

Report to the Executive Director of Place Application for a definitive map and statement modification order to add bridleways in Stony Down Plantation, Corfe Mullen For Decision

Portfolio Holder: Cllr D Walsh, Planning

Local Councillor(s): Cllr Mike Barron, Cllr Paul Harrison

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Report Status: Public

Brief summary:

Following an application for a Definitive Map and Statement Modification Order to add sixteen bridleways in Stony Down Plantation, Corfe Mullen, this report considers the documentary and user evidence relating to the status of the routes and a recommendation is duly made.

Recommendation:

That:

- a) The application be accepted in part and an order made to modify the definitive map and statement of rights of way by adding bridleways from A – P – O, P – N, O – M – G, O – N – E, M – E, B – T – Q – R, T – S, C – S – R – D, D – E, E – K, F – G, J – K and G – I, as shown as routes Red 1, Red 2, Red 3, Red 4, Red 5, Green 1, Green 2, Green 3, Blue 1, Orange 1, Orange 2, Orange 3 and Orange 4, on Drawing T544/20/1
- b) The application be accepted in part by adding a footpath from K – L – L1 – H shown as route Orange 5 on Drawing T544/20/1
- c) The application be refused for those parts Q – Q1 and L – Q as shown as routes Green 4 and Orange 6 on Drawing T544/20/1

- d) If the Order is unopposed, or if all objections are withdrawn, it be confirmed by the Council.

Reasons for Recommendation:

- (a) The available evidence shows, on the balance of probabilities, that the claimed rights of way listed above subsist as bridleways.
- (b) The available evidence shows, on the balance of probabilities, that the claimed right of way listed above subsists as a footpath.
- (c) The available evidence for the remaining rights of way does not show that these rights of way subsist on the balance of probabilities.
- (d) The evidence shows, on balance, that the routes referred to in a) above should be recorded as bridleways and the route referred to in b) above should be recorded as a footpath, as described. Accordingly, in the absence of objections the Council can itself confirm the Order without submission to the Planning Inspectorate.

1 Background

Applicant

- 1.1. An application to add sixteen bridleways as shown on Drawing T544/20/1 (Appendix 1) was made by Mr B L Heath on 14 November 2015:

A – P – O (Red 1),
P – N (Red 2),
O – M – G (Red 3),
O – N – E (Red 4),
M – E (Red 5),
B – T – Q – R (Green 1),
T – S (Green 2),
C – S – R – D (Green 3),
Q – Q1 (Green 4)
D – E (Blue 1),
E – K (Orange 1),
F – G (Orange 2),
J – K (Orange 3),
G – I (Orange 4),
K – L – L1 – H (Orange 5),
L – Q (Orange 6).

N.B. Some forms referred to the colour 'Pink' to describe the routes referred to in this report as 'Red'. For consistency the routes will only be referred to using the term 'Red' in this report.

Description of the routes (based on a site visit made on 19 March 2020)

- 1.2. The claimed route Red 1 (A-P-O) starts at point A where there is currently a large double metal gate (locked). The path is then a clear track, approximately 3-4m wide, running approximately due north through mature mixed wood (predominantly pine). The path is partially obstructed just north of point A by a pile of mixed hard-core. The surface is partly hard-core / gravel and partly bare soil / grass. Closer to point P there are rhododendrons either side. At point P the rhododendron cover is so dense that it is impossible to see the line of the claimed path Red 2. From point P to point O the route is narrower and a single worn path rather than a track, it is bounded on both sides by dense rhododendrons and is 2-3m wide. The surface is bare soil / grass. The route bears to a north-easterly direction to reach point O where route Red 4 continues ahead, and route Red 3 branches off to the north.
- 1.3. The route Red 2 (N-P) starts at point N as a narrow grassy branch off route Red 4. It runs west-south-westerly between bracken, brambles and rhododendrons in conifers, but after a few metres it becomes too overgrown to be followed. The vegetation is suggestive of the existence of a path in the past. At the point where the claimed path joins route Red 1 at point P there is no sign of a path through the dense rhododendrons.
- 1.4. Route Red 3 (O-M-G) starts at point O where there is a junction with routes Red 1 and Red 4. It heads in a generally northerly direction as a narrow, overhung path through rhododendrons and broad-leaved trees. The width is 0.5m - 1.5m. Initially it descends quite steeply and the path on the ground meanders more than the claimed route. Nearer to point M the path on the ground runs closer to the western boundary fence than the claimed route. At point M the trees have been cleared for the overhead power lines and route Red 5 branches off to the east. Route Red 3 continues as a narrow path, initially north through bracken and conifer plantation, then east through mixed woodland and bushes, 1 – 2m wide. The path on the ground does not follow exactly the claimed route, and at the north-western corner, is further from the woodland boundary. Approaching point G a branch continues north-

westerly as route Orange 4 and route Red 3 terminates at a metal field gate (locked) at the junction with bridleway E37/22. Throughout its length the path is bare earth / leaf litter.

- 1.5. Route Red 4 (O-N-E) starts at point O; the junction of routes Red 1 and Red 3 and continues eastwards on a level, leaf-litter covered path through rhododendrons, then conifers and bracken to point N. Then across a short stretch of stony track to point E where it joins route Blue 1 and a large metal gate (locked) separates it from bridleway E37/22.
- 1.6. Route Red 5 (M-E) starts at point M on the woodland boundary, at a junction with route Red 3. It goes uphill, beneath powerlines, initially on a grassy, overgrown path between gorse and rhododendrons, approximately 0.5m wide. Closer to point E the path widens to approximately 3m and is sandy / chalky surfaced. At point E there is a junction with routes Red 4 and Blue 1, and a double gate (locked) to bridleway E37/22.
- 1.7. Route Green 1 (B-T-Q-R) starts at point B on bridleway E37/22. The route is blocked by a fallen tree and not passable, but vegetation suggests there may have been a path on the ground previously. Initially the vegetation is brambles, long grass / rushes and small trees, but after approximately 10m the claimed route is obstructed by a wire fence and enters a conifer plantation with rhododendrons. After the fence there is no indication of a previous path, and the route could not be followed until point T where it emerges onto a forest track (route Green 2). Between point T and point Q there is a crushed stone / road planing surfaced forest track with camping platforms either side. The track is 3 – 5m wide and heads north. It seems to be slightly to the east of the claimed route, but no other route was in evidence through the conifer plantation. Between point Q and point R the track continues 3 – 4m wide heading west, surfaced with road planings and with camping pitches to the north.
- 1.8. Route Green 2 (S-T) starts at point S on route Green 3, and heads in a generally south-easterly direction as a surfaced forest track, 3 – 5m wide (surfaced with crushed stone and road planings). There are camping platforms to the north, in the conifer plantation. The route on the ground meanders slightly more than the claimed route but there are no other visible routes on the ground in the vicinity. The route joins Green 1 route at point T.

- 1.9. Route Green 3 (C-S-R-D) starts at point C on bridleway E37/22 with a locked metal field gate. The route heads initially north-east as a 3 – 5m wide track, surfaced with crushed stone / road planings. At point S there is a junction with route Green 2 to the east. The route then continues in a northerly direction to point R, at the same width and surface. There is evidence of fly-tipping on the edge of the track to the east. At point R there is a junction with route Green 1 to the east. Route Green 3 continues north-westerly to point D where there is another locked gate before bridleway E37/22.
- 1.10. Route Green 4 (Q-Q1) begins at point Q as a continuation of the forestry track, but then becomes an unsurfaced grassy track heading north-east, approximately 3m wide. It terminates in scrub at point Q1 under some power lines.
- 1.11. Route Blue 1 (D-E) starts at point D on bridleway E37/22 with a locked metal field gate, it heads north-west then north to point E. It runs through mainly conifer plantation, with some rhododendron. The width of the track is 4 – 6m and the surface is part tarmac / part road planings, there are cats-eyes down the centre. At point E there is a junction with route Red 4, and a locked metal gate to bridleway E37/22.
- 1.12. Route Orange 1 (E-K) starts with a locked metal gate at point E on bridleway E37/22. The route heads north-east as a wide, grassy track / path through conifer plantation to point K. It is 3 – 4m wide. At point K it joins routes Orange 3 and Orange 5.
- 1.13. Route Orange 2 (F-G) starts at point F on bridleway E37/22 with a large metal field gate (locked). The track is 3 – 4m wide through conifer plantation, with rhododendrons and bracken, the surface is road planings then grass. Initially the track heads north-east then turns west to re-join bridleway E37/22 at point G, with a locked metal gate.
- 1.14. Route Orange 3 (J-K) starts on bridleway E37/22 at point J and heads south to point K. There is no access now from the bridleway; a fence and dense undergrowth obstructs any entry. No sign of a path could be seen at either point J or the termination point of route Orange 3 at point K. However, at point K variation in vegetation could be suggestive of the existence of a former path.

- 1.15. Route Orange 4 (I-G) starts at point I on bridleway E37/22 with a locked metal field gate. The route heads south-west, following a stream to the north, through native mixed woodland of mostly quite young trees, some coppiced. There is a disused chalk pit to the south of the path soon after point I. The path is 0.5m – 2m wide, with a bare soil surface, and occasionally deviates around fallen trees. Approaching point G the route heads south and re-joins bridleway E37/22 at point G with a locked metal field gate.
- 1.16. Route Orange 5 (K-L-L1-H) begins at point K; the junction of routes Orange 1 and Orange 3. Initially it is a narrow (0.5 – 2m wide) path between conifers and rhododendrons, heading south past point L. The route soon turns to the east at point L1 and descends steeply through rhododendrons, becoming less distinct. At the bottom of the bank no trace of a path could be found through an area of more open broadleaved woodland as it headed north. At point H1 the claimed route was obstructed by a fence and the remainder of the claimed route to point H could not be inspected. However, little trace of a path could be seen from the surrounding land. At point H the claimed route re-joins bridleway E37/22 but is obstructed with a fence.
- 1.17. Route Orange 6 (L-Q) begins at point L where only the slight hint of a former path could be seen through dense rhododendrons. It could not be followed. The path claimed emerges at point Q but again no trace of a path could be found through the conifer plantation / rhododendrons.

2 Law

- 2.1 Section 53 of the Wildlife and Countryside Act 1981 allows any person to apply to the Council for an order to modify the definitive map and statement of rights of way to show a public right of way.
- 2.2 Section 31 of the Highways Act 1980 says that where a way has been used by the public as of right for a full period of 20 years it is deemed to have been dedicated as highway unless there is sufficient evidence that there was no intention during that period to dedicate it. The 20-year period is counted back from when the right of the public to use the way is brought into question. 'As of right' in this context means without force, without secrecy and without obtaining permission.
- 2.3 The common law may be relevant if Section 31 of the Highways Act 1980 cannot be applied. The common law test is that the public must have used the route 'as of right' for long enough to have alerted the

owner, whoever he may be, that they considered it to be a public footpath and the owner did nothing to tell them that it is not.

2.4 Whereas under Section 31, use 'as of right' raises a presumption which passes the burden to the landowner to rebut, under common law it is necessary for those claiming a right of way to show that the landowner intended to dedicate a way as a public highway, either expressly or by implication from his conduct. Therefore, under common law it is not enough that there has been open, peaceful and non-permissive use. Knowledge by the landowner of the use is necessary, either actual or by inference. However, there is no need to prove actual knowledge if: "the use and enjoyment has been so open and notorious as to give rise to the presumption that the owner must have been aware of it and acquiesced in it." (Webb v Baldwin 1911 per Parker J). There is no set time period under the common law.

2.6 The Council must make a modification order to add a route if the balance of evidence shows either:

- (a) that a right of way subsists (for either Highways Act 1980 or common law) or
- (b) that it is reasonably alleged to subsist (for Highways Act 1980).

2.7 The evidence necessary to satisfy (b) is less than that necessary to satisfy (a). A reasonable allegation that a public right of way exists is sufficient for an order to be made under Section 31 Highways Act. In brief a reasonable allegation is that there is credible evidence that the route exists without having resolved any conflict of evidence. For example, between the applicant and any objector. However, an order can be confirmed only if, on the balance of probability, it is shown that it does exist. A common law dedication must satisfy the 'balance of probability test'.

2.8 Further information on the law is contained in Appendix 2.

3 Issue to be decided.

3.1 The issue to be decided is whether there is evidence to show, on the balance of probabilities, that public rights subsist, or are reasonably alleged to subsist, on the routes claimed and if so, at what status the routes should be recorded. It is not necessary for evidence to be 'beyond reasonable doubt' before a change to the Definitive Map can be made.

3.2 Any changes to the Definitive Map must reflect public rights that already exist. Decisions must not be taken for reasons of desirability or suitability. Before an order changing the Definitive Map is made, the Council must be satisfied that public rights have come into being at some time in the past. This might be demonstrated by documentary evidence and/or witness evidence.

3.3 Historical documentary evidence and user evidence has been examined to see whether depictions of the routes point to them having acquired public rights as a result of deemed dedication in the past. Any such rights are not lost through disuse. Unless stopped up by due process of law, any unrecorded public rights will still exist even if they are no longer used or needed. It is unlikely that a single map or document will provide sufficient evidence to justify a change to the Definitive Map: the evidence must be assessed holistically. The Council has a duty to record any rights that are found to exist even if they are not those claimed by the applicant.

