

HAMPSHIRE COUNTY COUNCIL**Decision Report**

Decision Maker:	Regulatory Committee
Date:	13 January 2016
Title:	Application for a Definitive Map Modification Order to record a public footpath at Browns Lane, Sowley, in the Parish of Beaulieu
Reference:	7177
Report From:	Director of Culture, Communities and Business Services

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1 Executive Summary

- 1.1 This is an application, made under Section 53 of the Wildlife and Countryside Act 1981, to record a public footpath at Browns Lane, Sowley, in the parish of Beaulieu. The claim is supported by user evidence which the applicant believes demonstrates that the public have acquired rights through long use without challenge.
- 1.2 It is considered that the evidence submitted in support of the application is sufficient for it to be inferred that, on the balance of probabilities, the claimed route should be added to the Definitive Map. The application is therefore recommended for acceptance.

2 Legal framework for the decision

WILDLIFE AND COUNTRYSIDE ACT 1981 - Section 53: Duty to keep definitive map and statement under continuous review

(2) As regards every definitive map and statement, the surveying authority shall:

b) keep the map and statement under continuous review and as soon as reasonably practicable after the occurrence.... of any of [the events specified in sub-section (3)] by order make such modifications to the map and statement as appear to them to be requisite in consequence of that event.

(3) The events referred to in sub-section (2) are as follows: -

b) the expiration... of any period such that the enjoyment by the public of the way during that period raises a presumption that the way has been dedicated as a public path;

c) the discovery by the authority of evidence which (when considered with all other relevant evidence available to them) shows –

- i) that a right of way which is not shown on the map and statement subsists or is reasonably alleged to subsist over land in the area to which the map relates, being a right of way [to which this Part applies]
- ii) that a highway shown in the map and statement as a highway of a particular description ought to be there shown as a highway of a different description
- iii) that there is no public right of way over land shown in the map and statement as a highway of any description, or any other particulars contained in the map and statement require modification.

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

- a) Where a way over any land...has been actually enjoyed by the public as of right and without interruption for a full period of 20 years, the way is deemed to have been dedicated as a highway unless there is sufficient evidence that there was no intention during that period to dedicate it.
- b) The period of 20 years...is to be calculated retrospectively from the date when the right of the public to use the way is brought into question, whether by a notice...or otherwise.

PRESUMED DEDICATION AT COMMON LAW

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

3 Summary of Legal Tests

- 3.1 The primary issue to be decided by this Committee is whether there is clear evidence to show that public rights subsist or are 'reasonably alleged' to subsist. Under section 53(3)(c)(i) of the Wildlife and Countryside Act 1981, case law has decided that the burden of proof associated with Map Modification Orders is 'on the balance of probabilities', so it is not necessary for evidence to be conclusive or 'beyond reasonable doubt' before a change to the Definitive Map can be made. If there is genuine conflict in the evidence, for example between the evidence of users on the one hand and landowners on the other, Members should make an order so that the evidence can be tested at a public inquiry. Officers are of the view that there is such a conflict in this case.
- 3.2 If a right of way is considered to subsist or reasonably alleged to subsist, then the route, status and width of that way must also be determined, and authority for the making of an Order to record that right on the Definitive Map should be given.
- 3.3 Where a Map Modification Order is made by authority of this Committee, the process allows for objections to the Order to be made. Further evidence could potentially be submitted for examination along with an objection. In these

circumstances, the County Council cannot confirm the Order, and the matter would need to be referred to the Secretary of State.

- 3.4 Where an Order has been made, and no objections to the Order are received, the County Council can confirm the Order.

4 Claimant

- 4.1 The claim was submitted in March 2008 by **Mr Jeff Spencer**, a resident of Lymington. Mr Spencer has unfortunately died since lodging the application, but in 2012 he passed authority for dealing with the application to **Mr Maurice Higgins**, who lives in New Milton.

5 Landowners

- 5.1 Browns Lane forms part of the registered title for Sowley Gate House, which is situated at the foreshore end of the route and was reportedly built in the 1920s. The freehold to the land was owned by the Beaulieu Estate until 1964 when it was acquired by Mrs Heather Bell and her husband Robert. In 1998 the land was transferred to their sons, Mr Simon Bell and Mr Aidan Bell, and their daughter Mrs Penelope Melville (hereafter referred to as 'The Bells'), who now jointly own the property and let it as a holiday home. The landowners object to the recording of Browns Lane as a public footpath.
- 5.2 Sowley Gate Cottage, which is situated just to the north of Sowley Gate House, is leased to a Mr and Mrs Phillips, who maintain Sowley Gate House and the drive for the landowners. Both properties are often referred to collectively as 'Sowley Gate'.

6 Description of the Routes (please refer to the maps attached to this report)

- 6.1 The claimed route is approximately 670 metres long. It is largely comprised of a metalled, 3 metre wide access road serving the above-mentioned properties which runs along the parish boundary between Boldre and Beaulieu. It commences at a junction with Sowley Lane opposite Beaulieu Footpath 4 (Point A) and proceeds in a south-easterly direction along a surfaced track with several speed bumps for approximately 570 metres, at which point the access road bears eastward into the grounds of Sowley Gate House (Point B). The claimed route continues southward along a narrower earth path varying between 2 and 2.5 metres in width which runs alongside the edge of the property boundary for a further 110 metres, until it meets the foreshore of Sowley Beach (Point C).

7 Background to the Claim

- 7.1 The question of public rights on Browns Lane was considered by the County Council as early as 1962 and, having been claimed by the Rambler's Association, the route was initially included as Beaulieu Footpath 6 on the draft version of the 3rd Edition of the Definitive Map of Public Rights of Way (published in 1964), before being deleted following an objection from the Sowley Estate. Around this time, an exhaustive investigation of historic documentary evidence took place which, it was considered at the time, was insufficient to demonstrate that the route was a public right of way. Despite this process having already been undertaken by officers in the 1960s, for the sake of completeness the available documentary

evidence has been reviewed as part of this investigation, and the evidence and correspondence dating from that period are discussed in detail later in this report.

- 7.2 In 2002 a large metal gate and fence was erected at Point B, bearing a sign that read "Private Property to LWM" [Low Water Mark]. Around this time, the County Council received a letter from Boldre Parish Council expressing concerns about the recent erection of signs at Browns Lane, and asking what steps would need to be taken to record the route as a right of way. The County Council replied explaining the mechanism by which an application could be submitted, but no application was subsequently made.
- 7.3 In 2008, following an exchange of correspondence in which the County Council clarified the status of Browns Lane and how a claim could be made to record it as public, Mr Spencer submitted his application.

8 Issues to be decided

- 8.1 The issue to be decided by this committee is whether there is evidence to show that, on the balance of probabilities, public rights subsist, or are reasonably alleged to subsist, on the route shown on the Committee Plan.
- 8.2 Any changes to the Definitive Map must reflect public rights that already exist. It follows that changes to the Definitive Map must not be made simply because such a change would be desirable, or instrumental in achieving another objective. Therefore, before an Order changing the Definitive Map is made, Members must be satisfied that public rights have come into being at some time in the past. This might be proved by historic documentary evidence or by evidence of use in the recent past.
- 8.3 Historic and documentary evidence has been examined to see whether the past history and use of the route point to it having public rights as a result of dedication in the near or distant past. Rights are not lost merely through disuse. Unless stopped up by due process of law, any rights previously dedicated will still exist, even if they are now neither used nor needed. This evidence must be looked at as a whole, it being unlikely that a single document or map will provide sufficiently cogent evidence to justify a change to the Definitive Map. The County Council is under a duty to record such rights as are found to exist, even if they are not claimed by the applicant.
- 8.4 The originals of many of the documents referred to in this report are only available in public record offices, but copies of most documents are available for inspection in the offices of the Countryside Access Team. Members are invited to inspect these, or the originals, when considering this report.

