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# Report to the Secretary of State for Transport

by Alan Beckett BA MSc MIPROW

an Inspector appointed by the Secretary of State for Transport

Date: 20 July 2020

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**TRANSPORT AND WORKS ACT 1992**

**TOWN AND COUNTRY PLANNING ACT 1990**

**THE NETWORK RAIL (ESSEX AND OTHERS LEVEL CROSSING REDUCTION)  
ORDER 201X**

**APPLICATION FOR DEEMED PLANNING PERMISSION**

Dates of inquiry: 18 October 2017 – 13 February 2019

File Ref: DPI/Z1585/17/12

**ABBREVIATIONS & GLOSSARY**

AHB	Automatic half-barrier
ALCRM	All Level Crossing Risk Model
AONB	Area of Outstanding Natural Beauty
ATC	Automatic Traffic Counts
BR	Bridleway
BOAT	Byway Open to All Traffic
CBC	Colchester Borough Council
CCTV	Close Circuit Television
CWIS	Cycling and Walking Investment Strategy
DCO	Development Consent Order
DfT	Department for Transport
DIA	Diversity Impact Assessment
DMRB	Design Manual for Roads and Bridges
ECC	Essex County Council
EIA	Environmental Impact Assessment
ELAF	Essex Local Access Forum
EPR	Environmental Permitting (England and Wales) Regulations 2016
ETS	Essex Transport Strategy
FP	Footpath
FWI	Fatality Weighted Injuries
HMWT	Herts & Middlesex Wildlife Trust
LCM	Level Crossing Manager
LNR	Local Nature Reserve
LTP	Local Transport Plan
MfS	Manual for Streets
MSLs	Miniature Stop Lights
NFU	National Farmers' Union
NPPF	National Planning Policy Framework
NPSNN	National Policy Statement for National Networks
NRSA91	New Road and Street Works Act 1991
NTQP	Night-time Quiet Period
NWL	Northumbrian Water Limited
ORR	Office of Rail and Road
PCPA04	Planning and Compulsory Purchase Act 2004
PoE	Proof of Evidence
PROW	Public Rights of Way
PSED	Public Sector Equality Duty
RMG	Royal Mail Group
RRRAP	Road restraint Risk Assessment Process
ROW	Rights of Way
ROWIP	Rights of Way Improvement Plan
RSA	Road Safety Audit
SOM	Statement of Matters
SPA	Special Protection Area
SSSI	Sites of Special Scientific Interest

TCPA	Town and Country Planning Act 1990
TfL	Transport for London
The 1980 Act	The Highways Act 1980
The 1992 Act	The Transport and Works Act 1992
The Scheme	Network Rail (Essex and Others Level Crossing Reduction) Order Scheme
TPO	Tree Preservation Order
TSR	Temporary Speed Restriction
TTRO	Temporary Traffic Regulation Order
TWA	Transport and Works Act
TWAO	Transport and Works Act Order
UWCT	User Worked Crossing with Telephone
VRS	Vehicle Restraint System

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## **CASE DETAILS**

### **THE NETWORK RAIL (ESSEX AND OTHERS LEVEL CROSSING REDUCTION) ORDER 201X**

#### **And**

### **APPLICATION FOR DEEMED PLANNING PERMISSION**

- The Order would be made under sections 1 & 5 of, and paragraphs 2 to 5, 7, 8, 10, 11 and 16 of Schedule 1 to, the Transport and Works 1992.
- The deemed planning permission would be granted by a Direction under section 90(2A) of the Town and Country Planning Act 1990.
- The application for the Order and deemed planning permission was made on 31 March 2017 and there were 190 objections outstanding to it at the commencement of the local inquiry.
- The Order and deemed planning permission would authorise the closure or downgrading of a number of level crossings in the Counties of Essex and Hertfordshire, in the London Borough of Havering, in the Borough of Thurrock and in the Borough of Southend-on-Sea. In relation to these closures or downgradings the Order would also authorise the carrying out of works including the removal of the crossings from the railway and the stopping up, diversion or downgrading of the status of certain public roads, footpaths, bridleways, restricted byways and byways open to all traffic and the creation of new public rights of way. The Order would also authorise the construction of new footbridges to carry public rights of way over drains or watercourses. The Order would also permit Network Rail to acquire land and interests in land in connection with the construction of the works to be authorised under the Order.

**Summary of Recommendation: That the Order as modified be made and that deemed planning permission be granted subject to conditions.**

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## **1. PREAMBLE**

### **Pre-inquiry Meeting**

- 1.1 I held a pre-Inquiry meeting on 9 August 2017 to discuss procedural matters relating to the Inquiry. There was no discussion of the merits of the case for or against the proposals. A note following the meeting was circulated to all parties who had submitted objections or other representations.

