

Hampshire (Test Valley Borough No. 63) Parish of East Dean DMMO 2017

WILDLIFE AND COUNTRYSIDE ACT 1981

The Hampshire (Test Valley Borough No. 63)

(Parish of East Dean)

Definitive Map Modification Order 2017

PROOF OF EVIDENCE OF
JERRY GREENWOOD, HEAD OF LIABILITY NEGOTIATION
ON BEHALF OF
NETWORK RAIL INFRASTRUCTURE LIMITED

PINS REFERENCE: ROW/3181878

1. Introduction

- 1.1. My name is Jerry Greenwood. I am employed by Network Rail Infrastructure Limited (hereinafter referred to as Network Rail) as Head of Liability Negotiation, a position that I have held since July 2013. Prior to that I was employed as the National Liability Negotiations Manager since February 2008. I have been employed by Network Rail (and previously, continually, with Railtrack and British Rail) since September 1980.
- 1.2. By profession I am a Senior Manager. My role is to advise Network Rail on railway legislation and the application of Network Rail's core statutory, common law and contractual responsibilities applicable to its land and infrastructure. Insofar as relevant to this matter, this includes their application to the operational railway.
- 1.3. I was formerly a member of the Royal Institute of Chartered Surveyors. I hold a Higher National Diploma in minerals surveying.

2. Scope of Evidence

- 2.1. My proof of evidence principally addresses the settled proposition that Network Rail does not have the legal capacity to dedicate a public right of way in respect of the claimed route crossing over the railway on the level, between points *N-(R)-O* on the Order plan ("the claimed crossing").
- 2.2. This is not least because, with regard to evidence provided by Network Rail to this inquiry, to purport to do so would be incompatible with the *safe*, and separately, the *efficient* running of the railway, inconsistently with the regulatory framework under which it operates, consistently with the licence it has been granted by Office of Rail and Road (ORR). The ORR is the independent safety and economic regulator for Britain's railways that regulates Network Rail's activities and funding requirements, regulates access to the railway network, licenses the operators of railway assets, and is responsible for ensuring that railway operators comply fully with health and safety law.
- 2.3. Further to statutory incompatibility, the use of the route *N-R-O* as any public right of way would separately give rise to illegality/criminality under section 55 of the British Transport Commission Act 1949. This additionally prevents any dedication of a public right of way.
- 2.4. Despite a suitably early and abundantly clear request made by Network Rail, by date of its Statement of Case, for the Council to speedily clarify its case for having made the order (see: NRIL's SoC "Clarification requested of HCC"), it has failed to do so. As such, the Council has notably declined, without providing any response, to confirm that dedication is irrelevant to its decision for making. Network Rail also remains very aware that dedication is expressly referenced as having formed part

of the justification for making the order. It is Network Rail's understanding that the Council has, to date, not sought to correct or refine this.

- 2.5. As such, Network Rail has therefore been effectively compelled to produce this evidence in order to correct the Council's clear error regarding route *N-(R)-O* in the specific context of any asserted dedication of a public right of way, statutory and/or common law incompatibility, and also illegality/criminality arising under the 1949 Act with regard to the particular circumstances of the claimed crossing.

