

## Croydon Council

For general release

<b>REPORT TO:</b>	Nick Hibberd Corporate Director Sustainable Communities, Regeneration & Economic Recovery Directorate <b>02 / 06 / 2022</b>
<b>AGENDA ITEM:</b>	
<b>SUBJECT:</b>	<b>HAWKHIRST ROAD – ORDER TO AMEND THE COUNCIL DEFINITIVE MAP AND STATEMENT</b>
<b>LEAD OFFICER:</b>	<b>[Steve Iles], Director of Sustainable Communities</b>
<b>CABINET MEMBER:</b>	<b>N/a</b>
<b>WARDS</b>	<b>Kenley</b>
<b>CORPORATE PRIORITY/POLICY CONTEXT:</b>  We will focus on providing the best quality core service we can afford. First and foremost, providing social care services that keep our most vulnerable residents safe and healthy. And to keep our streets clean and safe. To ensure we get full benefit from every pound we spend, other services in these areas will only be provided where they can be shown to have a direct benefit in keeping people safe and reducing demand.  The recommendations in this report address the obligations placed on the Council pursuant to the Wildlife and Countryside Act 1981 and the Highways Act 1980 to:  (a) accurately maintain Council held records, namely the definitive map and statement ('DMS') and List of Streets ('LoS'); and  (b) consider and make a determination following the submission of a Definitive Map Modification Order application by a member of the public.  The objectives are to:  <ul style="list-style-type: none"><li>- Ensure compliance with statutory obligations;</li><li>- Maintain accurate Council records; and</li><li>- <a href="#">Council's priorities</a></li></ul>	
<b>FINANCIAL IMPACT:</b> These proposals can be contained within the available public rights of way budget this financial year 2022/2023	
<b>FORWARD PLAN KEY DECISION REFERENCE NO.:</b> n/a	

## 1 RECOMMENDATIONS

Consider:

- (a) The Council's statutory duties, including its duties to:
  - i. Determine a Definitive Map Modification Order ('DMMO') Application in accordance with Section 53(5) of, and Schedules 14 and 15 to, the Wildlife and Countryside Act 1981 ('WCA 1981');
  - ii. Maintain and continually review the Definitive Map and Statement of Public Rights of Way under Section 53WCA 1981; and
  - iii. Maintain a list of all highways that are maintainable at public expense under Section 36 of the Highways Act 1980 ('HA 1980').
- (b) The DMMO Application in respect of that part of Hawkhurst Road, Kenley, which runs from a point south of the Hawkhurst Road/Wildwood Court junction to the junction of Hawkhurst Road with the way known as Longwood Road, which because a highway cannot exist in a vacuum, with no point of public terminus, the Council treats (consistent with the Independent Report) as concerning that part of Hawkhurst Road that runs from its junction with Valley Road to its junction with Longwood Road ("Hawkhurst Road: North") and documents provided in support of the Application.
- (c) The findings detailed in the Independent Report in relation to both Hawkhurst Road: North and that part of Hawkhurst Road which runs from its junction with the way known as Longwood Road to Kenley Common and the unmetalled part of Longwood Road itself ("Hawkhurst Road: South" and "Longwood Road: East" respectively).

██████ Agree:

- (a) The findings detailed in the Independent Report;
- (b) The making of a Definitive Map Modification Order to record all of Hawkhurst Road: North, Hawkhurst Road: South and Longwood Road: East as restricted byways; and
- (c) The making of an amendment to the Council's list of streets to remove the reference to "private street" as regards Hawkhurst Road.

██████ Determine to:

- (a) Make and publish the Definitive Map Modification Order to effect the above; and

(b) Delegate to the Director Sustainable Communities to either:

- i. confirm the Definitive Map Modification Order following the statutory objection period provided that no objection is made within that period or any objection made has been withdrawn/resolved; or
- ii. follow the prescribed statutory process in the event that an objection is made and not withdrawn/resolved.

## **2 EXECUTIVE SUMMARY**

█ This report has been prepared in respect of an application for a Definitive Map Modification Order ('DMMO') submitted to the Council on 11 September 2019 relating to the legal status of a portion of Hawkhirst Road, a route within the London Borough of Croydon. It sets out the Council's statutory duties in relation to maintenance of the Definitive Map and Statement and in respect of applications for a DMMO.

█ This report summarises the DMMO Application of 11 September 2019, along with the Independent Report commissioned by the Council to establish the highway status of the relevant part of Hawkhirst Road based on all available evidence (and for the avoidance of doubt, references to "the Independent Report" include both the Independent Assessor's first (and main) report of 19 August 2021, concerning Hawkhirst Road: North but also his supplementary written advice as summarised below, including in relation to Hawkhirst Road: South and Longwood Road: East).

