

“Suitable and convenient”

1. It is common ground between Network Rail (NR), Suffolk County Council (SCC) and the Ramblers’ Association (RA) that section 5(6) is silent on the qualifications which attach to s.5(6)(a), that is as to the form of the alternative right of way to be provided.
2. It is common ground that the statutory test should be read with the guidance contained within Annex 2 to the DfT ‘A Guide to TWA procedures’ (June 2006) which states at page 105 that:

“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.”

3. It is common ground between the parties that those words are being used in the context of guidance and should not be construed as if they were a statute. The words should be given their ordinary, common sense meaning having regard to the statutory scheme and policy guidance of which they form part.
4. The 2011 edition of the Concise Oxford English Dictionary defines the terms “suitable” and “convenient” in the following way:

Suitable right or appropriate for a particular person, purpose or situation

Convenient fitting in well with a person’s needs, activities and plans
Involving little trouble or effort

5. SCC take those definitions as a starting point. RA point to the slightly wider definitions in the OED as attached.
6. NR’s position is that in considering whether an alternative route is suitable and convenient, this needs to take account of the purpose and use of the existing route, its local environment, and relationship with the wider PROW network. It has looked at the function served by the existing PROW, having regard to the origin and destination points, desire lines, and whether the route is (eg) a utility route or a leisure route.
7. SCC and RA agree that those are all matters to be taken into account. They consider, however, that the factors to be considered should also include the quality of experience of using the route (ie enjoyment of the route).
8. In the view of SCC and RA, there can be no exhaustive list of the relevant factors to be considered in assessing an alternative route’s suitability and convenience for existing users as the assessment will be case-specific. However, SCC and the RA highlight the following factors as being particularly relevant:

- Length of the route;
 - Maintaining desire lines to users' destination or destinations,
 - Accessibility of the route, including the gradient of the route and any obstacles (such as stiles, gates or steps) included in the route;
 - Scenic views and "quality" of the route, including the setting of the route (for example, does the route take walkers through fields, or towns or alongside busy roads);
 - Safety of the route;
 - Surface of the route,
 - Directness of the route;
 - Width of the route, including the sense of space that walkers would experience along the route (for example, is the route surrounded by fencing or, by contrast, across an open field); and,
 - Risk of flooding.
9. NR agrees that there is no exhaustive list of all relevant factors to be considered and that the assessment will be case specific. NR agrees that all of the factors above are potentially relevant, save (1) scenic views and "quality of the route, including the setting of the route; (2) directness of the route, insofar as it extends beyond (i) length of diversion or (ii) maintaining desire lines to users' destination or destinations; and (3) width of the route in the wider sense suggested by SCC and RA, namely including the sense of space that walkers would experience along the route.

Comparative?

10. Further, whilst NR accepts that in deciding whether an alternative route is 'suitable and convenient', the alternative must be considered as against the existing route (as explained in para 6 above), NR's position is that s.5(6) does not require a comparative exercise to be undertaken as to whether the proposed route is (e.g.) "nearer or more commodious"¹, or "will not be substantially less convenient"² than the existing PROW.
11. SCC and RA however, consider that the word "replacement" included in the Guidance, read alongside "convenient and suitable" and the reference in the procedures to "existing" users, suggests a comparative meaning. SCC and RA note that the concise OED (2011) defines "replacement" as:

Replacement a person or thing that takes the place of another

¹ The test in s.116 HA 1980

² The test in s.119 HA 1980

Public Enjoyment?

12. Nor does NR accept that in considering whether the proposed diversion is “suitable and convenient” that this is subject to any overarching requirement to take account of the “public enjoyment of the footpath as a whole”: cf the test in s.119 HA 1980.

SCC and RA consider that the “public enjoyment of the footpath as a whole” should be a factor to consider within the “suitable and convenient” test.

Existing Users?

13. The parties are also not in agreement as to the meaning of “existing users” within the TWA guidance.
14. NR has looked at existing use and users of the PROW having regard (*inter alia*) to constraints which exist on the existing PROW. It does not agree that “existing users” requires the decision maker to have regard to any person who might be legally entitled to use the route (but for whom the route is not usable due to, eg, accessibility constraints), or who might, theoretically, do so in the future (e.g. following construction of a new development in the area). For the avoidance of doubt, NR would not rely on there being no existing users of the crossing due to it being temporarily closed under a TTRO or unlawfully obstructed to conclude, without more, that provision of an alternative right of way was not required.
15. SCC and RA cannot accept that the term “existing users” is to be defined in this limited way. To do so opens up the possibility that where a crossing has no existing users at the time of any assessment of a level crossing closure, perhaps because it is the subject of a Temporary Traffic Regulation Order, or perhaps because it is unlawfully closed, there need be no consideration of the convenience and suitability of the alternative route.
16. The RA takes the view that this cannot be the intention of the guidance. The RA view is the term existing users must to some extent be taken to include all those with a legal right to use the route and those who might be disposed to use it.
17. SCC takes the term “existing users” to mean any person who uses the PROW at the time, and any person who might reasonably be expected to use the PROW, considering its location and purpose.
18. NR is content with this definition of the term, subject to its position as set out in paragraph 14 above.