



**OFFICER REPORT TO LOCAL COMMITTEE  
(ELMBRIDGE)**

**ANNEX A**

**ALLEGED PUBLIC BYWAY OPEN TO ALL TRAFFIC (BOAT) ALONG  
ESHER PARK AVENUE, ESHER – CP540**

**10 SEPTEMBER 2012**

## ANNEXE A (August 2007)

**Map Modification Orders – Legal Guidance**

The National Parks and Access to the Countryside Act 1949 placed a duty on all Surveying Authorities in England and Wales to produce a definitive map and statement, indicating and describing public rights of way within their areas.

The '49 Act also required Surveying Authorities i.e. County Councils, to keep their definitive map and statement under periodic revision. The Wildlife and Countryside Act 1981 completely changed the way in which the definitive map and statement is updated. Under this Act Surveying Authorities have a duty to keep their map and statement under continuous review.

Certain specified events can trigger that process and one of these is an application under Section 53 of the Act for a map modification order (MMO). Section 53(5) enables any landowner, occupier or user to apply for a Map Modification Order to modify the definitive map. Landowners and occupiers may believe for example that a right of way should never have been shown on the definitive map at all, or is shown on the wrong line or that its status is incorrectly shown, for example, as a bridleway instead of a footpath.

Claims may also be made for routes to be added on the basis of evidence from historical documents or of evidence of public use, either for a continuous period of 20 years, as provided for by the Highways Act 1980 (s31) or for a shorter period under Common Law.

Both at common law and under Section 31 of the Highways Act 1980 the public's enjoyment of the way must have been "as of right" in order to form the basis of implied dedication. "As of right" was interpreted in Merstham Manor v Coulsdon and Purley UDC (1937) as acts done openly, not secretly, not by force and not by permission from time to time given. The House of Lords has held in R v Oxfordshire CC ex p Sunningwell Parish Council (1999) that subjective state of mind of the user does not have to be proved. Users over a long period may have been "subjectively indifferent as to whether a right existed".

Deciding who "the public" are can sometimes be difficult. In general it should be people other than those working for the landowner(s) concerned or who had the permission or licence of the landowner(s) to use the route. The period of 20 years is counted back from the date on which the public's right to use the way was first brought into question or from the date at which an application is made to modify the Definitive Map and Statement. In order to bring the public's right into question, the landowner must challenge it by some means sufficient to bring it home to the public, for example, through the erection of a fence or locking of a gate across the way, however long ago that date was.

## Statute Law

“Section 31 of the Highways Act 1980 provides that the claimants’ evidence must show that the route has been actually enjoyed for a 20-year period. The use must be without force, without secrecy and without permission”.

Although 20 years uninterrupted use by the public establishes a presumption that the way has been dedicated to the public, this can be contradicted by evidence showing that the landowner did not intend to dedicate public rights during that time. Evidence of interruption of the public’s use of the way, would have to be shown to have been both effective in preventing public use and clearly known to the public. The turning back of the occasional stranger will not be a sufficiently positive act - at least where the way continues to be used by locals. Notices clearly displayed and maintained on the way, indicating that it was private, or plans deposited with the surveying authority or its predecessors can prove sufficient evidence of an intention by an owner not to dedicate. Section 31(6) of the Highways Act 1980 enables landowners to protect themselves against claims based solely on use by depositing a map, statement and statutory declaration with the surveying authority showing which rights of way they acknowledge to be public on their land.

It is not possible to claim a route by presumed dedication over Crown Land such land being exempt from the provisions of the Highways Act 1980. Byelaws for some National Trust Land and other open spaces may also prevent the acquisition of rights.

Under Section 53c (i-iii), documentary evidence alone, may be sufficient to establish the existence of public rights and however old the document, the rights recorded will still exist unless there is evidence of a subsequent legally authorised change.

In May 2006, the Natural Environment and Rural Communities Act was brought into commencement. The main effect of sections 66 and 67 of this act was to significantly curtail the scope for recording further public rights of way for mechanically propelled vehicles (MPVs) on the definitive map and statement. This was done in two ways. Firstly, any existing unrecorded public rights of way for MPVs (with certain exceptions) were extinguished, so that they cannot then be added to the definitive map and statement as byways open to all traffic (BOATs). Secondly, the act also ensures that no further public rights of way for MPVs can be acquired unless expressly created or constructed. Typically, where such rights had been acquired but were thereafter extinguished, this results in a restricted byway.

## Common Law

A highway is created at Common Law by the dedication by the owner of a right of passage across his land for the use by the public at large coupled with acceptance and use by the public as of right. Dedication may also be inferred at Common Law where the acts of the owner conclusively point to an intention to dedicate. In Poole v Huskinson (1843) it was held that “2 things to be made good, that the user has been sufficient in its duration and character and that the presumption then arising has not been rebutted. The length of user evidence is also important but there is no fixed minimum or maximum period of use which must be proved in order to justify an

inference of dedication. Under Common Law it is possible to claim a route by presumed dedication over Crown Land.

### **Schedule 14 Applications For Definitive Map Orders**

The procedures for the making and determination of an application are set out in Schedule 14 of the 1981 Act. Anyone making an application must serve notice on every owner and occupier of land affected by the application. In cases of difficulty in tracing the owner or occupier, the authority has the power to direct that a notice be placed on the land instead. The procedures include the right for applicants to appeal to the Secretary of State for the Environment against the surveying authority's refusal to make an Order. In such cases the Secretary of State can direct the authority to make the Order even when the authority considers the evidence does not support the making of the Order.

Once the authority has received the certificate of service of notice it has a duty to investigate the application and consult with every local authority concerned, i.e. District, Parish/Town Council. The authority should make a decision on the application as soon as reasonably practicable. Where the authority has not come to a decision within 12 months of receiving an application, the applicant can appeal to the Secretary of State for the Environment, Transport and the Regions who can direct the authority to determine it within a specified time.