3. Network Rail Licence and Statutory Objectives

- 3.1. Network Rail owns and operates the rail infrastructure of Great Britain. It is responsible for its safe operation, efficient running and maintenance, repair and renewal, and a duty to enhance and improve the railway network in operational terms.
- 3.2. As a statutory undertaker regulated by ORR, the consideration of statutory incompatibility and safety is obvious. Specifically, in respect of level crossings Network Rail has a duty of care to promote and uphold public user safety, as its foremost principle.
- 3.3. Network Rail's legal duty and purpose in terms of user safety is comprehensively underpinned statutorily. This also includes under the Health and Safety at Work Act 1974, whereby Network Rail is responsible for the health, safety and welfare of its employees and for protecting others against risks to health or safety in connection with its undertaking. This includes a responsibility for those who use level crossings, in various guises (including, but not limited to, vulnerable and encumbered users), in addition to those who deliberately misuse or trespass.
- 3.4. Additional to the overarching duties of Network Rail comprehensively codified in statute, it is also reflected through its governing licence, as regulated by the ORR and by the Secretary of State, and as granted under section 8 of the Railway Act 1993, which provides for statutory authorisation of Network Rail's operation of the railway network.
- 3.5. As such, the ORR and the Secretary of State must have due regard to the protection of the interests of users of rail services, to promote the use, efficiency and economy on the parts of persons providing rail services and to impose on operators of railway services the restrictions that are consistent with the performance of their functions.
- 3.6. The licence governing Network Rail includes conditions under which Network Rail must operate (see Part III). There is no discretionary entitlement to depart from the licence or its imposed conditions. As the operator and owner of the national rail infrastructure, Network Rail has a key role to play in railway safety and improving railway performance and efficiency. The licence is a primary instrument through

which ORR holds Network Rail to account. There is a requirement for absolute compliance with the licence in all respects.

- 3.7. In the present case it is evident that a public right of way over the claimed crossing would necessarily give rise to:
- (i) A highly specific, and unacceptable safety risk; and
 - (ii) Operational inefficiency, which would prove equally unacceptable.
- 3.8. A public right of way over the claimed crossing would prove fundamentally incompatible with the various statutory objects of Network Rail and/or the objects from which Network Rail derives its objects/powers (i.e. via ORR), not least in connection with the Railway Act 1993, sections 4 and 117.
- 3.9. Separately, there is the licence, against which incompatibility may be separately adjudged. Condition 7 of Part B of the licence concerns the ‘disposal’ of land, as defined (which includes the granting of private and public rights over the railway), and the requirement for Network Rail to gain ORR consent before land disposal. Pursuant to the licence, ORR’s consent would not be forthcoming in respect of public user as this would fundamentally undermine the operation, maintenance and improvement of the railway network. Condition 7 of the licence confirms such:
- “7.1 The licence holder shall not dispose of any land otherwise than in accordance with this condition.*
- 7.2 The licence holder may dispose of any land where:*
- (a) ORR consents to such disposal; or*
 - (b) the disposal is required by or under any enactment.*
- 7.3 Where the licence holder seeks ORR’s consent it must give a minimum of 2 months’ prior written notice specifying the land disposal it intends to make (the notice). A notice under this condition shall be in such form and contain such particulars as ORR specifies.*
- 7.4 Having given such notice, the licence holder shall provide further information as ORR may require.*
- 7.5 Unless otherwise agreed between ORR and the licence holder, if ORR does not inform the licence holder of a consent or refusal of consent within the time specified in the notice, the licence holder will be deemed to have consent and may dispose of land in accordance with the notice.*
- 7.6 If ORR refuses consent to the disposal of land specified in the notice, the licence holder will be informed of any entitlement to appropriate compensation for the loss of value (if any) as a result of not being able to make such disposal.*

7.7 *In this condition:*

“disposal” includes any sale, assignment, gift, lease, licence, the grant of any right of possession, loan, security, mortgage, charge or the grant of any other encumbrance or knowingly permitting any encumbrance to subsist (other than an encumbrance subsisting on the date when the land was acquired by the licence holder or on 15 November 2001) or any other disposition to a third party, and “dispose” shall be construed accordingly” [emphasis underlined]

- 3.10. Consequently, the ORR produced an advisory publication “*Land disposal by Network Rail – the regulatory arrangements*” (December 2013) [**Appendix JG1**]. At paragraph 3.5 of this publication, it is advised that the ORR will use the following decision criteria when considering any proposed land disposal:

“3.5 We will have regard to the following criteria when considering a notification from Network Rail about a proposed disposal of land:

(a) ORR’s duties under section 4 of the Act, and in particular our duties to:

(i) promote improvements in railway service performance;

(ii) otherwise to protect the interests of users of railway services;

(iii) promote the use of the railway network in Great Britain for the carriage of passengers and goods, and the development of that railway network, to the greatest extent that it considers economically practicable;

(iv) contribute to the development of an integrated system of transport of passengers and goods;

(v) contribute to the achievement of sustainable development; and

(vi) enable persons providing railway services to plan the future of their businesses with a reasonable degree of assurance.

