

# Licensing Panel AGENDA

**DATE:** Wednesday 30 May 2012

**TIME:** 6.30 pm \*

**VENUE:** Committee Room 5,  
Harrow Civic Centre

\* THERE WILL BE A BRIEFING FOR MEMBERS AT 6.00 PM IN COMMITTEE ROOM 3

## **MEMBERSHIP** (Quorum 3)

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**Chairman:** (To be appointed)

**Councillors:**

Mrinal Choudhury  
Ajay Maru

John Nickolay

## **Reserve Members:**

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**Note:** There are no Reserve Members currently appointed to this Panel.

**Contact:** Manize Talukdar, Democratic Services Officer  
Tel: 020 8424 1323 E-mail: [manize.talukdar@harrow.gov.uk](mailto:manize.talukdar@harrow.gov.uk)

## **AGENDA - PART I**

### **1. APPOINTMENT OF CHAIRMAN**

To appoint a Chairman for the purposes of this meeting.

### **2. DECLARATIONS OF INTEREST**

To receive declarations of personal or prejudicial interests, arising from business to be transacted at this meeting, from:

- (a) all Members of the Committee, Sub Committee, Panel or Forum;
- (b) all other Members present in any part of the room or chamber.

### **3. MINUTES**

[Note: Licensing Panel minutes are:-

- (1) approved following each meeting by the Members serving on that particular occasion and signed as a correct record by the Chairman for that meeting;
- (2) not submitted to the next panel meeting for approval.

Reasons: The Licensing Panel is constituted from a pooled membership. Consequently, a subsequent Panel meeting is likely to comprise a different Chairman and Members who took no part in the previous meeting's proceedings. The process referred to at (1) above provides appropriate approval scrutiny].

### **4. PUBLIC QUESTIONS, PETITIONS AND DEPUTATIONS**

To receive any questions, petitions or deputations (if any), under the provisions of Committee Procedure Rules 17, 15 and 16 (Part 4B) of the Constitution respectively.

*[Note: These items are qualified by the requirements of the licensing legislation and will not be applicable to applications on the current agenda.]*

### **5. ANY OTHER URGENT BUSINESS**

Which cannot otherwise be dealt with.

### **6. HARROW SCHOOL: PUBLIC FOOTPATHS APPLICATION (Pages 1 - 30)**

Report of the Divisional Director Environmental Services.

## **AGENDA - PART II - NIL**

## REPORT FOR: **LICENSING PANEL**

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<b>Date of Meeting:</b>	30 May 2012
<b>Subject:</b>	Harrow School – public footpaths application
<b>Responsible Officer:</b>	John Edwards, Divisional Director Environmental Services
<b>Exempt:</b>	No
<b>Enclosures:</b>	Appendix 1 – Application Letter from Harrow School Appendix 2 – Drawing showing the existing footpaths and the proposed diversion <b>(Hard copies of Appendix 2 available on request from the clerk)</b>

### Section 1 – Summary

This report sets out an application from Harrow School (Appendix 1) to divert public footpaths 57 and 58 and create a new footpath located on the school playing fields and seeks authority to commence the statutory process for diverting and creating the proposed footpaths (shown at Appendix 2) under sections 119 and 26 of the Highways Act 1980.

#### Recommendations:

The Panel is requested to:

1. Note the application received from Harrow School;
2. Authorise the Director of Legal and Governance Services, in consultation with the Divisional Director of Environmental Services to:
  - carry out an informal consultation with key interest groups on the proposed diversion of footpaths 57 and 58 (“the Diversion Orders”) and the creation of the new footpath (“the Creation Order”) shown on Appendix 2;
  - make the Diversion Orders and the Creation Order subject to consideration of any representations received during the

informal consultation exercise;

- carry out a minimum four week formal public consultation on the Diversion Orders and the Creation Orders when the orders are made;
- confirm the Diversion Orders and the Creation Order if no objections are received to the orders (or if objections received are withdrawn) following the formal public consultation;
- submit the Diversion Orders and the Creation Order to the Secretary of State if objections are made to the orders which are not withdrawn following the formal public consultation.

**Reason: (For recommendation)**

The proposed diversion of footpath 57 and 58 and the creation of the new footpath will provide improved, clear and unobstructed routes for use by the public around the playing fields at Harrow School, which will resolve the conflict between the public's use of the footpath and the School's use of the existing sports pitches.

## **Section 2 – Report**

### **Background**

- 2.1 In 2001 Harrow School submitted a planning application for new sports facilities to be constructed on the school playing fields. The application for two all weather pitches and twelve tennis courts was approved and subsequently constructed. The facilities encroach upon the current line of footpath 57 (as shown in the Council's definitive map) which runs in between the two all weather pitches and crosses the tennis courts. The line of footpath 58 as shown on the definitive map also crosses several of the grass sports pitches. No formal diversion of the footpaths was undertaken thus creating a conflict between the public's use of these footpaths and the School's use of its sports facilities.
- 2.2 In 2003, following discussions between the Council and the School, a permissive footpath agreement was entered into by the Council and the School which permitted the public to use some alternative routes around the sports facilities. The agreement did not, however, take away the right of the public to use the existing right of way as shown on the Definitive Map.
- 2.3 When the permissive footpath was introduced the gates to the enclosure around the all weather pitches was locked thus denying the public access to this part of footpath 57. The Ramblers organisation protested against the locking of the gates and demanded that they be reopened in 2003 and more recently in 2011. In both cases the Council wrote to the school requesting that the gates be unlocked.

