

The Network Rail (Suffolk and Level Crossing Reduction) Order (“the Order”)

Network Rail’s response to
*Cost Application: Transport and Works Act 1992: Application for the Proposed Network Rail
(Suffolk Level Crossing Reduction) Order Level Crossing: S24 Higham Ground Frame*
received on 25 May 2018 (“the application”)

1. The application is made by Birketts LLP on behalf of their clients “Mairi Johnston and Alistair Fish as Trustees M J Johnson Settlement and M J Johnston Children’s Settlement and Mairi Johnston [sic] and Alistair Fish, the owners of the land affected by the proposed closure of the S24 Higham Ground Frame level crossing” (“the claimant”).
2. The claimant seeks costs relating to the matters set out in paragraph 2.1 of the application (“costs”).
3. At the heart of the application is the claimant’s assertion in paragraph 3.1 that “*Network Rail have behaved unreasonably*” as set out in detail in sub-paragraphs 3.1.1 – 3.1.7.
4. The guidance on ‘unreasonable behaviour’ is contained in paragraph 4.123 of the Guide to TWA Procedures 2006 (the TWA Guide), and the Department of Transport Circular 3/94 (“the Circular”).
5. Annex 2¹ to the Circular sets out examples of what may be regarded as unreasonable behaviour in inquiry, resulting in an award of costs if abortive expense is incurred:
 - failing to provide an adequate pre-inquiry [...] statement of case, for example, unclear presentation of facts or arguments [...]
 - causing an inquiry [...] to be adjourned or unnecessarily prolonged by the late submission without good reason of a statement of case, [...] or of a proof of evidence [...]
 - causing an objector to call a professional witness to attend unnecessarily – for example where a technical issue could have been resolved satisfactorily by prior discussion.
6. Network Rail submits that its conduct at inquiry does not fall within any of the examples given in Annex 2 to the Circular.
7. Paragraph 4.124 of the TWA Guide states that “*it should be borne in mind [...] that behaviour before an inquiry is as relevant in this regard as behaviour at the inquiry itself*” and “*procedure rules are designed to secure maximum disclosure and exchange of information before the inquiry or hearing takes place*”.
8. Network Rail has complied with the procedural requirements set out in The Transport and Works (Applications and Objections Procedure) (England and Wales) Rules 2006 (the 2006 Rules).
9. Network Rail has submitted with the application documents the Statement of Consultation (NR05) setting out the consultation approach, scope and methodology, as well as feedback from two rounds of consultation.
10. Network Rail has complied with the requirements of The Transport and Works (Inquiries Procedure) Rules 2004 (the 2004 Rules) to provide the Statement of Case and Proofs of

¹ General Procedural Requirements in Proceedings in Respect of Applications for Orders Under Section 6 of the Act: Unreasonable Behaviour: Awards Against Applicants or Objectors

Evidence. It set out its case in detail at inquiry through the submissions of its legal counsel and in evidence given by its witnesses.

11. Network Rail rejects the submissions made in sub-paragraphs 3.1.2 to 3.1.7 of the application. Some of the issues raised in those paragraphs have been dealt with in detail by Network Rail in the attached response dated 18 December 2017 (“objection response”) to the claimant’s original objection and the statement of case submitted to inquiry. The vast majority of the complaints set out in the costs application are premised on the claimant’s disagreement with Network Rail’s proposals as being required, suitable and convenient alternative routes for existing users of the level crossing. That is not a proper basis for an award of costs.

In summary:

12. Network Rail has consulted with the claimant before the application for the Order and held discussions with them, including on a ‘without prejudice’ basis (ref to allegations at 3.1.1).
13. Network Rail rejects the submission at 3.1.4 that it “*included the additional route to the north of the railway line after all parties agreed that it did not fit the framework due to the fact that the area is used for shooting*”. The details of those discussions and the reasons for Network Rail progressing with its proposals as submitted with the application documents are set out in Network Rail’s attached objection response, and were further addressed by Mr Kenning in his oral evidence.
14. Network Rail has properly considered the impact of the additional proposed routes on the claimant’s business. There is a disagreement as to the magnitude or extent of that impact – having regard to measures which can be used to manage or mitigate those impacts – and compensation available (Mr Billingsley discussed this in his evidence in chief) , but there is no proper basis for concluding that Network Rail HAS “failed to consider” this. In reality, the disagreement between the parties is as to whether Network Rail has struck the ‘right balance’ between the interests of the landowner and the need to provide a suitable and convenient alternative for the purposes of s.5(6) of the Transport and Works Act 1992 (“the Act”). Disagreement on that issue is not a proper basis for an award of costs (ref to 3.1.2 of the application).
15. Network Rail has emphasised several times in the objection response that it was prepared to discuss any further concerns with the claimant with the view to exploring whether any suitable mitigation measures might be appropriate (ref 3.1.7 of the application). To date that invitation has not been taken up by the claimant.
16. Network Rail rejects the submission that it failed to take into account the issues of pedestrian safety. The objection response points out that the proposed new bridleway on the north side of the railway is separated from the active shooting area east of Needles Eye by the live railway, so the shooting activities should have no bearing on users of the proposed bridleway. This was also discussed in evidence on Day 23 of the Inquiry, and Network Rail would note that the British Horse Society raised no concerns in this regard in its consultation response – and indeed, requested provision of further bridleways to join up the existing / proposed bridleways (which was not taken forward by Network Rail): see page 143 of the Consultation Statement (NR5).
17. Network Rail rejects the submission that, as alleged in paragraph 3.3 of the application, it “admitted” that “*the land being used for shooting, testing rifles and shotguns is a risk to pedestrians*” but that notwithstanding this Network Rail “*have continued to pursue the inclusion of additional routes in the Order*”.
18. With regard to the claimant’s land in the vicinity of the crossing for clay shooting and testing rifles and shotguns, Network Rail stated in its objection response that the claimant

would be aware of the risk to pedestrians who currently access or travel past the land, as well as to the users of the railway, and take appropriate precautions. The existence (or creation) of a public right of way (PROW) on land does not prevent the land being used for shooting, per se, although clearly it will require management of the risks which may arise from the same. There is no basis for suggesting that Network Rail has acted unreasonably in pursuing its proposed alternative routes by reason of the same, and, again, this complaint is, in reality, one as to the merits of Network Rail's proposal, not one disclosing 'unreasonable behaviour' such as might give rise to a proper basis for an award of costs.

19. The claimant states at paragraph 3.2 of the application that "*Network Rail would appear to have acted at the request of Suffolk County Council*" (SCC).
20. Network Rail had extensive discussions with all stakeholders, including the affected owners, local planning and highway authority. In developing its proposals it took into account the feedback from those consultations. It has not, however, proceeded solely on the basis of what others (including SCC) have requested (as appears to be implied at para 3.2 of the application): as is plain from the round 1 consultation material, an easterly diversion route was always being considered by Network Rail in considering proposed alternative routes for existing users of S24. Network Rail did not merely accept the proposals put forward by SCC at consultation stage: on assessment, the route to the east on the north side of the railway between the Needles Eye underpass and New Road was considered to enable a north-south crossing of the railway at the underpass and the necessary link from that crossing point to the existing highway network for onward journeys. Network Rail would also highlight in this regard that it did not accept the wider eastern diversion route proposed by SCC as it did not consider that it was suitable or could be justified as mitigation for loss of N-S routes across S24 (see para 2.14.26 of Ms Tilbrook's Proof of Evidence). The impact of the provision of a bridleway instead of a footway was assessed and as the route used an existing track, it was considered that there would be no detriment to the farming activities taking place on land through which the track passed.
21. Network Rail rejects the submission in paragraph 3.1.5 of the application that it "*changed the proposals at the last minute without discussion or agreement with our Clients* [the claimant]".
22. Network Rail rejects the claimant's assertion in paragraph 3.1.3 that it "*failed to identify that the proposed additional public rights of way on our Clients' [the claimant's] are not necessary to mitigate the closure of the crossing*". Ms Tilbrook explained in evidence that the existing north south crossings provided by both S23 Higham and S24 Higham Ground Frame needed to be considered together as they provided opportunities for users of the PROW network to cross the railway in 2 locations, giving flexibility in the way people use the network at present. The provision of the routes to the east, one making use of the Needles Eye underpass and the other being the route to the south (D-E), were assessed and considered to provide the second north south crossing of the railway and convenient routes so that current users of the network could access both the Needles Eye and Higham Road crossings of the railway.
23. Network Rail rejects the claimant's assertion that the claimant "*would not have incurred significant legal and other costs if Network Rail and their Agencies had considered that the inclusion of the alternative additional routes proposed on our Clients* [sic] [the claimant's] *land are not required to mitigate the closure of S24 Higham Ground Frame level crossing*".
24. The alternative routes proposed on the closure of S24 have been provided in accordance with the test set out in s5(6) of the Transport and Works Act 1992 which prevents extinguishment of a public right of way unless the Secretary of State is satisfied that an alternative will or has been provided or that it is not required.

25. The alternative routes at S24 are suitable and convenient for existing users and Network Rail has designed them, with the approval of Suffolk County Council, to provide connectivity to the existing public rights network.
26. For the reasons set out above, Network Rail does not consider that the application is justified and requests that the Secretary of State refuses the application.

Winckworth Sherwood
30 May 2018