

From: Chris Wade (Public Rights of Way Principal Case Officer)

To: Regulation Committee Panel Meeting – 27<sup>th</sup> October 2009

Subject: Application to register Public Rights of Way on the former Bayham Estate, Lamberhurst and Pembury.

Classification: Unrestricted District: TUNBRIDGE WELLS

Local Member: Mr A King

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**Summary: To seek approval to inform the Secretary of State that the County Council wishes to take a neutral stance at any Public Inquiry into this application**

**FOR DECISION**

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## **Introduction**

1. On 5<sup>th</sup> of April 2005, a Regulation Committee Member Panel meeting resolved to reject an application lodged by the Ramblers Association (“the applicant”) under provisions contained within Section 53 of the Wildlife and Countryside Act 1981. The application was seeking to modify the Definitive Map of Public Rights of Way by adding a number of Public Footpaths across the former Bayham Estate. The application was in respect of land both in Kent and East Sussex.
2. In such cases, where an application is refused, the applicant has the right of Appeal to the Secretary of State. As reported to Members of the Regulation Committee on the 22<sup>nd</sup> January 2008 (a copy of this report is attached at **Appendix A**), the applicant took the opportunity to exercise this right. Within the same report I indicated to Members that the Secretary of State would no doubt be taking into account the judgement of what was then a recently decided case in the House of Lords and in consequence may well direct the County Council to go against its original decision not to make a Definitive Map Modification Order.

## **Secretary of State’s decision**

3. On the 27<sup>th</sup> March 2009 the Secretary of State informed the County Council that having considered the appeal it was considered that an Order should be made in respect of the relevant parts of a route known as “The Red Route” which falls within Kent County. A map showing the route is attached at **Appendix B**.
4. Accordingly the Secretary of State, under provisions available to him, directed the County Council to make an Order to modify the Definitive Map of Public Rights of Way to record the “Red Route” at Public Footpath status. A similar direction was given to East Sussex County Council.

## **Definitive Map Modification Order**

5. In consequence, the County Council made the necessary Order on the 5<sup>th</sup> August 2009. An objection period was allowed and expired on the 28<sup>th</sup> September 2009. At

the expiration of this period one objection had been received from Knights Solicitors of Tunbridge Wells on behalf of affected landowners. As a result of this objection the County Council has no option other than to send the Order to the Planning Inspectorate for resolution: almost certainly by way of a Public Inquiry.

### **Counsel's opinion**

6. At the January 2008 Regulation Committee Members agreed that the County Council should seek Counsel's opinion on further action in the event the County Council received a direction from the Secretary of State. This has been sought and Counsel whilst appreciating that a different interpretation has been place upon the legislation since the County Council took its original decision, is of the view that the Council should still continue with its normal practise in such circumstances. Counsel does not consider that such action would disenfranchise either the applicant or the objector.
7. In this respect, this Authority (in line with other Local Authorities in a similar position across the Country on the receipt of a direction from the Secretary of State), maintains a neutral stance at any consequent Inquiry and whilst facilitating the Inquiry and providing information and evidence already considered to the Inspector would take no positive role in either asserting or objecting to the Order. I would therefore seek Members approval to inform the Secretary of State (Planning Inspectorate) that the County Council wishes to maintain a neutral stance in respect of any Public Inquiry held into the addition of a Public Footpath across the former Bayham Estate at Pembury and Lamberhurst.

### **Recommendation**

8. I recommend that the County Council informs the Secretary of State that it will maintain a neutral stance at any Public Inquiry held into the addition of a Public Footpath crossing the former Bayham Estate at Pembury and Lamberhurst.

### **Background documents**

APPENDIX A – Copy of report to Regulation Committee on 22<sup>nd</sup> January 2008  
APPENDIX B – Plan showing claimed routes

### **Case Officer:**

Mr. Chris Wade – Tel: 01622 221511 or Email: [chris.wade@kent.gov.uk](mailto:chris.wade@kent.gov.uk)

From: Chris Wade (Public Rights of Way Principal Case Officer)

To: Regulation Committee- Tuesday 22<sup>nd</sup> January 2008

Subject: Application to register Public Rights of Way on the former Bayham Estate, Lamberhurst and Pembury.

