Alleged Public Byway open to all traffic (BOAT) along Esher Park Avenue, Esher – CP540

Response by EPARA to the Officer Report issued on 30 August 2012

For the Local Committee meeting on 10 September 2012

Agenda item 8

4 September 2012

Executive 2-page summary for the Committee[1]

General points

- The Officer's recommendation – addition of a restricted byway under s53 of the WCA 1981 based on the period 1972 to 1992 - was not part of the BOAT application.
- The outcome of the application is of very great concern to the residents of EPA. Interested parties should be afforded a reasonable and fair opportunity to consider the Report: we have had little time since 30 August to consider the Report in detail.
- The period of time relied on in the Report for establishment of a restricted byway is a 20-year period from 1972 to 1992. But, it is clear that the Council has been on notice of these matters for about 20-years and it concluded that EPA was not a public highway in 1990.
- It is highly relevant that the Committee is considering this application nearly 20-years after the Council rightly decided not to pursue this issue with EPARA. Had it done so in 1993 and again in 1998 when the issue was fully identified, EPARA would of course have had access to a wide range of evidence that simply does not exist anymore.
- This delay and prejudice to EPARA means that the Committee must be very alive to the danger of reaching conclusions of fact based on evidence not being available where it would or may have been in 1993.
- Accordingly, where there is doubt over the evidence, the right approach for the Committee is to resolve that doubt in favour of EPARA given the delay.
- The Officer's conclusion that a restricted byway should be imposed relies on the period 1972-1992, but it is clear that EPARA did not dedicate a right of passage over EPA to the public as a restricted byway in that period. This is for the 3 reasons set out below, any one of which if established would dispose of the application.

Reason 1- the Notices

- The key issue is whether these are inconsistent with the dedication of EPA as a highway. It turns on what the notices say.

"No Public Right of Way"

- The Report accepts that a 'No public right of Way' sign would defeat the restricted byway (as it did in 1992 bringing to an end the period from 1972 relied on).
- But, the Report ignores/gives insufficient weight to 163 user questionnaires which evidence that signs at EPA said "No public right of way" **in 1985**. This fact alone defeats the application.

"Private Road"

- The Report accepts that such a sign was in place in the period 1972 to 1992 and it is submitted that this perfectly sufficient to defeat the application.
- It is obvious that "Private Road" means what is says – it is for the private use of the owner and this is manifestly inconsistent with the existence of public rights over the road.
- Lord Denning also thought so when EPARA took his specific advice on the issue in 1993.

[1] References in this Response to para numbers are to the numbered paragraphs of the Report. We also adopt the definitions used in the Report fro convenience.

- The Report builds its case against this sign by relying on a selective quote from the *Paterson* case where a 'private' sign was not sufficient in the particular context of that case.

- But *Patterson* does not assist: it concerned a footpath to open fields – the sign indicated that the open fields (not the footpath) were private. The decision is therefore irrelevant to the position of a residential private road in the middle of urban Esher and the Committee would make an error of law to rely on it.

- Moreover, Shorter Oxford dictionary defines "*private*" as "*Not open to the pubic; restricted or intended only for the use of a particular person or persons*". That is precisely what the EPA sign - "Private Road" means and as such it also disposes of the restricted byway argument.

Reason 2- re-installation and shutting of the Gates (1986-1991)

- The Report concludes that there were no gates at EPA until 1992 and does not acknowledge that the gates were shut in early 1991.

- If either there were gates before 1992 or they were shut in 1991 - it would destroy the argument for a restricted byway based on the period 1972-1992.

- And **there is clear evidence of re-installation of the gates at EPA as early as 1986 and that the gates were shut in early 1991**

  - *Note that the law here is also clear – that if the gates were shut in 1991 for a single day, there was no 20-year period prior to 1992 for the purposes of establishing a restricted byway.*

- Unfortunately, again this evidence appears to have been ignored/given insufficient weight. As a result the Report is also flawed on this issue.

Reason 3 – EPARA's action to make clear no right of access was dedicated

- There is also evidence (relevant to the period 1972 to 1992) that users of EPA did not consider that there were public rights of access for use of EPA as a restricted byway and of EPA residents taking *vigilante* action (as described in the press in 1987) to make clear that rights of access over EPA were not dedicated to the public at large for this use.

