

**THE NETWORK RAIL
(CAMBRIDGESHIRE LEVEL CROSSING REDUCTION)
ORDER**

Opening Statement on Behalf of Cambridgeshire County Council

1.0 Introduction

- 1.1 This opening statement sets out the County Council's current position regarding points of objection to the Network Rail (Cambridgeshire Level Crossing Reduction) Order (the "Order"). It provides an update for the Inquiry, taking into account various discussions and negotiations which have been ongoing since the submission of the Authority's Statement of Case, and indeed also since the submission of their Proofs of Evidence. It should be further noted that some such discussions and negotiations are still ongoing.

2.0 The Order

- 2.1 Network Rail was originally seeking to close or downgrade 35 level crossings across its network in Cambridgeshire. Over the course of time this has reduced to 25 level crossings, with four such crossings being withdrawn from consideration only 3 weeks before the Inquiry (and notably after the deadline for the submission of proofs of evidence) due to Network Rail's failure to serve all interested parties with the necessary notices.
- 2.2 Through the Order, Network Rail seeks to carry out works for the removal of the crossings and for the diversion, and/or re-designation of the status of, certain public highways. It further seeks the creation of new public rights of way and for the acquisition of land and interests in land that will be needed to implement the proposals.
- 2.3 The Order has significant implications for the public rights of way network across the County, and also for the County Council in its roles as both Highway and Surveying Authorities. Whilst the County Council are broadly supportive of Network Rail's overall aims and objectives, they consider that the current Order is ill conceived, and to date,

has been poorly executed. This is in part, due to widespread closures of this nature having never reached this stage (i.e. Draft Order) before, a certain amount of naivety on the part of Network Rail, and perhaps also the fact that they are attempting to implement three such Orders at the same time. It is quite clear that Network Rail have, so to speak, “bitten off more than they can chew”, as is evidenced by the adjournment of the Essex Inquiry due to major procedural irregularities, and indeed further similar irregularities in respect of these proceedings.

2.4 Cambridgeshire County Council is aware of the legal Submissions that have been made on behalf of the Rambler’s Association in respect of the use of the Transport and Works Act procedure over the alternative procedures available under the provisions of the Highways Act 1980.

2.5 The County Council is generally supportive of the Rambler’s Association’s submissions in this respect, is broadly supportive of the same, and for the avoidance of repetition, commends them to the Inspector. Had the 1980 Act procedures been used, each proposal for a diversion or closure would have its own order, its own consultation process and its own assessment by local people and the highway authority. This must be far preferable, and more-so in the public interest than bulldozing through so many proposals in one go.

3.0 Legislative Tests

3.1 Section 5(6) of the Transport and Works Act states that an Order shall not extinguish a public right of way over land unless the Secretary of State is satisfied that an alternative right of way has been or will be provided, or that one is not required. Furthermore, the Department of Transport guide to TWA procedures states that if an alternative is to be provided, the Secretary of State would wish to be satisfied that it will be a convenient and suitable replacement for existing users. Network Rail confirm that they have identified and assessed alternative routes on this basis¹.

¹ Susan Tilbrook – Summary Proof para 3.2

- 3.2 Network Rail do, quite rightly of course, stress² that the Order is not an application under the Highways Act 1980. However, they go on to say that such Orders contain a “suitable” test, which of course they do not in such terms, but they also rightly refer to it also taking into account “public enjoyment of the path as a whole”.
- 3.3 Had they chosen to adopt the provisions made available to them under the 1980 Act (as amended by the TWA), they may have found their task of satisfying the legislative criteria far easier than the evidential hurdles they now face. Not only do they have to grapple with the questions of what defines a “suitable and convenient” alternative route, they must also set this definition against the considerations in the analogous legislative tests of the 1980 Act which include tests of “not being substantially less convenient” and in some instances, being “as convenient”. All of this set against a starting point of any alternative route being *prima facie* less convenient (at very least in terms of distance travelled).
- 3.4 Network Rail must then also set their case in context to the issues set out in the “Statement of Matters” about which the Secretary of State particularly wishes to be informed for the purpose of considering the Order, which include, but are not limited to:
- The impact that individual proposals will have on the public, land owners and local businesses;
 - The Impact on other users;
 - Flood risk, drainage and environmental impact; and
 - Suitability, including length, safety, maintenance and accessibility
- 3.5 All these matters must, of course, be evidenced and any subsequent decisions must be evidence-based because the diversion and extinguishment of public highways (at whatever status) is a quasi-judicial matter. The Order cannot simply be made because it seems like a good idea or is desirable for the Applicants.