(b) Where ORR has considered Network Rail’s notification and any supplementary information, including representations from third parties, and:

(i) there is evidence of a clear, feasible and funded plan or plans put forward by a passenger or freight train operator or funder for the site for future development of the railway network; or

(ii) the DfT (or successor franchising authority), Transport Scotland, the Welsh Government, PTA/PTE or other local transport authority provides evidence that the site is needed for future development of the railway network or for the development of integrated transport facilities; or

(iii) there is evidence which indicates that the proposed disposal would conflict with Network Rail's obligations under condition 1 of its network licence;

it is unlikely that ORR will consent to the disposal of land by Network Rail."

- 3.11. Hence, in such a case arising (where multiple subparagraphs, as above, are engaged), the ORR will not give their consent.
- 3.12. The circumstances in which consent may be given are narrowly prescribed in the guidance and do not apply in the present case. It is advised that in order for it to be likely that consent is given, as regards any land disposal (per paragraph 3.5(d)(ii)): “*the only objection(s) are from individuals, a local or national pressure group without support from a train operator or funder and ORR concludes from Network Rail's submission and its further statements and evidence that there are no major issues at stake*”. Again, such is not the case presently.
- 3.13. Separately, additionally under the Licence is Condition 22 (Safety and standards) of Part F (Standard industry obligations) under Part III. Condition 22 provides:

“22 Safety and standards

22.1 The licence holder shall:

(a) be a member of RSSB (Rail Safety Standards Board) and a party to the constitution agreement;

(b) comply with its obligations under the constitution agreement and the articles of association of RSSB; and

(c) exercise its rights under the constitution agreement and the articles of association of RSSB so as to ensure that RSSB shall act in accordance with the constitution agreement.

22.2 The licence holder shall comply with the code and such Railway Group Standards as are applicable to its licensed activities.”

- 3.14. In the above context, safety is an obvious and principal matter in respect of which Network Rail has a high legal duty and responsibility to discharge.
- 3.15. RSSB Codes and Guidance promote issues of operational safety, safety of the travelling public and those individuals (public or private) who interface with railway operations – i.e. at level crossings. These Railway Standards and Guidance are what Network Rail has to comply with, under Licence Condition 22.1 (b). Railway Group Standards Protocols and Guidance are accessible on the RSSB website.

3.16. Hence, Network Rail is under a regulated and enforceable duty (by ORR) both to operate the rail network efficiently and safely so far as is reasonably practical and having due regard to all relevant circumstances, as well as to satisfy more generally the core needs of train operators and of rail users. This includes its management of crossings such as in the present case, and their interrelationship with the railway line, operational service, and infrastructure maintenance and repair. In so doing, Network Rail contributes to meeting the Government's integrated transport policy.

4. Incompatibility at Common Law

4.1. Specifically at common law also, there is no adequate evidence in the present case of (express or implied) dedication by the owner and acceptance and use by the public. There is no adequate evidence of use ever occurring at the site of the claimed crossing 'as of right' and certainly not for any sufficient period as to adequately evidence an intention of the landowner to dedicate. Prior use by the public at any time will not of itself raise the presumption of an intention to dedicate. The burden lying with the public who assert the public right, to demonstrate, both in quantitative and qualitative terms, public user has not been sufficient to bring home to the landowner, Network Rail, the assertion of a public right of way. Network Rail, as the landowner, has not acquiesced public use. There has been no use 'as of right'.

4.2. More generally, the evidence is insufficient, on the balance of probabilities, to demonstrate a public right of way subsists over the claimed crossing or indeed any similar alignment.