- This again appears to have been ignored/given insufficient weight in the Report.

- This is a classic area where further evidence could have been assembled by EPARA had the Council proceeded with this issue in 1993, but is in large part now probably unavailable.

A possible practical solution

- Under s54(4) WCA 1981, the Council may order the restricted byway to be subject to a limitation that recognises the existing gates in place. Subject to agreement with the Council as to how that limitation is to be operated in practice, if so ordered, it would probably be unnecessary for EPARA to continue to challenge any restricted byway.

- This solution has obvious merit and common-sense on its side given the history here and the difficulties now of reaching conclusions based on the evidence. EPA has had gates in place for over 2 decades with wide open side walkways without causing any issue over rights of way and with the full knowledge of the Council. The gates are also part of and enhance the street scene and the local planning authority thought so when approving them.

- The gates do not obstruct and are in reality a practical and sensible way of managing use of EPA by the public of mechanically propelled vehicles (the rights the Report has concluded do not exist). We very much hope that the Committee will reach a reasonable decision in the unusual circumstances of this long-running matter which enables it to be finally concluded.

The Report in detail

Our difficulties in assisting the Committee with comments on the Report

(1) Shortness of time between the Report and the meeting on 10 September 2012

1 The application was received on 9 January **2010** by the Council. The Report provided on 30 August 2012, is to be considered at a meeting of the Local Committee on 10 September 2012.

2 The outcome of the application is of very great concern to the residents of EPA. Interested parties should be afforded a reasonable and fair opportunity to consider the Report and decide whether to speak at the Committee or not.

3 As the Committee will appreciate, the very short time-frame in which we have had to consider the Report has caused prejudice to EPARA. We have done the very best we can in the time available and circumstances to assist the Committee by providing our comments. However, we have not had a time to consider matters in sufficient depth or undertake further investigations.

4 It has taken over two and half years from the date of the application for the Report to be issued. We accept that the matter is complicated and involves substantial evidence. This all takes time to consider.

5 We also note that the Officer's recommendation – the addition of a restricted byway under s53 of the WCA 1981 based on the period 1972 to 1992 - was not part of the application. The application was for a BOAT.

6 There are three further points we would make about this:

6.1 No parties have had an opportunity to make representations on this new issue prior to the Report by which point the Officer has obviously already formed his views;

6.2 To date all representations have naturally been directed to the application to add a BOAT along EPA;

6.3 No parties have had an opportunity to investigate what further evidence exists in relation to this particular period (1972 to 1992) and issue.

7 It appears that the Report is seeking to amend the current application to substitute it with a fresh application for something not sought in the first place by the applicant.

8 In short, a different matter is now proceeding to the Committee based on the Report without the parties having had a proper ability to make representations.

(2) The application at this late stage has prejudiced EPARA's ability to defend its rights

9 Under s53 WCA 1981, the Council has a duty to keep the definitive map and statement under "continuous review" and "as soon as reasonably practicable" after the occurrence of particular events, make modifications to the map and statement.

10 The relevant event here under s53(3) is "*...another event, whereby – (iii) a new right of way has been created over land in the area to which the map relates, being a right of way such that the land over which the right subsists is a ....restricted byway.*"

11 The obligation to act quickly is clearly so that the public and owners of land have certainty over their rights. It is also to avoid a situation such as the present where a landowner is faced with having to assert their rights by evidence in relation to a time period which ended decades earlier and where evidence may simply no longer be available to do so. This is our concern.

12 The period of time relied on in the Report for establishment of a restricted byway is a 20-year period from 1972 to 1992. But it is clear that the Council has been on notice of these matters for about 20-years.

13 This is clear from correspondence in 1993 between the Council and EPARA referred to in the Report. In that correspondence, the Council considered that full highway rights existed along EPA and complained about the matter although EPARA did not accept that public rights existed.[2]

14 The Council presumably did not take action as soon as reasonably practicable in 1993 because it formed the view (correctly we would say) that there was no proper basis for a restricted byway to be imposed over EPA. As such, there was no breach of statutory duty by the Council in 1993 and continuously thereafter.

