

IN THE MATTER OF THE TRANSPORT AND WORKS ACT 1992  
AND THE APPLICATION BY CHILTERN RAILWAYS (BICESTER TO OXFORD  
IMPROVEMENTS) ORDER

RE: THE PROPOSED CLOSURE OF THE PEDESTRIAN LEVEL-CROSSING  
AT THE TRAP GROUNDS OFF ARISTOTLE LANE, OXFORD

*Department of Transport Reference TWA/10/APP/01/OBJ/5*

SUBMISSION TO PUBLIC LOCAL INQUIRY

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CLOSING SUBMISSIONS OF THE TRAP GROUND ALLOTMENT ASSOCIATION,  
JONATHAN CLARK AND IAN SALISBURY, OBJECTING TO THE CLOSURE OF THE  
ARISTOTLE LANE LEVEL CROSSING

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Jonathan Clark  
Tony Hollander for the Trap Ground Allotment Association  
Ian Salisbury

23 Chalfont Road  
Oxford

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## *Introduction*

- 1 These Closing Submissions are made in support of the objections to the stated intention of Chiltern Railways to close the private footpath level crossing which leads to the Trap Ground Allotment Gardens near Aristotle Lane, Oxford [**Level Crossing Options Assessment Report – CD/2.5 - Table page 7**].
- 2 The objectors whose submissions are now made are the Trap ground Allotment Association, whose representations to date have been made by Mr Tony Hollander [**OBJ/13**]; also Mr Jonathan Clark [**OBJ/236**] and Mr Ian Salisbury [**OBJ/5**]. Reference will also be made in the submissions to the evidence of Ms Hoonie Feltham [**OBJ/317**], Mrs Stella Boswell, Dr Joe Lee [**statements of both adduced within OBJ/13/2**], Mr and Mrs Peter Jarvis [**OBJ/320**] (“the objectors”) and to the evidence of the Promoter, Chiltern Railways.

## *Points of contention*

- 3 Objections have been made because the proposal to close the level crossing – or more correctly to fail to include an extension to the existing level crossing in the Order Submission is unreasonable. The failure is not substantiated, and it takes no proper account of the national *Policy on level crossings* issued by the Office of Rail Regulation [**OBJ/005/2 – Tab 12**].
- 4 In its Statement of Case, the Promoter says it intends to close all of the railway level crossings between Oxford and Bicester apart from one at London Road, Bicester, and to avoid the creation of any new ones [**CD/1.27, paragraph 11.1**].
- 5 However, nowhere in the Promoter’s Statement of Case is there any specific proposal to close the existing level-crossing at Aristotle Lane. The crossing is nevertheless shown as being within the land subject to the Draft

Order, but its closure would result passively from it being orphaned if no extension to the crossing was to be permitted across the new Work No 3 line. It is submitted that the entry in the Draft Order [CD/12 – Schedule 9 Part 1 “Accommodation Crossings for which a Substitute is to be Provided”] should be read in this way: that the closure of the crossing is a consequence of the proposal and not a primary objective. Despite Network Rail submitting two statements [SUPP/041/1 and SUPP/041/2] in support of the proposal, it is to the point that neither made any reference to closure of the existing crossing.

- 6 Because the closure of the existing crossing over the Birmingham main lines and the Jericho Down line is therefore not a part of Chiltern’s case, the Inspector is respectfully requested to direct his attention principally to the merits of creating an extension to the existing level crossing, and to discount any consideration in respect of the existing level crossing other than where that matter has a bearing on his decision for the extended crossing.
- 7 The principal reason given for closing level crossings generally is safety, and this is dealt with at Section 11 of its Statement of Case [CD/1.27]. However an additional reason is given at paragraph 11.8 as follows:

*In addition to the safety benefits associated with Chiltern’s policy, the closure of all but one of the existing level crossings will lead to a reduction in operational disruption to the railway. Such disruption occurs for a variety of reasons, including in reaction to accidents and incidents on the railway (including “near misses”) and as a result of failures of level crossing equipment.*

- 8 It is submitted that the disruption caused by accidents and incidents is inextricably linked to safety issues and is therefore part of the principal reason, while the failure of safety equipment has little relevance to

Aristotle Lane as the equipment amounts to only a couple of gates. So the secondary reason given for closure is for “operational disruption” for “other reasons” not stated.

*Points of satisfaction*

- 9 Having heard the evidence of Mr Stephen Barker, it is accepted that the Thames Water sewer that runs under or parallel to the new track Work No 3 is unlikely to impede the construction of the new track. Objection to the Work No 3 on the grounds of the presence of the sewer made by Ian Salisbury [OBJ/005/5] is therefore no longer pursued.

*“Reasonable” and qualifying “exceptions” to the general national policy on new level crossings, with reference to that policy*

- 10 The *National policy on level crossings* is published by the Office of Rail Regulation [OBJ/005/2 - Tab 12 or CD/3.18]. This states “Except in exceptional circumstances, there should be no new level crossing on any railway”. It will be seen however that this is not expressed as a part of the executive policy but under the heading “What we believe”.
- 11 If the statement “there should be no new level crossing on any railway” had been set out as a policy rather than a belief, then perhaps the Office of Rail Regulation would have defined “exceptional circumstances”; but it is a matter of fact that these are nowhere defined. Nowhere in the executive sections (“What we expect...”; “What we will do...”) does it make any statement about whether or not new crossings are to be permitted. Where the policy is expressed under the heading “What we expect”, the reference is to removing or replacing existing level crossings and making them safer when the opportunity arises. And where the policy refers to closing level crossings, any action clearly qualified by the word

“reasonable”.

