

RE: GLEBE WAY LEVEL CROSSING EXTINGUISHMENT ORDER

CLOSING SUBMISSIONS

On behalf of the Whitstable Society

Objectors to the Order

Overview of the Whitstable Society's case against extinguishment

1. The following abbreviations are frequently used in these Closing Submissions on behalf of the Whitstable Society:
 - a. Network Rail (NR):
 - i. Jeremy Greenwood (JG)
 - ii. Damian Hajnus (DH)
 - iii. Gemma Kent (GK)
 - b. The Whitstable Society (WS):
 - i. Eleanor Preson (EP)
 - ii. Mark Demery (MD)
 - iii. Daren Keates (DK)
 - c. Documents:
 - i. Main Proof of Evidence (MPOE)
 - ii. Rebuttal Proof of Evidence (RPOE)
 - iii. Statement of Case (SoC)
 - d. Other
 - i. Cross Examination (XX)
 - ii. Examination-in-Chief (X-i-C)
 - iii. Re-examination (Re-x)
2. These Closing Submissions should be read together with the WS's Opening Submissions, which are relied upon in their entirety but not repeated here.
3. These closing submissions summarise the Whitstable Society's case against Confirmation of the Order for extinguishment of the Glebe Way Level Crossing in the following structure:
 - a. Safety of the crossing and possible mitigation
 - b. User evidence and alternative routes

- c. Overall expediency balance
4. The approach to be taken to the decision whether to confirm the Order is set out in the WS's SoC and Opening Submissions and not repeated here.

Overarching matters

5. The public inquiry proceeded virtually, during the unprecedented times of Coronavirus. The WS wishes to pay tribute to the Inspectorate for its assistance, support and flexibility; all of those who participated in the process; and especially to Kent County Council for organising a room for witnesses to attend and give evidence who for technical reasons would not otherwise have been able to do so.
6. The inquiry heard powerful and affecting testimonies of the impact of the tragic death of Sacha Wheeler at the Crossing in 2015. The WS wishes to extend continued condolences to the family and all others affected.
7. During the course of the inquiry, the spotlight was repeatedly turned onto the WS itself, and in particular its internal processes and functions. This was a distraction from the main issues which fall to be decided and will not be addressed in these submissions at length.
8. The WS has been the town's amenity society for the last 60 years. It serves and represents the local community, aiming to improve the amenity and utility value of the town and district for local people, preserving the character and features of the town and improving the area to meet the needs of the future. The WS has taken a keen interest over the years in tree planting, open spaces and rights of way, and it is the official planning consultee for the area, in the absence of a town council. Membership is open to all and regular meetings are held which are open to members and the general public.
9. At the inquiry, the WS's entire team acted on a pro bono basis.

Compensation

10. By section 121(2) of the Highways Act 1980, s.28 of the HA 1980 provides for compensation to be payable in respect of an order under s.118A where it can be shown that the value of an interest in land has depreciated as a result of the order or where a person has suffered damage by being disturbed in his enjoyment of land in consequence of the making of an order.
11. The term "interest" is defined widely in subs (5) of s.28 to include rights over land, whether those rights are enjoyed by virtue of an interest in land, by agreement or by licence. However, compensation in respect of an interest in land or in respect of

disturbance in the enjoyment of land, other than the land over which the path or way has been created or extinguished, will only be payable where the creation or extinguishment would have been actionable at the suit of the claimant had it been effected otherwise than under statutory powers. Where rights are affected in respect of land not crossed by the path and which is in separate ownership to the land carrying the path then the right to compensation will only be payable where the creation or extinguishment (rather than use or cessation of use) of the path would have given a right to civil action.

12. Compensation is payable by the order making authority. A claim for compensation must be made within six months of the order coming into force.
13. There does not appear to be evidence before the inquiry that suggests compensation would be payable if a claim were made.

Safety

Overall approach

14. As Mr Greenwood for NR accepted in cross examination, whilst NR have duties to reduce risk, there is no legal requirement to seek closure prior to attempting to reduce risk through mitigation and improvement. The Health and Safety Regulations cited state principles but do not impose requirements and don't require that risk must be eliminated at all costs, and he saw no reason to doubt that they applied equally to road and rail.
15. Mr Greenwood confirmed that NR take Office of Rail and Road requirements and guidance very seriously, and that they had relevant guidance on assessing risk – RSP7, and that they expected their guidance to be followed. He was not able to assist with a clear answer either way when asked whether the ORR could be taken to endorse closure where their own guidance hadn't been followed in the safety assessment. Mr Hajnus accepted that the NR SoC was “not precise enough” where it sought to represent the position of the ORR as being that their policy was to seek closure wherever possible.¹
16. Mr Greenwood confirmed in cross examination that the way NR chose to organise its budgeting and finance is not part of the test which the inspector has to apply in this case. Similarly, in cross examination, Mr Hajnus accepted that NR's consideration of reasonable practicability did not supplant the task the Inspector must independently undertake in forming a conclusion.
17. Whilst Mr Greenwood stated emphatically that expected safety standards had improved enormously since railways were first built in the 19th century, and even in the last 30 years, he also accepted that technology to make railways safer has also improved

¹ DH XX, NR SoC 1.10.

in the same time periods.² In particular, Covtec and OMSLs were not available 30 years ago.

18. When asked about the approach taken, and in particular the Level Crossings team motto noted in the Census good Practice guide, which states “if we cant close a crossing let’s make it safer”, Ms Kent stated that “there is no safe crossing, so we would always strive to close that crossing... obviously under extreme circumstances where we’re not able to do that at all, we would try to make that safer.” She agreed that NR’s policy is to close level crossings if they can, and if they cant they try to improve them. It appears there is therefore some tension between on the one hand the ability to be objective and independent in assessing risk and on the other the apparent goal of NR to close in preference to mitigation.³

