



Date of Meeting: 22 November 2021

Lead Members: Cllr Clare Sutton, Cllr Kate Wheller, Cllr Brian Heatley – Lead Members for Rodwell and Wyke Ward

Lead Officer: Matthew Piles, Corporate Director for Economic Growth and Infrastructure

Executive Summary:

In response to an application to add a footpath in the Weymouth Town Council area, this report considers the evidence relating to the status of the route.

Equalities Impact Assessment:

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

Budget:

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

Risk Assessment:

As the subject matter of this report is the determination of a definitive map modification order application the Council's approved Risk Assessment Methodology has not been applied.

Other Implications:

None

Recommendation:

That the application be refused.

Reason for Recommendation:

The available evidence does not, on balance, show that the claimed right of way subsists or is reasonably alleged to subsist

Use of Evidence:

The applicant submitted documentary evidence in support of this application.

Documentary evidence has been researched from sources such as the Dorset History Centre and the National Archives.

A full consultation exercise was carried out in September – November 2019, which included landowners, user groups, local councils, those affected and anyone who had already contacted Dorset Council regarding this application. The Councillors for Rodwell & Wyke Ward, Cllr Wheller, Cllr Sutton and Cllr Heatley, were also consulted. In addition notices explaining the application were erected on site.

36 user evidence forms from users of the claimed route and the previous claim were submitted during the investigation. Any relevant evidence provided has been discussed in this report.

Appendices:

1. a) Drawing 19/21(current application T516),
b) Drawing 20/02 (old application T392)
2. Law
3. Documentary evidence
 - Ordnance Survey Map (1901) 1:2500
 - Ordnance Survey Map (1959) 1:2500
 - Ordnance Survey Map (1965 - 73) 1:1250
 - Conveyance Plan (1936)
 - Conveyance Plan (1949)
 - Dorset Council Freehold Plan All Saints' School Playing Field (2020)
 - Sign at Point B1 photographed 2005

- Aerial photo (1947)
- Aerial photo (1972)
- Aerial photo (2005)
- Aerial photo (2017)

4. User evidence - Charts to show periods and level of use

Background papers:

The case files of the Executive Director of Place (ref. RW/T516 and T392).

Most of the original historic maps and documents referred to are in the custody of the Dorset History Centre, except for the Finance Act maps, which are at the National Archives, Kew.

Copies (or photographs) of the documentary evidence can be found on the case file RW/T516, which will be available to view by arrangement.

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1 **Background**

Applicant

- 1.1. An application to add a footpath as shown A – A1 – A2 – A3 – A4 – B – B1 – C on Drawing 19/21 (Appendix 1a) was made by Mr R. B. Price on 14 September 2011, and was subsequently taken on by Ms C Price on 16 September 2019.

Description of the route

- 1.2. The route claimed starts at point A on the footway of Ryland's Lane. It passes through a 1.1 metre wide pedestrian gate into the school grounds, there is a sign on the gatepost reading "PRIVATE PROPERTY, THIS IS NOT A PUBLIC RIGHT OF WAY."
- 1.3. Between points A and A1 the 2 metre wide tarmac path runs between bushes / trees with grass beneath and its total available width between fences is 8.7 metres.
- 1.4. At A1 the path deviates north westerly by about 3 metres towards the boundary fence at A2 then continues parallel with the boundary fence. The surface is still tarmac. On the southern side there is a steep bank covered in dense, well established brambles, and a building.
- 1.5. At A3 the route deviates from a straight line by about 5.5 metres in a south westerly direction to point A4. The surface is still tarmac. At A4 the path turns in a more westerly direction and continues, with mown grass either side, to the school drive at point B.
- 1.6. There is a sign to the south of point B directing to "Sunnyside Rd, No cycling" on one side and "Ryland's Lane, No Cycling" on the other side.
- 1.7. At point B the route crosses the school drive via a 'zebra' pedestrian crossing to a pavement opposite. It then turns easterly and follows the curving drive, on the pavement to point B1. Here there is a remotely lockable pedestrian security gate, 1.3 metres wide, adjoining a vehicle security gate.
- 1.8. The route continues to follow the pavement adjoining the school drive to point C where there is a 1.1 metre wide pedestrian gate. Here it joins the footway of Sunnyside Road. There is a sign on the outside gatepost reading "PRIVATE PROPERTY, THIS IS NOT A PUBLIC RIGHT OF WAY."

Background to the application

- 1.9. There was a previous claim for a similar route in 2005, based on user evidence (case file T392). The route claimed on this occasion was directly from A – A1 – A4 – B, then continuing B – B1 – C as in this claim (see Drawing 20/02 Appendix 1b).
- 1.10. The case was withdrawn by the applicant in 2009 because he felt that, if successful, the application would simply result in closure of the path on school security grounds.
- 1.11. The direct route A1 – A4 is no longer available because the building of a school sports hall in 2005 resulted in cutting away of the path to form a steep bank. The new section A1 – A2 – A3 – A4 of the current application route was set out and tarmacked following the building of the sports hall in 2005.
- 1.12. The land over which the application route passes is owned freehold by Dorset Council and was acquired by Dorset County Council in 1949. The land was leased to Ambitions Academies Trust in June 2019.
- 1.13. To address the conflict of interest arising from Dorset Council being the landowner, it is considered that the decision should be made by the Strategic Planning Committee.

2 Law

- 2.1 A summary of the law is contained in Appendix 2.

3 Issue to be decided

- 3.1 The issue to be decided is whether there is evidence to show, on the balance of probabilities, that public rights subsist, or are reasonably alleged to subsist, on the route claimed and if so, at what status the route should be recorded. It is not necessary for evidence to be 'beyond reasonable doubt' before a change to the Definitive Map can be made.
- 3.2 Any changes to the Definitive Map must reflect public rights that already exist. Decisions must not be taken for reasons of desirability or suitability. Before an order changing the Definitive Map is made, the Council must be satisfied that public rights have come into being at some time in the past. This might be demonstrated by documentary evidence and/or witness evidence.

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

4 **Documentary evidence (Appendix 3) (copies available in the case file RW/T516)**

4.1 A table of all the documentary evidence considered during this investigation is contained in the case file. All documents considered relevant are discussed below. Information on the background and evidential weight which should be attached to particular historical sources is discussed in this section.

Inclosure Award

4.2 The Wyke Regis Inclosure Map of 1797 covers the area of the claimed route but no roads or paths are depicted which correspond to the claim.

Tithe Map

4.3 The Wyke Regis Tithe Map and Award of 1841 cover the area of the claimed route but no roads or paths corresponding to the claim are depicted or described.

Finance Act 1910

4.4 The area of the application route is covered by the Finance Act Map held at National Archives under reference IR125/2/571. It does not show a path / road corresponding to the application route.

Ordnance Survey Maps

4.5 The Ordnance survey map of 1901 at a scale of 25 inches : 1 mile is the first map to show the road now called Sunnyside Road (it was then called Fairview Road). Ryland's Lane was also shown, but no path is shown between them. There is a footpath shown to the south, running between Williams' Avenue and Ryland's Lane.

4.6 The corresponding maps of 1926 and 1937 show a similar situation.

- 4.7 The map of 1959 shows the buildings of All Saints' School and the drive to it corresponding to the application route from B – B1 – C. There is no path shown from A to B.
- 4.8 The first map to show a path between A and B is the Ordnance Survey Plan of 1965 – 1973 at a scale of 50 inches : 1 mile. It shows a drive with possible footway from B – B1 - C and a direct path from A – A1 – A4 – B, lined with trees to the south. Lines across the route at A and C suggest the route may have been gated.
- 4.9 A similar situation is depicted on various maps up to 1992 although these are of a smaller scale so do not show as much detail.
- 4.10 None of the Ordnance Survey maps showed a public right of way in the vicinity of the application route. However, this is not prejudicial to the existence of any unrecorded rights.

