

**WILDLIFE AND COUNTRYSIDE ACT 1981**

**The Hampshire (Test Valley Borough No. 63)  
(Parish of East Dean)  
Definitive Map Modification Order 2017**

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**PROOF OF EVIDENCE**

**OF**

**DAMIAN HAJNUS, LIABILITY NEGOTIATIONS MANAGER**

**ON BEHALF OF**

**NETWORK RAIL INFRASTRUCTURE LIMITED**

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**PINS REFERENCE: ROW/3181878**

**I, Damian Hajnus, Liability Negotiations Manager for the Wessex Route, and Network Rail Infrastructure Limited (“Network Rail”), Basingstoke Campus, Gresley Road, Basingstoke, RG21 4 FS, will say as follows:**

**1. Introduction**

1.1. I have been employed by Network Rail from September 2014 as a Liability Negotiations Adviser and from January 2017 as Liability Negotiations Manager.

1.2. My role is to advise Network Rail on statutory and contractual responsibilities concerning its property and infrastructure. This includes advice on legal matters pertaining to level crossings, including, where appropriate, challenging claims and representing Network Rail in hearings, committees and inquiries. I am also responsible to the legal processes leading to closure of level crossings or bridges.

**2. Scope of Evidence**

2.1. My evidence addresses the relevant historic and statutory context of the railway at the location in question and will refer to the Special Act of Parliament that authorised the construction of the railway line, including its Deposited Plan and the Book of Reference. It will also address the common law presumption of dedication as a legal basis for the Hampshire (Test Valley Borough No. 63) (Parish of East Dean) Definitive Map Modification Order 2017 (the Order), as well as the extinguishment of public rights of way by virtue of s.16 of the Defence of Realm Act 1842.

2.2. My evidence does not seek to rehearse matters already set out in Network Rail’s Statement of Case, whether regarding the way in which Hampshire County Council (HCC) has historically approached making the order, its treatment of historic documentary evidence, and the abstract mentions made of dedication (but which remain in the order, and upon which Network Rail has unsuccessfully sought speedy clarification from HCC upon: see, for example: HCC’s Statement of Case at paragraphs 2.2 – 2.5). Inevitably there is however some overlay between Network Rail’s Statement of Case and this Proof of Evidence. My evidence also does not seek to repeat that of my colleagues.

**3. History of the Redbridge Junction to Salisbury Tunnel Junction (“RTJ2”) Railway Line**

**3.1. Parliamentary Records**

3.1.1. For Network Rail’s purposes, the relevant section of the Order route is section N-(R)-O which passes over the RTJ2 railway line at approximately 86 miles and 40 chains, the original construction of which was authorised by the Salisbury Branch Railway Act 1844 (“the 1844 Act”) [**Appendix A**].

3.1.2. Prior to Royal Assent being given to the 1844 Act a comprehensive survey of land was undertaken along the course of the proposed railway line by the predecessor railway company to Network Rail. The underlying rationale was to identify and record not only the

physical layout and features of the land, its ownership and occupation status for the purposes of future acquisition, but also any relevant third party rights potentially binding the land (including public highways or occupation roads/paths, etc.).