█ This report makes recommendations as set out above.

█ The recommended approach is considered compliant with relevant statutory obligations and requirements, in particular the Council's statutory duties under Section 53 of and Schedules 14 and 15 to the WCA 1981 and Section 36 of the HA 1980.

## **3 DETAILED RECOMMENDATIONS**

### Location

█ Hawkhirst Road:North is a metalled roadway located within the London Borough of Croydon. It forms a junction with Valley Road to the North and continues South terminating at Hawkhirst Woods at a junction with Longwood Road (which at its eastern end meets Hawkhirst Road and to the west meets Kenley Lane) where a gate blocks the route to vehicular access and the metalled surface terminates. Hawkhirst Road: South continues through the woods beyond that junction and forms a junction with a bridleway to the South. That portion of the route is not currently recorded on the Definitive Map and Statement and its status is also disputed. For the sake of completeness the

Council has sought independent advice on the highway status of that portion of the route and of the unmetalled part of Longwood Road. The metalled part of Longwood Road, shown in the map appended at Appendix 6 to this report, is an adopted highway and, for the avoidance of doubt, subsequent references to “Longwood Road: East” within this Report exclude that part of the way which is an adopted highway.

██████ Hawkhurst Road is currently recorded on the Council’s list of streets as a Private Street, meaning an un-adopted highway maintainable at private expense for the purposes of the Highway Act 1980. It is not currently recorded on the Definitive Map and Statement.

### DMMO Applications

██████ A DMMO Application is a form of statutory challenge to the information published by a Council on its Definitive Map and Statement. A DMMO Application may be made by any person and must be determined in accordance with Section 53(5) of, and Schedule 14 to, the WCA 1981. On receipt of an application, a Council is under a duty to investigate the matters stated in the application ‘as soon as reasonably practicable’ after receiving a certificate from the applicant certifying that they have served notice of the application on every owner and occupier of any land to which the application relates.

██████ Following its investigations and after consulting with every local authority whose area includes the land to which the application relates, having investigated the matters in the application, the Council must then decide whether to make or not to make the Order to which the application relates.

██████ Any such determination ought to have been made within twelve months of an application. In the event that a determination has not been made within this timeframe, the applicant may apply to the Secretary of State to make a direction to the Council.

██████ The modification which may be made by an order must include any addition to the statement of particulars as to (a) the position and width of any public path, restricted byway or byway open to all traffic which is or is to be shown on the map; and (b) any limitations or conditions affecting the public right of way thereover.

██████ As soon as practicable after determining the application, the Council must give notice of their decision by serving a copy of it on the applicant and any person on whom notice of the application was required to be served under paragraph 2(1).

█ If the decision is to make an Order, upon making it, the Council must give public notice. If the order is unopposed, it may be confirmed by the Council itself without modification; if there are to be any modifications it must be submitted to the Secretary of State for confirmation by him. If the order is opposed, it must also be submitted to the Secretary of State for confirmation by him, and generally a local inquiry or hearing will be held.

### The Hawkhurst Road DMMO Application

█ The status of part of Hawkhurst Road was challenged by way of a DMMO Application submitted to the Council on 11 September 2019. The application sought an order to be made in accordance with Section 53(2) WCA 1981 modifying the DMS for the area by “Adding the entire length of the bridleway shaded grey only on the large scale map annexed to the Form CA16” (the CA16 is included at Schedule 4 of the DMMO application). The DMMO Application in respect of that part of Hawkhurst Road, Kenley, which runs from a point south of the Hawkhurst Road/Wildwood Court junction to the junction of Hawkhurst Road with the way known as Longwood Road. Due to the fact a highway cannot exist in a vacuum, without a point of public terminus, the Independent Assessor has treated, and the Council agrees it should treat, the DMMO Application as concerning that part of Hawkhurst Road that runs from its junction with Valley Road to its junction with Longwood Road, “Hawkhurst Road: North”.

█ The CA16 which was previously deposited by the applicant and is published on the Council’s website states;

- “Hawkhurst Road Limited is the owner of the private land that is not maintained at public expense (the freehold land registered with title number SGL789381 and shown edged red on the official copy title plan and the large-scale map accompanying the CA16).
- The way shown grey (within the area outlined red) on the accompanying large-scale map is dedicated as a bridleway only (the “Bridleway”).
- The areas shown green (within the area outlined red, either side of the Bridleway) on the accompanying large-scale map have no public rights of way over them dedicated whatsoever.
- No other ways over the land edged red on the accompanying map have been dedicated as highways”

█ The DMMO application contains a notice from the applicant to itself as owner of the land to which the application relates, advising that they have made a DMMO application (Schedule 1 of the application).