- 12 It is submitted that such a reasonable course of action will include looking not only at the safety and management priorities of the railway operator, but also at the safety, convenience and other matters of concern to those who would be affected by a level crossing closure.
- 13 During this Inquiry there have been semantic exchanges over the question of whether the absence of the provision of a level crossing within Chiltern Work No 3 is the denial of a *new* level crossing or the denial of an *extension to the existing* level crossing resulting in its closure [As an example : CRCL/R/OBJ5 – paragraph 3.1115]. The Inspector is asked to be aware of this difference of language, for such differences can, of course, be used subjectively to influence attitudes. Clearly and objectively, what is intended under the national policy is that there should be a reasonable approach to the decision – which is whether or not to extend the level crossing with a new section. (In passing it should not be forgotten that this new section has an antecedent that crossed the two tracks of the Varsity Line for a hundred years [OBJ/5/002 - paragraphs 12-19].)
- 14 It is therefore submitted that no presumption should be brought in favour of a decision that would result in the closure of the crossing until all the exceptional factors have been weighed and considered. This approach, it is respectfully submitted, is both the reasonable and the correct approach to the Promoter’s proposal to stifle this existing crossing and its necessary extension.
- 15 During the course of the Inquiry, evidence concerning the benefits of the level crossing was brought to the Inquiry by all the objectors. In our submission, if this evidence is weighed reasonably against the evidence of the Promoter in favour of closure, then the objectors’ will be the more persuasive. But if, as it appears the Promoter would wish, a presumption in favour of closure is assumed without making a reasonable assessment

of all the relevant issues, then the result will be contrary to national policy and mistaken.

*Matters to take into account in reaching a “reasonable” decision within those defined terms*

- 16 These are the matters contained in our submissions and evidence that the Inspector is asked particularly to take into account:–
  - 16.1 Chiltern Railway’s intention to close all level crossings to provide a railway track without level crossings is primarily for management convenience rather than safety;
  - 16.2 The relative safety of the existing level crossing and its proposed extension;
  - 16.3 The importance of the allotment gardens as a social, health and economic benefit in its neighbourhood;
  - 16.4 The poor quality of the mitigation scheme that has been offered to the allotment holders;
  - 16.5 The loss of acquired prescriptive rights to foot access and nearby car parking;
  - 16.6 Chiltern’s own evidence that the extended level crossing over the new Work No 3 line meets design requirements and is feasible;
  - 16.7 Collateral advantages to the school, and
  - 16.8 That Ian Salisbury’s sketch proposal of an extended crossing is feasible (as assessed by the Promoter’s own evidence).

*The motivation behind Chiltern Railway’s intention to close all level crossings to provide a railway track in “modern form” is primarily for*

*management convenience rather than safety.*

- 17 Although it is clear from Chiltern’s evidence that there is a motivation to build the new section of railway (Work No 3) in “modern form”<sup>1</sup>, this term has not been precisely described. None of Chiltern’s witnesses has given any reason *in objective terms* why such “modern form” is either important or even significant. It is clear that it is intended that the advantage is to be presumed. From Mr Nelson’s Summary Evidence [CRCL/P/7/C – paragraph 13] “The Order Scheme is SFAIRP<sup>2</sup>], it appears that to construct a railway in modern form” is a ‘given’; but although it may have been used to justify the closure of level crossings on the West Coast Main Line and to build none on the Channel Tunnel Rail Link, the term appears without reference to any defining criteria – it does not appear in either the Statement of Case or the Draft Order. Yet these two words appear to justify Mr Nelson’s conclusion: “Accordingly as level crossings are not provided on new railways in other than exceptional circumstances the scheme proposes closure of 37 of the 38 level crossings between Bicester and Oxford.”
- 18 It is therefore submitted that Mr Nelson’s proof is at root neither justified nor even evidentially based. The 75mph Work No 3 track<sup>3</sup> cannot be compared with an arterial high-speed line or with a line built to the French *lignes à grande vitesse* standards. The Promoter here relies on assumptions that are simply not supported by comparable evidence.
- 19 Mr Nelson’s evidence, we submit, is designed to fit the management desideratum. In particular:

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1 In the context of this Inquiry, as far as we are aware, this term has not been used to describe concrete slab track – that is track laid onto a concrete strip without ballast – but with reference to the 125mph high-speed West Coast Main Line or the 186mph Channel Tunnel Rail Link. It means merely that it includes a line that is uninterrupted by level crossings [Aiden Nelson Proof : CRCL/P//7/A – paragraph 80].

