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## Order Decision

Inquiry opened on 30 November 2016

by **Peter Millman BA**

an Inspector appointed by the Secretary of State for Environment, Food and Rural Affairs

Decision date: 13 December 2016

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### Order Ref: **FPS/B3600/7/110**

- This Order is made under Section 53(2)(b) of the Wildlife and Countryside Act 1981 and is known as The Surrey County Council Footpath No. 604 (Haslemere) Definitive Map Modification Order 2015.
- The Order is dated 4 November 2015 and proposes to modify the Definitive Map and Statement for the area as shown on the Order plan and described in the Order schedule.
- There was one statutory objection outstanding when Surrey County Council submitted the Order to the Secretary of State for Environment, Food and Rural Affairs for confirmation.

**Summary of Decision: I have confirmed the Order.**

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### Procedural matters

1. The one objection to the Order was made by Mr H Robbie and Mr P Warner, owners of the land over which part of the Order route runs. They were represented at the inquiry by Mr D Stedman-Jones of Counsel, and I refer to them below as 'the objectors'.
2. At the inquiry, an application for a full award of costs was made by Mr T Ward of Counsel, on behalf of Surrey County Council, against the objectors. That application is the subject of a separate decision.

### Main issue

3. The main issue is whether the evidence shows that public footpath rights exist over the route shown on the Order plan (copy attached at the end of this decision). The relevant part of the statutory test for confirmation of modification orders is set out in s31 of the Highways Act 1980 ("the 1980 Act"). It reads as follows: *(1) 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 to be deemed to have been dedicated as a highway unless there is sufficient evidence that there was no intention during that period to dedicate it. (2) The period of 20 years referred to in subsection (1) above is to be calculated retrospectively from the date when the right of the public to use the way is brought into question...* In addition, section 31(3) states: *Where the owner of the land over which any such way as aforesaid passes- (a) has erected in such manner as to be visible by persons using the way a notice inconsistent with the dedication of the way as a highway; and (b) has maintained the notice after 1<sup>st</sup> January 1934, or any later date on which it was erected, the notice, in the absence of proof of a contrary intention, is sufficient evidence to negative the intention to dedicate the way as a highway.* The standard of proof is the balance of probabilities.
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4. It is not disputed that the way in question – to which I refer as ‘the Order route’ – was used by the public for a full period of 20 years prior to February 2015, when a fence was erected across it by the objectors (near C on the plan below). The two principal issues are, first, whether any or all of the notices positioned near the path had the effect of rendering public use not to have been ‘as of right’ (see previous paragraph), and, second, whether the same notices, or some of them, demonstrated sufficient evidence (again see previous paragraph) of a lack of intention on the part of one or more of the affected landowners to dedicate a right of way to the public.

## **Reasons**

### ***Background***

5. The Order route is, effectively, a pedestrian short-cut of about 50 metres in length in the centre of Haslemere, between the High Street and College Hill. It leaves the High Street between a branch of Lloyds Bank and a barbers shop. It runs uphill on a tarmac surface over land belonging to Lloyds (A-B on the plan below), then over land belonging to Dove Properties (B-C on the plan below), then over land which has belonged to the objectors since 2014 (C-D) before crossing land in unknown ownership (D-E) which the County Council suggests might be highway land, to reach College Hill. Where the path crosses Lloyds Bank land, it is separated from a car park area by metal bollards on its eastern side. Dove Properties supports the Order. Lloyds Bank does not object to the Order.