■ The necessary certificate confirming that all owners and occupiers of the land to which the application relates have been notified of the application is at Schedule 2 of the application.

■ The application also contains a 'Demand for a Modification to the List of Streets' at Schedule 3. The 'demand' is for the Council to comply with its duties under section 36 of the Highways Act 1980 (the HA 1980) and remove the alleged private land from the List of Streets and amend it to reflect its asserted status as a bridleway.

■ Thirteen questionnaires were submitted as Schedule 5 of the application on 11 September 2019, all from residents of Hawkirst Road. On 10 November 2019, 32 further questionnaires from residents of the surrounding area and friends and family of residents were submitted by HRL in support of the application by email, along with a number of key points and graphical representations of some of the questions that the applicant believes are pertinent. Further material was submitted by the applicant on 11 November 2019.

■ All evidence submitted in connection with the DMMO Application has been considered in reaching a recommendation on determining the application.

The process of determining this Application has been protracted as a result of both the complexity of the application and issues it raises which have been compounded by difficulties associated with the pandemic causing certain physical information sources to be inaccessible for lengthy periods of time.

The Applicant made an application to the Secretary of State on 12 September 2021 resulting in a direction to make a determination in this matter by 4 May 2022.

### Independent Report

In order to appropriately assess the DMMO Application, the Council instructed an independent assessor to report on the status of Hawkirst Road. The assessor considered the legal position, all available documentation, records and plans, where relevant, held by the local authority, national archives; as well as submissions from the public, residents and stakeholders as appropriate.

The Independent Report is comprised of the primary, substantive report dated 19 August 2021 (the "RC First Report"), a supplementary report dated 26 August 2021 (the "RC Supplementary Report"), and a letter dated 17 December 2021 responding to further questions raised (the "RC December Response").

The RC First Report addresses all of Hawkirst Road: North, the RC Supplemental Report was commissioned to assess the remainder of Hawkirst Road, "Hawkirst Road: South" (shown C-D-E on the plan attached to the RC Supplementary Report) and of the unmetalled part of Longwood Road, "Longwood Road: East" (shown C-F on the plan attached to the RC Supplemental Report), to sit alongside the RC First

Report. The RC December Response provides a response to the matters raised by a member of the Applicant, and understood to be on behalf of the Applicant, in their letter dated 23 September 2021.

The conclusions of the RC First Report are as follows:

- The documentary evidence, taken as a whole, is that the “Application Route” was constructed as public carriageway and dedicated and publicly accepted as such in the early 20th century.
- Section 67 of the Natural Environment and Rural Communities Act 2006 took effect over the “Application Route” and that no Section 71 exemptions applied.
- The correct highway status for Hawkthirst Road: North is therefore a restricted byway;
- The highway extends from boundary to boundary;
- Responsibility for maintenance of the highway remains unchanged – ie maintenance is not the responsibility of the Council and it is likely to be the responsibility of the frontagers to the restricted byway; and
- The status of the highway preserves/creates a private right of way for the purposes of accessing land and property served by the Application Route.

The conclusions of the RC Supplemental Report are as follows:

- The correct highway status of Hawkthirst Road: South and Longwood Road: East is a restricted byway;
- OS mapping evidence suggests that Hawkthirst Road: South and Longwood Road: East were physically set out in the same timeframe and manner as Hawkthirst Road: North;
- As such, it is logical that the same practical consequences will follow (i.e. regarding maintenance and rights of way);
- However, the report acknowledges that there are factors which differentiate Hawkthirst Road: South and Longwood Road: East from Hawkthirst Road: North, and as such the Council must be cognisant that Hawkthirst Road: South and Longwood Road: East are:
  - Absent from the Highway Authority records (as either publicly or privately maintainable);
  - Not excluded from the 1910 Finance Act Index Plan and included within the Hereditament 2318; and
  - Terminates at Stumps Lane junction cul-de-sac, which is a public bridleway.

- The differences do not preclude a status of restricted byway from applying to Hawkhurst Road: South and Longwood Road: East;
- Neither are the differences necessarily indicative of a different landowner intention (c.1910);
- In fulfilling its duty to confirm the DMMO, the Council will be required to establish status on the balance of probability, but at this stage, merely making the DMMO, the test to be satisfied is a lower threshold, one of 'reasonable allegation'.

