

## Network Rail Infrastructure Limited

### Proposed Network Rail (Suffolk Level Crossing Reduction) Order

#### Network Rail response to SCC and proposed Order modifications

#### 1 Response to points raised in Suffolk County Council's (SCC) letter to Winckworth Sherwood (WS) dated 6 April 2018

- 1 First, Network Rail is willing to meet the Council to discuss the proposed modifications (to the extent not already addressed by this response and particularly to discuss the scope of a proposed draft agreement and wording of article 16A, as proposed in the Council's version 2 of the draft Order). Unfortunately due to availability issues, it will not be possible for this meeting to take place until after 19 April, but Network Rail has separately suggested dates to the Council when it could be available for such a meeting.
- 2 As regards the changes proposed by the Council, Network Rail does not consider that the reasoning behind most of the proposed modifications in either version of the proposed Orders has been explained in previous correspondence or is self-explanatory. The Council's amendments do not appear to follow the principles set out in the DfT's Guide to TWA Procedures regarding the approach to drafting the Order. For instance, paragraph 1.46 of the Guide sets out that when drafting an Order reference should be made to the model clauses, and to consider "*recently made TWA Orders which may contain more up to date versions of "standard" provisions. Applicants should, however, bear in mind that each application has to be considered on its own merits in the light of the particular circumstances arising*". Paragraph 1.51 also makes it clear that the Secretary of State requires that Order provisions are "*consistent with current policy and legislation, are suitably drafted for a statutory instrument, and would be within the purposes of the TWA.*" Paragraph 3.5(b) sets out that the explanatory memorandum should "*explain clearly and concisely in relation to each article and schedule why the provisions are considered necessary in the circumstances of the application and what they are intended to achieve*" and "*the explanation should make clear why [the] non-standard provision is considered justified (if there are relevant precedents it would be helpful if these were cited)*". Furthermore, there are a number of amendments made which appear to Network Rail to be entirely new points not canvassed in earlier correspondence between the parties. For instance, Network Rail was unaware until receipt of the letter dated 6 April 2018 that the Council had concerns over timescales in articles 7 and 10.
- 3 In response to the Council's comment in the first full paragraph at the top of page two that the Order must ensure what is being promised at detailed design is delivered, Network Rail does not agree that the Order is the means to secure this. The purpose of the Order is to authorise works which interfere with, alter and extinguish, as well as create, certain public rights and to provide powers for compulsory acquisition of land or interests in land including interference with private rights. The Order need only provide the powers necessary to authorise and construct and maintain those works and does not need to include arrangements within it to ensure that matters which are subject to detailed design are delivered. As Network Rail has previously explained to the Council, it is not appropriate to include in an Order details of arrangements concerning the exercise of powers which can be agreed by the parties in a legally binding agreement enforceable through the courts (and see further comments on the proposed Order modifications below).

- 4 As regards crossing S23 Higham, this does not need to be moved from Part 2 of Schedule 2 to the Order to Schedule 1. This is because Network Rail is not, for the purpose of section 5(6) of the Transport and Works Act 1992, creating any new section of highway (prow) to provide an alternative route, but is relying on an alternative route which already exists on the highway network and improving the form of that highway for pedestrian users by provision of a footway within the existing highway verge. Network Rail is satisfied therefore that the crossing has been correctly listed in Part 2 Schedule 2, consistent with the provisions of article 15.
- 5 Re “further clarifications”, Network Rail sets out explanation on the powers set out under articles 7 to 11 below.

#### Comments on articles 7, 9, 10 and 11

To assist the Inspector, and in response to the Council's request for clarification on the terms of articles 7, 8, 10 and 11, Network Rail sets out the position on these provisions as follows:

##### Article 7 - Power to alter layout of streets:

Article 7 is based on a “tramway” model clause but has precedent in other Network Rail Orders as set out in the Explanatory Memorandum (**NR 3**). Paragraph (1) specifically authorises Network Rail to alter the layout or carry out works in the streets set out in Schedule 6: specifically, a new footway at:

- (a) Coalpit Lane in the Parish of Higham in relation to S23 Higham within in the limits of plots 7 as shown on Sheet 2 of the Order plans; and
- (b) Pound Hill in the Parish of Bacton within the limits of plots 37, 38, and 39 as shown on Sheet 20 of the Order plans.<sup>1</sup>

These works are included under this article and Schedule 6 as in each case Network Rail will need to alter the layout of the street in order to provide the works – that is, there is not sufficient room within the existing carriageway, and will require works in what is currently the verge to create the new footway.