### **The inquiry**

- 1.2 The inquiry opened on Wednesday 18 October 2017. On the morning of the third day of the inquiry, I was advised by the Department for Transport (DfT) that the Land Agents for Network Rail had undertaken an audit of the Book of Reference. That audit had revealed that a number of parties had not been served notice of the application contrary to the requirements of rule 15 of the Transport and Works (Applications and Objections Procedure) (England and Wales) Rules 2006.
- 1.3 The audit revealed that 12 new parties had not been served notice of the application, that 12 existing parties had not been served notice in relation to land in which they had an interest and that 8 mortgage companies had not been served notice in relation to land in which they had an interest. In total 60 additional notices were required to be served. Notices were served

- on 30 October with parties having until 1 December 2017 to make representations or objections.
- 1.4 The inquiry was scheduled to sit for five weeks in total meaning that it was scheduled to finish before the expiry of the 42-day notice period to which the recipients of the notices were entitled. In the interests of fairness and natural justice to those parties who had not been served notice in relation to some or all of their land interests I adjourned the inquiry so that affected parties would have the benefit of that 42-day statutory period of notice in which to fully consider the implications of the application as it affected their interests and to make objections or representations to the Order.
  - 1.5 During the adjournment, I was further advised that on 8 November 2017, Network Rail had served a further 14 additional notices on 12 new interests in relation to 6 plots of land and that on 23 November 2017, 12 further notices were served on 2 existing parties (one of whom also had notice on 20 October for a different land interest).
  - 1.6 The inquiry remained adjourned until Tuesday 25 September 2018 to enable the inquiries into similar Orders in Cambridgeshire (DPI/Z1585/17/11) and Suffolk (DPI/V3500/17/13) (scheduled to commence in December 2017 and February 2018 respectively) to proceed without interruption.
  - 1.7 The inquiry resumed on 25 September 2018 and sat for 7 consecutive weeks before adjourning once again on 9 November 2018. Thereafter the inquiry sat on 20-23 November 2018, 4 – 6 December 2018 and 29 January 2019 to 13 February 2019, a total of 48 sitting days.
  - 1.8 Mrs Joanna Vincent was appointed as independent Programme Officer for the inquiry. Her role was to assist with the procedural and administrative aspects of the inquiry, including the programme and timing of the appearance at the inquiry of those parties who had made representations or objections to the proposals for particular level crossings. Mrs Vincent helped greatly to ensure that the proceedings ran efficiently and effectively but has played no part in the production of this report or the conclusions and recommendations found within it.
  - 1.9 On various dates prior to and during the inquiry, I made unaccompanied inspections of the level crossings at issue and the proposed alternative routes. Some of the proposed alternative routes followed in whole or in part existing public highways and I was able to undertake a thorough inspection of those routes. Where the proposed alternative routes involved the diversion of the existing PROW to a new alignment over private land, I viewed the proposed alternative route to the best of my ability from public vantage points.
  - 1.10 Accompanied site visits were requested by the Ramblers and Essex County Council (ECC) to a number of the crossings to which objections had been made. These inspections were undertaken on 14, 15, 26, 27 and 28 February 2019 and 12 and 13 March 2019.

## Structure of the Report

- 1.11 This report deals firstly with the procedural matters raised at the inquiry in respect of the use of s1 and s5 of the Transport and Works Act 1992 (the 1992 Act) in relation to the proposed closure of railway crossings. The report then deals with the arguments relating to the strategic matters advanced by Network Rail in support of its application for the Order.
- 1.12 In August 2017 the DfT issued a Statement of Matters (SOM) pursuant to rule 7 (6) of the Transport and Works (Inquiries Procedure) Rules 2004. This document sets out the matters about which the Secretary of State wishes to be informed for the purposes of his consideration of the order and the application for deemed planning permission. This Report sets out the relevant SOM, with comments, as appropriate in each section. The SOM are set out below:

SOM1 The aims and the need for the proposed Network Rail (Essex and Others Level Crossing Reduction) Order Scheme ('the Scheme').

SOM2 The main alternative options considered by Network Rail and the reasons for choosing the proposals comprised in the scheme.

SOM3 The extent to which the proposals in the Transport and Works Order (TWAO) are consistent with the National Planning Policy Framework, national transport policy, and local transport, environmental and planning policies.

SOM4 In relation to each of the 58 level crossings to be closed, the 2 level crossings to be re-designated, and the proposed diversionary routes to be created: (a) the likely impacts on landowners, tenants, local businesses, the public, utility providers and statutory undertakers, including any adverse impact upon their ability to carry on their business or undertaking or access their properties; (b) impacts upon other users; (c) impacts on flood risk; (e) impacts on any Site of Special Scientific Interest and local wildlife sites; (f) impacts on the landscape, agricultural land and forestry; (g) any other environmental impacts including noise and health; (h) the suitability (including length, safety, design, maintenance and accessibility) of diversionary routes proposed for each right of way proposed to be closed<sup>1</sup>.

SOM5 The measures proposed by Network Rail to mitigate any adverse impacts of the scheme including any protective provisions proposed for inclusion in the draft TWAO or other measures to safeguard the operations of utility providers or statutory undertakers.

SOM6 Having regard to the criteria for justifying compulsory purchase powers in paragraphs 12 to 15 of the MHCLG Guidance on the "Compulsory purchase process and the Crichel Down Rules for the disposal of surplus land acquired by, or under the threat of, compulsion"<sup>2</sup>

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<sup>1</sup> The Secretary of State will note that SOM4 does not contain a SOM4(d).

<sup>2</sup> Current guidance was published in July 2019

SOM6 (a) whether there is a compelling case in the public interest for conferring on Network Rail powers compulsorily to acquire and use land and rights in land for the purposes of the scheme; and

SOM6 (b) whether the land and rights in land for which compulsory acquisition powers are sought are required by Network Rail in order to secure satisfactory implementation of the scheme.

SOM7 The conditions proposed to be attached to the deemed planning permission for the scheme, if given, and in particular whether those conditions satisfy the six tests referred to in Planning Practice Guidance, Use of Conditions (Section ID:21a).

SOM8 Network Rail's proposals for funding the scheme.

SOM9 Whether the statutory procedural requirements have been complied with.

SOM10 Any other matters which may be raised at the inquiry.