The conclusions of the RC December Response are as follows:

- Hawkhurst Road's dedication as a public carriageway would not have devalued the land (indeed would be favourable for the purposes of the trust);
- Detailed investigation into the status of each intersecting route was appropriate to consider the status of the Application Route (as a restricted byway);
- The presumption of boundary to boundary highway width has not been negated by plantation along the western boundary of the Private Land;
- Establishment of the public carriageway rights (dedication) relies upon the common law, and has not been barred;
- Sales particulars are not sufficient to negate the intention to dedicate the land as a highway; public carriageway rights were already established;
- Finance Act documents and Index provide good evidence of public highway rights, by virtue of the extent of the land that was excluded from valuation;
- OS maps contribute by providing evidence of relevant physical features;
- Town Planning Scheme (1930) provides good evidence of the reputation of the route as a public highway;
- Inclusion of the Application Route in the Council's highway records is significant;
- For almost 90 years the Local Authority has publicly acknowledged that the road is a privately maintainable public carriageway, therefore it is unsurprising there are no documented private rights of access;
- Deeds of easement not yet registered have no relevance and cannot have retrospective effect;
- User evidence put forward is insufficient to give rise to a presumption of dedication;
- Conclusions within the reports regarding private rights only concern property holders along the Application Route;



- Overall, there is not a credible case upon which it could be concluded that the Application Route is a bridleway; the evidence all points to restricted byway status.

A more detailed analysis of the Independent Report, and a full copy of the Independent Report is appended to this report.

█ The Independent Report recommends that the Council:

- (a) make a Definitive Map Modification Order to record the Application Route (Hawkhirst Road: North) on the Definitive Map and Statement as a restricted byway;
- (b) make a Definitive Map Modification Order to record Longwood Road: East and Hawkhirst Road: South on the Definitive Map and Statement as restricted byways;
- (c) make an amendment to the Council's list of streets to remove the reference to "private street" as regards Hawkhirst Road;
- (d) If no objections are duly lodged to the Definitive Map Modification Order ("the Order" or "the DMMO"), or if objections are duly lodged and then subsequently withdrawn, the Order be confirmed;
- (e) If objections are duly lodged, and not subsequently withdrawn, the Order be referred to the Secretary of State via the Planning Inspectorate for a decision upon whether or not it should be confirmed.

#### Engagement with Interested Parties

The Council endeavoured to afford all those interested in the Application an opportunity to consider these reports and the material referred to within them. To that end, the Applicant and interested parties have been provided with redacted versions of the Independent Report and enclosures, inviting their views upon the reports and their enclosures.

The Council has received and considered all material received in response together with the Application and the reports.

#### Consultation with other Local Authorities

When determining a Definitive Map Modification Order, the Council must consult with every other local authority whose area includes the land to which the order relates<sup>1</sup>.

For the purposes of the Application, a local authority means a non-metropolitan district council, a parish council or the parish meeting of a parish not having a separate parish council.

Whilst no relevant Councils are in existence in relation to the land to which the order relates, as a matter of fact the Council has engaged with Surrey County Council on the basis that they are the next neighbouring highway authority to the South. No comments were received.

#### Reasons for Recommendation

Having considered the DMMO Application including the views of users and respondents to the Application and the Independent Report, it is recommended to implement a Definitive Map Modification Order amending the Definitive Map and Statement to reflect the highway status of Hawkhurst Road: North, Hawkhurst Road: South and Longwood Road: East as a restricted byway from boundary to boundary.

It is also recommended that the Council's list of streets is amended to reflect the status of Hawkhurst Road as a restricted byway.

The recommendations wholly reflect the findings of the independent assessor, whose reasoning, it is suggested, should be adopted.

#### Implications of Recommendation

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<sup>1</sup> Paragraph 3(1)(b) to Schedule 14 of the WCA 1981

■ The effect of the order would be to list Hawkhurst Road and Longwood Road: East on the DMS for the first time and reflect that the public right to drive a motor vehicle over Hawkhurst Road was extinguished under the Natural Environment & Rural Communities Act 2006. Prior to making the Order, the independent assessor has requested the opportunity to undertake a measurement checking exercise so that the width of the restricted byway can be correctly identified on the face of the DMMO.

■ As noted above, the effect of the DMMO is merely to ensure that the correct highway rights of Hawkhurst Road: North and South and Longwood Road: East are reflected in the DMS. A restricted byway is defined as a highway over which the public have restricted byway rights, with or without the right to drive animals of any description. "Restricted byway rights" include a right of way on foot, on horseback or leading a horse and a right of way for vehicles other than mechanically propelled vehicles (this includes a right of way for pedal cycles and horse drawn vehicles).