4.3. More specifically, for the purposes of section 53 of the Wildlife and Countryside Act 1981 Act, it is contended that the requirements of section 31 of the Highways Act 1980 ("the 1980 Act") would not be met:

- (i) Any claimed right is of such character that its use could not give rise at common law to any presumption of dedication;
- (ii) Network Rail, as landowner, has no capacity to dedicate a right over the claimed crossing as a highway, in light of incompatibility with its statutory purposes and, to date, there has been no intention to dedicate;
- (iii) Use of the route would give rise to the fundamental criminality, identified above.

5. Statutory Incompatibility (Further): Safety

5.1. As a matter of fact, as at the date of Inquiry (and previously), it would not be compatible with railway safety for Network Rail to dedicate a public footpath over the claimed crossing and the railway, since it would give rise to an unacceptable risk to safety, involving users of the footpath, other 'passengers' of the railway line, passengers of travelling trains, and also railway workers.

- 5.2. In exploration of the case on incompatibility and of incapacity to dedicate in a railway safety context (and, separately, operational efficiency) Network Rail relies upon the lead judgment in *Ramblers Association -v- The Secretary of State for Environment Food and Rural Affairs, Network Rail & Others* [2017] EWHC 716 (Admin) (“*Ramblers*”) [**Appendix JG2**]. The proper application of this case will be discussed more fully at Inquiry together with preceding case law (discussed by Dove J in *Ramblers*), should this become necessary.
- 5.3. The judgment of Dove J in *Ramblers* (not previously considered by the Council, despite the stated basis upon which the DMMO has been made) affirmed the lawfulness of the order decision of an Inspector dated 26th October 2015, in refusing to confirm the Nottinghamshire County Council (Burton Joyce Footpath No.17 and Stoke Bardolph footpath No.6) Modification Order 2013 in respect of a claimed footpath passing from Nottingham Road, Burton Joyce, across a level crossing over the Nottingham-Lincoln railway line [**Appendix JG3**]. The footpath had been claimed on the basis of 20 years’ usage, and evidence of user forms were submitted from people who had used the route to establish that the requirements of section 31 of the 1980 Act had been met.
- 5.4. In relation to their legal objections Network Rail had contended that there were three separate reasons in law of fundamental, strategic significance why the relevant order should not be confirmed, including that Network Rail had no capacity to dedicate a new public right of way on the basis that dedication would be inconsistent with its obligations to operate a safe and efficient railway network (*Ramblers*, para 4), and separately that criminality would otherwise arise through public use by virtue of section 55 of the 1949 Act.
- 5.5. Dove J accepted Network Rail’s position that deemed dedication of the footpath under section 31(1) Highways Act 1980 would be incompatible with key statutory duties governing railway safety and operational efficiency. The judge upheld that the date at which statutory incompatibility falls properly to be assessed for the purposes of section 31(1), is at the date at which the issue is concluded upon by the tribunal, and not at either the beginning or end of the claimed 20 years period. The judge also held that section 31(8) is to be viewed as operating in parallel with the common law as the origin for incompatibility to dedicate.
- 5.6. Dove J also considered the lawfulness of the Inspector’s treatment of this question that the dedication of a public right of way over the claimed crossing, in the circumstances would give rise to illegality: a criminal liability arising by virtue of section 55 of the 1949 Act in respect of use post-dating the coming into effect of that section. The Court rejected the claimant’s submission that “*the principle should not be given effect in the present case so as to deprive the public of the benefit of the right of way which would otherwise be established*” (*Ramblers*; para 6).

