103 Mortlake High Street, London SW14 8HQ

Wildlife and Countryside Act 1981

The Wildlife and Countryside (Definitive Maps and Statements) Regulations 1993

Definitive Map and Statement for the London Borough of Richmond upon Thames

To: The London Borough of Richmond upon Thames
Of: Civic Centre
44 York Street
Twickenham
TW1 3BZ

I Mr I D Herbert of 103 Mortlake High Street, London SW14 8HQ hereby apply for an order under section 53(2) of the Wildlife and Countryside Act 1981 modifying the Definitive Map and Statement for the area by adding the footpath from Mortlake High Street at grid reference TQ 21195 76046 through Tideway Yard archway at grid reference TQ 21178 76062 and thence to Jubilee Gardens at grid reference TQ 21004 76022 including access to the towpath at grid reference TQ 21146 76068 as shown on the map accompanying this application.

I enclose copies of the following documentary evidence (including statements of witnesses) in support of the application.

List of Documents

Background Documents

a) Map of route in question and map showing grid reference points
b) Chronology/History of the site
c) Letter from Environment Trust for Richmond upon Thames
d) Statement from Gillian Harwood 11/1/11

Formal Documents

e) My letter dated 24th October 2011 to Council's Legal Services Department, and statement attached thereto
f) Copy of my letter to the freeholder
g) Certification of compliance with Wildlife and Countryside Act 1981 Sched 14 Para 2
h) 17 evidence forms completed by witnesses showing use of the path over periods from 1975 until the present day, as follows:

1. [redacted]
2.
3.
4.
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6.
7.
8.
9.
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11.
12.
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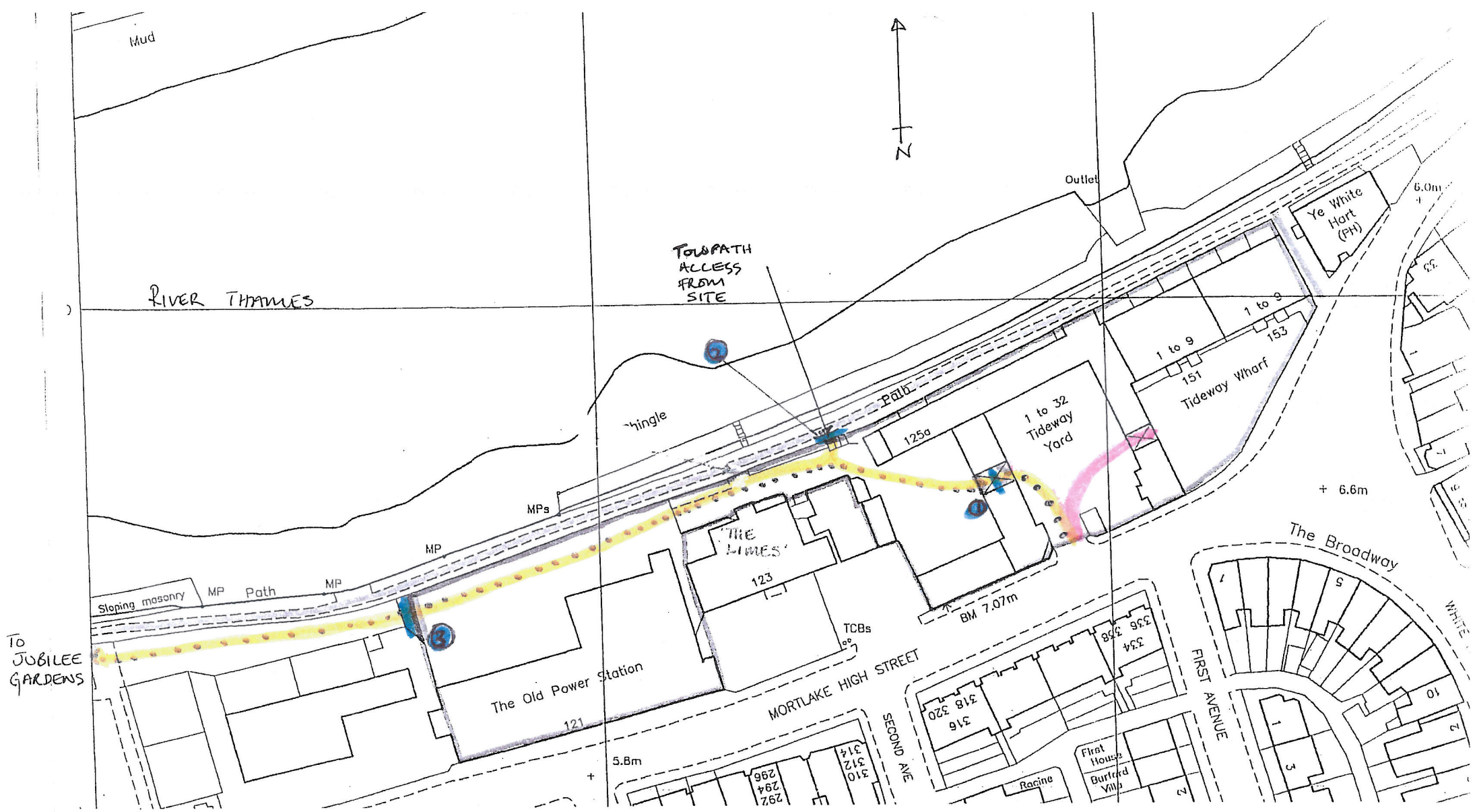
14.
15.
16.
17.