- 3.1.3. The outcome of the survey was recorded on the Deposited Plan (“the Plan”) [**Appendix A1**] that showed the intended course of the proposed railway line (see: centre line; a thick, continuous, black line) with two broken lines running parallel to it. These broken lines denote the “*Limit of Deviation*”, being a boundary within which the railway company is authorised to construct the railway line.
- 3.1.4. The Plan showed the land within the limit of deviation as numbered plots with a separate numbering for each Parish. This was accompanied by a Book of Reference [**Appendix A2**] that contained the details pertaining to land shown on the Plan. It comprised a description of an enclosure (e.g. *Arable Field, Road, Public Footpath*) in relation to its location within a Parish and listed the names of owners, occupiers and lessees. In a case of a public highway the owner would typically be described as “*Surveyor of Highways*”.
- 3.1.5. The Order route (N-(R)-O) that affects the railway did not exist when the railway was constructed. It would have fallen between enclosures 64a and 64b within the Parish of East Dean that are both described in the Book of Reference as “*Arable*”. Enclosure 64a is described as being owned by Sir John Barker Mill Baronet, and occupied by Thomas Edney. Enclosure 64b is described as being owned by Thomas Chamberlayne, and occupied by Thomas Sleats.
- 3.1.6. There is no reference given under either enclosure that notes any public rights having being scheduled or that notes ownership, for example, of a Surveyor of Highways or of Inhabitants of the East Dean Parish.
- 3.1.7. Both the Plan and the Book of Reference were prepared with the intention of being later appended to the 1844 Act. It was therefore of paramount importance that both the survey and the information contained in the Book of Reference was a wholly accurate reflection of the status quo.
- 3.1.8. This was of particular relevance due to the fact that the authority granted to the railway company would take a form of an Act of Parliament and would bestow upon the railway company a wide range of powers to, amongst other matters, take lands, interfere with or to modify the course of roads or watercourses (note, s.104 of the 1844 Act that grants the power to make the railway and ancillary works).
- 3.1.9. The proviso to granting such a wide powers was that the lands affected by construction of the railway would be accommodated by the railway company. If, therefore, any land to be intersected by the railway was subject to any third party or public rights, such information was of significance since it would necessitate adequate provisions being made, whether by accommodating lands severed by the construction of the railway or by ensuring continuity of public highways (e.g. by a bridge, tunnel or a level crossing).
- 3.1.10. To this end, for example, s.120 of the 1844 Act establishes a general principle that roads are not to be crossed on the level and that certain types of public roads shall be carried over the railway by means of a bridge. Whereas, by exception, s.121 authorises a number of

expressly mentioned roads to be crossed on the level. Also, with regards to footways s.135 provides that the Company is to make convenient ascents and descents for over the footway crossing the railway. Section 136 deals with accommodation works

- 3.1.11. The Plan and Book of Reference would also be relied on by the railway company in negotiations for acquisition of land (note, s.12 of the 1844 Act, providing the company the power to purchase lands, limited to 3 years by operation of s.84.).
- 3.1.12. These would most likely be prepared by a surveyor with a sufficient degree of care and skill i.e. including site visits and local enquiries to verify findings.
- 3.1.13. Both the Plan and Book of reference would also be subject to local scrutiny and, therefore, open to challenge - s.95 refers to depositing plans and sections with the clerks of the peace of the counties through which the railway was intended to pass.

### 3.2. **Plans:**

- 3.2.1. I do not repeat here the broad observation made regarding the deficiency in information provided in terms of the various maps and plans ‘evidence’ apparently relied upon by HCC in this matter. Network Rail naturally reserves the right to further scrutinise those plans and maps which are not properly scaled, clearly coloured, dated and/or are without adequate legend or key to enable the reader to adequately denote the status and history of any way shown. Inevitably, when considering the corroborative value of such ‘evidence’ it is paramount for the decision maker to afford an appropriate level of scrutiny to any given map or plan.
- 3.2.2. Similarly, in order to avoid unnecessary repetition I do not, after each observation recorded below (or in Network Rail’s Statement of Case), labour the significance of what is and is not shown on a particular map or plan, and what one would reasonably expect to be shown were a public right of way to have historically existed. There is no need to do so for the Inspector will be familiar with the circumstances in which one would reasonably expect a right of way to be shown and the reliable inference that may safely be drawn where it is not. Network Rail invites for these necessary inferences to be drawn in the way outlined in its Statement of Case with regard to Order route (N-(R)-O).

#### Railway Line Plans

- 3.2.3. Network Rail’s predecessor Railway Company carried out a detailed survey of its land in 1867 [the 1867 Plan – **Appendix B**]. There is nothing to suggest that this survey was not accurately carried out. It has corresponding features with the Deposited Plan and shows both enclosures in question (64a and 64b) separated by a straight continuous boundary line. There is no sign of a footpath crossing in either enclosure.

#### Ordnance Survey Maps

- 3.2.4. OS County Series Maps 1<sup>st</sup> Edition from 1876 [**Appendix C**] shows the railway line already in situ. The original enclosures 64a and 64b would be located on parcels of land marked on the 1876 map as 88, 89 (corresponding approximately with 64b on the 1867

plan) and part of 80 where both 88 and 89 are separated by a boundary from parcel 80. No paths or other features crossing the railway can be seen on the plan.

- 3.2.5. OS County Series Maps 2<sup>nd</sup> Edition from 1895 [**Appendix C1**], where the Order route N-(R)-O is concerned, corresponds with its predecessor 1876 map in what it positively shows. The parcels are given different numbers to those on the 1876 map but their geographical extent is probably the same and, again, parcels 79 and 78 are shown as separated from 83 and 84 by a continuous, black and straight boundary line. There is no path shown as crossing the railway at that point.

