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| **Order Decision** |
| Inquiry opened on 2 November 2021 |
| **by Sue Arnott fiprow** |
| **an Inspector appointed by the Secretary of State for Environment, Food and Rural Affairs** |
| **Decision date: 5 September 2022** |

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| **Order Ref: ROW/3253077** |
| * This Order is made under Section 119A of the Highways Act 1980 and Section 53A(2) of the Wildlife and Countryside Act 1981. It is known as the Cumbria County Council (Unrecorded Footpath at Bailey Lane Parish of Grange over Sands) Public Path Diversion and Definitive Map and Statement Modification Order 2019.
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| * The Order is dated 29 August 2019. It proposes to divert a section of (non-definitive) public footpath that crosses (at grade) the Cumbria Coastal Railway at Grange-over-Sands, as shown on the Order map and described in the Order schedule. It would also modify the definitive map and statement accordingly.
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| * There were 10 objections or representations outstanding when Cumbria County Council submitted the Order for confirmation to the Secretary of State for Environment, Food and Rural Affairs.
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| **Summary of Decision:**  | **The Order is not confirmed.** |

**Procedural Matters**

1. I opened a public local inquiry into the Order at the Methodist Church Hall in Grange over Sands on 2 November 2021. After sitting for four days, I adjourned the event until 11 January 2022 to complete matters.
2. The introduction of further restrictions in December 2021 because of the Covid-19 pandemic meant that a public meeting of this nature could not be held as planned and consequently the outstanding proceedings were re-arranged as a virtual event. The inquiry therefore continued on 11, 12 and 13 January 2022 with the aid of Microsoft Teams technology. I am extremely grateful to all concerned for their assistance in making this alternative arrangement during difficult times.
3. I visited the site, unaccompanied, on 14 October before opening the inquiry, so as to familiarise myself with the area. I made a further inspection during the afternoon of 4 November following an enforced break in the proceedings due to a power cut. On that occasion I was joined by two representatives of the applicant (Network Rail Infrastructure Ltd (NR)) and an objector to the Order (Mr Thorne).
4. Some of the objections criticised the timing of NR’s submission of its statement of case. The sequence of, and deadlines for, the submission of inquiry documents is set out in the Rights of Way (Hearings and Inquiries Procedure)(England) Rules 2007. In short, the order-making authority is required to put forward its case in full before other parties are then to respond with their own material. In this case NR submitted its case in accordance with the deadline for those who have made objections and for representations of other parties wishing to speak at the inquiry. Consequently, objectors found themselves having to submit their own cases without sight of all the details being provided by NR in support of the Order, in particular updated safety information. In the circumstances I was prepared to accept late submissions from all parties in rebuttal.
5. I have considered very seriously whether the complaints made are justified, whether NR’s behaviour was unreasonable, whether any other party has been prejudiced as a result or incurred unnecessary expense. By producing essential supporting material so late in the process objectors can be put at a distinct disadvantage and under pressure to respond within a relatively short timescale, particularly where (as here) the totality of the safety case was not available earlier.
6. It would have been more helpful had NR, as the applicant and main supporter of the Order, provided its documents alongside the order-making authority, Cumbria County Council. However, there is no mandatory requirement to do so. Whilst I accept the concerns of the objectors were validly made, the rules do not assist in circumstances such as this. Although not ideal, I accept that in practice the process has not resulted in any prejudice to the cases put before me by other parties.
7. An application for an award of costs was made at the inquiry and is the subject of a separate decision.

**The Main Issues**

1. In its capacity as highway authority, Cumbria County Council (CCC) made this order under Section 119A of the Highways Act 1980 (the 1980 Act). In accordance with the requirements of that section, the authority was satisfied that it is expedient to divert the footpath in question, which crosses a railway (at grade), in the interests of the safety of members of the public using it or likely to use it.
2. While other criteria are not specified in Section 119A, Defra Circular 1/09 v2 advises (at paragraph 5.51) that the new way should be reasonably convenient to the public. Further, authorities should have regard to the effect the proposal will have on land served by the existing path or way and on the land over which the new path or way is to be created. Consideration should also be given to the effect that the diverted way will have on the rights of way network as a whole and the safety of the diversion, particularly where it passes along or across a vehicular highway. Although these are matters to be considered before an order is made, they may also be relevant factors when determining an order.
3. At this stage, if I am to confirm the Order before me, I must be satisfied that it is **expedient** to do so having regard to **all the circumstances** (which may include the above), and in particular to:

(a) whether it is reasonably practicable to make the crossing safe for use by the public; and

(b) any arrangements that have been made for ensuring that, if the Order is confirmed, any appropriate barriers and signs are erected and maintained.

1. The Public Rights of Way (Combined Orders) (England) Regulations 2008 (S.I. 2008/442) enable surveying authorities to include directions to modify the definitive map and statement alongside orders that make changes to the rights of way network by creation, diversion and extinguishment under the 1980 Act. Related guidance is found in “*Combined orders - the power to include definitive map modification orders within public path and analogous orders - Guidance for English Surveying Authorities*” published by Defra in October 2010.
2. Whilst I must also have regard to any material provisions in any rights of way improvement plan for the area when determining this Order, no issues have been raised in this respect. In addition, in reaching my conclusions, I have considered the principles of the Public Sector Equality Duty where appropriate.

**Legal submissions**

*The integrity of the Order as a diversion*

1. In his original objection Mr Thorne contended that the diversion promoted by this Order must fail on account of the whole of the proposed alternative route being used already by the public as a right of way.
2. None of the alternative route is recorded on the definitive map. Yet even a cursory view of the path indicates nothing presently visible on the site that would suggest the public is restricted in any way from freely using any part of it. This observation may be of no consequence whatsoever to the actual legal status of the route, but it is sufficient to prompt a question as to the basis on which the public enjoys use of the route at present.
3. A diversion order may propose that the line of a path or way be altered so as to follow, in part, a pre-existing route. However, such an order cannot be used to close a path where the whole of the alternative route is already a public right of way. As was noted in the case of *R v Lake District Special Planning Board, ex parte Bernstein*, The Times, February 3 [1982] (*Bernstein*) the effect would otherwise be to enable the statutory tests for stopping up a path (found in Section 118 of the 1980 Act) to be side stepped.
4. Having made an initial examination of the evidence in this case and the issues highlighted in the objections, I raised with the main parties (at a pre-inquiry meeting held virtually on 19 October 2021) questions in relation to submissions that the alternative route being offered in this Order may already be used by the public by a presumed right, albeit not one recorded on the definitive map.
5. I made clear that I could have no jurisdiction in terms of determining the legal status of any of the ways where that might be in doubt. However, I noted that this is a combined order which proposes also to modify the definitive map and statement. I asked to be provided with background information so as to fully understand the points made by objectors and to establish for myself the extent to which any of these issues may need to be taken into account under the statutory requirement to have “regard to all the circumstances”.
6. In fact the route which is the subject of this Order is not recorded on the definitive map either. Definitive status is not a pre-requisite for a diversion proposal under the 1980 Act but it is entirely appropriate that I should be reasonably satisfied that a route is indeed a highway if I am to confirm an order to realign it. For that reason, I must enquire into the evidence which supports that conclusion.
7. As regards the status of the alternative route proposed in the Order, I also consider it a reasonable question to ask: ‘*does all or part of the alternative follow an existing highway?*’. Indeed, sub-section 119A(9)(b) of the 1980 Act anticipates such a situation arising since it requires the Order map to make a distinction between the new path that is to be created and any existing public right of way.
8. Further, the format recommended by the Rail Crossing Extinguishment and Diversion Orders Regulations 1993 (as amended by the regulations for combined orders) specifically invites the order-making authority to identify in the Order Schedule any section of the new route which is already comprised in a footpath, bridleway or restricted byway and to include details of owners, lessees or occupiers whose land is affected.
9. There is no obligation to approach that question solely by reference to the definitive map, but the purpose is to make quite clear to the public what is new and what is not. That may affect future obligations for maintenance, for compensation or for details which are ultimately added to the definitive record, for example if pre-existing limitations apply.
10. For this reason, I consider it perfectly legitimate to enquire into the background of an alternative route where ostensibly the public currently enjoys unrestricted access thereto, where references are made in the evidence to long-standing use, but no existing highways are listed in the Order. However, whilst I may form an opinion on the evidence before me insofar as it affects this Order, I again emphasise that it is not for me to make a finding as to the legal status of any part of the proposed ‘new’ route.
11. Even if I am wrong in my approach and were to be wholly convinced that the alternative route is already a public right of way so that the principle established in ‘*Bernstein’* were to prohibit consideration of the Order as a diversion, the legal tests to be applied to extinguishment under Section 118A of the 1980 Act are essentially the same as those in Section 119A. Thus, the harm foreseen in ‘*Bernstein’*, that the tests for extinguishment in Section 118 (which are substantially different to Section 119) would be side-stepped, would not arise here.