1.13 The railway crossings at issue are dealt with individually or in groups as appropriate within sub-sections of Section 5 of the report as set out in the table below.

Report sub-section	Crossing number	Crossing name
5.1	E01	Old Lane
5.2	E02	Camps
5.3	E04	Parndon Mill
5.4	E05	Fullers End
5.5	E06	Elsenham Emergency Hut
5.6	E07	Ugley Lane
5.7	E08	Henham
5.8	E09	Elephant
5.9	E10	Dixies
5.10	E11	Windmills
5.11	E13	Littlebury Gate House
5.12	E15	Parsonage Lane / Margaretting
5.13	E16	Maldon Road
5.14	E17 & E18	Boreham & Noakes
5.15	E19	Potters
5.16	E20	Snivellers
5.17	E21	Hill House 1
5.18	E22	Great Domsey
5.19	E23	Long Green
5.20	E25	Church 2
5.21	E26	Barbara Close
5.22	E28	Whipps Farmers
5.23	E29	Brown & Tawse

5.24	E30 & E31	Ferry and Brickyard Farm
5.25	E32	Woodgrange Close
5.26	E33	Motorbike
5.27	E35	Cranes No 1
5.28	E36	Cranes No 2
5.29	E37	Essex Way
5.30	E38	Battlesbridge
5.31	E41	Paget
5.32	E43	High Elm
5.33	E45 & E45	Great Bentley Station and Lords No 1
5.34	E47	Bluehouse
5.35	E48	Wheatsheaf
5.36	E49	Maria Street
5.37	E51 & E52	Thornfield Wood and Golden Square
5.38	E54	Bures
5.39	E56	Abbotts
5.40	H01	Trinity Lane
5.41	H02	Cadmore Lane
5.42	H04	Tednambury
5.43	H05, H06 & H09	Pattens, Gilston and Fowlers
5.44	H08	Johnsons
5.45	HA01	Butts Lane
5.46	HA02	Woodhall Crescent
5.47	HA03 & HA04	Manor Farm and Eve's
5.48	T01	No 131
5.49	T04	Jefferies
5.50	T05	Howells Farm

- 1.14 Section 5 contains brief descriptions of each railway crossing and its surroundings, a description of the proposal for each crossing, the gist of the evidence submitted by the parties in relation to that proposal and my conclusions in relation to the matters identified in SOM4 together with a recommendation regarding each crossing.
- 1.15 The Secretary of State will note that the Report deals with 57 crossings. Network Rail have withdrawn E12 Wallaces, E42 Sand Pit, E57 Wivenhoe Park and H03 Slipe Lane from the draft Order.
- 1.16 The submissions of the parties on other matters found in the SOM are dealt in appropriate sections with conclusions set out in relation to each of those sections.

## 2. PROCEDURAL MATTERS

### **Whether use of the Transport and Works Act 1992 is appropriate**

#### **The Case for the Ramblers**

- 2.1 It was contended by the Ramblers that the use of the 1992 Act procedure to secure the diversion of PROWs over level crossings was inappropriate as other mechanisms existed whereby such diversions could be achieved were available to Network Rail. The substantive points of the Ramblers' submissions are as follows.
- 2.2 The powers to close and divert PROWs over level crossings existed within s118A and s119A of the 1980 Act which have been specifically designed to enable railway operators to stop up and divert footpaths, bridleways and restricted byways that cross railways. The provisions of the 1980 Act are the correct statutory procedures which should be applied by Network Rail to carry out the level crossing closures under the Order.
- 2.3 It is recognised that the 1992 Act provided for a number of subsidiary, but necessary, powers to be available for inclusion in an Order to enable 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 the power to make byelaws.
- 2.4 Part II of the 1992 Act created an updated statutory framework for ensuring the "safety of railways", which, by way of s47 and schedule 2, introduced two new provisions to be inserted into the 1980 Act: s118A and s119A. In short, these provisions allow for orders to be made for the stopping up (s118A) and diversion (s119A) of footpaths, bridleways and restricted byways which cross railways. These sections have their own specific procedure for applications and consultation. Section 48 of the 1992 Act was designed to complement s47 in that the Secretary of State could order the operator of the railway to provide a tunnel or bridge as a replacement for a level crossing.
- 2.5 It is evident that Part II of the 1992 Act was carefully designed for the exact same purpose which underlies the scheme that Network Rail is currently pursuing by way of the Order. Parliament was aware, at the time of enacting the 1992 Act, that 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.
- 2.6 Within this context, it is clear that Parliament intended for s118A, s119A of the 1980 Act and s48 of the 1992 Act 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 the 1992 Act:

*"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 or 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 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"<sup>3</sup>*

- 2.7 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 s118A or s119A of the 1980 Act; alternatively, the Secretary of State was given powers to require a bridge or tunnel to be constructed under s48 of the 1992 Act.
- 2.8 The sole purpose of the Order is to close level crossings. Whilst Network Rail claim that they are seeking to close the crossings for 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. Whilst there have previously been TWAOs confirmed that seek solely to close one or two level crossings and/or divert PROWs, the scale of this Order, in seeking to close 60 crossings across a whole county, is wholly unprecedented. The Ramblers contend that confirmation of previous orders does not act as a bar to establishing the inappropriateness of the use of the 1992 Act for such schemes.
- 2.9 They argue that, by this Order, Network Rail attempts to bypass the specific statutory scheme that was designed by the 1992 Act to accommodate the closure of level crossings. They accept that there are a number of different legislative provisions by which the closure or diversion of public rights of

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<sup>3</sup> *Hansard*, HC, Vol 204, col 485.

way can be achieved, and that the existence of one such power does not, necessarily, prevent the use of another. However, they contend that, having regard to the statutory intention behind the TWA as outlined above, it is clear that Network Rail's proposed use of the TWA for this scheme would frustrate the statutory purpose of s118A and s119A of the 1980 Act.

