

THE PROPOSED NETWORK RAIL (SUFFOLK LEVEL CROSSING REDUCTION) ORDER

Section 5(6) TWA 1992 – “required”

NOTE

1. This Note is submitted by way of supplement to the Note on Network Rail’s (NR) approach to whether an alternative right of way was “required” for the purposes of s.5(6) TWA 1992, submitted to the inquiry on 15 February 2017 (NR-INQ-)
2. It seeks to address, in particular, the relationship between s.5(6) TWA 1992 and the guidance contained in Annex 2 of the DfT ‘A Guide to TWA Procedures ‘ (June 2006).
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 (para 3(b) of NR-INQ- refers).
7. 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).
8. In terms of the TWA Guidance, it is common ground between the parties that Annex 2 (p. 106) provides 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.”

9. 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)

10. 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).
11. 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...”

12. 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.
13. As set out in the earlier Note (NR-INQ-), in considering whether an ‘alternative right of way’ is required to be provided, NR has not limited its consideration to whether an alternative route exists on the PROW/highway network per se. It has looked at whether that diversionary route would be suitable for users, applying the same approach it has adopted in considering whether any proposed new right of way would be “suitable and convenient” for

users, or could be made so – even though it was not legally required to do so (for the reasons set out in paras 11 & 12 above). Paras 4© and 4(d) of NR-INQ-XX refer.

14. Following that approach, NR concluded that it was not required to provide a (new) 'alternative right of way' in respect of 2 crossing, namely, S11 Leggetts, and S23 Higham. In respect of S11 Leggetts, an alternative route is already provided by the existing PROW/highway network (utilising restricted byway 13 Haughley, Wassicks Lane, and footpaths 48 Haughley and 61 Old Newton with Dagworth).¹ In respect of S23 Higham, an alternative route is provided by the existing highway network (Higham Road).²
15. In respect of S22 Weatherby, and S21 Abbots, NR has determined that provision of an alternative right of way is not required, as there are no public rights of way over the crossing, and therefore s.5(6) is simply not engaged. These crossings are therefore also listed in Part 2 of Schedule 2 to the draft Order.
16. Despite the fact that NR is not required to provide an alternative right of way, s.5(6) not being engaged, NR is satisfied that a suitable alternative route exists for each crossing.³
17. These crossings are therefore recorded in Part 2 of Schedule 2 to the Order: "crossings of level crossings not subject to opening of new highway".
18. In the case of 17 crossings,⁴ NR has concluded that a new right of way is required (if only to provide a connection between existing PROWs forming part of the proposed diversionary route), and these are recorded in Part 1 of Schedule 2 to the draft Order.
19. One crossing over which PROW are to be extinguished, S12 Gooderhams, is not included in Part 1 of Schedule 2 of the draft Order. That is because the crossing will remain open as private rights are being maintained, and as such it is dealt with separately in Article 9 of the draft Order. NR does not consider that provision of a new right of way is required in respect of this crossing, as a suitable alternative route is provided by the existing PROW/highway network.⁵

¹ See page 39 of the Design Guide (NR/12)

² See pages 39-40 of the Design Guide (NR/12)

³ See page 39 of the Design Guide (NR/12)

⁴ S01, S02, S03, S04, S07, S08, S13, S16, S17, S24, S25, S27, S28, S29, S30, S31 & S69

⁵ See page 38 of the Design Guide (NR/12)

20. In respect of S18, Cowpasture Lane, the draft Order seeks the downgrading of rights over the crossing, rather than its closure, and this crossing is the subject of draft Article 13.. NR does not consider that provision of an alternative right of way is required for this crossing.

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