottage - Mr M Whittaker of Shepherds Piece - Mr & Mrs Tacey of Crestwood - Mr P Tatham of Fox Cottage - Mrs R Martin of Timbertops - Mr & Mrs Macleod of Knowle House - Ms Curry of Charcoal Hut - Mr & Mrs Alderson of Pickwicks - Mr R Tyson of Cranham Wood - Cranham Common Trust - Ms Smith of Random Patch, Cranham - Mr & Mrs Nicholson of 181 Seagrove Road, London - Ms Harris of Grove Farm House, Swindon & Ms Franklin of Marsh Farm, Malmesbury.

- 7.3** Although the land over which the claimed paths cross is unregistered, several of the householders whose properties abut them have lodged cautions with Land Registry for private easements to drive motor vehicles over the paths to reach their properties. In view of the fact that the land is unregistered however, authorisation was granted for Form 2; 'Notice to Owners and Occupiers' to be posted at the end of the claimed routes.
- 7.4** The claimed paths cross land abutting Cranham Wood and Common, designated CL12 under the Commons Registration Act 1965. S2 of the Countryside and Rights of Way Act 2000 ("CROW Act") grants a public right of access on foot to land mapped as registered common land for the purpose of enjoying 'open air recreation'.
- 7.5** Cranham Wood and Common is separately subject to a revocable Deed of Grant executed under s193 Law of Property Act 1925 ("LPA25") dated 15 October 1929 which granted the public a right of access for 'air and exercise' and as such is designated as s15 land under the CROW Act (land which benefits from rights of access under an alternative legislative provision). This Deed was subject to an 'Order of the Minister of Agriculture and Fisheries Imposing Limitations on and Conditions as to the Exercise of Rights of Access to a Common or Manorial Waste under Section 193 of the Law of Property Act 1925' dated 12 November 1930. *Sections of the claimed paths are included within this designation.* A plan is attached showing the extent of ownership of Cranham Wood and Common adjacent to the claimed paths today and also the extent of the s15 land (**JH2**).

## **8. DESCRIPTION OF CLAIMED PATHS**

- 8.1** No historical indication has been found of a name for the claimed highway. A plan of the claimed paths ("plan") at a scale of 1:1250 is attached (**JH3**) on which the main length of claimed path is marked A-F ("main path") and the additional spur is marked B-G ("spur path"). The claimed paths, which were surveyed by the Case Officer on 13 February 2019, connect the junction of the 3/193 and the 41149 roads, abutting the property, Hillfield, with Cranham Wood & Cranham Common. They are described as follows;
- 8.2** The main claimed path has an overall length of approximately 207 metres. It starts from a point marked A on the said plan at Ordnance Survey Grid Reference (OSGR) SO9000/1285 and runs in a generally north north easterly direction for approximately 79 metres to a point marked B on the said plan at OSGR SO9005/1292 then continues in a generally east south easterly direction for approximately 114 metres then turns in a generally east north easterly direction for a further 14m to a point marked F at OSGR SO9015/1286. The path comprises a 5 metre wide stone track between points A-B for the most part running between stone walls on either side with a grass embankment or verge alongside Pickwicks, The Charcoal Hut and Knowle House. For the most part the path is enclosed. At point B, opposite The Knowle and at point D near Timbertops, there are wide areas used for car parking. Neither of these areas are shown to have been historically part of the path. There is a relatively new wooden field gate at point C at OSGR SO9008/1290 and a

wooden bridleway gate with an auto latch at point E at OSGR SO9013/ 1287. Both gates have notices attached saying "*Walkers please close the gate*".

- 8.3 The unenclosed spur path which also has a stone surface runs for approximately 29 metres, starting at the said point B and running in a generally north westerly direction to a point marked G at OSGR SO 9003/ 1294 where there is a wooden bridleway gate with a trombone handle attached. The gate has the words "*Cranham Common*" etched on it. Photos showing the character of the claimed paths are held (JH4).

## 9. DOCUMENTARY EVIDENCE

- 9.1 **Under Section 32 of the Highways Act 1980, when determining whether a way has or has not been dedicated as a highway, or the date on which such dedication, if any, took place, shall take into consideration any map, plan or history of the locality or other relevant document which is tendered in evidence, and shall give such weight thereto as the court or tribunal considers justified in 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.**

- 9.2 The County Archivist has examined sources in the Gloucestershire County Record Office to see if this path is marked in any way and has identified other sources which might be useful in establishing the status of any right of way along this route. These sources have then been checked and added to by the Asset Data Officer. The Archivist's report can be read in full at (JH5).

- 9.3 **Ordnance Survey Maps;** The original surveys were carried out by Royal Engineers at the time of the Napoleonic wars in order to better plan the transportation of ordnance around the country. It was only in the early 20th century that the OS evolved to become a public service that sold its mapping information to the public. Since the 1960s this mapping information has included public rights of way, which are derived from each county's Definitive Map.

The Ordnance Survey has produced a series of topographic maps at different scales notably the one inch, six inch and 1:2500. The detailed, large scale 1:2500 maps from the 1870s onwards provide the best evidence of the position and width of routes and the existence of any structures on them. These maps provide good evidence of the physical existence of routes at the time the map was surveyed. When compared with earlier, less accurate maps they can help corroborate the existence of routes. Ordnance Survey maps show features that physically exist and may label routes as footpaths and bridleways etc. However, the disclaimer which has been added to all editions since the 2nd edition maps (circa 1898 in Gloucestershire), along with official guidance to the surveyors of the maps at the time, states that the representation of any track or way is no evidence of a public right of way.