- 2.10 Network Rail have, however, sought to defend their use of the 1992 Act on several grounds, none of which they believe have merit. Firstly, Network Rail have argued that s118A and s119A 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.
- 2.11 However, s118A and s119A allow for other issues to be considered under the broader "expediency" test (at the stage of confirming the order). Furthermore, it is clear that safety concerns are the driving concern behind Network Rail's scheme. If Network Rail were to be allowed to bypass the s118A and s119A procedures simply by pointing to the further operational benefits to be gained from closing the crossings, then there is a risk that s118A and s119A 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 s118A and/or s119A. Most notably, it would then, as a result, not need to consider 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.
- 2.12 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 the Ramblers consider that such an efficiency-based argument does not make the process lawful.
- 2.13 They consider that whilst Network Rail also argue that the Order will grant several ancillary powers which fall within the ambit of a TWAO, to enable the closure of level crossings, that the process would be easier for Network Rail does not make it lawful. They believe that the whole Order is directed towards the closure of level crossings which is a matter within the ambit of s118A and s119A of the 1980 Act. For the reasons given above, they consider that where the focus of an order is the closure of such level crossings, it should be sought under s118A and s119A of the 1980 Act.
- 2.14 Whereas Network Rail argue that s118A and s119A of the 1980 Act do not apply to BOATs or other public highways, the Ramblers consider that provisions of s116 and s117 of the 1980 Act are available for the stopping up or diversion of any highway that is not a trunk road or a special road. In their view, 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. The powers to downgrade highways subject to the retention of footpath, bridleway or restricted byways are available under

- s116 (4) of the 1980 Act and s116 (3) provides that local authorities have a right of veto over any proposed order.
- 2.15 They consider that, if Network Rail is seeking to frustrate this intricate statutory scheme through use of a TWAO, having recognised that use of the s116, s117, s118A or s119A process does not guarantee success and can be costly and time consuming. Also, Network Rail has consciously sought to bypass the protections under the 1980 Act, 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".
- 2.16 The Ramblers consider that reliance can be placed upon the provisions of s13(2) of the 1992 Act: *"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..."*
- 2.17 When promoting this sub-section, the Minister stated (in response 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 procedure for extinguishing rights of way, where such a proposal was not related to a works matter that belonged to the new procedure."*
- 2.18 The same concern is evident at paragraph 1.14 of A Guide to TWA Procedures: *...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"*.
- 2.19 The provisions found in the 1992 Act should not enable applicants to circumvent established procedures for extinguishing rights of way in circumstances where the extinguishment (and/or diversion) of PROWs 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". In their view, it is clear, from the above quote, that the TWA is not designed to accommodate this type of application.
- 2.20 The catch-all provision of section 5(6) of the 1992 Act 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 TWAO solely concerned with closure of level crossings, for which the 1992 Act itself has provided a designated legislative process. The object of the Order can be achieved by other means and the Order should be refused on these grounds.

### **The Case for Essex Local Access Forum (ELAF)**

- 2.21 ELAF consider that during the inquiry it became clear that the crossings in the TWAO had not been selected on safety grounds. The crossings were selected by Network Rail because there is a non-at grade crossing not far away up or down the railway line and so no bridging or underpass works were required on the railway line. The few bridges that are proposed are over drainage ditches /watercourses. Height differences are dealt with by steps rather than by ramps which is against the spirit of accessibility for all. With no major engineering works proposed, the ELAF sees no need to use an Act whose purpose is to enable major works and infrastructure projects like HS2.
- 2.22 They consider that s118A and s119A of the 1980 Act are procedures specifically for the closure and diversion of PROWs that cross railway lines. ELAF contend that, with the geographic scattering of the mainly foot crossings in this TWAO, these established procedures should have been used instead of the procedures of the 1992 Act.

### **The Case for Network Rail**

- 2.23 They state that the Order is pursued under s1 of the Act, the matters contained within the draft Order being matters ancillary to the operation of a transport network: specifically, the efficient and safe operation of the railway network within the Anglia region.
- 2.24 Reducing the number of level crossings across the network is a key, strategic priority for them, both generally and across the Anglia region. Every level crossing represents a constraint on the operational network – an effect which is both individual and cumulative. Those constraints both impact on the operational efficiency – and resilience – of the existing network and provide barriers to future opportunities to enhance the capacity and efficiency of the network. That is in addition to the ‘risk’ which each crossing introduces to the railway system – both in terms of risk to users of the level crossing, and risks to the operational railway.
- 2.25 It is simply unarguable, therefore, that an Order, the effect of which would be to reduce those constraints – and thus enhance the operational efficiency and resilience of the network – is not a “*matter ancillary to the operation of a transport network*”, within the meaning of s1 of the Act. Clearly, the reduction of risk both to the railway and to crossing users is a material objective, and benefit, which would be realised by the Order. It is not, however, the ‘key’ justification for the Order.
- 2.26 They believe that the Order proposals could not be pursued through the other statutory regimes. The procedures under s118A of the 1980 Act may only be used where it appears to the highway authority that the crossing should be closed on the grounds of safety of those using the PROW. That is not the basis on which this Order is pursued.
- 2.27 Nor do they believe that this power could be used to stop up a PROW for the objectives pursued by this Order: the power conferred by s118A can only be

used in considering the safety of users of the PROW, not, "risk" to the railway, or the current – or future - operational needs of the railway. Further, it is in the discretion of the highway authority whether such an order should be pursued. E16 Maldon Road was the subject of a s118 Order not pursued by the highway authority due to objections being made to it by the Ramblers.