## **Current position**

- 2.4 A meeting between the School and the Ramblers and the Council was organised on 7<sup>th</sup> March 2012 to discuss the options available to see if it was possible to resolve this issue amicably without the necessity of legal action which could involve huge costs to all parties. At the meeting the school presented a proposal to divert footpaths 57 and 58 and create a new footpath as a solution to the encroachment upon the current line of footpath 57. The proposal lengthens the routes of both footpaths 57 and 58 but the distances are not excessive. An additional footpath is also created which would improve connectivity between the footpaths and would provide an overall improvement to public access around the playing fields. The School agreed to open the gates on an unconditional basis and the gates remain open at the time of writing this report.
- 2.5 The School has now submitted a formal application to the Council under sections 26 and 119 of the Highways Act 1980 dated 19<sup>th</sup> March 2012 (Appendix 1) to divert footpaths 57 and 58 and create a new public footpath. A plan setting out the proposals can be found at Appendix 2.
- 2.6 Authority is, therefore, sought from the Panel for officers to commence the statutory process for diverting footpaths 57 and 58 and creating the proposed new footpath.

## **Legal Comments**

- 2.7 The Council has powers under the Highways Act 1980 (“the Act”) to divert existing footpaths and to create new footpaths.
- 2.8 Before making and/or confirming the Diversion Orders requested by the School, the Council must be satisfied that:
- it is expedient in the interests of the School (as owner and occupier) or of the public that footpaths 57 and 58 be diverted
  - the proposed lines of diversion will not be substantially less convenient to the public
  - the diversion will have a positive effect on the public’s enjoyment of the footpaths as a whole.
- 2.9 The Council must also be satisfied that the new footpath to be created will add to the convenience or enjoyment of a substantial section of the public (or to the convenience of persons resident in the area) before making the Creation Order.
- 2.10 The procedures for the making of the Diversion Orders and Creation Order are set out in Schedule 6 of the Highways Act 1980 and can be summarised as follows:

- The Council must give notice of the Diversion Orders and Creation Order to every owner, occupier and lessee of the land, all statutory consultees and such other persons as the Council considers appropriate
- The Council must publish a copy of the notice in a local newspaper circulating in the area and in the London Gazette and display a copy of the notice in prominent positions at the land and at the Council offices
- If no objections are received to the Diversion Orders or Creation order following the consultation period (or any objections made are withdrawn), the Council may proceed to confirm the Diversion Orders and the Creation Order.
- If, however, objections are received which are not withdrawn, the Council must submit the Diversion Orders and the Creation Order to the Secretary of State who may decide to hold a public inquiry to determine the objections.

## Finance

- 2.11 Harrow School has undertaken to pay for the drafting, advertising and making of the Diversion Orders and Creation order. If a public inquiry is held to consider any objections, the School will also be responsible for any legal costs to be incurred. Therefore there will be no costs incurred by the Council.

## Risk

If the Diversion Orders are not made the line of footpath 57 will continue to be encroached by the School's pitches causing further conflict between the School and users of the footpath.

## Section 3 - Statutory Officer Clearance

Name: Kanta Hirani	<input checked="" type="checkbox"/>	on behalf of the Chief Financial Officer
Date: 16 May 2012		
Name: Abiodun Kolawole	<input checked="" type="checkbox"/>	on behalf of the Monitoring Officer
Date: 9 May 2012		

## **Section 4 - Contact Details and Background Papers**

### **Contact:**

David Eaglesham, Service Manager – Traffic & Highway Network Management

Tel: 020 8424 1500

Fax: 020 8424 7622

email: david.eaglesham@harrow.gov.uk

**Background Papers:** None

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D Eaglesham Esq  
Traffic and Highway Network Management  
Harrow Council  
PO Box 39  
Civic Centre  
Station Road  
Harrow  
Middlesex HA1 2XA

19 March 2012

Our Ref ASR/GEP/4664.322/AS  
Your Ref

Dear Sirs

**Harrow School Playing Fields - Highways Act 1980  
Application for Public Path Diversion Orders in respect of London Borough of Harrow Footpath  
Number 57 and London Borough of Harrow Footpath Number 58 and Public Path Creation Order**

Applications under sections 26 and 119 Highways Act 1980

We refer to the meeting held at the School on 7 March 2012, when officers of the Mayor and Burgesses of the London Borough of Harrow ("the Council") and Graham Wright (Footpath Checker for the Ramblers in the London Borough of Harrow) were able to discuss the School's draft applications as provided in advance of the meeting.

