

THE NETWORK RAIL (CAMBRIDGESHIRE LEVEL CROSSING REDUCTION) ORDER

CLOSING SUBMISSIONS ON BEHALF OF NETWORK RAIL

1. Through this Order, Network Rail seeks powers to close or downgrade rights over 25 level crossings in the County of Cambridgeshire, together with associated powers (including the acquisition of land and deemed planning permission) to allow works to be carried out to provide diversionary routes.
2. These closing submissions are structured as follows:
 - a. Part 1: Overarching issues
 - i. NR's underlying case for level crossing closure/downgrade (the "strategic" case);
 - ii. The development of the Order proposals including alternatives;
 - iii. The position of objectors on the strategic issues, including "process" concerns;
 - iv. The general approach to public rights of way (law and policy);
 - v. Road safety;
 - vi. The general approach to matters relating to land acquisition.
 - b. Part 2: Considerations relating to individual crossings;
 - c. Part 3: The Order, planning conditions, side agreement, and other consequential matters;
 - d. Part 4: Conclusion.

Part 1: Overarching issues

A: The underlying case for level crossing closure or downgrade

(i) Level crossings carry risk for users of the route and of the railway

3. All level crossings carry risk. Level crossings are the largest single contributor to train accident risk on the railway network. They present a risk to those walking, riding or driving over the crossing; and to those driving and riding on trains. A number of high profile and appalling incidents on level crossings have (rightly) drawn national attention to the risks that they present. Mr Brunnen’s evidence illustrated these risks in detail. They are risks which exist at each crossing; they can be particularly acute at *passive* crossings; they can differentially affect those who are old, hard of hearing etc.; they are increased by the distractions of modern life.
4. When the risks materialise they have appalling consequences. The Inquiry only heard from one person directly affected by a level crossing incident – Mrs Parnell – but it is very obvious that her experience was a traumatic one, even though she was in the (relative) safety of the train, and experienced no physical injuries. Other evidence before the Inquiry¹ illustrates the profound impacts of level crossing accidents on victims, families, witnesses and so on. One has to be careful to avoid too emotive an argument on these issues, but equally Network Rail – and the Secretary of State – cannot disregard the human reality of this risk.²
5. Network Rail must carefully manage that risk. At any particular crossing those risks can be managed but can only be *avoided* through closure.³
6. Various duties are imposed on Network Rail through both its regulatory framework and the general law. In XX Mr Brunnen, Miss Golden sought to draw a distinction between reducing risk so far as *practicable* and reducing risk so far as *possible*. This is a distinction without a difference in this context. As Mr Brunnen explained in his evidence, avoidance is the first step in risk management. If level crossing risk can be

¹ See for example the Transport Select Committee report

² Network Rail does not, contrary to the Ramblers’ submission, simply regard level crossings as “a nuisance”.

³ A point expressly accepted by the RA (MG XX of MB, Day 1): “We agree there is a safety risk at all level crossings. The best way to reduce risk is to close. The only way to eliminate risk is to close.”

avoided altogether by closure – because that closure can be lawfully achieved – then it should be pursued. Whether that is “practicable” or “possible” is precisely the question that this Inquiry is examining. There is an overarching duty on Network Rail to operate a safe railway. That means that where it can be made safer – such as through the removal of the single largest contributor to accident risk on the network – Network Rail should strive for that.

7. Similarly, in both XX and in Closing, CCC sought to draw distinctions between “danger” and “risk” and what that said about “safety”. Language can sometimes be important, but sophistry is not, and the actual position is clear:
 - a. If a level crossing is open, it means that Network Rail consider that it is compliant with their risk management processes. As Mr Kenning said in his evidence, if the crossing is opened it can be assumed that Network Rail consider that the risks are being managed appropriately⁴;
 - b. That does not mean that the crossing does not carry risk – it obviously does: see above. The risk is both quantified by Network Rail (ALCRM) and assessed by other means (e.g. narrative risk assessments). Again, all level crossings carry risk;
 - c. “Dangers” do exist at all level crossings. They materialise even at crossings which Network Rail has identified as being of lower risk. The fundamental danger is the moving train, which can be encountered at any open crossing. For obvious reasons, Network Rail do not describe open (i.e., risks managed) crossings as “dangerous” but nor do they need to make a case for closure;
 - d. Safety is the absence of risk or danger. It is accepted by all parties that risk can only be removed by closure – and using the word in that way, there is no such thing as a “safe” level crossing. But safety is also concerned with the reduction of risk – i.e. it need not be an absolute outcome. “Safe” may therefore mean “risks managed” rather than “risks removed”;

⁴ Of course, this conclusion is only as good as the last safety inspection – these crossings are not continuously monitored.

- e. It remains an unavoidable fact that even if a party to the Inquiry wishes to describe a crossing as “safe”, it still carries risk. Whilst CCC relied on Professor Grimmett’s rather surprising contention that the fact he was not aware of any incident at a crossing meant that the risk at the crossing was “zero”, in fact the Professor very quickly disavowed that contention in XX. He could obviously not defend that view.
8. Rather than focus on semantics, it is more useful to consider the actual evidence before the Inquiry on this point. In reality there is little challenge to the safety case for closure. There is no challenge to Network Rail’s evidence that the Order will achieve a reduction in statistical risk at every crossing in the Order⁵, and cumulatively that that risk reduction is material.
9. Whilst some witnesses appeared to take a libertarian view that individuals should take responsibility for their own safety at crossings, that is not the prevailing view in 21st century Britain. More importantly, it is not the position of those authorities responsible for considering these issues, and in particular the ORR – a point returned to below. There was also a suggestion from some that level crossing risk was low, particularly at the lightly used crossings in this Order, and that risk on roads was far greater. Road safety issues will be addressed further below, but at the outset it should be noted that this misses the point of the Order. Network Rail is responsible for the rail network. It cannot excuse its responsibilities by noting that more people die on the roads (or, indeed, on level crossings elsewhere in the world).
- (ii) *Level crossings produce operational issues and costs which are borne by the travelling public*
10. The risk carried by level crossings also means that resources are called for to assess, maintain, and where necessary upgrade, each of the crossings on the network. There are many thousands of them and 771 on the Anglia Route alone. In practical terms, that imposes a significant operational cost to Network Rail which is ultimately borne by railway users and taxpayers. It is self-evident that reducing the number of crossing

⁵ Contrary to CCC’s case in closing at paragraph 8.4, NR have explained the risk reduction across the crossings concerned and in respect of each crossing.

points reduces the number of individual locations in which those resources must be deployed. Risk can be concentrated into fewer locations, which can then be more closely managed. Whilst not typical of the majority of crossings in this Order, the Palmer's crossings provide a good example of this in practice: Network Rail proposes to close two of the three private vehicular crossings on the land, and to provide a technological enhancement at the one which remains. It is obvious that Network Rail should seek to rationalise its level crossing estate in parallel with providing safety enhancements, since that allows limited public funds to be spent more efficiently and effectively.

11. In light of Network Rail's objective to remove passive level crossings from the network by 2040, the costs of *renewals* of level crossing infrastructure in fact should be assessed as the costs of *upgrades*. These costs are very significant where the required upgrade is from a passive crossing to one which incorporates technology – as a minimum, miniature stop lights (MSLs).
12. In closing, CCC suggested⁶ that this element of the Network Rail's case was not made out. That is simply wrong. Clear and undisputed evidence has been adduced to explain:
 - a. The actual maintenance costs at level crossings: See JP Proof 4.3; NR Note 5; together with the supplementary information submitted in response to the Inspector's questions (NR-INO-35/36);
 - b. The actual costs of upgrading the actual crossings in the orders: see NR Note 5.
13. Part of the challenge to this element of the strategic case was that maintenance liability is shifted – from Network Rail to CCC. That is an over simplification since highway maintenance costs and level crossing maintenance costs are not the same. But moreover, there is no such shifting of the burden, since Network Rail have agreed commuted sum payments to CCC, and CCC no longer pursue any argument on this point. Even accounting for commuted sums, the costs of implementing the order are less than the costs savings derived from it.⁷ There is no justification for a costs/benefit

⁶ Closing 8.4

⁷ Dr Algaard evidence in chief

analysis to be derived for each crossing when the scheme plainly stacks up financially.⁸ In any event, CCC did not pursue this point in closing.

14. It is worth noting here that the Order proposals stack up economically solely on the basis of the avoidance of these operational costs. This has been described pejoratively as a “cost-saving exercise”. The better analysis is that these are costs which are borne by those who use the railway, or by the tax payer (to the extent that the railway is not self-funding). Network Rail does not pay dividends. Costs savings either allow more to be spent elsewhere on the railway, or reduce the costs borne by users and the taxpayer. A railway with lower operating costs is a more sustainable one.

15. The existence of these costs savings is not necessary to justify the Order, because the safety benefits derived from the proposals from it justify the investment. The Order scheme thus happily benefits from a coincidence of improving level crossing safety and reducing the expenditure of public money.

