

APPENDIX 2 - EVIDENCE REPORT

1.0 Background

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.

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 through correspondence and a meeting with Mr Dunbar, Ms Elek and Mr Andrew Kasriel. The landowner of the land across which the path runs and the owners of adjacent properties were also consulted, as were local councillors and the Auto Cycle Union, British Driving Society, Byways & Bridleways Trust, Open Spaces Society, Ramblers Association, Cyclists Touring Club and British Horse Society. A draft of this report was also provided to the applicant, landowner, adjacent owners and occupiers, local councillors and the residents named above.

2.0 User Evidence

The evidence submitted by the applicant consisted of 12 questionnaire-style user evidence forms from members of the public (including the applicant) that describe their use of the path and a further 50 short forms (most apparently from staff or visitors to St Margaret’s Care Home in West Heath Road), indicating the signatory was or had been a regular user of the path and would like to see it reopened. These short forms also gave information about the length of time, frequency and purpose of the use of the path.

Some evidence on some of the 12 user evidence forms submitted by the applicant appears to have been pre-completed, including the end date of use of the path of 2012. The applicant’s form is entirely typed / word-processed apart from the signature and date. Those completed by David Dunbar MBE, Gillian Dunbar, Roger Webb and Christina Webb are also typed / word-processed apart from the signature. These five forms use similar wording to answer many questions, but some longer answers are worded differently, if only slightly, such that three distinct forms of wording are used across the five forms.

The forms completed by Norman Primost, Judith Kasriel, Andrew Kasriel, Sheila Philip, Debbie Primost, Simon Cohen and Yael Cohen appear to be based on that completed by the applicant. Some information appears to have been pre-completed on the form by word-processor. This information is in bold type (in contrast to the text of the form) and in some cases is also highlighted. The rest of these forms have been completed by hand. The start year of path use, purpose and frequency of use and preparedness to attend a public enquiry, signature and date are all completed by hand on these seven forms. Other information included in this section and summarised below appears to have been pre-completed on these forms.

Nine of the people who had completed a short form about the path have subsequently completed a user evidence form. Three other people who completed a short form have confirmed by telephone that their form can be used as evidence and they would be prepared to attend a public enquiry should this be necessary. 23 additional user evidence forms have been provided by other members of the public that have been verified.

Evidence forms and short forms that have not been verified by contact with the individual concerned are not considered further in this report.

2.1 Location and route of the footpath claimed:

The 12 user evidence forms provided by the applicant all included the pre-completed information that the path ran from West Heath Road NW3 to Finchley Road NW11 and gave grid references for the ends of the path. The forms asked if the route of the way had always run over the same route or whether it had changed. All indicated that the route was always the same.

A map was provided to the applicant and to the 11 other residents who had provided forms with grid references to confirm they were clear about the location of the path. 10 (including the applicant) returned the plan confirming this was the route referred to in the application or their evidence form as appropriate. Mr Webb responded without explicitly confirming and has since confirmed by telephone his understanding as being as the map provided, and Mrs Webb has also confirmed by telephone her understanding of the path as being as the map provided.

The shorter forms were all pre-completed with the path description as "Footpath between 179 and 183 West Heath Road NW3, leading to the Llanvanor Road bus stop on Finchley Road". The 32 additional user evidence forms were all pre-completed with the path described as "from West Heath Road, NW3 – between Nos 179 & 183 to Finchley Road, NW11 – between Nos 492 & 494". Seventeen additional forms also included a copy of the plan described above confirming the route (these are indicated with a * beside the name in table 1). The additional user evidence forms all indicate that the route has remained the same except one that does not answer this question and one that says: Around March 2012 a fence was build up stopping people going through the path.

Despite the various descriptions of the footpath, it is evident that the path described is the same path discussed by all users of the path.

2.2 Use of the path

The period, frequency and purpose of use referred to by the people who have provided a verified user evidence form or agreed their short form can be used are set out in table 1. The table also identifies those people who would be prepared to attend a Public Enquiry should this be necessary.

Table 1.

Name	Address	Period of use path	Where going to and from / for what purpose	Frequency of use	Prepared to give evidence at public enquiry (evidence form or subsequent info)
Norman Primost	98 West Heath Road	1949-2012	From West Heath Road to the Finchley Road and vice versa. Best Route to the Bus Stop on Finchley Road	Approx 100/year	Yes
Christina Webb	90 Crewys Road	1955-2012	To and From West Heath Road and Finchley Road. Access to and from Golders Hill Park, Hampstead Village and Hampstead Heath	Average 20/year	Yes
Roger Webb	90 Crewys Road	1955-2012	To and From West Heath Road and Finchley Road. Access to and from Golders Hill Park, Hampstead Village and Hampstead Heath	Average 20/year. Mr Webb has indicated use was greater when he was younger and less in recent years	Yes
Debbie Primost	98 West Heath Road	1965-2012	From West Heath Road to Finchley Road and vice versa. Best Route to the Bus Stop	Approx 100/year	Yes
Sheila Philip	40 Nant Road	1970-2012	From West Heath Road to Finchley Road and vice versa. Shortcut to Heath and Park. Visiting friends.	40/year	No
David Dunbar	31 Llanvanor Road	1975-2012	From West Heath Road to the Finchley Road and vice versa. Access to and from Golders Hill Park, Hampstead Village and Hampstead Heath.	Approx 20-30/year on average	Yes
Gillian Dunbar	31 Llanvanor Road	1979-2012	From West Heath Road to the Finchley Road and vice versa.	Approx 10-20/year average	Yes

Name	Address	Period of use path	Where going to and from / for what purpose	Frequency of use	Prepared to give evidence at public enquiry (evidence form or subsequent info)
			Access to and from Golders Hill Park, Hampstead Village and Hampstead Heath		
Simon Cohen	175 West Heath Road	1977-2012	From West Heath Road to the Finchley Road and vice versa. To go to Finchley Road to travel, to the synagogue, visit friend.	250/year	Yes
Yael Cohen	175 West Heath Road	1977-2012	From West Heath Road to the Finchley Road and vice versa. Access to Finchley to travel, shop visit etc	500/year	Yes
Andrew Kasriel	90 West Heath Road	1978-2012	From West Heath Road to the Finchley Road and vice versa. To and from work in central London + shopping + leisure journeys	Over 200/year	Yes
Judith Kasriel	90 West Heath Road	1978-2012	From West Heath Road to the Finchley Road and vice versa. To and from work, shopping, leisure	Approx 300	Yes
Judith Prais	83 West Heath Road	1985-2012	From West Heath Road to the Finchley Road and vice versa. Often in order to catch the bus from outside the footpath or to descend the bus and reach home. Sometimes in order to cross the Finchley Road and reach other roads.	Most weekdays (in order to return from school and then in order to travel to and return from work). And at weekends for leisure purposes	Yes (Statutory declaration also provided)

Name	Address	Period of use path	Where going to and from / for what purpose	Frequency of use	Prepared to give evidence at public enquiry (evidence form or subsequent info)
R Acker Holt	50 Platts Lane	1970's onwards till path blocked	Finchley Road to West Heath Road or the reverse (Golders Hill Park)	2-3 / week	Yes
Dorothy Holt	474a Finchley Road	1970 (evidence form 2013) Short form provided 2012 stated: 1979 till path blocked, 2 or three times/week. Confirmation of period of use awaited.	Finchley Road to Hampstead Heath (evidence form) Short form stated: To visit friends in West Heath Road and go to Hampstead and Park.	Several times a week	Not confirmed whether prepared to give evidence at public enquiry
Vivienne Flower	75 West Heath Road	Last 25 years (2013 evidence form - & not stopped or turned back till last year when barrier erected). Short form states 1988 to now [dated July 2012].	West Heath Road to Finchley Road. (Short form: Reaching Finchley Road)	intermittently	Not confirmed whether prepared to give evidence at public enquiry
Andrew Thomas (& family)	77 West Heath Road	1998-2012	House to Bus stop	340/ year x twice/day	Yes
Martyn Woolf	Flat 4, 75 West Heath Road	About 1938 onwards (Short form (2012) states:	Finchley Road to West Heath Road (Short form: to go to and from bus. Leisure & business).	How many times per year? "Innumerable" Short form (2012) states: 1994-present	Yes

Name	Address	Period of use path	Where going to and from / for what purpose	Frequency of use	Prepared to give evidence at public enquiry (evidence form or subsequent info)
		1994-present (July 2012). 4-5 times per week. 2013 evidence form notes: about 1 year ago barrier was erected)		(July 2012). 4-5 times per week. 2013 evidence form notes: about 1 year ago barrier was erected	
Paloma Hidalgo	84 West Heath Road	2006-2012	84 West Heath Road to Finchley Road	About 15 times / week	Not confirmed whether prepared to give evidence at public enquiry
Maurice Mulvihill	2 Thorverton Rd NW2 (evidence form 2013). 10 Mazenod Ave NW6 (short form 2012)	1999-2013. Short form states: 2011-2012.	Walking	4/year (Short form states: 2011-2012, once/week)	Yes
Mr Mulvihill has confirmed by telephone that he has two addresses. Over the last 3-4 years used the path mainly to visit mother at St Margaret's home. Otherwise has used the path for walking the dog on the heath. Use has been greater in recent years when visiting mother.					
Peter Tighe	43 Linfield, Sidmouth Street. WC1	2010-2012	To the care home. (short form to visit mother & the heath).	A lot of times (per year). 5 days / week. (Short form states: 4/week)	No
Jill Elek	47 Llanvanor Road	1984-2012	Home to Park – Golders Hill Heath and Hampstead	Variable (evidence form).	
Ms Elek has confirmed she has used the path intermittently between 1984-2012. From 1989-90 she lived out of London during the week and					

Name	Address	Period of use path	Where going to and from / for what purpose	Frequency of use	Prepared to give evidence at public enquiry (evidence form or subsequent info)
some weekends. Since about 2009 till path closure used it about twice per week for walks to Golders Hill Park and Hampstead Heath but used the path less often before that – perhaps twice a month in summer and less in winter.					
Zea Katzeff	6 Hodford Road, NW11	many many years - been at my address 29 years	Home to Golders Hill Park	Twice a week	Yes
Ms Katzeff has confirmed “My three children attended King Alfred School in North End Road NW11 from September 1988 until June 2009. (My eldest son is now 33, my youngest 22). During this period we regularly used the footpath (during the week, twice a day) as the quickest way to reach Golders Hill Park (from our home) which we then crossed to access the school.					
We have been at our address for 29 years, from April 1984. The access path was always the most convenient route for the family to Hampstead Heath and also for me when walking to Hampstead Village which I still regularly do.”					
Brian Berelowitz	6 Hodford Road NW11	1976-2011	To Heath, visit friends, walks with kids	+15/year	Yes
Mila Villastiqui (short form only)	37 Gonville Crescent, Northolt. UB5	1996-present before closure	To work at St Margarets to do errands for the home.	5 days/week. 10-13 times/week	Yes
Phyllis Tafiranyika (short form only)	59 Arrow Close, Luton	1996 - 2012	Workplace on West Heath Road. Take clients out shopping and on outings. Alley was quickest route to main road.	15 times/week	Yes
Lurline Morgan (short form only)	St Margarets Housing & Adult Social Care, 84 West Heath Road	July 1999 - 2012	To care for the elderly	14 days (sic) / week	Yes