- 2.28 The same problems apply as with s119A. In addition, although that section provides for the PROW to be diverted onto other land, no provision is made for the acquisition of land or rights of access to land for the construction of the new right of way or the removal of the crossing infrastructure. Furthermore, the 1980 Act does not grant planning permission for any physical works, such as the construction of bridges, steps or ramps.
- 2.29 Whilst s116 of the 1980 Act extends to public carriageways, it is even more limited as to the basis on which an order can be made. The focus, in s116(1) is thus on whether the PROW is "unnecessary" for the highway user, or whether the diversion would, essentially, be "more commodious" for those using the highway – the focus is not on the needs of (or risks to) the operational railway.
- 2.30 Thus, none of the other statutory procedures which the Ramblers contend should be used instead of the TWAO procedure could, in fact, be used to achieve the strategic objectives which underlie the current application. That is also the simple response to the reliance placed on para 1.14 of the TWA Guidance: the proposals contained within this Order are simply not proposals which could be dealt with under existing, statutory procedures in Network Rail's view.
- 2.31 In any event, those proceedings would only be available where PROWs across the railway are affected. Not all the crossings in this Order are subject to public rights<sup>4</sup>. Further, the objectives of this Order are ones which the relevant provisions of the 1980 Act simply do not take into account; the sole basis for closure under s118A or s119A is the safety of users of the crossing. That is only part of the objectives sought to be achieved through this Order.
- 2.32 The safety of users of the railway (as opposed to the safety of users of the PROWs), its operational efficiency, reliability, resilience and future capacity are all elements of the strategic case advanced through this Order. Section 116, s118A or s119A simply do not provide for closure for those wider reasons. The proposals contained within this Order are simply not proposals which could be dealt with under other existing, statutory procedures.
- 2.33 The Ramblers submit that s13(2) of the 1992 Act provides that where the Secretary of State 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*".

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<sup>4</sup> E07 & H09 relate to the extinguishment of private rights and H01 seeks to downgrade a public road to bridleway status with the grant of a licence for vehicular access over the railway

- 2.34 The starting point here is "*the order applied for*" – i.e. that which Network Rail is seeking through this application. This is highly material, because the order applied for includes:
- i. Compulsory acquisition of rights over land;
  - ii. Temporary possession of land;
  - iii. Disapplication of legislation;
  - iv. A request for deemed planning permission;
  - v. Extinguishment of private rights;
  - vi. Dedication of new public rights of way; and
  - vii. Closure and associated alteration of rights of way across multiple crossings.
- 2.35 These matters simply could not be achieved under the 1980 Act processes.
- 2.36 The power under s13(2) of the 1992 Act is, in any event, a discretionary power. The Secretary of State is not required to refuse the Order even if the objects of the Order (contrary to these submissions) could have been met by other means. If and to the extent the Secretary of State considers it necessary to consider exercising his discretion under s13(2) of the 1992 Act, no doubt he would wish to have regard to the fact that TWAOs to close level crossings have been made on at least 5 occasions in the past – two during 2017<sup>5</sup>.
- 2.37 Network Rail consider that the reliance which the Ramblers placed upon s48 of the 1992 Act is wholly misplaced. The exercise of this power, as with s118A, is again premised on the crossing constituting a danger to members of the public – not the wider objectives sought to be achieved by this Order.
- 2.38 Secondly, they consider that the Ramblers reliance on this provision wholly fails to acknowledge that s48 does not confer a power on the operator to acquire land or rights necessary to provide (or improve) the bridge or tunnel, or indeed any other powers required to construct the bridge. This is clear from s48(7) – which makes express reference to the operator potentially needing to use the TWA procedures in order to acquire the necessary land or rights.
- 2.39 Network Rail contend that there is simply no basis for concluding that a TWAO is not an appropriate, and lawful, means of seeking to effect the objectives of this Order

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<sup>5</sup> NR 122 Ammanford Level Crossing Order 1996 (no associated works); Northumberland Park and Coppermill Lane Closure Order 2017 (only work was a replacement footbridge); Abbots Ripton Level Crossing Order 2017 (no associated works).

