

7th April 2009

Southwater: Application for a Definitive Map Modification Order (Application No: 5/08) to add to the Definitive Map and Statement for Horsham a footpath from Denne Gate to Denne Park in the parish of Southwater.

Report by the Head of Legal Services

Executive Summary

The application, made under the provisions of Section 53 of the Wildlife and Countryside Act 1981, seeks to modify the Definitive Map and Statement for Horsham by adding a footpath from Denne Gate to Denne Park to intersect with footpath 1663 in the parish of Southwater.

All evidence in respect of this claim is available for inspection in the Members' Room prior to the meeting.

Conclusions

1. The application is based on evidence of use and 54 witness evidence forms were submitted in support of the claim, testifying to use between 1933 and 2008.
2. The applicant also submitted archival evidence and this has been considered by the County Council, which has also undertaken its own archive research. It is concluded that there is insufficient archive evidence to support the claimed route as having public highway status. In the absence of conclusive archive evidence the claim is considered under section 31 Highways Act 1980.
3. The application was made following the construction of electric gates across the claimed route in 2005. There is, however, conclusive evidence of the existence of a notice bringing the public right to use the way into question from 2001. The relevant 20 year period of continuous use considered for the purposes of this application is therefore 1981-2001. A further relevant 20 year period of continuous use from 1939 to 1959 is also considered.
4. There is contradictory evidence from users, landowners and other interested parties relating to the existence or otherwise of notices being displayed from 1959 to 2001.
5. The evidence provided to dispute the claim therefore conflicts with the evidence of use submitted with the application. It is considered that the evidence of use is not outweighed by the evidence against the claim and that the applicant has reasonably alleged the existence of the claimed path under section 53 (3) (c) (i) of the Wildlife and Countryside Act 1981.

Recommendation

On the balance of available evidence that a Definitive Map Modification Order, under Section 53 (2) in consequence of an event specified in sub-section 53(3) (c) (i) of the Wildlife and Countryside Act 1981, to add a new length of footpath from Denne Gate to Denne Park (points A-B-C-D on the report plan) be made.

1. Introduction

- 1.1 An application to add to the Definitive Map and Statement for Horsham a footpath from Denne Gate to Denne Park in Southwater was submitted, by Mr. Norman Raby of 'Rainbow', Chesworth Lane, Horsham, West Sussex RH13 5AJ on 22nd August 2008.
- 1.2 The application was supported by 54 witness evidence forms, including eleven witness statements lodged with a previously withdrawn application (DMMO 9/06).
- 1.3 On 10th October 2008 Mrs Marion Cottrell wrote to the Council to request that her evidence form be withdrawn, as she had "...since done further research into the matter..." The evidence submitted by the remaining 53 witnesses is considered at paragraph 5.

2. Character and features of the route

- 2.1 The site was visited on 1st September 2008 to inspect and photograph the route of the claimed path. The photographs taken during this site visit will be displayed at the Committee meeting.
- 2.2 The claimed route is marked on the plan attached to this report, running between points A-B-C-D. The approximate length of the claimed path from point A to D is 925 metres.
- 2.3 Approaching from the south, the claimed path commences in Denne Park at a junction with footpath 1663 (point A). There are no notices denying public access at this point. It is approximately 3.3 metres wide and has a tarmac surface. The path crosses Denne Park, which is generally flat, open grassland with occasional clumps of trees and shrubs. It proceeds in a northerly direction for approximately 116.7 metres, at which point the path divides (point B). While the track with a tarmac surface turns eastwards towards Hillview Cottages and Hill Top Cottage, the claimed path continues in a generally north westerly direction with a surface of impacted gravel and soil and a width of approximately 3.4 metres. To each side of the path are concrete kerbs, with sparse trees to the west and open parkland to the east. There are no notices denying public access along this section of the claimed path.
- 2.4 After approximately 87.9 metres, the path enters a more densely wooded area and is approximately 4 metres wide at this point. It continues at this width towards a cattle-grid, with a surface of part concrete, part impacted soil. After approximately 77.9 metres the path

crosses the cattle grid (point C) and has a width at the opening between a brick pillar on the eastern side of the cattle grid and a post and wire fence and trees on the western side of approximately 3 metres. To the east of the brick pillar is a closed five-bar gate (rusted) and the dilapidated remains of a 'kissing gate', giving alternative access on foot to the path beyond. There are no notices denying public access to the claimed path at this gateway.

- 2.5 The claimed path continues at a width of approximately 3 metres with a surface generally of impacted soil and stones. There is woodland to the east of the path, while to the west the land falls away steeply into a deep, possibly ancient, tree-lined feature which follows the line of the claimed path. There are no notices denying public access along this section of the claimed route.
- 2.6 The claimed path emerges from woodland near the property known as 'North Lodge', which is situated on its eastern side. There is a wide grassy verge on the western side of the path where there is a small sign which reads 'Private Drive No Public Footpath' which appears to be of recent origin. The surface of the claimed path is tarmac from this point throughout the remainder of its length and remains approximately 3 metres wide.
- 2.7 The route of the claimed path continues north-eastwards, with fields on the eastern side and a strip of woodland on the western side, towards a pair of stone pillars and attached pair of wooden gates. The eastern gate of this pair has a small notice attached, of recent appearance, which reads: 'Private Drive No Public Footpath'. This sign is not clearly visible when the gates are open. The stone pillar to the west of the gateway carries a tribute plaque dated 2005 and the pillar to the east has a plaque which reads 'Denne Park Private'. Next to the eastern pillar is a 'kissing gate' which carries a small sign which reads 'Private Drive No Public Footpath', also of apparently recent origin.
- 2.8 Approximately 5 metres to the north-east of these gates there is a section of iron railings which run along the claimed path and then at right angles to it. On the northern side of this fencing, clearly visible to path users approaching from a northerly direction, is a larger, older sign which states 'Private Drive' and 'No Public Right of Way'. The claimed path then meets footpath 1665, which approaches the path from its eastern boundary (point D).
- 2.9 An additional sign is situated on the eastern side of the roadway, approximately 67 metres before the commencement of the claimed path, which reads 'Private No Entry' and 'Access only to public footpaths'.

3. Land ownership

- 3.1 Research by the applicant and enquiries to the Portsmouth Land Registry Office have shown that the owners of three separate sections of the route can be reliably identified. The land owners are:

Mrs. C.L. Parsons, Mrs. A. H. Carlson-Hedges and Mr. C.D. Newman (jointly);
Mr. O.W.T. Close;
Mr. P. Blewitt.

A plan identifying the extent of ownership of these three sections is included with the evidence available for inspection in the Members' Room prior to the meeting.

- 3.2 As part of the claimed route crosses unregistered land and its ownership was then uncertain, all known adjoining property owners have been consulted and notices were also posted on site to comply with legislation.

4. **Consultations**

- 4.1 Before making a Definitive Map Modification Order, the County Council is obliged to consult the relevant District or Borough and Parish Councils. Consultations have also been carried out with other interested bodies. In considering the result of the consultations, Members of the Committee are requested to bear in mind that, when determining this application they can only take into account evidence which demonstrates whether or not the tests in section 53 have been satisfied. Members are requested to refer to pages 13 to 18 of 'The Guide to the Law for the Right of Way Committee'. The following consultation replies have been received:

- 4.2 **Horsham District Council** "...does not have any records of the routes use but does not object to the order."
- 4.3 **Southwater Parish Council** "...supports it, and has no objection to this path being added to the definitive map."
- 4.4 **The Ramblers Association** "...would not support the introduction of the proposed additional path." And "...continues to see no great advantage in making an established roadway into an additional definitive path that will in fact be adjacent to, and virtually parallel to, existing paths even though the latter maybe in need of greater use."

This is not an issue relevant to the consideration of this claim and may be properly disregarded.

- 4.5 No consultation replies were received from any of the other amenity societies.
- 4.6 **The North Horsham County Local Committee** was also consulted, but no reply was received.

5. **Evidence submitted in support of the application**

- 5.1 The application form is supported by 53 public way evidence forms completed by witnesses claiming to have used the path. All 53 witnesses report to use on foot and 3 of the 53 witnesses claim to have used the

path on foot and pedal cycle. The claim is for a public footpath.