### ***Gates and notices***

6. There is an iron gate at A and another at B, at each end of the land in Lloyds’ ownership. There is no significant evidence that either gate has been locked shut across the Order route since the 1960s.
7. There are 4 notices. All are near B. At the inquiry these were referred to as notices 1, 2, 3 and 4. Notices 1, 2 and 3 would have been visible to a pedestrian walking from south to north, but not to one walking south from the High Street unless or until he or she had passed it and looked back. Notice 4, which is in fact two notices immediately adjacent to each other, would not be visible to a pedestrian using the Order route from either direction, unless he or she strayed from it.
8. It is not known who erected notice 1. It is headed PRIVATE PROPERTY, and underneath that are the words, in much larger lettering, PARKING NOTICE. The rest of the notice deals with terms and conditions ‘for car park use’. It is well to the left of a pedestrian walking along the Order route from south to north. Although Mr Spooner, who owned from 2008 to 2014 the small piece of land now owned by the objectors, stated in oral evidence that he had put up a notice on his land reserving a space for his car, he said that he had not erected any of notices 1 to 4, that he was aware that members of the public were using the Order route and that he made no attempt to prevent such use. It did not bother him. His only concern had been to get money from Lloyds for accessing its car park. The objectors did not rely on the wording of notice 1; it is clearly too far from the line of the path to be considered as referring to it.
9. Notices 2 and 3 are on the brick wall either side of the gate at B, and face south. That on the western side of the gate (notice 2) is headed, on a white

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background: **PRIVATE PROPERTY**. Underneath are the following words, some in upper case (punctuation added for ease of reading): 'Unauthorised parking or parking a vehicle in an area or space that has not been designated to you may result in your vehicle receiving a parking charge notice. Enforcement in operation 24 hrs. Permits must be clearly displayed in windscreen at all times. Terms of parking without permission: you do so at your own risk to property and personal injury and you are contractually agreeing to pay a parking charge fee. The following fees apply. Parking charge notice £90 per day or the reduced sum of £60 if payment is made within 14 days. You will incur additional charges resulting from further action being taken against you if the fee remains unpaid. 0845 463 5050. UK Car Park Management Ltd (part of Parking Control Management). All appeals in writing to PO Box 4760 Worthing BN11 9NR.'

10. A supporter of the Order gave evidence that she had discovered that UK Car Park Management Ltd had not existed before 2010. The objectors had not put up notice 2; it was on Lloyds' land. They gave no evidence, however, that in advance of the inquiry they had approached Lloyds or phoned the number given on the notice in an attempt to discover on whose behalf it had been erected.
11. Notice 3, on the eastern side of the gate, is on a green background, and would clearly have been erected by or on behalf of Lloyds. It is headed, in large capital letters: **PRIVATE CAR PARK**, and in smaller letters beneath are the words: 'When you use this car park, you do so at your own risk. Lloyds Bank cannot accept responsibility for any loss or damage to your vehicle, its contents or accessories.'
12. Notice 4, not visible to users of the Order route, since it is to the east of the path and faces east, is also green and in two sections, the upper of which reads: 'This is a private forecourt access prohibited to prevent acquisition of rights of way.' The lower part is in capital letters and reads: 'Private Car Park for Lloyds Bank customers only whilst on banking business, maximum stay 20 minutes.'
13. There are no notices at A, and no evidence that they were ever present was given to the inquiry.

***The statutory test – 'as of right'***

14. Use of a route which is 'as of right' is use which is *nec vi, nec clam, nec precario*; in other words uncontentious, open, and not based on any licence from the owner of the land.
15. The objectors' case was that use of the Order route by the public was, as they put it, 'contentious and/or by permission'.
16. It seems to me that if use was contentious, then it is unlikely that at the same time it could have been by permission; likewise, if it was by permission then it is unlikely, if not impossible, to have been contentious.

***Contentious use***

17. Contentious use may be by force, for example by breaking down a fence, but it is also well-established that use which continues in opposition to a clear indication by a landowner that he does not want it to do so will also be contentious. Patten L J stated, in his judgment in the case of *Taylor v*

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*Betterment Properties (Weymouth) Ltd* [2012] EWCA Civ 250: *If the landowner displays his opposition to the use of his land by erecting a suitably-worded sign which is visible to and is actually seen by the local inhabitants then their subsequent use of the land will not be peaceable.* The issues here are therefore to do with the visibility of the signs and whether their wording would show the opposition of the landowner to public use of the Order route on foot. It is quite clear that in this case notice 1 did not contain suitable wording and that notice 4 was not visible to users of the Order route.