Assessment undertaken

19. NR, who promote this Order, have undertaken various safety assessments to seek to demonstrate the Crossing not to be safe. The approach mandated by s.118A(4) requires particular regard be paid to whether the Order is reasonably practicable to make the crossing safe. It follows that if the Crossing is already safe, or at least has not been shown to be unacceptably unsafe, Extinguishment will not be reasonably practicable. The burden therefore is, and always has been, on NR to demonstrate the Crossing is not safe. In support of this position, NR have produced various assessments: a 2019 Narrative Risk Assessment (NRA) and a 2020 NRA. The WS has not sought to replicate this process, but rather to bring independent judgment to bear on the assessments already undertaken. Mr Keates sought to do this through his evidence which was largely directed at holding NR to their own standards and those of the ORR, so as to form a view on whether the NR assessments could be relied upon. It is the view of Mr Keates that they cannot.
20. Whilst Ms Kent’s evidence dealt in more detail with technical safety matters, Mr Greenwood fairly accepted under cross-examination that his proof of evidence contained generalisations such as stating at 8.7 that the crossing contained no warning of train approach, when in fact it is fitted with Covtec; and speaking at 11.8 of the potential for line speed increase at the Crossing, whereas there were no plans to do so.
21. Mr Greenwood highlighted a number of accidents at other level crossings around the country at 10.10 of his proof. In short, no helpful comparison can be drawn because whilst the Crossing has an attainable speed of approximately 50mph on the up line, many of these comparators have wildly different attainable speeds (e.g. JG9.16 100mph, 10.10 sub 14 100mph). Furthermore, there is no indication which if any of these comparators are fitted with Covtec, which it is accepted is an effective reducer of

² JG XX

³ And in circumstances where Ms Kent was already writing a proof of evidence supporting closure whilst writing the NRA.

risk. The differences between the Crossing and these comparators clearly limits the relevance of these comparators.

Sighting distances and speed

22. Crucial to the assessment of the safety of the Crossing is sighting distance: the distance from which users of the Crossing can first see the train approaching. The time from which they first see the train to when it crosses the Crossing is the 'warning time'. The ORR defines warning time at a level crossing by reference to highest attainable speed.⁴ Mr Keates explained that it is important to use the highest attainable speed in a safety critical environment, especially where the margins may be fine. In this case, he felt it was not appropriate to use the line speed for the up line, because the difference between this and the highest attainable speed was significant and made a difference to the extent to which the Crossing was considered compliant.⁵ The failure to use the attainable speed in this case renders the NRAs undertaken in 2019 and 2020 unreliable in painting an accurate picture of the safety of the Crossing.
23. As Mr Keates explained in relation to the up line, the entire train must pass the speed board (increasing speed from 50 to 65mph) before the train can accelerate. Even with a 3 car train (which Mr Keates noted appeared to be shorter than any passenger trains which actually run on this line), the driver will only be able to accelerate when the train is very close (45 metres) to the Crossing itself, and as Mr Greenwood notes in appendix JG6,⁶ there is unlikely to be any discernible increase in speed by the time of reaching the Crossing even if the driver did accelerate straight away. For a 4-car train, acceleration will only be possible when it is 16m from the Crossing. It is of course inconceivable that a driver would accelerate if they saw a hazard at the Crossing itself and were that close to it.⁷ This seems well borne out in the attainable speeds shown in JG6 and Mr Keates' proof.⁸
24. In relation to the down line, where it was agreed sighting distances were in any event plentiful, Mr Keates was of the view that despite the 65mph line speed, the train would have to be doing 56.8mph in order to have slowed down enough to be doing 50mph by the time it reached the lower speed limit ahead.⁹
25. Mr Greenwood confirmed that he commended the approach of Inspector Millman in the Buriton s.118A decision letter,¹⁰ who at paragraph 17 considered the safety of the crossing bearing in mind the attainable speed, not simply the line speed. Mr Greenwood confirmed that his appendix JG6, which showed operational data from trains travelling

⁴ WS01, p.73 (RSP7)

⁵ Use of line speed rendering the crossing compliant, albeit only just.

⁶ JG6, p.15

⁷ DK X-i-C

⁸ The latter at DK MPOE section 2.2

⁹ DK MPOE 2.2.6 – on assumed braking capacity

¹⁰ WS11

over the Crossing, showed the highest recorded attainable speed and that there was no other operational evidence before the inquiry showing higher attainable speeds.

26. Nevertheless, in oral evidence, Mr Hajnus stated that for a train travelling in the down direction “it is perfectly open to travel and cross the Crossing at maximum permissible line speed”.¹¹
27. Ms Kent stated there was every opportunity for trains to be travelling at line speed over the Crossing in both directions. But Ms Kent confirmed there was “not currently” any evidence showing highest attainable speeds other than in JG6.¹² She accepted that in the examples in JG6, the line speed could not be achieved at the Crossing. She acknowledged that on the up side “possibly” the train wouldn’t reach 65mph, but there is always that opportunity. She accepted that the difference between 65mph and 51mph was significant.¹³
28. The attainable speed should have been used, and the failure to use it renders the NRA not an accurate representation of the real-world risk.
29. Using the attainable speed of 50mph, Mr Keates in his MPOE at 2.7.1 notes that the required sighting distance is 178.8m for the up line (from both sides). The then measured sighting distances of 293m and 243m were therefore compliant by 164% and 136% respectively.
30. Mr Keates confirmed that the measured sighting distances had increased following vegetation clearance which took place during the course of the inquiry.¹⁴ The fact of this cutback was not challenged by NR.¹⁵ The sighting distance for the down side looking up the line has become 284m, which at an attainable speed of 50mph gives a warning time of 12.7s, which is in excess of even the figure reached following Ms Kent’s 50% vulnerable users safeguard.
31. In any event, even using the line speed, the crossing is compliant if the required warning time is taken as 8s.¹⁶ Using 50mph, it is comfortably so, and using the newer sighting distance figures following vegetation clearance it is very comfortable. It is compliant in all directions on both lines. If the 50% is applied using 50mph attainable speed, and bearing in mind the new sighting distances following vegetation clearance, the Crossing is compliant in all respects. The closest is the down side, looking in the up direction, where the figure is 12.7s.

¹¹ DH X-i-C

¹² GK XX

¹³ GK XX

¹⁴ See note submitted by Mr Keates on 1 October on sighting distances and vegetation clearance. This was submitted during the inquiry because the vegetation clearance only occurred during the inquiry.

¹⁵ As noted by NR’s advocate on 2 October pm.; additionally NR’s note on 2 October on sighting distances took into account the vegetation clearance.