(iii) Level crossings are a constraint to the operation and enhancement of the network

16. Level crossings are, in practice, a constraint on the operation of the network. They are an integral part of the railway system and, quite obviously, the manner in which the railway is operated must account for the presence of level crossings and therefore pedestrians, horse riders, motorcycles, farm vehicles etc. on the railway track. Thus level crossings can affect the speed at which trains can operate; they can interfere with upgrade works such as laying additional track; they can affect signalling operations.

17. Dr Algaard explained in her evidence that many of the crossings affected by this Order lie in areas which are the subject of proposed enhancements. The details of those schemes are evolving, but by removing the constraint imposed by level crossings, the deliverability of those schemes is improved. These enhancement schemes are much needed as Cambridgeshire fulfils its economic potential. They are schemes which are themselves supported by CCC, which views the railway as a sustainable means of transport for passengers and freight in and across the county.

⁸ See Dr Algaard evidence in chief: The case for closure is strategic and systemic. The CRD confirms that individual CBAs should not be prepared for early GRIP stages.

18. Closing a level crossing removes the risk. It removes the management and maintenance burden. It removes the constraint on future development. For these reasons, there is a compelling case underpinning this Order.
19. These are the reasons for seeking the Order. Contrary to the Ramblers' submissions (paragraph 20), Network Rail does not say that the closures are justified because suitable and convenient alternative routes are available or provided (although they are). That would be the tail wagging the dog. The closure of crossings is justified for the reasons articulated above. The effects of such closure clearly should be mitigated where necessary and possible: and that is where the question of alternatives arise. Network Rail does not shy away from the proposition that it would, if possible, remove level crossings from the railway entirely.

B: The development of the Order proposals including alternatives

(i) National strategy

20. In light of the factor described above, Network Rail has adopted a strategy for level crossings which *includes* a process of reducing the number of crossings. It proposes, in this Order, to do so through co-ordinated multiple closures and diversions. This is distinct from the process of individual closures for safety reasons⁹. It is also distinct from the ongoing work to improve the safety of retained crossings – both through the routine management of risk, and through the wider objectives of phasing out passive crossings by 2040.
21. Thus the ORR has required Network Rail to seek significant reductions in level crossing risk. It has approved, in that context, a strategy which prioritises level crossing closure. It has put at Network Rail's disposal a significant fund to specifically manage level crossing risk, which provides part of the funding for this scheme. In authorising the expenditure, it has endorsed the Order scheme.

⁹ "Chipping away" at the highest risk crossings is not sufficient to deliver meaningful risk reduction across the network: see MB XX. This accords with the approach of grappling both with the highest risk crossings, and generally seeking to rationalise the number of crossings, allowing for resources to be focused in fewer locations.

22. This strategy has not been adopted in a vacuum. Network Rail is wholly owned by the Government. It owns and operates the railway network under a licence from the Government. It is responsible for the maintenance, repair, renewal and safe operation of the railway. It has a duty to enhance and improve the railway network in operational terms. It is required to meet these duties in a way which is regulated by the Office of Rail and Road (“ORR”).
23. The ORR has expressly endorsed level crossing closure as part of Network Rail’s output in the current “control period” (“CP5”). It has provided ring-fenced funding for reducing risk at level crossings *including through* closure. Of course, the detail for how that is delivered is left to Network Rail. Here, the detail is also a matter for the decision-maker on the Order – the Secretary of State. But Network Rail submits that through this Order it is seeking to do that which it has been told to do by its regulator.

(ii) *Anglia strategy*

24. The Anglia Strategy (NR18) sets out a phased approach to removing level crossings from the Anglia Route. Mr Kenning authored it and Dr Algaard endorsed and adopted it, and they explained it in their written and oral evidence.
25. It articulates a clear strategy which includes a phased approach to level crossing closure. Phases 1 (mainline) and 2 (branch line) seek closure of crossings that are clearly unused or have extremely little use; and “those that have a nearby alternative route utilising existing bridges as a means of crossing the railway”. It was noted that the means to get to the alternative crossing point would be provided by Network Rail wherever possible. Phase 4 of the strategy included the downgrading of roads and “[user worked crossings] where an alternative means of access has been identified and needs powers to enforce the provision of access”. Phases 3 (non-vehicular) and 5 (road crossings) concern new bridges. The Strategy also recognises that there are many level crossings “where it is not feasible to extinguish or divert the right of way” and where technology would be required.
26. The Strategy goes on to address the “Scheme Definition”. It explains an approach of assessment which has the users of the route at its heart – including “diversity impact assessment”.

27. Appendix B to the Strategy sought to provide an overview of where crossings might fit in the phased approach. As Mr Kenning explained in his evidence, that was an early attempt at capturing which might fall into each phase, not a definitive conclusion that either a crossing would fall into a particular phase, or that it should actually be closed at all. Appendix D identified certain crossings which would obviously not be suitable for closure in a reasonable timeframe (and which thus could be excluded from the immediate consideration).

28. Whilst this is not an Inquiry into the Strategy, it is helpful in setting the Order scheme in its context. The Order scheme is not Network Rail's final position in respect of level crossings in Cambridgeshire. More will be done, but the Order proposals encompass those phases which require the least new infrastructure. It is also important to recognise that the availability of an alternative route is at the heart of the strategy. By definition, the PROW crossing closures in this Order are ones where Network Rail considers that an alternative is available.

(iii) The Order scheme

29. The Order scheme originates from the Route Requirements Document which was developed to give effect to Phases 1 and 2 of the Strategy.¹⁰ The RRD was written in tandem with the Strategy. It was a desk-based exercise, preceding the engagement with CCC and others, and appointment of consultants (Mott MacDonald) to take forward the assessment of the proposals.

30. Discussions with CCC began in April 2015. Mott MacDonald were appointed in June 2015. The first of three rounds of public consultation began in June 2016.

31. As Mr Kenning explained, at various stages proposed closures dropped out of the Order scheme following more detailed assessment, and following public consultation. This Inquiry is not a judicial review of the process of the development of the Order scheme. However, what is clear from this process is that the Order scheme was clearly supported

¹⁰ AK Appendix 1

in national policy; articulated as part of an Anglia-wide phased approach; and developed carefully over several years before submission.

C: The position of objectors on the strategic issues, including “process” concerns

(i) CCC’s overall position

33. There is no doubt that this process has frustrated CCC and put pressure on the individual officers who have had to deal with it. It is unnecessary to examine whether those frustrations were, in fact, justified. As Mr Carr put it, there was a “steep learning curve”¹¹. He went on to say that time had not been wasted in the Inquiry through which all matters have been “fully and appropriately addressed”.
34. The strong sense is that CCC fundamental position is different now from how it was when the Inquiry opened. Ten of the 25 crossings are still the subject of objections, but what seemed at times to be opposition in principle to the proposals has fallen away. The case is now clearly put that CCC is “supporting of the Order where, in the County Council’s view, suitable and convenient alternative routes have been identified and/or will be provided”.
35. This position of support (as opposed to non-opposition) is inevitable when one considers the purposes of the Order and the wider strategic case. The evidence of Mr Poultney, effectively CCC’s policy head, who recognised that the Strategy described above was broadly in line with CCC’s Local Transport Plan and Long Term Transport Strategy¹². He was quick to reaffirm that position in XX.
36. It is regrettable that at times CCC’s witnesses regarded the strategic alignment of Network Rail’s project with their employer’s corporate priorities as a matter of irrelevance to their focus on the rights of way network. It is myopic to regard the local footpath network in isolation, and at times the evidence had a sense of failing to see the wood for the trees. Disrupting the existing rights of way network and re-writing the definitive map is an *inevitable consequence* of the Strategy and the Order scheme. Because the Strategy aligns with the Council’s own policies, it must necessarily accept the change that the Order scheme brings.

¹¹ Closing 1.3

¹² Proof, para 7

(ii) Ramblers Association's overall position

37. The reality of the Ramblers' case is that their bark was worse than their bite. Whilst they cried foul in their Opening, and seem intent on seeking to place obstacles in the way of the Order generally, in reality their case should be treated as a far more limited one. The careful, measured evidence of their sole "strategic" witness, Mr de Moor, bears testament to this.
38. Mr de Moor is a walking champion – dedicated to promoting the enjoyment of walking – but does not do so with any sense of zealotry about the preservation of the existing footpath network at all costs. He argues, compellingly, for the promotion of walking for health and wellbeing reasons. He fears, rightly, that significant erosion of the rights of way network might undermine the attainment of those benefits.
39. But he accepted in his evidence that level crossing closure, with suitable alternative routes, could be in the interests of walkers and walking. He saw the logic of the position that, through closing crossings where suitable diversions are attainable, investment can be focused on those which remain. He was compelled to agree that, in fact, the Ramblers should *support* the making of the Order, save where Network Rail's proposals failed to provide suitable and convenient alternative routes for walkers.
40. More importantly, perhaps, when the Ramblers actually scrutinised Network Rail's proposals (doubtless with the benefit of Ms Rumfitt's expertise), they found their objections to be relatively limited in extent – albeit firmly made. They in fact oppose only 5 of the 25 crossings in the Order. They only called evidence on two of them. There is a very clear disjunct between their "in principle" objections and the actual position "on the ground".
41. The Secretary of State might consider that where a national campaign group does not in substance oppose the aims of an Order, and calls evidence to oppose only limited parts of it, limited weight should be given to more generalised but ultimately academic complaints about process. Similarly, the Secretary of State should give less weight to points made for the first time at the Inquiry (and not previously made in consultation

responses, objections, Statements of Case, or proofs of evidence) – which in fact pertains to a lot of the points pursued in submissions.

