

## THE NETWORK RAIL (LEEDS TO MICKLEFIELD ENHANCEMENTS) ORDER 20XX

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### **Response to Legal Submissions on behalf of Leeds City Council and legal issues by the Peak & Northern Footpath Society**

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#### **Introduction**

1. These submissions are filed in response to the Legal Submissions on behalf of Leeds City Council (“LCC”) and two discrete legal issues raised by the Peak & Northern Footpath Society (“PNFS”) within the Proof of John Harker.
2. The points addressed below will be addressed further if and as required in Network Rail’s Opening and/or Closing Submissions. However, this document is filed with Network Rail’s rebuttal proofs in the interest of providing an earlier response to specific points raised in the documents referred to above.
3. To the extent that LCC’s submissions extend beyond points of law, and make submissions based on the evidence (see, for example, what is stated at paragraph 2.6 of LCC’s Legal Submissions as to whether the tests in s.5(6) of the Transport and Works Act 1992 are met), a response will be provided in Network Rail’s Closing Submissions after evidence has been heard and tested in Inquiry in the usual way.

#### **Legal Submissions on behalf of LCC**

##### *Transport and Works Act 1992 s.5(6)*

4. In paragraph 2.3, LCC state that given that Network Rail is seeking, as part of its proposals to close Peckfield Level Crossing, to extinguish a public right of way over the railway, the Secretary of State must be satisfied that there is an alternative right of way that is being proposed as part of the Scheme.

5. That is not a correct interpretation of s.5(6) TWA 1992. S.5(6) provides that:

“An order under section 1 or 3 above shall not extinguish any public right of way 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.”

6. The TWA 1992 thus expressly allows for a situation whereby a public right of way may be extinguished under a TWAO if an alternative right of way is not being provided. One such instance that has previously been accepted in this context is where the existing highway and/or PROW network provide an alternative means of crossing the railway: see, for example, paragraphs 2.94-2.96 of the Inspector's Report to the Secretary of State on The Network Rail (Essex and Others Level Crossing Reduction Order) 2022<sup>1</sup> ("the Essex Order").

*Transport and Works Act 1992 s.5(6) : Guidance*

7. In section 3 of LCC's Legal Submissions reference is made to guidance as to what is considered an alternative, the guidance in question being found in the document referenced in footnote 1 of those Submissions: 'Guide to Transport and Works Act Procedures, DfT (2006) Annex 2 Commentary on Schedule 1 to the TWA Para 4'.
8. This is understood to be a reference to a DfT document from June 2006, a copy (or version) of which is provided at Appendix 1 to Mr Harker's Proof on behalf of the PNFS.<sup>2</sup>
9. The current status of that guidance is unclear. It does not, for example, appear any longer on the GOV.UK webpage 'Collection: Transport and Works Act (TWA) applications and decisions'<sup>3</sup> or guidance page 'Guidance Transport and Works Act orders: a brief guide'.<sup>4</sup> It is therefore unclear whether it remains extant, no longer being publicly available via DfT pages on the GOV.UK website.<sup>5</sup>

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<sup>1</sup> Relevant extracts at Appendix A to this Note. A full copy of the Inspector's Report is available at <https://www.gov.uk/government/publications/essex-level-crossing-reduction-transport-and-works-act-order>

<sup>2</sup> Long title, from copies available on the National Archives website, 'A TWA Guide to Procedures Guidance on the procedures for obtaining orders under the Transport and Works Act 1992, relating to transport systems, inland waterways and works interfering with rights of navigation' [https://webarchive.nationalarchives.gov.uk/ukgwa/20160120172622/https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/4502/procedures-guide.pdf](https://webarchive.nationalarchives.gov.uk/ukgwa/20160120172622/https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/4502/procedures-guide.pdf) (One of several results which appears on a search on the National Archives webarchive website)

<sup>3</sup> <https://www.gov.uk/government/collections/twa-inspector-reports-and-decision-letters>

<sup>4</sup> <https://www.gov.uk/government/collections/twa-inspector-reports-and-decision-letters#full-publication-update-history>

<sup>5</sup> Screenshots taken on 20 February 2024 provided as Appendix B to these Submissions.

10. It should, in any event, be stressed that the guidance contained in that document is simply that: guidance. It is not and should not be equated to or treated a statutory test or some sort of gloss on the language in s.5(6) – contrary to how it appears to be being applied in section 4 in particular of LCC’s submissions.