*The approach to ‘temporary circumstances’*

1. It is an accepted fact that the rail crossing at Bailey Lane has been closed to the public by traffic regulation order (TRO) since August 2017 and a number of safety-related items (such as crossing decks, whistle boards and signage) have been removed from the site.
2. Although the gates at both sides cannot now be opened by the public, if these obstructions were to be disregarded, there is no doubt that the crossing in its present state would be considerably less safe for all concerned than when it was last in operation.
3. Mr Wilson submitted that the fact the crossing has been closed for at least 4 years should be a consideration. Not only does he argue that closure was premature, pending the outcome of the diversion order process, but also that removal of related safety features such as whistle boards and crossing decks inevitably reduces my ability to reliably address the criteria and to compare the present and proposed routes. Indeed, it was not possible for me to use the crossing so as to evaluate for myself the propositions put to me in relation to safety.
4. At the inquiry I invited submissions on whether guidance which imports a provision in Section 118(5) of the 1980 Act to consideration of Section 119 orders should be applied in this case. Circular 1/09 advises (at paragraph 5.25) that “*Section 119 of the 1980 Act does not specifically entitle an authority to disregard temporary circumstances, including any buildings or structures preventing or diminishing the use of the existing way in considering whether or not to make an order and the consideration is equally not available to the body confirming the order. The Planning Inspectorate Advice Note 9 … indicates that in forming an opinion on whether the replacement route is not substantially less convenient to the public, a fair determination can only be made on the assumption that the existing route is available to the public to its full legal extent*.” Although the precise wording of the Advice Note has since been updated, the principle remains the same.
5. It was Mr Bruce’s view (for CCC) that it is not a coincidence the same advice is not applied to Section 119A. The statutory tests in Section 119A differ in that confirmation of the order requires the decision-maker to have regard to “*all the circumstances*” and in particular “*whether it is reasonably practicable to make the crossing safe for use by the public*”. In his submission “*all the circumstance*s” takes account of the current circumstances regarding the crossing so that rather than disregarding any temporary circumstances, they must be taken into account.
6. For NR, Mr Lopez accepted the principle advocated in the Circular in respect of disregarding ‘temporary circumstances’ as provided in Section 118(6). He submitted that in practice this means that NR had legitimately relied on historic information together with future projections of use to produce reliable, expert assessments.
7. Mr Thorne considered it logical to adopt an approach which addresses the position as in 2017 before the crossing was closed. He submitted that it would set a worrying trend if a right of way over a crossing could be extinguished on the basis that there is no impact on current users when at present people could not actually use the way because of a TRO. Further Mr Wilson argued that I cannot reasonably make a finding that the crossing is unsafe whilst no-one is using it.
8. Having considered the submissions on this point, it seems to me that the wording of the legislation itself, Section 119A, must be the main framework which guides my approach. As Mr Bruce advocated, that requires that I take account of “**all the circumstances**”. I interpret that to mean that whether such circumstances are temporary or permanent, variable or unchangeable, or desirable or unwelcome, I must address the situation as it is now. Inevitably that is complicated by the fact that there has been no use of the crossing for over 4 years. As a consequence, some of the data presented in support of closure is based on forecasts and assumptions, rather than direct survey and observation and I will be obliged to weight that evidence accordingly.

*Presumption that the crossing is unsafe*

1. For CCC, Mr Bruce submitted that there is a pre-set bias here insofar as, at the confirmation stage, determination of the Order is founded on the premise that the highway authority has already been satisfied that the crossing is unsafe, otherwise it would not have made it. Indeed, I recognise that was CCC’s conclusion on the evidence put before its Development Control and Regulation Committee in 2019, (albeit by a narrow margin).
2. As I have set out above, one of the essential questions for me to address is whether it is reasonably practicable to make the crossing safe for use by the public. Whilst I am not required to reach a specific conclusion on whether the crossing is unsafe at present, my task will inevitably require an assessment of relative safety based on all the circumstances.
3. As I interpret my role, I am not required simply to accept the safety case has been decided by CCC. Instead, in addressing the relevant tests, I must examine the basis for that conclusion and form my own view following cross-examination of NR’s expert witnesses together with challenges made by objectors and the submissions made by all parties.

**Reasoning**

***Background***

1. The Bailey Lane pedestrian level crossing was, until 2017, a well-used public footpath within Grange-over-Sands. It provides one of several links between the town centre and the ‘sea-front’ promenade that is frequented by both residents of, and visitors to, the resort. Along the two-mile section of non-electrified railway stretching from Grange over Sands station in the north-east (550m from the crossing) to Kents Bank station around 2.5km to the south-west there are 3 underpasses, 2 bridges (although one is currently unusable) and 3 level crossings. Two of these crossings are barrier-controlled vehicular crossings giving access onto the sands of Morecambe Bay; the third is the Bailey Lane crossing.
2. One of the three pedestrian underpasses is that which leads from Main Street car park through to the promenade (shown as Q-R on the Order map). This underpass was constructed by NR in 2006 at a cost of around £2m when an opportunity arose to take advantage of a planned line closure due to operational works elsewhere along the Cumbria Coastal Railway. The works were completed in December of that year under planning permission SL/2003/2253 and it has been available to the public since then.
3. In 2005 Network Rail applied to Cumbria County Council to divert the Bailey Lane footpath under Section 119A of the 1980 Act. For reasons that are not entirely clear, this was treated as an extinguishment under Section 118A and rejected on 20 September 2007 on the grounds that NR had failed to show the crossing was dangerous to use or that it had a bad safety record.
4. A further application was made in 2009, again under Section 119A, but this was not proceeded with by CCC. Another in 2012 followed but this time not under the special provisions for rail crossings. This was rejected on the basis that “*the proposed diversion is substantially longer than the existing route and involves a narrow section with no option to widen*”. A subsequent application in December 2013 for diversion under S119A was rejected because CCC “*had not been provided with any further evidence to show that the safety record of the crossing had significantly changed since September 2007*”.
5. In July 2017 a serious incident was recorded at the crossing in which a couple were nearly hit by a train. NR immediately closed the crossing and sought the temporary closure of the path. Cumbria County Council acceded to the request and imposed an emergency TRO to prohibit pedestrians. This was subsequently renewed and then later replaced on 22 August 2017 with a temporary TRO.
6. NR applied to CCC once more on 27 September 2017 for an extinguishment order under Section 118A but it was a revised application on 4 January 2018 for a diversion order under Section 119A that was taken forward. After much deliberation, the Council’s Development Control and Regulation Committee resolved to make the Order that is now to be determined.
7. For NR, Mr Lopez submitted that this lengthy list of applications is not relevant to the determination of this Order, that history is not a factor for consideration and that safety is the main issue here. To a large extent, I agree with that view, although if I were to disregard all past intentions, then NR’s contention that the 2006 underpass was expressly built to replace the Bailey Lane crossing would also be set aside yet that is something I recognise is still a strong motive for NR.
8. In my view the failure of previous applications to close the crossing does not affect the grounds for closure put forward by NR although it does highlight the highway authority’s changed view of it.
9. In relation to this point, some objectors criticise CCC for its failure to adequately, and independently, assess the safety case put forward by NR to justify the conclusion that the Bailey Lane crossing is unsafe. They argue this occurred at two stages: firstly, after NR had physically closed the crossing in 2017 and pursued a temporary TRO to legalise its actions, and secondly, when considering the application submitted in 2018.
10. I cannot address questions that relate to procedural matters prior to the Order being made. The processes followed by the highway authority are not at issue here. However, it is quite apparent that I do not have before me any independent assessment of the safety related data provided by NR, whether commissioned by, or compiled by, CCC or otherwise. Indeed, even at the inquiry CCC relied entirely on evidence submitted by NR in relation to safety at the rail crossing.
11. For CCC Mr Bruce drew attention to paragraph 5.46 of Circular 1/09: “*It will usually be for the operator to justify the need for the order and, while some information relating to the use of the path may be available from the highway authority or other sources, the operator is expected to make the best assessment on the information available*” (his emphasis).
12. Without question, NR is acknowledged to be a specialist in the field of rail safety, although as the applicant seeking closure of a public right of way, it is understandable that its impartiality may be called into question. Undoubtedly, independent scrutiny by competent rail safety experts could have enhanced its veracity but no such assessment is available to me.
13. Indeed Mr Lopez highlighted the fact that no contrary assessment of the safety of the crossing had been submitted by any of the objectors to dispute the case put forward by NR. Nevertheless, the data relied upon by NR has been subject to detailed scrutiny at the inquiry, albeit those challenges were not made by professionals in the field of rail safety.
14. However, I recognise that the determination of this Order is not solely a question of rail safety. It concerns the interaction between an operational railway and a public highway. Both interests are relevant here.