42. A large part of the Ramblers' disquiet appears to be that this is a "unique" proposal. There are two answers to this. First, if it is said that the closure of level crossings is a unique proposition, it is not: see further below. Second, the approach taken by NR in its Anglia Strategy is a "fresh" approach is absolutely no reason to resist it. There is nothing inappropriate about the scale of the process – in fact, it is a process which is more proportionate than pursuing multiple separate orders, each requiring its own inquiry (doubtless each presenting its own procedural issues).
43. Whilst Miss Golden suggests that there is "serious concern" from the present approach, there is absolutely no evidence that the Ramblers' or anyone else's interests have been prejudiced. In fact, it is slightly odd for Ms Golden to suggest that there has been such a problem, when the Ramblers in fact only called evidence on 2 of 20 PROW crossings. It would be no easier for the Ramblers to deal with 20 separate orders in the same timeframe – in fact it would be harder. The Ramblers have had these proposals before them for two and a half years, and one wonders what more they would have done with further consideration.
44. Finally, as in her cross examination, Miss Golden's closing fundamentally misunderstand the Inquiry process. It is not a judicial review of Network Rail's decision-making process. It is not an Inquiry into Network Rail's state of mind at any particular time. It is an Inquiry into the merits of the Order. However the Order proposals were devised by the Promoter is frankly irrelevant; the question is whether they are now justified. The Ramblers may have proposed a different Order for different reasons, but that is not the Order which is before the Secretary of State. The "crucial question" in paragraph 38 of her submissions is not crucial at all: it is in fact irrelevant. The balance is for the Secretary of State, on the basis of the evidence before him.
45. Once this last point is understood, the Inspector can legitimately ask, what is actually left of the Ramblers' case? In my submission what is left is the 5 objections to 5 crossings in the Order.

(iii) TWA process

46. The Ramblers pursue what appears to be a more fundamental objection to the Order, namely that it should not be allowed to proceed because there is an alternative available by way of applications under s 118A or s 119A Highways Act 1980. The Ramblers' position was adopted by CCC at the outset, but has clearly now been abandoned since (i) CCC is supportive of the Order being made save in the specific instances where it maintains objections (ii) for all the complaint about the pre-application process, the Inquiry process has in fact in CCC's view allowed all matters to be addressed "fully and appropriately".
47. In light of Mr de Moor's evidence, and the experience of actual scrutiny of Network Rail's proposals once we came to look at individual crossings, it is puzzling that the Ramblers maintain this point.
48. This is essentially a legal issue which I addressed in Opening and anticipated making fuller submissions in Closing. In fact, the Ramblers case on this issue has gone no further since Opening. I therefore simply repeat that this is entirely misconceived for the following reasons:
- a. This Order falls squarely within s 1(1) TWA: "an order relating to, or to matters ancillary to, the construction or operation of... a railway". There is absolutely no doubt that the closure of a level crossing on a railway relates to the operation of the railway. That does not seem to be disputed;
 - b. So far as it is argued that the Highways Act process is better, that is irrelevant. If the application is lawfully made under the TWA then a "better" route is nothing to the point – the application must be determined on its merits;
 - c. In any event that general point is very obviously wrong. It would require 20 separate applications under the Highways Act. It would be for the highway authority to decide whether to co-operate in the closures – if they did not, whatever Network Rail's position was would be irrelevant. If the proposals got off the ground, it would require 20 Inspectors to hold 20 inquiries;

- d. The more sophisticated legal point made by the Ramblers is that s 13(2) TWA provides that where the Secretary of State considers “that any of the objects of the order applied for could be achieved by other means, he may on that ground determine not to make the order”;
- e. The starting point here is the “order applied for” – i.e., that which Network Rail seeks and not that which objectors say we should have. This matters because the order applied for includes:
 - i. Compulsory acquisition of land
 - ii. Temporary possession of land
 - iii. Disapplication of legislation
 - iv. A request for deemed planning permission
 - v. Extinguishment of private rights
 - vi. Closure (and associated alterations of rights of way) across multiple crossings.

Those matters could not be achieved under the Highways Act processes. This is a complete answer to the argument.

- f. Further, the objects of the Order are ones which the Highways Act provisions simply do not take into account. The sole basis for closure under s 118A/119A is for the safety of users of the crossing. That is an important part of the objects of this Order – but not the only part. The safety of users of the railway; its operational efficiency; and its future capacity are all elements of the justification. As ss 118A and 119A does not allow for extinguishments or diversions on the grounds of operational efficiency, the Highways Act is dealing with a materially different proposition;
- g. It should be recalled that s 13(2) is expressed as a discretion (“may on that ground determine not to make the order”). The Secretary of State is not required to refuse the Order even if the points above are rejected. Here there are very good – indeed compelling – reasons why he should not do so, including:

- i. The Secretary of State has on at least 5 separate occasions¹³ made orders to close level crossings under the TWA;
- ii. The applicant specifically canvassed this issue with the Orders Unit in advance of the application being made. The Orders Unit confirmed that it was appropriate to proceed under the TWA. Even if the discretion in s 13(2) were engaged, it would be unfair for the Secretary of State now to exercise it in light of the clear indication from the Department that it was content that the application could be dealt with under the TWA. There is nothing “unscrupulous” in seeking the Order through this means. It results from confirmation from the Department that it was content with the approach;
- h. It should also be remembered that this objection to the use of the TWA only “bites” where public rights of way across the railway are affected. Thus, in respect of 5 crossings, this is a non-issue even taking the Ramblers/CCC case at its highest.

(iv) Consultation

49. Consultation concerns can be dealt with shortly. It is commonplace for those opposed to infrastructure schemes to say that they have not been consulted when, in fact, what is meant is that the promoter has not acceded to their consultation responses. This is certainly the case here.

50. As the consultation report makes clear, there has been meaningful, thorough and repeated consultation on the Order proposals – far more than is required by the law or as a matter of policy. The consultation has been meaningful both on the inclusion of particular crossings, and on the detail of diversionary routes. The proposals have changed as a result of consultation (as explained by Mr Kenning and Ms Tilbrook in

¹³ Swynedyke Level Crossing Order 1995; Ammanford Level Crossings Order 1996; Seaham Level Crossing Order 2013; Northumberland Park and Coppermill Lane Level Crossing Closure Order 2017; Abbots Ripton Level Crossing Order 2017. Another relevant example is the recent Chiltern Railways (Bicester to Oxford Improvements) Order 2012/2679 closed 3 road LCs, 13 footpath LCs and 11 accommodation crossings.

their written evidence). The Ramblers' submission that the *principle* of closure was not consulted on is simply wrong – Network Rail invited responses on precisely this point.¹⁴

(v) Equalities

51. The Ramblers, and to a lesser extent CCC, have called into question the way in which equalities issues have been dealt with and in particular the extent to which the Public Sector Equality Duty (“PSED”)¹⁵ has been met.

52. This point is misconceived:

- a. As a matter of fact, Network Rail has considered equalities issues at each stage of the process – as confirmed in its Strategy. Where potential issues have arisen, they have resulted in the production of Diversity Impact Assessment. It is unarguable that there has been a failure to “have regard” – which is the duty in s 149;
- b. The duty to “have regard” in fact rests with the decision-maker in this context – i.e. the Secretary of State. Doubtless in discharging that duty the Secretary of State will have regard to the totality of the evidence including, for example, the concerns about the provision of a stepped access at C7;
- c. So far as third parties such as the Ramblers suggest that there are other factors which should have been considered – they can, and have, made those points in the Inquiry. Those will be considered by the Secretary of State in having regard to the issue;
- d. In fact, for completeness, Network Rail rejects the criticisms of its DIA process and has responded to the Ramblers' position with a note from suitably qualified experts (as opposed to legal submissions).

(vi) Evidence

¹⁴ “To what extent do you agree with the changes proposed at the level crossing itself?” – see the Proposals Questionnaire at NR5.