- 5.2 Of the 53 witnesses, 40 do not refer to the existence of any stiles, gates or other obstructions to the claimed path, 5 witnesses refer to the gates being constructed in 2004 at Denne Gate, 3 witnesses refer to gates which were locked or closed and 7 witnesses refer to the existence of gates prior to those recently constructed, at either or both ends of the claimed path. Mr. I. Dunscombe (who claims use between 1958 and 2008) reports that there used to be a five bar gate at Denne Gate, but it was always open. Mr. N. Sexton (who claims use between 1946 and 2006) reports that there used to be a gate in the 1940s and 1950s (location unspecified) which was sometimes closed, but not locked. 3 witnesses refer to the cattle grid and 1 witness refers to a stile in an unspecified location along the route.
- 5.3 The Applicant reports that around 2003 the ownership of North Lodge and the road leading up to it from Denne Gate changed. Thereafter large automatic gates were erected across the road at Denne Gate, together with a pedestrian side gate. Planning permission for the erection of the gates was granted by Horsham District Council on 3rd November 2003, suggesting the route was first obstructed following the construction of the gates. The landowners write that the gates were in fact constructed in 2005, which means that the date that use was first called into question by an obstruction to the way was 2005.
- 5.4 10 out of 53 witnesses remember notices along the claimed route. 2 witnesses remember notices after 2004 or when the recently constructed gates were erected. Mr. N. Sexton refers to a sign which read "Private Road to Denne Hill" or similar which he saw along the route in the 1950s and 1960s. Mr. S.A. Benson (who claims use between 1978 and 2003) reports a single notice at Denne Gate stating "Private Road" and "No Public Right of Way" being displayed approximately 1999. Altogether 6 out of 53 witnesses remember notices referring to a "Private Road".
- 5.5 4 out of 53 witnesses claim to have been challenged while using the way. Mrs. B. Caborn (who claims use between 1988 and 2008) writes that shortly after she moved to the area in 1988 she "...stopped to chat with a previous house owner & asked if this was a private road & was told not as far as she knew..." Ms. Wendy Dodds (who claims use between 1997 and 2008) writes that she was not challenged until 2008 when the gates were locked and that she had "...no previous objections over the years..." Ms. Anna Spoard (who claims use from 1972 to 2008) writes that she has only been challenged "...in recent years..", not prior to summer 2008. Similarly, Ms. Margaret Straoghan (who claims use between 1954 and 2008) writes that sometime after 2004 she was challenged by the occupier of the School House, but was allowed to continue as she was only dog-walking.
- 5.6 5 out of 53 witnesses claim to have exercised private rights when using the claimed path. However, even though at times these witnesses may have used the claimed path in the course of their work or to visit residents in the park, it appears from their evidence forms that all 53

witnesses have also used the path for recreational activities and for pleasure and in doing so have used the claimed route as a public footpath.

5.7 All 53 of the witnesses mark on the plans attached to their evidence forms the same route as that shown on the application plan, from Denne Park to Denne Gate.

6. **Evidence submitted by adjoining landowners and others with knowledge of the claimed path.**

6.1 Requisitions for Information and consultation requests were sent to all the landowners recorded at paragraph 3.1 above. As part of the claimed route crosses unregistered land and its ownership was then uncertain, Requisitions for Information and consultation requests were also sent to all landowners immediately adjacent to and in the close vicinity of the path. A total of 26 landowners were consulted in this way.

6.2 Responses were received from 12 landowners; 3 of the identified owners of the land over which the claimed route passes; 3 landowners whose properties lie immediately adjacent to the route - Mr. and Mrs. Thompson, their predecessors in title Mr. and Mrs. Hadida, and Mrs. Mary Collis; and 6 other landowners within Denne Park – Mr. Duncan (Chair of the Denne Park Avenue Residents' Association), Mr. and Mrs. Kennedy, Mr. P. Ring, Mrs. R. Langridge, Mr. and Mrs. Matthews and Mr. B. Francis.

6.3 In addition, evidence was submitted by Mr. Michael Wood, agent for the following landowners affected by the claim:

Mr. Oliver and Mrs. Katie Close (landowners)
Mr. Martin and Mrs. Cherry Parsons (landowners)
Mr. Michael and Mrs. Margaret Thompson (adjoining landowner)
Mrs. Mary Collis (adjoining landowner)
Mr. Piers Blewitt (landowner)

Mr. Wood makes a number of representations, which rely on evidence provided by 4 further individuals: Mr. John Hall (a former landowner), Mr. Jeff Paynter, Mr. Peter Tobutt and Mr. Chris Williams (local residents).

Representations from landowners' agent

6.4 Mr. Michael Wood makes the following representations on behalf of these landowners:

- That the date when the right of the public to use the way was brought into question was not before 2005 and that the period of 20 years should be calculated retrospectively from that date, being the period 1985-2005. *The user evidence for this period is considered at section 10 below.*

- That the witness evidence forms submitted in support of the earlier applications should be discounted as they relate to a different route.
- That the failure of witnesses to observe the existence of gates and/or notices on the claimed route does not mean that such features were not present, whereas the admission of the existence of gates and/or notices by some of the witnesses supporting the application is credible evidence of the existence of such features. *The conflicting evidence from users and landowners is considered at section 10 below.*
- That since “the 1960s” any gates at Denne Gate were locked from time to time to demonstrate an intention not to dedicate the claimed path as a public right of way. *See the evidence set out in section 7, considered at section 10 below.*
- That since “the 1960s” notices have been maintained by the landowners to demonstrate an intention not to dedicate the claimed path as a public right of way. These notices have always included the statement “No Public Right of Way” and have been situated alongside the entrance gates in a place where they were visible to users of the way. *The landowners’ evidence is set out at section 7 below and is evaluated at section 10.*
- That there was no intention to dedicate the claimed path as a public right of way. *This is considered at section 10 below.*

Evidence submitted by landowners

6.5 Representations from Mr. and Mrs. Parsons of ‘Fernside’, 6 North Parade, Horsham.

Mr. and Mrs. Parsons are the former occupiers of North Lodge, Denne Park. Mrs. Parsons, Mrs. Carlson-Hedges and Mr. Newman sold the property to Mr. Close on 24th May 2007, but retained ownership of part of the land over which the claimed route passes (coloured green on the plan showing ownership). Mrs. Parsons and her family occupied North Lodge for a period of 40 years. She writes “In all that time there have been clear signs on the gates and driveway stating that the land was private, with no public right of way and that access was granted purely to the properties that had right of way across it.” Some use has been permissive, but non-permissive use has been challenged.

Mrs. Parsons writes that her parents (the Newmans) purchased North Lodge in 1968/9 from a Mr. and Mrs. Burns. Mrs. Parsons was a babysitter for the Burns and was aware that they and other driveway users would “...open and shut the gate every time they walked or drove through it.” After her parents bought North Lodge they continued this practice. It became inconvenient, however, as the numbers of visitors (through business, charitable work and social visits) using the path grew, so the gate tended to be left open. Mrs. Parsons writes “...A lot of

these people were granted permission, through their friendly connections with ... [my parents]..., to walk up the drive. This was an informal arrangement based on friendship and trust." Her father and "...the other people in the park would make sure that the gate stayed shut on several occasions a year..." and she recalls having to stop to open and shut the gate when visiting her family after leaving home in 1974.

Mrs. Parsons confirms that she continued to allow these people access and "...friends of our own and our children's friends..." after she purchased the property. Mrs. Parsons writes that some of these friends "...have taken liberties with this personal permission and are now considering it as a right of access to all!" She names "the local vicar" and Mrs. Bowen as being known to her parents, both of whom are witnesses in support of the application.

Subsequently, the properties at the top of the hill within Denne Park were let out, which led to the gates being left open by the tenants and their visitors, "...but the permanent residents would rectify this whenever convenient." Mrs. Parsons recalls having her use of the path called into question at around this time. She and her husband were challenged by the head gardener at Chesworth House, Mr. Meech, as he did not recognise them. She relates that he "...was challenging everyone that he ever passed on the drive..."

Mrs. Parsons continues that around 1980 "... new larger signage was bought and paid for collectively to replace the rather tatty ones that had seen better days. These signs were improved, enlarged and worded specifically to let the general public know that they were trespassing on private property if they walked up the driveway without permission and that the drive had no public right of way." More signs were bought than needed and the spares were stored in the garage of Old School House, where they were discovered by Mrs. Collis when she purchased the property. The spare signs were used in due course "...when we smartened up the gate and entrance to the private drive."

Mrs. Parsons explains that the gate was replaced "...because it became difficult to close the old gate after a heavy goods vehicle damaged the oak post that the gate closed against." She goes on to say that "People had started trying to use the driveway as a short cut through Horsham to Southwater and even when padlocks were placed on the gates across the park these were vandalised with super glue."