#### **4 PUBLICITY**

■ On taking the decision to make a Definitive Map Modification Order, the Council must give public notice by way of:

- (a) publication in at least one local newspaper circulating in the area in which the land to which the order relates is situated;
- (b) by serving a notice on—
  - i. every owner and occupier of any of that land;
  - ii. every local authority whose area includes any of that land;
  - iii. every person specified under Paragraph 3(3) of Schedule 15 to the WCA 1981; and
  - iv. such other persons as may be prescribed in relation to the area in which that land is situated or as the authority may consider appropriate; and
- (c) by displaying a copy of the notice at:
  - i. the ends of the affected way;
  - ii. local council offices; and
  - iii. at such other places as the authority may consider appropriate.

Statutory services providers, local members, local residents, the emergency services and The Ramblers Association, will be consulted.

Once the notices have been published, the public (including the applicant) has not less than 42 days to comment or object to the proposals. If no objections are duly lodged, or if objections are duly lodged and then subsequently withdrawn, the Order may be confirmed. If objections are duly lodged, and not subsequently withdrawn, the Order must be referred to the Secretary of State via the Planning Inspectorate for consideration.

## **5 STATUTORY CONSIDERATIONS**

### Section 53 of the Wildlife and Countryside Act 1981

Under Section 53 of the WCA 1981, the Council is obliged to keep its DMS under continuous review and make such modifications to the DMS as 'appear to them to be requisite' as a result of a new right being created or a highway being shown to be of a different description to that listed.

Under section 53(5) of the WCA 1981, any person may make an application for an order modifying the DMS to the Council with such an application to be determined by the Council as soon as practicable under the requirements of Schedule 14 to the WCA 1981.

### Section 36 Highways Act 1980

Section 36(3) of the HA 1980 requires the Council to make and keep up to date a list of the streets within their area which are highways maintainable at the public expense.

The inclusion of routes which are highways yet not maintainable at public expense in the Council's list of streets is a practice shared by a number of Councils which goes beyond the statutory requirement contained in s36(3) of the HA 1980. The Council is obliged to maintain and update its list of streets.

### The Equality Act 2010

The Equality Act 2010 places a duty on local authorities to comply with the provisions set out in the Act. The two provisions are:

- The duty under section 1 of the Equality Act 2010, to have due regard to the desirability of exercising the Council's functions in a way that is designed to reduce the inequalities of outcome which result from socio-economic disadvantage;
- The public sector equality duty in s 149 of the Equality Act 2010 requires the Council to have due regard to the need to—

- (a) eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under the Equality Act;
- (b) advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it;
- (c) foster good relations between persons who share a relevant protected characteristic and persons who do not share it.

### The Human Rights Act 1998

█ The Human Rights Act 1998 states that it is unlawful for a public authority to act in a way which is incompatible with a right or freedom under the European Convention on Human Rights

█ The Council must discharge its Equality Act and Human Rights Act duties and it is not considered that in taking this decision to make the DMMO, any characteristics protected by the Equality Act or human rights will be infringed. In any event, the Council is obliged to determine the DMMO and has no discretion in such decision-taking.

## **6 LEGAL CONSIDERATIONS**

█ The requirements of the WCA 1981 to determine this DMMO Application have been set out in this report.

█ Irrespective of what decision the Council takes, any person dissatisfied has the opportunity to object to the Secretary of State. If objections are made and not withdrawn the Secretary of State will appoint an Inspector who will consider the application and make a recommendation to the Secretary of State for a final decision upon whether or not any modification to the DMS is required.

█ In addition to the substantive risk of challenge, public rights of way disputes, not infrequently lead to judicial review actions. It is essential that the Council observes procedural requirements in addressing this application.

█ By appointing an independent assessor the Council has prudently facilitated a third party consideration of the application and the relevant law and evidence. The report of the assessor should be carefully considered.

## **7 DECISION MAKING**

█ This Report relates to the making of a Definitive Map Modification Order under s53 of the Wildlife and Countryside Act 1981.

The Local Authority (Functions and Responsibility) Regulations 2000 states that functions under s53 of the Wildlife and Countryside Act 1981 are non-executive functions (Schedule 1 Part I paragraphs 24, 25, 26 and 28). The Council has

delegated this decision taking to the Chief Executive and in turn, the Chief Executive Scheme of Delegation (version 2019) delegates this function to the Corporate Director Sustainable Communities, Regeneration & Economic Recovery Directorate

█ (at page 7 paragraph 1).

