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Meeting	Planning and Environment Committee
Date	20 March 2014
<b>Subject</b>	<b>Application to add a Public Right of Way from West Heath Road NW3 to Finchley Road NW11 to the Definitive Map and Statement</b>
Report of	Strategic Director Growth and Environment
Summary of Report	This report presents the evidence related to the application and the legal issues to be considered in deciding whether or not to make an order to add a footpath to the Definitive Map and Statement.

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Status (public or exempt)	Public
Wards Affected	Childs Hill Ward
Key Decision	Not applicable
Reason for urgency / exemption from call-in	Not applicable
Function of	Council
Enclosures	Appendix 1 - Plan of claimed route Appendix 2 - Evidence report
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## **1. RECOMMENDATION**

- 1.1 That the Committee instructs officers to make an Order under Section 53 of the Wildlife and Countryside Act 1981 to add to the definitive map and statement a footpath from West Heath Road NW3, between numbers 179 and 183, to Finchley Road NW11, between numbers 492 and 494.**

## **2. RELEVANT PREVIOUS DECISIONS**

- 2.1 None

## **3. CORPORATE PRIORITIES AND POLICY CONSIDERATIONS**

- 3.1 The Wildlife and Countryside Act 1981 places a duty on Local Authorities to update the definitive footpath map and statement for the areas under their jurisdiction, bringing urban areas under the same consideration as footpaths in rural areas which had been maintained under the previous National Parks and Access to the Countryside Act.

## **4. RISK MANAGEMENT ISSUES**

- 4.1 Such matters should not form part of the Committee's considerations in determining the application

## **5. EQUALITIES AND DIVERSITY ISSUES**

- 5.1 The council in the exercise of its functions, recognises its statutory duty to have regard to the need to eliminate all types of discrimination, advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it and to foster good relations between persons who share a relevant protected characteristic and persons who do not share it as required under section 149 of the Equality Act 2010.
- 5.2 Section 149 of the Equality Act 2010 requires a decision-maker to have 'due regard' to achieving a number of equality goals: (i) to eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by the Act; (ii) to advance equality of opportunity between those with protected characteristics and those without; and (iii) to foster good relations between persons with a relevant protected characteristic and those without. The relevant protected characteristics are age, disability, gender reassignment, pregnancy and maternity, race, religion or belief, sex and sexual orientation.
- 5.3 Inclusion of the path on the Definitive Map would not, of itself, result in any physical change to the site. The path is stepped in places and issues regarding anti-social behaviour have also been raised in relation to the path. Although either of these issues could impact more on some groups with protected characteristics than on the general population, it is considered that inclusion of the path on the Definitive Map would not directly affect any of the protected groups or affect good relations between persons sharing a relevant protected characteristic and others not sharing that characteristic.

## **6. USE OF RESOURCES IMPLICATIONS (Finance, Procurement, Performance & Value for Money, Staffing, IT, Property, Sustainability)**

- 6.1 Such matters should not form part of the Committee's considerations in determining the application.
- 6.2 Costs of making the Order and any subsequent legal representations would be met from existing budgets

## **7. LEGAL ISSUES**

7.1 Under Section 53 of the Wildlife and Countryside Act 1981 ("WCA") the London Borough of Barnet ("the Council") as the surveying authority, is obliged to keep the Definitive Map and Statement (of public rights of way) under continuous review. The Council may make modifications to the Map and Statement where certain events occur including where the Council discovers evidence which shows that a right of way which is not shown on the Map and Statement subsists or is reasonably alleged to subsist (s.53 (3)(c)(i) WCA). The applicant must present evidence that there is deemed dedication or a right of way either by operation of Section 31 of the Highways Act 1980 or at common law. Section 53(5) of the Wildlife & Countryside Act 1981 provides that any person may apply to the authority for an order which makes such modifications as appear to the authority to be requisite in consequence of the occurrence of certain events.

