Sue Rumfitt Associates

Rights of Way Consultancy

161 Spring Road, Kempston, Bedford, MK42 8NR T: 01234 270210 E: Sue@Rumfitt.com
Website:www.rumfitt.com

Izabella Suberlak
Associate
Winckworth Sherwood
Minerva House
5 Montague Close
London
SE1 9BB

By email only to isuberlak@wslaw.co.uk

8 February 2018

Dear Ms Suberlak

THE PROPOSED NETWORK RAIL
(SUFFOLK LEVEL CROSSING REDUCTION) ORDER

Department for Transport reference: TWA/17/APP/04/OBJ/36

The Ramblers rely on legal submissions that have already been made in respect of the applications for Orders in Essex and Cambridgeshire, with which Network Rail will already be familiar. A copy of the submissions made in respect of the Cambridgeshire Order is attached; there is a postscript in respect of two minor details that differ between the two inquiries.

A matter that arose during the Cambridgeshire inquiry and which also in principle arises in the Suffolk inquiry is the interpretation Network Rail places on "*existing* users". At the Cambridgeshire inquiry it was contended that no alternative provision need be made for users of four wheeled vehicles at a crossing which had been unlawfully obstructed for a period of years; the obstruction, at a byway crossing, prevented use by four wheeled vehicles, whilst still permitting access for all other users. The Ramblers does not accept that the meaning of "*existing* users" can be constrained so that it excludes users whose lawful use has been unlawfully prevented by obstruction; particularly where the obstruction is on land controlled by Network Rail.

Crossing S23 Higham is currently obstructed by fencing. (I observed this myself on 2 February 2018.) The evidence of Andrew Woodin, Rights of Way and Access Manager for Suffolk County Council, states that this crossing was unlawfully closed on 26 June 2016 (his para 9) which he goes on to say was during the nine day census. This appears to be confirmed by the evidence of Susan Tilbrook (her para 2.14.4). Unsurprisingly, the census recorded no use.

If the principle contended for at the Cambridgeshire inquiry actually applied, then Network Rail would have no need to provide an alternative route for Footpath 1 Higham as the crossing has, in Network Rail's terms, no "*existing* users". (Ramblers accept that Network Rail is providing an alternative route in the case of S023; Ramblers continue to have concerns about safety.)

Further, it cannot be right that Network Rail seeks to rely, even in principle, on an unlawful action, namely the obstruction of a public highway.

Ramblers also maintains its position on certification of the Order, should it be made, and the need to properly record routes on the Definitive Map and Statement. (Your colleague's letter to Mr Suggett dated 26 January 2018 refers.) Ramblers have not been party to negotiations between Network Rail and Suffolk County Council and it may be that the details of any agreement between the Council and Network Rail will also be satisfactory to Ramblers. However, Ramblers do not accept that these areas are not matters upon which Ramblers can offer comment and make representations about to the inquiry. The failure of certification processes in other orders and the failure to properly record public rights and the effect that these failures have on the right of way network are matters that Ramblers have considerable experience of.

Ramblers is also aware of the issues that may arise from the lessened protection offered to public vehicular carriageroads and especially the verges of such highways, given that these are recorded, where they are highways maintainable at public expense, on the 'list of streets' kept by the Council under Section 36(6) of the Highways Act 1980 and are not recorded on the Definitive Map and Statement. The Section 36(6) list, unlike the Definitive Map and Statement, is not legally conclusive as to public rights. Again Ramblers do not see this as an issue that is solely and exclusively the preserve of the Council as highway authority.

A copy of this letter goes to Mrs Vincent and to Merrow Golden, counsel for Suffolk County Council.

Yours sincerely

Sue Rumfitt
Principal

Re: Proposed Network Rail (Cambridgeshire Level Crossing Reduction) Order

Legal Submissions on Behalf of the Ramblers' Association

Introduction

1. The Ramblers' Association (the "Ramblers") set out, in their Statement of Case, their view that it is inappropriate to use a Transport and Works Act Order ("TWAO") to pursue the level crossing closures and diverted routes (the "Proposed Scheme") envisioned in the Proposed Network Rail (Cambridgeshire Level Crossing Reduction) Order (the "Order"). The Ramblers drew attention to the existence of sections 118A and 119A of the Highways Act 1980 ("HA 1980"), which are specifically designed to enable railway operators to stop up and divert footpaths, bridleways and restricted byways that cross railways, and which, in the Ramblers' view, are the correct statutory provisions to be applied by Network Rail to carry out the level crossing closures under the Order.

