

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

Closing Submission on Behalf of Cambridgeshire County Council

1.0 Introduction

- 1.1 This statement sets out the County Council's closing position regarding its remaining points of objection to the Network Rail (Cambridgeshire Level Crossing Reduction) Order (the "Order"). It takes into account and recognises the various discussions and negotiations with Network Rail which have been ongoing throughout the Inquiry.
- 1.2 For completeness, and for the avoidance of any doubt, the County Council recognises the strategic objectives of Network Rail in undertaking this project and is supportive of the Order where, in the County Council's view, suitable and convenient alternative routes have been identified and/or will be provided.
- 1.3 This Inquiry has been the first of its kind in terms of the number of crossings being sought for closure within a single Order. As such it has (or should have) presented a steep learning curve for all of the parties involved. No doubt, as time goes by, if more Orders of this nature are proposed, the lessons learned from these earlier Orders (including those in Suffolk and Essex) will allow for some of the issues and considerations, that have been either before the Inquiry itself, or subject to discussion and negotiation during the Inquiry, to be addressed at a far earlier stage in the process, or considered in more defined and concise terms. That is not to say that time has been wasted during this Inquiry as it has been important to ensure that all matters have been fully and appropriately addressed.

2.0 Quasi-Judicial Test & Burden of Proof

- 2.1 It has been accepted by Network Rail that the decision whether or not to make the Order they have requested is "quasi-judicial" in nature. In other words, the decision maker (i.e. the Secretary of State) must make his decision based upon all the available and relevant evidence. The Order cannot simply be made because it seems like a good

idea or is desirable for the Applicant, nor could it, or any part of it, be made simply because no one has objected.

- 2.2 The burden of proof rests squarely upon Network Rail to demonstrate, by the production of sufficient relevant evidence, that their proposals have met the requisite statutory tests. The standard of proof is, of course, the civil test of on the balance of probabilities.
- 2.3 How Network Rail choose to go about demonstrating that they have discharged their burden of proof, and what evidence they consider necessary to submit in doing so is, of course a matter for themselves. However, it is not (in my submission) sufficient for them to state that something is right or wrong, or to put forward certain propositions without substantiating their point by way of the production of the necessary working papers and evidence upon which they rely in reaching such a conclusion.
- 2.4 It is for this reason that the Council has, on occasion, questioned what evidence and papers have been submitted to the Inquiry. If, on such occasion it turned out that the documents have not been provided, it is the Council's view that this may represent a deficiency or omission in the Applicant's evidence which may affect the discharge of their burden of proof.
- 2.5 It was suggested that such challenges should have been put in the form of the proposition that Network Rail's findings or conclusions were incorrect, however to put such a proposition, it would have been first necessary to have sight of the omitted-documentation being queried. Thus, we are potentially faced with a "chicken and egg" type situation whereby parties are perhaps expected simply to take Network Rail's word that what they say is correct. We say this is insufficient for the purposes of Network Rail discharging their Burden of Proof, and that the Secretary of State must be satisfied that he has all of the evidence he requires to make his decision. If he does not, then the Order must fail.

3.0 Legislative Tests

- 3.1 The terms under which an Order may be applied for (and made) as set out within the Transport and Works Act 1992 are quite general. However Section 5(6) of the 1992 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.
- 3.2 Given that, in each of the proposals to which the County Council continues to object, Network Rail have put forward proposals to provide an alternative route (or routes), it is submitted that they must be satisfied that an alternative route IS required in each instance.
- 3.3 If this were not the case then, in line with their financial obligations under “*Managing Public Money*”, and the requirement within the scope of compulsory purchase and acquisition processes that they can only seek to secure the minimum requirement, without betterment, they would not be seeking alternative routes. It should therefore follow that there should be no argument, or submission made by Network Rail in respect of any of these crossings, that an alternative “is not required”.
- 3.4 The only remaining issue under consideration therefore, is the matter of whether the proposed alternatives are appropriate. In this respect the Department for 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 their proposed alternative routes on this basis¹.
- 3.5 For clarification and completeness, the County Council acknowledges that, unlike many public path order processes, whereby one might expect the creation of a completely or substantially new alternative route, under the TWAO process, an alternative route may

¹ Susan Tilbrook – Summary Proof para 3.2

(fully or partially) utilise existing highways. It is not a diversion 'per-se' it is the closure of one route (or part of it) and the provision and/or identification of an alternative.

- 3.6 Notwithstanding this subtle difference, in considering the issues of "suitability" and "convenience", there is still an element of comparison to be considered between the current route (we say in the whole) and any proposed alternatives.

4.0 Statement of Matters

- 4.1 Further guidance on the issues that the Secretary of State would wish to hear evidence on before making his decision are contained within the published "Statement of Matters" 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

- 4.2 During the Inquiry the Inspector also sought the opinion of the County Council's witness, Camilla Rhodes, on whether she considered the issue of the "enjoyment" of the proposed routes was a material factor. Mrs Rhodes responded that it was, and it is, and remains the County Council's view that the enjoyment of a proposed alternative route is a material consideration in determining whether or not it is "suitable". (I shall address this point further shortly).

- 4.3 As previously mentioned, in considering the alternative routes the Secretary of State has indicated that he would wish to be satisfied that it/they (the alternative(s)) will be a convenient and suitable replacement(s) for existing users. There are therefore a number of matters which need to be defined e.g. defining "Existing Users", Suitability (Suitable) and Convenience (Convenient); and, where "Enjoyment" of the route falls within these matters.