4 Documentary evidence (Appendix 3) (copies available in the case file RW/T544)

4.1 A table of all the documentary evidence considered during this investigation is contained in the case file. All documents considered relevant are discussed below.

4.2 No documents prior to 1886 show any routes corresponding to any of the application routes. The area was originally heathland with a variety of tracks which evolved as the surrounding road system developed.

Ordnance Survey Maps

4.3 First Edition Ordnance Survey maps at a scale of 25 inches : 1 mile (1886 - 1887) show routes with parallel pecked lines which approximately correspond to application routes Orange 1, Orange 4 and Red 3 (part). There is no indication that any of these routes were used principally on horse or foot; none are labelled 'F.P.' or 'B.R.'. At this time, the majority of the area of current Stony Down Plantation was already plantation, but an area in the north-east was heathland.

4.4 The situation is the same on the Second Edition maps of the same scale, revised 1900.

4.5 The Ordnance Survey maps (1953 – 1962) at a scale of 6 inches : 1 mile show routes approximately corresponding to application routes

Orange 1, Orange 4 (part), Red 3 (part) and Red 4 (part). No indication is shown that the routes were considered to be used on horseback or on foot.

4.6 The Ordnance Survey maps (1982 – 1989) at a scale of 1 : 10,000 show tracks approximately corresponding to application routes Orange 1, Orange 2, Blue 1, Green 3 and Green 1 (part).

4.7 Officer Comments:

- a) Although not conclusive as to status, Ordnance Survey maps do provide evidence as to the physical existence of ways on the ground at the time of the survey. In respect of routes in Stony Down Plantation, the Ordnance Survey maps demonstrate that routes Orange 1, Orange 2, Orange 4, Red 3 (part), Red 4 (part), Blue 1, Green 1 (part) and Green 3 were in existence at some point in time between 1886 and 1989.
- b) The absence of routes being recorded on Ordnance Survey maps should not be taken to indicate that they did not exist. From 1950 onwards aerial surveying was used for ongoing updates of maps and in areas with extensive tree cover this did not always record newer routes.

Dorset Council Records

4.8 The Corfe Mullen Parish Survey of Rights of Way (1950s) did not claim any rights of way through Stony Down Plantation and nor were any rights of way recorded on the subsequent Draft Map (1959).

4.9 There was an objection raised to the Draft Map (Case number 67, subfolder 9) and this was upheld, resulting in the addition of a bridleway corresponding to the current Bridleway E37/22.

4.10 Accordingly, the Provisional Map (1964) shows Bridleway 22 in its current location. This was repeated on the First Definitive Map (1967).

4.11 An application was reported to have been made in 1971 to divert Bridleway 22 between points F – G – J – H to a route approximately following route Orange 2 from point F to route Orange 3, then following this north to approximately point J, and continuing north to join route Orange 4 to point H. No order was made to divert Bridleway 22 and there are no further details.

- 4.12 As part of the Special Review of the Definitive Map an application was made in 1972 to add a bridleway “from Bridleway 22 across ditch via headland to farm gate leading to track from parish boundary to Old Market Road”. This claim was made on 20 years usage and was upheld by the committee in 1973.
- 4.13 Accordingly, the Revised Draft Map (1974) shows bridleways to the north of Stony Down Plantation including one heading north from point G numbered Bridleway 37 (this corresponds with only a few metres of the claimed route Orange 4).
- 4.14 Objections were raised to the Revised Draft Map in 1975 but the Special Review process was abandoned before the case could be investigated. As a result, the route was not added to the definitive map.
- 4.15 The current Definitive Map (sealed 1989) shows only Bridleway 22.
- 4.16 Officer comment: The documents held by Dorset Council following the National Parks and Access to the Countryside Act (1949) offer no support for any of the claimed routes.

Sales Brochures

- 4.17 A sales brochure produced by Ensor (no date but believed to be prior to the sale of the land by Ministry of Agriculture Fisheries and Food in 1986) describes the sale of the freehold of Stony Down Plantation by the Ministry of Agriculture Fisheries and Food. Bridleway 22 is acknowledged but described as ‘*whilst shown following an unused route on the definitive plan now follows the line of the centre access road*’.
- 4.18 The accompanying plan has no key but shows the area divided into four numbered quadrants and each quadrant is divided into lettered compartments. A cultivation plan is included for each compartment. The quadrant dividing line running North/South through the plantation (shown with alternate dashes and dots) corresponds with application routes Green 3, Blue 1 and Orange 2. The quadrant dividing line running East/West using the same line style corresponds to route Red 2 and Orange 1. Supplementary lines between lettered compartments (shown with dots) correspond with application routes Green 1 (part), Green 2, Green 4 and Orange 4 (part).
- 4.19 The land adjoining application route Orange 3 is described in the cultivation plan as ‘scrub and power lines’.

4.20 Viewing is described as 'At any reasonable time of the day with a copy of these particulars to hand.'

4.21 Officer comments:

- a) The route of Bridleway 22 had not been diverted legally, so the suggestion is that the seller was acknowledging that the public had been allowed to use a different route through Stony Down Plantation, as if it were a right of way (bridleway status). The accompanying plan does not include a key and does not indicate clearly the location of the 'used route' but the description could fit a route dividing the main quadrants North/South which corresponds with the claimed routes Green 3, Blue 1 and Orange 2. The legal line of the bridleway is also shown on the base-map (except for a small deviation near point G).
- b) It is not known whether the compartment boundaries were represented by physical features on the ground, but it seems unlikely that the application routes listed correspond to these boundaries by coincidence.
- c) The viewing arrangements suggest that at the time of the sale, the whole area was open to all without obstruction. Thus, all the routes shown on the plan could have been available for public use.

4.22 A sales brochure produced by J Clegg & Co. (2003) describes the sale of the Freehold of 'Stony Down Wood'. Viewing was described as '*at any time by prospective purchasers carrying a set of these particulars*'. Directions were given as '*Drive in for a short distance and the woodland gate on the right leads to the excellent forest road system*'.

4.23 The currently recorded bridleway is described as "roughly following the line of the main ride", the accompanying map has no key but illustrates routes Green 3, Blue 1, and Orange 2 as the principal track. The current Bridleway 22, though shown on the base-map is not illustrated as a forest access route between points H - G - F, E - D, or part of D - C. No other public access is acknowledged.

4.24 The accompanying plan shows tracks corresponding to routes Green 3, Green 1 (part), Green 4, Blue 1, Orange 1 and Orange 2. In addition, forest compartment boundaries are shown corresponding to routes Green 1 (part), Green 2 (part), Orange 3 and Orange 4.

4.25 Officer comments:

- a) The description of visiting arrangements suggests that the area was open and available to the public, without obstruction / restriction at the time viewing was likely to take place.
- b) The description of the bridleway does not make it clear whether the used route was the definitive line or the forest 'main ride'.
- c) The lack of key makes it difficult to interpret the plan. However, it can be deduced that routes corresponding to Green 3, Green 1 (part), Green 4, Blue 1, Orange 1 and Orange 2 were present on the ground. In addition, the boundaries of forestry compartments might be expected to have some form of access so routes corresponding to Green 1 (part), Green 2 (part), Orange 3 and Orange 4 may have been in existence.

4.26 The sales brochure revised by Symonds & Sampson (2015) describes the sale of the Freehold of Stoney Down Plantation. The woodland is described as having *'only one public right of way being a bridleway leading off Rushall Lane and exiting at the northern tip of the woodland. However, there are other informal paths through the woodland.'*

4.27 Viewing is described as *'Interested parties should register their interest with the selling agents before viewing during daylight hours only with a copy of these details to hand'*. Under the heading *Directions* it says, *'Please do not drive over the access road as the gateway leading into Stoney Down Plantation is currently locked'*.

4.28 Officer comments:

- a) The reference to 'other informal paths through the woodland' in addition to the public bridleway suggests that the seller was acknowledging use of other paths by the public. No plan was accompanying this sales brochure so the location of any such paths cannot be determined.
- b) The arrangements for viewing suggest that, apart from a gate preventing vehicular access from Rushall Lane, the area was open and freely accessible to visitors and the public at the time visiting was to take place.

Landowner Deposits

- 4.29 On 19 April 1996 the then landowner deposited a Statement and plan under Highways Act 1980 Section 31(6) for the whole of Stony Down Plantation. Bridleway 22 was acknowledged but no other dedicated highways were acknowledged.
- 4.30 On 5 June 1997 the subsequent landowner (since April 1997) deposited a Statutory Declaration for the same area under Highways Act 1980 S31(6) declaring that no additional ways had been dedicated.
- 4.31 On 6 October 2015 Lodges & Yurts.com Ltd deposited a Statement and plan under Highways Act 1980 S31(6) and Commons Act 2006 S15A(1) on behalf of Paradise Farms Ltd (owner) for the whole of Stony Down Plantation. Bridleway 22 was acknowledged but no other dedicated highways were acknowledged. They supplied further evidence in the form of a photo of a sign erected on site stating: "This woodland is private property... the only access to this area is on the public bridleway". They stated that the notice was displayed at both the north and southwest bridleway access points to the area.
- 4.32 On 7 October 2015 the above Statement was backed up by a Declaration.
- 4.33 Officer comments:
- a) The Landowner Statement (1996) is evidence that the landowner had no intention to dedicate any further public rights of way.
 - b) The Landowner Declaration (1997) is valid because the protection provided by a landowner deposit under Highways Act 1980 S31(6) passes to any successors in title. This is sufficient evidence that the new landowner had no intention to dedicate any further rights of way (unless there is other evidence to the contrary). At the time, there was a requirement to renew declarations within 10 years to maintain protection i.e., by 4 June 2007. No such renewal was received.
 - c) Therefore, Stony Down Plantation was protected from the accrual of additional of public rights of way between 19 April 1996 and 5 June 1997.
 - d) From 1997 – 2015 the plantation was not covered by any protection under Highways Act 1980 S31(6).

- e) The Landowner Statement and Declaration (2015) are evidence that the new landowner had no intention to dedicate any further rights of way (unless there is other evidence to the contrary). At this time there was a requirement to advertise that part of the application under the Commons Act to the public, so it can be taken as a date when use of the route was brought into question.
- f) The additional evidence regarding gates supplied with the 2015 deposits has little relevance to claimed use because the allegation that there had always been a locked gate at the southern entrance is not a deterrent to use, it being passable on foot and with horses.
- g) The notice referred to is discussed in paragraphs 5.46 – 5.49 below.

Statutory Declaration of Sale

- 4.33 A Statutory Declaration at point of sale (2003) would appear from the reference included in Land Registry documents to indicate that the landowner at the time had unofficially diverted the right of way (Bridleway 22) onto a different route i.e., dedicated an additional route to the public. It has not been possible to locate this document.
- 4.34 Officer comment: This might appear to provide some support for the claimed routes, however, without sight of the original document and without details of the route being used by the public, it is not possible to give any weight to this.

Land Registry

- 4.35 The land known as Stony Down Plantation was registered with Land Registry on 20 January 1986. It is now recorded as Title numbers DT312064 and DT442374.
- 4.36 DT312064 refers to a conveyance dated 29 January 1960 which is expressed to grant rights of way. It does not state whether the rights of way are public or private. This was when the land was acquired by the Ministry of Agriculture Fisheries and Food (now Forestry Commission). A note adds that a Statutory Declaration dated 12 August 2003 states that the route of the rights of way has altered. It has not been possible to locate this Statutory Declaration (see paragraphs 4.33 – 4.34 above).
- 4.37 Officer comment: The land is believed to have been sold to private buyers in 1986 and again in 2003 and 2015.

- 4.38 The freehold to DT312064 was acquired by Paradise Farms Ltd on 30 July 2015. In August 2015 it was leased to Lodges & Yurts.com Ltd. Part of the north-eastern corner of the plantation was then transferred to a private buyer on 31 July 2018 and was registered under a separate title DT442374.

Aerial photographs

- 4.39 Aerial photographs from 1947 to present day each reveal marks on the ground, suggestive of paths in the location of some of the claimed routes. None of the claimed routes is apparent in all the photos and some are not apparent in any photos, though this may be because the area has extensive tree cover which would obscure smaller paths.
- 4.40 Three of the claimed routes have been visible on all the photos since 1972 when there appeared to be a major replanting of the plantation: Green 3, Blue 1 and Orange 2.
- 4.41 In 1972 the route of Bridleway 22 appears to have been ploughed and no evidence of it was apparent on the ground. In 1986 there was an indication that at least part of route Orange 4 existed to the north of current Bridleway 22.
- 4.42 Route Orange 3 seems to have been in existence (as judged by bare earth) from 1972 – 2009 although the whole length did not show visible signs of wear towards the end of the time span.
- 4.43 Route Orange 1 was visible as bare earth in 1972 and 1986, but later the path may have been obscured by growing trees.
- 4.44 Route Red 5 was visible as bare earth in 1986 and 2002 – 2014 although towards the end of this period it was not visible throughout its length.
- 4.45 There was no evidence in aerial photos for routes Green 1 and Green 2 before 2017, when there was limited evidence.
- 4.46 There was no evidence in any of the photos of the following routes: Red 1, Red 2, Green 4, Orange 5 and Orange 6. Route Red 3 had only limited evidence in 1947.
- 4.47 Officer comments:
- a) Aerial photographs provide some support to the existence of some routes, although they do not provide evidence of public use.