2 So Far As Is Reasonably Practical.

3 75mph being the design speed, a speed that in service may not necessarily be reached. [See paragraph 24 below and Ian Salisbury’s Rebuttal of Further Evidence of Mr Nelson OBJ5/9 – paragraph 3]

- 19.1 Paragraph 14 of Mr Nelson’s proof [CRCL/P//7/A] appears to be the his starting point. It was contradicted at paragraph 3 of Ian Salisbury’s own rebuttal evidence [OBJ/005/6d] where it was demonstrated that the Promoter’s case was not made out. Mr Nelson’s spoken evidence (largely based on the ALCRM which we shall return to presently in this Submission) [05/11/10] provided nothing more tangible in the way of substantive evidence – other than his further assertions: “The first point is to consider whether it can be eliminated” – than he brought in his original Proof of Evidence [CRCL/P//7/A].
- 19.2 Further, no answer that supported the closure proposition was obtained from Mr Nelson when he was asked questions concerning:
- 19.2.1 increased risk to allotment holders on the closure of the crossing;
- 19.2.2 whether or not Mr Ive of South Central Ambulance Service was assessing relative risks in making his assessment [OBJ/005/2 - Tab 13]; and
- 19.2.3 whether or not the suggested alternative access route to the allotment gardens would increase or decrease the response time for the emergency services above or below the target 8 minutes [ref OBJ5/10 - Fact sheet of the Commission for Rural Communities].
- 19.3 As to the compilation of the evidence in his report, following service of Ian Salisbury’s Rebuttal [OBJ5/9] of Mr Nelson’s further evidence [CRCL/P//7/E], Mr Nelson was dismissive. It nevertheless remained clear from oral examination that
- 19.3.1 Mr Nelson was not responsible for the collection of any of

the data that he relied upon to criticise the safety of the Aristotle Lane level crossing and could not therefore assess their merit;

19.3.2 there was no data for the Aristotle Lane level crossing of any particular worth;

19.3.3 the visibility splays relied upon bore little or no relation to the achieved and expected train velocities;

19.3.4 no account had been taken of the change in the overgrowth of vegetation which at Ian Salisbury's instigation had recently been cleared [see OBJ5/9 para 9], and

19.3.5 having made an assertion [CRCL/P/7/E - paragraph 3.5] Mr Nelson could not at first admit – he did not have the facts – to the clear fact [shown by the Promoter's own plans Sheets 28 to 30 – CD/1.9] that the visibility of 690m in both directions can be achieved for the “new” crossing and that therefore in the instance of building such a “new” level crossing across the new line, the HSE safety guidelines would be met [CRCL/P/7/E - paragraph 3.10].

19.4 But in particular Mr Nelson has not assessed any appurtenant increase in risk that results from crossing closure such as prevention of rapid access to the allotment gardens by the emergency services. Mr Nelson was, we submit, not helpful to the Inquiry in the objective assessment of risk / benefit.

*The relative safety of the existing level crossing and its proposed extension*

20 Chiltern's case on safety is for the most part based upon the All Level Crossing Risk Model (“ALCRM”). When Mr Nelson described this in detail [CRCL/P/7/E] he made no claim that it provided objective risk values;

he merely said [at paragraph 2.1] that it is used to *model* the predicted risk. Times to cross the existing crossing used for the model were not, for instance, realistic [17.16 seconds predicted; 8 to 12 seconds achieved irrespective of encumbrance – OBJ5/9 paragraphs 6 and 7]. That is not same as ascertaining the risk and Mr Jonathan Clark effectively drew evidence from Mr Nelson demonstrating that the ALCRM safety appraisal provided no objective or absolute safety criteria; all ALCRM could provide was a loose and relative comparison of safety between level crossings.

- 21 The Promoter’s case on safety has been almost entirely based upon the comparative Risk Rankings of ALCRM and an absence of objective risk values. Where objective figures are presented, such as at paragraphs 49 of his proof of evidence, Mr Nelson does not distinguish between pedestrians killed only on pedestrian level crossings from pedestrians killed on any kind of crossing [CRCL/P//7/A; CRCL/R/OBJ5 paragraph 3.28]. When he does make this distinction, at paragraph 55, no data is given on the number of pedestrian level crossings so that it is not possible to ascertain risk. That 38 people were killed over a period of 10 years is not disputed, but it is no more useful than saying that 828 people were killed in airline crashes in 2010 without also providing information on passenger air miles travelled in safety.
- 22 As to his assessment of ALCRM, Mr Nelson’s failure in his spoken evidence to explain the technical information contained in the TWA Order Response to Questions of Clarification [CRCL/CR/OBJ/5/A paragraph 3.14] was to the point: indeed in his spoken evidence he did not appear to understand the difference – or even the difference in significance – between “Individual Risk Rankings” and “Collective Risk Rankings” under ALCRM. Mr Nelson’s knowledge extended only so far as the explanation given in the ALCRM User Guide at paragraph 9.3.1 [CD/3.36]. His explanation of the distinction between these Rankings was hesitant, contradictory and confused. When asked by Mr Clark whether the

ALCRM model reflected good practice (in assessment of risk) Mr Nelson conceded that it did not. When he was asked in admirably simple language whether “the model doesn’t model it”, Mr Nelson had no answer. The response that he should perhaps have used was the one given in rebuttal of Ian Salisbury’s evidence at paragraph 3.42 [CRCL/R/OBJ5]: “ALCRM outputs as used in Mr Nelson’s evidence should be seen as indicating the *relative* risk of level crossings in relation to the wider populations of level crossings on Network Rail controlled infrastructure” (my emphasis), which is to say it can describe whether one crossing is safer than another, but it cannot say how safe either of them really is. Or Mr Nelson could simply have replied “Yes”; for clearly by what is stated in the rebuttal, the model doesn’t model it.

23 But there is among all that Mr Nelson adduced concerning the Aristotle Lane level crossing one piece of significant evidence that supports the likely safety of the extension. When addressing the actual anticipated safety of the extension to the Aristotle Lane level crossing, and finding that the layout was compliant with design guidelines, Mr Nelson acknowledged it, albeit bringing himself only so far as to use a double negative to describe it. He said: “a level crossing of the new line would not be non-compliant with HSE guidance” – which is to say: “the proposed level crossing over the new line would be entirely compliant with HSE guidance” [CRCL/P/7/E - para 3.10].