¹⁶ Accepted by GK in XX

32. During cross-examination of Mr Keates, NR produced new evidence concerning acceleration abilities of various trains.¹⁷ This showed that class 395 and 375 trains on the up line could reach 57.3 and 56.3mph by the Crossing respectively. Mr Keates noted there were errors in this documentation: first, the calculations assumed the trains could begin to accelerate as soon as the front of them had passed the 65mph speed board. This he noted to be incorrect because, to repeat, trains can only begin to accelerate once the whole train set has passed into the new speed zone. Additionally, the class 395 train referred to is only produced in 6-car and 12-car variants (the former being 120m), meaning that even in the shortest 6-car variant, the train would already have passed the Crossing before all of it was out of the 50mph zone and it could accelerate. In relation to the class 375 – Mr Keates noted this type is only made in multiples of 2 or 4-car sets. In both cases, the trains would not be able to accelerate for 106m before reaching the Crossing. Furthermore, the available distance quoted of 106m in which the trains could accelerate was inaccurate because the actual distance is 99m. Additionally, Mr Keates noted that 2-car trains do not ordinarily run on this line. When Mr Keates offered to work out the likely speed at the crossing of a 2-car train and provide his calculation in response to this document, he was told that any subsequent workings of his would be resisted.
33. Nevertheless, the note supplied on 2 October was subsequently withdrawn on 6 October, with the aforementioned error regarding the point at which a train will commence acceleration recognised, and replaced by a further note from NR (also untested through cross examination). The updated note does not address the 395 Class and so it is not clear whether NR continue to rely on that part of the note from 2 October.
34. Despite Mr Keates having been told that any further calculation from him as to the speed of a 2-car train would be resisted, the new document did just that and contemplated a 2-car unit on the up line, which at 40.8m long could begin to take power from 58.2m from the Crossing (using the distance between the speed board and the Crossing of 99m). Using the new, and apparently unchallenged, sighting distance on the up line from the down side of 284m, the train would travel 225.8m (284m less 58.2m) at up to 50mph, which would take 10.1s.¹⁸ For the remaining 58.2m it could begin to accelerate and even if it immediately travelled at 54mph (the final speed at the Crossing contemplated in the new NR note), it would cover that remaining distance in 2.4s.¹⁹ Therefore, on NR's own new figures, even assuming the train can instantaneously go from 50 to 54mph, the total time for the approach from first sighting is 12.5s, which is greater than NR's declared 12s required sighting distance pursuant to the application of the 50% vulnerability safeguard.

¹⁷ Untested in cross examination of NR witnesses

¹⁸ 225.8 divided by 22.35m/s

¹⁹ 58.2m divided by 24.1m/s (54mph).

35. Mr Keates noted the Whistleboards had been moved and he thought now provided an adequate 17s. One thing he was concerned about is that the sound of the train horn was now quieter with the Whistleboards moved further away, but the warning time provided by the Whistleboards was more than sufficient. Ms Kent noted that now the Whistleboards had been moved this had made the crossing safer for all to use.
36. Sighting distances are therefore compliant and perfectly adequate.

Vulnerable and encumbered users

37. Ms Kent accepted that her NRA did not mention the 2019 census data, data which would have led to the conclusion that there had been a reduction in the assumed level of use of the Crossing from 2019-2020. Ms Kent acknowledged that the 2020 NRA was the first time that a 12s warning time was assumed as being required (on the basis of the 50% safeguard).²⁰
38. Mr Keates felt there was a clear difference between potential vulnerability and actual vulnerability of users of the Crossing. He had not seen any evidence regarding observations of people crossing and whether they were actually vulnerable.²¹
39. Mr Keates produced a helpful Train Pedestrian Value chart which showed the times when users were recorded crossing and the times of trains, and from this was able to assess with some detail a comparison between actual census data and the risk presented by trains.²² Mr Keates felt the reality of risk on the basis of this exercise was lower than projected by NR.
40. Mr Keates noted that whilst the Census Good Practice Guide²³ might be illustrative, it is there to guide users so as to encourage a consistent approach to crossings. Whilst he had not observed all of the census data, Mr Keates was concerned that the guidance hadn't been followed and the assumptions had been made that every dog user on or off the lead is unsafe and vulnerable, that every unaccompanied child and elderly person is deemed to be using unsafely. He did not think that assumption a correct one.
41. Mr Greenwood commended the approach taken by Inspector Elliot in the Darkies crossing decision letter,²⁴ where at p.34 of that decision the inspector accepted reliance

²⁰ GK XX

²¹ DK X-i-C

²² DK MPOE 2.4.7

²³ WSx32

²⁴ WS14

on the Census Good Practice Guide. He accepted that the Census Good Practice Guide suggested that a distinction should be drawn between those who were potentially vulnerable, and those who were *actually* so. He accepted that in his 9.10, he had not sought to distinguish between those two categories, and had treated all potentially vulnerable users as actually vulnerable. Whilst Mr Greenwood sought to play down the importance of the Good Practice Guide, both he and Ms Kent accepted that it remained relevant, and had not been superseded or withdrawn.

42. In the circumstances of this case, as Ms Preston noted, it was not the case that potential encumbrances meant the users were actually encumbered/vulnerable: particularly because the heavy kissing gates either side of the crossing meant the user would struggle to use them if encumbered with shopping. Similarly, Ms Preston felt that it could not be said that all children using the crossing were *actually* vulnerable, since many appear to be able to use it perfectly safely.
43. Ms Kent acknowledged that in order to use this guidance, one has to have a clear grasp on how many vulnerable users there are. She accepted that the guidance expected the level crossing manager to exercise some judgment as to when the *potentially* vulnerable user is *actually* vulnerable. Ms Kent accepted that in relation to dog walkers, when they are acting completely correctly with a dog completely under control, of course they wouldn't be vulnerable, but it wouldn't be possible to make that observation on every dog walker at every time.²⁵
44. Ms Kent was taken to WS09, the Sotera census document which contained 'general observations' which noted that "the vast majority of dogs were safely leashed or harnessed when they crossed... Very few unaccompanied children were seen to use the crossing during this period...and...The majority of pedestrians approached trackside with caution, looking repeatedly both ways." Ms Kent agreed these were general observations of someone who had looked at the CCTV footage, and acknowledged that she hadn't looked at the footage. Initially, Ms Kent noted that she didn't have any reason to suppose these observations were incorrect. She acknowledged that Sotera had said, from reviewing their footage, that the vast majority of dogs were safely leashed, and fairly noted she had to make her own judgment on it. Ms Kent acknowledged she had not been able to observe every user with a dog at the Crossing. She stated she had instead assumed that all dog walkers with dogs on leads were vulnerable. She noted she had not observed whether some of the users were in fact using the Crossing safely.²⁶