Classification: Unrestricted District: TUNBRIDGE WELLS

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**Summary:** To inform Members of the current position relating to this application and to seek approval to refer the eventual decision from the Government Office for the North East to Counsel for advice on further action.

**FOR DECISION**

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**Introduction**

1. On 5<sup>th</sup> of April 2005, a Regulation Committee Member Panel meeting resolved to reject an application lodged by the Ramblers Association (“the applicant”) under provisions contained within Section 53 of the Wildlife and Countryside Act 1981. The application was seeking to modify the Definitive Map of Public Rights of Way by adding a number of Public Footpaths across the former Bayham Estate.
2. In such cases, where an application is refused, the applicant has the right of Appeal to the Secretary of State. The applicant exercised this right, and the matter is currently being dealt with by an Inspector appointed by the Secretary of State. The Government Office for the North East is responsible for the administration of this process.

**The effect of the ‘Godmanchester’ case**

3. The original decision to reject the Ramblers Association’s application was based upon a number of factors. In order to be successful with their application, the Ramblers’ Association needed to show that the criteria contained within section 31 of the Highways Act 1980 had been met. Section 31 reads as follows:  
‘where a way over land... has been actually enjoyed by the public as of right and without interruption for a full period of 20 years, the way is deemed to have been dedicated as a highway *unless there is sufficient evidence that there was no intention [by the landowner] during that period to dedicate it*’ (emphasis added).
4. One of the prime factors considered in this case was whether the landowner had taken sufficient **overt** actions in order to inform the general public that he had no intention to dedicate rights for the public on land within his ownership. The interpretation which had to be given the words ‘overt’ and ‘intention’ *at the time* of the County Council’s decision had been decided by the Court of Appeal which clearly held that any action taken by a landowner in a manner that appeared to show his desire not to dedicate such rights would be enough to deny the public, despite the fact that some (if not all) of those actions were not being made in a manner that the public would have been aware of.
5. A good example of this at Bayham was the tenancy agreements which were in force during the relevant 20 year period of claimed use. The landowner made it quite clear

to his tenants within this agreement that it was his intention that no rights of Way should be dedicated to the public. Although the clause within these agreements would not have been available to the public at large, the interpretation of the word 'overt' *at the time* deemed this was enough to show the landowner had no intention to dedicate. Members, in taking their original decision, interpreted that evidence at the time in the accepted manner and this was one of the reasons why the Regulation Committee Member Panel rejected the application.

6. The question arising in the Godmanchester case, which was finally heard in the House of Lords, was the relevance of such actions and, in particular, whether such actions constituted *sufficient evidence* of a landowner's lack of intention to dedicate. After careful consideration and having heard submissions from very learned Barristers representing both parties, the Law Lords decided that the previous interpretation of the word 'sufficient evidence' in the lower courts was wrong. As a result of this decision, it is now considered that landowners must bring to the attention of users of the way by very deliberate acts to show that they have no intention to dedicate the path to the public: the fact that they might have written this in other documents to which the general public do not have access is simply not enough.

### **The powers of the Secretary of State**

7. As a result of the appeal by the applicants against the County Council's resolution, the decision as to whether or not an Order should be made has now passed to the Secretary of State. He has the power to direct the County Council to make an Order should he deem it appropriate. The Inspector appointed by the Secretary of State to take a decision on this matter has no option other than to interpret the words 'sufficient evidence' and 'overt' in the manner decided in the House of Lords. It is therefore possible that the County Council may receive a direction from the Secretary of State to go against the original decision not to make an Order. If this should be the case, then I would ask for Members approval to seek Counsel's opinion as to the stance the County Council should take at any subsequent Public Inquiry.

### **Recommendation**

8. I recommend that members receive this report for information.
9. I also recommend that the County Council seeks Counsel's opinion on further action in the event the County Council receives a direction from the Secretary of State to make a Definitive Map Modification Order to add Public Rights of way across the former Bayham Estate.