7.2 The present application falls to be considered by the Council under Section 53 (3)(c)(i) WCA. The Courts have reviewed the extent of the Council's duties when considering an application for a Modification Order. The Courts have stated that before making an Order the Council must have had all evidence clearly presented before it and must have had clear guidance on how the law relating to a presumed and implied dedication of land is to be applied.

7.3 A brief summary of the law relating to presumed and implied dedication of land is set out below.

### 7.3.1 Presumed Dedication

Under section 31 of the Highways Act 1980 ("HWA") a presumption of deemed dedication may occur if it can be shown that the public have had: -

- a) Use for a period not less than 20 years (calculated retrospectively from the date that the use was first brought into question)
- b) Use as of right
- c) Use without interruption

### 7.3.2 Implied Dedication

If the applicant cannot satisfy the criteria as set out in the Section 31 HWA, it may claim an implied dedication of the right of way at common law. The applicant must show that the way has been used by the public as of right and without interruption for such a long period of time that it is appropriate to draw an inference that dedication has been made.

7.4 The present application falls to be considered under Section 31 HWA as the evidence is that the right of way has existed for over 20 years.

- 7.5 The Council must be satisfied on the evidence that "the right of way subsists or is reasonably alleged to subsist". This means that after considering the evidence on the balance of probabilities it can be said that a right of way exists and that a reasonable person having considered all evidence would reasonably conclude the existence of a right of way . Even if the Council itself is not convinced that there is a right of way, but it is reasonably arguable that there is a right of way, the Council is obliged to make a Modification Order.
- 7.6 If the landowner can show incontrovertible documentary evidence that there is no intention to dedicate or that a presumption could not arise, then the Council could conclude that it would not be reasonable to allege that a right of way subsists and the application should be rejected.
- 7.7 In summary, where there is conflicting evidence, the Council should consider whether it is reasonable to accept one side of that evidence and reject the other.
- 7.8 If the Council decides to make an Order for Modification then after making the order the authority must give notice to the statutory consultees and invite representations on the order.
- 7.9 If no representations are made, the Council can proceed with the Order and amend the Map and Definitive Statement.
- 7.10 If representations opposing the Order or seeking modification of the Order are received, the Council must refer the Order to the Secretary of State for confirmation.

## **8. CONSTITUTIONAL POWERS (Relevant section from the Constitution, Key/Non-Key Decision)**

- 8.1 Councils Constitution, Responsibility for Functions, the Planning and Environment Committee Terms of Reference include Council highways functions (including highways use and regulation, access to the countryside, arrangements and extinguishment of public rights of way) which are limited to:
- *creating, stopping up and diverting footpaths and bridleways*
  - *asserting and protecting public rights to use highways*
  - *removing things deposited on highways which cause nuisance*

## **9. BACKGROUND INFORMATION**

- 9.1 On 6 July 2012 Judith Prais ("the applicant") applied to have a footpath from West Heath Road (between numbers 179 and 183) and Finchley Road (between numbers 492 and 494) added to the Definitive Map of Public Rights of Way.
- 9.2 The claimed footpath is within the land of private ownership of Mayfair Charities Limited. According to the Land Registry title documents the current owners have had the title absolute of the land since 1991.
- 9.3 Evidence was supplied by the applicant at the time of the application and over the following two months approximately regarding use of the path by the public. The Council has also investigated its own records and additional evidence has been provided by other interested local residents. Solicitors for

the landowner, owners and occupiers of adjacent premises and local ward Councillors have also provided evidence that is summarised in the appended Evidence Report.

