

LOCAL COMMITTEE (MOLE VALLEY)

DATE: 29 September 2021

LEAD OFFICER: DANIEL WILLIAMS, COUNTRYSIDE ACCESS OFFICER

SUBJECT: PUBLIC FOOTPATH 24 (LEATHERHEAD)- GREEN LANE
LEVEL CROSSING INVESTIGATION

DIVISION: ASHTEAD

SUMMARY OF ISSUE:

Once prepared and until subsequently modified, the Definitive Map and Statement (DMS) is conclusive evidence that a right of way exists and of its particulars. Surrey County Council (SCC) as surveying authority has a duty to make an order modifying the DMS where evidence is discovered that a public right should be added, modified or deleted.

Between 2015 and 2021 representations were made to SCC from Network Rail (NR) regarding that part of public footpath 24 (Leatherhead) which crosses the railway as shown A-B on the Drg. 3/1/51/H116. These were accompanied by evidence, which NR argued showed that A-B was recorded on the DMS in error. NR were informed that it would be normal procedure for them to make an application to the Council under s.53 and Schedule 14 of the Wildlife and Countryside Act 1981 which would require us to consider the evidence and make a decision upon it. Countryside Access took legal advice on NR's assertion that we had a duty to consider the evidence without an application and not to defer it until all Schedule 14 work had been done. Surrey Legal confirms (s. 4.2 of the report) that this was the case and that we should look at the evidence and make a determination on it.

Evidence was sought from various parties with an interest in this matter. Substantial evidence was received for and against Network Rail's assertion and otherwise discovered by SCC. This is described in section 2 of this report. This matter was weighed up on the basis of the legal tests laid out in Annex B and sections 1 and 9 of this report.

It is considered that evidence shows that section A-B of public footpath 24 (Leatherhead) as shown on Drg. 3/1/51/H116 should not be included on the Definitive Map and therefore should be deleted from it. A legal order to modify the DMS should be made.

RECOMMENDATIONS:

The Local Committee (Mole Valley) is asked to agree that:

- (i) There are no public footpath rights over A-B on Drg. No. 3/1/51/H116 and that this part of the route should be deleted from the Definitive Map.
- (ii) A Definitive Map Modification Order (DMMO) should be made and advertised to implement these changes. If objections are maintained to

such an Order, it will be submitted to the Secretary of State for Environment, Food and Rural Affairs for determination.

REASONS FOR RECOMMENDATIONS:

The County Council has a duty under Section 53 of the Wildlife and Countryside Act 1981 (WCA 1981) to modify the (DMS) if it discovers evidence which on balance supports a modification.

The evidence considered in this case shows that:

- i. No evidence has been presented which can show that a public right of way was in place prior to the construction of the railway.
- ii. A private crossing was created in 1857 when the railway was laid out and this position is confirmed in 1880.
- iii. The existence of a public right has been challenged over extended periods by the railway companies, by locked gate, by notice, in legal agreements and in writing.
- iv. The British Transport Act 1949 and earlier acts made any trespass a criminal offence. This provides that rights could not arise through long use, as a result of statutory and operational incompatibility and a lack of capacity to dedicate.
- v. The Inspector at Inquiry in 1954 confirmed no public right existed.
- vi. No right appeared on the 1952 and 1959 maps but did appear on the 1966 map and subsequently.
- vii. There is no evidence to indicate that the route was included in 1966 as a result of new evidence or any legal process.
- viii. The route (A-B) has not been included on any versions of the Definitive Statement since the first version was published in 1952. It is quite clearly 'excluded'.
- ix. Notices were erected and maintained on site from 1934 until sometime between 1971 and 1983 which indicated that the way was not dedicated to the public.
- x. It is not possible for a right of way to be dedicated for the purposes of section 31 of the 1980 Act when use is by virtue of it already being shown on the Definitive Map; use in such circumstances cannot be 'as of right' as rights that cannot be prevented cannot be acquired (See para 1.9).

There is new, sufficient and cogent evidence that the inclusion of A-B on the 1966 map must have been a cartographic error which has been carried through to the present day. No convincing evidence has been presented which indicates that the inclusion on the map in 1966 was valid or that rights have somehow otherwise arisen.

1. INTRODUCTION AND BACKGROUND:

1.1 The relevant section of public footpath 24 (Leatherhead) runs for 17 metres over railway land, as shown A-B on Drg. No. 3/1/51/H116. It is indicated on the current Definitive Map with the relevant date of 22 March 2006 (**Annex A**). It runs between gates on either side of the railway. Several warning notices (by Network Rail and predecessors) are posted on site on either side to the effect: "Stop look listen- beware of trains", "Warning do not trespass on the railway penalty £1000", "Danger, do not touch live rail" and "cyclists dismount".

1.2 The current Definitive Statement records that the path goes:

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To the northern boundary of the railway

And then:

Path recommences on southern side of railway.

This shows a conflict between the map and the statement which has been in place since the 1966 review of the Definitive Map (see paras. 2.2-2.11)

- 1.3 Section 32(4) of the 1949 National Parks and Access to the Countryside Act 1949 (NPACA 1949) provided, as does s. 56(1)(e) of the WCA 1981 that, where a way is shown on the Definitive Map, any particulars in the statement as to the position or width of the way are conclusive evidence as to the position and width of the way. There is no provision within any Act for deciding whether, in the case of conflict, the map or the statement takes precedence, although s. 56(1)(a) of the 1981 Act states that the map is conclusive evidence that there were rights on foot at the relevant date of the map without prejudice to any other rights.
- 1.4 Section 53(2) of the WCA 1981 places a duty on Surrey County Council (SCC) as Surveying Authority to keep the DMS under continuous review. This means modifying the map and statement to take into account the discovery of relevant evidence as soon as reasonably practicable. This may be that a right subsists or is reasonably alleged to subsist; that a way should be shown as a highway of a different status or that there is no public right of way over land shown in the map and statement. This duty is placed upon the Council irrelevant of whether an application is made by any party to modify the DMS under s. 53 and Schedule 14 of the Wildlife and Countryside Act 1981. The only relevant considerations are whether the evidence is sufficient to raise a presumption that the DMS should be modified. Other issues such as security, privacy, safety or convenience are legally irrelevant, except where statute explicitly says otherwise.
- 1.5 In the event of a discrepancy between the map and statement, it is the Council's duty to determine, on the basis of evidence, which of these two documents is the correct record of public right of way 24 (Leatherhead). In the case *R (Norfolk CC) v Environment Secretary* [2006] the judge summarised the above as follows¹:

“At review, neither the map nor its accompanying statement is conclusive evidence of its contents. In the case of irreconcilable conflict between the map and the statement, there is no evidential presumption that the map is correct and the statement not correct. The conflict is evidence of error in the preparation of the map and statement which displaces the Trevelyan presumption. Each should be accorded the weight analysis of the documents themselves and the extrinsic evidence, including the situation on the ground at the relevant date, demonstrates is appropriate”.

Two possible outcomes might arise to reconcile the documents (notwithstanding the discovery of evidence which might suggest other changes of status or extent are required).

¹ *R (Norfolk CC) v Environment Secretary* [2006] 1 WLR 1103 para. 73
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OPTION 1:

The Definitive Map is modified to delete the section across the railway land to bring it in line with the Definitive Statement.

OPTION 2:

The Definitive Statement is modified to add the excluded section, as currently shown on the Definitive Map.

These are discussed in more detail below.

- 1.6 OPTION 1 : Under Section 53(3)(c)(iii) of the Wildlife and Countryside Act 1981 the Surveying Authority must be able to conclude that there is no public right of way over land shown in the map and statement as a highway of any description.

The evidence needed to remove what is shown as a public right on such an authoritative record as the DMS- and this applies equally to the downgrading of a way with 'higher' rights to a way with 'lower' rights as well as complete deletion- will need to fulfil the following requirements²:

These are that:

- The evidence must be new- an order to remove a right of way cannot be founded simply on the re-examination of evidence known at the time the Definitive Map was surveyed and made
- The evidence must be of sufficient substance to displace the presumption that the Definitive Map is correct.
- The evidence must be cogent.