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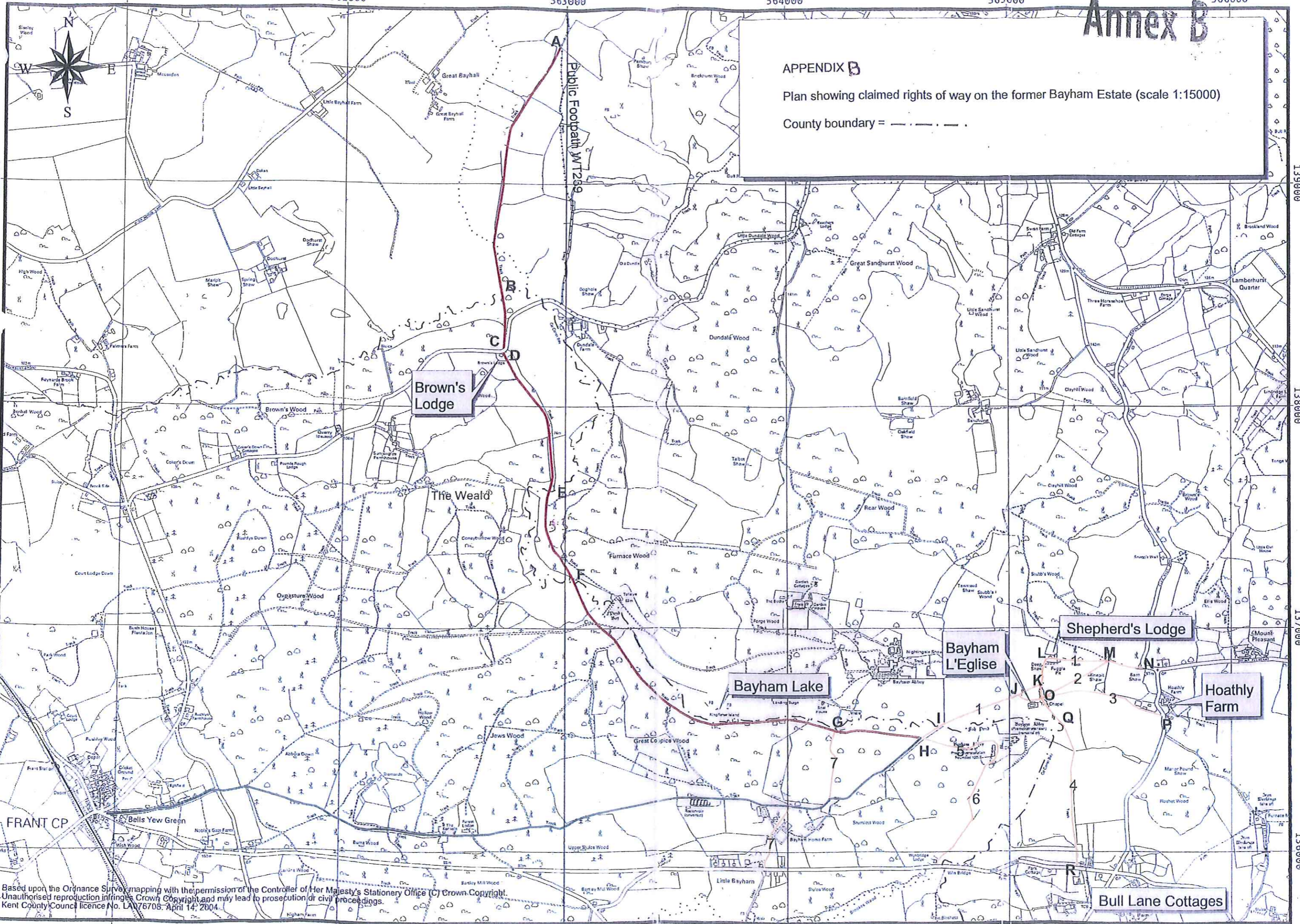
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# Annex B

## APPENDIX B

Plan showing claimed rights of way on the former Bayham Estate (scale 1:15000)

County boundary = - - - - -



Brown's Lodge

The Weald

Bayham Lake

Bayham L'Eglise

Shepherd's Lodge

Hoathly Farm

Bull Lane Cottages

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