6.6 Representations from Mr. O.W.T. Close of North Lodge.

Mr. Close is the present owner of North Lodge and part of the land over which the claimed route passes (coloured yellow on the plan showing ownership). Mr. Close deposited a statement and map with West Sussex County Council under S.31 (6) of the Highways Act 1980, as amended by Schedule 6 Paragraph 3 of the Countryside and Rights of Way Act 2000 on 28th May 2008. This statement and map indicates that he does not admit any ways over his land as being dedicated as highways. Under the terms of S.31 (6) (b), these deposited documents provide "...in the

absence of proof of a contrary intention, sufficient evidence to negative the owner or his successors in title to dedicate any such additional way as a highway.”

The practical effect of this deposit is that public use of an unrecorded path during the period of 10 years from the date of the deposit cannot count towards a claim to establish a footpath on the basis of user evidence. It does not have a retrospective effect, however, so will only affect public use from its date of deposit. It will have no effect on a claim which relies on documentary evidence of use as a highway.

- 6.7 Representations from Mr. Piers Blewitt, care of Mr. Michael Wood, ET Landnet, A1 Speldhurst Business Park, Langton Road, Speldhurst, Kent.

Mr. Piers Blewitt is the owner of land over which the claimed route passes (coloured blue on the plan showing ownership). His representations are made through Mr. Wood.

Evidence submitted by other interested parties

- 6.8 Representations from Mr. and Mrs. Thompson of Denne Park Gate, Denne Road.

Mr. and Mrs. Thompson were tenants of Denne Park Gate from January 2006 until February 2008 when they purchased the property from Mr. and Mrs. Hadida. They have permissive rights to access their property along the route of the claimed path and to use the path running up into Denne Park, permission having been granted by Mrs. Parsons and Mr. Close. Mr. and Mrs. Thompson report that there is an “historical agreement that residents at the ‘bottom of the hill’ can use the access through Denne Park at ‘the top of the hill.” They state that the claimed route “is a private road” and that they are obliged under the terms of their house deeds to contribute to its maintenance along with four other residents.

- 6.9 Representations from Mr. and Mrs. Hadida.

Mr. and Mrs. Hadida are the former owners of Denne Park Gate, a property which is situated immediately adjacent to the claimed path. They assert that the path is on a privately owned road which they were obliged to maintain along with four other residents, under the terms of their house deeds. They report that there have been “No Public Right of Way” signs in place since November 2000 when they purchased the property. Mrs. Hadida has lived in Horsham since 1967 and has local knowledge that signs stating “No Public Right of Way” have been in place “well before that date.”

Mrs. Hadida recalls that her husband “...regularly told people it was a private road...” She remembers an incident when their dog barked at a passing dog-walker, who then complained. The walker was told that the dog was barking at someone who should not have been there. Mr. Hadida kept the signs clear of undergrowth while they were the owners

of Denne Park Gate.

They write that the gate at Denne Gate was usually left open, but the gate was closed "...a few days a year because we thought we had to do that to prevent people claiming a "right of way"..." The new gate erected by Mr. and Mrs. Parsons has not been locked due to vandalism.

Mr. and Mrs. Hadida draw attention to the fact that there are three other public footpaths in the vicinity (1664, 1665 and 1663) "which more than adequately support any local need for footpaths" and are well used, well defined and clear. They also report that there had been "...incidents relating to people who drink, motocross and party in the private woodland..." with which the police have been involved. They are concerned that these incidents might increase if access for the general public is made easier. They were, however, prepared to support a permissive path.

These issues are not relevant to the consideration of this claim and may be properly disregarded.

6.10 Representations from Mrs. Collis of Old School Cottage, Denne Road.

Mrs. Collis does not consider the claimed path to be a public right of way, but asserts that the road is privately owned, for the use of residents and service vehicle access only. There are five local residents responsible for its maintenance, as recorded in their house deeds.

Mrs. Collis claims that there are "many signs" which say "Private No Public Right of Way" and she provides photographic evidence of the "No Public Right of Way" signs which she claims were on site in November 1997 when she moved to the area. These are the two signs described in paragraphs 2.8 and 2.9 above. She also claims that "owners have said it's private" and that her house deeds/searches say it's not public.

Mrs. Collis uses the claimed path every day to go anywhere from her house, from which the route is visible. She regularly sees members of the public using the path, either on foot or sometimes in vehicles. She frequently turns back or stops members of the public from using the way.

Mrs. Collis reports there being two other footpaths in the vicinity (1665 and 1663) which are used by "large numbers" of people. Mrs. Collis describes the "large automated gates at the start of this path (Denne Gate)" as having "been purposely constructed to prohibit traffic through the park and maintain the private atmosphere." She is concerned about the impact a public right of way would have on her property, requiring her to fence or hedge her garden "to maintain my current levels of privacy" with the consequence that "this would greatly reduce my enjoyment of the surrounding countryside through loss of a lovely panoramic view." Mrs. Collis also mentions the "small minority of people who make their way up Denne Hill to drink, motocross and party in the private woodland at the top of the hill" and attaches copies of

correspondence from the police and the landowner's agent regarding these incidents. She is, however, prepared to support a permissive path.

These issues are not relevant to the consideration of this claim and may be properly disregarded.

6.11 Representations from Mr. Duncan of 'Pineapple Cottage', Denne Park.

Mr. Duncan is a former Chair of the Denne Park Avenue Residents' Association and has owned 'Pineapple Cottage' for 21 years. The property has been in his family since the late 1960s. In his public way evidence form dated 25th May 2008 Mr. Duncan considers the claimed route to be a public right of way and records use as "footpath, occasional bridleway and local traffic". In a telephone conversation with the WSCC Rights of Way Officer on 27th May 2008 he expresses his support for the application, although he wants some regulation of its use. He denies the existence of any obstructions to the route, except the gates constructed "fairly recently in memory of the Newmans".

Mr. Duncan confirms the existence of a notice stating the path was "Private" and referring to a "Restricted Thoroughfare". He remembers there being a similar notice before the new gates were constructed in 2005, stating "Private Road", but he cannot recall whether that notice included the wording "No Public Right of Way".

He understands "...that the 'road' in question was at one time – before the current 'Worthing Road' – used for normal/general traffic..." He says that the path has been available for use for hundreds of years and is still well used by local people.

In his witness statement dated 5th February 2009, however, Mr. Duncan opposes the application. He relates that his use of the path is on the basis of an "understanding" between the landowners and local residents, giving them and their visitors permission to use the claimed path. He states that the other people he has seen using the claimed route are also residents of certain properties in and around Denne Park, who have permission to use the way.

He is concerned that by giving the claimed path public highway status security will worsen for local residents. This issue is not relevant to the consideration of this claim and may be properly disregarded.

6.12 Representations from Mr. and Mrs. Kennedy of 'Panfields', Denne Park.

Mr. and Mrs. Kennedy assert "... we have always considered we had a right of way between points A-B [refers to the plan attached to their evidence form]. We have used it consistently over a period of 22 years without any problems..." They also support the claim for a public footpath and record "long use by public". They walk the path regularly themselves and "very frequently" see other walkers.

They describe the gates at point A (Denne Gate) being "...locked on occasions...", while those at point B (not identifiable, but possibly by the cattle grid) are never locked. They record the existence of a notice which "...appeared a few months ago opposite North Lodge" and a notice at Denne Gate "...stating access only to various houses."

6.13 Representations from Mr. Ring of 'Eversfield', Denne Park, Horsham.

Mr. Ring has lived at 'Eversfield' for the past 10 years. He supports the application for a public footpath over the claimed route. Mr. Ring uses the path several times a week and often sees members of the public on foot using the way. Mr. Ring writes that the claimed path "...is used by pedestrians and to the best of my knowledge has been used this way for the last 50 years." He does not offer any information regarding the existence of notices.

Mr. Ring suggests that the claimed route "...was once one of the drives of Denne Park House, and was used by vehicles and pedestrians as a route from the town to the cottages at the top of Denne Hill, Denne Park House and the adjacent houses..."

He also expresses the view that "...It would be a considerable inconvenience if what has been an apparent right of way from the time the Canadian Army was based in Denne Park during the war should be closed to the public for no good reason." This issue is not relevant to the consideration of this claim and may be properly disregarded.

6.14 Representations from Mrs. Langridge of 'Fir Trees', Denne Park.

Mrs. Langridge has lived at 'Fir Trees' for the last 28 years. She does not consider the claimed route to be a public right of way. She asserts that it is a "Drive to Denne Park House and adjoining properties", limited to residents of Denne Park and their visitors. Mrs. Langridge refers to the electric gates which she states are "...to prevent cars...", but also refers to a "...gate for pedestrian access". She writes that "In recent times new 'no public footpath' signs have been erected." And also refers to a "Notice with list of properties with access".