- 9.4 People who have provided evidence or information about their use of the path have been contacted to verify they provided the information, were aware that it would be used as evidence in this matter and resolve some queries. Where a response has not been received then the contact has not been made then details have been excluded from the evidence report.
- 9.5 The claimed route runs from West Heath Road, via a driveway between numbers 179 and 183 West Heath Road to Finchley Road, between numbers 492 and 494. 181 and 181a West Heath Road are accessed from the route.
- 9.6 The application was prompted by the erection in 2012 of concrete fences across the path near the Finchley Road and near 181a West Heath Road at the point where the path narrows. The landowner advises that these fences were erected on 30 March 2012. This is considered to be the date at which the right of the public to use a way was brought into question.
- 9.7 For the public to be considered to have “actually enjoyed” use of the path there must be sufficient evidence of use. This will vary depending on the circumstances of each case. What might constitute sufficient use in a remote area would perhaps not be considered sufficient in a more urban area.
- 9.8 Clyde and Co, the solicitors for the landowners highlight that the evidence of some users refers to infrequent use. As such it may be insufficient to demonstrate ‘actual use’ however it nevertheless contributes to the overall evidence of use.
- 9.9 They also note that some evidence is provided by members of the same household, and at least in relation to the initially verified evidence, this was a small number of households, which might suggest limited use by the public. Subsequent additional evidence indicates that use has been by more than a few households.
- 9.10 Table 1 of the evidence report sets out the level and periods of use of those members of the public who have provided evidence. A number of these describe use of the path multiple times per week, some more than once per day. Taken in aggregate the path would appear to have been in daily use throughout the twenty years preceding its closure
- 9.11 Evidence from people who have used the path only in recent years clearly does not include the entire 20 year period, but may provide supporting evidence regarding recent use.
- 9.12 Some evidence refers to use of the path “to date” or to 2013, by which dates the path would have been blocked. Such dates are clearly inaccurate.
- 9.13 A number of the 12 evidence forms provided with the application were pre-completed with the end date 2012 and average use over the period was generally quoted. Consequently there may be some doubt as to whether the intensity of use stated continued throughout the periods specified and until path closure.

- 9.14 Most people who have provided evidence have indicated that they would be prepared to give their evidence at a public enquiry should this become necessary. Where this is not the case (indicated in the table in table 1 of the evidence report) then the landowner would be denied an opportunity to test the evidence and such evidence should be afforded only limited weight.
- 9.15 Use 'As of right' means that use has been not by force, not secretly and not by permission. A House of Lords decision in R. v. Oxfordshire County Council, ex parte Sunningwell Parish Council determined that it would be wrong to import a subjective element of belief to that definition. Before this case it had been thought that the phrase 'as of right' included an element of belief by the public using a way that they were entitled to use it. Clyde and Co highlight Mr & Mrs Cohen's evidence that they were advised the way was private when they asked about street lighting and suggest this is relevant to their use 'as of right'. However it is not necessary that they believe the way to be public for the use to be 'as of right'. The actual use must be 'as of right' i.e. without permission of the Landowner.
- 9.16 Use 'Without interruption'  
It is sometimes very difficult to determine what constitutes interruption, but in general terms this is usually taken to mean an actual and physical act which stops the public or some members of the public from using the way. The interruption must be carried out by the owner of the land or on the authority of the owner. An interruption may consist of closing of a right of way against all users for a single day or isolated acts of turning back. It can be hard for landowners to provide evidence that they have carried out either type of interruption. In this instance the landowner has not suggested that any form of interruption of use had taken place until erection of fences in March 2012.
- 9.17 'Sufficient evidence that there was no intention during that period to dedicate' might take the form of depositions made and lodged with the highway authority about a landowners intention to not dedicate rights of way across their land and/or signs that are inconsistent with the dedication of the way as a highway. There is no suggestion that such depositions have been made and the landowner has not suggested that any such signs were in place before those provided on the fences erected across the path in 2012 and most users of the path indicate they have not seen signs except those installed on the fences across the path. A sign on the fence of number 494 regarding dogs does not seem to be intended or have been interpreted as applying to the path.
- 9.18 The legal criteria in Section 7 of this report and evidential and legal material contained in Appendix 2 (the Evidence report) should be taken into account in making the resolution whether or not to make an Order.

## 10. LIST OF BACKGROUND PAPERS

- 10.1 Written evidence  
Witness statements.  
Maps  
Photographs

<b>Cleared by Finance (Officer's initials)</b>	<b>JH</b>
<b>Cleared by Legal (Officer's initials)</b>	<b>PR</b>