

NETWORK RAIL (CAMBRIDGESHIRE LEVEL CROSSING REDUCTION) ORDER

SUBMISSION ON BEHALF OF SOUTH YORKSHIRE PENSIONS AUTHORITY IN RELATION TO THE PROPOSED DOWNGRADING OF CROSSING C28

1 BACKGROUND

- 1.1 This submission is made on behalf of the South Yorkshire Pensions Authority ("SYPA") in relation to the Network Rail (Cambridgeshire Level Crossing Reduction) Order ("the Order").
- 1.2 It follows from the representation dated 19 December 2017 (Document 1) made on behalf of the SYPA by Burges Salmon and seeks to expand on that representation in so far as it affects the proposed downgrading of crossing C28.
- 1.3 Crossing C28 is situated on a public highway known as Black Horse Drove (see Plan at Document 2). That highway serves property in the ownership of the SYPA which directly abuts the adopted public highway Black Horse Drove.
- 1.4 The proposal, as outlined in the Network Rail (Cambridgeshire Level Crossing Reduction) Order Design Guide at page 42 (see Core Document NR12) is stated as follows:

"Proposed Work

All public rights would be extinguished at the crossing although public road will continue on either side. The crossing will become a private user worked crossing for registered users.."

- 1.5 SYPA understood this to mean that, notwithstanding the highway within the confines of the crossing would be extinguished. SYPA would continue to have rights to pass along Black Horse Drove at the crossing (to be granted to the SYPA by Network Rail) which would allow it to access the public highway to the east and the west of the crossing. On this basis it did not object to the proposed Order.

1.6 However, by letter dated 27 November 2017 (see Document 3), Cambridgeshire County Council raised concerns regarding the status of the public highway to the west of the crossing should the Order regarding crossing C28 be confirmed.

1.7 Specifically the letter states:

“As local Highway Authority, Cambridgeshire County Council is concerned to ensure that owners of land to the west of the crossing...are aware that in fact it is likely that the effect of the Order will be to extinguish this highway”

1.8 This is of concern to the SYPA as it is not the owner of the land over which Black Horse Drove runs. Accordingly, should the effect of the Order be as per the letter from Cambridgeshire County Council, the SYPA would no longer have the right to access its property.

1.9 Network Rail have produced a response to Cambridgeshire County Council's letter (see NR-INQ-11 Note 5). This Note states:

Those who need to use the crossing will be granted rights to do so and their access across the railway will be unaffected.

1.10 The Note acknowledges that:

CCC's position in relation to this crossing is that it has no objection to the closure of the crossing provided that all highway rights are stopped up west of the crossing...

1.11 It also states that:

Network Rail's proposals explicitly extinguish the public rights over the railway and replace them with private rights. However, the Order is silent on the highway to the west of the railway which provides a link to the private road to the cluster of properties.

- 1.12 It appears from the Note that Network Rail does not agree with Cambridgeshire County Council's position. Network Rail state that *"residents would be entitled to continuing access over the former highway, whether by private treaty or operation of the law"*. They also confirm that it is not Network Rail's intention to leave any property without a right of access.

2 THE LEGAL POSITION

- 2.1 There are strong arguments in favour of Cambridgeshire County Council's position on the status of Black Horse Drove following confirmation of the Order.
- 2.2 Support for the Council's assertions can be found in a number of High Court cases including Bailey and Another v Jamieson and Others (1876) 1 C.P.D. 329 (see Document 4) and Kotegaonkar v Secretary of State for the Environment, Food and Rural Affairs [2012] EWHC 1976 (Admin) (see Document 5).
- 2.3 Although any given case will, of course, depend on its facts, these decisions record that a way ceases to be (and cannot be) a public highway where the public access to it has been lawfully stopped up at either end. In such circumstances it becomes a track which no member of the public can legally get to. Essentially an "isolated highway", being one which is unconnected to any other highway, does not have all the requisite essential characteristics of a highway: passing along it as licensee does not constitute passing along it freely and at will and is longer a right enjoyed by the public "as of right".
- 2.4 The effect of the Order is likely, therefore, to prevent that part of Black Horse Drove to the west of the crossing C28 remaining as public highway.
- 2.5 To confirm an Order in such circumstances would be unusual as, in most cases where stopping up of a public highway is being considered, it is a requirement that an equally commodious alternative is first provided. That is not the case here.

3 SYPA'S POSITION

3.1 Having established that the effect of the Order is likely to result in the road to the west of crossing C28 no longer being a highway, the SYPA is concerned to ensure it retains right of access along Black Horse Drove to and from its property.

3.2 In an attempt to address this, Network Rail has proposed an amendment to the Order (NR-INQ-11 Note 5):

...to address any ambiguity as to the rights of access of those potentially affected properties to the west of the level crossing, Network Rail request that the Secretary of State make the following minor amendment to article 15 of the Order to include a new article 15(4)

(4) The closure of Black Horse Drove to the public is not to be taken to affect the right of passage on foot and by vehicle of owners of properties who until the downgrade of the level crossing have obtained access to their property over that part of Blackhorse Drove which lies to the west of the level crossing."

3.3 The SYPA have the following concerns in respect of this proposed amendment:

(a) Cambridgeshire County Council's position is that it does not object provided that all public rights of way to the west of the crossing are stopped up and replaced by private rights. However, the amendment to the Order does not appear to have the effect of granting private rights of way over the road to the west of the property: it merely states the closure isn't to be taken as affecting rights of way. SYPA take this as meaning that the Order does not affect existing private rights of way. In the absence of a public highway right, there are no existing private rights of way which benefit the SYPA and allow it to access its property along Black Horse Drove. In order for the SYPA to obtain the necessary private rights, these would need to be granted by the subsoil owner of the

land over which Black Horse Drove runs (or such rights would need to be acquired compulsorily). This is acknowledged in the letter from Cambridgeshire County Council (Document 3);

- (b) If the road to the west of crossing C28 ceases to be public highway, there will no longer be any duty on the Local Highway Authority to maintain it. Maintenance responsibilities will need to be agreed with the subsoil owner of the land over which Black Horse Drove runs (or rights of maintenance acquired compulsorily). Network Rail has not addressed this issue in its response;

3.4 In view of this, the SYPA submits that the Order in relation to crossing C28 **should not be confirmed** unless and until:

- (a) Network Rail has procured rights from the owner(s) of the subsoil to the west of the crossing over which Black Horse Drove runs in favour of the SYPA to pass and repass over the land between crossing C28 and SYPA's property for all purposes with or without vehicles in connection with access to and from its property and it provides evidence that, notwithstanding that the road to the west of crossing C28 will cease to be public highway, it will nevertheless continue to be maintained as such at no cost to the SYPA; and
- (b) In any event and for the avoidance of doubt (provided Network Rail satisfies the Secretary of State that he is in a position to include a proposed Article 15(4) in the Order) a new Article 15(4) shall be included in the Order in the following terms:

If any part of Black Horse Drove lying west of the level crossing at any time ceases, in consequence of this Order, to be a road over which the public has a right of way for all traffic, the owners and occupiers of the land abutting such part shall have such rights of passage over it as shall be necessary to enable them to pass and repass to and from that land from and to the level crossing as if there had been no such cessation.

Burges Salmon

29 December 2017