- 9.4 **Ordnance Survey 1811 2":1 mile Pen & Ink on Paper Drawing by Robert Dawson (Cheltenham OSD163W) British Library online**

Robert Dawson was appointed a first-class draughtsman on formation of the Royal Corps of Military Surveyors and Draughtsmen, a corps of warrant officers under the Board of Ordnance, with headquarters in the Tower of London. A government mandate was issued to map the whole country in response to military needs during the Napoleonic wars. Critical communication routes such as roads and rivers were to be shown clearly and accurately. Preliminary drawings were made at a scale of six

inches to one mile for areas of particular military significance, down to two inches to one mile elsewhere. Back in the Tower of London, copies of the drawings were prepared at the scale of one inch to one mile. From these, copper plates were engraved for printing. The British Library possesses 351 of the original preliminary drawings made by the surveyors between the 1780s and 1840 – one of which is the 1811 drawing of Cheltenham attributed to Robert Dawson. This drawing shows the cluster of properties at The Knoll but is not clear enough to make out the claimed paths – (JH6).

**9.5 Ordnance Survey First Edition; 25"1 mile, Map sheet 34.13 - published 1884- (National library of Scotland);** This is one of the first edition sheets which used colouring. The colours identified;

- Blue for water features
- Burnt sienna for roads
- Carmine for buildings made of brick or stone
- Grey for buildings made of wood or iron.

The claimed paths are shown connecting the main road with Cranham Wood & Common at points G and F without barriers (JH3). The broken line at the junction of the main claimed path with the road indicates a change of surface. The claimed paths are shown uncoloured, having a good width, being braced to the common and having part unfenced (dashed lines) and part solid boundaries– (JH7).

**9.6 Ordnance Survey Edition; 6"1 mile, Map sheet 34SW - published 1883; (National library of Scotland) -** The claimed paths on this map are shown in a similar manner to those on the contemporaneous 25"map; wide, with part unfenced and part solid boundaries and connecting freely to the road, the common and to tracks across the common which are annotated C.T., (used by Ordnance Survey to denote Cart Tracks). The plan of the claimed paths (JH3), suggests that the cart track connecting with the spur path at point G has disappeared whereas the cart track which connects with the main path at point F still exists today but has no public highway designation – (JH8).

**9.7 Ordnance Survey; Second and Third Editions, 25":1 mile, Map sheet 34.13 – published 1902 & 1922- (National library of Scotland);** These maps both show the claimed paths in a similar manner to the 1883 & 1884 editions above but there is now a physical barrier shown at (point F) on the 1902 edition whereas a change of surface is indicated at the same point on the 1922 edition. The paths are not shown on either map as being braced to the common but an open brace is used near point F which Ordnance Survey use to denote a parcel of land that is divided by another parcel. This suggests that this section of claimed path was not considered to be in the same ownership as the land it divided at this time – (JH9 & 9A).

**9.8 1824 Greenwood's Map of Gloucestershire – (TBR/E33 Glos Archives);** Christopher Greenwood's Map of Gloucestershire, dated 1824, was drawn from an original survey. The depiction is much more accurate (like an Ordnance Survey map) rather than being schematic. This may be due to survey equipment (theodolites) becoming commercially available in the 1790s. The "explanation" (or legend) on Greenwood's map identified turnpike roads and cross roads. It did not purport to show footpaths. Greenwood's maps were sold to members of the public and cost 3-4 guineas. The commercial nature of the map means that routes shown are likely to be public unless there is strong contemporary evidence which shows that routes are private. As public roads prior to 1835 were maintainable by the

parish, it is likely that routes shown are now publicly maintainable. Greenwood shows and annotates the hamlet of Knowl but it does not show the claimed paths – (JH10).

**9.9 Inclosure Map/ Award;** There is no known Inclosure Award for the area of interest.

**9.10 Cranham Tithe Map 1838 (Glos Archives - GDR/T1/64)** ; although not produced to record public rights of way, Tithe Maps provide important evidence as to the physical existence of such paths. The maps were drawn up under statutory authority by the Tithe Commissioners under the provisions contained in the Tithe Commutation Act of 1836 to show all cultivated land, arable and pasture, as tithe was payable on land producing crops. It is unlikely that a tithe map will show public footpaths and bridleways as their effect on the tithe payable was likely to be insignificant. They were required to show wasteland and roads, because tithe was not payable on these, although this is not necessarily an indication that the land was public. Lord Denning said in *Kent County Council v Loughlin 1975* “*If a road passed over a man’s land, he would naturally require it to be shown so as not to pay tithe on it*”. Thus a distinction is made between tithable and untithable land, with roads clearly marked as untithable.

An 1837 amendment to the Act provided for Tithe Maps to be either first or second class. First class maps, being signed and sealed by the commissioners, are considered to be a true record of matters relating to the purposes for which the map was designed. Second class maps, signed but not sealed, which failed in some, often minor way to meet the stringent test for first class status, are not necessarily inferior from a cartographic point of view. Both first and second class maps have been accepted by the courts as evidence (*Smith v Lister 1895*).

The Cranham Tithe Map is a first class colour washed map on which the houses are coloured red, the boundaries of pasture fields are coloured blue (e.g. plot 179; Cranham Common) and the boundaries of arable fields are coloured orange. 25 plots are noted as being ‘Inclosed from common’. Of the plots abutting the claimed paths, only plot 152 was so noted.

The apportionment records both private and public roads, all of which are coloured burnt sienna. The Private roads are assigned plot numbers and have boundary features at each end of the plot, whereas the public roads are un-numbered and annotated ‘to.....’ at their exits from the parish. All but 2 of the 7 recorded private roads remain private tracks today. Plots 222 & 208a, which form one route, are designated today as a public bridleway.