15 The Report says that it is for the party who asserts that a highway exists to prove its existence and extent and both dedication by the landowner and acceptance by the public. That is not how the process works in practice. As demonstrated by the Report, having at stage 1, concluded there was 20-years use 'as of right', the question at stage 2, is whether that use was without interruption by the landowner. This two-stage test effectively throws the burden of proof onto the landowner – to prove the second stage - that there **were** acts preventing passage.

16 In this respect it is highly relevant that the Committee is considering this application nearly 20-years after the Council decided not to pursue this issue with EPARA. Had it done so in 1993, EPARA would of course have had access to a wide range of evidence that simply does not exist anymore. For example, residents who lived in the road in the period 1972 – 1992 could have been asked to provide witness statements with their recollections and may have retained old photos and other documents that could help shed light.

17 Instead, we are in a position where nearly all of those witnesses have now moved on and in the case of certain key potential witnesses, are now dead. Had EPARA known in 1993 that this issue would be pursued, they would for example have asked:

17.1 Mr Ekberg to provide a statement before he died in 2008 - he would have been a key witness being the Chairman of EPARA in the period (and who was involved in correspondence with the Council and Lord Denning over this very issue in 1993 and shutting the gates in 1991 – see below);

17.2 Mr Ian Hendrie who shut the gates in early 1991 – see below; and

17.3 all of the other residents of EPA over the period 1972 to 1992, nearly all of whom have long moved on.

18 We note in this respect that the Report refers to the interview of 14 people by Council officers. We have not seen the notes of those interviews or any statements that were made as a result. We are, for example, concerned that officers may not have interviewed the appropriate persons with knowledge relating to the specific period 1972 to 1992 now relied on.

19 It was perfectly right for the Council not to have pursued this matter in 1993. But having not done so, EPARA is now prejudiced in having to assemble its 'case' decades later to address the very same issue that should have been addressed in 1993.

20 We do not suggest that it is too late for the Committee to consider the question as to whether a restricted byway should be imposed. But what this delay and prejudice to EPARA means is that the Committee must very alive to the danger of reaching conclusions of fact based on evidence not being available where it would or may have been in 1993.

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[2] Para 2.21.

21 This point is very relevant to the areas of uncertainty that exist over the key issues of what notices were in fact in place, when the gates were reinstalled and shut and also the other acts taken by EPA residents to prevent passage in the relevant period. Where there is doubt over the evidence, the right approach for the Committee is to resolve that doubt in favour of the landowner given the delay.

Public BOAT rights

22 The conclusion in the Report that the evidence is sufficient on the balance of probabilities to establish that public BOAT rights subsist is not accepted.

23 However, given that the Report has correctly concluded that the mechanically propelled vehicle element of those rights has been extinguished by s67(1) of NERCA, we restrict our comments at present to the conclusion that a public restricted byway exists.

24 This should not of course be taken as any acceptance on our part that in the absence of extinguishment of those rights by NERCA, they would subsist.

Restricted byway - based on the period 1972-1992

25 The Officer's conclusion that a restricted byway exists hangs entirely on the view that public rights to use EPA in this way were acquired between the 20-year period 1972 and 1992.[3]

26 This is despite the Council having made clear for the record (in a letter from the office of the Town Clerk and Chief Executive to EPARA) in 1990, that it only regarded the section of EPA "*west of Church Path*" as "*as a public highway*".[4] The Council were right in 1990 to say that and not to pursue the matter further in 1993.

27 In order to assist the Committee, we feel it is appropriate to point out that that the Report appears to have made various errors of fact and law in coming to its conclusion.

28 The starting place is to be clear as what must be established as a matter of law in order for the rights of passage to arise.

29 The Report acknowledges that it is for the party who asserts that a highway exists to prove its existence and extent and both dedication by the landowner and acceptance by the public i.e.:

29.1 that EPARA has expressly or impliedly dedicated a right of passage over EPA to the public at large **and**

29.2 the public has accepted that right.