2. These submissions address in more detail the points made by the Ramblers in their Statement of Case. They are designed to assist the Inspector, Network Rail and any other interested party to the Inquiry, in understanding the scope of the Ramblers' position prior to the Inquiry taking place, as well as to provide advance notice to Network Rail of some of the overarching concerns that the Ramblers have relating to the Order and Inquiry Procedure.

Inappropriate Use of the Transport and Works Act 1992

TWA – an overview

3. The Transport and Works Act 1992 ("TWA") was enacted to enable infrastructure-related projects to be processed by way of a statutory order. Previously, such schemes were authorised by the more cumbersome and time-consuming process of promoting a Private Bill in Parliament. The TWA was intended to speed up and simplify the process, as well as enable a more localised consideration of infrastructure projects that were not of national significance.[1]

[1] Part of the initial inspiration for the TWA can be found in a Joint Select Committee report, *Report of the Joint Committee on Private Bill Procedure,* Session 1987-88; HL Paper 97, which highlighted delays experienced in

4. The TWA is designed to offer a "one-stop shop" approach to infrastructure-related projects, by providing for a number of subsidiary, but necessary, powers to be available for inclusion in a TWAO, thereby enabling an applicant to more efficiently carry out works. Such powers include, for example, compulsory purchase powers, powers allowing for the interference of both public and private rights of way and powers to make byelaws.

5. Section 1 of the TWA states, in the relevant part:

> 1. **Orders as to railways tramways etc**.
> (1) The Secretary of State may make an order relating to, or to matters ancillary to, the construction or operation of a transport system of any of the following kinds, so far as it is in England and Wales –
> (a) a railway;…

6. Furthermore, section 5(6) of the TWA provides:

> **5. Subject-matter of orders under sections 1 and 3**
> …
> (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.

Part II TWA – ss47 and 48

7. It is notable, however, that the TWA did not simply establish a new system for creating statutory instruments to enable infrastructure works. Part II of the TWA created an updated statutory framework for ensuring the "safety of railways", which, by way of section 47 and schedule 2, introduced two new provisions to be inserted into the HA 1980: ss118A and 119A.

8. In short, these provisions allow for orders to be made for the stopping up (s118A) and diversion (s119A) of footpaths, bridleways and restricted byways[2] crossing railways.

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the enactment of Private Bill and other concerns arising from the ongoing reliance on the centralised Parliamentary system.

[2] In relation to restricted byways, see Restricted Byways (Application and Consequential Amendment of Provisions) Regulations 2006, sch.1(1), para 1.

In order to confirm these orders, the confirming authority (whether the Secretary of State or the council) must be:

"satisfied that it is expedient to do so having regard to all the circumstances, and in particular to –
(a) whether it is reasonably practicable to make the crossing safe for use by the public, and
(b) what arrangements have been made for ensuring that, if the order is confirmed, any appropriate barriers and signs are erected and maintained."

9. Whilst enacted by the TWA, it is notable that ss118A and 119A were inserted into Part VIII of the HA 1980, which has been referred to as part of a "carefully structured scheme for the creation, extinguishment and diversion of footpaths".[3] These sections have their own specific procedure for applications, consultation etc,[4] and they contain particular provisions that, for example, restrict what alterations can be made to a point of termination of a path or way following a diversion order (s119A(5)), or afford powers to a council to require a railway operator to defray, or contribute towards, expenses associated with the erection or maintenance of barriers and signs (ss118A(5) and 119A(8)(b)). Certain organisations have also been expressly specified as bodies that are required to be notified at various stages of the order-making/confirming process pursuant to ss118A and 119A.[5] These organisations include the Ramblers.[6]

10. In addition, s48 of the TWA was designed to complement s47 (and ss118A and 119A). Section 48 provides:

48. Footpaths, bridleways and restricted byways over railways.
(1) This section applies where –
(a) a public right of way over a footpath, bridleway or restricted byway crosses a railway or tramway otherwise than by a tunnel or bridge,
(b) the operator of the railway or tramway has made a closure or diversion application in respect of a crossing, and
(c) in the opinion of the Secretary of State the crossing constitutes a danger to members of the public using it or likely to use it.

(2) The Secretary of State may by order require the operator to provide a tunnel or a bridge, or to improve an existing tunnel or bridge, to carry the path or way over or

[3] *Hertfordshire County Council v Secretary of State for the Department of Environment, Food and Rural Affairs* [2006] EWCA Civ 1718, per Wall LJ at [65]. This point was not disputed by the other justices.
[4] See The Rail Crossing Extinguishment and Diversion Orders Regulations 1993 and HA 1980, sch 6.
[5] The Rail Crossing Extinguishment and Diversion Orders Regulations 1993, reg 4(3) and sch 4.
[6] The Rail Crossing Extinguishment and Diversion Orders Regulations 1993, sch 4.

under the railway or tramway at or reasonably near to the crossing to which the closure or diversion application relates.