Paragraph (2) allows Network Rail to make other such alterations within the Order limits, which have not been specified within Schedule 6, if necessary for the scheme at detailed design stage. The alterations permitted are of the sort set out in (but not limited to) sub-paragraphs (a) and (b) of paragraph (2), but such a power can only be exercised with the consent of the highway authority (who cannot unreasonably withhold consent). If the highway authority does not respond in the specified timescale or fail to give reasons for a refusal, consent will be deemed to be granted – see paragraphs (4) and (5).

##### Article 8 – Power to execute street works

This allows Network Rail to interfere with or break open the existing surface of a street (that is, the carriageway or footway) and if necessary move or install apparatus (including that of statutory undertakers) within the street for the construction of works authorised by the Order. In particular, this will authorise Network Rail to carry out the following works which are addressed in Schedule 7:

- (a) in relation to S22, in plots 1, 2, 3 and 4 shown on Sheet 1, to carry out works to remove the existing path (and tarmacked surface leading to the crossing and to

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<sup>1</sup> As set out in section 3 of the Design Guide (NR12))

remove the tactile paving adjacent to the crossing (as set out in the Design Guide (NR12)).

- (b) in relation to S23, to create footway in the existing carriageway of the A14 Slip Road and in Higham Road (as set out in section 3 of the Design Guide (NR12)).
- (c) in relation to S27, in plots 18 and 20 shown on Sheet 11, to clear the verge of vegetation and to provide a standing area for pedestrians and white line demarcation in the carriageway (as set out in section 3 of the Design Guide (NR12)).
- (d) in relation to S31, in plots 8 and 9 shown on Sheet 15, to clear the verge of vegetation and to provide a standing area for pedestrians and white line demarcation in the carriageway (as set out in section 3 of the Design Guide (NR12)).
- e) in relation to S04, in plots 3, 4 and 5 on Sheet 32 to make any necessary adjustments to and around the vehicle restraint barrier to allow pedestrians to pass round it (as set out in the Design Guide (NR12)).
- (f) in relation to S02, in plot 14 on Sheet 35, to allow for the new footway (as set out in the Design Guide (NR12)).

#### Article 10 – Temporary stopping up of streets

Article 10 authorises Network Rail to temporarily stop up the highways (including the public rights of way) set out in Schedule 8 to the Order between the P or T points specified in column (3) of the Schedule and shown on the relevant Order plan. The temporary stopping up is required to allow Network Rail to construct the works authorised by the Order, including to carry out the street works already authorised under articles 7 and 8 above. In certain cases this also provides for a PROW to be stopped up temporarily in order to effect the permanent stoppings up, ie extinguishment. In addition, in relation to S24, as shown on Sheet 8, Schedule 8 specifies temporary stopping up of the Unnamed Road as a safety measure where the parcels may encroach into the street; and, in relation to S01, as shown on Sheet 36, Schedule 8 specifies the temporary stopping up of Rectory Lane/Bridleway 015 and Restricted Byway 014 and Footpath 12, Brantham within order limits as plot 16 is being used for access for construction which may affect access to all three listed PROWs.

#### Article 11 – Construction and maintenance of new or altered streets

Article 11(1) sets out that article 11 relates only to streets (including altered carriageway), but not to any newly created or amended footpaths, bridleways or byways open to all traffic (because these are covered by the provisions of article 16). Its purpose is to ensure that any new or altered street is constructed to the reasonable satisfaction of the highway authority and places a maintenance obligation on Network Rail for the first 12 months on opening of the altered section of street. However, as there are no new streets to be constructed under this Order, Network Rail notes that article 11(2) and (3) do overlap and repeat themselves. Article 11(2) should therefore be deleted from the Order.

Network Rail is satisfied in all other respects that the contents of the Order Schedules are correct, however, it notes that the cross-reference in Schedule 8 should refer to article 10.