30 The requirement that the public has accepted the right is not addressed below in any detail. We do not accept that they have. But this is not important because it is clear that EPARA has not expressly or impliedly dedicated a right of passage over EPA to the public at large for the limited uses of a restricted byway.

31 This is for three main reasons:

31.1 the notices that have been in place both before and during the relevant period 1972 to 1992;

31.2 that gates were reinstalled and shut during that relevant period; and

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[3] Paras 8.6 and 8.10.

[4] Letter from the Council to EPARA dated 22 May 1990 (p33-36 of "JSR1"). Nor was this letter the product of a 'rogue' employee - the letter (signed by the Deputy Town Clerk) followed an earlier meeting in February 1990 with the Chairman of EPARA and apologised for the delay in writing because he had to "wait for comments from relevant colleagues".

31.3 the further evidence that exists to demonstrate that in this period EPARA has not dedicated a right of passage over EPA to the public at large for the limited uses of a restricted byway.

32 We address each of these issues in detail below.

(1) The notices in place between 1972 and 1992

The notice exception

33 s31(3) HA 1980 provides that where the owner of the land

> *(a) has erected in such manner as to be visible to persons using the way a notice inconsistent with the dedication of the way as a highway, and*
>
> *(b) has maintained the notice after the 1st January 1934, or any later date on which it was erected,*
>
> *the notice, in the absence of proof of a contrary intention, is sufficient evidence to negative the intention to dedicate the way as a highway*

34 The Report states that *what notices were there did not deter use by the public and were not deemed to be a challenge to use.*[5] With respect, this misses the point and is not relevant. A s31(3) notice, cannot be 'overridden' by improper use.[6] Otherwise, improper use by the public would be encouraged to defeat the notice.

35 The notice is sufficient in the absence of a contrary intention by the owner of the road (i.e. not the public) to dedicate use of the way as a highway.

The user questionnaires and Report acknowledge the existence of the requisite notice

36 163 user questionnaires were completed.[7] The Report acknowledges that all of them had seen notices which said 'private' and 'no public right of way' and that "*the earliest dates on which the signs were seen are as follows: Private: 1985;* ***No public right of way: 1986; No through road 1986****"* (our emphasis).[8]

37 The Report argues that a notice which says 'private" is insufficient.[9] We do not accept this and address this below. However, the Report rightly accept that a sign which says 'no public right of way' (or equivalent) is a reliable challenge to public right and should be the date when the public right is brought into question.[10]

38 Accordingly, if there was a sign which said 'no public right of way' prior to the selected date of 1992, the 20-year period from 1972 on which the Officer's arguments are based for a restricted byway fall away.

39 In this respect, the Report ignores/gives insufficient weight to the clear evidence based on the output of 163 user questionnaires, that such a sign was indeed in place from 1986. As such it represented an effective notice for the purposes of s31(3) HA 1980. In considering the weight to be give to the 163 user questionnaires, the Committee should also bear in mid our

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[5] Para 2.8.

[6] This is also supported by *Godmanchester* [2008] 1 AC 2008 at para 24.

[7] Para 2.26 I. These were against the applicant's claim.

[8] At para 2.6 you comment in relation to the 168 people who completed public user forms (in support), that *all of the users (who completed the question) mentioned that they had seen both the gates and signs*. There is no indication in the Report that any of these 168 people disagreed with the statements about signage made by the 163 people who completed user questionnaires against the claim.

[9] Para 8.9.

[10] Paras 8.6 and 8.9.

comments above about the 'burden of proof' given the prejudice to EPARA in defending itself on this issue at this very late stage.

40 In short, we consider that the Report falls into error in concluding that 'no public right of way' signs were only first erected in 1992.[11]

<u>But in any event the 'Private Road' or "No through Road" signs were perfectly sufficient.</u>

41 The Report notes the evidence that in the period 1972 to 1992, there were signs at each end of the EPA stating "Private Road"[12] and, as noted above, the evidence (on the basis of 163 User Questionnaires) shows that there were also signs saying "No through road" from 1986.

42 Either sign would be sufficient for the purposes of s31(3) – they were both notices inconsistent with the dedication of EPA as a highway.

