The Ramblers' Submissions on the Definition of "Convenient and Suitable for Existing Users" in the context of s5(6) Transport and Works Act 1992

## Introduction

1. According to section 5(6) of the Transport and Works Act 1992 ("TWA"):

   *An order under section 1 or 3 above shall not extinguish any public right of way over land unless the Secretary of State is satisfied –*
   *(a) that an alternative right of way has been or will be provided, or*
   *(b) that the provision of an alternative right of way is not required.*

2. The Guide to TWA Procedures states that "[i]f 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."[1] Network Rail appears to agree that the "convenient and suitable" test needs to be applied to the diversionary routes proposed in the Network Rail (Cambridgeshire Level Crossing Reduction) Order (the "Order").[2]

3. An Oxford English Dictionary (2nd ed) definition of the words "convenient" and "suitable" has been provided to the Inspector. The following submissions intend to highlight a number of relevant considerations which, in the Ramblers' view, should be factored into any assessment of what is a "convenient and suitable replacement [right of way] for existing users".

## "Existing users"

4. The Ramblers seek to highlight that the test is focussed on whether a replacement is convenient and suitable for "existing users". In this regard, the Inspector must have regard to who is currently using each of the rights of way proposed to be diverted, as well as the purpose for which they are using it.

5. This would appear to align with the previous decision in *Ramblers Association v Kent County Council* (1990) 60 P&CR 464[3] – albeit that this was a case arising from an

[1] A Guide to TWA Procedure, Annex 2, p. 105
[2] Susan Tilbrook's Proof of Evidence at 1.3.2.
[3] See divider 6 of the Ramblers' Statement of Case.

application made under a different procedure to the TWA (namely, section 116 of the Highways Act 1980) – in which the court needed to consider whether an alternative way was "reasonable". The court held, per Woolf LJ, as he then was, at 471:

*In deciding whether an alternative way is reasonable, it must be a way which is protected, so far as duration is concerned, in the same way as the existing way is protected. It must also be suitable, or reasonably suitable, for the purpose for which the public were using the existing way.*

**The alternative right of way must be subject to the same legal protection**

6. The Ramblers submit that, in order to be a convenient and suitable replacement for existing users, any proposed alternative route in the Order must have the same protection under the law, throughout its route, as the right of way which it replaces.

7. In this regard, the Order must ensure that any replacement public right of way will be shown on the definitive map and statement. The Ramblers are concerned that parts of an alternative route proposed in the Order that run alongside highway verge cannot be recorded on the Definitive Map and Statement because the verge is already part of the carriageway highway.

8. This approach also aligns with the dicta of Woolf LJ (as he then was) in *Ramblers Association v Kent County Council* quoted above.[4]

**Other relevant considerations for determining suitability and convenience**

9. In the Ramblers' view, there is no exhaustive list of the relevant factors to be considered in assessing an alternative route's suitability and convenience for existing users. However, it is submitted that the following factors are particularly relevant:
   (i) Length of the route;
   (ii) Accessibility of the route, including the gradient of the route and any obstacles (such as stiles, gates or steps) included in the route;

[4] See also *R v Winter* (1828) 8 B&C 785.

(iii) Scenic views and "quality" of the route, including the setting of the route (for example, does the route take walkers through fields, or towns or alongside busy roads);

(iv) Safety of the route;

(v) Directness of the route, including whether the route follows natural "desire lines";

(vi) Width of the route, including the sense of space that walkers would experience along the route[5] (for example, is the route surrounded by fencing or, by contrast, across an open field); and,

(vii) Risk of flooding.

10. In addition, the impact that any proposed extinguishment or diversion of a right of way will have on the level of use of existing routes may also be relevant. Where an alternative route depends in whole, or in part, on existing rights of way, then in the Ramblers submission, the Inspector should consider the impact that an increased level of users (due to the extinguishment or diversion of the right(s) of way at the level crossing) would have on this, or other nearby, right(s) of way.[6]

11. The Ramblers also note the dicta in *Young v Secretary of State for the Environment, Food and Rural Affairs* [2002] EWHC 844 which provides some guidance as to what is meant by 'convenient' in the context of an assessment of whether a route is

[5] See, *Gravesham Borough Council v Wilson and Straight* [1983] JPL 607 (divider 7 of the Ramblers' Statement of Case) in which Mr Justice Woolf (as he then was) held, in considering the assessment, under section 116 of the Highways Act 1980, of whether a proposed new route was "nearer or more commodious to the public" than an existing route, that it was open to the justices to find that the proposed new route was not more commodious due to the fact that it was narrower in places and there would be deviation in level. "Commodious" was afforded its ordinary English meaning including "a flavour of convenience, roominess and spaciousness" as well as, in it highway context, a "flavour of utility".

[6] In this regard, see, again *Ramblers Association v Kent CC* at 471 (following on directly from the paragraph quoted in the submissions above):
*If it is a way which has similar characteristics as the existing way, then certainly the justices can find that the existing way is unnecessary, albeit that the justices must also bear in mind that the result of the loss of way could be to render the other ways which are available more crowded than they are at present. If a way is being used primarily by the public for recreational purposes, that is a consideration which the justices are perfectly entitled to take into account and in my view, should take into account in deciding whether the way is unnecessary.*

"substantially less convenient to the public" under s119(6) of the Highways Act 1980. Turner J held at [27] – [28]:

*…In my judgment the expression 'substantially less convenient to the public' is eminently capable of finding a satisfactory meaning by reference to consideration of such matters as the length, difficulty of walking and purpose of the path. Those are features which readily fall within the presumed contemplation of the draftsman of this section as falling with in the natural and ordinary meaning of the word 'convenient'.*

*I find it not to have been within the contemplation of the draftsman that the considerations contained within subparagraphs (a) to (c) of subsection (6) should have been intended to qualify the word 'convenient' as well as the expression 'expedient to confirm the order having regard to the effect which…the diversion would have on public enjoyment of the path as a whole'."*

12. Finally, the Ramblers would draw the Inspector's attention to the useful commentary in Stephen Sauvain QC's 'Highway Law' (5th ed) at 9-71:

*In deciding whether the diverted path is substantially less convenient than the original, similar issues to those raised in the consideration of whether the diverted path is nearer or more commodious for the public are likely to be relevant. It will be difficult to justify a diversion which makes a path substantially longer than the original, unless there are compensating advantages in terms of size or ease of use. Regard must be had to the effect on the public enjoyment of the path as a whole. Scenic considerations may be relevant here, and the relationship of the path to the network of paths in the area will be important. In considering the effect of the order the confirming authority must take account of the existence of the provisions for claiming compensation in s.28 of the 1980 Act, which are applied by s. 121(2). However, the existence of compensation does not absolve the decision maker from considering the economic effects of the diversion on a business.* (Emphasis added.)

**Conclusion**

13. Having regard to the submissions made above, the Ramblers contend that in order for an alternative route to be a "convenient and suitable replacement for existing users", existing users must be just as likely to use the alternative route for the purposes for which they are using the existing route. If users are less likely to use the route then there is a risk that the PROW network will become disconnected as a result of the extinguishment or diversion. What requirements an alternative route will need to meet in order to satisfy this test will depend on the specifics of the existing route that it will replace and, most importantly, the purpose for which that existing route is being used.

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