

**Examination of the M42 Junction 6 Improvement Scheme DCO
Planning Inspectorate Ref: TR010027**

**Open Spaces Society -
Response to Examining Authority's written questions of 5 August 2019**

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Summary

This is the response of the Open Spaces Society to Questions 2.1.2, 2.7.10, and 2.7.11 from the Examining Authority.

Examples from policy documents and legislation are provided to show the need for the "reasonable convenience" of path diversions.

Objections to the current scheme proposals are clarified, with the addition of a proposal for a dedicated underpass beneath Airport Way.

The lack of information on the construction phase of the proposed scheme limits the assessment of impacts on non-motorised users during construction.

Investigation of an alternative route from the A45 footbridge to Birmingham International Station should be expanded to include engagement with property owners. If unsuccessful, more priority should be given to retaining footpath M106 close to its current alignment.

1. Question 2.1.2

1.1 Addressees

Highways England, CPRE, and Open Spaces Society

1.2 Question from Examining Authority

Section 136 of the Act¹ deals with public rights of way. It requires that:

(1) An order granting development consent may extinguish a public right of way over land only if the Secretary of State is satisfied that:

- (a) an alternative right of way has been or will be provided, or
- (b) the provision of an alternative right of way is not required.

There is no obvious statutory test or legal requirement in the Act for an alternative right of way to be 'reasonably convenient'. Nevertheless, the Panel expect to report on the convenience of alternative routes, particularly in relation to severance and the future provision of footpaths and cycleways, in considering the impact of the scheme and to ensure compliance with the NPSNN to make reasonable efforts to foster non-

¹ Planning Act 2008

motorised and sustainable travel. Hence, please explain on what grounds (if any) a legal requirement to apply a test of 'reasonable convenience' might exist.

And, whether or not such a test might be warranted, please submit any further relevant evidence necessary to address the 'reasonable convenience' of the PROW provision proposed here.

1.3 Response from Open Spaces Society - (1) legal requirements

1.3.1 NPSNN

Section 136 of the Act gives no detail on how a RoW should be diverted or replaced. However, the aforementioned NPSNN² is informative. There are clear expectations set out with regard to Sustainable Transport in sections 3.15 to 3.17, with reference to the identification of opportunities to invest where the road network acts as a barrier to cycling and walking, thus correcting historic problems. Further detail is given in section 5.180 and, more specifically, section 5.184. The latter makes it clear that:

" Applicants are expected to take appropriate mitigation measures to address adverse effects on [. . .] other public rights of way [. . .] In considering revisions to an existing right of way consideration needs to be given to the use, character, attractiveness and convenience of the right of way."

1.3.2 NPPF

Policy in the NPSNN is supported by sections 96 to 98 of the NPPF³, which deal with Open Space and Recreation. In particular, section 98 states:

"Planning policies and decisions should protect and enhance public rights of way and access, including taking opportunities to provide better facilities for users, for example by adding links to existing rights of way networks including National Trails."

This paragraph indicates a general objective to "enhance" and "provide better".

1.3.3 Highways Act

Parallels may be drawn with the stopping up and diversion of highways in other circumstances. The legal requirements are set out in Part VIII of the Highways Act 1980. Subsection 119(6) requires the path or way not to "be substantially less convenient to the public in consequence of the diversion", and should take account of "the effect [. . .] on public enjoyment of the path or way as a whole".

In addition, the general expectation of the quality of a RoW is indicated by the phrase "convenient for the exercise of the public right of way". This phrase - or its converse - occurs in multiple sections of the Highways Act 1980:

s131A *Disturbance of surface of certain highways*

s134 *Ploughing etc. of footpath or bridleway*

s135 *Authorisation of other works disturbing [the way]*

² Dept for Transport, National Policy Statement for National Networks (December 2014)

³ Secretary of State for Housing, Communities Local Government, National Planning Policy Framework (Feb 2019)

s135A *Temporary diversion for dangerous works*

s137A *Interference by crops, and*

Schedule 12A *Power to carry out works* subpara 3(1).

We also find reference, when dealing with obstructions, to "safe or convenient passage" in:

s142 *Licence to plant trees, shrubs, etc., in a highway, and*

s152 *Powers as to removal of projections from buildings.*

1.3.4 Equality Act

Further, if a diverted or alternative RoW is to be provided under the DCO, its quality should take account of more recent legislation such as the Equality Act 2010. Section 149 sets out the Public Sector Equality Duty: "A public authority must, in the exercise of its functions, have due regard to the need to . . . advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it".

The relevant protected characteristics would include age [both young and old people] and disability [both physical and mental]. Consequently an improved standard of what constitutes "reasonable convenience" is likely to be needed when consideration is given to a diverted or alternative RoW.

1.3.5 Case law

The need for "reasonable convenience" can also be inferred from litigation over maintenance. In 2010, the judgement in *Herrick v Kidner & Somerset CC*⁴ cited the earlier statement of Lord Diplock in *Burnside v Emerson*⁵ that "the duty of maintenance of a highway is a duty not merely to keep a highway in such a state of repair as it is at any particular time, but to put it in such good repair as renders it reasonably passable for the ordinary traffic of the neighbourhood."