#### 1929 Handover Map

- 3.2.6. This map [**Appendix C2**] shows in sufficient detail the extent of publicly maintainable highways in East Dean. It does not show the Order route N-(R)-O as a public highway of any denomination. It shows, comparatively with the OS Map from 1908, a footpath approaching the railway from the south.
- 3.2.7. The legend accompanying the map distinguishes between public footpaths maintained by the District Council, Parish Council and not repaired as being separately marked on the map. The Order route N-(R)-O does not fall in any of these categories and is not marked as a public highway.

#### Conveyances of land

- 3.2.8. The land within the enclosure marked 64b on the Deposited Plan was acquired from Sir John Barker Mill under conveyance dated 13<sup>th</sup> December 1845 [**Appendix D**]. Under the terms of this conveyance, the Company had an obligation to make and maintain a crossing on the level in either the field numbered 66 or the field numbered 54. No reference, however, can be found to any public rights binding the land or the need to provide crossing facilities for such rights. The conveyance plan shows features similar to those shown on the Deposited Plan or the plans and maps referred to in section 3 above. There is a straight black and continuous line separating enclosure 64b from enclosure 64a, to the east.
- 3.2.9. Enclosure 64a was purchased from Thomas Chamberlayne Esq and Amelia his Wife and their Trustees under the terms of conveyance dated 1<sup>st</sup> August 1849 [**Appendix D1**]. Similarly to 3.3.1 above, this conveyance does not refer to any crossings on the level and no paths are referred to in the body nor shown on the plan.

## **4. Implied Dedication at Common Law**

- 4.1. English common law was prepared to imply dedication from long usage of a way as of right. It was originally based upon a presumed grant for the public that was, supposedly, made before 1189. In the alternative, proof of enjoyment of a public right of way since living memory was accepted as giving rise to presumption that a right of way existed before 1189. Since such constructions brought about the inevitable evidential difficulties, the doctrine of Lost Modern Grant (“LMG”) began to be employed to infer a lawful origin from evidence of a long user as of right.

- 4.2. Whilst the implied dedication under common law does not require a prescribed minimum period of user, the user nonetheless must be sufficient in order to infer dedication, and it must be as of right. Since common law dedication, similarly to LMG, is prefaced upon a legal fiction, the evidence needs to be assessed separately from the underlying purpose of establishing dedication. Instead the overarching objective should be, objectively, to ascertain the correct legal status of a way. Such approach to evidence was recommended by Lord Hoffman in R. (Godmanchester Town Council) v Environment Secretary [2007]<sup>i</sup>:

*(...) “dedication is not usually the most likely explanation for long user by the public, any more than a lost modern grant is the most likely explanation for long user of a private right of way (...) It is however hard to believe that many of the cartways, bridle paths and footpaths in rural areas owe their origin to a conscious act of dedication. Tolerance, good nature, ignorance or inertia on the part of landowners over many years are more likely explanations”.*

- 4.3. It is noted that HCC’s Decision Report, dated 16 July 2014 (“the Report”) deals briefly with implied dedication at common law only at paragraph 2.2. This is possibly due to the fact that the underlying legal premise (and an instance necessitating definitive map modification) for recommending that the Order be made was the allegedly non-permanent or improper stopping up in 1939. Such an approach is indeed reflected in 1.1 of the Report. Irrespective of this however, the Report continues to place considerable reliance on historic evidence, especially on maps and plans, of which only 3 out of 10 show a footpath of some description, without asking the question of fundamental importance – could dedication be properly inferred from all the evidence and, consequently, what was the status of the Order route N-(R)-O?
- 4.4. HCC’s Statement of Case (HSC) notably overreaches the Report and asserts<sup>ii</sup> that: *on the balance of probabilities, (...) there was a common law dedication of full public footpath and public vehicular rights over a number of routes at some time during the eighteenth and/or nineteenth centuries.*
- 4.5. This assertion however defies the absence of any evidence of common law dedication of the Order route N-(R)-O, specifically, during the eighteenth century. The inference seems to be that dedication might possibly have occurred at some point between the nineteenth and twentieth century (if at some point between 1856 and 1939). Notably, this is not in fact claimed. Indeed it should be discounted not least for the reasons given below.
- 4.6. In chronological order, the first key item of evidence on which HCC appears to found the claim for implied dedication at common law is The Southampton, Bristol and South Wales Railway Act 1856 (“the 1856 Act”) which is also relied on in that capacity by the Report.
- 4.6.1. The HSC states, at section 3.7.10, with regards to the 1856 Act: *“The Definitive Footpath emerges just to the west of a field with a plot number ‘34’. The book of reference for this plan gives plot 34 as ‘Arable field and footpath’. South of the proposed*