²⁵ GK XX

²⁶ GK XX

45. Attempts were made by NR to distance themselves from the comments made by Sotera on the basis that Sotera were not instructed to make those general observations and they do not override the view taken by the level crossing manager. The fact remains that Sotera did make these comments, and did so having apparently viewed the users of the crossing in some detail.
46. Mr Greenwood emphasised in re-examination the importance of the level crossing manager observing users of the crossing in forming a judgment about whether the users were vulnerable or were using safely.
47. Ms Kent in cross-examination confirmed she had not looked at all the CCTV data. Ms Kent noted that the inquiry did not have the footage before it because “that would be very lengthy,” and confirmed that she had not looked at it herself. In re-examination of Ms Kent, NR’s position involved asserting that the census output that was produced by Sotera was not in the form of footage, but of photographs. In a note produced on the last day of evidence of the inquiry, the position moved yet further to stating there was “no video footage taken of any user of the LC as part of the Census”. This does not appear consistent with the Sotera Census report (WS27) which states at paragraph 2.1 that the census was carried out “using continuously recording equipment.”
48. Whatever the status or existence of the CCTV footage, the application of the 50% safeguard on the basis of vulnerable users is not rigorously justified because it appears to be based on broad generalised assumptions, rather than adequate observations, made (about dog walkers, as well as other potentially vulnerable categories) that all potentially vulnerable users are actually vulnerable and should be considered as such. In failing to make this distinction, the Good Practice Guide has not been followed.
49. By way of example of this approach, Mr Hajnus maintained in cross examination that every child using the crossing was a vulnerable user even if using the Crossing safely.
50. Mr Hajnus acknowledged in cross examination that it had been clumsy of him to describe dog walkers as being the “clear majority” of users of the Crossing.²⁷ Similarly, Ms Kent fairly acknowledged that her suggestion in her POE that 64% of users of the Crossing had dogs was incorrect.²⁸
51. Mr Keates said the expert structured judgment would need to be exercised following observation of video footage or in person, using the table as the guide. Mr Keates felt he could not say either way whether the 50% safeguard should have been applied,

²⁷ DH XX; See DH POE 6.2

²⁸ GK XX

because he had not seen any evidence of any of the vulnerable behaviours being observed. Nevertheless, Mr Keates noted the 50% safeguard, if it was to be applied, should be applied not to 8s crossing time, but to 7.74s, which was the crossing time drawn from Notice Board 166.²⁹ The result is that the required warning time *if* the 50% safeguard is applied is 11.6s, rather than 12s.

Mitigation - OMSLs

52. NR previously applied for a footbridge diversion, and went through a full iterative process to get to the position of making that application. They were willing to spend £1.1m. Mr Greenwood now says that the costs of the footbridge would be “disproportionately high” (JG6.3-6.4), and confirmed that NR had changed their view since 2019. Under cross-examination, Mr Greenwood accepted that OMSLs offered a meaningful risk reduction (of an apparent 40% on NR’s own documentaiton),³⁰ at a considerably lower cost (£120k) than the footbridge originally pursued, and this option showed a higher cost benefit analysis score (0.85 for 2020 NRA as opposed to 0.62 for the 2019 footbridge score). Mr Greenwood confirmed that the cost benefit analysis metric used by NR gave an indication of whether something was “a worthwhile option.”
53. NR’s evidence on the cost benefit analysis of the OMSL option changed during the inquiry: with the ratio reducing from 0.85 to 0.53.³¹ Whatever view one might take as to this change of position during the inquiry, the new figure still presents as a reasonable business case, on the basis of NR’s own cost benefit analysis metric.³²
54. The focus of the inquiry was latterly directed to the feasibility of the OMSLs, following the suggestion during Ms Kent’s evidence that OMSLs would not be feasible because of the location of signalling equipment (EK5063) on the down line a few hundred metres from the Crossing.
55. Mr Keates acknowledged there could not be a stopping signal between the strike-in and the crossing, however he stated the signal was at 432m from the Crossing. Mr Keates used his own observation, two mapping services, and NR’s own mapping tool ‘Routeview’ which supported this distance, and was consistent with JG6 which showed the location of the EK5063 AWS magnet.³³
56. The NR standard states the strike-in position should be placed at a distance of the traverse time plus 5 seconds (to a position of safety).³⁴ Using 1.2m/s crossing speed for a traverse distance of 9.1m (=7.6s) and adding 5s, the required minimum distance for OMSLs strike-in point is 12.6s away from the Crossing. At the line speed of 65mph, the

²⁹ WSx30 – NB166 – Table A1, page 7 – clarifies pedestrians would be traversing crossing at 1.189m/s (multiplied by traverse distance of 9.1m = 7.74s).

³⁰ WS19, p.3

³¹ Correction slip supplied by GK on 28 September.

³² GK2, p.15

³³ AWS magnet which DK noted would normally be positioned 180m in advance of the location of the signal.

³⁴ WSx29, section 2

EK5063 signal is 14.9s away from the Crossing and so the OMSLs are feasible. This was not the case if the 50% vulnerable users safeguard was applied, but Mr Keates noted one could not be sure whether this would be appropriate, firstly given the issue over number of vulnerable users, and secondly that, in any event, the relevant NR standard for feasibility of OMSLs did not refer to application of the 50% safeguard.³⁵ Mr Keates further noted that all this assumed a blanket 65mph, which as he noted ignored the deceleration required to safely reach the 50mph speed board just beyond the Crossing. This likely adds further time and further tips the balance to enable OMSLs.³⁶ Mr Keates said it was a reasonable improvement in the safety at a reasonable cost, and would improve the safety significantly enough to make it an even safer crossing.³⁷

