Re The Network Rail (Suffolk Level Crossing Reduction) Order
Public inquiry February 2018

Submissions on behalf of Suffolk County Council
On the application of section 5(6) of the Transport and Works Act 1992
and the meaning of "required"

Introduction

1. On Day 2 of the Inquiry, the Inspector requested a note from Network Rail detailing how Network Rail had approached the issue of whether an alternative right of way was "required" to be provided under section 5(6) of the Transport and Works Act 1992 ("TWA"). Network Rail submitted a note on Thursday 15 February 2018.

2. Network Rail has since prepared a supplementary note ("Supplementary Note") on this matter, providing further detail as to how Network Rail interprets the meaning of "required" in section 5(6) of the TWA.

3. This note has been prepared on behalf of Suffolk County Council ("SCC"). It sets out some of the questions surrounding the interpretation of "required" in section 5(6), as well as SCC's position, for purposes of this Inquiry, in relation to these matters. SCC is grateful to have been provided with a copy of Network Rail's Supplementary Note, prior to Network Rail submitting it to the Inquiry. For ease of reference, cross-reference is made below to the Supplementary Note where relevant.

Section 5(6) TWA

4. Section 5(6) TWA provides:

> (6) 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**.

(Emphasis added.)

5. The TWA Guidance states in Annex 2, p105:

> *Paragraph 4* provides for orders to authorise the creation or extinguishment of rights over land, including rights of navigation over water, either compulsorily or by agreement. "Over" includes in or on land. This power is widely drawn because of the multitude of rights and interests in land that may be affected by a works proposal, especially one of a linear nature. Where, for example, a proposed railway crosses a public right of way, it may be necessary to stop up the right of way or to divert it (by the construction of a bridge or underpass). The power to extinguish a public right of way is however restricted by section 5(6). This provides that a section 1 or 3 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. 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.

6. During the present Inquiry, the text underlined above has colloquially been referred to as the "suitable and convenient" test. A separate note (NR-INQ-26) has been submitted to the Inquiry setting out Network Rail, SCC and the Ramblers' respective positions on the proper interpretation of this test.

7. SCC considers that the wording in section 5(6) is ambiguous and open to different interpretations. The Inspector and the Secretary of State will, therefore, need to give careful consideration to the proper interpretation of this section. In order to consider how the concept of "not required" should be approached under section 5(6)(b), it will be necessary to interpret the following terms:

   (i) "right of way";
   (ii) "has been…provided"; and,
   (iii) "required".

"Right of way"

8. The preamble to section 5(6) refers to "any public right of way", which shall not be extinguished unless an alternative is provided or not required. However, the reference in sub-paragraphs (a) and (b) is simply to an "alternative right of way".

9. **Interpretation 1:** It is arguable that the alternative right of way, if it is to be provided, must also be a "public right of way", in other words a public right of way which can be recorded on the definitive map and statement.[1] If so, an alternative "public right of way" must be provided, unless one is "not required" under sub-paragraph (b). However, it could also be argued that where an alternative route already exists on the highway network (albeit one that is not made up of public rights of way), an "alternative [public] right of way" will not be "required" under sub-paragraph (b).

10. **Interpretation 2:** Network Rail has, by contrast, interpreted "right of way" in sub-paragraphs (a) and (b) to mean "a route over which the public is legally entitled to pass and repass, either as a [public right of way] or as highway".[2] In applying Network Rail's definition of "right of way", SCC submits that where an alternative route already exists on the highway network, which constitutes a "route over which the public is legally entitled to pass and repass", this would, in fact, fall into the sub-paragraph (a) category of an "alternative right of way" which "has been…provided". The question of whether or not an alternative right of way is "required", under sub-paragraph (b), would essentially fall away as one has already been provided.

11. **SCC position:** For the purposes of this Inquiry, at a practical level SCC considers that an existing public highway could, in theory, serve as a replacement to the existing right of way, provided that the suitable and convenient test (as defined by SCC) has been met. **F**ollowing on from Network Rail's interpretation of "right of way", SCC considers that - where an alternative route (consisting of routes over which the public is legally entitled to pass and repass) already exists on the highway network – then the situation falls into a sub-paragraph (a) scenario (an alternative right of way has been provided) rather than a sub-paragraph (b) scenario (an alternative right of way is not required).[3]

"Has been…provided"

[1] Footpaths, bridleways, restricted byways and byways open to all traffic (Wildlife and Countryside Act 1981, section 56).
[2] Network Rail's Supplementary Note, para 5.
[3] By contrast, Network Rail takes the view that it will fall into a sub-paragraph (b) scenario, Network Rail's Supplementary Note, para 6.

12. SCC takes the position that "has been…provided" includes the situation where an "alternative right of way" already exists on the network when the TWAO in question is applied for. It may also include a situation where an alternative "right of way" has been provided through other means/proceedings (for example, through a separate public path creation order under the Highway Act) which were progressing concurrently to the TWA process but which have now been completed.

"Required"

13. SCC maintains that there can be two possible circumstances in which an "alternative right of way" will not be required under section 5(6)(b):

    (1) **Not necessary (Category 1):** Where the existing public right of way is not used or is no longer necessary. Essentially, this would cover circumstances in which that public right of way could be stopped-up/extinguished under section 118 of the Highway Act 1980.

    (2) **A suitable and convenient alternative route already exists (Category 2):** Where an alternative route already exists on the highway network, which is a "convenient and suitable replacement for existing users". (This is the approach taken by Network Rail, as set out in the Supplementary Note at paragraph 6).

14. For the reasons set out above, SCC submit that, regardless of which interpretation is taken to the term "right of way" in sub-paragraphs (a) and (b), Category (2) will be provided for by the section 5(6) test taken as a whole.[4] If it is accepted that "alternative right of way" includes any "route over which the public is legally entitled to pass and repass", then the section 5(6)(b) will only address a Category 1 scenario.

[4] In short, if Interpretation 1 is preferred, then Category 2 can be applied through an application of sub-paragraph (b) – that an alternative "[public] right of way" is "not required" because an alternative route (albeit not a public right of way) exists. If Interpretation 2 is preferred, then Category 2 can be applied through an application of sub-paragraph (a) – an "alternative right of way" "has been…provided".

15. In relation to a proposed downgrading of rights, SCC takes the position that the section 5(6) test will apply. However, in relation to this Order, SCC accept that an alternative right of way is "not required" in relation to S18 Cowpasture Lane (which is the only crossing over which rights will be downgraded).[5]

Category (2) must be "suitable and convenient" in the circumstances

16. SCC agrees with Network Rail[6] that the relevant part of the TWA Guidance, which uses the language of the "convenient and suitable" test, is referring, specifically, to the provision of an alternative right of way under sub-paragraph (a). It is not technically referring to the question of whether or not an alternative right of way is "required" under sub-paragraph (b).

17. However, SCC submits that, when dealing with a Category 2 scenario, it is appropriate to apply the "suitable and convenient" test to determine if the presence of an existing "alternative route" means that an alternative "right of way" is "not required". This is the approach that has been taken by Network Rail.[7]

18. What is more, SCC submit that it is important within a Category 2 scenario that, when considering the suitability and convenience of the alternative (existing) route, regard is had, in particular, to its "existing" nature. The Inspector will need to consider the fact that the alternative route is already present on the highway network and yet the public right of way (due to be extinguished) remains in use. The Inspector will need to properly scrutinise the purpose for which each route – the existing public right of way and the existing alternative route - is being used and assess whether, having considered their current co-existing status, the existing alternative route can serve as a suitable and convenient replacement for users of the public right of way.

[5] See Network Rail's Supplementary Note at para 20.
[6] Network Rail's Supplementary Note at para 10.
[7] Network Rail's Supplementary Note at para 13, albeit that SCC considers that Network Rail was "legally required to do so" because of the above suggested legal interpretation of when an alternative right of way is "required" and when it is not. It is suggested that Category 2 only applies if the existing route is "suitable and convenient for users, or could be made so".

19. In this respect, SCC would draw to the Inspector's attention the dicta of Woolf LJ in *Ramblers Association v Kent County Council* (1990) 60 P & CR 464 at 471.[8] In particular, consideration should be had to the fact that extinguishment of the public right of way could result in the existing alternative route being more crowded/having a higher footfall than at present.

Endnote: application of section 5(6) TWA

20. In addition, SCC takes this opportunity to highlight that for purposes of this Inquiry it is important to recognise the limitations on the scope of section 5(6). Section 5(6) essentially sets out a condition precedent – a test - that will need to be satisfied in circumstances where any public right of way is planned to be extinguished by a TWAO. However, section 5(6) is not the test to be applied to determine whether the substance of the TWAO should be made.

21. In other words, the fact that the section 5(6) test has been met does not, in and of itself, justify the closure of the existing public right of way. Justification for the closure of an existing public right of way will need to otherwise be provided for by the applicant (in this case, under section 1 of the TWA).

[8] Appended to the Ramblers' Statement of Case for this Inquiry.