18. In his judgment in the case of *Paterson v Secretary of State for Environment* [2010] EWHC 394 (Admin) Sales J noted that: *how a range of members of the public have in fact understood signs in a particular context may well be a helpful indicator how a reasonable person would interpret a sign in that context.* Signs 2 and 3 therefore need to be considered in their context.
19. The objectors argued that because those signs were placed on either side of the gate at B it would have been clear that they related to use of the Order route. In closing submissions Mr Stedman-Jones stated: *by virtue of their positioning at point B and their clear demarcation of private, as opposed to publicly accessible land, [they] are inconsistent with dedication.*
20. It seems to me that if the intention of Lloyds was to show that use of so much of the Order route as crossed its land was prohibited, then one would expect there to have been, additionally, notices visible to pedestrians at either side of the entrance to the path at A, or perhaps notices on the gates at A and B; the gates at A and B would not have been locked because, even if Lloyds had meant to prohibit the public from using the route it would have needed to keep it open for its customers using the car park. That there were no other notices suggests that notices 2 and 3 were not directed at pedestrians. These notices would have faced car drivers coming into Lloyds' car park. In any event, as one supporter of the Order pointed out in oral evidence, the great majority of public footpaths cross private property.
21. I have already noted (paragraph 10 above) that the objectors had apparently not contacted Lloyds to see if it had any evidence about the message that notices 2 and 3 were intended to convey (if indeed notice 2 was erected by Lloyds).
22. The manager, from 1969 to 1984, of Lloyds Bank in Haslemere, gave oral evidence to the inquiry. During his time as manager, he stated, the gates at A and B had never been locked. It had never been an issue that members of the public used the Order route. Miss Prismall, giving evidence for the County Council, stated that she had been told by the Estates Manager for the Lloyds Banking Group, that he had 'no detailed knowledge, but would speculate that judging by their contents the intention was to prevent unauthorised vehicular access, possibly reflecting an agreement with Woolworth when they owned an adjoining building that their vehicles would not stop on the Lloyds car park when making deliveries'.
23. Thus the surrounding circumstances of the notices, setting aside for the moment their content, does not suggest that they were directed at members of the public on foot.
24. As for the wording of the notices, the most prominent feature of notice 2 is **PARKING NOTICE** and of notice 3 **PRIVATE CAR PARK**. It would hardly be surprising, in my view, if pedestrian users of the Order route had not

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considered that the notices applied to them, if they gave the matter any thought at all. It is likely that few of them did, since the great majority of the 64 people who completed user evidence forms (50 of whom had used the Order route in excess of 20 years) stated that they had seen no notices 'across or beside' the Order route. In his closing submissions for the objectors, Mr Stedman-Jones referred to paragraph 6 of their Statement of Case, which, he said, should be taken as forming part of his submissions. That paragraph states, of notices 1 to 4, *Signs indicating the private nature of the site, including specific reference to the lack of any footpath rights, have been in position on site for many years...* I set out the wording of these notices above at paragraphs 8 to 12. It is to be noted that the word 'footpath' does not occur, nor does any synonym of 'footpath'. The objectors' submissions, therefore, in respect of the wording of notices, are not correct.

25. The objectors themselves took what seemed to me an extremely simplistic view of the wording of the notices, not justified by the relevant case law. Mr Robbie stated in evidence: *As I made clear in my statement to the SCC Southern Area Committee meeting "Private" means "Private" whether for vehicular or pedestrian use. I struggle to see how anyone could understand it as having any other meaning or indeed why people might claim they didn't think it applied to them. They may have wished it didn't but that is another matter entirely.* Mr Warner wrote: *I agree with Hamish Robbie that private means private.*
26. Other people, however, took a different view. One user of the path, who had walked it daily since 1990, except when away from home, wrote in his statement for the inquiry: *At no time was the footpath ever closed or any notice displayed to inform us that we could not use the footpath.* Another witness, who had not prepared any written statement for the inquiry, but lived adjacent to the Order route, was asked in cross-examination whether it was not the case that any reasonable person standing at B would have expected the land beyond to be private because of the notices (2 and 3) on either side of the gate. This witness, whose evidence to my mind was particularly credible because of its spontaneity, replied that he wouldn't even have thought about it, but if he had he would have assumed that the notices referred only to car parking; the word 'enforcement' could only apply to car parking.
27. Despite his view of the word 'Private' (paragraph 25 above) Mr Warner, one of the objectors, stated in oral evidence that he had used the Order route once or twice a year since 1995. He had never sought permission to use it and had done so simply because there was nothing to prevent his use. It seems that he did not think that any notices at B (it is not clear when they were first erected) applied to him.
28. Mr Stedman-Jones, for the objectors, cited the judgment of Foskett J in the case of *R (Burrows) v Worby Estates Sales Ltd* [2014] EWHC 389 (Admin) (to which I had referred the parties in my opening remarks). This case was to do with the registration of land as a town or village green. There was a sign erected at one of the entrances to the land, stating 'PRIVATE PROPERTY Access to this land is by permission of the owners'. The inspector's view that this notice was unambiguously prohibitory was upheld by the Court. It clearly does not follow, I consider, that just because the notice in that case and the notices in this case share the phrase 'private property', that they must be interpreted to have the same effect or carry the same message.

29. The evidence considered in the previous eleven paragraphs suggests very strongly that a common-sense reading of notices 2 and 3 in their context by a reasonable person would give him or her no cause to conclude that use of the Order route was prohibited.
30. I conclude that none of the notices 1 to 4, singly or in combination, taking account of the surrounding circumstances, would have brought home to the reasonable user that walking along the Order route was contentious.

*Permissive use*

31. None of the notices considered above stated explicitly that use of the Order route was by permission. The objectors' case was that use, if not contentious, was by an implied permission which was obvious and necessary on the facts of the case. It was analogous, Mr Stedman-Jones argued, to the situation in *R (Newhaven) v East Sussex CC* [2015] UKSC 7 [which was a case to do with the registration of land (including a beach) as town or village green]. Lord Neuberger, in the Supreme Court, stated: *In this context it is easy to infer that the harbour authority's passive response to the use by the public of the Beach was evidence of an implicit permission so long as such user did not disrupt its harbour activities. This is consistent with our view of the Byelaws which we have discussed above. There has been no user as of right by the public of the Beach that has interfered with the harbour activities.* The objectors argued that the details of sign 2 were significant because they concerned the regulation of the Lloyds car park, which is adjacent to the Order route and separated from it by bollards. The words of these notices, it was argued, were analogous to the words of the bye-laws in the *Newhaven* case. In this case they granted implied permission to pedestrians: *to use the area to the left of the bollards where there is unlikely to be a conflict with vehicles. That consent is reinforced by the fact that the gates at point B are almost always left open.*
32. It seems to me, first of all, that after having argued that the notices rendered the public's use of the Order route contentious, the objectors are in rather a difficult position if they then argue that the notices grant permission. That aside, however, I do not accept their argument. By erecting bollards, Lloyds separated the car park from the footpath, so that if ever the path was part of the car park, then after the mid-1980s (which is when the evidence suggests that the bollards were put in) it ceased to be so. In any event, at paragraph 58 in *Newhaven*, Lord Neuberger explained that it might, as a matter of pure linguistic logic, be possible to interpret a byelaw as implying a permission, but, he continued: *as with any question of interpretation, a strictly logical linguistic analysis of the words concerned cannot prevail over a contextual assessment of what they would naturally convey to an ordinary and reasonable speaker of English.*
33. Mr Stedman-Jones asked one witness in cross-examination whether, when arriving at point B from the south and looking at notices 2 and 3, he would have assumed that the land to the north was private land. The witness answered 'yes'. He was then asked whether it would be a reasonable conclusion that the landowner was permitting him to continue. His reply was 'No, I wouldn't have taken any notice of it because it referred to parking.'
34. It seems to me that in the context of the area around point B, any ordinary and reasonable speaker of English, such as the one cross-examined by Mr Stedman-Jones, would probably have thought (if thought entered into it at all)

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that the notices were concerned with the area in which cars parked, and did not concern the footpath, from which the car park was physically separated.

35. I conclude that use of the Order route by the public was not by permission, express or implied, between 1995 and 2015.

***The statutory test – sufficient evidence of a lack of intention to dedicate***

36. The objectors' case was that the Order could not be confirmed because at all material times the: *actions of the landowners, as well as the circumstances and context of the majority of the site as a private car park, have at all times made it clear that there was no intention to dedicate a footpath.*

37. I noted above (paragraph 5) who owned the land over which the Order route runs. Of these owners, it is only Lloyds which, before the route was blocked in 2015 by the objectors, appears to have taken any action in relation to the use of the land crossed by the path.

38. Much of the evidence which might relate to a lack of intention to dedicate has been discussed already, in the preceding sections of this decision. From that evidence I conclude that none of the notices 1 to 4, on its own, or in combination with others, is sufficient evidence, or even any evidence, of a lack of intention to dedicate public footpath rights on the Order route during the relevant 20 year period.

39. A lack of intention to dedicate, if it is to be sufficient for the purposes of section 31 of the 1980 Act (paragraph 3 above) must be communicated to those members of the public using the route in question.

40. One piece of evidence, not considered above, is this; the current manager of Lloyds Bank in Haslemere, who has been in post for four years, has closed the gate at B (the gate at A has not been able to be closed for many years) on one day a year around Christmas, but not locked it. She was instructed to do so by the Bank's management. She does not know whether this was the practice before she became manager. I do not consider that closing, but not locking, a gate could be sufficient evidence of a lack of intention to dedicate.

41. I also referred, at paragraph 3 above, to section 31(3) of the 1980 Act. It follows, from my conclusions so far, that none of the notices 1 to 4 is, in my view, inconsistent with the dedication of the Order route as a highway of footpath status.

42. I conclude that the evidence is insufficient to show that any owner of the land crossed by the Order route did not intend, during the 20 year period between 1995 and 2015, to dedicate footpath rights over the Order route to the public.

***Conclusions on the statutory test***

43. The two points at issue with regard to the statutory test are, first, whether use of the Order route was 'as of right' and second, whether, if it was, there was sufficient evidence to show that Lloyds Bank did not intend to dedicate public rights of way. I have concluded that use of the Order route was neither contentious nor by permission, and was therefore 'as of right'. I have concluded that there is not sufficient evidence of a lack of intention to dedicate.

**Conclusion**

44. Having regard to these and all other matters raised both at the inquiry and in written representations I conclude that the Order should be confirmed.

**Formal Decision**

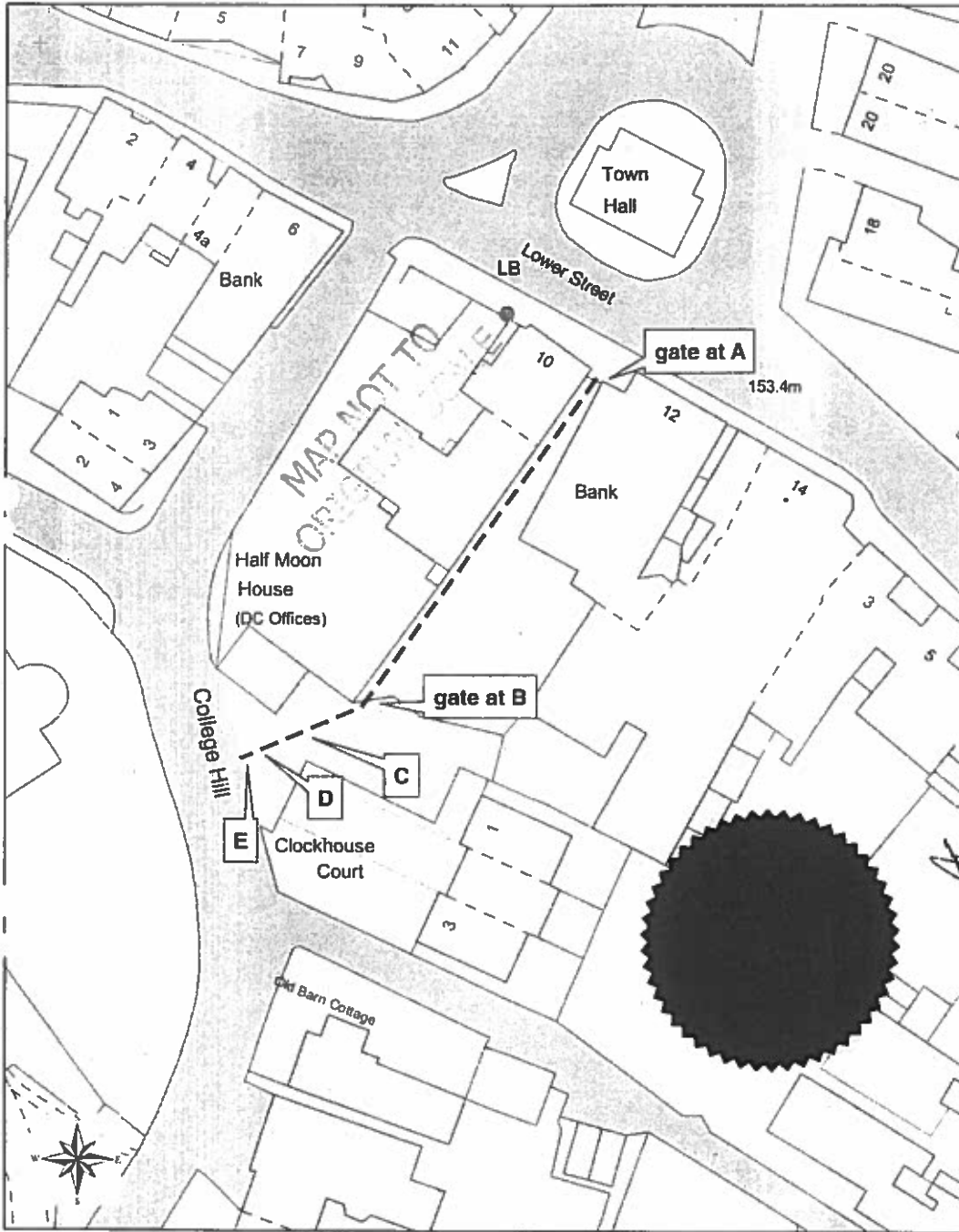
45. I confirm the Order.


*Peter Millman*

**Inspector**



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 <p><b>SURREY</b> COUNTY COUNCIL</p>	<p>Borough of Waverley                  Alleged Public Footpath No. 604, Haslemere                  Distance A - B - C - D - E 52m</p>	<p><b>Rights of Way</b>                  Status                  --- Footpath                  --- Bridleway                  --- Restricted Byway                  --- BOAT</p>
	<p>1:500</p>	

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**APPEARANCES**

**For Surrey County Council**

Mr T Ward	Of Counsel, instructed by Surrey County Council
He called:	
Miss D Prismall	Senior Countryside Access Officer, Surrey County Council
Mr R Serman	Applicant for the Order and President of the Haslemere Society
Mr R Manville	Former manager, Lloyds Bank, Haslemere
Mr C Scholfield	Local resident
Mr M Weston	Local resident
Mrs S Farley	One-time Nursery School Principal
Mr R Bond	Local resident

**Other supporters**

Mr P Moores	Local resident
Mrs A Hall	Chair, Half Moon Estate Residents' Association
Mr T Bennett	Local resident

**Objectors**

Mr D Stedman-Jones	Of Counsel
He called:	
Mr P Spooner	Local resident
Mr P Warner	Property Developer and landowner
Mr H Robbie	Property Developer and landowner

### **Documents handed in at inquiry**

1. Mr Serman's photograph of bollards adjacent to the Order route
2. Extract from Perry's 1814 map of Haslemere
3. Mrs Hall's statement
4. Documents relating to UK Car Parks Ltd
5. Haslemere Town Council's statement
6. Emails between Mr P Warner and Mr T Warrell
7. Mr Stedman-Jones' closing submissions
8. Mr Ward's closing submissions
9. Mr Ward's costs application