***Status of routes shown in the Order***

*The existing route to be diverted (A-B)*

1. As the Order title recognises, the public right of way over the Bailey Lane crossing is not recorded on the definitive map and statement and its status as a highway has not been conclusively established. However, no-one has challenged the basic premise that the public does enjoy (at least) a public right of way on foot over it.
2. A brief look at the history of Grange over Sands shows that the road referred to as Bailey Lane (and sometimes *Bayley Lane*) pre-dated the railway which was established by the “Ulverstone & Lancaster Railway Act 1851”. It led from the town to the foreshore and later, in 1875, to a pier from which a steamboat operated to bring tourists to and from destinations around Morecambe Bay. A promenade was subsequently built on the foreshore at the beginning of the twentieth century.
3. Through the British Rail Act 1968 (the 1968 Act), any higher rights over the crossing were formally extinguished leaving only a right of way for pedestrians. In the absence of any further legal closure, there can be little doubt that a public footpath does exist over the crossing. The width of the highway was not altered by the legislation and therefore will still exist to its pre-1968 extent although no specific measurement is noted in the Order.
4. There are comments amongst the objections which hint at the possibility of higher rights having been acquired over the crossing subsequent to the 1968 Act extinguishment. As I made clear at the inquiry, it is not the purpose of an order made under the Highways Act, nor is it my role, to investigate the legal status of a route and I certainly do not have sufficient evidence before me to reach an informed conclusion on the point. However, even if I was to be provided with further evidence from users, I regard the likelihood of such a claim being successful to be very low indeed given the statutory protection from presumed or implied dedication afforded to operational railway land.
5. Without prejudice to any subsequent claim for a higher status, I am satisfied that this Order is technically valid insofar as it proposes to extinguish the rights of the public to use the pedestrian highway from A to B, whilst providing for an alternative.

*The alternative route proposed by the Order (A-Q-R-X-B)*

1. In its statement of case, CCC stated “*Large sections of the new diversion are permissive rights of way over which a public right of way may be dedicated by the landowner*”. In advance of the inquiry, I indicated that I required some clarification of that statement. As a result, more information was supplied to shed light on the various assertions as to the status of the route.
2. I will reiterate that it is not my role to determine the status of the alternative route proposed by this Order. However, I have set out above the extent to which the issue may be relevant to the matters before me.
3. Amongst the submitted evidence I can see nothing to suggest that the higher rights along Bailey Lane, stopped up between A and B in 1968, were also extinguished along its continuation towards the old foreshore (B-Y-X). It would appear that such rights could still exist (and to their original width) although I cannot make any firm finding in that respect. The creation of a 4m wide definitive footpath over B-Y-X through this Order would not necessarily conflict with that and would be without prejudice to the existence of any higher rights subsequently shown to subsist.
4. Evidence shows that after a crossing had been established over the railway line here in the nineteenth century, a ‘new’ footpath was constructed to enable people to reach it from the town’s main shopping area near the Commodore Inn (formerly the Commercial Hotel). Ordnance Survey maps show this along a line partly coincident with the proposed Order route (A-L) on the north-western side of the railway. As an initial view, I am inclined to agree that the public probably do already enjoy a right to use this section, but its designation as a public footpath on the definitive map would not be at odds with that, again subject to any higher rights that may have been acquired over it.
5. However, this historical route did not lead to the underpass (as now proposed) since this feature was not in existence until 2006. There has not yet been sufficient passage of time for a claim of presumed dedication to be founded under statute for those parts of the alternative route that relate to the underpass (L-Q-R-T) and, whilst NR drew attention to notices that were placed on the car park side of the underpass denying a public right of way, I cannot confidently reach any conclusion on the likely success of a claim at common law for this section. Designation as a public footpath through this order would put the matter beyond doubt, at least in respect of pedestrian rights.
6. As regards the proposed new route along the promenade, this is currently the subject of an application for a definitive map modification order. It is reported that SLDC acquired the land under the provisions of the Public Health Act 1875 for the purpose of public walks and pleasure grounds, or alternatively (as Mr Thorne suggested) to deal with the sewer outfall from the town. I do not have sufficient evidence before me to form an opinion on the likely success of the claim that a public right of way already exists on foot or otherwise, but it is absolutely clear that the public already enjoys access (at least on foot) and that public access has been governed by byelaws for over a century.
7. Byelaws were introduced to the promenade and other ornamental grounds in Grange over Sands in 1898, revised in 1905 and repealed by new byelaws introduced by South Lakeland District Council in 1990. However these are expressly stated to *not* operate so as to “*prevent the exercise thereon of any public rights*” (although there seems to be some doubt whether this applies to the promenade or solely to the foreshore). CCC and NR take the view the very existence of byelaws indicates that the public enjoys access on a permissive basis.
8. The Order would record a public right of way on foot over the full width of the promenade between T and X and thereafter maintenance of the surface of this section would (in law) be the responsibility of the highway authority. However, as provided by subsection 119A(6) of the 1980 Act, Article 5 of the Order provides that NR “*shall maintain the surface and all associated overbridges and supporting structures (on the whole of the alternative footpath) including the underpass between Q-R and retaining sea wall between R-W*”. I recognise that is a significant commitment by NR.
9. The conclusion I reach from this examination of the proposed alternative is perhaps an obvious one: that it is currently available to, and in use by, the public. Indeed since the crossing A-B was closed in 2017 there has been no other option for pedestrians wishing to cross the railway in this area of the town.
10. However, the legal basis on which that use takes place is not evident without much deeper enquiry than is appropriate here. Although there is no certainty that each section may be found to carry a public right of way, neither does there appear to be any serious likelihood of access to any part being withdrawn in practical terms.
11. I recognise that there would be a benefit to the public in recording the whole route as a definitive footpath so as to ensure access in perpetuity, particularly through the underpass, but the public is not actually being offered a route that is new or untested. There is an advantage to that insofar as people have had the opportunity to use all parts of it; in the case of the underpass, since 2006, and as respects the connecting routes on both sides of the railway, for over a century. Indeed, since the gates were locked in 2017, people wishing to cross from A to B have been obliged to follow the proposed diversion or to take alternative routes in the local network.
12. In summary, I accept that there are no technical grounds for dismissing this proposal as a diversion but in practice the effect of the Order will be the closure of a pedestrian railway crossing. However, as I have noted above, the legal tests are effectively the same whether this is dealt with as a diversion or extinguishment: in applying the tests I have set out at paragraph 10 above I am required to consider ‘*all the circumstances*’.

***Whether it is reasonably practicable to make the crossing safe for use by the public***

*Overall approach*

1. CCC made this Order having concluded it was expedient to divert the footpath in the interests of the safety of members of the public using the Bailey Lane level crossing, or likely to use it. Councillors accepted the case made by NR in its application that the crossing was unsafe for public use.
2. As part of NR’s licence to operate, and manage, railway infrastructure it has a legal duty to protect its passengers, the public and its workforce, and to reduce risk at level crossings **so far as is reasonably practicable**.
3. Alongside that, the Office of Rail Regulation (ORR) directs NR to eliminate risk from the rail network wherever possible. The ORR considers level crossings to be the primary source of risk to the operational railway and recommends the removal of level crossings as the most effective way of dealing with such risk.
4. NR’s document *Enhancing Level Crossing Safety (2019-2029)* acknowledges that “*Ideally, we would not have any level crossings*” although it does recognise that “*roads and walking routes are public rights of way and therefore running a safe and reliable railway must be delicately balanced with the number of level crossings in operation and the people who use them*”. This strategy makes clear that NR is “*committed to improving level crossing safety and will do all that is reasonably practicable to close crossings and improve safety at those which remain open*”.
5. NR’s application for this Order, its support for confirmation and, in particular, its assessment of the relative safety of the crossing, has to be viewed against that background.
6. Equally the highway authority has a duty to assert and protect the rights of the public to use acknowledged rights of way but also to consider applications for change to the established highway network in terms of highway safety, whilst balancing the best interests of the public against the requirements of independent landowning interests including statutory bodies such as NR.
7. The legislation under which this Order is made requires me to consider whether it is reasonably practicable to make the Bailey Lane crossing **safe** for public use.
8. Whilst giving evidence to the inquiry, NR’s witness Mr Greenwood admitted that in his professional opinion the only ‘safe’ level crossing is one that is closed. Indeed, that appears to be the thrust of the ORR’s recommendation. NR’s general standpoint is that even where crossings are compliant with recommended standards, there is still scope for misuse by the public which then renders them unsafe.
9. If I were to accept the proposition that there is no such thing as a ‘safe’ level crossing that is open to the public, the burden in Section 119A could never be satisfied; no amount of improvement to a crossing could ever reach a standard where it could be described as ‘safe’.
10. That cannot have been an interpretation anticipated by the legislation. There is no guidance, statutory or judicial, which points to any presumption in favour of closure (or diversion) once an Order is made. It is a question of expediency in all the circumstances. In my view the question must therefore be ‘can the crossing be made sufficiently safe for the public to continue to enjoy the right of way to which they are entitled?’.
11. But what is an acceptable level of risk? There seems to be no absolute measure to answer that question but, short of complete closure, the legislation requires NR to reduce the risk to a point “as low as reasonably practicable”. In my approach to this issue, I shall interpret the test to be whether, taking account of any reasonably practicable mitigations, the residual risk at this crossing would be acceptable in public safety terms.