### **Inspector's conclusions on whether the use of the Transport and Works Act is appropriate**

- 2.40 Section 118A and s119A of the 1980 Act were introduced into that Act retrospectively by s47 and Schedule 2 of the 1992 Act. Section 118A and s119A provide for the extinguishment or diversion of a PROW which crosses a railway line where the provisions set out in those sections are met. The provisions are applicable to public footpaths, bridleways and restricted byways which cross the railway on the level.
- 2.41 Subsections 1 of both s118A and s119A are to be applied in those cases where it appears to the highway authority to be expedient in the interests of the safety of the public using the crossing that it should be stopped up (s118A) or diverted (s119A) onto land in the same or another ownership. Section 119A also provides for the diversion of so much of the PROW which includes the crossing as the highway authority considers requisite.
- 2.42 In giving consideration to any order made under these provisions, the confirmatory body must be satisfied that it is expedient to do so having regard to all the circumstances, paying particular attention to whether it is reasonably practicable to make the crossing safe for use by the public.
- 2.43 Whilst the Ramblers dispute Network Rail's justification for not making orders under s118A and s119A, the emphasis of these two sections is on the consideration of the extent to which the safety of members of the public using the crossing is put at risk by the interaction of the public with an operational railway. Given that the emphasis of the two sections is on closure of railway crossings where the highway authority considers there to be a risk to the safety of those using them, it would be inappropriate to use these provisions to seek the closure of public rights of way which cross the railway which are not considered to pose a risk to the safety of the public.
- 2.44 Although there are some crossings within the Order which are considered to pose a risk of danger to the public (some having been closed under temporary road traffic regulation orders on the grounds of public safety), other crossings included within the Order have been the subject of infrastructure upgrades and the application of technology to mitigate the assessed risk. Some crossings appear to pose a moderate or low risk to those using them.
- 2.45 For those crossings included in this order where improvements have been made to the crossings by the installation of assistive technology (MSLs incorporated or overlain on the signalling system) to mitigate risk, the use of s118A or s119A may be inappropriate.
- 2.46 The Ramblers submit that matters other than public safety can be considered under a s118A extinguishment or s119A diversion order as the decision maker is required to consider whether such action is "*expedient in all the circumstances*". Whilst what may be taken into account under "*expediency*" is likely to be quite broad, it is nonetheless a test to be applied in the overall context of those sections which are primarily directed at a consideration of whether a crossing should be extinguished or diverted

given the risk of danger use of it poses to the public. Matters such as the safety of users of the railway, its operational efficiency and future capacity, all matters advanced by Network Rail as part of its strategic case for the Order, would not provide justification for the closure of a crossing under s118A or s119A.

- 2.47 Although s119A provides for the diversion of the footpath onto other land (which may or may not be in the same ownership), this section is silent as to how that diversion is to be implemented. Whilst s28 compensation for disturbance or loss may be applicable, there is no mechanism whereby access to the land can be obtained or the use of land for any necessary works can be acquired [2.28].
- 2.48 The provisions of the 1980 Act are also only applicable to those routes which are PROW, and it would not be possible for the closure of accommodation crossings to be achieved using these procedures [2.31]. The 1992 Act procedures allow for private rights to be addressed where it has not been possible to reach agreement with the private rights holder.
- 2.49 The Ramblers submit that the Secretary of State would be justified in determining not to make the Order on s13(2) grounds as the crossings could be closed under a different legislative procedure, and that the Secretary of State's own guidance is that approval of a TWAO would be unlikely where no new works requiring a TWAO are being proposed [2.16, 2.18].
- 2.50 In response, Network Rail submits that s13 (2) has to be considered in the light of the objectives of the order applied for and sets out those powers which the Order would confer and which are not available under the provisions of sections 116 to 119 of the 1980 Act [2.33, 2.34].
- 2.51 There are no engineering works associated with this Order, and the only works set out in the schedule to the Order relate to the proposed construction of footbridges over ditches and minor watercourses. Whilst the Ramblers contend that the use of the TWAO procedure is inappropriate in such circumstances, the Northumberland Park and Abbots Ripton Orders [2.36] both made provision for the closure of pedestrian rights of way over the railway on the level, in addition to conferring ancillary powers to facilitate the closure of those crossings and for the construction of alternative means by which the railway could be crossed.
- 2.52 Whilst s116 to s119 of the 1980 Act provide an 'intricate statutory scheme' [2.15] for the stopping up or diversion of PROWs over railway crossings, those sections would not confer upon the applicant the objectives of the Order applied for under the 1992 Act. As such, I conclude that the use of the 1992 Act procedure is appropriate.

## **The Tests to be Applied**

### **The Case for Network Rail**

- 2.53 If the Secretary of State is satisfied that Network Rail has made out its strategic case for the Order, then it follows that the only basis on which the Order could either not be confirmed, or confirmed with modifications (removing specific crossings from the Order) is one of two grounds. Either that an alternative route has not been provided but is required or that the alternative route is not "suitable and convenient".
- 2.54 Consideration of the Order is therefore a two-stage process. Firstly, is the strategic case for rationalisation of the level crossing estate through removal of the Order crossings from the network made out? Determination of this matter does not involve consideration of whether a suitable and convenient alternative route has been provided at a specific crossing.
- 2.55 The second stage of the process is the consideration of the proposals for individual crossings. If the Secretary of State is satisfied that an alternative right of way is required but has not been provided, or that the alternative right of way proposed is not a suitable and convenient replacement for existing users, then the PROW over that crossing cannot be extinguished: s5(6).
- 2.56 If, however, the Secretary of State considers that either an alternative right of way is not required, or that the alternative right of way proposed is a suitable and convenient replacement for existing users, then the prohibition in s.5(6) of the 1992 Act is not engaged, and Network Rail may, legally, extinguish the PROW passing over the crossing.
- 2.57 There is no case for importing the second stage test into the first stage.
- 2.58 The note entitled 'Note on section 5(6) TWA 1992 – "required"' sets out Network Rail's approach to whether the provision of a new (alternative) right of way is required. Network Rail's view is that;
- (a) provision of a new (alternative) right of way is not "required" where no public rights of way exist over a crossing;
  - (b) when considering whether an alternative right of way needs to be provided, if a diversionary route would be provided by the existing PROW or highway network then provision of an alternative right of way is not required;
  - (c) an assessment has to be made as to whether an existing route is (or could be made) "suitable and convenient" taking into account the views of the Highway authority;
  - (d) where the existing PROW/highway network does not provide a potential diversionary route or that route would not be suitable and convenient, an alternative right of way would need to be provided

