

# FLORISTON AVENUE- APPLICATION TO MODIFY THE DEFINITIVE MAP AND STATEMENT TO INCLUDE A PUBLIC FOOTPATH

<b>Cabinet Member</b>	Councillor Keith Burrows
<b>Cabinet Portfolio</b>	Cabinet Member for Planning and Transportation
<b>Officer Contact</b>	John Fern, Environment and Consumer Protection
<b>Papers with report</b>	Appendix 1- Application form.

## HEADLINE INFORMATION

<b>Purpose of report</b>	To present Cabinet with a description of the legal framework and relevant considerations to be taken into account when determining an application submitted pursuant to Section 53 of the Wildlife and Countryside Act 1981.
<b>Contribution to our plans and strategies</b>	A safer borough
<b>Financial Cost</b>	The estimated costs of making the order are £800 to advertise the order before confirmation, plus some officer time. If the order is contested by the owners there would be further costs, which are estimated to be in the region of £5,000.
<b>Relevant Policy Overview Committee</b>	Residents' & Environmental Services
<b>Ward(s) affected</b>	Hillingdon East

## RECOMMENDATION

That Cabinet:

**Agrees that on the balance of probability, the evidence, when considered with all other relevant evidence available, shows that a right of way which is not shown in the Definitive Map and Statement subsists or is reasonably alleged to subsist over land in the area to which the map relates. As such the right of way should be added to the Definitive Map and Statement.**

## INFORMATION

### Reasons for recommendation

1. The purpose of this report is to ask Cabinet to make a decision in relation to an application which it has received to add a route to the definitive map and statement.

## Alternative options considered

1. That Cabinet does not agree that on the balance of probability the evidence, when considered with all other relevant evidence available to them, shows that a right of way which is not shown in the definitive map and statement subsists or is reasonably alleged to subsist over land in the area to which the map relates and that the right of way should be added to the Definitive Map and Statement.
2. There are no alternatives to considering the application to add the right of way to the definitive map and statement. If the Council fail to determine the application within a period of 12 months from the date of the application, the applicant has the right to appeal to the Secretary of State.

## Comments of Policy Overview Committee(s)

3. None at this stage.

## Supporting Information.

### A. The legal framework

5. This matter concerns an application dated 24<sup>th</sup> July 2009 made by Mr Ken Jacobs (the applicant) requesting the Council to consider adding a right of way to the definitive map and statement.
6. The definitive map and statement for an area is kept by the local highway authority and records existing public footpaths, bridleways and byways open to all traffic and roads used as a public path.
7. Section 53 of the Wildlife and Countryside Act 1981 (the Act) allows updates to the definitive map and statement by:
  - a. Adding any of these types of right of way which have not been included;
  - b. Changing the recorded status of a right of way already shown;
  - c. Deleting any way that can be proved not to be a right of way; and
  - d. Changing other details of the map or statement.
8. Cabinet, in this report, is therefore being asked to make a decision as to whether to add a right of way to the definitive map and statement and in doing so should have regard to the statutory provisions and case-law.
9. The legal test for making a decision to add a path to the definitive map and statement is contained in Section 53 of the Act and is made on the balance of probabilities.
10. The leading cases in this area are R v Secretary of State for the Environment, ex parte Bagshaw and Norton (1994), as confirmed in R v Secretary of State for Wales, ex parte Gordon Emery (1997).
11. In the Court's judgement in Bagshaw, it was stated that a two stage test had to be applied by local highway authorities which is:

- a. whether all the evidence available either shows that a right of way subsisted (test “A”); or
- b. that it was reasonable to allege that a right of way subsisted (test “B”).

12. In this case Owen J held that to answer either test A or test B should involve evaluation of the evidence and a judgement upon that evidence; and

- in order to satisfy test A, it is necessary for the Council to show that, on the balance of probability, the right of way does exist; and
- in order to satisfy test B, it is necessary for the Council to show that, a reasonable person having considered all of the evidence could reasonably allege that a right of way subsisted.

13. In making a decision, Cabinet must only consider the facts of the route based on the evidence presented. Cabinet should not consider what the Council, or anyone else, would like the situation to be.

## **B. Relevant history**

14. The houses in this area, bounded by Floriston Avenue, Lynhurst Road and Ryefield Avenue, Hillingdon, were built in the 1930's and designed into the build were a number of service roads to enable residents to access the garages at the rear of their properties. Most of the service roads are private property and not adopted public highway nor do they have any recorded public right of way running over them.

15. The service road that runs between numbers 12a and 14 Floriston Avenue not only allows access to the rear of the properties in both Floriston Avenue and Lynhurst Road, but also links directly with the service road that runs between numbers 111 and 113 Ryefield Avenue thereby allowing direct access between Floriston Avenue and Ryefield Avenue. The road is jointly owned by the four properties on either side.

16. The section of road that runs between 111 and 113 Ryefield Avenue is of gravel surface. The section of road between 12a and 14 Floriston Avenue has at some time been tarmaced. Both sections of road are approximately 3.5 metres wide and form a total length of 83 metres. Between the two sections a lamp column has been erected however there are no Council records relating to this column, although the type of column is similar to that which has previously been used by the Council and it is estimated that the column dates from around 1982. Where the service road adjoins Floriston Avenue, a pair of offset railings has been erected to prevent vehicle access but still allow pedestrian access. There are no Council records relating to these railings.

17. In June 2009 one of the owners erected a sign on the railings stating ‘advanced notice private land this will be gated no public access or right of way’.

18. In August 2009 two of the owners erected 2 metre high metal gates to prevent access along the section of service road between their two properties.

### **C. The Application**

19. In July 2009 the Council received an application under Section 53 of the Act from Mr Ken Jacobs of Lynhurst Avenue requesting the Council to add the path to the definitive map and statement due to its uninterrupted use for in excess of 20 years prior to the erection of the sign. His application was supported by 23 User Evidence Forms from other residents in the area.

### **D. User Evidence**

20. The 23 User Evidence Forms show the following use of the path.

<b>Number of years Route used</b>	<b>Number of Supporters</b>
1 – 19 years	3
20 – 29 years	8
30 – 39 years	10
40 – 49 years	2

21. Twenty of the supporters claimed to have used the route uninterrupted for a period of 20 years or more, with ten claiming to have used it for a period in excess of 30 years and two claiming to have used the route for in excess of 40 years.
22. Land registry title documentation provides evidence that at least 14 of the supporters purchased their properties over 20 years ago. Mr Jacobs, the applicant, purchased his property 35 years ago.
23. In terms of frequency, all of the supporters claim to have used the route on a frequent basis.
24. None of the supporters report having to gain permission to use the route and none recall having been stopped or prevented from using it prior to the sign being erected in June 2009. None recall seeing any previous notice preventing use of the way.
25. Land Owner Evidence forms have been received from the four owners of the adjacent properties to the route and all have objected to the path being added to the definitive map and statement.
26. One of the owners of the service road has objected to this application on the grounds that the land is privately owned and to allow a public right of way would adversely affect the privacy and enjoyment of his home due to anti- social behaviour by users of the route. The owner also claims to have erected a sign stating private on his fence approximately 16 years ago. He states that the sign was destroyed the next day and was reaffixed twice each time being destroyed. He also describes the route as being so overgrown over the years that residents could not have used it as a path. The land registry document provides that this owner purchased his property 16 years ago.

27. One of the other owners has objected on the grounds that the land is private and to allow a public right of way would adversely affect the privacy and enjoyment of his home due to anti-social behaviour by users of the route.
28. Of the two other adjoining land owners one has objected on the grounds of anti-social behaviour by users of the route and stated that since the way was gated life had been much quieter. The owner did however state that the way had been used by members of the public uninterrupted for over 20 years.
29. The other owner has also objected again on the grounds of anti-social behaviour by users of the route.

#### **E. Documentary evidence**

30. Aerial photographs from 1994/1995 and 1981 illustrate the physical existence of the route upon the photograph.
31. Revision map (Estate map), 1935 illustrates the route (taken from abstract of title). This map provides evidence of the physical existence of the way depicted on it.
32. OS Map, 1922 to 1969 illustrates the route on this map and OS Map shown 1959 – 1976 – footpath shown on this map. This map provides evidence of the physical existence of the way depicted on it.
33. Conveyance map, 1933 – the route is not shown on this map (also taken from abstract of title). It is probable that this map is too early to depict the route as the estate may not have been built at this time.

#### **F. Consideration of the application.**

34. The basis of the applicant's case is that the route should be added to the definitive map and statement due to its uninterrupted use for in excess of 20 years prior to the erection of the sign in June 2009. The period of use before Cabinet for consideration is therefore June 1989- June 2009.
35. A copy of the application dated 24th July 2009 with enclosures is attached at Appendix 1.

#### **Test A- does a right of way subsist?**

36. The application has been made on the basis of user evidence with 20 of the 23 supporters claiming to have used the path for a period of 20 years or more. At least 14 of the supporters purchased their properties over 20 years ago. Mr Jacobs, the applicant, purchased his property 35 years ago
37. The supporters have reported that during the usage there were no obstructions or challenges to their use prior to the erection of the sign in July 2009, followed by the erection of 2 metre high gates in August 2009.
38. The evidence of existence/usage of the route is documented as far back as 1938 with one supporter claiming to have used the route from this time onwards.
39. Of the four objections received regarding the application only one of the owners has raised matters to challenge the evidence of the supporters. He states that in the past the

route had become so overgrown that it could not have been used as a path, however no evidence has been put forward by him to support this. Ariel photographs obtained by officers of the Council (various dates) show the route to be passable by members of the public. Land Registry documentation shows that this owner purchased his property only 16 years ago.

40. The three remaining objections received were mainly concerned with the privacy of the adjoining land owners and concerns regarding anti-social behaviour. These objections did not challenge the supporter's position on the basis of uninterrupted use for 20 years. Officers accept the concerns of the adjoining landowners however Cabinet must only consider the legal test (as detailed above) based on the evidence presented and should not take into account irrelevant matters.
41. Based on the evidence presented, it is officer's view that, on the balance of probability, the right of way does exist.

Test B- Is it reasonable to allege that a right of way subsists?

42. The OS Map 1922 to 1969, 1959 – 1976, the Revision map (Estate map), 1935 and aerial photographs from 1994/1995 and 1981 all evidence the physical existence of the route. The physical existence of the route can therefore be found in documentary evidence throughout the 20 year period in question and far longer.
43. Although the representation of the route on a map published by the OS or an aerial photograph is not evidence of the existence of a right of way over it, it is officer's view that support for a claim that a way carries public rights may be gained from the fact that the way is shown on an OS map/aerial photograph published at an earlier date.
44. In addition to this, at some point in the past a lighting column has been erected together with a pair of offset railings which facilitate passage along the route.
45. Supporters have claimed on the User Evidence Forms that, prior to the erection of the gates, the route was used because it facilitates a "cut through" from the estate to the main road on Ryefield Avenue.
46. Based on the evidence evaluated, it is accepted by Officers that a reasonable person having considered all of the evidence could reasonably allege that a right of way subsisted.

**G. Procedure for adding a route to the definitive map and statement under Section 53 of the Wildlife and Countryside Act 1981.**

47. If Cabinet agree with the recommendation, a Notice of Order is drafted in accordance with the Wildlife and Countryside (Definitive Map) Regulations 1993 Statutory Instruments 1993 no 12 (as amended). The notice will be placed in the local newspaper, and displayed on the site and by the Council. Every landowner affected by the Order must also be notified. Notice of the Order must be advertised for 42 days, excluding bank holidays. Objections received during this period must be properly and carefully considered by the Council.
48. If all objections are withdrawn the Order can be confirmed by the Council. If objections are not withdrawn, the Order must be submitted to the Secretary of State for confirmation. The matter will then be dealt with either by written representations, public

hearing or public inquiry following which the Planning Inspectorate will issue the Inspector's decision letter. The Inspector will either confirm the Order or will not confirm the Order.

49. If the Order is confirmed and the right of way is obstructed, action can be taken by the Council to deal with the obstruction.

## **Financial Implications**

50. If Cabinet agree with the recommendation the resulting costs would have to be met by the Council, as it has a legal duty to investigate these applications. The estimated costs of making the order are £800 to advertise the order before confirmation, plus some officer time. If the order is contested by the owners, and went to a Public Inquiry there would be further costs, which are estimated to be in the region of £5,000. These costs would need to be met from the Highways Maintenance revenue budget for Public Rights of Way.

## **EFFECT ON RESIDENTS, SERVICE USERS & COMMUNITIES**

### **What will be the effect of the recommendation?**

51. Should the route be added to the Definitive Map and Statement then local residents would be able to use it as a path to access Ryefield Avenue directly from Floriston Avenue and Lynhurst Road without making a large detour.

### **Consultation Carried Out or Required**

52. If Cabinet agree with the recommendation in this report, the Council will proceed to comply with the publication requirements laid down in Schedule 15 of the Wildlife and Countryside Act 1981.

## **CORPORATE IMPLICATIONS**

### **Corporate Finance**

A Corporate Finance officer has reviewed this report and is satisfied that if Cabinet agree with the recommendation, that the costs would be met from the Highways Maintenance budget for Public Rights of Way. The costs have to be met by the Council, as it has a legal duty to investigate these applications.

### **Legal**

The legal implications are contained in the body of the report.

### **BACKGROUND PAPERS**

User Evidence Forms from 23 local residents.  
Land Owner Evidence Forms from the four adjoining land owners.  
Ariel photographs 1981, 1994/1995.  
Revision Map, 1935.  
Conveyance Map, 1933.  
OS Map, Historical County Series Epoch 4 1922 to 1969.  
OS Map, Historical 1250 National Grid 1<sup>st</sup> Edition 1959 to 1976.  
Site visit photographs.