*railway line, the field has the plot number '33', given in the book of reference as 'Arable field and public footpath'. It is not known why the entry for plot 34 does not include the word 'public' but, in any case, Sir John Barker Mill is given as the owner of both plots, with James Lavington occupying both, so it is likely that both parts of the footpath were used by the public. Given that the railway company would have to deal with all potential crossings of its railway line, it would need to know the status of those routes falling into this category. The book of reference indicates that there was a footpath continuing from field number 34 south to field number 33 and that it had the reputation of being a footpath for public use. It can be said that, in 1856, there was an existing public footpath approximately along the eastern boundaries of fields 34 and 33, corresponding to Order route N-O."*

- 4.6.2. It will be noted that no rationale or explanation is given as for why plot 34 should refer to "public". By reference to plots 33 and 34 no indication is given as for why it would be probable that both parts of the footpath had been in public use. Nor is the "reputation" for the public use of the footpath at all persuasively explained.
- 4.6.3. The deposited plan of the 1856 Act does not show any public path as *emerging just to the west of a field with a plot number '34'* or, in fact, crossing the railway at the location in question nor does it describe one in its book of reference. The latter also contains a notable and apparently purposeful distinction between a "public footpath" on one side of the railway line and a "footpath" on the other.
- 4.6.4. An inference drawn from such evidence as to the public status of the entire path or its *reputation* as such is speculative and does not find any support in evidence.
- 4.7. The second critical piece of evidence, referred to<sup>iii</sup> as the *deciding factor* in ascertaining, *on balance of probabilities*, the true status of the path were the minutes from 1937 of the Rural District Council which describe a *public footpath*.
- 4.8. Network Rail has previously drawn the Inspector's attention in its Statement of Case<sup>iv</sup> to the striking fact that there is no map or plan accompanying the minutes that would allow determining the exact course and location of the alleged path. Furthermore, Network Rail does not have any record of a level crossing at that location.
- 4.9. For the purposes of implying dedication at common law the user needs to be as of right i.e. without secrecy, permission or force. *Vi* – 'force', does not only relate to, in such context, the public overcoming some form of physical resistance by the landowner. It also relates to instances of the public using a way notwithstanding the landowner having demonstrated a lack of intention to dedicate (e.g. by the erection of signage).
- 4.10. Such lack of intention or contrary intention of course needs to be adequately demonstrated. The landowner cannot escape the effect of implied dedication simply "by saying that locked in his own mind he had no intention to dedicate"<sup>v</sup>.
- 4.11. In this context, it is worth noting that Network Rail predecessors would typically affix anti-trespass signage at stations, crossings and gates. Notices reading "No trespass" or "Passengers must not cross the line" would ordinarily be displayed at the platform ends

since at least 1949, consistently with the coming into effect of the 1949 Act<sup>vi</sup>.