11. What is said, in Annex 1 to that document (internal page 93) is as follows:

*“Paragraph 4 provides for orders to authorise the extinguishment of rights over land, including rights of navigation over water, either compulsorily or by agreement. [...] 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.”*

12. Some caution is also required in terms of elevating the consideration given to this guidance and its application to individual level crossings in the Essex Order to the status of some sort of general guidance on the approach that should be applied whenever extinguishment of a public right of way over a level crossing is being considered as part of a TWAO application.

13. Firstly, it should be noted that the Essex Order was one of three TWAOs which Network Rail was promoting to close a number of level crossings across the Anglia region, the other two being the [Network Rail \(Cambridgeshire Level Crossing Reduction\) Order 2020<sup>6</sup>](https://www.gov.uk/government/publications/cambridgeshire-level-crossing-reduction-transport-and-works-act-order) and the [Network Rail \(Suffolk Level Crossing Reduction\) Order 2020<sup>7</sup>](https://www.gov.uk/government/publications/suffolk-level-crossing-reduction-transport-and-works-act-order), the Inspectors’ Reports and Secretary of State’s decisions on which are available on the links footnoted below.

14. Secondly, that the issue fell to be considered in the context of an active disagreement between Network Rail and the Ramblers Association in particular as to:

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<sup>6</sup> <https://www.gov.uk/government/publications/cambridgeshire-level-crossing-reduction-transport-and-works-act-order>

<sup>7</sup> <https://www.gov.uk/government/publications/suffolk-level-crossing-reduction-transport-and-works-act-order>

- a. whether the TWAO procedure could be used for the closure of level crossings absent some other works or project to which closure of a particular level crossing was associated under the Order – or whether Network Rail should instead be pursuing individual applications under the Highways Act 1980; and
  - b. the factors which should or should not be taken into account when considering whether the Order should be confirmed with or without a particular crossing included. In particular, whether the ‘enjoyment’ or ‘amenity’ considerations provided for under those other procedures should be imported into s.5(6) TWA 1990.
15. It can be seen from the Inspectors’ Reports into those Orders that each of them took a slightly different approach. For example, on the Suffolk Order, the Inspector considered that the term “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’ either”* (paragraph 12.2.7(b) of the Report<sup>8</sup>): see the position taken by the Inspector on the Essex Order (referred to at paragraph 3.7 of LCC’s Legal Submissions).
16. The Secretary of State’s Decision Letters did not (no doubt understandably, given the Inspectors’ Reports were not considered collectively with decisions on the three Orders being issued at the same time) either identify or seek to reconcile the various differences between the three Inspectors where they differed. No criticism is made regarding the same: it merely highlights the caution which should be employed in seeking to extrapolate some form of ‘test’ from an Inspector’s decision on a previous TWAO.

#### *Modifications to the Order*

17. At paragraph 4.1.5 of its Legal Submissions, LCC makes reference to its proposed alternative of a bridleway bridge which it considers would meet the tests in s.5(6).

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<sup>8</sup> Extract at Appendix C to these Submissions.

18. For the avoidance of doubt, it is Network Rail's position that substitution of a bridleway bridge for the proposals included in the Order would not be a modification which it was open to the Inspector to recommend, not least as it would require the inclusion of different and/or additional land to that already included within the Order application.

*Section 106 contributions*

19. This will be addressed in Closings if required.

**NPFS: Proof of Mr John Harker**

20. In paragraph 3 of his Proof, Mr Harker also makes reference to the 2006 DfT 'Guide to Transport Works Act Procedures', and in particular to the guidance at paragraph 1.14 on matters which are unlikely to be approved in a TWA order on policy grounds unless compelling reasons can be shown, which include, at the third bullet point, "*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*".

21. In respect of each of the Anglia Orders referred to above, it was contended that it was not appropriate to use the TWA procedure to close the level crossing as there were specific statutory procedures under the Highways Act 1980 which could – and, it was argued, should – be used instead. Paragraph 1.14 of the policy guidance was in fact expressly relied upon by the Ramblers Association in their submissions on (at least) the Essex Order: see paragraph 2.18 of the Inspector's Report (Extract at Appendix A). In each of the Decision Letters, the Secretary of State rejected that contention and accepted that use of the TWA procedure was appropriate. There is no justified basis for taking a different view in respect of the crossing in this Order.

JACQUELINE LEAN

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Landmark Chambers  
180 Fleet Street  
London, EC4A 2HG