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By Email Only
Mr Steve Kerr
Definitive Map Manager, Rights of Way and Access
Suffolk Highways
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30 January 2018

Our Ref: HXA/jw/18136/00662

Dear Mr Kerr

Transport and Works Act 1992
Proposed Network Rail (Suffolk Level Crossing Reduction) Order

Further to your letter dated 5 January 2018 to Network Rail and having seen your proof of evidence submitted to the forthcoming inquiry into the above draft Order which includes comment on the Council's view on the draft Order and plans in paragraphs 31 to 52, Network Rail responds as follows:

1 Appropriate content of the Order

Network Rail considers that matters relating to the drafting of the Order are properly matters for legal submission, rather than for evidence. To the extent necessary, Network Rail will make submissions to the Inquiry on the points raised in your Proof.

Nonetheless, and since it has been raised in your letter dated 5 January, Network Rail's position is that it maintains that precedented clauses, both in the form of the Model Clauses and provisions used in other made Transport and Works Act (TW) Orders, provide a clear indication and is persuasive of the scope of provisions that Secretary of State considers appropriate for a TW Order. The model clauses and other clauses therefore are more than "*there to help an applicant with the drafting of an Order*".

You say on the second page of your letter that "*The scale of what Network Rail is seeking to achieve is through this Order is unprecedented*" and that "*the council views the scale of the proposed closures as a substantive distinction when comparing it to other TWA Orders*". To the extent necessary, we would direct you to the Chiltern Railways (Bicester to Oxford Improvements) Order 2012/2679 which (as well as providing for closure and replacement of road and accommodation crossings) includes provision for the closure and replacement of 13 footpath level crossings in the District of Cherwell, Oxfordshire. We do not consider that the scale of what

is proposed in this Order is such as to justify what would be a significant departure from previous precedent.

We also note that you say in your letter on page 2 that "*to the extent you refer to what is, or has been, occurring in the related Essex and Cambridgeshire Level Crossing Reduction Orders (on p1 of your letter)* [Network Rail's letter dated 22 December]*, we refute that this bears any significance when assessing the Council's position in relation to the Suffolk Inquiry. Rather this is simply a statement of fact that Network Rail has chosen to adopt the same approach for all three Orders*". Bearing this in mind, Network Rail is surprised to note in your proof at paragraph 44 in relation to a request against article 16(11) of the Order, reference to this being "*in line with neighbouring authorities (Cambridge* (sic) *County Council and Essex County Council et al)*".

2 Extent of powers vs details

Network Rail does not agree with your analysis under the above heading, on page 2 of your letter. The Order will confer powers and rights on Network Rail including to survey, compulsory acquire or use land, create, extinguish or interfere with public and private rights, redesignate highways or dedicate land as highway, interfere with public highway, close level crossings, in accordance with the provisions of sections 1 and 5 of the Transport and Works Act and will authorise the construction and maintenance of certain works associated with the proposals and disapply certain legislation.

The form of the powers in the Order, i.e. without qualifications or preconditions of the sort which the Council is seeking, provides what is required, to enable Network Rail to carry out the works relating to its transport undertaking without undue delay, given the public interest in closing the level crossings It is wholly inappropriate to include in the Order details of arrangements concerning the exercise of the powers which can be agreed by parties in a legally binding agreement enforceable through the courts. This is because one only includes in a statutory instrument the matters which are actually necessary and require statutory effect. Network Rail fully expects that the matters which can reasonably be dealt with by agreement (and which Network Rail has indicated it is willing to enter into, having provided a draft with its 22 December 2017 letter) would not be included by the Secretary of State in the Order, as they are matters which it is not necessary to give statutory effect to.

Although the Council may desire that obligations, such as the obligation to pay commuted sums should be included in the Order, to qualify or make conditional the exercise of the powers, that is not a matter for the Order, as the instrument which confers those powers. It is normal practice on TW Orders for obligations to qualify or condition the exercise of powers in the Order as between parties by means of a separate legal agreement and a review of recently made TW Orders, whether for level crossing closures or otherwise, will confirm that such obligations simply do not appear on the face of the Order. Network Rail considers that a submission to amend the Order to provide for these qualifications would not be accepted by the Secretary of State. If the Council wishes to seek such conditions and qualifications to the exercise of the powers conferred through the Order, and particularly where it has concerns as to the quantity of crossings involved, Network Rail strongly suggests that the Council should seek to remedy this by negotiating these matters through the draft side agreement Network Rail provided in December 2017.

3 Joint site visits

NR has accepted the principle of joint site visits as set out in its letter dated 22 December 2017 and explained the timing of these. This is because, for third party land, until the Order is made and comes into force, Network Rail has limited powers of entry to enter and survey land, and will rely on s172 of the Housing and Planning Act 2016, which requires notice to the landowner or it must seek agreement with the landowner to enter the land.

4 Certification process

For the reasons stated above, we maintain that the appropriate mechanism by which to address concerns over volume, process and detail is by way of a legal agreement, and as indicated in its letter dated 22 December, Network Rail is willing to enter into a legally binding agreement which will provide arrangements for a detailed process including for approval in principle leading to the certification of the diversionary routes proposed in the Order, and any necessary phasing. If the Council is not content with the proposed phasing, or other details in the draft agreement, Network Rail invites the Council to provide a counter proposal to enable a constructive dialogue on these matters to take place and to reduce the scope of issues between the parties at the forthcoming inquiry.

Network Rail's view remains that article 16(11) in the Order, which provides for a 28-day deemed certification per crossing if the highway authority does not respond within that timescale, needs no adjustment. Network Rail, having qualified article 16 so that it cannot close a level crossing until a new diversionary route is constructed to the reasonable satisfaction of the highway authority, should not be left to wait indefinitely for the diversionary route to be certified and the crossing closed, both of which are firmly in the public interest. Article 16(11) is retained in the Order in the form accepted by the Secretary of State on other TW Orders with equivalent provision, including the Chiltern Railways (Bicester to Oxford Improvements) Order 2012 and as has recently been approved by Parliament relating to certification of highways in paragraph 10 of Schedule 4 to the High Speed Rail (London – West Midlands) Act 2017 (c.7). Furthermore, Network Rail does not believe this provision was challenged by any highway authority before the Select Committee hearing petitions against the then Bill. I would reiterate that the 28 day period runs from the application for certification in respect of each individual crossing: it is not a 28 day period from when the first application is submitted.

5 Commuted sums

Again, as set out above, Network Rail does not agree that commuted sums are a matter that should be included in the Order. Network Rail believes that it should be possible to settle these by agreement with the Council, documented through a legally binding agreement.

6 Legal Event Modification Order

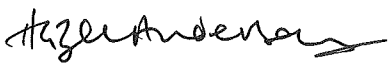
Network Rail does not agree that widths and grid references are a matter that should be included in the TW Order. They relate to the matters for the Council under its duty in section 53(4) of the Wildlife and Countryside Act 1981 to promote a Legal Event Modification Order (LEMO) to change the Definitive Map and Statement and therefore have no place in this TW Order. The provisions in the TW Order to extinguish, create or alter public rights of way will create legal events as defined in section 53(3). which will trigger the need for a LEMO. The TW Order is not in itself, and cannot under section 53A be modified to become, a LEMO. Network Rail is perfectly willing to agree to provide the widths and grid references to the Council in the side agreement, as evidenced in Schedule 2 to the draft agreement sent under cover of our letter dated 22 December 2017. SCC's duty under section 53 will remain to promote a LEMO as required.

7 Compensation to Highway and Surveying Authority

Unlike procedures under the Highways Act 1980 in relation to public paths and rail crossing diversion Orders where the Highway Authority as decision maker is able to charge for the costs associated with the making, advertising, and confirming of the Order itself, in the case of a TW Order, the Highway Authority is not the decision maker and there are no obligations under the Transport and Works Act to pay the Highways Authority's costs. Network Rail maintains its position set out in its letter dated 22 December that it is not obliged to make such payments under the Transport and Works Act and considers that such a payment would constitute a special payment under "Managing Public Money", and which would, if accepted, set an unhelpful precedent for future TW Orders.

A copy of this letter goes to the programme officer, Joanna Vincent.

Yours sincerely



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11 January 2018

Our Ref: HXA/18136/00633

Dear Mr Kerr

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

Thank you for your letter dated 5 January 2018.

Network Rail is disappointed that the Council maintains its position in relation to matters which Network Rail considers fall outwith the provisions of the draft Order and ought reasonably to be included in a side agreement.

Nonetheless it notes that the Council is willing to meet to discuss scope and wording for a draft agreement, and with a view to narrowing the issues between the parties, Network Rail (Nick Eddy) has already offered (in an email dated 9 January to council officers) to meet the Council to discuss commuted sums, a draft agreement and other concerns relating particular crossings in the Order. It would also be helpful to discuss the draft Statement of Common Ground at that meeting.

We look forward to receiving suggested dates from you for a meeting in Ipswich.

Yours sincerely

Hazel Anderson

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Your Ref: HXA/18136/633
Our Ref:
Date: 5 January 2018
Enquiries to: Stephen Kerr
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Dear Ms Anderson,

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

Thank you for your letter, dated 22 December 2017. We are happy to note that Network Rail will not object to Suffolk County Council's (the "Council") request to add the contents of its letter, dated 5 December 2017, to its statement of case.

Your letter is helpful in setting out Network Rail's position on the points made by the Council in our 5 December letter and we appreciate your having sent through a first draft for a suggested side agreement to be entered into by Network Rail and the Council.

We thought it would be useful for us to make clear, at the outset, our continued position on these issues, noting the contents of your letter and the draft side agreement. We hope that, by doing so, this will assist any further discussions that may be had between the parties in the period leading up to, and during, the Inquiry.

Notwithstanding our position, as clarified in this letter, we still appreciate the merit in pursuing a side agreement for matters of detail, arising from the exercise or implementation of the powers which may be conferred by the Order. In this regard, we suggest that an initial meeting be arranged with representatives of both parties, at the earliest convenience (and once Network Rail has had an opportunity to consider the contents of this letter), to discuss the appropriate scope for, and wording of, the draft agreement.

For ease of reference, and where possible, we will try to align our response to the headings included in your letter, dated 22 December 2017.

Overview

Appropriate content of the Order

Firstly, we must make clear that we are operating under no misconception as to what matters are, or are not, permissible for inclusion in the Order. You state in your letter that:

"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."

To the extent that this implies any presumption that there must be compliance with the 2006 Model Clauses Order, or another precedent, unless this can otherwise be justified, it is an inaccurate reflection of the Transport and Works Act 1992 ("TWA") framework. The explanatory note to the 2006 Model Clauses Order states that "*The use of the prescribed clauses is not mandatory: they may be omitted entirely from orders if not appropriate or may be adapted to meet special requirements.*" In short, an applicant for a TWA order will need to justify the proposed order, regardless of whether the wording is based on the Model Clauses or not. The Model Clauses are there to help an applicant with the drafting of an order, but they should not be referred to as in any way prescribing or restricting what can be included in it.

We seek to emphasise this point (which we appreciate may have arisen on the basis of a misunderstanding of semantics), due to the particular nature of this Order. It is accepted that the scale of what Network Rail is seeking to achieve through this Order is unprecedented. Network Rail has obtained TWA orders for level crossing closures before, which you have cited to on p.2 of your letter, but these have only ever been for one or two crossing closures. We are unaware of any precedent whereby Network Rail has successfully closed more than two crossings through one TWA order. The Council views the scale of the proposed closures as a substantive distinction when comparing it to previous TWA orders. As a result, these previous orders are of no precedential value.

Furthermore, to the extent that you refer to what is, or has been, occurring in the related Essex and Cambridgeshire Level Crossing Reduction Orders (on p.1 of your letter), we refute that this bears any significance when assessing the Council's position in relation to the Suffolk Inquiry. Rather, this is simply a statement of fact that Network Rail has chosen to adopt the same approach for all three orders.

"Extent of powers" vs "details"

In the third paragraph of p.1 of your letter, you state:

"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."

We do not accept this. The concerns we have set out, in our letter dated 5 December 2017, do relate to the "extent" of Network Rail's powers.

To take the issue of commuted sums as an example, whilst the actual amount to be agreed, or even the principles by which to agree it, may be matters of "detail", the fact that commuted sums need to be agreed before the new highways can be certified goes to the "extent" of Network Rail's powers. We are requesting that NR would only have the power to have works certified as completed to the satisfaction of the Highway Authority if commuted sums have been agreed. Their powers would, thereby, be limited in extent.

Similarly, were there to be a pre-works authorisation requirement built into the process of exercising the power to carry out the works under the Order, the effect of this would be to limit Network Rail's powers to carry out the works. Such powers would only be exercisable once the pre-works authorisation requirement had been met. Again, this matter affects the "form and extent" of NR's powers rather than just the "exercise or implementation of the powers".

In short, the procedure by which NR's powers are to be exercised will affect the substance (or "form and extent") of those powers. For this reason, we cannot accept that our holding objections can be sufficiently addressed through means of a side agreement.

Ongoing request for joint site visits

You state that Network Rail considers that the suitability of the routes can largely be determined from the existing highway. We do not accept this and reiterate our request that the Council be provided with the opportunity to attend joint site visits as soon as possible. We maintain our holding objection (holding objection 1) in this regard.

The Council considers it is impossible to properly assess the suitability of the vast majorirty of the proposed alternatives from the connecting highway network. To undertake an accurate assessment will require each diversionary route to be walked along its entire length, and this would necessitate the permission of landowners to access their land.

Furthermore, we reiterate our concern that the failure, by Network Rail, to arrange joint site visits prior to the deadline for submission of proofs, has restricted the evidence that the Council can provide. We may, therefore, request an opportunity to add to any proofs of evidence following the joint site visits, once these have been arranged.

Certification process

We are not content to rely on the non-binding assurance given by Network Rail, as communicated via your letter dated 22 December 2017, that Network Rail will not implement all the works and submit all of the certification requests to the Council at once or in one go. Whilst we are happy to note that Network Rail does not expect the requests for certification to come *"out of the blue or all at once so as to require certification by the Council in an unreasonable timescale"*, we maintain our objection to the inclusion of Article 16(11) in the Order and our holding objection (holding objection 2) to the whole Order unless and until the Order can be re-worded to address the Council's concerns relating to the certification process (as set out in the Council's letter dated 5 December 2017).

Nor, do we accept that the draft side agreement's provisions, both as to (i) the pre-works authorisation process (section 5) and (ii) the post-works certification process (section 7) satisfy our concerns in this regard. We note, in particular, that section 7 is of little, if any, utility to the Council, whilst Article 16(11) remains in the Order.

We take this opportunity to also highlight that the "phases" suggested in the draft side agreement are for *"[w]orks for a group of not more than [15] crossings, unless otherwise agreed in writing between Network Rail and the Highway Authority"*. We do not consider 15 crossings at a time to be a "phased approach", nor do we consider this to be a reasonable or appropriate number of certification requests to be dealt with at the same time.

Commuted sums

We maintain our position that a requirement that commuted sums must be agreed prior to certification of the works, is an appropriate matter for inclusion in the Order.

Whilst we accept that the actual amount of commuted sums to be agreed, as well as the method by which to calculate the amount, are matters that will best be dealt with by means of a side agreement, we maintain that the overarching requirement that commuted sums will need to be agreed prior to certification (and that there should be no "deemed certification" procedure that could undermine this) is an appropriate matter for inclusion in the Order.

Legal Event Modification Order

Similarly, we maintain our position as regards the need to include widths and grid references for new, or modified, rights of way in the Order. If it is not possible for this information to be provided,

with certainty, until the detailed design stage, then we suggest that a provision is inserted into the Order to ensure a mechanism by which this information will be provided to the Council, as the Surveying Authority, prior to both (i) any pre-works authorisation and (ii) post-works certification (should this information change during the course of the works).

Compensation to Highway and Surveying Authority

We must note that we do not see how the payments requested could "appear to amount" to "ex-gratia" payments, under the Managing Public Money framework (a document which, of course, the Council is similarly governed by). The notion of an "ex-gratia" or "special" payment relates to payments over and above statutory requirements. The statutory requirement at issue is the terms of the Order itself. If the Order is made, and if it contains provision for compensation to be paid by NR to the Highway or Surveying Authority, then it is the Order, itself, that will be the statutory requirement under which the payments would be made.

Even if these payments did somehow constitute ex-gratia payments, which we do not accept, there is no duty to "avoid" these. Rather, public bodies are cautioned to only authorise them after careful appraisal of the facts and when satisfied that the best course has been identified (*Managing Public Money,* A4.13.2) and by obtaining approval from the Treasury. The document goes on to state, at A4.13.7, how the Treasury will consider each proposed payment. It is clear, therefore, that the very fact that a payment is ex-gratia is not a basis on which to dismiss it.

We reiterate, however, that there is no basis for considering these payments to be ex-gratia.

Conclusion

We have noted the requests that Network Rail has made for the Council to send through a list of works and commuted sums assessment, a response to the actions contained in the minutes for the meeting on 4 August 2017, and comments on the draft statement of common ground.

We communicated the principles by which the Council intends to calculate a commuted sums payment to Network Rail on 22 December 2017 and hope to be in a position to return the amended draft statement of common ground shortly. At this stage of the proceedings we are not in a position to send through the list of works, for the reasons set out above and in our letter of 5 December.

We hope that this letter helps to clarify our position in relation to the matters addressed in your letter, dated 22 December 2017. As noted above, we take the view that it is still worth pursing further negotiations on the draft side agreement, albeit that the Council will be taking the position detailed in this letter with regards to what matters can effectively be dealt with in such an agreement.

Yours sincerely,

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