

THE PROPOSED NETWORK RAIL (ESSEX & OTHERS LEVEL CROSSING REDUCTION) ORDER

Section 5(6) TWA 1992 – “required”

NOTE

1. This Note sets out the approach that Network Rail (NR) has taken in considering whether an alternative right of way is “required” for the purposes of s.5(6) TWA 1992. This Note sets out NR’s understanding of what is required under s.5(6) TWA 1992 and how that relates to the approach NR has taken to the Order proposals.
2. The content of this Note reflects that set out in a similar Note provided in respect of the Proposed Network Rail (Suffolk Level Crossing Reduction) Order.
3. Section 5(6) TWA 1992 provides that:

“(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.”
4. Underlining has been added to emphasise that what s.5(6) is concerned with is not whether there is, or will be, an alternative route for the users affected by the proposed extinguishment of an existing public right of way (PROW) (or part thereof) but whether a new right of way has been or will be provided.
5. NR interprets ‘right of way’ in this context as meaning a route over which the public is legally entitled to pass and repass, either as a PROW or as highway (the greater including the lesser rights in this regard).
6. Thus, one situation in which the Secretary of State may be satisfied that the provision of an ‘alternative right of way’ is not required is where an alternative route is already provided by the existing PROW and/or highway network.
7. Network Rail’s approach to determining whether provision of an alternative right of way was required was as follows:
 - a. Where there are no public rights of way over a level crossing (e.g the level crossing is subject only to private rights of way), s.5(6) does not apply, and Network Rail is not required to provide an alternative right of way;

- b. When considering whether an alternative right of way needs to be provided, Network Rail has looked at whether (1) a diversionary route (an alternative route) is required and (2) a suitable diversionary route would be provided by the existing PROW or highway network.
 - c. In considering whether an alternative route is required, Network Rail has also been informed by the views of the relevant highway authority.
 - d. If NR considered that an alternative route would be provided by the existing PROW or highway network (question 2 above), then NR has concluded that it is not required to provide a new alternative right of way – i.e. that s.5(6)(b) TWA 1992 is engaged. Consequently, the PROW over the level crossing is proposed for extinguishment in Part 2 of Schedule 2 to the draft Order¹.
 - e. In assessing whether the existing PROW/highway network provides a suitable alternative route, such that provision of a new alternative right of way is not required, Network Rail has considered whether the diversionary route utilising the existing PROW/highway network would be suitable and convenient, applying the approach described by Ms Tilbrook in her evidence – or if it could be made suitable and convenient.
 - f. Where the existing PROW/highway network did not provide for a potential diversionary route or it was considered that a diversionary route along the existing PROW/highway network was not suitable (applying the approach set out above) it was concluded that provision of an alternative route was required: i.e. s.5(6)(a) TWA 1992 was engaged). An alternative right of way has therefore been provided for within the Order proposals, and the existing PROW has been included within Part 1 of Schedule 2 to the draft Order.²
8. For the avoidance of doubt, NR accepts that it is for NR to satisfy the Secretary of State that the provision (in the form of creation) of an alternative right of way is not required, if reliance is placed on s.5(6)(b).
9. In terms of the TWA Guidance, Annex 2 (p. 106) states in the commentary on para 4 of the Schedule to the Act 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.”

¹ And falls within draft Article 14: Closure of level crossings

² And falls within draft Article 13: Closure of level crossings subject to opening of new rights of way

10. That statement must, however, be read in context. Specifically, the sentences which precede it:

“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.” (Annex 2, p. 106)

11. It is clear, when read in context, that the final sentence is referring to the situation where an alternative right of way is to be provided – not the more general question of whether there is (or will be) an ‘alternative route’ for users. It does not, therefore, apply to the question of whether the provision of an alternative right of way is required, under s.5(6)(b).
12. Unfortunately, there does not appear to be any case law directly on point as to when an alternative right of way is “required” to be provided under s.5(6), although there has been some consideration of the term in the compulsory purchase context. For example, in *Sharkey v Secretary of State for the Environment* [1992] 2 PLR 11, the Court of Appeal held that ‘required’ (in the context of what is now s.221 TCPA 1990) meant “necessary in the circumstances of the case”. In *Re Newhill Compulsory Purchase Order, Payne’s Application* [1938] 2 All ER 163, considering the meaning of s.75 of the *Housing Act 1936* (a precursor to s. 8 of the *Compulsory Purchase Act 1965*, which provides that nothing in the Act should authorize the compulsory acquisition of any land which... was required for the amenity or convenience of any house), Du Para J said (at p.167):

“Required I think in this section does not mean merely that the occupiers of the house would like to have it, or that they would miss it if they lost it... Required means, I suppose, that without it there will be such a substantial deprivation of amenities and convenience that a real injury will be done to the property owner...”

13. The approach taken by NR is, it is submitted, in line with both of those interpretations of the term “required”. NR submits that it is important to bear in mind in this context that the creation of an alternative right of way may involve the dedication of a route over third party land. It would, in NR’s submission, be difficult to justify the acquisition of compulsory powers over third party land to create a new right of way where an alternative route was already provided by the existing PROW/highway network.

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