Dated: 24th October 2011

Signed:

[redacted]

Ian Herbert



KEY

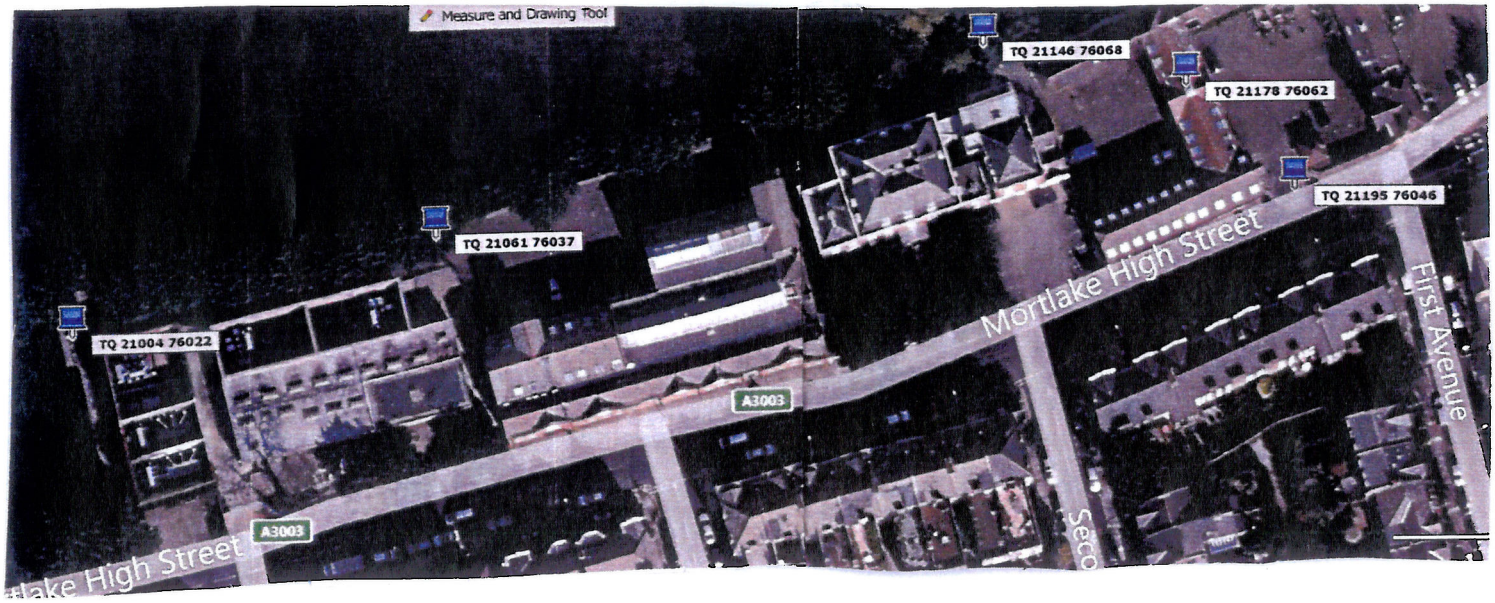
ROUTE FROM MORTLAKE HIGH STREET TO JUBILEE GARDENS

TIDEWAY WHARF RESIDENTS HAVE EXISTING RIGHT OF WAY

1 2 3 GATES

GRID REFERENCES

(a ii)



Grid Reference	X (Eastings)	Y (Northings)	Latitude	Longitude	Description (Click to Edit)	
TQ 21195 76046	521195	176046	51.470410	-0.25650679	TQ 21195 76046	— ENTRANCE TO TIDEWAY YARD
TQ 21178 76062	521178	176062	51.470557	-0.25674595	TQ 21178 76062	— ARCHWAY GATES (1)
TQ 21146 76068	521146	176068	51.470618	-0.25720438	TQ 21146 76068	— TOWPATH GATE (2)
TQ 21061 76037	521061	176037	51.470358	-0.25843816	TQ 21061 76037	— ACCESS TO JUBILEE GDNS GATE (3)
TQ 21004 76022	521004	176022	51.470235	-0.25926353	TQ 21004 76022	— ENTRANCE TO JUBILEE GDNS

CHRONOLOGY

1720s	The Limes constructed. Former residents include the Franks Family (Jewish Merchant Bankers who came to Mortlake from New York in 1754 and led the English Ashkenazi Jewish community for more than a century, Lady Byron (wife of poet Lord Byron) and Quintin Hogg (founder of Polytechnic movement). The Limes is a listed Grade 2 for architectural merit and historical significance.
1827	The Limes becomes the subject of two works by JMW Turner (1755-1851)
1895	The Limes becomes the seat of local government.
1901	Tideway Yard is constructed. The complex is originally a municipal and utility complex for Barnes Urban District Council comprising a small power station using coal or coke brought up the Thames, the Council House, a fire station (1904) and a Council Depot. At one time the site contained a de-lousing station and the borough mortuary. During World War II the building occupied by The Depot served as a barracks for air raid wardens.
1981	Richmond Borough Council decide that they have no further use for the buildings and their demolition was proposed. Local Mortlake residents were outraged by this and formed a Residents Association to protest about the demolition and to suggest future uses for the interesting collection of buildings on the site. A competition was held to develop the site whilst retaining the best of the original buildings and to provide space for small new businesses to start and flourish.
1983	Philip Lancashire and Gillian Harwood win Architect/Developer competition for the conservation and redevelopment of Mortlake Riverside and Barnes Power Station.
1985	They go into partnership with Marstons Properties to redevelop the site. According to the development brief, Tideway Yard was to be used as workshops and studios with a community workshop scheme. In order to create more useable space inside the old stable buildings, an iron walkway was designed. The cast iron columns supporting this were salvaged from the County Stand at Aintree racecourse. The final part of the development was The Old Power Station. The original turbine hall now houses the local youth club

