

12.1.12. However, having regard to the submissions made, I consider overall, that it is appropriate to use the TWA procedure in this case. That said, this is a legal matter upon which the Secretary of State may wish to take advice.

12.2. **The tests to be applied**

12.2.1. The purpose of this report is to allow the Secretary of State to come to an informed view on whether it would be in the public interest to make the Order and give the associated Direction in respect of Deemed Planning Permission⁸²³. A number of factors need to be taken into account when determining, on balance, whether it would be in the public interest.

Factors to be considered with respect to the public interest balance

12.2.2. In support of the Order, Network Rail cites benefits to the railway, which it considers would be realised; its strategic case. Network Rail acknowledges that its strategic case is not the only matter to consider when determining whether or not the Order should be made and that a 'balancing act' is required. However, it suggests that if it has made out that strategic case for the Order, the only basis on which the Order could either not be confirmed, or confirmed with modifications, is if the test set out in section 5(6) of the TWA is not met. I do not agree, for a number of reasons.

12.2.3. Firstly, 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.

12.2.4. In my view, the outcome of the section 5(6) test is not a matter to be weighed in the public interest balance. The test essentially sets out a condition precedent that would need to be satisfied if a level crossing closure, which includes the extinguishment of a public right of way, is to be included in the Order⁸²⁴. In this case, it potentially limits the scope of what may be included in the Order. To my mind this is a matter to be determined before consideration can be given to where the public interest lies, not least as removing a crossing from the Order, as a result of a failure to comply with section 5(6), would not only mean that any adverse consequences associated with its closure would not be realised, but also the scale of the benefits to the railway associated with the Order, through level crossing closure, would be reduced.

⁸²³ For example, DfT 'Transport and Works Act Orders: a brief guide' para 4, NR/INQ/30 para 2.5.

⁸²⁴ OP/INQ/24 para 20.

- 12.2.5. Secondly, the matters to be 'weighed in the balance' when determining the public interest are not limited to potential benefits to the railway, whilst understandably of particular concern to Network Rail. The *Guide to TWA Procedures* indicates that the Secretary of State may need to address a wide range of issues and policies, in deciding whether it is in the public interest to grant the powers applied for in a TWA Order, including taking due account of any objections made, providing the issues raised are relevant to the particular powers being sought in the Order⁸²⁵. For example, such matters may include the likely impact of Network Rail acquiring rights over the land of others⁸²⁶. The Government's *Guidance on Compulsory purchase process and The Crichel Down Rules (2018)* confirms, amongst other things, that: 'A compulsory purchase order should only be made where there is a compelling case in the public interest'; and, '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'. The SoM sets out the matters upon which the Secretary of State wishes to be informed.

Application and interpretation of section 5(6)

- 12.2.6. A range of opinions have been expressed regarding the application and interpretation of section 5(6) of the TWA [8.2.33-39]⁸²⁷. I take the following views:

- a) Where the closure of a level crossing would not necessitate the extinguishment of a public right of way, for example if the level crossing is subject only to private rights of way, section 5(6) does not apply.

However, to my mind, in such circumstances, it may be that the absence of an alternative route is a material consideration when separately considering the public interest balance.

- b) Sections 5(6)(a) and 5(6)(b) are concerned with provision of 'an alternative right of way', not necessarily provision of an alternative 'public' right of way. Therefore, the terms of section 5(6)(a), 'an alternative right of way has been or will be provided', would be met in circumstances where an alternative route over which the public is legally entitled to pass and repass, either as a public right of way or as a highway, has been or will be provided.
- c) The terms of section 5(6)(b) 'the provision of an alternative right of way is not required' would be met if a public right of way over a level crossing is no longer used. In my judgement, it is not concerned with circumstances in which an alternative right of way is already available, as that falls within section 5(6)(a).

⁸²⁵ NR/INQ/63 Appendix 23 para 1.21.

⁸²⁶ NR/INQ/63 Appendix 23 para 1.39.

⁸²⁷ NR/INQ/13, NR/INQ/26, OP/INQ/24.

- d) Under the terms of section 5(6) there is no requirement to have regard to the tests set out in sections 116-119A of the Highways Act 1980⁸²⁸, such as the requirement to consider '*whether it is reasonably practicable to make the crossing safe for use by the public*'.⁸²⁹

12.2.7. The *Guide to TWA Procedures* indicates that '*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*'. A range of opinions have also been expressed regarding the interpretation of this guidance⁸³⁰. I take the following views:

- a) It is reasonable to regard the requirement for an alternative to be a convenient and suitable replacement for existing users as applying to both an alternative right of way which '*has been*' provided and an alternative right of way which '*will be*' provided.

Whilst Network Rail has indicated that in practice it has tested both existing and proposed alternatives against that requirement, it appears to suggest that, with reference to the wording of the *Guide to TWA Procedures*, the requirement strictly only applies to alternatives that '*will be provided*'⁸³¹. I do not agree. In my judgement, it is unlikely the intention of the guidance is to indicate that an alternative which '*will be provided*' needs to be a convenient and suitable replacement, whilst an alternative which '*has been provided*' need not be a convenient and suitable replacement for existing users of the public right of way to be extinguished.

- b) '*Existing users*' means any person who uses the public right of way at the time and any person who might reasonably be expected to use it, considering its location and purpose⁸³².

In my judgement '*existing users*' does not include people who, whilst they may be legally entitled to do so, are unable to use a route as a result of accessibility constraints that form part of it, such as steps or styles. People who theoretically may use a route in the future following the construction of a new development in the area would not constitute '*existing users*' either⁸³³.