9 Documentary Evidence

Information on the background and evidential weight which should be attached to particular historical sources is included at Appendix 1, which should be read in conjunction with this section.

Beaulieu's monastic past means that there is no Inclosure or Tithe Award for the area, and so the historic documentary evidence is in this case limited to Commercial, Estate and Ordnance Survey mapping.

Early Maps and Plans

9.1.1 Thomas Milne's Map of Hampshire (1 inch to 1 mile) – 1791

The first commercial map to show the claimed route, Milne's map also clearly shows Sandpit Lane, and Tanners Lane, but Pitts Deep Lane, which is situated immediately to the east of Tanners Lane, is not shown. Pitts Deep, which on subsequent mapping can be identified as the route running south from an area of woodland (now known as Sowley Brooms), is not shown. Browns Lane is shown on a straight alignment, running west of a group of buildings, probably Sowley Farm. The depiction of the parish boundary by a dark pecked line on western side of the claimed route makes it difficult to infer how the route itself is shown. The eastern boundary of the route appears to consist of a solid line, which the map's key refers to as being an 'enclosed road', but the map does not indicate whether the route is public or private. No properties are shown at the southern end of the route.

9.1.2 OS First Edition (Old Series) – 2" Drawing (c1808) and 1" Map (c1810)

The claimed route is shown on both the drawing and ensuing map, on a slightly different alignment to Milne's map, with the northern half bearing due north towards Sowley Pond. The northern section is unenclosed, as shown by pecked lines, with the southern section abutting an area of woodland shown by solid lines, suggesting it was enclosed. Pitts Deep is shown on this map. The claimed route is shown as having the same width as other routes which are now recognised as public carriage roads, but other than confirming it was a feature that existed on the ground, the map offers no insight as to the status of the route, and as such offers only limited support to the application.

9.1.3 Christopher Greenwood's Map of Hampshire (1 inch to 1 mile) - 1826

Greenwood's map shows the claimed route on the same alignment as the 1810 OS map. The route's northern section is shown by pecked lines, and where it runs between two areas of woodland, by solid lines. The only roads shown by this map are turnpike roads and cross roads, with the claimed route appearing to be shown as the latter.

Ordnance Survey Records

9.2.1 OS County Series 1st Edition Map - 1866

Browns Lane is shown by parallel pecked lines (an identical depiction to the route that was subsequently recorded as Beaulieu Footpath 4), just to the east of the parish boundary, which is shown by a single, darker pecked line. The route is shown on the straight south-easterly alignment shown on modern mapping. Based on the absence of a parcel number relating specifically to the route and the bracing that links it to the surrounding land, it appears that at this time it was not considered to have had any particular status of its own. A recently built Coastguard Station is shown on the foreshore, just to the west of the southern end of the route, and it is possible that its location was determined by its proximity to the pre-existence of the claimed route. At this time it appears Sowley Gate House is still yet to be built, as it does not feature on the map.

9.2.2 OS County Series 2nd Edition Map - 1896

This map offers a similar picture to the preceding map, although this time the claimed route is labelled 'Foot Path', possibly an indication of its reputation at the time. The route to the north of Sowley Lane now recorded as Beaulieu Footpath 4 is labelled 'FP'. The parish boundary is now shown by a dotted line.

9.2.3 OS County Series 3rd Edition Map - 1907

The 3rd Edition map is identical to the preceding edition.

9.2.4 OS 1:2500 Map (National Grid Series) – 1970

The claimed route is shown on the same alignment as the preceding maps, and for the first time is labelled '*Browns Lane*'. Solid boundaries indicate that, by now, the route is enclosed on both sides, for its entire length, with a width of three metres on the metalled track, and a slightly narrower width of 2 to 2.5 metres on the grass path leading to the shore. A solid line a few yards from the Sowley Lane end of the route indicates the existence of a gate or other barrier. The Coastguard Station is no longer marked, and no buildings are shown on the site it once occupied. Sowley Gate is now shown situated to the east of the claimed route's southern end.

NB – This is the first map to accurately reflect the width of the path during the years it appears to have been most heavily used by the public, and has therefore been used to calculate the width of the highway between boundaries defined by solid line features.

9.2.5 Summary of Ordnance Survey evidence

The Ordnance Survey evidence offers limited support to the application. According to the 1905 OS document '*Instructions to Field Examiners*', surveyors were required to reflect all clearly-marked and permanent footpaths but other than for the First Edition, they did not concern themselves with whether or not routes were public rights of way, nor did they make enquiries as to their status. However, the same document also states that a clearly marked track on the ground was "*not in itself sufficient to justify showing a path, unless it is in use by the public.*" This guidance is somewhat ambiguous, and makes it difficult to infer the status of the claimed route at the time. It is clear that a route did exist, and it is likely that it served as a means of accessing the Coastguard Station, but it is not clear whether the route was in more general use by the public at this time. The depiction of the claimed route on the later map of 1970 supports the view that at some point during the 20th century the route was surfaced and was used henceforth as a private drive serving Sowley Gate, as supported by the spur leading into the property at the southern end of the route.

Estate Maps

9.3.1 Extract from Beaulieu Estate Map - John Booth - 1718

This map was produced for John, 2nd Duke of Montagu, and was provided by the Beaulieu Estate archivist. Land boundaries are shown in yellow, roads in red. Sowley Lane and Sandpit Lane are shown in red, but the claimed route does not appear on the plan, with the yellow shading that depicts the field boundary being all that is discernible. An area of woodland can be seen near the foreshore,

apparently unbroken, and so officers cannot be certain whether or not the route existed at this time.

9.3.2 Extract from Beaulieu Estate Map - WJ Butcher - 1820

This extract from a larger map of the Beaulieu Estate, produced for Elizabeth, Dowager Duchess of Buccleuch, was also provided by the Beaulieu Estate, and shows the area immediately to the south of Sowley Pond. Again, the plan shows Sowley Lane and Sandpit Lane (shaded yellow), and also shows private access roads serving Sowley Farm and Sowley House. Nothing falling within the Parish of Boldre is detailed, and it is unclear whether the extent of the land shown on this plan coincides with the parish boundary. Given that the claimed route runs along this boundary it is difficult to be certain as to the reason for its absence from this plan. The nationally produced commercial and OS mapping of the time did show a route at this location, but without knowing the purpose for which this map was produced it is impossible to ascertain why the route was not shown, but it may be simply because it fell outside the extent of the Beaulieu Estate at that time.

9.3.3 Plan of Sowley Farm – c1867

Also from the Beaulieu Estate archives, this map was produced around the same time as the OS County Series 1st Edition, and is broadly based upon it - the land surrounding the farm is divided into parcels with plot numbers which mirror those on the OS map. Unlike the OS map, this plan does not acknowledge the claimed route as a feature on the ground (which by now was shown by the OS on its straighter alignment), although it does show the footpath to the north of Sowley Lane as well as private roads serving properties in the area. The parish boundary is shown, and as with the above plans, nothing within Boldre parish is shown. Again, it is not known why the route was not shown, but it may be the case that it was considered to be outside the area that was of interest those people producing the map.

