AGREED NOTE ON THE "TESTS" RELEVANT TO THE DETERMINATION OF THE APPLICATION

Statutory provisions

1. The Transport and Works Act 1992 gives a broad discretion to the Secretary of State to make orders under it: "The Secretary of State **may** make an order relating to, or to matters ancillary to, the construction or operation of a transport system" (s 1(1)). The 1992 Act does not otherwise explain how the order making power (including in respect of compulsory acquisition of land) should be exercised.

2. Section 13(1) provides the Secretary of State with three options when faced with an application:

> "(a) to make an order under section 1 or 3 above which gives effect to the proposals concerned without modifications, or
> (b) to make an order which gives effect to those proposals with modifications, or
> (c) not to make an order."

3. The power to make an order with modifications does not extend to the inclusion of additional land within a compulsory purchase without the written consent of the landowner.

4. There are other provisions which are relevant to the determination. The only relevant provision which might to be said to set a "test" is s 5(6), which 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."

5. Other relevant provisions for the determination are as follows:

    a. By s 13(2), the Secretary of State may determine not to make the order on the grounds that "he considers that any of the objects of the order applied for could be achieved by other means";

    b. The Secretary of State is empowered under s 13(3) to make a "split decision" on the proposals;

    c. Section 13B requires the Secretary of State to consider the EIA information and "reach a reasoned conclusion about the likely significant effects of the proposed works or other projects on the environment" where the proposal is for an EIA Order.

Policy

6. The Guide to Transport and Works Act Procedures 2006 [INQ/005] ("the Guide") sets out the Secretary of State's policy on determination of applications for orders, albeit by way of guidance.

7. In respect of **compulsory acquisition** of land, it notes:

    a. "Before confirming such powers, the Secretary of State will wish to be satisfied that there is a compelling case in the public interest for taking away a person's land or rights in land, and that all the land in question is required for the scheme" (1.39);

    b. Similarly, in the commentary of Schedule 1 to the Act, it notes that where "land is to be acquired compulsorily, the Secretary of State would wish to be satisfied that the public benefits outweighed any private disbenefits. This is especially important in view of provisions in the Human Rights Act 1998 which provide (amongst other things) that no one shall be deprived of his possessions except in the public interest".

8. In respect of **planning policy**, the Guide states that where proposals would authorise works, and any deemed planning permission, the Secretary of State will have regard to national, regional and local planning policies. It continues (1.28):

    > "In line with the plan led system for determining planning applications, projects that conflict with relevant policies in the development plan are unlikely to be authorised, unless material considerations indicate otherwise."

9. In respect of funding, the Guide states (1.32ff)

    > "1.32 … in deciding whether to make a TWA order authorising works, the Secretary of State will wish to have regard to the applicant's prospects of funding the planning and construction of such works, including the payment of any statutory land compensation. This applies whether the project is to be financed entirely by the private or public sector or by a combination of the two.
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    > 1.33 It follows that, however the proposed works are to be funded, the applicant should be able to demonstrate that the proposals are capable of being financed in the way proposed. Depending on the size of the project and the nature and extent of the opposition to it, the applicant may need to provide a financial appraisal of the scheme for the purpose of any public inquiry and to be ready to respond to any questions about the project's financial viability.
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    > 1.34 The applicant will not however be expected to have secured the necessary funds to implement the proposed works before the TWA order is determined. It is accepted that the private sector may be unwilling to commit funds until the necessary statutory approvals have been granted…"

10. In respect of the **safety**, the Guide does not prescribe any test but refers to the Railways and Other Guided Transport Systems (Safety) Regulations 2006, noting that the applicant should consult with ORR about whether their approval would be required (1.43). The Guide continues:

    > "1.44 In relation to a proposed new railway, if the system would involve the construction of a level crossing, ORR should be consulted at an early stage to ascertain whether they consider that there are exceptional circumstances which would justify providing a level crossing as opposed to a bridge or tunnel. If a level crossing were considered acceptable by ORR then they would require that, if the TWA order authorising the system were made, the protection

arrangements for the level crossing should be prescribed subsequently by way of an order made under the Level Crossings Act 1983, as amended by the Level Crossings Regulations 1997 (SI 1997 No. 487)."

11. In respect of **public rights of way**, the Guide refers to s 5(6) (above) and notes:

> "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."

