



Order Decision

Inquiry opened on 14 October 2020

by Mark Yates BA(Hons) MIPROW

an Inspector appointed by the Secretary of State for Environment, Food and Rural Affairs

Decision date: 09 February 2021

Order Ref: ROW/3221975

- This Order was made under Section 53(2)(b) of the Wildlife and Countryside Act 1981 ("the 1981 Act") and is known as the Suffolk County Council (Parish of Newmarket) Modification Order 2018.
- The Order was made by Suffolk County Council ("the Council") on 25 October 2018 and proposes to add a footpath to the definitive map and statement, as detailed in the Order Map and Schedule.
- There was one objection to the Order outstanding at the commencement of the inquiry.

Summary of Decision: The Order is proposed for confirmation subject to the modifications set out below in the Formal Decision.

Procedural Matters

1. In light of the Covid 19 pandemic, the public inquiry¹ into the Order was held as a blended event over the course of nine days during October and November 2020². Prior to the second national lockdown, people were able to participate or watch the inquiry at the King Edward VII Memorial Hall, Newmarket or remotely by way of the Microsoft Teams platform. The inquiry subsequently continued in a fully virtual format. I undertook unaccompanied visits to the site and surrounding area on 13 and 15 October 2020 to look at the relevant features identified by the parties.
2. The Council considered the evidence was sufficient to warrant the making of an Order, but it has taken a neutral stance in terms of whether the Order should be confirmed. Newmarket Town Council ("NTC") took over the responsibility of presenting the case in support of the confirmation of the Order. The applicant (Mr Smy) and other individuals have also provided information in support of the route claimed ("the claimed route") being a public right of way. The sole objection has been pursued by Network Rail Infrastructure Limited ("NR").
3. The claimed route runs between Granary Road and Cricket Field Road, Newmarket and comprises of the approaches to a level crossing³ and the crossing itself.

Main Issues

4. The Order relies on the occurrence of an event specified in Section 53(3)(c)(i) of the 1981 Act. Therefore, for me to confirm the Order, I must be satisfied that the evidence shows on the balance of probabilities that a public right of way subsists.

¹ Originally scheduled to open on 28 July 2020

² 14-16 October 2020 and 2-3, 5-6, 16 and 27 November 2020

³ Known as the Weatherby Level Crossing

5. In considering the above test, I shall firstly assess whether the evidence is sufficient to support the common law dedication of a highway prior to the construction of the railway. For this to be applicable it would need to be inferred from the evidence that the landowner dedicated a highway and the public accepted this dedication. Section 32 of the Highways Act 1980 requires a court or tribunal to take into consideration 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.
6. Alternatively, NTC submits that a public right of way was dedicated following the construction of the railway under common law or Section 31 of the Highways Act 1980. The latter requires consideration of whether there has been use of a way by the public, as of right and without interruption, for a period of twenty years prior to its status being brought into question and, if so, whether there is evidence that any landowner demonstrated a lack of intention during this period to dedicate a public right of way.
7. In relation to the alleged dedication of a public right of way after the opening of the railway, I will need to consider the submissions made by the parties regarding criminality and statutory incompatibility as the claimed route continues to cross an operational railway line.
8. In terms of any vehicular rights found to subsist over the claimed route, none of the exemptions in Section 67(2) or (3) of the Natural Environment and Rural Communities Act 2006 are stated to be applicable and therefore any public right of way for mechanically propelled vehicles is extinguished. This means that if public vehicular rights are shown to subsist over the route it should be recorded as a restricted byway.

Reasons

Early Documentary Evidence

9. The supporters believe the claimed route historically formed part of a way between the village of Saxton Street and Newmarket. Attention is drawn to the reference to a Saxton Way in a survey of Ditton Valance manor of 1501/2 by Sir William Capell. In the absence of any map from this period, it cannot be determined what alignment the way took between these settlements. It can only be concluded that it possibly followed the route shown on the much later mapping.
10. Attention is drawn to a road between Saxton Street and Newmarket which is shown on the Chapman maps of 1768 and 1787. The responses of the witnesses to my question on this point indicate that this road broadly corresponded with Park Lane and Cricket Field Road (encompassing the claimed route) and it continued southwards via the Drift. Two buildings are shown near to the southern end of Park Lane and these are annotated "*Dog Kennel*". As John Chapman had passed away in 1778, it is likely that the later map would have been a re-print and therefore it should not carry any additional evidential value.
11. A 1775 estate map of land belonging to the Marquis of Granby⁴ by Thomas Warren appears to depict particular routes and attention is drawn by NTC to one shown between Saxton Street and Newmarket, which incorporates a

⁴ The heir apparent of the Duke of Rutland

section of the claimed route. This route is annotated "*Old Road from Newmarket to Saxton Street*". It is apparent that this map was a working document which has been annotated over time. This means there will be uncertainty regarding when and by whom this annotation was added to the map. Nonetheless, it provides further support for the existence of a historical road between these settlements.