## **8 CUSTOMER IMPACT**

█ The effect of the proposed order will not be to extinguish public rights over Hawkhurst Road: North and South and Longwood Road: East but to clarify those rights that do in fact exist. The Order will provide clarity to the public in respect of the nature of their right of way. The public would no longer enjoy a right to drive vehicles along Hawkhurst Road: North and South and Longwood Road: East thereby restricting motorised access to the Hawkhurst woods from Valley Road. Public rights to walk, ride and lead horses and cycle along this section of Hawkhurst Road would remain.

█ It is not anticipated that any residents of Hawkhurst Road or Longwood Road: East will be impacted as a result of the existence of private rights of access for residents.

█ Through publication of the Order, members of the public will be given a further opportunity to object to or make representations in respect of the proposed Order.

## **9 EQUALITIES IMPACT**

█ An Equalities Impact Analysis (EqIA) has been carried out and it is included as appendix 7.

█ The Council is, in accordance with its duty under section 1 of the Equality Act 2010, having due regard to the desirability of exercising its functions in a way that is designed to reduce the inequalities of outcome which result from socio-economic disadvantage;

█ The Council, in discharging the public sector equality duty in s 149 of the Equality Act 2010 in relation to the decision upon the making of the recommended DMMO, has due regard to the need to—

- (a) eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under the Equality Act;
- (b) advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it
- (c) foster good relations between persons who share a relevant protected characteristic and persons who do not share it.

It is not considered that in taking this decision to make the DMMO, any characteristics protected by the Equality Act will be infringed. The report and subsequently publishing of the Definitive Map Modification Order will invite objections which will need to be considered before any changes to the Definitive Map can be made.

The DMMO decision does not change the responsibility or maintenance standards. Responsibility remains with the residents and the maintenance is only for the purposes of allowing access to those leading or riding horses.

The DMMO process follows set statutory procedure. Should a claim be successful any subsequent works to the right of way will take into consideration Equalities Act requirements in terms of accessibility

**Approved by: Gavin Handford, Director of Policy, Programmes & Performance**

## **10 ENVIRONMENTAL IMPACT**

There need be no change in respect of the street scene. Once the final orders have been confirmed, it may be necessary for some form of appropriate signage to be provided. Any such Council produced signs will be designed to limit the environmental impact and appropriate measures to be used in environmentally sensitive and conservation areas.

## **11 CRIME AND DISORDER REDUCTION IMPACT**

The Council will rely on the existing enforcement provisions.

## **12 HUMAN RIGHTS IMPACT**

Regard should be had to the provisions of the Human Rights Act. In particular, the provisions of Article 1 of the First Protocol, protection of property. In relation to Article 1, residents of Hawkhurst Road and owners of neighbouring land may be concerned that vehicular access may be curtailed. However, as noted above, the Order proposed does not change the rights that exist but simply amends the Council's records to reflect the true status of the road.

Private rights utilised to access property by motorised vehicle are unaffected by the Order.

It is possible there may be an effect on property values, but this appears speculative.

In any event, the statutory scheme under s.53 of the 1981 Act does not make questions of private property rights a material consideration and nor does the Council consider that s.53 should be interpreted so as to do so: the purpose of

s.53 is to allow for formal recognition of highways that are highways as a matter of law.

### **13 REASONS FOR RECOMMENDATIONS**

█ In making the recommendation to make the Definitive Map Modification Order, consideration has been given to all matters in this report.

### **14 OPTIONS CONSIDERED AND REJECTED**

█ The options considered and rejected are:

- (a) Making an Order in precisely the terms sought in the DMMO Application; and
- (b) Rejecting the DMMO Application and making no Order.

### **15 DATA PROTECTION IMPLICATIONS**

*WILL THE SUBJECT OF THE REPORT INVOLVE THE PROCESSING OF 'PERSONAL DATA'?*

NO

*HAS A DATA PROTECTION IMPACT ASSESSMENT (DPIA) BEEN COMPLETED?*

NO

The Director of Sustainable Communities comments that the subject of the report does not involve the processing of personal data.

**16 Approved: by Steve Iles, Director of Sustainable Communities, dated 03 May 2022**

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<b>REPORT AUTHOR:</b>	Anthony Graham, Highway Records Officer Highway Improvements, Streets, 020 8726 6000
<b>CONTACT OFFICER:</b>	As Above
<b>BACKGROUND DOCUMENTS:</b>	DMMO Application Supporting Documents Assessor's Report and corresponding appendices Plan of the Area



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## APPENDIX 1

### Analysis of Independent Report

#### Hawkhirst Road: North

Mr Carr's first substantive step in the RC First Report was to note 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 that as such the DMMO Application in respect of the HRL Route 'would be likely to fail at the outset due to it not linking to any other acknowledged highway', but that '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 Hawkhirst Road shown by a broken black line (A-B-C) on Plan 1'. Section "A-B-C" being the section from the junction with Valley Road to the junction with Longwood Road, and which Mr Carr refers to as "the Application Route".