- b) Evidence in the 1972 photo is consistent with routes Green 3, Blue 1 and Orange 2 having been laid out as part of the replanting of the area as a plantation.
- c) Absence of evidence of routes in aerial photos does not indicate they did not exist on the ground because tree cover obscured much of the area.

Summary of documentary evidence

Route	OS 1886-7	OS 1953-62	OS 1982-89	Sales broch 1986	Sales broch 2003	Sales broch 2015	Aerial photo 1947	Aerial photo 1972	Aerial photo 1986	Aerial photo 1997	Aerial photo 2002	Aerial photo 2005	Aerial photo 2009	Aerial photo 2014
Red 1														
Red 2														
Red 3	✓													
Red 4		✓												
Red 5									✓		✓	✓	✓	✓
Green 1			✓	✓	✓									
Green 2					?									
Green 3			✓	✓	✓		✓	✓	✓	✓	✓	✓	✓	✓
Green 4					✓									
Blue 1			✓	✓	✓		✓	✓	✓	✓	✓	✓	✓	✓
Orange 1	✓			✓	✓			✓	✓					
Orange 2			✓	✓	✓		✓	✓	✓	✓	✓	✓	✓	✓
Orange 3					?			✓	✓	✓	✓	✓	✓	
Orange 4	✓			✓	?				✓					
Orange 5														
Orange 6														

Key: ✓ = evidence of route, ✓ = evidence for part of route,

? = possible evidence, ? = possible evidence for part of route

4.48 There is no indication that these routes were used by the public (or principally used) on foot or with horses; none of the documentary evidence gives any indication of status.

4.49 Absence of evidence cannot be taken to indicate evidence of absence of the routes; the wooded nature of the area means that evidence of routes on the ground might have been obscured from aerial photographs. This could also have affected Ordnance Survey mapping in the absence of a full resurvey.

4.50 The only public right of way to be recorded through the area was current Bridleway 22 which was first recorded on the Provisional Map of 1964.

4.51 Some of the documentary evidence supports the existence of some of the claimed routes and there is a suggestion that these were open and available during at least some of the time period of the claim. However, none of the documentary evidence provides support for public rights over these routes.

5 User evidence (sample graphs are in Appendix 4) (original evidence and analysed data relating to all routes are available in the case file RW/T544)

5.1 A total of 87 witnesses sent in evidence of use of the claimed routes in Stony Down Plantation. Of these, the evidence of 8 witnesses was discounted for a variety of reasons; they wandered everywhere / claimed different routes, claimed to have used it for business purposes / had a private right, gave insufficient detail of their use and could not be contacted for clarification. Thus, the evidence from 79 witnesses was analysed.

5.2 In addition, a further 19 witnesses who sent in evidence that the area of the plantation had been used as a town and village green also claimed they had used some or all of the claimed rights of way. These witnesses did not provide sufficient evidence of which routes they used, or the extent of that use for their evidence to be included in the analysis.

5.3 Of the 79 witnesses analysed, 51 used some / all of the routes on foot, 49 on horseback and 7 on pedal cycle. Some witnesses used the area by more than one means. All had seen others using the routes.

- 5.4 One of the users on pedal cycle; user 79, recorded routes used on Cyclometer / Strava satellite tracker. There were over four hundred files available, but only 56 dated GPX tracks thus created were requested in evidence. These revealed that between 2010 and 2015 there was considerable use by a cycle of routes Green 1 (part), Green 3, Orange 1, Orange 2, Orange 3 (part), and Orange 4 by one user. There was moderate use of routes Red 3 and Red 4 by one user. There was limited use of routes Blue 1, Red 1, and Red 5 by one user. See Appendix 4 for a compilation 'heat map' made from the tracks.
- 5.5 A video of two cyclists using routes Red 3 and Orange 4 was also submitted, this was dated 2012. In the video the paths appeared well used and there was no obstruction between Orange 4 and the current bridleway at point I.
- 5.6 Each of the 16 routes claimed will be considered individually. Sample graphs showing periods and level of use for route Green 3 (one of the most used routes) and route Orange 6 (one of the least used routes) and route Orange 5 (which was predominantly used on foot) form Appendix 4. Equivalent graphs for all the other routes are available in the case file.
- 5.7 The potential qualifying years of use, which could have led to the acquisition of public rights, can be divided into two periods; 1976 – 1996 and 2003 – 2014. The period from 1996 – 1997 was protected by a landowner deposit under S31(6) Highways Act 1980, see paragraphs 4.28 – 4.32. The landowner from 1997 – 2003 gave an indication that there was no intention to dedicate rights of way, but this was not converted to full protection by renewing the declaration within the relevant time, see paragraphs 4.29 – 4.32. There was a sign erected in 2014 which is discussed in paragraphs 4.30 – 4.32.
- 5.8 The tables below summarise:
 - a) the years during which each route was used (by two or more users)
 - b) the minimum number of different users of each route during the years 1976 – 1996 and 2003 – 2014 both on foot and on horseback / pedal cycle
 - c) the mean frequency with which each route was used per day (minimum during the relevant years), assuming the same frequency of use on each day of the year (see paragraphs 5.9 and 5.10 below for explanation).

1976 – 1996:

Route	Dates used	Minimum no. users / year 1976 -1996		Minimum Frequency of use / day 1976 - 1996	
		Foot	Horse / cycle	Foot	Horse / Cycle
B1	1965-2015	12	5	0.6	0.5
G1	1962-2015	10	4	0.6	0.4
G2	1962-2015	6	3	0.3	0.2
G3	1962-2015	16	6	0.8	0.5
G4	1996-2003	0	0	0	0
O1	1966-2015	10	4	0.3	0.2
O2	1962-2015	9	5	0.5	0.5
O3	1970-2015	9	3	0.4	0.1
O4	1962-2015	9	4	0.4	0.3
O5	1982-2015	5	0	0.4	0
O6	1983-2015	2	0	0.2	0
R1	1962-2015	15	6	0.8	0.6
R2	1962-2015	10	6	0.4	0.6
R3	1965-2015	14	6	0.6	0.9
R4	1965-2015	10	3	0.5	0.4
R5	1970-2015	7	3	0.3	0.2

2003 – 2014:

Route	Dates used	Minimum no. users / year 2003 –2014		Minimum Frequency of use / day 2003 - 2014	
		Foot	Horse / cycle	Foot	Horse / Cycle
B1	1965-2015	27	23	1.3	4.5
G1	1962-2015	27	22	1.8	4.6
G2	1962-2015	19	19	1.0	4.1
G3	1962-2015	36	28	2.2	5.5
G4	1996-2003	0	1	-	0.2
O1	1966-2015	27	18	1.7	3.1
O2	1962-2015	21	21	1.4	3.6
O3	1970-2015	23	15	1.4	2.6
O4	1962-2015	23	17	1.4	3.5
O5	1982-2015	18	9	1.4	1.7
O6	1983-2015	10	6	0.8	1.3
R1	1962-2015	37	25	2.3	4.8
R2	1962-2015	28	23	1.6	4.6
R3	1965-2015	30	22	1.8	3.7
R4	1965-2015	23	14	1.5	2.9
R5	1970-2015	21	19	1.2	3.6

- 5.9 Frequency of use on foot has been estimated by calculating, for each route, the mean number of times users of that route visited the plantation each year but dividing these by three, because most users when interviewed said that they used approximately a third of the total routes they ever used at each visit. Then these figures were used to calculate mean frequency of use each day.
- 5.10 Most users on horseback and cycle claimed to have used all the routes they listed on most visits, so the frequency of use data has not been adjusted. Frequency was calculated for each route as the mean number of times users of that route visited the plantation each day.

Considering the period 1976-1996:

- 5.11 Given the number of years that have elapsed between the use taking place and the data being collected / consultation taking place, it is to be expected that fewer of the users from this period are likely to have come forward with evidence. The number of witnesses giving evidence for this period is likely to be a smaller proportion of the total number of users than for more recent times.
- 5.12 Route Green 4 received minimal use for a limited number of years during this period. Use of this route during this period will not be considered further.
- 5.13 Routes Green 1, Green 2, Orange 1, Orange 3, Orange 4, Orange 5, Orange 6, Red 4 and Red 5 received use by fewer than five different people on horseback / cycle for at least one year between 1976 – 1996.
- 5.14 Officer comments:
- a) It is considered that this is insufficient to be considered as use by the public, consistent with a bridleway, even when taking into account the loss of information over time.
 - b) Use of a pedal cycle on a route during the period of interest contributes to bridleway rights; see Appendix 2.
- 5.15 Routes Blue 1, Green 3, Orange 2, Red 1, Red 2, and Red 3 all received use by five or more different people on horseback / cycle between 1976 – 1996.

- 5.16 Officer comment: This could be considered to be use by the public consistent with a bridleway.
- 5.17 Routes Blue 1, Green 1, Green 2, Green 3, Orange 1, Orange 2, Orange 4, Red 1, Red 2, Red 3, Red 4 and Red 5 all received use by someone on horseback / cycle on average at least 0.2 times a day, i.e. at least six times a month on average, between 1976 – 1996.
- 5.18 Officer comment: This is considered to be sufficient to have brought the use to the attention of a reasonable landowner.
- 5.19 The frequency of use on horseback / cycle of routes Orange 3, Orange 5, and Orange 6, was three or fewer times a month.
- 5.20 Officer comment: This is considered to be insufficient to have brought the use to the attention of a reasonable landowner.
- 5.21 Routes Blue 1, Green 1, Green 2, Green 3, Orange 1, Orange 2, Orange 3, Orange 4, Orange 5, Red 1, Red 2, Red 3, Red 4, and Red 5 all received use by five or more different people on foot between 1976 – 1996.
- 5.22 Officer comment: This is considered to be sufficient to be considered as use by the public consistent with a footpath.
- 5.23 Routes Blue 1, Green 1, Green 2, Green 3, Orange 1, Orange 2, Orange 3, Orange 4, Orange 5, Red 1, Red 2, Red 3 Red 4 and Red 5 received use on foot at least 0.2 times a day on average i.e. six or more times a month.
- 5.24 Officer comment: It is considered that a reasonable landowner would have been aware of this frequency of use.

Considering the period 2003 – 2014:

- 5.25 All claimed routes were used by 10 or more people for the 12 years ending in 2014 except route Green 4. Route Green 4 had insufficient use to warrant further investigation for the existence of public rights.
- 5.26 Excluding route Green 4, all other routes were claimed to be used by both walkers and riders (horse or pedal cycle) from 2003 - 2014.

- 5.27 Officer comment: Use of a pedal cycle on a route during the period up to 2006 contributes to bridleway rights; see Appendix 2. Use of a pedal cycle from 2006 onwards could potentially result in the acquisition of restricted byway rights, but levels of use during this period were considered to be insufficient.
- 5.28 For routes Blue 1, Green 1, Green 2, Green 3, Orange 1, Orange 2, Orange 3, Orange 4, Red 1, Red 2, Red 3, Red 4, and Red 5, there were at least 14 different users each year between 2003 and 2014, using the route on horseback / cycle (i.e. as a bridleway).
- 5.29 Officer comment: This number of different users in a rural area like Stony Down Plantation is believed to be sufficient to be considered as use by the public.
- 5.30 For route Orange 6 there were six or more different users each year, and for route Orange 5 there were nine or more different users each year on horse / cycle between 2003 and 2014.
- 5.31 Officer comment: This number of different users is considerably less than the other routes in the vicinity and is considered to be less than sufficient to amount to use by the public for either route Orange 5 or Orange 6 as a bridleway.
- 5.32 For all routes except route Orange 4, the daily frequency of use of each route (taken as a mean each year) was at least 1.3 times a day, on horseback or cycle between 2003 – 2014, i.e., at least 39 times a month.
- 5.33 Officer comment: This frequency of use on horseback / cycle is considered to be sufficient that a reasonable landowner would have been aware of the use.
- 5.34 All claimed routes except route Green 4 and Orange 6 were used by 18 or more different users each year on foot from 2003 – 2014.
- 5.35 Officer comment: This is considered sufficient to conclude that it was used by the public on foot during these years.
- 5.36 Route Orange 6 was used by 10 or more different users during the same period.

5.37 Officer comment: This represents considerably less than the number of users on the other routes on foot and it is considered that this number of different users was not sufficient to amount to use by the public.

5.38 Frequency of use on foot during this time period was considerably less than the frequency of use by riders for all routes. Nevertheless, all routes received use on foot of at least 0.8 times a day. This is believed to be sufficient to have been brought to the attention of the landowner.

5.39 Officer comment: Thus, route Orange 5 was significantly less well used than the other routes on horse / cycle but was used at a similar frequency to other routes on foot. It is considered that this would have been sufficient to come to the attention of a reasonable landowner.

Considering use from all periods:

5.40 Since 1970, all users thought the claimed paths had followed the same routes except when logging operations were taking place / trees had fallen / areas became too boggy.

5.41 Officer comment: Temporary diversion around natural obstructions / logging operations does not affect public rights on the substantially used route.

5.42 Only one witness recalled a stile but did not give details of where it was.

5.43 Officer comment: No weight can be given to the unsubstantiated recollection of one witness.

5.44 32 witnesses recalled a gate, and most described this as being at or near point A. Most of those that described a gate, and some of those that said there was 'no gate' clarified that there was a barrier / gate that was locked to prevent vehicle access but that there was a gap to allow horses / pedestrians to pass. Several witnesses described further gates that were erected in 2015. None of the witnesses encountered a gate that prevented their access prior to 2015.

