

**APPLICATION TO MODIFY THE DEFINITIVE MAP FOR THE LONDON BOROUGH OF
HARROW IN RESPECT OF LAND BEHIND THE AVENUE, HATCH END, HARROW**

**OFFICER'S REPORT AND RECOMMENDATION HAVING CONSIDERED WRITTEN
EVIDENCE**

Introduction

1. The Council of the London Borough of Harrow is the Surveying Authority for the purposes of the Wildlife and Countryside Act 1981 (“WCA 1981”).
2. The Council has before it an application made under section 53 of the WCA 1981 (“the Application”) by which land described within the application is sought to be added to the Council’s definitive map through a modification order.
3. The Application was submitted by Mr David Fordham (“the Applicant”) and was made in accordance with the requirements of Schedule 14 to the WCA 1981.
4. The date of the Application is to be taken as 22 March 2011, being the date that the Council received written confirmation that the owner of the land had been served with the Application.
5. The application is subject to an objection made by Mr Pervez, the owner of the land in question (“the Objector”).
6. Both the Applicant and the Objector have submitted written evidence in support of their respective cases.
7. This report sets out a description of the application site, summarises the evidence provided and finally sets out conclusions and the officer’s recommendation.
8. The summary of evidence set out in this report will cover the main points arising from the evidence provided.

The Application Site / The Land

9. The land subject to the application is the freehold land lying to the North East side of the Avenue, registered at HM Land Registry under title number MX39558 (“the Land”). The Land is commonly referred to as “The Woods” by local residents.
10. The Land shares its boundaries with: green belt land (which is within the Council’s ownership); a brook/stream fronting the rear gardens of properties 56 to 70 (evens) The Avenue. It is alleged that some of these properties formerly had direct access

onto the Land via a number of plank bridges which extended over the stream; and the rear gardens of property numbers 3 to 9 (odds) Royston Park Road.

11. In the evidence provided it is stated that the access to the Land via the rear gardens has been blocked (details set out in the summary of evidence below).
12. Following numerous requests to access the Land, two officers from the Council's Highways team were finally granted access by the Objector on 13 January 2012.
13. On arrival at the Land, two officers were met by the Objector and two acquaintances.
14. The Objector unlocked the gate to the side of No. 70 The Avenue, in order for officers to access the Land. Officers walked in a north easterly direction along the side of No 70 The Avenue; there was some slight overgrowth but officers were able to walk through. Officers veered to the right in a south easterly direction following a stream which backs onto properties Nos 56, 58 & 70 The Avenue. Officers noted that a number of small footbridges connecting those properties to the Land appeared to have been removed and that on the Land itself there was a barricade of large logs and branches on the bank of the stream which ran alongside the alleged footpath.
15. Officers continued walking along the route stopping just past a small dilapidated outbuilding, as they were unable to proceed any further due to overgrown vegetation. The officers were prevented from walking the other routes set out in the Application due to the overgrowth, however they noted that "small open areas were visible where possible routes could have existed".

Summary of Applicant's Evidence

16. David Fordham moved to No. 68 The Avenue in June 1994. He has completed the Public Right of Way Evidence Form and has also provided a supporting witness statement. Mr Fordham states that he made frequent use of the footpaths at the Land up until the summer of 2010. He used the footpaths to walk the family dogs, to play with his children, enjoy the flora and fauna and to also access the adjacent fields of

Oxhey Lane Farm. In particular, he used the footpath to access the boundary edge of Oxhey Lane Farm for the purpose of walking up to and onto Oxhey Lane. However, the strip of land which enabled him to access Oxhey Lane is now a raised path forming part of the Hatch End Flood Alleviation Scheme.