11. It is evident that Part II of TWA was carefully designed for the exact same purpose which underlies the Proposed Scheme that Network Rail is currently pursuing by way of the Order. Parliament was well aware, at the time of enacting the TWA, that (the then named) British Rail intended to update a number of level crossings due to safety concerns. In fact, British Rail had already attempted to promote the East Coast Main Line (Safety) Bill in November 1990, in order to effect the closure of ten level-crossings over the East Coast Main Line. That Bill was blocked by MPs in Parliament, and it seems that the legislative scheme established by the TWA was intended to accommodate British Rail's objectives.[7]

12. Within this context, it is clear that Parliament intended for ss118A, 119A of the HA 1980 and s48 of the TWA to be used by railway operators intending to close level crossings. It is worth quoting in full, the Minister's remarks during the second reading in the House of Commons of what became s48 TWA:

The intention is that the railway or tramway operator will identify potentially dangerous crossings in the first instance, using as criteria the guidance recently issued by the railway inspectorate, on which comments are being sought. It is right that this responsibility should remain with the operator. BR is currently surveying all its footpath crossings, beginning with those on high-speed lines.

Where a crossing is identified as unsafe and, following consultation with the council and other parties, it appears that a stopping-up or a simple diversion to another crossing point is appropriate, the Secretary of State may step in and propose a bridge or tunnel order. Where all the interested parties agree that a bridge or tunnel is necessary, the Secretary of State will be able to give notice of a bridge or tunnel order at the same time as the operator applies for a diversion of extinguishment order. If a works order under part I is required, that could be dealt with concurrently.

An inquiry may be necessary to decide whether it is reasonably practicable to retain a crossing and to make it safe for use by the public. In such cases it would be premature to publish a draft bridge order as that would prejudice the outcome of the operator's application. If the inquiry inspector recommended that a crossing was unsafe and could not be made safe, but should not be closed, a structure would be needed and the Secretary of State would consider making an order. The Department

[7] See, for example, the response of the Minister, Mr McLoughlin, to a query raised by the hon. Member for Denton and Reddish (Mr Bennett) about whether British Rail would continue to pursue the East Coast Main Line legislation following the enactment of the TWA, "It is for British Rail to decide how it wishes to proceed with that legislation. It will want to take into account what happens with this Bill if it reaches the statute book."

of the Environment and the Department of Transport will make all the administrative arrangements to ensure that each is aware of the diversion and extinguishment applications."[8]

13. It is evident from the above quote that the intention behind the TWA was to create a specific statutory scheme to address British Rail's proposed closures of level crossings on safety grounds. The railway operator should seek a stopping up or diversion order under ss118A or 119A of the HA 1980; alternatively, the Secretary of State was given powers to require a bridge or tunnel to be constructed under s48 TWA.

Network Rail's Proposed Scheme – frustration of statutory scheme

14. Network Rail is seeking to close 23 crossings[9] located throughout the whole county of Cambridgeshire. It is seeking to do so through the use of <u>one</u> TWAO. The purpose of the Order is to close level crossings. Whilst Network Rail claim that they are seeking to close the crossings for *inter alia* reasons of improving operational efficiency, it is clear from Network Rail's statement of case that the key justification for the crossing closures is its concerns about safety.

15. Whilst there have previously been TWAOs confirmed that seek solely to close one or two level crossings and/or divert public rights of way, the scale of this Order, in seeking to close over 20 crossings across a whole county, is wholly unprecedented.[10]

16. By seeking a TWAO, Network Rail are attempting to bypass the specific statutory scheme that was designed (by the TWA itself) to accommodate such closures of level crossings. The Ramblers accept that there are a number of different means by which to close or divert public rights of way,[11] and that the existence of one such power does

[8] *Hansard*, HC, Vol 204, col 485.
[9] This is the original number applied for. The Ramblers were informed, in a letter dated 6 November 2017, that three of the proposed crossing closures (C03, C08 and C09) and one of the proposed re-designations of crossing status (C13) have since been withdrawn due to Network Rail having "recently discovered certain non-compliances in relation to the service of landowner notices relating to these crossings".
[10] Furthermore, the fact that other TWAOs have previously been confirmed (and the time limit for reviewing those TWAOs has passed) does not act as a bar to establishing the inappropriateness of the use of the TWA for such schemes.
[11] For example, see ss247 and 257 Town and Country Planning Act 1990; sch 10 Housing Act 1988; s48 Civil Aviation Act 1982.

not, necessarily, prevent the use of another.[12] However, having particular regard to the statutory intention behind the TWA as outlined above, it is clear that Network Rail's proposed use of the TWA for the Proposed Scheme would frustrate the statutory purpose of ss118A and 119A of the HA 1980.[13]

17. Network Rail have, however, sought to defend their use of the TWA for the Proposed Scheme on a number of grounds, none of which have merit. Firstly, Network Rail have argued that ss118A and 119A are solely concerned with safety issues at level crossings, whereas the proposed Order is for purposes of operational efficiency (relating to Network Rail's plans to, for example, speed up the network) in addition to safety concerns. Network Rail asserts that only a TWAO can address issues in addition to safety concerns.