5.45 Officer comment: None of the structures described prior to 2015 can be considered to have obstructed use by the public on foot / horse / cycle, or to have led them to the conclusion that they should not be accessing the claimed routes.

- 5.46 Prior to 2015, 23 witnesses described seeing notices. Six of these described these as reading 'Stoney Down Plantation', four said the notices were related to forestry or tree felling operations, four described notices that were not related to access or were related to the currently recorded bridleway, and two said the notices were related to fire risk or who to phone in an emergency. Two described a sign which was likely to be the one referred to by the landowner in the 2015 Landowner Deposit (see paragraph 4.30 above). One of these witnesses said that this sign was taped to a gate at the southern entrance to the Plantation in 2014 and that there was no such sign at the northern entrance.
- 5.47 Officer comments:
- a) The sign stated: "This woodland is private property... the only access to this area is on the public bridleway".
 - b) The location of the sign(s) is unclear. The new landowner in 2015 stated that the sign was displayed at the northern and southern entrances to the plantation, but witnesses only saw a sign displayed at or near point A. It has not been possible to contact the landowner prior to 2015 to establish his intent or to establish the location of the sign(s).
 - c) The date of erection of the sign is also unclear. The landowner in 2015 stated that the southern entrance had "always had a padlocked gate with a notice stating that the only public access to the area is the bridleway". One witness stated in 2015 that the sign appeared when the gate was erected at the southern entrance "less than two years ago" and another stated that the sign had been taped to the gate at the southern entrance in 2014 but was not easily visible to users.
- 5.48 Other evidence of notices: During a site visit by a Dorset County Council Officer in October 2015 there were two signs apparent. A waterproof card one at point A reading "WARNING This woodland is private property Damage to this property has been reported to the police who are monitoring the area The only access to this area is on the public bridleway". The other was a carved wooden sign at point I reading "Stony Down Plantation" and giving a phone number.
- 5.49 Officer comment: The waterproof card sign had algae present on the surface and did not look new, but it was attached to a relatively new gate by tape. It is considered that this sign would not have been a

permanent display in this form for many years. The wooden sign which was displayed at point I gives no relevant information about public rights.

- 5.50 None of the witnesses described other obstructions except fallen trees, boggy ground, forestry operations or overgrowth / brambles.
- 5.51 None of the witnesses was an employee or tenant of the landowner. None had a private right to use the routes.
- 5.52 None of the witnesses considered had been given permission to access the claimed routes. However, one of the witnesses whose evidence was discounted due to using the routes in the course of his business, thought that he had been given permission to use the routes. He was unable to provide further information.
- 5.53 Some witnesses when interviewed said that they used to see the former owner (prior to 2015) and chat to him, thus they felt he was aware of use and acquiesced to it.
- 5.54 None of the witnesses considered that they had been challenged in their use of the routes prior to 2015. Some witnesses had attended a public meeting with the new owners in 2015 where they understood they were assured that their use of the area could continue.

Summary of user evidence

- 5.55 106 people submitted evidence, of which 79 witnesses provided evidence of use of some/all of the claimed routes as rights of way. This is a large number of users when taking into account the location of Stony Down Plantation.

Evidence is summarised below outlining if there were sufficient numbers of users and frequency of use for each route to be considered to have public rights as a footpath or bridleway. Results are broken down into evidence 1976 – 1996, and 2003 – 2014 (the reasons for choosing these periods can be seen in section 8 below)

Route	Sufficient evidence 1976 – 1996		Sufficient evidence 2003 - 2014	
	Footpath	Bridleway	Footpath	Bridleway
B1	✓	✓	✓	✓
G1	✓	x	✓	✓
G2	✓	x	✓	✓
G3	✓	✓	✓	✓
G4	x	x	x	x
O1	✓	x	✓	✓
O2	✓	✓	✓	✓
O3	✓	x	✓	✓
O4	✓	x	✓	✓
O5	✓	x	✓	x
O6	x	x	x	x
R1	✓	✓	✓	✓
R2	✓	✓	✓	✓
R3	✓	✓	✓	✓
R4	✓	x	✓	✓
R5	✓	x	✓	✓

5.56 User evidence suggests that prior to 2014 there were no barriers to access and no signs indicating that the users should not be using the area. None of the users was challenged by the owner before 2014.

6 Landowner correspondence (copies available in the case file RW/T544)

Current landowner of DT312064

6.1 The current landowner did not return any evidence at the time of the application. Steele Raymond LLP made a request in March 2017 for copies of evidence supporting the claim to be sent but did not provide any evidence to counter the claim.

6.2 Evans & Traves LLP replied on 28 September 2020 on behalf of the landowner, Paradise Farms Ltd, and enclosed an Objection Statement written on their behalf by Rowena Meager, Barrister.

- 6.3 Ms Meager claims that for an order to be made under the Wildlife and Countryside Act (1981) S53(3) (c)(i) it must meet the 'balance of probabilities test' rather than the 'reasonably alleged test' and she references *Todd v Secretary of State for the Environment, Food and Rural Affairs* EWHC [2004] 1 WLR 2471.
- 6.4 Officer comments:
- a) The above case was considering whether it was appropriate to *confirm* an order based on the 'reasonably alleged test'. The legal test for making an order under the Highways Act 1980 is the 'reasonably alleged test' but the legal test for confirming an order is the 'balance of probabilities test' as explained in Appendix 2 Section 1.
 - b) However, when the evidence is considered under common law, the legal test is the 'balance of probabilities test' for both making and confirming an order.
- 6.5 Ms Meager highlights that the applicant did not cross through the part of the application form listing types of documentary evidence which could be submitted, yet no documentary evidence was submitted by the applicant.
- 6.6 Officer comment: Omitting to cross out the documentary evidence part of the application form does not invalidate the application.
- 6.7 Ms Meager points out that the application is deficient because it did not identify which years of use were being claimed as having contributed to accrual of rights, and she therefore feels that the authority is incapable of assessing the evidence.
- 6.8 Officer comment: The authority has a duty to consider any evidence that has come to light which may indicate that the definitive map and statement is incorrect. All evidence submitted should be considered.
- 6.9 Ms Meager points out that statements and declarations have been made under Section 31(6) of Highways Act 1980.
- 6.10 Officer comment: These have been discussed in Section 4 above.

- 6.11 Ms Meager suggests that the user evidence submitted is 'vague and imprecise' and is of little evidential value. In particular she highlights that some users reported that overgrowth of brambles and other natural obstructions sometimes altered the routes, and it was unclear for which periods this occurred.
- 6.12 Officer comment: Written evidence of users was of acceptable detail and was backed up with further verbal evidence by telephone interview where clarification was needed. Users who provided an unacceptable level of detail were discounted. Temporary natural obstructions such as mud, overgrowth of brambles and fallen trees are normal occurrences on rights of way and have no bearing on public rights. A full analysis of the user evidence is in Section 5 above.
- 6.13 Ms Meager also questions the evidence of one user regarding notices 'not relevant to access' and whether this meant that the notices simply did not physically prevent access.
- 6.14 Officer comment: The evidence relating to notices is dealt with in Section 5 above.
- 6.15 Ms Meager points out a disparity between witnesses who claim there were locked gates and those that say there were no gates.
- 6.16 Officer comment: Evidence relating to gates is dealt with in Section 5 above.
- 6.17 Ms Meager summarises that in her opinion the user evidence is totally unsatisfactory, overly simplistic, and devoid of useful detail. She invites the authority to reject the application.
- 6.18 A further objection was received from Evans & Traves LLP on 22 March 2022. They stated that approximately two thirds of the witnesses were unable to demonstrate a 20-year continuous period of use prior to April 1996. They want to challenge the evidence and such low use would surely fail the test of 'significant'.

Current landowner of DT442374

- 6.19 The owner of DT 442374 did not submit any written evidence but during a site visit expressed the opinion that there had never been a right of way across the land owned by them (since 2018).

Previous landowners

6.20 It was not possible to contact previous landowners, or they did not respond to attempts to contact them.

7 Consultation responses and other correspondence (copies available in the case file RW/T544)

The following points were raised:

- 7.1 There was a claim from Witness 27 that the landowner deposits LD24/1 and LD24/2 (2015) for Stony Down Plantation were factually inaccurate with respect to the area of land owned, to locking of a gate into the plantation and to the displaying of notices. The claim was dated November 2014 but was not received until November 2015. The same points were also made by Witness 3.
- 7.2 Witness 27 stated that the landowner deposit included land relating to an extra access point to Stony Down Plantation from Rushall Lane, north-east from the bridleway entrance. They did not believe that the landowner actually owned this land.
- 7.3 Witness 27 stated that the land had not always had a padlocked gate, but no date was suggested when the gate was first locked.
- 7.4 Witness 27 stated that the notice indicating that the only access is the bridleway has not always been present and 'was put up by the previous owner less than 2 years ago'. The claim stated that prior to this there were 'no notices of this kind'.
- 7.5 Witness 3 also alleged that the landowners 'have now built a permanent structure on an area which has a DMMO application'.
- 7.6 Officer comments:
- a) The landowner was contacted by Dorset County Council at the time and advised that there was a dispute over whether they owned all the land included in the landowner deposit. The deposit was not resubmitted. It is not believed that this alleged error invalidates the landowner deposit with respect to the claimed rights of way as they do not cross the disputed land.
 - b) The locking of the gate at point A is discussed in paragraphs 5.44 and 5.45.

- c) The wording and timing of the notices is discussed in paragraphs 5.46 – 5.49.
 - d) Two site visits were made, and this suggested that the building was not on the line of the DMMO application, and this was agreed by the applicant.
- 7.7 The applicant and other witnesses made requests for the application to be prioritised for various reasons, and also expressed concern that a firearm was being discharged on site.
- 7.8 Officer comment: None of these points impact on the determination of existence of rights of way.
- 7.9 Witness 53 sent in details of a parish council planning meeting in October 2015, which considered a planning application for Stony Down Plantation. At the meeting a representative of the new landowner (Paradise Farms Ltd) is said to have promised that existing access would be maintained. Also enclosed was other information relating to events after the date of the DMMO application.
- 7.10 Witness 53 stated that the route of the bridleway through Stony Down Plantation had been difficult to distinguish from other tracks and had lacked signage. Enclosed was a Corfe Mullen Parish Council leaflet to celebrate the Diamond Jubilee 2012, which described a walk southwards through Stony Down 'keep on a wide gravel bridleway to the end of the plantation'. Witness 53 said this suggests using one of the forest tracks instead of the recorded bridleway.
- 7.11 Officer comments:
- a) Events after the application was submitted have no bearing on the application. However, any acknowledgement by the new landowner at the public meeting that current use could continue would suggest that such use was apparent at the time, but it is not clear if the landowner was just acknowledging use of the recorded bridleway.
 - b) The Jubilee Walks leaflet is difficult to interpret without knowledge of the tracks as they would have appeared in 2012. The leaflet map is suggestive of use of application routes Blue 1 and Green 3 but is insufficiently detailed to define this precisely. This document may provide some support to public use of application routes Blue 1 and Green 3 at the time.

7.12 Witness 11 sent copies of the sales documents discussed in paragraphs 4.17 – 4.27 and suggested that Stony Down Plantation was purchased by the Forestry Commission in approximately 1959, and sold to a private owner in the 1980s. The land was then sold to again in early 2003 (as evidenced by a letter from the previous owner) and when he died in 2013, it was inherited by his grandchildren who sold it the Paradise Farms in 2015.

7.13 Corfe Mullen Town Council “strongly supports the application as it is reinstating paths which have been regularly used for over 20 years which constitutes a long standing right”.

8 Analysis of the user evidence

The evidence of use under Section 31 of the Highways Act 1980 and common law is considered below.

8.1 Analysis of the evidence under Section 31, Highways Act 1980

For Section 31 of the Highways Act to give rise to a presumption of dedication, the following criteria must be satisfied:

- The physical nature of the path must be such as is capable of being a right of way at common law.
- The use must be brought into question i.e., disputed or challenged in some way.
- Use must have taken place without interruption for a period of 20 years immediately prior to the date the right was brought into question.
- Use must be ‘as of right’ i.e., without force, without secrecy and without permission.
- Use must be by the public at large.
- There must be insufficient evidence that the landowner did not intend to dedicate a right of the type being claimed.

Bringing into question the right of the public to use the path

- 8.2 It is considered that there were three potential dates where use of the route was brought into question: The first is 19 April 1996 when the then landowner deposited a Statement under Highways Act 1980 s31(6) (and backed it with a Declaration in June 1997). The second is approximately 2014 when a witness reported that a sign was displayed at point A, and the third was 6 October 2015 when the current leaseholder deposited a Statement under Highways Act 1980 s31(6) and the Commons Act 2006.
- 8.3 The erection of a notice with the wording discussed in paragraph 5.46 – 5.49 above could have brought use of the application routes into question. There is very limited information about the timing of the sign being displayed and concerning its location, but one witness reported that the sign was displayed at the southern entrance to the plantation in approximately 2014 following an episode of vandalism. 61 of the witnesses accessed the plantation some or all of the time via point A and could have seen a sign. It may be considered that this is sufficient to suggest that use of the route was brought into question in 2014.
- 8.4 The landowner statement made in 2015 under the Highways Act and the Commons Act was advertised on site and would have clearly brought public use of the routes into question. This would have given a relevant period of consideration for a deemed dedication under the Highways Act 1980 of October 1995 – October 2015. However, during this period the then landowners made a Statement in April 1996 and a Declaration in June 1997 under s31(6) of the Highways Act that they did not intend to dedicate further rights of way.