57. Mr Keates noted that the risk of another train coming was a risk at any level crossing and that MSLs gave the opportunity to mitigate this risk, and the Covtec system also provided some mitigation.
58. During Mr Keates' cross-examination, NR presented a new note concerning OMSLs. Mr Keates observed the diagram (scheme plan) supplied was clearly wrong, since it showed the footpath Crossing 192m from the two speed boards east of the Crossing.³⁸ This was clearly not the correct distance, as shown by NR's own documentation including the other note they supplied on 2 October concerning acceleration over the 106m between the 65mph speed board and the Crossing. That error accounts for the difference between the parties as to the location of signal EK5063.
59. A further note was submitted by NR on the afternoon of 6 October, which again dealt with feasibility of OMSLs. This was late and untested through cross examination. As with the note on 2 October submitted by NR, this latest note asserted that the presence of the fence and posts prevented installation of the MSL light unit at the current decision point and that this necessitated a 20 second minimum warning requirement. This, it was said, furthered NR's point that OMSLs were not feasible at the Crossing, since a 20 second minimum warning requirement would necessitate the strike-in point being further away, thus further past signal EK5063 on the down line. The simple and surprising flaw with this assessment is that it does not appear to consider the possibility of moving or rearranging the fence and posts to facilitate the installation of the MSL light unit. It unfortunately appears to be a further example of NR seeking to make OMSLs appear more infeasible, when instead they should be seeking a way to make this useful and cost effective mitigation work and improve the Crossing.
60. Other mitigations ought to have been considered in more depth by NR, including lowering the fence-line to improve visibility,³⁹ replacing the blue-path lighting,⁴⁰

³⁵ WSx29, section 2

³⁶ See note submitted by DK on 1 October relating to OMSLs.

³⁷ DK X-i-C

³⁸ 192m is the difference between the distance marker for the 65mph speed board (94,144) and the Crossing itself (93,952), shown in the diagram in the NR document on OMSLs submitted on 2 October.

³⁹ There appear to be examples of lower fences in the photographs in JG POE 9.7

⁴⁰ In the evening video of the Crossing shown during the inquiry by Ms Kent, only one of the ten lights appeared to be working.

installing more suitable street lighting, improving the surface to prevent slips and trips, installing dummy CCTV cameras to deter misuse, and considering signage requiring people to keep dogs on leads.

61. In conclusion, and especially with regard to the OMSLs, it is reasonably practicable to make the Crossing safer through further mitigations.

Misuse and suicide

62. Mr Greenan, a serving Detective Inspector, stated that in relation to anti-social behaviour, his professional experience did not give him any reason to think the Crossing was a particular hotspot, and he reported far more call outs to local roads, bridges and stations. Similarly, in relation to suicides and suicidality, the Crossing did not feature as much on his radar as other places. He had no reason to think the Crossing a hotspot for either suicide or suicidality.
63. Mr Greenwood accepted that pedestrians are responsible for their own safety and are expected to use reasonable vigilance,⁴¹ that if pedestrians see a train very close “it is their responsibility” and that there is ultimately “nothing you can do to prevent misusers.” Ms Kent confirmed in cross examination that there is no way of completely ameliorating the potential for misuse on railway land.
64. Mr Greenwood presented a number of photographs of misusers of other crossings, but accepted under cross-examination that these were not of the Crossing and did not know of any evidence before the inquiry suggesting those misuse activities took place at the Crossing. He accepted the photographs show worse things happening than actually happen at the Crossing. The WS remains of the view that these photographs are irrelevant and prejudicial to the impression given of behaviours at the Crossing.
65. In his oral evidence, Mr Greenwood sought to indicate that owing to similarities between the Crossing and Kings Mill crossing noted at his para 10.10 sub 12, it was open to users to cycle straight across the crossing without stopping or checking. He accepted under cross examination however that the Crossing has large heavy gates which meant any cyclist able to get through the gates would have to dismount and remount.
66. Oral evidence was given at the inquiry by Dr Kenny in relation to suicides, although as she accepted under cross-examination, her assessment had only compared the Crossing with the Alexandra Road footbridge with a sample size of 4, and no comparison to other types of risk. She also accepted that at the Crossing, the heavy gates presented a barrier to accidental straying onto tracks. Whilst Dr Kenny sought to present her view from a professional perspective, she acknowledged that she had a personal connection to the crossing and that she “just wanted it to close”. It is therefore not clear whether her

⁴¹ JG 9.1

opinion can be taken to be independent or objective. Rather it appears her professional expertise was being used to bolster a personal view.

67. Mr Hajnus maintained in oral evidence that the Crossing had a “conspicuously high” number of suicides, despite the fact that the NR policy for identifying hotspots which he stated were “based on statistics and objective criteria” was not satisfied, and no comparative data or assessment had been provided to back up the assertion.⁴² Mr Hajnus fairly acknowledged in re-examination that it was “perhaps a shortcoming not to further that analysis with examples.”

Compliance and safety

68. Mr Keates stated that generally compliance equals safety: “compliance to the standards equals a safe railway: if the suggestion is this crossing isn’t safe, then either it has been assessed incorrectly or the standards aren’t suitable.” This Crossing is compliant, and is therefore safe.

Braking distances – worst case scenario

69. Ms Kent confirmed that none of the relevant standards of compliance required that a train be able to come to a stop within the sighting distance, before it reaches the crossing. Nevertheless, in the worst case scenario of a train coming round the corner on the up line and a pedestrian stranded at the Crossing, the last page of JG6 indicates the train could come to a stop from 50mph within 196m,⁴³ which is well short of the Crossing.

Conclusion on safety

70. The important points to draw from the foregoing analysis of the evidence and its evolution during the inquiry is that it now appears that on NR’s own evidence for sighting distances, given the vegetation clearance, and the use of the highest attainable speed for a 2-car train on the up line that sighting distances are compliant even with the 12 second figure reached using the 50% vulnerability safeguard. The 17 seconds warning provided by the moved Whistleboards provide yet further warning time. The Crossing is therefore compliant and is safe to an acceptable standard. Furthermore, it is reasonably practicable to install further mitigation measures such as OMSLs.