	and also contains some splendid reminders of its heavy-industrial past.
1986	The refurbished buildings at Tideway Yard, including The Depot, re-opened.
1989	Philip Lancashire and Gillian Harwood win First Prize in the Times/RICS Conservation Awards and the Times/RIBA Community Architecture award for Tideway Yard.
1989	18 new residential flats (Tideway Wharf) are built on the Eastern side of the site
1989-2009	Richmond Council refuse to grant long leases at Tideway Yard to Marstons as their development of the commercial part of the site for office use was not in accordance with the Agreement which was to rent workshops and studios with a community workshop scheme (http://cabnet.richmond.gov.uk/mgConvert2PDF.aspx?ID=19206)
June 2009	Marstons agree to pay a settlement to Richmond Council for the backdated breach of user
Late 2009	Marstons buy the freehold of Tideway Yard.
Sept 2010	Marstons install gates at 1. The archway in Tideway Yard (Gate 1 on map) 2. The base of the steps leading down to the towpath north-east of the Limes (Gate 2) 3. At the western boundary of the site (north-west of the Old Power Station) near Jubilee Gardens (Gate 3) Gates 2 and 3 are initially kept padlocked but, after complaints from the commercial tenants, they are opened during office hours. Local residents are prevented from walking through Tideway Yard to access the towpath and Jubilee Gardens during evenings and weekends.
Jan 2011	Mrs J Heath lodges application for modification of Definitive Map and Statement for the footpath through Tideway Yard with Richmond Council
July 2011	Submission on behalf of Marstons is sent to the Council pointing out that route claimed does not extend to the public highway
Sept 2011	Mrs J Heath withdraws application
Oct 2011	New application is submitted by Mr I Herbert extending route to the entrance of Tideway Yard on Mortlake High Street.

The route through Tideway Yard to the river and Jubilee Gardens has been used as a public footpath since the buildings were converted in 1986. According to some of the witness statements enclosed there was public access through this site for many years before this.

There has never been a sign indicating that this was private property or that the public had no right of way. In fact, public access has been encouraged during evenings and weekends when there has been a sign up indicating that customers of The Depot are free to park in this area.

Residents of Tideway Wharf share the same entrance as Tideway Yard and have a right of way through to the flats at Tideway Wharf (eastern side of the development). For more than 20 years they have enjoyed direct access to the towpath and the common ground at Jubilee Gardens.

Clearly, as can be seen from the history above, local residents played an important part in the planning of this development and have never previously been prevented from accessing the river and the pleasant walk along this historic site

Refs: Marstons Properties website, Barnes and Mortlake History Society, Richmond Council website, Barnes and Mortlake Remembered (Nelson 1988), Ordnance Survey Map 1913 (John Griffiths)

David Barnes
Head of Planning and Development Control
London Borough of Richmond upon Thames
Civic Centre
York Street
Twickenham TW1 3BZ

27 November 2010

Dear Mr Barnes

Ref:10/0250/FUL Old Power Station, 121 Mortlake High Street, SW14 8SN
Public right of way over Tideway Yard

We understand that retrospective planning permission has been granted for gates closing access across Tideway Yard to Jubilee Gardens, but that if public use over 20 years can be demonstrated, an Order of Modification of the Definitive Map might be made.

The Environment Trust has worked with local residents and the Thames Strategy Kew to Chelsea as the Tow Path Group to draw up an Audit of the Wooded Tow Path from Kew Bridge to Beverley Brook. This was started in 2003 and culminated in a 3-volume document recording the condition of the tow path, river edge and landward edge. The Group further worked with Richmond Council to establish improvements to Jubilee Gardens, hitherto a neglected park. Work was completed in 2005 and use of the garden has much improved.

The tow path in this area is narrow and very prone to flooding, with the only alternative dry route being beside the busy Mortlake High Street. Alternative dry routes are necessary, especially those which offer a glimpse of what is left of Mortlake's history in the form of buildings wharves and yards. A policy of the Thames Strategy for this Character Reach No.2 states "The network of historic passages and alleys between the River and Mortlake High Street...are poorly defined and in need of protection and restoration".

The Trust supports the application by local residents and Mortlake Community Association to establish a public right of way over Tideway Yard.

Yours sincerely

[redacted]

Projects Manager

INVESTORS IN PEOPLE

ENVIRONMENT TRUST FOR RICHMOND UPON THAMES
Unit 6, Upper Deck, Phoenix Wharf, Eel Pie Island, Twickenham TW1 3DY
020 8891 5455 office@environmenttrust.co.uk www.environmenttrust.co.uk

(2)

11.1.2011

STATEMENT CONCERNING PUBLIC ACCESS OVER THE SITE AT TIDEWAY YARD, 125 MORTLAKE HIGH STREET, SW14 8SN

My name is [redacted] I live at [redacted]

[redacted] Tideway Developments Ltd. was set up as a company [redacted] in order to take part in an Architect/Developer competition held in 1983 to redevelop the above site. The competition was sponsored by Richmond Borough Council, with the Development Brief substantially developed by the Mortlake Community Association. (A copy of the Brief is attached as Annexe A)

A shortlist of finalists in the competition was displayed in the local library and local residents were asked to vote for their preference. Tideway Developments Ltd. were the winners – chosen because our scheme and the type of management we offered adhered most closely to the original Brief. Key to the success was the effort we made to make the site accessible to local residents. We worked with the PLA to design new access steps down to the towpath and we had to ensure that access from the adjacent public gardens was maintained at all times. During the daytime this access was either by pedestrians or people on bicycles. In the evenings, once the studio occupants had vacated their car parking spaces, public parking was also permitted – indeed actively encouraged – by people visiting The Depot restaurant.