The School indicated at the meeting that it was eager to submit the applications as soon as possible, but that it would consider any comments and suggestions as to the same.

It is now 12 days since the meeting. The School is pleased to note that since the meeting there have been no adverse comments from the Council or from the Ramblers in terms of its proposed applications.

In the circumstances, the School hereby formally submits:

- (a) An application for a public path creation order under section 26 of the Highways Act 1980; and
- (b) Two applications for public path diversion orders under section 119 of the Highways Act 1980 with respect to part of the current lines of the London Borough of Harrow Footpath Number 57 and the London Borough of Harrow Public Footpath Number 58, together with requisite extinguishment of part of the current line of those footpaths.

The detailed applications are enclosed herewith. They are supported by two plans (Harrow School Sports East: Proposed diversion of nos. 57 & 58 Public Footpaths and creation of new public footpath (29 February 2012) and the Width Plan). The applications are also supported by the enclosed Joint Opinion of John Steel QC and Stephen Whale, dated 19 March 2012.

### Permissive Footpath Agreement ("PFA")

The School explained at the meeting on 7 March 2012 that in-depth discussions had taken place with the Council and the Ramblers Association before the tennis courts and the Astro turf pitches had been installed and that all parties had agreed at the time that the route of the permissive footpaths was the best option. Mr Wright indicated that he did not believe this was the case. Mr Wright's belief is misplaced, as the enclosed documentation makes clear.

We enclose herewith a letter from the Council to the School, dated 27 September 2000, copied to Bob Dunn of the Ramblers Association. The letter refers to Mr Dunn's suggestion of an alternative route around the grass sports pitches, and it encloses a copy of Mr Dunn's plan showing the proposed alternative route. The letter also invites the School's comments on whether it would be prepared to enter into a legal agreement creating a "permissive route" along the line suggested by Mr Dunn. It is clear from this letter that the proposal for an alternative route was originally a proposal of the Ramblers Association adopted by the Council.

The discussions which followed embraced more than Mr Dunn's original proposed alternative route. On 2 July 2002, Mr Dunn called the School regarding the School's proposal for an alternative, permissive, route in respect of the public footpath between Football Lane and the farm. Mr Dunn explained that he had discussed this proposal with other senior members of the Ramblers Association. He added that the route (i.e. London Borough of Harrow Footpath Number 57) is described as "undefined" [in the definitive statement] and that therefore the Ramblers Association had "no problem" with the School's suggested permissive route.

A File Note as to this conversation is enclosed.

It is therefore clear that there was indeed the in-depth discussion and agreement referred to at the meeting on 7 March 2012 prior to the execution of the PFA on 23 May 2003.

The plan attached to the PFA (Drawing Number 100-0211/101b) notes that the existing paths 1 and 2 (i.e. the London Borough of Harrow Footpath Number 57 and the London Borough of Harrow Public Footpath Number 58) are "undefined" between points A-C and A-B, respectively.

Pursuant to clause 1 of the PFA, the School granted the public permission to walk along the "permissive footpaths" (as defined in the PFA) until such time as it decided to close the said permissive footpaths to the public, which decision to be communicated to the Council by not less than 6 months notice in writing. The provisions as to alteration of the permissive footpaths do not in the present circumstances apply.

In accordance with clause 1 of the PFA, the School hereby gives the Council written notice of the closure of the permissive footpaths, as defined in the PFA, together with written notice of the termination of the PFA. This closure and termination will take simultaneous effect at 0001 hours on 24 September 2012. Please provide written acknowledgement of the same.

This closure and termination is part and parcel of the School's applications. We refer to the detail of the applications in this regard.

### Astro turf gates

One of the issues discussed at the meeting on 7 March 2012 was the locking of the gates between the Astro turf pitches.

The gates between the Astro turf pitches were unlocked on 15 March 2012, albeit strictly without prejudice to the School's position that it does not need to do so and that it has not committed any offence under section 137 of the Highways Act 1980.

#### Nature conservation

The School's applications refer to, amongst other things, the fact that the proposed diverted London Borough of Harrow Public Footpath Number 58 will clearly be more enjoyable to the public than the existing route including in terms of cover, features and biodiversity interest. You will no doubt be pleased to learn that the School has already taken active steps to improve the environment of the stream alongside the proposed diverted route including from the perspective of nature conservation and biodiversity.

#### Charges

The School is aware that the Council has power to charge in respect of the making and confirmation of public path orders, including where the owner of land requests an authority to make a public path order under sections 26 and 119 of the Highways Act 1980 (Local Authorities (Recovery of Costs for Public Path Orders) Regulations 1993, as amended). The School undertakes to pay any charges properly payable in connection with its applications. We would be grateful if you would please provide us with a copy of the Council's published scale of charges, and inform us of the maximum charge for the applications, in accordance with paragraph 5.35 of DEFRA Circular 01/2009.

#### Conclusion

We look forward to receipt of the acknowledgement sought regarding the PFA, and to the making and confirmation of the orders sought in due course.

