ROBIN CARR ASSOCIATES

Public Rights of Way Management & Consultancy Services

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

Proof of Evidence in Objection to the Order

PINS Ref: ROW/3181878

1.0 Introduction

1.1 My name is Robin Carr. I am an independent consultant, specialising in Public Rights of Way and Highway matters. I am a Fellow of the Institute of Public Rights of Way & Access Management (IPROW) and a Registered Expert Witness.

1.2 My experience is based, most generally, on an expertise that has been developed over a twenty-five-year period as a Public Rights of Way practitioner. This includes substantial experience of legal order processes, archive research and the investigation and determination of issues surrounding the existence, or otherwise of public rights of way/highways.

2.0 Instructions & Understanding of the Background to the Case etc

2.1 As part of my instructions I have compiled a report titled: "*Wildlife & Countryside Act 1981 Definitive Map Modification Order – Alleged Public Rights of Way over the former Royal Naval Armaments Depot (RNAD): Dean Hill, East Dean, Hampshire. Closure of Public Rights of Way under the Provisions of Section 16 of the Defence Act 1842"* a copy of which has been submitted in evidence.

2.2 Details of my instructions, the scope of my research and my understanding of the background to this case are set out within sections 2 and 3 of the above report.

2.3 I rely principally upon the above report as my evidence in respect of this case, and for the avoidance of doubt, having considered the evidence available to me, I have concluded that the public footpaths which (prior to 1939) crossed the former RNAD Dean Hill site were

stopped-up, and an alternative route provided in lieu thereof, using the provisions of Section 16 and 17 of the Defence Act 1842.

2.4 It is my understanding that the powers under Section 16 and 17 of the Defence Act 1842 there is no requirement for there to be an actual documented "legal order" style document and therefore proof of the implementation of the procedures may be reliant upon other documentary evidence.

2.5 It is my further understanding that the powers under Section 16 and 17 of the Defence Act 1842 have permanent effect (i.e. the paths do not come back into being once the site is decommissioned from military use).

3.0 Proof of Evidence

3.1 Within this proof of evidence I focus primarily on points of principal disagreement that arise out of the Order Making Authority's Statement of Case relating to the stopping up of footpaths at the former RNAD Dean Hill site using the powers provided under Section 16 & 17 of the Defence Act 1842.

3.2 For the avoidance of doubt, I have conducted a desk-based review of the evidence provided by the Order Making Authority which relates to the existence of the Order Routes prior to 1939. I am therefore aware of the documentary evidence upon which the Order Making Authority relies. The fact that I have not provided any commentary on the interpretation of this evidence as part of any report, or within this proof of evidence, should not be taken as my acceptance of the Order Making Authority's interpretation of the documents.

"*Once a Highway, Always a Highway"*

3.3 The County Council, quite rightly, refer to the legal principle that is generally cited as "*Once a Highway, Always a Highway*". This essentially sets out the principle that once public highway rights have come into being, they cannot simply cease to exist due to a lack of use, or as the result of a route being closed to public use.

3.4 With the exception of circumstances such as destruction of the land over which a public highway runs (e.g. coastal erosion) a public highway right, once established, will only cease to exist as a result of the appropriate legal process.

3.5 For the avoidance of doubt, there is no suggestion, on my part, that the "Once a Highway, Always a Highway" principle does not apply in this case. On the contrary, it is my opinion that the Order Routes (with the exception of the Restricted Byway D-E-X) were permanently stopped-up by reference to Sections 16 & 17 of the Defence Act 1842. The Restricted Byway (D-E-X) could not have been stopped-up using these provisions because, at the time, they only applied to footpaths and bridleways, not public carriageways. As I explain in my report it is my view that D-E-X was closed pursuant to s.40 of the 1860 Act.

