

## Ramblers' Association

### Proposed Network Rail (Suffolk Level Crossing Reduction) Order

#### DRAFT Note on the status of C22 Weatherby Crossing

1. On day 9 of the inquiry the Ramblers' Association ("the Ramblers") asked to submit a note in response to the submissions made by Suffolk County Council as to the rights of way status of C22 Weatherby Crossing (OP-INQ-20). The Ramblers are grateful to the Inspector for allowing the submission of this note.
2. The Ramblers consider that *this* Transport and Works Act inquiry as currently constituted is not the appropriate forum to determine whether or not public rights exist over Weatherby crossing. We do not go so far as to say that *any* Transport and Works Act inquiry would automatically be an inappropriate forum for the determination of a question of the existence of any public right of way. However, we consider that ordinarily if the question of the existence or otherwise of a public right of way arises then the appropriate processes to be followed would be those under the Wildlife and Countryside Act 1981 ("the 1981 Act") discussed below.
3. If we are wrong about this, and the Inspector and, ultimately, the Secretary of State for Transport, considers this inquiry is a sufficient forum to determine the status of the crossing and, further, that the Secretary of State has the final jurisdiction in the matter then we respectfully submit that:
  - (a) if the Secretary of State concludes that no public right of way subsists over the crossing and it is, as Network Rail contends, used only with Network Rail's permission then it should be removed from the Order<sup>1</sup>, and
  - (b) if the Secretary of State concludes that a public right of way subsists over the crossing then the tests to be applied to the closure of this public right of way are as set out in the Transport and Works Act and the associated guidance. The Ramblers' position on 'suitable and convenient' has already been set out (NR-INQ-26). We agree with the County Council as regards the meaning of 'required' (OP-INQ-24).

#### Reasons

4. The Ramblers accept that there are no public rights shown on the Definitive Map and Statement over Weatherby crossing. However, it is important to understand the limits of

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<sup>1</sup> As there is no need to stop up rights that do not in fact subsist.

the legal effect of the Definitive Map and Statement. Put simply, whilst the Definitive Map and Statement are conclusive legal evidence of the public rights of way shown in the Map and Statement, this is without prejudice to public rights that may subsist that are not so shown.

5. The 1981 Act provides the statutory regime for the continuous review of the Definitive Map and Statement and places a duty on the surveying authority (in this case Suffolk County Council) to make such a modifications to the Definitive Map and Statement as appear to be requisite. Modifications must be made upon the occurrence of a number of “events”. These are set out in Section 53 of the 1981 Act and include, in so far as is relevant,: -

*at Section 53(3)(b) “the expiration, in relation to any way in the area to which the map relates, of any period such that the enjoyment by the public of the way during that period raises a presumption that the way has been dedicated as a public path or restricted byway”;*

*and at Section 53(3)(c) “the discovery by the authority of evidence which (when considered with all other relevant evidence available to them) shows—*

*(i) that a right of way which is not shown in the map and statement subsists or is reasonably alleged to subsist over land in the area to which the map relates, being a right of way such that the land over which the right subsists is a public path, a restricted byway or, subject to section 54A, a byway open to all traffic.”*

6. The 1981 Act also sets out a process under which a member of the public may formally require the surveying authority to consider evidence and, if it concludes that it is requisite to do so, to make an Order. It is important to note that it is not necessary for the surveying authority to be in receipt of a formal application for it to act; the ‘trigger’ is the discovery by the authority of evidence.
7. The Ramblers submit that it is the 1981 Act that sets out the due process under which the public rights, if any, over Weatherby crossing should be determined. Parliament has provided a detailed and comprehensive statutory regime precisely for the purpose of determining whether or not a public right that is not shown in the Definitive Map and Statement subsists. This allows for consideration of all the relevant available evidence. There is a clear statutory duty placed on the surveying authority, in the first instance, to determine such questions once there has been discovery of evidence. If a Definitive Map Modification Order is made to add a right of way to the Map and Statement and the confirmation of that Order is opposed, the 1981 Act provides a detailed regime for the determination of the Order by the Secretary of State for Environment, Food and Rural Affairs.