1.4 Response from Open Spaces Society - (2) additional evidence

1.4.1 Factors contributing to "convenience"

As noted in §1.3.1 above, the NPSNN cites "convenience" alongside "character" and "attractiveness".

In choosing a route, the user will consider the *perception* of convenience rather than simply the ease of travelling from A to B, and will take account of issues such as personal safety and how the route looks, sounds, and smells.

Designers should seek a reasonably direct route, adequate surfacing and drainage, freedom from obstructions, sufficient width to permit a clear view and to reduce conflicts with other users, safe road crossings, avoidance of areas used for unpleasant work processes, and arrangements to maintain cleanliness and amenity.

⁴ [2010] EWHC 269 (Admin)

⁵ [1968] 1 WLR 1490

1.4.2 Impacts of the scheme proposals

The legal and policy framework suggests the Junction 6 Improvement Scheme should have aimed to enhance non-motorised access and correct historic difficulties. In the past, pedestrian access has suffered substantial severance effects and indirect routing due to the Rugby and Birmingham railway line, the M42, the A45, Airport Way, and other access roads to the NEC, Airport, and Station.

The concept planning for the scheme did not aim to correct these defects, nor did the budget provide for the appropriate works. The important M106 route to Birmingham International Station is jeopardised by the proposed increase in the width of carriageways at several locations.

While the Society's *Additional Written Representation* of 3 June 2019 identified how the scheme would cause further harm to the network of Public Rights of Way, it also showed how small amounts of additional work could provide reasonable mitigation.

Many of the Society's requests are straightforward, but depend on the availability of funding.

1.4.3 Additional proposal

Given the priority expressed for non-motorised travel in national policies, one of the difficulties for M106 could be unlocked by providing an underpass beneath Airport Way. This would shorten the route, take it away from vehicle traffic, and avoid the width constraint beside Catherine de Barnes Lane.

2. Question 2.7.10

2.1 Addressees

Highways England, Solihull MBC, and Open Spaces Society

2.2 Question from Examining Authority

PRoW M112 connects Damson Parkway in the west to St Peters Lane, Bickenhill. The PRoW would be severed by the mainline link road and would be redirected around 2 sides of a triangle over the proposed 'Catherine-de-Barnes north overbridge' near St Peters Lane. However, paragraph 13.9.20 estimates that there would be a 50m reduction in journey lengths. Can the Applicant provide further explanation as to how this would be achieved?

2.3 Response from Open Spaces Society

It is noted that a similar reduction in journey length is claimed for the Green Man Trail in paragraph 13.9.17⁶. Both these changes arise during the construction phase of the project, and appear to rely on the provision of temporary accommodation bridges.

However, this cannot be verified without construction-phase plans. There is an absence of information needed to gauge the convenience and amenity of the non-motorised user routes during construction of the scheme.

⁶ https://infrastructure.planninginspectorate.gov.uk/wp-content/ipc/uploads/projects/TR010027/TR010027-000146-TR010027_M42J6_6-1_Environmental_Statement_Chapter_13.pdf

3. Question 2.7.11

3.1 Addressees

Highways England, Solihull MBC, and Open Spaces Society

3.2 Question from Examining Authority

Paragraphs 3.15-3.17 of the NPSNN commits the Government to investing in 'high-quality cycling and walking environment to bring about a step change in cycling and walking across the country.' The Panel appreciate the work undertaken in assessing alternative routes between the proposed A45 overbridge and Birmingham International Railway Station [REP3-017]⁷, but they consider that the assessment gives insufficient weight to the policies set out in the NPSNN⁸.

Please reconsider that assessment in the light of those policies and indicate whether the possibility of implementing 'route A' (Table 5.1, REP-017) would require alterations to the DCO or whether other mechanisms (including funding and suitable forms of agreement with the relevant bodies – SMBC, Network Rail etc) would suffice.

3.3 Response from Open Spaces Society

It is disappointing that the search for alternatives has been unproductive. An investigation at the concept stage for the scheme could have influenced the overall proposal and led to more suitable routes for non-motorised users.

Of the options considered, Route A provides a direct connection, but there are serious space constraints. Standard guidance suggests 3 metres would be the minimum suitable width, increasing to 5 metres if the route is to be shared with cyclists⁹. However, the landowners are likely to ask for full-height fencing along much of the 300 metres length, and some users would find this intimidating, even at the larger width.

An adequate width would have significant impacts on the current use of the land for car parking and landscaping.

Discussions with landowners were not included in the "high level" assessment. Significant re-planning of the area would seem to be necessary, and engagement with the landowners might lead to both enclosed and unenclosed path options. Either way, it's important the total cost of providing an acceptable direct route from the footbridge to the Station is identified and understood.

Without this direct route, the impact on non-motorised users is unacceptable. The cost of provision could be balanced against the alternative, which is to retain M106 close to its current alignment. The proposed underpass (see §1.4 above) below Airport Way would overcome one of the reported difficulties, and actually improve the route for pedestrians.

⁷ Highways England, Assessment of potential footpath connectivity between the A45 and Birmingham International Railway Station (July 2019) [Examination Ref REP3-017]

⁸ Dept for Transport, National Policy Statement for National Networks (December 2014)

⁹ Highways Agency, Design Manual for Roads and Bridges TA 90/05, *The Geometric Design of Pedestrian, Cycle and Equestrian Routes*, Chapter 7