*Relevant risk assessment methodology*

1. NR’s systems for assessing risk are complex and take into account a myriad of factors. It incorporates both quantitative and qualitative assessments, the former based on risk modelling and the latter on the structured analysis of an experienced level crossing manager.
2. The ‘All Level Crossing Risk Model’ (ALCRM) is a recognised tool based on extensive research within the rail industry. This has two elements: “collective risk” and “individual risk” of fatality.
3. Collective risk is a measure of the total harm or safety loss, expressed in terms of “fatalities and weighted injuries” (FWI) per year. The risk is ranked from 1 to 13 where 1 represents the highest risk. This does not relate directly to the type of crossing; crossings that are busy with lower levels of protection are ranked more highly whereas lightly used crossings that have high levels of protection receive rankings towards the lower end.
4. For individual risk, ALCRM calculates the probability of fatality expressed as a letter and ranked from A (the highest risk) to M (the lowest). This is also unrelated to crossing type, those with higher degrees of protection being grouped around the lower end and less protected crossings at the higher end.
5. The ALCRM score is not an absolute figure; it is used to undertake a comparative assessment of different level crossings to determine the effect (higher or lower risk) of any proposed mitigation measure. It generates a monetary figure against which to assess the likely cost of a proposed mitigation scheme when assessing what is or is not reasonably practicable. As such, the calculated levels of risk are used as one part of NR’s overall risk management process, identifying the relative risks of different level crossings and guiding business decisions on crossing upgrades and closures. In the ranked schedule of priority cases, as some crossings are closed, others rise up the list.
6. This model uses the basic principles of risk assessment, identifying hazards, frequency and consequences leading to a calculation of risk, varying according to the particular characteristics of the crossing, the people using it, the number of lines to be crossed, the number and frequency of trains, train speed and variance of speed. It can also look at the causes of accidents that could occur at different types of crossing, for example footpaths where users are responsible for complying with signage and for making their own decision on when it is safe to cross where accidents may be caused by failure to correctly ‘stop, look and listen’ for trains.
7. The narrative risk assessment brings together the quantitative calculations with the qualitative assessment of risk through a structured analysis by the Level Crossing Manager. Site inspection, external stakeholder engagement, analyses of user demographics, accident history, network trends and behavioural norms are all factored into the assessment to provide a broader and more holistic perspective as part of the decision-making process.
8. Before the crossing was closed in 2017 its risk score was C3. Since then, an updated version of the software indicates that if the crossing were to be reopened, the risk score would now be C2.
9. No alternative methodology or risk assessment systems were submitted at the inquiry, but the data on which NR relied in producing its figures was rigorously challenged by objectors.

*Safety at Bailey Lane level crossing*

1. As I have already noted, the crossing at Bailey Lane is currently closed by TRO. Paradoxically, it could therefore be said to be completely safe at present and whilst the public cannot access it. In truth, this is only a temporary measure, although objector Mr Wilson suggested that a series of TROs might provide a remedy for limiting risk until technological advances can provide an adequate solution to management of the crossing.
2. Although I accept restrictive TRO’s could be a useful tool for managing particular periods of intense public access (such as ‘Prom Art’ or during similar events), and could (in overall terms) help to make the crossing safer for use by the public, it is not one that tackles the fundamental issues required when determining this Order.
3. Before its temporary closure, Bailey Lane was a passive crossing (as opposed to a protected one) with no stop lights, alarms or controlled barriers to warn users of approaching trains. The risk to users of a level crossing is greatest where the user is asked to take more decisions for themselves; quite understandably, risk reduction at passive level crossings is therefore a priority for NR.
4. Mr Greenwood pointed out that the Bailey Lane crossing has been of concern to NR for a considerable period of time. Indeed, the underpass had been built in 2006 with the intention of replacing the level crossing to address these safety concerns. However, objectors drew attention to statements by NR on several occasions pre-2017 to the effect that the crossing was “not dangerous”. Mr Greenwood’s response was that the crossing may have been compliant with minimum standards but was not necessarily safe, largely due to the numbers of users that fall into the ‘vulnerable’ category and the propensity for misuse by the public at this location.
5. The factors affecting this particular crossing were explained further by Mr Shipperd, Level Crossing Manager who covers the West Coast Main Line and several connecting routes including the Carnforth to Barrow railway. This line is in use 24 hours each day. In addition to the 39 passenger services running between 06.00 to 23.30 there are around 6 freight trains daily, plus other unscheduled services.
6. As a passive crossing, there were no direct means of warning the public of approaching trains. There were no lights, audible warnings or barriers interlocked with railway signals as are found elsewhere on active crossings. Consequently, any member of the public was required to make their own visual assessment of whether it was safe to cross the line, with the possible assistance only of a horn initiated by the train driver.
7. **Whistle boards** were located on the approach to the crossing in both directions. These are provided by NR as a reminder to train drivers to sound a warning on the approach to a crossing but this practice is reported to be inconsistent, being dependant on the exact point at which the horn is sounded (if at all). Horns are not used during the ‘night time quiet period’ – 00.00hrs to 06.00hrs.
8. At this location the railway curves, thereby reducing visibility of, and from, the crossing. Vegetation does have an impact but has been regularly managed to reduce unnecessary restrictions.
9. NR argues that the physical restrictions of the site effectively mean that trains could not be seen in sufficient time to enable a person to safely cross within the predicted crossing time. Bailey Lane was a skewed crossing, complicated by a two-deck one-way system; therefore, **sighting distances** from the decision point (a minimum of 2m from the track) must be calculated looking both up and down the line. These have been measured at 379m, 327m, 245m and 180m, the shorter distances being in the Grange Station direction.
10. Based on a 10m length for both decks, NR calculations predict it would take an average user 8.41 seconds to cross, but this is increased by 50% to 12.62 seconds on account of the number of vulnerable users at this location. Given the sighting distances available here, this translates into **warning times** of 19.96, 14.63, 10.96 and 8.05 seconds. Mr Shipperd highlighted the deficiency in relation to warning times, not only for vulnerable people but for all classes of user crossing from the promenade when looking towards the station. It was to address the shortfall here that whistle boards were provided and obstructive lineside vegetation removed.
11. **Slips, trips** and becoming snagged on crossings are reported to be responsible for 14% of train strikes nationally despite NR’s attempts to remove this risk. There were also instances at Bailey Lane of people stepping off the crossing deck and walking on the uneven ballast, thereby increasing the trip risk.
12. NR’s research has shown that most level crossing risk (95%) relates to the **behaviour** of those using it (*Level Crossing Digest Issue 3 January 2021*). Therefore, a great deal of work has been undertaken to study the factors which influence behaviour at crossings and specific data was gathered in relation to the Bailey Lane crossing to inform its decision to seek closure. Along with site visits by the Level Crossing Manager, the census data collected has informed the narrative risk assessment.
13. Census data was gathered during the week of 3-11 June 2017, very shortly before the crossing was closed. This had shown an average of around 300 people using the crossing daily of whom around 12% were classed as **vulnerable users**. This included accompanied and unaccompanied children, people with pushchairs, cyclists and mobility scooters, dog walkers and people encumbered, for example carrying heavy bags.
14. Subsequent to closure of the crossing, census data was collected over 10 days in September 2021, this time at the underpass (Q-R), using photographic evidence gathered by CCTV followed by manual analysis. This was not carried out at the height of the tourist season and therefore the figures are said to be higher at other times but it did include a weekend on which the event ‘Prom Art’ took place.
15. Of the 8284 people counted in total, averaging around 800 per day, the assessors categorised approximately 25% as vulnerable users. In addition to those user types previously (in 2017) classed as vulnerable, this figure also included people distracted though wearing headphones, using a mobile phone or wearing a hood that restricted sideways vision, together with “elderly people” and those having difficulty walking.
16. Earlier census data from 23-31 May 2015 illustrated the types of behaviour that NR categorises as the deliberate misuse of the crossing as distinguished from accidental human error. For example, users were distracted by taking photographs whilst on the crossing deck, walked the wrong way through the one-way system, stepped off the decking onto the track, and used mobile phones or wore hoods whilst crossing. In addition, large groups using the crossing at the same time resulted in queues backing up at the exit gate, leaving some standing on the deck.
17. At the inquiry both Mr Greenwood and Mr Shipperd emphasised that tourists and irregular users present the greatest risk since they are often unfamiliar with railway crossings, are frequently distracted and are more likely to be encumbered with bags. Further, the proportion of residents of Grange over Sands aged over 60 is significantly higher than the national average, a fact reflected in the number of vulnerable users of the crossing.
18. Although the number of fatalities at (or near to) the Bailey Lane crossing is low, the seriousness of the two mentioned at the inquiry (dating back to 1988) must be acknowledged; one was a small child at the crossing, the other an elderly lady some 200m along the line and not recorded in relation to the crossing statistics. In addition, there have been 5 other serious incidents reported since 2009, these being near-misses in 2009 (3), 2013 and 2017. Nevertheless, NR argues that it would be wrong to look only at these figures.
19. In her evidence to the inquiry, Mrs Buckley summarised the particular features of this crossing which have raised serious safety concerns: the high number of users, the high proportion of vulnerable users, the sighting deficiencies, particularly for vulnerable users, the frequency and speed of train movements and the instances of misuse recorded here.
20. Taking into account forecasted increases in pedestrian use, based on anticipated new residential developments in the town and leisure proposals on the promenade, NR predicts at least 300 people per day will use the crossing if it is re-opened with a significantly high proportion of these people being vulnerable users.
21. In forming my own conclusions on the relative safety of the crossing, both before it was closed and now (the point at which I am required to judge it), I find the evidence heavily reliant on data that rests on forecasts of likely usage.
22. I understand why NR decided to take pre-emptive action by seeking TRO(s) to close the crossing to the public pending the outcome of this Order. However, the consequence of this is that current numbers and patterns of usage are no longer available. Such data is dependent on analysis of past, and predictions of future, use. Meanwhile, in the last two years quite fundamental changes have been observed nationally in visits to tourist destinations and, as NR has highlighted, residential developments in the town are scheduled and the Cross Bay guided walk has altered its point of termination. Whilst these changes and others could potentially have an impact on the use of the Bailey Lane crossing, in the absence of actual survey, these remain assumptions.
23. Although I was presented with census data from September 2021 for the underpass, I do not consider that any element of this can be extrapolated so as to indicate the likely usage of the level crossing, particularly when the latter has been closed to the public for over 4 years.
24. The rationale behind this diversion order, and in particular NR’s support for its confirmation, is that re-opening the crossing will unacceptably increase the level and frequency of public pedestrian crossings of the railway, especially by vulnerable and encumbered people and for a multitude of user groups. I am not convinced that this argument is supported by hard evidence.
25. If I am to consider the residual risk at this crossing in the light of the various mitigations discussed at the inquiry, it is important to establish the baseline. Since the mechanisms for assessing safety of the crossing are influenced to a large part by the numbers, characteristics and behaviour of members of the public, given the passage of time and changes in patterns of use through the enforced closure and to an extent by the Covid pandemic, I have doubts over the reliability of levels of risk identified by NR. Suffice to say that I am not convinced that use of the crossing will return to pre-2017 levels, nor that it need do so if certain measures are taken.