I can confirm that at no time was anyone ever prohibited from walking anywhere on the whole site, however a barrier was put up to prevent cars parking in front of the residential area.

In 2009 [redacted] sold our interest in Tideway Developments Ltd. to Marston Properties (our Joint-Venture partners on the development). Recently, Marstons have put up gates barring the public from entering the site from the towpath or from the adjacent gardens. They have also put up gates preventing both pedestrians and cars from gaining access to the site (in the evenings and at weekends) any further than the entrance yard outside The Depot restaurant. This action would appear to be not only illegal – as it closes off a right of way which has been established for well over 25 years to my knowledge, but also affects local residents in another way. The entrance yard outside The Depot does not offer very generous parking space and so overspill cars are now forced to seek parking space on the already congested residential streets outside the site.

Signed [redacted]

Date: 11/1/2011

Post by
Rec. Delivery

103 Mortlake High Street
London SW14 8HQ

Legal Services Department
London Borough of Richmond Upon Thames
Civic Centre
44 York Street
Twickenham
Middx TW1 3BZ

24th October 2011

For the attention of Mr G Chesman

Dear Sirs

Application to modify the Definitive Map re Tideway Yard, Mortlake, SW14

I enclose an Application for an Order to Modify, which I hope will receive support from the Council.

Your solicitor Mr Chesman will be aware that the relevant freeholders – Marston Properties Ltd – submitted a challenge in response to an earlier application (recently withdrawn) made by Mrs J Heath. That challenge took the form of a lengthy and detailed analysis of Mrs Heath's Application by a freelance consultant, [redacted] Her commentary correctly highlighted the fact that a number of specific details in the Application needed amendment (e.g. grid references to be changed and the route through to Mortlake High Street to be clearly included). These points have been taken into account in my enclosed Application, and also in the enclosed Evidence Forms; and will, I trust, deal adequately with bullet points one to six inclusive of [redacted] No. 3 sub iv).

I submit that much of [redacted] challenge commentary re 'intentions for the site' (her eighth bullet point) is, in fact, irrelevant in so far as the historic usage of the footpath in question is concerned; and, as the Council itself, and its legal officers, have been closely involved with the Tideway site throughout the last two decades, you and your colleagues are well placed to reach an independent and balanced decision based on the applicable law. (One assumes that Marston's preferred views of the history of the site, as expressed by [redacted] would anyway surely not be accepted just as they stand by the Council).

Referring to [redacted] seventh bullet point, in relation to which she attempted to put forward a concept of 'user population vs. total local population' I submit that this idea is spurious, and is certainly not supported by relevant legal authorities. I attach to this letter a detailed statement, which gives reasons and quotes authorities, enabling one to justifiably state that the whole concept

alleged to exist by [redacted] is fundamentally wrong, and that it should be ignored by the Council when determining my Application. The Ramblers' Association strongly supports this view, and has assisted in the production of my statement: I understand that they are a recognised authority on matters concerning Rights of Way and are the publishers of the standard textbook "Rights of Way – A Guide to Law and Practice (Riddall & Trevelyan, 4th edition. Published 2007 by the Ramblers' Association and the Open Spaces Society).

I confirm that the freeholder is being advised (as per the enclosed separate Certificate of Service), of my Application, and that I will tomorrow post the required notices at the gateways on the Tideway site.

Please do contact me if any points need clarification [redacted] I look forward to receiving your confirmation of safe receipt of these papers.

Yours faithfully

[redacted]

I D Herbert

'Statement' to London Borough of Richmond Upon Thames dated 24th October 2011, as per letter of that date

1. I, Ian D Herbert, have seen a copy of a submission made on behalf of the objector: 'Landowner case and evidence refuting the claim for a public footpath at Tideway Yard, Mortlake High Street, London SW14 8SW'. Below I refer to this as 'the Landowner case'. I am grateful for this opportunity to comment on it. If in commenting I do not refer to a point made in the Landowner case it does not follow that I agree with it.

Tests

2. The Landowner case mentions (their paragraphs 10–14) various tests. At paragraph 10 it is said that 'the "test" which has to be fulfilled to make a Modification Order is that on the balance of probability public rights subsist or are reasonably alleged to subsist.' With due respect, I think that may be mistaken. I think that the test is *that public rights are reasonably alleged to subsist, or that on the balance of probability public rights subsist.* 'Balance of probability' does not quite make sense when applied to the 'reasonable allegation' test, and the relevant authorities – *R v Secretary of State for the Environment ex parte Bagshaw* [1994] 68 P&CR 402, and R *v Secretary of State for Wales ex parte Emery* [1998] 4 All ER 367 – do not appear to link 'balance of probabilities' with 'reasonable allegation'.

