

Network Rail (Suffolk Level Crossing Reduction) Order Inquiry

Note on Inspector concerns on draft Order as drafted and side agreement

1 **Article 10(7) and Article 16(11)**

- 1.1 As set out in the Explanatory Memorandum (NR 3), article 10 (temporary stopping up of streets) includes powers for Network Rail to temporarily stop up, alter or divert a street and also to use it as a temporary worksite. Paragraph 5 requires that before exercising powers under this article Network Rail must either (a) consult with the highway authority in relation to the streets specified in Schedule 8, or (b) obtain the consent of the highway authority in relation to any other street, but such consent must not be unreasonably withheld. (This follows the model clause). Paragraph 7 is not in the model clause but has precedent in article 12 of the Network Rail (Ordsall Chord) Order 2015 (SI 2015/780). It provides that in relation to paragraph 5(b) deemed consent for non-specified streets will be given after 28 days where the highway authority has either failed to give notice or refuses to give grounds for its refusal. Network Rail considers that inclusion of article 10(7) is justified in this case because it would prevent a highway authority from unnecessarily or unreasonably delaying the implementation of works in the Order. The Secretary of State has been satisfied on other TWA Orders as the principle of providing for a deemed consent in similar circumstances.
- 1.2 Suffolk County Council originally expressed concerns over this provision and proposed that a longer time period for deemed consent (56 days) be included in the Order to assist with resourcing in relation to the consents, approvals and certifications required by the Order in relation to the various works authorised within it. However, such an amendment to the timescale is not required in the Order because the side agreement provides a mechanism for staging of submission of details and approvals for the works per crossing which will assist the Council in resourcing any formal request under article 10(7), such that the original concern over the 28-day time limit is resolved. So far as the Council and Network Rail are concerned the provision in article 10(7) can remain as provided in the filled up Order dated 24 May 2018.
- 1.3 As set out in the Explanatory Memorandum, article 16 is largely based on model clause 10, Construction and maintenance of new or altered streets. Article 16(11) is not included in the model clause but has precedent in article 7(4) of the Network Rail (Northumberland Park Level Crossing and Coppermill Level Crossing Closure) Order 2017 (SI 2017/257) and article 6(7) of the Network Rail (Closure of Abbots Ripton Level Crossing) Order 2017 (SI 2017/1074). Network Rail justifies the inclusion of article 16(11) in equivalent terms in this case as it considers it appropriate to include a deemed 28-day certification in circumstances where a highway authority fails to respond to a request for certification of new highway (as specified in part 1 of Schedule 2 to the Order) which, under article 14(3), is required to be provided before a level crossing can be closed. Having constructed new highway to provide for a suitable and convenient alternative to meet the tests required under section 5(6) of the Transport and Works Act 1992, Network Rail requires inclusion of such a provision in this

case so that the closure of a crossing (under article 14) cannot be frustrated by a failure to respond to a certification request by a highway authority.

- 1.4 Article 16(11) does not go so far as article 10(7) in providing for a deemed consent in relation to a failure to give grounds for a refusal and indeed does not explicitly refer to refusal. This is because the failure to give grounds has not as yet been included in recent TWA Orders to close level crossings and Network Rail in considering the provisions of this article considered the form of deemed refusal in earlier orders as sufficient in this case. It did not specifically consider the failure to give grounds point in relation to this paragraph for consistency with article 10(7). Network Rail would suggest that although article 16(11) does not explicitly provide for refusal, it can be implied (and in those circumstances the matter could be referred to arbitration under article 34 of the Order). However, a deemed consent on the basis of a failure to give grounds for refusal cannot be implied in article 16(11) and must be expressly provided for, or the inclusion of those words in article 10(7) would not be necessary. It does not matter that the two articles are not consistent with each other. Both provisions are clear in themselves and are not linked. As there is a side agreement in place to deal with arrangements leading to any formal request under article 16(11) for certification, it matters less that article 16(11) does not explicitly include provision for failure to give grounds of refusal and it makes sense to require grounds for refusal to consent to a temporary highway closure. If the inspector is concerned that the two articles are inconsistent Network Rail would have no objection if the Inspector wished to recommend inclusion of such words in the Order.
- 1.5 Suffolk County Council (the Council) originally expressed concerns over this provision and proposed that a longer time period for deemed consent (56 days) be included in the Order to assist with resourcing in relation to certification required under article 16. However, such an amendment to the timescale is not required in the Order because the side agreement provides a mechanism for staging of submission of details and approvals for the works per crossing which will assist the Council in resourcing any formal request under article 16, such that the original concern over the 28-day time limit is resolved. So far as the Council and Network Rail are concerned the provision in article 16(11) can remain as provided in the filled up Order dated 24 May 2018.

2 Relationship between article 14 and article 16

- 2.1 Both SCC thought its table of explanatory text on modifications submitted by the Council in OP-INQ 91 for version 2 of the modification Order and the Ramblers (paragraph 16 of OP INQ 89) raised a concern in relation to the extent of the condition applied in article 14 before level crossings can be stopped up. The condition is that the new highways specified in Part 1 of Schedule 2 are to be completed to the reasonable satisfaction of the highway authority under article 16 and brought into public use. The concern is that the condition as drafted does not extend to cover modifications to existing highway and a proposed amendment by SCC sought to ensure that the relevant level crossing could not be stopped up and the alternative route brought into use until that route is acceptable in safety terms, including following stage 2 RSAs where required.

- 2.2 However, as set out in the Joint Statement submitted on 24 May 2018 by the Council and Network Rail, the side agreement includes a specific provision requiring the approval and construction of any works altering the existing highway, which would include works required following a stage 2 RSA, to be undertaken before the related crossing can be closed. This has been sufficient to address the council's concerns on the point, and should therefore also meet the concerns of the Ramblers who can have comfort that the highway authority is now satisfied that there is legally binding obligation on Network Rail to ensure that modifications to existing highway and provision of new highway will have to be implemented before level crossings can be closed, such that its objection and proposed modification have now been withdrawn.

3 Joint statement on behalf of Network Rail and the Council

- 3.1 The inspector on day 24 raised concern about bullet points 2 and 4 of the joint statement relating to the scope of the completed side Agreement. Bullet point 2 explains that the side agreement contains arrangements for agreeing the design and approval of a Schedule of works in relation to each crossing. Bullet point 4 refers to arrangements relating to certification of the works including the detailed information to be provided to the Council to enable them to make modification to the Definitive Map and Statement. Network Rail's note on the approval process (NR-INQ-79) sets out the steps to be undertaken to certification and closure of a crossing and provision of the necessary information to enable the Council to make a Legal Event Modification Order and there is nothing in the side agreement that is contrary to that note. The arrangements in the side agreement set out a detailed process relating to implementation and exercise of the Order powers but do not in any way circumvent or modify the need for certification as set out in the Order or for a Legal Event Modification Order under s53 of the Wildlife and Countryside Act 1981.

4 Comments on the Council's table of explanatory text on its version 2.1 of the draft Order

- 4.1 Network Rail's comments are contained in the attached annotated version of the table.

5 Other TWA Orders with undisclosed side agreements

- 5.1 At TWA inquiries it is normal practice for parties not to disclose agreements reached to enable objections to be withdrawn, either fully or partially. Aside from the recent Network Rail (Cambridgeshire Level Crossing Reduction) Order, within the experience of the wider Network Rail team, examples of other TWA Order applications with undisclosed side agreements at inquiry include:

- (a) the Croxley Rail Link Order 2013;
- (b) the Network Rail (Ordsall Chord) Order 2015;
- (c) the Network Rail (Piccadilly Oxford Road) Order;
- (d) the Network Rail (Werrington Grade Separation) Order;

Winckworth Sherwood LLP

25 May 2018