Dorset Council Records

- 4.11 The Weymouth Parish Survey (1950's) for this area did not claim a right of way corresponding to the application route, nor was it shown on the Draft Map (1954), Provisional Map (1964), Revised Draft Map (1974), First Definitive Map (1966-7) or Current Definitive Map (sealed 1989).
- 4.12 A footpath was claimed between William's Avenue / Fairview Road and Ryland's Lane but this was to the south of the application route. This became Footpath 76, although its original route claimed on the parish survey was slightly different from the current definitive line.
- 4.13 Ryland's Lane was recorded as a footpath (Footpath 115) on the Draft, Provisional and First Definitive Maps.
- 4.14 Ryland's Lane and Sunnyside Road are both now recorded on the list of streets.

Conveyance Documents

- 4.15 The Conveyance Document for land known as "Broadmead" Wyke Regis (1936) details a right of adjoining owners and occupiers to pass and repass over a portion of the land being sold "with or without wheeled vehicles horses and other animals". This right applied only to two small parts of the land (illustrated on a plan and coloured yellow) approximately corresponding to the eastern end of Sunnyside Road and another small parcel lying south of this, near the western end of Footpath S1/76.

4.16 The adjoining owners affected were not specified but it is indicated that they were to the left (west) of the land over which they had a right. The accompanying plan included the names of three landowners.

4.17 The same right appears in the Conveyance Documents (1949) for the same land when it was sold to Dorset County Council. This document was submitted by the applicant as evidence of public rights.

4.18 Officer comments:

The right described relates to the application route only in that it applies to the highway maintainable at public expense to which the application route joins, at point C. Therefore in this respect, the land specified in the conveyance does today, have public vehicular rights.

4.19 In the Requisitions on Title Document (1949), in answer to the question "Is the property subject to any and what rights of way, light, or drainage, or other easement" the answer is recorded as "Not so far as is known otherwise than disclosed by Contract and Plan".

4.20 The Conveyance of 111 Ryland's Lane (1983) does not refer to private rights over the land.

4.21 Officer comment:

These documents make no mention of public rights of way being in existence at the dates of the documents.

Dorset Council Property Services Plan All Saints' School Playing Field (2020)

4.22 The plan shows that the application route runs exclusively over land owned by Dorset Council.

Aerial photographs

4.23 The aerial photo of 1947 shows various structures on the area now crossed by the application route. It is possible that the area was being used for small-holdings. There is no sign on the ground of a path in the location of the application route.

4.24 The aerial photo of 1972 shows the school, and the school playing field, the approach road to the school (points B – B1 – C on Drawing 20/02) and the original application route laid out (A – A1 – A4 – B on Drawing 20/02). There is some suggestion that there might be gates / barriers of some sort at points A and C.

- 4.25 A similar situation is seen in the aerial photos of 1997 and 2002 although by 2002 a tree is obscuring point A so it is not possible to see if a gate or barrier was there.
- 4.26 In the aerial photo of 2005 (summer) work is being carried out on the site and the new route A – A1 – A2 – A3 – A4 – B appears to be being set out. The application route appears to be obstructed with fencing.
- 4.27 In the aerial photos of 2009, 2014 and 2017 there is a large building next to where the original application route A – A1 – A4 – B was located, and this route is not in existence. The new application route is in existence: A – A1 – A2 – A3 – A4 – B – B1 – C (Drawing 19/21). There appears to be a gate at point C in each photo (sometimes open), but point A is obscured by a tree.

Summary of documentary evidence

- 4.28 Documentary evidence suggests that there was no path in existence in the area of the application route prior to the building of All Saints' School in the 1950's.
- 4.29 None of the documents available are suggestive of public rights along the application route.

5 User evidence (Appendix 4) (copies available in the case file RW/T516)

- 5.1 Charts showing periods and level of use form Appendix 4. Evidence submitted in 2005 as part of the original application, T392, has been included in this analysis, as well as that submitted in 2011 with application T516 and that submitted in response to consultation in 2019.
- 5.2 Across the two applications a total of 36 witnesses claimed to have used one or both of the application routes.

However 7 of these witnesses were discounted because they:

- did not sign their evidence
- did not adequately describe the route they used
- did not describe when they used the route
- gave evidence on behalf of others
- used the route to get to All Saints School.

Efforts were made to contact these witnesses to clarify but not all could be contacted. Thus 29 witnesses were considered to have used one or both application routes. One further witness claimed to have used a route that did not correspond with either of the application routes.

- 5.3 It is considered that the two routes: A – A1 – A4 – B – B1 – C and A – A1 – A2 – A3 – A4 – B – B1 – C are sufficiently different that evidence for each must be considered separately.

Use of the original route A – A1 – A4 – B – B1 – C (Drawing 20/02, Appendix 1b)

- 5.4 12 witnesses declared they had used the original route and a further 13 described using a route between points A and C during the years that the old route was laid out and available. Although via their maps they claimed use of the new route A – A1 – A2 – A3 – A4 – B – B1 – C.

- 5.5 Officer Comment:

It is considered likely that witnesses have simply forgotten that the route originally followed a more direct line. Therefore, two possible scenarios will be considered; a 'least evidence scenario' (only considering declared users of the original route), and a 'most evidence scenario' (declared and presumed users of the original route). When considering a 'most evidence scenario', all 25 of these witnesses will be presumed to have used the old route for the years when this was available and laid out.

Least evidence scenario for use of the original route A – A1 – A4 – B – B1 – C, Declared Use only.

- 5.6 Between 1986 and 2005 there were between 10 and 12 declared users of the original route.
- 5.7 The frequency with which each witness used the route ranged from once a year to 360 times per year. Between the dates 1986 – 2005, on average the route was used between 1.7 and 2.8 times per day by a witness who declared they used the original route.

Most evidence scenario for use of the original route A – A1 – A4 – B – B1 – C, Declared and Presumed Use.

- 5.8 Use of the original route A – A1 – A4 – B – B1 – C was first claimed in 1955 but only 3 witnesses used the route before 1961.
- 5.9 There were 17 witnesses claiming to use the route in 1986 and this rose to 25 in 2005 just before the layout of the route was changed to accommodate a new sports hall.
- 5.10 The frequency with which each witness used the route ranged from once a year to 800 times a year. Between the dates 1986 – 2005, on average the route was used between 3.6 and 6.9 times per day.
- 5.11 All witnesses claimed that they used the route on foot, and in addition, 3 of them used the route on a pedal cycle.
- 5.12 Officer Comment:
- Use with pedal cycles is considered insufficient to result in a deemed dedication of a restricted byway.
- 5.13 All witnesses except one had seen other people using the route although many described seeing school children.
- 5.14 Officer Comment:
- This use by people accessing the school would not contribute towards use by the public.
- 5.15 All witnesses except 2 described gates on the route, but none remembered the gates being locked in the period prior to the change of the route in 2005. All witnesses that specified said the gates were at Points A and C.
- 5.16 22 witnesses remembered there being signs on the route but only 2 thought these were in place prior to 2005. One of these witnesses described the sign prior to 2005 as reading “Not a right of way but you are welcome to walk through” and the other described “No dogs”.
- 5.17 Officer Comment:
- A sign reading “Not a right of way but you are welcome to walk through” would be sufficient to prevent acquisition of public rights, but the fact that the sign was only seen by one person during the time this route was laid out makes its presence open to question.

5.18 Two witnesses thought they had a private right to use the route although one had only discovered this recently. It was not possible to contact the second witness who declared a private right, and neither was it clear that he understood the question. Consequently, the use of both witnesses with a private right has been included in the analysis. No witnesses were aware of having permission to use the route.

5.19 No witnesses reported being challenged in their use of the route prior to the temporary closure of the path in 2005 when the sports hall was built and the path diverted.

5.20 Officer Comment:

The temporary closure of the path in 2005 is considered to be a date when the public use of the route was brought into question.