Twenty years use without interruption

- 8.5 The period from 1976 – 1996 would meet the criterion of 20 years use if the filing of a Landowner Deposit under section 31(6) of the Highways Act were considered to have been brought to the users' attention. However, up to 1986 the land was owned by the Ministry of Agriculture Fisheries and Food and as such the Highways Act S31 does not apply for presumption of dedication as the land is treated as Crown land which is exempt from the provisions of the Highways Act 1980.

- 8.6 The period of use from 1997 – 2014 or 1997 – 2015 are insufficiently long to consider a presumed dedication under section 31 of the Highways Act.
- 8.7 Thus, it is considered there is not an uninterrupted 20-year period when a presumption of dedication under the Highways Act 1980 could be considered.

Conclusions under Section 31, Highways Act 1980

- 8.8 It is considered that the requirements of Section 31 have not been satisfied in this case.

Analysis of the evidence under common law

- 8.9 This matter can also be considered under common law, where it is the responsibility of the applicant to show that the owners were aware of, and acquiesced in, the use of the path by the public. The users must be able to show that it can be inferred from the conduct of the landowners that they had intended to dedicate the route as a public right of way of the type that has been applied for. This may be by an express act of dedication, or it may be implied by a sufficient period of public use without force, secrecy or permission and the acquiescence of those landowners in that use. This is needed to meet the two requirements for the dedication of a highway – that is dedication and public acceptance of that way by use. The length of time that is required to demonstrate sufficient use is not fixed under common law and depends on the facts of the case. The use must have been for long enough and been in a manner that the owner must have known about the public use. So, use on unproductive land would usually need to be higher than on productive land for the owner to have known about the use. The owner may rebut any suggestion of a dedication by acts such as turning people back, putting up a physical barrier or erecting notices stating that the route is not a public right of way of the type being claimed.
- 8.10 The owners in 1997 indicated that they did not intend to dedicate any rights of way by depositing a declaration under Section 31(6) of the Highways Act 1980, refreshing their statement of the previous year.

Whilst this declaration was not effective in providing ongoing protection for deemed dedication under the Highways Act 1980 (because it was not renewed), the fact that the owner had indicated that they had no intention to dedicate a right of way in 1997 could give some ongoing protection from dedication under common law. This ownership came to an end in 2003 and the new owner did not give an indication that he/she had no intention to dedicate.

- 8.11 The sign, believed to have been erected in approximately 2014 (after the land was inherited) could be taken to indicate that the owner had no intention to dedicate.
- 8.12 This gives two potential periods of time when a common law dedication could have occurred; prior to 1996 and 2003 – 2014. The second period of time is the most contemporary and therefore most reliable evidence and will be considered here.
- 8.13 The sales brochure published for the sale of the land in 2015 acknowledged that there were 'other informal paths through the woodlands'. If the sign which was reported to have been erected in 2014 was intended to challenge use, it is unlikely that such paths could have come into being between 2014 and 2015. There appears to have been no effort to discourage such use prior to 2014. As a result, officers' view is that the owners from 2003 until 2014 must have been aware of the public use of the routes other than the public bridleway.

Physical nature of the route

- 8.14 The following routes are considered capable of being a public right of way at common law, given that they follow well-defined, linear routes: Red 1, Red 3, Red 4, Red 5, Green 1 (northern part), Green 2, Green 3, Green 4, Blue 1, Orange 1, Orange 2, and Orange 4.
- 8.15 Routes Green 1(southern part), Red 2, Orange 3, Orange 5 (northern part) and Orange 6 are now not defined on the ground, but this could be the result of obstruction and disuse since the claim was made.

Without force, secrecy or permission

- 8.16 There is no evidence to suggest the routes were used by force prior to the reported erection of a sign in 2014.
- 8.17 Use of the routes has been open and without secrecy.

- 8.18 There is no evidence to suggest that use of the routes has been because of the landowner's permission, except one witness who described having a 'private right', this evidence was discounted for other reasons.

Use by the public

- 8.19 Use must be of a volume that is capable of coming to the attention of the landowner, and should be public and not, for example, solely by the tenants or employees of a particular landowner or business. Only public use has been presented.

Conclusions under common law

- 8.20 There is sufficient user evidence for an inferred dedication at common law for routes Blue 1, Green 1, Green 2, Green 3, Orange 1, Orange 2, Orange 3, Orange 4, Red 1, Red 2, Red 3, Red 4, and Red 5 as bridleways.
- 8.21 There is sufficient user evidence for an inferred dedication at common law for route Orange 5 as a footpath.
- 8.22 Officers consider that whilst the level of use for these routes may appear relatively low to some, it has taken place consistently over a considerable period and was sufficient to establish physical routes on the ground. As a result, and in conjunction with the previous owner's acknowledgment of informal routes on the land in the sales particulars, the public use must have come to the owner's attention during their ownership. There is no evidence that the owners between 2003 and 2014 took any steps to prevent public use or expressed an unwillingness to dedicate or that this has been widely communicated to the public.
- 8.23 The routes Green 4 and Orange 6, for which there is insufficient evidence for a dedication to have resulted from use between 2003 and 2014, were also considered for the previous possible period, prior to 1997. There was insufficient evidence of a common law dedication of these routes during this period too.

9 Financial Implications

Any financial implications arising from this application are not material considerations and should not be taken into account in determining the matter.

10 Environmental implications

Any environmental implications arising from this application are not material considerations and should not be taken into account in determining the matter.

11 Well-being and Health Implications

Any well-being and health implications arising from this application are not material considerations and should not be taken into account in determining the matter.

12 Other Implications

None

13 Risk Assessment

Having considered the risks associated with this decision, the level of risk has been identified as:

Current Risk: LOW

Residual Risk LOW

14 Equalities Impact Assessment

An Equalities Impact Assessment is not a material consideration in considering this application.

15 Conclusions

15.1 In deciding whether or not it is appropriate to make an order, it must be considered whether, on the balance of probability, public rights subsist on these routes. On balance it is considered that there is sufficient evidence for the “balance of probability” test to be met for some of the routes, but not others.

15.2 The documentary evidence indicates that some of the routes were in existence on the ground but for some routes the evidence was absent. None of the documentary evidence provides support for public rights over these routes.

- 15.3 The user evidence indicates that routes Red 1, Red 2, Red 3, Red 4, Red 5, Green 1, Green 2, Green 3, Blue 1, Orange 1, Orange 2, Orange 3 and Orange 4 received sufficiently high levels of use on horse and cycle during the period 2003 – 2014 for an inferred dedication as bridleways.
- 15.4 The user evidence indicates that route Orange 5 received sufficiently high levels of use on foot for an inferred dedication as a footpath.
- 15.5 The use of routes Green 4 and Orange 6 was insufficient for a common law presumption of any status.
- 15.6 It is therefore recommended that an order be made to record routes Red 1, Red 2, Red 3, Red 4, Red 5, Green 1, Green 2, Green 3, Blue 1, Orange 1, Orange 2, Orange 3 and Orange 4 as shown on Drawing T544/20/1 as bridleways.
- 15.7 It is also recommended that an order be made to record route Orange 5 as shown on Drawing T544/20/1 as a footpath.
- 15.8 It is recommended that no order be made with respect to routes Green 4 and Orange 6.
- 15.9 If there are no objections to a modification order, Dorset Council can itself confirm the order if the criterion for confirmation has been met. An order can be confirmed if, on the balance of probability, it is shown that the routes as described do exist. It is considered that the evidence is sufficient to satisfy this test for routes Red 1, Red 2, Red 3, Red 4, Red 5, Green 1, Green 2, Green 3, Blue 1, Orange 1, Orange 2, Orange 3, Orange 4 and Orange 5.

16 **Appendices**

- 1 Drawing T544/20/1
- 2 Law
- 3 Documentary evidence
 - Ordnance Survey Map (1982 – 1989)
 - Aerial photograph 2009
- 5 User evidence

- Example charts to show periods and level of use for routes Green 3, Orange 6 and Orange 5, (a complete set of charts for all routes is in the case file reference T544).
- Cyclometer / Strava Satellite Tracker Heat Map

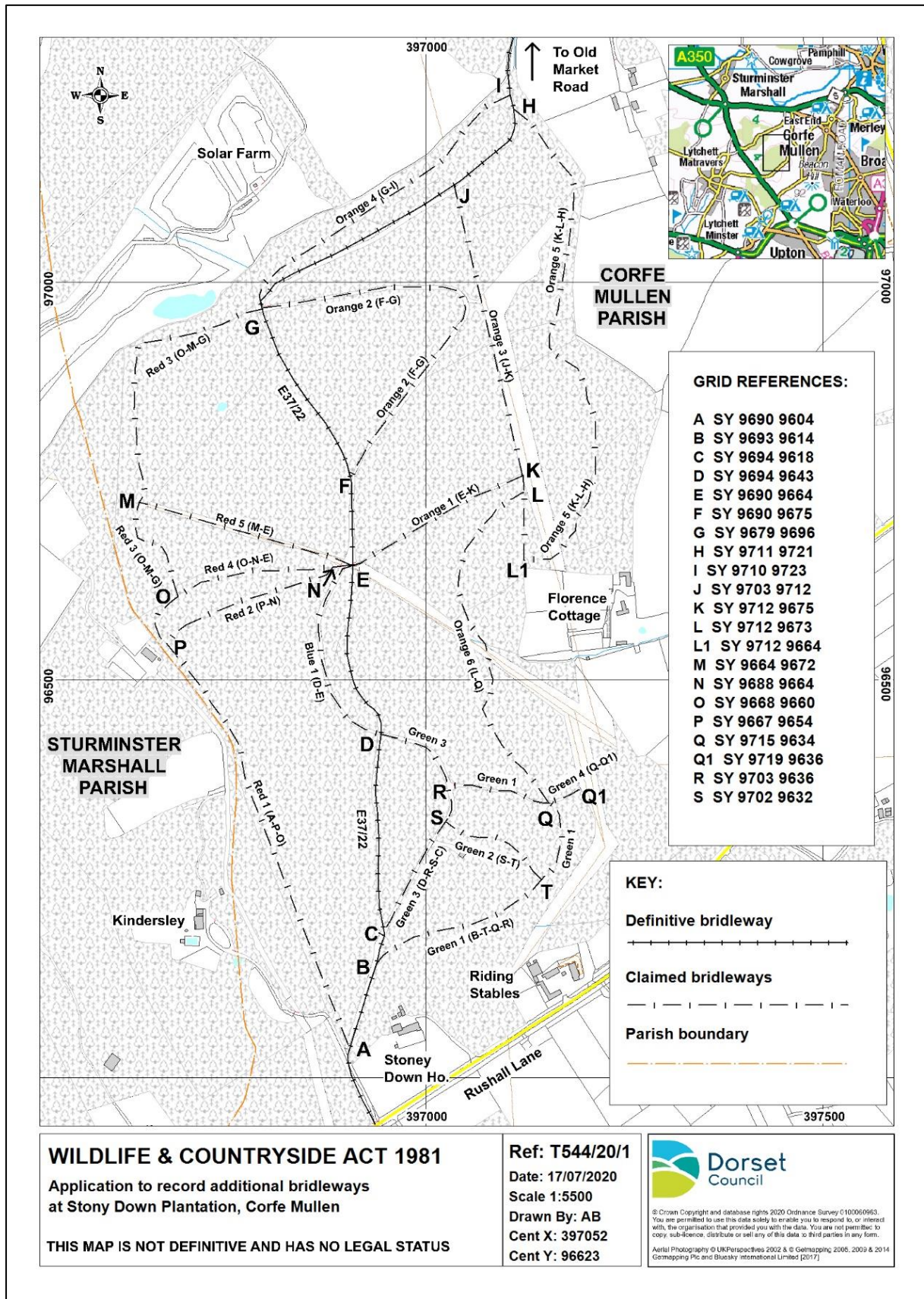
17 **Background Papers**

The file of the Executive Director, Place (ref. RW/T544).

May 2023

APPENDIX 1

Drawing T544/20/1



LAW

General

Wildlife and Countryside Act 1981

- 1.1 Section 53 of the Wildlife and Countryside Act 1981 requires that the Council keep the definitive map and statement under continuous review and in certain circumstances to modify them. These circumstances include the discovery of evidence which shows that a right of way not shown in the definitive map and statement subsists or is reasonably alleged to subsist.
- 1.2 Section 53 of the Act also allows any person to apply to the Council for an order to modify the definitive map and statement of public rights of way in consequence of the occurrence of certain events. One such event would be the discovery by the authority of evidence which, when considered with all other relevant evidence available to them, shows that a right of way not shown on the definitive map and statement subsists.
- 1.3 The Council must take into account all relevant evidence. They cannot take into account any irrelevant considerations such as desirability, suitability and safety.
- 1.4 For an application to add a right of way, the Council must make an order to modify the definitive map and statement if the balance of evidence shows either:
 - (a) that a right of way subsists or
 - (b) that it is reasonably alleged to subsist.