5.0 Existing Users

- 5.1 In his guidance the Secretary of State defines that the alternative route should be suitable and convenient for “existing users”. It would therefore appear (if taken on face value) that consideration is to be given to the type of use a crossing receives within a certain snap-shot in time (i.e. immediately prior to the Order) rather than taking into account the actual legal rights that are legally available to the public (whether used or not immediately preceding the Order). This in-itself is, it is respectfully submitted, somewhat short sighted and contrary to the public interest. Instead the County Council submits that in determining what constitutes “Existing Users” consideration must also be given to the actual status of the route, and not just those using it at one particular time.
- 5.2 Notwithstanding my previous submission, if the consideration of an alternative is to be restricted to only “existing users” (in terms of actual use at the time of survey), such a test must be applied quite liberally; and take into account and facilitate all evidenced legitimate users (including the nature of that use) however limited or infrequent it may be.
- 5.3 Further consideration must also be given to any circumstances which may have restricted or deterred any legitimate use from taking place prior to the Order being made. For instance, if a crossing is unlawfully obstructed by the Applicant (such as C11 – Furlong Drove) and has been for approximately 20 years, it is of little surprise that there is no use by certain types of legitimate use (e.g. 4x4 vehicles). The route has a long reputation of being obstructed, so why would 4x4 users drive along the route when they have the certain knowledge that they cannot complete their journey (due to unlawful obstructions) without turning around and retracing their steps?
- 5.4 That is not to say that, in the example given, that the County Council seeks that the alternative route (in that instance) is made available to 4x4 users (rather than just pedestrians, equestrians and cyclists). The point is that the assessment of “existing use” has been tainted by the fact that (in this instance) Network Rail themselves have unlawfully obstructed the route and prevented certain classes of legitimate user from

exercising their lawful right to pass and repass over the crossing for some considerable time. Such factors cannot be ignored when considering the issue of “existing users”

5.5 By analogy (albeit perhaps extreme and unlikely), if Network Rail were to close (lawfully or otherwise) every crossing before undertaking their assessments to identify “existing users”, it would be an easy step for them to subsequently conclude that no alternative routes are required because there are no “existing users”. This cannot be right.

5.6 The Inspector, and the Secretary of State, are therefore urged to exercise a significant degree of caution in considering the balance between “existing users” and “existing rights” so as to ensure that the rights of the public to pass and repass along the public highways concerned are suitably and appropriately considered and protected. Protecting such rights should not be viewed as betterment, simply as maintaining the status quo.

6.0 Definition of “Suitable” & “Convenient”

6.1 The Concise Oxford English Dictionary (2001) defines “Suitable” as: “right or appropriate for a particular person, purpose, or situation” and it should be given its usual meaning in respect of its application to the Order.

6.2 The Concise Oxford English Dictionary (2001) defines “Convenient” as: “fitting in well with a person’s needs, activities and plans involving little trouble or effort” and should also be given its usual meaning in these proceedings.

6.3 The County Council maintains its position, as per opening submissions, that any alternative route that involves an increase in distance to complete the same journey (if the crossing were not to be closed) is prima facie less convenient. The guidance says that the Secretary of State would wish to be satisfied that it will be a “convenient” and “suitable” replacement. It does not say that an alternative route may be “less convenient”.

- 6.4 Distance of travel is, of course, only one consideration in terms of convenience however it does mean that in the majority of cases the starting position, with regard to matters of convenience, is that the scales are tipped in favour of refusal of the Order (on the grounds that the alternative route is “not convenient”), and for Network Rail to discharge their burden of proof they must, at the very least restore the balance and then tip it in their favour.

7.0 Consideration of “Enjoyment”

- 7.1 Reference has been made at various times to the wording in s119(6) of the Highways Act 1980 (“public enjoyment of the footpath as a whole”) and that such a test does not apply under the TWAO procedure.
- 7.2 The County Council’s position is that such a proposition is correct, the additional “expediency” test that is to be applied, having particular regard to the “public enjoyment of the footpath as a whole” under s119(6) of the 1980 Act does not apply.
- 7.3 However, references in evidence to “enjoyment” should not be taken out of context. The fact that it is referred to as a distinct/additional test in the HA 1980 should not be relied upon by Network Rail to divorce a consideration of “enjoyment” from an assessment of what is “suitable” and “convenient” in the context of the TWAO.
- 7.4 It is the County Council’s submission that the likely impact on “enjoyment” of an existing route is a material consideration in assessing the impact that the proposal will have on the public, users and the local community.
- 7.5 It is further the County Council’s submission that the “enjoyment” of a proposed alternative route is also a material consideration in terms of its suitability. In real terms, an alternative route is only a genuine alternative if users of the existing way are likely to use it. If they are deterred from doing so, e.g. as a result of risks (perceived or otherwise) or the environment through which they are expected to walk or ride, they are unlikely to use the route and it is therefore no real alternative. And as such, it cannot be said to be “suitable”.

8.0 Network Rail's Strategic Objectives

8.1 At paragraph 2.3 of his proof of evidence, Mr Brunnen (for Network Rail) sets out Network Rail's Strategic objectives in respect of the Order. These are:

- a) Improved operational efficiency of the Network.
- b) Increased safety of both rail users and those interacting with railway by reason of [*the rationalisation/removal of*] Public and Private rights across the operational railway.
- c) More efficient use of public funds in accordance with "Managing Public Money".