An authority can act on evidence without a Schedule 14 application being made and should do so on discovery of relevant evidence. There is no requirement to investigate the claim within 12 months and no right of appeal to the Secretary of State for the Environment, Transport and the Regions in these cases.

### **Order-making procedure**

If it is established that, on the balance of probabilities, public rights have been acquired, a MMO is published and advertised on site and in a local newspaper. If no objections are received the Order can be confirmed by the County Council. If there are unresolved objections it must be referred to the Secretary of State who will probably decide to hold a Public Inquiry to resolve the matter.

If the authority has been directed by the Secretary of State to make a MMO after it has decided not to do so and objections are made which result in a Public Inquiry being held, the authority may adopt a neutral stance or oppose the Order.



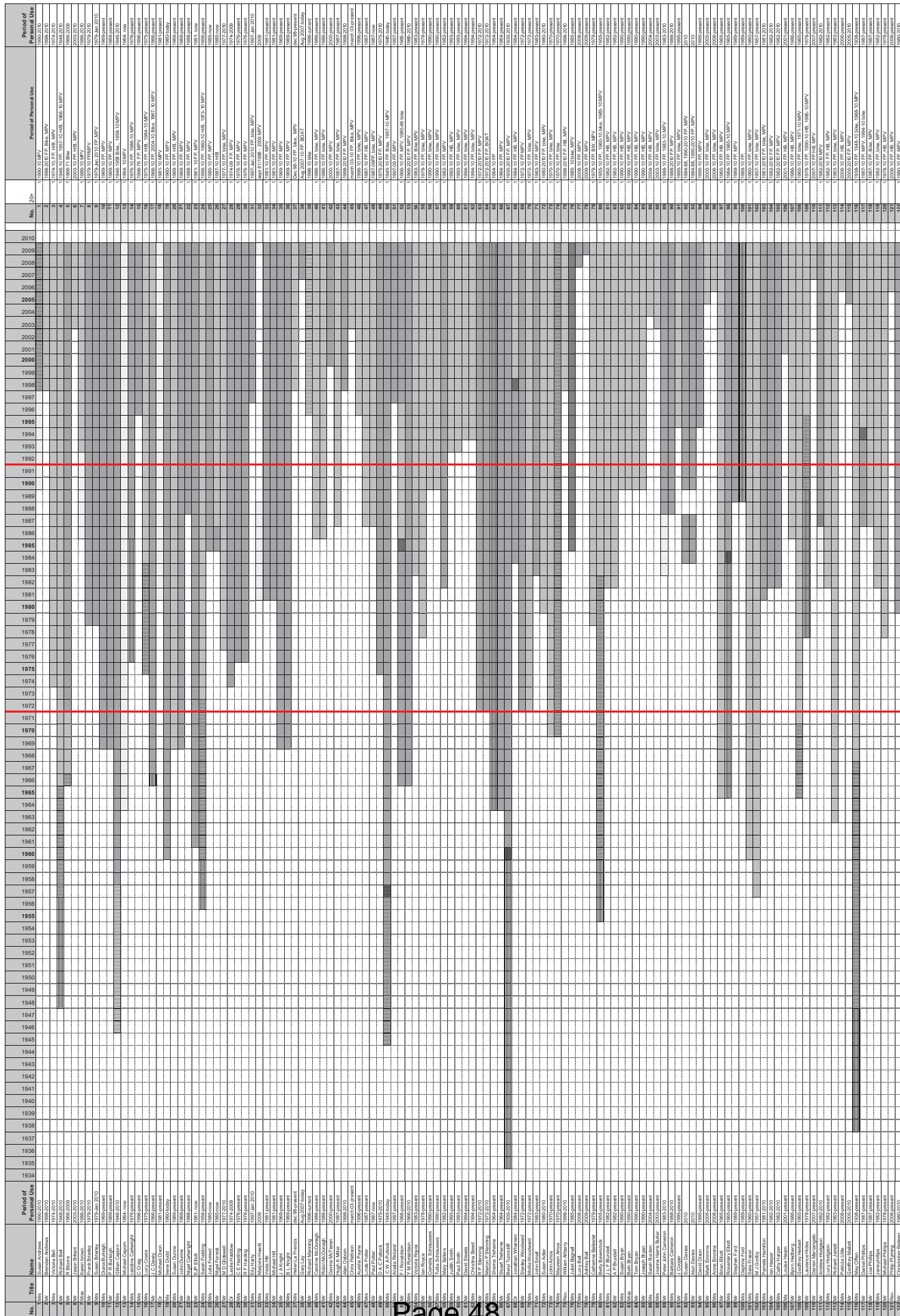
**OFFICER REPORT TO LOCAL COMMITTEE  
(ELMBRIDGE)**

