

**By Email Only**  
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12 February 2018

Our Ref: HXA/18136/00633

Dear Mr Kerr,

**Transport and Works Act 1992 (TWA) Application for the Proposed Network Rail (Suffolk Level Crossing Reduction) Order (Suffolk Order)**

Thank you for your letter dated 9 February enclosing a revised draft agreement, which Network Rail notes the Council has enclosed to provide a constructive dialogue on protections that the Council seeks, though that is not to be taken as any indication that the Council accepts the provisions are to be included in a side agreement as opposed to the Order.

**1 Appropriate content of the Order**

Despite what you say in your letter, Network Rail maintains that the precedents in other TWA Orders are relevant to the proposed Suffolk Level Crossing Reduction Order. Regardless of the distinction you seek to make in relation to the Chiltern Order (SI 2012/2679) due to the nature of the works it contained, the 28-day deemed certification for over a dozen level crossings within one local authority area as set out in the Chiltern Order indicates that the Secretary of State is satisfied that the timescale is appropriate where there are multiple crossing closures and that article 16 of the Suffolk Order requires no adjustment.

**2 Extent of powers vs details**

Network Rail is surprised that having stated in the third paragraph of section 1 of its letter, that the Chiltern Order is of little precedential effect, the Council then seeks to rely on provisions in that and numerous other TWA Orders for the purposes of section 2 of its letter. Although the Council has identified a number of examples of protective provisions from other TWA Orders to seek to justify inclusion of provisions for the Council on the face of the Order, Network Rail does not accept that in this case it is appropriate to include protective provisions for the Council in the Order.

The examples you have provided are not comparable to the position of the Council in relation to the works proposed in the Suffolk Order. In the case of the Chiltern Order, the Nottingham Express Transit System Order 2009, the two Docklands Light Railway Orders (2005 and 2009) and the Merseytram Order 2005, the works proposed in each interfered with the existing network

and/or apparatus of a statutory undertaker, such as the provision of tram lines or other transit system infrastructure in the highway, or works adjacent to an operational railway. Protective provisions for the benefit of a statutory undertaker's network or infrastructure being interfered with and potentially damaged were therefore justified in those cases. In the case of the Suffolk Order the works are amending or extending the same highway network and the nature of the works are extremely limited.

Network Rail maintains that the qualifications and preconditions the Council wishes to include in the Order are more appropriately for a side agreement and none are required on the face of the Order.

3 Joint site visits

Network Rail has provided within the draft agreement arrangements for site visits to take place as part of the approval of the proposed new rights of way at the detailed design stage.

4 Certification process

As regards your proposed rewording of Article 16, we refer you to our comments under heading 1 above for the appropriate timescale for deemed certification. Network Rail is unable to comment further on your proposed wording without a definition of "extenuating circumstances". Network Rail does not understand the concern raised in your letter in relation to the drafting of articles 14 and 16 of the Suffolk Order. Network Rail is satisfied that the drafting is in line with the requirements of section 5(6) of the TWA.

5 Commuted sums

As we have previously explained, Network Rail is willing, in principle, to pay the Council commuted sums, but the details of those sums are a matter of negotiation between the parties which are not a matter for the Order. We refer you to our comments under heading 2 above as to why the examples you cite are not appropriate in this case.

6 Legal Event Modification Order

Network Rail is pleased to note that the Council agrees that the TWA Order cannot be a LEMO, but it does not accept that the details or the mechanism to provide those details need be included in the Order. Network Rail is willing to provide the necessary details in due course but, as they do not need to be given statutory effect, Network Rail proposes that the appropriate mechanism is an agreement between the parties.

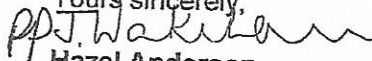
7 Compensation to Highway and Survey Authority

Network Rail's position on this remains as set out in our previous correspondence.

Network Rail is considering the terms of the draft agreement sent with your latest letter and is willing to engage further with the Council during the inquiry with a view to reaching agreement on its content, so as to reduce time before the inquiry, if the Council is so willing.

