

**Report for:** Corporate Committee 10 March 2022

**Title:** Application for Definitive Map of Public Rights of Way to be modified to include path between Dickenson Road and Mountview Road

**Report authorised by:** Rob Krzyszowski, Assistant Director, Planning, Building Standards & Sustainability

**Lead Officer:** Maurice Richards, Transport Planning Team Manager

**Ward(s) affected:** Crouch End

**Report for Key/ Non Key Decision:** Non Key decision

## 1. Describe the issue under consideration

- 1.1 In July 2021 the Council was notified a pedestrian route between Mount View Road and Dickenson Road had been closed off by the landowner via the erection of a gate. As the route was not a Public Right of Way (PRoW) the Council had no powers to require it to be re-opened. Having regard to community concerns about the closure of the route a third party seeking to protect the route made an enquiry to the Council about getting the route designated as a PRoW. PRoW are highways that allow the public a legal right of passage and can be created through a number of routes including under section 31 of the Highways Act 1980 which provides a way may be dedicated as a PRoW where there has been uninterrupted use for a full period of 20 years. An application was subsequently submitted to the Council in August 2021 under section 53(5) of the Wildlife and Countryside Act 1981 to make an Order modifying its Definitive Map to include the footpath as a PRoW.
- 1.2 As part of the application evidence was submitted to support that the route had been in uninterrupted use for a full period of 20 years. At the same time notice was served on the landowners of the path who subsequently responded to the Council asserting that the path is private property and that no public rights of way exist including supplying evidence that the path has not been in uninterrupted use for a full period of 20 years together with related evidence there was no intention to dedicate the route as a PRoW. Following assessment of all of the evidence supplied it is considered likely that the key legal test of 20 years of uninterrupted use of the path is not met. The benefits of the path to the community are not something which should be taken into account in the Council's determination of the application and consequently it is recommended that Corporate Committee reject the application to make an Order for the Council's Definitive Map to be modified to include the footpath as a PRoW.

## 2. Recommendations

The Committee is recommended to:

- 1) Consider the documentation as set out at Appendix B to C in relation to the application under section 53(5) of the Wildlife and Countryside Act 1981 for the Council's Definitive Map to be modified to include the footpath between Mount View Road and Dickenson Road (as shown in Figure 1 and identified in Appendix A) as a public right of way;
- 2) Reject the application (as set out at Appendix A) under section 53(5) of the Wildlife and Countryside Act 1981 to make an Order for the Council's Definitive Map to be modified to include the footpath between Mount View Road and Dickenson Road.

### **3. Reasons for decision**

- 3.1 Section 53(2) of the Wildlife and Countryside Act 1981 requires the Council to modify its Definitive Map and Statement because of certain "events". In this case the relevant "events" are (b) the expiration of any period such that the use of a way by the public during that time raises a presumption that the way has been dedicated as a public footpath; and (c) the discovery by the authority of evidence which, when considered with all other relevant available evidence, shows that a right of way subsists or is reasonably alleged to subsist.
- 3.2 Section 31 of the Highways Act 1980 states that a way is deemed to have been dedicated as a public right of way if it has actually been enjoyed by the public as of right and without interruption for a full period of 20 years unless there is sufficient evidence that there was no intention to dedicate. The 20 year period is calculated retrospectively from the date when public use of the way is brought into question.
- 3.3 Officers have reviewed both the evidence submitted by the applicant in support of their claim that a public right of way is deemed to have been established and the evidence submitted by agents acting on behalf of the landowner that refutes the applicant's claim of having had unhindered and continuous use of the path without permission over a period of 20 years. It is considered that, on balance, the evidence indicates that the path was not intended or allowed an unhindered and continuous use as a public right of way, over at least 20 years. Consequently Corporate Committee is recommended to reject the application to make an Order for the Council's Definitive Map to be modified to include the footpath between Mount View Road and Dickenson Road.

