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Ref: DW/24 Leatherhead

Wildlife and Countryside Act 1981
The Surrey County Council Footpath No.24 (Leatherhead) Definitive Map
Modification Order 2022

Network Rail hereby objects to the above order (the Order) affecting its operational property. The Order, if confirmed will have the effect of creating a public footpath across the railway line between points 'A' and 'B' on the order plan, where currently Green Lane level crossing (the Crossing) is situated.

The Order is made absent evidential basis and, if confirmed, will be incompatible with Network Rail's key statutory and regulatory objects.

Background and legal status

Prior to the construction of the railway there was no path or road in existence at the location of the Order route.

The railway line in Ashted was authorised by the Epsom and Leatherhead Railway Act 1856 (the 1856 Act) which does not contain any specific provisions in relation to the location in question.

The location of the Crossing/Order route, according to the Deposited Plan to the 1856 Act, fell within enclosure no.26 in the Parish of Ashted. The Book of Reference accompanying the 1856 Act and the Deposited Plan identified this land as "Arable" owned by the Honourable Mary Howard. Neither the Deposited Plan

nor the Book of Reference mention any paths, public or private, at that location, nor do they include any owners or occupiers of the land as being the Surveyor of Highways, the Mayor Alderman or any other person or party of the local authority.

The 1856 Act incorporates the Railways Clauses Consolidation Act 1845 which, pertinently to the present matter, imposes, in section 68, an obligation for Network Rail's predecessor railway company, to provide and maintain certain works for "*the Accommodation of the Owners and Occupiers of Lands adjoining the Railway*".

The relevant part of s.68 reads as follows: "*The company shall make and at all times thereafter maintain the following works for the accommodation of the owners and occupiers of lands adjoining the railway, that is to say, such ... convenient gates ... and passages over ... the railway as shall be necessary for the purpose of making good any interruptions caused by the railway to the use of the lands through which the railway shall be made; and such works shall be made forthwith after the part of the railway passing over such lands shall have been laid out or formed, or during the formation thereof.*"

The Crossing (and therefore the Order route) was therefore provided as a new work pursuant to s.68, for the benefit of and the sole use of the landowner and its successors in title, to enable continued access for the field severed by the construction of the railway, rather than work built to carry a pre-existing [construction of the railway line] public highway.

The legal effect of section 68 is to establish a (private) statutory easement for the benefit of a landowner.

Such an easement however, subject to the usual principles, can become extinguished in certain circumstances. One such circumstance, relevant here, is severance or abandonment, whereby the dominant tenant disposes of their land on one side of the railway line, thus severing their sole, undivided ownership, without retaining a right of way in, say, a level crossing.

Accordingly, Network Rail's obligation pursuant to section 68, to "*all times maintain*" accommodation works can carry on in perpetuity, barring an act of a landowner contradicting its need for accommodation work. In such a case, the statutory easement will have outlived its statutory purpose and become extinguished. This is the case with the Crossing.

The relevant land on which the railway line was intended to be built was acquired by Network Rail's predecessor railway company under the terms of conveyance dated 1st August 1857 from Hon. Mary Howard – the title deed does not specifically mention Green Lane level crossing but contains general provisions for accommodation works in that area.

Since patently the sole ownership of land on both sides of the railway was severed, it follows that any private rights of way across the railway at that point must have been, on the evidence, extinguished at some point in the past and cannot be revived by operation of law.

1953 claim for public rights of way over the Crossing

In the 1950's Surrey County Council (the Council) undertook a survey of the public paths in its area pursuant to the obligations introduced by the National Parks and Countryside Access Act 1949. In consequence of this exercise, in 1953, the Council claimed a path across the railway at Green Lane as a public right of way and duly recorded it on its definitive map and statement.

British Transport Commission objected the claim (no. 457) in the spring of 1954, the matter went to inquiry where the Inspector confirmed non-existence of public rights of way over the Crossing (Order route). In consequence, the Council, on 18th October 1955, ordered the deletion of *"a footpath from Barnettwood Lane opposite its junction with Agate's Lane north-westwards over the railway to Links Road, Ashtead"*.

On evidence available, it appears that the deletion was not fully implemented;

The definitive statement correctly reflects the post-1954 inquiry status quo (and post-1955 deletion order) and properly describes the path in question (Leatherhead 24). The statement excludes the extent of the Order path and reads, inter alia, that the path continues only *"To [the] northern boundary of [the] railway"* and that the *"path recommences on [the] southern side of [the] railway"*. This wording leaves no doubt that there is no recorded public right of way across the operational railway.

The definitive map, due to its quality and resolution does not allow for conclusive determination on what is recorded but when read conjunctively with the statement and seen against the available evidence it points to, assuming that it shows a line across the railway, a drafting error or omission rather than something of substance. This much was confirmed by the Council; in the Officers Report¹ prepared for the purposes of making of this Order, the author concludes that *"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"*

Discovery of evidence – section 53(3)(c) Wildlife and Countryside Access Act 1981 (WCA1981)

The apparent legal basis for the Order is section 53(3)(c)(i) and (iii) of WCA1981. This was also the original legal mechanism by which Network Rail has sought to

¹ Dated 29 September 2021, for the Local Committee (Mole Valley) for the purposes of the Order on p.2

compel the surveying authority to review its (incorrect) definitive map². A comprehensive analysis of current law was provided, to show that the surveying authority had a statutory duty to *continuously* review and update its definitive records, without the need for a Schedule 14 application.

This was underpinned by a compilation of *new* (i.e. not previously known or available), *sufficient* (to overcome the evidential presumption the definitive map is correct) and *cogent*³ evidence to justify the requested modification.

This reasoning was, eventually, accepted by the surveying authority and the weight of, what is a body of conclusive evidence was deemed sufficient to recommend making an order deleting the section of path 24 in question (the Order route). This much is clear from the very comprehensive officer's report.

Against this factual and evidential backdrop, the Order was made, *recording* the Order route not only against clear recommendation contained in the officer's report but, concerningly, against available evidence or rather, based on near-complete paucity of evidence to contrary. The balancing (of probabilities) exercise of evidence of the Order maker remains a mystery.

Implied/presumed dedication

Network Rail and its predecessors have always maintained that no public rights of way existed across the railway at the Crossing. Relevant notices were displayed and other actions incompatible with the intention to dedicate for public use were taken over the years. For example, throughout the 20th and 21st century there is evidence of non-dedication notices, pursuant to the Rights of Way Act 1932 and Highways Act 1980 being displayed at the Crossing, as well as non-trespass notices also having been displayed at both the Crossing and the platform ends of nearest stations, at all relevant times. Further, there is a course of correspondence, historic and contemporary, concerning the non-public status of the Crossing.

In this context, of presence of conclusive evidence of no public rights of way pre-existing the construction of the railway line at the location of the Order route, it is difficult to see how the Order route could have come into existence and, as a critical adjunct, how could it be claimed under presumed/implied dedication when *any* public user must have been contentious. *Any* public use of the Order route therefore, cannot be properly characterised as *as of right*.

² In a letter dated 8 March 2018 from Network Rail to Surrey County Council.

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

The Order incompatible with Network Rail statutory objects

Capacity to dedicate

There is a requirement at common law that the landowner must have the capacity to dedicate.

Network Rail is a statutory undertaker authorised only to manage the railway infrastructure in Great Britain. As such, in principle, it has no requisite capacity to dedicate land for public rights of way. It becomes of special importance where public paths crossing the lines of the railway at a grade are concerned as such a dedication would be incompatible with the efficient running of the railway and inconsistent with its obligation to run a safe and efficient railway network.

The lack of capacity of a statutory undertaker is a question of fact to be addressed individually in each case. The question of lack of capacity was consequently explored by courts over the decades, notably by the House of Lords in the case of *BTC v Westmoreland County Council* [1958]⁴. It established a number of principles, which apply to the present case:

1. A statutory undertaker cannot voluntarily release or otherwise abandon a statutory power that has been conferred upon it by a special Act of Parliament and that concerns the way in which that statutory undertaker may permissibly deal with land acquired for the purposes of that Act;
2. A statutory undertaker cannot, in the absence of an express statutory power, grant any easement over land acquired for the purposes of its special Act if the existence of such an easement – in any possible circumstances and at any future time – would undermine the statutory undertaker’s satisfaction of the purposes of the special Act;
3. A statutory company has no power to grant public right of way where the enjoyment thereof by the public is incompatible with the statutory objects of the company, and;
4. For the purposes of adjudging incompatibility, it is a question of fact whether, at the date when the question is considered by a tribunal of fact, that there is any likelihood that the existence of an alleged right of way would interfere with the adequate and efficient discharge of the undertaker’s statutory duty.

Statutory incompatibility

Level crossings are considered, by Network Rail’s regulator, the Office of Rail and Road (ORR), the single biggest source of railway’s catastrophic risk and the

⁴ And more recently applied in *Ramblers Association v SoSEFRA* [2017] EWHC 716 (Admin)

most appropriate way, recommended by the ORR, of managing such risk is by eliminating it and closure of level crossings.

Many level crossings across the network, introduce an unacceptable level of risk both to safety of members of public using these as well as to the safe and efficient operations of the railway.

The Order route, if confirmed, will create a public right of way across a busy railway line and, in turn, would introduce risk to members of public and the railway. Consequently, it would contradict the terms of Network Rail's operating licence and be incompatible with its overarching objective to run a safe and efficient railway network.

Licence under which Network Rail must operate does not allow it to sanction a use of the railway which amounts to misuse and which would import an unacceptable level of risk to users. It also is a primary tool by which its operator, the ORR holds Network Rail to account in respect of safety and operational efficiency.

The Licence contains conditions which govern Network Rail's competence to grant new rights and any such grants require the ORR's consent. Network Rail would be very unlikely to receive consent from the ORR to grant a new public right of way as the grant would undermine the business of operating and improving the railway. Autonomous grant by Network Rail would therefore, in light of the above, be ultra vires.

Criminal trespass

Section 55 of the British Transport Commission Act 1949 makes it a criminal offence to trespass on the railway. Network Rail is not authorised to legitimise any unlawful use of the railway, particularly such that amounts to criminal trespass; removing the criminality of this offence does not lie within the powers granted to Network Rail or in the 1949 Act.

Conclusion

In light of the above, Network Rail's position with regards to the Order is as follows:

- (a) There is no evidential basis under s.53(3)(c)(i) and (iii) of Wildlife and Countryside Access Act 1981 for the Order;
- (b) There were never any public rights in the crossing pre-dating the railway and the constructing railway company made no provision for public rights. The various railway undertakers, including NR has always maintained there were no public rights scheduled in the level crossing.

- (c) 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; only the Definitive Statement was corrected;
- (d) In any event, 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. Network Rail does not have the capacity to dedicate a public 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.

For Network Rail,

Damian Hajnus
London, 04 September 2022

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