

By Email and Post

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22 December 2017

Our Ref: HXA/18136/633

Dear Mr Kerr

**Network Rail (Suffolk Level Crossing Reduction) Order
Suffolk County Council**

Thank you for your letter to us dated 5 December 2017 a copy of which we note has also gone to the programme officer, requesting that the contents of the letter be added as part of Suffolk County Council's Statement of Case. If the Inspector is content to do so, Network Rail does not object to the Council adding to its statement in this way, though it may assist the council to consider the content of this letter, and it has written to the programme officer in such terms.

First, we should say that the Council is no doubt now aware that the inquiry is now reinstated to the original timetable and it may help to explain that, if made, the Order will confer statutory authority and the necessary powers on Network Rail to alter, extinguish and create public rights, for compulsory use of land or rights in land and to extinguish or interfere with private rights, subject to certain limitations within the Order, in relation to the closure of the various level crossings. A draft Order must conform to the model clauses provided in the Transport and Works (Model Clauses for Railways and Tramways) Order 2006 or point to suitable precedent or justify the provisions within the Order in the explanatory memorandum submitted with the application where they depart from them, and ultimately the Secretary of State decides the form in which the Order will be made.

The matters you raise generally relate to details arising from the exercise or implementation of the powers, not the form and extent of the powers to be conferred by the Secretary of State and are not matters which properly fall to be included in the Order itself. Most of the concerns raised in your letter are matters which Network Rail considers are more appropriately dealt with by way of written agreement, as has been the case with such matters on the related Essex and Cambridgeshire Level Crossing Reduction Orders. To that end we enclose a proposed draft agreement which it is hoped will address the Council's concerns raised in your letter dated 5 December 2017 and letter of objection

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Network Rail notes the Council's comments in relation to access for joint survey. Network Rail's view is that the suitability of the routes can largely be determined from the existing highway, which the Council can undertake prior to settling its proofs of evidence for the inquiry. Until the TWAO powers are made and exercised, NR itself has only limited powers to access third party land affected by the Order under statute unless it can secure agreement from the landowner for such purposes. As the acquiring authority Network Rail will be reliant on the survey powers under s172 of the Housing and Planning Act 2016 for its own surveys, or once the Order is made, under equivalent powers in the Order. Network Rail accepts the principle of undertaking joint site visits, and it will liaise with the Council to arrange these. There are likely to be a few cases where it will seek to undertake joint surveys in advance, but otherwise Network Rail is likely to carry out further joint site inspections post Order powers being granted, as provided for in the attached draft agreement, as surveys of the land will be required to confirm the detailed design of the route proposed.

We should add that Network Rail will be in contact with the Council early in the New Year with detailed design for the bridges required by the Order proposals and with reports on ecological Preliminary Methods of Working and archaeology to support the draft planning conditions accompanying the draft Order.

Turning to the further holding objection points you raise, Network Rail notes that the Council is not satisfied with the drafting of the Order in relation to certification of the new highway, regarding commuted sums and in relation to the information needed for a LEMO.

Certification process

In relation to the 28-day time limit for certification of works in article 16(11) we note that the Council is opposed to this time period and the Council is particularly concerned that if all certification requests were submitted at once it would place a disproportionate burden on the Highway authority. Article 14 of the Order is drafted so that for those crossings where a new public right of way is to be provided, the level crossing can only be closed once the new rights of way have been certified to the satisfaction of the highway authority.

However, Network Rail is content to confirm that it does not intend to implement all of the works and submit all of the certification requests to the Council at once or in one go. Assuming the Order is made and Network Rail proceeds to implement the Order, Network Rail expects to submit the requests in a phased approach. Furthermore, in advance of construction of works, Network Rail expects to liaise with the Council on the details of the new public rights of way (prow) to be created and provide a timetable and schedule of works so that the Council will be fully aware of the proposals and timescales. Therefore the requests for certification of completion of the relevant prow to the Council should not come either out of the blue or all at once so as to require certification by the Council in an unreasonable timescale. Network Rail's draft agreement includes provisions which amount to, in effect, a "pre-works certification" process.