17. Mr Fordham would also access the fields of Oxhey Lane Farm via the footpaths for recreational walks and confirms that such walks required the consent of the farmer. Mr Fordham recalls that there were two plank bridges which crossed the stream and joined his property to the footpaths at the Land. The approximate routes of the claimed footpaths are indicated on the plan marked 'Diagram A' which is attached to the application. Occasionally, friends of Mr Fordham would join him on his walks through the Land to access the fields at Oxhey Lane Farm.
18. Mr Fordham maintains that his use of the Land was never disguised or concealed and is unaware of any agreement to use the alleged footpaths at the Land. He was never prevented from using the footpaths and does not recall ever seeing any signs on the Land such as 'Keep Out' or 'Private not to be used' etc. Force was never used to access the Land and up until 2009 Mr Fordham had never encountered any opposition to the use of the footpaths from any owners of the Land.
19. In the summer of 2009, Mr Fordham states that the Landowner and his representatives started to object to the use of the footpaths at the Land. It is claimed that access to the footpaths became impractical in the summer of 2010 after the Landowner allegedly installed a new fence at the entrance to the Land from The Avenue; "built a palisade of cut trees and branches behind mine and the other houses in The Avenue; removed the footbridges which had previously provided access to the Land from a number of properties on The Avenue".
20. Mr Fordham also supplied photographs of the Land which clearly show worn paths.
21. Audrey Churchman moved to No. 54 The Avenue in 1970. Her user evidence form and statement confirms that her house does not back onto the application Land.

However, when her family moved to the house her children would play on the Land, commonly known as “The Woods”, and in some years this occurred more than once a month. The user form indicates that Ms Churchman used the footpaths less than once a month – although the form also states that for a while she used it daily to get to work particularly after it had been snowing each winter. She stopped using it as a result of age and when her children had grown up however she has not provided a precise date as to when her use ceased.

22. Eugene Stratton has lived at No. 73 The Avenue with his wife since 1970 and has submitted an evidence form and a statement in support of the Application. Mr Stratton states that during the years 1970 – 2010 both he and his wife have had access to and have walked the footpaths at the Land on many occasions. During their walks they enjoyed observing bats, owls, great crested newts and many species of birds. Mr Stratton does not recall seeing signs on the Land intended to prevent / restrict access to the Land and never encountered any objection from previous owners of the Land as to their use of the footpath.
23. Margaret Wells has lived at No. 62 The Avenue since 1955. Between 1955 and 1995 her husband frequently walked the footpaths at the Land and did so without any objection land owners at the time. Mrs Wells rarely accessed the Land.
24. Juliet Chodzko lived at No. 68 The Avenue with her husband and two sons during the period August 1978 to 8 June 1994. She states that they made continuous use of “the wood during their period of ownership, usually for the purposes of walking their dogs, playing with their sons, enjoying the flora and fauna, blackberry picking in the autumn and also to access the borders of Oxhey Lane farm fields.
25. Her statement claims that there were established footpaths already in existence when they moved to the property in 1978. From her recollection the direction of the

footpaths is shown approximately on Diagram A. According to Ms Chodzko the previous owners of the property, the Walker family also used “the wood” from time to time too.

26. Ms Chodzko was frequently joined on her walks along the footpaths by Mrs Judith Stratton and sometimes Mr Stratton accompanied them.
27. Ms Chodzko states that the residents of The Avenue and Royston Park Road (“and any others”) were the only people using the footpaths and the only ones keeping the footpaths open by treading them down and believes that such use was as of right. She does not recall ever seeing any notices declaring the Land to be “Private” or informing the residents to “Keep off” the Land. Indeed, she recalls a period when the owner of the Land (a Mr Popovic) was known to be growing vegetables on the Land and he never questioned their use of the footpaths on the Land.
28. Mrs Judith Stratton has lived at No. 73 The Avenue with her husband since 1970. Throughout their occupation they have both accessed and walked the footpaths at the Land and were never approached or denied access to the Land prior to Mr Pervez’s ownership. Mrs Stratton does not recall ever seeing any signs stating that unauthorised access to the Land was prohibited.
29. Michael Walker lived at No. 68 The Avenue with his family between the period August 1970 to August 1978. He states that they would make occasional but not frequent use of the footpaths at the Land without any prohibition. Mr Walker also recalls large vehicular green metal gates where The Avenue met the Land, and believes that those gates were padlocked. However, the gates deteriorated into disrepair and access could be gained through and around them.
30. Peter Murray has lived at No. 60 The Avenue with his wife since 1979. They have both had access to, and on many occasions Mr Murray has walked, the footpaths at the Land. Prior to Mr Pervez’s ownership of the Land they were never approached or

denied access to the Land by previous landowners. They did not enter the Land by force or under any agreement.