Name	Address	Period of use path	Where going to and from / for what purpose	Frequency of use	Prepared to give evidence at public enquiry (evidence form or subsequent info)
*Belinda Mindell	36 Holly Park, N3	1983-2012	Bus stop on Finchley Road to 98 West Heath Road & vice versa. Part of the time living at 98 West Heath Road and part of the time visiting parents/grandparents.	100/year when living at WHR then 30 times when visiting.	Yes
*Max Kasriel	107b Sumatra Road. NW6 (2011-present) (previously 90 West Heath Road)	1987-2011 (since 1997 unaccompanied)	Bus stop on Finchley Road to access Swiss Cottage, St John's Wood, Central London, etc	1997-2011 estimates between 30-40 & 300-400 times/yr depending on period.	Yes
Anne Davies	42 Llanvanor Road	2011 until closure of path.	The Royal Free Hospital, place of work.	More than 200 times/year	Yes
*Stephanie Blendis	18 Fortismere Avenue, N10	1975-2000 (from 1984 unaccompanied)	From my home on West Heath Road to use bus stop to travel to school/into town.	400/year	Yes
*Chris Potter	28 Llanvanor Road	1982-2013	From 1988 until closed, to work (King Alfred's School)	5 days/week	Yes
*Emily Potter	24A Conway Road N15	1985-1998	School (Finchley Road ->North End Road)	Schooldays	Yes
*Jeremy Kasriel	107a Sumatra Road. NW6 (2011-present previously 90 West Heath Road)	1979-2003 (since 1987 unaccompanied)	From my House on West Heath Road to use bus stop on Finchley Road fro journeys to Central London etc	300/year	Yes

Name	Address	Period of use path	Where going to and from / for what purpose	Frequency of use	Prepared to give evidence at public enquiry (evidence form or subsequent info)
Rafael Kidel	51 Llanvanor Road	2006-2012	School (with children), Church, Park/Heath	104/yr (2006-2009) approx 156/yr (2010 onwards)	Yes
Sara Kidel	40 Park Drive	1995-closure	Visiting friends, shops, bus stop	24/yr	Yes
*M.R. Mossetti	17 Llanvanor Road	1978-1993	Home to Golders Hill Park – in particular walking dog from 1978-1993 3-4 times/week up path to park.	from 1960s spasmodically but in particular from 1978-1993 3-4 times/week	Yes
*Rosina Alzano	32 Llanvanor Road	Mid 1990s- early 2000	St Margaret's Old People's Care Home	weekly	Yes
*Kate Fugallo	39 Llanvanor Road	When my children were young visiting friends & children to play & 1990s [unclear] access to the Heath		30/40 per yr	Yes
*Derek Ross	46 Llanvanor Road	2000-2013	To Golders Hill and Hampstead Heath from our home and back to our home	Around 30-50/yr	Yes
*Susan C Ross	46 Llanvanor Road	2000-2013	To Golders Hill and Hampstead Heath from our home and back to our home	Around 30-50/yr	Yes
*James Edward Barnett	Flat 2, 31 Templars Avenue, NW11	2007-2012	To/from Golders Hill Park; Hampstead also	~25/yr	Yes
*LR Dixie	55 Crewys Road	1982-2009	From home to the Heath – Golders Hill Park dog walking	1/wk 1982-1995 1/month 1996-2009	Yes
*D.H.J Cohen	37 Ferncroft Avenue, NW3 (formerly 163 West Heath Road)	1984-2004	From home W[est] H[earth] R[oad] to Finchley Rd. bus stop direction Golders Green & to get to Hodford Rd direction Synagogue	120/yr	Yes

Name	Address	Period of use path	Where going to and from / for what purpose	Frequency of use	Prepared to give evidence at public enquiry (evidence form or subsequent info)
*B.R. Cohen	37 Ferncroft Avenue, NW3 (formerly 163 West Heath Road)	1984-2004	Home on W[est] H[eath] R[oad] for bus direction Golders Green and to get to Hodford Road. Direction Synagogue.	approx 70/yr	Yes
*Elizabeth Tucker	15 Llanvanor Road	From 2000 onwards	Home, to Golders Hill Park, The Hill at Hampstead Heath	80/yr	Yes
*Andrew Tucker	15 Llanvanor Road	From 2000 onwards	From home to Golders Hill Park or Hampstead	50/yr	Yes
Clova Reid	96 Leslie Road, Leyton, E11 4HG	1999-2012	Work / to and from the bus stop	4 days/week	Yes

2.3 Stiles or gates

The user evidence forms ask whether there have ever been any stiles or gates on the way.

Of the twelve forms provided by the applicant users responded to the questions using similar or identical wording. Eight users responded: "About three months ago cement blocks were erected to prevent entry to the footpath. I do not recall that prior to that any stiles or gates or other blockage to our route"

Two users responded: "None. About three months ago concrete posts and horizontal slid-in panels to a height of about 2 metres were erected at the top and lower ends of the footpath preventing access. Prior to this there have never been any obstructions to the footpath during the period I have used it." And two others used the same wording without the word None at the beginning.

Of the other verified user evidence forms 26 responded "No". The other 6 responded:

No (except now it is blocked)	R Acker Holt
2 gates were put in place. One near Finchley Road one near West Heath Road	Paloma Hidalgo
No stiles or gates within the time I have used the path / Not within the time I have used the path	Anne Davies
No obstacles	Chris Potter
Not during our time of use	DJH Cohen
Not during our time of use	BR Cohen

2.4 Working for or tenant of landowner

The twelve forms provided by the applicant all stated not applicable in response to this question (the question asked, if this were not the case, to write No). . Eleven of these have subsequently confirmed they had not been working for or a tenant of the landowner. Mrs Webb has not responded directly to a follow up question about this. 30 of the others who completed verified user evidence forms responded no to this question. Rosina Alzano and Kate Fugallo responded not applicable.

2.5 Stopped, turned back or told by owner or tenant that way was not public?

The twelve forms provided by the applicant all stated "never" in response to a question about being stopped or turned back and "no" to a question about whether they had been told by an owner or tenant that the way was not public.

Of the others who completed user evidence forms 28 responded "no" (or "never") to the question about being stopped or turned back. The other four responded:

Not until last year when the barrier was erected	Vivienne Flower
There's no way over the fence	Paloma Hidalgo
Stopped due to erection of barriers in April 2012	Anne Davies
No. even with recent security cars on West Heath Road, was never stopped or turned back.	James Barnett

28 also responded "no" to the question about being told the way was not public, with the other four responding:

Never told, fence stopped anyone going through	Paloma Hidalgo
N/A	Rosina Alzano
Only when we requested lighting at night & council informed us it was not public	D.H.J Cohen
Only when we requested lighting at night & council informed us it was not public	B.R. Cohen

2.6 Locked gates or obstructions

The 12 forms provided by the applicant all stated “no” in response to this question. Eighteen of the additional user evidence forms also say “no”. The other fourteen responded:

Locked gates/obstruction?	
No (except now)	R Acker Holt
Yes – about 1 year ago a concrete barrier was erected	Martyn Woolf
The gate is locked stopping everyone to go up or down	Paloma Hidalgo
blocked at entrance at Finchley Road	Peter Tighe
not until recently as far as I know	Jill Elek
No – only by the new wall there now	Brian Berrelowitz
[No response]	Belinda Mindell
barriers at upper and lower ends from April 2012	Anne Davies
No, not until recent blockage	Chris Potter
[No response]	Rafael Kidel
2 walls were built earlier in 2013	Derek Ross
2 walls were built earlier in 2013	Susan C Ross
not until recent closure	Elizabeth Tucker
not until recent closure	Andrew Tucker

2.7 Notices on the path

Of the twelve forms provided by the applicant users responded to the questions using similar or identical wording. Eight users responded “Only three months ago [forms dated July 2012] when cement blocks were erected with a statement that there was no entry” and four users responded “Only three months ago [forms dated July 2012] when the concrete walls were erected each had a sign saying “No Thoroughfare”

23 additional user evidence forms respond “no” (or “never”). The other nine say:

Notices on path	
No - on the contrary there was a sign saying "public footpath" until it was removed when obstruction placed	Dorothy Holt
It just says private	Paloma Hidalgo
Private	Peter Tighe
Yes see above [response above reads - not until recently as far as I know]	Jill Elek
Yes - cannot recall exact wording	Anne Davies
Only in 2013	Derek Ross
Only in 2013	Susan C Ross
not until recent closure	Elizabeth Tucker
not until recent closure	Andrew Tucker

2.8 Permission to use the way

All who completed verified user evidence forms responded “no” when asked if they had ever asked permission to use the way. Mr Barnett added “it has always been open”.

2.9 Other information

The 12 forms provided with the application all include the same or similar wording to highlight use of the path by employees of the St Margarets Home at 84 West Heath Road.

R. Acker Holt and Dorothy Holt both refer to a sign that said public footpath. R. Acker Holt says “for as long as I can remember (about 40 years) there was always a sign at the corner of the Finchley Road end of the footpath which said “Public Footpath”.” This sign disappeared when the obstruction was built.”

Mr Mossetti states he has lived in his house for 60 years and always used path for easy access to Golders Hill Park

Kate Fugallo states “this is a public footpath”

3.0 Maps

The way is not shown as a public right of way on the definitive map for the area, however this location was an “excluded area” when the definitive map was produced, so not included in the survey. An extract from the definitive map is included in the appendix.

Available issues of the Ordnance Survey map have been examined.

There is no indication of the path on the Ordnance Survey 1:2500 second edition County Series (1894-1896), at which point there was a property, “Mountfield” where 181 West Heath Road stands but no surrounding houses on Finchley Road or West Heath Road. A path or drive runs from the south side of the building curving to the southwest to join the Finchley Road.