18. However, ss118A and 119A allow for other issues to be considered under the broader "expediency" test (at the stage of confirming the order).[14] Furthermore, it is clear that safety concerns are, in reality, the driving concern behind Network Rail's Proposed Scheme. If, in relation to the Proposed Scheme, Network Rail were to be allowed to bypass the ss118A and 119A procedure simply by pointing to the further operational benefits to be gained from closing the crossings, then there is a risk that ss118A and 119A will, in future, become defunct. A railway operator would simply need to assert that closing a crossing will also assist in improving operational management of the network, in order to proceed under a TWAO and avoid meeting the tests set out in ss118A and/or 119A. Most notably, it would then, as a result, not need to consider

[12] See, for example, the saving and interpretation provision, s123 HA 1980.

[13] *R (Lumba) v Secretary of State for the Home Department* [2011] UKSC 12 at [199] per Baroness Hale, "the long-established principle of United Kingdom public law that statutory powers must be used for the purpose for which they were conferred and not for some other purpose: *Padfield v Minister of Agriculture Fisheries & Food* [1968] AC 997."

[14] Sections 118 and 119 of the HA 1980 are also available to stop-up or divert public rights of way on grounds other than safety. A s118 stopping-up order can be made where it appears to a council that a footpath, bridleway or restricted byway is not needed for public use; the order may be confirmed if the confirming authority is satisfied that it is expedient to do so having regard to the extent (if any) to which the path or way is likely to be used by the public. A s119 diversion order can be made if expedient to do so (in the interests of the owner, lessee or occupier of land crossed by the path or way or of the public); the order may be confirmed if the confirming authority is satisfied *inter alia* that it is expedient to do so and that the diverted route will not be substantially less convenient to the public. The confirming authority will also need to be satisfied that it is expedient to confirm the order having regard to the effect to which (a) the diversion would have on public enjoyment of the path/way as a whole, (b) the coming into operation of the order would have as respects other land served by the existing PROW and (c) any new PROW created by the order would have as respects the land over which the right is so created and any land held with it.

whether it is reasonably practicable to make the crossing safe for use by the public. This is not how the statutory scheme was designed to operate.

19. Secondly, Network Rail have argued that a TWAO allows a more comprehensive approach to crossing closures, allowing multiple closures to be achieved through one order. This may well be true, but such an efficiency-based argument does not make the process lawful.

20. In addition, Network Rail note (at para 121 of Network Rail's Statement of Case) that the Order includes a number of matters that fall within the ambit of a TWAO and, furthermore, that a TWAO will afford Network Rail a number of ancillary powers, such as CPO powers, to enable the closure of level crossings.[15] Again, the fact that the process would be easier for Network Rail does not, in itself, make the process lawful. Furthermore, whilst Network Rail may be requesting a number of ancillary powers in the Order to carry out the Proposed Scheme, this should not detract from the fact that the whole Order is directed towards the closure of level crossings which falls within the ambit of ss118A and 119A of the HA 1980. For the reasons given above, where the focus of an order is the closure of such level crossings, it should be sought under ss118A and 119A of the HA 1980.

21. The Ramblers note the argument raised by Network Rail (para 122 of Network Rail's Statement of Case) that ss118A and 119A of the HA 1980 only apply to footpaths, bridleways and restricted byways. However, ss116 and 117 of the HA 1980 are available for the stopping up or diversion of any highway that is not a trunk road or a special road. Whilst s116 requires an application to be made by the highway authority, s117 specifically enables any person, who desires a highway to be stopped up or diverted, to request that the highway authority make an application under s116.

22. Furthermore, s116(4) of the HA 1980 specifically provides that:

> "An application under this section may be made, and an order under it may provide, for the stopping up or diversion of a highway for the purposes of all traffic, or subject to the reservation of a footpath, bridleway or restricted byway"

[15] As an aside, it is noted that s119A of the HA does make provision for the payment of compensation. See s119A(8)(a).

This undermines another of the reasons provided by Network Rail for proceeding under a TWAO; namely, that a TWAO "permits the downgrade or upgrade of the status of certain highways and authorises certain public and or private rights over a crossing to be extinguished, where appropriate, in place of outright closure.".[16] The same powers are available under the HA 1980.

