

<b>Subject/Title of Report</b> <b>Definitive Map Modification Order – Public Footpath</b> <b>Leading from High Elms to the Square Woodford Green</b>	<b>Classification</b> Public
<b>Decision-Maker</b> Leader of the Council	

## 1. Executive Summary

- 1.1 Officers are seeking approval for the making of a Definitive Map Modification Order on a public footpath leading from High Elms to the Square, Woodford Green.

## 2. Decision(s) Taken

**That having taken advice, as appropriate, for the reasons set out herein I have decided to:**

- 2.1 Approve the application for a Definitive Map Modification Order to add a public footpath to the Definitive Map and Statement area of the London Borough of Redbridge as shown in Appendix 1 (section “A-B-C-E” as shown on the attach plan).
- 2.2 Authorise Officers to make the Order pursuant to Section 53(3)(b) Wildlife and Countryside Act 1981 by virtue of a period of 20 years user as of right.

### **THE DECISIONS PROPOSED IN THE RECOMMENDATIONS TO THIS REPORT MAY BE CALLED IN**

#### **CONFIRMATION OF DECISION**

I confirm that I have made the executive decision(s) set out in Section 2 above (“Decision(s) Taken”), in accordance with authority delegated to me under Standing Order 36 of the Council’s Constitution

Signed: 

Name: Councillor Kam Rai

Title: Deputy Leader and Cabinet Member for Finance, Leisure & Culture

Date: 27<sup>th</sup> May 2022

- 3.7 Schedule 14 of the Wildlife and Countryside Act 1981 provides the means by which a member of the public may apply for a Definitive Map Modification Order, on the basis that one of the events at s.53(3) Wildlife and Countryside Act 1981 has occurred.

#### **4. Proposals and Reasons for the Decision**

- 4.1. The first question is to decide when the way was called into question. Officers consider that the way was first called into question on 6 July 2020 by the erection of notices which read "Private, no public access".
- 4.2. The notices were erected by Mr Bales, a director of Britannia Properties Ltd. The land is unregistered and Mr Bales (for Britannia) claims adverse possession of the land. That application is subject to a separate procedure and is contested. However, for these purposes, it does not matter whether Mr Bales or Britannia was the landowner at the point in time, because a way can be called into question by actions otherwise than by the landowner.
- 4.3. Accordingly, the question is whether between 6 July 2000 and 6 July 2020 the way has been in use by the general public, in the character of a highway, as of right without interruption.
- 4.4. The application has been supported by 13 user evidence forms. These forms appear to represent use by the general public (as opposed to a limited class of the general public). Officers are of the view that such use as is described in the forms would be sufficient to put a landowner on notice of the need to make her protest clear if it was not accepted.
- 4.5. Collectively the users say they have used the route A-B-C-E for a period in excess of 20 years prior to 6 July 2020. Some users also describe using the sections C-D and E-F. The use described is all in the character of a highway (i.e. passing and re-passing) such as could potentially give rise to a presumption of dedication at common law.
- 4.6. Roughly at points B and C, Mr Bales says there were chains across the way from 2001. The chains were, he says, attached to wooden posts and padlocked. A number of the users also mention these chains. However, the users generally say they were low to the ground and easily walked over. Moreover, there is a Google streetview photograph which has been submitted with Rita O'Sullivan's UEF, which appears to show no chains in place in 2008. It appears to officers that the evidence is conflicting on whether the chains were permanently in place throughout the relevant period (i.e. 2000-2020). In any event, the chains did not appear to have interrupted the public's use of the route.
- 4.7. Turning to whether the use was "as of right". That phrase means the use was without secrecy, permission or force. To be "without force", includes not only without physical force but also that the use of the land was without objection from the landowner.

- 4.14. Overall, officers therefore consider that an “event” at s.53(3)(b) Wildlife and Countryside Act 1981 has occurred. That is to say that it is reasonably alleged that a public right of way subsists between points A-B-C-E on Annex 1. Accordingly, by s.53(2)(b) Wildlife and Countryside Act 1981, the Council is under a duty to make a DMMO in consequence of that event.
- 4.15. The DMMO will be advertised for at least 42 days and within that time any person may object. If the objection is duly made and not withdrawn within the consultation period, the Council is legally obliged to refer the order to the Secretary of State for confirmation. The Secretary of State will appoint an Inspector (from the Planning Inspectorate) to convene a public local inquiry to hear the evidence and decide whether to confirm the order. The Council, as order making authority, will be expected to participate in the inquiry to assist the Inspector take that decision.

