

REPORT FOR: LICENSING PANEL

Date of Meeting:	Thursday 4 October 2012
Subject:	Application to Modify the Definitive Map – Land rear of The Avenue, Hatch End
Responsible Officer:	John Edwards – Divisional Director Environmental Services
Exempt:	No
Enclosures:	<ul style="list-style-type: none">- Officer Report setting out legal basis for Recommendation- Application and supporting evidence- Objector's statement and evidence

Section 1 – Summary & Recommendation

The council has received an application to modify the Definitive Map and Statement in respect of alleged public rights of way over land to the rear of The Avenue, Hatch End. This report summarises the detailed report covering the officer's assessment of the Application.

Recommendations:

The Panel are requested to formally agree:

1. to suspend Committee Procedure Rule 16 which relates to deputations for the duration of this item;
2. that the Applicant (or his representative) and the Objector (or his

representative) are allowed to speak for a maximum of 10 minutes;

3. accept the officer's report and recommendation and accordingly refuse the Application.

Representations received

An application to modify the Council's Definitive Map and Statement was submitted by Mr Fordham on 22 March 2011 ("the Application").

The Application is subject to an objection made by Mr Pervez, the owner of the land.

Both Mr Fordham and Mr Pervez have submitted written evidence in support of their respective cases.

Section 2 – Report

Duty in respect of the Definitive Map and Statement

The Council is the relevant Surveying Authority for the administrative area of Harrow. As such it has a duty to keep the Definitive Map and Statement under continuous review and make such modifications to it (by order) where it appears requisite.

Once prepared (and subsequently reviewed), the Map and Statement is conclusive evidence to the particulars of the public rights of way.

The Council's Highways team maintains responsibility for the continuous review of the map and statement. However, given the legal consideration required in assessing such applications the report has been drafted by legal officers.

It appears that the last review of the definitive Map and Statement was undertaken on 31 December 1969.

Relevant Legal Considerations

The Application has been assessed under section 53(3)(b) of the Wildlife and Countryside Act 1981. Essentially, that section relates where events have occurred since the map and statement were prepared (or last reviewed) and those events may have resulted in a right of way coming into existence where none existed before.

The majority of the witness statements supporting the Application refer to using the Land from 1970, i.e. after the map and statement were last reviewed.

Has a public right of way come into existence?

In order to prove this the Applicant had to satisfy the following tests:

1. Does the application relate to a way over land that is of a character that use of it by the public could give rise at common law to a presumption of dedication?
2. If so, has it been enjoyed by the public for a full period of 20 years without interruption?
3. If so, has that use been as of right?

Does the application relate to a way over land that is of a character that use of it by the public could give rise at common law to a presumption of dedication?

A site visit by Highway officers confirms that it was not possible to access all of the routes indicated on the Application given overgrown vegetation. However they noted that small areas where possible routes may have existed were visible.

The Application and supporting evidence claims that the routes were either accessed from The Avenue or from the rear gardens of neighbouring properties. The access from the Avenue is a point at which the public would have been entitled to access therefore this would meet the test. However, it is unlikely that the access from the neighbouring properties would meet the character test.

Has the use been enjoyed by the public for a full period of 20 years without interruption?

The routes have not been used up until the date of the application (i.e. 22 March 2011). However, in order to succeed the claim need only demonstrate an earlier 20 year use period. The supporting evidence claims that use of the paths at the Land commenced in 1970.

As detailed in the appended report, it is the officer's view that the Applicant has managed to demonstrate that some of the residents have used the Land for a full period of 20 years without interruption.

However, the Applicant has not managed to demonstrate the public use of the routes. The evidence of use is rather from residents within a very limited area and in the officer's view this would not satisfy the test of 'public' use required for dedication.

Has the use been as of right?

This is an objective test which requires the Applicant to establish use of the way without force, stealth or permission. The evidence in support of the Application maintains that use of the Land had not been challenged prior to Mr Pervez's ownership. Supporters claim that there were no signs informing them to keep off the Land; neither were they prevented from using the paths (until access became impossible in 2010); and they used the Land in the absence of any agreement, licence or permission of the landowner (current or previous).

The Objector maintains that there have always been signs on the Land stating that it is private land. However, the photographs submitted in support of this

assertion clearly demonstrate that the signpost is not clearly visible and no indication is provided as to its exact location or when it was erected. Much of the Objector's case relies on the presence of fencing covenants set out within earlier transfers of the Land. However, in assessing this Application regard must be had to what actually occurred on the Land rather than what ought to have happened. The Objector has not provided any evidence as to how previous owners managed the Land.

As such, based on the evidence submitted and on the balance of probabilities the Application appears to satisfy the use as of right requirement.

Conclusion and Recommendation

The Applicant has not established the public nature of the use and for that reason alone the officer's recommendation to members is to refuse the Application.

This Application has been carefully considered by officers having weighed evidence submitted by both sides in light of the relevant legal tests.

A distinction must be drawn between private and public rights of way. The Council's remit extends to the latter but not the former. It may be possible that the Applicant has acquired a private right of way however, such determination cannot be made by the Council.

Implications of the Recommendation

Financial Implications

There are no cost implications in accepting the recommendation.

Legal Implications

Should the Panel choose to accept the recommendation and refuse the Application notice of that decision will be served on the Applicant and the Objector.

The Applicant may appeal the decision within 28 days of notification, by serving notice of an appeal on the Secretary of State and the Council.

Section 3 - Statutory Officer Clearance

Name: Kanta Hirani

on behalf of the*
Chief Financial Officer

Date: 25 September 2012

Name: Abiodun Kolawole

on behalf of the*
Monitoring Officer

Date: 25 September 2012

Section 4 - Contact Details and Background Papers

Contact: Katherine Hamilton, Assistant Lawyer – Planning & Information Law; ext 2890

Background Papers: None