23. Interestingly, s116 of the HA 1980 includes particular safeguards, for example, local authorities and parish councils are afforded a right of veto over any proposed order (s116(3)). It is clear that Parliament has intended, through Part VIII of the HA 1980, for specific safeguards to apply to decisions as to the stopping up or diversion of rights of way, and that these safeguards will vary depending on what right of way is at issue and whether any particular circumstances apply (for example, ss118B provides for certain procedures to apply for orders stopping up certain "relevant highways" for purposes of crime prevention). Again, Network Rail is seeking to frustrate this intricate statutory scheme through use of a TWAO.

24. It is notable that Network Rail have clearly outlined the issues they might face if they were to proceed under the HA 1980. In NR18, Client Requirements Document Anglia CP5 Level Crossing Reduction Strategy, it is stated:

> **1.1.1 Closure difficulties**
> Public footpaths and bridleways can be closed by rail crossing diversion or extinguishment orders (expedient in the interests of public safety) or normal public path orders (diversion to make more commodious/better serve the landowner/not necessary). However, all of these are subject to challenge which can result in public inquiry, where success is not guaranteed. This is therefore a risky and time-consuming strategy. The legal costs of a basic application are around £3k–4k.
> All public highways can be closed or downgraded by application to a magistrate's court, on the grounds that they are not needed for public use, or should be diverted. Again, this is risky as there is no guarantee magistrates will agree to make an Order. Cost of an application about £3k.
> Building bridges often requires Planning Permission, land take and other problems which increase the cost (e.g. crossings, where a landowner held us to ransom).
> The best way to close public highways is through a Transport and Works Act Order. In that way, all proposed changes and consents can be consulted in advance, bridges provided where appropriate, and we can argue using the greater public benefit of improved rail services.

[16] Para 123, Network Rail's Statement of Case. It is also worth noting that section 116(5) allows for an "application or order under this section may include 2 or more highways which are connected with each other".

User Worked Crossings (UWC) generally now only exist where there is a need to access land where no other practicable access is available; this is as a result of the good efforts during CP4. Closure of these types of crossings is achieved as a private negotiation between Network Rail & the land owners or authorised users.
(Emphasis added.)

25. What appears evident, from the above quote, is that Network Rail has consciously sought to bypass the protections under the HA 1980, mainly due to the fact that they cannot "guarantee" success. Instead they are attempting to use a TWAO by simply referencing "the greater public benefit of improved railway services".

Section 13(2) TWA

26. It is worth highlighting section 13(2) of the TWA which states:

…Where an application has been made to the Secretary of State under section 6 above and he considers that any of the objects of the order applied for could be achieved by other means, he may on that ground determine not to make the order…[17]

27. In promoting this subsection, the Minister stated, in relation to a question from the floor as to what the phrase "other means" referred to:

That point was raised in Committee. Concern was expressed about a possible flood of applications dealing with matters for which procedures already exist. In particular, some Members feared that unscrupulous applicants might seek to use the new orders to sidestep the established procedures for extinguishing rights of way, where such a proposal was not related to a works matter that belonged to the new procedure.

28. This statement clearly supports the submissions made above. The TWA should not enable applicants to circumvent established procedures for extinguishing rights of way in circumstances where the extinguishment (and/or diversion) of rights of way does not relate to a works matter. Here, Network Rail is not proposing any distinct "works matter". Rather, Network Rail is attempting to promote the extinguishment and/or diversions, in themselves, as the "works matter". It is clear, from the above quote, that the TWA is not designed to accommodate this type of application.

[17] Subsection 13(2) is "without prejudice" to subsection 13(3) which provides that "The power of the Secretary of State to make a determination under subsection (1) above includes power to make a determination in respect of some only of the proposals concerned, while making a separate determination in respect of, or deferring consideration of, others (and accordingly the power to make an order under section 1 or 3 above includes power to make two or more order s on the same application."

29. Whilst the Minister appears to have had in mind the risk of side-stepping procedures that were already "established" when the TWA was introduced, the same reasoning must apply equally to the interplay between the broad provisions of s1 of the TWA and the procedures of ss118A and 119A (due to be introduced by the TWA at the time the Minister made the above-quoted statement). In short, applicants should not be allowed to unduly use a TWAO to sidestep specific procedures that have been enacted for stopping up and diverting rights of way (whether or not these are on railway crossings).

30. In this regard, the Ramblers reiterate the guidance to the TWA, *A Guide to TWA Procedures*, which states, at 1.14:

> …the following matters are unlikely to be approved in TWA orders on policy grounds, unless compelling reasons can be shown:
> …
> - Proposals which could more properly be dealt with under other existing statutory procedures – for example the closure of an inland waterway or public right of way where no associated new works requiring a TWA order are proposed. (Emphasis added.)