¹⁵ S 149 Equality Act 2010

53. A substantial section of the Ramblers' closing argument suggests that Network Rail failed to put sufficient evidence before the Inquiry. There is an important process point here, which Miss Golden completely ignores. Network Rail produced a statement of case. It made various points in support of the Order, including for instance the case that cost savings would be derived from it. It then prepared evidence on the basis of that statement of case. It has done so in full compliance with the relevant rules and Guidance. Necessarily, all of the underlying documents to support, for instance, costings are not before the Inquiry. There needs to be sensible approach here – or else where does one stop? At every turn when challenge has been made to Network Rail's evidence, it has been answered.
54. In their Statement of Case and evidence, the Ramblers did not challenge any of these points – for example, that the costings were not justified. These points were raised for the first time in cross examination. Network Rail has strived to assist by providing this information when requested, but it really is unacceptable for a represented party to treat cross examination as a fishing exercise, as opposed to putting its own case. Miss Golden was not counsel to the Inquiry – she was presenting her client's case which is that set out in their Statement of Case, and in evidence.
55. Network Rail has not, for the avoidance of doubt, “bitten off more than it can chew”¹⁶. It has promoted far larger TWAOs than this. It is perhaps understandable that the Ramblers are not familiar with this process, but the Inquiry having played out (with the Ramblers' actual case considered carefully and fully over 16 sitting days), these misconceived procedural jibes are not helpful.

D: The general approach to public rights of way (law and policy)

56. Network Rail's position on this issue was set out in Note 6, and in Ms Tilbrook's evidence. The position is summarised here.
57. The starting point is the statute, and s 5(6) TWA which provides that that an 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.

¹⁶ RA Closing 80

There is no further gloss on this and no definitions are needed. It is a simple test. If an alternative right of way is required, it must be provided. If it is not required – perhaps because the existing network is sufficient – then it need not be provided.

58. The Secretary of State has established guidance on this issue in Annex 2 to the DfT Guide to TWA Procedures. It explains 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.

59. The words are being used in the context of guidance, and accordingly should not be construed as if they were a statute. The phrase should be given its ordinary, common sense, meaning, and appropriate to the context of the policy as a whole and the wider statutory framework. In that respect, the following observations are made:

- a. Section 5(6) anticipates that an alternative may not be required at all. Where an alternative is found to be required, the statute does not say anything about the form of that alternative;
- b. The Secretary of State’s interpretation focuses on existing users of the public right of way. It is therefore clear that any assessment must relate to existing users and not to those who might theoretically wish to use the route, or those who might insist on their legal rights to do so. Similarly, the language indicates that the Secretary of State is not seeking enhancements to the public rights of way network in applying s 5(6). For these purposes, Network Rail does not accept the submissions made at Part 5 of CCC’s Closing. The word “existing” does not extend to those who might theoretically be entitled to use a route, but never in fact would (e.g. due to some other constraint, or its general geographical position). It is accepted, though, that a degree of common sense is required in identifying existing users and clearly if there is some unrelated short-term obstruction of a route, there may be users who are temporarily impeded and protesting that they have been obstructed. They should sensibly be treated as being within the class of existing users. That point must have limits though: if the constraint on a theoretical class of users has been present for many years without complaint, it is very difficult to regard them as “existing” users;

- c. It is possible within this guidance to find that one class of existing users should be accommodated, but another should not. The focus on suitability and convenience must relate to the user in question. Questions of directness, for instance, will be more important to those who use routes for utility purposes¹⁷ than those who use them for recreation. Similarly, it may be concluded that some classes of users require the provision of a direct off road alternative, but such provision is not required for others (see e.g. NR's case in respect of trail bikers at C11 and C27);
- d. Importantly, the guidance does not invite a comparative exercise between the extinguished right of way and the alternative (if required). Accordingly, the policy test is materially different from that in, for example, s 119 Highways Act 1980 ("will not be substantially less convenient"), or s 116 ("nearer or more commodious");
- e. Similarly the guidance does not suggest any overarching requirement to take account of the "public enjoyment of the footpath as a whole". This again distinguishes the policy from the test in s 119 HA 1980; and
- f. The test is closer to (although not the same as) that in e.g. s 14(6) Highways Act 1980 where "another reasonably convenient route" is required where side roads may be stopped up for trunk road development; or s 18(6) where such a route is required where side roads may be stopped up for a "special road" (motorway); or where footpaths etc. are stopped up for the purposes of crime prevention under s 118B HA 1980; or where footpaths are temporarily diverted for dangerous works under s 135A. These provide better analogies because the Act there recognises that the wider public interest (in the construction of a trunk road or motorway, or in the prevention of crime) may mean that the existing users of the affected route may be inconvenienced to some degree when compared to the prior situation.

¹⁷ Interestingly, there is scarcely any evidence of "utility" use of the PROWs affected by the Order.

60. In Closing, CCC suggested that there was some importance in the fact that Annex 2 does not say that an alternative route may be “less convenient”¹⁸. Network Rail does not agree. There is nothing to suggest that this is a comparative exercise between the current route and the route after the Order scheme is implemented.
61. However, the issue does not end with the TWA Guidance since there is a wider policy context to consider.
62. National and local policy supports the provision of a good public rights of way network – and so should it. For the reasons set out in the Cycling and Walking Investment Strategy, for instance, walking and cycling should be encouraged. There are significant health and social benefits arising from walking – which have been repeatedly emphasised at this Inquiry, and which are not in dispute and fully accepted by Network Rail.
63. However, national and local policy also focuses on the *safety* of these routes. Risks at level crossings render walking routes less safe; they also may deter some users from the route altogether. Further, non-motorised journeys are part of a wider system of sustainable travel which includes rail travel. One necessarily, therefore, has to seek to balance these modes of transport – a point which Dr Algaard made in her oral evidence.
64. Thus it is wrong to attempt to set walking, cycling and riding against train travel, as if they are in competition or conflict. The issue is about striking the right balance. It is presumably for that reason that Mr Poultney for CCC agreed that, in light of the safety benefits and rail efficiency benefits of the proposals in the Order, the question is whether in any instance there is a “significant adverse effect on the rights of way network” from the proposals. This approach sits with the broader policy context as set out in Dr Algaard’s evidence and in the Planning Note. It reflects the NPPF’s injunction to permit sustainable development unless the adverse effects of doing so significantly and demonstrably outweighs the benefits¹⁹.

¹⁸ 6.3

¹⁹ NPPF paragraph 14

65. It is also language which reflects that used recently by the Secretary of State in a similar order²⁰, and therefore it is an approach which is commended to this Inquiry.

E: Road safety

66. Ms Tilbrook's evidence explained how road safety issues had been accounted for in assessing diversionary routes. It is material to note that one crossing was excluded from the Order because of a road safety concern. It is also material to note that the assurance given to CCC in respect of the Palmer's crossings (see below) was in direct response to a road safety issue. These issues have been central to the identification of the Order proposals.

67. A general argument is made that risk is simply being transferred from the railway to the road. That is not accepted by Network Rail, nor is it borne out by any evidence.

68. The Inquiry has heard from two witnesses with considerable road safety expertise: Ms Tilbrook and Mr Peter Taylor (for CCC). Their positions were, in fact, relatively closely aligned. It was agreed, for instance, that RSA is an iterative process and that road safety issues would inform the detailed design of the proposals, with CCC overview. It was further agreed that the RSA process to date had complied with the process requirements in HD 19/15. It was also agreed that it was not possible to make a meaningful comparison between road and rail safety, and that accordingly the distinct assessments of safety should be considered separately.

69. In fact, most of Mr Taylor's road safety concerns were based on misunderstandings of the proposals (see for instance his objection to the closure of C01 Chittering in his Review).

70. The Inquiry was also presented with evidence from a highways engineer acting on behalf of the Ramblers, who made various inchoate criticisms of Network Rail's road safety audit process in the Essex TWAO Inquiry. These have been addressed in full and since that person did not attend to be cross examined, little weight should be given to his evidence. In particular, the suggestion that Ms Tilbrook unfairly influenced the RSA process was shown to be completely wrong. The contention, put in closing, that "the

²⁰ Abbots Ripton Level Crossing Order 2017

Order cannot be made on the basis of the Stage 1 RSAs alone” completely ignores HD 19/15, which specifically endorses Stage 1 audits for the purposes of deciding on the principle of a scheme.

F: The general approach to matters relating to land acquisition

71. Mr Smith's evidence sets out the land acquisition process in some detail and it is unnecessary to repeat it in detail here. The essential point is this: those landowners whose interests in land are adversely affected by the Order scheme will receive compensation. This will take into account the impact of, e.g. a new footpath on the agricultural production of the field in question.

72. Where land and rights are acquired by the Order, Network Rail submits that a compelling case for that compulsory acquisition has been made. The case is:

- a. Where rights over the railway are being extinguished, the case is founded squarely in the Order's objectives as articulated in section A above;
- b. Where land and rights are acquired to create diversionary routes, the compelling case is made up of two steps:
 - i. That there is a compelling case for closure of the crossing for all the reasons set out above; AND
 - ii. That it is necessary to provide the diversionary route to accommodate existing users, which creates a compelling case for the acquisition of land and rights to do so.