6.15 Representations from Mr. and Mrs. Matthews of 12 Denne Park House, Denne Park.

Mr. and Mrs. Matthews are residents of one of the flats in Denne Park House. They write that "...to have this footpath as a right of way would be advantageous for us and we support this application."

This issue is not relevant to the consideration of this claim and may be properly disregarded.

6.16 Representations from Mr. Francis of Garden Cottage, Denne Park.

Mr. Francis writes that he has no interest in the land in question, neither

as owner or occupier, nor did he have any other information to contribute.

6.17 Representations from Mr. John Hall of Jessamine Cottage, Eype, Dorset.

Mr. Hall lived at Denne Park Gate/Old School Cottage continuously from 1959 to 1997. He writes, "...throughout that period the driveway was private property with no pedestrian or vehicular right of way for the public, and a large notice to that effect was posted on the fence beside the entrance gate."

Mr. Hall recalls that members of the public only "very occasionally" ignored the notice and walked up the avenue, but when they did, he and other residents "...would politely point out to them that they had done so".

Mr. Hall states that the transfer deeds for both the above properties state that the owners have "...rights of way for all purposes over the driveway corresponding to their frontages onto it, and also a responsibility to pay a fair proportion of the repair costs." He encloses copy documents which show the proportionate contributions made by the residents in 1979 and 1990.

Mr. Hall writes that he and his sisters "...remember that when we first moved to Denne Park in 1959, and continuously thereafter, a wooden notice approx. 2'6" x 2' with black and red lettering on a white background was fixed to thefence to the side of the entrance gate. The notice stated that the driveway was private, with no public right of way, and listed the five properties within the park which had access rights."

Mr. Hall took responsibility for maintaining and replacing the notice at Denne Gate. The notice was renewed by Mr. Hall in 1981 due to vandalism and an additional notice was placed "...further back and closer to the railway bridge." He states that the "... wording on the notice beside the entrance gate was similar to the wording on the original wooden notice..." (for the wording of the sign closer to the railway bridge see paragraph 2.9 above.). He provides relevant copy correspondence between the residents who contributed towards the cost of the replacement signs. Mr. Hall also provides copies of photographs of the entrance at Denne Gate from 1960, 1961, 1968, 1980, 1983, 1985, 1987, 1989 and 1999. Although a sign is visible in most of these photographs, the wording of the notice is not visible in any of them.

Mr. Hall comments that Mr. and Mrs. Newman were "...always concerned to keep the driveway in good condition and to maintain its privacy" during the period of their ownership (from the early 1970s to the early 1990s). He concludes with the statement that "There was certainly no suggestion at any time, or from any source, during the period 1959 to 1997 that the driveway was a public footpath, or should be so designated."

6.18 Representations from Mr. Jeff Paynter of 28 Queensway, Horsham.

Mr. Paynter is a local resident who has lived in the area for most of his life. He writes "...I have often walked along the drive in question, knowing full well it was private as there have always been at least a couple of permanent signs to that effect." He also remembers "...the drive being restricted by gates a long time ago, before the new gates were installed." Mr. Paynter has also been challenged when using the claimed route "...I have been politely told that the drive is private..."

Mr. Paynter states "... that there are plenty of footpaths in the vicinity... There are two footpaths adjacent to the drive, one to the East and one to the West, both within 100m of the drive." He does not support the application and suggests that "...taxpayers' money...could be better used elsewhere in the community."

These issues are not relevant to the consideration of this claim and may be properly disregarded.

6.19 Representations from Mr. Peter Tobutt of 1 Fairview, Horsham.

Mr. Tobutt is a local resident of 36 years standing and was the Area Civil Engineer for British Rail at Horsham from 1972. In this role he was required to inspect, on a regular basis, the railway bridge which crosses Denne Road approximately 30 metres north of the start of the claimed route. Mr. Tobutt writes "...during these visits to this bridge I could clearly see the "Private – No public Right of Way" signs always displayed."

Mr. Tobutt recalls that he went for walks with his family in the area, but "...we had to get to Denne Park via the Barrack Field (alongside the cricket pitch) because the private access road to Denne Park was always clearly signed as a private road." He subsequently became a District Councillor for the Denne Ward of Horsham (1999 to 2003), regularly having cause to walk in this area on the boundary of his ward. He writes "...[I] am convinced in my own mind that the private access way to Denne Park was always clearly signed as a private road."

Mr. Tobutt has been a volunteer leader for the Council's Healthy walks programme since 2001 and "... [has] always been aware that this was a private road not accessible for such walks." He now has written permission from the residents to use the claimed path on 6 occasions a year.

6.20 Representations from Mr. Chris Williams of 'Pilgrims Post', Kings Lane, Southwater.

Mr. Williams was a frequent visitor to the area, from the end of 1963. Around this time he "...inadvertently trespassed on the private road past North lodge, having strayed from the footpath..." Mr. Williams only realised he was not on a public footpath when he arrived at Denne Gate where there were "...notices saying "Private Road" and something along

the lines of “no admission – no public right of way”.”

Mr. Williams writes that he has only ever walked the claimed route about half a dozen times “...and although I don’t remember ever being challenged I had absolutely no doubt that it was not a public footpath.” He claims that the signs have always been there and thinks that, prior to the construction of the electric gates, a “field type gate” in the same position was generally kept closed.

8. **Archive and other evidence submitted by the applicant**

8.1 The following archive and documentary evidence was submitted with the application, described by the applicant as exhibits A-D: maps from the archives of Horsham Museum (exhibit ‘A’); an extract from an article published in ‘British History Online’ (exhibit ‘B’); an article entitled ‘Old Ordnance survey Maps, Horsham (South) 1938 by Tony Painter (exhibit ‘C’); and an article from ‘The Horsham Society’ magazine entitled ‘Denne road – A Roman Road’ (exhibit ‘D’).

8.2 As exhibit ‘A’ the applicant submitted copies of two maps from 1814. The claimed route is featured on the untitled map identified by the applicant as ‘Map of Horsham’ (Museum Reference No. 1994.616.1) where it is shown with continuous solid lines to the edge of ‘Den Place’ and then as pecked lines to a point in the approximate centre of the park. The map entitled ‘Hills Place Horsham from a Road Map 1814’ (Museum Reference No. 1994.416) features the claimed route as continuous solid lines from Horsham to the approximate centre of ‘Den Place’. Neither map shows any connection to a route southwards.

There are no keys identifying the status of the roads featured on these maps, neither is it clear by whom and for what purpose they were produced. It is therefore difficult to assess how accurate the maps are and what weight to give their evidence. They may be a reasonable guide to what physically existed on the ground at that time, but cannot be relied on in deciding the status of the claimed path.

8.3 Exhibit ‘B’ is an extract from an article in ‘British History Online’, written by T.P. Hudson (editor) et al. in 1982 and revised in 1985, which relates:

“The chief route south from the town in the Middle Ages was that over Denne Bridge and through Denne Park, as indicated by the Holloway...; the Denne Hill section was still known as the old coach road in 1905...the road presumably originally led west of Denne Park House, and continued by way of Southwater Street or Easteds Farm. It had apparently ceased to be important by 1724.”

The article mentions the turnpiking of the ‘Worthing Road’ in 1764 and that:

“At the same time all northsouth roads through Denne Park were closed for horse or wagon traffic.”

The references provided for this article are confused, but a document recorded in the Quarter Sessions roll for 1765 is cited. This document is described as an '*Indenture*' and is discussed at section 9 below.

The authors acknowledge that much of the information for the article was supplied by members of the 'Horsham Museum Society.' The article also cites two books by W. Albery, but notes their uncritical approach and reliance on inaccurate transcripts.

An extract of this article was also attached to the Public Way Evidence Form of Mrs. B. Isherwood.

- 8.4 Exhibit 'C' was written after 1995 to accompany the reprint of the Ordnance survey map for Horsham (South) of 1938. The article suggests that:

"The curving cutting east of the Worthing Road is a relic of the old trackway..."

- 8.5 Exhibit 'D' is an article entitled "Denne Road – A Roman Road" by Oliver Evans-Palmer from "The Horsham Society" newsletter of April 1999. The article refers to Wimbolt's article of 1934 (see paragraphs at section 9 below) and concludes that the "trackway" was a route for the trading of iron-work and tilery. The author concludes that:

"...at least in Roman times, the trackway was a spur from the main system rather than a thoroughfare."