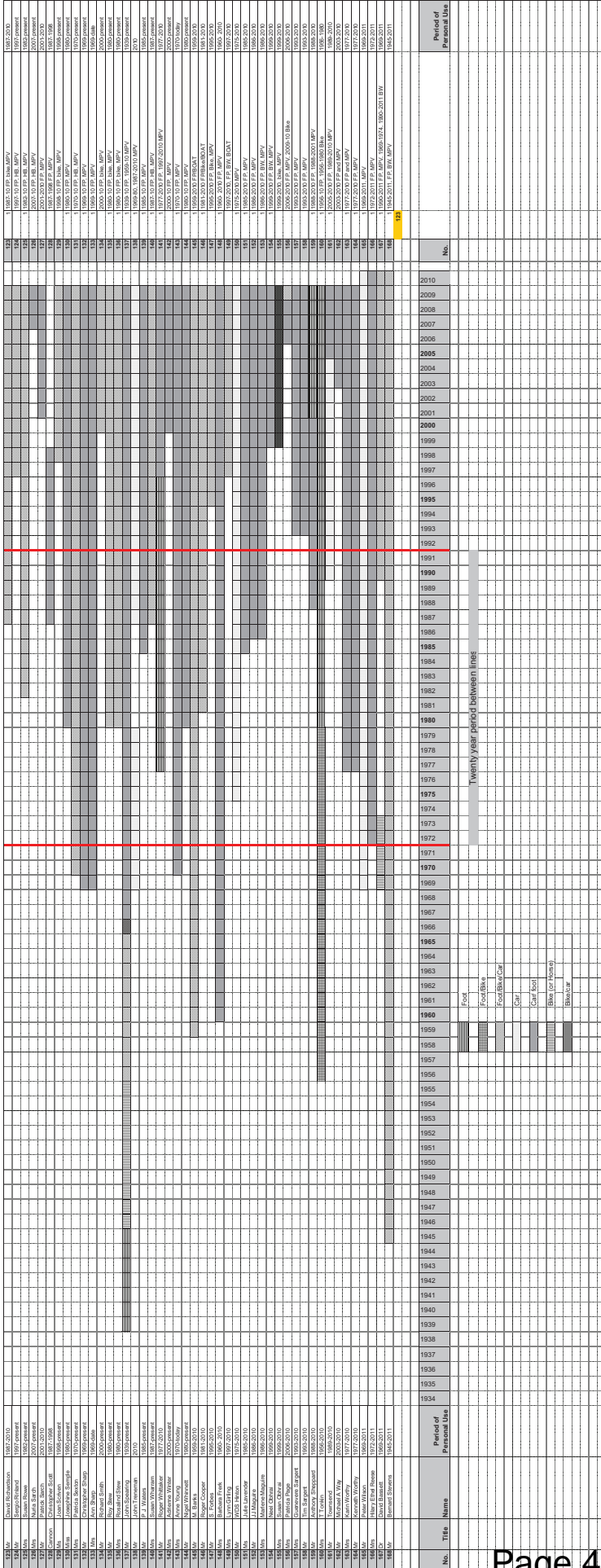
**ANNEX B**

**ALLEGED PUBLIC BYWAY OPEN TO ALL TRAFFIC (BOAT) ALONG  
ESHER PARK AVENUE, ESHER – CP540**

**10 SEPTEMBER 2012**

Bar chart showing use of Esher Park Avenue - CP540







**OFFICER REPORT TO LOCAL COMMITTEE  
(ELMBRIDGE)**

**ANNEX C**

**ALLEGED PUBLIC BYWAY OPEN TO ALL TRAFFIC (BOAT) ALONG  
ESHER PARK AVENUE, ESHER – CP540**

**10 SEPTEMBER 2012**



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3 June 2011

Special Delivery

Dear Sir

**Esher Park Avenue - Application for the modification of the definitive map and statement**

Further to discussions you have had with our Jenny Reid about Esher Park Avenue, and further documents and information provided by the directors of our client, Esher Park Avenue Residents' Association Limited "EPARA" we have compiled a bundle of witness statements and relevant documents, which is enclosed with this letter.

The folder comprises:

1. Witness statement of John Bentley, who is a director of Esher Estates Limited, and a retired director of EPARA. John was born on Esher Park Avenue in 1942, lived there until he was in his late 20's, remaining in the area, and returning to Esher Park Avenue regularly. He has been living on Esher Park Avenue since 2001. John's statement gives helpful recollections of the road while he was a child and growing up in the 40's and 50's. He also describes the development of the road.
2. Witness statement of Lawrence Guy Greaves (known as Guy Greaves). Guy was born on Sandown Avenue in 1946, and lived there until he was 13. He returned to live on Sandown Avenue in 1986, and has lived there ever since. His witness statement deals with his recollections about the development of Esher Park Avenue, and his recollections about the Road, in the early 1950's, and from 1986 onwards.
3. Witness statement of Paul Hamill. Paul is a former director of EPARA, and has lived on Esher Park Avenue since 2002. Paul's statement describes the history of Esher Park Avenue, and give details about when the gates and signs were put up. Annexed to his statement is a schedule of relevant extracts from the minutes of Esher Estates Limited which relate to the development of the road between 1904 and 1947.
4. Statutory declaration of Jennifer Sarah Reid, who is an employee of Penningtons Solicitors LLP. Jenny has reviewed various files provided by the directors of EPARA which relate to documents going back to 1982. Attached to her statutory declaration are relevant documents which may help in the consideration of EPARA's position and which clarify dates mentioned

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in the other statements such as the date that the 'no public rights of way' signs and the gate at the Sandown Avenue were erected (both in 1992).

#### Key information from the witness statements

We highlight below the key information from the various witness statements for your ease of reference:

- Esher Park Avenue formed part of the Esher Lodge Estate. As can be seen from the plan attached to the extract of title dated 1925 attached to John Bentley's statement, the land was largely fields with Esher Lodge at the High Street end, and a lodge at Littleworth Avenue end. The track which is now known as Esher Park Avenue can be seen going from Esher Old Church up to the lodge at the Littleworth Avenue end. Esher Park Avenue is in a slightly different position by the pond in the middle section of the road.
- Plots of the land were sold off in the late 1920s and 1930s, prior to 1945 there were 6 houses and up until the 1980s there were only 16 properties on the Road.
- The "private" signs were put up when the original gates were taken down during the Second World War.
- There were very few cars, if any on the Road during the Second World War, and in the 1940s and 1950s most residents and users would have walked along the track. John Bentley recalls that the road was very quiet around this time.
- Until the mid-1980s, Esher Park Avenue was a rough gravel track with many potholes and was in a poor state of repair.
- Plots called "Broomfields", "Cranford", "Acorns" and "Rosebriars" were developed between the mid-1980s and 1992.
- As the properties were developed, there was an increase in the number of residents using Esher Park Avenue and it was necessary to create a more hard-wearing surface.
- A tarmac surface was laid on Esher Park Avenue for the first time in late 1988 (see Jennifer Reid's statutory declaration for relevant correspondence and details of the accounts).
- Double gates were put up at the Littleworth Avenue/Milbourne Lane end of Esher Park Avenue at some time between 1986 and 1991 (see John Bentley's statement).
- Double gates were put up at the Sandown Avenue end of Esher Park Avenue in September 1992 and paid for by Octagon as part of the "Rosebriars" development at that time (see Jennifer Reid's statutory declaration for documentary evidence).
- The gates were closed from time to time, and for a long period during the widening of Claremont Lane in 1991.
- The "no public right of way" signs were put up at either end of Esher Park Avenue in April 1992 (see Jennifer Reid's statutory declaration for the invoices).
- Sleeping policemen were put in the road in about 1995/1996 (see John Bentley's statement)