Yours faithfully

*Pemberton Greenish LLP*

**Pemberton Greenish LLP**

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**IN THE MATTER OF THE HIGHWAYS ACT 1980 (“THE ACT”)**

**AND IN THE MATTER OF APPLICATIONS BY THE KEEPERS AND GOVERNORS OF THE POSSESSIONS REVENUES AND GOODS OF THE FREE GRAMMAR SCHOOL OF JOHN LYON (“THE SCHOOL”) TO THE MAYOR AND BURGESSES OF THE LONDON BOROUGH OF HARROW (“THE COUNCIL”) FOR TWO PUBLIC PATH DIVERSION ORDERS AND A PUBLIC PATH CREATION ORDER**

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**PUBLIC PATH APPLICATIONS**

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Introduction

1. The School hereby applies to the Council for public path diversion orders under section 119 of the Act with respect to part of the lines of the London Borough of Harrow Footpath Number 57 (“Footpath 57”) and the London Borough of Harrow Footpath Number 58 (“Footpath 58”), together with requisite extinguishment of part of the current line of those Footpaths, and it further applies for a public path creation order under section 26 of the Act to create a footpath. The existing, diverted and created footpaths are shown on the attached plan (“Harrow School Sports East: Proposed diversion of nos. 57 & 58 Public Footpaths and creation of new public footpath, 29 February 2012”).

## Background

2. The School has owned and occupied the subject land at Harrow-on-the Hill since before 1900.
3. The School's facilities include a range of grass sports pitches, tennis courts and Astro turf pitches and which are all used throughout the year. Some of these facilities were constructed pursuant to a planning permission granted on 23 April 2003 after consultation with the Council's rights of way officers and the Ramblers' Association. They are very well used for formal and informal sports and recreation by pupils and staff at the School, by pupils from other schools including those in the local community, by local clubs (including the Harrow Lawn Tennis Club), by Summer School participants (from the UK and overseas) and by large numbers of spectators watching matches taking place on these facilities.
4. The line of Footpath 57 as shown on the definitive map crosses several of the tennis courts and the viewing area directly between two Astro turf pitches, although the route is described in the definitive statement as an undefined route. Use of this part of the footpath by the public is obviously incompatible with use of the tennis courts and the Astro turf viewing area, with significant health and safety and inconvenience implications for public footpath users, pupils, staff and spectators.
5. The line of Footpath 58 as shown on the definitive map crosses several of the grass sports pitches, although the route is described in the definitive statement as an undefined route. Use of this part of the footpath by the public is obviously incompatible with use of the sports pitches, with significant health and safety and inconvenience implications for public footpath users, pupils, staff and spectators.

6. The context for these applications includes a permissive footpath agreement entered into by the School and the Council on 23 May 2003. This agreement, entered into after full consultation with both the Council and the Ramblers' Association, includes an acknowledgement that use of the existing footpaths by the public may often conflict with the sporting uses of the land crossed by those existing footpaths. Indeed, the proposal for a permissive route came initially from the Ramblers' Association and which was then adopted by the Council. The present applications are entirely consistent with the purpose of the permissive footpath agreement.
7. The proposed public path creation order is part of the package of proposals needed for the resolution of the acknowledged conflict between the users of the School's facilities and the users of the footpaths.

#### The public path diversion orders

8. The applications for the two public path diversion orders have been considered against the tests for confirmation. If, as the School submits, those tests are met, it must follow that the orders should be made.

#### *Expediency*

9. In the interests of the School as owner and occupier and the users of its facilities (including local community users) *or* of the public, it is expedient that the line of part of Footpath 57 and the line of part of Footpath 58 should be diverted. No limitations are to be placed on these interests.<sup>1</sup> The expediency test is a low threshold.<sup>2</sup> All concerned have an obvious interest in avoiding the conflict inherent when public footpaths cross well-used sports and recreation facilities, a conflict that has long since

<sup>1</sup> Robertson v Secretary of State for the Environment [1976] 1 WLR 371.

<sup>2</sup> Hargrave v Stroud DC [2001] EWHC 1128 (Admin) at [34(i)] (proposition unaffected by the appeal judgment).

been acknowledged by all concerned. This inherent conflict is exacerbated when users of the existing footpaths are accompanied by dogs both on and off the lead. School staff have witnessed several instances of dog-fouling on the sports pitches currently crossed by Footpath 58 in particular, both in the vicinity of the footpath itself and on the sports grounds more widely. Indeed, members of the public are found routinely to wander off the line of the footpath as well as dogs off lead.