While all three conditions must be met they will be assessed in the order listed. Before deciding to make an order, authorities must take into consideration all other relevant evidence available to them concerning the status of the right of way and they must be satisfied that the evidence shows on the balance of probability that the map or statement should be modified.

- 1.7 Evidence is then required that A-B was included (on the map) in error and no public rights existed over the route at the relevant date. No presumption in favour of the map at the expense of the statement should occur. The evidence should be approached on its own merits and a decision made on the balance of probabilities.
- 1.8 A precondition for the exercise of the statutory power contained in s. 53(3)(c)(iii) is the discovery of evidence. Case law³ has shown that where there is a divergence between the map and statement, perhaps in the form of a drafting error, this can then be characterised as the discovery of evidence or 'recent research' and that it should not be necessary to also characterise it as new. Nevertheless, as I shall explain, given that this route does not seem to have been added to the map on the basis of any evidence-based decision, then all evidence considered might be characterised as new.

² Para. 4.32-4.35 Planning Inspectorate Circular 1/09 Version 2, Released October 2009.

³ Kotarski v SSEFRA & Devon CC [2010] EWHC 1036 (Admin). Paras 24-27.

- 1.9 In the case of deletions, guidance issued by DEFRA⁴ suggests that a case for the dedication of a right on the basis of use in the period between the recording of the right of way and its subsequent removal must fail. It is not possible for a right of way to be dedicated for the purposes of section 31 of the 1980 Act when use is by virtue of it already being shown on the Definitive Map; use in such circumstances cannot be ‘as of right’ as rights that cannot be prevented cannot be acquired. In other words, rights cannot have been acquired since the route was added to the map in error.
- 1.10 OPTION 2: Or, under Section 53(3)(c)(i) of the WCA 1981 the “authority shall make such modifications to the DMS as appear to them to be requisite in consequence of the discovery of evidence which (when considered with all other relevant evidence available to them) shows that a right of way not shown on the DMS subsists or is reasonably alleged to subsist over land in the area to which the map relates”.
- 1.11 This involves two tests:
 Test A: Does a right of way subsist on a balance of probabilities? This requires clear evidence in favour of the Appellant and no credible evidence to the contrary.
 Test B: Is it reasonable to allege that a right of way subsists? If there is a conflict of credible evidence, and no incontrovertible evidence that a way cannot be reasonably alleged to subsist, then the answer must be that it is reasonable to allege that one does subsist.
- For the purpose of making an Order to modify the Definitive Statement it is only necessary to meet the second (lesser) test.
- 1.12 Only a small amount of first-hand evidence of ‘use’ has been submitted with regard to this route so we cannot rely upon section 31(1) of the Highways Act 1980 (1980 Act). Nor can we infer dedication at common law (see section 31(9) of the 1980 Act where there is evidence that a landowner has dedicated a right of way and that the public has accepted the dedication. Some statistics of daily use have been provided and are outlined at para. 2.41. In this case the partial user evidence and the documentary evidence must enable an inference of dedication and acceptance of a right of way. Section 32 of the 1980 Act requires a court or tribunal to take into account any map, plan or history of the locality, or other relevant document which is tendered in evidence, giving it such weight as appropriate before determining whether or not a way has been dedicated as a highway. If the evidence is sufficient to show that at some stage in the past the route did carry public rights then the accepted legal principle “once a highway always a highway” will apply if no lawful extinguishment can be shown. The caveat outlined in para. 1.9 must also be considered however.
- 1.13 Additional aspects which also must be considered, include whether the dedication of rights was prevented by past and current legal regimes; whether Network Rail or their predecessors had the legal capacity to dedicate and whether cul-de-sacs should be created on the map as a result of changes made.
- 1.14 This item seeks a decision based upon this report. This is a non-Executive Function.

⁴ Ibid.

2. HISTORY AND ANALYSIS:

- 2.1 Given the reference to section 32 of the 1980 Act in para. 1.12 above, evidence must be the basis of determining that no public rights are shown to exist despite the inclusion of a way on the DMS.

Evidence from the Surrey Definitive Map and Statement

- 2.2 The DMS is a legal document and conclusive evidence of the existence of public rights (and their particulars) at the relevant time on the map.
- 2.3 The earliest versions of the Definitive Map were produced under the NPACA 1949 and were subject to (in theory) a wholesale review every five years. These were the first maps of rights of way to be legally conclusive.
- 2.4 Prior to this, maps were prepared in response to the 1932 Rights of Way Act. These maps had no statutory weight unlike those prepared under the later 1949 Act⁵ and are NOT definitive in nature but were intended to be a resource and a source of information for authorities to draw upon. Their preparation was not without controversy. During 1934 and 1935 there were attempts to establish whether the public had rights across the level crossing or not. In response to an enquiry (dated 14 February 1934) about the status of the crossing, Southern Railway stated to the Urban District that:

“no public footpath has existed over the railway. This is borne out by the fact that no wicket gates or stiles were provided when the line was constructed”.

They also drew attention to the fact that:

“The present wicket gates were provided in 1911 by agreement with the Epsom Rural District Council and as a convenience for persons who had shewn themselves entitled to use the vehicular crossing and did not want the trouble of unlocking the gates. By such documents the Company’s predecessors repudiated any claim to a public footpath at the crossing”.

Subsequently then when maps were drawn up by Leatherhead Urban District Council it is surprising to see that the footpath was drawn across the railway. The map (see below) deposited in 1937 for the purposes of the 1932 Rights of Way Act by Leatherhead Urban District Council shows a red solid line annotation crossing the railway.

⁵ In fact this Act placed no requirement on any authority to prepare maps of public rights of way, being mostly concerned with outlining in statute how public rights might arise.

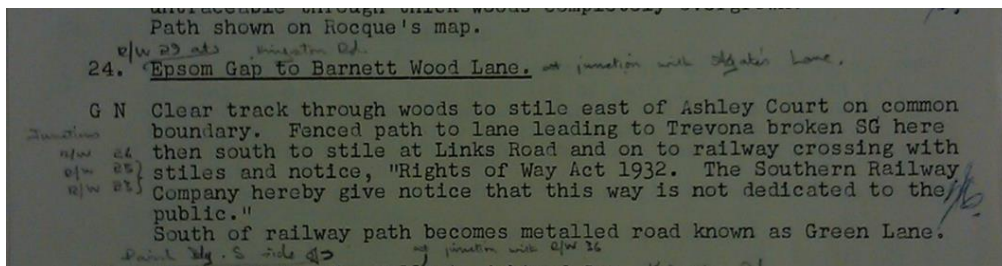


2.5 Prior to the publication of the 1952 Definitive Map (in 1957), 'Draft Definitive Maps' were drawn up for the entire county in 1950 for public consultation. Initially these were drawn up on by the various parishes, districts and boroughs on a locality basis and submitted to the County Council. The first 1950 version is shown below.



1950: The inclusion of a way (or otherwise) on the DMS was the subject of extended deliberation during the compilation of the 1952 version. On this early draft version of the DMS, public footpath 24 was recorded across the railway by Leatherhead Urban District Council.

2.6 A schedule to accompany this map was also produced by the District Council in 1951. This is rather less clear about whether the route over the railway is included.



This prompted a formal objection from the Railway Executive to SCC regarding its inclusion. As a result, SCC determined to modify the particulars contained in the DMS by the deletion of the footpath from Barnetwood Lane opposite its junction with Agates Lane north-westwards over the railway to Links Road. Objections were subsequently made by Leatherhead and District Countryside Protection Society and Leatherhead Urban District Council amongst others. A public hearing was convened on 14 February 1955 to determine this matter and was chaired by the independent Inspector Mr J. F. Hedley. Following the hearing of evidence Mr Hedley concluded:

“From the evidence submitted I am of opinion that there has never been a public right of way over the Green Lane crossing but I am of the opinion that the Draft Map and Statement should be amended to show a right of way on foot from Barnett Wood Lane along Green Lane as far as the Epsom and Leatherhead railway line and a similar R/W from the north of the crossing to Links Road”.