- 5.7. Dove J therefore upheld the Inspector’s finding that the claimed public use, on the facts, amounted to trespass under section 55. In light of this finding, the court concluded that it had been properly open to the Inspector to further find that the public interest in ensuring railway safety outweighed any countervailing interest associated with section 31. Accordingly, it had appropriately been found that there had been no dedication.
- 5.8. The approach now put forward by the objectors, fails properly to accord with the decision in *Ramblers*. This is not least so with regard to statutory (and common law) incompatibility/incapacity to dedicate.
- 5.9. The Supreme Court in *R (oao Newhaven Port and Properties Limited) v East Sussex CC and Another* had also (earlier) discussed *British Transport Commission v (1) Westmorland County Council (2) Worcestershire County Council* [1958] AC 126 (HL) (“BTC”) at [78] and [87]: observing the comments of Lord Keith that “...it would be going too far to hold that the public could never acquire a right of way over railway property but acknowledging that incompatibility with the conduct of traffic on the railway could bar a public right of passage. He opined (p. 166) that incompatibility was a question of fact and that it was for the statutory undertaker to prove incompatibility”, hence refining *Magistrates of Edinburgh v North British Railway Co.* [1904] 6 F 620 (at [83]) – not disapproved of. Noteworthy also is the discussion from paragraphs [91] to [103] and the various objectives/provisions with which incompatibility may be found, namely: (i) interference with operations (at [94]); and (ii) criminality (at [95]). Both considerations are demonstrated in the present case.
- 5.10. The appropriate *evidential* approach to statutory undertaker and incompatibility is dealt with at [96-97], against a ‘reality’ (“...all this is apparent without leading further evidence...”). This relieves the Court or other decision-taker from overly scrutinising the evidence, in light of that reality, before making a finding (as in *Newhaven*) that “...there is a clear incompatibility...”
- 5.11. The decision in *Ramblers* affirms the correctness of previous decisions taken by DEFRA Inspectors with regard to on the level crossings and public rights of way, by way of example: *Zulus Occupation Level Crossing* and *Stamford* (below).
- 5.12. At the public inquiry for *Zulus Occupation Level Crossing*, Burton Joyce, Nottingham (PINS Ref: FPS/L3055/7/76) (Order Decision dated: 26 October 2015) the Inspector found, upon not confirming the order, that Network Rail did not have capacity to dedicate a public right of way on the level and, in particular that:
- (i) The dedication of a public right of way is inconsistent with Network Rail’s statutory obligations to operate a safe and efficient railway network;

(ii) The Licence under which Network Rail operates the railway network does not allow it to sanction any use of the railway that amounts to "misuse" or which would otherwise import an unacceptable level of risk to users;

(iii) In conjunction with the claimed right of way, section 55 of the British Transport Commission Act 1949 would give rise to criminality.

5.13. The Inspector found more particularly, at [15]: *"In my view, use by the public of [the crossing] would be incompatible with Network Rail's ability to undertake and execute its statutory objectives as set out by the legislation governing the operation of the railway network."* At [17] he stated: *"The claimed footpath crosses the...railway on the level and it is clear that the land is part of the operational railway. The Crossing therefore satisfies the description of land found in section 55 as being 'the lines of the railway'. Use of Zulus Crossing by the public therefore constitutes an offence under section 55 of the 1949 Act."*

5.14. Having noted *BTC* at [10] the Inspector also considered and distinguished *Bakewell*: at [20], *"Bakewell concerned criminality because the landowner could give, but had not given lawful authority to drive over the common. This is in direct contrast to section 55 of the BTCA which makes trespass on the railway a criminal act and where there is no provision for the network operator to give 'lawful authority' for such acts. Secondly, Network Rail cannot grant such authority as it would be contrary to the terms of the license under which it operates"* and, at [22] concludes *"it is not possible for Network Rail to authorise the use which the public have made of the Crossing."*

5.15. It is strongly considered that the claimed crossing in the present case raises the same or substantially the same considerations as were present before the Inspector in respect of the Zulus Occupation Level Crossing.