12. The Chapman and estate maps contain no key and were not produced for the purpose of distinguishing between public and private roads. Accordingly, the weight to be attached to them will be limited. Given the extent of the land held by the Marquis of Granby in this locality, it is possible that roads passing through the estate were private in nature in order to access the various landholdings. Nonetheless, the depiction of a road between two settlements, which links with the local road network, can provide some support for it having public status.
13. It was reported in two local newspapers at the time that on 24 December 1808 five people had become lost on the heath when returning to Saxton Street from Newmarket and their calls for help were heard near Dog kennel Lane⁵. Although Mrs Emrys-Roberts for NTC says that this could only relate to the relevant road on the Chapman map or the branch leading off it, there is some uncertainty regarding the route they were attempting to take. Therefore, this incident only potentially provides evidence of use of the claimed route on one occasion.
14. What is now Park Lane is shown on the 1815 inclosure map for South Newmarket and there is the annotation "*Dog Kennel*" near to the parish boundary. This road is depicted continuing southwards within the neighbouring parish of Wood Ditton⁶. A copy of the South Newmarket Inclosure Award is not available, but the map shows the claimed route as a direct continuation of a present-day public road. This map could be suggestive of public rights continuing southwards along the claimed route.

1824 Wood Ditton Inclosure Award

15. The Commissioners' powers in relation to the inclosure award were derived from the local Act for the parish of Wood Ditton of 1813. This local Act contained some specific provisions, but it generally incorporated the clauses found within the Inclosure Consolidation Act of 1801 ("the 1801 Act"). The award made provision for ten public roads and thirteen private roads. There were additionally six roads and one lane listed on the map, including Dog Kennel Lane. However, there is uncertainty regarding the relevance of these roads in the absence of any specific provision for them in the award.
16. The claimed route is shown on the inclosure map as a direct continuation of Dog Kennel Lane in the adjoining parish and annotated "*No.1 Private Road*". Running west from the claimed route is the private road numbered 2. Additionally, there is a reference in the Commissioners minute book, dated 29 May 1816, to Mr Weatherby's allotment at its eastern end being potentially brought up to the old Saxton Street Road. He had an allotment that was located adjacent to a section of the present Cricket Field Road, which is shown on the inclosure map as part of private road number 1.

⁵ It is apparent that Dog kennel Lane corresponds to at least a proportion of the present Park Lane

⁶ Now spelt Woodditton

17. The relevant road is set out in the award as "*No.1 One Private Road of the breath of thirty feet commencing at the South East End of the Dog Kennell Lane where it leaves the Parish of Newmarket all Saints and proceeding in a South Easterly direction till it enters - allotments to the Duke of Rutland and Edward Weatherby – respectively*". This entry clearly reveals that the Commissioners awarded it as a private road. Further, the award specified that the private roads were for the use of only those with an interest in the adjoining land.
18. There was a power in Section 8 of the 1801 Act to divert or stop up public roads, passing or leading through any part of the old inclosures, but this was subject to the Commissioners obtaining an Order from two Justices of the Peace to do so. The local Act specified that this was the case for any ways passing "*in, through, upon, over or between any of the Lands, Grounds or old Inclosures, within the parish of Wood Ditton*".
19. In this case, the claimed route proceeded adjacent to old inclosures on its eastern side and the relevant provisions outlined above would have been applicable if any historical public rights existed over the route. NTC draws attention to the Commissioners stopping up a public road and two public footpaths elsewhere in the award. In doing so they expressly stated that they had complied with the required procedure in the 1801 Act. There is no evidence that any public rights were stopped up over the claimed route. Whilst NR refers to Section 35 of the 1801 Act specifying that the provisions of the award are binding, any failure to stop up a pre-existing highway could mean that these rights still exist.
20. Mrs Emrys-Roberts identifies some anomalies arising out of the inclosure award. The issues identified only point to the potential for errors to have occurred when the award was compiled. There is some evidence which could provide support for the claimed route being a highway prior to the inclosure award, most notably the Chapman maps and the Commissioners minute book. There is nothing to suggest that any such rights were stopped up by the Commissioners. However, I do not find the weight of this evidence to be sufficient to show on balance that the route was a pre-existing highway. The award itself only provides positive evidence of the existence of private rights over the claimed route.
21. Mr Smy draws attention to the continued existence of the claimed route as a physical feature after the inclosure process and he believes it is likely that people would have continued to use the route. Clearly, there is the potential for the route to have been dedicated at some later point in time, but this would need to be supported by evidence.

Railway Documents (1845-46)

22. Documents were deposited in connection with the proposed Newmarket and Chesterford railway and notice was given in November 1845⁷ that it was intended to apply to Parliament for an Act to build the railway. The deposited plan for the railway shows the claimed route falling within plot 29 and annotated "*Park Lane Level crossing*". It is annotated in the same way on the cross-section plan along with the additional statement "*Public Road to be lowered 7ft and passed on level*". The notice gave details of where these documents could be inspected by the public.