- 2.7 Several key points of history arose during the inquiry. It seems that from 1903-1909 the gates on either side of the railway were kept locked to prevent unauthorised use of the crossing. The wicket gates were provided in 1911 under the terms of an agreement with Epsom Rural District Council, for the convenience of those persons who had a private right to use the crossing. A local user Mr Devitt acknowledged that members of the public climbed over the gate prior to that. Another user claimed that there had always been a public right of way here and referred to the Tithe Apportionment Map (See para. 2.40) and Ordnance Survey maps of 1867 and 1895. She had however no personal knowledge of the area during the period 1903-09 when the gates were locked.
- 2.8 As a result of the inquiry, the footpath was deleted in its entirety from Barnett Wood Lane to Links Lane and then was added back to the map as:
- i. a footpath from Barnetwood Lane along Green Lane to a point immediately south of the Epsom and Leatherhead Railway, and
 - ii. a footpath from a point immediately north of the Epsom to Leatherhead railways in a north-westerly direction to Links Road.

Subsequently the draft definitive map of 1952 reveals the right of way stopping at each side of the railway. Also indicated here are notations ‘S’ indicating the presence of stiles and ‘N’ indicating the presence of a notice. These are listed clearly in the draft Definitive Statement which accompanied the map at the time.

ITEM 8

Parish District Leatherhead ^② Reg. No. _____
 R/W. No. 24 Status _____ Surveyed by DLS Date 10/52
 Width claimed _____ Address _____
 Commences at _____ in a _____ direction

Description	Width Fence to Fence	Condition or surface	Remarks
			Made of the intention to pass through gate with road and over the gate and presumably surface to the top surface of the road.
4' 19'	4'	free	
19'	19'		
as above	as above		well used path

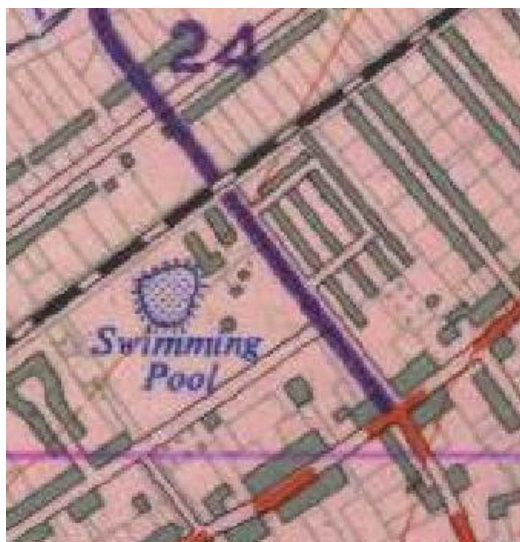
The statement remains identical in all its earlier versions to that outlined in para. 1.2.

- 2.9 The 1952 and 1959 maps (shown below) show that a purple line clearly ceases on each side of the railway land as required by the determination made by the Inspector Mr Hedley. No line crosses the railway.



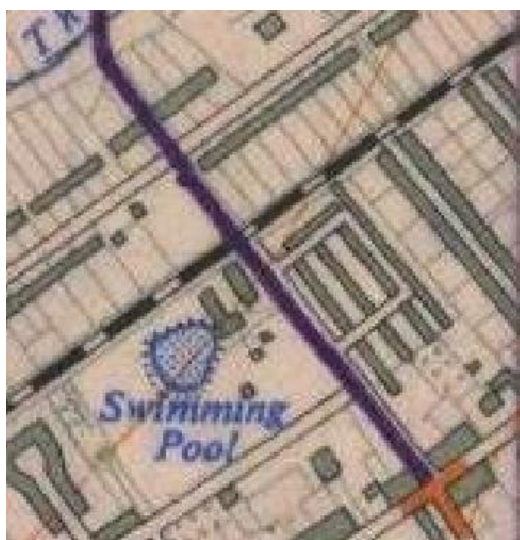
1952

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1959

The map published in 1966 is shown below. This clearly shows footpath 24 continuing across the railway as a continuous purple line.



1966

The 1966 definitive statement does not concur with this however.

ITEM 8

R/W No.	Status & Width Claimed	Description	Width Fence to Fence	Condition or Surface	Remarks	Map No.
24	F.P.	<p>FROM R/W 29 (Epsom Gap) in a south-easterly direction:-</p> <p>Track Crosses R/W 26 Track Crosses R/W 25 Track Junction with R/W 23 Path Stile Path Kissing gate Path Stile Crosses links Road Path Stile Notice</p> <p>TO northern boundary of railway Path recommences on southern side of railway:- Path Stile Occupation road TO Barnetwood Lane</p>	28' 0"	Metalled	"The Southern Railway Company hereby give notice that this way is not dedicated to the public"	TQ 15

2.10 No evidence has been uncovered to suggest that any legal order or other legal mechanism was employed or enacted in order to create rights across the railway. There is no evidence that any evidence was put forward to support its inclusion on the map or conversely that any objection was raised with the Council to its inclusion.

2.11 The current DMS was consolidated from the earlier 1966 records and subsequent legal orders to produce the current set of black and white maps accompanied by Definitive Statements for each route. Each of the 89 sheets covering the County had an initial relevant date of 1 March 1996. These sheets were subsequently updated (where relevant) on a piecemeal basis by legal order. Each time this happened that sheet would be given a new relevant date. Footpath 24 (Leatherhead) appears on sheet TQ15 NE and has the relevant date of 22 March 2006. The accompanying statement does not have a relevant date but is also continuously updated where affected by legal orders. Map TQ15 NE (below) shows footpath 24 running north-westwards from Barnett Wood Lane. The pecked line runs along Green Lane and progresses over the railway line. Thereafter it continues along an un-named path enclosed by fences to Links Road and beyond. The route has been shown this way since the map was redrawn onto this base map in 1996. In contrast however the statement below clearly notes that the footpath does not cross the railway but ends at the boundary of the railway land and recommences on the other side.





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R/W No	Status & Width Claimed	Description	Width Fence to Fence	Condition or Surface	Remarks	Map No.
24	FP 2m	<p>FROM R/W 29 (Epsom Gap) in a south-easterly direction:-</p> <p>Path Junction with R/W 27 Crosses R/W 26 Path</p> <p>TO R/W 25</p> <p>Path recommences from R/W 25, 60m south-east of previously described section:-</p> <p>Path Stile Path Kissing gate Junction with R/W 596 Path Stile Crosses Links Road Path Stile Notice</p> <p>TO northern boundary of railway</p> <p>Path recommences on southern side of railway:-</p> <p>Path Stile Occupation road</p> <p>TO Barnetwood Lane</p>	<p>udf</p> <p>udf</p> <p>udf</p> <p>udf</p> <p>28' 0"</p>	<p>Grass</p> <p>Grass</p> <p>Grass</p> <p>Grass</p> <p>Grass</p> <p>Metalled</p>	<p>M M Legal Events Order 2000</p> <p>"The Southern Railway Company hereby gives notice that this way is not dedicated to the public"</p>	TQ 15

Evidence submitted by Network Rail

2.12 Since 2015 Network Rail has submitted evidence in support of the position that the Definitive Map is in error and should be brought in line with the Definitive Statement. I shall outline this evidence in chronological order; drawing thematic links between the evidence where relevant. An analysis of the importance of their key points will take place in the conclusion of this report at section 9.