43 It is important to recognise that if this point is right – there is no basis whatsoever for the rights to arise in the period 1972 to 1992 and, in turn, no basis for EPA to be a restricted byway.

44 The "***No through Road***" sign:

44.1 The natural and ordinary meaning of "No through Road", means there is no right to the public to pass "through the Road": it is to be equated with a sign that says no public right of way.

44.2 Indeed, the absurdity of the point can be tested as follows: the question of whether there is a restricted byway cannot turn on the Committee divining a detached and literal meaning from "No through Road" which is materially different from "No [right to pass] through Road" - both signs have the same meaning and no other sensible distinct meaning can be given to both.

45 The "***Private Road***" sign:

45.1 The Report accepts that this sign was in place in the relevant period (1972 to 1992). It was sufficient to be *a notice inconsistent with the dedication of the way as a highway.*

45.2 The Officer refers to *Farey v Southampton CC*[13]. In that case, Lord Denning said that the public's right *is "brought into question" as soon as the landowner puts up a notice or in some other way makes it clear to the public that he is challenging their right to use the way".*[14] This case does not however answer the question whether a notice saying "Private Road" does so.

45.3 After the *Farey* case, however we have the advantage of knowing what Lord Denning thinks about this issue - he considered this question in the particular circumstances of EPA.

45.4 In his advice provided by letter to EPARA on 11 June 1993, he was of the clear view that that the notices were sufficient.

45.5 He said that he knew Esher well and this would of course have been in the critical period relied on by the Officer, 1972-1992. He said:

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[11] Para 8.9.

[12] Para 2.17.

[13] [1956] 3 WLR 354.

[14] Para 37.

Your evidence is quite clear, ***for the last 50 years at least [EPA] has been a private road.*** *Your notices and gates*[15] *have been erected in assertion of the character of the Avenue, without any objection until recently. I think* ***your evidence is quite sufficient to establish [EPA] 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 [EPA] ***is a private road*** *and you will contest any suggestion to the contrary, and* ***you will keep up your notices*** *.....*(our emphasis)

45.6 The Report accepts that *Notices saying private 'might' have been sufficient to challenge use but it is not certain.*[16] It is clear however from Lord Denning's specific advice, that one of the most famous and respected judicial minds in English legal history,[17] took a different view. He does not consider there is any doubt - that the notices that had been up for 50 years before 1993 that said 'Private' and 'Private Road' were quite sufficient. In addition, it is notable that Lord Denning considers the status of the road as a private road to be a sufficient challenge to public use.

45.7 The *Godmanchester* case referred to in the Report was not a case about notices using the expression "private road". The House of Lords in that case did however say that a notice inconsistent with dedication, placed and maintained in such a manner as to be visible to those using the way will be sufficient.[18] Other than that, it does not assist in this situation.

45.8 In reality, therefore, the Officer's case on this issue appears to be built upon the shaky foundation of a selected quote from the *Paterson* case.

45.9 The signs in *Paterson* said "Private" and "Private, No tipping".

45.10 But, as the judgment makes clear, the signs had to be considered to assess how a user might interpret them in their particular context and it was the particular context in *Paterson* – a footpath to open fields that led to the conclusion – see our full extract below from the passage quoted in the Report :

> *"The inspector properly reviewed and considered this evidence at paragraph 52 of the decision, set out above. He was entitled to come to the conclusion he did in that paragraph.* ***He had visited the site and was well placed to assess how a user of the footpath might interpret such signs in that particular context.*** *The inspector was entitled to find that signs in such terms did not unambiguously provide sufficient evidence or notice that there was no intention that the footpath be dedicated to public use.* ***A sign saying only "Private" could simply have been indicating that the land a short way further down the footpath (which was open fields) was private so that people should stick to the footpath****. In that regard, the inspector was entitled to accept the submission by Mr Ramm that virtually all rights of way are over private land so that a simple sign saying "Private" does not clearly indicate that there is no public right of* ***way along a marked footpath****. Similarly, the inspector was entitled to conclude that a sign saying "Private, No Tipping" did not clearly indicate that there was no public right of way over the footpath* ***(it might more naturally be taken to refer to what should not be done on the fields at the end of the path)****."*

[15] Note that although he also refers to the gates, it is clear from the evidence provided to him (with Mr Ekberg's letter on behalf of EPARA dated 8 June1993) that gates were taken down in WWII and **replaced by PRIVATE notices** and only later re-erected.

[16] Para 8.9.

[17] Lord of Appeal in Ordinary in House of Lords 1957 and after five years returned to the Court of Appeal as Master of the Rolls in 1962, a position he held for twenty years

[18] [2008] 1 AC 221, at para 10.

45.11 The position in *Paterson* (a sign on a footpath to open fields) is entirely different to a sign into residential private road in the centre of urban Esher. It is accordingly no support for concluding that a sign saying "Private Road" in EPA is insufficient.

45.12 There is also a further relevant distinction here with the *Paterson* case. In *Paterson,* the Court effectively decided that "Private" could be interpreted to mean that only the open fields were private and not the footpath i.e. "Private" was not to be interpreted as "Private Footpath". This issue does not arise in relation to EPA – the sign said "Private **Road**"

45.13 Moreover, we consider that it is obvious that "Private Road" means what is says – it is for the private use of the owner and it is manifest that such use is wholly inconsistent with the existence of public rights to use it.

45.14 This is also supported by the Shorter Oxford dictionary which defines "private" as *"Not open to the pubic; restricted or intended only for the use of a particular person or persons*". That is precisely what the EPA sign saying "Private Road" means

(2) Re-installation and shutting of the Gates

Introduction

46 This issue only arises if the notices referred to above are not enough. It is also important to note that our position is that the gates are consistent with the use of EPA as a restricted byway – see below.

47 However, it appears from the Report[19] that the Officer considers that gates are inconsistent with use of EPA as a restricted highway. We address this issue separately below. But, the logic of this is effectively that use of gates in the relevant period would also be sufficient evidence that the owner of EPA did not dedicate the right of passage now claimed for under a restrictive byway.[20]

Reinstallation of the gates

48 The Report proceeds on the basis that there were no gates in EPA during the period relied on (1972-1992): *The evidence suggests that rights were acquired before the installation of the gates at any point along EPA.*[21]

49 This follows the statement earlier in the Report that:

> *2.18 GATES*
>
> *I. It is alleged that gates were in place prior to WW2 but were taken down for access reasons. No evidence has been supplied to support this. The current gates were installed in April 2011* ***to replace gates installed during 1991-1992.*** (our emphasis)

50 This is factually incorrect and oddly inconsistent with the statement in another part of the Report where the Officer summarises the evidence and says "*During WW2 existing gates were taken down to allow military and emergency access...".*[22]

51 But, there is abundant evidence that the gates were in place prior to WW II and taken down for access reasons:

51.1 **Mr Hamill** notes in his witness statement,[23] his understanding from discussions with Mr Bentley who was a resident of EPA in the key periods between 1942 and 1968 and

[19] Para 8.17.

[20] Para 8.17.

[21] Para 8.17.

[22] Para 2.17 I.

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1988 and 1999 that the gates were in place at either end of EPA before 1939 and taken down during WW II to allow for emergency access.[24]

51.2 **Mr Ekberg's** memorandum prepared in April 1993 and provided to Lord Denning and others notes that "*Gates were taken down during the 1939-1945 War*"

51.3 **Mr Greaves** (who lived in EPA in the key periods from 1946 to 1959 and then from 1986 in Sandown Avenue) noted in his witness statement,[25] that a property in Sandown Avenue was requisitioned by the army during WW II and that the EPA gates were removed during the war by the fire brigade.

52 If the gates were reinstalled after the war but prior to 1992, it would not be possible to rely on the period 1972 to 1992 to establish the relevant rights.

53 There is clear evidence that gates **were** reinstalled prior to 1992 which has unfortunately been ignored/given insufficient weight in the Report and as a result it is flawed. Again, we repeat our points above about how the Committee should approach the burden of proof in this matter. Where there is doubt over the evidence it should be resolved in EPARA's favour.

54 In particular, we refer to the first-hand evidence provided by the witness statement of Mr Bentley who states:[26]

> *My understanding is that EEL arranged to put up new gates at the Littleworth Avenue end of [EPA] in about **1986**. I believe that these gates may be the same, but if not are similar to the existing gates and they had a five bar gate on one side and a single arm on the other side. the gate with the single bar was left open.*
>
> *I think that there were gates that the Sandown Avenue end of the lower section of [EPA] from sometime **before 1988**.* (our emphasis)

55 In addition, the Report summarises certain evidence from 168 people who completed public user evidence forms in support of the application. It says that *all of the users (who completed the question) mentioned that they had seen both gates and signs. These are generally referred to as having been there for around 20 years **or since 1990**.*[27]

56 Finally, a letter from the Council to EPARA in 1998,[28] confirms the existence of gates by 1991: "*You will hopefully recall that we met on two occasions **in 1991** and also exchanged correspondence about the gates that **had** been erected in* [EPA]".

Shutting the gates in 1991

57 If the gates were shut in 1991 for a single day, there was no 20-year period prior to 1992 to be relied on for the purposes of establishing a restricted byway.

58 We refer in this respect to the Lord Neuberger's speech in *Godmanchester*:[29]

> "…*it is clear that an interruption of the user at some point during the relevant 20-year period, such as the landowner locking a gate and preventing access, will defeat an argument based on user "as of right" under section 31(1) during that period.*

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[23] Dated 18 May 2011, at para 28.

[24] Mr Bentley himself does not address this in his witness statement dated 20 May 2011 – he does confirm that a resident of Milbourne Lane used the gates as firewood during the war – para 41.

[25] Dated 26 May 2011 at para 7.

[26] Dated 20 May 2011 at paragraphs 43 & 44.

[27] Para 2.6 of the Report.

[28] Letter of 30 July 1998 from the Council to EPARA (p31 of "PDH1").

[29] At para 89.

Traditionally, one day a year is the norm: see for instance Merstham Manor Ltd v Coulsdon and Purley Urban District Council [1937] 2 KB 77."

59 There **is** evidence that the gates were locked during early 1991 for several days. This is referred to in the Report[30] where it is noted that in a letter dated 31 January 1991 to Mr Ekberg, a resident, Mr Ian Hendrie explained the dates and times the gates would be locked. It is clear from the letter that this was about how the gates would be shut before work began in Claremont Lane in late May 1991.

60 For some reason this clear contemporaneous documentary evidence does not appear to inform the conclusions of the Report. It is not clear to us why this evidence has been ignored particularly in the context of what we say above about the burden of proof here. In addition, the evidence does not appear to be contested in the Report as far as we can see.

61 Again, EPARA is in an invidious position. It cannot now produce further evidence from Mr Eckberg who is dead and Mr Hendrie moved from EPA long ago.

(3) Further evidence that EPARA did not dedicate a right of passage over EPA to the public at large

62 There is substantial evidence (relevant to the period 1972 to 1992):

62.1 that users of EPA did not consider that there were public rights of access even for the use of EPA as a restricted byway; and

62.2 of EPA residents taking action to make clear that rights of access over EPA were not dedicated to the public at large even for the use of EPA as a restricted byway.

63 This evidence appears to have either been ignored or given insufficient weight in the Report, particularly given our points above about how the Committee should approach the burden of proof here.

64 Examples of the evidence that we rely on in this respect are as follows:

64.1 As summarised in the Report:[31] *An article in the Esher News and Mail on 7 January 1987 explained actions by residents of EPA to non-residents parking in their road. This includes a photograph of a notice stuck on a windscreen stating; "Do not park. [EPA] is private....please do not park here in future"* This article – describing the "*threats by [EPA] vigilantes*" to the public is hardly consistent with an intention to dedicate a right of passage over the road.

64.2 According to the Report, of the 163 completed User Questionnaires – **all** believed that it was a 'private road'[32] and **none** thought there were **any** public rights.[33]

64.3 According to the Report, two individuals who completed User Questionnaires said that *they had been stopped whilst using EPA, one in the early 1980s.*[34]

64.4 According to the evidence referred to in the Report: *EPA was referred to widely as a private road with access for residents, guests and contractors* ***and no rights for the public***, although a very few believed there were public rights for pedestrians.

64.5 According to the evidence referred to in the Report: *from time to time directors have told people (and schools) not to use EPA....and informing non-residents consistently that EPA is a private road with* ***no public rights of way over it*** (our emphasis).[35]

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[30] Para 2.25 VI.

[31] Para 2.25 III of the Report.

[32] Para 2.26 I & II of the Report.

[33] Although you say that 7 people then contradicted this and said it was a public footpath.

[34] Para 2.26 VII.

65 Given a reasonable opportunity to investigate the history of this particular period on this particular issue, it may be possible for further important evidence to be assembled to support our position. Given the scope of the application, understandably, none of our investigations to date have been focussed in this way.

The gates already in place – a limitation on any restricted byway imposed

66 We note that that the Officer has offered his views on the legality of the gates[36] - a clearly somewhat controversial matter that is beyond the scope of the application before the Committee.

67 This issue would only arise if the Committee decided to impose a restricted byway in a manner which did not make clear that the rights acquired are subject to the gates in place (or following an appeal).

68 The evidence suggests the gates were in place and shut prior to 1992. Therefore, we would expect the Committee to impose a limitation on any restricted byway imposed that recognises the existence of the gates presently in place.

69 There is also no difficulty in making such a limitation. Under s54(4) WCA 1981, any order made *shall include the addition to the statement or particulars as to …(b) any limitations or conditions affecting the* [restricted byway]"

70 EPARA of course must at this stage reserve its rights over the decision made. But, clearly, if the Committee were to impose a restricted byway with this limitation (and subject to agreement with the Council as to how that is to be operated in practice) it would probably be unnecessary for EPARA to continue to challenge any restricted byway under Schedule 15 WCA 1981.

71 This solution has obvious merit and common-sense on its side given the history of this long-running issue and the difficulties at this time of reaching clear and definitive conclusions based on an archaeological dig over the available evidence.

72 The fact is that EPA has had gates in place for over 2 decades with wide open side walkways without causing any issue over rights of way for the public and with the full knowledge of the Council. The Council confirmed that EPA was not a public highway in 1990 and correctly decided not to pursue this issue in 1993 and again in 1998.

73 The gates are part of and enhance the street scene. Indeed, the local planning authority thought so in approving the current replacement gates in 2009.

74 We raise this common-sense solution because we have to consider how this matter would play out if no limitation is imposed on any restricted byway: EPARA will be forced to challenge the order through all avenues at its disposal.

75 Ultimately, if after that process is exhausted, an unlimited restricted byway was imposed, there would (according to the Report) then be an issue over what was and was not an 'obstruction' with regard to the gates. EPARA would like to avoid a dispute over that as we are sure would the Council.

76 The Council would for example need to show, despite the very limited use involved with a restricted byway (i.e. no mechanically propelled vehicles) - that the use of the gates at any particular time together with the wide open side walkways could be characterised as an 'obstruction of the highway'.

77 EPARA's position on this is that the gates are plainly not intended to obstruct and in practice do not do so - all restricted byway rights are capable of being exercised. It is notable in this

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[35] Para 2.19 IV.

[36] Para 8.17.

respect that the Council did not consider that any obstruction issues arose in the context of the 2009 planning approval for the replacement gates. Indeed, the Planning Officer's report recommending approval noted that "*given the comments received from the Highway Authority it is considered that the proposed gates will not create any adverse impact on the highway*"[37]

78 In reality, the gates are a practical and sensible way of managing use of EPA by the public of mechanically propelled vehicles (the rights the Report has concluded do not exist). Certainly they would for example be a far more acceptable solution to EPA and the public than EPARA employing guards to prevent public motor vehicles using EPA - even though that could not be argued to be an obstruction to unlimited restricted byway rights.

79 We very much hope that the Committee will reach a reasonable decision in the unusual circumstances of this long-running matter which enables it to be finally concluded in a way that we hope would be acceptable to the council, the community and the residents of EPA and thereby avoid protracted, costly and potentially acrimonious litigation. At the end of the day a pragmatic solution acceptable to all parties must be the preferred outcome for all.

[37] Paragraph 12 of the report to Application Ni 2009/2012.