73. In Closing their case, NFU suggested that there had been a failure to consult with landowners. That is factually incorrect, as Mr Smith's evidence makes clear. Network Rail has met with and written to affected landowners. It is true that in most cases these discussions have not materialised into agreements. However, that reflects the fact that most of the affected landowners would rather not see their land interests interfered with at all. The position of the Hurrells is a good example. They complain of a failure to negotiate, but when they articulate the substance of what they seek from that negotiation, it is that Network Rail should abandon their proposals altogether. That is not a position which is capable of being negotiated around.

Part 2: Individual crossings

74. For the purposes of these submissions, it is not intended to repeat the detailed evidence in respect of each crossing nor to go over crossings which have not been the subject of evidence at the Inquiry. Network Rail's written evidence which in each case describes the crossing including assessments of the risk at the crossing; the proposals for it including their evolution; and an assessment of the impact of the proposals, specifically the suitability and convenience of the alternative route: see the evidence of AK, ST and JP.

75. At the outset it is not accepted that CCC's witnesses are any better placed to make these assessments than Ms Tilbrook, or that their evidence should be preferred in default. It is Ms Tilbrook who has made the more thorough assessment, informed by a wider team of specialists at Mott MacDonald. She is an experienced highways engineer with very extensive experience of dealing with public rights of way. More importantly, her evidence should be assessed on its substance. It is detailed and careful in writing. Orally, her evidence was clearly fair and balanced; she did not seek to diminish or avoid the concerns of objectors. She gave full and thoughtful answers. Mr Carr's submission was in essence that you should judge a witness's evidence by the letters after their name. Network Rail submits that Ms Tilbrook very obviously is suitably qualified to give her evidence. Once satisfied as to that, her evidence should be assessed on its merits.

C01 Chittering

76. This is a footpath crossing which is little used – if at all. The diversionary route directs walkers to the footpath crossing at Jack O'Tell to the north. There is no substantive objection to this proposal, the Ramblers having withdrawn their objection and CCC not objecting.

C02 Nairns; C33 Jack O'Tell; C34 Fysons: "the Palmer crossings"

77. These three user worked crossings lie on land farmed by FC Palmer as part of a sophisticated and substantial agricultural enterprise. Whilst potato farming is a major component of the enterprise, there are other activities including a solar farm, salad crops and proposals for a very substantial glass house.

78. The Order proposals were that each of these crossings should be closed. Since the FC Palmer operations span the railway line, this would displace farm traffic onto the road network. In discussions with FC Palmer and CCC, Network Rail accepted that the closure of all three would have unacceptable impacts and has sought to mitigate those impacts.
79. Network Rail now proposes to close C35 and either C02 or C33. By retaining one crossing point, the impact on FC Palmer's operation will be minimised and CCC's concerns about the wider highway network will be addressed in their entirety.
80. As things presently stand, it is not possible to confirm whether C02 or C33 will remain open. That is because the choice depends on securing rights on third party land to allow one of them to be served by farm tracks which will provide connections to the entirety of the relevant land holdings. Negotiations for the acquisition of such rights are at an advanced stage but have not yet been completed.
81. However, both CCC and FC Palmer have the benefit of assurances from Network Rail that notwithstanding the terms of the Order, it will not close both C02 and C33, and it will close neither until the relevant rights over third party land have been secured. These assurances are enforceable against Network Rail and can be relied upon by the Secretary of State in making the Order. Amending the Order to remove one of the crossings would frustrate entirely the process of properly mitigating the impacts of closure. The approach of Network Rail is supported by CCC and in substance acceptable to FC Palmer – although they maintain objections, which are addressed below.
82. Network Rail invites the Inspector to recommend that the Order is made with the inclusion of all three crossings, in reliance on the assurances given that the powers will not be exercised in full. This will allow the Order objectives to be fulfilled, whilst providing a mitigated solution. That these crossings need to be grappled with is absolutely clear: the accident at C02 Nairns confirms that the status quo cannot be continued.
83. In their latest position, FC Palmer suggest that the Order should not be made until there is certainty as to which crossing will be retained. That, we submit, simply frustrates the

objectives of the Order. It serves no useful purposes since FC Palmer accept, in principle, that one of C02 and C33 should close and one remain open – the position which Network Rail would be bound to achieve because of the terms of the undertaking.

84. FC Palmer make a further argument which is that a full barrier, or AHB, should be installed on the retained crossing. In deeply unattractive submissions, they relied on the incident at Nairns to justify this demand. The reason why this is so unattractive is that the incident was caused by the criminal misuse of the crossing by FC Palmer's own employee in the course of his work. The implication from the FC Palmer representatives appeared at times to be that the fault lay elsewhere – a point which is flatly inconsistent with the culprit's conviction and imprisonment for endangering the railway.

85. Even if the demand did not come from such a poor starting point, it is in any event without merit:

- a. The cost of such provision would be exorbitant – upwards of £2m. Mr Kenning explained that detailed resignalling work would be required for such provision in this location. This would be an unjustifiable burden on the public purse;
- b. Network Rail propose, in any event, to install MSLs at the retained crossing. This is an improvement to existing situation since it would obviate the need to telephone for approval to cross with all but the largest vehicles. Such provision is proportionate to and appropriate for an accommodation crossing on a farm.

86. There is no basis for FC Palmer's demand and it should not be allowed to ransom the delivery of this much needed Order scheme so far as it relates to this land holding.

C04 No. 20

87. This became the most controversial of Network Rail's proposals, and detained the Inquiry for a considerable amount of time. It might be regarded in some sense as the high-water mark of the case against the Order proposals.

88. Nonetheless, and notwithstanding the evidence called against it, it is maintained that the Order should provide for the closure of C04 and the diversion as proposed.

89. First, context is important here. The actual usage of the crossing is relatively low (albeit regular). 53 users were identified over a 9 day period, with the busiest day having 12 pedestrian users. The footpath has stiles which means that only walkers who are able to cross stiles use the route at present.

90. Second, Station Road provides a suitable crossing of the railway for existing users:

- a. Whatever its perceived problems, the reality is that Station Road is currently used by pedestrians far more than the route over C04 – up to 90 pedestrians a day use Station Road at present. At most the pedestrian flow on Station Road would be 10-20% above current levels;
- b. The narrow footway which is the focus of much of the resistance to this proposal reflects an existing condition – an issue which CCC are clearly satisfied does not present any special risk to pedestrians at present (since it would be bound to address that risk if it thought otherwise). The Order proposals do not worsen the condition of the footway – they simply put a small additional number of users onto the footway;
- c. Despite the perception of risk arising from the narrow footway, there is in fact no evidence of accidents on the route which would be used under the Order scheme;
- d. The incline on Station Road is 1 in 20 at worst. This is an acceptable incline for wheelchair users. In any event, C04 is very unlikely to be used by those with significant mobility issues due to the presence of stiles. By contrast Station Road is currently used by those with mobility impairments. If there is an issue here, it is entirely unrelated to the Order proposals. The contention by Mr Smith that there is a breach of a duty in the Equality Act 2010 was not, in fact, pursued under cross examination.

91. Third, Network Rail propose to create a new field margin footpath in the southern part of Station Road. This would be an improvement on the current situation on Station Road, where those walking south of the railway on the east of the road have to cross at the entrance to Valley Farm to use a footway.

92. Fourth, the diversionary route to the north of the railway is suitable and convenient, and does not have any unacceptable impacts on landowners or users:

- a. The route follows a field margin for the majority of the diversion, which presents no issues for users;
- b. Shortly before its junction with Station Road, the diversionary route crosses part of the circulation road for the industrial estate. This does not present any significant safety issues, and nor is it unexpected. Indeed, pedestrians on Station Road cross the same industrial estate access road whilst walking into Meldreth. At the site entrance itself, the footpath is proposed to be separate from the site access – a point with which Mr Peter Taylor was satisfied;
- c. The impact on the AP Burlton turkey shed is overstated. The NFU’s case turned on an assertion that walking past a poultry building created a biosecurity hazard. There is no evidence for this whatsoever. Defra has issued guidance on biosecurity for poultry units which makes no mention of people walking past such units (as opposed to being permitted access to them). The poultry business will of course have to prevent unauthorised access but it presumably does so now. Whilst Ms Staples prayed the Defra guidance in aid, she failed to identify any part of it which would guard against a footpath as proposed in the Order;
- d. The impact on AP Burlton’s future aspirations is speculative – there is no planning application and no plans. It is telling that the point was originally put as a desire to undertake free range farming, but in closing NFU described it as a desire to construct a “new turkey building”. Network Rail cannot promote the Order on the basis that a landowner might wish to develop in the future, especially when the landowner’s intentions are unclear. If the landowner does develop, it will have to deal with the footpath network as it finds it, and apply for diversion orders if necessary. So far as the insertion of the footpath diminishes the value of the land, that sounds in compensation;

- e. The alternative diversion route running close to the railway was rejected during consultation, leading to the present proposals. It does not represent a realistic alternative to the Order scheme.