⁷ In the London Gazette and Cambridge General Advertiser

23. Plot 29 links with a route going westwards (plot 26⁸) and continues southwards as plot 30. The accompanying book of reference records plot 29 as a "*Public Highway*" in the ownership of the "*The Parish Surveyor of Highways*" with no occupiers listed. Plot 26 is described in the same manner and plot 30 is recorded as a private road in the ownership of the Duke of Rutland with various occupiers listed. Plot 29 proceeds northwards beyond the claimed route to at least as far as the parish boundary and the road shown continues along the present Park Lane.
24. The Newmarket and Chesterford Railway Act ("N&CRA"), passed on 16 July 1846, authorised the building of the railway. It incorporated the general provisions of the 1845 Railway Clauses Consolidation Act ("RCCA") and also made specific provisions in relation to the proposed railway. The railway was opened to goods traffic on 3 January 1848 and for passengers on 4 April 1848.
25. Section 46 of the RCCA provided that if the railway crossed any turnpike road or highway (except where otherwise provided for by the Special Act) either the road should be carried over the railway or the railway carried over the road by means of a bridge. On this issue, Section 26 of the N&CRA made provision for certain roads to cross the railway on the level and one of these was No. 29. Section 27 of the N&CRA further provided that for the greater convenience and security of the public the railway company had to erect and permanently maintain either a station or lodge where the railway crossed any of the roads on the level.
26. Where a turnpike road or public carriage road crossed a railway on the level, Section 47 of the RCCA required the railway company to erect and maintain gates across the road and employ people to open and shut the gates. These gates needed to be of sufficient width to fence off the railway when the road was in use in order to prevent animals from straying onto the lines. This provision follows on from a gating requirement contained in Section 71 of the Highways Act 1835.
27. It is apparent that a hut was located at the crossing from at least 1869⁹ and it remained in place until 1969. Mr Day of NR does not consider that this structure would have constituted a lodge by reference to an example of the railway lodge at the nearby Dullingham level crossing. It would ordinarily be a place of residence, but he accepts that this may not necessarily be the case where staff lived nearby. There is evidence that this was applicable in relation to particular members of staff who were based at the crossing. It cannot be determined whether any manned presence was required 24 hours a day.
28. NR do not believe that the gating requirement in Section 47 of the RCCA could have been satisfied at the crossing given the extent of the gates required to enclose the railway lines. It is apparent that over time there was an expansion in the number of lines, and this followed on from the acquisition of additional land by the railway company. However, it cannot be determined how wide these gates would have needed to be when the railway was opened in 1848.
29. Notice of the proposal to apply to Parliament for an Act to authorise the building of the railway was followed by the book of reference and deposited plans being made available locally for public inspection. The process would

⁸ This corresponds with private road number 2 in the Wood Ditton Inclosure Award

⁹ As shown on the plan with an 1869 agreement involving the Great Eastern Railway Company and the Duke of Rutland

have included consultation with landowners and the surveyor of highways. This proposal would then be subjected to Parliamentary scrutiny. There is no suggestion that the information in the railway documents relating to plot 29 was the subject of the procedure for correction set out in Section 7 of the RCCA. This required giving notice to affected landowners and obtaining a certificate from two Justices of the Peace that the reference was made in error. In respect of Section 10 of the RCCA, this only outlines that true copies of the deposited documents shall be taken as evidence of its contents.

30. The information contained in the book of reference and shown on the deposited plans is supportive of the claimed route being a public road prior to the building of the railway. Given the level of scrutiny involved, I view these documents as carrying a significant amount of weight. At this point in time, it is not possible to conclude whether the railway company failed to comply with any requirement in respect of the provision of suitable gates or the required manning provision in relation to the gates. It is also unclear whether the hut provided was considered to constitute a lodge for the purpose of Section 27 of the N&CRA. However, any potential failure of the railway company to comply with a statutory requirement does not diminish the value of these railway documents in support of the claimed route being viewed as a pre-existing highway.

Railway Documents (1847-52)

31. There were subsequent proposals to extend the railway beyond Newmarket to Thetford and Bury St Edmunds/Ely. Two deposited plans show the claimed route and its continuation northwards annotated as "1a". Plot 1a continues southwards and includes plot 30 on the Newmarket and Chesterford Railway plan. Towards the southern end of the section shown is the annotation "*To Kirtling*", which is indicative of the road continuing southwards and ultimately serving as a link to the village of Kirtling. The cross-section specifies that this road would cross the railway on the level. Plot 1a is listed in the books of reference as a public road in the ownership of the surveyors of highways for the parish of Wood Ditton.
32. These proposals were ultimately included in two Acts of 1847. Sections 17¹⁰ and 37¹¹ of these Acts refer to the highways crossing the railway on the level, including 1a in Wood Ditton. Although both Acts passed through Parliament, neither of the railways were built. Nonetheless, these Acts and the corresponding documents are supportive of the evidence detailed above in respect of the Newmarket and Chesterford Railway. There is nothing to suggest that the information contained in the later documents was taken from the documents produced in connection with the N&CRA. Accordingly, they provide additional evidence in support of the claimed route being a vehicular highway.
33. The Newmarket Railway Company placed a notice in the London Gazette on 8 November 1851 advertising its intention to apply to Parliament to amend, consolidate, extend, enlarge or repeal some of the powers and provisions of the N&CRA and the two 1847 railway Acts. It specifically refers to alterations commencing at or near a certain highway known as Dog Kennel Lane and numbered 29 on the deposited plan for the Newmarket and Chesterford Railway. The deposited plan for the proposed Act shows Dog Kennel Lane

¹⁰ The Newmarket & Chesterford Railway (Thetford Extension) Railway Act 1847

¹¹ The Newmarket & Chesterford Railway (Bury Extension and Ely Branch) Railway Act 1847

extending over both sides of the crossing. This would be supportive of the claimed route also being viewed as a highway. However, as Dog kennel Lane was located outside of the limits of deviation for the railway it was not included in the book of reference. This will serve to limit the weight that can be attached to the notice and plan. The subsequent Newmarket Extension Act of 1852 served to extend the line eastwards to Bury St Edmunds.