3. The Landowner case also says (their paragraph 11), that 'if an order is made, to succeed it must fulfil a further legal test, that user evidence is representative of use actually enjoyed as of right for an uninterrupted period of 20 years by the public at large. The interpretation', says the Landowner case, 'of this sentence is important'. I submit that this is a slightly unusual assertion. The 'sentence' whose interpretation the Landowner case says is important is the Landowner case's own sentence; it does not appear either in section 31(1) or (so far as I can find) in any of the case-law which interprets it. Small wonder, since it is not the 'use' which has to be 'actually enjoyed' but the way itself. So this sentence whose interpretation the Landowner case says is important is already not in fact an accurate statement of the law. I suggest that what is important is the interpretation of the law itself, not this unrepresentative statement of it.

Adequacy of use

4. For a claim to succeed under section 31(1) of the 1980 Act, the way must have 'been actually enjoyed by the public as of right and without interruption for a full period of 20 years'. If those criteria are fulfilled it becomes a highway through the operation of the law, unless there is sufficient evidence that during the material period there was no intention to dedicate it.

5. At its paragraphs 27–31, the Landowner case, having recognised as paragraph 27 that there is no clear guidance on what constitutes sufficient use, then goes on at paragraph 29 to claim that 'claims in an urban area are expected to show

many more legitimate users than would be expected in a rural area'. Then in paragraphs 30 and 31 the Landowner case quotes statistics concerning numbers of residents, and derives from them a figure which, they say, 'could be expected to fulfil "use by the public at large" in this claim.' The user-evidence falls short of this 'expected ratio', runs the argument.

6. With due deference, I say that all of that is wholly artificial. There is no legal basis for talking about an 'expected ratio'. There is no authority for asserting that there is a correlation between population-statistics and the number of users. The law is what the statute says it is, and it says that the way must have been 'actually enjoyed by the public', and it says nothing about proportions or ratios. I submit that even a small number of members of the public can count as the public. It would be perverse if members of the public were not to count as 'the public'. There are several reasons, ranging from judicial interpretation to ordinary construction of language, for taking the view that there is no such empiric test.

Case-law

Mann v Brodie

7. It was held by Lord Watson in *Mann v Brodie* (1885) 10 App Cas 378 that the number of users must be such as might be reasonably expected if the way had been unquestionably a highway.

8. But to that there are a couple of important qualifications. *Mann v Brodie*, though decided by the House of Lords, was not an English case; it was a case referred to the House of Lords from the Scottish courts about how rights of way come into existence *under Scots law*. It is therefore at best persuasive authority.

9. Moreover, in 1885 when *Mann v Brodie* was decided, there was no law equivalent to section 27 of the Countryside Act 1968, requiring the signposting of public rights of way, so it is not correct to apply that test without the necessary adjustment. By this I mean that, in a locality where definitive rights of way are required to be signposted, it cannot be right to compare use of a non-definitive path which is not signposted (or otherwise promoted). Ways which have been signposted since the 1968 Act took effect, or are promoted as recreational routes, are bound to get more use than ones which are not, since there is more chance of the public getting into the habit of using them. The *Mann v Brodie* 'test', which dates from a time when there were no promoted routes and no requirement to signpost or waymark paths, therefore requires adjustment, if claimed ways which are not signed are to be unfairly contrasted with definitive ones which are signed.

Merstham Manor v Coulsdon and Purley Rural District Council

10. Moreover, the *Mann v Brodie* 'test' should be read against what was said by Mr Justice Hilbery, in *Merstham Manor v Coulsdon and Purley Rural District Council* (1937) 2 KB 77: 'public user is essentially to some extent intermittent, occurring, as it does, only when individual members of the public make use of

the way' (and that was a case about a 'roadway', apparently in a well-populated suburb). Given that the Oxford English Dictionary defines 'intermittent' as: 'intermits or ceases for a time'; 'coming at intervals'; 'operating by fits and starts', it can be fairly claimed that the levels of use by the public in the present case easily measure up to that test. Even if at some periods the use has been to some extent intermittent. But that does not oust the claim given Hilbery J's recognition that use can be 'essentially to some extent intermittent.'

11. What Hilbery J said in the same case in the context of his definition of 'interruption' is also worth attention in the context of the definition of 'actually used'. He ruled that 'interruption', as in 'without interruption', means actual physical stopping or prevention of the public's use of the way by the landowner or somebody acting on the landowner's behalf. He said: 'it is ... to the interruption of the enjoyment of the way and not to the period of time that the words are attached by way of qualification.' So 'interruption' is nothing to do with any absence of continuity in *de facto* use. Read against his acknowledgement that 'public user is essentially to some extent intermittent, occurring, as it does, only when individual members of the public make use of the way,' it becomes absolutely clear that Parliament does not require a more-or-less continual stream of use *whatever the locality*. One would have expected, given his close analysis of what counts as uninterrupted use, for the judge to have referred to the requirement if there were one for the use to be proportionate to the number of residents; but he did not, since there is no such requirement. On the strength of *Merstham*, it can be contended that not only is there no requirement for use to have been continual, but that there could in certain cases be a very long period of even a year or more of non-use, provided that such use as occurred was sufficient to satisfy the requirement that the way was used by the public. *Merstham* points up the fallacy of setting up some arbitrary figure and requiring it to be reached annually in order for it to be said that the way was used by the public.