Administrative Records

9.4.1 New Forest Rural District Council Minutes - 1951

Two entries in the New Forest Rural District Council minute books relate to the question of public rights along the claimed route. The first, dated 18th June 1951, raises a query from the Open Spaces and Amenities Committee over *“the rights of the public to use the road opposite Sowley Pond to shore between Pitts Deep and Thorns Beach.”* A subsequent entry dated 3rd September 1951 states that the Divisional Surveyor had reported that the road was *“not a publicly repairable highway, nor is it shown on the Schedule as a Public right of Way under the Rights of Way Act 1932.”*

9.4.2 Access to the Foreshore – Sowley Beach - Report of the County Surveyor – 13th September 1962

Produced in order to address a report by the Ramblers' Association of obstructions to public access in the area, this report documents a visit made to the area by the then County Surveyor, Colonel H N Jenner. During his visit he called at the offices of the Beaulieu Estate, where it was confirmed that the Estate owned the foreshore down to low water mark, but that certain lands

previously owned by the Estate had been sold and were now owned by Francis Showering, Director of Babycham, and Sir Henry Spurrier of Leyland Motors. He also spoke to a Captain Henry Widnell, who between 1908 and 1953 was the agent for the Estate. Mr Widnell advised that during his tenure the shore was kept private. Colonel Jenner's report continues:

"The late Lord Montagu had men posted at each of the lanes leading to foreshore to stop people from going down to the shore, and he issued a pass to every tenant on the estate, however small their holding, with a pass so that they could visit the shore if they desired, but his Lordship directed that fishermen should have access at all times, but Captain Widnell informed me that he did not surrender any of his rights in doing this as was well known.....To stop people from walking along the shore from the west, a man was also posted at the western end of the estate foreshore. This continued until the outbreak of war and after the war conditions were again introduced, but not so strictly owing to the shortage of labour, but the beach was kept private as far as possible up to the retirement of Capt Widnell in 1953."

Colonel Jenner then visited the shore and found that Mr Showering and Sir Henry Spurrier had installed structures which prevented public access to or along the beach (officers have established that Sir Henry Spurrier owned Sowley House, whilst Francis Showering owned the House on the Shore, near Thorns Beach – Browns Lane is situated some way to the east of both properties and, it would appear, did not fall within the ownership of either estate). A chance encounter with a 75 year old resident of East End, named William Crouteer, is also recounted:

Crouteer informed me that he had been visiting the foreshore all his life, and considered that he had a right to do so. He stated that the Late Lord Montagu did issue passes to all of his tenants but that he and others refused to accept them as they had the right of going to the shore without permission....Recently when walking to the shore someone from Sir Henry's household had stopped him and told him that he had no right along there. Crouteer informed the person that he was within the forest and had every right there, and went along his way. Sometime later the person saw him and expressed regret and said that on making enquiries had found that the track or land down to the foreshore was in fact within the forest."

Colonel Jenner concludes by stating:

"None of the ways to the foreshore are on the footpaths definitive map, but it would appear that the older local inhabitants consider that they have a right to go down to the foreshore notwithstanding that the shore is the property of private persons, and I am of the opinion that if it was necessary enquiries would produce evidence to show that it has been considered a public right of way to the foreshore and on it. If there is likely to be any need of this evidence it should be obtained whilst available."

This report does not make specific reference to the claimed route, and the description of routes to (or along) the foreshore indicates only how other landowners managed public access on their land. Consequently, this document is of little assistance in determining this application. It is however indicative of how the Beaulieu Estate managed access within its ownership around this time, with the policing of public access apparently being relaxed after the war due to a lack of resources. It also indicates that some local residents believed they had a right of access down to the shore at this time.

9.4.3 Letter from Mr K C Woolgar – Footpath at Sowley - November 1965

This letter, received by the County Council from a member of the public, reported that there was:

“...a private notice on the top of what of what is known as Sowley Gate, which is right opposite Pond Close. As this has always been a footpath used for generations by the local people, and used to be marked as a footpath on the map, could you please give this your consideration as soon as possible, as I feel very shortly there will be nowhere for people to spend their leisure time, as there are very few footpaths left in this area between Beaulieu and Lymington rivers, and I can't really believe they have all been closed by fair means.”

Based on the description of its position opposite Sowley Pond, this letter clearly relates to Browns Lane and, it would appear, was written shortly after the erection of a sign at the northern end of the route (this is corroborated by evidence provided by the landowner, discussed elsewhere in this report). The County Surveyor's reply to this letter could not be located, but the route was not recorded as public at the time (it is unclear to which map Mr Woolgar was referring), and any reply is likely to have reflected that. The letter does however give the impression that the route had apparently been in general public use prior to 1965.

9.4.4 National Parks and Access to the Countryside Act 1949 – Second Review of the Definitive Map – Correspondence between 1964 – 1966

During the period leading up to the publication of the Third Definitive Map (or Second Review), the Ramblers' Association objected to the omission of Browns Lane from the map at a local hearing in December 1964, and consequently the County Council added the route to the draft map as 'Beaulieu Footpath 6'. There is no evidence to indicate that the landowner objected to the addition of the route to the definitive map at the time, but an objection was made by the adjacent landowner, the Sowley Estate, at a subsequent hearing in November 1965, following which a recommendation was made to the Footpaths Sub-Committee of the County Roads and Bridges Committee that the route should be removed from the draft map. An extract from the minutes of a meeting of this committee in February 1966 confirms that this recommendation was approved. Officers have not been able to locate any further information regarding how this decision was arrived at. In a letter to the Ministry of Housing and Local Government dated 19th April 1966 (copied to the County Council), the Footpath Secretary to the Ramblers Association, Mr W R Myers, served notice of an appeal against the decision. It is not known how this appeal was dealt with as officers could locate no further correspondence relating to it, but the fact that the route was ultimately omitted from the definitive map suggests that the appeal was refused. This conclusion is reinforced by the fact that the following year the Ramblers' enquired again about the status of the route, leading to a thorough investigation of available historic evidence (as referenced in paragraph 7.1 and described in more detail in the following paragraph).

9.4.5 Investigation into Status of a Highway by Hampshire County Council – August 1967

In a letter to the County Surveyor dated 22nd August 1967, Mr Myers claimed to have been informed by local residents that when the claimed route was made a private drive, *“probably during the nineteen thirties”*, the highway authority

imposed a condition that there should be no interference with the existing public footpath. He asked if a search could be made of County records to discover whether the allegation was true. A thorough investigation ensued, with searches being made of many of the maps described earlier in this section, as well as the highway maintenance maps of 1929 and 1946.

Also discovered was a statement made in 1933 by the then head gamekeeper to Sowley Beach for Beaulieu Manor, a Mr John Loseby. Cited in the investigation as a comparable example where a landowner was able to demonstrate that a right of way did not exist, Mr Loseby's statement recounts how he was instructed by Lord Montagu that a gateway at the southern end of what is now Sandpit Lane should be kept locked and that other than authorised persons (who should apply to him for the key) no one should be allowed to go through. In addition he was also instructed to order off any persons found using any part of the marshes or foreshore and to prevent people from landing their boats there. Mr Loseby referenced other gates, including one on the foreshore at the southern end of the claimed route, to which he had custody of the keys, but stated that these were gradually abolished following the erection of private houses.