## **5. Fairness Implications, including Equality and Diversity**

- 5.1 In summary, section 149 of the 2010 Act requires the Council, when exercising its functions, to have ‘due regard’ to the need to:
- a) Eliminate discrimination, harassment and victimisation and any other conduct that is prohibited by or under the Act (which includes conduct prohibited under section 29);
  - b) Advance equality of opportunity between people who share a relevant protected characteristic and those who don’t share it;
  - c) Foster good relations between people who share a relevant protected characteristic and those who do not (which involves having due regard, in particular to the need to tackle prejudice and promote understanding).
- 5.2 Under the PSED the relevant protected characteristics are:
- (i) Age
  - (ii) Disability
  - (iii) Gender reassignment
  - (iv) Pregnancy and maternity
  - (v) Race
  - (vi) Religion
  - (vii) Sex
  - (viii) Sexual orientation
- 5.3 In respect of the first aim only i.e. reducing discrimination, the protected characteristic of marriage and civil partnership is also relevant.
- 5.4 Having due regard to the need to ‘advance equality of opportunity’ between those who share a protected characteristic and those who do not includes having due regard, in particular, to the needs to:
- (a) Remove or minimise disadvantages suffered by persons who share a relevant protected characteristic that are connected to that characteristic;

form (a) describing the general effect of the order and stating that it has been made and requires confirmation, (b) naming a place in the area in which the land to which the order relates is situated where a copy of the order may be inspected free of charge, and copies thereof may be obtained at a reasonable charge, at all reasonable hours; and (c) specifying the time (**not being less than 42 days from the date of the first publication of the notice**) within which, and the manner in which, representations or objections with respect to the order which must include particulars of the grounds relied on, may be made.

- 9.4 It is a statutory requirement for a copy of the notice to be advertised by in at least one local newspaper circulating in the area in which the land to which the order relates is situated. A copy of the notice shall be served on notice on (i) every owner and occupier of any of that land; (ii) every local authority whose area includes any of that land; (iii) every person on whom notice is required to be served in pursuance of sub-paragraph (3); and (iv) such other persons as may be prescribed in relation to the area in which that land is situated or as the authority may consider appropriate.
- 9.5 It is also a requirement that a copy of the notice shall be displayed in a prominent position (i) at the ends of so much of any way as is affected by the order; (ii) at council offices in the locality of the land to which the order relates; and (iii) at such other places as the authority may consider appropriate.
- 9.6 As stated at paragraph 4.15 of this report, if objections are made and not withdrawn during the 42 days statutory consultation period, the order making authority shall refer the matter to the Secretary of State who will appoint an inspector to set up a public inquiry in order to determine whether the DMMO order should be confirmed. The Council will be required to make arrangements for the public inquiry to be held including the costs for holding the inquiry.

## **Background Papers**



**BRANCH  
AUSTIN  
McCORMICK**

Highways  
Parking Transportation  
London Borough of Redbridge  
Lynton House  
255-259 High Road  
Ilford IG1 1NN  
By email only: [highwaysg@redbridge.gov.uk](mailto:highwaysg@redbridge.gov.uk)

Our Reference: HB/GP/B23.26  
Your Reference:  
Date: 2 August 2022

Dear Sirs,

**Notice of Modification Order – Section 53 of the Wildlife and Countryside Act 1981  
The London Borough of Redbridge  
The London Borough of Redbridge Definitive Map and Statement of Rights of Way  
The London Borough of Redbridge (A footpath from the Square to Woodford Green)  
Definitive Map and Statement Modification Order 2022**

We act for Britannia Properties Limited.

Please find enclosed our client's objection to the Definitive Map and Statement Modification Order 2022.

Kindly acknowledge safe receipt.

Yours faithfully,

*Branch Austin McCormick*

**Branch Austin McCormick LLP**

Email: [hb@branchaustinmccormick.com](mailto:hb@branchaustinmccormick.com)

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3. Unless the Objection (and any other duly made objection or representation) is withdrawn, LBR is required by paragraph 7(1) of Schedule 15, WCA 1981 to submit the Order to the Secretary of State for Environment, Food, & Rural Affairs for confirmation. This Objection sets out the reasons why the Order should not be confirmed.
4. BPL is the registered proprietor of 457 High Road, Woodford Green, IG8 0XE (Title No. NGL117001), which Title includes a claimed private right of way on foot and with vehicles over part of the land that is traversed by the route subject to the Order (generally corresponding with section A - B and part of section B – C of the Order route). BPL also claims ownership by adverse possession of part of the land which is traversed by the route that is subject to the Order (generally corresponding with most of section B – C of the Order route). BPL is also the occupier of the land traversed by those parts of the route that is subject to the Order comprising sections A - B and B – C of the Order route and has occupied that land since September 2001.