- 4.12. The latter wording can be seen at both platforms at West Dean station and although these do not mention expressly the word “trespass” their meaning is unambiguous. In my view, it is likely that the appropriate signs were in situ since at least 1949 and had been maintained since. Such was also the Inspector’s determination in a number of cases concerning the railway<sup>vii</sup>.
- 4.13. Whilst the effect of criminality of railway trespass is dealt with by Mr Jerry Greenwood in evidence I add that trespass on the lines of the railway was first introduced as early as 1840, therefore before construction of the RTJ2 railway line<sup>viii</sup>, again through analogous signage being overtly displayed at stations<sup>ix</sup>.
- 4.14. The presence of legible signs has been subject to considerable judicial treatment. In Taylor v Betterment Properties (Weymouth) Ltd [2012]<sup>x</sup> Patten LJ commented:
- “If the landowner displays his opposition to the use of his land by erecting a suitably-worded sign which is visible to and is actually seen by the local inhabitants then their subsequent use of the land will not be peaceable. It is not necessary for Betterment to show that they used force or committed acts of damage to gain entry to the land. In the face of the signs it will be obvious that their acts of trespass are not acquiesced in.”*
- 4.15. Further, the case of Winterburn v Bennett [2016]<sup>xi</sup> established that “*the continuous presence of legible signs may be sufficient to render user contentious*”.
- 4.16. It was, further, a requirement of the 1844 Act, under s.135, that “*sufficient (...) fences for separating the land taken for the use of the Railway from the adjoining lands not taken (...)*”. It is not only conceivable, but indeed probable, that the railway line at East Dean has been, since completion, properly fenced off from neighbouring lands. This is wholly inconsistent with the intention to dedicate and an act of overcoming a fence in order to traverse the line of the railway renders the user by the public, in fact, forceful or contentious, therefore not as of right.
- 4.17. At common law there remains a fundamental requirement that the landowner has the capacity to dedicate and holds a sufficient interest in land. This proviso meets with significant challenges when faced with limited owners (e.g. lessees or mortgagees) or public bodies whose capacity is limited by the statute which created or empowered them. It is a well-established principle<sup>xii</sup> that a statutory undertaker, such as Network Rail, does not possess the requisite capacity, as to dedicate would be incompatible with its statutory purpose. This will be further dealt with in Mr Greenwood’s evidence.
- 4.18. It was against the backdrop of the circumstances described above that Network Rail challenged the Report’s conclusions in the letter of objection dated 6<sup>th</sup> June 2017 [**Appendix E**]. Subsequently, a further clarification was requested (in the Statement of Case [**Appendix F**]) from HCC on the precise legal basis on which the Order was made. It remains our view that the legal grounds for making the Order continue to be unclear and, since no clarification has been given, Network Rail must inevitably reserve

its position as regards its further submissions. For the Inspector's note it is regrettable that no answer has been received from HCC, still less any sufficient reasons given, for its decision not to answer Network Rail's correspondence inviting speedy clarification of the precise basis upon which the order was in fact made.

## **5. Stopping up of highways under s.16 Defence Act 1842 ("the 1842 Act")**

- 5.1. The Report asserts, on balance of probabilities, that the Order route N-(R)-O was not extinguished by a legal order.
- 5.2. The basis for this assertion appears to be lack of certainty or conclusive evidence regarding how the *prescribed process, involving Sections 16 and 17* [of the 1842 Act], *was put into effect*<sup>xiii</sup>.
- 5.3. This however is irreconcilable with the opening sentence of the same section of the Report which states, unequivocally, that *there is no provision under the Defence of the Realm Act 1842 for any particular procedure to be followed or any other order to be made to extinguish rights of way over military land*. This flat contradiction remains unacknowledged and unanswered by HCC.
- 5.4. The Report however goes further in purely speculating (at 12.19, etc.) on alternative theories, including *an informal agreement*, for which there is simply no evidence.

### Factual background to the application of the 1842 Act

- 5.5. It is understood that the Admiralty commenced negotiations for the acquisition of land between at least February and May 1939. On 8 February 1939 the Civil Engineer in Chief of the War Department writes to the Romsey and Stockbridge Rural District Council requesting, inter alia, information about public footpaths relative to the land which the Admiralty proposed to acquire. The information was supplied on 17 February 1939.

### Application of Section 16 and 17 of the 1842 Act

- 5.6. Section 16 (1) of the 1842 Act provides, insofar as material, as follows:

*It shall be lawful for the principal officers of Her Majesty's ordnance for the time being to (...), or to stop up or divert any public or private footpaths or bridle-roads (...), and to treat and agree with the owner or owners of such lands, (...), either for the absolute purchase thereof, or for the possession or use thereof during such time as the Exigence of the public service shall require.*

- 5.7. The Report wrongly relies upon there being no overt documentary evidence of legal extinguishment under these sections (s.16 and 17)<sup>xiv</sup> which, together with the fact that Admiralty commenced negotiations for acquisition and consulted the parish council on the alternative path, appears to have given rise to a conclusion that there was no certainty that the Admiralty, as a matter of fact, relied on the 1842 Act.