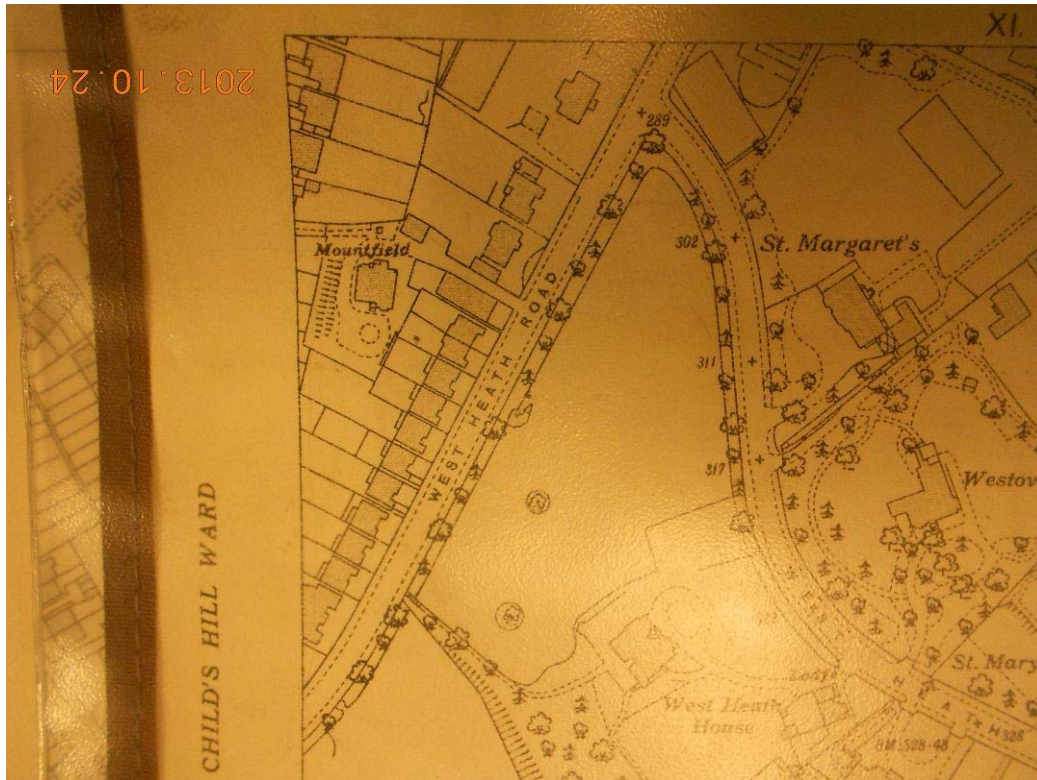
In the 1930s surrounding properties had been built and “Mountfield” had a driveway from West Heath Road along the current line (i.e between 179 and 183 West Heath Road) and a pathway towards Finchley Road along the current line (i.e alongside the boundary of 494 Finchley Road). There is a solid line boundary shown across the path roughly level with the rear boundary of 492 Finchley Road. (Conventionally a dotted line would indicate a boundary that would not present a barrier to pedestrians, so a change of surface or a change of level of less than a foot, whereas a solid line might represent a wall, fence or change in level).

The 1953 map shows steps at the boundary of Finchley Road but continues to show a solid line across the path near the rear boundary of 492 Finchley Road.

By 1967 “Mountfield” has become “Pardes House School”, with boundaries shown essentially as on the modern map.

Detailed survey plans submitted with a recent planning application for the site of 181 West Heath Road show the path is stepped near the rear boundary of 492 Finchley Road.

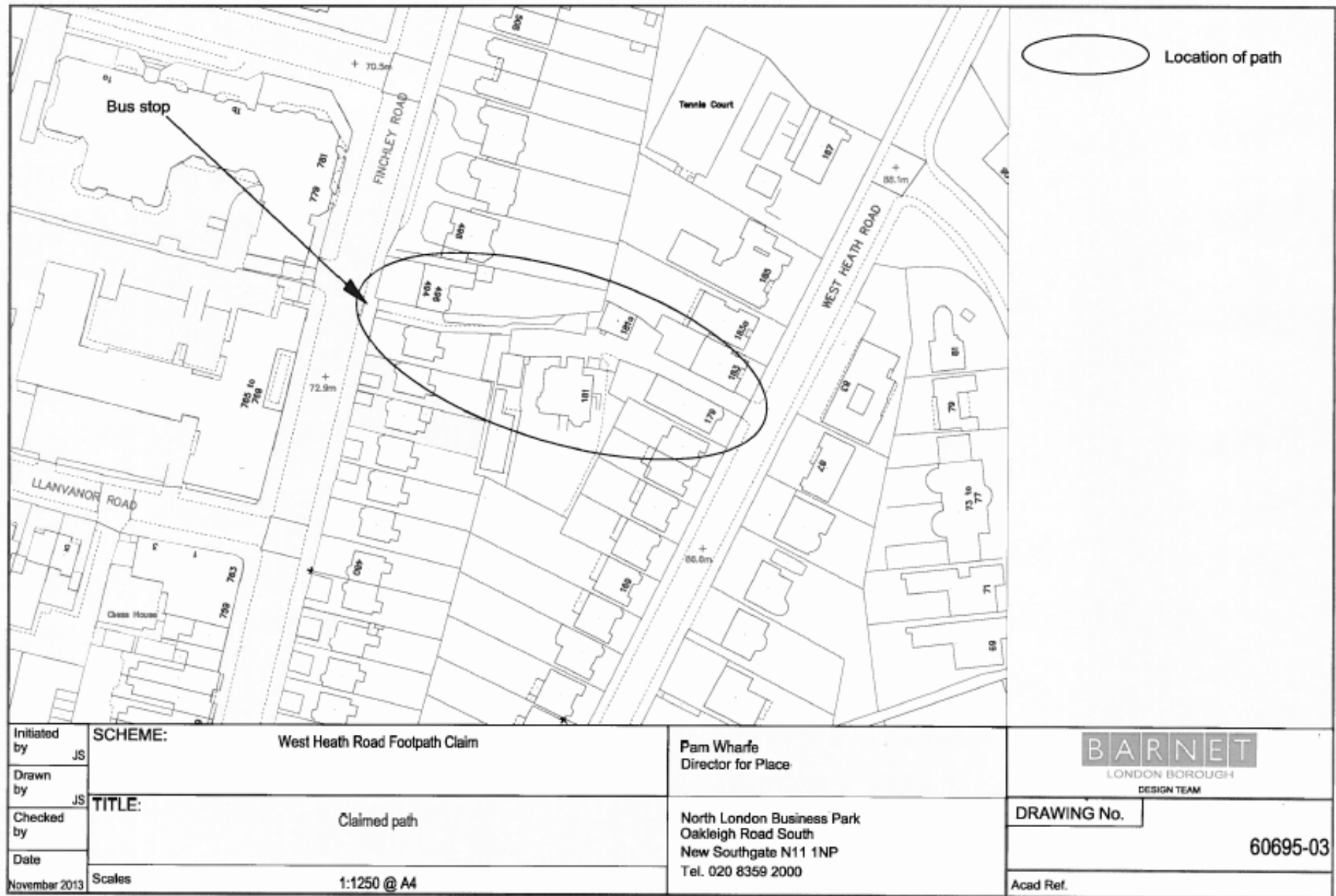
A selection of map images follows.



Photograph of Middlesex Sheet XI revision of 1934 (Hendon Library Archives)



Photograph of 1953 Ordnance Survey plan held at Hendon Library archives.



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Drawing showing current OS mapping in area of path

4.0 Land Registry

Land registry searches for 181 West Heath Road and surrounding properties indicate that the path is part of the land registered as 181 West Heath Road. The property 179/181a has the benefit of rights of way drainage and entry reserved in a Transfer of land dated 22 July 1948 across the land.

There is no reference to rights of way in the register for 492 Finchley Road, 494 Finchley Road, and 183 West Heath Road.

A copy of the land registry documents for 181 West Heath Road and 179/181a West Heath Road are included in the appendix.

5.0 Site visit / Photographs

The site was visited and photographs taken in November 2012 and November 2013. There are steps behind the bus stop on Finchley Road leading to a tarmac path between 492 and 494 Finchley Road which proceeds to a concrete fence erected across the path (at which point the path is 2.26m wide between fence and building). On the far side of the wall the path continues. There are inspection covers on the path before the wall and a gate in the fence to 494 Finchley Road. There is a sign "No Trespassing" on the concrete fence across the path and a sign on the fence to 494 Finchley Road saying "Beware dangerous dogs. Enter at your own risk."

At the West Heath Road end of the path there is a driveway access between 179 and 183 West Heath Road leading 181a West Heath Road and to a gated access to 181 West Heath Road. Between the gate into the area around 181 West Heath Road and 181a West Heath Road is a concrete fence across a path with a sign "no trespassing."

A selection of photographs of the path follows.



Bus stop Finchley Road with start of steps just visible.



Steps Finchley Road end of path and view to concrete fence.



View over concrete fence at Finchley Road end of path.



View from West Heath Road between 179 and 183 West Heath Road.



View from between 179 & 183 West Heath Road showing gate into area around 181 West Heath Road, and concrete fence across footpath (behind vehicle).



Fence across path at West Heath Road end, beside black painted gate to area around 181 West Heath Road.



Photograph provided by local resident (believed May 2012) showing view over fence at West Heath Road end of path and showing lighting unit on fence to left.

6.0 Other Records

A file of enquiries and information related to highway status/maintenance responsibility includes an internal council memo dated 13/3/95 from an officer based

at Mill Hill Depot to the survey section at Barnet House asking for a land registry search to determine ownership of footpath between 492-494 Finchley Road "which runs from the Finchley Road to West Heath Road". The same file includes a copy of an Ordnance Survey map extract with a handwritten annotation pointing to the path saying "Note footpath not adopted". The annotation is dated but the last digit is unclear so the year might read either 90 or 99 (or possibly 98). Copies of these documents are included in the appendix.

A 2007 tree preservation order report refers to a tree "beside the access roadway to 181/181a West Heath Road and pathway to Finchley Road. ... It is clearly visible from pathway and between buildings from West Heath Road. ... visible from various public vantage points"

Photographs taken as part of a 2007 Transport for London bus stop survey show the west end of the path at the bus stop. These do not show any "public footpath" signage at the Finchley Road end of the path (such as that referred to in evidence from R. Acker Holt) but the view is not sufficient to entirely rule out the presence of such a sign.