Unlike the public and private roads, the claimed paths are shown uncoloured. They are also un-numbered and connect freely to the existing road network of the time. The sections of path which directly abut the common are shown as unfenced or open to Plot 179; (Cranham Common) perhaps indicating that at this time it was considered to be part of the Common – (JH11).

**9.11 Conveyance plan; 3 August 1934 (included in title for Timbertops)** - Mrs between Mr Clarke, owner of land and property at the Knoll and Mrs Haylings and Mr George both of Cheltenham, relating to the sale of 3 parcels of land including Knoll Cottage “*together with all rights or road or way appurtenant thereto*”. The map attached to this conveyance shows the 3 coloured parcels of land connected by the uncoloured main claimed path, annotated ‘*cart road*’. Use of the cart road was by private easement in this conveyance which facilitated the use and enjoyment of the associated land and property by its owner and any successors in title.

**9.12 Conveyance plan; 14 June 1940(included in title for Charcoal Hut & Timbertops)** - between Mrs Drake and Freda Munn, owners of Knowle House and Mr Heybourne of Knoll Cottage, relating to a water supply, has attached a plan of the properties abutting the main claimed path, which is annotated 'Cart Road'. A copy of the conveyance plans for 1934 & 1940 are held – (JH12).

**9.13** The following properties claim a private prescriptive easement to drive vehicles along part/ all of the claimed paths based on long user;-

- The Land Registry document; GR168569; the **Charcoal Hut**, includes registration dated 15 November 1994 of a caution to the effect that the registered owner claimed that the land has the benefit of a right of way with or without vehicles along part of the claimed route.
- The owners of **Westley** (Land Registry – GR256484); lodged a separate caution; (GR415082) based on a statement of truth to the effect that as owners of Westley, they benefit from a private easement along the claimed route dating back to 1977.
- The owners of **Shepherds Piece** (Land Registry - GR354341) lodged a caution based on a personal Statement of Truth dated 6 May 2011 in which the registered owner declared "*For the last 30 years I have been aware that the track has been used for pedestrian and vehicular access to the property*".
- The Land Registry documents (GR 345550); **Knowle House**, include registration dated 15 November 1994 of a caution to the effect that the registered owner claimed that the land has the benefit of a right of way with or without vehicles along part of the claimed route.
- The owners of **Fox Cottage** (Land Registry - GR299516) lodged a separate caution; (GR304257) to the effect that the land in that title has the benefit of a right of way over the property and this right is supported by statutory declarations dated 13 October 1964 and 9 November 2006.
- The owner of **Timbertops** (Land Registry – GR382990) benefits from the conveyance referred to in paragraph 9.13 of this report which relates to the sale of 3 parcels of land including Knoll Cottage "*together with all rights or road or way appurtenant thereto*".

**9.14 National Archives trip Inland Revenue, maps compiled under the Finance Act, 1910, based on Ordnance Survey 25": 1 mile, c.1902 edition, marked up by Inland Revenue c.1915, and reference books or files. Map sheet 34/13. IR58/38465.**

**9.15** The Finance (1909-1910) Act 1910 was passed in order that a tax could be levied on any increase in the value of land when it changed hands. In order to ascertain the value of all land as at 30th April 1909, a survey was carried out assessing each piece of land. The OS 2nd Edition Plans (1898 -1902 in Gloucestershire) were used as the base maps and annotated. Details were recorded in field books and valuation books. These books included a column which allowed a deduction in tax if a public right of way crossed the land. Every property was given a plot or 'hereditament' number which was then referred to in the valuation books and maps. Hereditaments were coloured on the maps to identify land holdings. Not all land was coloured.

- 9.16 Once a provisional valuation of a property had been reached, landowners were given the opportunity to appeal. The whole process was carried out under statutory authority by the Valuation Department of the Inland Revenue and there were criminal sanctions associated with the falsification of evidence. It would have been negligent to omit such land from the survey, including private roads, which might have had value. However, it was not a criminal offence not to deduct tax if a right of way did cross your property. Consequently, the resultant records carry a high level of evidential weight as to the routes which they show to exist, but are unlikely to be good evidence that rights of way do not exist.
- 9.17 Where a route is shown uncoloured on the plans and excluded from the taxable land this provides strong evidence of it being public highway. Usually this will be of vehicular status unless there is other contemporary evidence to indicate otherwise. Where footpaths and bridleways cross privately owned land these may be recorded as a reduction to the tax. However, where routes cross large hereditaments it can be difficult to establish which route is considered to be the right of way without additional details.
- 9.18 Section 11 of the Planning Inspectorates Consistency Guidelines (2<sup>nd</sup> revision June 2008) says in paragraph 11.7; *“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, i.e. they will be shown uncoloured and unnumbered. .... 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; however, there may be other reasons to explain its exclusion”*.
- 9.19 The claimed paths are shown uncoloured, un-numbered and excluded from the adjacent hereditaments. The Field Book entries for the adjacent hereditaments; 16, 10, 33, 110, 73, 16 & 101 were checked at the National Archives at Kew for any reference to the claimed paths. The Valuer noted that hereditament 73 enjoyed a ‘Right of Common’ but no deduction was made and the only entry to register a deduction for a Public Right of Way was No. 110. This hereditament encompassed 3 parcels of land in the vicinity of The Knoll, Cranham. A separate conveyance dated 23 September 1954, found within Land Registry’s Property Register for Pickwicks (GR239334) relating to the sale of the Knole (Knoll) Estate, included covenant No.3;...*“from the date hereof erect and forever thereafter maintain in good repair and condition a good and substantial cattle fence and poultry proof fence or wall between that part of Ordnance Survey No.54 hereby conveyed by the vendor. Provided nevertheless that in so far as the site of such fence hedge or wall shall traverse a public footpath then the purchaser shall be deemed to have complied with the requirements of this covenant if he shall provide and hang a gate or erect a foot stile over and along the course of such footpath as being a part of such fence hedge or wall”*. Field No.54 as shown on the 25” second edition OS map was one of the fields included in hereditament 110. It is unlikely therefore that this deduction pertains to the claimed paths.

