

## Windmill Lane, Long Ditton

### 1 Description of Route

- 1.1 Windmill Lane is located in a largely residential area of Long Ditton. It runs between two public roads (i.e. the A307, Portsmouth Road and D6803, Fleece Road) and is metalled throughout. Between its junction with Portsmouth Road and Savery Drive there are pavements on either side of the carriageway. From Savery Drive only the pavement on the western side continues up until Effingham Road. There are no pavements between Effingham Road and the railway bridge where pavements on both side recommence. From Windmill Close to Fleece Road there is only a pavement on the western side.
- 1.2 The Lane is for the most part abutted by housing. However Long Ditton Recreation Ground, which is owned by Elmbridge Borough Council, sits adjacent to the Lane for approximately 220 metres.
- 1.3 The London to Southampton railway line crosses over Windmill Lane. The railway bridge is approximately 4.2 metres (14 foot) high<sup>1</sup> and, at its narrowest, is 4.6 metres (15 foot) wide.

### 2 Current Status

- 2.1 The majority of the route, from Portsmouth Road to the southern most point of the railway bridge is recorded on the Definitive Map and Statement as Bridleway 20 (Esher).
- 2.2 The southern end of the bridleway to Fleece Road is recorded on the List of Highways Maintainable at Public Expense as a D Road. The first 195 metres, from Portsmouth Road to the southern boundary of 40, Windmill Lane, is recorded as a D Road as well as Bridleway 20.

### 3 Historic Maps

#### 3.1 The following historic maps show Windmill Lane:

- Rocque's 1770
- Andrew's 1777
- Colonel Mudge's 1816 (re-published with railways in 1892)
- Greenwood's 1823
- A Bryant's 1823
- Cruchley's 1855

#### 3.2 However the Lane does not appear on:

- J Senex's 1729
- Bowen's 1749
- Lindley and Crosley's 1873
- James Wyld's Road Map 1874

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<sup>1</sup> There is a height restriction sign stating that vehicles over 13.3 foot should not pass under the bridge, the top of the arch is slightly higher than that level.

- 3.3 Given the scale and dates of their maps it is unsurprising that Windmill Lane does not appear on Senex and Bowen. However, as the route appears on Roque's Map of 1770, it might have been expected to be shown on Lindley and Crossley's map and that of Wyld both of which were published after Roque.
- 3.4 Many, if not most, of the other routes which are shown on these maps and which still exist are now regarded as all purpose highways. The roads at either end of Windmill Lane (i.e. Portsmouth Road and Fleece Road) also appear on all of the maps listed in paragraph 3.1.
- 3.5 There is strong evidence that the route physically existed in the early 1800s, and it seems likely that it was created prior to the 1770s. Many of the cartographers of the time appear to have understood Windmill Lane to have been a major public route, and given the nature of the other routes depicted, quite possibly a carriage road. However, this is not in itself sufficient to show that public rights legally existed.

#### 4 Ordnance Survey Maps

- 4.1 The route crosses two OS sheets. Between Portsmouth Road and a point approximately 50 metres north of its junction with Effingham Road, Windmill Lane appears on editions dated 1871, 1911, 1913, 1932, 1937. The southerly section of the Lane to its junction with Fleece Road appears on editions dated 1871, 1880, 1896, 1913 and 1932. In each case the route is marked by solid double lines and is named. As with the historic mapping, Windmill Lane is depicted by the OS in the same way as the other public 'roads' in the vicinity. It is shown varying in width between 8 and 12 metres.

#### 5 Tithe Award

- 5.1 Windmill Lane appears on the Tithe Map of 1841 and, like the other roads in the area, is unnumbered. This would suggest that public rights were believed to exist over the route but it gives no indication as to what those rights might have been.

#### 6 Railway Acts

- 6.1 The London to Southampton Railway Company deposited a plan and book of reference in 1833. An Act was then passed in July 1834 allowing them to compulsory purchase land and to build the railway. A month later a further plan and book of reference were placed on deposit. In each case (i.e. the Act and two sets of deposit documents) Windmill Lane is recorded as a 'Road'. In 1933 it was shown to be owned by Elizabeth Knott whereas in the Act and 1834 deposit no owner was recorded. This suggests that the ownership details in the 1933 book of reference may have been in error and corrected for later versions of the document.
- 6.2 What is not explicitly explained in the documentation relating to the 1834 Act is what was meant by the term 'road'. It could be referring to a private road, a turnpiked road, a public right of way, or a vehicular carriageway.

- 6.3 Other routes shown as 'roads' in the books of reference for this area are now deemed to be public vehicular roads<sup>2</sup> although Fleece Road is shown as a 'footpath and bridle road'. Had the route been private or a turnpike, the landowner would need to have been notified of the proposed railway and as such their name would have been recorded in the Act and the book of reference in 1834. The fact that there is no owner recorded for Windmill Lane after 1833 suggests that it was not considered to be either turnpiked or private. Furthermore, where turnpikes and private roads did exist they appear to have been recorded as such. For example, the A243, Upper Brighton Road is shown as a 'turnpike road'<sup>3</sup>. Elsewhere routes are shown as occupation roads which presumably means that it was private (although no details of ownership are given<sup>4</sup>). For these reasons it can be assumed that Windmill Lane was considered to be a public highway of some sort.
- 6.4 The way in which public highways were recorded appears to be slightly inconsistent throughout the Act and each of the accompanying deposits. However the term 'road' appears frequently and tends to be recorded in the 'owners name' column of the book of reference with no further information. Elsewhere parcels of land are described as having footpath/bridle roads across them. This tends to be noted in the 'description of property' column implying that the surveyor explicitly differentiated between what were termed 'roads' and those routes with lower rights. If this is the case, and in light of the conclusions reached in paragraph 6.3 (i.e. that Windmill Lane was considered to be public), the term 'road' must have been used to refer to a vehicular carriageway.
- 6.5 This argument is supported by the wording of the 1834 Act itself. Section 74 required railway bridges over 'public highways' to be at least 15 feet wide and not less than 14 feet from the surface to the highest point of the arch. As mentioned above, at its narrowest point the existing bridge on Windmill Lane is 15 feet and it appears to be approximately 14 feet high. The Railway company would not have constructed a large, and expensive bridge unless they had to.
- 6.6 Unfortunately, like the term 'road', 'public highway', as used in section 74, is not explicitly defined in the Act. Although in theory it could potentially have included footpaths and bridleway, it seems unlikely that Parliament would have required such a large bridge for lower rights. Furthermore, the summary of section 74 in the margin to the Act suggests that it was intended to only apply to public 'roads'. On the other hand section 77 refers to both 'carriage' and 'horse' roads. Had Parliament wanted to make a similar distinction in section 74 they would presumably have done so. As they did not maybe they were using 'public highway' in its modern sense.
- 6.7 In 1869/70 a further Act of Parliament was required for the Surbiton, Cobham and Ripley Railway. This recorded Windmill Lane as a Public Road with the Kingston Highway Board being shown as both the Owners/Reputed Owners and the Occupiers. Fleece Road was recorded in the same manner. As with

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<sup>2</sup> Parcel number 6 in the book of reference for Thames Ditton is now Ewell Road and North Sugden Road. While parcel number 16 in the same book is now Claygate Lane (although it appears that a spur of that Lane was diverted when the Surbiton to Ripley line was built).

<sup>3</sup> Shown as parcel number 91 in the book of reference for Kingston upon Thames.

<sup>4</sup> e.g. parcel number 88 (which roughly follows the line of Glenbeck Road) in the book of reference for Kingston upon Thames.

the 1834 Act, both footpaths and occupation roads<sup>5</sup> are recorded as such elsewhere in the same Book of Reference which suggests that Windmill Lane was still considered to be a vehicular carriageway.

## 7 Urban District Council of Esher and the Dittons Minutes

7.1 Below is a timeline of decisions and discussions from various local authority committees held at the turn of the 20<sup>th</sup> century:

- 1896 – Lord Lovelace (owner of Windmill Lane) asked for the route to be widened to 40 foot. The Urban District Council of Esher and the Dittons agreed to do work but would recharge full costs.
- 1898 – There was a suggestion that the council would be willing to adopt the Lane as a public highway (the minutes also use the word ‘road’) if Lovelace were to make it up and widen that section from Portsmouth Road to Effingham Road. The deal would involve Lovelace paying for improvement works on the existing route, dedicating additional land so that in total it was 40 foot and also paying £100 towards making up the additional land. Officers recommended that it should be a public thoroughfare.

It was agreed that the surveyors plans be accepted/approved.

- 1899 –The committee asked to declare that the route was maintainable by inhabitants at large. The first 310 feet (94 metres) from Portsmouth Road was adopted. This is approximately to the junction with Alston Close.
- 1901 – Petition to council to make up road. Lambeth Water Company asked the Council to contribute to the laying of a main.
- 1906 – Lane being freely used for the deposit of refuse. Notice boards erected warning against deposit of refuse and council removed decaying vegetation.
- 1909 – Council still trying to get owners to maintain the Lane. A small part had been made up and was under the control of Council (i.e. the first 94 metres). The land was well used by foot passengers and was being damaged by carts from the ‘new’ waterworks. Lovelace was of the view that the road doesn’t need improving as it is hardly used.
- 1910 – Lovelace’s attention drawn to poor state of route. Also made aware of Council’s powers under s.19 of the Public Health Acts Amendment Act 1907. Lovelace agrees to undertake works.

Lovelace repairs section between Effingham Road and Railway  
Minutes do indicate some vehicular use – although likely to have been horse and cart type rather than motorised.

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<sup>5</sup> Parcel 13 in the book of reference for Parish of Kingston upon Thames is shown as a ‘Footpath and Occupation Road’.

- 7.2 Although the minutes of the Urban District Council often suggest that Lord Lovelace was willing to dedicate the route as a road (presumably a cart track) it would appear that he only signed a formal deed for the first 94 metres from Portsmouth Road. Therefore, on the basis of the evidence that we have, express dedication of vehicular rights can be ruled out.
- 7.3 The minutes do suggest that the route was being well used by the public at the turn of the 20<sup>th</sup> century; this is presumably the reason that the Council were considering 'adopting' it. Nevertheless, throughout the minutes the Council make reference to the route being privately maintainable and even suggest that it was not a 'public thoroughfare' (although elsewhere they refer to the road being a disadvantage to the 'public traffic').

## 8 Definitive Maps

- 8.1 A map prepared in accordance with the 1932 Rights of Way Act shows Windmill Lane from Alston Close to Fleece Road as a 'BR, CR and FP'. (Bridle Road, Cart Road and Footpath). North of Alston Road is not shown as a right of way.
- 8.2 Both the draft definitive map and the 1952 map show Bridleway 20 as commencing at Alston Close but stopping at the railway line (i.e. it did not carry onto Fleece Road). The surveyor's notes for the draft map still refer to it as a 'footpath, bridle road, carriage road, public highway' although it is shown on the map as a bridleway. The surveyor's notes also state that the first '100 yards or so' from Portsmouth Road and that part of the Lane to the south of the Railway bridge were an all purpose highway. This left the central section as a bridleway. At the time of the survey the route was clearly metalled up to Effingham Road. To the south of Effingham Road the Urban District Council had erected a notice prohibiting the depositing of rubbish. The surveyor mentions that the council had repaired that part of the Lane to the south of Effingham Road approximately two years prior to the survey.
- 8.3 All versions of the definitive map since 1952 have shown Bridleway 20 commencing at Portsmouth Road and continuing to the railway line.

## 9 Deed Agreement dated 1958

- 9.1 A deed of 1958 split number 42 Effingham Road into two separate properties. In doing so a new house was created on Windmill Lane. As part of this process a short section of the Lane became a 'new street' for the purposes of section 30 and 31 of the Public Health Act 1925. In practice this meant that part of land adjacent to no. 44 became maintainable at public expense.

## 10 Discussion

- 10.1 Section 10 of the Planning Inspectorate's consistency guidance discusses the evidential weight that should be given to railway acts when determining the existence or otherwise of public rights. Paragraph 10.5 of that guidance states that:

"The process for the authorisation of railway schemes provided for scrutiny of the plans by involved parties. Landowners would not have wished unnecessarily to cede ownership, Highway Authorities would not

have wanted to take on unwarranted maintenance responsibilities, and Parish Councils would not have wished their parishioners to lose rights. Therefore an entry in the book of reference that a way was in the ownership of the 'Surveyor of Highways' may be persuasive evidence of a public right of some description. However, the weight to be given to this can only be determined when it is considered alongside all the other evidence. It may be that there is reputable evidence to rebut it such as a deed, conveyance or local map."

10.2 Although the term 'surveyor of highways' does not appear against the 1834 entry for Windmill Lane, it is not used for any of the individual parcels of land recorded in the Act but is used at the end of the record for each parish. It seems inconceivable that none of the routes crossed by the railway line were public roads. Furthermore the 'surveyor of highways' is recorded against the entry for Windmill Lane in the 1870 book of reference.

10.3 Paragraph 10.6 of the Inspectorate's guidance states that:

Where...the route is described as 'road' in the book of reference, it is sometimes possible to establish the nature of the way by reference to the description of other roads.

10.4 There is strong evidence to suggest that Windmill Lane was considered to be a public carriage road in both the 1834 and 1870 Railway Acts. In both cases, many routes which are now known to carry public vehicular rights, are described in the same way as Windmill Lane. Within the same books of reference other routes were recorded as being subject to private or lower rights, indicating that the surveyor, and Parliament, clearly differentiated between them.

10.5 It is therefore considered that both railway acts are good evidence that Windmill Lane was a publicly maintainable all purpose highway. However, this evidence needs to be considered in light of the other evidence available.

10.6 The main evidence against the route being a publicly maintainable carriageway are the minutes of the Urban District Council. It is clear from these that Lord Lovelace dedicated the first 94 metres of the Lane from Portsmouth Road as a public vehicular highway. This, and a little more, is still recorded as an all purpose highway. It is also clear that the Council had a significant interest in the route which appeared to be well used by the public. However, at the turn of the 20<sup>th</sup> century, they were not of the opinion that it was publicly maintainable. If they had of been then there would have been no reason for Lord Lovelace to dedicate the part of the route that he did. Furthermore, the majority of the Council's discussion on the matter appear to have been attempts to encourage the landowner to bring the route into a suitable condition so that it could be adopted.

10.7 Having said this there is also significant evidence to support the railway acts. Not least the fact that the route appears on so many of the historic maps. As mentioned above, these in no way prove the status of a route. However, in each case the cartographer was clearly intending to only indicate the larger more important 'roads' in an area. Given that Windmill Lane appears on most of the post-1800 maps it seems likely that, historically, Windmill Lane was of some local importance. Furthermore, of those routes which were shown on the

historic maps and which still exist, a large proportion are now considered all purpose highways.

10.8 Other records are of little help in determining status. The fact that the Lane is not numbered on the Tithe Map is certainly evidence that there were public rights, but it gives no indication as to whether it was a bridleway or carriageway. The evidence of the definitive map is that the central section of Windmill Lane has, since the 1952 map, been considered a bridleway. However, as the map is only conclusive evidence of what it contains, it does not preclude the existence of higher rights.

## 11 Conclusion

11.1 At the turn of the century the Urban District Council were certainly of the view that the central section of Windmill Lane was not publicly maintainable although there is some suggestion that they did consider it to be a highway of some sort. However, based on the other evidence available, and in particular the Railway Acts of 1834 and 1870, it seems likely that several decades before those discussions the entire length of Windmill Lane had been recognised as a public carriage road. If this is the case, then it would be an 'ancient highway' and as such publicly maintainable.

11.2 As there is no evidence that the vehicular rights were extinguished they would still have existed in 2006 when the Natural Environment and Rural Communities Act was commenced. Section 67 of that Act extinguished all vehicular rights except those that fell into certain specified exemptions. Section 67(2)(a) provides that vehicular rights are not extinguished if they are 'over a way whose main lawful use by the public during the period of 5 years ending with commencement was use for mechanically propelled vehicles'. The five year period in question is May 2001 to May 2006.

11.3 Strictly speaking this exemption is incapable of proof (we don't have records of use between 2001 and 2006). However, Defra advise taking a 'pragmatic' approach, possibly meaning that highway authorities should bear in mind the intention of the Act. In the Masters case<sup>6</sup>, which related to the creation rather than extinguishment of byway rights, Roch L.J. looked at the character of a route as well the quantitative use of it. It has been suggested that this same approach could be taken to section 67(2)(a) – i.e. was the character of the route what would have been expected of a 'road'. This is not to say that no evidence is necessary. In an inspector's decision<sup>7</sup> relating to the reclassification of a RUPP to a BOAT in 2006 it was decided that hearsay of vehicular use was insufficient particularly when considered in light of the testimony of those who lived along the route (who accepted that the route had been used by vehicles but that it was not the main lawful use).

11.4 Windmill Lane undoubtedly has (and I understand had) the character of an all purpose highway. It has been suggested that there are plenty of people who can confirm that there was more vehicular use than either pedestrian or equestrian (although we would need to collect this evidence and ensure that they were not referring to those who had a private right, this could be backed

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<sup>6</sup> Masters v Secretary Of State For Environment, Transport & Regions, Court of Appeal - Civil Division, July 31, 2000, [2000] EWCA Civ 249.

<sup>7</sup> Planning Inspectorate reference: FPS/L3055/8/3

up by a modern survey of use). For this reason it is considered unlikely that NERC would have extinguished the vehicular rights which existed over Windmill Lane.

11.5 For the reasons stated above it is considered that Windmill Lane is a publicly maintainable all purpose highway.

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