8.2 It is the County Council's submission that (in terms of the majority of the crossing proposals to which it objects) these objectives are for the most part, not met.

8.3 In terms of operational efficiency, no evidence has been submitted, on a case by case basis, as to how the closures will improve operational efficiency, certainly there are no speed restrictions to be lifted.

8.4 Network Rail have not, in fact, and certainly not on a crossing by crossing basis, put a safety-based case at all. In fact, they have accepted in cross-examination that if a crossing is open, they consider it to be safe and/or fit for purpose. Their case in this respect has been to seek to reduce risk, and not to improve safety or remove danger. This may be a subtle difference, but (we say) it does not meet their stated objective.

8.5 Perhaps the only objective that might be said to have been met is the efficient use of public funds, but again this will only be true if (as suggested) the funds that would be used to maintain the crossings, that are the subject of this Order, are actually used to improve other crossing facilities elsewhere, and not simply to meet budget shortfalls or cost-cutting requirements.

9.0 Risk vs Safety/Danger

- 9.1 The County Council accepts that all crossings carry a risk, indeed any activity we carry out, as evidenced by Mr Kenning on a number of occasions, carries a degree of risk. This does not however, mean that all crossings are dangerous.
- 9.2 Danger and Risk are two words that are often confused due to the appearing similarity in their meanings, when strictly speaking, there is a difference between the two words. The word danger is used in the sense of 'catastrophe' or 'peril.' It is usually employed by people when they are describing situations when one can come under harm due to some fact. On the other hand, the word risk is used in the sense of 'chance.' This is the important difference between the two terms. They both carry negative meanings with them. Danger and risk are the words that people use when they are speaking of something that can happen or harm them.
- 9.3 Mr Kenning said in evidence (in respect of C11) that if a crossing was open Network Rail must consider it to be safe. He further clarified this in cross examination (C04), when directly asked, that if a crossing was open it was considered "fit for purpose", but later when cross examined on the "Palmer Crossings" (by the land owner's representative) he again stated that if a crossing was open it was considered safe.
- 9.4 This clearly examples and confirms the difference between risk and safety.

10.0 Areas of Expertise

- 10.1 It has not been disputed by the County Council that Network Rail hold the expertise in matters relating to the operation of the railways, indeed they were the only party in the proceedings to table witnesses claiming such expertise, and this went unchallenged.
- 10.2 Network Rail also called witnesses with expertise in the areas of land and compensatory issues and also highway design/infrastructure etc. However, the witnesses' knowledge and understanding of public rights of way matters was, perhaps quite understandably, more limited and theoretical rather than based on any day to day working knowledge.

- 10.3 This was evidenced in the first part by their lack of awareness of the Parliamentary Rights of Way Review Committee's Code of Practice for Consultation on changes to the Rights of Way network. Network Rail may, or may not, have inadvertently met, or even exceeded, the requirements of this Code of Practice but one might have expected it to have at least been referenced, given that it is a cornerstone of the good practice that is followed by most Order Making Authorities on a day to day basis when considering changes to the minor highway network.
- 10.4 Secondly, and perhaps most telling of all, was their complete lack of understanding of both the long and short-term implications of creating a cross-field path that will be subject to regular agricultural disturbance (i.e. Proposal C15: Brickyard Drove (Whittlesey FP 48)).
- 10.5 The County Council, and its Officers, on the other hand, do have a day to day working knowledge of matters relating to public rights of way management, and this is to be expected given that the County Council are both the Highway and Surveying Authority for its area. Within this remit Council Officers have considerable experience of successfully securing changes to the rights of way network.
- 10.6 Therefore, in respect of matters relating to the weighting of the evidence given both for and against the proposals under consideration, we say that you might, quite reasonably, defer to the expertise of Network Rail when it comes to matters relating to the operation of the Railway. However, in that same respect, you should defer to the County Council on matters that relate to changes to the public rights of way network, not least because it was the only party to offer up evidence from witnesses with an actual day to day working knowledge of these matters.

11.0 Perceptions vs Expert opinions

- 11.1 Whilst it is accepted that there are problems in comparing risk on the crossings and risk on alternative routes (especially public carriageways) this is still an important factor in considering the suitability and convenience of an alternative route.
- 11.2 It is also accepted that various assessments and audits have been undertaken to assess the level of risk. These have undoubtedly been carried out in accordance with their defined methodologies and subject to expert consideration (on both sides).
- 11.3 Notwithstanding this, consideration must still be given to the perceptions of risk and or danger/safety, on a case by case basis, as evidenced by actual users of the routes in question. By way of example, I refer to the evidence of Professor Grimmer (C04) who gave evidence that, based upon his own experience and the evidence available to him, the Crossing (C04) presented a risk comparable to zero, but that he considered the alternative (Station Road) to be dangerous and a risk to his life to such an extent that he only ever used it in a vehicle.
- 11.4 It really doesn't matter how many experts say an alternative is safe or fit for purpose, if the actual (or potential) user has, from their own personal knowledge and experience a different perception. The fact of the matter is that if those users feel that they cannot or will not use the alternative provided (because of safety concerns, or because it does not meet their needs in the same way as the original route, or simply because it is not as enjoyable), then that alternative route cannot be said to be "suitable".