31. The catch-all provision of section 5(6) TWA may well anticipate the need to close PROWs as a measure ancillary to a TWA project. This does not, however, justify the promotion of a TWA solely concerned with closure of level crossings, for which the TWA itself has provided a designated legislative process.

32. For those reasons, and in addition to the submissions made above, the Ramblers will be inviting the Inspector to recommend that the Order be refused on the basis that the objects of the Order could have been achieved by other means.

The test to be applied under section 5(6) TWA

33. As has been set out above, the Ramblers submit that it is inappropriate to use s1 of the TWA to carry out the Proposed Scheme. If, however, s1 TWA is to be used then the Ramblers submit, as an alternative argument, that the same considerations as would apply to orders made under ss118A and 119A, should likewise apply to the assessment of individual crossing closures in the Order.

34. The Ramblers welcome Network Rail's acceptance that the reference to an "alternative right of way" in s5(6) TWA means "a convenient and suitable replacement for existing users" as stated in Annex 2 of the *Guide to TWA Procedures*.[18]

35. The Ramblers further submit, however, that in light of the submissions made above, if a crossing is to be closed under the Order which would result in the stopping-up or diversion of a public right of way, it must be "expedient to do so having regard to all the circumstances" and, in particular, having regard to "whether it is reasonably practicable to make the crossing safe for use by the public", as well as "what arrangements have been made for ensuring that, if the order is confirmed, any appropriate barriers and signs are erected and maintained."

36. If these considerations were to be applied to the assessment of each of the proposed crossing closures in the Order, then this would, at least in practice, help alleviate some of the Ramblers' concerns set out above relating to the inappropriate use of the TWA.

37. In this regard, it is worth noting that the relevant considerations to apply under the tests in ss118A and 119A of the HA 1980, has been elaborated in DEFRA's Rights of Way Circular (1/09) (October 2009). The circular states, at 5.49, in relation to s118A:

Before confirming the order, the Secretary of State, or the local authority in the case of unopposed orders, must be satisfied in accordance with section 118(4) that it is expedient to do so having regard to all the circumstances. This provision enables all the relevant factors to be taken in to consideration, which may include the use currently made of the existing path, the risk to the public of continuing such use, the effect that the loss of the path would have on users of the public rights of way network as a whole, the opportunity for taking alternative measures to deal with the problem, such as a diversion order or a bridge or tunnel and the relative cost of such alternative measures.

And, at 5.51, in relation to s119A:

Section 119A(1) provides for the diversion of a footpath, bridleway or restricted byway that crosses a railway otherwise than by a tunnel or bridge where it appears to the council expedient in the interests of the safety of members of the public using it or likely to use it. While other criteria are not specified in section 119A, the new way should be reasonably convenient to the public and authorities should have regard to

[18] See, for example, Susan Tilbrook's Proof of Evidence at 1.3.2.

the effect that the proposal will have on the land served by the existing path or way and on the land over which the new path or way is to be created. Consideration should also be given to the effect that the diverted way will have on the rights of way network as a whole and the safety of the diversion, particularly where it passes along or across a vehicular highway.

38. Similarly, Sauvain QC, in *Highways Law* (5th ed) has provided further guidance as to the appropriate considerations to be applied when assessing orders under s.118A (at 9-82):

On its face, s.118A appears to be a sensible measure for addressing those rail crossings that are on the level, which the railway company has a statutory obligation to maintain but which have become dangerous. The statutory obligation of the railway company is now effectively replaced with a more limited obligation based around the criteria within this section…Notwithstanding the existence of powers of diversion in s.119A, there is no specific duty in s.118A to consider whether the path could not more appropriately be diverted than stopped up. However, this issue, together with the importance of the path to the public, will fall within the "expediency" judgment to be made by both the order-making and the confirming bodies. The factors which might influence the question of expediency are not defined in the section and will involve the usual questions relating to the public interest which have to be considered when changes are made to the existing highway network. The factors which could be taken into account might include the use currently made of the existing path, the risk to the public of continuing such use, the effect that the loss of the path would have on users of the public rights of way network as a whole, the opportunity of taking alternative measures to deal with the problem such as a diversion order, bridge or tunnel and the relative costs of the various alternatives. Furthermore, the Secretary of State has power to require the railway operator to provide a tunnel or bridge, or to improve an existing tunnel or bridge, to carry the path or way over or under the railway at or reasonably near to the crossing to which the application relates instead of pursuing an order under this section.' (Emphasis added.)