### The new gates

As I understand you are aware, the new electric gates were installed in April 2011, in accordance with the planning permission obtained by EPARA. It was our client's intention to leave the new gates in the same configuration as the old gates (that is with one half closed and the other half open). However the mechanism does not currently permit the gates to be left in the same configuration without the risk of damage to the gates (although the directors are exploring whether it would be possible to adapt the gates so that they could be placed in the former configuration).

Both sides of each set of the new gates are therefore being left permanently open, in order that large vehicles, such as the refuse collectors, lorries, can gain access to Esher Park Avenue. It does not reflect any change in our client's opposition to the application to modify the definitive map by Esher Residents' association.

### ERA's application

Neither EPARA nor we have received any correspondence from Esher Residents' Association in relation to the application. If you have received any documents, or further correspondence, we should be grateful if you would let us have copies.

### Next steps

If you need any further information from EPARA, please do not hesitate to contact us. Jenny Reid will be on maternity leave from 27 May 2011, but Hannah Dare will be able to assist you. Hannah's telephone number is 020 7457 3067 and her email address is Hannah.Dare@penningtons.co.uk

### EPARA's position

As we indicated in our letter of 30 March 2010, our client objects to the application to modify the definitive map and statement by the addition of a byway open to all traffic along the section of Esher Park Avenue which is owned by our client for the following reasons:

- The effect of section 67(1) Natural Environment and Rural Communities Act 2006 is that any public right of way over the Avenue claimed by the applicant would have been extinguished.
- Without prejudice to that contention, in any event, our client has neither expressly nor impliedly intended to dedicate the Avenue as a public right of way because of:
  - Signs displayed to the public
  - Closure of existing gates
  - Action taken to restrict access and use of the Avenue by members of the public
  - communications to the public, to Elmbridge Borough Council and to Surrey County Council
- The applicant will not be successful in its application, in light of the objection maintained by our client.

If we can be of any further assistance, please do let us know.

Yours faithfully

*Penningtons Solicitors LLP*  
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30 March 2010

Dear Madam

**Esher Park Avenue - Application for the modification of the definitive map and statement**

We write further to our letter dated 1 March 2010. Since our letter dated 15 January 2010, we have had the opportunity to take further instructions from our client, and obtained counsel's opinion as to the application, and we write to set out in more detail our client's objection to the application. We have summarised our client's position below and we have set out the evidence and further details in the second letter which is enclosed. We enclose a file of papers containing the documents referred to in the second letter.

In our letter dated 1 March 2010, we confirmed that our client objected to the application to modify the definitive map and statement by the addition of a byway open to all traffic along the section of Esher Park Avenue which is owned by our clients (shown on the plan attached to the office copy entries sent with our letter dated 1 March 2010). In these letters, where reference is made to "the Avenue", we mean the section of the Avenue of which our client is the registered proprietor.

**Summary**


- The effect of section 67(1) Natural Environment and Rural Communities Act 2006 is that any public right of way over the Avenue claimed by the applicant would have been extinguished.
- Without prejudice to that contention, in any event, our client has neither expressly nor impliedly intended to dedicate the Avenue as a public right of way because of:
  - Signs displayed to the public
  - Closure of existing gates
  - Action taken to restrict access and use of the Avenue by members of the public
  - communications to the public, to Elmbridge Borough Council and to Surrey County Council
- The applicant will not be successful in its application, in light of the objection maintained by our client.

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Members of  and the European Law Group.

- We invite the council to make a swift disposal of the application in order that this matter can be resolved conclusively. This will save time and costs for the applicant, our client and the council.
- If it would assist you, our client would like to meet with you during the weeks commencing 19 or 25 April.

### **Expediting the consideration of the application**

In light of the overwhelming evidence and strength of our client's objection set out in our second letter, we invite the council to make a swift disposal of the application in order that this matter can be resolved conclusively. This will save time and costs for the applicant, our client and the council.

As you may be aware, on 17 February 2010, our clients were granted planning permission to install 1.3 metre-high automated entrance gates at both ends of the Avenue to replace the existing gates (application number 2009/2016). A condition has been attached to the planning permission requiring the gates to be *"installed with a mechanism to enable them to open automatically when approached by any motor vehicle without needing a code or key. Such mechanism is to be maintained in good working order at all times thereafter unless otherwise agreed in writing by the Local Planning Authority, and in case of breakdown the gates shall be fixed open."* The reason for including this condition is *"To ensure the gates do not cause an obstruction and traffic nuisance in this residential area in accordance with saved policy MOV4 of the Replacement Elmbridge Borough Local Plan 2000"*. We have advised our client that the planning department is not entitled to attach such a condition, and our client intends to lodge a challenge to the condition.

Of key relevance for Elmbridge Borough Council in reviewing the application for planning permission, will be whether the Avenue is subject to any public rights of way (for the avoidance of doubt, which our client does not accept). The outcome of the application to modify the definitive map is likely to have a bearing on court proceedings for judicial review of the planning condition, or any appeal to the planning inspectorate. It is therefore crucial that the application to modify the definitive map is determined at the council's earliest possible convenience in order that a decision can be made in relation to the condition attached to the planning permission.

As we have indicated, in September last year our client held a street party for all the residents of the Avenue, closing the gates at both ends. They intend to hold further similar events for residents, including another street party this year. Until the application is determined, our client's and the residents' freedom over the use of the Avenue is limited.