### *Convenience*

10. The diverted footpaths will not be substantially less convenient to the public.
11. A number of factors are typically considered when this test is being applied, including length, difficulty of walking and purpose of the path.<sup>3</sup>
12. The route from the Footpath 57 stile into the Harrow School football grounds (“the field stile”) to the junction with Football Lane, using the permissive footpath, is 680m. The distance between these two termini using the proposed diverted route of Footpath 57 is much shorter, at only 440m. When the permissive footpath is closed, and if the proposed new footpath is not created, it will not be possible to walk direct from the field stile to the commencement point of Footpath 58 at the stile on the western side of the A404 Watford Road (“the road stile”). The public will instead have to take the route of the existing or diverted Footpath 57 followed by the existing or diverted Footpath 58. This is a distance of at least 815m. The proposed direct route from the field stile to the road stile, incorporating the newly-created footpath of 110m, is considerably shorter at only 470m (a reduction of 345m). The proposed routes also allow for the possibility of taking and enjoying a circular route around the

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<sup>3</sup> R (Young) v Secretary of State for the Environment, Food and Rural Affairs [2002] EWHC 844 (Admin) at [27].



School's playing fields, which, if the orders sought are not made and confirmed, will not be available when the permissive footpath is closed. Any additional walking distances generated by the proposed routes and their various permutations are not significant in terms of additional walking time given that the overwhelming use of the existing footpaths is recreational.

13. Public use of Footpath 57 presently involves a number of obstacles if a straight line approach is adopted. These include a wooden car parking area rail, tennis court netting and the oft-congested Astroturf viewing area with its cumbersome gates at either end. Obstacles on Footpath 58, likewise adopting a straight line approach, include users of the sports pitches and the dense vegetation adjacent to the road stile. By contrast, the two proposed diverted routes would be entirely free of obstacles. The diverted route of Footpath 57 offers advantages in terms of gradient, in that the grass bank between the tennis courts and the car parking area is avoided. Both diverted routes also offer advantages in terms of surface condition, particularly given that the often muddy and slippery grass sports pitches are avoided with a route with a better surface under the canopy of the line of trees utilised instead. These various advantages apply to dog walkers and non-dog walkers alike.

#### *Public enjoyment*

14. The proposed diversions would clearly have a positive effect on the public enjoyment of the footpaths as a whole.
15. Adopting a straight line approach, Footpath 57 crosses man-made sports facilities associated with an urban environment. The route across the tennis courts and between the Astroturf pitches is almost entirely devoid of trees. The surface conditions include

lengthy stretches of Astroturf and concrete. Views incorporate utilitarian tennis court netting and Astroturf pitch netting. The current practical route, passing between the tennis courts and the athletics track, is little better. This incorporates another stretch of concrete track affording unappealing views of the tennis court/Astroturf netting on one side and the steep grass bank up to the athletics track on the other.

16. The proposed diverted Footpath 57 would clearly be more enjoyable to the public. It is less urban and more scenic, affording as it passes down the side of the tennis courts and one of the Astroturf pitches commanding, uninterrupted, views across grass sports pitches towards the City filtered by appealing close-up views of a number of mature trees. Between the Astroturf pitches and the rough farm field, it passes through an attractive belt of woodland alongside a stream.
17. Footpath 58 is presently a nondescript route across several grass sports pitches, lacking in cover and features. By contrast, the proposed diverted route would clearly be more enjoyable to the public. It would pass along a secluded path under the canopy of a line of mature and growing trees before turning to follow the line of a stream flanked by attractive vegetation and trees. It is better in terms of cover, features and biodiversity interest.
18. The permissive routes are used more frequently than the existing official routes. Diversion as proposed would not break up the network of public footpaths in the area, and, when considered with the proposed public path creation order, would serve to enhance significantly such network. These factors lend further support to the diversion applications in terms of the expediency, convenience and public enjoyment tests within section 119 of the Act.

*Other matters*

19. The termination points of the existing footpaths are unaltered by the proposed diversions (section 119(2) of the Act). The rights of way created by the public path diversion orders should be unconditional (section 119(4)). There are no effects in terms of other land served by the existing public rights of way or the land over which the new public right of way is to be created or any land held with it (section 119(6)(b)-(c)). There is no compensation issue (section 119(6)). There are no material provisions in any rights of way improvement plan particular to these applications (section 119(6A)). There are no issues in terms of agriculture, forestry, nature conservation or statutory undertakers (section 121 (3)-(4)).

*Conclusion*

20. The statutory tests for confirming the diversion orders are met. The Council should therefore make the orders sought.

The public path creation order

21. The proposed new public footpath crosses land presently crossed by part of the permissive footpath created by reason of the 23 May 2003 agreement. The School is entitled to close the permissive footpath on notice, pursuant to clause 1 of the agreement, which it is doing in parallel with these applications.
22. There is therefore a need for a public path creation order as proposed (section 26(1)). The new footpath would add to the convenience or enjoyment of a substantial section of the public, or to the convenience of persons resident in the area (section 26(1)(a)), in that they would gain a statutory right of way in place of a determinable permissive footpath shortly to be closed.

23. There is no issue in terms of the effect of creation on the rights of persons interested in the land, and no issue as to compensation (section 26(1)(b)). There are no material provisions in any rights of way improvement plan particular to this application (section 26(3A)). The new right of way should be unconditional (section 26(4)). There are no issues in terms of agriculture, forestry or nature conservation (section 29). The detail of the proposed footpath, in terms of its alignment, length (110m) and width, is fully consistent with the section 26 tests.<sup>4</sup>
24. In the light of all the above, the Council should be satisfied that it is expedient that the path should be created.