93. Fifth, the proposals in this location were the subject of suitable notices. It appears that some notices were printed double sided, interfering with the ability to read them. However, multiple notices were displayed across the affected route and it is inconceivable that any concerned user would have been unaware of the proposals.

94. For those reasons, the Order proposals are acceptable in terms of the provision of a suitable and convenient alternative route for existing users. It follows that the Order should be made as proposed.

C07 No. 37

95. Users of a pedestrian crossing of the railway will be diverted to the B1368 to cross the railway on an existing road bridge.

96. The proposals include the provision of substantial lengths of new off road walking which constitute a wider benefit in terms of access to the wider PROW network. To the north of the railway, the diversionary route uses an existing permissive footpath. This Order would formalise this route and incorporate it into the local PROW network. At the road, users would cross to the east of the road and join a new field margin footpath. At present, walkers wishing to use the permissive path and then continue their journey east on BOAT 3 have to walk in the carriageway. One user's dog was killed on this walking route – a situation which would be avoided under the Order scheme. The new field margin path is supported in principle by CCC.²¹

97. At the existing road bridge, users would use new steps to reach road level, where they would cross the road²² before using steps to the west of the road to join a new field margin path. The new path would continue southwards and move into the highway verge, where it would connect to the longer distance hoggin path running south to Newton.

²¹ CR XX

²² Peter Taylor confirmed that this crossing point was suitable and the appropriate location for such a crossing on the replacement route

98. The main complaint of CCC and the Ramblers relates to the stepped access. It is said that users of C07 may be unable to manage the steps and therefore unable to enjoy the replacement route. Whilst recognising the concerns²³, Network Rail submits that they are not a reason to reject the proposals:

- a. The proposed steps meet “inclusive design” requirements. They incorporate the gradient, rises, and resting places of a footpath bridge designed to modern standards. To that extent they are the same as what the Ramblers argue should be provided at the crossing location²⁴;
- b. A ramped solution is simply impractical in this location. It would be a very significant engineering operation and would require substantial land take.

99. A secondary complaint relates to the loss of a pleasant wooded route to the north of the railway, close to the crossing. Whilst this is undoubtedly a nice walk, the route to the north which is unaffected by the proposals is also tree lined. The diversionary route to the north of the railway, whilst more open, is in countryside and therefore not materially less pleasant than the current route.

100. Accordingly, Network Rail maintains that the proposals are appropriate.

C10 Coffue Drove

101. No objections were heard at the Inquiry.

C11 Furlong Drove

102. The proposed closure relates to a BOAT, although in practice for many years the crossing infrastructure would not permit a four-wheeled vehicle to cross the railway. The evidence is that this position has been unchallenged for many years and accordingly the Inspector should proceed on the basis that any provision for “existing users” need not address any four wheeled vehicles. A number of issues are raised by objectors here.

²³ Expressly in the DIA: “The implementation of a permanent diversion which includes stepped access may disproportionately affect certain sections of the population who find walking long distances and / or navigating steps difficult.”

²⁴ Jill Tuffnell Proof, para 9

103. First, it is said that the new bridleway created to the north/west of the railway should be a BOAT to permit trail riders to use the route. Network Rail considers this to be unnecessary and an unreasonable burden on the landowner. Trail riders can cover significant distances in their rides. This was their evidence – called by the Council – and therefore not a matter for Network Rail to “prove” as suggested by Mr Carr. There is an extensive network of unsurfaced routes and lightly traffic roads which can be used in the vicinity. These users do not need alternative provision since they can use, for instance, BOAT 34.
104. Second, it is said that equestrian users are denied a long gallop. This is wrong: they can gallop as before, since they are only diverted at the crossing itself where they would at present have to dismount. Provision is made for them by a diversionary route to both the north and the south of the railway. In any event, the surrounding road network is suitable for equestrians and used by them in practice now (a point which was begrudgingly accepted by Ms Champion).
105. Third, concern is raised by the Ramblers in respect of the impact on the Hereward Way. This is a long distance route which can be accommodated readily through the diversion, with little additional distance. Walkers can simply use BOAT 34 in place of BOAT 33. It is notable that Ms Champion, the local rights of way officer, did not raise any concern about this issue.
106. Fourth, so far as users would be diverted to Main Drove, it is a wide road with opportunities to walk in, or step into, the verge. No road safety issue has been identified here and Ms Champion deferred to Peter Taylor – who did not identify any problems.
107. Fifth, concern is raised by the landowners (and latterly CCC) about the diversionary route to the south of the railway, to provide a connection between footpath 22 and BOAT 34. This bridleway route was introduced because CCC were concerned about equestrians riding round “Dunkirk Corner”. It clearly does have an impact on landowners, but Network Rail maintain it makes appropriate provision for existing users. Mr Smith explained how drainage pumps and pipes can be accommodated through e.g. the provision of pipes beneath the bridleway. This is ultimately a matter for the Inspector and the Secretary of State. If the view is taken that the additional diversionary route is *unnecessary*, then clearly this is not an impediment to the Order:

that section of bridleway can simply be omitted, and users can use the road and continue round “Dunkirk Corner” towards BOAT 34.

108. Sixth, a concern is raised about the view of Ely Cathedral. The Order proposals do not interfere with that view, and it can be enjoyed through the retained sections of BOAT 33. There are, of course, many spectacular views of the Cathedral across the fens.

C12 Silt Drove

109. No evidence was heard on this.

C14 Eastrea Cross Drove

110. The proposals here relate to a footpath diversion. There is no concern for users per se, but CCC object on the basis that the proposed replacement path will not be made up to a good enough specification to prevent it being damaged by farm machinery etc. The landowner disagrees with CCC, but argues that the route should run between the two drainage ditches rather than in the field boundary.

111. Turning first to CCC’s argument, it would plainly be excessive to engineer a footpath in the way sought. This is a field edge path – it plainly should not be a metalled road. There is no reason for the farmer to drive on the path and no reason to think that it would be subject to any special damage beyond the normal wear and tear of a field edge path. There are further problems identified by the landowner from installing a new road, including great loss of agricultural land and potential for vehicular trespass.

112. In closing, CCC argued that Network Rail lacked the expertise to speak to the structure of the path. That is obviously wrong: Ms Tilbrook is a highways engineer and is the best placed witness to speak to this point.

113. Ultimately, CCC will have to approve the detail of the path, so this really should be a matter left for detailed design. CCC will have to be reasonably satisfied as to the form of the path laid out by Network Rail before the level crossing closure can be implemented.

114. The difficulty with the landowner's proposal is that the space between the drainage ditches is close to the ditches and, according to the IDB, used for maintenance purposes. It does not therefore present a viable option. The presence of a field edge footpath will not be a substantial interference with the agricultural use of the field, and in any event will be give rise to a compensation claim.

C15: Brickyard Drove

115. CCC's main concern here, raised also by the landowner, is the presence of a cross field path. This is not a sound basis for resisting the proposals:

- a. Cross field paths are common place. Indeed, at C20, CCC oppose a closure where the current footpath is a cross field path, and the proposed diversionary route is not;
- b. Cross field paths are capable of being maintained. Contrary to the unjustified submissions of CCC on this evidence, Mr Smith gave cogent evidence on this point. He does understand the position – he is a chartered surveyor with significant experience of rural issues and a good familiarity with farming practices (as demonstrated on a number of occasions in his evidence);
- c. CCC's position ignores completely the reason for the cross field proposal here. There is a badger sett which would potentially be interfered with by the original, field margin, proposals. It would be unlawful to allow such interference when this alternative solution is available. It is for this reason that the proposal does not follow the field margin. If this was properly grappled with by CCC, their position on these proposals may be different.

116. Ms Champion made a number of other points in respect of suitability and convenience here, in particular suggesting that the proposals required greater use of Benwick Road. For most users the changes would not have that effect, and certainly the suggestion that there was a linkage to a byway to the south of Benwick Road was obviously wrong (since the byway is severed by a deep ditch).

117. The sole material issue is therefore the presence of a cross field path. Such paths are present elsewhere and can be managed. This is not reason to exclude this crossing from the Order.

C16/C17 Prickwillow 1 and 2

118. No evidence was heard on these crossings.

C20 Leonards

119. This footpath crossing currently forms part of circular walks from Soham and provides connections to the wider network to the south/west. To the east of the railway, closest to Soham, the footpath network crosses paddocks and water courses, with a number of sharp turns. To the west of the railway, FP101 crosses an arable field and then meets Mill Drove. Here, most users are likely to use the road to head south and connect with BOAT 113 or routes further south. That is because the immediate footpath connection – FP 114 – has been severed by farm buildings and is effectively unusable.