In light of the available evidence, it was considered that the County Council held no records to show that the route was ever a public right of way. In conclusion it was stated that *"if a dedication/declaration was made...in return for planning permission in regards to this way as alleged by the Ramblers' Association...it might be in the minute book [of New Forest Rural District Council]."* Officers have conducted an exhaustive search of the New Forest Rural District Council minute books but have not found anything to substantiate the Ramblers' claim.

In October 1967, the County Council wrote to Mr Myers to confirm that no evidence had been discovered to support the claim that a right of way existed.

9.4.6 Ramblers' Survey of Beaulieu – 1977

During the late 1970s, the Rambler's Association undertook a systematic review of every recorded public right of way in Hampshire and submitted their findings to the County Council. Accompanying the survey of Beaulieu Parish was a list of paths suggested for designation as rights of way – Browns Lane is included in this list as 'Path from C17 at 374964 opposite No. 4 to Beach of Pitts Deep on parish boundary.' A more detailed description of the path is also included:

"Through gateway for 580 metres on 3 metre wide tarmac road with hedges on both sides leading SSE to metal stile, continue SSE over stile for 110 metres of metre wide earth path with wire fence and trees and grass bank on right to the beach at 376957.

Notices at C17 Sowley Lane; Old Notice - "Private Road – to Sowley Gate Only"; New Notice - "Private Property – Sowley Gate Only – No Right of Way".

The early notice was generally assumed by walkers to mean "No Motors" and thus assumed not to apply to them. The path is important as it links the hinterland with the coastal path to Lymington."

This report coincided with correspondence between the County Council and Pitman and Bazett Solicitors in the March and April of 1977, in which enquiries were made by the latter regarding the status of the claimed route. The County Council responded by issuing an OS map on which the routes recorded as rights of way (as shown on the 1964 Definitive Map) were drawn by hand. It is possible

that the appearance of the 'new notice' referred to in the Ramblers' report and this enquiry are connected.

9.4.7 Summary of Documentary Evidence

It is considered that the available documentary evidence alone is insufficient for it to be inferred that, on the balance of probabilities, the claimed route was ever dedicated as a public highway. Investigating the route's history has been made difficult by the scarcity of available documentary evidence, largely due to Beaulieu's extra-parochial status. The route is shown on the commercial maps of the 18th and 19th centuries, and it is possible that the public would have made use of such a route given that it led to the shore but, as was the case in the 1960s, officers do not consider that this evidence taken as a whole is sufficient to infer that the route is public. As a result, the application must be determined based upon the evidence of use in recent years.

10 User Evidence

- 10.1 The provisions of the Rights of Way Act 1932 and subsequently, the Highways Act 1959, enabled evidence of public use to be taken into account when determining whether a deemed dedication had taken place. However, whilst it is clear that public access at Browns Lane was discussed at length during the 1950s and 1960s, at the time it does not appear that officers made such assessments, focussing instead on historic documentary evidence. However, evidence of use dating back to this period can now be considered under the provisions of Section 31 of the Highways Act 1980 and, if applicable, at common law.
- 10.2 There is evidence to suggest that the route has been used by the public since at least the 1940s (although given the fact that many users said that they were introduced to the route by family members, it is probable that it was used by the public prior to this date). The evidence is comprised of user forms and statements. Evidence of the periods of use is depicted in the chart at Appendix 2. Of twenty-two witnesses who contributed evidence, one has been discounted due to the witness not actually making personal use of the claimed route. The accounts of the remaining twenty-one witnesses are summarised at Appendix 3.
- 10.3 The bulk of evidence put forward is provided by users who began using the route in the 1950s, when most of them were of school age. Most have lived in the Lymington area all their lives, with a significant proportion of users living in the nearby villages of East End, Pilley and Norley Wood at the time of their use. The earliest reported use of the path was in 1940, and three additional users were using the path by 1950. By 1960 there were fourteen users. This remained the case until 2000. Twelve users attest to using the path beyond 2002. There are fifteen users who have put forward qualifying use of twenty years or more. The bulk of user seems to be between 1950 and 1980.
- 10.4 Of the twenty users, Mr W Higgins, Mr G Kitcher and Mr Vincett claimed use at a frequency of twice per week, and Mr M Higgins, Mrs R Kitcher and Mr Parker a frequency of once per week. Mr Mapes, Mr W Kitcher and Mr Smith walked the route approximately twice per month. Eight users walked the route once per month or less, with the remaining three not specifying a frequency of use. Six users also confirmed that they had regularly used the route on a bicycle.

- 10.5 Mr Garrett, Mr Parker, Mr W Kitcher and Mr Smith all refer to signs indicating that the route was not public, though it is apparent that they were referring to signage that was erected in 2002. Fourteen users refer to obstructions on the route, with some describing locked gates and fencing in 2002.
- 10.6 Ten users recalled seeing a 'Footpath' sign, with reported sightings as early as 1952 and as late as 1976. According to witnesses, this sign pointed along Browns Lane from Sowley Lane. According to some users (including Mr M Higgins and Mr Smith) there was a corresponding sign on the foreshore, as evidenced by a rusty post on the foreshore (which, it is alleged, is a remnant of the old signpost). This is disputed by the landowner, and despite exhaustive searches of New Forest Rural District Council minute books, officers have found no reference to either the installation or removal of signpost at either location. It is possible that users may have been recalling a sign at the end of Footpath 4, the terminus of which is immediately opposite the claimed route, although some users were adamant that this was not the case when this possibility was suggested to them during interviews. In the absence of any corroborating evidence, officers have not been able to establish whether there ever was such a signpost at either end of the claimed route.
- 10.7 Fourteen users remember passing through gates and nine remember encountering stiles along the route. Most users who were interviewed either recalled no gate at Point A or one that was seldom closed. Mr Garrett, Mr M Higgins, Mr G Kitcher and Mr W Kitcher specifically remember a barrier at Point B with metal bars prior to the new fence and gate being erected.
- 10.8 Six users state that they were told that the route was not public. Of these, Mr Crompton states that he was challenged in around 2000 and Mr M Higgins in 2006, whilst Mr Spencer was told so in a letter from the landowner (presumably he was referring to an exchange of correspondence leading up to the application of 2008). Mr Mapes, Mr W Higgins and Mr A Phillips did not give a date of challenge, but all three gave evidence of use up to and including 2006, so it is possible that challenges were issued after the gate and fence were erected in 2002 - none of the witnesses who were interviewed said they were challenged by anyone prior to this date.
- 10.9 Only one user, Mr A Phillips, stated that he used the route with permission, but he gave no further insight into this on his user evidence form. It should be noted however that on the same form Mr A Phillips indicated that he had been challenged by the landowner, which makes it unclear whether his use actually was permissive.
- 10.10 All but one of the witnesses stated that they saw other people using the route, with fifteen people stating that they saw other pedestrians. Eight users said they witnessed other people using the route on a bike and three users saw people on horseback. Users appear to have seen both locals and strangers using the route.