- 2.13 Network Rail has drawn particular attention to the various Acts and associated documents which led to the laying out and construction of the railway line during the 1840s and 1850s (Annex C). They assert that prior to the construction of the railway there was no path or road in existence at the location of the Green Lane crossing. The railway line was authorised by the Epsom and Leatherhead Railway Act 1856 which contains no provisions relating to the crossing, but did incorporate the Railways Clauses Consolidation Act 1845 which imposed a specific obligation for the railway company to provide and maintain certain works ‘for the Accommodation of the Owners and Occupiers of Lands adjoining the Railway’. In other words, to facilitate the crossing of the railway. The crossing was provided as a new work for the benefit of and the sole use of the landowner and its successors in title. The Book of Reference and Deposited plan accompanying the 1857 Act described the land over which the path now runs as ‘Arable’, owned by the Honourable Mary Howard. They mention no path, neither private nor public. Closer examination shows part of what became footpath 24 is indicated as a narrow enclosure, leading to a wooded shaw. There is nothing in either document to suggest its status.
- 2.14 Several earlier Railway Acts and Plans were also supplied, although as none of these were ever enacted their significance is limited. They show a similar situation to the Act which was ultimately enacted.
- 2.15 In a conveyance schedule dated 1857 with regard to land owned by Mary Howard there is reference to various accommodation⁶ works. One of these is
- “..a level crossing ...on the farm in the occupation of John Agates ...to be the usual field crossing for carriages and to be placed as requested by said Mary Howard”.*
- 2.16 The accompanying plan shows the tip of the narrow strip of land which equates to part of Green Lane to the south of the railway. This however ends some distance before the railway, adjacent to the shaw. There is no indication of any public rights being granted at this time or already being in existence. A later memorandum in this document explicitly confirms:
- “In respect of the wicket gates provided at this crossing to accommodate pedestrians, the Companies doing so without admitting the right of the public to cross the line at the point A (Agates Crossing)”.*
- 2.17 Network Rail suggest that the most likely reason for the railway company to provide a crossing at this point was to create a statutory easement for a private right of way solely for the benefit of a landowner and not for the use of the public. They continue, to argue that such a way must be maintained for only as long as the landowner requires it or there is a change in the land use which lies outside of the purpose for which the crossing was provided.
- 2.18 Other documents from the archives of Network Rail continue to support the position that the crossing was not public. A detailed file note dated 3 March 1922 considers Agates Crossing. Of key importance are the following extracts:
- “...what is now ‘Green Lane’ did not exist in field 26, nor is a track of any sort shown. Apparently when this field was severed Green Lane was extended up*

⁶ Works required to facilitate access to private land/property.
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to the Railway and a level crossing constructed for Farmer Agate's use, but nothing further..."

"...it would appear that a footpath had subsequently been formed, extending from the level crossing to an apparently newly constructed road about 530 yards away".

"..it would seem as if this crossing was an ordinary farmer's occupation crossing with no public footpath rights".

- 2.19 The file acknowledges that it had been considered from many points of view, although no further information was supplied to suggest what these might have been. Thereafter Network Rail (or rather its various predecessors) had continuing concerns about this crossing. In November 1933 it arranged for notices pursuant to the Rights of Way Act 1932 to be exhibited. In January 1934 this was confirmed as done. A letter dated March 1934 confirmed that the crossing was a made up ballast crossing which is the usual form of crossing for agricultural purposes.
- 2.20 An undated letter (circa 1930s) from the Railway Executive to the Urban District Council noted that the map prepared by them under the 1932 Rights of Way Act showed public footpath 24 passing over the railway at the crossing. The Executive pointed out that they did not admit that the wicket gate at the crossing was provided for the purpose of a public footpath and that the gates were subject of a Memorandum sealed by the Epsom Rural District Council on 22 November 1911. This letter also referred to correspondence between Southern Railways Traffic Manager and the Urban District where reference was made to the Notices erected in 1934. They asked that the alleged footpath 24 be deleted from the map so far as it affected the railway. No response has been sourced to this letter.
- 2.21 In 1951 a memorandum by the Chief Civil Engineer of the South Region of British Railways made reference to the notice plates exhibited at the crossing.

On up and down sides.

Southern Railway Warning

Notice is hereby given under section 97(2) of the Southern Railway Act 1924, to persons not to trespass upon the railway. Penalty not exceeding 40/-.

Rights of Way Act 1932

The Southern Railways Company hereby give notice that this way is not dedicated to the Public.

Warning

Stop, look and listen, before crossing the line

On down side only:

London and Western Railway

In order to ensure as far as possible the safety not only of trains running on the Railway but also of the persons and traffic entitled to use this crossing, notice of the intention to pass traction and other road engines through this gate and over the railway must be previously given to the Company's servants at the nearest station.

- 2.22 In 1967 British Railways considered the possibility of closing the crossing. There is no evidence of any actions taken towards this.
- 2.23 On 12 February 1969 internal correspondence noted that the crossing was laid out as an accommodation work on the deposited plan for the railway authorised by the Epsom and Leatherhead Railways Act 1856 under the terms of the Conveyance from the Hon. Mary Howard. It mentions that wicket gates were provided in pursuance of the aforementioned agreement with Epsom Rural District Council in 1911 and notes that the path was claimed by Leatherhead Urban District Council as a public footpath under the NPACA 1949 to which the board objected and achieved the deletion of the length across the railway between the fences (as mentioned in paras. 2.9-2.11).
- 2.24 Photographs of the various signs on each side of the railway crossing dated 29 April 1971 were provided which clearly show the wicket gates, the crossing boards and an assortment of notices, some of which appear to be the same as those referred to above.
- 2.25 On the basis of the above Network Rail assert that:
- i. There were never any public rights at the crossing pre-dating the railway and the constructing railway company made no provision for public rights. The various railway undertakers, including Network Rail have always maintained there were no public rights scheduled in the level crossing.
 - ii. In 1953 the Council claimed a public right of way over the crossing and the British Transport Commission's objection to the claim was subsequently upheld; but the Council neglected to modify the Definitive Map although the statement was corrected. This in itself reinforces there were no public rights over the level crossing. The Council has failed in its duty to modify the Definitive Map to correct the error that it made in 1954.
 - iii. The public cannot acquire a right of way over an operational railway 'on the level' because to do so would be inconsistent with its statutory purpose. Use was 'contentious' and 'sufficient' notices have been maintained on site and at both ends of the platform of the nearest stations as required by the British Transport Commission Act 1953 (BTC Act 1953).
 - iv. Network Rail does not have the capacity to dedicate a right of way in respect of the private level crossing as to do so would be incompatible with both the safe and efficient running of the railway, and inconsistent with the regulatory framework under which it operates.

Evidence submitted by Ashtead Residents Association

- 2.26 In response to the decision to consider the evidence put before SCC by Network Rail, representations were invited from other interested parties (see section 4). A response was received from Ashtead Residents Association (ARA) who submitted several pieces of evidence and alternative interpretations of Network Rail's and other evidence. Their evidence is summarised below in chronological order and will be analysed in section 9.

ARA argue that:

“The route under discussion proceeds from Agates Lane: on high ground between it and Skinners Lane, respected by a kink in the latter, once stood the Saxon homestead later to become known as Little Ashtead Manor, the Old Court.....The way continues to Epsom Gap and via the present footpath 25, Ashtead Gap. The ‘Gaps’ relate to gates which were set up there through a ditch and fence established under the auspices of...Countess of Arundel...in 1619”.

- 2.27 A sketch map dated 1638, credited to John Lawrence and annotated with red pen is supplied which they argue supports this.
- 2.28 Roques' map (1768) indicates the line proceeding from what much later became Agates Lane across the Rye to Seymours Manor to Ashtead Woods.
- 2.29 The Wyburd Survey 1802 shows the track in the form of an enclosure extending two field lengths down from Barnetwood/Marsh Lane. The upper part is described as 'Driftway' by definition 'a common road or path for driving cattle...'. Further north the alignment has become 'Shaw', a strip of woodland to provide cover for game.
- 2.30 The 1838 Tithe Map shows plot 189 extending from Barnett Wood Lane to the field boundaries and beyond and described as 'Driftway', i.e. part of the ancient drove way along which herds were moved between the village and market in Kingston.
- 2.31 The Dorking to Epsom Railway Plan 1845 (annex C) shows the occupation crossing was required in substitution to an existing access to the watering hole on the Rye (a brook) and not as an original creation simply to provide access to fields divided by the new railway line from the home farm. The Green Lane/Driftway was re-established west of the Shaw. There were gates but not locked and available to use without let or hindrance. There is no evidence that the railway exercised any control at that stage. "...the driftway enclosure has been outlined but not numbered or names. From where it meets the Shaw, plot 25, at its northern end, the footpath turns west across Plot 28 before returning northwards alongside plot 28 before returning northwards alongside plots 29 and 30 down to cross the rye brook. The terrier records plot 28 and 29 as Arable and Plot 30 pasture, each field containing the footpath.
- 2.32 The 1855 plan of Epsom and Leatherhead Railway shows the driftway enclosure outlined but not numbered or named. From where it meets the Shaw, Plot 25 at its northern end a network of footpaths appears proceeding either side of adjacent plots Plots 23 and 24, between plots 26 and 27/28, another track extends all the way down to Rye Brook and watering hole. The

latter is described as 'occupation road'. Diversion of the ways to field edges can be explained by a need to skirt arable land on conversion from pasture.

- 2.33 A conveyance and accompanying plan of 13 February 1880, relating to the purchase of the estate by Francis Soames specified a '.....right of way in common with other persons entitled thereto, with or without horses, carts and carriages, over and along the road or way crossing London-South-western Railway to Barnett Wood Lane". The inference 'those entitled to use it' within it, do not imply a narrow interpretation. There is no evidence to suggest the way is not used by the public.
- 2.34 In 1870 and then later in 1889 both a subway and then a road bridge were requested for carriages and foot passengers in lieu of the crossing. Both were rejected by the Railway Company. Access via ladder stiles continued abutting double gates. The gates were locked with keys provided for landowners.
- 2.35 The 1895 Ordnance Survey map shows the driftway as 'green lane', which has no legal meaning but many such lanes represent ancient routes that have existed for millennia. The route continued over the railway line to the old ford/watering place
- 2.36 No controversy arose until in 1909 the firm who owned the lane wrote to Ashtead Parish Council stating 'with regard to the Caen Estate that there was no right of way over the property'. Evidence of the reaction to this by parish councillors can be found in parish magazines from the time. Ashtead Parish Council minutes for 19 April 1909 show that adjacent landowner Mr Soames requested that a stile or wicket gate be erected to the recently enclosed fence enclosing his land. The minutes admit that the gates 'were always kept locked' and were 'worn by people getting over the gate'. Gates were later replaced in their original position and wickets removed. The Parish wrote to the Railways Company requesting that wicket gates or stiles be reinstated. This was done in July 1910 without any admission that a right existed. The Railway company wrote to the Council asking for an agreement on the matter. This was reached via the aforementioned 1911 memorandum. Neither Ashtead Parish nor Epsom RDC conceded that this crossing was NOT a public right of way and in fact maintained the opposite view.
- 2.37 In minutes of the Epsom Rural District Council of July 1912 it was noted that Ashtead Parish Council consented to the erection of the wicket gates provided that the Council claimed that the footpath existed and was one over which they had sole control. Despite a resolution that the Clerk be instructed to exchange counter parts of the agreement with the Railway Company no evidence has been uncovered that this was ever done or what the response to it might have been.
- 2.38 The ARA refer to a recent case in the High Court at Wrexham⁷. They contend this shows great similarity to the situation at Green Lane, particularly with regard to the path and occupation road shown on the railway maps prior to construction of the line as evidenced in the documents and maps. They quoted from it:

"The inspector then examined the documentary evidence in turn and dealt with OS maps, an 1840 Tithe map, railway plans, and other documents. Her core

⁷ Network Rail Ltd v Welsh Ministers [2020] EWHC 1993 (Admin)

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reasoning in confirming the order was that she was satisfied that the evidence pointed towards the order route being available on the ground and used by the public on foot before the statutory process necessary to construct the railway lines was commenced in 1853”.

- 2.39 It is the contention of ARA that this is a well-established right of way from its days as a cattle droving route to the market at Kingston, to the modern era where it is an essential route for residents to reach shops and for schoolchildren to safely reach cycle paths and leisure walkers.
- 2.40 The definition section of the 1835 Highways Act does not define driftway. This act was primarily concerned with problems of repair. Where a driftway appears in conjunction with the word ‘private’ this is to imply ‘privately maintainable’ only.

Evidence submitted by Mr Peter Williams

- 2.41 From summer 1983 until 2021 the shortest route to the butcher, pharmacy and post office was via the Green Lane foot crossing. Between those dates he was never prevented from crossing on foot due to the gates being locked.
- 2.42 From 1983 until January 2016 there was no notice on either side saying that the way was not ‘dedicated to the public. They had no reason to study the definitive map until the notice appeared.
- 2.43 The test (as laid out here in para. 1.9) is not even-handed and not fair.
- 2.44 It makes no sense that the footpath would be cut in-half, becoming two cul-de-sacs.
- 2.45 It is nonsense to suggest that you can have an unlocked and well-maintained foot crossing like this yet claim every user was trespassing and could be fined.
- 2.46 Signs were erected by Network Rail in 2016 to the effect of “Highways Act 1980. Network Rail hereby give notice that this way is not dedicated to the public”. Surely Network Rail should not have put these signs up if they had been illegal. How can the permanent notices which were in place in 1971 be justified.
- 2.47 I understand that safety and convenience are not relevant matters. The Council should not be subject to pressures on such matters that could affect its reading.
- 2.48 The railway company had allowed the public right of way to be created (or reinstated) by neither locking gates after the 1981 Act nor displaying onsite notices whose words were in the definitive statement text.

Evidence submitted by Mr B. E. Bouchard

- 2.49 The Parish had from time to time immemorial, a network of footpaths providing free movement by custom and common usage as exemplified in Surrey Quarter Sessions for Easter 1661. From 1 March 1661 a footpath leading from Ashtead to Kingston had been forcibly obstructed with a ditch and fences”.

ITEM 8

- 2.50 Ashtead's ancient droveway, extended as a thoroughfare from a reserve mapped as the driftway by 1802 through a ford across The Rye to Epsom gap (a gate set up there through a ditch and fence established under the auspices of the Lady of the Manor.
- 2.51 Under the General Highways Act 1835 Parishes were under a duty to maintain highways and the legislation mentioned driftway in conjunction with the word 'private' to make it clear that it was not maintainable at public expense. Driftways are found described as 'private roads' without that term implying any restriction of use.
- 2.52 The 1845 Railway Plan (annex D) shows the way emanating from the driftway and skirting plots 28 and 26 to reach the Rye and described as footpath in the terrier. It crossed both 'Limits of deviation' and was cut by the railway. Footpaths commonly meander in use and may be temporarily diverted in order to go around the edge of arable fields. Such variations neither alter the route's intrinsic nature nor its continuity.
- 2.53 On the 1855 Railway plan the stretch of footpath along the edge of field 26 had been consolidated into an occupation road. Since this was to be severed by the railway, the promoters would have been obliged to reinstate the link. Thereafter the public experience unimpeded passage for the next 50 years. Requests for bridges or tunnels were not based on any lack of entitlement to cross at ground level.
- 2.54 When the Ashtead Estate was sold in 1987 a provision was made for a right of way with or without horses, carts and carriages over the road crossing the railway.
- 2.55 The 1895 Ordnance Survey map is extended as parallel dotted lines to, across and from the railway lines, noted F.P at intervals.
- 2.56 In 1908, in accordance with the 1894 Local Government Act, the Parish Council gave 'considerable attention to the necessity for preserving to the public a number of footpaths in the Parish which the old inhabitants believe to be public', specified the following year to include Green Lane to Ashtead Woods. Under that Act no right of way could be extinguished or diverted without the permission of both the Parish and Rural District.
- 2.57 In 1909 Joseph Soames arranged for the crossing to be barred. This was declared unlawful by the Parish Council supported by the Steward of the Manor. The railway company had removed existing ladder stiles and Epsom Rural District Council asked to initiate legal proceedings, but wicket gates were substituted. Each side reserved its own position and the status quo was maintained until the public hearing in 1950. Viewed after the event it did not proceed with proper legal candour with the failure by the Railway to disclose the existence of the 1845 Railway Plan and the suppression of recognition of a pre-existing accommodation road in 1855.
- 2.58 J. Soames claimed in 1909 that no rights of way existed across any of his land, demonstrably a falsehood. Following his demise this was not repeated by the family form of Solicitors but had been espoused by the Railway company. There is no direct evidence that the short way across the railway track-bed was of a different character to the rest of the way on both sides.

- 2.59 The onus of proof lies upon whoever advocates change. The case of Network Rail Ltd V Welsh Ministers, No. CO/3369/2019 says “the order route being available on the ground and used by the public on foot before the statutory process to construct the railway lines was commenced....” supports a presumption that the definitive map is correct.

Historic evidence

- 2.60 **Tithe Map and Award:** The Tithe Apportionment and Map dating from 1838, which was prior to the planning and construction of the railway. A narrow plot equating to the most southern section of Green Lane is shown and numbered 189 on the plan. The apportionment records this as ‘driftway’. This then appears to end at plot 190 (The Three Acres- Arable). No indication is given as to who might have a right to use the driftway but both 189 and 190 were occupied by Michael Agate and owned by Fulke Greville Howard. The Altered Tithe Apportionment Map of 1887 shows the southern section of Green Lane up to the London and South Western Railway. No crossing is shown across the railway. A wide track is shown on the northern side leading to an unnamed road (later to become Links Road).
- 2.61 **Historic Maps:** No route of any kind equating to footpath 24 and the crossing is visible on historic maps from J Senex 1729, Bowen 1753, Roques 1770, Lindley Crosley 1793 or Greenwood 1823. A short spur of Green Lane is shown extending north from Barnettwood Lane on maps produced by the Ordnance Survey in 1804 and Colonel Mudge 1816. This probably equates approximately to the driftway recorded on the Tithe Map, but does not extend as far as where the railway would subsequently run.
- 2.62 **Ordnance Survey records:** The Ordnance Survey First Edition County Series map dated 1877 shows a route known as ‘Green Lane’ running north-westerly from Barnettwood Lane to the southern side of the crossing point. It meets a solid boundary at the railway land although a faint double pecked line crosses the railway indicating that some kind of crossing feature was surveyed on the ground. There is no sign of any track continuing on the northern side. A solid line also separated Green Lane from Barnettwood Lane, which may indicate some kind of barrier or gate.
- 2.63 The Ordnance Survey Book of reference for the 1877 map records the length of Green Lane running as far as the southern side of the railway as ‘Private road’. This is enclosed by solid lines. The field on the northern side of the railway is recorded as ‘Arable’. These records are however not definitive in terms of the status of a way.
- 2.64 The equivalent map published in 1897 shows a similar situation south of and across the railway. The map also however shows a track shown by double pecked lines continuing to the north-west of the railway labelled F.P. The 1913 edition shows a similar situation, although there is no obvious sign of a crossing across the railway land. Agates Lane is visible for the first time. Green Lane is now only separated from Barnettwood Lane by a pecked line, which indicates perhaps only a change in surface. The 1932 edition indicates that a more substantial crossing of the railway has been constructed, although solid lines continue to suggest the presence of gates. The footpath northwards from the railway is now enclosed by housing plots. The 1976 map details a complex system of enclosures each side of the railway, which relate closely to the present day.

- 2.65 Whilst Ordnance Survey maps are good evidence of the physical existence of part of the feature to become known as Green Lane and its subsequent development they do not indicate public status, levels of use, nor every route being used at the time of survey.
- 2.66 **Highways minutes:** On 25 May 1892 the Highway Board for the District of Epsom considered a list of public bridleways and footpaths submitted by The Surveyor which were in the District. 18 routes were listed in the Parish of Ashted. On 6 February 1907 the Highways and General Purposes Committee of Epsom Rural District Council considered a similar report from the Surveyor. 33 routes were listed in the Parish of Ashted. In neither report does any route equate to any part of Green Lane or the railway crossing.
- 2.67 **1911 Memorandum:** This Memorandum was sealed by the District Council of Epsom on 22 November 1911. It acknowledged that they alleged a public footpath across the railway whilst the railway company denied the same, whilst agreeing, without prejudice or admission that a public footpath exists, to fix wicket gates on each side of their railway for the use of persons desiring to cross the railway on foot, subject nevertheless to the rights (if any) of any person's right to have such wicket gates removed and railway fences restored.

Evidence of use

- 2.68 First-hand evidence of use was submitted by 4 local residents dating from January 1978 to the present day. They also noted use, where relevant by their respective partners and children. All said they had used the way freely to go across the crossing, to access the common, the butchers, pharmacy, Post Office, Schools and more. Use was both for specific purposes and general recreation. None had seen any notices which they thought had challenged their use until January 2016 when it was noted that signs appeared referring to the 1980 Act to the effect that the way 'is not dedicated to the public'. Not everyone recalled this notice.
- 2.69 Evidence presented by the ARA but collected by Network Rail using cameras, suggested the following indicative levels of use over the last year. In November 2020 over 598 people used the crossing over 3 days before equipment failure. Network Rail had noted an increase in use during the lockdowns of 2020 although an earlier 9-day census in December 2019 suggested 2446 people and 635 cyclists used the crossing during the period. Footage included adults and school children not dismounting from bikes, joggers with headphones and people standing taking selfies or photos of the tracks. To contrast with this they also noted that 234 trains used the line every day on average with a line speed of 60 mph.

Landowners and adjacent landowners

- 2.70 The entirety of public footpath no. 24 is unregistered, although the section currently shown crossing the railway is claimed by Network Rail, including the fences and gates on each side.

Legal considerations

- 2.71 A number of legal considerations are pertinent in this matter as to whether either option 1 or option 2 can be shown to be the correct legal conclusion.

They concern whether public rights can be acquired over a railway crossing and whether as a result of this cul-de-sac ways may or may not be recorded.

2.72 **Statutory and Operational Incompatibility:** Section 31(8) of the 1980 Act states

“Nothing in this section affects any incapacity of a corporation or other body or person in possession of land for public or statutory purposes to dedicate a way over that land as a highway if the existence of a highway would be incompatible with those purposes.”

This was itself preceded by similar sections in earlier relevant Acts, including that of 1932 (See para. 2.4). Whilst there may be some public interest to recognise public rights over this footpath, a balance must be struck regarding public interest and protection. Section 55 of the BTC Act 1949 made it an offence to trespass on railway land with the objective of promoting and securing the safe and efficient operation of the railways. This gives rise to the public interest of protecting the public themselves and protecting the operation of the railway and its services. Relevant case law (1957 and 2017⁸) confirmed that the public safety objective of preventing people from trespassing, by means of criminal sanction, is of greater weight; and that use of a crossing, such as in this case, amounted to an offence under s. 55(1) of the 1949 Act. The implication of this is that the operation of both s. 31(1) of the Highways Act (known as statutory deemed dedication) and that of common law dedication (see para. 1.12) are incompatible with s. 55 of the 1949 Act. In the case of the former on the basis that it is enshrined in s. 31(8) of the 1980 Act. Therefore, if the conditions laid out by the 1949 Act are met, public rights could not have been acquired by any amount of use since that time. The conditions of the 1949 Act are that:

Para 24. 2017 Case: For a penalty of trespass to be applicable under section 55 of the 1949 Act it is necessary that notice to not trespass on the railway has been given at the railway station nearest to the point where the trespass is alleged to have taken place and that such notices have been renewed when defaced or destroyed. (This is 55(3-4))

2.73 Subject to section 55 of the 1949 Act, any use of a crossing by the public may be unlawful and it is not possible for Network Rail to grant lawful authority for such use. This use is not just deemed incompatible from the viewpoint of the 1949 Act but the Railway Regulation Act 1840 (s. 16) and Regulation of Railways Act 1868 (s. 23) also made trespass a criminal offence with presumably the same consequences.