Table on Suggested Modifications by Suffolk County Council 6.4.18 as annotated by Network Rail

**Version 1**

<b>Amendment</b>	<b>Form</b>	<b>Network Rail response</b>
Article 5(7)	Additional provision	<p>The additional paragraph (7) which makes reference to requiring “prior agreement of the highway authority” is unnecessary and potentially confusing. The provisions which would authorise Network Rail to carry out street works (e.g. to alter or stop up the existing highway) already contain qualifications on the exercise of powers provided in the relevant articles which authorise those works. Those qualifications are either (a) to obtain the consent of the street authority (such consent not to be unreasonably withheld) (see e.g. article 7(4)), or (b)) to consult the street authority on particular works specified in the Order Schedules and to obtain their consent if works are not so specified (e.g. article 10 (5) re consultation if in Schedule and consent if not). Both provisions and their qualifications follow the form of the relevant TWA model clauses and Network Rail does not consider that the Council has provided any justification for the inclusion of their proposed additional provision.</p>
Article 7(5)	Provision /amended	<p>The proposed extension of 28 days to 56 days for the deeming of consent of the street/highway authority in relation to the power to alter the layout of streets is a new matter which has not been raised previously by the Council and no justification has been given as to why this modification is needed.</p> <p>Such an amendment is not acceptable to Network Rail on the basis that the 28-day deemed consent in this article (and also in article 10) would only arise in circumstances where the Council does not respond at all within the 28 days or refuses consent without giving grounds. Furthermore, such a change would be unnecessary if a side agreement is entered into in which details on</p>

		<p>arrangements for works are set out.</p> <p>If such an arrangement were approved this Order would be contrary to the 28-day timescale which has been established by precedent in numerous other TW Orders and hybrid Bills, and therefore considered by the Secretary of State to be a reasonable timescale. If agreed for this Order, it would put the Suffolk Order arrangements on a different basis to the other Anglia Level Crossing Orders proposed which could be difficult to manage at implementation stage. Network Rail requests the Inspector to recommend to the Secretary of State that this provision is not amended but remains as per the 28-day timescale preceded in other TW Orders.</p>
Article 8(3)	Additional provision	Specific reinstatement provisions as proposed by the Council are not necessary (and do not, for instance, appear in the model clause) because the relevant provisions from the New Roads and Street Works Act 1991 Act (the 1991 Act) will apply on the basis that the works in the Order amount to "street works" as defined by s48 of the 1991 Act and the reinstatement provisions in the 1991 Act have not been disapplied by the Order in articles 3 or 4.
Article 10(7)	Provision /amended	See comment re increased timescale re article 7(5) above
Article 11(3A)	Additional provision	There is no need to include a provision of the sort proposed here by the Council to address defects. Network Rail must maintain the street to the standard of the works when first opened to public use and it will include addressing defects in the first year of the works coming into use.
Article 12(2)	Provision /amended	See comment re increased timescale re article 7(5) above
Article 16(1A) – (1F)	Additional provisions	Network Rail has previously set out in correspondence (NR-INQ-08) that it is not appropriate to include in an Order details of arrangements concerning the exercise of powers which can be agreed by the parties in a legally binding agreement enforceable through the courts. Provisions of this sort are capable of being included in a side agreement. Network Rail is willing to negotiate and enter into an agreement

		on reasonable terms to address such arrangements. As regards specifically the proposed new article 16(1F) see also comments on proposed article 11(3A).
Article 16(11)	Amended provision	See comment re increased timescale re article 7(5) above
Article 16(13) - (14)	Additional provisions	<p><u>Proposed article 16(13)</u>: Network Rail has previously explained in correspondence(NR-INQ-08) that it is not appropriate to include in an Order details of arrangements concerning the exercise of powers which can be agreed by the parties in a legally binding agreement enforceable through the courts. To date the Secretary of State has not found it necessary to include such a provision in other TW Orders which provided for equivalent arrangements to those proposed here (eg see most recently, the Network Rail (Closure of Abbots Ripton Level Crossing) Order 2017 (SI 2017/1074) article 6 and the Network Rail (Northumberland Park Level Crossing and Coppermill Lane Level Crossing Closure) Order 2017 (SI 2017/257), article 7).</p> <p><u>Proposed article 16(14)</u>: None of the statutory provisions in article 16 of the Order can be varied by an agreement under article 16A as that provides for arrangements as to costs and does not allow for amendment of the terms of article 16. Even if an amended article 16A sought to do so, Network Rail does not consider that an agreement could change the now well-precedented terms of article 16 (see above under comments on proposed article 16(13)). It is therefore inappropriate to include a provision which seeks to alter the statutory effect of the provisions in article 16 as is proposed here. A side agreement may provide more detailed arrangements on how the powers may be exercised and may deal with costs, but those cannot vary or modify what is set out in article 16, including the timescales in article 16(11).</p>
Article 16A(1)-(3)	New article	Network Rail has previously explained in correspondence (NR-INQ-08) that it is not appropriate to include in an Order details of arrangements concerning the exercise of powers which can be agreed