### **4. Alternative options considered**

- 4.1 Option A: To approve the application. This option is rejected as it is not considered that, on balance, the evidence indicates that the path was not intended or allowed an unhindered and continuous use as a public right of way, over at least 20 years. The legislation relating to such applications does not enable the Council to take into account other considerations such as public benefits of the path remaining open and as such these have not been factored into the recommendation.

### **5. Background information**

### *Introduction*

- 5.1 In July 2021 the Council was notified that a pedestrian route between Mount View Road and Dickenson Road had been closed off by the landowner via the erection of a gate.
- 5.2 The route is not a Public Right of Way and despite community requests the Council had no powers to require it to be re-opened for pedestrian access.
- 5.3 Having regard to community concerns about the closure of the route a third party seeking to protect the route made an enquiry to the Council about getting the route designated as a PRow. PRow are highways that allow the public a legal right of passage. A PRow can be created as follows –
- i) By express dedication or agreement of the landowner – e.g. a public path creation order; or
  - ii) By presumed dedication:
    - a) Under section 31 of the Highways Act 1980 – this dedicates a way as public right of way where there has been uninterrupted use for a full period of 20 years; or
    - b) At Common Law – where it can be shown that a use has been created as a right. There is however, no fixed minimum period which must be proved in order to justify an inference of dedication.