12. The Guide also notes (at 1.39) that "Relevant advice" on the use of compulsory purchase powers can be found in Circular 06/2004 issued by the former Office of the Deputy Prime Minister and entitled "Compulsory Purchase and the Crichel Down Rules". Circular 06/2004 is now replaced by "Guidance on Compulsory purchase process and The Crichel Down Rules" (July 2019) [INQ/008] ("the Guidance").

13. The following parts of the Guidance are relevant:

    a. A compulsory purchase order should only be made where there is a compelling case in the public interest (sections 2, 12);

    b. Authorising authorities should ensure that the purposes for which the compulsory purchase order is made justify interfering with the human rights of those with an interest in the land affected (section 2, 12);

    c. Acquiring authorities should provide substantive information as to the sources of funding available for both acquiring the land and implementing the scheme (section 14). Funding should "generally be available now or early in the process. Failing that, the confirming minister would expect funding to be available to complete the compulsory acquisition within the statutory period" (section 14). If an acquiring authority cannot show that all the necessary resources are likely to be available within a reasonable timescale, it will be difficult to show conclusively that the compulsory acquisition of land is justified (section 13);

    d. The acquiring authority will need to show that the scheme is unlikely to be blocked by any physical or legal impediments to implementation (section 15).

Relevance of ORR policy

14. The Guide refers to ORR's previous policy of not permitting new level crossings except in "exceptional circumstances". The ORR's current policy (Principles for managing level crossing safety, 15 June 2021) does not refer to exceptional circumstances but states:

> "26. The first consideration for all level crossings should be whether there are reasonably practicable alternatives to a level crossing, this is best considered at the design stage of a level crossing as part of a whole system approach.

27. Proposals for new level crossings are rare, but projects to reinstate old railways may include proposals to reinstate a level crossing which previously existed on the route. During the design of a new railway or reinstatement scheme, there are likely to be fewer constraints and greater flexibility for identifying alternatives. In principle, ORR does not support the creation of new level crossings where there is a reasonably practicable alternative, and we encourage alternatives such as diversions, bridges or tunnels to be fully explored and delivered where reasonably practicable. Each situation should be considered on a case-by-case basis, taking account of the nature of the railway operations, surrounding environment and foreseeable users."

15. The test of reasonable practicability is further addressed under the heading "reasonable practicability and decision making":

"33. Reducing risk so far as is reasonably practicable involves a judgement as to whether the risk can be controlled if the duty holder takes certain measures. The level crossing operator has a duty to manage risks to those who use a level crossing,
including rail employees, rail passengers and members of the public.

34. The Courts have decided that risk control measures should be deemed reasonable unless the cost of the measure is grossly disproportionate when compared to the risk. There is no authoritative guidance on what factors should be taken into account when deciding whether cost is grossly disproportionate and no single algorithm which can be used to determine gross disproportion; it is a case-by-case, site-by-site judgement."

16. The "gross disproportion judgement" is then addressed:

"35. Duty holders have to judge the risks at a level crossing. The risks to individuals and the likelihood and severity of the consequences of an incident at a level crossing, should be taken into account along with the specific characteristics of each crossing. This should be weighed against the cost in money, time and trouble or effort of options to eliminate, reduce, or mitigate risk.

36. Gross disproportion is a matter of informed judgement on a case-by-case basis for the duty holder. ORR does not set out what an appropriate gross disproportion factor would be for a level crossing. This is for two key reasons. Firstly, a single factor
cannot be used for such a variety of circumstances as those found at level crossings.
Secondly, the choice of factor should take account of the degree of risk involved, the uncertainty of any analysis and the potential for significant harm, which can only be determined on a case-by-case basis.

37. Use of cost benefit analysis (CBA) and applying the gross disproportion test are useful ways of deciding whether you have reduced risk so far as is reasonably practicable, but they are only part of the overall decision making process. The judgement should not be based on numerical calculations alone and should take account of your knowledge about the particular location, including information on past incidents and near misses. RSSB provide a useful guide to decision making – Taking Safe

> Decisions – which sums up the key test of a good decision as whether you are confident that it is rational, equitable and defensible."

17. Whilst the ORR guidance is directed to its own considerations as regulator and the approach of "duty holders" (i.e., operators), the Secretary of State may consider ORR's policy and determinations to be relevant to the principle of authorising the level crossings.