The RC First Report, after introductory matters including the above, proceeds through "Background", which covers both the DMMO Application and also "legislative context", then a "Summary of Evidence", including both the user evidence submitted with and subsequently in support of the DMMO Application but also a range of documentary evidence, beginning with a run of sales particulars from 1863, 1902, 1922 and 1934, then 1910 Finance Act records, Ordnance Survey maps, local byelaws, the 1930 Town Planning Scheme for the area, Building Notices from 1900 and the 1930s, a 1937 Private Street Works Scheme, Rural District Council Committee minutes from 1937-38 and 1962, highway authority records and registered title documents, including those 'of properties adjoining and served by the Application Route' as to which Mr Carr notes 'none of them have any recorded access rights over Hawkhirst Road'. After this, the RC First Report proceeds to consideration of the user evidence, being essentially the DMMO Application which, Mr Carr notes (see para. 10.8), relies upon the Form CA16 Statement as evidence of intention to dedicate as bridleway on the part of HRL.

Mr Carr rejects the DMMO Application as not credible, on the bases that: (i) though evidence of public user sufficient to give rise to statutory prescription of a bridleway is very light (indeed), there is evidence of dedication as a bridleway by HRL from 2018, but the other requirement, acceptance by the public at large, is missing, as the evidence of user is not of acceptance by the public at large, but by residents of Hawkhirst Road and their visitors (ii) the evidence of dedication as a bridleway cannot downgrade the existing status of the highway. As to the latter, Mr Carr concludes, on the documents, a higher status established many decades (in fact over a century) earlier.

Mr Carr's essential conclusions are that the documentary evidence, taken as a whole, is that the "Application Route" was constructed as public carriageway and

dedicated and publicly accepted as such in the early 20th century. Mr Carr relies upon the totality of the evidence, including the following points of particular significance:

- (a) 1863 sales particulars of the Kenley House Estate (the name of the sizeable holding within the boundaries of which Hawkhurst Road: North and South and Longwood Road now sit) show that what Mr Carr terms “the Application Route” had not yet been set out. By contrast a 1900 building notice (Appendix 16 to RC First Report) shows the northerly extent of “the Application Route” and the 1902 sales plan of a number of building plots fronting onto “the Application Route” does show it laid out, and indeed all of Hawkhurst Road as laid out, and named as Hawkhurst Road, but not as included in the land that was for sale either side of it (Appendix 11 to RC First Report). This is repeated in subsequent sales particulars. Mr Carr notes, that the fact the “Application Route” is not included in any of the registered titles of the adjoining properties is consistent with its exclusion from the sales particulars considered, and given the adjoining properties must have rights of access, and given Hawkhurst Road was set out specifically to serve proposed housing, the lack of private rights of access suggests that from the outset the intention was that Hawkhurst Road be a public carriageway (RC First Report paras. 14.2, 14.27 and 14.38-14.39, 15.2).
- (b) Equally, 1922 sales particulars refer to purchasers contributing to the upkeep of “roads” including Longwood Road and Hawkhurst Road ‘until the said roads and footpath shall be taken over by the Local Authority’. Mr Carr observes that the 1922 sales particulars can only be construed as envisaging the highway authority taking over responsibility for maintenance, but for that to occur Hawkhurst Road must first have been dedicated as public highway, the inference being this was the intention from the start (RC First Report, paras.14.3, 14.39 and 15.5).
- (c) In Mr Carr’s view, there is no evidence that the “Application Route” was gated, or other means employed to physically prevent public use, nor that signage was in place, at any point in the early 20th century. He considers the setting out of the road, as carriageway, and the apparent throwing open of that road to the public constitute evidence of overt actions by the landowner from which dedication may be inferred (RC First Report paras.15.2-15.3).
- (d) The “Application Route” was shown as Hawkhurst Road and clearly excluded from the 1910 Finance Act valuation map, as, in fact, was Hawkhurst Road: South up to its emergence from the woodland immediately surrounding Kenley House (Appendix 12 to RC First Report), that section being points C-D on the plan to RC Supplementary Report (points D-E being the continuation to its terminus junction with Stumps Lane). Mr Carr describes the exclusion of “the Application Route” from valuation as very good evidence of the existence of public highway rights at that time (i.e. circa. 1910) (RC First Report paras.14.9, 15.4).