11 The Landowner

- 11.1.1 The land over which Browns Lane runs has, since 1964, fallen within the ownership of the Bell family. Prior to this, it was owned by the Beaulieu Estate. Enquiries were made with the Estate regarding its management of Browns Lane in the period leading up to 1964, but it was unable to locate any evidence that

might shed any light on the question of public rights on the route. However, correspondence received from the Estate Secretary confirms that there was uncertainty over this matter at the time the property was sold:

“In the correspondence leading up to the sale relating to the draft agreement between solicitors there is a reference to Lord Montagu retaining a right of way over the road coloured green (Browns Lane), they reply is that this is not required, but the solicitor wonders whether any other person has been granted rights or exercise rights of way over the road and if this is the case the conveyance of the road should be made subject to such rights in favour of such third parties as exist or a re capable of being exercised.

The conveyance of the sale of Sowley Gate states that the track (Browns Lane) was sold subject ‘to such rights of way (if any) as may subsist in or over the road or way shown green on the said plan’.

So it would appear at the time of the sale in 1964 they were not sure if any rights of way existed.”

- 11.1.2 Mrs Heather Bell, having initially leased the land from the Beaulieu Estate for two years, acquired the freehold along with her husband Robert in 1964, and passed the land on to her children in 1998. The Bells object to the application, and maintain that the route is, and always has been, a private drive leading down to private property. They are represented by Mrs Judith Bell, who is married to Aidan Bell. She has provided a comprehensive statement regarding the Bell’s management of the lane (summarised below), and numerous statements from other members of the Bell family, from tenants and previous leaseholders as well as owners of neighbouring properties – these additional statements are summarised at Appendix 4.

11.2 Mrs Judith Bell

- 11.2.1 In her statement, Mrs Judith Bell sets out the history of the ownership of Sowley Gate House. For a number of years until 1964, the freehold title of the property was owned by the Trustees of the Beaulieu Estate, with a long lease granted to Mrs Eileen Browne in 1951 (which included Sowley Gate House and Browns Lane, but not the foreshore). The lease required the tenant to keep the route in a good state of repair and to permit game beaters employed by the Trustees to use the route. The residue of the lease was transferred to Mrs Heather Bell in 1962, and it is stated that pre-contract enquiries carried out by her solicitors (which included enquiries to the County Council regarding whether the route carried any public rights) would have established the existence of any footpath signs on Browns Lane at the time of the enquiry.
- 11.2.2 Mrs Heather Bell acquired the freehold of Sowley Gate in April 1964, which by now included the foreshore. Again, pre-contract enquiries were conducted, and it was established that no one was permitted to use Browns Lane without the freeholder’s permission, and that there was no indication that the route was being used by anyone who hadn’t received such permission.
- 11.2.3 Early in April 1964, Mrs Heather Bell arranged for the gate to be replaced at the northern end of Browns Lane. Officers have been forwarded a copy of a letter sent to SCATS of Lymington, dated 2nd April 1964, in which Mrs Bell specified that in addition to the gate, she wanted a post and rail fence to be installed from the hedge on each side of the drive to the gate posts, and for a new sign to be erected 20 feet inside the gate reading “Private Drive to Sowley Gate Only” [the Ramblers’ Survey of 1977 corroborates this]. Mrs Bell sketched the approximate

position of the gate at the bottom of her letter, showing the new gate a short distance from Sowley Lane, with the sign's location indicated further along the route on the eastern verge.

- 11.2.4 In September 1969 Sowley Gate was let to a family friend, Dr Burnford, and it was a term of the lease that all boundary gates were to be kept shut. Between 1971 and 1993 the Gate House was let to Mr Andreas Jones QC (although the cottage continued to be used by family members during this time). Mrs Bell's statement includes a letter from Mr Jones in which he confirmed his understanding that Browns Lane was a private drive, and that he replaced the 1964 sign after his tenancy commenced (Mr Jones has not been able to confirm the exact date this was done). During his tenancy, Mr Jones stated that the gate was kept closed and on occasions locked, and that he challenged anyone he saw using the lane without his consent. There were also signs on the foreshore identifying the beach in front of Sowley Gate as private property.
- 11.2.5 Mrs Bell's statement confirms that since 1993 the property has been used by the owners, and in 1998 the title was transferred by Mrs Heather Bell to her children. Also in 1998, Sowley Cottage was let to Mr and Mrs Phillips, who still reside there. According to Mrs Bell, in 2001 the sign on the entrance gate was renewed - this sign remains in place today and reads "*Sowley Gate House – Private Road – No Shore Access*". To the left hand side of the gate is a narrow entrance which is not fenced – the property falls within the New Forest National Park and this gap allows free roaming ponies and cattle to graze along Browns Lane.
- 11.2.6 Some years ago Peter Bell gave permission to local fishermen to fish from the foreshore (which includes access along Browns Lane), but as the popularity of the location has grown, so have problems with anti-social behaviour (camping on the beach, litter, noise etc), with some fishermen parking their cars on Browns Lane itself, causing access issues for the landowners. Following an incident in which Mrs Phillips was verbally abused by a fisherman whose car was blocking access, a decision was taken to replace the old wooden barrier [Point B] with a gate and fence. The gate is closed early in the evening and has been successful in reducing the number of fishermen who stay on the shore overnight.
- 11.2.7 Mrs Bell also confirmed that for a number of years the Pylewell Estate has given permission for Boy Scout and Girl Guide groups to camp on the land immediately to the west of Sowley Gate House, with the only access to the camp site being along Browns Lane. Permission to use the lane has been granted with the consent of the owner of Sowley Gate (officers have been provided copies of these letters).

12 Consultations with Other Bodies

- 12.1 The following people and organisations have been consulted on this application: The Ramblers, Auto Cycle Union, British Driving Society, British Horse Society, Byways and Bridleways Trust, Cyclists' Touring Club, Open Spaces Society, Beaulieu and Boldre Parish Councils, New Forest District Council, New Forest National Park Authority, County Councillor Ken Thornber, Hampshire County Council (Hampshire Highways and the Area Countryside Access Manager).

12.2 Beaulieu Parish Council

Beaulieu Parish Council does not support the application, and has advised that as far as it can establish, the claimed route is not a public right of way. It

ventures that it may have previously been wrongly identified as such due to the parish boundary markings running its length.

It has also highlighted an existing problem which it claims is caused by people who fish on the private beach at the bottom of Browns Lane, and who have apparently proved abusive to residents, lit fires on the beach and left unacceptable amounts of rubbish on the foreshore, which is a Site of Special Scientific Interest (SSSI), a Special Area of Conservation and a National Nature Reserve. Fishermen also cause parking problems in Sowley Lane and could pose a potential obstruction to emergency vehicles. The Parish Council feels that recording the claimed route as a public footpath would only exacerbate these problems.

12.3 Boldre Parish Council

Boldre Parish Council was consulted as the claimed route runs along the parish boundary. Its view is that Browns Lane has always been a right of way, and that the route should remain open to the public.

12.4 New Forest National Park Authority

The National Park Authority has no evidence relating to the route's use or management over the years, nor any other evidence that might otherwise be useful in determining its status. It advises that if the route is recorded as a public right of way, then some consideration will need to be given as to how best to manage public access, given the fact that the foreshore is the subject of several international and European nature conservation designations as well as being a SSSI. It also considers that any negative impact caused by required infrastructure or surfacing works should be avoided or minimised.

The NFNPA also advises that the integration of any newly identified route within the existing wider network would accord with Objective 7 of the New Forest National Park Management Plan 2010-2015, and also with the priorities of the recreation Management Strategy 2010-2030.

12.5 Area Countryside Access Manager

The Area Manager has no information relevant to the claim.

12.6 Hampshire Highways

Hampshire Highways knew of no information relevant to the claim.