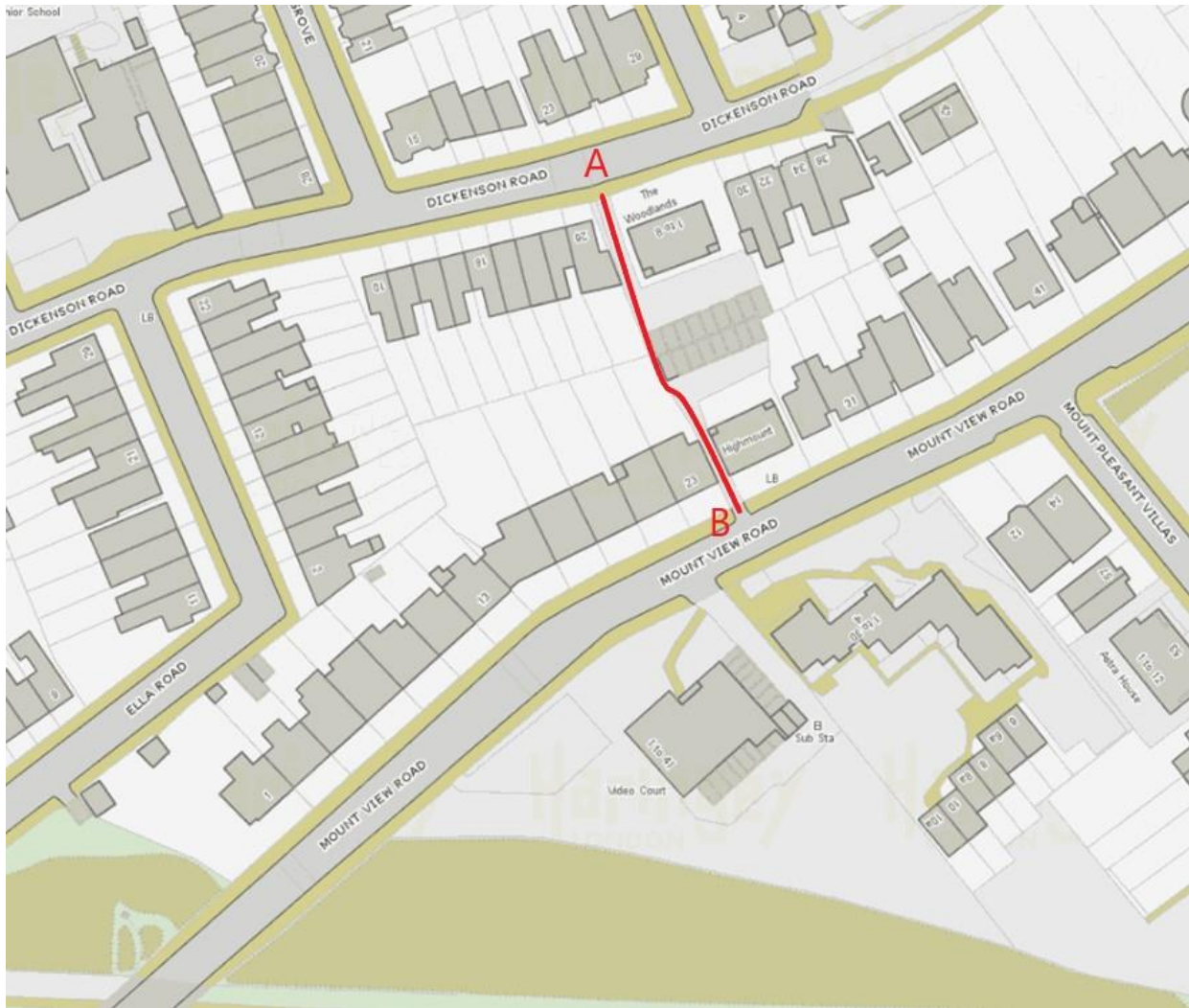
### *Application*

- 5.4 An application was subsequently submitted to the Council on 16 August 2021 under section 53(5) of the Wildlife and Countryside Act 1981 to make an Order modifying its Definitive Map to include the footpath as a PRow.
- 5.5 As part of the application the following was submitted to the Council:
- A Schedule 7 application form for a modification to the Council's definitive map and statement
  - A Schedule 9 Certificate confirming that notices had been served on all the affected landowners
  - Supporting evidence comprising 12 statements of witnesses/public rights of way user evidence form
- 5.6 The applicant asserts that the application route had been in uninterrupted use for a full period of 20 years and should therefore be added to the Council's Definitive Map.

### *Description of route*

- 5.7 The application route runs from Point A on Dickenson Road, N8 to point B on Mount View Road, N4 as shown on Figure 1.

Figure 1 Location of closed route



- 5.8 From point A to point B the path runs generally north-south. Following erection of a gate in June 2021 the route is no longer accessible to pedestrians and is closed roughly half-way between point A and point B.

*Response of landowner following notification of application*

- 5.9 Following notification by the applicant and being contacted by the Council, the landowner responded to the Council asserting that the path is private property and that no public rights of way exist including supplying evidence that the path has not been in uninterrupted use for a full period of 20 years together with related evidence there was no intention to dedicate the route as a PRoW.

*Relevant legislation*

- 5.10 Section 53(2)(b) of the Wildlife and Countryside Act 1981 provides that the Council must keep its Definitive Map and Statement under continuous review and must make such modifications as appear to them to be requisite in the light of certain specified events. In this case 53(3)(c)(i) is of particular relevance.
- 5.11 Section 53(3)(c)(i) states that the Map and Statement should be modified where the Council discover evidence which, when considered with all the other available evidence, shows “that a right of way which is not shown in the map and statement

subsists or is reasonably alleged to subsist over land in the area to which the map relates, being a right of way such that the land over which the right subsists is a public path a restricted byway or, subject to section 54A, a byway open to all traffic”.

- 5.12 Later in the same Act section 53(5) enables any person to apply to the Council for an Order to be made modifying the Definitive Map and Statement in respect of a number of ‘events’ including those specified in Section 53(3)(c)(i) as quoted above. On receipt of such an application the Council is under a duty to investigate the status of the route. It was under these provisions that the application which is the subject of this report was made.
- 5.13 The purpose of Section 53 of the Wildlife and Countryside Act 1981 is to record or delete rights which already exist rather than create or extinguish them. Practical considerations such as public benefits, suitability, the security and wishes of landowners or user groups cannot be considered under the legislation.
- 5.15 Any changes to the Definitive Map must reflect public rights that already exist. It follows that changes to the Definitive Map must not be made simply because such a change would be desirable, or instrumental in achieving another objective. Therefore, before an order changing the Definitive Map is made, the decision maker must be satisfied that public rights have come into being at some time in the past. The decision is a quasi-judicial one in which the decision maker must make an objective assessment of the available evidence and then conclude whether or not the relevant tests set out above have been met.
- 5.16 Section 31 (1) of the Highways Act 1980 states that “where a 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 actually been enjoyed by the public as of right and without interruption for a full period of 20 years, the way is deemed to have been dedicated as a highway unless there is sufficient evidence that there was no intention during that period to dedicate it”.
- 5.17 Therefore twenty years use by the general public can give rise to the presumption of dedication of a way. The period of 20 years is measured backwards from a date of challenge. If no other date of challenge is identified, the date of the application to modify the Definitive Map will be the date of challenge. Alternatively, a public right of way may be established over a shorter period under common law. Dedication can be implied from evidence of public use and of acquiescence in that use by the landowner.

