Proposed Network Rail (Cambridgeshire Level Crossing Reduction) Order

Network Rail Note 6- definition of "suitable" and "convenient"

Network Rail's position as explained in the evidence

In her proof of evidence, Ms Tilbrook states:

"1.3.2 Section 5(6) of the Transport and Works Act states that an order shall not extinguish a public right of way over land unless the Secretary of State is satisfied that an alternative right of way has been or will be provided, or that one is not required. Although there is no definition of 'required' in the Act itself, the DfT Guide to TWA Procedures states that if an alternative is to be provided, the Secretary of State would wish to be satisfied that it will be a convenient and suitable replacement for existing users. This is the basis on which alternative routes have been identified and assessed.

1.3.3 It should be noted that this is not an application under the Highways Act 1980, under which any proposed diversion must be suitable and it must also take into account 'public enjoyment of the footpath as a whole'. This is a different statutory test to that under s.5(6) of the Transport and Works Act 1992."

This reflects Network Rail's position, and the basis upon which the order proposals have been assessed.

Further observations on the Secretary of State's guidance

Annex 2 to the DfT Guide to TWA Procedures explains that the power to extinguish a public right of way under the Transport and Works Act 1992 is restricted by section 5(6) of that Act. This provides that an Order under section 1 or 3 of that Act shall not extinguish a public right of way over land unless the Secretary of State is satisfied that an alternative right of way has been or will be provided, or that one is not required.

Annex 2 to the Guide explains that if an alternative is to be provided, the Secretary of State would wish to be satisfied that it will be a **convenient** and **suitable** replacement for existing users.

The words are being used in the context of guidance, and accordingly should not be construed as if they were a statute. The phrase should be given its ordinary, commonsense, meaning, and appropriate to the context of the policy as a whole and the wider statutory framework. In that respect, the following observations are made:

(1) Section 5(6) anticipates that an alternative may not be required at all. Where an alternative is found to be required, the statute does not say anything about the form of that alternative;

(2) The Secretary of State's interpretation focuses on *existing* users of the public right of way. It is therefore clear that any assessment must relate to existing users and not to those who might theoretically wish to use the route, or those who might insist on their legal rights to do so. Similarly, the language indicates that the Secretary of State is not seeking enhancements to the public rights of way network in applying s 5(6);

(3) Importantly, the guidance does not invite a comparative exercise between the extinguished right of way and the alternative (if required). Accordingly, the policy test is materially different from that in, for example, s 119 Highways Act 1980 ("will not be substantially less convenient"), or s 116 ("nearer or more commodious");

(4) Similarly the guidance does not suggest any overarching requirement to take account of the "public enjoyment of the footpath as a whole". This again distinguishes the policy from the test in s 119 HA 1980; and

(5) The test is closer (although not the same) as that in e.g. s 14(6) Highways Act 1980 where "another reasonably convenient route" is required where side roads may be stopped up for trunk road development; or s 18(6) where such a route is required where side roads may be stopped up for a "special road" (motorway); or where footpaths etc. are stopped up for the purposes of crime prevention under s 118B HA 1980; or where footpaths are temporarily diverted for dangerous works under s 135A. These provide better analogies because the Act there recognises that the wider public interest (in the construction of a trunk road or motorway, or in the prevention of crime) may mean that the existing users of the affected route may be inconvenienced to some degree when compared to the prior situation.

The 2011 edition of the Concise Oxford English Dictionary defines these terms in the following way:

Suitable	right or appropriate for a particular person, purpose, or situation

	(i.e. in this case, for "existing users")
Convenient	fitting in well with a person's needs, activities and plans involving little trouble or effort.

Evidence of Cambridgeshire County Council officers – significant adverse impacts

During cross examination of Cambridgeshire County Council ("CCC") witnesses on 6 December 2017 it was accepted by Mrs Camilla Rhodes (Asset Manager - Information in the Highway Asset Management service at CCC) and Mr Chris Poultney (Transport and Infrastructure Strategy Manager at CCC) that there was a general public interest in closure of level crossings for the strategic reasons explained by Network Rail. Because of that public interest in closure, both witnesses accepted that the CCC only resisted closure where the alternatives provided were such that there would be significant adverse impact on the public rights of way network or local communities.

In the Abbotts Ripton TWA decision (referred to in Opening Submissions), the Secretary of State similarly considered whether the proposals would have a "significant adverse impact on users" of the existing route.

Winckworth Sherwood

8 December 2017