12.7 County Councillor Ken Thornber

Councillor Thornber is aware of the application.

No other comments have been received.

13 Analysis of the evidence

- 13.1 As has been established, the acquisition of a public right of way cannot be supported by historic documentary evidence alone, and so the application must be considered on the evidence of long use under Section 31 of the Highways Act 1980, or at common law.

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

For Section 31 of the Highways Act 1980 to operate and 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. challenged or disputed in some way
- use must have taken place without interruption over a period of twenty years before the date on which the right is brought into question
- use must be *as of right*, i.e. without force, without stealth 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

13.3 Physical nature of the route

The claimed route is clearly defined and linear in nature, with a metalled surface continuing onto a hard-trodden earth path. The route terminates at a public highway (Point A) and on an area of foreshore which is within private ownership (Point B). In most instances, public rights of way terminate at junctions with other public highways, but no rule of law has stipulated that such a way cannot be created unless both its termini are other public highways. Since the early part of the 20th century the courts have accepted the principle of *culs-de-sac*, and numerous examples exist of rights of way with a terminus other than on another public right of way.

Of particular relevance to this application, in *William-Ellis v Cobb* [1935] it was held that a path that terminated on the foreshore was a public right of way. It is therefore considered that the claimed route is capable of being a right of way at common law (questions such as need, suitability and safety cannot be considered during this investigation, and do not assist in the determination of the question of what public rights can be said to subsist on the way).

13.4 The bringing into question of the public's right to use the path

It is considered that there are four events that could be construed as bringing the public's right to use the path into question, thus determining the basis for calculating the relevant twenty year period under Section 31.

- The erection of a sign in 1964 by Mrs Heather Bell near the gate at Sowley Lane reading "*Private Drive to Sowley Gate Only*", giving a relevant period of 1944 – 1964.
- The erection of a sign by Mr Andreas Jones near (or on) the gate at Sowley Lane reading "*Private Property – Sowley Gate Only – No Right of Way*". No date has been provided for the erection of this sign, and so officers have relied upon the only confirmed sighting of the sign in 1977 (referenced in the Ramblers' Survey) giving a relevant period of 1957 – 1977.

- The erection of a fence and gate by the landowner at Point B, obstructing pedestrian access to the foreshore for the first time and giving a relevant period of 1982 – 2002.
- Mr Spencer's application of 2008, giving a relevant period of 1988 – 2008.

(The renewal of the sign at the northern end of the route in 2001 has not been considered as an event which called use into question – see 13.4.3).

Each event is considered below.

13.4.1 Notice – “Private Drive to Sowley Gate Only” - 1964

In her statement, Judith Bell states that in 1964 a sign was erected that “*marked the property as private property with no right of way over Browns Lane*”. Although the existence of this sign has not been acknowledged by users, correspondence provided by the landowner and the independent report on the Ramblers' Survey confirms that the sign was installed at this time.

It is questionable how effective the sign was in communicating the landowner's intentions with regard to public access. Case law has established that simply indicating that land is private property does not unambiguously provide evidence of a lack of intention to dedicate public rights. In *Burrows v Secretary of State for the Environment, Food and Rural Affairs* [2004] the court upheld the inspector's view that the wording '*Private Road – Access Only*' had:

“...an informal and uncertain meaning, and that the public would normally interpret the word 'road' as signifying a way for vehicles....the words 'Access Only' should in my view be taken to grant consent for the use of the lane by vehicles only for the purpose of accessing the properties that it served....I do not think that it can be taken as having called into question the right of the public to traverse the lane on foot....though it might be taken as having been a challenge to the use of the lane by vehicles other than those accessing to the properties served by it.”

It could be argued that the wording on the notice erected by Heather Bell in 1964 was similarly interpretable as in case law, and was so interpreted by members of the public. It is conceivable that, as ventured in the 1977 Ramblers' Survey, pedestrians perceived this notice to be directed solely at motorised users and none of those who provided witness evidence recall such signage. However, the letter from Mr Woolgar in 1965 (9.1.3) indicates that the sign did come to public attention, and clearly Mr Woolgar felt that the notice affected his use of the way as a footpath.

Not only is there a conflict in the evidence on this point, but also potentially in its interpretation, but in light of the relevant case law, it is considered that the wording on the 1964 notice was not an effective means of calling public use into question as it insufficient to make it clear to the public that there was no public right of access along Browns Lane *on foot*.

13.4.2 Notice – “Private Property – Sowley Gate Only – No Right of Way” - 1977

Again, although users do not recall this sign, the Ramblers' Survey of 1977 confirmed its existence and the wording upon it. It is apparent from Mr Jones' letter of 2006 that he erected the sign sometime after the start of his tenancy to replace the above notice, which had become 'dilapidated'. Whilst it could be

argued that this notice did not make it clear that there was no 'public' right of way along the route, its wording is more robust than the preceding sign in this regard. It could be argued that this sign would have given pedestrian users of the route cause to question whether they should have been so doing, and so could be considered to be an event which called public use into question. As has been established, no evidence has been provided to confirm when this sign was erected, and so the sighting confirmed in the Rambler's Survey has been used to calculate the relevant period, giving dates of 1957 to 1977. The landowner has indicated that the sign was maintained until it was replaced by the current signage in 2001, but nothing has been either provided by the landowner or is apparent in the user evidence to confirm that the sign was maintained beyond 1977, and so it is considered that it should not preclude the consideration of subsequent events which called public use into question.

13.4.3 Erection of a fence and gate at Point B - 2002

The applicant has indicated that the gate and fence currently situated at Point B was erected in 2002. This structure blocked access to the foreshore, and prompted Mr Spencer to submit his application to the County Council (eventually received in 2008). Although only a short section of the route was rendered inaccessible the new gate would have challenged public access to the beach (the sole reason for using the route). This action appears to have brought the public right to use the route into question, and gives a relevant period of 1982 to 2002. The renewal of the sign currently in place at the northern end of the claimed route was reportedly in 2001, but this assertion has not been supported by evidence and so has not been relied upon as an event which called public use into question.

13.4.4 Mr Spencer's application of 2008

In view of the correspondence during the intervening years, officers are of the opinion that the application of 2008, although submitted some years later, was a consequence of the action in 2002, and so should not be treated as an event that brought public use into question. It is therefore considered that two relevant twenty year periods can be considered under Section 31 - 1957 to 1977 and 1982 to 2002.

13.5 Twenty years' use without interruption

The user evidence indicates that the claimed route has been used by the public in every year since the earliest use in 1940. The evidence provided by users indicates that there were no permanent obstructions in place during either relevant period of 1957 to 1977 or 1982 to 2002.

13.6 'Without force, stealth or permission'

Force – to be as of right, use must not be as the result of the use of force.

- 13.6.1 Current DEFRA guidance (most recently updated in 2013) describes the use of force as including *the breaking of locks, cutting of wire or passing over, through or around an intentional blockage, such as a locked gate*. Other than those witnesses who specifically stated that they used stiles (which is an acceptable means of negotiating a barrier), no-one indicated that they had to climb, or jump, over anything to gain access to the path. As has been established, aside from iron rails at Point B which were apparently installed to prevent vehicular access

to the foreshore, and which presented no obstacle to use on foot, there appear to have been no permanent obstructions prior to 2002. There is a conflict in the evidence regarding the gate at Point A – Mr Jones stated that during his tenure it was occasionally locked, whilst most users who were interviewed said that they do not even recall a gate at this location, and those that did believed that it was often left open and never locked. Based upon the available evidence it is apparent that there was a gate at Point A from at least 1964, but there is no corroborating evidence to indicate that the gate was ever publicly acknowledged to have been locked.