31. Raj Rudran has lived at No. 64 The Avenue with his family since 1994. They have walked the footpaths at the Land on rare occasions. Mr Rudran has always been aware that people walked the footpaths but is not aware of any instance where signs were placed on the Land to restrict its use.
32. Ariella Lister lived at 54a The Avenue with her husband and two children between the years 1977 – 2002. Mrs Lister was aware that others would walk on the Land but her family chose not to, preferring to keep “the fence up between the rear of our garden and the Wood” for the safety of their small children. From Mrs Lister’s observations previous owners of the Land did not attempt to restrict or deny access to the Land.
33. Martin Goodman lives in Finchley and confirms that he has walked the footpaths at the Land many times since 1994, when visiting Mr Fordham (whom he has known for many years).
34. He confirms that access to the Land was achieved via: Mr Fordham’s property; from The Avenue “beside the fence of No. 70 ..”; and also from the fields of Oxhey Lane Farm.

Summary of Objector’s Evidence

35. The Objector has submitted a bundle of documents in support of his objection to the Application. In summary, the objection is made on the following basis:
 - (i) when the current owner acquired the Land in April 1998 it was fenced and gated and he has maintained these throughout his ownership of the Land;
 - (ii) there have been signposts clearly stating that the Land is private land and that entry by the public is not permitted; and

- (iii) three witness statements from other witnesses together with other evidence.

36. Mr Shahid Pervez the current registered owner of the Land has provided a witness statement together with a 100 page evidence bundle. In his statement Mr Pervez states that he acquired the Land in April 1998. He states that the Land was fenced and gated when he acquired it and that he has maintained the fence and gate throughout his ownership and possession of the Land. Mr Pervez states that there have also been signposts clearly stating that the Land is private land and entry to the public is not permitted. Mr Pervez claims that he has never encountered any member of the public on the Land claiming there to be a right of way.
37. Mr Arshad Pervez & Mr Tariq Mahmood state in their witness statements that the Land was clearly fenced, gated and locked when their brother purchased it. They have assumed responsibility for maintenance of the Land and they visit the Land on a regular basis and state that it has always been locked. The statements stipulate that there are signposts still in existence which state that the Land is private land and that public entry onto the Land is not permitted.
38. Shahnaz Qureshi states that she accompanied her brother to view the Land in November 2007. She recalls that on approach to the Land the entrance was securely fenced and gated. Once the gates were unlocked by her brother, Ms Qureshi recalls seeing signs along the boundary fence which stated "Private Property – Keep Out".
39. Ms Qureshi also states that the Land was overgrown with vegetation at the time.
40. The Objector also submitted a DVD with his bundle of evidence ("DVD 1") and on 10 September 2012 solicitors acting on behalf of the Objector sent another DVD ("DVD 2") to the Council for consideration.
41. DVD 1 - starts with a short video clip (date stamped 07-09-2009 16:58) in which the Objector (I presume) is captured in mid conversation with another man (presumably

Mr Murray as asserted in the Objector's supporting evidence). The dialogue appears to be taking place on the Land with the discussion focused on the cutting of trees. The Objector then informs "Mr Murray" that he cannot enter the land; he states that it is private land and tells him not to enter the land without permission. The Objector then escorts the man off the Land via the vehicular gates at The Avenue.

42. DVD 1 also includes two still photographs (date stamped 07-09-2009) of the entrance gates leading onto The Avenue. In the still images the gates are closed.
43. The second video clip (date stamped 4-1-2007 13:09) appears to show gating and fencing at The Avenue entrance to the Land. The short video clip also appears to show evidence of overgrown vegetation and 'fly-tipping'. Although not entirely clear, there seems to be a 'gap' between the posts supporting the vehicular gates and the boundary of No. 70 and it is not possible to see from the video whether this 'gap' is fenced.
44. The final video clip (date stamped 16-02-2007) shows two individuals conversing as they exit the Land via the vehicular gates, one of the individuals then locks the gates.
45. DVD 2 – shows a short video clip (date stamped 09-09-2006 14:53) in which an unidentified man is seen taking photographs (presumably of the person who is filming). The man in the video clip is captured saying something along the lines of "I've got a right of way over this land, you do not have a right of way over my land". He also states that he will continue to "clear" the land in order to exercise his right. After which he can be seen walking towards a plank bridge leading to one of the properties backing onto the Land.