Use of the crossing

⁴² DH X-i-C; DH XX

⁴³ Agreed with GK in XX

Value to the community

71. There is no general local consensus that the Crossing is perceived as being unsafe. Whilst it is accepted that safety is ultimately an objective matter, perception of safety is relevant to user of the crossing. Evidence suggests that the Crossing is used carefully by many without anxiety about its safety.
72. Evidence was presented by Ms Preston on behalf of the WS of a questionnaire which was undertaken of users of the crossing, which she noted provided many strong and compelling human stories of use of the crossing.
73. The WS questionnaire sought to provide further detail to the inspector as to the nature of local use and feeling about the Crossing and alternative routes. It was not designed as an opinion poll, but was about obtaining information. The results presented at the inquiry detail all responses received, and not just those opposed to extinguishment. It was distributed digitally and physically (the latter to some 1000 addresses on 39 roads). 222 responses were received. Some conclusions can clearly be drawn about users of the Crossing:
 - a. Of those who used the crossing, 32% reported using it at least once a day, 30% at least once a week, 23% several times a month and 12% once a month or less.
 - b. Approximately 80% reported using the Crossing to access the beach, 44% to get to centre of Whitstable, just over a third to visit family and friends, while 8% use it to get to and from work (options were not mutually exclusive). A notable number of respondents stated they used the crossing to access parking, because of parking pressures in the town.
 - c. A considerable number of respondents noted in response to question 5 that if the Crossing closed, they would use the car instead of walking. This suggests the choice is not simply between the Crossing and alternative routes, but between the Crossing and alternative modes of transport.
 - d. The detailed responses to question 6 show the value of the Crossing for allowing contact with family and friends, as a route to work, parking and medical care, those with medical issues. The responses also highlight the particularly detrimental effect which closure would have on those who live in the immediate vicinity of the crossing for whom the pedestrian permeability and access which the Crossing provides are of importance to the enjoyment and value of their properties. Equally clear is the importance of the crossing in giving easy pedestrian access to amenities and encouraging local shopping.

74. In cross examination, NR sought to undermine the value of the questionnaire. However, Ms Preston confirmed that the questionnaire had sought to be as neutral as possible, was designed by a group of volunteers, sought to strike a balance between detail and brevity so as to ensure maximum response rate, and that there was no other more detailed survey of local opinion and use before the inquiry.
75. In the circumstances, the WS questionnaire is the best and most detailed evidence before this inquiry of the level and nature of use of the Crossing in the immediate locality, and the attitudes to extinguishment. The list of streets at the end of Appendix A to Ms Preston's Proof of Evidence shows that it draws on views from the immediate local community. On the other hand, NR relied on the KCC consultation on the Order, on which Mr Hajnus could provide no confirmation that the respondents even lived in the local area, despite NR's opening submissions stating that "NR enjoy a clear majority of support from those local to the crossing".
76. The conclusions of the WS questionnaire are strengthened by the results from NR's own previous consultation of locals in 2016, reported in the Diversity Impact Assessment which showed just 2% support for closure only.⁴⁴
77. The WS questionnaire demonstrates that the Crossing provides for many an important access way across a rail line which divides the town in two. It is particularly valued because of being light traffic and having no-step access to and from the coast and a much reduced traffic access to and from the commercial centre of Whitstable, in an area where users reported high levels of stationary traffic and accompanying pollution.⁴⁵ Mr Cronin-Hill reported that traffic can back up from the Harbour Car Park all the way up to the bridge and Borstal Hill.
78. The inquiry heard powerful first-hand testimony from a number of regular users of the crossing:

Parking, access and car use

79. Restricted availability of residential parking immediately north of the Crossing was a concern for many, serving as a reason why pedestrian permeability is so highly valued. For Mr Rosser, the parking difficulties meant that a decisive factor in purchasing his property north of the Crossing was that it included a garage in Glebe Way. This link means Mr Rosser uses the Crossing daily: he fears extinguishment would result in

⁴⁴ KCC18, p.1433

⁴⁵ See references to pollution levels in the SoC on behalf of the Canterbury Green Party (Nicole David); and at page 5 of the POE of the three Gorrell Ward councillors.

devaluation of his property. Furthermore, extinguishment would (given his walking speed and the increase in walking time from 5 to 25 minutes) “present a big problem” because it would compromise his ability to access his car and therefore his independence.⁴⁶ He emphasised, however, that he did not want to use the crossing if it damaged others or drivers. It was noted by Ms Waterson that 10 garages in Glebe Way are owned by a person who lives north of the Crossing and sublets the garages, indicating that Mr Rosser may not be alone in his situation.

80. A consistent theme of user testimony was that extinguishment would encourage them to use their cars to make the equivalent journey, rather than walk via alternative routes. Mr Hajnus acknowledged in cross-examination that it was possible that closure might increase car use in Whitstable. This was not something which users were keen to do, because of the heavy traffic, lack of parking, and for environmental reasons. Additionally, Mr Cronin-Hill reported he would be more likely to shop out of town. Access to amenities north of the Crossing was an aspect of the benefits brought by the Crossing which were overlooked by NR.⁴⁷ As Ms Preston noted, there are many more shops north of the crossing.
81. Mr Cronin-Hill felt that closure would isolate many older people from the town and sea front.

Family ties

82. For Ms Seath, who had used the crossing for 61 years, the Crossing provides a quick route between her home in Clifton Road and that of her daughter in Glebe Way, and allows them to support each other with ease, especially when in ill health. Extinguishment would adversely affect this. Mrs Brankley who lives south of the crossing and uses it to visit family north of the crossing noted that the increased journey time would make a difference especially if there was an emergency.

Leisure

83. Ms Court reported that it would be “such a shame” if the Crossing was closed because it would add an extra 30 minutes to her walk to the beach, which would discourage her from walking there with her dog on a regular basis as she doesn’t have much spare time in her day.⁴⁸ A similar sentiment was echoed by Mrs Brankley who noted that when she is busy and working, she does not have much time and will seek to go for a walk using the quickest and nicest route.

⁴⁶ Mr Rosser, X-i-C

⁴⁷ DH POE 5.41

⁴⁸ Ms Court, X-i-C

84. Mr Greenan, who lives north of the Crossing and had used it for 28 years, noted he used it to access the nearby Downs, and it was of great convenience for enjoyment of the local area. Mr Hosea confirmed that the existence of the Crossing was a consideration when he bought his house in between Canterbury Road and the railway line, as it prevents having to use the main road to get into town or to the beach.
85. Mr Priston, who has lived in the town for most of his life, used the Crossing regularly for recreation and wellbeing. It was an important part of his family's life as part of a route to the West beach, and a part of the decision to buy his present property. Closure would reduce the value he put on his home, and mean his family would go to the beach much less frequently. The extra time taken to use alternatives would mean they wouldn't have time to go to the beach on many occasions, and would be likely to use the car and visit a different beach.

Access to employment

86. Powerful evidence was given by Ms Bradshaw who owns a bar on the High Street (and lives south of the Crossing) and uses the Crossing several times a day, primarily for work but also for leisure. She noted that, given how often she uses the Crossing, being forced onto the underbridge alternative route could add an hour or more to her journeys to and from her small business, and in some cases would need to resort to car use which would be difficult because of parking pressure north of the Crossing. As a result, it would have a huge impact on her work-life balance.

Approach of NR to user evidence

87. Mr Hajnus for NR had sought to reduce the value of user evidence of the crossing on the basis that many were leisure users who could not in principle suffer any inconvenience. Ms Preston noted that convenience is always in the eye of the person experiencing it, that the inconvenience would be present for leisure users following extinguishment, whether their journey was a personal choice or not. As Mr Demery put it, whilst there are always choices involved in any journey, "the beach is where it is, and if you wish to get there [following closure] it will take longer".⁴⁹
88. Mr Hajnus had sought to argue at 5.60-61 of his POE that beach users were encumbered with beach gear and therefore hazardous, and that as a result they would suffer no inconvenience; and additionally at 5.42 that shopping users were encumbered and hazardous in the same way. But he accepted in cross examination that he did not mean that every use of the crossing for access to the beach with any equipment led to

⁴⁹ MD X-i-C

encumbered users, nor that every shopping trip results in an encumbered user. In any event, Ms Preston observed this did not chime with her experience since the Crossing has heavy gates which “are a deterrent to anyone carrying any large beach gear”.⁵⁰

89. As Mr Hajnus accepted in cross-examination, his approach to leisure users, stating they did not suffer a relevant inconvenience, served to reduce the importance given to their complaint about closure. He accepted that this was a categorisation of his own creation, and to his recollection had no basis in the DEFRA Circular 1/09⁵¹ (under which both leisure and amenity use of rights of way have value). It is submitted this is an unrealistic approach to the value of use of the Crossing, which the inspector should not follow.
90. Mr Hajnus accepted that extinguishment would cause adverse effects for some users of the crossing, and acknowledged that different conclusions were reached in the SoC and his POE in this regard.⁵² NR’s own document, the 2016 Diversity Impact Assessment, noted that closure only would deter some people from crossing the railway, and that extinguishment was unlikely to be promoted by the local authority due to loss of connectivity in the local area.⁵³ Mr Hajnus agreed that NR’s position had changed in relation to these matters. As elsewhere, it changed in a direction that lends further support to the argument for closure.
91. As Mr Hajnus acknowledged, the inspector must consider not only the existence of alternative routes, but also the relative convenience of those routes.⁵⁴ To state as did NR that no relevant inconvenience *could* be suffered simply because users were able to use another route is to depart from that approach, and to miss the emphasis on the comfort, enjoyment and pleasure of a particular route.

New development

92. Mr Hajnus sought to argue that new development would lead to an increased level of use of the Crossing, but this is not entirely consistent with his views elsewhere that the Crossing is the least attractive and convenient means of crossing the railway. Furthermore, a number of the new developments are a considerable distance from the Crossing, and Mr Hajnus confirmed there was no evidence that NR had requested contributions or restrictive conditions on these developments relating to closure or improvement of the Crossing.⁵⁵

⁵⁰ EP X-i-C

⁵¹ DH XX; see DH appendix 3.

⁵² DH XX; SoC 2.11; DH POE 14.7.

⁵³ KCC18/1431.

⁵⁴ DH XX

⁵⁵ DH XX

Alternative routes

93. The alternative routes to the Crossing are considered by many to be poor substitutes, which they are less keen to use for a variety of reasons. Mr Demery summarised the WS's case in relation to alternatives and noted that both alternatives would, in a number of cases, lead to increased journey times, but that there was more to the issue than a quantitative measure of time: noting that the Crossing is perceived as the shortest route for many because it is quiet.
94. Mr Demery found it "slightly extraordinary" that Mr Hajnus described the Crossing as the least convenient and accessible in the context of the alternatives,⁵⁶ because that would suggest all who currently use the crossing are perversely deliberately choosing the least convenient route. He also noted that NR did not originally apply to close the Crossing, they applied to divert, thus recognising the convenience of the Crossing.

Canterbury Road underbridge

95. Mr Hosea noted that in a number of places there is not enough room for two people to pass each other. Mr Demery confirmed this with measurements taken which showed that there were sections of pavement under and adjacent to the bridge which are barely 1 metre wide, considerably less than widths which are typically considered acceptable minima.⁵⁷ In this context, the view of Mr Hajnus that the widths of the path are adequate⁵⁸ is strongly disputed. Whatever the precise measured width, Mr Demery was clear these pavements were "not enjoyable or comfortable."⁵⁹ The point was put to Mr Demery that notwithstanding the narrowness, in an ideal world there needed to be give and take on the footway, but he responded by saying that when looking at how people use something, allowances must be made for all types of behaviour – reasonable and unreasonable – in the same way as NR seek to do when assessing the safety of the Crossing.⁶⁰

Safety

96. A consistent theme of user testimony was concern relating to pedestrian safety at the underbridge. This because of the narrow pavements requiring single-file and the volume and proximity of passing traffic. Mr Cronin-Hill reported that whilst walking along the pavement on the south west side of the bridge he was struck in the shoulder by the wingmirror of a passing lorry. He reported having seen a number of near misses,

⁵⁶ MD X-i-C; DH POE 6.3.

⁵⁷ MD MPOE paras 7-8. See also the document submitted during the inquiry by the WS showing Canterbury Road pavement widths.

⁵⁸ DH X-i-C

⁵⁹ MD X-i-C

⁶⁰ MD X-i-C

and that because of the narrow pavement pedestrians are forever having to hug the wall.

97. Mrs Brankley noted that buses often mount the kerb at the narrow section, and Mr Hosea confirmed it as a “locally known fact” that this route is dangerous because of the narrow pavements. Indeed, Ms Bradshaw noted that she felt safer using the Crossing than using the underbridge route: “if I felt more safe on Canterbury Road, I would use that instead, but I don’t.”⁶¹ Mr Hosea felt the same way about the relative safety of the Canterbury Road route compared to the Crossing. Ms Court reported that the narrowness of the footway on this alternative route meant that her dog gets stressed and as a result she avoids using it if possible. Mr Priston noted that in relation to the Crossing he had trust that when used safely a train will not be speeding, come off the rails or run red lights, but did not have the same level of trust in car drivers.
98. Mr Demery commented that although Mr Hajnus’ POE at 5.16 suggests the possibility of pedestrians stepping momentarily into the road whilst they are passing each other, this “was an unusual suggestion in a document in part addressing safety, in that it suggests stepping into the road, and given that you cant tell when the traffic is clear, so cant be sure it is safe.”⁶² Mr Demery is obviously right that, particularly at the blind corner, the narrowest part of the route on the south west side of the bridge, stepping onto the road is not an appropriately safe thing to do.
99. For his conclusion (and positive statement) that this section of the highway is safe, Mr Hajnus stated that NR relied on the KCC email stating there was no concentration of events or incidents that would give rise to concern.⁶³ However Mr Hajnus had also agreed as a matter of principle that assessing safety is about more than just looking at history of past events, but also likelihood of future events. He confirmed that NR had not themselves undertaken an assessment of the underbridge alternative route. Mr Hajnus later said he had undertaken an assessment of the route himself, but acknowledged he is not an expert in highway safety. It remains the position of the WS that the pinch point under the Canterbury Road underbridge has not been positively and comprehensively demonstrated to be safe for all users.
100. It was surprising that Mr Hajnus was content to say that stepping off the footway here into the road when passing others was safe, whilst he maintained that stepping off the Crossing decking onto the anti-trespass guards for a moment was unsafe. It naturally follows that if there is an acknowledged need from time to time to step off the pavement, that shows the pavement is not wide enough.

⁶¹ Ms Bradshaw X-i-C

⁶² MD X-i-C

⁶³ DH X-i-C

3-way crossing – ‘alternative to the alternative’

101. At the inquiry, NR produced photographs showing that if users felt unsafe on the west side pavement, they could use three separate pelican crossings to cross to the other side of the road and continue North towards Oxford Street. Mr Demery produced a document showing pavement widths and photographs of this ‘alternative to the alternative’, and noted that it was “unwelcoming, because the two corners are narrow.”⁶⁴ Mr Hajnus acknowledged he had not assessed this route in his POE, although in the weekend mid-way through the inquiry, NR visited Whitstable to assemble further evidence about this route.⁶⁵ The inspector is invited to draw her own conclusions about NR’s confidence in their own work given they felt the need to undertake such further assessment during the course of the inquiry, in addition to how this fits with NR’s opening submissions which extolled the “thorough, objective and comprehensive” assessment of alternative routes.
102. Nevertheless, in Mr Cronin-Hill’s experience this route would feel no safer since buses overhang the narrow pavement on the corner of Belmont Road and Canterbury Road, to the extent that “those who are knowledgeable have to keep a sharp eye out.”⁶⁶ Ms Seath reported similar concerns, stating that the on the corner of Belmont Road and Canterbury Road vehicles “come perilously close to the footway”.⁶⁷ Mr Greenan and Ms Bradshaw stated that both corners under the bridge were too narrow to comfortably pass another person.
103. Mr Greenan confirmed that in his view the Belmont Road junction was “one to be avoided” because of narrow pavements, and also because he had witnessed the aftermath of a vehicle collision with pavement infrastructure, which he believed was caused by a southbound vehicle swinging wide on the turning.⁶⁸ It can reasonably be inferred that whilst the immediate cause of such accidents may be driver error, the margin for error at constrained (even if formally compliant) junctions is narrower and chances of resultant accidents higher. No evidence was provided by NR of the widths of the highways and junctions at this point to suggest they would present no problems to vehicles.

⁶⁴ MD XX

⁶⁵ DH XX

⁶⁶ Mr Cronin-Hill X-i-C

⁶⁷ Mrs Seath X-i-C

⁶⁸ Mr Greenan X-i-C

104. Mr Hosea noted that even despite the deficiencies of the western side footpath, he would not naturally use the 3-crossing route given that it also feels narrow and dangerous. In his mind it was no better than the other side of the road.
105. Furthermore, NR's new-found apparent reliance on this three pelican crossing alternative to the alternative betrays a lack of confidence in the convenience and adequacy of the route on the west pavement under the bridge.
106. Regardless of which side of the pavement one walks to use this alternative route, Ms Seath reported it not being a comfortable place to walk: at night cars speed, and during the day there is idling traffic and pollution. As Mr Demery put it, whilst it is almost inevitable that there will be traffic on Canterbury Road emitting pollution, it is not inevitable that you have to walk alongside it if your route is one which can be reached via the Crossing.⁶⁹
107. During cross-examination of a number of WS witnesses, the somewhat peculiar point was apparently put to them that because they did not object to the continued existence of Canterbury Road and were not actively campaigning for its closure or restriction, somehow they therefore were not entitled to complain about it being busy or polluted. This is to miss the point: the Crossing and alternatives must be considered as they are presently, and users are entitled to make observations about the merits of different routes regardless of their own formal position on whether they should in an ideal world be improved.

Alexandra Road footbridge

108. There were some witnesses who, despite having no significant ambulatory issues, would struggle to use the footbridge because of other health conditions (Mr Cronin-Hill) (Ms Seath). As Ms Preston noted, for people such as these, it is not simply a matter of choice whether to use the Crossing or this alternative route. That choice simply isn't available.
109. A number of witnesses including Mr Greenan, a serving Detective Inspector, felt the footbridge was not a pleasant place, particularly at dusk and in the evening. A number of female witnesses stated that as women they would not feel comfortable walking the route at night. Mr Hajnus confirmed that a user concerned about lighting may opt not to use this route.⁷⁰

⁶⁹ MD XX

⁷⁰ DH XX

110. Mr Demery also felt that the graffiti present on the bridge⁷¹ demonstrated that it is more isolated than the Crossing, and so provides a tableau for anti-social behaviour.

Conclusion on expediency

111. The conclusion on the expediency of the Order can be stated briefly. The Crossing is not inherently unsafe for those users exercising reasonable vigilance. It offers perfectly adequate warning time. There are additional mitigations which could be implemented that would reduce risk yet further, in particular OMSLs. It is of high value to the local community and closure would change the lives of many, reducing and in some cases restricting people's enjoyment of the local area. This is not simply a rural crossing with limited discretionary use, it is an important suburban resource for pedestrian connectivity used by many with regularity. The alternative routes are not equivalent substitutions.

112. The Inspector is therefore respectfully invited to not confirm the Extinguishment Order.

JONATHAN WELCH

7 October 2020

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⁷¹ Shown in MD POE Appendix 2, figures 9-16; although recently painted over during the course of the summer.