Jones v Bates

12. So does *Jones v Bates* [1938] 2 All ER 237. In this leading case Scott LJ said that 'mere absence on the continuity of the *de facto* user proved will not prevent the statute from running' and that, if that were so, 'the necessary proof in public-right-of-way cases would often break down ... simply because witnesses were not available to fill in the gaps in such proof.' That, too, shows that in no case is there supposed to be a deluge of use. The judge is contemplating that, whatever the locality, there can be gaps during which there is no actual evidence of use. A judge who is so relaxed about the issue as to say that there can be significant gaps in *de facto* use even during the material 20-year period (since this was a case about statutory deemed dedication following 20 years' use) cannot be contemplating that when the use *does* takes place it must be on a level proportionate to the local population.

13. The burden of what I say above is this. The judges in those early cases about the operation of section 1 of the Rights of Way Act 1932, the direct ancestor of the present section 31(1) of the 1980 Act, set out to define that relatively new provision, which was a significant departure from highway law as it had thitherto

been. They might have been reasonably expected to refer to this supposed correlation between user-numbers and local population if in their view the legislative intention was that there should be such a correlation. (No earlier case refers to it.) Instead they said nothing about it. The fact that the judges were prepared to countenance periods of *de facto* use is at least a pointer to the view that there is no need in any locality for a stream of use by some fixed proportion of residents the rest of the time.

14. There are a couple of other old authorities which I might mention for completeness here. I understand that in *R v Inhabitants of Southampton* [1887] QBD 590, Lord Chief Justice Coleridge said that 'user by the public ... in this connection must not be taken in its widest sense ... for it is common knowledge that in many cases it is only the residents in the neighbourhood who ever use a particular road or bridge.' (He went on to say that the meaning of the word public was 'confined to that portion of the public' which actually used the way.) Prior to that, in *R v Leake* (1833) 5 B&D 469, Littledale J said that 'if a road has been used by the people in the parish, it furnishes evidence *pro tanto* of its being a way for the rest of the public.' *R v Broke* (1859) 1 F&F 513 showed that 'seafaring men' could count as the public. In none of these or the cases cited above is anything said about the ratio of users to residents being part of the factual matrix.

Whitworth v Secretary of State for Environment, Food and Rural Affairs

15. So just what judicial authority – over and above those mentioned so far – is there to support the Landowner case contention at its paragraph 12 that 'clearly in a major urban area ... use would need to be demonstrated by a far greater number of people [than in a remote part of a rural parish] reflecting that greatly increased population to demonstrate actual enjoyment'?

16. The only other case in which the matter of 'quantity of users' appears to have been examined judicially is the very recent case of *Whitworth v Secretary of State for Environment, Food and Rural Affairs*: High Court [2010] EWHC 738 (Admin), and Court of Appeal [2010] EWCA Civ 1468.

17. In the Administrative Court below, Mr Justice Langstaff declined to quash an Inspector's decision to confirm an order adding to the definitive map a restricted byway, where the only evidence supporting restricted byway status was of one witness using a pony and trap—albeit very frequently, but not for a full 20-year period—and of use by two cyclists. Langstaff J upheld the Inspector's decision, saying

> ... Mr Clay says that he used the pony and trap on a regular basis, it appears probably fortnightly, throughout the period from 1976 onwards. 1976 does not, so far as I can see, appear from his written material and must have been derived by the Inspector from what he said orally. I reject the suggestion that if one person uses a pathway so regularly, it cannot give rise to there being a carriageway, when use to a lesser extent in aggregate, but by several different users over the same period, might. What matters is the nature and quality of the use taken as a whole, and whether it is secretly, with permission, with force; those requirements which are well understood as necessary for the establishment of a right of way...

The Court of Appeal found a firm enough footing in the arguments behind Ground One to allow the appeal, deciding that the Inspector erred in law in finding that use of a bicycle would be consistent with a finding that the route was anything more than a bridleway, since members of the public have a right to use bridleways for cycling in any case.[1] In passing, however, Lord Justice Carnwath had this to say on the issue of level of use (ground-ii)—

> The conclusion on ground (i) makes it unnecessary to consider in any detail ground (ii), which involves a consideration of the evidence relating to the use by the two cyclists. I would only observe that I see some force in Mr Elleray's [for the appellant] submission that [the evidence] was on any view insufficient to support a finding of use as enjoyment as of right 'by the public'. Mr Roscoe was a close neighbour (at Craglands), and Mr Harding was his friend. The way through the farmyard would, it seems, have been a convenient route from this property on to the Fell.

18. I mention this because of the very moderate terms in which Carnwath LJ dealt with the proposition that two cyclists and one pony-and-trap driver could raise the presumption of dedication. He merely said that he 'saw some force' in the submission that this evidence was 'insufficient to support a finding of use ... as of right "by the public"'. He did not say that it was a wildly fantastic proposition; merely that there was some force in the argument that the evidence was insufficient, and whilst recognizing that one of the cyclists was an immediate neighbour, and the other was a friend, and that the pony-and-trap use did not cover the full 20-year period. The ratio of users to population was not part of the Inspector's reasoning, the High Court's acceptance of it or the Court of Appeal's very moderate criticism of it. But, as Mr Alan Kind points out in the journal *Byway and bridleway* 2011/1 at page 9, *Whitworth* 'is the clearest – and apparently the only – express view of the courts on the "minimum number of users required for section 31", and ... *Mann v Brodie* provide[s] only incidental references in this matter.'