		<p>by the parties in a legally binding agreement enforceable through the courts and the Secretary of State has not found it necessary to include such a provision in other TW Orders which provided for equivalent arrangements to those proposed here.</p> <p>Even if the powers/the provision is the subject of a side agreement as to how it is implemented, the costs provisions do not need to be given statutory effect on the face of the Order</p> <p>Furthermore, the inclusion of article 16A which relates to costs, and making article 16 subject to it, cannot be used to prevent article 16 powers being implemented (see comments under article 16(13) and (14)).</p>
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## Version 2

Article 5(7)	Additional provision	<p>The additional paragraph (7) which makes reference to requiring “prior agreement of the highway authority” is unnecessary and potentially confusing. The provisions which would authorise Network Rail to carry out street works (e.g. alter or stop up the existing highway) already contain qualifications on the exercise of powers provided in the relevant articles which authorise those works. Those qualifications are either (a) to obtain the consent of the street authority (such consent not to be unreasonably withheld) (see e.g. article 7(4)), or (b) to consult the street authority on particular works specified in the Order Schedules and to obtain their consent if works are not so specified (eg article 10 (5) re consultation if in Schedule and consent if not). Both provisions and their qualifications follow the form of the relevant TWA model clauses and Network Rail does not consider that the Council has provided any justification for the inclusion of their proposed additional provision.</p>
Article 7(5)	Provision amended	<p>The extension of 28 days to 56 days for the deeming of consent of the street/highway authority in relation to the power to alter the layout of streets is a new matter which has not been raised previously by the Council and no justification has been given as to why this modification is needed.</p>

		<p>Such an amendment is not acceptable to Network Rail on the basis that the 28-day deemed consent in this article (and also in article 10) would only arise in circumstances where the Council does not respond at all within the 28 days or refuses consent without giving grounds. Furthermore, such a change would be unnecessary if a side agreement is entered into in which details on arrangements for works are set out.</p> <p>If such an arrangement were approved this Order would be contrary to the 28-day timescale which has been established by precedent in numerous other TW Orders and hybrid Bills, and therefore considered by the Secretary of State to be a reasonable timescale. If agreed for this Order, it would put the Suffolk Order arrangements on a different basis to the other Anglia Level Crossing Orders proposed which could be difficult to manage at implementation stage. Network Rail requests the Inspector to recommend to the Secretary of State that this provision is not amended but remains as per the 28-day timescale preceded in other TW Orders.</p>
Article 8(3)	Additional provision	Specific reinstatement provisions as proposed by the Council are not necessary (and do not, for instance, appear in the model clause) because the relevant provisions from the 1991 Act will apply on the basis that the works in the Order amount to "street works" as defined by s48 of the 1991 Act and the reinstatement provisions in the 1991 Act have not been disapplied by the Order in articles 3 or 4.
Article 10(7)	Provision /amended	See comment re increased timescale re article 7(5) above
Article 11(3A)	Additional provision	There is no need to include a provision of the sort proposed here by the Council to address defects. Network Rail must maintain the street to the standard of the works when first opened to public use and it will include addressing defects in the first year of the works coming into use.
Article 12(2)	Provision /amended	See comment re increased timescale re article 7(5) above
Article 14(6)	Additional provision	None of the statutory provisions in articles 14, 15 or 16 of the Order can be varied by an agreement under article



		16A as that provides for detailed arrangements as to how the powers may be exercised and costs and does not allow for amendment of the terms of articles 14, 15 or 16. Even if an amended article 16A sought to do so, Network Rail does not consider that an agreement could change the now well-precedented terms of those articles (including as set out in the Network Rail (Closure of Abbots Ripton Level Crossing) Order 2017 (SI 2017/1074) and the Network Rail (Northumberland Park Level Crossing and Coppermill Lane Level Crossing Closure) Order 2017). It is therefore inappropriate to include a provision which seeks to alter the statutory effect of the provisions in articles 14, 15 and 16 as is proposed here. A side agreement may provide more detailed arrangements on how the powers may be exercised and may deal with costs, but those cannot vary or modify what is set out in article 16, including the timescales in article 16(11).
Article 15(5)	Additional provision	See comments on proposed article 14(6).
Article 16(13)	Additional provision	See comments on proposed article 14(6).
Article 16A	New article	Subject to discussions with the Council as to its specific terms and with certain qualifications, Network Rail is willing to accept inclusion of a provision allowing for the parties to enter into an agreement or agreements for some or all of the matters set out in proposed article 16A, but for the reasons stated above cannot accept that articles 14, 15 and 16 of the Order be subject to that agreement.

Winckworth Sherwood  
16.4.2018