Transport for London advise that their records show the Llanvanor Road bus stop on Finchley Road (southbound) as being in existence in 1966 which is the default date for any asset they had from before electronic records began, and that there has been no move of this stop for at least 20 years, if at all.

Correspondence was received by the Council from residents from April 2012 asking about the closure of the path.

7.0 Landowners evidence

The landowners solicitor (Clyde & Co) has written in response to an initial consultation. They advise:

We note that the adjoining plot to the north east of the Land [i.e. land at 181 West Heath Road, NW3 7TT] known as 179/181A West Heath Road has the benefit of a right of way over the Path pursuant to a Transfer dated 22 July 1948. No other parties have the benefit of any express or implied right of way over the Path. In addition, access to the Path was fenced on 30 March 2012.

The solicitor also makes observations regarding the perceived weaknesses of the ten un-redacted user evidence forms (including that of the applicant) that had been provided to them at that stage. The letter (dated 1 November 2013) is included in the appendix as is a subsequent letter (dated 10 January 2014) in response to a draft of this report that reiterates and summarises these concerns in relation to these original evidence forms and provides comments. The summarised comments were:

- (a) only limited weight should be attached to the [original] user evidence forms ("UEF") on the basis that such forms were pre-completed prior to distribution;
- (b) none of the signatories adequately speak to different occasions of user;
- (c) the evidence of Mr Webb and Mrs Dunbar as to the frequency of their use of the Path was insufficient to establish use as a matter of fact;
- (d) the purported use of the path by less than six households: (i) falls short of establishing use of the Path 'by the public' (as required by section 31(1) of the Highways Act 1980) ("the 1980 Act"); and (ii) is so trivial so as not to give rise to the outward appearance to a reasonable landowner of user as of right. As such, any failure by our client to take action to prevent the claimed use cannot reasonably be ascribed to be knowledgeable acquiescence on its part; and

- (e) as such, there is insufficient evidence to establish actual use of the Path by the public as of right for the relevant period (being 30 March 1992 – 30 March 2012, when the Path was fenced “the Relevant Period”).

The January letter also provides comments in relation to additional user evidence forms and short forms referred to in the draft version of the report which were subsequently provided (referred to in the letter of 10 Jan 2014 as “Additional Evidence”). These relate to evidence from 30 people (29 referenced separately in the draft report – in one instance two people had jointly completed a single form). In relation to this additional evidence the solicitors state that their points included in the original letter and summarised above apply equally to the additional evidence. They also suggest (in summary):

- (a) the evidence of Ms Philip and Mrs Webb should be afforded little weight on the basis that such forms were completed prior to distribution;
- (b) there are obvious discrepancies in the evidence provided by those individuals who have submitted a UEF in addition to previously completing a short form, giving examples, and that these discrepancies cast serious doubt upon the credibility of the evidence;
- (c) That none of the short forms submitted by members of the public purport to evidence use of the path for the whole of the Relevant Period;
- (d) The evidence of Ms Flower, Mr Dixie, Ms Kidel, Mr Mossetti and Mr Berelowitz as to the frequency of their use of the path is insufficient to establish use of the Path as a matter of fact;
- (e) The individuals who purportedly claim use of the Path often (when paired together) comprise one household. This is not evidence of use of the Path ‘by the public’ and does not satisfy the statutory test;
- (f) In reply to a question on the user evidence form “Were you ever told by any owner or tenant of the land crossed by the way, or by anyone in their employment, that the way was not public? If so, state when and give particulars and dates”, DJH Cohen and BR Cohen state ‘Only when we requested lighting at night and the council informed us it was not public.’ And consequently the Cohens had actual knowledge that their purported enjoyment of the Path was not ‘as of right’ during the Relevant Period.
- (g) Should Ms Philip, Ms Holt and Ms Flower decline to attend any public enquiry, our client would be denied an opportunity to test this evidence; as such we invite the Council to attach very limited weight to their representations.

They note that R. Acker Holt and Dorothy Holt refer to a public footpath sign and that they are instructed that no such sign was removed from the path when it was fenced in March 2012, and advise that their client has confirmed that a ‘No Thoroughfare’ sign was erected at each end of the path when it was fenced in March 2012.

The January letter also refers to two Further Evidence forms that they state do not add materially to the Applicant’s case and to other as yet unverified forms that they state must not be taken into consideration by the Council unless their client has been provided with a full copy and has reasonable opportunity to make submissions in respect of these.

8.0 Other consultation responses

A response from a neighbour at **183 West Heath Road** and from a representative of the same neighbour highlights that the path was used by individuals using a moped or motorcycle to gain access to 183 West Heath Road during an aggravated burglary. The burglary is described in one instance as taking place in April 2012 and in the other as shortly before the path was closed.

The representative notes that a security company has been minding 183 West Heath Road since 12/06/11. In addition to this, they send a monthly report of all the suspicious activity taking place around the house. Many relate to activity involving people looking at the house and access areas to the side of the house.

The information also highlights that walking around the block rather than using a footpath is a short distance (4 minutes according to google maps), and that people have been seen loitering in the alleyway and syringes found. The responses express a desire that the path not be reopened for these reasons.

An email from an occupier of **181a West Heath Road** states:

"I'm very nervous of this footpath being opened as it's right on my front doorstep. The footpath is full of drug paraphernalia and discarded handbags and women's clothes that I can only assume have been from bag thefts. The footpath also gives the squatters living in 181 west Heath road access to the old school and is always full of unsavoury characters. I feel that the opening of this foot path will bring them all right on top of my doorstep, this is worrying my girlfriend greatly and I'm the only front door that the footpath will be crossing.

"I am really against this footpath being opened, because of this footpath the residents of 183 have had to hire 24 hour security and opening it will only cause further discomfort.

"As you can see in this picture; my front door is right next to the opening of the footpath and as it's so dark down my drive at night my girlfriend and I wouldn't feel safe returning home with it opened. Especially when my girlfriend returns home without me.

"I've also heard many bad stories of this footpath being misused by drug addicts and rapists in the past hence it's closure to begin with.

"I would like my email to be strongly considered before anything further happens with the reopening."



An email from Brickman Yale Chartered Surveyors on behalf of their client who owns **179 West Heath Road and 181a West Heath Road** states that the draft evidence report was the first correspondence they had seen from the Council about this matter and agrees with the comments of Clyde & Co in their letter of 1 November 2013.

Initial responses from **local councillors** were in favour of an order but provided no evidence regarding the path. However in response to the draft evidence report they have provided additional information by email.

Cllr Jack Cohen has advised that he was elected as Councillor for the Ward in 1986 and in the two or three years prior to that and since elected he used the footpath whilst out delivering leaflets and would be prepared to give evidence.

Cllr Susette Palmer advises:

"I have not used this footpath myself recently because the people I used to visit have moved away but I have lived in the area since I was a child and can certainly say that to the best of my recollection there has always been access used as a right of way between West Heath Rd and the Finchley Road as defined in the Council report."

Cllr Lord Palmer advises:

"I have used the path on rare occasions in the past, but then I have little need to use it personally.

However, I have been a Councillor for the ward since 1986 and have lived in the ward for 51 years.

Residents have at many times spoken to me about the path and I had always understood there was a right of way. When it was blocked off, I as a ward Councillor received complaints from users". ...

"[The people who have provided user statements] are 'Members of the Public,' and are but a few examples of public use. It goes without saying that some of the users over 20 years will have died or moved away. I fully support the Application."

No other responses have been received from adjacent properties or the statutory bodies consulted.

Appendix

Extract from Definitive Map

Land registry details for 181 West Heath Road and 179/181a West Heath Road

Highway status/maintenance responsibility enquiries

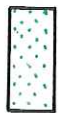
Correspondence from landowner's solicitor

Extract from Definitive Map

SURVEY OF PUBLIC RIGHTS OF WAY

COUNTY OF MIDDLESEX

KEY TO NOTATION



Areas included in the Survey

Rights of Way :



Reference Number in Statement

Footpath

Bridleway

Roads used as a public path

County Boundary

County District Boundaries

Abbreviations

FB-----Footbridge

CB-----Cartbridge

FG-----Fieldgate

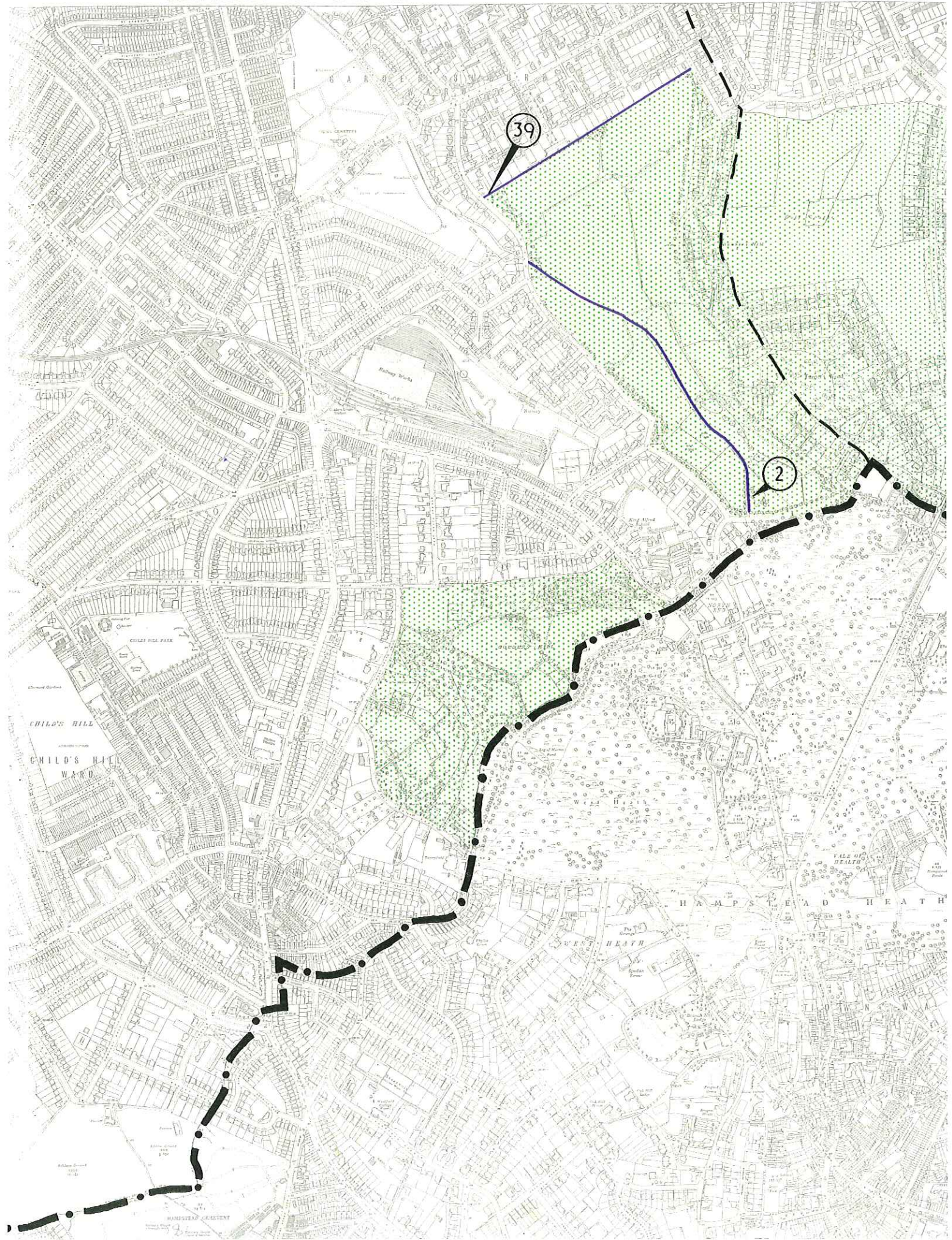
WG-----Wicket Gate

KG-----Kissing Gate

S-----Stile

F.R.I.C.S., M.T.P.I., COUNTY PLANNING OFFICER.