And, in relation to s119A (at 9-84):

'The test to be applied in deciding whether or not to confirm the order is identical to that contained in s118A. However, it is likely that the range of circumstances which will have to be considered would include a consideration of the length and convenience of the diversion, the effect of the diversion on the land on which the new path is created as well as the public interest in keeping the existing path open over its present route. Necessarily, diversions away from an existing level crossing are going to involve significant re-routing of paths – to the next point at which a path or road crosses the railway. However, where an application is made under s119A, the Secretary of State may require the railway operator to provide a tunnel or bridge, or to improve an existing tunnel or bridge, to carry the path or way over or under the railway at or reasonably near to the crossing to which the application relate.' (Emphasis added.)

39. The Ramblers do not expect these considerations to be controversial. But it is worth highlighting that Network Rail's proposed use of the TWA procedure must not be allowed to undermine a proper consideration of each crossing closure, as would have been required under ss118A and 119A of the HA 1980.

Procedure to be applied under s1 and s5(6) TWA

40. In a similar vein, it is imperative that the Inquiry procedure is conducted in a procedurally fair way, having particular regard to the number of proposed crossing closures to be included in the Order. As is evident from the submissions above, sections 118A and 119A of the HA 1980 were designed to ensure a proper consideration of each crossing closure, and include protections to best guarantee that interested parties, including the Ramblers, would be duly notified of proposals and afforded an appropriate opportunity to make representations and be heard.[19]

41. If s1 of the TWA, as opposed to ss118A and 119A of the HA 1980, is to be used in order to close level crossings then, it is crucial that care is taken to ensure that there is a proper assessment, during the Inquiry, of each crossing closure that is opposed. This will require there to be sufficient time for objectors to put forward their case on each individual crossing and for there to be a proper assessment of all relevant considerations as to the expediency of closing or diverting each crossing. The procedure must not be rushed and it is important that crossings are not grouped together in such a way that risks losing sight of the wood for the trees.

42. In this regard, it is worth highlighting that the TWA imposes no deadline by which a TWAO must be made. In fact, the Highways Encyclopedia states, in the commentary to s10 of the TWA (dealing with objections) (Vol 2, at 3-2132.1):

> The Government resisted attempts to impose a statutory time limit on taking decisions, because of the fear that a Secretary of State who made himself subject to such a limit might lay himself open to the criticism that he had not properly considered all the evidence in the case. Decisions should take as long as they have to in order to give all factors full and proper considerations (*Official Report,* Standing Committee A, col. 205, January 14, 1992). (Emphasis added.)

[19] See, for example, HA 1980, sch 6, para 2.

Conclusion

43. These submissions are designed to further elaborate on the legal points made by the Ramblers in their Statement of Case. They are also intended to provide appropriate notice to Network Rail, prior to the start of the Inquiry, as to the Ramblers' over-arching concerns relating to the Order and the Inquiry procedure.

44. The Ramblers submit that the use of a TWAO for the Proposed Scheme is inappropriate and risks frustrating the legislative scheme set out in Part II of the TWA that was designed to regulate the closure of level crossings.

45. Alternatively, and without prejudice to the above position, the Ramblers submit that if the Order is to be pursued, it is imperative that the same considerations, as would apply under ss118A and 119A of the HA 1980, should apply to the assessment of each proposed crossing closure. Furthermore, the Inquiry procedure must be fair and afford appropriate time to the consideration of each proposed crossing closure.

MERROW GOLDEN

21 NOVEMBER 2017

FRANCIS TAYLOR BUILDING

INNER TEMPLE, LONDON, EC4Y 7BY

References applicable to Suffolk

Para 14 Fn 9 Twenty-four crossings were originally applied for, one, S05 Pannington Hall, has been withdrawn.

Para 22 Fn 16 The quoted text appears in para 117 of Network Rail's statement of case for the Suffolk TWA inquiry

Winckworth Sherwood

By Email and Post

Sue Rumfitt
Sue Rumfitt Associates
161 Spring Road
Kempston
Bedford
MK42 8NR

Solicitors and
Parliamentary Agents

Minerva House
5 Montague Close
London
SE1 9BB
DX: 156810 London Bridge 6

Switchboard 020 7593 5000
Direct Line 020 7593 5164
www.wslaw.co.uk

Your Ref: TWA/17/APP/04/OBJ 36
Our Ref: HXA/18136/00633
Please quote reference when replying

9 February 2018

Dear Madam

Proposed Network Rail (Suffolk Level Crossing Reduction) Order
The Ramblers

We refer to your letter dated 8 February 2018 and respond on behalf of Network Rail.