A copy of this letter also goes to the programme officer.

Yours sincerely,

  
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Your Ref: HXA/jw/18136/00662  
Our Ref:  
Date: 9 February 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 30 January 2018, the contents of which sets out in more detail Network Rail's position on the matters the Council raised in our letter dated 5 January 2018. In order to provide further information on the Council's position prior to the start of the Inquiry next week, we wish to respond to the points you have raised.

We have enclosed with this letter a copy of your draft side agreement with a number of suggested changes to the protective provisions contained within it. This is to enable a constructive dialogue on the content of the protective provisions, but it must not be seen as any indication that the Council accepts that these provisions should be included in a side agreement as opposed to the Order itself.

**1. Appropriate content of the Order**

We maintain our position that the Model Clauses must not be relied on to prescribe or restrict what can be included in a Transport and Works Act Order ("TWAO"). They help to ensure consistency in drafting TWAOs where that is appropriate on the basis of the content of the TWAO at issue, but they are non-exhaustive and will often be adapted significantly to reflect the particular circumstances of the matter at hand.

We note your reference to the Chiltern Railways (Bicester to Oxford Improvements) Order 2012/2679 ('the Chiltern Order'), as evidence that you do not consider *"the scale of what is proposed in this Order [to be] such as to justify what would be a significant departure from previous precedent"*.

Regarding the scale of how many level crossings are proposed to be closed and diverted through the Order, the Council considers that the Chiltern Order is of little precedential effect. The Chiltern Order concerned the construction of a new length of railway to connect the Oxford-Bicester line to the Bicester-London line and the closure and diversion of level crossings were ancillary to those works. By contrast, this Order is solely concerned with the closure and downgrading of level crossings. A TWAO has never been used on this scale with a sole purpose of closing and downgrading level crossings.

**2. Extent of powers vs details**

We are, however, grateful for your having drawn the Chiltern Order to our attention and to the attention of the Inquiry. It appears to provide a stark example that the types of procedural



protections which the Council is seeking for insertion to this Order, are entirely appropriate to be included on the face of the Order itself, as opposed to by way of a side agreement.

The Chiltern Order contains a number of schedules (Schs 14-17, see also ss50-53) that specifically provide procedural protections for a number of statutory bodies, notably including NRIL (Sch 16).

In particular, we take this opportunity to highlight that the following types of provisions were included:

(i) Pre-works authorisation processes

- Sch 15, para 2 (between the Company (Chiltern Railways) and the Environment Agency (EA)).
- Sch 16, para 5 (between the Company and NRIL).

(ii) Indemnification for administrative costs imposed

- Sch 15, para 9 (indemnification to the EA for costs reasonably incurred in its examination or approval of certain plans).
- Sch 16, para 10 (agreement to pay costs to NRIL for fees/expenses incurred by *inter alia* (b) approving plans submitted to it by the Company).

(iii) Payment of commuted sums

- Sch 16, para 12 (provides for agreement to pay "any additional expense which NRIL may reasonably incur in altering, reconstructing, working or maintaining railway property under any powers existing at the making of this Order by reason of the existence of a specified work, provided that 56 days' previous notice of the commencement of such alteration, reconstruction, working or maintenance has been given to the Company, are to be repaid by the Company to Network Rail.").

(iv) Provision of further information

- Sch 16, para 16 (the Company must supply plans to NRIL in a certain format within 28 days after certification).

(v) Tailored dispute mechanism clauses for disputes between certain parties

- Sch 15, para 13 (provides an additional dispute mechanism for any disputes between the Company and the EA (albeit that the EA could still choose to use the arbitration clause within the Order)).

The Chiltern Order is not alone in including these type of protective provisions. The practice is widespread, and we draw your attention to the following TWAOs which provide a non-exhaustive list of examples where explicit protections have been provided for a highway authority, or local authority more generally:

(i) The Nottingham Express Transit System Order 2009/1300

- s70 provides explicitly for "Arrangements with highway authorities", including pre-works authorisation procedures and specific arrangements for the basis on which the Highway Authority would authorise those parts of the authorised works which were to become



public highways. Notably, there is a differently worded "deemed certification" clause which provides for 56 days as opposed to 28 (s70(7)).

(ii) The Docklands Light Railway (Stratford International Extension) Order 2006/2905

- s38 and sch 13 provide protections for the London Borough of Newham.
- See also The Docklands Light Railway (Woolwich Arsenal Extension) Order 2004/757 (s43, sch 14) and The Docklands Light Railway (Silvertown and London City Airport Extension) Order 2002/1066 (s38 and sch 12).

(iii) The Docklands Light Railway (Capacity Enhancement) Order 2005/3105

- s41 and sch 14 provide protections for the Highway Authority (notably s40 and sch 10 provide protections for NRIL).

(iv) The Merseytram (Liverpool City Centre to Kirkby) Order 2005/120

- s67 provides for "Arrangements with highway authorities".

It is therefore clear that you are incorrect in your assertion that *"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 by the courts."* Not only are there many examples where such details have been included in TWAOs, but it is notable that NRIL has itself previously ensured such protections for its own position. We, therefore, do not understand why NRIL continues to maintain that the procedural protections we are seeking must be provided through a side agreement.

In light of the above, we very much hope that NRIL will reconsider its position regarding the qualifications and preconditions sought by the Council. The Council is simply requesting that its interests are reasonably protected. It is a public authority, similarly bound by the "Managing Public Money" framework, and with its own statutory duties to ensure that the local highway network, which includes the public rights of way network, is properly maintained and fit for use.

### 3. Joint site visits

We note your comments in relation to this. We reiterate that the inability to attend joint site visits prior to the Inquiry may be relevant when considering the evidence we have been able to provide. It also further underlines the importance for there being a robust pre-works authorisation process included in the Order.

### 4. Certification process

We maintain our position that the details of the certification process should be included in the Order. Without prejudice to this position, we also enclose suggested changes to the wording of Art 16(11), which should be read alongside the certification procedure provisions in the draft side agreement.

It has also come to our attention that, as presently drafted, Art 14 only restricts the closure of level crossings until certain "new rights of way" have been constructed and completed to the reasonable satisfaction of the Highway Authority in accordance with Art 16. However, there are a number of examples where NRIL is proposing other changes (not necessarily limited to the provision of new rights of way) in order to provide a suitable and convenient alternative route. The Council, therefore, requests that Art 14 be expanded so that a level crossing will not be closed until the entirety of the proposed works which Network Rail is offering, have been delivered.

## **5. Commuted sums**

The Council is not requesting that the amount of commuted sums be included in the Order, but only that the means by which commuted sums will be agreed and paid should be set out. We refer to the above examples where TWAOs have included provision for the payment of maintenance costs.

## **6. Legal Event Modification Order**

We agree that the Order will create legal events, as defined in s53(3) of the Wildlife and Countryside Act 1981 and, thereby, trigger the need for a LEMO. We also agree that the TWAO cannot, itself, be modified to become a LEMO. It is the Council's duty to independently produce the necessary LEMOs that underlies our request for the information on widths and grid references to be provided. If it is not possible, at this stage, to include that information in the Order, then we request that the Order be modified to include the procedure by which the relevant information will be provided to the Council once it becomes available.

## **7. Compensation to Highway and Survey Authority**

Our position remains the same in this regard and we refer you to what we have said in our letter dated 5 January 2018, as well as the references above to previous provisions in TWAOs requiring the payment of compensation for additional administrative burdens incurred by affected authorities.

We reiterate that we hope to continue working with NRIL on the above matters with a view to withdrawing our holding objections if sufficient procedural protections can be included within the Order.

A copy of this letter (but not the draft side agreement) has been sent for the Inspector's attention.

Yours sincerely,



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