He also dismisses the idea that the road would have continued further south, regarding it as "...something of a cul-de-sac, accessible from the north." If this were the case, although the trackway would have been used by both workers going to and from their occupation and vehicles transporting products of these local industries, it would not follow that the trackway had highway status.

The article refers to the way as being a public footpath, but it does not produce evidence to support this assertion.

- 8.6 The maps submitted as exhibit 'A' are of interest, but do not provide evidence of highway status.

The articles submitted as exhibits 'B', 'C' and 'D' suggest a considerable local interest in the history of Denne Road, but while they discuss the probable uses and antiquity of the way they are mostly speculative. Furthermore, they do not clearly support the use of the road as a public highway, suggesting instead a closer link to local industrial use.

9. **Archive Research by West Sussex County Council**

- 9.1 The Council's own research at the County Record Office included: early maps including those in '250 years of map making'; various editions of

the Ordnance Survey maps; the Tithe Award for Horsham; Adcock's report; General and Local Turnpike Acts; Railway Acts; Parish Council Records; and the Sussex County Magazine.

The Early Maps and '250 Years of Map Making'

- 9.2 The following maps were examined:
1724 Budgen
1787 Cary
1795 Gardner & Gream
1792 Draft Ordnance Survey
1801 Cary
1813 Ordnance Survey
1825 Greenwood
- 9.3 Budgen's map shows the end of the road now known as Denne Road leading south from Horsham and stopping on the north side of the river Arun. It shows Denne Park and the road which later became the route of the turnpike road. The scale of this map limits its use in identifying minor roads, but the fact that the claimed route is not featured supports the view that it was not part of the main north/south route from Horsham to the coast in 1724, some 40 years prior to the Turnpike Acts (see paragraphs 9.18 - 9.22 below).
- 9.4 Cary's map of 1787 shows Denne Park and the turnpike road. Neither Denne Road nor the claimed route is featured. Cary's map of 1801 features the claimed route from the direction of Horsham to the northern edge of Denne Park (a route continues south from the edge of Denne Park to join the turnpike road south of Southwater).
- 9.5 Gardner and Gream's map shows Denne Road crossing the river Arun as a 'crossroad'. The claimed route is shown by pecked lines to the edge of the park surrounding 'Den Place'. The route continues through the park and ends at a point near Den Place. There is no continuation of the route to the south.
- 9.6 The draft map for the first edition of the 1" to 1 mile Ordnance Survey map (surveyed in 1792 at 3" to 1 mile) shows Denne Road crossing the river Arun. At the start of the claimed route there is a junction; the road curves in an easterly direction towards 'Chedworth' and also continues, more narrowly and bounded by narrow strips of woodland, in a southerly direction over the course of the claimed path. The path appears to end at a wooded area within 'Den' Park. It may be linked to the north/south drive passing 'Den' House. There is no clear junction with a road continuing south.
- 9.7 The Old Series 1" to 1 mile Ordnance Survey map of 1813 shows the claimed route as far as the edge of Denne Park where it appears to end. There is no apparent link to the north/south drive within Denne Park and no continuation of the route to the south.
- 9.8 Greenwood's map shows the claimed route as a 'crossroad' to the edge

of 'Den Park'. An avenue of trees within 'Den Park' follows a north/south direction, which may follow the line of part of the claimed route. There is no connection with a route to the south.

Railway Act Plan 1838

- 9.9 As there were no compulsory purchase powers in the 19th Century, a private Act of Parliament was required to authorise the compulsory purchase of land for new railways. From 1803, detailed plans had to accompany these private acts, together with books of reference containing details of all owners and occupiers. Public rights of way required bridges with set specifications, so rights of way had to be shown on the plans. The status of a highway would have a considerable impact on the cost of the venture and therefore they were not shown if this could be avoided, but as the process was an open one, highway surveyors, landowners and competitors could scrutinise the plans for errors.
- 9.10 It is recognised that high standards of accuracy were achieved by the surveyors. Deposited plans are therefore good, but not conclusive, evidence to support the existence of a public right of way. Omission of a right of way from such plans, however, is only weak evidence of the non-existence of a public path.
- 9.11 The Railway Act plan of 1838 shows 'Coppard's Bridge' on Denne Road, crossing the River Arun. The proposed line of the railway crosses Denne Road at that point and this section of the road is marked as parcel 249. The book of reference identifies parcel 249 as 'Parish Road' under the ownership of the Surveyor of Highways. This is strong evidence that this section of Denne Road was indeed a highway, but it does not form part of the claimed route.
- 9.12 The land corresponding to the route of the claimed path from Denne Gate to the approximate location of North Lodge is marked as parcel 246. The book of reference identifies parcel 246 as 'Private Road' under the ownership of Henry Tredcroft, Mrs. Tredcroft and Charles Eversfield. Parcel 247, running alongside parcel 246, corresponds to the deep tree-lined feature and is identified as 'Meadow and Shaw', under the same ownership. This provides weak evidence of the non-existence of a public right of way along the claimed route.

Horsham Tithe Apportionment 1844

- 9.13 The Tithe map shows land as numbered and roads as numbered and coloured. The Apportionment is a separate document which lists the numbered parcels of land and identifies land use. The land over which the claimed path runs is not coloured and is numbered 681. The Apportionment identifies parcel 681 as 'Road', under the ownership of Henry Tredcroft. From its boundary with the highway at the approximate position of Denne Gate, parcel 681 is bounded to the west by a wooded strip of land (nos. 1602a and 1602, also under individual ownership) which appears to follow the line of the deep cutting, described at

paragraph 2.5. Parcel 681 ends approximately halfway along parcel 1602, although a pecked line continues parallel with parcel 1602 for a similar distance. There is no continuation of the "Road" into "Den Park" and the north/south drive is not shown.

Ordnance Survey Maps

- 9.14 The first edition of the Ordnance Survey 25" to 1 mile, surveyed in 1875, features the claimed route as pecked lines throughout its length. The claimed route and the narrow strip of woodland on its western side (including the deep cutting) is numbered 1319, but is not recorded as road. The boundary of parcel 1319 with Denne Road (numbered 1337) is shown by a continuous black line, which may indicate the presence of a barrier, or may simply record the extent of that land. The revised editions of 1896, 1911, 1932 and 1937 feature the claimed route in the same way, although only the 1875 edition shows its junction with a track to 'Hilltop Cottages'.

The County Surveyor's Report 1890

- 9.15 In 1890 Charles Adcock, County surveyor, submitted to the County Council his 'Classification of the Parish Highways in the County, and report as to their state of repair'. It is acknowledged that the survey was primarily concerned with the state of repair and not highway status. Although Adcock's map features the claimed route as uncoloured continuous lines from the position of Denne Gate to Denne Park, it is not given any classification. The claimed route is recorded through Denne Park, connecting with the drive running north/south.

The County Council's Rights of Way Records

- 9.16 The investigation involved a search of the County Council's records and archived records. The claimed route was formerly located within the Parish of 'Horsham Rural'. It is not marked as a footpath on either the map or a separate booklet (dated 1935) describing paths recognised under the Rights of Way Act 1932. The route is depicted on the Parish Claim map of 1950, but is not shown as a public footpath. The route is also depicted on the draft Definitive Map, the Provisional Map of 1952 and all subsequent Definitive Maps, but is not shown as a public footpath.
- 9.17 The Ramblers Association produced a report on a survey of footpaths in the parish of Horsham Rural, carried out during the spring and summer of 1950. The claimed path is not described in the report. The report refers to a notice situated where footpath 1666 intersects with footpath 1663, at a point approximately 185 metres north-west of the intersection of the claimed route with footpath 1663. The notice read in part "This park and carriage drive are private. The public are requested to keep to footpaths." The remainder of the notice was obliterated by a board which read "Closed to Public. W.D."

Turnpike Acts

- 9.18 A number of local Acts of Parliament relating to a turnpike road running roughly parallel to the claimed route from Horsham to Shoreham and on to Brighton were examined at the County Record Office and hand written extracts from the relevant Acts, obtained from a County Council file, are contained in the evidence file.

The map of turnpike roads shows a road from Horsham running southwards. The Turnpike Acts were Acts of Parliament, enacted from the end of the 17th Century, which set up Turnpike Trusts which were authorised to levy tolls on passengers using highways, with the object of improving their condition. A Turnpike Trust was in effect a permanent highway authority, unconnected with county, parish or borough.

- 9.19 **Local Turnpike Acts** were usually repealed and re-enacted every 21 years until such time as the roads ceased to be turnpikes. Local Acts for 1764, 1785, 1807, 1828 and 1860 and the general Acts of 1773 and 1822 were examined.

- 9.20 In order to generate sufficient income from the tolls to finance improvements, passengers were encouraged to use the turnpike road by "stopping up" or "shutting up" existing alternative routes, under the terms of the Act. It is unclear whether the intention was to "stop up" these minor highways permanently, or only until the turnpike road ceased to be a turnpike. The practical consequences are also unclear; the roads may have continued to be available to local traffic, or they may have been physically obstructed on the ground.

- 9.21 **The 1764 Local Act** (4 Geo III 44) was repealed and renewed every 21 years, with the final Act expiring in the year 1881. The 1764 Act relates:

"And whereas the Intention of this Act may be rendered ineffectual, and the Tolls hereby granted may be eroded if a certain...horse-way through a gate called the Holloway Gate, leading through the Park of Sir Charles Eversfield, Baronet, to a Gate called the New Lane Gate, and also another certain horse-way leading from the said Holloway Gate through the said Park to a place called Wiggengham's Corner, are not shut up, and disused by all travellers and passengers;...be it therefore enacted, &c. that they be shut up."

- 9.22 **The 1785 Local Act** (25 Geo III 109) provides that:

"Certain lanes already shut up to continue so"

The Local Acts of 1807, 1828 and 1860 re-enact the provisions of the 1785 Act.

Quarter Sessions Records

- 9.23 Prior to 1888, the Quarter Sessions acted as an administrative body for

the County, dealing with a range of highway matters, including highway stopping-up orders and the supervision of turnpike trustees. There are two "Indentures" from the Quarter Sessions roll of 1765 which are relevant to this claim (QDD/W1/ (16) & (17)). These documents are very old and difficult to read; they are drafted using an archaic legal language and style and the condition of the documents has deteriorated. They may, however, relate to the sale of the land over which the claimed route passes from the turnpike trustees to a private landowner, identifying the land as:

"...All that Land from Wiggerham's Corner to the end of the Hollow Way leading [to] Southwater as the same is now fenced in with Posts and Rails to the End of the field of...Catherine Napper [...] the New Road now passed which said Lane was part of the Old Road from Wiggerham's Corner to Southwater aforesaid [...] become useless and unnecessary for the purpose of a common highway..." QDD/W1/ (17).

- 9.24 It is not certain that the 'Old Road' to which these documents refer is indeed the route which is the subject of this claim (see the Applicant's representations in the evidence file). Nevertheless, read with the relevant Turnpike Acts, the documents call into question the continued status of the claimed route as highway, if such a status can be shown to have existed prior to that date.

Sussex County Magazine

- 9.25 An article written by the well known archaeologist S.E. Winbolt, entitled 'Denne Road: An ancient derelict way at Horsham' was published in the March 1934 edition of the Sussex County Magazine (see paragraph 8.5 above). The article traces the route of 'Denne Road' from Horsham to its junction with the Worthing Road and suggests that it was the probable course of one of the old roads south to the coast. The route he identifies as 'Denne Road' follows the line of the deep cutting which runs alongside the claimed route and joins the drive through Denne Park at approximately point C on the report plan.

In particular he argues that the iron slag, which he noted along the route of the deep cutting (but not along the route of the later turnpike road), is evidence that the road was probably in use by the local furnaces which operated between 1550 and 1650. Indeed, from 1584 an Act of Parliament required ironmasters to use "sinder, gravel and stone" on roads used by them. He concludes that 'Denne Road' was:

"...*the* route from the coast in Saxon times when Horsham was settled...It served Horsham during Mediaeval times: it was used by the mediaeval ironmasters and by their successors in Tudor and early Stuart times. Some early residence stood by it on the site of Denne Park House...With the construction of the Worthing Road in c.1760 ... the old road ...gradually fell into desuetude."

While Winbolt's argument goes a long way to establish the existence of a 'road' in antiquity on the ground, his evidence does not have any value

in relation to the legal status of such a roadway. He speculates that it was:

"...undoubtedly the main southern road out of Horsham till the mid-eighteenth century [along which] proceeded the general traffic of pedestrians, saddle horses, pack-horses, and wheeled carts and carriages."

The evidence supporting this claim relates, among other things, to the rate of erosion of the deep cutting which runs alongside the claimed route. He goes on to admit, however, that "...this article is pioneer work, and may be open to correction..."

10. **Consideration of the claims**

- 10.1 The archival evidence suggests that the claimed route broadly follows an historic roadway, but there is no evidence to support its status as a public highway other than the broad archaeological evidence as discussed by Wimbolt in his article of 1934. The claimed route runs alongside the deep tree-lined feature, the one piece of compelling evidence of use as an historic roadway, but by 1724 the main link from Horsham to the coast appears to be the way over which the turnpike road would later run. Later evidence from the Turnpike Act of 1764 suggests that any remnant of this ancient roadway may have been "shut up" from that date. There is also evidence from the Railway Act 1838 which suggests that no public path then existed over the claimed route.
- 10.2 In the absence of conclusive archival evidence, the claim for the existence of a public right of way must be tested under section 31 of the Highways Act 1980. Under s.53 (3) (c) (i) of the Wildlife and Countryside Act 1981 the applicant must show that either on the balance of probability a right of way exists or, if the evidence is conflicting, that it is reasonable to allege the existence of a public right of way.

The 20 year period

- 10.3 Under section 31 of the Highways Act 1980 use of the land has to be shown for a full period of 20 years. This relevant period needs to be established to determine the period when the land was actually enjoyed by the public 'as of right' and 'without interruption'. The 20 year period is calculated retrospectively from the date when the right of the public to use the way was brought into question by notice or otherwise.
- 10.4 The applicant has confirmed that he was first challenged at the beginning of 2006 when he first saw a notice displayed on the electric gates at Denne Gate which read "No Public Right of Way". The landowners have suggested that the 20 year period of use runs from 1985-2005, 2005 being the date when the electric gates at Denne Gate were erected.
- 10.5 There is, however, conclusive photographic evidence of the existence of

a notice stating "No Public Right of Way" from Spring 2001. Under section 31(3) Highways Act 1990, where there is clear evidence of a notice this will be sufficient to bring the public's right to use the way into question. The relevant period for the purpose of this application is therefore the 20 years immediately prior to 2001; 1981-2001. There is evidence of use of the way from 49 witnesses from 1981 to 2001, with 31 claiming use for the entire 20 year period.

As of right

- 10.6 The House of Lords has provided guidance on the meaning of the phrase "as of right". The Lords confirmed that this phrase means without force, secrecy or permission. While it had been thought that the users of a path had to believe they were entitled to use the route in order for their use to be "as of right", this is no longer the case. Knowledge, ignorance or indifference as to their entitlement to use the route is irrelevant. What is important is that, looked at objectively, they appeared to be using the path as of right.
- 10.7 As regards "permission", there is a distinction to be drawn between toleration and permission. A landowner may be aware of the use of a path, but choose to do nothing to prevent that use. In those circumstances, even if he later makes it clear he did not support the use of the path during the relevant period; his actions could be regarded as toleration of the use during that period. This means the use could still be regarded as being as of right. The situation would be different, however, if the landowner permitted the public to use the path, but made it clear (either expressly, e.g. by a notice, or through conduct e.g. by closing the path occasionally) that his consent could be withdrawn in the future. In that case the use would be with permission and not as of right.
- 10.8 As the analysis of user chart shows, 49 out of the 53 witnesses have used the route between 1981 and 2001 and they report to have used the way without secrecy, without force and without permission until 2001 when a notice stating "No Public Right of Way" can be shown to have been displayed at Denne Gate.
- 10.9 None of the 49 witnesses record that any gates which pre-dated the existing electric gates were locked at any time between 1981 and 2001. None of the 49 witnesses mention any other verbal or physical challenges to their use between 1981 and 2001.
- 10.10 Mrs. Parsons' evidence is that the gates which pre-dated the existing electric gates were shut and locked from time to time to challenge use as of right. Mrs. Hadida also recalls closing the former gates at Denne Gate for a few days each year. Mr. Williams thinks that the field-type gate which used to be at Denne Gate was generally kept closed. Mr. and Mrs. Kennedy, who support the claim, record that the gates at Denne Gate are "locked on occasions", although no dates are given. The landowners describe a number of other challenges to people using the way over the years. These challenges were verbal, no dates could be supplied and the identities of the persons challenged are unknown.