*Other measures that could be taken to improve safety*

1. NR helpfully set out its assessments of alternatives to closure of this crossing, working on the principle that any measures should deliver the greatest degree of public benefit in terms of safety in relation to the level of expenditure.
2. Options evaluated include the provision of a pedestrian bridge (together with closure of the level crossing), the installation of miniature stop lights (MSLs) or VAMOS (an overlay miniature stop light system) and a speed reduction to 25mph. All have been discounted by NR and, having considered all these options, NR concludes that it is not reasonably practicable to reduce the risk at this crossing beyond the current ALCRM category C2.
3. The construction of a **footbridge** at this location would require additional land outside of NR’s ownership, and despite potentially delivering a 100% safety benefit, it is estimated to cost in the region of £1.2m. There are physical constraints at this site which would demand an exceptionally inventive design if it were to provide a solution here. I would not dismiss this as wholly impossible, but I do not attach any weight to it as a reasonably practicable option.
4. Indeed it is NR’s argument that the equivalent – **the underpass** - has already been delivered as an alternative providing 100% safety for pedestrians
5. NR dismissed the installation of **warning lights** for pedestrians at the crossing both on technical and cost grounds. The cost of installing MSLs is estimated at an astonishing £1.35m and although the lower cost system (VAMOS) that could provide both warning lights and sound is estimated at £200k, this is reported to be technically impossible due to the proximity of the crossing to Grange Station.
6. Objector Mr Wilson expressed incredulity that NR had not been able to introduce technology that could provide cost-effective solutions (such as that provided by VAMOS) that could work in a situation such as here. He highlighted NR’s Cumbria Coast Study which referred to its emerging “Digital Railway Programme” which identified the Cumbrian Coast “*as one of the key areas of the network which may benefit from the roll out of the Digital Railway*.” I note that amongst its anticipated performance improvements is “*improved asset reliability due to on-board rather than line side equipment*”.
7. I have some sympathy with Mr Wilson’s view. With the widespread use of cheap technology today it is frustrating to find such high costs attached to the only currently available solution that could provide a realistic advance warning system for crossing users.
8. Whilst NR acknowledge that MSLs can bring undoubted benefits in removing the need for the standard ‘stop, look, listen’ safety judgement, they cannot mitigate the higher risk from deliberate dangerous actions or reduce trespass and vandalism. Further, NR says that even if warning lights were to be deployed at this crossing, it cannot be assumed that all users would pay attention.
9. I accept that those intent on deliberate misuse and vandalism will pay no heed to signs but in my view NR’s approach tends to confirm that there is not one single solution that would address all the safety concerns at this crossing. It is therefore disappointing that its assessments of alternatives to closure do not examine any of the possible remedies in combination.
10. The constraints on visibility and the consequent minimum crossing times for pedestrians is related to the speed at which trains are likely to approach. Reducing the current 50mph **speed of trains** using the line could, potentially, improve sighting and warning times.
11. However, NR stated that when this had previously been tried elsewhere, it had a negative effect insofar as it encouraged people to cross in front of an approaching train as they were inclined to misjudge its speed, thereby believing they had time to cross. Incidents in 1994 and 1995 following the introduction of a temporary speed restriction here were said to indicate a consequential increase in user error. However there is no evidence specific to these incidents to support this assertion. Both Mr Shipperd and Mr Greenwood cited an incident at Grimston Lane in Suffolk as being relevant to this point but my reading of the subsequent Rail Accident Report does not suggest that a change in the train speed was a factor; the pedestrian may not have seen the train or may have misjudged its speed but there appears to be no finding that a lower speed led to that unfortunate outcome.
12. Other than to consider a 25mph option, the analysis provided by NR does not specifically assess the impact of imposing any other lower line speed on the approach to the crossing. It is therefore not possible to say with absolute certainty whether a reduction from 50mph to 45mph or 40mph would result in the sighting times being sufficient to enable the crossing to be made safely. Nevertheless, it would be reasonable to conclude from the evidence that it would be saf*er* to some extent and that could be a significant adjustment in a context where seconds matter. Further, it would be a reasonably practicable measure to take, even in the context of the operational demands on NR.
13. Another mitigation suggested would be to replace the previous two-deck one-way system with **a single deck,** and/or **to widen the deck/s,** and/or **to re-align it** from the present ‘skewed’ arrangement. All are possible adjustments and all have slightly different effects on sighting distances and crossing times. I respect Mr Shipperd’s view that visibility could potentially be reduced as a result but in 2013 NR advised Grange-over-Sands Town Council that reconfiguring the crossing to a straight crossing could shorten the pedestrian crossing time by 1 second based on it being 1 metre shorter.
14. It is clear from the census data collected in 2015 and 2017 that just over half the incidents recorded at the crossing were noted as users crossing in contradiction of the one-way traffic flow system. NR appears to interpret this as further evidence that many members of the public simply do not read signs. In fact small signs were attached to the gates indicating the “*Way In*” and “*No Entry*” but these were not particularly prominent and neither was their significance explained to users.
15. NR comments that even if the crossing were changed back to a two-way system, that would not change the proportion of vulnerable users or the likelihood of accidental human error. Again, in my view that demonstrates the need to examine the effect of small-scale changes in combination.
16. The one-way system was introduced to try to avoid queues of people waiting on the deck and people stopping to talk whilst crossing. Since both of these behaviours have been observed, even with two decks, the benefits of this non-standard arrangement seem questionable, particularly when using the wrong deck inflates the incident total.
17. I am told that the system was introduced following discussions on site in 2003 with Mr Tilley (HMRI Principal Inspecting Officer of Level Crossings) to consider options for mitigating risks at the crossing. At that time a crossing with similarly high levels of pedestrian usage in south-east England was trialling a one-way access to ease congestion; a similar one-way system was suggested as a solution at Bailey Lane. This was implemented in 2004 along with other measures. I have seen no report on the outcome of the south-eastern trial but a later trial at Cannock Chase was deemed unsuccessful because of user failure to enter through the correct gate.
18. There is therefore some support for **simplifying the crossing**, reducing it to one deck although that alone cannot provide a satisfactory solution. Without providing the public with sufficient guidance to make a fully informed choice as to whether, when and how to cross safely, it is somewhat unfair to criticise their judgements and past behaviour.
19. The question of **signage** requires examination on several levels: the commun-ication of instructions to the user to enable them to use the crossing safely; advice on available alternatives, and wider directional advice between the town centre and promenade.
20. The only direct instruction to users that has been provided in the past at this site is the industry standard: “stop: look: listen”. Yet NR’s document “Enhancing Level Crossing Safety 2019-2029” recognises that: “*Signs which convey safety messages must be clearly articulated such that they can be easily and expediently understood. The signs found at passive level crossings, which are mandated by legislation, have not evolved in many years and are not necessarily optimised for modern society or ergonomically designed around human factors studies*.”
21. It is unsurprising to find the census material presented here has shown that some people appear not to understand the risks involved in crossing an operational railway and that their behaviour is then judged to fall into the ‘misuse’ category. With a high level of visitors in the vicinity acknowledged by NR, some of whom may never before have encountered a railway crossing, the instruction to “stop: look: listen” says nothing about crossing quickly, without stopping to take photographs or chat with others, or not proceeding onto the deck until the exit is clear.
22. I fully accept that not all ‘misuse’ can be rectified by clearly understood signage, but there is little doubt that it would offer greater assistance to unfamiliar users than has been provided in the past. A greater understanding of the protocols for crossing would enable those with an intention to proceed in the safest possible way to do so and thereby reduce the number of incidents that raise the risk level.
23. In his submissions, Mr Thorne argued that retaining the crossing would not oblige any member of the public to use it. Indeed, at the inquiry Cllr Wearing stated that he used to use the crossing before the subway was built but he now chooses to use this instead. Mr Thorne submitted that, with sufficient guidance on site, some people (and particularly some vulnerable users) may choose the underpass option.
24. It appears that at no time since the underpass was provided in 2006 has there been any signage on either side of the Bailey Lane crossing to advise people unfamiliar with the area that an alternative route is available for those who would prefer not to cross an operational railway.
25. That may be due, in part at least, to the non-definitive status of the underpass and perhaps a reluctance on the part of the highway authority to dissuade members of the public from using an acknowledged public path in favour of an apparently permissive one. But semantics aside, the signposting of a feasible alternative for more vulnerable people who may not have been aware of its existence would surely have been in the public interest. With some people actively choosing the underpass, the percentage of vulnerable users crossing at grade would most probably decrease (at least to a limited extent) but sufficient to have an effect on the forecast level of risk at Bailey Lane.
26. This raises a wider point about how visitors to Grange over Sands are directed to and from the promenade and the factors that influence who is likely to use the crossing. It is pertinent to consider why a tourist unfamiliar with the town (and with railways) would choose to cross at Bailey Lane unless following directional signposts. In fact there is a sign at the top of Bailey Lane on the Esplanade clearly directing people down to the promenade and a tourist signpost near point X indicating the town centre. It is therefore little wonder that some people who might be better suited to the underpass might find themselves channelled along Bailey Lane but with no indication that their journey will involve crossing a railway, nor any notice at the crossing to indicate an alternative via an underpass.
27. To an extent I agree with objectors who argue that it would be unjust to close this crossing on the basis that many people who are likely to use it are vulnerable because they are unfamiliar with railway crossings when those people have not been advised of any other route. This is not a case of trying to “constrain user numbers” (which Mr Lopez suggested was a practical impossibility) but looking pragmatically at the movement of people, in particular visitors, between the town and the promenade and the factors that influence their choice of route. Locals like Cllr Wearing may know the options well and make informed choices but first-time visitors can (and perhaps should) be steered towards more suitable routes.
28. I agree with Mr Lopez’ submission that signage away from the crossing is not a matter for NR. However, it is a matter for the highway authority and it is CCC’s order that is at issue here. Although the point was raised at the inquiry, it was not explored in any great depth, but I consider it to be valid nonetheless although not a determinative factor.
29. NR also refers to research which indicates that when crossing in groups, people pay less attention to their surroundings and adopt a herd mentality. This, it says, is of particular significance given the large numbers of people who join organised walks across Morecambe Bay (often up to 500 people) many of which are apparently forecast to choose the route up Bailey Lane to the town at the end of their walk.
30. Although I do not doubt the general point made here, there is no evidence I have seen that is based on actual survey to show whether, or how many, people from the cross-bay walks actually do (or would) independently choose to use the Bailey Lane crossing in large groups after their expedition.
31. One other feature that was suggested but dismissed by NR were **self-locking gates** which lock automatically when a train approaches. Mr Shipperd referred to such gates in use near Knaresborough in North Yorkshire, emphasising that there they are overlooked by a signal box so that anyone caught within the railway corridor could be easily released. Even if these had release buttons to let people through, he argued that these would be misused and therefore unreliable.
32. This is a measure which appears to have the potential to limit access during the greatest risk period when a train is approaching the crossing but one on which I found there to be little research material provided. It is true there is no signal box near this site but no obvious reasons why remote viewing via CCT could not assist were forthcoming.
33. Supplementary Audible Warning Devices (SAWD) were mentioned very briefly but not pursued either, and other alterations were suggested by objectors although none were considered by NR to be either feasible or cost-effective.