As stated in paragraph 9.20, there could be another reason for the claimed paths portrayal on the valuation plan; it could be because they were shared access/ occupation roads that none of the adjoining landowners claimed to own and which may or may not have also carried public rights of some sort – **(JH13)**.

- 9.20 **Deed of 15 October 1929 under s193 Law of Property Act 1925 (“LPA25”) Natural England Open Data – CRoW Act 2000- S15 land; ref 101441 (3/43 & 3/44**

**9.21** The landowner, Ellis Hicks-Beach drew up a revocable Deed of Grant for 'all men' on 15 October 1929 executed under s193 Law of Property Act 1925 ("LPA25") which granted a public right of access to Cranham Wood & Common for the purpose of 'air and exercise'. The plan attached to this Deed includes parts of the claimed paths. The Deed was deposited with the Minister of Agriculture and Fisheries on 18 June 1930 who subsequently made an Order on 12 November 1930 setting out by-laws with regard to the exercise of rights of access across Cranham Wood and Common. A copy of the Deed and plan is held – **(JH14)**.

**9.22 County Surveyor: papers relating to survey of footpaths under National Parks and Access to Countryside Act, 1949 ("NPACA 1949"); Glos Archives.** The paths subject to this application were not claimed.

### **9.23 DOCUMENTARY EVIDENCE CONCLUSIONS;-**

The documentary evidence when considered as a whole, suggests that the claimed paths were used mainly as a private access to the properties abutting them. Importantly, Cranham Parish Council did not claim the paths when they had the opportunity to add them to the official record of public rights of way in the 1950s. The 1929 Deed (LPA25) which granted the public a right to 'air and exercise' across Cranham Wood & Common and which included part of the claimed paths, constituted a right of access by licence or permission which could preclude a claim of presumed or inferred dedication.

**9.24** This report suggests that the documentary evidence is not sufficient, on its own, to establish dedication of these claimed paths.

## **10. CONSULTATIONS**

**10.1** Mr B Pockett, Yew Tree Cottage - Mr M Whittaker, Shepherds Piece - Mr & Mrs Tacey, Crestwood - Mr P Tatham, Fox Cottage - Mrs R Martin, Timbertops - Mr & Mrs Macleod, Knowle House - Ms Curry, Charcoal Hut - Mr & Mrs Alderson, Pickwicks - Mr R Tyson, Cranham Wood - Cranham Common Trust - Ms Smith, Random Patch, Cranham - Mr & Mrs Nicholson, 181 Seagrove Road, London - Ms Harris, Grove Farm House, Swindon - Ms Franklin, Marsh Farm, Malmesbury - The National Trust for Places of Historic Interest or Natural Beauty - Natural England - County Councillor Keith Rippington - Stroud District Council - Cranham Parish Council - The Byways & Bridleways Trust - The Open Spaces Society - The British Horse Society - Cycling UK and the Ramblers' Association, were consulted on 5, 6,7 or 14 February 2019. The following representations were received; -

**10.2** Copies of all of the emails received in response are held as **(JH15)**.

**10.3** Upon receipt of Form 2, Mrs Martin of Timbertops (one of properties abutting the main claimed path) responded by letter, dated 20 January 2018 saying;-

*"I understand that there has been an application for a Bridleway through our property. I wish to advise that I oppose specifically the Bridleway. The reasons for my opposition are as follows;*

- 1) The track is randomly used by some local Cranham people to walk along into the woods, but it is very rarely used by horse-riders and never by Cyclists.*

- 2) *There are currently no bridleways through or accessing Buckholt Woods. That said horse-riders do access the woods at the moment and they use much more suitable tracks than the one you are now proposing. Horse riders currently use a number of tracks and paths in the woods that are not bridleways, yet the proposal is to make a bridleway of this track that they do not use.*
- 3) *Our house and garage is accessed by vehicle along this track and has been for as long as it has been in our family's ownership for over 80 years. Our part of the track is approached around a sharp blind bend; this will be a potential accident risk for any people or horses using it.*
- 4) *The track is unadopted with no parking, there is no public parking near to make it suitably accessible.*
- 5) *There is already sufficient access to the common and woods; it does not need another one.*
- 6) *The track is used by some local people, but not very often, I do not feel that there is sufficient public use to necessitate to being designated a public bridleway or footpath.*

*In 2017 two ponies were kept for 6 weeks over the summer on the old stables behind Timbertops, prior to that we know that horses haven't been kept there is over 40 years.*

*I hope that you take this into account when making your decision. If you do think it necessary to make a Public Right of Way, it should be a footpath only.*

*Please note that 2 years ago we erected gate across the track indicating the area of the track that has been maintained and controlled by Timbertops for a number of years”.*

**10.4** On 12 February 2019, the Ramblers Association responded

*“We don't have any relevant comments to make on this”.*

**10.5** Hilary Macdonald, of the British Horse Society responded on 14 February 2019;

*“Thank you very much for consulting BHS Gloucestershire. Ros or I will respond to you in the near future.. You may wish to note Ros's email address for future use. ... “*

**10.6** Ros Davies of the British Horse Society further responded on 20 February 2019;

*“Re this DMMO in Cranham parish, you asked if anyone had ever been stopped from using the path. I am afraid I do not know anyone who rides in the area so I cannot say either way. I assume the riders on the evidence form should know.”*