REVISION OF 1957 with additions to 1959



Land registry details for 181 West Heath Road and 179/181a West Heath Road

The electronic official copy of the register follows this message.

Please note that this is the only official copy we will issue. We will not issue a paper official copy.



Official copy of register of title

Title number NGL355130

Edition date 24.05.2005

- This official copy shows the entries on the register of title on 18 NOV 2013 at 13:24:54.
- This date must be quoted as the "search from date" in any official search application based on this copy.
- The date at the beginning of an entry is the date on which the entry was made in the register.
- Issued on 18 Nov 2013.
- Under s.67 of the Land Registration Act 2002, this copy is admissible in evidence to the same extent as the original.
- For information about the register of title see Land Registry website www.landregistry.gov.uk or Land Registry Public Guide 1-A *guide to the information we keep and how you can obtain it*.
- This title is dealt with by Land Registry, Wales Office.

A: Property Register

This register describes the land and estate comprised in the title.

BARNET

- 1 (24.06.1927) The Freehold land shown edged with red on the plan of the above Title filed at the Registry and being 181 West Heath Road, Hendon, London (NW3 7TT).

B: Proprietorship Register

This register specifies the class of title and identifies the owner. It contains any entries that affect the right of disposal.

Title absolute

- 1 (11.04.1991) Proprietor: MAYFAIR CHARITIES LIMITED of 13/17 New Burlington Place, Regent Street, London W1Y 2JP.
- 2 (11.04.1991) RESTRICTION:-No disposition or other dealing is to be registered without the consent of the Charity Commissioners or an order of the Registrar.

C: Charges Register

This register contains any charges and other matters that affect the land.

- 1 A Transfer dated 22 July 1948 made between (1) William John Purser and (2) Isabel Melville contains restrictive covenants.

NOTE:-Original filed under MX201062.

- 2 The land is subject to the rights reserved by the Transfer dated 22 July 1948 referred to above.

Title number NGL355130

End of register

These are the notes referred to on the following official copy

The electronic official copy of the title plan follows this message.

Please note that this is the only official copy we will issue. We will not issue a paper official copy.

This official copy was delivered electronically and when printed will not be to scale. You can obtain a paper official copy by ordering one from Land Registry.

This official copy is issued on 18 November 2013 shows the state of this title plan on 18 November 2013 at 13:24:55. It is admissible in evidence to the same extent as the original (s.67 Land Registration Act 2002). This title plan shows the general position, not the exact line, of the boundaries. It may be subject to distortions in scale. Measurements scaled from this plan may not match measurements between the same points on the ground. See Land Registry Public Guide *19 - Title Plans and Boundaries*.

This title is dealt with by the Land Registry, Wales Office .

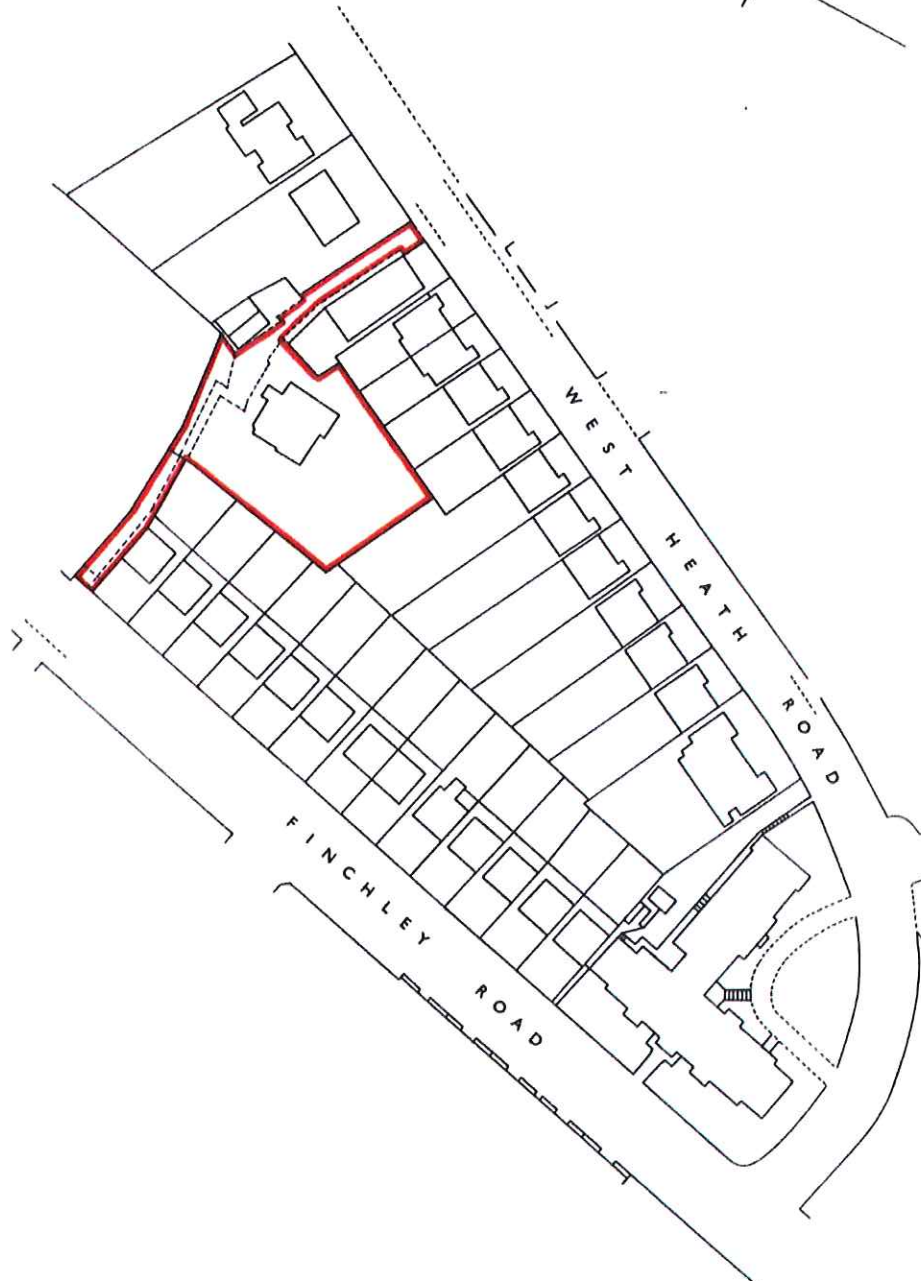
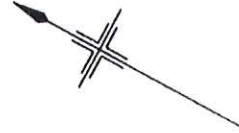
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H. M. LAND REGISTRY GENERAL MAP

GREATER LONDON SHEET TQ 2586 SECTION O
NATIONAL GRID

Scale 1/1250

BOROUGH OF BARNET



Old Reference MIDDLESEX XI 16 G

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TITLE No. NGL355130

The electronic official copy of the register follows this message.

Please note that this is the only official copy we will issue. We will not issue a paper official copy.



Official copy of register of title

Title number P26421

Edition date 02.07.2008

- This official copy shows the entries on the register of title on 18 NOV 2013 at 15:12:36.
- This date must be quoted as the "search from date" in any official search application based on this copy.
- The date at the beginning of an entry is the date on which the entry was made in the register.
- Issued on 18 Nov 2013.
- Under s.67 of the Land Registration Act 2002, this copy is admissible in evidence to the same extent as the original.
- For information about the register of title see Land Registry website www.landregistry.gov.uk or Land Registry Public Guide 1-A *guide to the information we keep and how you can obtain it*.
- This title is dealt with by Land Registry, Wales Office.

A: Property Register

This register describes the land and estate comprised in the title.

BARNET

- 1 The Freehold land shown edged with red on the plan of the above Title filed at the Registry and being 179 and 181A West Heath Road, London (NW3 7TT).
- 2 The land in this title has the benefit of rights of way drainage and entry reserved in a Transfer of the land edged and numbered MX201062 in green on the filed plan dated 22 July 1948 made between (1) William John Purser and (2) Isabel Melville.
NOTE: Filed under MX201062.
- 3 The land edged and numbered in green on the title plan has been removed from this title and registered under the title number or numbers shown in green on the said plan. The property description has been altered to reflect the land remaining in the title.

B: Proprietorship Register

This register specifies the class of title and identifies the owner. It contains any entries that affect the right of disposal.

Title absolute

- 1 (18.04.1957) PROPRIETOR: JUNE OLIVE PAULINE MORRISON of Verona Court, 11 Westcliff Gardens, Margate, Kent CT9 5DS and GORDON CARTWRIGHT of 9 Park Street, Chatteris, Cambridgeshire PE16 6AB.
- 2 (02.07.2008) RESTRICTION: No disposition by a sole proprietor of the registered estate (except a trust corporation) under which capital money arises is to be registered unless authorised by an order of the court.

Title number P26421

C: Charges Register

This register contains any charges and other matters that affect the land.

- 1 A A Conveyance affecting the land tinted blue on the filed plan and other land dated 3 April 1873 made between (1) the Ecclesiastical Commissioners for England and (2) John Henry Dallmeyer contains restrictive covenants.

NOTE: Particulars of covenants filed.

