

# **RE THE NETWORK RAIL (SUFFOLK LEVEL CROSSING REDUCTION) ORDER**

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## **CLOSING SUBMISSIONS ON BEHALF OF FOREST HEATH DISTRICT COUNCIL**

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### **Introduction**

1. Forest Heath District Council (“Forest Heath DC”) is the local planning authority for the area in which S22 Weatherby is situated and is a statutory object<sup>1</sup> to the proposal to close this crossing.
2. As stated in its opening submissions, Forest Heath DC, has three key grounds of objection:
  - (i) Network Rail has not sufficiently justified the need to close this crossing in this manner and at this time.
  - (ii) The proposal will have an unacceptable adverse impact on the local community in Newmarket.
  - (iii) The alternative route is not a suitable and convenient replacement for existing users.
3. There is a clear overlap in the objections of Forest Heath DC and Suffolk County Council (“SCC”) in relation to S22. For ease of reference, and to avoid unnecessary duplication, these closing submissions will, therefore, cross-refer to submissions made on behalf of SCC, making clear any points that are adopted by Forest Heath DC.

### **Failure to justify the need to close the crossing**

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<sup>1</sup> As defined by rule 2(1) of the Transport and Works (Inquiries Procedure) Rules 2004 and section 11(4) of the Transport and Works Act 1992.

4. Network Rail agrees that there is a “balancing act” to be carried out when assessing whether or not to close any level crossing.<sup>2</sup> It is telling that for S22, Cambridgeshire County Council, SCC, Forest Heath DC, Newmarket Town Council, the Ramblers and numerous local residents and community groups, representing many different groups of users of the level crossing, all consider that the balance comes down in favour of keeping the crossing open. Any consideration of the evidence before this Inquiry will clearly demonstrate that they are right.

### ***Lack of public benefit from closure***

5. To begin with, Network Rail has failed to demonstrate any significant public benefit arising from closure of the crossing.

#### ***(i) Safety risk***

6. In terms of any reduction in safety risk, Network Rail accepts that the specific safety risks associated with S22 were not a relevant consideration when deciding whether to close the crossing. Mr Brunnen was clear, in his evidence on strategic matters, that the specific safety risks associated with each level crossing (most clearly expressed in their individual ALCRM scores) was not relevant to the decision to close the crossing<sup>3</sup> and Mr Prest agreed, during cross-examination in relation to S22, that the ALCRM score was not relevant to the decision to close the crossing.<sup>4</sup>
7. Whilst Mr Kenning did emphasise the “high risk” ALCRM score at S22, it is clear that the crossing is only high risk due to the collective risk score of “2”. The reason this score is high is because of the high numbers of people using the crossing - demonstrating the value of the crossing to the community. As put to Mr Kenning, it would be bizarre if the high level of use of a level crossing could justify its closure.

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<sup>2</sup> Mr Brunnen XX, Dr Algaard XX and Mr Kenning XX on strategic matters.

<sup>3</sup> Mr Brunnen agreed with the Inspector when he summarised Network Rail’s approach to the selection of crossings in this Order as being based on whether there was an alternative crossing point nearby, irrespective of the ALCRM score, so that the inclusion of crossings was not determined at all by reference to the ALCRM score, albeit that the ALCRM scores are relied on to demonstrate the benefits of the order.

<sup>4</sup> Mr Prest S22 XX.

8. In terms of any risk saving, the closure of S22 would appear to result in only a 0.1% reduction of national risk, measured through the Fatalities and Weighted Index score.<sup>5</sup> In response to this point, Network Rail submitted a note highlighting that S22 still constitutes 71.1% of the FWI saving within the Suffolk Order as a whole.<sup>6</sup> That may be so, but the fact remains that the crossing's particular FWI saving is insufficient to justify its closure on safety grounds.

9. What is more, in relation to any specific safety risks associated with S22:

- (i) its sightlines are well over the required minimum sighting distance in all directions;<sup>7</sup>
- (ii) the crossing is over one line of rail;
- (iii) the line speed is only up to a maximum of 40mph;
- (iv) the crossing is located 400m from Newmarket station;
- (v) there are no rail freight timetabled on this section of the line; and,
- (vi) the surfacing is of a good quality.