- 5.8. HSC, in s.5.6.5, amplified the conclusion of the Report to state: “*on the balance of probabilities, that section 16 of the Defence Act was not invoked.*”
- 5.9. Indeed, the Admiralty commenced negotiations before February 8<sup>th</sup> 1939 but this cannot be taken as to mean that the power available to it under s.16 was abandoned.
- 5.10. Such approach is, in fact, concurrent with the provisions of s.16 which authorises *the principal officers of Her Majesty’s ordnance to treat and agree* for acquisition of land, amongst other matters. When viewed against the specific wording of the conveyances of land for the RNAD site from 1940’s (especially conveyance dated 21 November 1941 above) the inexorable logic becomes clear that the Admiralty relied on the 1842 Act and acted in accordance with its provisions.
- 5.11. It follows that the land upon which the Order route N-(R)-O (south of the railway line) is located is shown to have been acquired by the Admiralty pursuant to s.16 and s.23 of the 1842 Act, and certainly not in contradiction of or irrespective of these provisions.
- 5.12. The Report, where it concerns the stopping up under s.16, appears wrongly to infer, from an asserted lack of evidence (which is not accepted) of any *prescribed process was put into effect* or *a legal order*, that it cannot be said that the paths were stopped up. The Report proceeds with its bald speculation that the 1939 stopping up could in fact not be permanent<sup>xv</sup> and that it was therefore *reasonable to allege that any public rights of way that existed in 1939 are still public rights of way in 2014.*
- 5.13. This is ill-fitting with the Report’s conclusion that *there is no provision under the Defence of Realm Act 1842 for any particular procedure to be followed or any order to be made to extinguish rights of way over military land.* There is however simply no supporting evidence.
- 5.14. It is highly probable that the Admiralty evidently relied on the 1842 Act and, based on the evidence available, followed the provisions of s.16 (see: 5.11 above). The act of stopping up could therefore manifest itself by the Admiralty fencing off its land and physically preventing any public use which would be sufficient to satisfy the provisions of s.16.
- 5.15. Such a question was approached in the case of *R (on the application of Ramblers Association) v Secretary of State for Defence*<sup>xvi</sup>, Sullivan J observed with regards to s.16 and 17:

*“While the Act makes provision for the stopping up of footpaths and for the provision of another path in lieu, it does not make any provision for the publication of any formal order or notice to that effect.”*

#### 1941 Conveyance of land

- 5.16. The land on which the Order route N-(R)-O falls on the southern side of the railway line was subject to the acquisition by the Admiralty. The conveyance of land from Richard Melsome Woolley to the Commissioners for Executing the Office of Lord

High Admiral of the United Kingdom of Great Britain and Ireland, dated 21 November 1941 [Appendix G], in paragraph (2) of the Preamble invokes the 1842 Act and reads: “*the Purchasers require and are by virtue of Defence Acts 1842 to 1935 (...) authorised to acquire and hold the said property for the purpose of the defence of the Realm*”.

- 5.17. Paragraph (3) is more specific and states that “*the provisions of Sections 16 and 23 of the Defence Act 1842 had been complied with a Notice to Treat was given under the provisions of the said acts whereby the Vendor was required to treat with the Purchasers for the absolute purchase*” (...). The deed plan shows a footpath running to the southern boundary of the railway line along the eastern boundary of the land to be sold (coloured pink on the plan).
- 5.18. It is therefore evident that *provisions* of s16 had been complied with, contrary to the bald assertion of HSC<sup>xvii</sup> in that “*It cannot be assumed that every part of section 16 was complied with, as objectors suggest*”. There is simply no logical or evidenced reason to assume anything else.
- 5.19. As regards the allegedly temporary stopping up, once it is evident that the land was acquired under s.16, any hypothesis that the Admiralty would rely on a different regime or an *informal agreement* for the purposes of stopping up is manifestly without foundation and, again, completely unsupported by the evidence.
- 5.20. Section 16 is, furthermore, unequivocal in prescribing the mode of stopping up – it can only be permanent. No provision on temporary stopping up can be found in the 1842 Act. HCC do not credibly suggest otherwise.

#### Provision of Alternative Path

- 5.21. A proviso to s.16 can be found in s.17:
- “Provided always that whenever any footpath (...) shall be stopped up as aforesaid, another path (...) shall be provided and made in lieu thereof respectively, at the expense of the ordnance department, and at such convenient distance therefrom as to the principal officers of Her Majesty’s ordnance for the time being shall seem proper and necessary.”*
- 5.22. Correspondence from the War Department to East Dean Parish Council, dated 26 April 1939, refers to the *position of the access which is proposed to be given as an alternative to the footpaths in the parish of East Dean at present crossing the site from the main road to the south of the site which will be stopped up by the Admiralty scheme*. The letter is clear on what is submitted to the Parish Council – the future acquisition is not mentioned as it is, in all probability, not a debatable topic as is the stopping up of the public paths on the land to be acquired.
- 5.23. The letter unequivocally states that the footpaths will be stopped up thus leaving no uncertainty about the event.
- 5.24. Indeed the only item which the Admiralty appears to consult the Parish Council on is

the extent and course of the alternative path. This is presumably due to the wording of s.17 of the 1842 Act (which imposes the obligation to provide an alternative footpath) which contains a qualification on the provision of the alternative path – it is supposed to be provided at a *convenient* distance which would justify some form of local consultation. The proposed diversion is demarked with a red line on the plan attached to the letter.