24 Moreover, where elsewhere along the enhanced line train speeds are to be designed to be 100mph – which just exceeds the critical speed of 160kph, at Aristotle Lane they will be restricted to 75mph. Also, in re-examination, Mr Nelson said that by the time they reach the level crossing, trains would be in their “braking curve”, acknowledging that when they reached the Aristotle Lane Level crossing, the trains would not be travelling at their maximum permitted velocity.

- 25 There is also at least a question left from Mr Stephen Barker's cross-examination: for he was unable to confirm without detailed calculation (which has not been provided to us), whether any train would reach the maximum design speed when it reached the Aristotle Lane crossing, either Up or Down, between Oxford Station and Water Eaton Station. (Mr Barker confirmed that all trains would stop at Water Eaton.) He concurred that all trains on the new track will be slower than some trains on the existing track.
- 26 In re-examination, Mr Barker was asked whether there were reported incidents concerning the (we presume) engineering qualities of the level crossing, to which he replied in the negative. He was then asked whether trains could reach full line speed at the crossing. Mr Barker replied that if a train were to run through Oxford without stopping, then this might be possible. However, it is submitted that this would not be possible when trains use the points crossings to the main lines as these are not engineered to be traversed at 75mph<sup>4</sup>, and the new line Work No 3 is shown on the submitted plans as terminating at Oxford [CD/1.9 – Sheet No 31]. It is submitted that this evidence does not contradict what Mr Nelson has said<sup>5</sup>.
- 27 Based upon observations of the existing railway traffic, Ian Salisbury's evidence was that the maximum permitted speed would not be achieved [OBJ5/9 – paragraphs 1-3]. Train speeds will be further reduced if a lower speed limit is imposed on rail traffic passing through Wolvercote either for the protection of wildlife or to limit noise and vibration.
- 28 It is submitted that it is reasonable to ascertain as closely as possible the actual risk of crossing the proposed new line Work No 3 at grade so that those risks might be compared and balanced against others.

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4 It will be confirmed at the site inspection that there is a 25mph speed limit on these points.

5 See paragraphs 22, 24 concerning the length of the "braking curve" of moving trains.

- 29 Taking pedestrian crossings generally, risk calculated from real incidents is calculated for pedestrian crossings at section 9.2 of the RSSB Annual Safety Report 2009/10 [CD/3.26 – para 9.2]. Across the European Union, actual risk is described by the number of fatalities and weighted serious injuries (FWSI). Across Europe there are 23 FWSIs per billion train kilometres for pedestrian level crossings [CD/3.26 – para 3.3.3, page 39]. Compared with a billion, 23 is a very small number indeed.
- 30 A general assessment of risk has also been calculated by the Office of Rail Regulation. In its email to Ian Salisbury of 13 September 2010 [OBJ5/19] 2,462 footpath crossings were said to exist on Network Rail’s infrastructure. During the 11 years from 1999 to 2009 the number of fatal strikes on these crossings was recorded at an average 3.2 per year. This equates to the likelihood at any one pedestrian level crossing of an incident of just once every 775 years. That is no brief period: 775 years ago takes us back to 1236, the year when King Henry III of England married Eleanor of Provence – and before the start of the great rebuilding of Westminster Abbey.
- 31 In spoken evidence to Mr Clark on 9 November 2010, Mr Nelson agreed to 650 years (which takes us back merely to the reign of King Edward III) and to a risk assessment of 2 in 6,476. He also agreed that the chance of a strike at the Aristotle Lane level crossing was 1 in 3,250 years. (He agreed to 2 in 6,476.).
- 32 It is not surprising therefore that during the 168 years of the life of the Aristotle Lane level crossing (which takes us back to 1843 and the launch of the SS Great Britain from Bristol), there has not been a single collision.
- 33 It is submitted that no statistician would give such figures precise significance. The effective risk is of course substantial, but cannot in terms of mathematical probability be distinguished from zero. But in Ian Salisbury’s evidence [OBJ/005/2 – Tab 11], so as to gain at least some

appreciation of the level of risk which our society tolerates, for comparison he included evidence of the number of people killed or seriously injured on the roads in 2007. On the roads in that year there were 27,036 accidents involving death or serious injury. As to pedestrians struck by vehicles, there were 6,924 killed or seriously injured. That, it is submitted, is a significant number. But road accident deaths and serious injury are tolerated for the expediency of economy and convenience even if every single death and serious injury is a personal human tragedy.

34 While acknowledging that every accident is a tragedy, an equal sentiment should, of course, apply to each and every level crossing accident. Rarity of an event may make it more newsworthy when it occurs, but it is submitted that it does not make it more important. Although direct comparison of these figures for mathematical reasons is not possible, no walk of life is entirely free of risk and our attitude to risk taking in society is relevant, even if road safety statistics have no direct bearing on the safety of the crossing. But death from natural causes is a relevant consideration that bears on the case for safety.

35 In 2008, over 58 thousand people died of acute heart attack [OBJ/005/2 Para 36]<sup>6</sup>. No walk of life is entirely free of risk, but it is reasonable to make provision where those risks are appreciable to take steps to reduce them. Death from acute illness is an appreciable risk for those who garden the allotments and it is reasonable therefore to consider how to keep that risk to a minimum and, in particular, to recognise that closing the level crossing will significantly increase that appreciable risk. We shall come to this presently when we deal with the objector's appraisal of the Promoter's Mitigation Scheme.

*The importance of the allotment gardens as a social, health and economic*

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6 For the avoidance of doubt, this is not to say "You are 20,000 times more likely to die of heart attack than being struck by a train on a pedestrian level crossing".

*benefit in its neighbourhood.*

- 36 The level crossing at Aristotle Lane provides access to allotment gardens for some 250 people [150 members with family and friends - Allotment Association OBJ/13/2; Ian Salisbury Proof OBJ/005/2 – paragraph 9]. Among the array of the Promoter’s expert witnesses not one has shown any understanding of the operational requirements of the allotment gardens. The only evidence of that has been from those who have objected to the closure of the crossing: Stella Boswell [OBJ/013/2], Jonathan Clark [-/236/1], Tony Hollander [-/013/2], Joe Lee [-/013/2], Peter and Carol Jarvis [-/320/1] and Ian Salisbury [-/005/2]. None of it has been contradicted by Chiltern. Neither has evidence submitted by Ian Salisbury been contradicted that the productivity of the allotment land is comparable to the economic value of a farm of 200ha and to the social value of a farm several hundred times larger than that [OBJ/005/2 – paragraph 9]. The several objectors’ assertions (and these too have not been contradicted by evidence) that the Trap Ground Allotment Gardens provide a substantial benefit to the domestic economy of many households, that they provide a good diet for many, and that they provide a bonus of fitness and enjoyment for the gardeners – is palpably correct and the Inspector is invited to accept it [OBJ005/2 – paragraphs 7 and 9; OBJ320/1 and others].
- 37 In this regard, the Aristotle Lane Level Crossing is different from any other under threat of extinction. It is used more frequently; there are objections to the alternative access offered in mitigation, and there are the safety considerations that arise if it were to be closed relating to emergency access that will be addressed presently.
- 38 When the Inspector makes his site visit he will see at least some of the allotment gardens, and notwithstanding that he is making his inspection at the end of a hard winter and not in the growing season he will appreciate the nature of the place. This is an enterprise that is not to be equated to a

divided farm where an alternative local route can be taken by vehicle at slight inconvenience, or else where adequate and balancing compensation can be paid. The Aristotle Lane level crossing cannot be compared to a little-used public footpath used by occasional recreationalists. The crossing provides a vital link between those who garden the allotments and their homes in the locality. As Mrs Boswell, Dr Lee and Mr & Mrs Jarvis have intimated: destroy that close link and the enterprise will also fail to the disbenefit of the whole community [OBJ13/2; OBJ320/1].

*The poor quality of the mitigation scheme that has been offered to the allotment holders*

- 39 The mitigation scheme offered by the Promoter is the shared public use of the Aristotle Lane bridleway bridge and the use of the far gate into the allotments that opens onto Port Meadow.
- 40 The Promoter has made other suggestions for mitigation involving parking cars on the allotments and/or Port Meadow, and driving to and fro across the meadow, but these have all been shown to be impractical and have been withdrawn.
- 41 Use of the bridge does not meet the main requirement of allotment holders for convenient level access when carrying materials and produce to and from the allotments, one of the factors which makes this level crossing not just exceptional but unique within the scheme [**This has been generally asserted by all the objectors**]. None of Chiltern's witnesses have claimed to be experts in the needs of allotment holders for access to the allotment gardens. The only experts who have given evidence on this matter are the members of the Trap Ground Allotment Association, who have all stated that the alternative route offered by Chiltern does not meet their needs. The Inspector is invited to reject the Promoter's scurrilous suggestion (given with no evidence to support it) that it is unlikely that allotment holders who are sufficiently fit to garden will not be able use the

alternative route over the bridge [In this connection see Hoonie Feltham OBJ317/1 – paragraphs 3, 9 and 12; and Clark Rebuttal OBJ236/4 paragraphs 3 and 4].

- 42 It was Mr Clark’s evidence [Appendix to document OBJ236/4], not contradicted, that a typical task at the allotments will take more than three times as long for an able bodied allotment holder if Chiltern are allowed to extinguish the crossing. In the example chosen it was demonstrated that a task which today takes 19 minutes will, if the crossing is closed, take 68 minutes instead.
- 43 Mr and Mrs Jarvis pointed out in their written evidence [OBJ320/1W] that the alternative route will disproportionately disadvantage female members of the Association.
- 44 Turning then to the issue of comparative safety risk, at paragraphs 32ff of Ian Salisbury’s Proof of Evidence [OBJ/005/2] he drew the Inspector’s attention to a meeting that he had with Mr Robert Ive, the Risk Manager of the local division of the NHS Ambulance Service that covers the whole of Buckinghamshire, Oxfordshire and Berkshire. Mr Ive assessed the likely attendance times for ambulance crews approaching the Trap Ground Allotments on foot. In his email [paragraph 34, or Tab 13] he stressed that any delay could compromise the outcome for the patient, speed of attendance being of the essence. Having assessed the direct route over the level crossing and the circuitous route over the bridge, Mr Ive gave his opinion that the level crossing entrance was “the most suitable” because it allowed crews “to reach any patient within the Allotment compound in the shortest time possible”. (To delay the arrival of paramedics beyond 8-12 minutes after collapse means that CPR given immediately loses its effectiveness [paragraph 35, the bulletin of the American Heart Association at Tab 14 and the Commission for Rural Communities Fact Sheet already referred to - OBJ5/10]). Mr Ive said that “call time is of the essence and any undue delay could compromise the outcome for the patient”, and he concludes that

“while not ideal as access is over a ‘live’ railway track, option 1 [the level crossing] is *by far* the most suitable” (emphasis added).