² Susan Tilbrook – Summary Proof para 3.3

4.0 Procedural Matters (withdrawal of Crossing from the Order) etc

- 4.1 At the pre-Inquiry meeting the County Council requested, and Network Rail agreed, that it would provide to the Inquiry evidence that all pre-order and pre-inquiry procedural matters had been fully and properly complied with. Prior to the commencement of the Inquiry today, no such evidence had been provided.
- 4.2 It is, of course accepted that the compliance documents were submitted at the start of the Inquiry, and are now being checked.
- 4.3 I should stress that the Authority is not trying to be difficult in requesting that Network Rail follow the good practice that has been adopted and followed by many Highway and Surveying Authorities for many years, it has legitimate concerns over the levels of due diligence that has been applied to this process. That is not to say that the fundamental flaws in the implementation of procedures are deliberate. On the contrary is far more likely to be the naivety of Network Rail in embarking on not one, but three Orders, each of significant magnitude, when the whole process at this level has never been attempted before. Had they listened to, and followed the advice of, the Highway and Surveying Authority (whose Officers have considerable experience in such matters) these problems may have been avoided, and more time allowed.
- 4.4 In particular the Authority has identified two proposals, one where (we say) notices have not been properly posted to such an extent that (we say) there is procedural irregularity to an extent that it is highly prejudicial to the public interest; and a second where correct and appropriate information has not been provided to property owners to such an extent that the crossing closure may render their properties virtually unsaleable in the future, or at very least cause them significant problems. I shall turn the details of these in a moment, but for clarification the County Council invites Network Rail, in the interests of Natural Justice, to withdraw these crossings from the Order and the Inquiry with a view to them being addressed alongside the four crossings they have already withdrawn.

- 4.5 If Network Rail are unwilling to withdraw these crossings voluntarily, the County Council requests that the Inspector makes a ruling on these crossings prior to the proceeding with the Inquiry so as to avoid the potential for wasting Inquiry time addressing proposals which should not be considered due to the serious nature of the procedural flaws.

a) Proposal: C28 - Black Horse Drove – Extinguishment of Highway Rights leaving properties land locked

- (i) This highway is a cul-de-sac leading only to the private land and properties it serves. It is also maintainable at public expense. Network Rail propose to extinguish the public highway rights only over the crossing and grant private rights (again only over the crossing) for those properties etc served by the lane. The effect of the extinguishment of the highway rights over the crossing will be that neither end of the remaining section of highway will have a point of public terminus, the result of which would be that public highway rights will also cease to subsist over that section of the lane, thus leaving the properties it serves without any lawful means of access beyond the crossing. They will be land-locked and this will have a significant impact upon their value and saleability.
- (ii) The County Council is not opposed to the principle of the closure of the crossing, and indeed requested that the closure included the lane beyond the crossing subject to the reservation of private rights of access for the properties. This request does not however appear to have been acted upon.
- (iii) It is apparent that, during whatever consultation exercises have been carried out, the owners/occupiers of the properties concerned have not been advised of the consequences of the crossing closure (it is noted that none of them are listed in the book of reference), and may have been left with the impression that the affected section of road will remain a public highway, and will continue to be maintainable at public expense. Whilst it

is possible that the property owners would be able to negotiate private rights with the owners of the sub-soil (i.e. not the Highway Authority) or in the alternative an easement of necessity may arise as a result of the closure, this would not be recorded in their Registered Title until it came to light (i.e. when the property was being sold) and equally they would not be aware of any potential compensation they may be due from Network Rail as a result of them creating this situation.

(iv) The matter has been raised with Network Rail within the last week or so, it having only just come to the attention of the County Council, but it was summarily dismissed. The County Council has therefore sought to take steps to protect the rights of the residents of their area and written to the house-holders to make them aware of the situation they face, and their right to make representation to this Inquiry. Clearly this leaves those parties with little or no time to seek their own legal advice and representation (the letters were only sent yesterday) and the County Council considers that this is contrary to natural justice, not to mention their human rights and their right to be heard.

(v) This unfortunate situation is easily remedied by with withdrawal of the proposal from the current Order with a view to it being dealt with alongside other proposals already withdrawn.

b) Proposal C04 – No Name #20 - Notices not Posted Properly (FP 106/10)

(i) It has come to the attention of the Authority, and indeed is referred to in the proofs of evidence of a number of its' witnesses, that the statutory notices on this route have not been properly posted. That is not to say that notices were not placed on site. The notices were posted, but in some instances were printed double sided and then fastened to a post in such a manner that only one side of the notice could be read. The only way to have read the notice in full would have been to tear it down, thus making it unavailable for anyone else to read.

- (ii) The Authority's Officers have considerable experience of posting notices in such a manner so as to ensure they comply with the legislative requirements, and will give evidence to the effect that these notices do not, if so required. The fact of the matter is, that a notice that cannot be read because it is nailed to a post so as to make it unreadable, is not properly posted. No reasonable person would have been able to read the notice. It should have been printed single sided and multiple sheets posted instead.
- (iii) This failure to post the notices properly may mean that members of the general public have not been fully afforded their statutory rights to object and make representations to these proceedings. In that respect it is no different to Network Rails already acknowledged failure to serve the required notices on all land-owning interests.
- (iv) There is, of course, no suggestion that this bad practice on notice posting was a deliberate attempt to mislead the public or to reduce the number of likely objections, it simply demonstrates the lack of experience of those posting the notices and their lack of understanding of the importance that it is done correctly.
- (v) The matter has also been raised with Network Rail but was again summarily dismissed, thus evidencing their lack of understanding of the requirements of the process. It is understood that NR state that other notices were posted correctly, but we are still left with uncertainty over how well the notices were posted and the level of prejudice caused in terms of the general public.
- (vi) This unfortunate situation is again easily remedied by with withdrawal of the proposal from the current Order with a view to it being dealt with alongside other proposals already withdrawn.