Use of the new route A – A1 – A2 – A3 – A4 – B – B1 – C (Drawing 19/21, Appendix 1a)

5.21 25 witnesses declared they had used the route since 2005 and most drew the new route A – A1 – A2 – A3 – A4 – B – B1 – C on their map.

5.22 Officer Comment:

All 25 of these witnesses will be assumed to have used the new route from 2005 when this was available and laid out.

5.23 There were 22 witnesses claiming to use the route in 2005 and this rose to 23 before declining to 6 in 2019.

5.24 The frequency with which each witness used the route ranged from twice a year to 800 times a year. Between the dates 2005 and 2019, on average the route was used between 3.1 and 7.9 times per day.

5.25 All witnesses claimed that they used the route on foot, and in addition, 3 of them used the route on a pedal cycle.

5.26 Officer Comment:

Use with pedal cycles is considered insufficient to result in a deemed dedication of a restricted byway.

5.27 All witnesses except two had seen other people using the route although many described seeing school children.

5.28 Officer Comment:

This use by people accessing the school would not contribute towards acquisition of public rights.

5.29 All witnesses except 2 described gates on the route, all witnesses that specified said the gates were at Points A and C and later at B1. No witnesses remembered the gates being locked prior to December 2010 but dates when the gates began to be locked ranged from December 2010 to 2019. Some witnesses said that initially the gates were locked occasionally but that by 2018 they were locked all the time except at the beginning and end of the school day.

5.30 Officer Comment:

The locking of gates is considered to bring use of the route by the public into question. This was first reported in December 2010.

5.31 22 witnesses remembered there being signs on the route. 10 of these witnesses recalled the signs reading "Not a right of way but public welcome to use it" or similar wording. 2 witnesses recall "No dogs" signs, one "Private property", one "No right of Way" (2019) and one "Footpath to Sunnyside Rd".

5.32 The application from 2005 reported in April 2005 (before the path was diverted) that "until very recently there was no notice anywhere that would give any impression that it was not a Right of Way"

5.33 Officer Comments:

- a) A sign reading "This is NOT a Public Footpath however, you are welcome to walk via the pathway" was seen and photographed by a Dorset County Council Officer in 2005, when the first application was received. Such signs would be effective in granting permission for the public to use the route and as such would prevent acquisition of public rights. This would also bring public use of the route into question.
- b) The letter from the applicant suggests that such a sign might have appeared before the route was diverted in summer 2005 although this can only be inferred.

5.34 Two witnesses thought they had a private right to use the route although one had only discovered this recently. The other did not elaborate, and it was not clear whether he understood the question fully. No witnesses thought they had been given permission to use the route although one stated in other communications that the route was "permissive".

5.35 Officer Comments:

- a) Private rights cannot be considered here, but given that one witness did not realise that they had a private right, and it was not possible to establish if the other understood the question, their evidence will still be considered.
- b) The fact that witnesses did not realise they were using the route with permission does not alter the effect of the permission given via the signs.

5.36 Several witnesses were challenged in their use of the route between 2018 – 2019 by school staff.

5.37 Officer Comment:

This represents another date when use of the route was brought into question.

Summary of user evidence

5.38 Two routes have been used at different times and evidence for these must be considered separately.

Summary of user evidence, older route A – A1 – A4 – B – B1 – C

5.39 The older, direct route A – A1 – A4 – B – B1 – C was available and used on foot from at least 1961 – 2005.

5.40 For a 20 year period leading up to 2005 the route A – A1 – A4 – B – B1 – C was used by a minimum of 10 witnesses per year who declared use of this route. The route received on average at least 1.7 uses per day.

5.41 If the presumed users of the route are also included (because their use was at a time the original route was laid out) the minimum number of users rises to 17 people per year, and the route would have received, on average, at least 3.6 uses per day.

5.42 Use of the old route A – A1 – A4 – B – B1 – C prior to 2005 appears to be use as of right i.e. without force, without secrecy and without permission. However, it is considered that the number of different users is too low to be considered 'use by the public at large', particularly for an urban route where users say they were accessing shops, doctors' surgery, health centre and library.

- 5.43 The frequency of use of the old route A – A1 – A4 – B – B1 – C prior to 2005 is also considered to be too low for the use by the public to have been brought to the attention of the landowner. There would have been a large number of legitimate users of the school access path with a private right to access the school, and a small number of additional users taking a through route may not have been brought to the attention of the landowner.
- 5.44 Consequently, it is believed that public rights to use A – A1 – A4 – B – B1 – C on foot have not been acquired.
- 5.45 The presence of signs and locked gates on the route during this period is unclear.

Summary of user evidence, newer route A – A1 – A2 – A3 – A4 – B – B1 – C

- 5.46 The newer route A – A1 – A2 – A3 – A4 – B – B1 – C was available and used on foot from late 2005 – 2019. This is less than the 20 year period required for a deemed dedication under the Highways Act 1980.
- 5.47 10 witnesses described seeing signs on the route A – A1 – A2 – A3 – A4 – B – B1 – C following 2005 reading “Not a right of way but public welcome to use it”. Such signs mean that use by the public was with permission, i.e. that it was use ‘by right’ rather than ‘as of right’.
- 5.48 Consequently, it is believed that public rights to use A – A1 – A2 – A3 – A4 – B – B1 – C on foot have not been acquired.

6 Landowner correspondence (copies available in the case files RW/T392 and T516)

- 6.1 In response to a letter from the first applicant in 2005 the Church of England Diocese of Salisbury, Board of Education wrote on 3 May 2005: “The governors of All Saint’s School are particularly keen that the path currently used by members of the public with consent of the governors between Sunnyside Road and Rylands Lane does not become a Public Right of Way. Whilst the governors are happy for members of the public to use it with their consent, they believe that it is essential that they have the right to exclude individuals if they wish to do so.”

6.2 Officer Comment:

This an indication that the School had no intention to dedicate a right of way in 2005. However, there is no evidence that it was communicated to the public.

6.3 Following consultation in 2019 (for the application received in 2011) the Ambitions Academies Trust sent a Landowner evidence form (as lessees). It acknowledged that members of the public were using the route every few months, were being challenged, and that gates were being locked when pupils did not need access.

6.4 The Academies Trust was unsure of the history of signage having only recently taken over management of the school and lease of the land. It said that signs had been defaced and torn down, that drug related incidents had been reported to the police (police reports reported to be available). Photographs were provided of the signage erected following consultation in 2019.

6.5 The Academies Trust believes that a path within the boundary of the school grounds represents a safeguarding issue.

6.6 Dorset Council Premises Commissioning Team representing Dorset Council (as owners) opposed what it referred to as "the reclassification of the Student Pedestrian Access Path... to a formal public footpath". The grounds for objection were based on safeguarding concerns, and that agreeing to legislation to footpath access was in contravention of the Countryside and Rights of Way Act 2000 which makes provision to extinguish or divert public rights of way through school grounds under some circumstances.

6.7 Officer comments:

a) Safeguarding is not a matter that can be taken into account.

b) Extinguishment and diversion cannot be considered unless public rights have been established.

7 **Consultation responses and other correspondence (copies available in the case file RW/T516)**

Response from applicant of 2019

The following items were sent as evidence supporting the application:

7.1 A Weymouth and Portland Borough Council map of the area showing access to All Saints School from Ryland's Lane labelled 'path', and the entrance to Thornlow Playing Field not similarly labelled. The applicant interpreted this as meaning that All Saints School had public access whilst Thornlow Playing Field was private land with no access.

7.2 Officer Comment:

The Weymouth and Portland Borough Council Map does not record rights of way and the labelling of a path as 'path' is of no relevance to status of the route.

7.3 The applicant labelled a plan showing where the sign was located which gave 'permitted access'.

7.4 Officer Comment:

The relevance of signs giving permission for the public to use the route have been discussed in paragraph 5.33 above.

7.5 The applicant sent a plan of 111 Ryland's Lane and the pedestrian entrance to the school. It had a proposed road drawn on what is now part of 111 Ryland's Lane. The applicant did not explain what she felt was the significance of this plan.