The landowners accept that this evidence is not sufficient to negate an intention to dedicate the way.

- 10.11 It is therefore considered reasonable to accept that public use was without force or secrecy during the relevant period.
- 10.12 The landowners suggest that several of the witnesses have used the way with permission over the years, for example, Mrs. Bowen and Mr. Tansill. It is clear, however, that the overwhelming majority of users did so without permission.

Evidence of no intention to dedicate

- 10.13 Dedication is to be presumed from evidence of user unless the landowners are able to rebut the presumption by adducing 'sufficient evidence' that there was no intention during that period to dedicate it.
- 10.14 Section 31 (3) of the Highways Act 1980 provides that an owner of land over which a claimed route passes can erect a notice, to be visible by persons using the way, which is inconsistent with the dedication of the way as a highway. Such a notice will be sufficient evidence to negate a presumed intention to dedicate the way as a highway, from the date it was erected.
- 10.15 The landowners assert that they and their predecessors in title have erected a notice, or notices, which comply with Section 31 (3) of the Highways Act 1980. In particular, they assert that a notice has been erected at Denne Gate so as "to be visible by persons using the way".

As at 1st September 2008 there was a notice attached to the railings at Denne Gate which clearly stated "No Public Right of Way".

- 10.16 The landowners claim that a similar notice was erected at Denne Gate "as far back as the 1960s", although the exact date and wording of the first notice is uncertain. Mr. John Hall writes that such a notice had been displayed since at least 1959 when he moved to his property. He claims that the wording was always substantially the same as that of the notice being displayed as at 1st September 2008 (when it was photographed by the investigating officer), the only changes being to the names of the properties listed when the notices were renewed in 1981.

The correspondence submitted by Mr. Hall provides evidence of the replacement notices being erected in 1981. Mr. Hall also provides copy photographs from 1960, 1961, 1968, 1980, 1983, 1985, 1987, 1989 and 1999 which show the existence of a notice in position at Denne Gate, but do not provide evidence as to the wording of the notice.

- 10.17 Mrs. Parsons writes that clear signs have been in place for the past 40 years. Mrs. Parsons also records, in her email to Oliver Close of 10 October 2008, that the wording of the notice was changed "...to let the

public know that ...the drive had no public right of way..." She recalls the notice being renewed, probably in 1981, but claims in her witness statement that the original sign also included the words "No Public Right of Way".

- 10.18 Mrs. Hadida, Mrs. Collis, Mr. Paynter, Mr. Tobutt and Mr. Williams all write that notices have existed at Denne Gate prior to 2005, but do not provide any documentary evidence in support of their claims.
- 10.19 Mr. Duncan recalls the existence of a prior notice at Denne Gate. He suggests the wording of the notice used to be "Restricted Thoroughfare" in his evidence form, or "Private Road" in his witness statement, but he cannot recall whether or not the words "No Public Right of Way" were used. One of the 49 witnesses of use during this time, Mr. S. A. Benson, supports the existence of a single notice stating "No Public Right of Way" at Denne Gate, which he reports being present since the 1990s in his evidence form or since around 1999 in his witness statement. The remaining 48 witnesses do not recall the existence of a notice stating "No Public Right of Way" between 1981 and 2001.
- 10.20 The existence of such a notice is asserted by most of the landowners who oppose the claim, by three users of the way who oppose the claim (Mr. Paynter, Mr. Williams and Mr. Tobutt) and by one user of the way who supports the claim (Mr. Benson), although these individuals record seeing the notice at various dates and with various wordings.
- 48 of the 49 witnesses in support of the application do not record the existence of such a notice during the relevant period.
- 10.21 There is therefore substantial conflicting evidence as to the existence or otherwise of a notice with the wording "No Public Right of Way" being positioned at Denne Gate during the years 1981-2001. It is considered that the landowners' evidence is not outweighed by the user evidence and therefore it has not been shown, on the balance of probability, that the claimed route exists. It is, however, considered that the applicant has reasonably alleged the existence of the claimed path and so the application satisfies the lower test of reasonable allegation that the claimed path has been used as of right for a period of no less than 20 years.
- 10.22 In *R. v Secretary of State for the Environment Ex p. Bagshaw and Norton* (1994) the two tests set out in s.53 (3) (c) (i) were considered; whether a right of way subsisted and whether it was reasonable to allege that a right of way subsisted. In order to meet the first of these tests, it must be shown that, on a balance of probabilities, the right of way existed. In order to meet the second test, it must be shown that a reasonable person, having considered all the relevant available evidence, could reasonably allege that a right of way subsisted. The evidence necessary to establish that a right of way was reasonably alleged to subsist was less than that which was necessary to establish that such a right did, in fact, subsist. It was also held that it was for the local authority, in the

first instance, and then the Secretary of State, to decide whether it was reasonable to allege that a right of way existed.

- 10.23 In *R. v Secretary of State for Wales, ex p. Emery* [1998], the Court of Appeal considered these two tests again. Following *Bagshaw*, the Court was of the view that where an applicant for a modification order produced credible evidence of actual enjoyment of a way as a public right of way over a full period of 20 years and there was a conflict of apparently credible evidence in relation to one or other issues under the Highways Act 1980, s.31, then the allegation that the right of way subsisted was reasonable, and the Secretary of State should so find unless there was documentary evidence which had inevitably to defeat the claim.
- 10.24 In the case of *Todd v Secretary of State for the Environment, Food and Rural Affairs* (2004) it was held that in the case of an application under section 53(3) (c) (i) (addition of a way to the map), in deciding whether to make an order, the test to be applied is not whether the evidence establishes that a right of way exists, but whether a right of way can from the evidence reasonably be alleged to exist. If it can, the authority must make the order, notwithstanding that it may not consider that the evidence is sufficient to establish that the right of way does exist and that what may appear reasonable on paper may be confirmed or destroyed by seeing witnesses at an inquiry.
- 10.25 When comparing the evidence of use submitted in support of the application with the evidence submitted by the landowners and other interested parties who oppose the claim, the higher test based on the balance of probability is considered to have failed.

It is further considered, however, that the evidence of use is not outweighed by the evidence against the claim and that when the lower test, based on reasonably alleging the existence of the path, is applied the test is met. It is therefore concluded that the relevant tests under the Wildlife and Countryside Act 1981 have been met.

Other twenty year periods

- 10.26 There is evidence of continuous uninterrupted use as of right from 1939-1959, with no conflicting landowner evidence from this period. There are 8 witnesses who attest to use prior to 1959; Mr. G. Manvell (1933-1943), Mr. D. Bateman (1940-1950), Mr. R. Taylor (1941-2004), Mrs. E. Bowen (1946-2006), Mr. N. Sexton (1946-2006), Mrs. J. Bateman (1948-1953), Mrs. M. Straoghan (1954-2008) and Mr. I Dunscombe (1958-2008).
- 10.27 Taken together these periods of use amount to a full 20 year period of continuous use prior to 1959, but as no single witness gives evidence of use for the entire 20 year period and as the number of witnesses during the period is very low (ranging from 1 to 5 users) it is considered that on the balance of probability, there is insufficient user evidence to support a claim based on this period.

11. **Crime and Disorder Act Implications**

11.1 The Definitive Map Modification Order process involves the application of legal tests, which mean that it is not possible to give substantial weight to any effect on crime and disorder in this area.

12. **Human Rights Act 1998 Implications**

12.1 It is unlawful for a public authority to act in any way, which is incompatible with a convention right. The rights, which should be considered, are rights pursuant to Article 8, Article 1 and Protocol 1, and Article 6.

12.2 Article 8 protects the right to respect for private and family life including an individual's home. This is a qualified right and there may be interference by a public authority if that authority does so with an intention of protecting the right and freedom of others.

12.3 Article 1, Protocol 1 deals with the protection of property. Again, this is a qualified right and interference with it may take place where it is in the public's interest to do so subject to the conditions provided by law. Any interference, however, must be proportionate. The main body of the report identifies the extent to which there is interference with these rights and whether the interference is proportionate.

12.4 The Committee should also be aware of Article 6, the focus of which (for the purpose of this Committee) is the determination of an individual's civil rights and obligations. Article 6 provides that in the determination of these rights an individual is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal. Article 6 has been subject to a great deal of case law. It has been decided that for rights of way matters the decision making process as a whole, which includes the right to review by the High Court or the Planning Inspectorate, complies with Article 6.