The evidence necessary to satisfy (b) is less than that necessary to satisfy (a).
- 1.5 An order to add a route can be confirmed only if, on the balance of probability, it is shown that the route as described does exist.
- 1.6 For an application to change the status of an existing right of way, the Council must make an order to modify the definitive map and statement if the balance of evidence shows that it ought to be recorded with that different status.
- 1.7 The confirmation test for an order to change the status of an existing right of way is that same as the test to make that order.

- 1.8 An order to add a right of way and change the status of an existing right of way as part of the same route should only be made if the balance of the evidence shows that the new route exists and the existing route should be recorded with a different status.
- 1.9 Where an objection has been made to an order, the Council is unable itself to confirm the order but may forward it to the Secretary of State for confirmation. Where there is no objection, the Council can itself confirm the order, provided that the criterion for confirmation is met.

2 Highways Act 1980

2.1 Section 31 of the Highways Act 1980 says that where a way has been used by the public as of right for a full period of 20 years it is deemed to have been dedicated as highway unless there is sufficient evidence that there was no intention during that period to dedicate it. The 20 year period is counted back from when the right of the public to use the way is brought in to question.

- (a) 'As of right' in this context means without force, without secrecy and without obtaining permission.
- (b) A right to use a way is brought into question when the public's right to use it is challenged in such a way that they are apprised of the challenge and have a reasonable opportunity of meeting it. This may be by locking a gate or putting up a notice denying the existence of a public right of way.
- (c) An application under Section 53 (5) of the Wildlife and Countryside Act 1981 for a modification order brings the rights of the public into question. The date of bringing into question will be the date the application is made in accordance with paragraph 1 of Schedule 14 to the 1981 Act.

2.2 The common law may be relevant if Section 31 of the Highways Act cannot be applied. The common law test is that the public must have used the route 'as of right' for long enough to have alerted the owner, whoever he may be, that they considered it to be a public right of way and the owner did nothing to tell them that it is not. There is no set time period under the common law.

2.3 Section 31(3) of the Highways Act 1980 says that where a land owner has erected a notice inconsistent with the dedication of a highway, which is visible to users of the path, and maintained that notice, this is sufficient to show that he intended not to dedicate the route as a public

right of way.

- 2.4 Section 31 (6) of the Highways Act 1980 permits landowners to deposit with the Council a map and statement indicating what ways over the land (if any) he admits to having been dedicated as highways. A statutory declaration can be made at intervals of not more than 20 years stating no additional ways have been dedicated since the date of the deposit. In the absence of proof to the contrary, this is sufficient to establish that no further ways have been dedicated. Prior to the Highways Act 1980 a similar facility was available under the Rights of Way Act 1932 and the Highways Act 1959.
 - 2.5 Section 32 of the Highways Act 1980 says that the Council must take into consideration any map, plan or history of the locality. Documents produced by government officials for statutory purposes such as to comply with legislation or for the purpose of taxation, will carry more evidential weight than, for instance, maps produced for tourists.
 - 2.6 Section 31 of the Highways Act 1980 does not apply to Crown Land or to land owned by a government department e.g. Ministry of Agriculture Fisheries and Food.
- 3 Human Rights Act 1998
- 3.1 The criteria for definitive map modification orders are strictly limited to matters of fact and evidence. In all cases the evidence will show that the event (section 53) has already taken place. The legislation confers no discretion on a surveying authority or the Secretary of State to consider whether or not a path or way would be suitable for the intended use by the public or cause danger or inconvenience to anyone affected by it. In such situations where the primary legislation offers no scope for personal circumstances to affect the decision on the order, the Planning Inspectorate's recommended approach is to turn away any human rights representations.
 - 3.2 A decision confirming an order made under the Wildlife and Countryside Act 1981 would be lawful (under domestic law) as provided by Section 6.2 of the Human Rights Act 1998 even in cases where the Convention was apparently infringed, where it was impossible to interpret the 1981 Act in such a way that it is compatible with the Convention rights (section 3 Human Rights Act 1998).

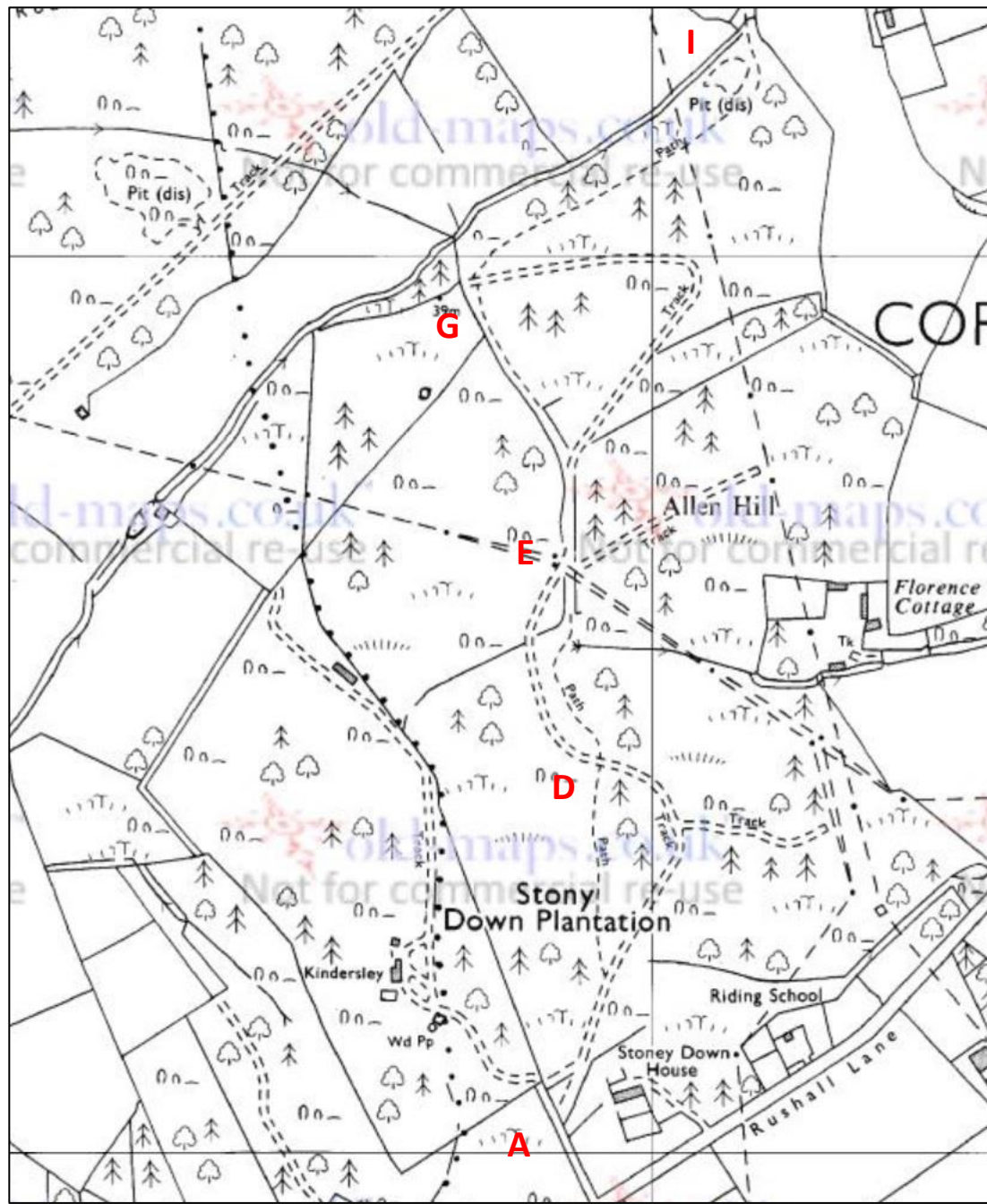
Case specific law

- 4 National Parks and Access to the Countryside Act 1949
- 4.1 The National Parks and Access to the Countryside Act 1949 required the County Council as “Surveying Authority” to compile the record of the public rights of way network and the District and Parish Councils were consulted to provide the County Council with information for the purposes of the survey.

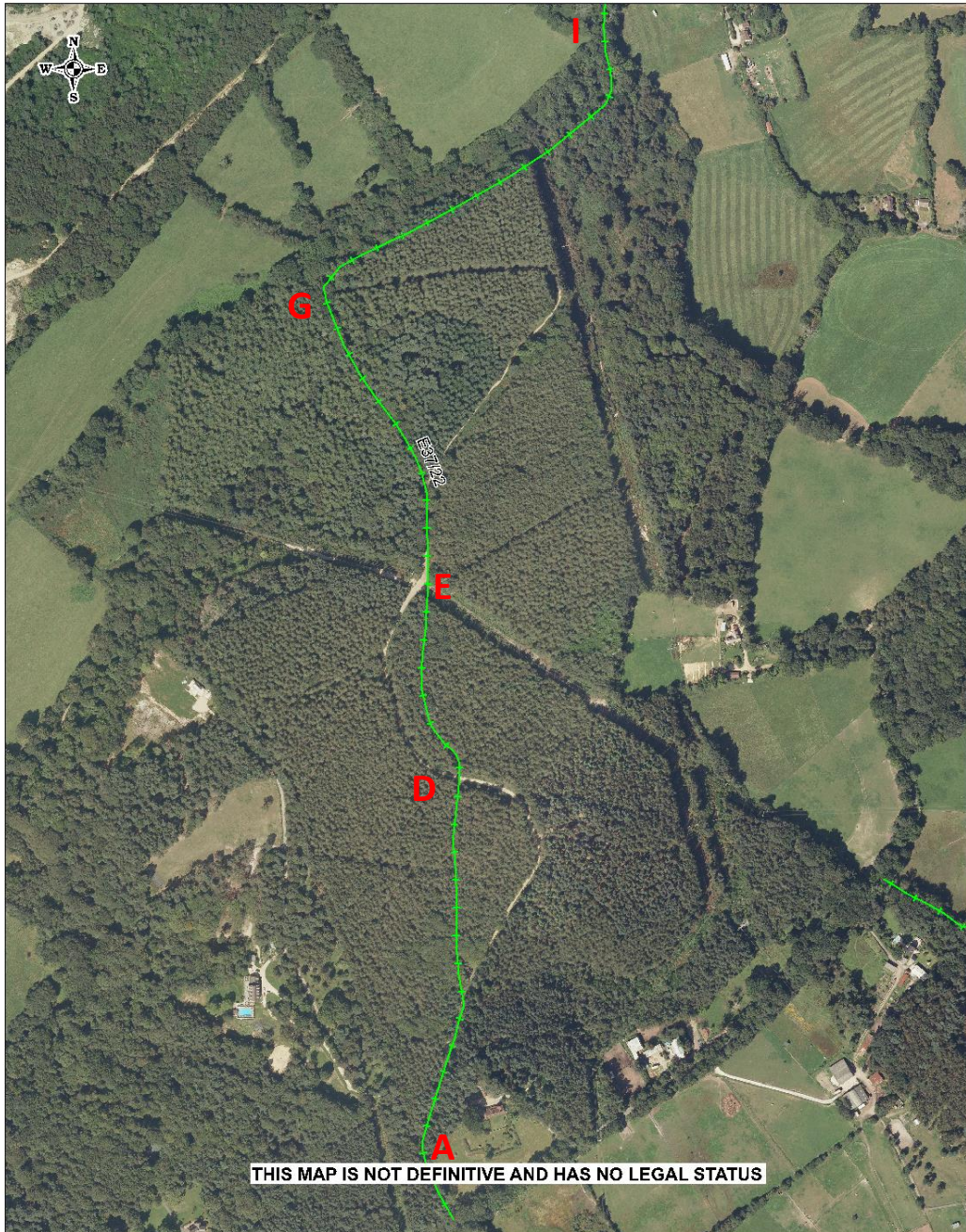
Case specific case law

- 5 Whitworth and others v SoS for Environment Food and Rural Affairs, EWCA Civ 1468 [2010]
- 5.1 According to case law, bicycle use before 1968 leads to carriageway rights. Bicycle use between 1968 and 2006 leads to bridleway rights and bicycle use since 2006 leads to restricted byway rights.