120. Network Rail's proposals would take users through pleasant paddocks (in the field margins) to the east of the railway, joining Mill Drove close to the existing AHB crossing where the railway can be crossed. Users would then walk a short distance on Mill Drove before joining a replacement footpath to connect to FP 114. Alternatively, they can continue on Mill Drove to BOAT 113.

121. In substance, then, these proposals do not materially affect the amenity, suitability or convenience of the route. Mill Drove is lightly trafficked (118 vehicles per day, and at a speed of 30 mph). The new route would not necessarily increase on road walking at all: indeed, by providing a connection to FP 114, on road walking could be reduced from the present position. The route to the east of the railway would provide a very high standard of amenity – likely more pleasant than the cross field path to the west of the railway which would be lost.

122. In evidence, there was no clear articulation as to how these proposals would diminish the recreational walking network around Soham. New paths would be created – including reinstating lost connections. New circular walks would be possible. The exaggerated language used to describe the proposals (“vandalism”, and even the suggestion that the proposal could undermine the health of Soham’s residents) belies a

failure to actually grapple with the details of the proposals. Indeed, in XX Cllr Hunt accepted that the proposed alternative route “may be equally pleasant” as the existing route.

123. Ms Champion’s further concerns about the surfacing and usability of the route to the east of the railway are matters which go to detailed design only, and which are governed by the approval’s process which is in CCC’s hands. To that end, they are not material to the underlying merits of the proposals, which is presumably why they were not pursued in closing submissions.

124. In summary, the proposals at C20 provide a good alternative route which is undoubtedly suitable and convenient; indeed in some ways it represents an enhancement from the present situation.

C21 Newmarket Bridge and C22 Wells Engine

125. The principal issue at these crossings relates to flood risk. They are, otherwise, very convenient diversionary routes since the user simply passes under, rather than over, the railway. It is accepted that the alternative routes lie in the floodplain, but there is no evidence of anything other than occasional flooding. It is true to say that Network Rail has not engaged in extensive hydraulic modelling to quantify the risk more accurately, but it is neither necessary nor appropriate to do so given that footpaths are, in any event, water compatible developments in the sense that they may (and regularly do) pass through the flood plain. The evidence of Cllr Bailey was that the area would not be flooded every year.

126. For the vast majority of the time, the routes will be passable. Network Rail has suggested that the occasional issue is mitigated by the presence of signage to indicate that the route may be impassable in times of flood. It will be very obvious to those in the area when the River Great Ouse is in flood.

127. For the avoidance of doubt, it is not accepted (contrary to CCC’s suggestion in closing) that a user could in times of flood simply divert over the railway. It is a criminal offence to trespass on the railway, and that would displace any arguable common law rule about deviation to avoid obstacles.

128. At C21, the proposed route is in fact the route of a well-used cycleway which forms part of a national network. It does not appear that the presence of that cycleway in the flood plain in this location has presented practical problems.

129. Ms Champion raised a separate concern about vandalism under the railway bridge. This is not a good reason to resist the proposals, not least because anti social behaviour equally affects level crossings. Indeed, in this location there is a history of misuse by pedestrians using the level crossing accesses to get onto the bridge across the River, and then cross the river in the empty track bed. This factor points towards making the Order, rather than the other way.

130. In short, the occasional obstruction of the alternative routes in times of flood is not a good reason to reject the Order proposals which are plainly sensible solutions in these locations.

C24 Cross Keys

131. Footpath 15 provides a popular walking route along the River Great Ouse. Access from the west depends on crossing the railway. Currently, the railway can be crossed at Adelaide (not affected by this Order) or C24. The proposal to close Cross Keys is accompanied by the provision of a new footpath, to the west of the railway in the field margin, and a new crossing point of the railway to the north at an existing underbridge.

132. The proposals here are not opposed by CCC, Ramblers or other users on the grounds of suitability/convenience, and perhaps unsurprisingly so. Indeed, it is immediately apparent that they provide a good alternative route. Those walking longer distances can choose to walk on either side of the railway, and they can cross at Adelaide or at the new underbridge crossing point. This alternative route is clearly necessary, since otherwise users of the existing network would necessarily have to turn back on themselves to get to crossing points of the railway.

133. The sole objection here is from the landowners, although part of their case is that the proposals would not be suitable and convenient for users. It is respectfully suggested that, in light of the absence of any objection on these grounds from CCC or the Ramblers, this element of the argument should be given little weight. The real

concern is the interference with the land here, some of which is Stewardship meaning that the owner is entitled to a grant for maintaining a field margin for wildlife.

134. As Mr Smith explained in evidence, if there are losses related to the Stewardship scheme they would be the subject of compensation. It is not clear, in any event, that the insertion of a footpath would necessarily mean that the margins would not be able to fall within the scheme. Similarly, as Mr Smith explained, losses arising from temporary construction activities would also be compensated. Network Rail would clearly wish to time those works such that those losses were minimised, since that would be more cost effective for Network Rail.

C25 Clayway

135. C25 Clayway has previously been considered for closure under s 118A Highways Act 1980. Whilst such an application cannot take account of the wider strategic case now before Secretary of State in this Order, and accordingly the weight to a decision under a different statutory provision, it is telling to consider how the circumstances now are materially different in several respects. The essential reasoning of the Inspector was based around the arrangements for pedestrians on Victoria Road where they had been diverted to Sandhill LC: users would have had to cross Victoria Road twice to regain their original route, and would have to “compete with road traffic”.

136. The present proposals are materially different since a new footway on the south side of Victoria Road is proposed. Accordingly, users would not have to cross Victoria Road to continue to the south. Since this issue was the central reason why the Inspector found that the proposals in 2004 were, on balance, not acceptable and it has been addressed, the case for closure is in fact supported by that decision. There is a further improvement from the 2004 application in that the Order would formalise the footpath between Victoria Road on the east of the railway and the river path. At present, this is not recorded as a right of way.

137. The most striking thing about the 2004 application is that it was supported by CCC. It is very surprising that they now resist these proposals. The only changes have been positive ones in favour of closure. In XX, Ms Champion could identify not a single reason why these proposals were worse than the ones which CCC supported in 2004. Indeed, she accepted that the proposals were materially better. Such a change of

position, without justification, is not rational. Perhaps it is in part explained by the fact that Mr Taylor, mistakenly, thought that the arrangements at Victoria Road were unchanged from the 2004 proposals (since he refers in his Review the need to cross the road to proceed on the footway to the north).

138. In any event, this is a crossing where there are a number of particular safety issues which need to be considered. It has insufficient sighting and it is fitted with two “whistle boards” (the removal of which would improve amenity for local residents). It is close to an intolerable level of risk.

139. The diversionary route is a short one. Whilst the current route provides a connection through a network of footpaths and local roads to the centre of Littleport, the proposed alternative continues to provide such a connection: either through the same network with some additional walking, or via Victoria Road itself. The additional walking on Padnal Road is on what is effectively a pleasant suburban street – exactly the same environment which would be encountered by any user walking through Littleport.

140. The excellent work done by Mr Clarke through his health walks would be unaffected by these proposals. It is inconceivable to think that such walks would cease because of such a minor change to the footpath network. Moreover, as Mr Clarke accepted, the route was obstructed when he started doing those walks – in other words, the need to divert via Sandhill LC has not deterred him and his walkers in the past. The Ramblers, notably, called no evidence on this crossing despite their objection to the proposals.

141. In short, this is a crossing which has called for action for many years. A previous closure proposal, supported by CCC but rejected on narrow grounds by the Inspector, has led to an improved proposal which addresses in full the narrow basis for earlier rejection. The strategic case for closure has, of course, strengthened since then.

C26 Poplar Drove/C27 Willow Row

142. The proposals here relate to the closure of C27 Willow Row, and the redesignation of C26 Poplar Drove. Users of C27 Willow Row will cross the railway at C26 Poplar Drove. A new bridleway connection will join the two crossings to the

east of the railway. To the west, a section of BOAT will be improved to allow for connections to BOAT 30.

143. The concerns of CCC relate almost exclusively to the use by trail riders. To that extent it is a concern raised very late in the day – in essence, CCC’s interest in the trail riders (and their interest in the Order) appears to have arisen after submission of the Order and not in the previous 2 years of discussions between Network Rail and CCC. The concern raised is that trail riders will not be able to use the proposed bridleway connection and therefore will not, in essence, be able to enjoy BOAT 30 to the east of the railway. CCC contend that a BOAT is required where the bridleway is proposed.

144. CCC’s concerns stand in stark contrast to the landowners’, who argue that even a bridleway is an excessive burden on their land, and that users can readily continue their journey on Ten Mile Bank to connect to Poplar Drove rather than coming up BOAT 30 and continuing beside the railway.