19. So as to the view that 'clearly' there needs to be far more use in an urban area before the users count as the public, there is no judicial (as well as no legislative) authority. The only pronouncements made by the courts are silent on the issue, though there is a point briefly raised by Carnwath LJ which in my view supports the argument that for use *anywhere* to count as public use, very few members of the public are needed. The point which I think it raises is that to show that use is by the public, what really needs to be shown is that there is use by a group of people sufficiently detached from the path than would otherwise give rise to a purely private easement. That, I submit, is the point which is being missed. Any other interpretation gives rise to too many inconsistencies and flaws, and introduces too much subjectivity, for it to be tenable.

20. Because let it be noted that use by *one* person is enough to give rise to a right of way. I refer, of course, to a *private* right of way. Though it is a significant burden on the land of another, preventing the owner of the servient tenement from being able to develop the land crossed by that right of way, one person is enough to create it. If Miss A makes a gap in the hedge at the bottom of her

[1] By virtue of section 30(1) of the Countryside Act 1968.

garden, and crosses over two fields which are not hers to reach a road where there is, say, a bus-stop, and she carries on doing it for 20 years as of right, then she acquires an inalienable right for herself and her successors to do that in perpetuity. Parliament introduced that under the Prescription Act 1832 and has not seen fit to alter it in 169 years. Parliament is clearly of the view that having a right of way over your land, onerous a burden though it may be, is not so onerous a burden that one person is inadequate to establish it.

21. Considered from that standpoint, I do not think there is any reason for asserting that in any circumstances, large numbers of people are necessary to establish a public right. I think that there is a perfectly good case for saying that what Parliament meant by 'the public' in the 1932 Act and in section 31(1) of the 1980 Act is nothing to do with having to prove use by large numbers of people – it is to do with proving that people were using the way not in their capacities as people establishing exercising a *private* right, i.e a way connected to their own properties whose use would result in a right exclusively for them, but in their capacities as people from further afield whose properties do not abut the land over which the way runs and whose use would not result in a private right. All civilized legal systems have rules which respect activities carried on for a long time, or as Lord Hoffmann put it in *R v. Oxfordshire County Council ex parte Sunningwell Parish Council* [2000] 1 AC 335, 'Any legal system must have rules of prescription which prevent the disturbance of long-established *de facto* enjoyment.' How can that apply if the users are neither so connected with the land as to give rise to a private right, nor numerous enough (on the Landowner-case argument) to give rise to a public right?

R v. Oxfordshire County Council ex parte Sunningwell Parish Council; and R (on the application of Godmanchester Town Council and Drain) v Secretary of State for the Environment, Food and Rural Affairs [2007] UKHL 28

22. These may seem irrelevant. *Sunningwell* was about whether users had to *believe* that they were exercising a right. They do not, of course; what matters is what they do with their feet, not what they think with their brains. *R (on the application of Godmanchester Town Council and Drain) v Secretary of State for the Environment, Food and Rural Affairs* [2007] UKHL 28 was about whether a landowner's intention not to dedicate had to be communicated to users of the way, or whether it was enough for him to be able to prove that locked in his own mind he had no such intention. The law lords found that the intention has to be communicated and that it would make nonsense of the Act if it did not have to be. What matters is what the landowner does, not what he thinks. *Godmanchester* also got rid of an affirmant's difficulty of knowing whether an Inspector would take a particular action by a landowner as being a calling into question of a way's public status, or simply a piece of evidence of intention not to dedicate. It decided that they are essentially the same thing. Previously, those wishing to claim rights of way had embarked on a gamble on account of this arbitrary factor.[2] Lord Hoffmann specifically criticized arbitrariness,

[2] By which I mean this. *Godmanchester* has ruled that, ordinarily, any act which satisfies the landowner's proviso will also bring the way's public status into question. Before the Lords ruled, you did not know whether you had a viable case or not: it would depend on whether the Inspector took a particular act as being a bringing into question or simply evidence of no intention to dedicate without it

referring at paragraph 37 to 'the arbitrary and illogical rules of common law'. By 'arbitrary' he meant that at common law, apart from anything else, the affirmant of a right of way had absolutely no idea how many years' use a tribunal would accept in any case before inferring dedication. The 1932 legislation got rid of that by stipulating a fixed period of 20 years. He also meant the difficulty faced by an affirmant of proving that the land was held by a person with capacity to dedicate; the legislation dealt with that, too.

23. To import into section 31(1) a new 'resident-ratio' rule would be to introduce the kind of subjectivity and arbitrariness that were so decisively rejected in *Sunningwell* and *Godmanchester*. The issue is whether people use the path: an objective test. To say that the issue is the number of people who use the path compared to the number of their fellow-residents who do not use it is to introduce subjectivity. It would mean that a public right of way on foot could never be established no matter how many people used it if they had the misfortune to live close to neighbours more yet numerous who never ventured beyond their front doors except in a vehicle. As to arbitrariness, a 'resident-ratio' would introduce a factor more arbitrary than any that has hitherto countervailed against affirmants of right of way. How is a claimant meant to know what the boundaries of the 'area' (as the Landowner case puts it in its paragraph 25) will be taken by the tribunal to be? If by 'population' an Inspector took a circle of 50 metres radius around an urban path, it might have a population of less than a dozen, the location being shops and offices and its residents a few caretakers, making more users than residents; but what if the Inspector took half a mile radius, or three-quarters of a mile, or a mile, or the whole county, or some other purely arbitrary acreage? The odds against the users being (on the Landowner-case argument) found to be 'public' would decrease. If Parliament meant this sort of balance between users and non-users to be taken into consideration, they would surely have codified some sort of 'catchment area'. They have codified nothing of the kind. There is no basis in law for the Landowner case to have plucked out of the air their statistics of population in the London Borough of Richmond, or the Mortlake and Barnes Ward. Highways have been coming into existence through long usage since before local government boundaries existed: there were no parish councils until the Local Government act 1888, but there is no suggestion that highways could not come into existence before then in territories later divided into parishes.