- 2 A A Conveyance of adjoining land affecting the land tinted pink on the filed plan dated 27 October 1926 made between (1) William John Purser (Vendor) and (2) Florence Mary Simmonds (Purchaser) contains the following covenants:-

"The Vendor for himself and his successors in title owners or owner for the time being of the land coloured green on the said plan hereby covenants with the Purchaser that he will not at any time hereafter erect or permit to be erected on such land more than one building such building to be used for private residential purposes only and to be of a prime cost in labour of materials of not less than £1500."

NOTE: The land tinted green on the plan to the said Conveyance is tinted pink on the filed plan.

End of register

These are the notes referred to on the following official copy

The electronic official copy of the title plan follows this message.

Please note that this is the only official copy we will issue. We will not issue a paper official copy.

This official copy was delivered electronically and when printed will not be to scale. You can obtain a paper official copy by ordering one from Land Registry.

This official copy is issued on 18 November 2013 shows the state of this title plan on 18 November 2013 at 15:12:36. It is admissible in evidence to the same extent as the original (s.67 Land Registration Act 2002). This title plan shows the general position, not the exact line, of the boundaries. It may be subject to distortions in scale. Measurements scaled from this plan may not match measurements between the same points on the ground. See Land Registry Public Guide *19 - Title Plans and Boundaries*.

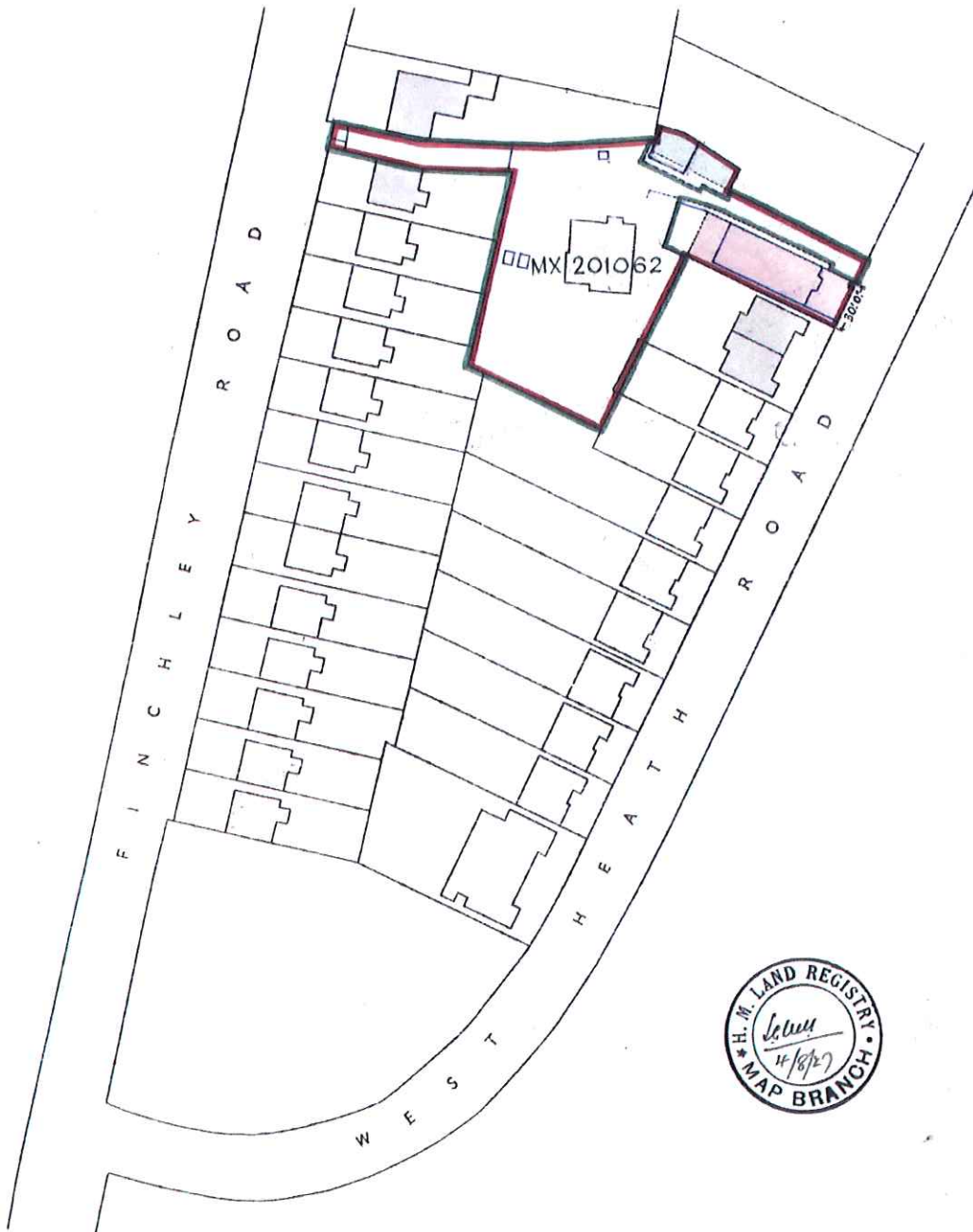
This title is dealt with by the Land Registry, Wales Office .

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H.M. Land Registry.

Filed Plan of Title No P.26421

Scale 88 Feet to One Inch



O. S. LONDON 5FT 11.78.
HENDON

G.1230 KCW 827

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(R161) Wt 23073A/1258P 5,000 3/27 H & SP Gp 118

Highway status/maintenance responsibility enquiries

FILE 796
JM

FROM

John Morely
Survey Section
Barnet House

TO

Neil Hannan
D.O.S
M.II Hill Depot

REFERENCE

flw between 492-494 Finchley Rd NW11

MESSAGE

Can you please carry out a land registry search to determine the ownership of the above footpath which runs from the Finchley Rd to West Heath Road.

The search can be charged to Expenditure Code C.11 112 520

SIGNED

Neil Hannan

DATE

13/3 95

REPLY

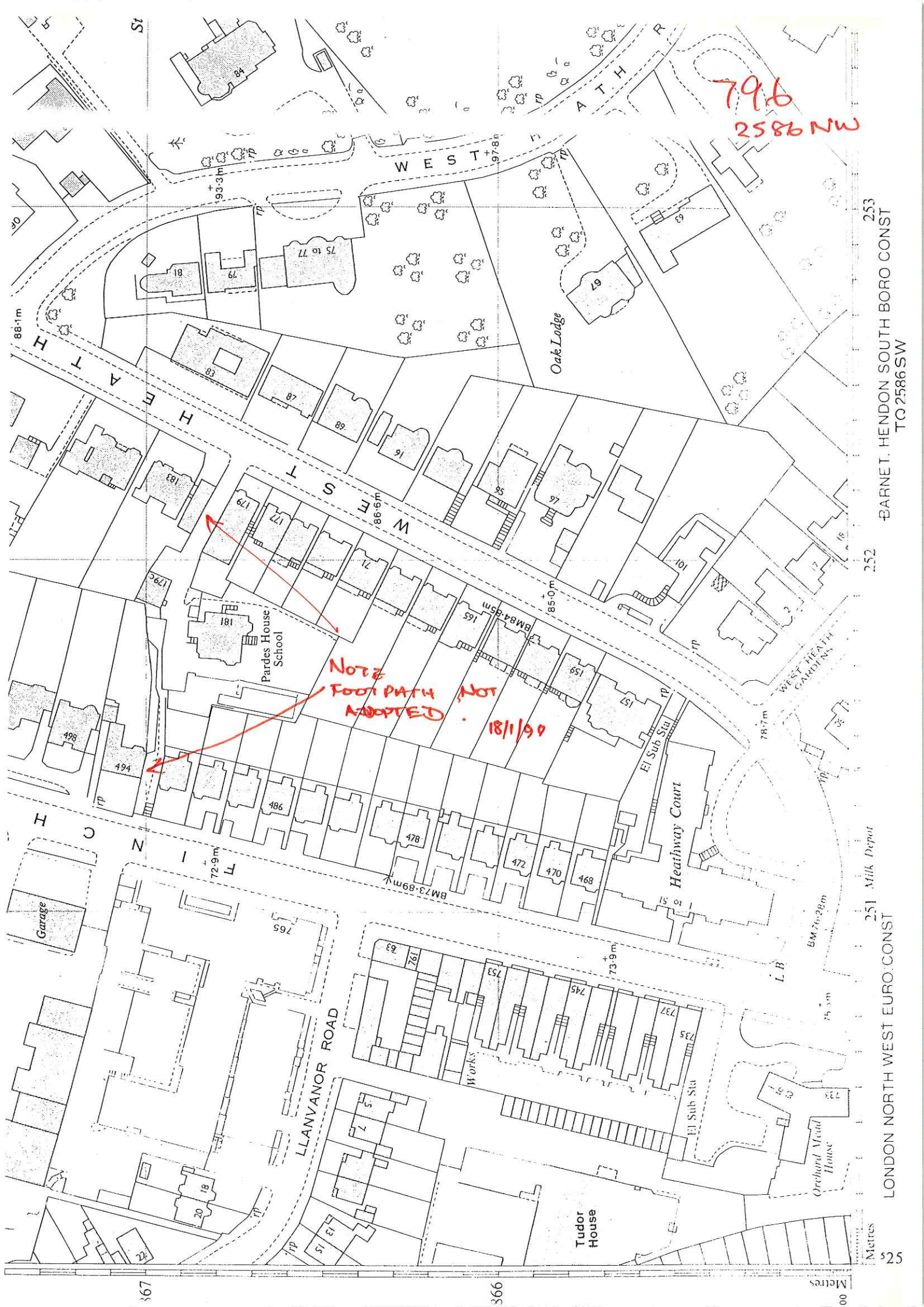
I attach H.M. Land Registry details of ownership of the subject land
BARNET HOUSE
12 FT 5 IN HIGH FENCE
WATSTONE N20 DET

SIGNED

D. Morely

DATE

20.3.95



79.6
2586 NW

NOTE
FOOT PATH NOT
ADOPTED
18/1/90

253
BARNET, HENDON SOUTH BORO CONST
TO 2586 SW

252

251 Milk Depot

LONDON NORTH WEST EURO CONST

Metres
255

367
366
Metres

Correspondence from landowner's solicitor

The St Botolph Building
138 Houndsditch
London EC3A 7AR
United Kingdom

Telephone: +44 (0) 20 7876 5000
Facsimile: +44 (0) 20 7876 5111
DX: 160030 Lime Street 5
www.clydeco.com

BY COURIER AND EMAIL

Ms Loide Miguel
Interim Director
Development Regulatory Services (DRS)
London Borough of Barnet
North London Business Park
Building 4
Oakleigh Road South
London
N11 1NP

Loide.miguel@barnet.gov.uk

Our ref
DH/LN/1213007

Your ref

Date
1 November 2013

**Application for a Modification Order under section 53(2) of the Wildlife and Countryside Act 1981 dated 6 July 2012 ("the Application")
Judith Prais of 83 West Heath Road, London NW3 7TN ("the Applicant")
Adding, as a Public Right of Way, the footpath which runs from West Heath Road, NW3 to Finchley Road NW11 ("the Path")**

We act for Mayfair Charities Limited, the registered proprietors of land at 181 West Heath Road, Hendon, London, NW3 7TT ("the Land").