12.0 Outstanding Objections

- 12.1 As part of my opening submissions I outlined those crossings to which the County Council had no objection; those to which objections remained outstanding, and those for which various discussions were still ongoing over several matters.
- 12.2 The County Council acknowledges, and thanks, Network Rail for this continued dialogue which has allowed various issues to be clarified and resolved, and which in turn has

facilitated the withdrawal of the County Council's objections to some of the proposed crossing closures.

- 12.3 Network Rail and Cambridgeshire County Council have also entered into an agreement that addresses a number of the concerns of the Council regarding the implementation of the proposals. A summary of these matters is set out within the joint statement that has been submitted to the Inquiry.

Filled Order

- 12.4 With regard to the Filled Order I have been instructed to make the following submission: *"The County Council notes the contents of the Filled Order and supports the changes that have been made that have enabled it to withdraw certain of its objections. However, being unfamiliar with the TWAO process, the County Council has tried to ascertain the status of Filled Orders. It is understood that they have no formal status, and that there is no guidance on them or their role. Whilst the County Council does not doubt that they are common practice, the lack of transparency (however unintended) makes it very difficult for highway authorities, landowners and other parties not au fait with TWAOs to understand its role and to be prepared for all that they should be. This is another example of the vagaries of the TWAO process, and the County Council would ask DfT to provide amended guidance as to what parties can expect. This will be particularly important if NR are to undertake further Orders of this nature in other areas of the country"*.

- 12.5 My following submissions summarise the County Council's position regarding only those matters which remain outstanding.

General Point #1: Downgrading of UCR to Byway Open to All Traffic

- 12.6 In opening submissions the County Council raised concerns over proposals to downgrade certain Unclassified County Roads (UCRs) to Byways Open to All Traffic. Given that both of these classifications relate to highways of exactly the same status (i.e. public carriageways) the only difference being their character, it is difficult to comprehend how any downgrading can take place when all of the public rights afforded

to the UCR will still remain in place if the designation were changed to Byway Open to All Traffic.

12.7 It is further difficult to comprehend, as was accepted by Mr Kenning in cross-examination (who said words to the effect that: “a crossing has stone ballast, metal rails, and is very much the same wherever it is”) how a railway level crossing might be considered to meet the “character test” (see the Masters Case) for a Byway Open to All Traffic. Mr Kenning suggested that one consideration may be the type of gates that are proposed to be installed on the crossings in question. This cannot however be the case because these gates can only be installed once the “down-grading” has occurred and an additional Traffic Regulation Order put in place.

12.8 The fact of the matter is that the proposed “down-gradings” (from UCR to BOAT) are not possible as a matter of law. You can’t downgrade something and then still retain exactly the same level of rights. Furthermore, they are completely unnecessary because the desired end-result can be achieved entirely by the proposed Traffic Regulation Order.

12.9 The Secretary of State is therefore requested to remove these so called “down-gradings” from the Order.

13.0 Proposal C04: No Name #20 (Meldreth Footpath No 10)

13.1 The County Council’s position on this crossing is that it should not be closed. The proposal moves a traffic free route onto an alignment which places users in conflict with traffic using the integral service roads of the industrial estate and then forces them along a narrow footway alongside the carriageway where it runs over the road bridge.

13.2 It was accepted by Ms Tilbrook, on behalf of Network Rail that the alternative route has a “perception of being in an unsafe environment”; that the footway over the bridge “does not meet the current standards for footway provision”, yet these proposals will result in a 20% increase in use; and it is longer than the existing route.

- 13.3 Cllr Van de Ven gave evidence (at paras 19 & 20 of her proof of evidence) that the current route is important to her constituents because it connects users and communities together, and that there will be a definite detrimental impact on this connectivity if this proposal is approved. In addition, she advised that the Meldreth area is growing, in terms of population, at an increasingly rapid rate. This means that the PROW network is now more important than ever, and extinguishing a part of it, as per these proposals will have a detrimental effect on a growing community as well as its ties with the surrounding area.
- 13.4 Mr Roger James, who appeared on behalf of the Parish Council, stated that in his opinion the existing crossing was safe, and that the alternative route via the road and adjoining footway over the bridge were undoubtedly more hazardous, and this resulted in “a significant shift in [his] safety”
- 13.5 We also heard from Professor Grimmett, a professor of mathematical statistics at Cambridge University, who uses the existing route for jogging and tries to avoid as much “road running” as possible. He advised that he avoided using the bridge other than in a car and generally sought to avoid Station Road on foot because he considers it a very unpleasant place. In a similar respect he avoids the industrial estate.
- 13.6 Professor Grimmett stated (at para 12 of his proof of evidence) that the distance from one side of the crossing to the other will, via the road route, be 480 metres longer, and that the closure would result in a loss of amenity to the users of the local path network around the beautiful environs of the local villages. He went on to say (para 18) that personally he values this specific route greatly and would miss it very much if it were closed.
- 13.7 Professor Grimmet expressed the view (in cross examination) that based upon the evidence he has seen he perceives the risk at this crossing as being comparative to zero; and that Network Rail have not defined “Risk” therefore without additional evidence he is not able to accept their conclusions. He also had some remarks to make on comparative risk assessment when re-examined. He expressed the view that common

sense is a good guide to risk assessment and at C04 the risk is Nil whereas it is much greater at the bridge on the road.

13.8 We also heard from Mr David Robinson who is a railway enthusiast and photographer. Mr Robinson objects to this proposal because the alternative route runs along a busy road with lots of cars travelling towards the station and lots of lorries to the industrial estate and other places. He does not have any problems with the footpath crossing the railway and feels that the proposals take path users away from a crossing where he feels safe, with clear sight lines, and puts them in harm's way by redirecting them along the busy road.