*Evidence supplied in support of application*

- 5.18 The applicant submitted a total of 12 signed statements in favour of the path being a public right of way.
- 5.19 Of those 12 people, 2 of them provided dates starting from within 20 years (2016 and 2019) and consequently their evidence does not help establish a PRow by virtue of uninterrupted use for a full period of 20 years. One statement gave dates from 2001 until 2021 but did not state when in 2001 so it is unclear whether this person could confirm the path was used without interruption for a full 20 years but this evidence would give weight to the evidence in the other statements.

- 5.20 Of the 9 statements that confirm the path was accessible from before 2001:
- 1 person confirms the path was accessible from 1980 with no interruptions (gates/barriers).
  - 1 person confirms the path was accessible from 1986 but did confirm there was a locked gate but did not confirm when or for how long.
  - 1 person confirms the path was accessible from 1980 with no interruptions (gates/barriers).
  - 5 people confirmed that the path was accessible from 1995 with 3 of those confirming there was no interruptions (gates/barriers), 1 confirming there was an unlocked gate but not when and 1 confirming there was a locked gate, but not when.
  - 1 person confirms the path was accessible from 2000 but there is a page missing from that statement so no information as to whether there was a gate at any point.
- 5.21 Of the 12 statements, 2 confirmed that there was a sign on the garages adjacent to the path stating “Private Property – No Right of Way” or words to that effect.
- 5.22 It is clear that there are inconsistencies with the evidence in support of the application but of note 5 out of 12 confirm 1995 was the year when they began using the path.

*Evidence supplied by landowner*

- 5.24 As set out at paragraph 5.9 the landowner responded to the Council asserting that the path is private property and that no public rights of way exist including supplying evidence that the path has not been in uninterrupted use for a full period of 20 years together. 12 pieces of evidence were supplied to support their assertion.
- 5.25 The evidence against the path being a public right of way includes 3 statements from residents confirming that a gate/door obstructing access through the path was in place until late 2005/2006 when it was removed.
- 5.26 Photographs are provided showing a locked gate and then the same gate broken in need of replacement/removal. It is confirmed by the estate management company that both of these photographs were taken circa 2005.
- 5.27 A photograph of a sign attached to one of the garages adjacent to the path clearly states “Private Property – No Right of Way” has been provided but no indication of when this photograph was taken.
- 5.26 Evidence by the estate management company from 2005 documenting the expenses incurred in relation to the removal of the gate in 2005 and a letter from one of the owners of the flat about a replacement gate being installed in 2006 has been provided – although it is clear that a replacement gate was not installed until 2021.
- 5.27 The agent for the landowner has also provided evidence of a settlement order from the County Court in Edmonton dated October 2021 and award of costs against the applicant’s claim of illegal erection of a gate.

## *Land Register*

- 5.28 Land registry records were procured for the route and do not include any covenants that indicate a public right of way along this path.

## *Conclusion*

- 5.28 Weighing both sets of evidence against each other, officers consider that it is more likely that the path was blocked by a gate/door up until late 2005. It is also more likely that there has been a sign displayed on one of the garages adjacent to the path throughout notifying the public that there is no right of way.
- 5.30 The statements also include descriptions of how the path benefits the local community through improved accessibility and also the problems of anti-social behaviour that the path being open has brought to the owners of the adjacent properties. However, these are not matters that should be taken into account in seeking to determine whether a right of way has been established.
- 5.32 Taking only the relevant evidence into account, it is considered that, on balance, the evidence indicates that the path was not intended or allowed an unhindered and continuous use as a public right of way, over at least 20 years. Consequently, Corporate Committee is recommended to reject the application to make an Order for the Council's Definitive Map to be modified to include the footpath between Mount View Road and Dickenson Road.