Proposal C26 (Poplar Drove) & C30 (Westley Road) Downgrading of UCR to Byway
Open to All Traffic

- 4.6 The County Council has also raised concerns with Network Rail over their proposals in respect of these crossings, and the fact that their proposals within the Order are not only legally impossible to implement, but can instead be dealt with within their proposed traffic regulation order for the sites. This is a case where clearly they (Network Rail) do not understand the legal definitions of the highways they are dealing with.
- 4.7 Network Rail propose to downgrade the Unclassified County Roads to a Byways Open to All Traffic. It has been explained to Network Rail that this is not possible because both an Unclassified County Road and a Byway Open to All Traffic are, as a matter of law, both public carriageways, and both enjoy the exact same level of public rights. (i.e. they are both open to public vehicular traffic).
- 4.8 The only difference between a UCR and a BOAT is that a BOAT would be defined as being of a character that is usually more akin to a footpath or a bridleway. In layman's terms it is perhaps what may be defined as a green lane. As per the Masters case, the reference to use as a footpath or bridleway within the statutory definition for a BOAT is a character test and does not require actual use. It is therefore difficult to see how a level crossing can meet the character test for a BOAT.
- 4.9 In view of the legal impossibility of what Network Rail are seeking to achieve in respect of this crossing the County Council invite Network Rail to amend their proposals accordingly.
- 4.10 If Network Rail are unwilling to do so voluntarily, the County Council requests that the Inspector makes a ruling on this matter prior to the proceeding with the Inquiry so as to avoid the potential for wasting Inquiry time addressing a matter which need not be considered because it simply is not possible.

Proposal C10 (Coffee Drove), Proposal C26 (Poplar Drove) Proposal C30 (Westley Bottom Road) (Schedule 15 – TRO Prohibition of Motor Vehicles

- 4.11 With regard the TRO relating to Proposals C10, C26 and C30 it is understood that there are proposals to restrict use to motor vehicles by the use of a width restriction. The proposals do not however appear to address how non-mechanically propelled vehicles of a greater width than the restrictions placed upon motor vehicles.
- 4.12 It is understood that in order to address this matter Network Rail indicated, in their email dated 17 Nov to CCC, that they will removed the reference to “motor” from the TRO in which case it will apply not only to motor vehicles, but also to non-mechanically propelled vehicles. This proposal means that certain classes of users will not be aware that their rights to use the crossings will be stopped. There are therefore also concerns over the level of consultation in respect of these routes, and that certain classes of user may be prejudiced.

5.0 General Matters to Which the County Council may no longer be Objecting

- 5.1 There are a number of matters that were raised by the County Council in its Statement of Case and subsequent proofs of evidence which are now the subject of discussion with a view to their being included in a side agreement. These are generally administrative matters relating to issues such as, but not necessarily restricted to, the provision of DMMO information, agreement of Commuted Sums and other costs in relation to various matters; Ecology, archaeology, and the Design and approval of works.
- 5.2 If agreement can be reached before the relevant County Council witnesses are called, or subject to agreement by the parties, by the end of the Inquiry, then there will be no need for these matters to be canvassed at the Inquiry. If, however, no such agreement has been reached they will have to be addressed, possibly by way of recalling witnesses towards the end of the proceedings.

Proposal C31 (Littleport Station)

- 5.3 It should be further noted that the County Council is still awaiting Traffic Impact Assessment from NR (requested originally in May). The one they have previously provided is inadequate and further information is awaited. If this information is forthcoming it may be possible for CCC to withdraw their holding objection on this proposal. If not it will have to be addressed at the Inquiry.

6.0 Crossing Closures to which the County Council is not Objecting

- 6.1 To assist the Inquiry, by way of an update I can confirm that the County Council does not object to the following proposals:

C01, C02, C03, C08, C09, C10, C12, C26, C28, C30 & C35

- 6.2 For clarification it should be noted that whilst the County Council is not objecting to these proposals this should not be interpreted as an indication of their outright support for them. It simply demonstrates that the County Council have adopted a pragmatic and considered approach to the proposals and recognises the aims and objectives of Network Rail.

7.0 Crossing Closures to which the County Council is Objecting

- 7.1 Once again to assist the Inquiry, it is confirmed that the County Council maintains its objections to the following proposals:

C04, C07, C11, C14, C15, C16, C17, C20, C21, C22, C24, C25, C27, C29, C31, C33, C34.

Notice of Costs Applications

Without prejudice to other possible costs applications, I am instructed to give notice of potential costs applications if the Inquiry needs to address the crossings that the County Council has requested be withdrawn within these submissions.