Given this, Network Rail considers that the 28-day time limit proposed in the draft Order would be reasonable and remains consistent with the limit provided for in other recent Transport and Works Act (TWA) Orders which authorise the closure of level crossings, including the Network Rail (Closure of Abbots Ripton Level Crossing) Order (SI 2017/1074) made on 17 November 2017, Network Rail (Seaham Level Crossing) Order 2013 (SI 2013/533) and the Network Rail (Northumberland Park Level Crossing and Coppermill Lane Level Crossing Closure) Order 2017 (SI 2017/257).

Commuted sums

On commuted sums, again, this is not a matter for the Order, but Network Rail agrees that the Order would place an increased maintenance burden on the Highway Authority through the provision of new prow. Therefore Network Rail will be seeking to agree separately through the

draft agreement the level of payment to be made in commuted sums to enable the Highway Authority to effectively manage the additional prowl network.

Network Rail notes that in the Council's objection letter dated 3 May 2017 and its letter dated 2 August 2017 confirming compliance with section 239 of the Local Government Act 1972, it also refers to sending a list of works and commuted sums assessment, but to date Network Rail has not received anything in either regard. It would be helpful if the Council could provide this information to Network Rail to assist with discussions in relation to the draft agreement.

Legal Event Modification Order

Network Rail accepts that for the purposes of making the Legal Event Modification Order associated with the works in the Transport and Works Act Order (TWAo), the Council will need to have the widths of the new rights of way and Ordnance Survey Grid References. However, as above, these are matters for the draft agreement, and have not been included in other recent TWAos relating to the closure of level crossings.

Compensation to Highway and surveying authority

Network Rail notes from in your letter that the Council is concerned that significant officer time and resources have been spent in dealing with the application for this Order and on dealing with matters if the Order is granted and therefore seeking reasonable compensation from Network Rail for time and money spent, and noting an administration fee would be payable for applications under s118A and S119A of the Highways Act 1990.

Network Rail is not obliged under the Transport and Works Act to pay a Highway Authority in relation to such matters and has not agreed to do so on the other proposed level crossing reduction Orders. Parties are expected to meet their own costs in attending an inquiry. As you will appreciate, Network Rail, as a public sector body, is required to comply with the requirements of "Managing Public Money". Network Rail is therefore obliged to avoid arrangements which are, or could be, construed as a special payment, (which would require justification to HM Treasury before approval) and, a payment of compensation as described in your letter, which, as an ex-gratia payment over and above statutory requirements, would appear to amount to such a payment.

Right to object to altered proposals:

If NR proposes any amendments to routes proposed in the Order before close of inquiry, the Council will be notified and provided with an opportunity to comment. The Council should have received notification in early December from Network Rail of amendments to the Scheme withdrawing crossing S05 Pannington Hall and 3 further plots, and reducing the extent of another plot remove public highway.

Meeting on 1 August and draft Statement of Common Ground

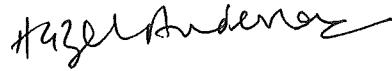
The Council and Network Rail met on 1 August to discuss the Council's letter of objection and concerns raised over particular crossing proposals. A set of minutes was provided by Network Rail on 4 August.

Network Rail notes there were actions on the council to respond in relation to S23 Higham and S27 Barrells and we would be grateful if you could now provide a response.

Network Rail (Nick Eddy) sent a draft statement of common ground to you for comment on 4 August and Network Rail would be grateful to receive the Council's substantive comments on this, in order to narrow the issues between the parties ahead of the public inquiry.

We hope the above explanations and the enclosed draft agreement will allay the concerns of the council in their letter of objection subsequent correspondence, and we look forward to receiving your comments on the draft agreement in the new year.

Yours sincerely



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Your Ref:
Our Ref:
Date: 5 December 2017
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Dear Sirs,

**TRANSPORT AND WORKS ACT 1992 (TWA):
APPLICATION FOR THE PROPOSED NETWORK RAIL (SUFFOLK LEVEL
CROSSINGS REDUCTION) ORDER**

Further to Suffolk County Council's objection letter dated 3 May 2017 (as ratified at its full council meeting on 20 July 2017, hereafter "the Objection") and Mark Stevens's (Assistant Director – Operational Highways) letter dated 2 August 2017 addressed to the Secretary of State for Transport (SoSfT), the Council is now in receipt of the Department of Transport's letter to you dated 27 November 2017, advising that the start of the Suffolk public inquiry has been postponed until further notice.