- 5.25. The Parish Council responds on 2 May 1939, approving the provision of the alternative footpath as proposed in the letter from 26 April 1939. The council's expressed approval of the *closing of the existing public footpaths* is, in light of the above, of little weight – the War Department was only consulting (and no more) on the provision of the alternative.
- 5.26. The letter from East Dean Parish Meeting to the County Surveyor, dated 21 April 1952, is concerned with preparation of the first definitive map. The letter contains a list of numbered paths with a brief description of their course and status and is accompanied by a marked plan. It also refers to the alternative path provided by the Admiralty: "*Paths marked on map as cancelled are not now available due to closure by Admiralty and one made available as alternative by Admiralty vide their letter 4602/39/214a of 22 May 1939, is not accessible owing to private land intervening, but No.5 above provides facilities.*" The alternative appears therefore to have been made by the Admiralty, indicating that its duty following from s.17 was complied with. Again, there is no logical or evidenced reason to suggest a procedural failing, and it is for HCC to prove this negative.
- 5.27. I also highlight that the land (south of the railway line) one which the Order route N-(R)-O is situated had remained in the Admiralty's ownership in 1952.
- 5.28. The alternative path is also mentioned in the letter from the Clerk to Romsey & Stockbridge Rural District Council to the County Surveyor, dated 22 January 1953. The "*alternative right of way granted (by Admiralty) from point 'A' to 'B'*" is shown on the attached plan and, again, it broadly corresponds with the Admiralty's proposal from 1939.
- 5.29. It follows therefore, in absence of any further provisions, that the only obligation of Her Majesty's ordnance was to provide and make an alternative path in lieu of the one stopped up.
- 5.30. The evidence strongly indicates that that duty was complied with, at least where the Order route N-(R)-O is concerned and that an alternative path had been provided (5.3-5.6 above), in which case the stopping up carried out under section 16 became complete.
- 5.31. Furthermore, given the peculiar lay of the land at the location in question, where the former Admiralty site is almost exclusively situated on a slope of a hill, it is probable that only one alternative was provided where it was critical to create one i.e. in order to complete the network of paths and provide a link to the public road over the railway line. Such could have been the understanding of the obligation flowing from section 17

at the time. The, very few, decided authorities appear to confirm this, in *R (on the application of Ramblers Association) v Secretary of State for Defence*, the Defendant had never discharged its duty under s.17 to provide and make another path in lieu, instead, it directed the public to use a public highway near to the path stopped up.

- 5.32. It was only by virtue of legal action brought by the then appellant that the provisions of s.16 and s.17 were scrutinised. The Court of Appeal concluded that whilst the then defendant was entitled to have regard to the already existing highway network and to utilise it where appropriate, it could not be said to have discharged its duty without making any positive provision (*by providing and making a relatively short stretch of new path at the expense of the ordnance department<sup>xviii</sup>*).
- 5.33. In the alternative, it is possible to accept that the alternative path, consulted on in 1939 and provided by the Admiralty, was a beginning of a process of provision and making of other, potentially multiple paths in the vicinity, which was stopped by the outbreak of hostilities in September 1939.