The Definitive Map and Statement for the London Borough of Harrow

46. Middlesex County Council ("MCC") was the relevant surveying authority (for the administrative area of Harrow) at the time when the definitive map and statement showing public rights of way was originally prepared. MCC formally adopted that map

and statement on 25 April 1951 and it was approved by the Minister of Local Government and Planning on 31 May 1951 (see London Gazette notice 11 July 1958 at Appendix A).

47. It appears that the Council's last review of its definitive map and statement was undertaken on 31 December 1969, that being the date of the third and special review (see the notice publicised in the London Gazette on 7 May 1976 Appendix A).
48. Once prepared, and until it is subsequently revised, the map and statement is conclusive evidence as to the particulars of the public rights of way contained therein.¹

Relevant Statutory Provisions

49. Section 53(2) of the Wildlife and Countryside Act 1981 ("the 1981 Act") states:

"As regards every definitive map and statement, the surveying authority shall –

- (a) as soon as reasonably practicable after the commencement date, by order make such modifications to the map and statement as appear to them to be requisite in consequence of the occurrence, before that date, of any of the events specified in subsection (3); and*
- (b) as from that date, keep the map and statement under continuous review and as soon as reasonably practicable after the occurrence, on or after that date, of any of those events, by order make such modifications to the map and statement as appear to them to be requisite in consequence of the occurrence of that event"*

50. The events specified in section 53(3) are as follows:

- (a) the coming into operation of any enactment or instrument, or any other event, whereby –*

¹ Section 56 Countryside and Wildlife Act 1981.

- (i) *a highway shown or required to be shown in the map and statement has been authorised to be stopped up, diverted, widened or extended;*
 - (ii) *a highway shown or required to be shown in the map and statement as a highway of a particular description has ceased to be a highway of that description; or*
 - (iii) *a new right of way has been created over land in the area to which the map relates, being a right of way such that the land over which the right subsists is a public path [or a restricted byway];*
- (b) *the expiration, in relation to any way in the area to which the map relates, of any period such that the enjoyment by the public of the way during that period raises a presumption that the way has been dedicated as a public path [or restricted byway];*
- (c) *the discovery by the authority of evidence which (when considered with all other relevant evidence available to them) shows –*
- (i) *that a right of way which is not shown in the map or statement subsists or is reasonably alleged to subsist over land in the area to which the map relates, being [a right of way such that the land over which the right subsists is a public path [or restricted byway] or, subject to section 54A, a byway open to all traffic];*
 - (ii) *that a highway shown in the map and statement as a highway of a particular description ought to be there shown as a highway of a different description; or*
 - (iii) *that there is no public right of way over land shown in the map and statement as a highway of any description, or any other particulars contained in the map and statement require modification.*

51. In accordance with section 53(5) any person may apply to the relevant surveying authority for an order which makes such modifications (as deemed requisite by the authority) in consequence of one or more events falling in paragraphs (b) and (c) of above.
52. The Court of Appeal² has provided the following useful guidance on the differences between the events specified in subsection (3): the events specified under paragraphs (a) and (b) relate to events which have happened since the definitive map was prepared and may result in a right of way coming into existence where none existed before; whilst the events in paragraph (c) may be usefully described as relating to the correction of a previously mistaken decision, which "... will normally, if not always, relate to a fact or situation which already existed at the time when the definitive map was prepared".³
53. Having regard to the witness statements submitted in support of the Application the earliest reference to use of the Land is set out in the witness statement of Margaret Wells, who has lived at 62 The Avenue since 1955. She states that her husband frequently walked the Land from that date. The earliest claimed use of the Land referred to in the other statements supporting the Application is 1970. This would appear to be the logical starting point for the purposes of determining this application.
54. Given that the last review of the Council's map and statement was undertaken in December 1969, officers have considered the application in accordance with the event listed under paragraph (b). That being simply expressed as an application to modify the definitive map and statement to reflect a right of way that has come into existence by prescription since the map and statement were prepared.
55. Officers consider paragraph (b) to be the most appropriate basis for consideration, given that at the time the Definitive Map was reviewed in 1969 any use of the Land for

² R v Secretary of State for the Environment *Ex parte* Burrows and R v Secretary of State for the Environment *Ex parte* Simms

³ *Ibid.* p388

passage on foot would not, on the evidence produced, have crystallised into a right of way that could be recognised on the Definitive Map at that time. Had the evidence shown that the use had crystallised into a right of way by the time of the Definitive Map was last reviewed then it would have been appropriate for officers to consider the Application under paragraph (c).

Presumed Dedication – Section 31 of the Highways Act 1980

56. In order to arrive at a carefully considered decision as to whether a right has been established through use by way of presumed dedication, officers have applied the tests set out in section 31 of the Highways Act 1980 (“the 1980 Act”).

57. The relevant provisions of section 31 of the 1980 Act are as follows:

“(1) Where a way over any land, other than a way of such a character that use of it by the public could not give rise at common law to any presumption of dedication, has been actually enjoyed by the public as of right and without interruption for a full period of 20 years, the way is 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, whether by a notice such as is mentioned in subsection (3) below or otherwise.

(3) Where the owner of the land over which any such way as aforesaid passes –

(a) has erected in such manner as to be visible to persons using the way a notice inconsistent with the dedication of the way as a highway, and

(b) has maintained the notice after January 1, 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.

...

[(7A) Subsection (7B) applies where the matter bringing the right of the public to use a way into question is an application under section 53(5) of the Wildlife and Countryside Act 1981 for an order making modifications so as to show the right on the definitive map and statement.

(7B) The date mentioned in subsection (2) is to be treated as being the date on which the application is made in accordance with paragraph 1 of Schedule 14 to the 1981 Act.]”

58. In short, the relevant issues to be considered are:

- (i) 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?
- (ii) If so, has it been enjoyed by the public for a full period of 20 years without interruption?
- (iii) 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?

59. The evidence submitted in support of the Application shows that the supporters primarily walked over the Land for enjoyment as a green open space adjacent to the residential area.

60. An important distinction must be made between the use of land to pass over a defined route (or routes) and its wider use for recreational purposes. There are some references to using the claimed way to access other land or areas but these are very limited.

61. Defined routes are indicated on the plan supporting the Application (“Diagram A”). The only corroborating evidence of those routes is provided mainly in very general terms by the supporting witness statements.
62. The site visit undertaken by Highway officers confirms that it was not possible to assess all the claimed footpath routes on Diagram A due to overgrown vegetation. However, they noted that small open areas, where possible routes may have existed, were visible.
63. It is claimed that the footpath route(s) over the Land were accessed from The Avenue or directly from neighbouring properties. The access from The Avenue is a point at which the public would have been entitled to access (given its status as a public highway); therefore this would meet the character test. However, the extent to which the Land was accessed solely from private land (i.e. the back gardens of adjacent residents) gives rise to questions as to how much of that use (from the back gardens) can be taken into account. This is further explored in the next issue.
64. Has the use been enjoyed by the public for a full period of 20 years without interruption? – The claimed routes have not been used up until the date the application was received by the Council (i.e. 22 March 2011). Irrespective of this fact, the claim is not defeated as long as an earlier 20 year period can be demonstrated.
65. For the purposes of section 31(2) of the 1980 Act, the 20 year period is *“to be calculated retrospectively from the date when the right of the public to use the way is brought into question”*.
66. As stated above, DVD 2 shows a short video clip of a confrontation between the current landowner (presumably) and an unidentified man in which the unidentified man asserts his claim to a right of way over the Land whilst denying that the owner has any rights to access his land. The man makes reference to an obstruction which

he has cleared and states that he will continue to clear other obstructions which interfere with his right to use the paths at the Land. That video clip is date stamped 09-09-06.

67. In his witness statement, Mr Fordham states: “.. around summer 2009, Mr Pervez and his representatives started to object to our use of the footpaths in the Wood. There were a number of confrontations on the paths ... I continued to walk and keep clear the paths [*sic*] until the summer of 2010 but by then Mr Pervez had (a) installed a new fence at the entrance to the Woods from The Avenue (not only across his land but also over the strip of unowned access land under title no: AGL214167) and (b) built a palisade of cut trees and branches behind mine and the other houses in the Avenue and (c) destroyed the footbridges from my property to the footpaths and (d) fenced off the access from the Oxhey Farm side. Access to the footpaths is now impractical”.
68. In his objection, the current landowner asserts that there have always been signposts clearly stating that the Land is private land. If these signs were erected by Mr Pervez after he became the owner in 1998, then the date that they were erected would be the relevant date. The Objector has submitted photographs evidencing the existence of a “Private Land – Keep Out” sign posted at the Land. However, in accordance with section 31(3)(a) the notice has to be erected in such manner to be visible to persons using the way; the photographs demonstrate that the sign is not visible given the overgrowth and in particular there is no evidence as to when the sign was first erected.
69. A relevant 20-year period would be from September 1986 to September 2006 . That being calculated retrospectively from the date of the video clip in which it can reasonably be inferred (from the statements made by the unidentified man) that the current landowner had placed obstructions on to prevent people from accessing the Land. Thereby bringing into question the right of the public to use the way.

70. The majority of the Applicant's supporting evidence relates to alleged use from 1970. Even if the evidence of the Objector and his supporting witnesses is accepted (i.e. the Land has not been used as claimed by the Applicant since he became owner on 9 April 1998), the Applicant still claims such use as of right for the 20 years previous to that (i.e. 9 April 1978 – 9 April 1998).
71. The evidence submitted by the Objector does not state how frequently he or his visitors visited the land since April 1998, nor do they address the strip of disputed land next to the gate adjacent to 70 The Avenue. The Objector does however seek reliance on the fencing covenants dating back to at least 1937, which are set out in the many conveyance documents forming part of his bundle. Those fencing covenants cannot be regarded as in themselves conclusive evidence against the Application, since it is the facts as to what actually happened on the ground which is the most relevant consideration. In contrast to the Applicant's evidence, the Objector provides no evidence as to how the Land was actually used prior to his ownership (e.g. if possible from previous landowners or others with knowledge of the land).
72. Having considered all the evidence, the relevant date that the use of the way was brought into question is September 2006. The precise date would not in the circumstances appear to be determinative, given that the majority of the Applicant's evidence alleges use from 1970. Therefore the relevant 20 year period is from September 1986 – September 2006.
73. However, in order to meet the requirements of this limb it is also essential to establish that the deemed dedication wasn't for a particular class of persons rather than the public at large. There must be evidence of a wider use rather than just residents from a very limited area.
74. For the purposes of the Application, claimed user is limited to the occupiers of 54a, 60, 62, 64, 68, 70 and 73 The Avenue. Evidence of wider use is limited to the following:

- (i) Mr Goodman states that he walked the footpaths many times. However, he was Mr Fordham's visitor;
- (ii) Ariella Lester states that she often saw people walking on the other side of the stream and crossing the stile. There are no details as to what is meant by 'often' and whether she saw people other than the residents of the above properties. The lack of specific references to other local people from outside the area of a small number of nearby houses is notable.

75. It is important to distinguish between private and public rights of way. A private right of way is one limited to an individual or group, and usually connected with land holdings.

76. Even where a route has only been used by local inhabitants it is still possible to establish dedication, provided that there is nothing to prevent it being used by anyone. However, in this case the evidence of users for the purpose of this Application is limited to a particular class of local residents, namely some of those neighbouring and nearby to the Land and their visitors, and in the Officer's view these do not constitute a section of the public that can properly be categorised as local residents so as to benefit from a public rather than a private right.

77. As stated above, section 53(3)(b) is considered to be the appropriate provision under which to determine the Application. In the author's view, even if it were arguable that the Application should be considered under section 53(3)(c)(i) (i.e. whether a public right of way has "*reasonably been alleged to exist*"), the evidence supporting the Application would still not satisfy that provision, given that the evidence does not support the requirement that the deemed dedication can reasonably be alleged to have been to the public at large.

78. *Has the use been as of right?* – This is an objective test which essentially means that the Applicant must be able to establish use of the way without force, stealth or permission.

79. The evidence of both Mr Fordham and Mr Walker acknowledge the existence of “vehicular gates” leading to the Land and from the evidence submitted it appears that those gates were at some point in a state of disrepair, which they claim afforded access onto the Land. Mr Fordham also submits that there was also a small unfenced gap between the gates and No. 70 The Avenue and access to the Land was also possible through this gap.
80. Mr Walker recounts that the gates fell into disrepair during his period of ownership of 68 The Avenue (between August 1970 and August 1978). From the evidence submitted, it appears that the gates were still in existence (in some form or another) in 1994 when Mr Fordham moved to the area.
81. The Objector maintains that the Land has always been gated and produces a letter (together with a plan)⁴ from Harrow Council regarding proposed works to ‘replace’ existing fencing.
82. It is apparent from the submitted evidence that there has always been a ‘vehicular gate’ leading to the Land from the Avenue. That ‘vehicular gate’ fell into a state of disrepair which enabled access to the Land through and around it (according to the evidence of Mr Fordham and Mr Walker). It has not been possible to independently verify the level of ‘disrepair’ as claimed as part of the Applicant’s case. Therefore, it is difficult to assess whether use via this entrance was achieved without force.
83. Another means of access onto the Land for the purpose of using the way appears to have occurred via the back gardens of a number of properties on The Avenue with rear gardens backing onto the Land. Mr Fordham submits that the rear gardens of property nos. 68 and 62 The Avenue benefited from plank and brick bridges (which crossed over a stream), and it was those bridges that afforded them direct access to walk the paths at the Land.
84. The Applicant and the witnesses supporting the Application assert that at no time:
- (i) were there any signs informing them to keep off the Land;

⁴ Pp 94-95 of the Objector’s evidence bundle

- (ii) were they ever prevented from using the paths; or
- (iii) was there an agreement / licence / permission to use the Land by some agreement with the landowner.

85. The Applicant makes reference to accessing the Land from the fields of Oxhey Lane Farm with the consent of the farmer.
86. The Objector's evidence on the other hand maintains that there have always been signposts on the Land clearly stating that it is private land and that public entry onto the Land was not permitted.
87. The Objector has provided a photograph⁵ of what he states is an example of such a sign at the Land. No indication is given as to where this signpost is or when it was erected and it is evident that due to the overgrowth much of the sign is now covered and clearly isn't visible.
88. The Objector also relies on the fencing covenants and the fact that the gate at the entrance from The Avenue was always locked to refute the assertion that the use was as of right. However, the evidence provided is very general and does not specify how often the Objector visited the Land and what times of the day. Therefore, limited weight has been given to the statements that he and his witnesses have never encountered members of the public claiming a right of way.

Conclusions and Recommendation

89. In conclusion, the Applicant has submitted evidence to support a claim for a 20 year period of uninterrupted use of the way at the Land as of right. The use as of right relates to access via the wooden planks and may potentially extend to the access via the strip of land between the vehicular gates and the boundary with 70 The Avenue.
90. However, the public nature of the deemed dedication has not been demonstrated, given that the evidence of use relates to that by the occupiers of some neighbouring

⁵ P100 Objector's evidence bundle

and nearby properties and their visitors, rather than from the locality generally and as such the Application must fail.

91. It may be possible that the Applicant has acquired a private right of way, however, the Council's remit does not extend to determining the existence of private rights over private land.
92. The recommendation to the Panel is to refuse to modify the definitive map and statement to include a public right of way over the footpaths as claimed in the Application.

Legal Implications of the Recommendation

93. 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 by serving notice of an appeal on the Secretary of State and the Council (as surveying Authority) within 28 days of being notified of the decision⁶.
94. If the Panel is minded to reject the Recommendation the order will be remitted to the Secretary of State for confirmation, since a surveying authority may not make an order that is opposed (as in this case).

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⁶ Paragraph 4 of Schedule 14 to the 1981 Act

APPENDIX A