Notwithstanding the recent adjournment of the Inquiry, we are mindful that the Transport and Works (Inquiry Procedure) Rules 2004, and the Guide to TWA Procedures, makes clear that parties are encouraged to provide maximum disclosure and exchange of information before the Inquiry takes place. In this regard, we seek to provide further detail on a number of the Council's objections to the Order.

Suffolk County Council is formally requesting that the Inspector allow the contents of this letter to be added to the County Council's statement of case (pursuant to rule 18(9) and rule 7 of the Inquiry Procedure Rules).

Further request for access to the proposed alternative routes

The Council wishes to express its concern at Network Rail's (NR) continued failure to provide Suffolk County Council with access to the proposed alternative routes for the rights of way which could be affected by the above Order. The County Council's officers will need to have had access to the proposed alternative routes in good time before the deadline for the exchange of proofs of evidence. This is to ensure that the County Council can properly assess what is being proposed by the Order and whether or not, in the view of the County Council, each of the proposed alternative routes is suitable and convenient for existing users.¹

¹ See *A Guide to TWA Procedures*, Annex 2, p. 105 which states that, in relation to an alternative right of way being provided under 5(6) Transport and Works Act 1992, "...the Secretary of State would wish to be satisfied that it will be a convenient and suitable replacement for existing users."

The Suffolk Level Crossing Reduction Order was first tabled by NR in 2015 and various meetings were held with council officers. The specific Order proposals were subsequently progressed by NR's appointed consultants during 2016. Throughout this process the council has stressed the importance of undertaking joint site visits with NR to inspect the proposed diversion routes currently included in the Order, the purpose of which would be to agree the works required to bring the new routes into a fit condition for use by the public and to inform the calculation of a commuted sum required to maintain the resultant network. These inspections could have the further potential benefit of reducing the number of objections on the part of the council.

It is therefore disappointing that it has only been very recently that NR has agreed to undertake these visits and highly frustrating that the earliest dates relevant NR staff were available from was the week commencing 15 January 2018 (only one day before the deadline for the exchange of proofs of evidence on 16 January 2018).

Now that the Inquiry has been postponed, we request that NR honour its commitment to enable these site visits and make all the necessary access arrangements with affected landowners. This must be done as soon as possible and, in any event, by such a date as will allow the council enough time to adequately prepare its evidence.

Holding objection 1: Until the County Council has been provided with access to enable council officers to "walk the route" of the proposed alternative routes in the Order, the County Council wishes to make clear that it will maintain a "holding" objection to all of those level crossing closures for which NR's proposals depend on the provision of an alternative route. It does so without prejudice to any other basis on which the County Council maintains a "holding" objection (as further detailed below).

Further Holding objections

In the event that the Order is granted, Suffolk County Council, as the local highway authority, will become responsible for the maintenance of the newly diverted routes and for ensuring they are safe to use. It is therefore absolutely essential that the council has the opportunity to advise as to whether the alternative routes can be brought into a fit condition for public use. It is further essential that the county council is not faced with unaccounted for expense in maintaining the newly created routes; a liability of course that has no time limit.

Suffolk County Council is not satisfied with how the Order is presently drafted with regards *inter alia* to both the need for the County Council to (i) certify that any new highway has been completed to the reasonable satisfaction of the highway authority and (ii) agree commuted sums.

Background communications on certification and commuted sums issues

On the first page of the Objection the County Council states:

'Some of the council's concerns could have been addressed by the applicant at an earlier stage, had, for example, NR taken up the council's offers to undertake joint site inspections of each proposal.'

'Further, the council must consider the impact of the proposals in its capacity as highway authority. New routes will become maintainable at the public expense and must therefore meet appropriate standards.'

And on the second page the letter states:

'At this stage, this response sets out whether the council objects to a proposal, and why, together with any other comments on each proposal.'

- (i) a highway has either been stopped up, diverted, widened or extended;
- (ii) a highway has ceased to be a highway of that description; or,
- (iii) a new right of way has been created over land in the area to which the map relates, being a right of way such that the land over which the right subsists is a public path or restricted byway.