- 45 Although as it happened not life threatening, nevertheless the stab wound that Ms Hoonie Feltham experience in her foot illustrates how swiftly ambulance crews can reach patients if they arrive via the level crossing [OBJ317/1]. The extra distance and difficult terrain they would have to cover taking the long route would undoubtedly have increased Mrs Feltham’s anxiety; and it might also have resulted in a more serious loss of her blood [OBJ317/1].
- 46 Others have given their evidence as to the general inconvenience and increased effort involved by having to take the long route to the Allotment Gardens, facts which Chiltern have been unable to contradict. Ian Salisbury’s evidence was graphical [OBJ/005/2 – Tab 6, sheet 2; the “**possible new bridge over ditch**” **now no longer in prospect**]; however, nothing can detract from the fact that the route over the bridge carries a gradient over a long distance that is less than ideal, and that the route does not meet the width requirements of the Highways Agency Design Criteria for Footbridges [OBJ/005/2 – Tab 7; paragraphs 6.9 - 6.11, 12.6 and 12.8]. What is offered in mitigation is a substandard route that fails to meet design guidelines.
- 47 The Promoter has failed to counter this shortcoming in its proposal. But by ignoring competing safety risks, the Promoter has failed to make out its principal argument for closing the crossing on grounds of safety. For as the evidence demonstrates, closing the crossing brings an increase, not a decrease, to the safety of life and limb to those who now cross it.
- 48 Making comparisons between small numbers leads to absurdity and in consequence it has not been suggested either in evidence or in any submission that there can be a precise analysis of comparative risk. However, the risk of being struck by a train on the level crossing is a disproportionately smaller risk than the health risk arising from a lack of

rapid treatment when acute illness or injury strikes a person on the allotment. The objectors have made out their case: closing the crossing increases risk. Chiltern have not, and indeed cannot contradict this.

- 49 It can be concluded therefore that the mitigation scheme is not only inconvenient for the 250 or so people who garden on the Trap Ground Allotments, it is also by far the more dangerous. The Promoter's argument that the level crossing should be closed on grounds of safety simply falls away. Joe Lee, a doctor, was correct when in his spoken evidence on 5 November 2010 he said the Promoter was being "absurdly cautionary", and he was correct in his opinion that the Promoter was exaggerating particular risks "to emphasize the negative viewpoint so as to eliminate any public interface".
- 50 There are other considerations, not directly involving the activities of the allotment gardeners but nevertheless of concern. The Inspector was by several submissions alerted to the status of Port Meadow as a Special Area of Conservation, an EU designation of higher importance than a Site of Special Scientific Interest (which it also is). Not only does the meadow rank highly in importance owing to its long undisturbed history as a water-meadow, but it is also home to the rare plant *Apium repens*. This plant, as the Promoter has conceded, is sensitive to the local water regime and although a water-margin plant, is nevertheless susceptible to anoxia under conditions of prolonged inundation, particularly in summer.
- 51 The Inspector asked the Promoter whether the area likely to be inundated as a result of the mitigation scheme had been assessed. It had not been, and despite the passage of time since this question was asked, no assessment has been made. It follows that the Promoter's case for raising the level of the pathway so as to make the allotment gardens accessible during periods of temporary flooding cannot be considered safe. Although culverts are shown passing under the raised part of the footpath, no provision is made

for ensuring their free running and, as Ian Salisbury said, in time they are likely to become blocked and the drainage of the meadow compromised.

[See also OBJ5/23 – Rebuttal of Gilder and Coates, paragraph 1]

- 52 As to the “improvements” to the ramp, raising and covering the eastern limb with tarmac to achieve a gradient of 1:17 [CRCL/R/OBJ5 – paragraph 3.138], Mrs Boswell and Mr Hollander both expressed their view in spoken evidence that the ramp would become the focus for local skateboarders, and the Highways Agency Design Criteria already referred to warn against fast travelling cyclists which should be slowed down by chicane barriers – impossible to install because the byway is too narrow [OBJ/005/2 – Tab 7 paragraph 12.6]. As to the western ramp, at 1:15 the gradient is even steeper [CRCL/R/OBJ5 – paragraph 3.139]; a long way from the ideal of 1:20 [Highways Agency Design Criteria OBJ/005/2 – Tab 7].

*The loss of acquired prescriptive rights to foot access and nearby car parking*

- 53 Any suggestion that prescriptive rights cannot be obtained across railway land is false. The Inspector’s attention is drawn to section 57 of the British Transport Commission Act, 1949<sup>7</sup> that Ian Salisbury appended to his Supplementary Rebuttal Evidence [OBJ5/18]. It says:

*As from the passing of the Act no right of way as against the Commission shall be acquired by prescription or user over any road footpath thoroughfare or place now or hereafter the property of the Commission and forming an access or approach to any station goods-yard wharf garage or depot or any dock or harbour premises of the Commission (our underlining).*

- 54 The conjunction “and” used in this sentence is prescriptive. It means, by

default, that any such land that does not form an access or approach to any station, goods-yard, wharf, garage or depot etc. is subject to the provisions of the Prescription Act 1832<sup>8</sup>. The Promoter has not submitted any evidence to show that any of the land lying beyond the Parcel 29002 qualifies under this section of the Act and would, in any event, be unable to do so. It follows, and we submit, that the provisions of section 2 of the Prescription Act applies. (The entitlement of the Commission under the 1949 Act has passed down to Network Rail and will so pass in due course to the Promoter, if it acquires this land.)

55 The relevant provisions of the Prescription Act are in section 2:

*No claim which may be lawfully made at the common law, by custom, prescription, or grant, to any way or other easement, or to any watercourse, or the use of any water, to be enjoyed or derived upon, over, or from any land or water of our said lord the King, or being a parcel of the duchy of Lancaster or the duchy of Cornwall, or being the property of any ecclesiastical or lay person, or body corporate, when such way or other matter as herein last before mentioned shall have actually been enjoyed by any person claiming right thereto without interruption for the full period of twenty years, shall be defeated or destroyed by showing only that such way or other matter was first enjoyed at any time prior to such period of twenty years, but nevertheless such claim may be defeated in any other way by which the same is now liable to be defeated; and where such way or other matter as herein last before mentioned shall have been so enjoyed as aforesaid for the full period of forty years, the right thereto shall be deemed absolute and indefeasible, unless it shall appear that the*

*same was enjoyed by some consent or agreement expressly given or made for that purpose by deed or writing.*

56 The language of this statute is not the easiest to understand and it is to our benefit that it was explained authoritatively by Lord Hoffman at paragraph 8 of the case *R (on the application of Godmanchester Town Council) v Secretary of State for the Environment*<sup>9</sup>. Whereas in order to acquire such rights at common law it had been the case that usage must have occurred since “time immemorial” (this being from 1189, the year when King Richard I was crowned), the qualifying time was reduced by the Act to 20 years. Lord Hoffman said:

*Starting from the common law, namely that use[~~r~~]<sup>10</sup> since 1189 would establish the easement, it provided in section 2 that a claim to such an easement which had been ‘actually enjoyed by any person claiming right thereto without interruption for the full period of twenty years’ should not be defeated by evidence which showed that it had arisen at some earlier date. This meant that it could no longer be defeated by showing that it had arisen after 1189.*

57 Evidence provided to the Inquiry was that the land shown as Parcels 29002 (the car park) and 29006 (the level crossing) has in living memory been used since at least before 1947 (61 years) for access on foot to the Allotment Gardens, and that cars have been parked on 29002 by the allotment gardeners for the whole of this period [OBJ5/18 – paragraph 1]. Three affidavits have been adduced to the Inquiry confirming this usage for continuous periods in excess of 20 years [Appended to OBJ5/18]. Nobody has ever entered an agreement for this usage from Network Rail or any of

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9 [2007] UKHL 28 - appended,

10 “User” appears to be a printer’s error.

its predecessors. Beyond peradventure, prescriptive rights therefore exist which in the case of usage over a period in excess of 40 years is absolute and infeasible. The Promoter has neither sought to contradict these rights nor to adduce evidence that might support a claim that the rights acquired do not exist, or to counter the status of the longer period as being absolute and infeasible.

*Chiltern's own evidence that the extended level crossing over the new Work No 3 line meets design requirements and is feasible*

58 This section follows from the statement of Mr Aiden Nelson to the effect that the proposed level crossing over the new line would be compliant with HSE guidance<sup>11</sup>.

59 Sight lines from the crossing point are generous and greater than those stated by Mr Nelson in his evidence [OBJ5/9 – paragraph 4.3]. If it were not for the overgrowth of track-side shrubs and bushes, the existing lines on the existing track would meet the requirements of the Health and Safety Executive. In the last year, despite numerous requests, Network Rail has only partially cleared the vegetation. Even so, the crossing can be traversed safely [OBJ5/9 – paragraphs 8 and 9].

60 No such concern arises with the new line, for all of those trees and shrubs which currently obscure the proposed path of the new track can be removed (which the Inspector will be able to appreciate when he makes his inspection in due course<sup>12</sup>).

*That the sketch proposal made by Ian Salisbury, if the extended crossing were to be allowed, is a feasible design.*

61 In his spoken evidence on 9 November 2010 in answer to questions from

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11 See paragraph 23 above.

12 Chiltern's evidence [CD/1.9 – plans sheets 29 and 30] is that the branch line Work No 2 runs parallel to the main line for 700m north of the North Oxford Junction, and that Work No 3 runs parallel to those tracks for 400m.

Mr Hollander, Mr Barker made two significant points concerning the feasibility of extending the crossing.

61.1 Firstly, he said that it would be “easy” to give access from the car park (that is, the one in the Promoter’s proposal at the southern boundary of land Parcel 29003 in echelon formation) to the crossing, and

61.2 Secondly, there was “no dispute” over the “room” to put in a level crossing, and that such a crossing could be made to be “compliant”.

62 Ian Salisbury made three sketch plans. The first two are appended to Ian Salisbury’s original evidence [OBJ/005/2 – Tab 15], the first sheet depicting the existing layout and the second showing the new Work No 3 track and a redefined car park. Having submitted those plans, the Promoter submitted its own sketch design plans where among other things, cess paths were introduced on either side of the track. In response he made a third plan accommodating the cess paths, also adapting the layout to increase the number of parking bays, and placing a stagger in the refuge to meet best design guidance [OBJ5/16].

63 All three plans have been drawn to the attention of Mr Stephen Barker, the Promoter’s engineer. On 11 January 2011 he was shown in particular the third sketch plan. Accepting that the plan was a sketch and would be the subject of detailed scrutiny if it were to be taken forward, Mr Barker nevertheless stated that the arrangement shown on that drawing was a feasible proposition. Moreover, by arranging the cars into echelon parking formation, the scheme was not dependent on acquiring any land from Oxfordshire County Council.

*Collateral advantages*

64 If the Inspector is minded to allow an extension to the level crossing over

the new track Work No 3, then the County Council has said it will allow its strip of land, currently unused and which runs next to the western boundary of the school ground, to be incorporated into an extended allotment car park [OBJ13/7]. Oxford City Council also supports this proposal [OBJ109/6] so enabling the County Council to make the best of the available land for extending the school playground so that it better meets the requirements of the Education (School Premises) Regulations 1999, Schedule 2, Playing Fields [Note of the Inspector OBJ5/20].

*What makes the above matters “exceptional”*

65 As stated above<sup>13</sup>, there is no guidance as to what the Inspector should take as being “exceptional” within the terms of the Policy on Level Crossings published by the Office of Rail Regulation [CD/3.18]. It appears that the Inspector must therefore decide the matter for himself, taking the reasonable approach that has been advocated in this submission. In our submission, the following are the exceptional matters that provide the Inspector with good reason to allow the existing level crossing at Aristotle Lane to be extended across the new track Work No 3:

65.1 The level crossing provides safe and close access to the allotments for about 250 gardeners who are engaged in an activity that brings social, economic and health benefits to the community, which benefits would be imperilled by the closure of the crossing. This distinguishes the Aristotle Lane level crossing from those serving farms and public rights of way. The 250 gardeners require convenient level access for this purpose.

65.2 Any benefit of safety to be had from the closure of the level crossing is more than offset by the increased risk of acute illness and injury to those on the allotment gardens occasioned by the

increase in travel time for the emergency services.

- 65.3 The mitigation scheme would be unsatisfactory in many aspects. It would be inconvenient to the allotment holders and would provide an unnecessary obstacle to many, particularly when carrying or transporting loads. The ramps are too long, too straight, too narrow and too steep. The eastern ramp is likely to be abused in use and the raised western ramp may imperil the sensitive habitat provided by Port Meadow by its effects on drainage. The echelon parking shown in the mitigation scheme is extravagant in the use of the land which could otherwise be used by the school. That the school will better serve the requirements of the Education (Schools Premises) Regulations is an indisputable collateral benefit.
- 65.4 Allotment holders have acquired rights of access to the allotment gardens , both by foot across the level crossing and to the car park on foot and in vehicles. Those rights have accumulated over a period in excess of 60 years, and they are described in statute as being absolute and indefeasible.
- 65.5 Whereas elsewhere along the track rail speeds are designed to exceed 160kph (at 100mph), at the Aristotle Lane level crossing it is intended that there be a speed limit of 75mph, which is 121kph – a speed that may be further reduced by any bat mitigation scheme.
- 65.6 Apart from considerations for the Promoter's management preference of having zero public interface, there is no other impediment to retaining the existing level crossing and extending it as shown on the plans Ian Salisbury has produced. The Promoter's own engineer has conceded that it is feasible and its safety expert has conceded that it would meet HSE requirements.

### *The Promoter's Case*

66 The Promoter's case, in essence may be reduced to its often repeated statement [Conveniently to be found at CRCL/R/OBJ5 – paragraph 3.79]:

*... If it is practicable to close the existing level crossing because a reasonable alternative route is available, there cannot be any exceptional circumstances necessitating the provision of a new private footpath level crossing over the railway to be provided by the Order Scheme. The sole purpose of such a level crossing would be to provide access to a private level crossing over the extant railway which it is practicable to close because a reasonable alternative route can be provided as included with the Order Scheme.*

67 In this closing submission the point has been made, with what we believe to be reasonable justification, that the Promoter's proposed alternative route is less safe, less practical, less convenient, more arduous to the elderly, the disabled and the frail, and potentially more hazardous to the Port Meadow SAC natural habitat. It is submitted that the objectors have amply demonstrated that for all these reasons, and because the Promoter's case on safety has not been made out, its case for refusing to build an extension to the existing crossing should be defeated, and the extended crossing built.

### *Request that the level crossing be retained and extended*

68 With reference to the above arguments and all the evidence, it is submitted that the Inspector should decide that there are qualifying exceptional circumstances in this instance and that it is reasonably safe and practicable to construct an extension to the level crossing with an intermediate safe

refuge between the existing tracks and the new. Against these exceptions, the Promoter's case for not extending the crossing is not made out.

- 69 On these grounds the Inspector is now therefore respectfully requested to decide that an exception to the general policy against the creation of level crossings is reasonably and properly justified, and that accordingly an extension of the existing level crossing across the new line is to be allowed. The Inspector is asked to apply the conditions requested relating to the sound construction and good maintenance of this crossing with an appropriate refuge, fencing, gates, signage, surfacing and grades, and with provisions to ensure that necessary distant sight-lines are maintained.

Jonathan Clark, Tony Hollander and Ian Salisbury. . . . . 27 January 2011