- 13.6.2 Some users said that they remember a wicket gate being situated at the side of the entrance to the driveway, and that at some point this was removed. It has not been possible to corroborate these accounts and so it cannot be said with any certainty that there was such a gate at this location (it is possible that it was in situ prior to Heather Bell acquiring the freehold in 1964). The landowner has said that the gap to the side of the gate was retained to allow free-roaming ponies to access the shore, and it is likely that pedestrians also utilised it. Use of such a gap would not constitute use by force if the gate itself was not locked.
- 13.6.3 Both user and landowner evidence acknowledges the existence of a barrier at Point B prior to the installation of the fence and gate in 2002. Although accounts differ regarding the composition of this barrier, it is universally acknowledged that its primary function was to prevent vehicles from accessing the shore as opposed to pedestrians. Whether users walked round or climbed over the stile that was reportedly part of it, none of them considered the barrier a challenge to their pedestrian use, and none encountered any difficulty negotiating it.

Stealth – to be as of right, use must be open and of the kind that any reasonable landowner would be aware of, if he or she had chosen to look.

Use of the route appears to have been open. The claimed route runs past Sowley Gate and it is probable that the level of public use that has been put forward by the applicant would have been noticed by anyone staying there. Several users gained the impression that the landowner was aware of public use of the route. During his early use of the route Mr Maurice Higgins recalled a dog regularly barking at him as he walked the last section to the foreshore, whilst Mr G Kitcher stated that he often chatted to people staying at the property if they were in their garden.

Permission – users as of right should not be using the way with any kind of licence or permission.

Only Mr A Phillips indicated that he used the route with permission, but as has been highlighted, he additionally stated that his use had also been challenged. The landowner has stated that at some point members of local fishing clubs were granted permission to fish from Sowley Beach by Peter Bell, but no evidence has been provided to support this assertion. In the absence of any evidence pointing to the contrary, it would appear that public use of the claimed route has been ‘as of right’.

13.7 Use by the public

Use must be by the public, and that should be reflected in its volume and the breadth of the type of users.

- 13.7.1 *The use must be of a volume that is capable of coming to the attention of a landowner. It should consist of enough users, and the number may reflect the setting of a path, such as whether it is in a rural or urban area and the type of use being claimed.*

Nineteen people put forward evidence of use during the relevant period 1957-1977, fourteen during the period 1982-2002. During both periods there were several users who claimed to have walked the route at least once a week. Given the relatively remote setting of the claimed and its close proximity to Sowley Gate, it is considered likely that the volume of public use put forward would have been sufficient to have come to the attention of the landowner.

- 13.7.2 *Use of a way should not consist solely of a particular class of person, such as the employees of a particular employer, tenants of a particular landlord, or customers of a particular business, if it is to be recorded as public.*

None of the users reported having any connection to the landowner. It is likely that some of Mr Namock's early use of the route (when game-beating for the Pylewell Estate) was permissive and so should be disregarded. It is also possible that some of the use of Mr Tanner and Mr Spencer in their capacity as local policemen would have been as a result of some implied permission, but there is no clear guidance on how such use should be regarded. Anecdotal reports of Boy Scout and Girl Guide groups camping at Pitts Deep cannot be taken into account as qualifying use as there is clear evidence that permission to use Browns Lane was sought from the landowner in advance.

13.8 Summary of user evidence

- 13.8.1 The evidence of use indicates that local people have been walking the claimed route in every year since 1940, with the bulk of use falling between the 1950s and 1970s. Use was not secretive or as a result of force, and appears to have been 'as of right'. There is no evidence to suggest that public access on foot was physically obstructed prior to 2002.
- 13.8.2 Many statements include anecdotal accounts which have proved impossible to verify. For example, Mr Namock referred to controversy over shooting meets held at Browns Lane in the 1950s on the grounds that it was an acknowledged right of way, and the majority of users referred to a footpath sign pointing along the route from Sowley Lane. It has not been possible to substantiate these accounts.
- 13.8.3 Some of the evidence put forward is incomplete, and it is possible that less weight should be attributed to the partially completed user evidence forms of Mrs Thompson, Mr Drodge and Mr A Phillips. Despite this, it is considered that the majority of public use of the claimed route during both the relevant periods was sufficient to satisfy the requirements of Section 31. However, dedication of a public right of way may not be presumed if there is sufficient evidence to demonstrate that the landowners did not intend to dedicate the way as a public footpath.

13.9 Actions by the landowner

- 13.9.1 Since 1964 the freehold of Sowley Gate House has been held by the Bell family. Prior to that the property was owned by the Beaulieu Estate, and between 1951 and 1962 was leased to Mrs Eileen Browne. Whilst Mrs Judith Bell has provided information detailing how the land was managed since 1964, save for the

generalised information discussed in Section 9, little is known about the foregoing period. However, it could be inferred that the uncertainty over what rights existed at the time the property was sold in 1964 suggests that the Estate had not sought to prevent public access along the route (as reflected by the user evidence put forward from that period).

- 13.9.2 Mrs Bell confirmed that since 1964 boundary gates have been kept shut and signage displayed indicating that the route is part of private property (which also includes the foreshore to the low water mark). A vehicle gate at Point A was replaced in 1964 by Heather Bell, and a sign was erected a little way along the route reading "*Private Drive to Sowley House*". As tenant of Sowley Gate House between 1971 and 1993, Mr Jones replaced this signage at some point during his tenancy with a sign that read "*Private Property – Sowley Gate House – No Right of Way*". He also confirmed that during his tenure the gate at point A was kept closed and was occasionally locked, and he challenged anyone he saw using the lane without his consent.
- 13.9.3 As has been outlined, in light of relevant case law, officers do not consider that the 1964 sign was a sufficient challenge to public use on foot. It is considered that the sign erected by Mr Jones, was more robust, and can be considered to have challenged use, but there is no evidence to support Mr Jones' assertion that the gate at Sowley Lane was ever locked. A closed, unlocked gate is not considered to be a challenge to public use, and users have also indicated that the gate was often left open and there was variously a gate or a gap to the side of the vehicle gate at Sowley Lane. The fact that the route runs over private land does not preclude the public from acquiring a right of way over it through unchallenged use.
- 13.9.4 Mr H Phillips replaced the vehicle barrier at Point B with a new fence and gate in 2002, which obstructed public access to the foreshore. Photographs taken in 2006 provided by the applicant show the gate padlocked and bearing the sign "*Private Property to LWM*". According to the landowner, public access to the shore is currently permissive, with the gate being closed at 6pm each evening. Although it is questionable how effective this action is in demonstrating the landowner's lack of intention to dedicate, it is clear from the correspondence received by the County Council from members of the public and Boldre Parish Council (and the subsequent application submitted by Mr Spencer) that the original barrier installed in 2002 did come to the attention of the public, and can be considered to have brought use into question.
- 13.9.5 Landowners and tenants stated that on the infrequent occasions that they have seen anyone they do not recognise on using the route, they have informed them that the lane is private. Several users state that they were challenged while using the route, but it is apparent from the information provided in their accounts that at least some of those witnesses were challenged after use of the route had already been called into question by the fence and gate erected in 2002. In addition, there is also evidence provided by users that indicates that their use was observed and unchallenged by people staying at Sowley Gate. The general impression gained from the landowner evidence is that challenges were issued during the years between the current landowner taking ownership of Sowley Gate and the installation of the gate and fence of 2002, but during the years when use was at its most frequent, there is no evidence to indicate that such challenges were issued. Aside from the challenges reportedly issued in recent years, there is

no evidence to indicate that the landowner's intentions were communicated more widely to the general public.