Conveyance of 26 November 1849

34. The schedule within the conveyance, which involved the sale of land by the Duke of Rutland to the Newmarket Railway Company, states "*26 Private Road (by mistake described as public highway)*" and "*ditto*" for Road No. 29. There is additionally a reference in the conveyance to a highway (Old Ashley Road) having been stopped up by an Order of the Quarter Sessions. However, the diversion of this highway was the subject of litigation that continued into the summer of 1850. It is also worth noting that the claimed route is shown continuing to the south and north on the conveyance plan where the annotation "*From Wood Ditton*" and "*To Newmarket*" appears respectively. This is suggestive of the existence of a through route between these two settlements and this annotation additionally appears on the plan in relation to the Wood Ditton Road to the west.
35. The references in the schedule clearly indicate that the parties to the conveyance considered the entries for plots 26 and 29 in the book of reference for the Newmarket and Chesterford Railway to be incorrect. It is therefore evidence that is supportive of these two roads having private rather than public status. I do not consider that this document serves as a replacement for a certification under Section 7 of the RCCA, which could be used to correct errors in a book of reference. However, it is possible for errors to occur in relation to a book of reference and for these to not be corrected at the time.
36. It may be expected that these parties would have been aware of the status of the roads over the land to be conveyed with due care being taken regarding statements contained in the conveyance. Nonetheless, it was a private document involving the parties concerned and completed after the railway was opened. It cannot in my view be afforded the same level of weight as the railway documents, which were subjected to scrutiny by interested parties and Parliament. I have also noted the annotation on the map, which provides support for the claimed route being part of a route between Wood Ditton and Newmarket. Overall, the respective documents need to be considered in light of the remainder of the evidence.

Substitute Road

37. NR asserts that the railway company used the powers contained in Section 16 of the RCCA to provide a substitute road to replace the roads numbered 26 and 29 in the book of reference for the Newmarket and Chesterford Railway irrespective of their status. In essence, this relates to the diversion of these roads to the northern side of the railway line between Park Lane and the Wood Ditton Road. Additionally, NR submits that the subsequent provision of a level crossing at this location was in connection with an occupational road.

38. Section 16 of the RCCA states:

"Subject to the provisions and restrictions in this and the special Act, and any Act incorporated therewith, it shall be lawful for the company, for the purpose of constructing the railway, or the accommodation works connected therewith, herein-after mentioned, to execute any of the following works; (that is to say,)

They may make or construct in, upon, across, under, or over any lands, or any streets, hills, valleys, roads, railroads, or tramroads, rivers, canals, brooks, streams, or other waters, within the lands described in the said plans, or mentioned in the said books of reference or any correction thereof, such temporary or permanent inclined planes, tunnels, embankments, aqueducts, bridges, roads, ways, passages, conduits, drains, piers, arches, cuttings, and fences, as they think proper;

They may alter the course of any rivers not navigable, brooks, streams, or watercourses, and of any branches of navigable rivers, such branches not being themselves navigable, within such lands, for the purpose of constructing and maintaining tunnels, bridges, passages, or other works over or under the same, and divert or alter, as well temporarily as permanently, the course of any such rivers or streams of water, roads, streets, or ways, or raise or sink the level or any such rivers or streams, roads, streets, or ways, in order the more conveniently to carry the same over or under or by the side of the railway, as they may think proper;...".

39. The post railway mapping shows that the claimed route physically remained in place and continued to link with other roads to the north and south of the railway. In contrast, Road 26 has ceased to exist, and a new road came into existence on the northern side of the railway. There is nonetheless uncertainty regarding when this change happened.
40. A map produced for an inquiry of 1850 held under the Board of Health Act 1848¹² does not show any sign of the substitute road. The map shows a proportion of the railway and the station which indicates that it was produced at some stage near to, or following, the completion of the railway.
41. The deposited map of late 1851, in relation to the Newmarket Extension Act of 1952, appears to show the physical existence of a section of road on the northern side of the railway leading out of Dog Kennel Lane. This indicates that at least a section of the alternative road was completed by the end of 1851. There is no indication of the corresponding section of Road 26. Nonetheless, it is noteworthy that the 1851 notice refers to Road 29 as a highway and makes no reference to the diversion of this road.
42. There is a dashed line on the 1849 conveyance plan, but this feature does not match with the alignment of the section of road shown on the northern side of the railway on the 1851 plan. This may be indicative of the route of a proposed road or a temporary road at the time. There is no apparent reference in the conveyance to the diversion of Roads 26 or 29.
43. A notice in relation to the sale of land by William Parr Isaacson in the Bury Free Press on 12 July 1884 refers to the substitute road as the "*New Road adjoining the Great Eastern railway*". However, this phrase is open to different potential interpretations. It also appears from the railway map of late 1851 that a section of road existed on the northern side of the railway by that time.

¹² This Act enabled local boards to be set up whose responsibilities encompassed highways.