Ordnance Survey Plan at a scale of 1:10,000 (1982 – 1989)



Aerial Photograph 2009



T544 VAP 2009

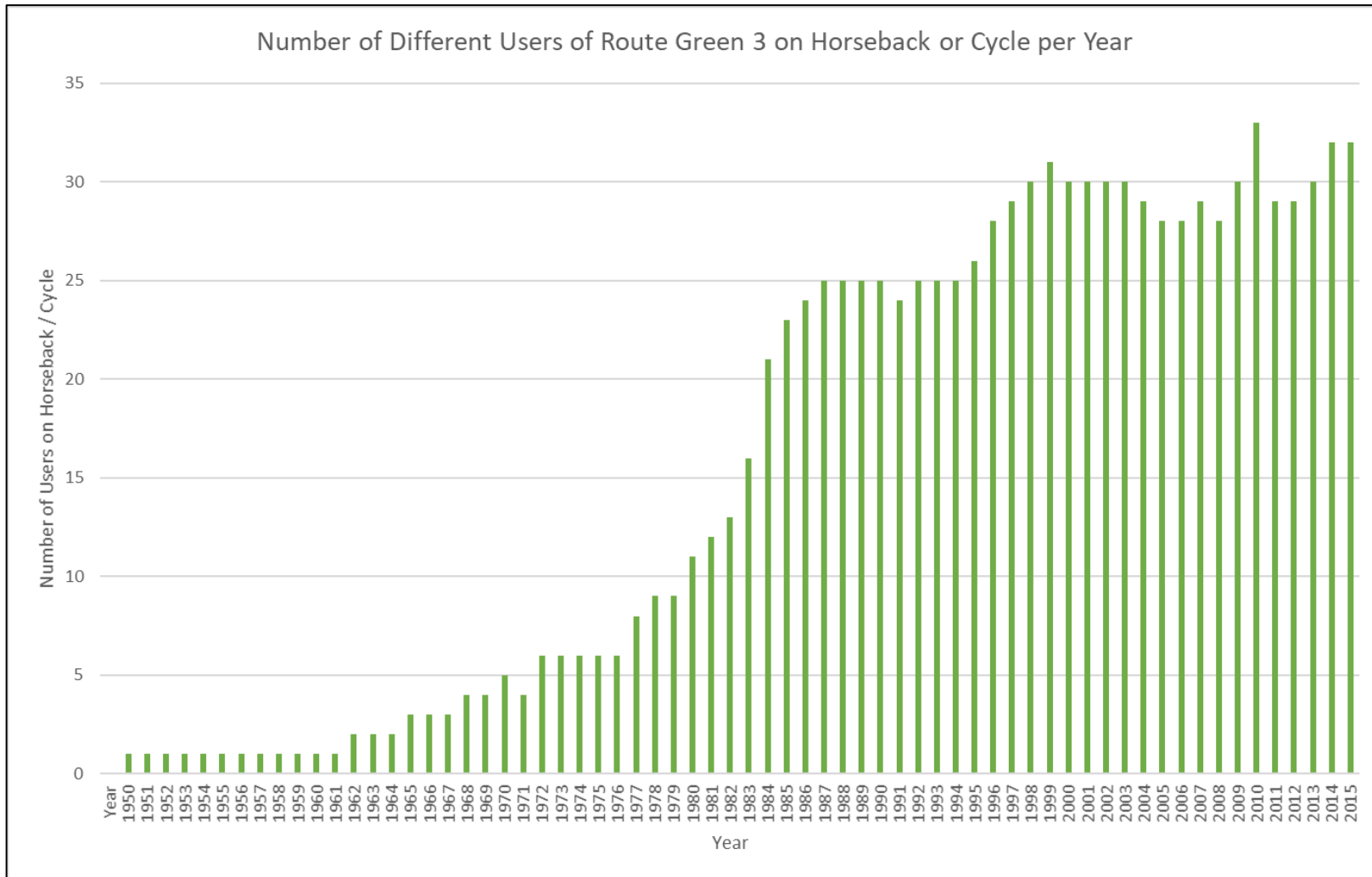
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Date: 24/06/2020
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Cent Y: 96606



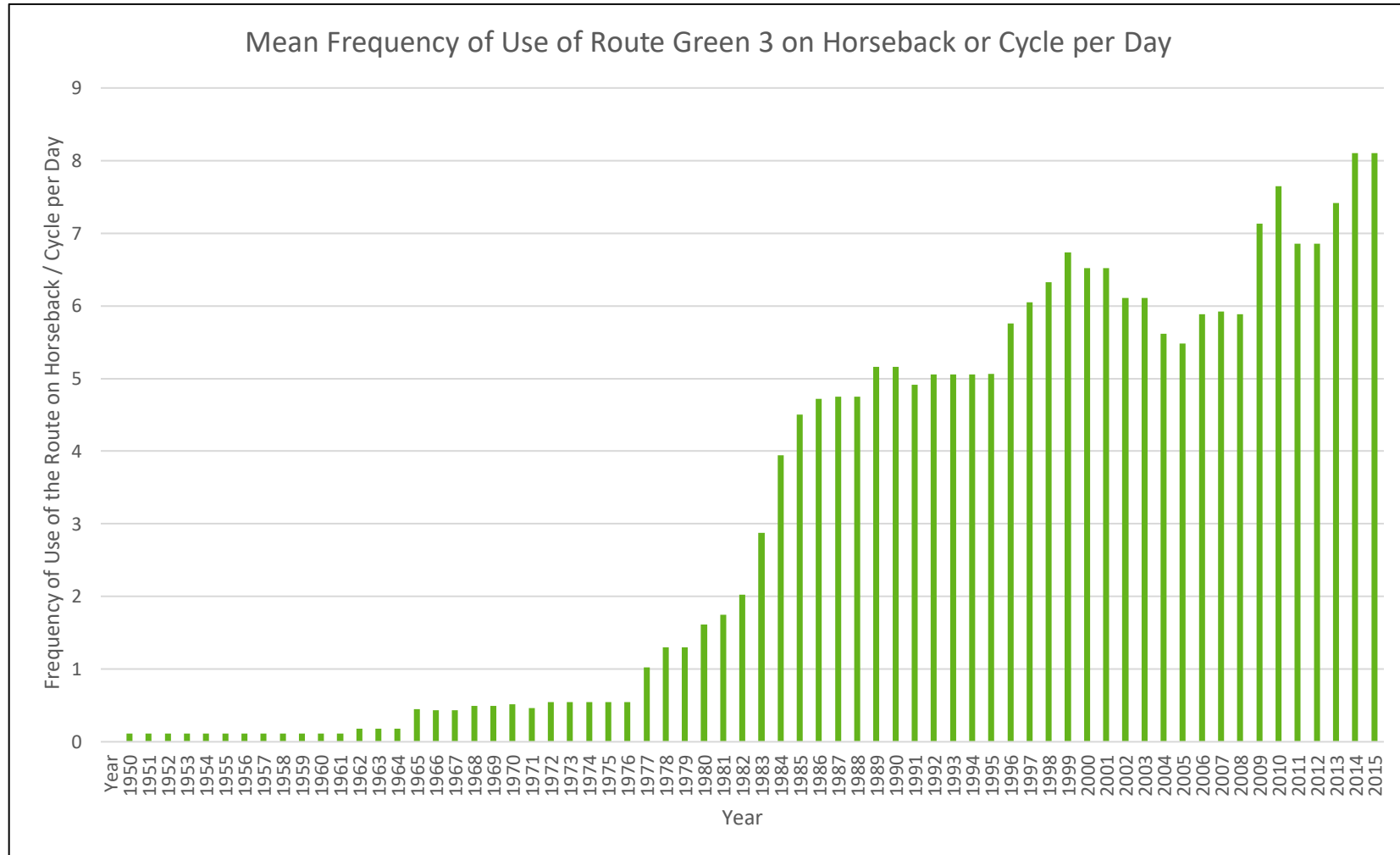
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You are permitted to use this data and/or to create you or licensed to be linked
with, the organisation that provided you with the data. You are not permitted to
copy, sub-licence, distribute or sell any of this data to third parties in any form.
Aerial Photography: SLMF Photos (since 2002) & SLD Photography 2008, 2009 & 2014
Cartographic: ITC and BlueSky International Limited (2011)

APPENDIX 4

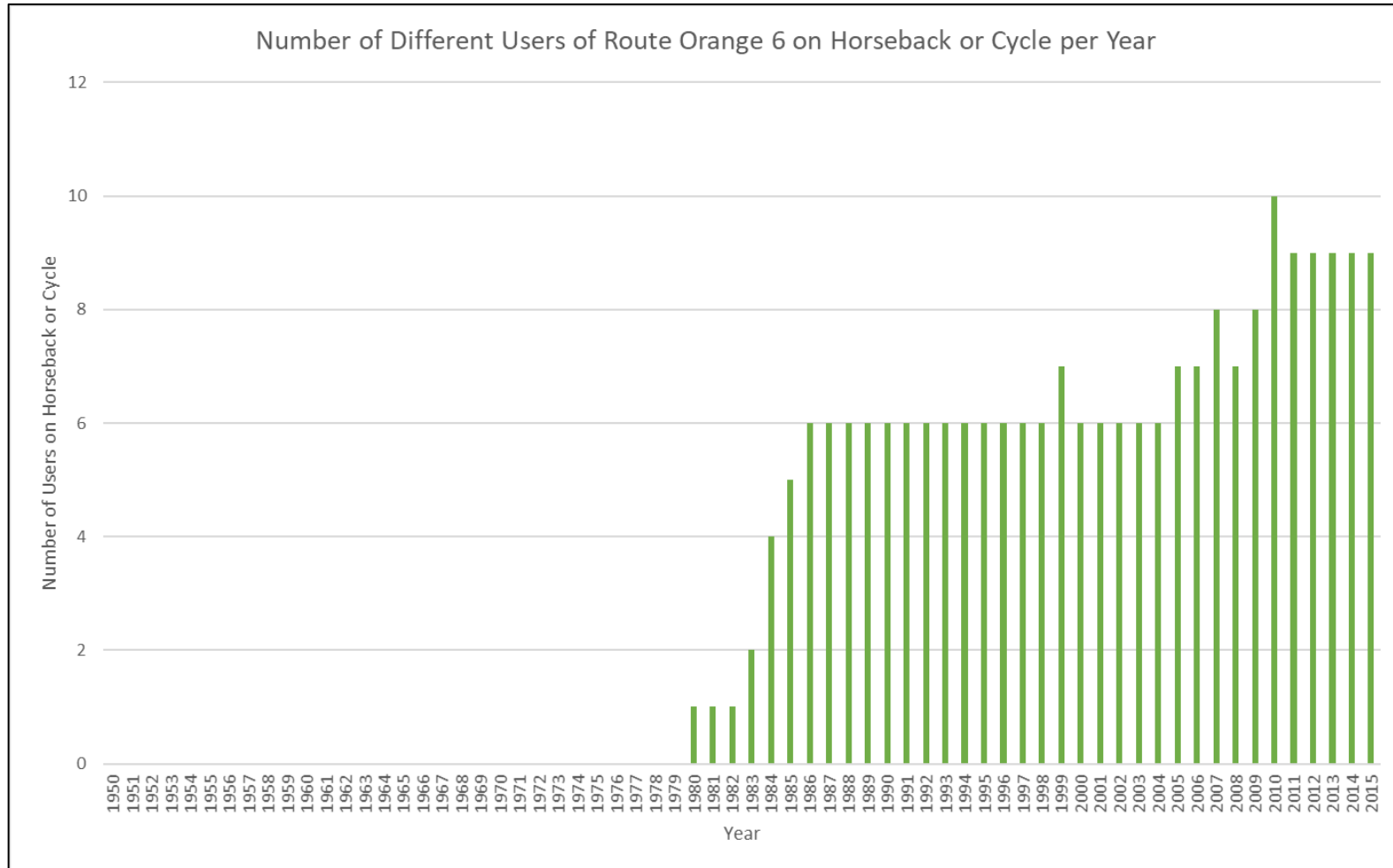
Example Chart to show level of use (charts for all routes available in the case file T544)



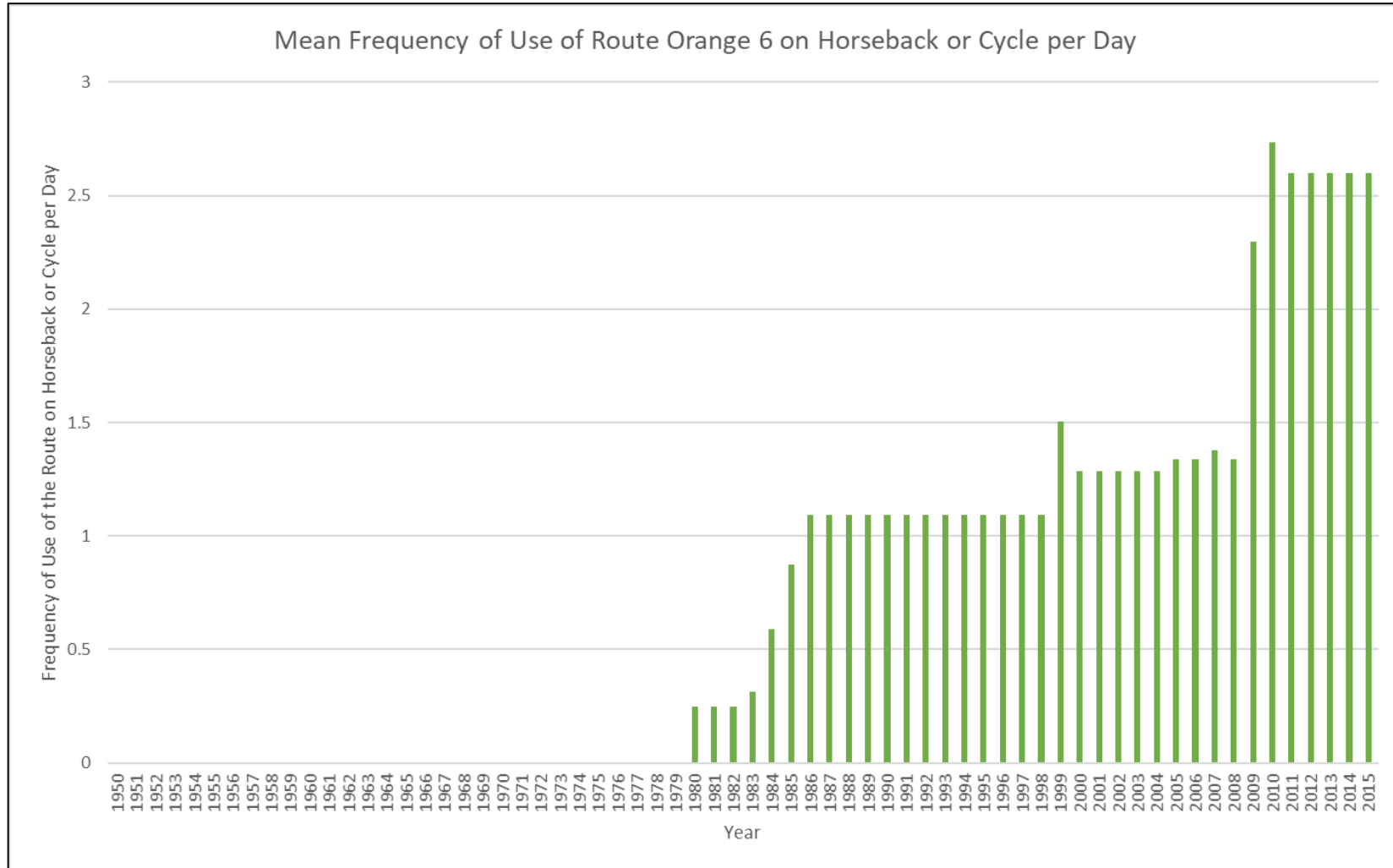
Example Chart to show Frequency of use (charts for all routes available in the case file T544)