No Statutory Requirement for a Documented Legal Order

3.6 This issue is examined within Section 4 of my report

3.7 In the majority of instances the closure or diversion of a public highway will be evidenced by way of some form of legal order process. This will be either a documented court proceeding or an administrative Order processed by a local authority. In either case there are usually newspaper advertisements, plans showing the proposals and some form of written Order which sets out the diversion or extinguishment by reference to the statute being relied upon. This would generally apply to both compulsory procedures and those undertaken with the agreement of the land owner.

3.8 The extinguishment of footpath and bridleway rights pursuant to the provisions of Section 16 & 17 of the Defence Act 1842, and other later defence powers, are very much the exception to the rule in terms of procedural requirements. There is no requirement for any documented legal order, or indeed any plan setting out the routes to be stopped up and/or the proposed new routes to be provided in lieu thereof.

3.9 Providing that the diversion or stopping up was required for the purposes set out in the Act (e.g. defence of the realm) and that an alternative route was provided, the terms of the legislation were met. The absence of the requirement for a "legal order" under different statutory processes, cannot be taken as evidence that the proper procedures were not followed.

3.10 The correctness of this analysis of the provisions in the 1842 Act is made entirely clear in the *Ramblers Association* case. Similarly, under the Defence Act 1860 there is no requirement for

a legal order. The Admiralty were aware of the highway D-E-X (see Tab 15). It therefore seems highly unlikely that they would not have closed this highway at the same time.

Use of (WWII) Emergency Powers

3.11 The use of these powers is examined within Section 5 of my Report.

3.12 The Emergency Powers (Defence) Act 1939 came into force on 24 August 1939 and initially continued in force for one year from the date of passing of the Act. The Act included provisions for it to be extended by one (later amended to two years) at a time. The final continuance, which was for a period of only six months was granted on 24th August 1945.

3.13 The Defence (General) Regulations 1939, which comprised the main group of regulations made under the powers conferred by the Emergency Powers (Defence) Act 1939, came into effect on 25th August 1939.

3.14 In my opinion it cannot have been intended to use these powers given the correspondence which pre-dates these powers coming into effect, the temporary nature of the closures allowed under those powers and the permanent nature of the facility being constructed.

Evidence of Use of Sections 16 & 17 of the Defence Act 1842 at RNAD Dean Hill

3.15 The evidence relating to the use of Sections 16 & 17 of the Defence Act 1842 is summarised and discussed in sections 6 of my report.

3.16 In my opinion, all of the available evidence points towards the paths being permanently closed using the provisions of Section 16 and 17 of the Defence Act 1842. Whilst no closure order or notice has been discovered, this is merely because there is no statutory requirement for such paperwork to be provided, and there was no practice at the time of providing formal paperwork. Notwithstanding this there is a wealth of documentation relating to the acquisition of the land, consultations over the closure of the paths, and the provision of an alternative route in lieu thereof.

3.17 In summary the following evidence demonstrates compliance with the provisions of the Defence Act 1842 and a clear intention to exercise powers under that Act:

a) The Defence Policy and Requirements Committee authorised the Admiralty to prepare proposals for the construction of 148 underground magazines (Tab 22)

b) By May 1938 (**Tab 22**) the Admiralty had responded with proposals for a new facility at Dean Hill thus indicating that surveys etc had been undertaken.

c) The 1940 and 1941 Conveyances (**Tab 16**) confirm that a Notice to Treat was served pursuant to the provisions of the Defence Act 1842.

d) The Chancellor approved the RNAD Dean Hill scheme on 5th December 1938) (**Tab 20)**

e) The Treasury Warrants were issued (on 15th February 1939) and subsequently signed (on 22nd February 1939) (**Tab 20**)

f) Whilst a Justices certificate has not been located it is beyond dispute that the land was acquired by the Admiralty and RNAD Dean Hill was built.

Use of Alternative Procedures or an Informal Agreement

3.18 I do not consider it likely that the East Dean footpaths were subject to closures under Regulation 16 of the Defence (General) Regulations 1939 because their closure, along with the provision of an alternative route, appears to have been implemented by Spring of 1939 (**Tab 15 & 19**) which is some months before the Defence (General) Regulations 1939 came into effect (25th August 1939).

3.19 I also do not subscribe to the proposition that paths were not formally closed, but were subject to some form of informal agreement. There is no evidence to support such a proposition. Furthermore, this possibility was considered by the County Surveyor In 1953 (**Tab 21**) when he proposed that if no formal closures were in place, the paths be added to the Draft Map with a view to them being made available if/when RNAD Dean Hill was decommissioned. Following discussions with the Admiralty, the paths were not shown on the Draft Map. This would suggest that the formal closure of the paths was evidenced to the County Surveyor at that time.

3.20 I note that East Dean Parish Council had the same Clerk (Mr Tanner) in 1953 as it did in 1939. He would therefore have been aware of the arrangements put in place when the paths were closed. At no point is he recorded as suggesting that there was any form of "gentleman's agreement" not to use the footpaths.

Provision of an Alternative Route

3.21 In the *Ramblers Association* case, Sullivan J confirmed that section 17 of the 1842 Act requires the provision of a "reasonably convenient replacement path" and explained that the purpose is to allow people to get from A to B. It is therefore not necessary that every path which is stopped-up or diverted must be provided with its own unique and individual alternative route. In practice such a requirement would be illogical and impractical.

3.22 On a site the size and configuration of RNAD Dean Hill the shortest alternative routes available would run around the boundaries of the site and therefore there is in effect only one alternative, i.e. that provided. The Council's analysis would not allow for multiple routes to be stopped-up using the 1842 Act in this situation. Any other paths would therefore have to be stopped up using alternative legislation. This cannot have been the intention of Parliament when they drafted the legislation because it thwarts its very purpose.

3.23 The 1939 correspondence between the local authority and the War Department (Tab 15) clearly indicates that multiple routes (plural) were to be stopped up and an alternative (singular) was to be provided. This is clear evidence of the practical implementation of the legislation.

Use of Term "Closed" vs "Extinguishment"

3.24 I do not agree with the proposition that the term "Closed" does not carrying the meaning of "legal extinguishment" but instead implies some form of temporary suspension of public rights. In my opinion the two words or phrases are entirely consistent.

3.25 In the absence of evidence to clarify their meaning, the terms "stopping up" and "closed/closure" should be prefixed (e.g. "temporary" or "permanent") to be clear as to their intent otherwise they may be interpreted as referring to either temporary or permanent circumstances. In the absence of such a prefix, it is necessary to interpret their meaning in the context of the circumstances under which they are being used. In this case the land was not being temporarily requisitioned, it was being permanently acquired. The permanency of the acquisition should also be attributed to the permanency of the closures.

4.0 Conclusions

4.1 In conclusion:

a) the provisions of Sections 16 & 17 of the Defence Act 1842 can be implemented by the appropriate Government Department (currently the MOD) without recourse to any other authority, and there is no requirement for any form of legal order or public notification to be made to bring the stopping up or diversion of a footpath or bridleway into effect.

b) It is likely that all of the path closures across the site were initially dealt with in the same manner (i.e. closed using the same legislative provisions).

c) The documentary evidence (Tab 15) shows that the Admiralty were aware of the existence of footpaths across the site and had consulted on their closure. It is therefore unlikely that, having commenced the process, they would not complete it.

d) No evidence has been discovered to demonstrate any temporary closures under Regulation 16 of the Defence (General) Regulations 1939, nor is there any evidence to suggest some form of "gentleman's agreement".

e) the fact that there is no actual closure order cannot be taken as evidence that the closures were not duly made. This is firstly because the Defence Act 1842 did not require any such Order, and secondly, all of the contemporaneous documentary evidence point clearly towards the use of the Defence Act 1842 provisions.

f) D-E-X was closed under s.40 Defence Act 1860.