13.9 Mr Robinson goes on to say that there is no enjoyment to be had walking along the alternative route. The existing route is a nice walk in the countryside with a greater chance of seeing animals than if walking on the road. If the proposals were to go ahead he would probably stop using the route altogether. He went on to express the view that the existing route is important for the purposes of maintaining connectivity to local amenities without having to use the road. In his opinion the alternative is not suitable or convenient and he expressed the view that it was important for the PROW network to be protected and improved, not extinguished.

13.10 We also heard from a number of witnesses (Mr Smith, Prof Grimmett and Mr Robinson) about the inadequate way in which the notices for this proposal had been posted. Notices had not been posted in the positions marked on the plans provided by Network Rail. Notices that had been posted were not crossing specific but included reference to multiple crossings, thus causing uncertainty, and also they had been posted in such a way that it was impossible to read them (i.e. printed double sided and then fastened to posts so that only one side could be read). Mr Smith, an experienced public rights of way professional, with significant experience of order making procedures, confirmed that such a practice was completely unacceptable, and that he did not consider the Notices to have been properly or appropriately posted on site.

14.0 Proposal C07: No Name #37 (Harston FP No 4)

- 14.1 The County Council's position on this proposal is that the crossing should not be closed.
- 14.2 A certain amount of time has been spent discussing the merits, pros and cons of ramped access to the road bridge, however this is not the proposal before the Inquiry, and Network Rail have confirmed there is no intention to undertake such works.
- 14.3 The County Council's view is that a very enjoyable walk, partially through a wooded area will be lost, and replaced predominantly by a route alongside the public carriageway. This will have a significant detrimental impact on the recreational value of this footpath.
- 14.4 In terms of convenience, the proposed route will require walkers to cross public carriageways on a number of occasions thus introducing the potential for conflict between motor vehicles and vulnerable road users. By comparison the existing route is traffic free (so far as motor vehicles are concerned) and involves a single crossing of the railway at a crossing which is open and therefore safe and fit for purpose. It will therefore be necessary for the Secretary of State to weigh up the level of risk faced by the walking public in using multiple public carriageway crossings, against the single crossing of the railway.
- 14.5 A further consideration, and perhaps the most serious of all, in terms of the convenience of the alternative route is the need for walkers to ascend and descend two flights of steps in order to cross the railway via the road bridge. These flights of steps are undoubtedly less convenient than the relatively level surface of the existing route, and they will form an absolute barrier to certain classes of user. They will therefore have a significant negative impact on the convenience and suitability of the alternative route.

15.0 Proposal C11 – Furlong Drove (Downham BOAT No 33)

- 15.1 The County Council's position on this proposal is that in the first instance the crossing should not be closed. However, if the alternative route located to the north of the crossing was to be designated as a Byway Open to All Traffic (subject to a Traffic Regulation Order to restrict mechanically propelled vehicles to motorcycles) this would be an acceptable compromise. This would address the lack of facility being proposed for the existing use by Trail Riders.
- 15.2 Mr Kenning (for Network Rail) confirmed in his evidence that the crossing must be deemed safe (fit for purpose) by virtue that the crossing is open (albeit we say it is unlawfully obstructed to certain users). Sight lines far exceed minimum requirements, there are no speed restrictions in place in relation to this crossing and no evidence of incidents has been submitted in support of closure.
- 15.3 Such a closure will have a significant impact on the use and enjoyment of the route, and in real terms, whilst most of the route would be still (legally) available, it would amount to the loss of the route, especially in terms of the southern section of the route which will be rendered a cul-de-sac.
- 15.4 The effective closure of the route (in real terms) is of specific concern given the uniqueness of this route and the astonishing and breath-taking views of Ely Cathedral (referred to by Councillor Bailey).
- 15.5 Any assessment of the nature and extent of the existing use of this crossing must be treated with extreme caution, because for the last 20 years or so legitimate users (i.e. 4 wheeled vehicles) have been unlawfully prevented from using this crossing. What perhaps makes the situation worse, in this case, is that the body responsible for this unlawful act is the applicant for the Order (Network Rail). The fact that these unlawful acts have gone unchallenged is no defence or excuse. What it does however mean is that certain users, who may have desired to use the route, but were aware of the long-standing obstructions, have had no option other than to use alternatives. This was evidenced by Alison Arnold who had found the gates to be locked on a couple of

occasions and therefore after that didn't bother to try and use the route. In view of these factors the nature and extent of potential use is impossible to quantify but, given the circumstances, cannot be ignored. The situation is perhaps analogous to those public path orders whereby temporary circumstances (such as obstructions) must not be taken into account as part of any assessment.