All of these factors reduce the safety risks associated with the crossing.<sup>8</sup>

(ii) Costs associated with S22

10. The second strategic benefit which Network Rail are relying on to justify the closure of S22 is the ability to economise on costs. Yet, Network Rail is unable to give any specific evidence on the costs associated with this level crossing, whether those relate to its maintenance, renewal or the need for its replacement.<sup>9</sup> It appears that the only evidence available on costs is in Dr Algaard's proof which sets out overall estimates of

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<sup>5</sup> Calculated on the basis that S22 FWI score is 0.0128 (Mr Prest's proof at 19.1) and the score for the all level crossings on the Anglia route is 2.95. 2.95 equates to 25% of the overall national level crossing risk (Dr Algaard's proof at 2.3.2).

<sup>6</sup> NR-INQ-70, para 1.

<sup>7</sup> Mr Prest agreed there were "certainly good margins", as can be seen on p. 79 of his proof of evidence. It is understood that this sighting factors in use by vulnerable users (Mr Prest in response to the Inspector's questions).

<sup>8</sup> Mr Kenning agreed in cross-examination that (ii)-(v) (equating to (a)-(d) in para 11 of Ms Noonan's proof of evidence) would affect the safety risk at S22.

<sup>9</sup> Mr Kenning agreed during cross-examination that there was no specific evidence on the costs associated with maintaining S22.

the costs associated with the Order as a whole.<sup>10</sup> As Ms Noonan highlighted through her evidence, this leaves statutory objectors, such as Forest Heath DC, entirely in the dark as to what cost-burden S22 represents both now and in the immediate future.

11. Forest Heath DC submits that without any specifics on these associated costs, Network Rail cannot justify closure on the basis of cost savings. It is not disputed that all level crossings incur an ongoing maintenance costs, but it is not possible to balance the factors in favour of keeping the crossing open against the costs associated with it, if specific information on such costs has not been given.

(iii) Operational efficiency

12. The final limb of Network Rail's strategic case relates to operational efficiency of Network Rail's network. In particular, Dr Algaard gave general evidence as to the disadvantages – in terms of added costs and delays – which level crossings can bring to any planned enhancement scheme. However, when the specifics of S22 are considered within this context, it is readily apparent that closure of the level crossing cannot be justified on operational efficiency grounds.

13. Mr Kenning agreed that the only enhancement scheme “in the pipeline” for this stretch of railway was the East-West Rail project.<sup>11</sup> This project is made up of three sections – the Western, Central and Eastern sections. It is the Eastern Section that applies to Weatherby and Mr Kenning had to agree that in relation to this section the timeline is still “TBC”.<sup>12</sup> It is accepted that the Eastern section will not be brought forward in advance of the Western and Central sections, which have planned implementation timelines of 2022-2024 and “early 2030s” respectively. It is, therefore, expected to be at least 10 years before the Eastern section will be progressed. However, Mr Kenning had to accept that there was, in fact, no guarantee that the Eastern Section would ever be developed.<sup>13</sup> Ultimately, Network Rail cannot show that any enhancement scheme will,

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<sup>10</sup> See, for example, Dr Algaard's proof of evidence at 2.2.4, 2.2.6 and 2.2.8.

<sup>11</sup> Mr Kenning S22 XX. Whilst Mr Kenning also referred to “other improvements” that may be done to improve resilience of the network, no further specifics were given.

<sup>12</sup> Mr Kenning did not dispute the annotated diagram Ms Noonan submitted as part of her updated appendices, marked with the title “East West Rail Route”.

<sup>13</sup> Mr Kenning S22 XX.

in fact, be impacted by S22 and certainly not within any specific timescale. There is a real risk that S22 could, on this basis, be closed prematurely and without the expected operational benefits ever being delivered.