## *Next steps*

- 5.33 If the Committee accepts the recommendation to reject the application and decide that no Definitive Map Modification Order should be made, all interested parties will be informed. The applicant has the right to appeal to the Secretary of State within 28 days' notice of the Council's decision. The Secretary of State may direct the Council to make a Definitive Map Modification Order.
- 5.34 If, contrary to the officer recommendation, the Committee decides to accept the application, a Definitive Map Modification Order will be made. The order will be advertised in the press and on site and copies will be sent to the applicant, the affected landowners, and other relevant user groups. There will then be a 6 week public consultation period.
- 5.35 If objections are received, the Council cannot confirm the Definitive Map Modification Order itself. The order together with the objections must be sent to the Secretary of State for them to make a decision. The Planning Inspectorate will appoint an independent inspector who will make a written decision following an exchange of written representations, a public hearing or a local public inquiry.

## **6. Contribution to strategic outcomes**

- 6.1 The decision will support the 'Place' Priority of the Borough Plan 2019-23 which includes Outcome 12: A safer borough. It will do this by reducing opportunities for

anti-social behaviour, however this is balanced against the opportunity cost of improving pedestrian accessibility.

## **7. Statutory Officers comments (Director of Finance (procurement), Head of Legal and Governance, Equalities)**

### **Finance**

- 7.1 The report recommends to Corporate Committee to reject the application (as set under section 53(5) of the Wildlife and Countryside Act 1981 to make an Order for the Council's Definitive Map to be modified to include the footpath between Mount View Road and Dickenson Road. There are no financial implications arising from this report.

### **Procurement**

- 7.2 There are no procurement implications arising from this report.

### **Head of Legal & Governance -**

- 7.3 The Head of Legal and Governance has reviewed this report and comments as follows.
- 7.4 The legal framework relating to public rights of way relevant to this application is set out in paragraphs 5.10 – 5.17 of this report.
- 7.5 When taking this decision the Council must assess the evidence submitted and balance the rights of the public against the rights of the private landowner. Only if it has been demonstrated that the statutory requirements for a public right of way to exist have been met should it confirm that the path subject to this application is a public right of way. Otherwise the private rights of the landowner over its land should be protected.
- 7.6 The Council would be acting in accordance with the law if having considered the evidence, it determines the application in accordance with the recommendations within this report.

### **Equality**

- 7.7 The Council has a Public Sector Equality Duty under the Equality Act 2010 to have due regard to the need to:
- Eliminate discrimination, harassment and victimisation and any other conduct prohibited under the Act
  - Advance equality of opportunity between people who share those protected characteristics and people who do not
  - Foster good relations between people who share those characteristics and people who do not.
- 7.8 The three parts of the duty apply to the following protected characteristics: age, disability, gender reassignment, pregnancy/maternity, race, religion/faith, sex and sexual orientation. Marriage and civil partnership status applies to the first part of the duty.



7.9 The legal framework relating to public rights of way relevant to this application is set out in paragraphs 5.10 – 5.17 of this report. It is noted that there are only limited matters that should be taken into account when determining whether a right of way has been established. The Public Sector Equality Duty applies to the Council exercising its functions as a public authority, which in this case is limited to the application of the legal tests to determine whether or not the path has been in continuous use for 20 years. Wider considerations such as the overall public utility of the use of the path, or its equalities impacts are beyond the scope of the Council's decision making powers in this case.

## **8. Use of Appendices**

- Appendix A - Application
- Appendix B – Evidence submitted by applicant
- Appendix C – Evidence submitted on behalf of landowner

## **9. Local Government (Access to Information) Act 1985**

9.1 N/A