7.6 Officer Comment:

The proposed road plan is of no relevance to the status of the path through All Saint's School.

7.7 The applicant sent a copy of the Weymouth, Portland and Dorchester A-Z Street Atlas. This showed the application route as a pecked line.

7.8 Officer Comment:

The A-Z Map does not have a symbol for rights of way but records features that are visible on the ground. It has no relevance to status of the application route.

7.9 The applicant sent a black and white copy of Ordnance Survey map OL15 (2004) at a scale of 1:25,000. This showed the application route with a thin pecked line.

7.10 Officer Comment:

Although the lack of colour makes it difficult to distinguish between a public right of way footpath (thick green pecked line) and a path (thin black pecked line) the route has never been recorded as a right of way. The map provides no evidence of status of the application route.

7.11 Conveyance August 1949 (copy). Conveyance 29 March 1983 (front cover copy). The applicant had underlined references to 'right of way'. The plan of the land subject to conveyance in 1949 appeared to have been hand shaded before copying, masking the distinction of different colours.

7.12 Officer comment:

These documents are discussed in paragraphs 4.15 – 4.18 above.

7.13 Epitome of Title for properties 103, 109 and 111 Ryland's Lane. This lists various documents relating to the properties.

7.14 Officer comment:

The Epitome does not contain any information of relevance.

7.15 Dorset and Bournemouth Police Authority Grant of a Right of Drainage through 107, 109, 111 Ryland's Lane.

7.16 Officer comment:

This contains no information of relevance.

7.17 Various photos of children playing on the application route, the gate from Ryland's Lane in an open position, and members of the public enjoying various social functions on the school field.

7.18 Officer comment:

Whilst some of these photos do confirm that the application route was open to the public at least some of the time, the social functions would mostly have been by invitation so do not provide evidence that the route was used as of right during the relevant period.

7.19 The applicant reported that there used to be a sign on the route stating that it was a public footpath and that no dogs were permitted.

7.20 Officer comment:

No other witnesses recall a sign with this wording. This would not have been an official Council right of way sign because dogs are a lawful accompaniment on a public footpath.

7.21 The applicant said she had evidence that the application route had been unlawfully blocked, but this evidence was not submitted.

7.22 The applicant, in emails in 2018 (before she took on responsibility for the application), referred to the application route as a 'permissive path'. The first email was headed "Permissive Footpath Closed Suddenly" and initially complained that All Saints' School had withdrawn permission without notice.

7.23 Officer comment:

If the path were permissive, the landowner would be allowed to withdraw permission at any time and use would not have been 'as of right'.

7.24 The applicant later expressed the opinion that "...at this time they [sic] were only permitted to lock the gates once a year, to keep the pathway as their land, but due to the pathway having been allowed permissive access since before the school was there, they were not allowed to always close it."

7.25 Officer comments:

a) It is not clear to which period of time this refers, but the indication that access had been permissive since before the school was there would contradict the assertion that public rights have been exercised.

b) The applicant's explanation of permissive access indicates that there was a general understanding of the principle of use with permission, and that when use began, it was with permission.

7.26 The applicant in 2019 said she had been told that the route was a "permissive pathway" but it had "never been controlled in 37 years...only in the last couple of years where the school has haphazardly begun locking the gate. Their right to do so has passed the 20 years of using is [sic] freely".

7.27 Officer comment:

If use were with permission, the duration of use is of no relevance. The dates when gates on the route were locked seem to be unclear.

Summary of evidence from the applicant of 2019

7.28 None of the documentary evidence supplied by the applicant provides support for the application.

7.29 It is unclear from communications whether the applicant was using the route as of right, or whether use was with permission, but this matter is discussed in more detail in section 5.

Other submissions (see case file T516)

7.30 Some submissions reported the locking of gates on the route. All such reports were suggesting gates were locked 2012 or later.

7.31 Other submissions concerned matters of convenience, desirability and security and did not contain any evidence which can be taken into consideration.

7.32 Officer comment:

None of the other submissions contain any relevant evidence which has not been considered elsewhere in the report.

8 **Analysis of the evidence**

8.1 There is evidence of use of two claimed routes since 1961. The evidence of use under Section 31 of the Highways Act 1980 and common law is considered below.

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

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

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

Physical nature of the routes

8.3 Both the original route and the new route claimed are capable of being a public right of way at common law, given that they each followed a well-defined, linear route between Ryland's Lane and Sunnyside Road.

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

8.4 The erection of a sign reading "This is not a right of way..." shortly prior to the original application in October 2005 is considered to have brought public use of the route into question. However, it has not been possible to establish an exact date when the sign was erected.

8.5 It is considered that the closure of the original route in Summer 2005 brought public use of the original route into question, giving a relevant period of 1985 - 2005.

- 8.6 Use of the new route was brought into question when the gates were locked in 2010. This does not give a period of 20 years prior to the bringing into question.

Twenty years use without interruption

- 8.7 Based on the documentary and user evidence, it would appear that there was no substantive interruption to public use of the original route during the period 1985 – 2005. The new route has not yet been in existence for 20 years.

Without force, secrecy or permission

- 8.8 Evidence to suggest that either route was used by force only applies to dates after the relevant 20 year period (i.e. during use of the new route)
- 8.9 Use of the original route has been mostly reported to be open but there are some unsubstantiated suggestions that gates were locked occasionally. Prior to 2005 most witnesses using the original route said they were unaware of permission, only one witness described a sign giving permission to use the route during the relevant 20 year period.
- 8.10 There is evidence to suggest that use of the new route has been with a landowner's / lessee's permission since 2005. The applicant of 2019 referred to the route as a "permissive path".

Use by the public

- 8.11 Use must be of a volume that is capable of coming to the attention of the landowner, and should be by sufficient individuals to be considered use by the public at large and not, for example, solely by staff, pupils or visitors to the school.
- 8.12 The evidence put forward in support of the application indicates only limited use by the public during the period 1986 – 2005. Declared use of the original route is not considered to be of sufficient frequency to have been brought to the attention of the landowner. Even when presumed use of the original route is included, it is considered that the frequency of use is insufficient to result in a deemed dedication. This is particularly so given the high frequency of use by legitimate visitors to the school both during school hours, and through letting of the facilities out of school hours, it could have been difficult for the landowner to perceive any further use as public use.

- 8.13 In addition, the number of different users of the route is considered to be too low to constitute 'use by the public at large' for an urban route where users say they were accessing shops, doctors' surgery, health centre and a library.
- 8.14 Use of the new route since 2005 cannot be considered because it was use with permission.

Conclusions under Section 31, Highways Act 1980

- 8.15 It is considered that the requirements of Section 31 have not been satisfied with respect to the original route A – A1 – A4 – B – B1 – C because the level of use was insufficient, bearing in mind the location and the high number of users with private rights. There is conflicting user evidence about whether use was with the permission of the landowner, and whether gates were occasionally locked on the route during the period of consideration.
- 8.16 In addition, it is considered that the requirements of Section 31 have not been satisfied with respect to the new route A – A1 – A2 – A3 – A4 – B – B1 – C because the duration of use was for less than 20 years, and use was with permission.

Analysis of the evidence under common law

- 8.17 This matter can also be considered under common law, where it is the responsibility of the applicant to show that the owners were aware of, and acquiesced in, the use of the path by the public. The users must be able to show that it can be inferred from the conduct of the landowners that they had intended to dedicate the route as a public right of way of the type that has been applied for. This may be by an express act of dedication, or it may be implied by a sufficient period of public use without force, secrecy or permission and the acquiescence of those landowners in that use. This is needed to meet the two requirements for the dedication of a highway – that is dedication and public acceptance of that way by use. The length of time that is required to demonstrate sufficient user is not fixed under common law and depends on the facts of the case. The use must be obvious to the landowners, who may rebut any suggestion of a dedication by acts such as turning people back, putting up a physical barrier or erecting notices stating that the route is not a public right of way of the type being claimed.