*Conclusions on safety at the crossing*

1. I have considered very carefully the arguments advanced by CCC and NR and the detailed data on which those are based. I have also taken on board the challenges that were made by objectors to its submissions when forming my conclusions on the issues to be addressed here.
2. I recognise that NR has rejected a number of potential measures on the basis that they would either be technically inappropriate or disproportionally expensive, and further they would not reduce the risk sufficiently at the Bailey Lane crossing.
3. However, I note the learning point identified in the Rail Accident Report for Kings Mill 2013 (RAIB): “*The possibility of making relatively small changes which may reduce the risk at crossings can be overlooked if those responsible are concentrating on the feasibility of major changes, such as provision of warning lights or total closure*.” I consider that comment to be apposite here too.
4. Working through the measures available, whistle boards may have variable reliability but do offer an audible warning and their re-introduction would add to safety if only to a small degree. Warning times could be improved by even a slight reduction in the speed of trains approaching, say to 40-45mph, particularly from the down (station) side. I have seen no evidence to indicate that a slower speed here would prompt users to cross when they would otherwise wait. Even if that were likely, instructions on signs at the entrance ought to make clear: ‘if you can see a train, do not start to cross’.
5. In fact, general advice to people crossing is absent on both sides and the scope for improved and effective signage is considerable: in terms of instructions on how to cross safely, advising on behaviour that is not appropriate, signposting the availability of an alternative that does not involve crossing an operational railway as well as more strategic signposting of pedestrian ways within the network. This is not solely the responsibility of NR; CCC as the highway authority has a pivotal role here too.
6. In addition, the possibility of reconfiguring the crossing itself has not, in my view, been sufficiently explored. Such changes alone may not be enough to significantly reduce the ALCRM score but as part of a package of small-scale measures, even including self-locking gates overseen by CCTV, these all have the potential to make the crossing safer than it has been judged to be in the past.
7. Since user numbers and behaviours are a key factor in assessing safety and risk, it is important that decisions on the future of the crossing are based on reliable fact. It is my conclusion that such data is not available and has been stymied by the premature closure of the crossing, and that further safety measures could be undertaken on the site (and in the surrounding area), in combination, to reduce the risks to the public and to improve the overall safety of the crossing.
8. To return to the question “*whether, taking account of any reasonably practicable mitigations, the residual risk at this crossing would be acceptable in public safety terms*” my conclusion is that several measures are possible and that, in combination, these have the capacity to reduce the residual risk at this crossing. It appears to me that that the resultant risk would be acceptable in public safety terms and could be an improvement on the situation that pertained in August 2017. The burden of proof lies with those that seek the change proposed by the Order.

***Arrangements made for ensuring that, if the Order is confirmed, any appropriate barriers and signs are erected and maintained***

1. At the inquiry Mr Lopez confirmed that in compliance with sub-section 119A(4)(b) of the 1980 Act, upon completion of the works agreed with South Lakeland District Council required for the new route, NR would remove all remaining infrastructure at the level crossing including gates and signage. Within a short timeframe thereafter it would install fencing to prevent access onto the railway.
2. Separately, and in addition to these measures, are the matters prefaced in the Order which are the subject of a separate agreement between NR and CCC. In short, these include the removal of 4 bollards in the car park and replacement with parking bumpers, resurfacing the proposed new route (approximately from L to C), replacing the line side fencing, removal of vegetation, replacing gulley grates and signposting the new route near point A as “public footpath to promenade”.
3. I have no doubt that, if the public right of way across the level crossing were to be extinguished, NR would take appropriate steps to ensure barriers and signs were put in place to prevent access along the existing route, and that the works agreed with CCC along the proposed diversion would be carried out.