Suffolk County Council will need to make a Legal Event Modification Order ("LEMO") to translate onto the Definitive Map and Statement the changes made to the rights of way network by the Order. In order to do so, Suffolk County Council will need information on the widths of the rights of way at issue and their Ordnance Survey grid references.

Holding objection 4: Suffolk County Council maintains a holding objection to the whole Order unless and until the Order is modified so as to specify the relevant information on widths and grid references to enable the Surveying Authority to make a LEMO.

Compensation to the Highway and Surveying Authority

In addition to the need to agree commuted sums for the ongoing maintenance of new, or altered, highways that may result from the Order, Suffolk County Council is concerned that significant officer time and resources have been spent in order to respond to NR's application for the Order, particularly in light of the unprecedented scale of the number of rights of way to be affected by a single Transport and Works Act order. Furthermore, if the Order were to be granted, further time and money will need to be spent on agreeing the detailed designs of works, commuted sums and to complete the certification process. The County Council will, therefore, be seeking reasonable compensation from NR for the time and money spent in this regard. The County Council notes that it charges an administration fee for applications made under the Highways Act 1980 for the diversion or extinguishment of Public Rights of Way, under sections 118A and 119A.

Right to object to altered proposals

Suffolk County Council has not objected to 15 of the 24 proposed level crossing closures. However, should NR make any changes to these proposals in the lead up to, or during, the Inquiry, the County Council reserves the right to reconsider its position.

Conclusion

As is noted above, the Council is requesting that this letter be read in conjunction with its statement of case which consists, namely, of the letter dated 3 May 2017. The County Council, therefore, maintains the objections, and concerns, set out there.

We reiterate our request that NR arrange for the County Council to have access to the proposed alternative routes as soon as possible. We look forward to hearing from you.

Yours sincerely



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Cc Joanna Vincent, Persona Associates Limited, 1st Floor, Bailey House,
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'The council will, however, be seeking a commuted sum from the applicant, to offset future maintenance costs of the resultant network. It is also preparing a list of works it considers necessary to bring the new routes into being and capable of being maintained at public expense.'

In its letter of 2 August the county council advised the SoSfT of the following:-

'Suffolk County Council is continuing to work with Network Rail to address outstanding objections and will send the list of works and commuted sums assessment referred to in its holding objection letter, in due course.'

The point of including these references in the letters of 3 May and 2 August is to draw to the attention of the SoSfT the importance of the proposed diversion routes being capable of being brought into a fit condition for the public to use, and that a commuted sum is paid to offset the cost of their maintenance.

The County Council's position on the certification process

Suffolk County Council is very concerned about the wording of draft article 16(11) of the proposed Order. As presently worded, article 16(11) provides for a deemed certification procedure, whereby if the highway authority fails to reply in 28 days to a request by NR for certification of a new highway under article 16(1), that new highway will be "treated as completed to the satisfaction of the highway authority". Suffolk County Council objects to any such "deemed certification procedure", particularly as there is nothing to stop NR from requesting certification for all new highways created under the Order at the same time, which would likely result in a disproportionate burden on the highway authority.

Suffolk County Council is also concerned that there is no provision to require "pre-works certification" by the highway authority of detailed designs for the works to be carried out before those works are started. The County Council requests that an article is added to the Order which requires there to be pre-works certification before any new highway works are carried out.

Further, the County Council is of the view that the highway authority can only certify that new highways have been completed to its satisfaction if commuted sums for the ongoing cost of maintaining that new highway have been agreed.

Holding objection 2: Suffolk County Council maintains a holding objection to the whole Order unless and until the Order is re-worded to address the County Council's above concerns relating to the certification process.

The County Council's position on commuted sums

Suffolk County Council is of the view that commuted sums could only be agreed for new highways once the detailed designs for the works to be carried out for the purposes of creating the new highways have been agreed with the highway authority.

Holding objection 3: Suffolk County Council maintains a holding objection to the whole Order unless and until an appropriate mechanism for agreeing commuted sums, which addresses the County Council's concerns, is added to the Order.

Legal Event Modification Order

Suffolk County Council is aware that it is under a duty, pursuant to section 53 of the Wildlife and Countryside Act 1981, to, as soon as reasonably practicable, make a modification order to the Definitive Map and Statement, which reflects a "legal event" whereby: