

THE DRIVE, ICKENHAM - APPLICATION TO MODIFY THE DEFINITIVE MAP AND STATEMENT TO ADD A FOOTPATH

Cabinet Member	Councillor Keith Burrows
Cabinet Portfolio	Planning and Transportation
Officer Contact	John Fern, Environment and Consumer Protection
Papers with report	Appendix 1- Application form & Local Map

HEADLINE INFORMATION

Purpose of report	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.
Contribution to our plans and strategies	A safer borough
Financial Cost	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.
Relevant Policy Overview Committee	Residents & Environmental Services
Ward(s) affected	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

2. 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 which is not shown in the definitive map and statement subsists or is reasonably alleged to subsist over the land in the area to which the map relates and that the right of way should be added to the Definitive Map and Statement.
3. 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)

4. None sought at this stage.

Supporting Information

A. The legal framework

5. This matter concerns an application dated 16th March 2009 made by Mr John Davies (the applicant) requesting the Council to consider adding a 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 and 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 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. An area of land known locally as ‘The Spinney’ which borders number 10 The Drive and 7 Pine Trees Drive, Ickenham was purchased in 1952 by the London Borough of Hillingdon and was allocated to Leisure Services as amenity land. The land comprised of an unfenced grassed area with a number of mature planted pine trees.
15. On 18th January 1993 the former Community Services Sub-Committee resolved that the land was surplus to the Council’s requirements.
16. On 2nd February 1993 the same committee resolved that the parcel of land should be sold.
17. On 17th November 1994 The Finance and Property Sub-Committee gave consideration to the representations received from local residents regarding the Notice of Disposal of Public Open Spaces, which the above parcel of land was and resolved to pursue the sale of the land.
18. In 1996 the land was sold to a gentleman from Gerrards Cross complete with a number of conditions of sale in the form of covenants. These covenants included permitting the land to be fenced, but prevented any form of building or development on this piece of land. Not to use the property or allow it to be used for any other purpose other than amenity land and for no other purpose including that of a private garden. The covenants also ensured that the land was maintained to an acceptable standard. There are also a number of trees on the land which are protected by a “Woodland” Tree Preservation Order (No. 533 made in 1993).
19. Since 2004 Mr Davies has made two applications to modify the Definitive Map and Statement under Section 53 of the Act on behalf of ‘The Association of the Residents of The Drive’ stating that a footpath had been established across the land for a number of years and as such the residents requested the Council to modify the Definitive Map and Statement to include this route.

20. However, the initial application received did not comply with the guidelines as set out in the Act and as a result the Council corresponded with Mr Davies in order to ensure that the correct procedure was followed and the problems with the invalid application rectified.
21. In June 2005 the owner of the land erected a wire fence around the boundary of the land. This fence prevents local residents from gaining access to the land. The fencing does contain a gate; however this is always kept locked.
22. In November 2007 the owner sold the land on to an adjacent home owner, whose property is directly beside the land, sharing a boundary.

C. The Application

23. In March 2009, the Council received a valid application made under Section 53 of the Act from Mr John Davies of The Drive, Ickenham. Mr Davies once again requested 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 fence in 2005. His application was supported by 12 User Evidence Forms from other residents in the area. The application shows the path to run from a point in Pine Trees Drive near the junction with The Drive Northwards along the Spinney to a point near the boundary of number 10 The Drive. He believes the path to have been some 60cm to 1 metre wide at it's narrowest.

D. User Evidence.

24. The 12 User Evidence Forms show the following use of the path.

Number of years Route used	Number of Witnesses
1 – 19 years	4
20 – 29 years	3
30 – 39 years	4
40 – 49 years	1

25. Eight of the supporters state that they have used the route uninterrupted for a period of 20 years or more, with four stating that they have used the route for a period in excess of 30 years and one claiming to have used it for in excess of 40 years.
26. In terms of frequency, two of the supporters state that they have used the route on a frequent basis.
27. In terms of the route, nine of the supporters show the path to start and end at the same points and follow a similar route across the Spinney. Two of the supporters show the path to start and end at the same points but to follow a slightly different route between the points. One supporter shows the route to start further along The Drive and follow a different route but ending at the same point near number 10.
28. None of the supporters state that they have had to seek permission to use the route and

none have mentioned having been stopped or prevented from using it prior to the fence being erected in June 2005.

29. On 8 March 2009 the new owner of the land was served with the requisite notice under the provisions of the Act informing him that an application had been lodged. The Council have since undertaken a site meeting with the owner and his legal representative in order to confirm the line of the application route and to explain the investigation process.

E. Documentary evidence

As part of the Council's investigation the Council have considered the following documentary evidence:

30. The Hillingdon Enclosure Awards dated 1812 identifies the road 'The Drive' as private and illustrates the road in virtually the same location as it is sited today. There are no public footpaths shown on the land in question or within the vicinity.
31. Setting out of Public Footpaths Schedule dated 1816 taken from the Hillingdon Enclosure Awards lists no footpaths on the land or in the vicinity.
32. Hillingdon Enclosure Award Map dated 1825 identifies no public footpath at this location.
33. O/S Map Historical County Series Epoch 4 1888 to 1915 identifies no public footpath at this location.
34. O/S Map Historical County Series Epoch 4 1922 to 1969 identifies no public footpath at this location.
35. Reproduction of a photograph taken in June 2005 illustrates a worn footpath established across the land.

F. Consideration of the application.

36. 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 fence in 2005. The period of use before Cabinet for consideration is therefore June 1985- June 2005.
37. A copy of the application dated 16th March 2009 is attached at Appendix 1.

Test A- does a right of way subsist?

38. The application has been made on the basis of user evidence with 8 of the 12 supporters stating that they have used the path for a period of 20 years or more.
39. The supporters do not report any obstructions or challenges to their use prior to the erection of the fence in June 2005. The evidence of use regarding this application dates back as far as 1953 with one supporter stating that they have used the footpath from this time onwards.

40. One photograph of the route has been submitted. The photograph has been reproduced from an original. The photograph is not dated, except for a written date provided by Mr Davies. The photograph does not identify the site by way of road signs etc, although it does show the large trees either side of a clearly identifiable route.
41. The Owner has considered the application submitted and makes the following observations:
- One of the statements from a resident appears to indicate that there may have been a notice displayed prohibiting use of the footpath and that the footpath may have been obstructed.
 - Many of the statements refer to the same straight line across the property but this is slightly different to the plan attached to the later application and in the later application many of the plans provided are different. Residents do not appear certain as to the exact route.
 - The photograph of the right of way in question was, unfortunately, unclear. It appeared to be over exposed and the route of the right of way cannot be ascertained from this.
 - Some of the dates on the statements are unclear.
 - The statement of John Davis indicates that the route of the path has "more or less" been the same throughout the twenty year period.
42. Based on the evidence presented, it is officer's view that, on the balance of probability, the right of way does exist across the land.

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

43. The dimensions of the pathway can be identified in the photograph and appear to be approximately 1 metre in width and approximately 64 metres in length running diagonally across the parcel of land between the large trees.
44. All of the supporter who submitted User Evidence Forms have agreed to attend a public inquiry to give evidence if required.
45. A review of Arial photographs of the land have failed to either support or deny the existence of the route due to the canopy of the trees on the land obscuring any overhead view.
46. None of the documentary evidence (as mentioned above) considered by the Council as part of the investigation identify the route.
47. 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 across the land.

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

48. 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.

49. 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.

50. 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

51. If Cabinet agrees 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 and resulted in 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 the Public Rights of Way.

EFFECT ON RESIDENTS, SERVICE USERS & COMMUNITIES

What will be the effect of the recommendation?

52. Should the route be added to the Definitive Map and Statement then local residents would be able to use and enjoy the route across the land as a short cut across this corner of The Drive where there is no footpath adjoining the carriageway.

Consultation Carried Out or Required

53. 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

54. 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

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

Corporate Property

56. The owner of the land has recently approached the Council with a view to providing a footpath over the land in return for an amendment to the covenants to allow all or part of the land to be used as garden land in conjunction with his adjoining property. No discussions have yet taken place with the owner, and should it be considered appropriate to enter into such discussions it is most unlikely that an outcome would be reached before the date of the Cabinet meeting.

Relevant Service Groups

BACKGROUND PAPERS

Supporting Evidence Forms from 12 local residents.

O/S Map Historical County Series Epoch 4 1888 to 1915.

O/S Map Historical County Series Epoch 4 1922 to 1969.

Reproduction of photograph taken June 2005.

Site visit photographs.

List of Covenants.

Appendix 1

Application form to modify the Definitive Map and Statement.

Local Map