Conclusions under common law

8.18 There is insufficient evidence due to the low level of use of the original route from which a deemed dedication at common law can be inferred. From 2005 there is evidence that the landowners did not intend to dedicate the new route.

9 Conclusions

9.1 In deciding whether or not it is appropriate to make an order, it must be considered whether public rights subsist or are reasonably alleged to subsist. There is disagreement between the parties as to whether the test is met in this case, but on balance it is considered that there is insufficient evidence for the “reasonably alleged” test to be met.

9.2 The documentary evidence indicates that the route was not in existence prior to the building of All Saints’ School in approximately 1957.

9.3 The user evidence is insufficient to satisfy a deemed dedication under Section 31 Highways Act 1980.

9.4 The available evidence is also insufficient for a common law presumption to be inferred.

9.5 Therefore, the recommendation is that the application be refused.

Matthew Piles

Corporate Director for Economic Growth and Infrastructure

October 2021

Recommendations accepted following 'minded-to decision' of Strategic Planning Committee on 22 November 2021:

Signed:

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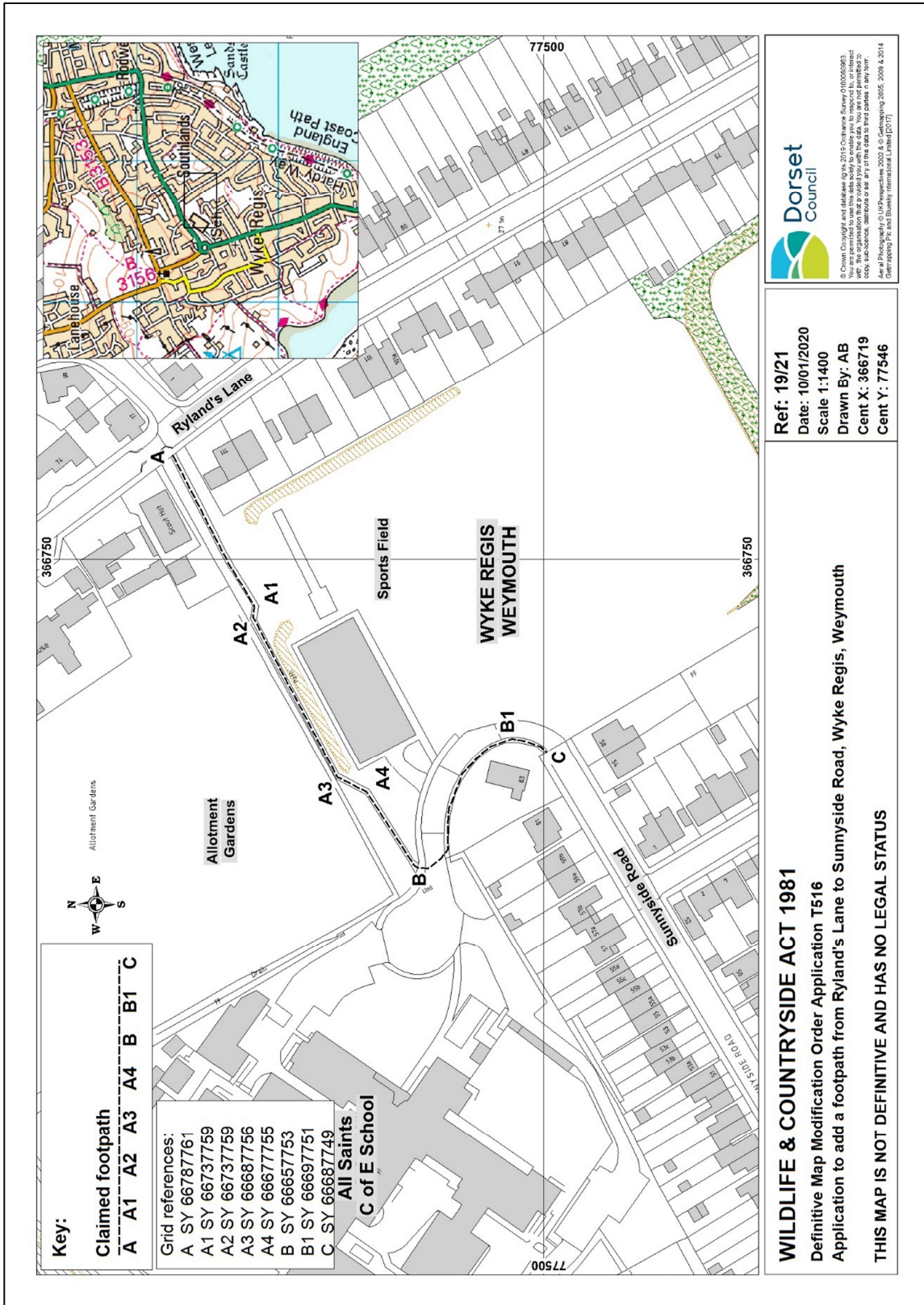
Date:..... 24 November 2021

Hilary Jordan

**Service Manager for Spatial Planning
Economic Growth and Infrastructure**

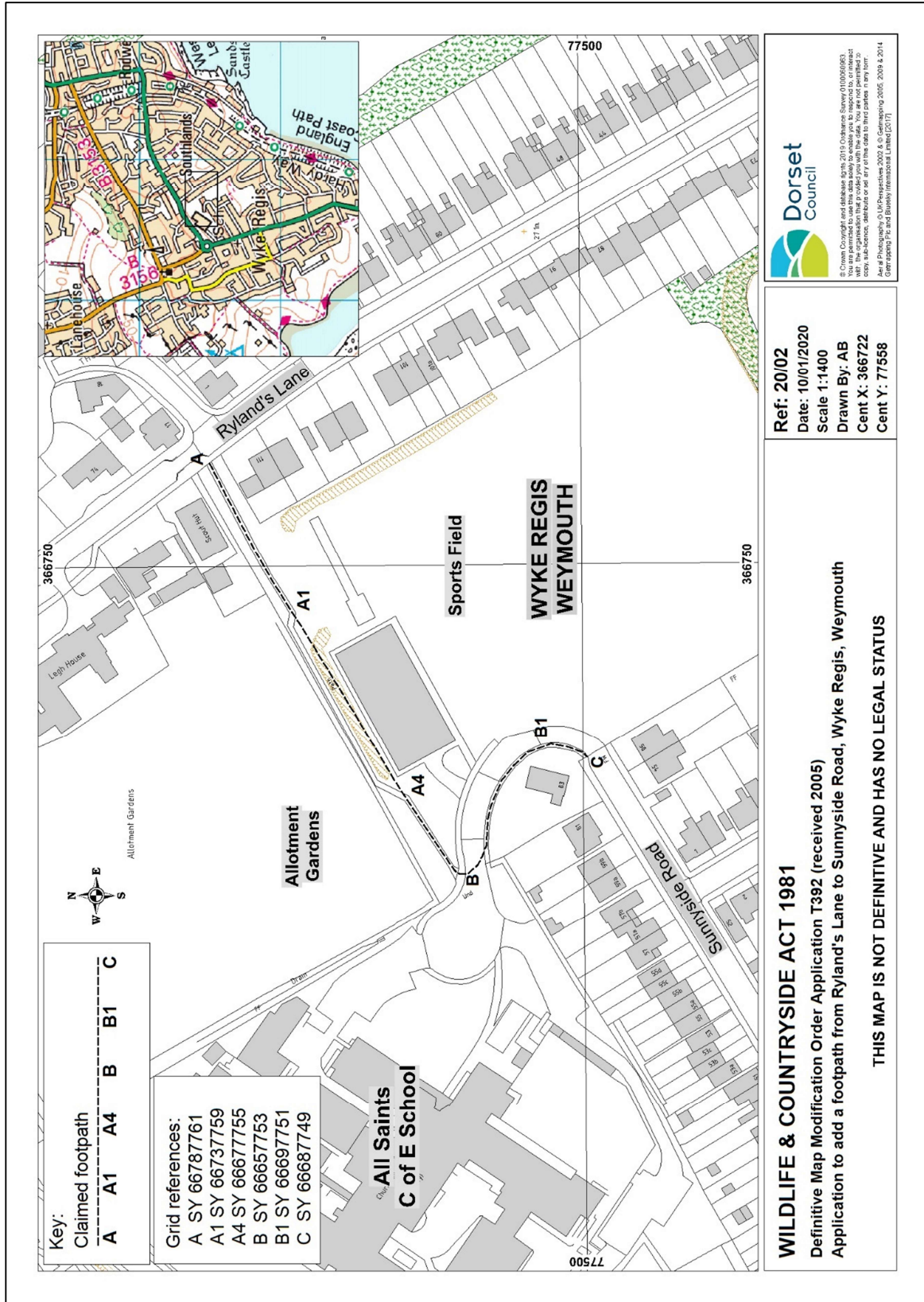
Drawing 19/21 (current application route, T516)

APPENDIX 1a



Drawing 20/02 (old application route, T392)

APPENDIX 1b



LAW**General**Wildlife and Countryside Act 1981

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

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

- 1.8 An order to add a right of way and change the status of an existing right of way as part of the same route should only be made if the balance of the evidence shows that the new route exists and the existing route should be recorded with a different status.
- 1.9 Where an objection has been made to an order, the Council is unable itself to confirm the order but may forward it to the Secretary of State for confirmation. Where there is no objection, the Council can itself confirm the order, provided that the criterion for confirmation is met.
- 2 Highways Act 1980
- 2.1 Section 31 of the Highways Act 1980 says that where a way has been used by the public as of right for a full period of 20 years it is deemed to have been dedicated as highway unless there is sufficient evidence that there was no intention during that period to dedicate it. The 20 year period is counted back from when the right of the public to use the way is brought in to question.
- (a) 'As of right' in this context means without force, without secrecy and without obtaining permission.
 - (b) A right to use a way is brought into question when the public's right to use it is challenged in such a way that they are apprised of the challenge and have a reasonable opportunity of meeting it. This may be by locking a gate or putting up a notice denying the existence of a public right of way.
 - (c) An application under Section 53 (5) of the Wildlife and Countryside Act 1981 for a modification order brings the rights of the public into question. The date of bringing into question will be the date the application is made in accordance with paragraph 1 of Schedule 14 to the 1981 Act.
- 2.2 The common law may be relevant if Section 31 of the Highways Act cannot be applied. The common law test is that the public must have used the route 'as of right' for long enough to have alerted the owner, whoever he may be, that they considered it to be a public right of way and the owner did nothing to tell them that it is not. There is no set time period under the common law.
- 2.3 Section 31(3) of the Highways Act 1980 says that where a land owner has erected a notice inconsistent with the dedication of a highway, which is visible to users of the path, and maintained that notice, this is sufficient to show that he intended not to dedicate the route as a public right of way.

- 2.4 Section 31 (6) of the Highways Act 1980 permits landowners to deposit with the Council a map and statement indicating what ways over the land (if any) he admits to having been dedicated as highways. A statutory declaration can be made at intervals of not more than 20 years stating no additional ways have been dedicated since the date of the deposit. In the absence of proof to the contrary, this is sufficient to establish that no further ways have been dedicated. Prior to the Highways Act 1980 a similar facility was available under the Rights of Way Act 1932 and the Highways Act 1959.
- 2.5 Section 32 of the Highways Act 1980 says that the Council must take into consideration any map, plan or history of the locality. Documents produced by government officials for statutory purposes such as to comply with legislation or for the purpose of taxation, will carry more evidential weight than, for instance, maps produced for tourists.

3 Human Rights Act 1998

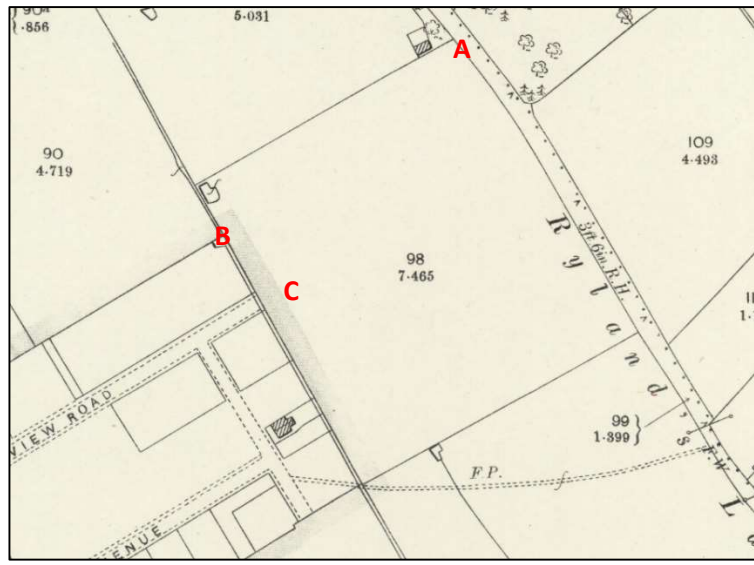
- 3.1 The criteria for definitive map modification orders are strictly limited to matters of fact and evidence. In all cases the evidence will show that the event (section 53) has already taken place. The legislation confers no discretion on a surveying authority or the Secretary of State to consider whether or not a path or way would be suitable for the intended use by the public or cause danger or inconvenience to anyone affected by it. In such situations where the primary legislation offers no scope for personal circumstances to affect the decision on the order, the Planning Inspectorate's recommended approach is to turn away any human rights representations.
- 3.2 A decision confirming an order made under the Wildlife and Countryside Act 1981 would be lawful (under domestic law) as provided by Section 6.2 of the Human Rights Act 1998 even in cases where the Convention was apparently infringed, where it was impossible to interpret the 1981 Act in such a way that it is compatible with the Convention rights (section 3 Human Rights Act 1998).

Case specific law

National Parks and Access to the Countryside Act 1949

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

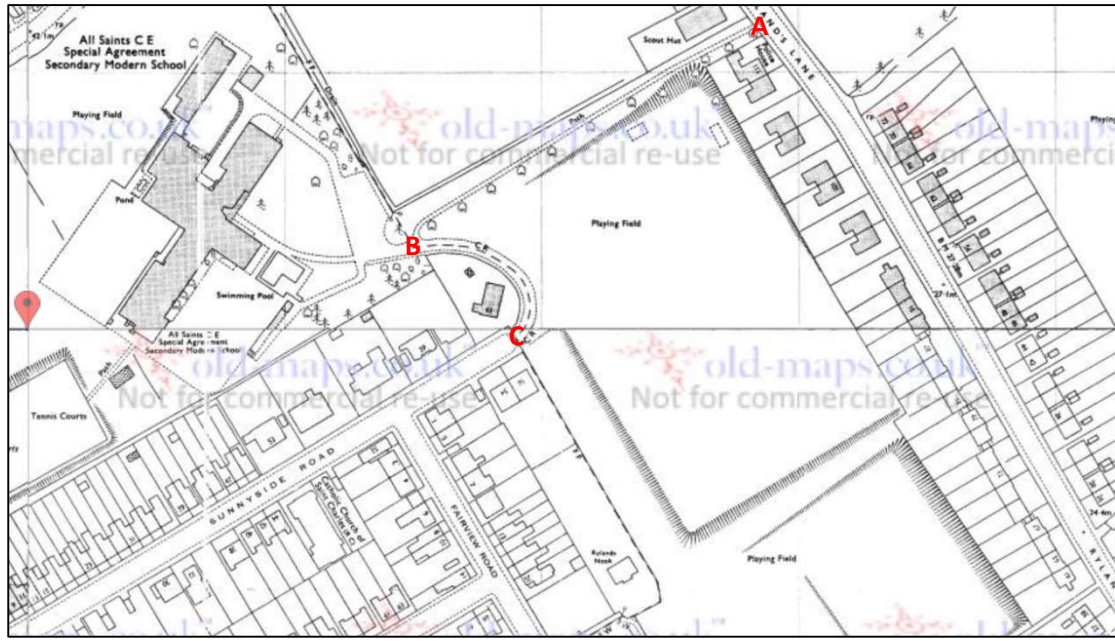
Ordnance Survey Map (1901) at a scale of 1:2500