#### *Conclusion*

25. The statutory tests for making and confirming the creation order are met. For the avoidance of doubt, the School applies for the creation order only insofar as and if the Council is prepared to make the two diversion orders.

#### Widths

26. Where the proposed footpaths follow a line that is already paved, the School is content for the orders to indicate that the diverted line is the full width of that paving in accordance with the widths recorded on the second attached plan (“the Width Plan”). In all other respects, the width of the proposed footpaths should be indicated in the orders at a maximum width of 1.2m.

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<sup>4</sup> R (MJI (Farming) Ltd v Secretary of State for Environment, Food and Rural Affairs [2009] EWHC 677 (Admin) at [25].

Summary

27. The Council is respectfully urged, in the first instance, to make the three orders sought.

19 March 2012

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**IN THE MATTER OF THE HIGHWAYS ACT 1980 (“THE ACT”)**

**AND IN THE MATTER OF APPLICATIONS BY THE KEEPERS AND GOVERNORS OF THE POSSESSIONS REVENUES AND GOODS OF THE FREE GRAMMAR SCHOOL OF JOHN LYON (“THE SCHOOL”) TO THE MAYOR AND BURGESSES OF THE LONDON BOROUGH OF HARROW (“THE COUNCIL”) FOR TWO PUBLIC PATH DIVERSION ORDERS AND A PUBLIC PATH CREATION ORDER**

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**JOINT OPINION**

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Introduction

1. We are instructed by Pemberton Greenish LLP, Solicitors, on behalf of the School. We are asked to advise on the merits of its applications (dated 19 March 2012) for two public path diversion orders and a public path creation agreement. We have had sight of a file of correspondence and documentation stretching back more than a decade, and we had the benefit of a site visit on 20 February 2012.
2. Underlying the applications is the ongoing conflict between the users of the School’s facilities and the users of Footpaths 57 and 58. This conflict is widely acknowledged, and it has been for many years. It prompted the Ramblers Association to propose an

alternative, permissive, route for Footpath 58 back in 2000, a proposal that was adopted by Harrow LBC (“the Council”). The Ramblers Association also agreed back in 2002 to the School’s proposal for an alternative, permissive, route in respect of Footpath 57. This discussion and agreement culminated in the Permissive Footpath Agreement executed on 23 May 2003. Unfortunately, this agreement has not resolved the acknowledged conflict. The School intends promptly to give notice of the closure of the permissive footpaths and the termination of the Permissive Footpath Agreement in parallel with its applications. The orders sought, if made and confirmed, should finally resolve the acknowledged conflict.

#### Legal tests

3. We have read the School’s applications for the three orders.
4. The applications correctly identify and address the legal tests for the confirmation of (and hence the prior making of) orders under sections 26 and 119 of the Highways Act 1980. We agree with the conclusions that the statutory tests for making and confirming the orders sought are met. In fact, we would go further and add that they are easily met. On the evidence before us, we consider that it would be unreasonable not to make and confirm the orders sought.
5. The School has also quite properly addressed its mind to the width of the proposed footpaths, since width should be indicated in the orders as made. There is no statutory width, and the width proposed (maximum 1.2m, save as where indicated) is wholly appropriate.



### Consultation

6. The School has, quite properly, consulted the Council and the current Footpath Checker for the Ramblers in the Borough (Graham Wright). The Council and the Ramblers' Association (now the Ramblers) have in the past adopted a sensible and pragmatic approach to resolving the acknowledged conflict. One would hope that they will adopt the same approach when it comes to assessing the School's applications.

### Obstructions

7. We have seen references in the correspondence to alleged wilful obstruction of Footpath 57, together with references to sections 130 and 137 of the Highways Act 1980.
8. These references are unhelpful and inappropriate.
9. First, there is an issue as to whether or not Footpath 57 has in fact been obstructed. We note in this regard that the definitive statement describes it following an "undefined route". Members of the public are in fact able to walk unobstructed from the field stile to the termination point of Footpath 57 (where it meets Footpath 59) by taking a route between the tennis courts and the athletics track.
10. Second, and insofar as there has been any obstruction (which is not admitted or accepted by the School), there is an issue as to whether or not there has been any wilful obstruction. We would suggest that the correspondence and documentation over the years calls this seriously into question.