- (e) Ordnance Survey maps from the late 19th and early 20th centuries confirm the laying out of the “Application Route” at the time suggested by the building notice and sales particulars, Hawkhirst Road not appearing in 1897 but shown (North and South) at 1913 (RC First Report, Appendix 13, compare pages 203-205 with 206-208), and Mr Carr observes it is shown as ‘more substantial in proportion than many of the surrounding older acknowledged public roads...(which suggests) the Application Route was set out as carriageway with verges’ (RC First Report para.14.16).
- (f) The 1930 Town Planning Scheme prepared by Coulsdon & Purley Urban District Council (RC First Report, Appendix 15) shows the “Application Route” (and in fact the northern part of Hawkhirst Road: South, to the edge of the woodland, the area south of that being hatched as outside the Scheme mapping) as an “existing highway over which the public at large have a right of way (other than main roads and roads maintainable by the inhabitants at large)” (see page 239 and key at page 238), along with Longwood Road, and proposes improvement at the corner of Longwood Road and Hawkhirst Road (see pages 236 and 239, item number 46). Mr Carr concludes it is clear the local authority considered the “Application Route” a public highway, but not maintainable at public expense (RC First Report, para.14.24) and in the circumstances the reference to “highway” is probably to a public carriageway type highway (RC First Report, paras.14.25 and 15.8).
- (g) The 1937 Private Street Works Scheme prepared by Coulsdon & Purley Urban District Council (RC First Report, Appendix 16), which Mr Carr notes as showing proposals (apparently not implemented) by the local highway authority to improve “the Application Route” (note, only the Application Route) and bring it up to adoptable standard (RC First Report para.9.15) along with apparent Council discussion of that scheme relevant to both Hawkhirst Road: North and Longwood Road over 1937-1939 (RC First Report, Appendix 18, see, for example, page 264, concerning 25 October 1937 and proposing improvement of Hawkhirst Road: North, similarly page 273 concerning 3 March 1938, whilst page 273, concerning 1 January 1962, has both Hawkhirst Road and Longwood Road recommended as “prospectively maintainable highways” (along with others)). Mr Carr considers these all support a conclusion that the “Application Route” was considered to be a public highway of carriageway status (RC First Report paras.14.29-14.31, 15.10).
- (h) The Council’s own highway records, which record the “Application Route” as a private street, likewise, I note, Longwood Road (see RC First Report, Appendix 19, pages 276-277, 279-280) accords with a consistent view of the “Application Route” (and indeed Longwood Road) as highway of carriageway status not maintainable at public expense (RC First Report, paras.14.35 and 15.11).

Mr Carr acknowledges the existence of some, albeit limited, evidence contrary to his conclusions. So far as RC First Report is concerned, that consists essentially of the

description in 1934 sales particulars of a “private road”. Mr Carr considers this either mistaken, misunderstood or a reference to private maintenance liability (RC First Report para.15.9).

#### Hawkhirst Road: South and Longwood Road: East

The essential difference regarding Mr Carr’s evidence concerning both Hawkhirst Road: South and Longwood Road: East by contrast with Hawkhirst Road: North is the degree of investigation and the depth and breadth of the evidence before him. I note that Mr Carr was instructed to prepare RC First Report in relation to the DMMO Application, which DMMO Application includes a deal of evidence regarding Hawkhirst Road: North. It was only later that Mr Carr was asked to address Hawkhirst Road: South and Longwood Road: East by way of RC Supplementary Report, in circumstances where he was not presented with a similar trawl of evidence relevant to them.

Notwithstanding this, Mr Carr observes in RC Supplementary Report that the evidence for Longwood Road: East is ‘essentially the same’ as that relating to Hawkhirst Road: North, the exception being a difference in treatment in the 1910 Finance Act documents, whilst the evidence for Hawkhirst Road: South is ‘similar’ to that for Hawkhirst Road: North, the differences being (a) Hawkhirst Road: South is not recorded on the highway authority’s records as either publicly or privately maintainable; (b) the southernmost section of Hawkhirst Road: South is not excluded from valuation on the 1910 Finance Act index plan; and (c) Hawkhirst Road: South terminates at its junction with Stumps Lane, recorded on the Definitive Map as a public bridleway and itself a cul-de-sac.

Mr Carr notes, it is the case that whilst, for example, the 1935 Ordnance Survey (RC First Report, Appendix 13, pages 209-211) essentially continues the marking of all of Hawkhirst Road in the manner of the 1913 map, later Ordnance Survey maps show Hawkhirst Road: South as less well defined (see e.g. RC First Report, Appendix 13, pages 201-202). As Mr Carr says, any change in character and use after initial dedication would not result in a change in public rights (subject to the effect of the 2006 Act).