8. The County Council has submitted that it has not “discovered” evidence. The Ramblers do not agree. It is clear from the objections made to the Order by other parties that there is public use of the crossing on foot and with bicycles (which are vehicles within the meaning of the Highways Act, 1980<sup>2</sup>) and that this use extends back for decades<sup>3</sup>, and there is also evidence<sup>4</sup> that may suggest that there was a road; potentially a public road, that pre-dated the building of the railway<sup>5</sup>. In the view of the Ramblers either or both of these things are sufficient to amount to ‘discovery’ (for the purposes of the 1981 Act), at least of evidence that supports, or may support, a reasonable allegation of public rights; thus triggering the need to consider the matter.
9. In a letter dated 26 January 2018<sup>6</sup> (in response to the Ramblers’ letter of 18 January 2018) Winckworth Sherwood stated that: *“Network Rail’s position remains that this crossing is not subject to public rights of way across the level crossing. Network Rail does not accept that any public rights could properly be claimed and will refer, if and to the extent necessary, to the recent decision of the Administrative Court in Ramblers Association v Secretary of State for Environment, Food and Rural Affairs [2017] EWHC 716 (Admin). Although Network Rail has the right to close permissive routes over the railways (in this instance, at Weatherby level crossing), without pursuing any of the formal statutory processes that might be used to close a public right of way. The crossing has been included in the Order, taking a precautionary view, (if the Order is made) to put the extinguishment of any claimed private<sup>7</sup> (or for that matter public) rights beyond doubt.”*
10. The Ramblers submit that this stance and the position Network Rail has adopted at this inquiry is disingenuous. On the one hand Network Rail’s evidence before this inquiry describes the crossing as “permissive”; on the other, the draft Order sets out that *“the extent of the public right of way to be extinguished”* is the path not on the definitive map between points P001 and P002. As we have previously pointed out, and Network Rail apparently accepts, if the crossing is truly only a permissive path then there is nothing to stop Network Rail from simply closing it. Indeed given the ALCRM score of D2 and the evidence to this inquiry of Network Rail’s view of its duty to safeguard the railway and the public, it is hard to understand why Network Rail would permit public use of the crossing at all, entirely at its own risk, since it has no legal obligation to do so if in fact no public rights exist over it.
11. Further, Network Rail seems to have incorrectly assumed that an assertion of public rights must be solely based on a presumption or inference of dedication from public use ‘as of

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<sup>2</sup> By virtue of Section 85 of the Local Government Act 1888

<sup>3</sup> The evidence of Councillor Hirst (OBJ/3) and of Dr Wood (OBJ/84)

<sup>4</sup> In the evidence of Dr Wood (OBJ/84): the two versions of Chapman’s map

<sup>5</sup> If indeed the route was a public road then under the terms of the National Parks and Access to the Countryside Act, 1949 it would not have fallen to be recorded on the first Definitive Map for the area.

<sup>6</sup> NR-INQ-14

<sup>7</sup> Ramblers note that the Order as drafted does not in fact seek to extinguish any private rights.

right’<sup>8</sup>. Modifications to Definitive Maps to add previously unrecorded public rights are frequently made on the basis of the discovery of historical documentary evidence or on a combination of historical documentary evidence and contemporary evidence of public use ‘as of right’. It would be material to the question of whether or not public rights pre-existed the building of the railway to investigate a wide range of documentary evidence including, for example, the book of reference compiled in respect of the Act of Parliament authorising the construction of the railway and the Act itself<sup>9</sup>. The necessary examination of documentary sources and the need, perhaps, for expert evidence on their evaluation, the need for oral evidence of use and oral and documentary evidence of the actions of Network Rail as landowner are matters that are not presently catered for in the terms of the current inquiry and it is, in part, for this reason that the Ramblers say that the inquiry as currently constituted is not a suitable forum.