44. I noted some inconsistencies in the evidence of Mr Day and the submissions of NR regarding by what date the substitute road needed to be in place. Mr Day did state during cross-examination that it would need to have been in place by the opening of the railway and this appears to be consistent with the initial part of Section 16. Although far from conclusive, the map evidence does not indicate that this was the case and some of the land crossed by the substitute road was not acquired until after the completion of the railway. This means there will be doubts regarding whether the works in relation to the substitute road were undertaken under Section 16 "*for the purpose of constructing the railway*" or even "*the accommodation works connected therewith*".
45. NR draws attention to other statutory provisions that could potentially be applicable, namely Sections 53 and 56 of the RCCA, whereby a replacement road could be provided for a road interfered with by works in connection with the construction of the railway. However, NR relies on Section 16 in relation to the substitute road argument. Whilst there is reference in Section 25 of the N&CRA to a seven-year period for the completion of works, these specifically related to the construction of the railway. It is not clear to me whether the construction of a substitute road would fall under Section 25.
46. The second limb arising from the substitute road argument is that a private crossing followed on from the provision of the road on the northern side of the railway. It is asserted by NR that the works in connection with the crossing, such as the provision of gates, would have been undertaken under section 68 of the RCCA. The railway company were not compelled to undertake any additional accommodation works after the prescribed period or, where there was no such period, after 5 years from the opening of the railway by virtue of Section 73 of the RCCA.
47. It is not disputed that there was a power under Section 16 of the RCCA to divert roads. The map evidence reveals that a road on the northern side of the railway was physically constructed and Road 26 ceased to subsequently exist. In light of the map evidence, I find it more likely that this occurred following the completion of the railway. This could suggest that the alteration was not compliant with Section 16. Nonetheless, the lack of documentation means that it cannot be determined what actually happened at the time in relation to the claimed route, which has continued to physically exist. It can only be concluded that it is possible that public rights over both roads were diverted with an occupational crossing retained. Due to the lack of available contemporaneous evidence, this matter needs to be considered in light of the evidence following the construction of the substitute road.

Railway Documents 1869-79

48. An 1869 agreement involving the Great Eastern Railway Company and the Duke of Rutland related to the supply of water to two cottages. The plan attached contains the annotation "*Occupational Crossing*" in connection with the claimed route. This could provide support for the second limb arising out of the substitute road argument. However, in the absence of any further information in this document, I give limited weight to this plan.
49. In November 1878, the Great Eastern Railway gave notice in the local press and the London Gazette of its intention to divert an occupation road. This is described in the latter publication as the "*diversion or stopping up of an occupation road in the parish of Wood Ditton ... now crossing the railway on the level ... and the extinction of any right of way over the railway at the*

present crossing". The Great Eastern Railway Act of 1879 included during the preparation stage a plan which states "*occupational level crossing to be stopped up*". For whatever reason this proposal was not included in the Act.

50. Although the crossing is described as comprising of an occupational road, the latter part of the extract refers to the extinguishment of any right of way over the crossing. This leaves open the possibility that a public right of way could have existed. Clearly this proposal was not taken forward.

Newspaper Reports

51. Firstly, there are some reports which deal with locations or events that were served by the claimed route. It was reported in the Bury and Norwich Post and Suffolk Herald on 9 February 1869 that Lord Manners had made provision for land to be laid out as allotments for use by residents of the town. An article in this newspaper of 10 November 1874 refers to the crossing being the only road to the allotments.
52. The Duke of Rutland granted a long lease in 1884 for land to the south of the crossing to be used as a new recreation ground and this became the site of Newmarket Town Football Club. NTC draws attention to examples of large events which took place at the ground. Notice was given in the Newmarket Journal on 7 March 1885 of an athletic club event on the Easter bank holiday and it was stated that entrance could be gained from the railway crossing via Park Lane and from Cheveley Road. It was subsequently reported that close to a thousand people attended the event. Another athletic event is reported as taking place on 26 April 1886.
53. The Bury Free Press reported that a horticultural show was held in July 1895 and this included athletic sports, musical performances and fireworks and the event is stated to have attracted around 6000 visitors. Further, two effective arches were erected at the railway crossing. The Bury and Norwich Post reported on 11 July 1899 that the annual horticultural show had taken place at the sports ground. The Newmarket Volunteer Fire Brigade Competition was reported in the local press in 19 July 1890, where it is recorded that the procession from the town used the crossing to reach the ground. There are other newspaper reports and notices that refer to the railway crossing as a point of reference.
54. Some additional articles focus on accidents or safety at the crossing. It was reported in the local press on 24 August 1878 that an inquest had been held into the accidental death of a person using the crossing when it was blocked by a goods train. One of the people who gave evidence was John Amos who worked for the railway company and it is evident that his duties included acting as a gate keeper at the crossing. The jury asked that the directors of the company be informed of the danger of the crossing as this was the second fatal accident within a short time. They were also of the view that if a second man was stationed there it would prevent accidents from occurring. NTC draws attention to there being no mention made in the reports to the person trespassing on the line.
55. An article in the Cambridge Daily News of 19 June 1889 reported on an alteration to the sidings at the top of Park Lane and advised that people would need to exercise caution when crossing the lines from Park Lane.