5.16. The Order decision in Zulus Occupation Level Crossing follows the Stamford Decision (PINS Ref: FPS/Q2500/7/69) (Order Decision dated: 28 June 2013) [**Appendix JG4**] in which the Inspector cited at [25], in relation to a claimed route running in close proximity to the operational railway (although not actually crossing the railway 'on the level') *"use of the land by the public constitutes a criminal offence under section 55 of the 1949 Act."* The Inspector continued, at [26] *"Section 55 also makes it an offence for any person to trespass in dangerous proximity to lines of the railway or other works..."*

5.17. The Inspector concluded, at [28] *"It is accepted that the Order route has been used by members of the public without any reported incident but nevertheless I conclude, on the balance of probabilities that the Order route is in dangerous proximity to the lines of the railway and to other works. In any event the use would have been unlawful in consequence of the fact that the land comprises 'similar work belonging*

or leased to or worked by the Commission' as identified in section 55 of the 1949 Act."

- 5.18. The Inspector also noted *Bakewell* at [37]: *"In respect of the Order route, the land over which it passes is... operational land of the railway and subject to the provisions of section 55 of the 1949 Act. Given that signage was in place which accords with section 55(3) there could be no use of the way with lawful authority and any use amounted to criminal trespass."* On *Bakewell* he concluded at [38] *"It is accepted that members of the public have used the route and that their presence was on occasions acknowledged by operatives carrying out work on the land. However, any acquiescence by Network Rail or their predecessors would be nullified by the effect of section 55 of the 1949 Act."*
- 5.19. Further to the above, it is well established that at common law a statutory body may not dedicate a highway incompatible with the purpose for which the statutory body has been established. The Court in *Ramblers* gives appropriate consideration to *BTC*, which is in effect reaffirmed in *Ramblers* as authority for the following principles:
- (i) A statutory company has no power to grant a public right of way where the enjoyment of which by the public is *incompatible with* the statutory objects;
 - (ii) For the purposes of adjudging *incompatibility*, it is a question of fact whether, at the date when the question is considered, there is any likelihood of incompatibility in terms of interference with the undertaker's statutory duty.
- 5.20. In the above context, any assertion that *BTC* does not establish that dedication (or deemed dedication) of a highway on operational railway property is, in principle, incompatible with the purposes for which land is held, would be flawed.
- 5.21. The context for the discussion of statutory incompatibility in *BTC* was not criminality (e.g. for present purposes, criminality arising under section 55). In the context of a footpath across a bridge spanning the railway (contrasting a passive crossing on the level, with private vehicular rights), the Court found – as a finding of fact in that case (and not as any general principle) – that the continued existence of the bridge would not *"...endanger the running of the trains nor the operation of the railway"* (see: holding; also (at [148]: *"...I am by no means satisfied that it would be impossible to discontinue the bridge, either under the statutory power or at common law, if it were no longer required as an accommodation way and if a public right of way existed over it..."*). On the basis of this specific finding only (that had been open to the tribunal to make on the evidence) – one that, respectfully, is not open to the Inspector on the present facts. It was held that the footpath had been dedicated.

6. Statutory Incompatibility: Operational Efficiency

- 6.1. Separate from the issue of safety, over the claimed crossing – which of itself gives rise to incompatibility, as a further matter of fact at the date of confirmation (and indeed previously) is the incompatibility arising with railway operational efficiency.
- 6.2. It is strongly evident that dedication over the railway at the site of the claimed crossing would unacceptably and unavoidably prejudice the efficient operation of the railway.
- 6.3. Efficiency here includes the provision of a new, compliant level crossing and the ancillary considerations of infrastructure maintenance, repair and replacement, and other attendant consequences.
- 6.4. As outlined by my colleague, Ms Ingram, a level crossing with suitable deck, signage, gates in the railway boundary fencing and accessible approaches would be required.
- 6.5. The claimed crossing deck would necessarily be the subject of ongoing maintenance because of exposure to use. This would generally be identified from ‘faulting’ during the annual inspections. As well as general maintenance to the gates, deck and signage, the maintenance includes keeping the approaches clear and walkable, all-year-round., as well as keeping lineside vegetation cut back so as not to obscure the sighting of approaching trains. Additionally, there is a need to lift and remove the deck for continued maintenance of the running rails, including realignment and tamping of the ballast supporting the railway.
- 6.6. Basic maintenance for a claimed crossing over a period of 20 years (including the requirement for additional advanced warning equipment fitted and maintained), is estimated as follows:

Basic annual inspections	£ 3,000
Level Crossing Risk Assessments and Management	£ 5,000
Basic maintenance (Deck, approaches, and signage)	£ 20,000
Lineside vegetation management	£ 25,000
Rail Tamping	£ 10,000
[Capital Sum:	<u>£ 63,000]</u>

- 6.7. It is important to note that these costings are baseline only and may be the subject of exponential increase in consequence of increased pedestrian user, ongoing accidental human error and deliberate misuse of the claimed crossing, trespass or other public use of the claimed crossing in conflict with operational efficiency.
- 6.8. For example, an increase in the number of vulnerable or disabled users may necessitate ongoing enhancement to the deck, approaches and gates, coupled with

the need to introduce additional technical measures (such as visual and audible advanced warning devices). Deliberate misuse and trespass arising from a crossing can cause severe delays to trains and this gives rise to high levels of compensation payments to the train operators.

- 6.9. The existence of a level crossing is a restriction to future rail enhancement proposals in both increasing train capacity and linespeed, and where the full benefits of such enhancements may only be achieved on the closure or removal of the level crossing. Necessary to improve resilient rail development so as to provide a transport network that is capable of stimulating and supporting social and economic growth, it would be *inefficient* to initiate an enhancement project at a higher cost whilst delivering a less efficient service because of the need to address the impact of the claimed crossing.
- 6.10. Although a footbridge may in theory provide a safe substitute to a level crossing, if Network Rail had to provide one at this location the cost thereof would be at Network Rail's expense - and is here confirmed not to be available expenditure, as to do so would divert safety funding from other more necessitating schemes. Hence a footbridge is not deliverable.
- 6.11. An outline costing for minimum required future enhancements for the claimed crossing (which is presently obstructed), which similarly renders it undeliverable also, is as follows:

Provision of Advanced Warning Equipment (Lights and Audio)	£ 250,000
Full life Maintenance of AWE (15 years)	£ 20,000
Provision of Stepped Footbridge	£ 1,500,000
Provision of Ramped Footbridge	£ 3,500,000
Ongoing Maintenance of structure (20 years)	£ 50,000

7. Conclusions on Incompatibility

- 7.1. It is well established that a statutory body may not dedicate a highway where to do so would be incompatible with the purpose(s) for which it has been established (*Ramblers*).
- 7.2. In the present case, it is strongly evident that a public right of way over the claimed crossing would produce both an unacceptable safety risk and operational inefficiency.
- 7.3. Following *Ramblers*, in the particular circumstances of the present case, there is no capacity to dedicate the use of a public right of way across the operational railway at grade, at the site of the claimed crossing.

- 7.4. Further to statutory incompatibility itself, it is noted that such use would also be contrary to the conditions of licence Condition 1A, 4 and 7, as well as being explicitly contrary to ORR guidelines.

8. Illegality

- 8.1. Insofar as relevant, section 55 of the 1949 Act provides:

“55. — For better prevention of trespass on railways &c.

(1) Any person who shall trespass upon any of the lines of railway or sidings...or upon any railway embankment cutting or similar work...belonging or leased to or worked by the Commission [or who shall trespass upon any other lands of the Commission in dangerous proximity to any such lines of railway or other works or to any electrical apparatus used for or in connection with the working of the railway] shall on summary conviction be liable to a penalty...

(2) The provisions of the Railways Clauses Consolidation Act 1845 with respect to the recovery of damages not specially provided for and of penalties and to the determination of any other matter referred to justices shall apply to this section.