We refer to the above Application, a copy of which was provided to our client under the cover of the Council's letter dated 30 August 2013 (as to which see further below). Notably, our client was not provided with a valid form of the evidence submitted in putative support of the Application until 25 October 2013 (following repeated requests) (as to which see further below).

As owners of the Land, our client is directly affected by the Application and has a statutory entitlement to respond to it.

We note that the adjoining plot to the north east of the Land known as 179/181A West Heath Road has the benefit of a right of way over the Path pursuant to a Transfer dated 22 July 1948. No other parties have the benefit of any express or implied rights of way over the Path. In addition, access to the Path was fenced on 30 March 2012.

For the reasons set out in this letter our client **strongly objects** to the Application.

1 Preliminary Observations

- 1.1 It has been difficult for our client to ascertain exactly on which evidence the Applicant purports to rely. We note the following timeline of events, over the course of which various documents have been provided to our client:

1213007 35225894.2

- (a) On 9 July 2012, our client received a notice pursuant to Paragraph 2 of Schedule 14 of the Wildlife and Countryside (Definitive Maps and Statements) Regulations 2013 ("the Regulations") informing it that the Application was made on 6 July 2012.
- (b) On 26 September 2012, on behalf of our client, we requested the details of (amongst other things) the material submitted in support of the Application. This request was made further to the Council's duty pursuant to The Public Rights of Way (Register of Applications under section 53(5) of the Wildlife and Countryside Act 1981) (England) Regulations 2005 but (for reasons that remain unclear) was progressed pursuant to the Freedom of Information Act 2000.
- (c) On 25 October 2012, the Council provided: (i) thirteen 'User Evidence Forms' ("UEF"); and (ii) thirty eight one-sided short-forms ("Short Forms") completed by third parties and submitted by the Applicant, which purported to attest to use of the Path. The details of the individuals who submitted these documents were redacted.
- (d) A further copy of the Application (again, redacted) followed on 6 November 2012.
- (e) On 30 August 2013, our client received a full copy of the Application including: (i) a plan; (ii) notice; (iii) certificate pursuant to paragraph 2 of schedule 14 of the Regulations; and (iv) a two page UEF completed by the Applicant.
- (f) Finally, further to numerous requests, on 25 October 2013, we received an email from your Jane Shipman, which attached:
 - (i) a letter from the Applicant to the Council dated 18 July 2012, (which stated to enclose: (a) twelve signed UEFs; (b) eight Short Forms from members of the public who have purportedly used the Path to visit residents at St Margaret's Home at 84 West Heath Road; and (c) thirty six Short Forms from employees of St Margaret's Home); and
 - (ii) a letter from the Applicant to the Council dated 9 September 2012, which stated to enclose three Short Forms from users of the Path (together "the Letters")

However, the email only attached nine UEFs, which comprised fuller versions of some of those provided by the Council on 25 October 2012.

In addition, the email stated:

'We are in the process of verifying the supporting evidence provided by users of the path and are conscious that not all of the people who provided information will necessarily have known that the information they provided would be used as part of this application.'

- 1.2 Therefore, subject to paragraph 3.7 below, as we have only received valid copies of the: (i) Application; (ii) the Applicant's UEF; and (iii) nine UEFs completed by third parties ((ii) and (iii) together being "the Unredacted UEFs"), our comments will be confined to these documents. We note that this material purports to cover the period of use from 1949 to 2012.

- 1.3 We note that the Short Forms and remaining UEFs have not been validated by the Council. Given that, when considering the Application, it is incumbent upon the Council to establish that the Path has '*actually been enjoyed by the public*' (as to which see further below), it is imperative that it is clear from whom this evidence is submitted. As such, this evidence should not be taken into consideration by the Council unless our client has been afforded the opportunity to make submissions in respect of it in its full (unredacted and valid) form. We fully reserve our client's position in this regard.
- 1.4 In addition, it appears from the Council's email that those individuals who have submitted the Short Forms may not be prepared to have their evidence tested, should the Application be heard at an inquiry. In the circumstances (and for those reasons more fully set out at paragraph 3.7 below), the Council should attach no weight to this evidence in its determination of the Application.

2 The Application

- 2.1 The Application is made pursuant to section 53(2) of the Wildlife and Countryside Act 1981 ("the Act") for a modification of the Definitive Map and Statement by adding, as a Public Right of Way ("PROW"), the Path.

- 2.2 In so far as is relevant, section 53(2) of the Act provides:

(2) 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).....

(3) The events referred to in subsection (2) are as follows –

[.....]

(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 right of way during that period raises a presumption that the way has been dedicated as a public path [or restricted byway]

[.....]

(5) Any person may apply to the authority for an order under subsection (2) which makes such modifications as appear to the authority to be requisite in consequence of the occurrence of one of more events falling within paragraph (b) or (c) of subsection (3); and the provisions of Schedule 14 shall have effect as to the making and determination of applications under this subsection.'

- 2.3 The Applicant has not expressly stated on what basis the PROW to use the Path is said to have arisen. However, by reference to the Letters we assume that the Application has been made pursuant to section 53(3)(b) of Act. There are two ways in which a sufficient '*period of enjoyment*' can be demonstrated in order to raise a presumption or inference that the Path has been dedicated for the purposes of Section 53(3)(b) of the Act. Firstly, this can be achieved by meeting the requirements set out in Section 31 of the Highways Act 1980 ("the 1980 Act"). Additionally, or in the alternative, the requisite period can be demonstrated by satisfying the requirements of common law.

- 2.4 Again, by reference to the Letters, we assume that the Applicant is seeking to rely on the statutory presumption to dedicate the Path, which provides:

'Where any way over any land, other than a way of such 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 a right and without interruption for a full period of 20 years, the way is to be deemed to have been dedicated as a highway unless there is sufficient evidence that there was no intention during that period to dedicate it.'

- 2.5 Where there is no identifiable event which has brought into question the use of a path or way, sub-section 7B of the 1980 Act provides that the period of 20 years referred to in section 31(1) of the 1980 Act is to be calculated retrospectively from the date on which the Application was made. However, in this case, it is common ground that the Path was closed on 30 March 2012, such that the relevant period for the purposes of the Application is between 30 March 1992 and 30 March 2012 ("the Relevant Period").

- 2.6 In order to satisfy the qualifying requirements under section 31(1) of the 1980 Act, the burden of proof is therefore on the Applicant to show that the Path has been actually enjoyed: (i) by the public; (ii) as a right (i.e. not by force, stealth, nor by licence of our client); and (iii) without interruption, for the Relevant Period.

3 User evidence

'Actual Use'

- 3.1 Whether the Applicant has demonstrated on the balance of probabilities that the Path has actually been enjoyed by the public for the Relevant Period is a question of fact. Upon examination of the evidence submitted by the Applicant (i.e. the Unredacted UEFs), it is immediately apparent that:

- (a) All relevant persons claim use on foot;
- (b) Much of the content has been pre-completed (presumably by the Applicant) prior to distribution¹. In particular, the date on which the purported use of the Path ceased, has been pre-filled (as 2012) on all of the UEFs. This approach is fundamentally flawed and raises questions as to whether the use of the Path is honestly and accurately recalled by all signatories. As a consequence, we invite the Council to attach little weight to the content of the UEFs.
- (c) In any event, the content of the evidence is hopelessly superficial. By way of illustration: none of the signatories describe their purported use of the Path as changing over the periods they have claimed to have enjoyed the right. For example, Mr Primost asserts that he used the Path from 1949 until 2012, yet this has always been one hundred times a year for the purposes of catching the bus. None of the signatories really speak to different occasions of user.
- (d) We note that the Applicant and Ms Cohen state that they would not be prepared to attend a hearing, public inquiry or Court to give evidence of their actual use of the Path. The reason for this reticence is unclear and is surprising. Nevertheless, given that our client would be deprived of an opportunity to test

¹ See, for example, question 11.

their respective evidence should an inquiry be convened in due course, we again invite the Council to attach limited weight to the representations made.

- (e) Mr Webb claims to use the Path less than once a week and Mrs Dunbar's use of the Path is even more infrequent. We submit that this is again insufficient to establish use as a matter of fact.

'By the Public'

3.2 As to whether there has been actual use of the Path 'by the public,' we note that the Applicant has only submitted valid material on behalf of ten individuals (including herself) in support of the Application. In addition, it is apparent from the Unredacted UEFs that these individuals often (when paired together) comprise one household (i.e. Mr and Mrs Dunbar, Mr and Mrs Cohen, Mr and Mrs Kasriel and Mr and Mrs Primost make up eight out of the ten signatories).

3.3 Therefore, the material submitted falls well short of establishing use 'by the public'². Any use that can be inferred from the UEFs is use of the Path by friends and neighbours. Even if the veracity of what is contained in the Unredacted UEPs is ultimately accepted, the use proved by these statements is insufficient to satisfy the statutory test.

'As of Right'

3.4 Further or alternatively, if the public is to acquire a right, it must be brought home to the landowner that a right is being asserted against it. In *R (Lewis) v Redcar and Cleveland Borough Council*³ Dyson LJ (for the Supreme Court) cites the following passage from Lindley LJ in *Hollins v Verney*⁴:

'...no actual user can be sufficient to satisfy the statute, unless during the whole of the statutory term... the user is enough at any rate to carry to the mind of a reasonable person...the fact that a continuous right of enjoyment is being asserted, and ought to be resisted if such a right is not recognised, and if resistance is intended...'

3.5 In this case, the purported use of the Path by a handful of households is so trivial (particularly, in the case of Mrs Dunbar) so as not to give rise to the outward appearance to a reasonable landowner of user as of right (as per Lord Hoffman in *R v Oxfordshire CC Ex p. Sunningwell Parish Council*⁵). Any failure by our client to take action to prevent the claim to use cannot be ascribed to be knowledgeable acquiescence on its part.