24. Thus, it is completely out-of-order for the Landowner case to base its ratio on the arbitrary figure derived from local government boundaries. They could just

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simultaneously bringing the way into question. Suppose you had twenty-one years' actual use, terminating in an unequivocal barricading of the way and erection of 'No right of way' signs. You made your claim and it would succeed. But what if after eighteen years the landowner had started challenging users – not often or notoriously, but enough for some of them to take note. Inspector A might find that these challenges were both evidence of no intention to dedicate *and* a bringing-into-question; Inspector B might find that they were evidence of no intention to dedicate but not a bringing-into-question. So Inspector A would confirm the order, Inspector B would not, because the 20-year period ended not with the challenges but with the barricading, and so had evidence of no intention to dedicate during it. Since *Godmanchester,* both Inspectors A and B must find either that the challenges were both a bringing-into question and evidence of no intention to dedicate, or instead that the barricading was both a bringing-into question and evidence of no intention to dedicate. The courts are clearly of the view that arbitrary rules have no part in statutory deemed dedication.

as easily, though it would not have suited their purposes, have chosen the population of the nearby Mortlake High Street as their 'location'; or Mortlake High Street and the Terrace; or Mortlake High Street and The Terrace and First Avenue; or Mortlake High Street and The Terrace and First Avenue and Second Avenue; or Mortlake High Street and The Terrace and First Avenue; or Mortlake High Street and The Terrace and First Avenue and Second Avenue; or Mortlake High Street and The Terrace and First Avenue and Second Avenue and White Hart Lane; or Mortlake High Street and The Terrace and First Avenue and Second Avenue and White Hart Lane and Cowley Road; or ... and so on. The whole population-ratio notion is completely artificial and introduces the kinds of subjectivity and arbitrariness rejected by the House of Lords both in *Sunningwell* and *Godmanchester.* There is no basis on which for claimants to be required to play this guessing-game of 'how big will the Inspector draw the circle round the path's location?'

Textbooks

25. Just as judicial authority offers not a scintilla of support to the notion that there must be correlation between the number of users and the local population, so neither do the textbooks. Riddall and Trevelyan, as the Landowner case says in its paragraph 14, say that use must be by the 'public at large'; they add that it is not sufficient if use has been only by a 'class of the public such as the employees of a particular employer, customers of a particular business or tenants of a particular landlord.' Nothing there to support the ratio theory. Nothing in Angela Sydenham's *Public rights of way and access to land* (Fourth Edition 2010) except that 'it is sufficient for a highway to be created if it is used by a section of the public' (page 36). No mention of anything to support the 'ratio' contention in Sauvain's *Highway Law* (Fourth Edition 2009), see section 2–63: quite the reverse: 'There appears to be no .... point in the section 31 process where the level of use would be directly relevant, other than to take a view as to whether a way was actually being used by the public rather than by a particular class of people or under permission' (my underlining): in other words, once the users go beyond being the employees of a particular employer, customers of a particular business or tenants of a particular landlord, then you have got your public, not matter how few they are, unless they are so few and at the same time live so close that what they are doing would amount to the establishment of a private easement.

26. I believe it is correct from that last point (supported by all I say above) that all Parliament is requiring by its use of the word 'public' is that there are users enough to show that it is not a mere private right that is being exercised and that it is not invitees, employees of the landowner or any other subset. It is correct to say that the ratio theory is pure invention, not backed up by a single authority and so full of arbitrary requirements as to make it impossible to work without frustrating the will of Parliament.

To: Marston Properties Ltd
Of: No 1 Mills Yard
Hugon Road
Fulham
London
SW6 3AQ

25th October 2011

Tideway Yard Gates

Notice is hereby given that, on 24th October 2011, I, Ian Herbert of 103 Mortlake High Street, London SW14 8HQ, made application to the London Borough of Richmond upon Thames, York Street, Twickenham TW1 3BZ that the Definitive Map and Statement for the area be modified by adding a footpath from the entrance to Tideway Yard SW14 8SN (Grid Ref TQ2119576046) to Jubilee Gardens (Grid Ref TQ2100476022) via Tideway Yard archway (Grid Ref TQ2117876062) and including access to the towpath at Grid Ref TQ2114676068.

Dated: 25th October 2011

Signed Ian Herbert

(9)

Certificate of Service of Notice of Application for Modification Order

Wildlife and Countryside Act 1981
Definitive Map and Statement for the London Borough of
Richmond upon Thames

To: London Borough of Richmond upon Thames
Of: Civic Centre, York Street, Twickenham TW1 3BZ

I, Ian Herbert, of 103 Mortlake High Street, SW14 8HQ, hereby certify that the requirements of paragraph 2 of Schedule 14 to the Wildlife and Countryside Act 1981 have been complied with in connection with my application to you dated 24th October 2011 for the modification of the definitive map and statement for the London Borough of Richmond upon Thames by the addition of a footpath from the entrance to Tideway Yard to Jubilee Gardens via Tideway Yard archway, and including access to the towpath.

[redacted]

Dated 26th October 2011

Signed Ian Herbert