56. The Newmarket Journal of 2 June 1923 reported on an inquest involving a fatality at the crossing. Reference is made by NTC to the recorded presence of senior officials of the railway company at the inquest. It is reported that the station master had stated that "*the Railway Co. usually had a man at the level crossing practically at all time, as a means of protection to the public crossing over... Many people used the crossing, but there had never before been a hitch in the 23 years the witness had been here*". The person who passed away used the crossing to get to the allotments.
57. The newspaper reports provide contemporaneous evidence of widespread public use and an acceptance that the crossing was used by the public during the latter part of the nineteenth century and early twentieth century. They are wholly supportive of the route being a highway.

1960s Correspondence

58. Mr Day has provided details of an internal letter of 24 October 1968 from the Divisional Manager to the District Estate Surveyor within British Railways. This outlined that changes to signalling at Newmarket would lead to the removal of the signal box, conversion of double lines to a single line for trains in both directions and the removal of certain redundant sidings. It stated that the time was right to discuss with the local authorities and authorised users the withdrawal of the crossing keeper.
59. A letter of 12 November 1968 from the British Railways Eastern Region to Newmarket Urban District Council¹³ referred to some of the historical evidence outlined above and asked whether in light of this evidence it was agreed that there was no need for an application under Section 108 of the Highways Act 1959 to stop up the level crossing for vehicular traffic. The letter says that there were vehicular gates on each side of the crossing with the southern one kept locked unless vehicular access was required. It is stated that in normal circumstances the southern gate only has to be opened once a week to allow for the passage of the refuse cart. There were also wicket gates for pedestrians and cyclists on each side of the crossing. The letter outlines that gates and fencing would be provided at the crossing along with appropriate warning notices in light of the recognised use by pedestrians and cyclists.
60. On the matter of the gates, Mr Day has provided an extract from a letter of 14 December 1954 involving British Railways. This is quoted as stating that the hand gates are "*not locked at any time permitting the free passage of pedestrians, bicycles, motor bicycles and perambulators*". In contrast, reference is made to the locking of a vehicular gate.
61. The Urban District Council's response on 13 December 1968 was that having seen a copy of the Wood Ditton Inclosure Award it was not thought that such an application was necessary, nor was it felt that any occupational rights existed over the crossing. It was stated that the chairman of the relevant committee would be recommending that the proposals are agreed.
62. A letter of 17 July 1969 from British Railways to the urban and rural district councils outlined that the works in connection with the crossing were nearly complete and it was proposed to withdraw attendance from 14:00 on 25 July when the level crossing hut would be demolished to provide greater visibility.

¹³ The letter states that other local authorities were also to be consulted on this matter

63. The views expressed regarding whether public vehicular rights were considered to exist would not impact upon any unrecorded historical rights. This would also apply in relation to searches undertaken in more recent times. The correspondence is supportive of ongoing use of the crossing and a crossing attendant being in place until 1969. It is evident that at the time British Railways felt it appropriate to make provision for the continued use by pedestrians and cyclists. However, it is also apparent that some control was exercised by the middle of the twentieth century in relation to vehicular use of the crossing.

Witness Statements

64. Thirty-two people have provided a witness statement in support of use of the claimed route and other matters relating to the level crossing and this locality. Six people gave oral evidence at the inquiry regarding use of the route. The evidence of use of the route in more recent years is not disputed. There is evidence of continued use since the works undertaken in the late 1960s and this is highlighted further by more recent user surveys. It is apparent from the user evidence that there has been continued use of the claimed route to access the allotments and for sporting events.

65. The witness statements provide personal evidence of use, dating back to the 1930s, and I place significant reliance on this evidence. I consider that much less weight can be placed on the indirect evidence of use by other people. It is apparent that the stated use was for a variety of purposes involving locations on both sides of the railway and I was able to view a number of these during my site visits.

66. The users have also provided evidence of railway staff based at the crossing ensuring that people did not cross when it was unsafe to do so either due to approaching trains or the shunting and moving of trains. I place particular reliance on the evidence of Mrs Goodchild whose father acted as a crossing keeper and Mr Cummins who was employed by the railway company. In addition to the presence of pedestrian and vehicular gates on either of the railway, there was a lampstand in the middle of the crossing that would have assisted people at night irrespective of the purpose of their use.

Manning

67. It is evident that Mr Amos worked for the railway company from at least 1867¹⁴ until 1891 and there are references in the documents to him being a gate keeper at the crossing. It is also apparent that there was a hut at the crossing until it was removed in 1969. Details have been provided of other people who worked at the crossing during the twentieth century and I have no reason to doubt that there was a consistent staffing presence at the crossing prior to 1969 and one of the functions of these railway employees was to ensure safety at the crossing.

68. NR have provided some examples of manned private accommodation crossings in support of manning arrangements not necessarily being indicative of public status. Some of the examples are linked to a conveyance or agreement, but others are not. Although the previous manning of the crossing by itself provides no confirmation of status, it needs to be considered in the context of the documentary and user evidence outlined above. In light of this evidence,

¹⁴ This is stated to be the case on his daughter's birth certificate

the manning of the crossing by railway staff could provide some support for the route having public status.