145. Network Rail considers that the right balance has been struck here. Equestrian users and pedestrians will have a short, off road diversion. It will interfere with parcels of agricultural land but it will sit at the edge of those fields closest to the railway, and the owners will receive compensation. Motorised users can more reasonably be expected to continue to Poplar Drove – perhaps 30 seconds of motorbiking away from Willow Row Drove – using the local road network. It is true that the extent of the connected BOAT network will be marginally reduced, but as explained in the context of C11, these routes form parts of extensive on and off road biking trips. None of the trail riders live in the immediate vicinity.

146. A further concern was raised by Mr Murfitt in respect of his farming enterprise. He argues that diversion via C26 Poplar Drove will undermine his agricultural operations, particularly in periods of intensive movements. At times his evidence was a little confusing, since it was unclear why a particular field should be the subject of such intensive activity. However, the reality is – as he accepted – that even in the worst case the journey would be extended by a matter of a few minutes. Of course repeated journeys would mean that this adds up, but it is not such a great inconvenience as to be

a good reason for resisting closure of the crossing. There is no fundamental impracticality in the proposed arrangements for him and his farming activity.

C28 Black Horse Drove

147. The proposals at this crossing relate to the extinguishment of the public rights of way over the crossing, which is currently a road open to vehicular traffic. Private rights for existing users will be granted. The benefits of doing so are that the crossing will not be freely open to the public, but only to authorised users and their invitees. Members of the general public can be directed away from it. If the crossing remains as it is at present (as a public road), then significant resources would need to be directed to upgrading the crossing through an automated barrier.
148. CCC is now satisfied with the proposals in respect of this crossing. Mr Green agreed that if the occupants of the properties served by the crossing could continue to cross, then the issue he identified (access to facilities, particularly via bus) did not materialise.
149. The issues raised by affected landowners went solely to the practicalities, not to the principle. There were two main issues:
- a. Availability of access over the crossing for visitors, emergency services etc.
 - b. That status and maintenance of the road to the west of the railway, which will cease to be public highway by operation of the Order.
150. Network Rail has carefully considered the issues raised and negotiated with landowners accordingly. In respect of the first point, Network Rail had originally indicated that the gates on the crossing would be secured by a combination padlock. In light of landowner concerns, and specifically those of Mr Alderton, Network Rail has agreed that the gate will not be locked. Appropriate signage will be put in place to indicate that the crossing does not constitute a public right of way, and is solely a means of access to the properties to the west of the railway.
151. In terms of the status and maintenance of the existing highway (which will cease to be such by its severance at the crossing of the railway), Network Rail has entered

into detailed discussions with both CCC and the South Yorkshire Pensions Authority, which owns land to the west railway. The outcome of those negotiations is a bespoke provision in the draft Order which addresses (a) the continued right to use the existing road for properties to the west of railway and (b) the provision of compensation for those affected by this closure. The Article puts these issues beyond doubt, and draws on precedent from other TWAs and other legislation. The fact that this provision has been carefully negotiated between Network Rail's solicitors and those for SYPA, and that SYPA is now satisfied, is a matter which should be given considerable weight.

152. Happily, when the Inquiry came to hear these objections, SYPA withdrew their objection in writing on 22 February. Following further discussions, Mr Alderton and Mr Price withdrew their objections at the Inquiry.

C29 Cassells

153. No evidence was heard on this crossing.

C30 Westley Road

154. No evidence was heard on this crossing, although it is affected by CCC's general concern about "downgrading" UCRs to byways: see below.

C31 Littleport Station

155. No evidence was heard on this crossing.

C35 Ballast Pit

156. This is a private user worked crossing which serves a small fishing lake. At the Inquiry the sole issue was the impact of the new track which is proposed to connect that lake to BOAT 14 to allow for vehicular access to the lake from the west.

157. Mr Clewlow's evidence on this was in essence misplaced. His clients wish to develop land to the west of the railway as part of the Waterbeach new town. They do not yet have any detailed plans for the area, but their broad intention is that BOAT 14 should cease to be a vehicular route. If that is so, that is an issue with which they will need to grapple regardless of these proposals, which simply connect to that existing route. The Order scheme does nothing to interfere with these proposals. Indeed, the closure of this crossing may well be needed to facilitate the new town (and the new

station) in any event. As Mr Clewlow accepted in evidence, “no doubt alternatives to the private means of access proposed could be negotiated”. That is obviously correct, and not a reason to delay the closure of C35.

Part 3: The Order, planning conditions, side agreement, and other consequential matters

158. Happily, substantial agreement has been reached on these matters. The Order itself is now essentially agreed between Network Rail and CCC, and with other objectors whose objections have focused on its provisions (e.g. South Yorkshire Pensions Authority). Network Rail has made changes to the Order and the Order plans to address various concerns; the Inspector has an explanatory note which need not be repeated.

159. The one wrinkle in this is a residual concern of CCC regarding the designation of certain unclassified roads as BOATs. This point starts with a misunderstanding as to the law. Mr Carr contends that the “fact of the matter is that the proposed “down-gradings... are not possible as a matter of law”.²⁵ With respect, he is wrong. A TWAO can achieve such a re-designation since it has the force of statute. It therefore displaces the common law presumptions – which are “character” tests – which inform Mr Carr’s position.

160. Mr Carr goes on to say that these provisions are “completely unnecessary”. With respect, again, he is wrong. Network Rail’s obligations in respect of level crossing infrastructure are materially different for unclassified roads as opposed to BOATs. Thus an unclassified road crossing should be equipped with automated barriers – even if a TRO applies a width restriction or other limitation on use of the connecting roads. A BOAT does not require such barrier protection. Accordingly, whilst CCC may regard this as an unnecessary change, it is in fact necessary for Network Rail’s purposes. None of the reasoning advanced by CCC addresses this important point.

161. Planning conditions are now agreed with CCC and the three local planning authorities concerned. They are not the subject of any objections. They each meet the policy tests since they are directly related to the (modest) works comprised in the

²⁵ Closing 12.8

implementation of the Order; they are necessary to ensure that those works are carried out in a manner which minimises any adverse impacts and secures policy compliance; and they are otherwise reasonable. No issues have been raised in this regard and the Secretary of State should therefore be satisfied on this point.

162. The Side Agreement has been summarised in a note provided to the Inquiry. This is an important consideration, since it will be recalled that both CCC and the Ramblers in opening and CCC in their evidence raised significant concerns about the approvals process and maintenance of footpaths etc. after completion of the works. These matters are now the subject of agreement with the highways authority, and therefore it can be recorded that they have been dealt with.

163. CCC remain concerned in respect of the costs they will incur in the implementation phase. It is true to say that CCC has taken issue with Network Rail at a senior level in this regard²⁶. Notably, however, CCC does not seek any amendment to the Order in this regard. It is in essence putting down a marker that the current system – whereby local authority approvals under TWAOs do not require the payment of a fee or otherwise make provision for the recovery of costs – is inappropriate. This is ultimately a matter of policy for the Secretary of State, as a matter of general policy and not in respect of this Order per se. For that reason little more needs to be said on this point. It is noted, however, that the supposed analogy with the recovery of costs by drainage boards is inappropriate. There, the TWAO disapplies an existing consenting regime – where fees are payable – and substitutes its own approvals process.

²⁶ CCC Closing, Part 22

Part 4: Conclusion

164. There is a compelling case for the Order. It will deliver material safety benefits. It will deliver material operational efficiencies on the railway. It will allow for future enhancements of the railway network.
165. The bottom line is that to operate a 21st century railway, Network Rail needs to reduce the number of level crossings and in particular address the presence of passive crossings on the network. This Order is an important step in that process.
166. The detail of the scheme has been carefully worked up through a phased approach to selection, and through the development of options for each crossing affected. These proposals have been the subject of consultation over an extensive period.
167. The proposals have been shown to comply with national and local planning and transport policies. That they accord with local transport policy – on the whole – is confirmed by CCC’s position at this Inquiry. There are similarly no planning authority objections. The details of compliance with local policy have been addressed and are not the subject of any challenge.
168. There are undoubtedly local impacts on users and landowners. However, none of these can reasonably be described as a significant adverse effect. The proposals do result in changes, but these changes are modest in scale. When weighed against the strategic case, any adverse effects are very clearly outweighed.
169. The terms of the Order are essentially undisputed, save for a few small issues.²⁷ Similarly, the terms of the planning request and conditions are not in dispute.
170. Where required, there is a compelling case for the acquisition of the land and rights concerned.

²⁷ CCC’s concern about redesignation of roads; and the EA’s submissions on one aspect of their protective provisions which has been addressed by NR in correspondence.

171. The Order scheme is funded, both through national funding for level crossing risk reduction, and through Anglia Route funding. This funding is secure.
172. All other procedural requirements have been met.
173. In those circumstances, the Inspector is invited to advise the Secretary of State that the Order be made in the form sought, and the Secretary of State is invited to agree.

Richard Turney
Landmark Chambers

23 February 2018