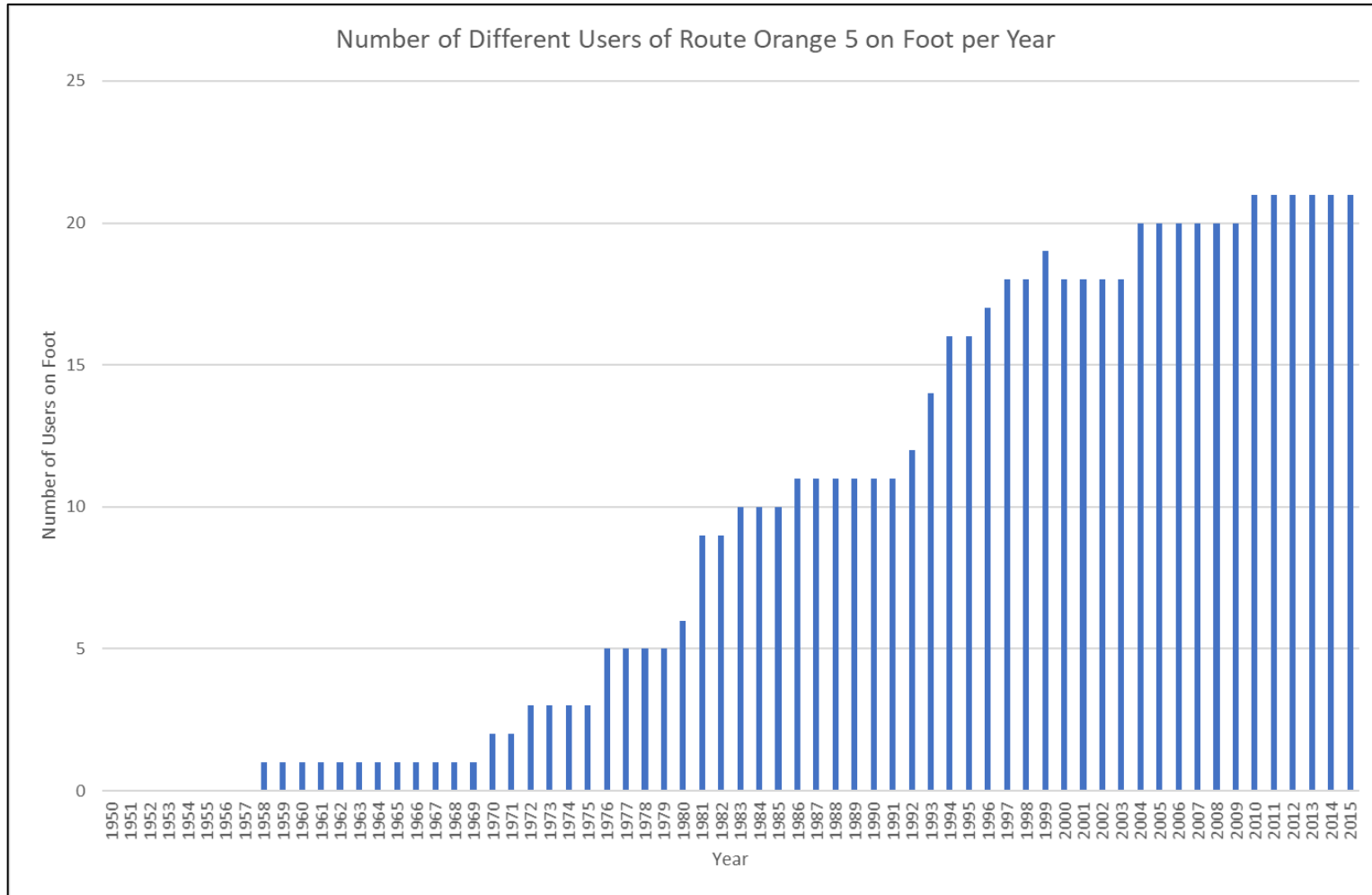
Example Chart to show level of use (charts for all routes available in the case file T544)



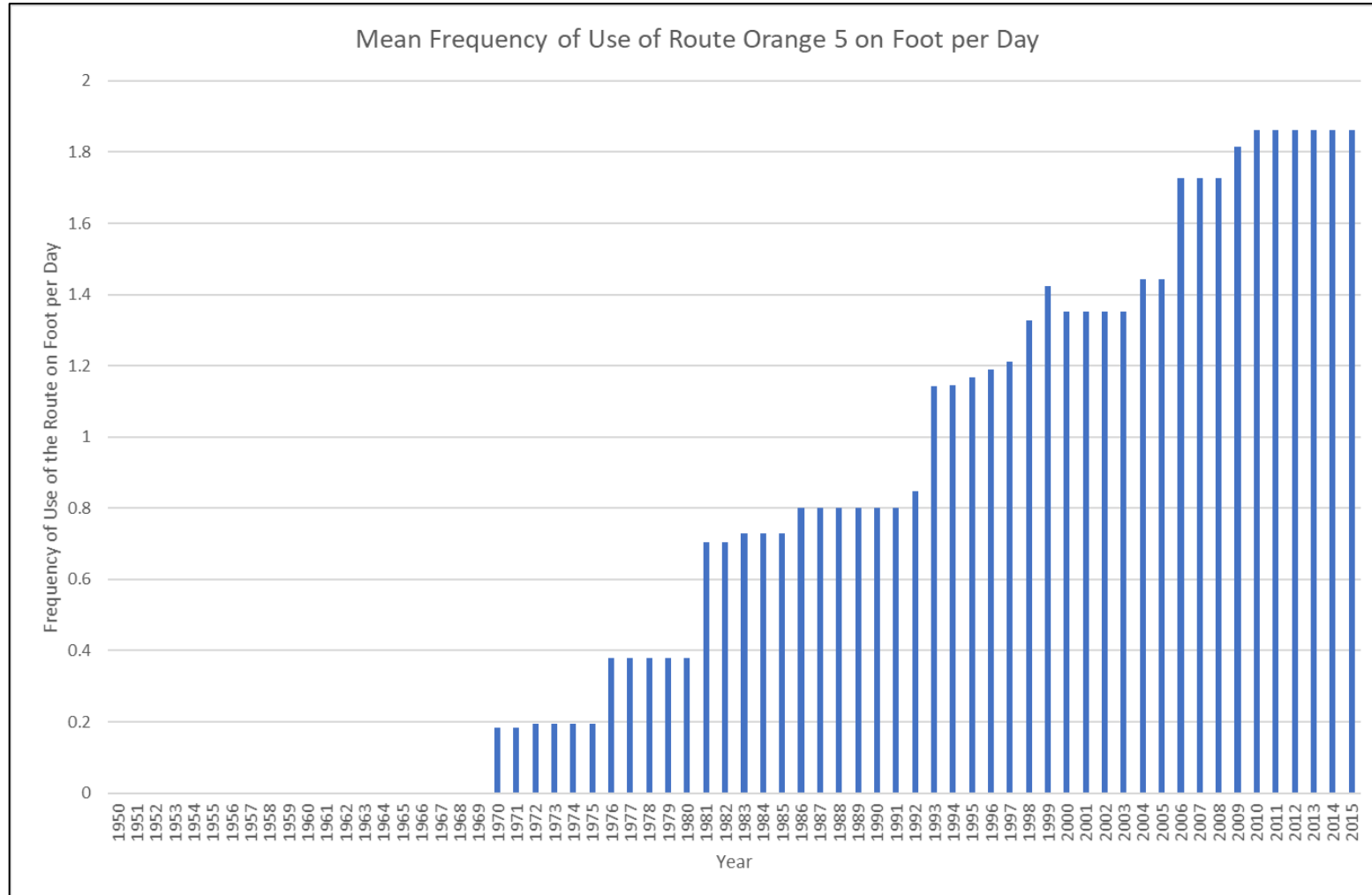
Example Chart to show Frequency of use (charts for all routes available in the case file T544)



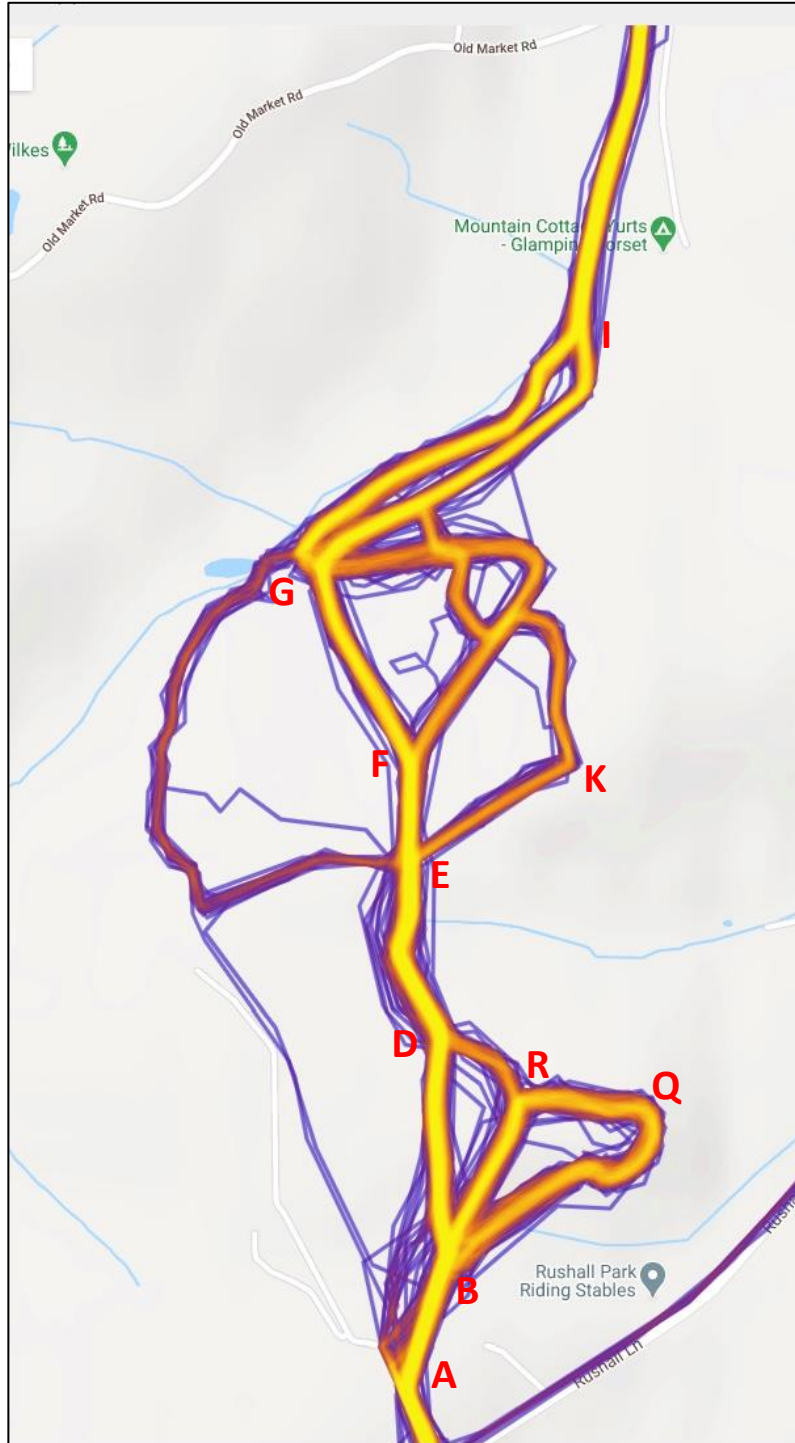
Example Chart to show level of use (charts for all routes available in the case file T544)



Example Chart to show Frequency of use (charts for all routes available in the case file T544)



**Cyclometer / Strava Satellite Tracker Heat Map, User 79, 2010-2015
by pedal cycle**



Blue - Red - Orange - Yellow - White

Least used ← → Most used

Recommendations accepted:

Signed:

Date: 25 May 2023

SIGNATURE REDACTED.

Hilary Jordan

Service Manager for Spatial Planning
Economic Growth and Infrastructure