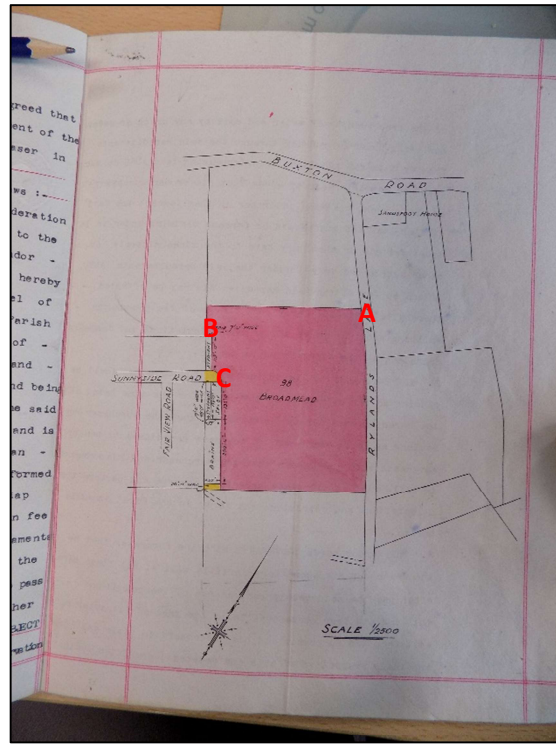
Ordnance Survey Map (1959) at a scale 1:2500



Ordnance Survey Map (1965 – 1973) at a scale of 1:1250



Conveyance document plan (1936)

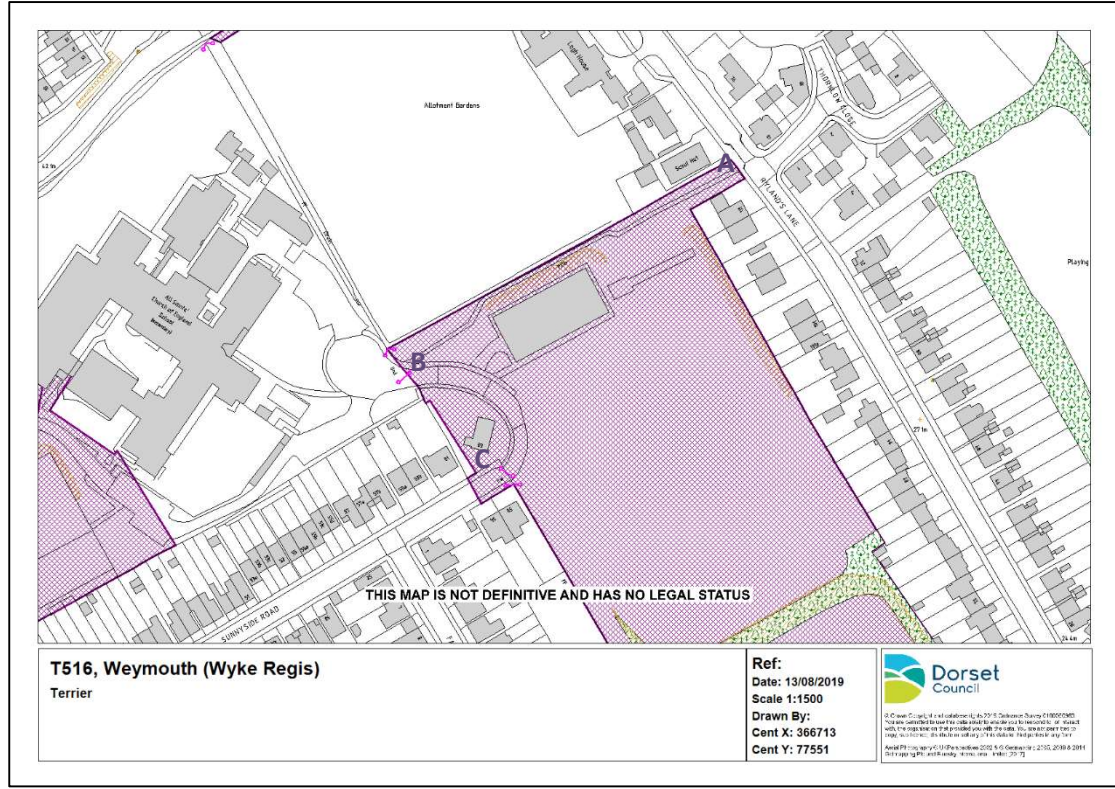


Conveyance Document plan (1949)



Dorset Council Property Services Plan

All Saints' School Playing Field (2019)



Sign at Point B1 photographed in 2005



Aerial Photo (1947)



Aerial photo (1972)



Aerial Photo (2005)



T516, Weymouth
VAP 2005

Ref:
Date: 13/08/2019
Scale 1:1500
Drawn By:
Cent X: 366744
Cent Y: 77544



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Aerial photo (2017)



T516, Weymouth
VAP 2017

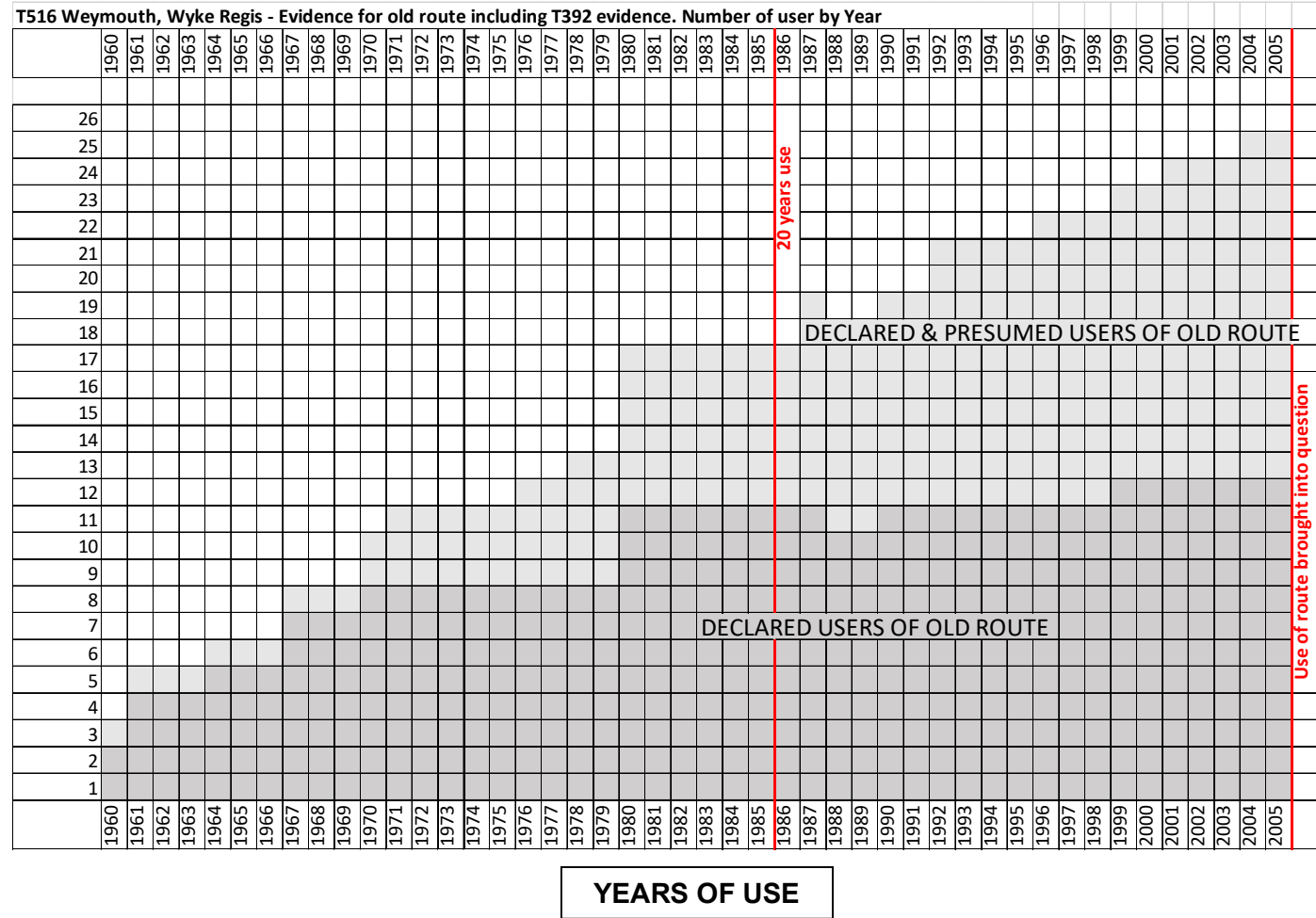
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Date: 13/08/2019
Scale 1:1500
Drawn By:
Cent X: 366744
Cent Y: 77544



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Chart to show level of use of old route

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Frequency of Use of Old Route

T516 Weymouth, Wyke Regis - Evidence for old route including T392 evidence (Declared and Presumed use). Frequency of use by User																																																					
User no	1960	1961	1962	1963	1964	1965	1966	1967	1968	1969	1970	1971	1972	1973	1974	1975	1976	1977	1978	1979	1980	1981	1982	1983	1984	1985	1986	1987	1988	1989	1990	1991	1992	1993	1994	1995	1996	1997	1998	1999	2000	2001	2002	2003	2004	2005							
1												200	200	200	200	200	200	200	200	200	200	200	200	200	200	200	200	200	200	200	200	200	200	200	200	200	200	200	200	200	200	200	200	200	200	200	200						
2																																											200	200	200	200	200	200					
3							150	150	150	150	150	150	150	150	150	150	150	150	150	150	150	150	150	150	150	150	150	150	150	150	150	150	150	150	150	150	150	150	150	150	150	150	150	150	150	150	150	150	150				
4																					50	50	50	50	50	50	50	50	50	50	50	50	50	50	50	50	50	50	50	50	50	50	50	50	50	50	50	50	50	50			
5	40	40	40	40	40	40	40	40	40	40	40	40	40	40	40	40	40	40	40	40	40	40	40	40	40	40	40	40	40	40	40	40	40	40	40	40	40	40	40	40	40	40	40	40	40	40	40	40	40	40			
6											40	40	40	40	40	40	40	40	40	40	40	40	40	40	40	40	40	40	40	40	40	40	40	40	40	40	40	40	40	40	40	40	40	40	40	40	40	40	40	40			
7																																																					
8																																																					
10	50	50	50	50	50	50	50	50	50	50	50	50	50	50	50	50	50	50	50	50	50	50	50	50	50	50	50	50	50	50	50	50	50	50	50	50	50	50	50	50	50	50	50	50	50	50	50	50	50	50			
11																																																					
12																		50	50	50	50	50	50	50	50	50	50	50	50	50	50	50	50	50	50	50	50	50	50	50	50	50	50	50	50	50	50	50	50	50	50	50	
16																					6	6	6	6	6	6	6	6	6	6	6	6	6	6	6	6	6	6	6	6	6	6	6	6	6	6	6	6	6	6	6	6	
17	96	96	96	96	96	96	96	96	96	96	96	96	96	96	96	96	96	96	96	96	96	96	96	96	96	96	96	96	96	96	96	96	96	96	96	96	96	96	96	96	96	96	96	96	96	96	96	96	96	96			
20																																																					
21																																																					
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25				12	12	12	12	12	12	12	12	12	12	12	12	12	12	12	12	12	12	12	12	12	12	12	12	12	12	12	12	12	12	12	12	12	12	12	12	12	12	12	12	12	12	12	12	12	12	12			
26	10	10	10	10	10	10	10	10	10	10	10	10	10	10	10	10	10	10	10	10	10	10	10	10	10	10	10	10	10	10	10	10	10	10	10	10	10	10	10	10	10	10	10	10	10	10	10	10	10	10	10		
27																																																					
29																																																					
30		2	2	2	2	2	2	2	2	2	2	2	2	2	2	2	2	2	2	2	2	2	2	2	2	2	2	2	2	2	2	2	2	2	2	2	2	2	2	2	2	2	2	2	2	2	2	2	2	2			
31																																																					
33																																																					
36																																																					
37																																																					
Total / year	0.4	156																																																			
Mean / day	0.5	198																																																			
Declared use of old route																																																					
Presumed use of old route																																																					
Declared Total / year																																																					
Mean / day																																																					

Use of route brought into question

Duration of Use, New Route

T516 Weymouth, Wyke Regis - Evidence for new route. Durati															
User no	2005	2006	2007	2008	2009	2010	2011	2012	2013	2014	2015	2016	2017	2018	2019
	Declared use of new route, around sports hall														
1															
2															
3															
4															
5															
6															
7															
8															
10															
11															
12															
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18															
19															
20															
21															
23															
24															
25															
26															
27															
35															
36															
37															
Total users	22	22	23	23	23	23	23	13	13	13	14	14	14	14	6

Number of Users, New Route

T516 Weymouth, Wyke Regis - Evidence for new route including. Number of user by Year														
	2006	2007	2008	2009	2010	2011	2012	2013	2014	2015	2016	2017	2018	2019
23														
22														
21														
20														
19														
18														
17														
16														
15														
14														
13														
12														
11														
10														
9														
8														
7														
6														
5														
4														
3														
2														
1														
	2006	2007	2008	2009	2010	2011	2012	2013	2014	2015	2016	2017	2018	2019

Frequency of Use, New Route

T516 Weymouth, Wyke Regis - Evidence for new route. Frequency of use by User																
User no	2006	2007	2008	2009	2010	2011	2012	2013	2014	2015	2016	2017	2018	2019		
1	200	200	200	200	200	200										
2	200	200	200	200	200	200	200	200	200	200	200	200	200	200		
3	150	150	150	150	150	150										
4	50	50	50	50	50	50	50	50	50	50	50	50	50			
5	40	40	40	40	40	40										
6	40	40	40	40	40	40										
7	800	800	800	800	800	800										
8	12	12	12	12	12	12										
10	50	50	50	50	50	50										
11	360	360	360	360	360	360										
12	50	50	50	50	50	50										
16	6	6	6	6	6	6										
17	50	50	50	50	50	50										
18		12	12	12	12	12	12	12	12	12	12	12	12	12		
19												360	360	360		
20	150	150	150	150	150	150	150	150	150	150	150	150	150	150		
21	100	100	100	100	100	100	100	100	100	100	100	100	100	100		
23	150	150	150	150	150	150	150	150	150	150	150	150				
24	12	12	12	12	12	12	12	12	12	12	12	12	12	12		
25	50	50	50	50	50	50	50	50	50	50	50	50	50			
26	50	50	50	50	50	50	50	50	50	50	50	50	50			
27	3	3	3	3	3	3	3	3	3	3	3	3	3	3		
35										100	100	100	100	100		
36	2	2	2	2	2	2	2	2	2	2	2	2	2	2		
37	360	360	360	360	360	360	360	360	360	360	360	360	360	360		
Total / year	2885	2897	2897	2897	2897	2897	1139	1139	1139	1239	1239	1599	1449	1144		
Mean / day	7.9	7.9	7.9	7.9	7.9	7.9	3.1	3.1	3.1	3.4	3.4	4.4	4	3.1		