- 2.59 In considering whether an alternative route is suitable and convenient, account has to be taken of the purpose and use of the existing route, its local environment, and relationship with the wider PROW network. Consideration has been given to the function served by the existing PROW, having regard to the origin and destination points, desire lines, and whether the route is (e.g.) a utility route or a leisure route. It is common ground between ECC and the Ramblers that these are all matters to be taken into account. Where there is no agreement is on whether the factors to be considered should also include the quality of experience of using the route (i.e. enjoyment of the route).
- 2.60 That distinction – function as against quality of experience – encapsulates the primary point of disagreement between the parties when considering the application of the statutory test to the Order proposals.
- 2.61 In determining whether a proposed alternative route is “suitable and convenient”, the statutory context in which that test falls to be applied, and the consequences of the test not being met has to be borne in mind. The Scheme is pursued under the 1992 Act, not the 1980 Act. That is an important distinction.
- 2.62 The focus, on applications under s118A, s119A or s116 of the 1980 Act is very clearly – one might say, almost solely – on the interests of those using a specific PROW. That is a wholly different statutory context to the 1992 Act.
- 2.63 The guidance is notably silent on any requirement to consider enjoyment of the route as a whole, as found in s119A of the 1980 Act. Nor does the guidance invite a comparative exercise between the established PROW and its replacement: the suggestion that the use of the word “replacement” in Annex 2 of the TWA Guidance imports such an exercise is unsustainable.
- 2.64 The 1992 Act provides an authorising regime for transport projects, and s5(6) of that Act provides an important protection for public rights of way which need to be disturbed or diverted in order for a transport scheme to be implemented. In this context it is clear that the focus on ‘function’ as opposed to more subjective consideration of ‘enjoyment’ is correct.
- 2.65 It would be unreasonable if a transport scheme which would realise significant public benefits were to be precluded from coming forward, because the alternative route for users of a PROW was not considered suitable and convenient because it did not offer the same ‘views’ or ‘aesthetic enjoyment’ as that which needed to be displaced for the scheme.
- 2.66 Network Rail submits that the correct approach to be adopted is to look at the existing use of the crossing and those currently using it having regard to the characteristics of and constraints present on the existing PROW, and the purposes it serves. It is acknowledged that future occupants of consented developments in the vicinity of the crossing can be included within that group.

2.67 Network Rail does not agree, however, that “existing users” requires the Secretary of State to have regard to any person who might be legally entitled to use the route (but for whom the route is not usable perhaps due to accessibility constraints), or who might, theoretically, do so in the future. The language used in the published guidance which focuses on existing users indicates that enhancement of the public rights of way network is not being sought under s5(6).

### **The Case for the Ramblers**

2.68 The Order is promoted under s1 and s5 of the 1992 Act. In determining whether or not a TWAO should be made under s1, a very wide discretion has been afforded to the Secretary of State. The question for the Secretary of State under s1 is simply whether or not the case for the Order has been justified and whether or not the Secretary of State, therefore, considers that the Order should be made. The exercise of this general discretion, to determine whether or not the Order should be made, is entirely distinct from the test set out in s5(6) of the 1992 Act.

2.69 The application of the test found in s5(6) to any railway crossing assumes that the Order has been justified under s1. Section 5(6) provides a test for when a PROW over a crossing *can* be extinguished. It does not set out a test for when a PROW *should* be extinguished.

2.70 Section 5(6) states: “(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”. The Guide to TWA Procedures states, in Annex II on p. 105: “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”.

2.71 In other words, s5(6) “restricts” what any TWAO can do to a PROW, but it assumes that the need for the TWAO has been justified on its own merits.

2.72 The complicating factor in this Order, arises through the way in which Network Rail has framed its “strategic case” for closure of level crossings. According to Network Rail’s strategic case, the justification for being able to close a level crossing appears to depend entirely on there being a “suitable and convenient” alternative route so as to comply with the s5(6) test. In this way, Network Rail’s underlying rationale for the Order – which considers whether or not level crossings “should” be closed – is applying the same wording and concepts as the s5(6) test – which simply determines whether or not public rights of way “can” be closed.

2.73 The distinction between the s1 test and the s5(6) test is crucial to a proper assessment of Network Rail’s proposed Order. There should be no assumption that a proposed level crossing closure has been justified simply on the basis that the test in s5(6) has been met.

2.74 A restrictive interpretation of the scope of the test under s5(6) should not be applied. As set out in the ‘Note on the meaning of suitable and

convenient<sup>6</sup>, there are outstanding disagreements between Network Rail and the Ramblers as to the parameters of s5(6) namely, as regards the extent to which the s5(6) test: (i) encompasses a comparative assessment between the existing route and the proposed diversion; (ii) involves a consideration of the “quality” of the route or the public enjoyment of the route; and, (iii) covers certain groups within the term “existing users” (most notably, whether this term includes all those categories of users who have a legal right to use the ROW).

2.75 The Ramblers submit that the underlying issue is quite simple. The question which needs to be answered is “what is the standard that an alternative route must meet in order for it to justify the closure and diversion of a PROW over a level crossing?” In the Ramblers submission, the comparative enjoyment of the alternative route vis-à-vis the existing route will be an important consideration.

2.76 In the context of this Order, s5(6) is not being applied in the usual way. It is being used as the *justification* for closure of a level crossing. According to Network Rail, if the test in s5(6) has been met, then its Order proposal for a particular level crossing has been justified under s1 of the TWA, having regard to the general issues associated with all level crossings.