(3) No person shall be subject to any penalty under this section unless it shall be proved to the satisfaction of the court before which complaint is laid that public warning has been given to persons not to trespass upon the railway by notice clearly exhibited and that such notice has been affixed at the station on the railway nearest to the place where such offence is alleged to have been committed and such notice shall be renewed as often as the same shall be obliterated or destroyed and no penalty shall be recoverable unless such notice is so placed and renewed.

(4) A notice shall not be invalid for the purposes of this section by reason only that it refers to an enactment other than this Act...”

- 8.2. By this section it is a criminal offence for persons to trespass on the railway. There is no qualification to such an offence contingent upon the giving of any lawful authority.

- 8.3. The documentary evidence in the present case does not disclose or disclose adequately that the public right of way has come into existence as a highway, whether before or after the commencement of section 55 of the 1949 Act.

- 8.4. In any event criminality (under section 55) would be firmly established by virtue of the public’s use of the claimed crossing. Criminality is to be determined at the date of the tribunal considering the claim for public rights (*Ramblers*).

- 8.5. The three relevant limbs of the section 55 offence are met in the present case:

- Section 55(1): *“trespass upon any of the lines of the railway”* (i.e. criminal,

not tortious). The present case is not one in which any trespass “*in dangerous proximity to any such lines*” need be shown;

- “*Public warning has been given to persons not to trespass...*” (section 55(3)). Public warning and an effective prohibition against trespass (noting, what may constitute an adequate prohibition is discussed by Dove J in *Ramblers*) has been clearly stated by existing, prominent signage located at West Dean Station, as well as at neighbouring stations;
- *By notice clearly exhibited...affixed at the station on the railway nearest to the place where such offence is alleged...*” (Section 55(3)).

8.6. Railway land, including the site of the claimed crossing, is well recognised by the Secretary of State to be subject to section 57 of the 1949 Act. This operates to prevent presumed statutory dedication, and implied dedication at common law, over land including any footpath or place that is the property of the Board. Any public user earlier of the claimed route will therefore prove inoperative.

8.7. The decision maker must avoid an erroneous approach to applying section 55:

- That there needs to have been a prosecution or a finding of guilt. There is no such need;
- That the circumstances of a railway crossing *per se* may not give rise to (qualifying) “*trespass*”;
- There may be a power for Network Rail to authorise use (whether that use is characterised as ‘trespass’ or not).

8.8. It would therefore be in error to conclude that all subsequent use would be in exercise of the right to use the claimed crossing as a public right of way. The use would constitute trespass and a criminal offence.

8.9. It would additionally be wrong to consider that a public right of way over a crossing that is established *before* the coming into force of the criminalising statutory provision, cannot subsequently (and today) give rise to a criminal offence. This misconstrues the effect of section 55. The illegality arising from the operation of section 55 of the 1949 Act remains constituted in respect of such use today, and is not merely established *subject to it* (*Ramblers*).

8.10. The 1949 Act was not the first statute for addressing Trespass on the railway. section 16 of the Railway Regulation Act 1840 (which remains in effect) states: “*For punishment of persons obstructing the officers of any railway company, or trespassing upon any railway*”: “*If any person shall [...] shall willfully trespass upon any railway [...] and shall refuse to quit the same upon request to him made by any officer or agent of the [railway] company.*”

8.11. Furthermore, Section 23, Regulation of Railways Act 1868 states: “*If any person shall...pass upon any railway, except for the purpose of crossing the same at any authorized crossing [after having received a warning] [administrative, signage, etc.] by the company which works such railway, or by any of their servants or agents, not to go or pass thereon, every person so offending...*”

9. Conclusion

9.1. With regard to the above reasons, and on the basis of the evidence before the Inquiry, the Inspector is respectfully invited to conclude that a public right of way has not come into existence over the railway crossing on the level, between the points N-(R)-O of the claimed route.

9.2. 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 above are true.

Signed:

A handwritten signature in blue ink, appearing to read 'J. Greenwood', with a horizontal line drawn through it.

Jerry Greenwood

Dated: 9 October 2018