## **6. Conclusion**

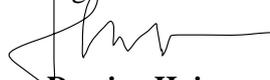
- 6.1. In light of the evidence submitted above, it cannot properly be concluded that the relevant section of the Order route, being N-(R)-O, had in fact existed before 1939 and/or that it was a public footpath.
- 6.2. There is also no satisfactory evidence to demonstrate that the way in question could have acquired public status by virtue of dedication.
- 6.3. It has been demonstrated that the parliamentary records relevant to the construction of the railway line do not corroborate a public path having been intersected by the railway at the location in question (3.1 above).
- 6.4. Both original conveyances of land (3.2.3 - 3.2.4), and corresponding detailed plans, show features that marry with the parliamentary records. None contain reference to a public footpath having featured anywhere within enclosures 64a and 64b.
- 6.5. The 1856 Act, which is apparently evidence upon which HCC rely considerably, shows the railway as already constructed and introduces a significant distinction between “public” and “non-public” paths crossing the land. The attempts by HCC to plot the course of the “public” path on the deposited plan to the 1856 Act or to muse on the public footpath “*reputation*” of these paths are speculative and find no support in evidence. The only positive indication one is able to draw from inspection of the 1856 Act is that the railway line in East Dean appears to have been constructed as planned and authorised by the 1844 Act.
- 6.6. The plans referred to above share significant similarities with both the parliamentary records and the conveyance plans. The railway’s land was surveyed in 1867 (3.2.2.1 above). There is nothing to suggest that the survey was incomplete or inaccurate. The subsequent two editions of OS maps (1876 and 1895 in 3.2.2.2 above) are, in relevant part, consistent with the 1867 survey. There is no path of any description shown on any of these plans at the location in question.

- 6.7. HCC's flawed documentary case is based principally upon the deposited plan to the 1856 Act and upon the 3<sup>rd</sup> edition of OS maps that show "a path" running from the south to the railway boundary. When viewed against the 1929 Handover Map (3.2.2.4 above) which does not show the section of the Order route N-(R)-O in question as a public path of any denomination, it becomes clear that there has never been sufficient evidence from which HCC may reasonably find dedication for public use.
- 6.8. *HCC considers that the minutes from 1937 of the Rural District Council that describe a public footpath* to constitute weighty evidence in relation to route N-(R)-O and public status. This view has seemingly been perpetuated since at least 2014 when the first iteration of the Report was prepared. This is notwithstanding a notable lack of documentary material (e.g. a plan).
- 6.9. Regarding the stopping up under s.16 and s.17 of the 1842, it has been sufficiently demonstrated by way of documentary evidence (5.16-5.17 above) that the land upon which the Order route N-(R)-O (south of the railway line) was acquired pursuant to s.16 and that the Admiralty complied with its provisions. Any public rights of way on such land were stopped up under s.17 of the same act.
- 6.10. It has also been evidenced that the Admiralty stopped up the paths on its land under s.17 and, where the Order route N-(R)-O is concerned, complied with the obligation to provide an alternative.
- 6.11. In light of the above and having regard to the evidence, Network Rail respectfully invites the Inspector to find that a public path has not come into existence across the railway, between the points N-(R)-O of the Order route.
- 6.12. The Inspector is respectfully invited to refuse to confirm the order in this regard.

### **STATEMENT OF TRUTH**

To the best of my knowledge, the matters stated in this Proof of Evidence are true.

Signed:



**Damian Hajnus**

Dated: 9 October 2018

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<sup>i</sup> 3 W.L.R 85 at para 88-9

<sup>ii</sup> Statement of Case of Hampshire County Council at p.1 pt.(i)

<sup>iii</sup> The Report at 12.13 and HSC at 5.4.8

<sup>iv</sup> Section 5.18

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<sup>v</sup> As per Lord Denning in *Fairey v Southampton CC* [1956] 2 All ER 843

<sup>vi</sup> Enactment of the British Transport Commission Act 1949, specifically s.55 thereof.

<sup>vii</sup> See for example: Order Decision FPS/L3055/7/76 at 25, Order Decision ROW/3157555 at 49.

<sup>viii</sup> See s.16 Railway Regulation Act 1840.

<sup>ix</sup> See for example of the Great Western Railway Company signage: Order Decision ROW/3157555 at 49.

<sup>x</sup> EWCA Civ 250, [2012] 2 P&CR 3

<sup>xi</sup> [2016] EWCA Civ 482

<sup>xii</sup> notably in *Rex v Inhabitants of Leake (1833)* 110 E.R. 86, *A-G v L&SWR (1905)* 69 J.P. 110, *South Eastern Rly v Warr (1923)* 21 L.G.R 669, *BTC v. Westmoreland [1958]* 2 WLR 428, *Ramblers Association v SoSEFRA [2017]* EWHC 716 (Admin)

<sup>xiii</sup> At 12.14.2

<sup>xiv</sup> 12.19

<sup>xv</sup> 12.19

<sup>xvi</sup> [2007] EWHC 1398 (Admin)

<sup>xvii</sup> s. 7.6.2

<sup>xviii</sup> Sullivan J at 14