2.74 **Capacity to dedicate:** The above then impacts upon Network Rail’s capacity to dedicate which seems to be at odds with both its statutory duties and the criminality of use as determined by the 1949 Act. Any use after this date would be negated by the effect of s. 55 of the Act. Network Rail were shown in the 2017 case to lack the capacity to dedicate a public right of way where the way across the live rails is of a character which could not give rise to a presumption of dedication at common law.

⁸ British Transport Commission v Westmorland County Council 9HL0 [1957] 2 All ER 353, [1958] AC 126 and The Ramblers Association v Secretary of State for Environment Food and Rural Affairs [2017] EWHC 716 (Admin)

2.75 **Cul-de-sacs:** The issue of the remaining sections of footpath to the north and the south of the railway land has not been raised by either party. As explained in para. 2.8 these were added to the definitive map by the Inspector following inquiry in 1955. The remainder of this land has not been subject to the same statutory restrictions as the railway land and whilst there is nothing in law preventing a public right of way being a cul-de-sac, the deletion of the footpath over the railway would leave two cul-de-sacs ending at a point where there was no legitimate point of termination or public resort. If that is so then the two cul-de-sacs added to the map by the Inspector might reasonably be deleted from both the definitive map and statement.

3. OPTIONS:

- 3.1 The Committee may agree or disagree with the officer's recommendation. Alternatively, they may decide that the evidence submitted shows that the routes should be of a different status or contain different particulars. Decisions can only be made on the basis of evidence. The recommendation is based upon the evidence submitted and interpreted under the current legislation. Matters such as convenience, amenity, security or safety are irrelevant (see Annexe B) except where such considerations are imposed by statute.
- 3.2 Due to the fact that no application was made under Schedule 14 to the WCA 1981, where the County Council decides not to make an order, there is no facility for the decision be appealed to the Secretary of State

4. CONSULTATIONS:

- 4.1 The following persons and bodies were consulted.

County Councillor: Chris Townsend	Suggested that this would be controversial and viewed critically by committee. He wondered why this had been picked up when no application was made. He thought Network Rail were not pursuing this.
District Councillor: David Hawsworth	Noted that a lot of work had been undertaken on this case and why the fact that public access had been allowed for approaching 150 years should not be given more weight. Where this route may have been elsewhere prior to the railway it seemed to him that it was probably moved to remove the 'dog-leg', thus closing the old route and instituting a new one which they maintained and allowed use of up to this day.
District Councillor: Patricia Wiltshire	Noted that she used the crossing personally and it is the safest crossing she had encountered. It would be an enormous burden on the residents should the crossing be closed. She thought a pragmatic approach be taken considering the welfare of residents and Network Rail should be challenged at the highest level to maintain public convenience
Mole Valley Planning Department	No response

Ramblers: Robert Alcock	No response
British Horse Society: Sarah Rayfield	No response
British Horse Society: Penny Tyson-Davies	No response
Open Spaces Society: Christine Hunter	No response
Cycling UK: Robert Eberhard	I use this crossing about a dozen times per year as part of a cycle route. Others will point out that the stile recorded in the Definitive Statement is now a kissing gate.
Byways and Bridleways Trust	No response
Ashtead Residents:	The main objectors are acting on behalf of the Ashtead Residents and have submitted substantial evidence which was considered above.
Corporation of London	No response

- 4.2 SCC Legal Services have been consulted and have approved this report. They advised prior to this report that the evidence should be considered without the receipt of an application made under Schedule 14 to the WCA 1981 in accordance with the Council's statutory duties. There is in this case then no 'applicant'.

5. FINANCIAL AND VALUE FOR MONEY IMPLICATIONS:

- 5.1 Council is under a duty to make a MMO to modify the DMS where evidence is discovered which, taken as a whole shows that a modification order should be made.
- 5.2 The cost of advertising a Map Modification Order would be approximately £1200, which would be met from the County Council's Countryside Access budget. If objections are received and a Public Inquiry held, additional costs of around £4000 will also be met from the same budget. Most costs are fixed by our duties under Schedule 15 of the WCA 1981.

6. EQUALITIES AND DIVERSITY IMPLICATIONS:

- 6.1 These factors cannot be a consideration under the current legislation.

7. LOCALISM:

This issue is not relevant and cannot be considered under the current legislation

8. OTHER IMPLICATIONS:

Area assessed:	Direct Implications:
Crime and Disorder	None of these are relevant considerations under the current legislation.

Sustainability (including Climate Change and Carbon Emissions)	None of these are relevant considerations under the current legislation.
Corporate Parenting/Looked After Children	None of these are relevant considerations under the current legislation.
Safeguarding responsibilities for vulnerable children and adults	None of these are relevant considerations under the current legislation.
Public Health	None of these are relevant considerations under the current legislation.

Human Rights Act 1998: Local Authorities are required to act to uphold European Convention rights which are now enforceable in British courts as a result of the Human Rights Act 1998. Primary Legislation, of which the Wildlife and Countryside Act 1981 is an example, may require the County Council to act in a particular way. While the Council must interpret primary legislation in a way that is compatible with Convention rights that duty does not apply if the County Council could not have acted differently. In this instance it is first necessary to consider whether the action recommended in this report impacts a Convention right. The making of this order may affect the rights of the landowner/occupier under Article 8 of the Convention, the right to respect for family and private life and Article 1 of Protocol 1, the right to protection of property. The Act makes it clear that such rights may only be interfered with in a way that is in accordance with the law. Here the action by the County Council as surveying authority is prescribed by law as detailed in paragraph 9.2-9.6 and Annex A of this report. As such the recommendations in this report are not considered to be in breach of the 1998 Act.

9. CONCLUSION AND RECOMMENDATIONS:

- 9.1 Any decision must be made on the legal basis set out in Annexe B and in section 1 of this report. The two options outlined in section 1 will be considered in reverse.
- 9.2 The section of path in question runs for 17 metres over the railway land, between gates on either side. Several notices (by Network Rail and predecessors) are posted on site on either side as noted in s. 1.1. It is not known when the notices referred to in 2.21 disappeared, but most likely between 1971 and 1983.
- 9.3 The user evidence dating from the 1930s is partial and was considered insufficient at the inquiry of 1954 and so must be insufficient now. A small amount of recent evidence of use has been submitted. It is acknowledged that it is very well used and this is supported by recent Network Rail statistics. The data currently available would nevertheless not be deemed sufficient to give rise to rights as a result of long use. Option 2 must therefore fail on the basis of user evidence, irrelevant of whether this use could have given rise to rights or not, which is deemed unlikely.
- 9.4 The Definitive Map history indicates that whilst the railway crossing section of footpath 24 had been considered for inclusion on the Definitive Map it has never been legally included. The conclusions of the Inspector during the 1954

inquiry confirms this. There is no evidence to suggest that the route was put forward with evidence for inclusion on the 1966 map. It seems most likely then that this was a cartographic error.

- 9.5 Various evidence has been proposed that rights existed prior to the 1954 Inquiry. This includes reference to it being an ancient highway of some sort or having being well used by local persons over a long period prior to the Inquiry. This evidence does not stand up well to scrutiny however.
- 9.6 With regard to Option 1; historic and later Ordnance Survey mapping, makes it clear that the short section of driftway running to the woodland shaw has long been in existence- the earliest map on which it is shown is from 1802. There is no evidence that this continued in any way to the point of the railway crossing until the railway itself was constructed. This does not necessarily mean there was no route- the maps can only reveal such evidence as the purpose for their surveying allows. These maps may be good evidence of the physical existence of a way, but do not reveal much about whether the way was for public or private use or anything about numbers- we cannot read things into them that are not there. The 1857 conveyance records that the way was laid out as an accommodation road for the use of a limited body of people and not for the public at large. There is no indication it was to accommodate an existing way, public or otherwise. It appears that that no wicket gates or stiles were provided when the crossing was first constructed- apparently use took place by climbing over the gate. A wider network of routes referred to by ARA and shown on both Railway Act maps with pecked lines do not equate to the route in question and we can know nothing about their use or status or whether they have ever in any way been realised. There is no evidence that any other routes were either public, nor that they were subsequently diverted to the position of the railway crossing. Railway deposited documents were prepared as part of a public process and were usually based on a specific survey. Public rights of way which crossed the possible route of a railway had to be retained and accommodated according to their status. As non were laid out here, maintained or diverted, it seems that the most likely answer is that there were none to record and non were granted. This is supported by the clear appearance elsewhere in the terriers of 'public footpaths' and 'public highways' to distinguish those features from the non-public.
- 9.7 In a similar fashion, references to documents such as the conveyance of 1880 show reference only to a route, which was laid out for the use of an unidentified class of user. Whilst it is shown crossing the railway it then ceases at the edge of a plot of private land. The clearly suggests that the use was by the landowner and guests to access their land. No continuation of the right is shown because the landowner would require none to be shown on their land. The public however would do.
- 9.8 In terms of later challenges to use by the public it is recorded that the gate across the railway was locked between 1903 and 1909. Then the 1911 memorandum indicated that the Railway Company admitted no public right of way, even if they admitted without prejudice to there being a way that could be used. In 1934 notices pursuant to the Rights of Way Act 1932 were erected both sides of the railway, which both challenged use and admitted that no rights exist. It is not known if any other notices were erected on site before this. The 1932 Act provided for the first time effective legal mechanisms for the landowner to express their intentions. Various effective notices have been maintained on-site up until sometime between 1971 and 1983. The railway

company defended this position when they successfully challenged the 1952 draft Definitive Map.

9.9 Railway land is subject to s. 55 of the British Transport Act 1949 which made trespass on it a criminal offence. This is the Act currently in operation but it was preceded by earlier Acts in 1840 and 1868 which contained similar provisions to make trespass an offence. There is no evidence that Network Rail could or have ever tried to waive this offence, either by overt actions or acquiescence- quite the opposite in fact. By applying the principle that advantage cannot be obtained from a criminal offence it seems reasonable to assume that it would never have been possible for the public to have acquired a right as a result of long use. Moreover, use would have been incompatible with the statutory protection and operation of the lines. Case law⁹ from 1958 and 2017 supports the assertion that rights could not have been acquired over a level crossing as a result of long use. The level crossing is land over which Network Rail requires operational control and which would be incompatible with its use as a public footpath. This further underlines the dismissal of option 2 and the acceptance of option 1.

9.10 In summary:

- xi. No evidence has been presented which can show that a public right of way was in place prior to the construction of the railway so the Wrexham case of 2020 is irrelevant.
- xii. A private crossing was created in 1857 when the railway was laid out and this position is confirmed in 1880.
- xiii. The existence of a public right has been challenged extended periods by the railway companies, by locked gate, by notice, in legal agreements and in writing.
- xiv. The British Transport Act 1949 and earlier acts made any trespass a criminal offence. This provides that that rights could not arise through long use, as a result of statutory and operational incompatibility and a lack of capacity to dedicate.
- xv. The Inspector at Inquiry in 1954 confirmed no public right existed.
- xvi. No right appeared on the 1952 and 1959 maps but did appear on the 1966 map and subsequently.
- xvii. There is no evidence to indicate that the route was included in 1966 as a result of new evidence or any legal process.
- xviii. The route (A-B) has not been included on any versions of the Definitive Statement since the first version was published in 1952. It is quite clearly 'excluded'.
- xix. Notices were erected and maintained on site from 1934 until sometime between 1971 and 1983 which indicated that the way was not dedicated to the public.
- xx. It is not possible for a right of way to be dedicated for the purposes of section 31 of the 1980 Act when use is by virtue of it already being shown on the Definitive Map; use in such circumstances cannot be 'as of right' as rights that cannot be prevented cannot be acquired (See para 1.9).

9.11 In conclusion, new, sufficient and cogent evidence has been discovered to show that the inclusion of A-B on the 1966 map was a cartographic error carried through to the present day. No convincing evidence has been

⁹ British Transport Commission v Westmorland County Council 1958 AC 126 and Ramblers' Association V SOSEFRA and NR [2017] EWHC 716 (Admin)

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presented which indicates that the inclusion on the map in 1966 was valid legally or evidentially, or that rights had somehow otherwise arisen and ought to remain shown on the map and included on the statement.

9.12 The conditions laid out in Option 1 above have been met.

9.13 The Mole Valley Local Committee is asked to agree that:

- (i) There are no public footpath rights over A-B on Drg. No. 3/1/51/H116 and that this part of the route should be deleted from the Definitive Map.
- (ii) A DMMO should be made and advertised to implement these changes. If objections are maintained to such an Order, it will be submitted to the Secretary of State for Environment, Food and Rural Affairs for determination.

10. WHAT HAPPENS NEXT:

- 10.1 If the Committee decides that the above order be made and objections are maintained to that order, it will be submitted to the Secretary of State for confirmation, most likely by public inquiry where the evidence can be heard in detail by an Independent Inspector.
- 10.2 If the Committee decides that a different order be made and objections are maintained to that order, it will be submitted to the Secretary of State for confirmation.
- 10.3 If Committee decides that no order be made there is no opportunity to appeal to the Secretary of State.
- 10.4 If the Committee resolution is different to officer recommendations, they should record the reasons and cite evidence for the decision. This will make it easier to explain the decision should the matter proceed to public inquiry or future legal challenge?
- 10.5 All interested parties will be informed about the decision.

Contact Officer:

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Consulted:

See section 4

Annexes:

- A Drawing No. 3/1/51/H116
- B Legal background
- C Railway and Ordnance Survey Maps

Sources/background papers:

- File '24 Leatherhead MMO' and all contents, including all correspondence and representations, responses to consultations, landownership details, legal cases, assorted maps and documents can be viewed by appointment or as PDF files
-

Section of footpath 24 to be deleted:
A-B = 17m



Public rights of way key

- BOAT
- Bridleway
- Footpath
- Restricted Byway

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Grid Ref at A: 517407 158580
Drawn by DW
Date: 18/11/2019
Drawing No. 3/1/51/H116
Scale: 1:500



District of Mole Valley
Public footpath 24 (Leatherhead)
Wildlife and Countryside Act 1981
Definitive Map Modification Order
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Map Modification Orders – Legal Guidance

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

The 1949 Act also required Surveying Authorities i.e. County Councils, to keep their definitive map and statement under periodic revision. The Wildlife and Countryside Act 1981 completely changed the way in which the definitive map and statement is updated. Under this Act Surveying Authorities have a duty to keep their map and statement under continuous review.

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

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

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

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

to the public, for example, through the erection of a fence or locking of a gate across the way, however long ago that date was.

Statute Law

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

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

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

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

An implication of dedication may be shown if documentary evidence can be provided which enables an inference of dedication and acceptance of a right of way. Section 32 of the Highways Act 1980 requires a court or tribunal to take into account any map, plan or history of the locality, or other relevant document which is tendered in evidence, giving it such weight as appropriate before determining whether or not a way has been dedicated as a highway. If the evidence is sufficient to show that at some stage in the past the route did carry public rights then the accepted legal principle “once a highway always a highway” will apply if no lawful extinguishment can be shown.

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

Common Law

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

Schedule 14 Applications For Definitive Map Orders

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

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

the Secretary of State for the Environment, Food and Rural Affairs, who can direct the authority to determine it within a specified time.

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

Order-making procedure

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

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