11. Third, a section 137 offence is made out only if free passage has been wilfully obstructed without lawful authority or excuse. We note the words of Glidewell LJ in this context: “Lawful authority includes permits and licences granted under statutory provision...”.<sup>1</sup> The simple fact is that the gates and fences referred to by Mr Wright in his letter of 8 September 2011 were erected pursuant to the 2003 planning permission for the tennis courts and Astroturf pitches, part of the context for which was the almost simultaneous 2003 Permissive Footpath Agreement.
12. Fourth, the tennis courts and the Astroturf pitches (with their netting and gates) were laid out in 2003 and 2004 without complaint at the time and there has been no objection taken until recently. This itself demonstrates the acceptance (or at the very least the acquiescence) by the Council and the Ramblers’ Association of the creation of any obstruction now alleged to be in existence.
13. In short, there are major doubts as to whether the evidential test is met in terms of section 137.
14. There is no public interest in a section 137 prosecution even if the conclusion is able to be reached that the evidential test has been met. The Council has expressly recognised that the whole issue requires further discussion and a “satisfactory permanent solution in the longer term.”<sup>2</sup> The three applications and the orders sought are designed to achieve precisely that. The School would have a good case for obtaining a stay of any prosecution as an abuse of process, with a favourable award of costs, given in particular the agreement as to the permissive footpath and the terms of the Council’s recent letter as just described.

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<sup>1</sup> Hirst and Agu v Chief Constable of West Yorkshire (1987) 85 Cr.App.R 143 at 151.

<sup>2</sup> Letter from David Eaglesham, Service Manager – Council Traffic & Highway Network Management, dated 14 October 2011.

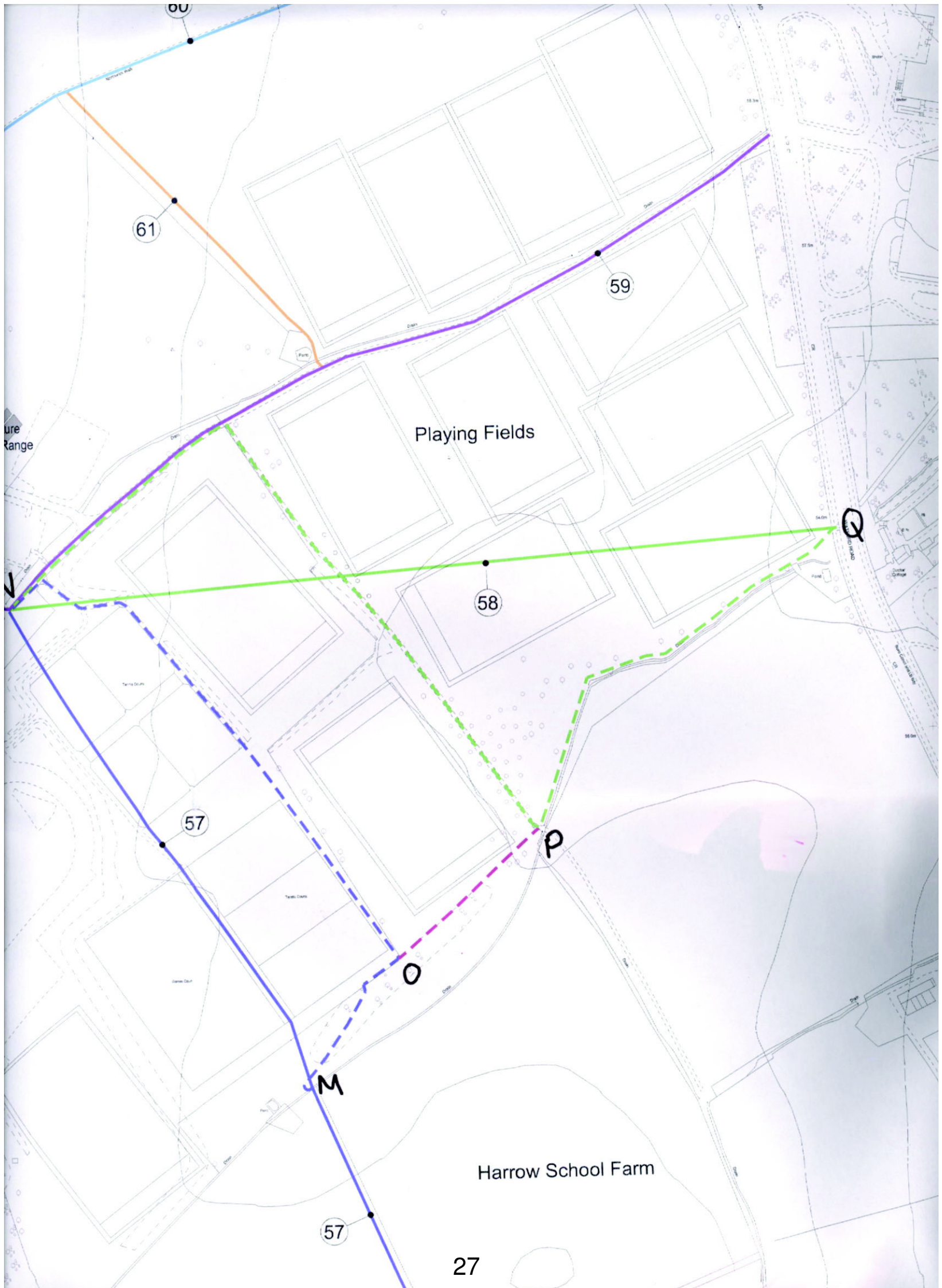
15. The court is now very unlikely to grant any application for an injunction to remove any obstructions particularly as the School is submitting a package of proposals for the diversion of Footpaths 57 and 58 plus the creation of a new, permanent, statutory footpath linking the two proposed diverted routes.

Conclusion

16. We are able to advise on current evidence that the three applications have very good prospects of success, and that the Council (or Secretary of State) may well be considered to have acted unreasonably if such applications are refused.

**JOHN STEEL Q.C.**  
**STEPHEN WHALE**  
**4-5 GRAY'S INN SQUARE**  
**19 MARCH 2012**

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Playing Fields

Harrow School Farm

61

59

58

57

57

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Range

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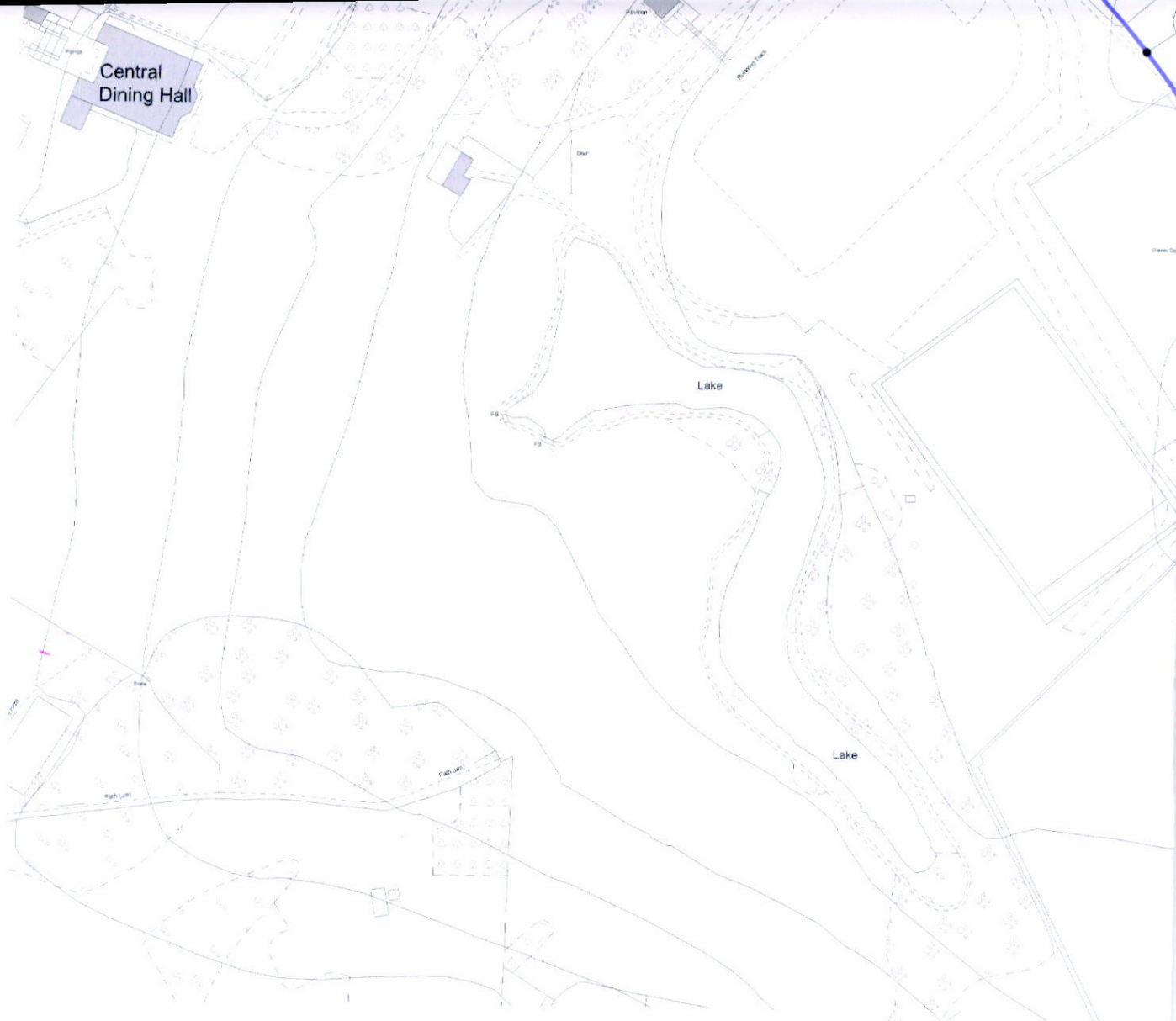
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### Key to Footpaths

-  Existing route of Footpath 57
-  Proposed route of Footpath 57
-  Existing route of Footpath 58
-  Proposed route of Footpath 58
-  Existing route of Footpath 59
-  Existing route of Footpath 60
-  Existing route of Footpath 61
-  Proposed new public Footpath

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