

Re The Network Rail (Suffolk Level Crossing Reduction) Order
Public Inquiry February - May 2018

Supplementary Submissions on Behalf of Suffolk County Council
on the Rights of Way Status of S22 Weatherby

Introduction

1. On Tuesday 27 February 2018, Suffolk County Council (the “Council”) submitted a note to the Inquiry setting out the Council’s position in relation to the status of rights of way over the S22 Weatherby level crossing.
2. The Council stated (at para 6 of that note) that:

“[The Council] will not be putting forward evidence to prove that a public right of way has been (or may have been) established by presumed dedication, or for that matter, by a historic legal event. Nor does the Council consider this Transport and Works Act Inquiry to be the appropriate forum for the matter to be determined...”
(Emphasis added.)
3. On Wednesday 28 February 2018, the Inspector asked four follow-up questions arising from the underlined statement, namely:
 - (i) If this is not the appropriate forum – what is?
 - (ii) Whether S22 should be taken out of the Order on the basis that Network Rail can close it anyway (outside of this Transport and Works Act procedure)?
 - (iii) If S22 stays in the Order, what test should apply? Does the “suitable and convenient test” in the TWA Guidance apply?
 - (iv) Would dealing with S22 in this Order circumvent other statutory provisions or appropriate tests?
4. This note sets out the Council’s response to the Inspector’s questions.

(i) If this is not the appropriate forum to determine whether or not a public right of way exists at S22, what is?

5. The appropriate process for establishing whether a disputed public right of way exists is established under section 53(3)(c) and (6) of the Wildlife and Countryside Act 1981.¹ This sets out a specific statutory procedure to determine whether a definitive map modification order (“DMMO”) (to reflect the existence of a public right of way) should be made to modify the Definitive Map & Statement.² The Council is the appropriate order making body, being the surveying authority.
6. Cases where a DMMO might be made are consulted upon, and once made a DMMO is published and open to representations and objections. Where a modification order is made but is duly opposed, a public inquiry may³ be held to hear and test the evidence both in support, and against, the existence of a public right of way.⁴ This could include evidence that use “as of right” by the public has given rise to a presumption of dedication, or that a public right of way could not have been established through presumed dedication because it would be incompatible with a relevant statutory purpose. The evidence put forward will often consist of both documentary evidence and “user evidence”.
7. This type of public inquiry is known as a “rights of way inquiry”, which will usually be before an Inspector acting on behalf of the Secretary of State. In some instances, objections to a proposed DMMO will be determined through written representations or a hearing. Through this process, the Secretary of State will decide whether or not to confirm the order.

¹ More specifically, section 53(6) applies the procedure set out in Schedule 15 of the Wildlife and Countryside Act 1981 to this process.

² The Definitive Map & Statement is the record of public rights of way. It serves as conclusive evidence of the particulars contained within it (namely the existence and status of public rights of way) but it is not an exhaustive record of all public rights of way.

³ Para 7 of Schedule 15 of the Wildlife and Countryside Act 1981 states:

(2) Where an order is submitted to the Secretary of State under sub-paragraph (1), the Secretary of State shall, subject to sub-paragraph (2A), either—

(a) cause a local inquiry to be held; or

(b) afford any person by whom a representation or objection has been duly made and not withdrawn an opportunity of being heard by a person appointed by the Secretary of State for the purpose.

In some cases, the matter may be determined via written representations or a hearing, as opposed to a public inquiry.

⁴ Schedule 15, para 7 of the Wildlife and Countryside Act 1981.

8. Notably, the procedure under the Wildlife and Countryside Act 1981 ensures that the public is appropriately notified about the proposed order and has the opportunity to submit representations in relation to it.⁵
9. The Council submits that the procedures established under section 53(3)(c) and (6) of the Wildlife and Countryside Act 1981 provide the appropriate forum to determine whether or not a public right of way exists at S22. This involves the making of a DMMO by the surveying authority and, if required, a rights of way inquiry.

This Transport and Works Act Inquiry is an inappropriate forum to determine the status of rights at S22

10. Network Rail's statement of case in relation to S22 relies on there being a "suitable and convenient" alternative right of way.⁶ This is a reference to the test that will need to be met if a public right of way is extinguished through a Transport and Works Act Order. Network Rail presented its case in the same manner as it did for any of the other crossings over which there are recorded public rights of way.
11. As a result, there was no indication in Network Rail's statement of case, that the Secretary of State would be asked to make a ruling on the existence (or otherwise) of public rights of way at the crossing. Nor, that Network Rail would be running an alternative argument that it did not need to provide any alternative route on the basis that no public rights of way exist at the crossing.
12. If that was Network Rail's intention then that needed to be made clear to all interested parties at the outset so that they could appropriately consider their positions in response. The public would also need to have been given proper notice that the status of rights at the crossing was a relevant issue, so that they could consider whether to

⁵ Schedule 15, para 3 of the Wildlife and Countryside Act 1981.