In addition, the existing gates need to be replaced as soon as possible, particularly given the destruction of one of the gates at the Sandown Avenue end of the Avenue following a road traffic accident. The existing gates are deteriorating (which is why the application for planning permission had been submitted to replace the existing gates). The wood is rotting and the swing arm is loose on one of the gates. Our client is concerned about exposure to possible claims if, for example, a child plays on the gates and is injured. The replacement gates will be stronger and safer, being made of painted aluminium. The residents of the Avenue desire to replace the gates as a matter of urgency.

In light of the overwhelming evidence in opposition of the application, the impact on the planning process, and our clients' desire to resolve this as soon as possible, we respectfully ask the council to consider the application at its earliest possible convenience.

### **Meeting**

If it would assist in considering the application, our client would like to meet with you to go through their evidence, and to consider with you if there are any steps which they can take to help the council to determine the application. May we suggest a meeting with you during the weeks commencing 19 or 25 April?, or indeed any other time at your convenience?

We appreciate your time in considering our client's objection, and we look forward to hearing from you

Yours faithfully



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30 March 2010

Second letter

Dear Madam

**Esher Park Avenue - Application for the modification of the definitive map and statement**

We write further to our first letter of today's date and write to set out in more detail our client's objection to the application.

**Section 67 of the Natural Environment and Rural Communities Act 2006 ("NERCA")**

Section 66 (1) of the Wildlife and Countryside Act 1981 defines a byway open to all traffic as follows:

*"A highway over which the public have a right of way for vehicular and all other kinds of traffic, but which is used by the public mainly for the purpose of which footpaths and bridleways are so used."*

In order to succeed with the application, the applicant would therefore need to show that the public have a right of way for vehicular traffic along the Avenue.

They will not be able to do so in light of section 67 of NERCA. Section 67(1) extinguished public rights of way for mechanically propelled vehicles which, before commencement of the Act on 2 May 2006, were not shown in the definitive map, or was shown as a footpath, bridleway or restricted byway. Section 67 of the 2006 Act provides, so far as material, as follows:

- "(i) *an existing public right of way for mechanically propelled vehicles is extinguished if it is over a way which, immediately before commencement -*
- (a) *was not shown in a definitive map and statement, or*
  - (b) *was shown in a definitive map and statement only as a footpath, bridleway or restricted byway..."*

Therefore, the effect of section 67(1) is that any public right of way over the Avenue claimed by the applicant would have been extinguished. Counsel (Katharine Holland of Landmark Chambers, who is a leading barrister in property litigation, and who recently has been appointed Queen's Counsel) has confirmed her advice that our client has very good prospects of successfully resisting the application to modify the definitive map so as to denote the Avenue as a byway open to all traffic.

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### The user evidence forms

Thank you for sending us the user evidence forms with your letter dated 1 February 2010. We received the further forms on 9 March 2010. From a preliminary reading of the forms, there are a large number of material and very substantial inaccuracies, in particular the road signs have been inaccurately described and dated.

Given the statutory limitation on denoting a road as a byway open to all traffic on applications made after 2 May 2006, it is not necessary for us to consider the extent of the evidence lodged. Without prejudice to the relative strengths and weaknesses of the parties' positions, the application to modify the definitive map in this way is simply too late in view of the impact of section 67(1) of NERCA.

That said, we reserve our client's right to object to the information provided in those evidence forms.

### Intention to dedicate a public right of way

Without prejudice to our client's contention that the application will not be successful in view of the limitations under 67(1) of NERCA, as we indicated in our letter of 15 January 2010, in any event, our client has neither expressly nor impliedly intended to dedicate the Avenue as a public right of way.

In order to create a public right of way, there must be an intention on the landowner to dedicate a right of passage over that land to the public at large.

In our letter dated 15 January 2010, we set out details as to the steps taken by our client to evidence their lack of intention to dedicate a public right of way over the Avenue. For the sake of completion, we will deal with these in turn:

#### **(a) Signs displayed to the public**

At tabs A and B of the bundle are plans of each end of the Avenue, which demonstrate the location of the signs and gates, and include photographs of each end of the Avenue. The numbers on the plans correlate with the numbers on the photographs.

The following signs are in place at the Sandown Avenue end of the Avenue:

- a) A large white sign on the right hand side of the road stating "PRIVATE / PLEASE DRIVE SLOWLY / LOOSE SURFACE / LOOK OUT FOR CHILDREN" (for at least 50 years).
- b) A red sign on the left hand gate, stating "PRIVATE ROAD / STRICTLY NO PARKING". (Since April 2006).
- c) An information sign showing "NO THROUGH ROAD FOR VEHICLES" (since 1993).
- d) A white sign under one of the no through road for vehicle signs, stating "NO PUBLIC RIGHT OF WAY". (Since 1992 at the latest)

At the Milbourne Lane end of the Avenue are the following signs:

- e) A large white sign on the right-hand side, stating "PRIVATE / PLEASE DRIVE SLOWLY LOOSE SURFACE / LOOK OUT FOR CHILDREN" (for at least 50 years).
- f) A "NO THROUGH ROAD FOR VEHICLES" information sign (since 1993).
- g) A red sign on the left hand gate marked "PRIVATE ROAD/ STRICTLY NO PARKING" (Since April 2006).

Other gates were in place prior to the existing gates, but were taken down during World War II to allow military and emergency access. At that time, notices marked "Private" and



"Private Road", were put in place, showing that there was no intention to dedicate the road as a public right of way.