First, we note that your letter attaches the legal submissions submitted on behalf of the Ramblers to the inquiry into the proposed Network Rail (Cambridgeshire Level Crossing Reduction) Order, with the addition (as referred to in your letter) of a postscript with references applicable to Suffolk. Your letter states that the Ramblers rely on those legal submissions.

Network Rail questions the propriety of the proposed submission of, and reliance on, those submissions.

Firstly, those submissions were submitted on behalf of the Ramblers in a separate inquiry, i.e. into the Cambridgeshire Order. The Suffolk inquiry is a separate inquiry into a separate set of Order proposals and it is not appropriate for the Ramblers to put in for the Suffolk inquiry submissions from Counsel from another inquiry expressly directed to that other inquiry and Transport and Works Order with minor adjustments made, by way of postscript, for Suffolk inquiry.

Secondly, they were drafted by Counsel instructed for the Ramblers at that inquiry, and were expressly referred to – and relied on – in Counsel's opening submissions. We assume that they will be spoken to and/or relied upon to the extent necessary in closing submissions at that inquiry, which we understand will also be delivered by the same Counsel. We understand that Counsel does not act for the Ramblers at this inquiry (an email from Suffolk County Council to the Programme Officer dated 27 November 2017 (copy attached) confirmed that "Ms Golden is not representing the [Ramblers] Association at the Suffolk inquiry and that there is no known conflict that would prevent her from representing" Suffolk County Council). We query, therefore, who is proposing to speak to the matters raised in those submissions, in the presentation of the Ramblers' case at inquiry.

Given Ms Golden is appearing for Suffolk County Council, who is not disputing the use of the TWAO procedure, we consider this does raise issues as to the propriety of the Ramblers seeking to rely on legal submissions in her name, prepared for the purposes of another inquiry, in support of the Ramblers' case in this inquiry that the TWA is not the correct procedure.

Turning to the Ramblers' comments concerning Network Rail's interpretation of "existing users", Network Rail observes that the circumstances relating to four-wheeled vehicles refer to matters raised at the Cambridgeshire Inquiry, and no such cases in relation to the Suffolk Order.

In relation to the Ramblers' comments made about S23 Higham crossing being obstructed, Network Rail refers the Ramblers to Mr Prest's rebuttal proof on S23 Higham which explains the position in relation to the closure of that crossing. A copy of the rebuttal is available on the inquiry website.

As regards the Ramblers view on what it can bring to bear on matters regarding certification, Network Rail would point out that the certification process forms no part of its statement of case, and Network Rail has seen no evidence from it on this point. Further, Network Rail suggests that if the Ramblers have experience of 'failure of certification processes in other orders and failure to properly record public rights' (which are matters for the Highway Authority), the deemed 28-day certification proposed in the draft Order is intended as a remedy to that very concern.

A copy of this letter goes to the Programme Officer and to Merrow Golden, Counsel to Suffolk County Council and to Suffolk County Council.

Yours faithfully

Winckworth Sherwood LLP

Winckworth Sherwood LLP

DT 020 7593 5164
DF 020 7593 5199
handerson@wslaw.co.uk

Sue Rumfitt Associates

Rights of Way Consultancy

161 Spring Road, Kempston, Bedford, MK42 8NR T: 01234 270210 E: Sue@Rumfitt.com
Website:www.rumfitt.com

Winckworth Sherwood
Minerva House
5 Montague Close
London
SE1 9BB

By email only to isuberlak@wslaw.co.uk and handerson@wslaw.co.uk

12 February 2018

Dear Sirs

THE PROPOSED NETWORK RAIL
(SUFFOLK LEVEL CROSSING REDUCTION) ORDER
Department for Transport reference: TWA/17/APP/04/OBJ/36

I refer to your letter of 9 February.

I will be making an opening statement on behalf of the Ramblers at the Suffolk inquiry and, to the extent that may be necessary, speaking to the matters raised in the submissions. The matters set out in the submissions apply across all three Orders; they are in the public domain and Ramblers has maintained a consistent stance on these matters and maintain that it is entirely appropriate that they are put before the Inspector at this inquiry.

I am aware of Mr Prest's rebuttal proof. The point remains, however, that there are no *existing* users of S23 (or indeed of S02 Brantham).

Concerns about the certification process in the Order have been raised by Ramblers in connection with the other two Orders and Network Rail is fully aware of these concerns. As a national groups representing walkers, who are the 'end-users' of the diversions to paths in the Orders, Ramblers does not accept that the matter of the detail of certification is a matter for the County Council alone. Certification does not bear on the matter of failure to properly record public rights.

A copy of this letter goes to Mrs Vincent and to Merrow Golden, counsel for Suffolk County Council.

Yours faithfully

Sue Rumfitt
Principal