Tony Kershaw

Head of Legal Services

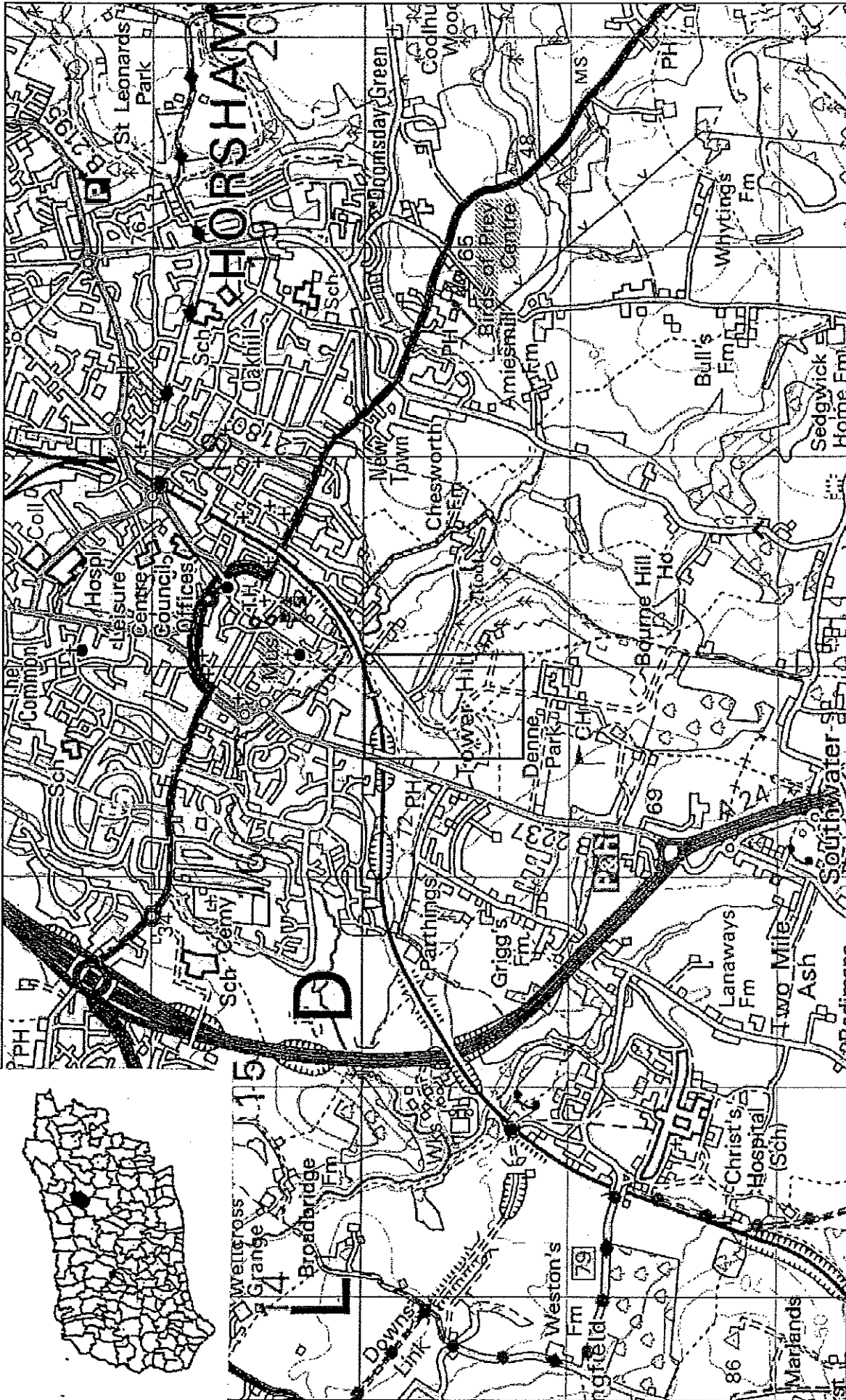
Background Papers



- a) Extract of Definitive Map and Statement for Horsham.
- b) Application (DMMO 5/08) from Mr. N. Raby.
- c) Site Visit Photographs.
- d) Consultation replies.

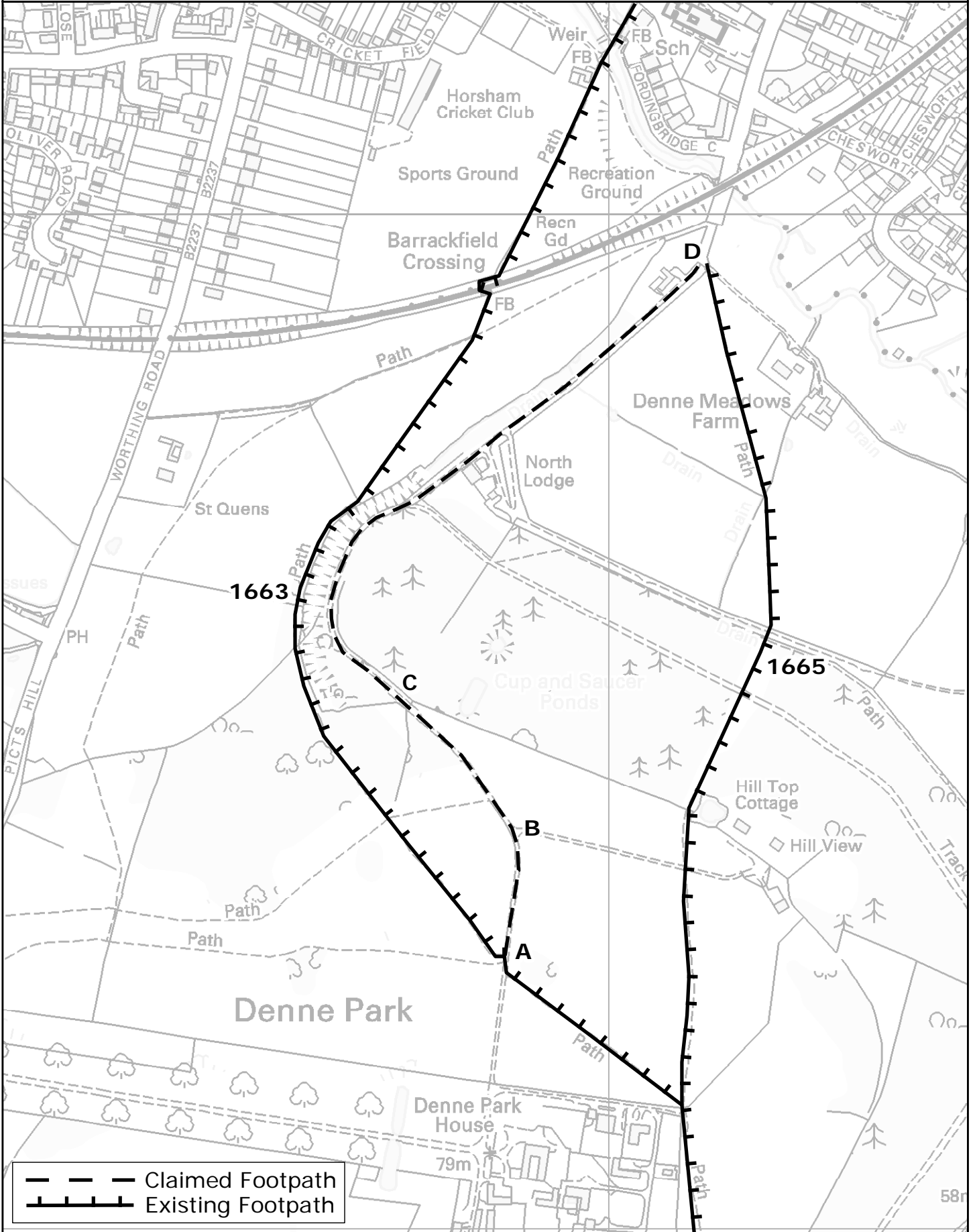
- e) Evidence Submitted in Support of the Application.
- f) Evidence Submitted by Landowners and Interested Parties.
- g) Representations from landowners' agent; photographic evidence of notice from 2001.
- h) Archival and Other Information – Submitted by Applicant.
- i) Archival and Other Information – West Sussex County Council.

Contact: Alison Poole
Ext: 77196

Agenda Item No: 8c



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	<p>Dec 18, 2008</p>		
	<p>1:24,752</p>		



 Claimed Footpath
 Existing Footpath

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Southwater: DMMO 5/08

Plan: 01482	1:2500	OS Sheet: TQ 12 NE		Photocopy liable to distortion	Tony Kershaw Head of Legal Services	
Date: 16.03.2009		Grid Ref: 5168 1297				