#### THE ORDER MAKING PROCESS

5. LBR has made (or purported to make)<sup>2</sup> the Order under s.53(2)(b) WCA 1981 by reason of the occurrence of an event specified in s.53(3)(b) WCA 1981.<sup>3</sup>
6. The event relied on in the Order is *“the expiration... of any period such that enjoyment by the public of the way during that period raises a presumption that the way has been dedicated as a public path.”*

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<sup>2</sup> It is to be noted LBR's Cabinet Member for Finance, Leisure & Culture in the decision dated 27 May 2022 to authorise the making of the Order did so only pursuant to s.53(3)(b) WCA 1981 (as set out in paragraph 2.2 of the record of that decision).

<sup>3</sup> Notwithstanding that the Order is said to be made by reason of the occurrence of an event in s.53(3)(b) WCA 1981, the report that informed the decision asserts that a right of way is *“reasonably alleged”* to subsist (at paragraphs 4.14 and 9.1 of the report), which is not relevant to s.53(3)(b) WCA 1981 but is one of the tests for making a DMMO where reliance is placed on s.53(3)(c)(i) WCA 1981.

*the same route, using a Public Path Creation Order pursuant to section 26 of the Highways Act 1980...*"<sup>6</sup> Mr Carr undertook investigations and reviewed all of the available evidence, including all of the user evidence forms and other supporting statements now relied on by LBR. In written reports provided by Mr Carr to LBR in May 2021, Mr Carr advised LBR that it was (a) his "*opinion that there is insufficient evidence to give rise to any reasonable allegation*"<sup>7</sup> that the *Application Route is a public right of way*"<sup>8</sup> and (b) that "*whilst finely balanced, I think there is a case in favour of promoting a Public Path Creation Order over the route A-B-C-E, C-D and E-F*".<sup>9</sup>

12. LBR officers made no mention of the advice received from the expert they had consulted when the case for making a DMMO was reported to the Cabinet Member for decision. It is therefore unclear whether the Cabinet Member (as LBR's authorised decision maker) was informed that the recommendation of officers was contrary to the expert advice that had been received. Even if the Cabinet Member was made aware of Mr Carr's conclusions, officers provided no reasons for rejecting that advice and nor did they identify any new evidence or changed circumstances that would justify a different conclusion since the matter of a DMMO was considered by Mr Carr.

13. The inclusion of an Order Map referable to a Public Path Creation Order (rather than to a DMMO) also suggests either that the Order making process was not the subject of careful scrutiny or that officers were confused as to the proper scope of statutory powers they were purporting to apply.

14. In the light of the above, BPL is deeply concerned as to the legitimacy of the Order making process. It is wholly unclear whether LBR officers understood the legal tests they were purporting to apply. It is also wholly unclear whether the Cabinet Member responsible for making the decision was properly informed of all relevant information, especially as regards the advice received

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<sup>6</sup> Letter dated 23 March 2021 from Robin Carr Associates to BPL's solicitors.

<sup>7</sup> Unlike LBR when making its decision, Mr Carr advised in the context of s.53(3)(c)(i) WCA 1981. Even within that context, and the lower test in that provision, his advice was that the case for making a DMMO was not made out.

<sup>8</sup> Paragraph 11.3 of the Robin Carr Associates DMMO report dated 27 May 2021.

<sup>9</sup> Paragraph 10.4 of the Robin Carr Associates PPO report dated 27 May 2021.

use of the same route (clearly defined) for the full period of 20 years must be shown on a balance of probabilities.

- (v) Several of the user evidence forms describe the same interruptions (or barriers) to use but maintain that they continued to use the route by traversing over or around the obstacles, which they understood to have been intended to prevent use. Such alleged use would be by force and could not be use "*as of right*" within s.31(1) Highways Act 1980.
- (vi) One user evidence form describes vehicular use which cannot provide any support for the Order.
- (vii) The map evidence provides no evidence of public rights of way on any routes depicted and is not sufficiently detailed to show the Order route (as opposed to routes crossing the immediately adjacent publicly accessible land forming part of Epping Forest and subject to the Epping Forest Act 1878).

17. In summary, the material relied on by LBR does not provide evidence sufficient to show on a balance of probabilities that the Order route has been "*actually enjoyed by the public as of right and without interruption for the full period of 20 years*" so as to give rise to any presumption of deemed dedication within s.31(1) Highways Act 1980. Nor does that material demonstrate dedication at common law. The requirements of s.53(3)(b) WCA 1981 have not been satisfied and nor could it properly appear to LBR that they were.

18. In addition, BPL as occupier of key parts of the Order route (irrespective of its claims to ownership of and to private rights over parts of the Order route) has since September 2001 to date acted to interrupt any use of the Order route by the public by maintaining chains across parts of the Order route, by parking and storing vehicles on parts of the Order route, by storing building and other construction materials on parts of the Order route, and by confronting any persons attempting to use those parts of the Order route occupied by BPL. BPL disputes the alleged use of the route as asserted in the user evidence forms.