Since then, we enclose the following evidence of the various signs:

- In April 1992, Mr Ekberg, the Chairman of our client reviewed the Highways Act 1980 and set out his conclusions in a note to his fellow directors. A copy of the note ("the Highways Act Note") can be found at pages 15 - 16 of tab C from which you will see that Mr Ekberg notes that:

*"the use by the public of private land does not confer the right of way unless the owner has a real intention to dedicate the right of way to the public."*

He goes on to state that *"the owner has a good defence if he can show that he had no intention to dedicate the land to public use by the erection of a notice or interruption. Sec 31(3) states that where the owner of land has erected, in such manner as to be visible to persons using the way, a notice inconsistent with dedication of the way as a highway, and has maintained the notice after the date on which it was erected, the notice shall, in the absence of proof of a contrary intention, be sufficient evidence to negative the intention to dedicate the way as a highway."*

Mr Ekberg considers the background: *"Esher Park Avenue Residents Association (and previously Esher Estates) has had notices saying "PRIVATE" for at least 50 years and it is contended that this is sufficient rebuttal of dedication. Gates were taken down during the 1939-1945 War, but were replaced by the PRIVATE notices, showing that there was no intention to dedicate the road as a public right of way. The erection of gates now is merely restoring the status quo, and it is contended that the residents are entitled to close the gates if they so wish."*

As a result of Mr Ekberg's study of the Highways Act he obtained an estimate for two more signs stating "NO PUBLIC RIGHT OF WAY" and asking his fellow director, Ken Barlow, to approve the placing of the order for the two signs. Mr Barlow approved the ordering of the signs on 28 April 1992. The signs were obtained and one placed at either end of the Avenue. [Copies of the memorandum from Mr Ekberg to Mr Barlow and the Highways Act Note can be found at pages 15 - 16 at tab C.] Suggest deleting as it reappears what's said above?

- 1994: Liberal Focus leaflet mentions existence of "private road" and "no public right of way" signs (see below and pages 52-53 at tab H)
- 1995 (August): Invoice for renovating "PRIVATE ROAD" sign from W B Building (page 17 of tab C).
- 1998: Modified design of existing signs including "no through road" and "no public right of way" installed in July. (see pages 18-22 at tab C)
- June 2002: "No Parking" signs were put up, as evidenced by the cheque stub for payment to Kingmead Parks Limited for "No Parking Signs" - page 23 of tab C.
- October 2004: "Private Road" signs were placed on the gate at the Millbourne Lane end (referred to as Littleworth Road end on the invoice) ( see Kingsmead invoice dated 29 October 2004, and letters dated 13 December 2005 and "Sunday am", together with cheque stub at pages 24 - 27 of tab C)
- April 2006: The smaller "Private Road" signs on both gates were replaced with the current "PRIVATE ROAD/ STRICTLY NO PARKING" signs by Paul Hamill, a

director of our client. At pages 28 - 29 of tab C is a copy of the invoice from Kingsmead dated 27 February 2006 and cheque stub for the new signs (which are b) and g) above).

Signs have been in place at both ends of the Avenue since at least World War II notifying the public that it is a private road, as confirmed by the evidence provided (see Mr Ekberg's letter dated 8 July 1992 to the Esher News and Mail, which was published on 22 July 1992, at pages 30 - 31 of tab D). Mr Ekberg's letter, which was published, sets out the same comments that were contained in the Highways Act Note, referred to above. This letter makes it clear to the readers of the Esher News and Mail and the wider public that the owner of the Avenue states that it was a private road, with no public rights of way. One of the directors of our client has reviewed the public archives for Esher News and Mail for the 6 months after the letter was published, and confirms that there was no response to that letter.

Further signs were put up in the early 1990s stating that there was no through road. In 1998 more signs were put up confirming again that it was a private road. It has clearly been our client's intention, and that of previous owners to notify the public at large that the Avenue is a private road, thereby demonstrating that it was not their intention to dedicate the Avenue as a public highway. Notice was made very clear to the public at large that (1) the Avenue is a private road and (2) there was no public right of way over that road since at least 1945.

**(b) Gates**

Other gates were in place prior to the existing gates, but were taken down during World War II to allow military and emergency access. The current gates at the Millbourne Lane end were erected in 1991. The gate at the Sandown Avenue end of the road was installed between 12 June 1992 and 3 November 1992.

At both ends of the Avenue there are double gates across the road. The gate on the left hand side on each approach to the Avenue is a five-bar white wooden gate with a red sign on it. The five-bar gates have always been closed permanently, although they are opened for the councils' refuse collectors on a weekly basis for access by the rubbish disposal vehicles, and closed again afterwards. On the opposite side of the road to the five-bar gates are single-bar gates with swing across arms on the diagonal, which meet the five-bar gates in the middle of the road when closed.

At both ends of the Avenue, the single-bar gate is open to allow access by the residents. At the Sandown Avenue end of the Avenue, the single-bar gate was knocked down recently following a road traffic accident. It has not been replaced as our client has applied for planning permission to replace both sets of gates with new structures.

**(c) Restrictions on access and use of the Avenue**

Until approximately 1988 when it was tarmaced for the first time, the Avenue was an un-surfaced road. It was never intended to be used widely by the public and indeed our clients believe that it would have been avoided as it was in such poor condition. The road was resurfaced in 1996/7. The user evidence forms do not reflect the fact that the Avenue was effectively a dirt track until relatively recently.

**(i) Closure of the gates**

From time to time the double gates at both ends of the road have been closed, for example in September 2009 for a street party for residents of the Avenue.

From approximately June 1992, works were undertaken to widen Claremont Lane, which led to the gates being closed at the residents' request at the Milbourne Lane end to prevent increased traffic using it as alternative route. The works were completed by June 1993. Our client believes that the works took between 6-9 months and during that time the gates were closed and the Avenue was blocked.

(ii) Restricting parking by non-residents

The directors of our client, and the residents' association before it have from time to time asked people not to park on the Avenue. Where residents of the Avenue have undertaken works to their properties, arrangements have been made to grant permission to the contractors to park on the Avenue. For example, we enclose at pages 34 - 36 of tab E, correspondence with Thirlstone Homes from early 2002 about the increased traffic using the Avenue to carry out the development work at 18-20 Esher Park Avenue. As can be seen by the letters, a traffic/vehicle management plan was put in place to restrict site traffic so as to allow access to the development site from Claremont Lane only. Thirlstone Homes asked for permission from our client to erect temporary signs saying that there was no access to the site at the junctions of Sandown Avenue/New Road and Esher Park Avenue/Littleworth Avenue. As can be seen from the letters, approval was sought from the chairman of our client, and permission granted in Mr Raven's letter to Thirlstone Homes Limited dated 4 February 2002. The letter from Mr Raven again refers to the Avenue as a private road.

It is clear to us following a recent visit to the Avenue that at the Millbourne Lane end cars are parked outside the gates, and before the signs saying no parking. The section of the Avenue falling between the two gates is not used by the general public for parking, and the only vehicles parked along the Avenue are those from the contractors working on houses within the Avenue, who have been given permission to park there by our client.

When the directors have become aware of unauthorised parking on the Avenue by non-residents, they have written to those involved to explain that the Avenue is a private road and such parking and access is not permitted.

(iii) Restricting access by non-residents

From time to time the directors have told people not to use the Avenue, by stopping cars, alerting owners of parked cars and informed non-residents consistently that the Avenue is a private road with no public rights of way over it.

On June 2009, the directors wrote to the headmaster of Danes Hill School, complaining of school buses driving at excessive speeds along the Avenue. At pages 37 - 38 of tab E is a copy of that letter from which you will see that our client:

- confirmed that the Avenue "is a private, gated road and there is no public right of way in the Avenue"
- was prepared to grant consent to access by a school bus if requested [third paragraph]
- "has a responsibility to preserve the nature of the private road and also safety of other children..."; and
- requested that the school only used the Avenue to drop off children who lived in the Avenue.

(iv) Route planners/Satellite navigation

The Avenue is not depicted as a public highway on satellite navigation equipment. At tab F are photos taken from a satellite navigation system by Mr King, one of the directors of our client. Photograph 1 shows the planned destination of 11 Esher Park Avenue (Mr King's address). Photograph 2 shows the subsequent screen which states that "Destination is located in a restricted or private area. You may need permission." It would therefore be clear to users of satellite navigation systems that the Avenue is restricted/private and not open to use by the public which is consistent with the Avenue being known as a private road.

Further, we have requested directions from RAC Route Planner, AA Classic Route Planner and TomTom Route planner for a journey from Hare Lane, Claygate KT10 to a

postcode on Esher High Street (KT10 9RT). The most direct route for this journey would be along the Avenue. However each three providers suggested a route that avoided the Avenue presumably because it is known to be a private road. These suggested routes, as can be seen from the print outs at tab G are much longer, being two sides of a triangle, as opposed to the direct route, along the Avenue. These routes do not take members of the public along the private road.

This increases our client's case that it is clear to the public at large that the Avenue is a private road with no public rights of way over it.

(v) Communications and publications

As referred to above, at pages 30 - 31 of tab D is a copy of a letter dated 8 July 1992 sent by Mr Ekberg to the editor of the Esher News & Mail, which was published on 22 July 1992. The letter sets out the background to the signs and gates, and the lack of intention to dedicate the Avenue as a public right of way to the world at large. No objections were submitted in response to that letter.

On 16 June 1992, a note was prepared by Mr Ekberg for discussion by the directors of our client about the closing of the Avenue during the works to Claremont Lane. A copy of this note is at pages 48 - 49 of tab H. In that note, it is suggested that, "6) *if residents should receive complaints from the members of the public concerning the management of our private road, it is suggested, in reply, they might consider the following points.*

- (a) *The road belongs to the residents who have the responsibility of maintaining the footpaths, verges and road surfaces along their frontages.*
- (b) *In 198? [1989], the residents had to provide £XX,000 [£60,000] to have the road re-surfaced but it was not the few residents' vehicles that made this necessary.*
- (c) *After the original gate across EPA [the Avenue] had to be taken down during the 1939-45 War to provide freedom of movement to the Police, Fire Brigades and Ambulances, the EPA residents have, for over 50 years, displayed "private road" or "private" notices at each end of the road. The public have completely ignored these notices although there has never been any indication that the residents wished, in any way, to dedicate the road as a public right of way."*

It is clear, therefore, that the directors of our client made sure that the residents of the Avenue were aware and communicated to the public its status as a private road. Residents were given guidance to respond to any complaints by the public about the Avenue. They were asked to make it clear that there was never any intention to dedicate the Avenue as a public right of way.

On 28 October 1992, Mr Ekberg wrote to J Maguire Esq, following an article by Mr Maguire in the autumn issue of the residents magazine concerning Esher Park Avenue. Again, Mr Ekberg sets out the wording in the Highways Act Note, indicating the lack of intention to dedicate the Avenue as a public right of way. A copy of that letter can be found at pages 50 - 51 at tab H.

In May 1994, The Liberal Democrats published a leaflet called "Focus", which included a section "Esher Park Avenue and Sandown Avenue - "Private Roads?". An extract of Focus can be found at pages 52 - 53 of tab H. Chris Ingram refers to gates and signs which were in place in June 1992. Upon receipt of Focus, Mr Ekberg wrote to Councillor Heaney on 25 June 1994, responding to the claims made by Mr Ingram in Focus. Once again, Mr Ekberg confirms that notices marked "Private" had been in place since at least 1945. He confirmed that in the opinion of Lord Denning, the notices existing at that time were sufficient to demonstrate our client's lack of intention to dedicate the Avenue as a public right of way. A copy of the letter can be found at page 54 of tab H.

In addition, we enclose letters and emails signed by nine residents objecting to planning application 2006/0956 to develop land at 24 Esher Park Avenue. Each of the letters and emails states categorically that the Avenue is a private road. Copies of the correspondence can be found at pages 55 - 61 at tab H.

Our client and residents have consistently adopted the approach that the Avenue is a private road, over which no public rights of way exist. This position has communicated clearly to members of the public through publications in newspapers, objections to planning permissions and in all dealings with members of the public. If our client has become aware of any challenge to the private status of the Avenue, or any assertions that public rights of way are alleged to exist over it, steps have always been taken to set out the correct position, as can be seen by the correspondence at tab H.

(vi) Correspondence with Elmbridge Borough Council

At tab I is the following correspondence between our client and Elmbridge Borough Council:

- *Letter from Elmbridge Borough Council ("EBC") dated 2 June 1993, which complains about new signs erected on the Avenue, re-enforcing the existing signs and gates. The letter states "as you are aware, it is the opinion of this Authority, in their role as agents to the Highway Authority that full highway rights exist over Esher Park Avenue and the gates and signs constitute unlawful obstructions of the highway." There follows a request to remove the signs and for the gates to be left permanently open.*
- *Our client responded to that letter on 2 June 1993, making it clear that it was not accepted that public rights of way exist over the Avenue. Once again, Mr Ekberg set out the wording in the Highways Act Note, referred to above. He added that "any proceedings which you may seek to bring will be vigorously defended."*
- *Letter from EBC to Mr Ekberg dated 30 June 1993 was seeking further instructions and would respond fully in due course.*
- *Letter from EBC to Mr Ekberg dated 22 July 1993, apologising for the delay in replying to Mr Ekberg's letter of 2 June 1993, and stating that "the matter is under consideration and I shall be contacting you upon this matter at a later stage".*

Having received the initial letter from EBC dated 2 June 1993, Mr Ekberg wrote to Lord Denning on 8 June 1993, asking for any comments that he might have as to the statements made in EBC's letter. Lord Denning replied to Mr Ekberg on 11 June 1993, stating:

*"I feel that the Elmbridge Borough Council are quite wrong in their letter they have sent you of 2 June. The Borough Council is not the Highway Authority. Only the Surrey County Council are the highway authority and it is for the County Council to assert and protect public highways in the county, not the Borough Council. I see that Mrs Paris claims that the Borough Council are agents of the Highway Authority. I do not think this is correct. I think you might well ask them on what ground they claim to be agents of the Highway Authority. In my view the opinion of the Borough Council on this matter is quite irrelevant.*

*"Turning now to the Highways Act 1980, you are quite right to set out section 31 in full. Your evidence is quite clear, for the last 50 years at least Esher Park Avenue has been a private road. Your notices and gates have been erected in assertion of the character of the Avenue, without any objection until recently. I think the evidence is quite sufficient to establish Esher Park Avenue as a private road, and not a public highway.*

*"I suggest that you reply to Mrs Paris's letter by saying that you will maintain that Esher Park Avenue is a private road and you will contest any suggestion to the*

*contrary, and you will keep up your notices and gates in the future as you have done in the past."*

Copies of Mr Ekberg's letter to Lord Denning, and Lord Denning's response can be found at pages 68 - 70 at tab I. Our clients are only waiving privilege in relation to legal advice obtained in respect of these letters. They are not intending to waive privilege in respect of any other legal advice that they may have received in relation to this matter.

Lord Denning agrees with Mr Ekberg's analysis of the position set out in the Highways Act Note, that is that the notices in place since 1945 were sufficient to demonstrate that our client has not intended to dedicate the Avenue as a public right of way.

Since the date of Mr Denning's letter, our client has followed the advice given, namely to keep up the notices and gates in the future, as they have done in the past.

In light of the fact that EBC did not respond to Mr Ekberg's letter dated 2 June 1993, our client concluded that EBC accepted the position as set out in our client's letter and that there were no public rights of way over the Avenue. From the lack of response, they concluded that the matter had been dropped.

On 30 July 1998, EBC wrote again to Mr Ekberg, some five years after the initial correspondence, stating that complaints had been made about the new signs which had been added at the end of the Avenue. A request was made to remove the signs.

Mr Ekberg responded to that letter on 10 August 1998, stating:

*"The signs to which you refer were erected in 1992 following legal advice from Lord Denning. The last correspondence I had with the Council was with the Head of Law in July 1993 who said "I shall be contacting you upon this matter at a later stage". I have received no further communication, possibly because he has been able to study the judgement in Benn v Hardinge in the Court of Appeal in October 1992 when Lord Justice Dillon stated, inter alia, that the law was clear that there had to be an intention to abandon a right of way and that even a period as long as 175 years was not sufficient by itself to indicate an intention by an owner to abandon a right of way. Such a right was a valuable property whose abandonment should not be lightly inferred.*

*"There has never been an intention to abandon the right of way over Esher Park Avenue and it should never have been inferred. This is a private road, not a private street."*

EBC responded to that letter on 24 August 1998. Copies of the letters can be found at pages 71 - 73 of tab I.

Again, in correspondence with EBC in relation to whether public rights of way exist over the Avenue, the response from our client consistently maintained that it is a private road and that there has never been an intention to dedicate the Avenue as a public right of way. The failure by EBC to challenge this lack of intention to dedicate the Avenue as a public right of way demonstrates to our client that it is unable to do so.

## **Conclusion**

Given the extensive signs at either end of the road confirming that it is a private road over which there is no public right of way, together with the existence of the gates, and their intermittent closure, and the steps taken by residents and our client to limit use of the Avenue by non-residents, there is overwhelming evidence of a lack of intention on the part of our client to dedicate the Avenue as a public right of way.

Counsel has advised our client that the notices and gates which have been erected at either end of the Avenue constitute strong evidence that there has been no intention to dedicate the

Avenue as a highway and that the applicant is likely not to be successful in his application for these reasons, quite apart from the point arising under section 67(1) of NERCA.

**Our client's objection to the application to modify the definitive map**

In conclusion, the applicant will not be successful in its application, in light of the objection maintained by our client.

Our client's objection is based on the limitation under section 67(1) NERCA for applications to modify the definitive map as a byway open to all traffic, which is clear and not open to interpretation. Without prejudice to the strength of our client's objection under that provision, in any event, our clients have clear and consistent evidence to demonstrate a lack of intention to dedicate the Avenue as a highway/public right of way.

We appreciate your time in considering our client's objection, and we look forward to hearing from you

Yours faithfully

A handwritten signature in black ink, appearing to be 'Per', written over a horizontal line.

Penningtons Solicitors LLP

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