***Other relevant factors***

*Convenience*

1. For CCC Mr Bruce drew attention to the differences between the statutory requirements in terms of convenience between orders made to divert paths under Sections 119 and 119A. Whereas the 1980 Act itself requires an alternative path provided by a diversion under Section 119 to be ‘not substantially less convenient’ than the original and its point of termination (if altered) to be ‘substantially as convenient’, Section 119A is silent on the issue.
2. Guidance in Defra Circular 1/09 v2 at paragraph 5.51 advises that for rail crossing diversion proposals under Section 119A, the new path should be “reasonably as convenient” to the public. Therefore, a direct comparison between the present and proposed routes is not a statutory requirement.
3. I accept the proposition that, in terms of overall weight when considering “all the circumstances” before reaching a conclusion on the Order, the fact that convenience is addressed only as guidance rather than a requirement does relegate the issue to just one of several factors to be weighed in the balance. The relative convenience is not a specific legal test that must be met, nor is a certain degree of convenience is required other than that the alternative is reasonable.
4. That is not to say that a significantly unreasonable degree of inconvenience might not carry sufficient weight to influence the outcome. However, in this case I am not persuaded that applies here although analysis is more complex than it might first appear.
5. The question requires consideration of the different needs and practices of local residents and those of visitors. It depends on the purpose of the journey: for example, as part of a daily dog-walking circuit, to get to a specific place such as the station or the shops, to access the promenade for general walking or to make use of specific facilities along it.
6. The public can include both residents of Grange over Sands and its visitors. I therefore accord no less weight to views expressed by path users living further afield who visit to town. That includes those who use the route regularly and have a degree of familiarity with it, those who visit occasionally but nonetheless have a set route they follow, through to those who are completely new to the town.
7. I fully recognise that ‘convenience’ does not relate only to relative distance. Width, gradient, limitations, surface and directness can all be factors which influence each individual’s perception of convenience and, not least, their own physical abilities and limitations.
8. Mr Bruce submitted that a crossing that is unsafe would be an inconvenience to the public. In my view, the question of safety falls under a different heading. However, I do accept that some people will not feel comfortable using a railway crossing such as this and would much prefer the underpass if made aware of its existence; others will have no hesitation in crossing at this point.
9. In simplistic terms, a diversion that requires a walker to use an alternative that extends to over 350 metres in length in place of a direct rail crossing that is 9 metres long could not be described as “reasonably as convenient”. However, as I have already noted, patterns of usage within the town are complex. Improved signage could enable people to make route choices well in advance of arriving at the crossing so as to avoid any inconvenience at all. But for those people who choose to use Bailey Lane and for whom this is the most direct route to the promenade, the diversion would prove an inconvenience.
10. Mr Bruce submitted that the issue is not just about individuals (such as some of the objectors) who find the underpass less convenient but the overall experience of ‘the public’. I have no difficulty in accepting his proposition. He referred to data showing 2,408 people were recorded using the crossing by Railtrack on 6 August 1994, a figure which (according to a Network Rail census) had reduced to 294 people a day in April 2017, despite it being generally agreed that usage of the promenade had probably increased over time. In his view the data indicates a significantly greater number of members of ‘the public’ find the underpass more convenient than Bailey Lane crossing.
11. I exercise some caution in deducing too much from these figures alone, but nonetheless I recognise that the underpass is a very convenient way for the majority of the public to access the promenade from the town, taking into account a whole host of factors.
12. For the majority of the alternative route, width is not an issue but in one particular place (E-F) the Order Schedule notes that the width reduces to 1.1m and between C and G (around 30m) the available width is 1.5m or less.
13. There are no standard widths for paths which are created or diverted under the 1980 Act and the Cumbria Countryside Access Strategy 2019-2024 does not offer any guidance as to the standards expected here. Objectors argue that this pinch-point is not adequate for people in wheelchairs to pass others on the route, or for people with children’s pushchairs or buggies.
14. Although not fatal to the convenience issue, I regard this particular section of the alternative route to be inadequate in terms of width and likely to result in occasional bottlenecks as people wait for others to pass.
15. The condition of the surface of the proposed route was questioned although works are proposed to improve the section to the north-west of the railway and to make alterations within the car park, the aim being to ensure the available width for pedestrians is increased and the opportunity for cars to overhang the path is reduced. The surface of the remainder, through the underpass and leading up to and including the promenade, are all satisfactory with no issues arising.
16. Objectors highlighted the tendency of the underpass to flood on occasion during high tides and high rainfall. In his evidence Mr Parr offered useful background information on the matter, explaining that flooding mainly affects the lower (northern) end of the car park rather than any part of the proposed alternative route, except for the underpass where there is a hump in the surface at the entrance to try to alleviate this. CCC submitted that the problems here had been overstated and in fact when carrying out my inspection in October 2021 prior to the inquiry I noted another underpass along the line to the west being flooded by at least 6 inches of standing water but none here.
17. In fact there was no reliable data available to demonstrate the frequency of standing water in the underpass along the route at issue here and it is my impression that such incidents are relatively short-lived so that the associated inconvenience to pedestrians is quite limited.
18. On the subject of flooding, there are floodgates on the promenade side of the underpass as protection from very high tides. Although it was said that these are incorrectly fitted and may not be as effective as intended, no expert evidence was available in relation to these gates. In Mr Thorne’s experience, closure is infrequent and usually only necessary for less than an hour. (In my view the gates should be listed as limitations on public use albeit their impact may be only brief.)
19. Some supporters of the Order argue that there is no need for the crossing, that Bailey Lane itself is steep and inaccessible, and that overall the inconvenience of the extra distance is not significant but could in any case be overcome by taking a different approach to the promenade. Many express concerns about the mis-use of the crossing they observed pre-2017.
20. In contrast objectors to the Order voiced frustration at the persistence of NR in trying to close this crossing whilst failing to carry out suggested improvements and for many years advising Grange over Sands Town Council that it was not dangerous. Others highlight the flooding issue on the alternative at the underpass and the limiting effect of the flood gates at high tide.
21. In reaching my conclusion on the ‘convenience’ issue, I have not (directly at least) taken on board the arguments of objectors in relation to the route that was described as ‘the de facto alternative’. This recognises that those who might normally walk down Bailey Lane from the Esplanade would instead opt to walk along Main Street and drop down into the car park past the Commodore Inn. Consequently, they argue this should be assessed as the alternative, just as much as the Order route.
22. I deal with the matter in more detail below but here I note only that this argument serves to show that patterns of usage here are complex. The existing footpath may be one short link but there are many different ways that local people and visitors might choose alternative approaches instead of Bailey Lane so as to minimise the degree of inconvenience they experience.
23. Overall my conclusion is that the proposed diversion would result in less convenience for some people, but an equal degree of convenience for most people. The alternative route is already available so that those already persuaded of its merits will continue to use it irrespective of the Order. It will be people (and I suspect mostly visitors) who, unless better directed through improved signage in the town, will find themselves pointed down Bailey Lane to the promenade, only to then find they have a long diversion via the underpass.

*The effect that the proposal will have on the land served by the existing path or way and on the land over which the new path is to be created*

1. No new issues were raised under this heading. The land affected by the existing footpath is an operational railway. It is quite evident that removing the public right of way here would substantively reduce the risks along this section of the line.
2. The proposed alternative footpath is already used by the public and therefore there would be little noticeable impact on the land itself if the Order were to be confirmed aside from its recording as a definitive right of way and any consequent improvements to the path surface.

*The effect that the diverted way will have on the rights of way network as a whole*

1. As I have noted above, the proposed alternative footpath has been in use since 2006 and the Order route itself has been closed since 2017, albeit only temporarily. I was not informed of any studies undertaken to monitor the effect of these actions on patterns of use since the closure of A-B.
2. Recording the ‘new’ route on the definitive map and statement will ensure greater protection as a public right of way, in particular at the underpass, but otherwise there is no substantive addition to the network of public access routes in the locality.
3. In fact in overall terms, the effect of the Order would be the closure of an historical way from the town to the foreshore and, as objectors argue, the loss of this route will reduce the choices available to pedestrians within the local network of public paths. However, as both CCC and NR have pointed out, there is not a single facility that could not be reached without the Bailey Lane crossing.

*The safety of the diversion, particularly where it passes along or across a vehicular highway*

1. The diversion proposed in the Order does not interact with a vehicular highway although it will pass along the edge of the Main Street car park. Works have been planned to ensure that pedestrians on the segregated footway are protected by a parking bumper to prevent parked cars from overhanging the path.
2. Although some concerns were expressed about public safety in this area, the main focus of the objectors’ criticism was centred not on the alternative proposed in the Order but on what I have already referred to as the ‘de facto alternative’.
3. It seemed to be accepted by all parties at the inquiry that, if the crossing were permanently closed, it is likely that some users would instead choose not to walk down Bailey Lane then via the path A-C-Q but instead to use Main Street and the car park access road past the Commodore Inn to reach the underpass.
4. In recognition of this prospect, CCC had recently commissioned an independent road safety audit from Tetra Tech on this roadside option. As Mr Bruce explained at the inquiry, Tetra Tech recommended limited works to parts of the public footway, particularly the installation of dropped kerbs and tactile paving. Whilst the report was accepted by CCC, it was the highway authority’s view that such works are unsuitable in the relevant locations as there are other considerations beyond the safety audit. There is limited space on Main Street, installing dropped kerbs and tactile paving would require the footways to be widened and there is not sufficient width within the existing carriageway to accommodate this whilst maintaining two-way traffic along the road.
5. Mr Wilson criticised this report on a number of levels. He drew attention to the contrast between the road safety audit and the approach to safety at a railway crossing. In his view the likelihood of being struck by a motor vehicle on the de facto alternative route is far greater than being struck by a train whilst using the level crossing but there is no comparable analysis within the road safety audit to support that proposition.
6. It is apparent from the report that overall *road* safety is examined, but I am not entirely convinced that the risks to pedestrians were the focus of the assessment. That aside, CCC drew attention to the accident record for this stretch of road which does not show there to have been any significant incidents in recent years. Nevertheless, there are concerns around car parking which are still being investigated, as described by Cllr Wearing.
7. Even so, Mr Bruce submits that “*there is nothing in the evidence to demonstrate that the alternative “de facto” route along the vehicular public highway is unsafe*”. I have to agree. Although the route is clearly not traffic-free and the experience for pedestrians is unavoidably influenced by proximity to the frequent traffic movements, it is a long-established route within the town.
8. I note that Tetra Tech recommend that the sign at the top of Bailey Lane is removed so that visitors are not directed to the promenade via this steep slope. There is no information before me to enable me to gauge the numbers of people who would previously have followed this sign to the crossing A-B and who would instead opt for using the de facto alternative. That being so, there is no way for me to assess in detail the impact this may have on the Main Street footway. But as CCC’s data has shown, the road accident figures show that, since the crossing was closed in 2017, no significant incidents have occurred.
9. This leads me to conclude that neither use of the alternative proposed in the Order, nor the de-facto alternative via Main Street, would entail substantive risk.

###### *Whether it is expedient to confirm the Order having regard to all the circumstances*

1. In reaching a final conclusion on confirmation of this Order, I have considered all the matters raised and in particular those I have examined in detail above.
2. CCC made the Order in the interests of the safety of members of the public using it or likely to use it. This was a crossing that, when open, was used by both local people and visitors, including visitors unfamiliar with the town and some of whom may never have encountered a pedestrian-only railway crossing before. Nonetheless, tourist signposts have directed people from the Esplanade to the promenade via Bailey Lane with no mention of the crossing or of any alternative.
3. The Order was sought by NR in line with its statutory duties and fundamental responsibilities for public safety and operational efficiency of the rail network. The delays resulting from temporary closure, line speed reduction or reduced train use that would inevitably result from a fatality, a ‘near-miss’ or a trespass incident would have a significant impact on this. I appreciate that such consequences fuel the national drive to close unnecessary pedestrian crossings where alternative arrangements can be made.
4. Equally I am aware that the highway at issue here pre-dated the railway and has historical significance. It is one of a limited number of links open to pedestrians between the town and the promenade, and the alternative being offered is in fact already available to the public although not ‘by right’.
5. In determining this Order, I am required to pay particular regard to whether it is reasonably practicable to make the crossing safe for use by the public. It is NR’s position that, in absolute terms, there is no such thing as a *safe* crossing that is open to the public. Against that background, I have resolved to interpret the test to be asking whether, taking account of any reasonably practicable mitigations, the residual risk at this crossing would be acceptable in public safety terms sufficient to enable the public to continue to enjoy the right of way to which they are entitled.
6. I recognise that the rigorous risk assessment systems employed by NR show there to be serious potential for harm at this crossing, and that implicit in CCC’s decision to make the Order is an acceptance (by the highway authority) that this data shows the crossing to be unsafe for public use.
7. However, I find the much of the census data on which that analysis relies to be skewed by the misuse of the one-way system and, given there has been no use for over 4 years, I consider NR’s predictions for future use to be tenuous.
8. The objectors to the Order have challenged NR’s dismissal of the possible measures it has evaluated and its failure to consider others. Whilst I have a high regard for the expert evidence given by NR’s witnesses at the inquiry, taking account of all the circumstances, I am not satisfied that all the mitigations that are possible at this crossing have been fully examined or, more particularly, that their combined effects have received due consideration. Further I am not satisfied that the likely numbers and types of users of the crossing (if re-opened) can be reliably extrapolated from use of the underpass whilst the crossing has been closed for 4 years.
9. Having examined the evidence in relation to all possible mitigations, I find the advice noted in my paragraph 146 above to be worthy of reflection: that it is easy to dismiss the potential for small scale changes that can collectively reduce the risks at a crossing if the focus is entirely on costly engineering solutions or closure.
10. Indeed, it is my conclusion that several potentially effective measures are reasonably practicable – a slightly reduced line speed, reconfiguration of the one-way two-deck arrangement, the reinstatement of whistle boards, improved signage (both at the crossing and within the local path network) - and that, in combination, these have the capacity to reduce the residual risk at this crossing. Calculations are not before me to assign absolute figures to the resultant risk although I am satisfied that safety at the crossing could be improved over and above the standard in 2017 and such as to make it safe for use by the public in relative terms.
11. I have examined other factors such as the relative convenience of the alternative route proposed in the Order, the effect of the proposal on affected land and within the rights of way network in the locality, together with the relative safety of the diversion as well as the de facto alternative route. None of these findings weigh substantively against confirmation of the Order. Further, I am satisfied that, if the Order were to be confirmed, NR would put in place appropriate barriers and signs to give effect to the diversion.
12. However, taking account of all the circumstances, and on the basis of the evidence before me, I am not satisfied that the Order should be confirmed.

**Conclusion**

1. Having regard to the above and all other matters raised at the inquiry and in the written representations, I conclude that the Order should not be confirmed.

**Formal Decision**

1. I do not confirm the Order.

Sue Arnott

**Inspector**

**APPEARANCES**

Mr R Bruce Solicitor; representing Cumbria County Council assisted by

 Ms S Gozney

*Who called:*

Mr A Sims Countryside Access Officer; Cumbria County Council

Mr J Lopez Of Counsel; instructed by the applicant, Network Rail Infrastructure Ltd

*Who called:*

Mr J P Greenwood Head of Liability Negotiation, Network Rail Infrastructure Ltd

Mr S Shipperd Level Crossing Manager, Network Rail Infrastructure Ltd

Ms A Buckley Liability Negotiations Advisor, Network Rail Infrastructure Ltd

*Also in support*

Cllr Mr W Wearing

Mr W Woods

Mr R Shapland

Mrs J E M Shapland

**Objecting to the Order**

Mr G Wilson Statutory objector

Mr N Thorne Statutory objector

Mr G Parr Statutory objector

**Appearing in a neutral capacity**

Mr F McColl Local resident

**DOCUMENTS**

1. Copies of statutory objections and representations

2. Statement of case submitted on behalf of Cumbria County Council with background documents

3. Proof of evidence and summary proof of Mr A Sims & appendices including Stage 1 Road safety Audit: “De facto” alternative route along Main Street and unnamed road past Commodore Hotel; Tetra Tech October 2010

4. Statement of case submitted on behalf of Network Rail with appendices A-H

5. Proof of evidence and summary proof of Mr S Shipperd

6. Proof of evidence and summary proof of Ms A Buckley

7. Proof of evidence and summary proof of Mr J Greenwood & appendices

8. Statement of case submitted by Mr N Thorne with appendices 1-44

9. Proof of evidence of Mr N Thorne & additional appendices 4a & 36

10. Statement of case submitted by Mr G Wilson

11. Proof of evidence of Mr G Wilson

12. Statement submitted by Mr C Eckroyd on behalf of the Cumbria & Lakes Local Access Forum dated 30 July 2021

13. Statement of case submitted by the Lake District Area Ramblers for the Ramblers’ Association

14. Proof of evidence of Dr M Green (as a member of the Ramblers’ Association)

15. Statement of case submitted by M Guest

16. Proof of evidence of Mr M Guest

17. Statement of Mr W Woods (with attached document) dated 24 August 2021

18. Statement of Mrs J E M Shapland dated 26 August 2021

19. Statement of Mr R Shapland dated 26 August 2021

*Submitted at the inquiry*

20. Email from Mr Wilson to the Planning Inspectorate on 19/10/21

21. Email(s) sent by Mr Bruce (for CCC) to the Planning Inspectorate on 20 October 2021 including related case law reports

22. Statement of Cllr Mr W Wearing submitted by email on 25 October 2021

23. Letter to the Planning Inspectorate dated 27 October 2021 from Network Rail

24. Letter to the Planning Inspectorate dated 28 October 2021 from Mr Wilson

25. Email to the Planning Inspectorate sent 28 October 2021 from Mr Thorne with list of documents referred to

26. Details of “Collisions in the vicinity of Main Street” (prepared by Tetra Tech) submitted by CCC by email dated 20 October 2021 together accompanying emails

27. Extracts from Grange Town Council Minutes 2005-2006 by Mr Shapland

28. Old photographs from Edwardian Grange Photographic Display submitted by Mr Shapland

29. Extract from The Guardian 24 August 2021 submitted by Mrs Shapland

30. Statement to inquiry of Mr Woods

31. Documents submitted by Network Rail

 1. Photograph of sign taken on 16/05/2013

 2. Planning conditions relating to Main Street car park underpass

 3. Cross Bay Walk details - (a) user numbers & (b) map showing new exit point

 4. Census data for LNW Underpass September 2021

 5. Clarification of reduced speeds of train during site inspection

 6. Note on infeasibility of Overlay Miniature Stop Lights at Bailey Lane Crossing

 7. Note on non-dedication of underpass at Main Street car park

32. Statement of objection from Mr G Parr (dated 2 October 2019)

33. Statement of Mrs Margaret Robinson submitted to the inquiry by Mrs Shapland

*Received during the adjournment*

34. Cumbria Countryside Access Strategy 2019-2024 provided by CCC

35. Email from Mr Thorne to the Planning Inspectorate on 4 November 2021 with details relating to the location of a sign at the underpass

36. Email from Mr Wilson to the Planning Inspectorate on 5 November 2021 providing a link to the Cumbria Coast Rail Line Digital Railway programme

37. Copy of discussion paper “Traffic issues in Grange-over-Sands” prepared in June 2002 by Grange-over-Sands Civic Society, provided by Mr McColl

38. Also provided by Mr McColl, a paper prepared by Peter Robinson dated 20 July 2014 in relation to a proposed 20mph speed limit

39. Statement submitted to the inquiry by Ms Lillian Greenhalgh

40. Network Rail structures report for Grange-over-Sands underpass dated May 2013

41. Statement from Mrs Lillian Greenhalgh received via CCC on 5 November 2021

42. Submission from Mr G Parr dated 4 January 2022

43. Letter from Mr P B Coates dated 10 January 2022

44. Note on creation of bespoke ‘one way’ twin deck pedestrian access over Bailey Lane Level Crossing submitted by Mr Greenwood for Network Rail on 5 November 2021

45. Email from Cllr Wearing to CCC sent 3 November 2021