### **Inspector’s conclusions on the tests to be applied**

2.77 It appears to be common ground between the parties that consideration of the Order and the crossings identified within it is a two-stage process [2.54, 2.73]. However, the Ramblers contend that Network Rail has used the test found in s5(6) to be applied to each of the crossings as an overall justification for the Order to be made under s1; Network Rail disputes this contention.

2.78 The test found in s5(6) is a protective measure to ensure that where a PROW has to be disturbed as part of the delivery of a transport scheme, an alternative route should be provided where one is required. The published guidance provides that in such cases, the alternative route should be suitable and convenient for existing users. These are quite clearly matters which have to be considered in relation to each of the crossings proposed to be closed (and are considered in relation to SOM 4 below) and can be considered if the case for making the Order under s1 is met.

2.79 Whether the making of the Order is justified is dependent upon an analysis of the strategic case advanced by Network Rail. Consideration of such matters is given in Section 3 below. I am not persuaded by the submission made by the Ramblers [2.76] that Network Rail seeks to justify the making of the Order on the basis that the proposed alternative routes are suitable and convenient for those current users of the crossings. Network Rail has advanced a case for the making of the Order based on a national and regional strategy for a reduction in its level crossing estate to provide improvements in operational efficiency, capacity increases, the safety of

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<sup>6</sup> NR 135

those interacting with the railway and operational, maintenance and renewal costs savings. These are matters which are considered in Section 3 below.

- 2.80 As part of the two stage process, consideration is to be given to the merits of the case advanced by Network Rail in relation to the making of the Order under s1, and if it is concluded that the Order should be made, then consideration should be given to whether each of the alternative routes proposed satisfied the tests found in s5(6).
- 2.81 Section 5(6) of the 1992 Act states "*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.*" In those instances where an alternative right of way is required, s5(6) (a) does not provide any clarification as to the matters to be considered in assessing that alternative route.
- 2.82 Some clarification as to how the test in s5(6) is to be addressed is found in the published guidance<sup>7</sup> which notes "*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.*" Additional clarification as to the matters which can be taken into account in determining whether an alternative route is 'suitable' is given in SOM(4) where matters such as the length, safety, design, maintenance and accessibility of any proposed alternative route can be taken into consideration in determining the 'suitability' of that alternative route.
- 2.83 No additional guidance has been provided as to what factors can be taken into consideration in determining whether a proposed alternative would be 'convenient' for use by the public and this term should be given its ordinary meaning. Although there is some common ground between the parties about the meaning of 'suitable and convenient' and examples of dictionary definitions of those terms have been submitted<sup>8</sup>, there is not consensus on all matters.
- 2.84 The principal disagreement appeared to be whether a consideration of the 'enjoyment' to be derived from using a given route over a given crossing can be taken into account (such a test being found within s119A of the 1980 Act in relation to the diversion of a PROW which crosses the railway) or whether the s5(6) test relates to the provision of an alternative route which would perform the same function as the existing crossing in allowing users to cross the railway [2.64, 2.75].
- 2.85 There is nothing in s5(6) of the 1992 Act or the published guidance which indicates that the quality of the experience of walking an existing PROW or the enjoyment to be derived from such an experience forms part or should

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<sup>7</sup> A Guide to Transport and Works Act procedures Annex II page 105

<sup>8</sup> NR 135

form part of the test being applied in relation to a diversion which arises in consequence of an order made under s1.

- 2.86 As Network Rail point out, the tests found in s5(6) are applicable in relation to a transport scheme where the aims of that transport scheme require the diversion of public rights of way. What is required in such circumstances is that where an alternative route is required, that alternative route should provide broadly the same function and purpose as the existing route and enable those currently using the crossing to continue to undertake their current journey without disrupting the purpose for which that journey is being undertaken.
- 2.87 In my view, there is no scope for the importation into the s5(6) test of a consideration of the 'enjoyment' to be derived from the use of a particular PROW such as is found in s119A of the 1980 Act; had such a test been envisaged as part of s5(6), then Parliament would have made such provision. What is required under s5(6) is a consideration of the proposed alternative route in terms of whether it would provide a 'suitable and convenient' route by which current users could continue to make their journey without affecting the purpose of that journey.
- 2.88 A further matter of contention was whether the reference to 'existing users' in the published guidance should be taken literally or whether that reference encompassed a consideration of all those who were legally entitled to use the crossing but could not do so due to existing constraints [2.67, 2.74].
- 2.89 It may be that location, topography and other physical characteristics influence the nature of the use of a crossing and limit those who can use it. A crossing in an isolated rural location used primarily for recreational purposes is likely to have a different user cohort from that found in an urban or semi-urban location which is used for utilitarian purposes. It is implicit from the published guidance that for an alternative to be 'suitable and convenient', the characteristics of the alternative route should not be such that current users are inhibited or prevented from using it. However, this does not mean that a proposed alternative could be viewed as being 'suitable and convenient' if it only permitted use by an already restricted group.
- 2.90 Whilst there may be constraints upon the existing crossing points of the railway or the approaches to those crossing points which currently preclude use by those legally entitled to do so, an assessment of the proposed alternative cannot be made simply in the light of those who currently can undertake and complete a journey using the crossing in question.
- 2.91 To give consideration to only whether those currently using a crossing (who may be young and with no mobility impairments) were able to use the proposed alternative is unlikely to discharge the PSED if the proposed alternative route discriminated against other users in not providing for their needs.
- 2.92 Consideration of the needs of current and potential users is reflected in matters such as length, safety, design, maintenance and accessibility being