However, I consider that the absence of any users being recorded during Network Rail's crossing census surveys would not be

⁸²⁸ NR/INQ/26 para 10.

⁸²⁹ NR/INQ/63 Tab 4 section 118A(4)(a), 119A(4)(a).

⁸³⁰ E.g. NR/INQ/26, NR/INQ/45, OP/INQ/23, OP/INQ/24, OP/INQ/28.

⁸³¹ NR/INQ/45 paras 8-13.

⁸³² NR/INQ/26 paras 13-18.

⁸³³ NR/INQ/26 paras 14.

sufficient to demonstrate that there are no existing users, as the surveys were of a relatively short duration, described by Network Rail as '*only provided a 'snapshot' of a point in time and was not determinative, nor treated as determinative, of levels of use*' [3.5.5.8]. Evidence associated with the S11-Leggets crossing reinforces my view, as whilst no users were recorded during the survey, consultation responses confirmed that the route is used, albeit infrequently. Furthermore, a nil return survey associated with a crossing which is temporarily closed on safety grounds, for example at S23, cannot be regarded as providing a reliable indication that the crossing would not otherwise be used⁸³⁴.

c) As regards the meaning of '*a convenient and suitable replacement*', it is reasonable to give those words their ordinary meaning⁸³⁵ as a starting point:

- i. Suitable-right or appropriate for a particular person, purpose or situation;
- ii. Convenient-fitting in well with a person's needs, activities and plans involving little trouble or effort; and,
- iii. Replacement-a thing that takes the place of another.

Furthermore, it is necessary to take account of the purpose and use of the existing route, its local environment and relationship with the wider PRow network. Whilst not an exhaustive list, factors that may be relevant to consider include⁸³⁶:

- i. Length of route;
- ii. Maintaining desire lines to users' destinations;
- iii. Accessibility of the route, including the gradient and any obstacles;
- iv. Safety of the route; and,
- v. Surface of the route; and, risk of flooding.

d) In the context of determining whether a crossing closure should be removed from the Order on the basis of section 5(6) and the associated guidance, I share the view of Network Rail that when considering whether a replacement is '*suitable*', it is not necessary to have regard to the effect that the diversion would have on public enjoyment of the path or way as a whole [3.5.1.10-13, 9.3.4.1]. This is not a particular requirement of section 119A of the

⁸³⁴ NR/INQ/26 para 15.

⁸³⁵ NR/INQ/26 source 'Concise Oxford English Dictionary 2011'.

⁸³⁶ NR/INQ/26 paras 8-9, NR/INQ/12 House of Commons Transport Committee-Safety at Level Crossings, February 2014 page 16.

Highways Act 1980 (*Diversion of footpaths [, bridleways and restricted byways] crossing railways*) either⁸³⁷.

Nonetheless, I recognise it is possible that an existing route might have particular value as regards public enjoyment/amenity value and I consider that may subsequently weigh in the public interest balance, undertaken separately from consideration of the section 5(6) requirement. [3.5.1.14, 8.3.22, 9.1.1, 9.1.7] My view in this regard is reinforced by the *National Planning Policy Statement for National Networks* (NPSNN), which indicates that in considering revisions to an existing public right of way consideration needs to be given to, amongst other things, the attractiveness of the right of way⁸³⁸.

12.3. **Side Agreement**

12.3.1. At the start of the Inquiry, SCC confirmed that it maintained an objection to the whole Order subject to amendments being made to the Order, amongst other things: a) to address concerns regarding the certification process for rights of way set out in Article 16; and, b) to provide an appropriate mechanism for agreeing commuted sums [3.3.25]. These concerns were echoed by the Ramblers' Association [3.6.3, 8.3.14-15]. SCC confirmed in closing that as a result of a formal Side Agreement having been reached between SCC and Network Rail on 23 May 2018, and an agreed proposed modification to Article 16 of the Order (Article 16A), those objections to the Order have been withdrawn [3.3.26, 5.4.2.1-2]. A joint statement, by Network Rail and SCC, providing an outline of the matters included in the Side Agreement, dated 24 May 2018, was also submitted to the Inquiry along with a further note of clarification on 25 May 2018⁸³⁹. In my judgement, this provides reasonable assurance that the concerns raised by SCC, and echoed by the Ramblers' Association [8.3.14]⁸⁴⁰, have been satisfactorily addressed.

12.4. **Alternatives-SoM2**

12.4.1. Network Rail has indicated that the purpose of the Order is to address the objective of Phase 1 of the *Anglia CP5 Level Crossing Risk Reduction Strategy*, which is:

'Mainline crossings that are clearly unused or have extremely little use would be extinguished. Also, crossings that would be included are those that have a nearby alternative route utilising existing bridges as a means of crossing the railway'. [3.3.7-8]

with a view to contributing towards 3 strategic aims:

- a) The safety of rail users and of those interacting with the railway by reason of the crossing points over the railway;

⁸³⁷ NR/INQ/63 Tab 4 section 119A.

⁸³⁸ NR/INQ/4 Appendix 5.1 para 5.184, Ms Tilbrook confirmed in oral evidence that whilst enjoyment of a route is not a consideration when determining whether an alternative route would satisfy the 'suitable and convenient' test, it would be a material consideration in the overall consideration of the case for closure of a crossing.

⁸³⁹ NR/INQ/122 (134-signed and dated) and NR/INQ/129.

⁸⁴⁰ OP/INQ/86.