'Without Interruption for a full period of 20 years'

3.6 As above, the evidence of purported use is insufficient to establish that the Path was in actual use by the public as of right for the totality of the Relevant Period. On this basis, the presumption of dedication in relation to the Path pursuant to section 31(1) of the 1980 Act does not arise.

3.7 For completeness, we refer to the Short Forms submitted by the Applicant. As above, these submissions have not been validated by the Council and are of questionable

² *Poole v Huskinson* (1843) 152 ER 1039

³ 2010 UKSC 11

⁴ 1884 13 QBD 304, 315

⁵ [2000] 1 AC 335, 357

credibility in any event. Nevertheless, we note that the Applicant's Letters refer to these Short Forms as evidence on behalf of those who are employed by/visit St Margaret's Home at 84 West Heath Road, whilst acknowledging that none of the Short Forms purport to evidence use for whole of the Relevant Period. On the Applicant's own admission, therefore, the evidence contained within the Short Forms does not evidence public rights were established over the Path when such rights were brought into question by our client (i.e. on the date of the closure of the Path). The Short Forms therefore add nothing to the Applicant's case and should be disregarded by the Council.

The Applicant has failed to evidence use of the Path by the public as a right during the Relevant Period. Accordingly, the requirements of section 53(3)(b) of the Act are not satisfied. We should be grateful for your confirmation of the same.

Notwithstanding this, should the Council see fit to alter the definitive map, our client requests that the matter be considered at a local public inquiry.

Yours faithfully



Clyde & Co LLP

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United Kingdom

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Development and Regulatory Services
North London Business Park
Oakleigh Road South
London
N11 1NP

jane.shipman@barnet.gov.uk

Our Ref
IDG/LVN/1213007

Your Ref

Date
10 January 2014

Dear Sirs

Application for a Modification Order under section 53(2) of the Wildlife and Countryside Act 1981 dated 6 July 2012 ("the Application")
Judith Prais of 83 West Heath Road, London NW3 7TN ("the Applicant")
Adding, as a Public Right of Way, the footpath which runs from West Heath Road, NW3 to Finchley Road, NW11 ("the Path")

We write further to your letter dated 9 December 2013, enclosing a draft evidence report in relation to the Application ("the Report").

This letter is to be read together with our letter dated 1 November 2013 ("the Letter").

- 1.1 We note that the Council has purported (at section 7 of the Report) to summarise the contents of the Letter. In particular, the Report records that: (i) 179/181A West Heath Road has the benefit of a right of way over the Path pursuant to a transfer dated 22 July 1948; (ii) no other parties have the benefit of an express or implied right of way over the Path; and (iii) the Path was fenced on 30 March 2012.
- 1.2 In addition, the Report states the following:

'the solicitors also make observations regarding the perceived weaknesses of the user evidence that had been provided to them at that stage.'

Whilst the Report appends the Letter, we are concerned that it significantly underplays our client's fundamental concerns as to the cogency of the evidence relied upon by the Applicant in support of the Application. In particular, we reiterate the following key points set out at length within the Letter, which need to be more fully addressed within the Report:

- (a) only limited weight should be attached to the user evidence forms ("UEF") on the basis that such forms were pre-completed prior to distribution;

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- (b) none of the signatories adequately speak to different occasions of user;
- (c) the evidence of Mr Webb and Mrs Dunbar as to the frequency of their use of the Path was insufficient to establish use as a matter of fact;
- (d) the purported use of the Path by less than six households: (i) falls short of establishing use of the Path 'by the public' (as required by section 31(1) of the Highways Act 1980 ("the 1980 Act")); and (ii) is so trivial so as not to give rise to the outward appearance to a reasonable landowner of user as of right. As such, any failure by our client to take action to prevent the claimed use cannot reasonably be ascribed to be knowledgeable acquiescence on its part; and
- (e) as such, there is insufficient evidence to establish actual use of the Path by the public as of right for the relevant period (being 30 March 1992 – 30 March 2012, when the Path was fenced ("the Relevant Period")).

1.3 In light of the above, the presumption of dedication in relation to the Path pursuant to section 31(1) of the 1980 Act does not arise.

Original Evidence

1.4 As at the date of the Letter, our client had only been provided with full unredacted copies of: (i) the Applicant's UEF; and (ii) nine UEFs completed by third parties (being Mr and Mrs Primost, Mrs and Mrs Dunbar, Mr and Mrs Cohen, Mr and Mrs Kasriel and Mr Webb) ("the Original Evidence"). Our Letter was, therefore, confined to commenting on such.

Additional Evidence

1.5 However, the Report advises that the Application consisted of: (i) twelve UEFs from members of the public (including the Applicant); and (ii) a further fifty short forms 'most apparently from staff or visitors to St Margaret's Care Home in West Heath Road.' As to (i), the forms completed by Christina Webb and Sheila Philip were not provided to us as part of the Original Evidence. As to (ii), we refer to paragraph 1.8(c) below.

1.6 The Report informs that the following further evidence submitted in support of the Application has also been validated by the Council:

- (a) eight UEFs completed by purported users of the Path who have previously completed a short form;
- (b) three short forms completed by individuals who have confirmed their evidence can be used should an inquiry be convened; and
- (c) a further three UEFs.

Eighteen UEFs were stated to be unverified.

1.7 Further to our request, the evidence referred to at paragraphs 1.5 and 1.6 above, together with thirteen out of the eighteen previously unverified UEFs ("the Additional Evidence") were provided to us pursuant to the Council's emails of 20 and 23 December 2013.

1.8 The points made in the Letter (particularly points (b), (c) and (e) repeated in summary form above) apply equally to the Additional Evidence. In addition, we note the following:

- (a) The evidence of Ms Philip and Mrs Webb should be afforded little weight on the basis that such forms were completed prior to distribution (see also paragraph 1.2(a) above);
- (b) There are obvious discrepancies in the evidence provided by those individuals who have submitted a UEF in addition to previously completing a short form. By way of example:
 - (i) Mr Holt records that he used the Path '2 x 3 x each week' on his UEF, yet his short form states his usage to be significantly more at five days a week;
 - (ii) Ms Flower records her usage of the Path to be '*intermittently*' on her short form, which rises to two times a week on her UEF;
 - (iii) Ms Holt states that she used the Path in 1970 (per her UEF) (i.e. outside of the Relevant Period for the purposes of the Application) but claimed her usage to span from '*1979 – until it was blocked off*' on her short form;
 - (iv) Mr Woolf claimed to use the Path '*from about 1938 onwards*' in his UEF on an '*innumerable*' number of occasions. Yet his short form records his purported use from 1994 to present as four to five times a week;

Such obvious inaccuracies in the Additional Evidence cast serious doubt upon its credibility and, with respect, cannot reasonably or fairly establish the use of the Path as of right for the Relevant Period;

- (c) The Applicant's letters of 18 July 2012 and 9 September 2012 conceded that none of the short forms submitted by members of the public who have purportedly used the Path to visit residents of, or travel to work at, St Margaret's Home at 84 West Heath Road purport to evidence use of the Path for the whole of the Relevant Period. On the Applicant's own admission, therefore, the evidence contained within the short forms of Ms Morgan, Ms Tarifanyika, Ms Villastiqui, Mr Tighe, Mr Mulvihill, Ms Hidalgo and Ms Alzano do not evidence that public rights were established over the Path when such rights were brought into question by our client (i.e. on the date of closure of the Path);
- (d) The evidence of Ms Flower, Mr Dixie, Ms Kidel, Mr Mossetti and Mr Berelowitz as to the frequency of their use of the Path is insufficient to establish use of the Path as a matter of fact;
- (e) The individuals who purportedly claim use of the Path often (when paired together) comprise one household (i.e. Mr and Mrs Webb, Mr and Mrs Holt, Zea Katzeff and Brian Berelowitz, DHJ Cohen and BR Cohen and Mr and Mrs Ross). This is not evidence of use of the Path 'by the public' and does not satisfy the statutory test;
- (f) In reply to question 7¹ of the UEF, DHJ Cohen and BR Cohen state:

'Only when we requested lighting at night and council informed us it was not public.'

Inexplicably, the Cohens' evidence is not referred to in the Report. This is a stark omission. On their own admission, the Cohens had actual knowledge that their purported enjoyment of the Path was not 'as of right' during the Relevant

¹ Were you ever told by any owner or tenant of the land crossed by the way, or by anyone in their employment, that the way was not public? If so, state when and give particulars and dates.

Period. This is plainly relevant to the determination of the Application and ought to have been recorded in the Report; and

- (g) Ms Philip has stated that she is unsure as to whether she would be willing to attend a hearing, public inquiry or Court to give evidence in support of the Application. It is also unclear whether Ms Holt and Ms Flower are prepared to participate further in the determination of the Application. Should Ms Philip, Ms Holt and Ms Flower decline to attend any public inquiry, our client would be denied an opportunity to test this evidence; as such we invite the Council to attach very limited weight to their representations.
- 1.9 Finally, it is alleged by Mr and Mrs Holt (and summarised in the Report) that a 'public footpath' sign was erected on or near the Path, which was removed when the Path was closed. No photographic evidence of the alleged sign has been produced. We are instructed that no such sign was removed from the Path when it was fenced in March 2012.
- 1.10 Our client has confirmed that a 'No Thoroughfare' sign was erected at each end of the Path when it was fenced in March 2012.
- 1.11 In summary, the Additional Evidence adds nothing to the Applicant's case. This being so, there is insufficient evidence to establish actual use of the Path by the public as of right for the Relevant Period. Consequently, the presumption of dedication in relation to the Path pursuant to section 31(1) of the 1980 does not arise and our client again invites the Council so to conclude.

Further Evidence

- 1.12 On 8 January 2014, the Council provided two additional UEFs submitted by Mr Barnett and Ms Reid, respectively. Whilst Mr Barnett's evidence was included in outline in table 2 of the Report, there is no reference in the Report to Ms Reid submitting any evidence in support of the Application. In any event, these UEFs, when taken together with the Original Evidence and Additional Evidence are insufficient to satisfy the statutory test and do not materially add to the Applicant's case.
- 1.13 The Council has confirmed that it is still to verify four outstanding items referred to in table 2 of the Report. This evidence must not be taken into consideration by the Council unless our client has been provided with a full copy of it and afforded a reasonable opportunity to make submissions in respect of it. We fully reserve our client's position in this regard.

We look forward to hearing from you with a further draft of the Report, which incorporates the above comments, together with a fuller summary of those contained within our Letter.

Yours faithfully


Clyde & Co LLP