APPENDIX 5

COMMONS ACT 2006, Section 15

Registration Authority: ESSEX COUNTY COUNCIL

RE: LAND AT MISTLEY QUAY, MISTLEY, ESSEX

THIRD ADDENDUM TO REPORT OF THE INSPECTOR

1. As I have noted previously, after the dissemination of my Report into this matter, produced following the public inquiry which I held in 2013, further comments and representations came in from the principal parties to the inquiry. This Third Addendum arises from the submissions and representations contained in a letter (with appendices) of 7th January 2014 from TW Logistics Limited ("TWL"), the 'First Objector' to the application in this case.

2. In this particular instance the nature and content of the submissions and representations from TWL seemed to me, and to the Registration Authority, to require the 'opposing side' (the Applicant under the ***Commons Act***) to be given the further opportunity to reply.

3. That opportunity was duly given, and led to a response, with a substantial collection of attached documents, from the solicitors for the Applicant, dated 13th March 2014. Because of the considerable element of 'new' material (albeit much of it was historic) contained in these documents, TWL were given the opportunity to respond once more, which they did in a letter of 2nd June 2014, accompanied by a further attachment. And the solicitors for the Applicant have made a final reply in a letter of 16th June 2014.

4. I regard it as most unfortunate that these exchanges should have carried on over such a protracted period after the submission of my Report on 28th

October 2013. However it can at least be said that the two affected parties (TWL and the Applicant) have each had a very full opportunity to consider and comment on the points raised by the other party, and there should now be no further reason for the Registration Authority to have to defer its reaching a final decision on this application, in the light of my original Report and the three subsequent Addendum Reports. [I should observe that it seems to me that the issues raised in these exchanges between TWL and the Applicant relate to an area of dispute which did not arise from the cases as presented by the second and third objectors, or indeed any other party. Thus there was no need, based on 'natural justice' or any other principle, for those other parties to be invited to become involved in this particular post-Report correspondence whose implications I now seek to address].

5. Turning to the substance of the matters raised in the correspondence, it is (in my view) only necessary for me to address points and matters which go beyond what was already before me in the context of the public inquiry in 2013, and then only to the extent that the new material and submissions might in principle lead me (or the Registration Authority) to form a view different from the one I expressed in my 28th October 2013 Report.

6. It was with surprise and at least an element of consternation that I noted that the first main point taken in TWL's representation of 7th January 2014 appears to be a suggestion that the exchanges I report in paragraph 16.110 of my original Report had not in fact taken place.

7. It had been a matter of very considerable concern to me as Inspector that on the eighth and final day of the Inquiry, almost at the very end of the closing submissions for the First Objector (which immediately preceded those for the Applicant), Counsel for that objector (TWL) had appeared to be raising as decisive a point about which nothing of substance had been said orally by anyone, witness, or advocate, during the preceding seven and a half days of inquiry. This was an argument to the effect that, whatever might have been the strengths of the Applicant's evidence about local people indulging in 'sports and pastimes' over the years on the most important, central part of the quay at Mistley, those can never have been '*lawful* sports and pastimes' [as required by the ***Commons Act***], because (at least for some of the relevant period) it would have constituted a criminal offence for people to be on, or to cross, the metal rails embedded in the surface of the quay.

8. It was a matter of particular concern to me because it seemed that what was in effect a 'new' point, as far as the active debate and argument at the inquiry were concerned (although I accept that the basis for the point had been foreshadowed, rather unobtrusively, in written material previously lodged for

TWL), was being raised for the first time orally as being a serious, determinative point, at a time when the inquiry was very close to its end. [There had been no need for me to say anything about the point at an earlier stage, as no active reference had been made to it by anyone on behalf of TWL, witness or advocate].

9. I have no doubt at all that Paragraph 16.110 of my Report accurately records the gist, if not the precise words, of what I said in relation to this matter at that late stage in the Inquiry, in the circumstances which I have just outlined.

10. Indeed the substance of what I said in that paragraph of my Report forms the logical basis for what I now go on to say about the content of the exchanges which have taken place in the post-Report correspondence from the two relevant parties.

11. I had concluded on the evidence, and so advised the Registration Authority in my main Report, that the Applicant had established, on the balance of probabilities, that what on any normal view would be regarded as 'lawful sports and pastimes' had been indulged in by local people on the 'remaining application site', over the relevant 20 year period between 1988 and 2008.

12. On that basis (and subject to all the other considerations discussed at length in the main Report) the Applicant's case had met the tests set by ***Section 15*** of the ***Commons Act***. In my judgment, if in those circumstances an objector wishes to say (in effect) "*well, no, the activities here were not in fact 'lawful' – they either were, or included, a criminal act*", there is at least an obligation on that objector to provide (in particular as far as the factual element is concerned) a clear basis on which it can be understood that the ostensibly lawful activities were in fact a criminal trespass.

13. I entirely accept, and so advise the Registration Authority, that the basic obligation to prove his case evidentially on the balance of probabilities lies upon the Applicant. I would express doubt however as to whether this obligation extends to his having to prove a negative, i.e. that the lawful-seeming activities he relies on were ***not*** criminal – at least unless some plausibly convincing basis has been introduced for thinking that the activities concerned might have been criminal ones.

14. In any event, the matter has now, in the post-Report correspondence, been addressed at greater length by both relevant parties, including the introduction of new (to me and the Registration Authority) evidential material.

15. As to the approach now to be adopted, points of law, insofar as relevant, must be interpreted correctly, to the best of our abilities, by myself and the Registration Authority; but insofar as the question turns upon disputed areas of fact, the balance of probabilities, on the material available, seems to me to be the basis on which it must be determined whether the activities of local people on the relevant part of the quayside here were either lawful or criminal.

16. I have considered all of the material which has been provided (whether by way of submission or factual material) in the post-Report correspondence from TWL and the Applicant. Since it is all in writing, and in the possession of the Registration Authority, it seems to me neither necessary nor appropriate to set out a lengthy summary of what the two parties are saying.

17. Thus in the following paragraphs I explain the conclusions I have reached (on the balance of probabilities where matters of fact are concerned) in the light of the material now available, together with what I and the Registration Authority had received previously.

18. It seems likely that the actual metal of the rails set into Allen's Quay was the property of British Rail and its predecessor companies (London & North Eastern Railway, Great Eastern Railway, etc.).

19. However I conclude on the balance of probabilities from the evidence provided that British Rail and its predecessors were not owners of the actual land of the part of the quay relevant in this case, into which the metal rails of the 'tramway' were embedded; they only had a wayleave over the track, in common it seems with property owners on the quay.

20. Although, as I had noted in my Report, it had been mentioned orally at the inquiry, with no party having then treated it as a controversial point, that the last actual use of the rails on Allen's Quay had taken place in about 1984, both parties in their further representations have alluded to the fact that Mr Garwood (one of the Applicant's witnesses) had given unchallenged evidence that access to the rail network had been closed in 1986. I should in the circumstances perhaps note that it was clear from the context to all concerned in the inquiry, including myself, that Mr Garwood had been referring to the end of physical access to the rail network, not to any kind of legal process.

21. As the 20 year period principally relevant to this case ran from September 1988 to September 2008, it makes no practical difference whether the ending of any rail use on the quay might have been in 1984 or 1986. The only

relevance of this issue at all, it seems to me, is as to whether there are grounds for concluding, on balance, that the physically unusable set of metal rails in the quay surface constituted, for any material time after September 1988, something which fell into the category of 'lines of railway', 'sidings', etc., trespass upon which is made a criminal offence by ***Section 55(1)*** of the ***British Transport Commission Act 1949***.

22. It appears (though this is not completely clear from its letters) that the First Objector TWL persists with its suggestion, raised on the final day of the public inquiry, that the piece of track on Allen's Quay was part of the 'Mistley Quay Branch', whose potential closure as a 'line' was still apparently under consideration by British Rail in January 1994. This is the point I discussed in paragraphs 16.117-118 of my original Report.

23. In spite of the months which have passed since I produced that Report, and the several new contributions (including evidence) from both 'sides', there does not seem to me to be any more reason now than there was then to conclude that the operational railway of that Branch, requiring some kind of formal closure procedure, included the disused (and it seems unusable) metals of the tramway embedded in Allen's Quay.

24. On the contrary, and as I have indicated in paragraphs 18 and 19 above, it seems clearer now than it did then, that the 'tramway' inset into Allen's Quay had been something over which British Rail and its predecessors had enjoyed nothing more than a wayleave, in common with others, even if they might have owned the actual metal of the rails.

25. In these circumstances, it seems to me that the alleged 'criminal offence' aspect of TWL's point could only have any force if the rails embedded into the quay's surface were plausibly to be understood as a 'siding' (or of course 'line of railway') "*worked by*" British Rail, at any time from September 1988 onwards.

26. My conclusion, from the evidence I have received, is that that cannot possibly have been the case, from 1986 at the latest, and quite possibly from 1984. It is for example inconceivable, in my view, that anyone could have been successfully prosecuted, between September 1988 and early 1994 (say) for 'trespassing' on a railway line or siding 'worked' by, or belonging to, British Rail, because they had walked over, or engaged in 'lawful sports and pastimes' on, the unused and unusable pieces of metal set into Allen's Quay. Yet that is in effect what TWL are arguing.

27. My conclusion therefore, on the new material which has been received from the parties, is that nothing has emerged which causes me to change the conclusions and recommendation set out in my original Report, except that to my mind it is clearer now than it was then that TWL's point based on 'railway law' is lacking in merit.

28. I should perhaps add that nothing in any of the exchanges which have taken place has led me to the view that there is any need to reopen the inquiry into this application; nor in my view is there any reason why the Registration Authority should not be able now to proceed to its determination of this matter.

ALUN ALESBURY
30th June 2014

Cornerstone Barristers
2-3 Gray's Inn Square
London WC1R 5JH