- 13.9.6 Mr Peter Bell confirmed that after obtaining the freehold to Sowley Gate he gave permission to a local fishing club for fishermen to access Sowley Beach via Browns Lane. Mr Bell cannot recall to which club this permission was granted (he thinks it likely to have been based in Lymington) and there is no evidence available to substantiate this point. Mrs Phillips stated that on occasions, she has allowed people she has encountered to walk to the end of the lane and return along Browns Lane to Sowley Lane, and use of the route under such circumstances could be classed as permissive. However, it is also apparent that some use that has been observed has gone unchallenged (for example, see the evidence of Mr Steve Deathe in Appendix 3), and Mrs Phillips has acknowledged that in practice it is difficult to ascertain whether or not the people using the route have had permission to do so. This being the case, the landowner might have taken additional steps to address access to the foreshore, such as depositing a statement and plan under Section 31(6) of the Highways Act 1980, seeking advice from the local authority or using more definite wording on the sign at the northern end of the route. In *Paterson v Secretary of State for the Environment, Food and Rural Affairs & Ors [2010]*, Sales J addressed a similar issue:

“The existence of extensive private rights of way in this case clearly did pose a problem for landowners who wished to make it clear to the relevant audience that there was no public right of way...But that did not remove the requirement that effective notice of a challenge to any public right of way be given to the relevant audience....It may be added that the unusual and difficult circumstances of this particular case did not make it impossible for landowners to make effective challenges to any public use of the footpath: they could have deployed clear and effective notices to achieve that objective...”

It is possible that prior to 2002 the landowner did not feel that public access needed to be restricted, but that as the popularity of the route (and occurrences of anti-social behaviour) increased they felt the need to prevent public access to the foreshore. However, it is apparent that the route was well-used prior to 2002 by a number of local residents, 'as of right'. Only Mr A Phillips indicated that he had permission to use the route (and this must be in doubt given that he additionally said his use was challenged).

13.10 Conclusions under Section 31, Highways Act 1980

There is conflict in the evidence provided by users and the landowner on a number of issues, particularly with regard to signage, but it is considered that, on the balance of probabilities, it can be reasonably alleged that the public have acquired a right of way on foot over the claimed route and that an order should be made to record these rights so the evidence can be tested further (if required) at a public inquiry.

13.11 Analysis of the evidence under Common Law

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 from a

sufficient period of public use without secrecy, force or permission, and the acquiescence of those landowners in that use. This is required in order to meet the two pre-conditions for the creation of a highway - that is dedication and public acceptance of that way by use. The length of time that is required to demonstrate sufficient user is not fixed under common law, and depends on the facts of the case. The user must be obvious to the landowners, who may rebut any suggestion of a dedication by acts such as putting up a physical barrier, erecting notices stating that the route is not a public right of way of the type being claimed, or turning people back.

13.12 Conclusions under Common Law

Whilst it can be argued that the landowner did not take sufficient steps to demonstrate a lack of intention to dedicate public rights under Section 31, it is considered that a dedication at common law cannot safely be inferred in this instance. It is apparent that there has never been a positive intention to dedicate by the landowner, and the evidence provided by the landowner indicates that permission to use the route was granted to various parties on specific occasions (including the staging of annual barbeques and camping trips). Such permission would be inconsistent with an intention to dedicate public rights, and so it follows that the claim must fail the tests for a common law dedication. However, it does not automatically follow that the issuing of permission to specific parties meets the requirements of the 1980 Act in demonstrating a wider lack of intention to dedicate to the public at large, and so the recommendation to Members is that the claim can still be considered under Section 31.

14 Conclusions

- 14.1 The documentary evidence reviewed is insufficient to infer that the claimed route is a public right of way.
- 14.2 There is evidence of public use of the claimed route since 1940.
- 14.3 The evidence put forward in support of the claim is such that it can be reasonably alleged that the claimed route has been used by the public as of right and without interruption for two full periods of 20 years (1957 – 1977 and 1982 – 2002).
- 14.4 The available evidence is insufficient for a common law presumption to be inferred (ie that the landowner intended to dedicate the claimed route as a public right of way).
- 14.5 If Members agree with paragraph 15.3 that, on the balance of probabilities, it can be reasonably alleged that a right of way subsists, then they should direct that a Map Modification Order is made to record the claimed route as a public footpath.

15 Recommendation

- 15.1 That a Definitive Map Modification Order be made to record a public footpath on the route between Points A-C, as shown on the Committee Plan.
- 15.2 That the order records a width of 3 metres between A-B, a width of 2.5 metres between B-C, and a vehicle gate and gap at Point A.

CORPORATE OR LEGAL INFORMATION:**Links to the Corporate Strategy**

Hampshire safer and more secure for all:	yes/no
Corporate Improvement plan link number (if appropriate):	
Maximising well-being:	yes/no
Corporate Improvement plan link number (if appropriate):	
Enhancing our quality of place:	yes/no
Corporate Improvement plan link number (if appropriate):	
OR	
This proposal does not link to the Corporate Strategy but, nevertheless, requires a decision because: the County Council, in its capacity as ‘surveying authority’, has a legal duty to determine applications for Definitive Map Modification Orders made under s.53 Wildlife and Countryside Act 1981.	

Section 100 D - Local Government Act 1972 - background documents

The following documents discuss facts or matters on which this report, or an important part of it, is based and have been relied upon to a material extent in the preparation of this report. (NB: the list excludes published works and any documents which disclose exempt or confidential information as defined in the Act.)

Document

Claim Reference: 981

Location

Countryside Access Team
 Castle Avenue
 Winchester
 SO23 8UL

IMPACT ASSESSMENTS:

1 Equalities Impact Assessment:

1.1 The County Council has a duty under Section 149 of the Equality Act 2010 ('the Act') to have due regard in the exercise of its functions to the need to:

- Eliminate discrimination, harassment and victimisation and any other conduct prohibited under the Act;
- Advance equality of opportunity between persons who share a relevant protected characteristic (age, disability, gender reassignment, pregnancy and maternity, race, religion or belief, gender and sexual orientation) and those who do not share it;
- Foster good relations between persons who share a relevant protected characteristic and persons who do not share it.

Due regard in this context involves having due regard in particular to:

- The need to remove or minimise disadvantages suffered by persons sharing a relevant characteristic connected to that characteristic;
- Take steps to meet the needs of persons sharing a relevant protected characteristic different from the needs of persons who do not share it;
- Encourage persons sharing a relevant protected characteristic to participate in public life or in any other activity which participation by such persons is disproportionately low.

2. Impact on Crime and Disorder:

3. Climate Change:

How does what is being proposed impact on our carbon footprint / energy consumption?

How does what is being proposed consider the need to adapt to climate change, and be resilient to its longer term impacts?

This report does not require impact assessment but, nevertheless, requires a decision because the County Council, in its capacity as the 'surveying authority', has a legal duty to determine applications for Definitive Map Modification Orders made under s.53 Wildlife and Countryside Act 1981.