12. It is hardly surprising that the public have not previously raised the question of the status of the crossing; on inspection of the crossing there is nothing to suggest that Network Rail considers the route to be over entirely private land. The crossing has the usual “stop, look and listen” signs. The public have had and continue to have unfettered *de facto* access to it.
13. The failure to adequately determine whether or not public rights subsist over the crossing *prior* to the application for the Transport and Works Act Order has implications for the decision whether or not to make the Order in respect of the crossing, and the terms in which any Order should be drafted.
14. Firstly, the Ramblers would question whether the term “path” adequately and accurately describes a restricted byway (should one in fact exist). The Order itself does not currently define “path”. We note that the 1981 Act distinguishes between public paths<sup>10</sup> (i.e. footpaths and bridleways), and restricted byways and byways open to all traffic.
15. Secondly, and more importantly, it is central to the test in Section 5(6) of the Transport and Works Act 1992, whether or not a *public* right of way is to be extinguished under the Order applied for. The Ramblers submit that it is therefore essential to know before an Order is made whether or not a public right subsists and, if one does subsist, the nature of that right (i.e. is it a public footpath, or a public bridleway, or a restricted byway or a byway open to all traffic).

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<sup>8</sup> For the avoidance of doubt, the Ramblers agree with the County Council’s submissions regarding the extent to which *Ramblers’ Association v The Secretary of State for Environment, Food and Rural Affairs, Network Rail and Others* [2017] applies.

<sup>9</sup> A Council investigating the status of a public right of way and an Inspector determining an opposed Definitive Map Modification Order would expect to see the documentary evidence alluded to in Mr Kenning’s rebuttal proof (NR 34/4/7) rather than rely in hearsay evidence about what it may or may not contain.

<sup>10</sup> Section 66 of the Act

16. As noted above it is the Ramblers' view that the inquiry as currently constituted does not have before it the relevant evidence to make that determination.

7 March 2018

Documents referenced in and appended to this note

- (i) Section 53 of the Wildlife and Countryside Act, 1981
- (ii) Section 66 of the Wildlife and Countryside Act 1981
- (iii) Section 85 of the Local Government Act 1888

## Wildlife and Countryside Act 1981

### Section 53

Duty to keep definitive map and statement under continuous review.

(1) In this Part “definitive map and statement”, in relation to any area, means, subject to section 57(3) and 57A(1),—

(a) the latest revised map and statement prepared in definitive form for that area under section 33 of the 1949 Act; or

(b) where no such map and statement have been so prepared, the original definitive map and statement prepared for that area under section 32 of that Act; or

(c) where no such map and statement have been so prepared, the map and statement prepared for that area under section 55(3).

(2) As regards every definitive map and statement, the surveying authority shall—

(a) as soon as reasonably practicable after the commencement date, by order make such modifications to the map and statement as appear to them to be requisite in consequence of the occurrence, before that date, of any of the events specified in subsection (3); and

(b) as from that date, keep the map and statement under continuous review and as soon as reasonably practicable after the occurrence, on or after that date, of any of those events, by order make such modifications to the map and statement as appear to them to be requisite in consequence of the occurrence of that event.

(3) The events referred to in subsection (2) are as follows—

(a) the coming into operation of any enactment or instrument, or any other event, whereby—

(i) a highway shown or required to be shown in the map and statement has been authorised to be stopped up, diverted, widened or extended;

(ii) a highway shown or required to be shown in the map and statement as a highway of a particular description has ceased to be a highway of that description; or

(iii) a new right of way has been created over land in the area to which the map relates, being a right of way such that the land over which the right subsists is a public path or a restricted byway;

(b) the expiration, in relation to any way in the area to which the map relates, of any period such that the enjoyment by the public of the way during that period raises a presumption that the way has been dedicated as a public path or restricted byway;

(c) the discovery by the authority of evidence which (when considered with all other relevant evidence available to them) shows—

(i) that a right of way which is not shown in the map and statement subsists or is reasonably alleged to subsist over land in the area to which the map relates, being a right of way such that the land over

which the right subsists is a public path, a restricted byway or, subject to section 54A, a byway open to all traffic];

(ii) that a highway shown in the map and statement as a highway of a particular description ought to be there shown as a highway of a different description; or

(iii) that there is no public right of way over land shown in the map and statement as a highway of any description, or any other particulars contained in the map and statement require modification.

(4) The modifications which may be made by an order under subsection (2) shall include the addition to the statement of particulars as to—

(a) the position and width of any public path, restricted byway or byway open to all traffic which is or is to be shown on the map; and

(b) any limitations or conditions affecting the public right of way thereover.

(4A) Subsection (4B) applies to evidence which, when considered with all other relevant evidence available to the surveying authority, shows as respects a way shown in a definitive map and statement as a restricted byway that the public have, and had immediately before the commencement of section 47 of the Countryside and Rights of Way Act 2000, a right of way for vehicular and all other kinds of traffic over that way.

(4B) For the purposes of subsection (3)(c)(ii), such evidence is evidence which, when so considered, shows that the way concerned ought, subject to section 54A, to be shown in the definitive map and statement as a byway open to all traffic.

(5) Any person may apply to the authority for an order under subsection (2) which makes such modifications as appear to the authority to be requisite in consequence of the occurrence of one or more events falling within paragraph (b) or (c) of subsection (3); and the provisions of Schedule 14 shall have effect as to the making and determination of applications under this subsection.

(5A) Evidence to which subsection (4B) applies on the commencement of section 47 of the Countryside and Rights of Way Act 2000 shall for the purposes of subsection (5) and any application made under it be treated as not having been discovered by the surveying authority before the commencement of that section.

(6) Orders under subsection (2) which make only such modifications as appear to the authority to be requisite in consequence of the occurrence of one or more events falling within paragraph (a) of subsection (3) shall take effect on their being made; and the provisions of Schedule 15 shall have effect as to the making, validity and date of coming into operation of other orders under subsection (2).

## Wildlife and Countryside Act 1981

### Section 66

#### Interpretation of Part III.

(1) In this Part—

“bridleway” means a highway over which the public have the following, but no other, rights of way, that is to say, a right of way on foot and a right of way on horseback or leading a horse, with or without a right to drive animals of any description along the highway;

“byway open to all traffic” means a highway over which the public have a right of way for vehicular and all other kinds of traffic, but which is used by the public mainly for the purpose for which footpaths and bridleways are so used;

“definitive map and statement” has the meaning given by section 53(1);

“footpath” means a highway over which the public have a right of way on foot only, other than such a highway at the side of a public road;

“horse” includes a pony, ass and mule, and “horseback” shall be construed accordingly;

“public path” means a highway being either a footpath or a bridleway;

“restricted byway” has the same meaning as in Part II of the Countryside and Rights of Way Act 2000;

“right of way to which this Part applies” means a right of way such that the land over which the right subsists is a public path or a byway open to all traffic;

“surveying authority”, in relation to any area, means the county council, county borough council, metropolitan district council, or London borough council whose area includes that area.

(2) A highway at the side of a river, canal or other inland navigation shall not be excluded from any definition contained in subsection (1) by reason only that the public have a right to use the highway for purposes of navigation, if the highway would fall within that definition if the public had no such right thereover.

(3) The provisions of section 30(1) of the 1968 Act (riding of pedal cycles on bridleways) shall not affect the definition of bridleway in subsection (1) and any rights exercisable by virtue of those provisions shall be disregarded for the purposes of this Part.



Local Government Act 1888

Section 85

Regulations for bicycles, &c.

(1) bicycles, tricycles, velocipedes, and other similar machines are hereby declared to be carriages within the meaning of the Highway Acts