⁶ NR26, p. 84.

object (on grounds that a public right of way does exist and an alternative right of way does need to be provided) and/or bring evidence specifically related to the point.⁷

13. The question of whether (i) a public right of way currently exists is distinct from the question of whether (ii) a suitable and convenient alternative route has been provided. The public has only been consulted on, and has only had a proper opportunity to bring evidence in relation to, (ii).

14. This is in clear contrast to a rights of way inquiry, the main purpose of which is to establish whether, on the evidence put forward, a public right of way exists (i.e. to determine question (i)).

(ii) Whether S22 should be taken out of the Order on the basis that Network Rail can close it anyway (outside of this Transport and Works Act procedure)?

15. Whether or not S22 can be closed outside of this Transport and Works Act procedure will depend on whether or not there are rights of way at the crossing which would require statutory powers to stop-up.

16. The Council is not able to confirm whether or not public rights of way traverse S22 and, for the reasons set out above, it does not consider that the matter can be appropriately determined at this Inquiry.

17. The Council considers that S22 should remain in the Order but that it must be considered on the assumption that a public right of way traverses the crossing. This will ensure that any unrecorded public rights of way are not inadvertently stopped-up through the TWA process, without the correct statutory test (in section 5(6)) having been applied. It is worth noting, that S22 has a high level of use by, and value to, the public. What is more, Network Rail continues to maintain the crossing as if it is a public right of way.

⁷ The fact that a few objectors may have put forward evidence that a public right of way does exist at the crossing is no answer to the point. It cannot be known if other objectors may have come forward, nor whether further evidence may have been submitted, if there had been appropriate notification.

(iii) If S22 stays in the Order, what test should apply? Does the “suitable and convenient test” in the TWA Guidance apply?

18. If S22 stays in the Order, then the Council submits that the TWA Guidance’s “suitable and convenient test” must apply.

19. The Inspector cannot conclude – on the basis of the information before this Inquiry – that no rights of way exist at the crossing. There is, therefore, a residual risk that public rights of way do traverse the crossing, in which case the “suitable and convenient test” set out in section 5(6) of the Transport and Works Act, read alongside the TWA Guidance,⁸ will need to be met.

20. Therefore, if the Inspector is not satisfied that the “suitable and convenient test” has been met in relation to S22, then he must recommend that the proposal to close S22 be removed from the Order.

(iv) Would dealing with S22 in this Order circumvent other statutory provisions or appropriate tests?

21. Not necessarily. Provided that the “suitable and convenient test” is applied to S22, there will be no circumvention of other statutory provisions.

22. Through the Transport and Works Act, any known public rights of way can be extinguished if the test in section 5(6) is met. It follows that any unknown public rights of way can also be extinguished if the section 5(6) test is met.

23. However, if the Inspector were to conclude that the section 5(6) test had not been met in relation to S22 Weatherby, then the only basis on which he could theoretically conclude that the crossing could be closed would be a finding that there are no public rights of way at the crossing. For the reasons set out above, this is not a conclusion that he can reach through this Inquiry. Were he to nonetheless make such a finding (that there are no public rights of way at the crossing), this would then circumvent the

⁸ TWA Guidance, Annex 2, p. 105.

statutory protections set out in the Wildlife and Countryside Act 1981, as described above.

Consideration of Network Rail's Strategic Case

24. The following submissions are made notwithstanding the Council's position set out above.

25. The Council is aware that Network Rail's is relying on a "strategic case" to justify the closure of each of the level crossings included in this Order, as well as the decision to close them by way of diversion. That "strategic case" operates through a particular methodology for picking which crossings can be closed in phases 1 and 4 of the "Anglia Route Strategy" (without the need for new replacement infrastructure).⁹ The crossings that were included in the Order are justified on the basis that there is an alternative route to cross the railway, using existing infrastructure. Further, it appears that Network Rail relies on the fact that for all of the crossings included in this Order the alternative route proposed is "suitable and convenient" to demonstrate that each proposal is appropriately balanced and has factored into account the wider community interests that would be affected by the closure of a crossing.

26. From Network Rail's evidence, it appears that the proposal to close S22 Weatherby is justified according to this "strategic case".¹⁰ Therefore, it is worth noting that Network Rail's case for closing S22 Weatherby relies on there being a "suitable and convenient" alternative route, regardless of whether public rights of way do, in fact, exist at the crossing.

Conclusion

27. Overall, the Council submits that if S22 is retained in the Order then it must be considered by the Inspector on the assumption that a public right of way does exist. The section 5(6) test will, therefore, need to be met. This further aligns with Network Rail's strategic case for closing the level crossing, for the reasons given above.

⁹ NR18, p. 9. See also Dr Algaard's Proof of Evidence, pp. 12-14 and Mr Kenning's Proof of Evidence, section 3.

¹⁰ See, for example, Mr Kenning's Proof of Evidence, section 19.

28. If the section 5(6) test is not met in relation to S22, then the Council will request that the Inspector recommends to the Secretary of State that the proposal for S22 must be removed from any Order that is made. This is notwithstanding any other grounds of objection to Network Rail's proposal to close the crossing through this Order.

MERROW GOLDEN

7 MARCH 2018

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