**10.7** On 8 February 2019, Mr Nicholson of Westley, (associated stables at rear of property about the main claimed path) responded by email,

*“I have recently received a copy of your letter dated 5<sup>th</sup> February 2019, which refers to the case number above.*

*We own Westley, The Knoll, Cranham GL4 8HR, which is shown on the map which you sent to me. The northernmost part of our property consists of some stables which about the east end of the track over which the right of way has been applied for.*

*The stables at Westley have for many years benefitted from a vehicular and pedestrian right of way along the track which the modification order seeks to*

*establish as a legal bridleway, as detailed in the Public Path Evidence Forms of Mr and Mrs Overs which have been summarised in your letter. These rights are also detailed in the attached statutory declaration, which was sworn in front of a solicitor, which makes clear that the track had been used by a horse and cart since 1924 for a business which was based in the stables at Westley; and that "locals have always used it as a footpath into the wood". Since we bought this property in 2015, we have also seen walkers, riders and on one occasion a motorcycle use the track for access into this part of the woods. From our own visual knowledge, the track is used several times daily.*

*On the basis of the above, I am able to support all of the Public Path Evidence Forms which suggest all manner of uses for the track, over a very long time period (since 1924).*

*It is worth noting that in 2017 our neighbour at Timbertops sought to block this access by erecting gates across the track, however they were asked by us (and I assume by the Cranham Common Management Committee which has submitted the application for the track to become a legal right of way) to remove/keep open these gates. The gates have been erected over land which is not part of the registered title of Timbertops (which is attached) however they have claimed to own this land, but have repeatedly declined to progress an application to the Land Registry/Lands Tribunal for adverse possession. I attach a photo from September 2015 of the track running past Timbertops before their recent enlargement of the property, after which point the track was gated in and resurfaced by the owner of Timbertops (in 2017). It shows a normal track leading into the wood, and no barrier of any kind which might impede walkers, horses or anyone else wishing to gain access. On two or three occasions I have been working down at our stables near to the track, and have seen walkers approach from the woods, and turn around upon seeing the gates, assuming that they had reached a private garden. I have taken care to point out that they can access the common through the gate, which they have then done. If the designation as a right of way is given, both of the gates should be removed and the track left in its previous unblocked state.*

*We would therefore fully support the formalisation by GCC of a right of way, as this will enable future generations of walkers, riders etc. to enjoy this beautiful countryside without impediment. We would ask however that you designate this track as a byway as far as the point where the track reaches the wood by our rear gate, rather than a bridleway, as this would not only facilitate what the Cranham Commons Management Committee require, but also what we, and the visitors to our stables, require for unfettered use.*

*Please let me know if you require any further information".*

- 10.8** On 18 February 2019. Mrs Pockett of Yew Tree Cottage (property abutting the main claimed path), responded;-

*"My husband and I have owned Yew Tree Cottage from 1975 and have used the route referred to in this application on a nearly daily basis.*

*Our access has been purely pedestrian and there has never been an obstruction to prevent pedestrian access, including via the new gate at Timber Tops.*

*Originally, prior to motorised vehicles the route immediately beyond Timber Tops may have been used by horses and possibly carts. However in our 43 years at Yew Tree Cottage we have never seen a vehicle, not seen any evidence whatsoever of any vehicle travelling beyond Timber Tops boundary.*

*We are very happy to make a declaration to this effect and to support an application for a footpath on the route described”.*

**10.9** On 21 February, Mr Tyson, Cranham Woods Ltd, responded;-

*“My wife and I, through Cranham Woods Ltd, own the 200 acres or so of Cranham & Buckle Woods that surround the area where the proposed new path submitted by Liz Hayden of the Cranham Common Management Committee is situated*

*We would like to make it clear that we have no objection to a footpath being created, as that path would lead naturally to our s.193 LPA and s.15 Crow Act land, and there is already a continuance of the proposed path into our woods.*

*We would however strongly object to a bridleway being created, not least as there are no bridleways in our woods, horses, dog walkers etc. are already welcome, but we are bedevilled by mountain bikers are doing damage to our SSSI status....”.*

**10.10** Peter Roberts, Secretary to the Cranham Common Trust responded on 8 March 2019;

*“At our recent board meeting on the 28<sup>th</sup> February the Trust unanimously supported the application for the registration of a path from the Knowle Track to the edge of the woodlands towards Many Well Springs.*

*Any suggestion of registration of a bridleway was firmly rejected as this might encourage cyclists to use the track, which would be unhelpful as cycling is banned from both the Common grasslands and the adjacent woodland, as it is recognised as detrimental to the ecosystem.*

*The Trust has no knowledge of the existence of formal rights of way along the proposed path, but would comment that the path in question has always been in regular use by villagers and the general public to gain access to the Common or the woodlands beyond for as long as anyone on the Board can remember”.*

## **11. USER EVIDENCE**

**11.1** Section 31(1) of the Highways Act 1980 (“s31HA80”) states that where a way over any land, other than a way of such character that use of it by the public could not give rise at Common Law to any presumption of dedication, has been actually enjoyed by the public ‘as of right’; without force, secrecy or permission and without interruption for a full period of 20 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”.

**11.2** Section 31(2) states that the period of 20 years in sub-section (1) is to be calculated retrospectively from the date when the right of the public to use the way is brought into question through an overt act by the landowner which makes it clear to the public that their right is being challenged.

**11.3** It is not essential for the paths or ways to have been used for the full period of 20 years by the same persons; the period may accrue as a result of use by different

persons for shorter periods (Davis v Whitby (1974)). Nor does it matter that the use is not continuous in the sense that it may not have occurred every day.

- 11.4 The main issues to be considered in relation to the s31HA80 legal provision are therefore:
- 11.5 **When the status of the claimed route was called into question;** No action was taken to question or challenge the public's use of the path. In such cases, Section 69 of the Natural Environment and Rural Communities Act 2006 (NERC) provides that the date of the DMMO application can be used in accordance with paragraph 1 of Schedule 14 to the Wildlife & Countryside Act 1981.
- 11.6 **For the purpose of this report therefore the user evidence will be assessed over the 20 year period 1998-2018 leading up to the application.**
- 11.7 **The extent and nature of the claimed use;**
- 11.8 13 Public Path Evidence Forms ("PPEFs") were completed by 12 individual members of the public in support of this application (Mr Drake submitted a 2<sup>nd</sup> PPEF upon being advised that his stated use on his 1<sup>st</sup> could be considered to be private as explained in the following paragraphs. His PPEFs are considered therefore as a single representation of his use). Use dates back to 1955 and can be broken down as follows; all 12 claimed use of the paths on foot but 4 claimed additional use by horse back and 4 claimed additional use with motor vehicles. The frequency of claimed use varied from 5-10 times per year to 'many'. A summary of the PPEFs and a useful bar chart of use are held as **(JH16 & JH16A** respectively).
- 11.9 The route, as described and marked on the maps accompanying the PPEFs, is consistent in their depiction of the claimed route.
- 11.10 The first point to consider is whether those providing the user evidence can be considered as "the public". S31HA80 requires that use must be 'by the public'. Ross Crail, Barrister 'Rights of Way Law Review' wrote "*User must have been by the public. That does not mean that users ... must come from all over the country; in the nature of things, they will usually be drawn from the local community, especially in the case of a claimed footpath or bridleway. But they must represent a wider cross-section of the public than just the owners or occupiers of nearby properties and their visitors – the postman, the dustcart, and so forth*".
- 11.11 The PPEFs record that Michael Drake used the claimed paths to deliver milk to householders at The Knoll, Martin Whittaker used it to visit family living at Shepherd's Piece (abutting the claimed spur path) and Nicola Overs used the path to deliver hay and foodstuffs to the stables behind and belonging to Westley. It could be argued that Michael Drake and Nicola Overs used the paths as implied visitors or by implied licence/ permission of householders living along the track and that Martin Whittaker enjoyed a private easement to drive over the claimed paths. This use is not considered to be use by the 'public at large'.
- 11.12 For a claim to give rise to a presumption of dedication, user must be without force, secrecy or permission. Use that complies with these three requirements is termed user 'as of right'. The House of Lords in *R v Oxfordshire County Council, ex parte Sunningwell Parish Council* [2000] 1 AC 335 (*Sunningwell*) reasserted an ancient principle namely, that if sufficient people carry on an activity openly and for long enough without anyone trying to stop them, it is right and proper that the activity should be treated by the law as having a lawful origin. The House of Lords held that it

was only necessary to prove that they have made use of the paths without resort to force, secrecy and as if they had a right to do so – that is, without having been granted any licence/ permission by the landowner.

- 11.13** There is no evidence of use by secrecy or force and with regard to use by permission or licence, we have seen that the use of the claimed paths by the three individuals noted in paragraph 11.11 of this report was considered to be by implied permission or by private easement. It follows therefore that their use would fail the user ‘as of right’ test.
- 11.14** Although we must discount the element of permissive use in the PPEFs supplied by these 3 individuals, Michael Drake stated that his use of the paths was also “*social & pleasure*” and Nicola Overs stated that she also used the path “*to walk in and out of the woods*” and referred to “*general access to the bridle path*” and therefore this element of their evidence could be considered to be ‘as of right’. It is however impossible to quantify how much use was permissive as opposed to ‘as of right’ and therefore their evidence, in terms of quantity of use is not included in the analysis of user evidence.
- 11.15** The third individual, Martin Whittaker, merely stated that his use of the paths was “*Road to Shepherds Piece, property owned by my family since 1985*” and his purpose in using the path was only noted as “*access to property*”. He stated in response to Q.9; Can you give any further particulars? “*I have used the marked path as far as Shepherds Piece and Timbertops*”. His claimed use was covered by a private easement and thus his evidence must be discounted.
- 11.16** Whilst considering the element of permission, as stated previously, the revocable Deed of Grant to ‘All Men’ executed under s193(2) LPA25, which granted a right of “air and exercise”, included sections of the claimed paths. Any such use would operate as a conditional permission to use the land and as such prevent presumed dedication under 31 Highways Act 1980. However, use of the claimed paths for reasons other than for ‘air and exercise’ could succeed. In case law; Billson 1998, Sullivan J accepted “*if a track across a common is not used for the purpose of air and exercise but is being used by the public for some other purpose; as a route between points A and B for example, from the village across a common to a nearby school, church, or railway station, then in principle such usage of the track is capable of establishing a right of way over it under section 31 of the 1980 Act*”. Applying this ruling, if the paths subject to this application are being used, not for the purpose of air and exercise but to travel along a defined route between two highways, then this use could be considered capable of satisfying a claim.
- 11.17** A further requirement for a claim of presumed dedication is that the path has definite start and end highway termination points or connects with a place of popular resort. Public user cannot give rise to a presumption of dedication if it does not. The claimed paths connect the highway road network with Cranham Wood and Common which has no designated highway status. The issue therefore is whether the common can be considered to be a place of popular resort. In paragraph 7.5 of this report, we saw that by virtue of the 1929 Deed, executed under the LPA25, the public were granted by way of a private licence or easement, a right to take ‘air and exercise’ across the common. As such Cranham Wood & Common would be considered to be a place of popular resort and would thus support a claim of presumed dedication of the paths terminating at it.
- 11.18** When considering the remaining 9 PPEFs, none of the individuals indicated by their responses that their use was by force, secrecy or permission and therefore their use

would be considered to be 'as of right'. When considering the statutory period, all 9 members of the public used the path for part or all of the qualifying period between 1998 and 2018 on foot and of those, 5 claimed use of this path across the whole 20 years. Peter Roberts, Secretary to the Cranham Common Trust stated ; "...*the path in question has always been in regular use by villagers and the general public to gain access to the Common or the woodlands beyond for as long as anyone on the Board can remember*". Signs on the field gate belonging to Timbertops at point C and the bridleway gate at point E (**plan JH3**) state 'walkers Please Close the Gate'. Mr Nicholson, owner of Westley and the stables abutting the main claimed path said "*locals have always used it as a footpath into the wood*". The user evidence therefore would support a case for deemed dedication of public footpaths.

**11.19** As noted in paragraph 11.8 of this report, although all 12 individuals who submitted a PPEF in support of this application stated that they used the claimed paths on foot, 4 also stated that they also drove motor vehicles along them and a further 4 indicated that they rode a horse along them.

**11.20** Aside from the individuals noted in paragraph 9.15 of this report, who benefit from private easements to drive motor vehicles along the paths to reach their properties abutting the paths, Michael Drake, Nicola & Richard Overs and (Martin Whittaker - whose evidence is discounted due to his use being by private easement) claimed use of the paths with motor vehicles. s66 Natural Environment & Rural Communities Act 2006 (NERC) restricted the creation of new public rights of way for mechanically propelled vehicles ("mpv") after commencement (May 2006), and s67 NERC extinguished existing mpv rights where not already recorded on the Definitive Map and Statement. There are however 5 exemptions as set out in s.67(2):-

- ways where the main use was by motor vehicles (rather than by other users, e.g. walkers, cyclists, horse riders and horse drawn vehicles) over the period 2001-2006;
- ways that are recorded on the list of highways maintainable at public expense (the List of Streets) but are *not* recorded on the Definitive Map of Public Rights of Way;
- ways that have been expressly created (by legislation or by instrument) for motor vehicles [for example by a Section 38 agreement, provided that the wording was clear, or other expressed dedication];
- ways that have been created by the construction of a road intended to be used by motor vehicles [for example Gloucester South West Bypass using Section 24 Highways Act 1980]; and
- ways over which rights for motor vehicles were *created* through use by such vehicles prior to 1930, when it first became an offence to drive off-road. If a way already carried vehicular rights then evidence of use by motor vehicles would not meet this exemption.

**11.21** None of these exemptions are deemed to apply to the claimed paths. Further, in *Dorset v. SSETR* [1999] it was accepted that, although the evidence within five PPEFs was truthful, it was insufficient to satisfy the statutory test. Therefore the evidence supplied by the remaining 3 individuals of motor vehicle use of the claimed paths is considered to be insufficient to raise a claim of presumed or inferred dedication as a byway or restricted byway.

**11.22** With regard to the 4 individuals who claimed to have ridden a horse along the claimed paths, it is suggested that the character of the area in which these paths are located is such that one would expect more compelling evidence of use of horse riding along

them. It was held in *Mann v Brodie 1885* that the number of users must be “*such as might reasonably have been expected, if the way had been unquestionably a public highway*”.

- 11.23** The report submitted as part of the application by Cranham Common Management Committee consultation did not provide any evidence pointing to use specifically by horse riders. The consultation carried out with regard to this application in February 2019 included the Parish Council, the British Horse Society and owners of land in the vicinity of the paths such as the National Trust, Natural England and The Open Spaces Society. Further, notice of the application was fixed to gateposts at each termination point along the paths, ie, points A, G & E, as shown on the plan held (JH3), the latter 2 abutting Cranham Common.
- 11.24** The only responses received with regard to use of the path by horse riders were; Mrs Martin of Timbertops stated in her letter of 20 January 2018 (paragraph 10.3 of this report) “*The track is randomly used by some local Cranham people to walk along into the woods, but it is very rarely used by horse-riders and never by Cyclists ..... Horse riders currently use a number of tracks and paths in the woods that are not bridleways, yet the proposal is to make a bridleway of this track that they do not use*”.
- 11.25** Ros Davies, Access and Bridleways Officer for the British Horse Society responded to the consultation of this application on 20 February 2019 (paragraph 10.6 of this report) saying; “*Re this DMMO in Cranham parish, you asked if anyone had ever been stopped from using the path. I am afraid I do not know anyone who rides in the area so I cannot say either way. I assume the riders on the evidence form should know.*”
- 11.26** The evidence of use by horse riders is not compelling. The legal argument referred to in paragraph 11.22 of this report; *Dorset v SSETR [1999]* suggests that the evidence supplied by the 4 individuals who claimed to ride horses along the claimed paths is also considered to be insufficient to raise a claim of presumed or inferred dedication as a bridleway.
- 11.27** **Whether there is evidence of a lack of intention to dedicate a public right of way;** “Intention to dedicate” was considered in *Godmanchester 2007*, which is the authoritative case dealing with s31HA80. In his leading judgement, Lord Hoffmann approved the obiter dicta of Denning LJ (as he then was) in *Fairey v Southampton County Council [1956]* who held “*in order for there to be ‘sufficient evidence there was no intention’ to dedicate the way, there must be evidence of some overt acts on the part of the landowner such as to show the public at large – the people who use the path...that he had no intention to dedicate*”.
- 11.28** The ‘sufficient evidence’ must be inconsistent with an intention to dedicate, it must be contemporaneous and it must have been brought to the attention of those people concerned with using the way.
- 11.29** The land over which this path crosses is unregistered although older documents indicate that it may have once been part of the common. There is no explicit reference in section 31(1) HA80 of use having to be of a level to have come to the attention of the landowner. It does not speak of a *landowner being deemed to have dedicated* the way, but of the *way being deemed to have been dedicated*, i.e., irrespective of the existence or non-existence of a person capable of dedicating the paths.

**11.30** As detailed in paragraphs 9.22 & 9.23 of this report however, the owner of Cranham Wood & Common, Ellis Hicks-Beach drew up a Deed of Grant for 'all men' on 15 October 1929 executed under s193 Law of Property Act 1925 ("LPA25") which granted the public a right of access for 'air and exercise'. The plan attached to the Deed indicates that sections of the claimed paths were included. The land remained in the ownership of the Hicks- Beach family until it was split up and sold (the land over which the claimed paths cross was not included); April 2009 to the Cranham Common Trust and February 2011 to Cranham Woods Ltd. As seen in paragraph 10.9 of this report, Mr Tyson, the owner of Cranham Woods Ltd, stated "*We would like to make it clear that we have no objection to a footpath being created, as that path would lead naturally to our s.193 LPA and s.15 Crow Act land, and there is already a continuance of the proposed path into our woods*" and as recorded in paragraph 10.10, Mr Roberts, Secretary to the Cranham Common Trust acknowledged that "*..... the path in question has always been in regular use by villagers and the general public to gain access to the Common or the woodlands beyond for as long as anyone on the Board can remember*".

**11.31** No evidence has been provided that use of the claimed paths has been challenged in any way or of a lack of intention to dedicate prior to 2018.

## **12. CONCLUSIONS**

**12.1** Section 53(3) (c) (i) of the Wildlife and Countryside Act 1981 relates to the discovery by the Authority of evidence that shows that a right of way that is not shown on the map and statement subsists, or is reasonably alleged to subsist, over land in the area to which the map relates.

**12.2** Paragraph 12 of Annex B of the Department of Environment Circular 2/93 states that before making an order the surveying authority must be satisfied that the evidence discovered by the Council, when considered with all other relevant evidence available, shows that, on the balance of probabilities, the Definitive Map and Statement require modification because a right of way which is not shown on the map and statement subsists, or is reasonably alleged to subsist. The relevant tests are now set out in section 4.4 of the Defra Rights of Way Circular 1/2009, version 2 (October 2009).

**12.3** The documentary evidence considered for this application suggests that the claimed paths were enjoyed as a private right of access. Further, they were not claimed by the parish council during the 1950's national process of officially recording public paths.

**12.4** The revocable Deed of Grant executed in 1929 granted the public a right to 'air and exercise' and the plan included sections of the claimed paths. This private right could preclude a claim of presumed dedication on the basis that most of the claimed paths were accessible by licence or permission. However the High Court ruling, Billson 1998, acknowledged that a claim for a different use of the land, i.e., for access between highways, as opposed to the purpose of 'air and exercise', could meet the criteria of s31 Highways Act 1980.

**12.5** Analysis of the 9 accepted Public Path Evidence Forms indicated that these paths were used 'as of right' without interruption or challenge for part or all of the 20 year qualifying period 1998 – 2018 on foot, and of those, 5 used the claimed paths over the whole period. Of these, 4 claimed additional use by horse back and 3 claimed additional use with motor vehicles. This report showed that the claimed paths did not comply with the NERC exemptions and thus a claim for public motor vehicular rights

could not succeed and separately case law indicated that the quantity of user for both groups was insufficient to raise a claim of presumed dedication.

**12.6** No evidence over this period has been submitted to indicate a lack of intention to dedicate the paths.

**12.7** On the balance of probability therefore, the user evidence is considered insufficient to show that the main claimed path; A-F and the spur path; B-G subsist or are reasonably alleged to subsist as public bridleways. The evidence is however considered sufficient to show that they subsist or are reasonably alleged to subsist as public footpaths. It is submitted that these sections of path must now be protected by being recognised on the Definitive Map as public footpaths.

**12.8** Thus the recommendations are as follows:

(a) That no order be made to add a length of public bridleway to the Definitive Map of Public Rights of Way between points A-F & B-G.

(b) That an order be made to add a length of public footpath to the Definitive Map of Public Rights of Way between points A-F & B-G.

### **13. APPENDICES:**

<b>JH1</b>	1:30,000 scale Location Map
<b>JH2</b>	Plan of ownership adjacent to the claimed paths and CROW designated 15 land
<b>JH3</b>	Claimed paths plan; 1:1250 scale
<b>JH4</b>	Photos of claimed paths
<b>JH5</b>	Archivist's report
<b>JH6</b>	Ordnance Survey 1811 Pen & Ink
<b>JH7</b>	Ordnance Survey 25":1mile first edition 1884
<b>JH8</b>	Ordnance Survey 6":1mile first edition 1883
<b>JH9 &amp;9A</b>	Ordnance Survey 25":1mile second and third editions 1902 & 1922
<b>JH10</b>	1824 Greenwoods Map
<b>JH11</b>	Tithe Map 1838
<b>JH12</b>	1934 & 1940 conveyance plans
<b>JH13</b>	Finance Act Map 1910
<b>JH14</b>	1929 Deed –Law of Property Act 1925
<b>JH15</b>	Consultation responses
<b>JH16</b>	Summary of PPEFs
<b>JH16A</b>	Bar chart of use