Conclusions

69. The early evidence provides some support for the claimed route being part of the local road network. However, I have found that the weight of this evidence by itself is not sufficient for me to conclude on balance that the route was a highway prior to inclosure. The inclosure award only made provision for the route to be a private road.
70. I place significant weight on the 1845 railway documents, which are supportive of the route being a highway prior to the construction of the railway. This could either be reflective of the route being a historical highway before inclosure or dedicated as a highway following the inclosure process. It is clearly supportive of the claimed route being viewed as a public road. This evidence is bolstered by the documents relating to other railway proposals that passed through the Parliamentary process. I do not find that the 1849 conveyance, 1869 agreement and 1878 notice are of sufficient evidential weight to outweigh the earlier railway documents.
71. It is apparent that an alternative road was physically created on the northern side of the railway. However, it cannot be determined how this substitute road impacted on the public rights acknowledged in the railway documents in relation to the claimed route. In contrast to Road 26, the claimed route has continued to exist as a physical feature. The additional pieces of documentary evidence and the user evidence are clearly supportive of significant public use which encompassed most of the period after the construction of the railway. This evidence is not indicative of the removal of public rights from the crossing. Overall, this evidence is consistent with an earlier dedication of a highway and supportive of the claimed route being viewed as a highway.
72. I find on balance that the evidence as a whole is supportive of the claimed route having been dedicated as a highway prior to the construction of the railway. This means there is no need for me to move on to consider whether there has been a more recent dedication of a right of way under common law or statute. Nor do I need to address the submissions made in relation to criminality and statutory incompatibility.
73. The railway documents are supportive of the claimed route being a historical public road rather than a lesser class of highway. The additional evidence prior to the middle of the twentieth century would not be inconsistent with the existence of a vehicular highway. This includes the evidence of widespread use by pedestrians. It is apparent that the action taken in 1969 meant the limited use by vehicles by that time could no longer happen. However, this would not impact upon the historical rights over the route. Therefore, I conclude on the balance of probabilities that a restricted byway has been shown to subsist.
74. NTC submits that the restricted byway should have a recorded width of 30 feet in light of the inclosure award. Whilst the award only made provision for a private road, it is indicative of the claimed route historically having a width of 30 feet. In the absence of any other evidence on this matter, I conclude on balance that the claimed route should have a recorded width of 30 feet (9 metres).

75. There is nothing to suggest that there were any gates across the route prior to the construction of the railway. Nor is it possible to determine what structures were initially put in place in relation to the railway. It cannot necessarily be concluded that the gates noted as being present during a proportion of the twentieth century were the same as those originally in place at the crossing. This means it is unlikely that gates were in place when the route was dedicated and there is no information regarding the dimensions of any authorised gates following on from the opening of the railway. Whilst there is clearly a need to make provision for the safe passage of the public, it seems to me that the gating provision at the crossing is something best resolved by the Council in discussion with NR.

Overall Conclusion

76. Having regard to these and all other matters raised at the inquiry and in the written representations I conclude that the Order should be confirmed subject to modifications.

Formal Decision

77. I propose to confirm the Order subject to the following modifications:

- Delete all references to "*footpath*" and insert "*restricted byway*".
- Delete the final three lines of Part II of the Order Schedule and insert "*Width: 30 feet (9 metres)*".
- Include the notation for a restricted byway on the Order Map rather than the notation for a footpath and amend the map key accordingly.

78. Since the confirmed Order would show as a highway of one description a way which is shown in the Order as a highway of another description I am required by virtue of Paragraph 8(2) of Schedule 15 to the 1981 Act to give notice of the proposal to modify the Order and to give an opportunity for objections and representations to be made to the proposed modifications. A letter will be sent to interested persons about the advertisement procedure.

Mark Yates

Inspector

APPEARANCES

For NTC:

Ms M. Golden

Counsel appearing for NTC

She called:

Mr J. Bursford

Mrs P. Collins

Mrs V. Goodchild

Mrs C. Camps

Dr R. Wood

Mrs R. Emrys-Roberts

Additional Supporters:

Mr M. Smy

Applicant

Mrs J. Smith

Mr C. O'Neil

For NR:

Mr J. Lopez

Counsel appearing for NR

He called:

Mr S. Day

Liability Negotiations Manager

Mr J. Prest

Route Level Crossing Manager

Mr J. Greenwood

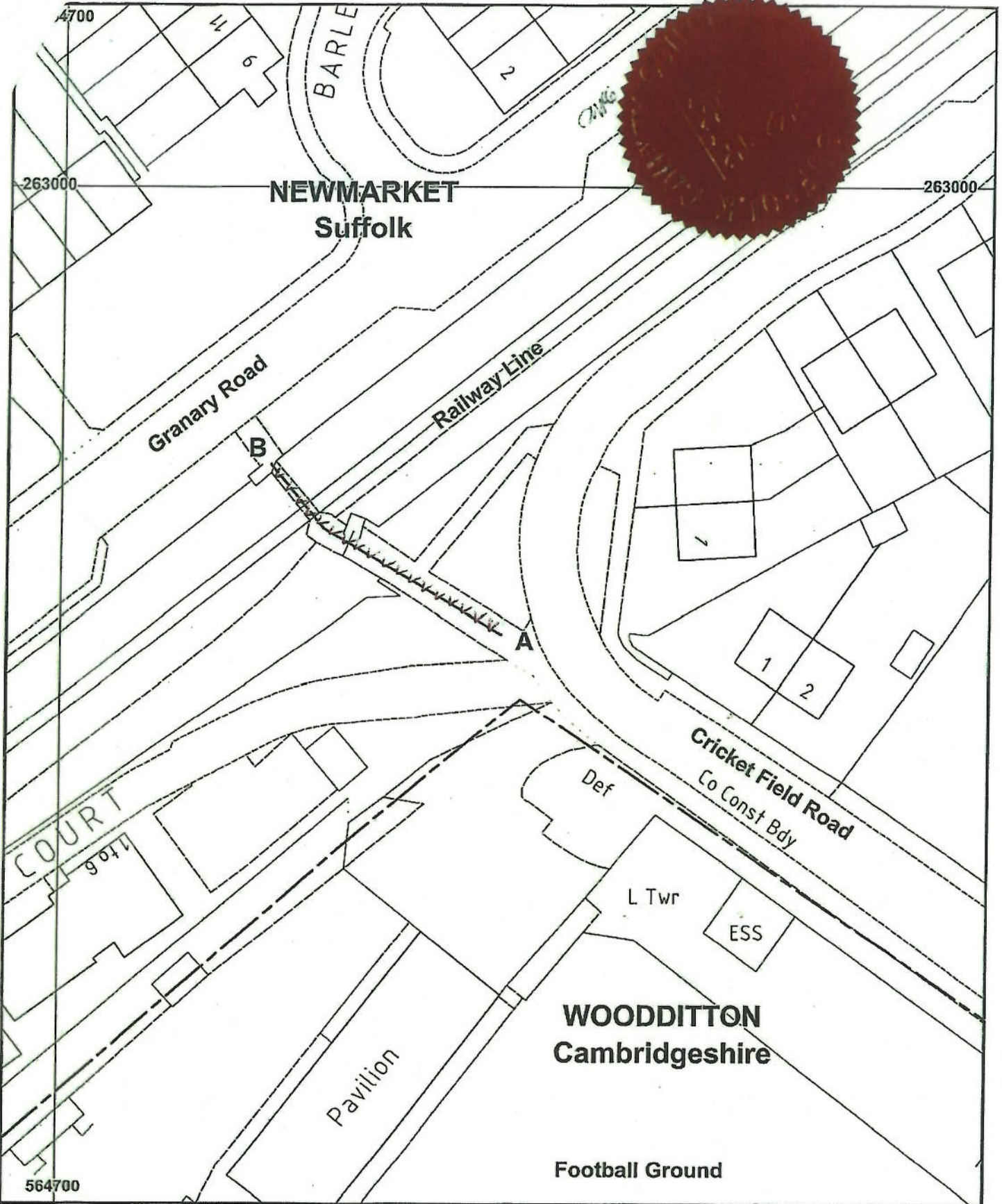
Head of Liability Negotiation

DOCUMENTS TENDERED AT THE INQUIRY

1. Extracts from the plans and books of reference for railway schemes of 1847
2. Great Eastern Railway Act of 1879 (Bill)
3. Rebuttal statement of Mr Smy and copies of cases cited
4. Birth certificate for Elizabeth Amos
5. Two reports to the General Board of Health of 1850
6. Timeline for the closure of Old Ashley Road
7. Documents relating to the stopping up of Old Ashley Road
8. Annotated 1846 railway plan
9. Planning Inspectorate Consistency Guidelines
10. NR's statement of response to the claim for a restricted byway
11. Plans showing locations of sites in the locality
12. Opening statement for NTC
13. Presentation notes of Mr Smy
14. Inquiry note from NR regarding signage
15. Inquiry note from NR on flooding
16. Email to the inquiry on 16 October 2020 from Mr Edwards
17. Youtube video link

- 18.Public Health Act 1848
- 19.NR note on the 1849 conveyance involving the Duke of Rutland
- 20.NR note on goods yard, station and depot history
- 21.NR note involving level crossing lodges
- 22.NR note regarding an example of a road diversion
- 23.NR note on 'Do Not Trespass' signage
- 24.NR note on 2020 user census
- 25.Copies of Inspectors Decisions for cases FPS/Z4310/14A/2 and FPS/B2002/7/1&2
- 26.Plans showing present and previous railway land ownership around the level crossing
- 27.Eastern Counties Railway (Brandon and Peterborough Extension) Act 1844 and associated documents
- 28.NR note regarding private attended vehicular crossings
- 29.NR note on ALCRM rankings
- 30.NR note regarding the date of the sale of the Newmarket old station site
- 31.Annotated versions of the 1775 Marquis of Granby estate plan
- 32.Article of 12 July 1884 from the Bury Free Press
- 33.Documents in relation to William Parr Isaacson
- 34.Photographs of the Lady Anne Crossing
- 35.Additional documents in relation to William Parr Isaacson
- 36.Closing submissions on behalf of NR and copies of authorities cited
- 37.Closing submissions on behalf of NTC and copies of authorities cited

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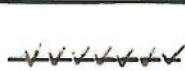


PROPOSED PUBLIC FOOTPATH - CRICKET FIELD RD TO GRANARY RD, NEWMARKET

Restricted Byways



Director of Growth, Highways and Infrastructure,
Endeavour House, 8 Russell Road, Ipswich, Suffolk. IP1 2BX



Restricted Byways
Proposed Public Footpath



Parish and County Boundary

Scale 1:500



Ordnance Survey MasterMap

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Filed at: