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Dear Mr Hearsurn

Application for a definitive map modification order
The Blue Lagoon Public House, 330 Kingsway, Hove

- 1 Following your letter of 18 March and your further letter of 5 July together with enclosures I have set out in this letter, my client's objection to the application for a definitive map modification order.
- 2 Punch Partnerships (PTL) Limited is the freehold owner of the Blue Lagoon public House ("the Blue Lagoon"). The Blue Lagoon is also currently occupied by Mr and Mrs Kane as tenants pursuant to a lease.

The tests to be applied

- 3 At common law the onus is on the claimant to establish that the landowner dedicated the route as a public right of way. The statutory test is that the onus is on the landowner to show that he had no intention to dedicate.
- 4 In order for there to be an inferred dedication at common law or deemed dedication under the Highway Act 1980, the user must be as of right. This means that the user must be without force, secrecy or permission.
- 5 The requirement of user as of right was summed up by Lord Blackburn in Mann v Brodie

"where there has been evidence of a user by the public so long and in such a manner that the owner of the field, whoever he was, must have been aware that the public were acting under the belief that the way had been dedicated and has taken no steps to disabuse them of this belief, it is not conclusive evidence, but evidence on which those who have to find a fact may find that there was a dedication by the owner whoever he was".

- 6 The subjective belief of the users themselves is immaterial.
- 7 A landowner must have an intention to dedicate a right of way over his land. Public user may be evidence from which that intention may be inferred. However mere use does not create the highway, dedication is required.
- 8 The courts have in some instances refused to imply dedication where they can find that the use has been as a result of the tolerance of land owners:

"it is the wise policy of the law not to construe acts of charity, though continued and repeated for never so many years, in such a manner as to make them the foundation of legal obligations" (Heath H in *Steel v Houghton* (1788) 126 ER 32).
- 9 Where there is a claim that a public right of way has been dedicated, it is for the claimant to prove that it can be inferred by the landowner's conduct that he had actually dedicated the route as a public right of way. User as of right is not of itself necessarily sufficient. It is still possible that the use was due to the landowner's tolerance rather than his intention to dedicate the route.
- 10 A landowner or a tenant may prevent a right of way being established across his land. He can put up physical barriers, erect notices indicating that the route is private. In *Poole v Huskinson*, Park B said:

"A single act of interruption by a landowner is of much more weight, upon the question of intention, than many acts of enjoyment".
- 11 Gates put across a route may indicate that the landowner has no intention to dedicate a right of way.
- 12 In *R v Secretary of State ex parte Dorset County Council* [2000] JPL 396, a landowner's objection to the revision of the definitive map made to the Department of the Environment was sufficient evidence even though the public were unaware of the objection. In *R (Godmanchester Town Council) v Secretary of State for the Environment Food and Rural Affairs and Cambridge County Council*, it was held that it was sufficient if this lack of intention was shown for part of the 20 year period [2007] UKHL 28.
- 13 A right of way can be established if there has been 20 years' use of the way over land by the public as of right, without interruption, unless the landowner can show that during that period there was no intention to dedicate. This is not a free standing period of twenty years. The period is calculated retrospectively from the date when the right of the public to use the way is brought into question.

Applicant's evidence

- 14 The letter marked 1 which you sent on 5 July includes a great deal of speculation as to the historical use of the claimed right of way. Paragraph A of that letter makes this clear where the applicant states that 'I have it on good authority' that a sign was put up in the 1920s stating that there was a right of access. The only aspect of this letter which contains any evidence of use is that the respondent claims to have used the route since 1977. The respondent does not expand on the time of day when the route is used, or whether that is without challenge. I note however that the applicant states that he used the public house facilities. The route was therefore used as an access and egress to and from the public house, not as a public right of way.

- 15 The years during which Document 4's respondent claims to have lived in the area do not make sense. The answer to question 8 also relates to alleged use by others not by the responded.
- 16 Document 5's respondent states that they use the route 'infrequently now'. It is impossible to know how regularly this may be and since when the use has been infrequent.
- 17 Document 6's respondent states that gates were erected in recent months. They were in fact erected in 2008. The response is unreliable due to its inaccuracy.
- 18 Document 7's respondent states in relation to question 5 that they have used the route '4-6 time a year now' and 'about once a month'. It is impossible to understand from this response what the frequency of use may be. Consequently this evidence is unreliable. The answer to question 24 is also vague. The respondent could not possibly know the route to be used 'most of the time' given the infrequency of their use and the acknowledgement that the gates were locked on occasions.
- 19 Document 8's respondent states in relation to question 5 that they do not use the route in winter months. This time period is not defined.
- 20 Document 9's respondent only claims to have used the route for 8 years. In response to question 8 they state that no restrictions applied to the use. However they also acknowledge that the gates are padlocked. This is contradictory. In response to question 27 it is clear that the respondent believes that the land belongs to my client.
- 21 Document 10's respondent only claims to have used the route 'very occasionally until 2005'. It is impossible to know how frequently this may be. The only regular use is claimed for a period of 6 years. The respondent's answer to question 7 and 8 contradict the answer to question 18. The answer to question 24 makes no clear statement as to frequency or times of use.
- 22 Document 11's respondent does not claim to have used the route with any frequency (answer to question 5).
- 23 Document 12's respondent claims in response to question 24 that the route is in 'constant use' but cannot possibly support such a statement. In any event they acknowledge in their answer to question 18 that the gates were put up which would have prevented regular use of the route. The answer to question 27 also indicates knowledge that the land across which the route runs belongs or is within the control of my client.
- 24 Document 13's respondent only claims to have used the route in summer months, but does not define this time period. The response to question 18 makes it clear that the respondent understands that the land either belongs to or is within the control of my client and that access is strictly controlled.
- 25 Document 14's respondent acknowledges that gates have been erected, but also states in response to question 24 that the route is used all of the time. This is contradictory and the respondent cannot possibly know that the use is at 'all times'.
- 26 Document 15's respondent refers in response to question 14 that they assume that the 'pub has some rights'. It is clear that the respondent has some doubt over the extent to which they may be entitled to use the route. Also the response to question 27 makes it clear that they believe that my client has responsibility for maintenance.

- 27 Document 16's respondent states in response to question 24 that the route is used 'all of the time'. They cannot possibly know this to be the case. They also acknowledge in question 18 that there are gates which restrict access, contradicting their answer to question 24. The respondent's answer to 'other comments' also makes clear that members of the public do not believe that the route is available for use by the public, and that it is in fact restricted by the closure of the gates.
- 28 Document 19's respondent is vague in terms of the response to question 5. It is not possible to understand the frequency of use. They do not appear to use the route in the spring or autumn. The respondent also states in response to question 24 that the route is 'always open to the public' which is not the case as the gates are frequently locked.
- 29 Document 20's respondent states in response to question 24 that they see 'tens/hundreds' of people using the route each day. It is highly unlikely that they would witness such numbers, particularly in light of the gates and fence having been erected.
- 30 Document 22's respondent states in relation to question 8 and 24 that the route is used 'constantly'. They cannot possibly know this to be the case, and this is contradicted by the answer to question 18 where they acknowledge that the gate and fence have been erected preventing access.
- 31 Document 23's respondent confirms in response to question 17 that a sign was put up stating that there was no way through the grounds of the public house. They also confirm that the route was obstructed. The respondent's answer to question 22 also makes it clear that they were aware that the route was not a public right of way.
- 32 Document 24's respondent does not make clear in response to question 5 what the frequency of use was or how often they were in the area so little weight can be given to this evidence.
- 33 Document 27's respondent acknowledges in response to question 17 that access was prevented by the erection of the fence and gates. They also state in response to 'other comments' that a patio has been built which obstructs the route and prevents access, clearly recognising that this is land within my client's ownership and control and land which is used in conjunction with the use of the public house, not as a public right of way.
- 34 Document 28's respondent only claims to have used the route 2 or 3 times a year and that they have not used the route since 2000. The respondent's evidence as to use as a public right of way is therefore unreliable.
- 35 Document 31's respondent acknowledges in response to question 18 that access is now obstructed. The respondent also acknowledges in response to question 21 that their belief that the route was a public right of way followed being misinformed by a local councillor.
- 36 Document 33's respondent gives no clear indication in response to question 5 as to the frequency of use.

Freeholder's evidence

- 37 The key time period is the 20 years preceding the date on which the route was called into questions. At the time that the application was made, the use of the route had been definitively restricted by the erection of a boundary fence and gates at the northern and southern entrances to the route and around the eastern boundary in 2008. Until this

time any use by members of the public had been by tolerance of my client, the previous owners and lessees.

- 38 The steps leading down to the lower ground level are clearly constructed in the same materials as the public house and form part of a single structure. The beer garden in front of the entrance to the public house at the lower ground level is also clearly part of a single physical planning unit, the curtilage of which is defined by the grass bank to the east.
- 39 My client, the lessee and previous owners have tolerated members of the public walking across the beer garden area as this would be a means of access for patrons and passing trade. My client together with the current lessee are no longer willing to tolerate members of the public using the route and they took action in the summer of 2008 to prevent access to the beer garden by the erection of a fence and gates at the northern and southern ends of the route.
- 40 My client and the lessee's tolerance of the use in no way indicates an intention to dedicate the route as a public right of way. In addition to this members of the public will have been fully aware that they were using the access to the public house's lower ground floor and will have been aware that they were crossing the beer garden. When considered objectively any reasonable person would have been aware that they were entering on to the public house land and were within the curtilage of the public house. The subjective belief of the users is immaterial.
- 41 The pavement to the south of the public house is part of the adopted highway. My client is not aware as to whose decision it was to lower the kerb. This is irrelevant in terms of my client's and the lessee's tolerance of the use of the route by the public.
- 42 The beer garden has been closed to the patrons and the public on numerous occasions when private functions have been held in the beer garden, particularly when marquees have been erected. The gates are closed during closing hours and are left open solely for use by patrons. Any person entering on the land, measured objectively would know that they were entering onto private property. It would be highly irregular for a public path or public land to be enclosed by a fence and gate in the manner in which the public house has been enclosed.
- 43 It cannot be inferred from my client's use or the lessee's use or previous owners' use of the land over which the route runs that there has ever been an intention to dedicate. The tolerance of the use by the public can be described as nothing more than an act of charity, and has been done with sound commercial reasoning, being that this is the main access for patrons and it is difficult to distinguish between potential patrons and those who are taking advantage of the unusual physical layout of the site.
- 44 Any use which may have been ongoing was interrupted by the erection of the fence and gates. The applicant has provided no evidence that there was ever an intention to dedicate, and my client and its lessee have rebutted any statutory presumption by the erection of the fence and gates and the use of the beer garden for private functions. This use would not be consistent with the intention to dedicate the route as a public right of way.
- 45 The evidence provided by respondents is often vague, but acknowledges in most cases that the use ceased in 2008 by the obstruction of the route with gates and a fence. One respondent confirms that a member of staff informed them that the route was not a public right of way, another confirms that a sign was put up stating that there was no access to the public. Most respondents claim to have understood that the route was a

right of way based on anecdotal evidence by other members of the public. They did not assess the matter for themselves.