- 15.6 The existing route has, of course, been open to use by pedestrians, cyclists, equestrians and motorcyclists, yet the proposed alternative route, situated to the north of the crossing, does not facilitate the latter (i.e. motor cycles).
- 15.7 Motor cycle users (or perhaps a more accurate description would be Trail Riders) are expected to forego their enjoyment of riding along this lane; and are instead expected to use more of the ordinary public carriageway network, despite that fact that this is precisely what they seek to try and avoid. The very enjoyment of their hobby is the technical challenge of riding along unsealed and unsurfaced public carriageways. Riding along tarmacked road somewhat defeats the object of their recreational journey. Furthermore, as was given in evidence, the configuration of their vehicle (i.e. the types of tyres etc.) is set up for riding on unsurfaced routes, which itself makes riding on sealed surfaces that bit more hazardous and therefore less enjoyable.
- 15.8 It is certainly not sufficient to say that Trail Riders can still use the route as far as the crossing, then turn around and retrace their steps, and therefore their use of the route may continue. The lane simply would not be used in this manner, and the closure of the crossing without alternative provision will simply result in it not being used at all.
- 15.9 Network Rail have repeatedly sought to emphasise that motorcycle users include routes such as Downham BOAT No 33 as part of much longer journeys of 70 to 100 miles, and that such journeys already include riding on the ordinary carriageway network. Whilst this may be true, due to the necessity of having to travel between the types of routes from which they derive their enjoyment, Network Rail have provided no data to clarify the percentage split between what may be described as on-road and off-road routes that are used in these journeys. Without data of this nature it simply is

not possible to ascertain the impact that the crossing closure will have on this class of existing user. It is therefore submitted that Network Rail have failed to undertake sufficient assessments etc in order to provide any form of objective commentary on whether or not this existing class of user is adequately catered for within the proposals.

15.10 It is the County Council's submission that in the first instance this crossing should not be closed, but if it is, the proposed bridleway to the north of the crossing should instead be designated as a Byway Open to All Traffic with Traffic Regulation Order provision to limit mechanically propelled vehicular use to motor cycles (as is proposed elsewhere in the Order). This would be considered an acceptable compromise position.

15.11 Turning to the proposed new section of bridleway to the south of the crossing, whilst the principle of keeping vulnerable road users away from normal vehicular traffic is accepted, this proposal falls short of what might have been achieved in this particular instance. The County Council's preference would have been a direct link between Downham BOAT No 33, starting somewhere near the railway crossing, and Downham BOAT 34. Overall such a link is likely to have had less impact on agricultural operations than the proposed route and it would have meant that the southern section of Downham BOAT No 33 would still have been available as a through route. There would, of course, have been a need for a bridge over the drain, but the County Council would have been prepared to accept future maintenance liability for such a structure.

15.12 The alternative route, as proposed, however runs around two sides of the same field, and on one of these sides runs parallel to a deep drainage ditch. The County Council considers that there is insufficient width provision along this stretch of the proposed route to allow safe passage; and we have heard the evidence of the landowners that diesel powered irrigation pumps are operated in the immediate vicinity of the route. This would not be conducive to equestrian users.

15.13 Taking all of these factors into consideration, it was the evidence of the County Council's Public Rights of Way Officer, Karen Champion, that these proposals, as they stand, will have a significant impact on the rights of way network and local community.

15.14 Finally, in respect of this particular proposal, you heard Mrs Taylor's evidence and issues surrounding the incorrect service of notices – Mr Turney submitted that where there was an interest in land and that party had not been served notice, but they were aware of the proposals and have attended the Inquiry, there is no prejudice. The question that the Secretary of State must grapple with here is whether this excuses non-compliance with the notice serving requirements, or whether this alone is reason not to proceed with this particular proposal as part of the current Order.

16.0 Proposal C14: Eastrea Cross Drove (Whittlesey FP 50)

16.1 It is accepted that the current crossing itself is safe and fit for purpose, but that signals in the vicinity mean that if a train has to stop, it may be either over the crossing itself or may obstruct visibility. It is also accepted that the proposals will move anyone needing to cross the railway from a passive crossing to an active crossing.

16.2 The County Council's objection to this proposal relates to the proposed level of works to be undertaken on the alternative route. These are considered to be insufficient to adequately safeguard the surface of the route against damage arising from the likely vehicular use it will receive. It is the County Council's view that a hard-surfaced track is required to address this issue. This will safeguard the surface of the route and reduce the potential maintenance burden for the Highway Authority.

16.3 The need for such surface treatments has already, in part, been acknowledged by Network Rail, who have already specified that the areas around the ditch crossing culverts need a hardened surface. The County Council believes this treatment needs to be continued along the rest of the alternative route.

16.4 The alternative route is already used by the Drainage Board and it is anticipated that use by heavy mechanically propelled vehicles (i.e. agricultural vehicles) is likely to increase given that it will be a 2.5-metre-wide, levelled and compacted uncultivated corridor. It will be a natural route for accessing the land avoiding crop damage etc.

- 16.5 Network Rail suggest amongst the reasons that they will not implement the proposed level of work is because the level of work requested is disproportionate; and the land owner doesn't want it.
- 16.6 Whilst the County Council sympathises with the landowner's position, it is tasked with the duty to protect and maintain the public rights of way network. In this respect the County Council does not wish to find itself in the position of having an increased maintenance liability, or indeed having to consider enforcement action against the owners/occupiers of the land in respect of any damage to the surface of the route arising from use by agricultural vehicles. The level of works sought by the County Council are not disproportionate. They are a considered response in light of the Highway Authority's direct experience of these matters. This is a level of experience and understanding that Network Rail simply do not have, nor have they sourced externally as part of this project.
- 16.7 It must be recognised that once this crossing closure has been implemented and fully signed off after the initial maintenance periods etc Network Rail simply walk away from the issue, and the consequences of their scheme. It will be the County Council and the Public Purse that will be left to address any problems that have been created.

17.0 Proposal C15: Brickyard Drove (Whittlesey FP 48)

- 17.1 The County Council's position regarding this crossing remains that the alternative path is neither suitable nor convenient due to it being across a field which is known to be subject to regular disturbance of the surface arising from agricultural activities.
- 17.2 Network Rail's witnesses demonstrated a distinct lack of understanding (if not naivety) of the effect that agricultural operations, such as ploughing, will have on a path, and also what might be considered a reasonable standard of reinstatement. It was also evident that they had little or no understanding of the implications that keeping a path clear of crops might have on the productivity of the land.

- 17.3 It was, of course, confirmed that Network Rail would be responsible for the surface of the new path for the first twelve months, and that they would reinstate the surface following any disturbance during that period. It was however apparent that they were not fully aware of the implications of these commitments (i.e. full reinstatement within 14 days of first disturbance and then 24 hours of subsequent disturbance, as per the Rights of Way Act of 1990). If for any reason Network Rail were to fail to adhere to those timescales, the occupier of the land may find themselves liable to criminal proceedings or enforcement action. Certainly, in the latter case all costs relating to such works would be recovered from the occupier of the land, who may in turn, under the circumstances, seek recompense from Network Rail.
- 17.4 The path must also be kept clear of crops. It is not sufficient to simply clear the legal width of the path, that width must also be kept clear of crops falling over and overhanging from the sides. The implications of this are that, with crops such as sugar beet one might have to potentially clear 1.5 – 2 metres either side of the legal width of a path to ensure it remains clear. A clear swathe of say 5 metres is not therefore unrealistic.
- 17.5 Consideration must also be given to the fact that after the initial 12-month maintenance period has ended the County Council will not be in a position to require the occupier of the land to reinstate the footpath, following disturbance of the surface, to the same standards as Network Rail seek to implement in the first instance. They can only require reinstatement to a standard that is “reasonably convenient” for the exercise of the public right of way.
- 17.6 With crops of the nature indicated by the landowners (e.g. potatoes, sugar-beet etc) reinstatement to even the most basic of standards is no easy task and Network Rail have not only underestimated the liabilities that this proposal places upon both the owners/occupiers of the land and the Highway Authority, they will leave a path which is substantially inferior to the existing route, thus having a significant and detrimental impact on the usability of the route in question.

17.7 Finally, contrary to Network Rail's assertions on this matter, it was Karen Champion's evidence (based upon 30 years of experience of such matters) that she didn't generally find cross field paths, even when reinstated well, to be as convenient as an undisturbed field edge path (which is analogous to any other undisturbed grass paths such as the existing route of this footpath). Furthermore, she would be very wary about accepting or agreeing any new path if it was a cross field route.

18.0 Proposal C20: Leonards (Soham FP 101)

18.1 The County Council objects to this proposal on the grounds that the alternative route is longer for the majority of those who use it. In his evidence Cllr Hunt described the proposal as "An act of vandalism to consider closing it" [the crossing] and Geoffrey Fisher (on behalf of Soham Town Council) advised that if the proposals do go ahead he wouldn't use the proposed alternative route because there are better & nicer paths that he would walk instead.

18.2 It is the County Council's view that the alternative route will not be used due to the loss of convenience and enjoyment provided by the current route. The crossing closure will therefore have a significant impact on the local rights of way network and its users.

19.0 Proposal C21: Newmarket Bridge (Ely FP 24) & Proposal C22: Wells Engine (Ely FP 23)

19.1 The County Council's position on these two crossings is that they should not be closed.

19.2 It is common ground between Network Rail and the County Council that the alternative routes for both of these crossings fall within high risk flood plains and that when flooded substantial diversions are required. It is certainly the County Council's view that the diversions during times of flood will cause significant inconvenience to path users. One of the paths is a promoted route and the other includes a cycle path.

19.3 Network Rail have not provided any flood data to assist the Secretary of State when considering these crossings. It is certainly not for those opposing the closure to prove that flooding will be problematic, it is for those proposing the Order to prove that it will not. In this respect, we say that Network Rail has failed to discharge its burden of proof

and that without flood data no objective and sustainable assessment of the impact of the closures can be undertaken.

- 19.4 Whilst Network Rail (Ms Tilbrook) have, quite rightly, stated that there is no restriction or reason why (from the Environment Agency's point of view) that a path cannot exist within a flood plain, it is submitted that this rather misses the point. The fact of the matter is that the existing path runs along the flood bank and is not subject to flooding, the new path is being moved into the flood plain thus causing potential problems for path users and will have a significant impact on the use of the local path network.
- 19.5 Mr Kenning suggested in his evidence that during periods of flooding there would be no right to deviate from the proposed footpath. It is submitted that this is incorrect, the common law right to deviate may apply.
- 19.6 During the cross examination of Mr Kenning on this point it was clarified (by Mr Turney) that the whole of the proposed new route runs on land owned by Network Rail. If the common law right to deviate is considered to apply, then if the proposed new path becomes flooded or foundrous the public may use other land in the same ownership (namely cross the railway line) to continue on their journey.
- 19.7 The law relating to the common law right to deviate is somewhat equivocal but in *Taylor v Whitehead* (1781) Lord Mansfield said "*[Highways].... are for the public service, and if the usual track is impassable, it is for the general good that people should be entitled to pass onto another line*". Later case law suggests that the right to deviate may only apply when a landowner has caused the obstruction or foundrous conditions. Whilst it is accepted that Network Rail cannot be said to be responsible for the flooding, they would be responsible for the path having been moved into the area that is known (in advance) to be liable to flooding, and therefore they are the creators of the situation.
- 19.8 The issue, at very least, creates ambiguity, which we submit the Secretary of State must take into consideration as part of the decision-making process.

19.9 With regard to the Wells Engine crossing (C22) the County Council's Public Rights of Way Officer, Karen Champion raised a number of concerns regarding the suitability of the proposed new route in respect of crime, fear of crime, anti-social behaviour and future maintenance liability. These factors may all have a negative impact on the use of this promoted route.

20.0 Proposal C25: Clayway (Littleport FP 11)

20.1 The County Council objects to this proposal because the alternative routes utilise the public carriageway network and connectivity with the remainder of the local path network, which runs towards the centre of the village is lost.

20.2 It was the evidence of the County Council's witness, Karen Champion, that the crossing closure, would have a significant negative impact due to the loss of the link between the riverside footpath and FP No 10 north west of Padnal Road. The net effect of this will be that users will tend to use Victoria Road to the Village centre instead of cutting back along Padnal Road to FP 10. This is less enjoyable given the mixed vehicular/pedestrian use compared to pedestrian use only.

21.0 Proposal C27: Willow Row Drove (Littleport BOAT 30)

21.1 The County Council's position on this proposal is that in the first instance the crossing should not be closed. However, if the alternative route was to be designated as a Byway Open to All Traffic (subject to a Traffic Regulation Order to restrict mechanically propelled vehicles to motorcycles) this would be an acceptable compromise. This would address the lack of facility being proposed for the existing use by Trail Riders.

21.2 The proposal as it stands however results in Byway 30 becoming a cul-de-sac route, for an established class of user (i.e. Trail Riders). This has the effect of a loss equating to 20% of the local byway network (14% becoming a no through route plus a further 6% total loss). This is by no means an insignificant percentage.

21.3 As mentioned previously, Network Rail have repeatedly sought to emphasise that motorcycle users include routes such as Littleport BOAT No 30 as part of much longer

journeys of 70 to 100 miles, and that such journeys already include riding on the ordinary carriageway network. Whilst this may be true, due to the necessity of having to travel between the types of routes from which they derive their enjoyment, Network Rail have provided no data to clarify the percentage split between what may be described as on-road and off-road routes that are used in these journeys. Without data of this nature it simply is not possible to ascertain the impact that the crossing closure will have on this class of existing user. It is therefore submitted that Network Rail have failed to undertake sufficient assessments etc in order to provide any form of objective commentary on whether or not this existing class of user is adequately catered for within the proposals.

22.0 Delivery Costs (as opposed to Commuted Sums)

22.1 Finally, the County Council would like to submit the following statement regarding the additional financial burden that is to be placed upon the Authority if the Order is to be granted:

22.2 The delivery of the proposed works will place a considerable extra burden upon the County Council, such as:

- Ongoing liaison with NR
- Reviewing and approving designs for works
- Undertaking site inspections before, during and after the works are constructed
- Approving and certifying works
- Updating the Definitive Map and Statement and other asset records to reflect the changes to the highway network

22.3 The Council has finite resources with which to undertake its duties and such resources are fully committed at a time of significant financial restraint. The requirement to undertake this additional work will create a further workload for the Authority beyond its normal resources and so other projects and statutory duties will be compromised in order to complete this work.

- 22.4 The County Council has sought costs from Network Rail for the significant officer time that the delivery of the proposed works will consume. Further, the Council seeks monies to help pay for additional resources that would help deliver the additional burden in a timely manner. Network Rail has informed the Council that this has been raised at or near the top of the Network Rail organisation and that payment for any of these costs has been refused.
- 22.5 The Council is very disappointed that Network Rail refuses to offset any of the additional burden that is being imposed upon the Authority. Network Rail has consistently stated that it has to make best use of public money, without apparently recognising that the Council has identical duties. The payment of reasonable sums to the Council for this additional work would not place an additional burden upon the public purse, it would merely serve to move monies from one part of the public purse to another, in line with the required public undertakings. The Council is particularly disappointed that Network Rail does not recognise this fact.
- 22.6 The Council notes that there are detailed protective provisions in the proposed Order at paragraph 9 of Schedule 16 for drainage authorities which includes indemnification for costs. As the Lead Local Flood Authority for Cambridgeshire, the County Council is also a drainage authority and, had there been any watercourses falling under its jurisdiction, this clause would have equally applied to the Council.
- 22.7 As Network Rail has agreed to pay the costs of the drainage authorities, the County Council considers it entirely reasonable that Network Rail should also pay the County Council in its capacity as the Highway Authority for its similar costs incurred by Network Rail's scheme. It seems perverse that drainage authorities should receive their costs but not the Highway Authority who will have a great deal more work to undertake in enabling Network Rail's scheme.
- 22.8 The County Council estimates its costs being around £20,000 over the 5 years of the implementation period. In light of the overall £20.8m in savings that NR anticipates

making as a result of its scheme, as outlined by Dr Algaard in her evidence, the County Council's request represents a very small cost.

- 22.9 The Council will continue to lobby Network Rail at the highest level for the payment of reasonable costs. The Council notes the implications of the Transport and Works Act Order process for other authorities that might be subject to similar works.

23.0 Submission

- 23.1 On the grounds set out above the Secretary of State is respectfully requested to exclude from any Order that may be made, the matters and crossings to which the County Council has maintained its objections.