14. Even assuming that an enhancement scheme were to be brought forward, it would be possible for S22 to be closed at that time through any TWAO or development consent order procedure used to implement the enhancement scheme itself.<sup>14</sup> Indeed, if Network Rail maintains that the crossing can be closed via diversion,<sup>15</sup> then there would appear to be relatively low costs involved in carrying out the diversion at this point in time. What is more, it appears that S22 is far from the only level crossing along the stretch of railway that would be used to implement the Eastern section of EWR. NR-INQ-52 sets out a table documenting the number of level crossings engaged, along with their current status. In relation to EWR, there are seven level crossings which will require footbridges/bridleway bridges (marked as white) and one crossing which will require a bridge following development work in Phase 1 (dark green).<sup>16</sup> It seems that any such enhancement scheme would need to address these level crossings in any event. It is unclear what additional time delays closure of S22 would cause.
15. When these points were put to Mr Kenning in cross-examination, his response was to state that “it’s the risk that is driving [the] need to do something here”.<sup>17</sup> However, as has been addressed above, the safety risks associated with S22 cannot justify its closure. Nor, it seems, can any alleged impact on operational efficiency of the network.

### ***Significant loss to the community from closure***

16. In contrast to the lack of public benefit associated with closing S22, the loss to the community, from closure, would be immediate and it would be significant.

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<sup>14</sup> Ms Noonan, on behalf of Forest Heath DC, referenced enhancements in the Ely area whereby the enhancement project if being moved forward along with measures directed towards a level crossing (Ms Noonan S22 XX).

<sup>15</sup> Notwithstanding the Forest Heath DC’s positions that the diversion proposed by Network Rail for this Order is not acceptable.

<sup>16</sup> Furthermore, the text directly above this table notes that the EWR route will utilise part of the route for the Strategic Freight Network, namely the sections labelled as “CCH” and “LTN1” which appear to engage further level crossings requiring removal.

<sup>17</sup> Mr Kenning S22 XX.

17. It will not be disputed that the crossing is well-used and of significant community value as a result.<sup>18</sup> Nevertheless, Forest Heath DC considers that the data relied upon by Network Rail to understand how the public uses the crossing (and, thereby, to appreciate the impact which closure will have on their day-to-day lives) is fundamentally flawed in several respects, which risks under-recording the expected loss to the community.

*Inadequacies in Network Rail's data on usage of the crossing*

18. Firstly, Mott MacDonald failed to carry out origin and destination surveys, notwithstanding that it could have easily done so. The team at Mott MacDonald were, therefore, left to rely on assumptions as to where users were likely going from and to by simply looking at a map and the location of local amenities. Ms Tilbrook agreed that the purpose for which an existing route is being used is relevant when considering if a replacement route is suitable and convenient for existing users.<sup>19</sup> It is also relevant when considering the value of an existing route to the local community.

19. In response to questioning on this point, Ms Tilbrook noted that such surveys were not felt necessary, in part because the destinations were “obvious” to Mott MacDonald.<sup>20</sup> It may have appeared obvious, but by failing to properly assess how the crossing is currently being used, there is a real risk that Network Rail have underestimated its value.

20. Secondly, this omission cannot be rectified through any reliance on the two rounds of consultation events held in June and September 2016.<sup>21</sup> It is notable that Network Rail chose to hold these two events in Bury St Edmunds, as opposed to Newmarket itself. In doing so, Network Rail failed to meet its own target of holding events no further than 10 miles away from the crossings discussed. Mr Kenning accepted Dr Wood's estimate

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<sup>18</sup> The numbers of people using the crossing has been documented by the census undertaken by Mott MacDonald set out above.

<sup>19</sup> Ms Tilbrook XX on strategic matters.

<sup>20</sup> Ms Tilbrook S22 XX.

<sup>21</sup> It should be noted that whilst Mr Kenning indicated through XX on S22 that the questionnaires submitted as part of this consultation provided information on users' origins and destination, Ms Tilbrook confirmed in XX on S27 that these questionnaires did not specifically ask people where they were going to and from.

that the events were, in fact, 15 miles away from S22.<sup>22</sup> Forest Heath DC submits that, had the events been held in Newmarket, the response would have been much higher.<sup>23</sup>

21. Finally, Mr Woodin highlighted that the census was a “blunt tool” and would fail to pick up on any non-visible disabilities, including respiratory conditions and mental health.

22. For these reasons, Forest Heath DC submits that only limited weight can be placed on the assessment, by Network Rail, of whether their decision to close S22 sufficiently factored in the community’s interests.

#### A pure “loss”

23. Bearing in mind the high level of everyday usage of S22, it is particularly surprising that Network Rail is essentially not offering anything new by way of the alternative route provided. The “alternative route” simply “diverts” users to existing highway which users could use today if they wanted to. It is telling that over 400 times a day users decide not to use the “alternative route” but to use the crossing instead. It seems that Network Rail is not, in reality, closing the crossing by way of diversion but is instead simply closing the crossing.

24. In this regard, Network Rail have not demonstrated why other solutions, such as the installation of a bridge, are not appropriate. In his proof of evidence, Mr Kenning asserts that it is not possible to fit a bridge with ramps in the width of Network Rail land.<sup>24</sup> However, in response to questions put by Dr Wood, he admitted Network Rail had not contacted any adjacent landowners to discuss if a workable solution could be found.

25. Mr Kenning has also referred to the cost-implications of other mitigation measures.<sup>25</sup> But no specific costs have been cited for mitigation measures at S22. Nor do the cost-

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<sup>22</sup> Mr Kenning S22 XX by Dr Wood.

<sup>23</sup> Indeed, as noted by Mr Hodson, the fact that such a small number of consultees responded in relation to the level of use of S22 should have been a warning to Network Rail that their consultation had not been effective.

<sup>24</sup> At para 19.4.2.

<sup>25</sup> Mr Kenning’s proof at para 19.5 and rebuttal at para 3.

benefit analysis figures in Mr Prest’s proof<sup>26</sup> specifically relate to the local circumstances of S22.<sup>27</sup> Rather, Mr Prest explained that these are worked out by means of a spreadsheet-based approach which relies on an average cost figure for all level crossings (in relation to a particular mitigation measure). Mr Prest emphasised that this was a “rudimentary” figure that was simply used as a starting point and he was unable to break-down the £50k starting figure for closure via diversion.<sup>28</sup> It seems from Mr Prest’s evidence, that this figure may then be added to through what appeared to be a similarly rudimentary assessment of additional costs associated with a level crossing.<sup>29</sup> As a result, limited weight, if any, can be placed on these figures. Indeed, it is unclear why, in fact, they have been provided as evidence at this Inquiry.

#### Undue reliance on the alleged status of rights of way at S22

26. When Mr Kenning’s evidence is scrutinised, it becomes apparent that Network Rail’s decision to close S22 - without the provision of any replacement infrastructure, such as a bridge - was not due to any land constraints, or an assessment of costs but, in reality, turned on Network Rail’s view that there are no public rights of way at the crossing.
27. During cross-examination by Mr Hodson on strategic matters, Mr Kenning, in reference to S22, stated that “...the bottom line is that nobody has proved there is a public right of way at the crossing...if there was a public right of way demonstrated then we would be in a very different situation regarding what we were offering”. This led to the Inspector asking what Mr Kenning had in mind, in terms of what Network Rail might have offered, and whether there was any principle in his mind in terms of his answer to Mr Hodson. Mr Kenning answered:

*yes – when we did the initial assessment of the entire route – the status of the crossings was taken into consideration – we know the status of the level crossing – we know that if there had been a public right – with the numbers that are using it then clearly a diversion would not be suitable for a public right – that there*

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<sup>26</sup> At para 19.15.

<sup>27</sup> Mr Prest XX on strategic matters.

<sup>28</sup> Mr Prest XX on strategic matters.

<sup>29</sup> Mr Prest used an example where an extra £20k may be added to represent the need for works to an underbridge. Forest Heath DC would highlight that para 2 of Network Rail’s “response to questions asked of Mr Prest in respect of S27 and S69” (handed into the Inquiry on 23 May 2018) provides a good example of the rudimentary nature of this assessment.



*would clearly need to be something provided other than a diversion – at that point it is down to the status of the path.*

28. The Inspector asked if Mr Kenning meant that Network Rail would be offering a bridge or an underpass and Mr Kenning replied “*if we were looking for closure then...yes*”.
29. The relevance of the alleged status of rights at S22 is also clear from Mr Kenning’s rebuttal in which he responds to SCC’s query as to why further mitigation measures cannot be provided. Mr Kenning sets out that Network Rail “does not believe” there to be any public rights at the level crossing, going on to cite a number of facts on which Network Rail relies to support its position in this regard and relying on a legal principle alleged to arising from *Ramblers Association v The Secretary of State for Environment, Food and Rural Affairs, Network Rail & Others* [2017] EWHC 716 (Admin).<sup>30</sup>
30. SCC considered it necessary to make legal submissions in response to this reference (OP-INQ-20), making clear that it would not be putting forward evidence in relation to the status of the rights of way at S22, nor did it consider that this Inquiry was the appropriate forum for the matter to be determined.
31. After further debate between the parties on whether the issue could be decided through this Inquiry,<sup>31</sup> the Inspector made a ruling on 27 April 2018 that he would not draw a conclusion on the matter of whether public rights of way do or do not exist over S22. Forest Heath DC welcomes the Inspector’s ruling and is grateful for his having provided clarity on the issue. As a result, the question of whether there is a public right of way at S22 will be left undetermined.
32. Following on from this, Mr Kenning began his evidence on S22 by stating that the statement he had previously made in answer to the Inspector’s questions during his strategic evidence (quoted above) was incorrect, clarifying that whilst he had said things would have been done differently if there had been a right of way at the crossing, in retrospect he did not think it would have made a difference.<sup>32</sup>

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<sup>30</sup> Mr Kenning’s rebuttal on S22 at para 2. The case is located in the legal bundle, tab 14.

<sup>31</sup> Including supplementary submissions by SCC (OP-INQ-33) and submissions made orally on behalf of SCC on Day 13 of the Inquiry.

<sup>32</sup> Mr Kenning S22 XIC.

33. Forest Heath DC submits that greater weight must be placed on Mr Kenning's initial answer. It was his first response to the point, it accords with his rebuttal evidence and there is no reason why his thinking should have been any different due to the fact he was giving evidence on strategic matters.
34. What is more, during cross-examination of Mr Kenning in relation to S22, it was clear that the alleged status of rights at S22 did play a role in how Network Rail determined to close the crossing.<sup>33</sup> In response to questioning on how Network Rail considered the level of opposition to closure, including a consultation response showing 97% against closure at round 1, Mr Kenning answered "it comes down to the legal point" that there is no public right of way at the crossing. A similar response was given when Councillor Hulbert asked if Mr Kenning had ever thought of the human issue that will be done to the people of Newmarket.
35. Forest Heath DC is unclear as to how, exactly, the undetermined legal status of rights at S22 factored into the "balancing exercise" in determining whether to close the crossing without the provision of replacement infrastructure. But it is clear that it did.
36. Such an approach is flawed for two reasons.
- (i) Firstly, the status of rights has not yet been determined and Network Rail's contention - that there are no public rights of way – may turn out to be wrong.
  - (ii) Secondly, regardless of the formal status of rights at the crossing, Mr Kenning agreed that the crossing has been maintained as if it were a public right of way. There are no signs saying that access is by permission only and the public enjoys access through it in the same way as any level crossing over which there are recorded public rights of way. Put simply, the practical impacts of closure on the wider community is unaffected by the legal status of rights.

### ***Conclusion on the lack of justification for closure***

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<sup>33</sup> Mr Kenning agreed that the status of rights of way "played a part" in the decision to close S22.

37. In light of these submissions, it is clear that Network Rail have failed to justify the need to close S22 or why no replacement infrastructure can be provided.

Lack of a suitable and convenient alternative route

38. Without prejudice to the above submissions, Forest Heath DC does not consider that a suitable and convenient replacement route for existing users is being offered by Network Rail at S22. In relation to this point, Forest Heath DC refers to, and adopts, the closing submissions made by SCC. It further echoes SCC's concerns relating to the DIA process.

*Unknown impacts on air quality*

39. In addition to the submissions made by SCC on issues associated with an expected increase in car journeys, Forest Heath DC has also raised a concern relating to air quality.

40. Through Ms Noonan's proof of evidence, Forest Heath DC highlighted the particular problems which Newmarket has had with air quality and sought clarification on how Network Rail had considered the potential impacts of increased car use caused by closure of S22. An Air Quality Management Area, situated on Old Station Road, has been in place since 6 April 2009, having been amended on 18 April 2017 to remove the High Street from its scope. It is hoped that the AQMA can be completely revoked in 2019, a welcome indicator that the situation has greatly improved in recent years.

41. Notwithstanding recent improvements, the AQMA remains in place at present and acts as a clear warning sign to any proposed development which may result in increases in car usage in its vicinity. Ms Tilbrook failed to mention the AQMA in her proof of evidence and the EIA Screening Report<sup>34</sup> refers to there being "no nearby<sup>35</sup> designated air quality management areas",<sup>36</sup> concluding that "[o]perationally, the proposals do not

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<sup>34</sup> NR-INQ-37.

<sup>35</sup> Ms Tilbrook was unable to comment on how "nearby" was defined in this context.

<sup>36</sup> NR-INQ-37 p. 142.

result in changes to local traffic flows, therefore it is anticipated that there will be no significant effects on air quality”.<sup>37</sup> In her rebuttal on this point, Ms Tilbrook simply states that she does not consider closure of the crossing to result in a move away from walking and cycling to car use “at the scale suggested” by objectors, referring to her evidence on usage and diversion distances.<sup>38</sup>

42. Network Rail’s assessment of the potential impacts on air quality that may be caused by the closure of such a well-used pedestrian access point located in the heart of Newmarket is cursory at best, appearing to rely on a “gut-feel” that users will not choose to drive to any problematic degree. It is clear from national planning guidance<sup>39</sup> that the potential impacts of any development on air quality need to be carefully considered. Ms Tilbrook’s evidence has failed to allay Ms Noonan’s concerns that Network Rail has done so. It is the applicant’s burden to carry out a proper assessment; the burden should not lie with objectors to incur the cost of their own traffic modelling assessments to prove the applicant has got it wrong or, indeed, to find out what the likely effects would be.

### Conclusion on S22

43. On the basis of these submissions, Forest Heath DC considers that by failing to properly balance Network Rail’s interests against the interests of other stakeholders, Network Rail has failed to justify the need to close S22. Nor has Network Rail justified why any closure of S22 should be via diversion as opposed to the provision of other mitigation measures. Network Rail is presenting its proposal for S22 on grounds that it has come to a balanced decision that factors in the wider community interest. Forest Heath DC submits that this has not been done and on this basis requests that the Inspector recommend removal of the proposal to close S22 from the Order.

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<sup>37</sup> NR-INQ-37 p. 143. It is worth noting that Forest Heath DC does not dispute the conclusion reached in this report that there would be no “likely significant effects” on air quality, but that this does not allay Forest Heath DC’s concerns as to how, if at all, the potential impacts on air quality in Newmarket were considered further by Mott MacDonald and Network Rail when considering whether or not to pursue closure of the crossing.

<sup>38</sup> Ms Tilbrook’s rebuttal on S22 at para 2.4.5.

<sup>39</sup> See, for example, NPPG (on air quality) para 5: “Whether or not air quality is relevant to a planning decision will depend on the proposed development and its location. Concerns could arise if the development is likely to generate air quality impact in an area where air quality is known to be poor.” (Emphasis added.)

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**24 MAY 2018**

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