

TRANSPORT AND WORKS ACT 1992

INQ

TOWN AND COUNTRY PLANNING ACT 1990

PLANNING (LISTED BUILDINGS AND CONSERVATION AREAS) ACT 1990

TRANSPORT AND WORKS (INQUIRIES PROCEDURE) RULES 2004

THE PROPOSED NETWORK RAIL  
(CAMBRIDGE SOUTH INFRASTRUCTURE ENHANCEMENTS) ORDER

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NOTE 4

ISSUES RELATING TO THE CLOSURE OF WEBSTERS AND  
DUKE'S NO. 2 LEVEL CROSSINGS AND THE PROVISION OF AN  
ACCOMMODATION BRIDGE

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**Introduction**

1. Issues relating to the closure of Webster's Level Crossing, Duke's No. 2 Level Crossing ('Webster's' and 'Duke's No. 2'; together 'the Crossings') and their replacement with an accommodation bridge are dealt with in the Proofs of Evidence of Mr John Prest (**NRE 6.2**), Mr Andy Barnes, (**NRE 1.2**) and Mr Bill Simms (**NRE 11.2**), and were explored in live evidence. There are additional matters – namely the status of the right enjoyed by OBJ 01, St John's College ('St John's') over the Crossings, and the legal test for closing level crossings – that are a matter for legal submissions. As these issues are cross-cutting, and at the Inspector's request, they are summarised in this note for convenience.
2. The following matters are addressed:
  - a. The Current Position
  - b. The Applicant's Proposals
  - c. The Status of the Rights over the Crossings
  - d. Legal Tests for closing level crossings

## The Current Position

3. The land to the east and west of the railway adjacent to/in the vicinity of the existing Crossings is owned by St John's College (OBJ1). The land is leased to an agricultural tenant, Mr Robert Webster. The Crossings themselves are located on land owned by the Applicant.
4. The above is confirmed in the Book of Reference (**NR 08**, pp.107-110) and depicted on the Revised Deposited Plans (**NR 09.1**, Sheets 4 and 5). The following are the relevant plots owned by St John's and tenanted by Mr Webster:
  - a. In proximity to Webster's:
    - i. eastern plots - 097-101, 105 and 107;
    - ii. western plots - 095 and 096.
  - b. In proximity to Duke's No. 2:
    - i. eastern plots – n/a (no land is being acquired on the east and so there are no plot numbers); and
    - ii. western plots - 095 and 096.
5. Both St John's College and Mr Webster are the sole authorised users of the Crossings, though in practice it is only the agricultural tenants who use the Crossings, as explained in Mr Prest's Proof of Evidence (**NRE 6.2**, [67], [69], [80]-[82] & [85]-[86]).
6. In addition to the level crossing, there is also a separate footbridge at Webster's (see **NRE 6.2**, Fig. 20, p. 43), which crosses over and above the rails. There is a public right of way over that footbridge for members of the public (**NR 15**, Fig 2-6, PDF p.18; **NR 09.1**, Sheet 5 of 10, PDF p.9). The footbridge itself will not be substantially affected by the CSIE Project, save that works are required to provide screening and electrical separation for users of that footbridge (**NRE 1.2**, p. 63 at [200]). This will require only minor modifications to the steelwork on the bridge. The public right of way over the footbridge is not to be permanently stopped up and as such is not therefore considered further in this note.

## The Proposal

7. An accommodation bridge is proposed in the upper, north-western part of the field to the west of the railway over Hobson's Conduit parallel to Addenbrooke's Road (see **NRE13**, PDF pp.17 and 43).
8. Without the proposed accommodation bridge, the proposed TWAO, by extinguishing the rights over the Crossings, would result in the field on the western side of the railway lines becoming landlocked, save for an access via "The Hectare" shown in Annex 1, Figs 3 and 4. Continued access to the western field is enhanced by the accommodation bridge, as it is unencumbered and agricultural vehicles can access it by using the local road network.
9. The current and proposed accesses to the western field are illustrated in Annex 1, Fig 1 to this note, departing from Granham's Farm (as to which see below).
10. In response to a question asked by the Inspector, Mr Simms indicated that he thought it might take 20 minutes for an agricultural vehicle to utilise the alternative access route from Granham's Farm. However, as indicated by Counsel on Day 7 of the Inquiry, he has since checked the position and confirms that access via the accommodation bridge is estimated to take c. 6 minutes, or 5-10 minutes during heavy traffic. The Applicant has also checked the position as regards access via The Hectare, which is estimated to take 3 minutes in normal conditions (see Annex 1, Figs 2a, 2b and 3).
11. It has subsequently emerged that the tenant farmer, Mr Webster, is based not at Granham's Farm but in Coton to the west of Cambridge and as such the Granham's Farm route is not relevant. It was agreed with the Inspector that no further information is required in this regard.
12. All vehicles that can pass through Webster's and Duke's No. 2 will be able to pass through the accommodation bridge, which, at 5.2m, is larger than the existing gates at Webster's (of 5m) and at Duke's No. 2 (which is 3.64m) (**NRE 6.2**, [72] and [66] respectively).
13. Final details of how the access is to be managed are to be the subject of agreement with St John's. However, the Applicant agrees with the landowner's proposal that the farm vehicle and pedestrian access in this

location be segregated/separate and as such this will be secured through detailed design.

## **The nature of the rights over the Crossings**

### The extent of the dispute

14. St John's objection raises no issue with the principle of the accommodation bridge and its relative convenience and utility, nor the safety case for justifying the closure of the Crossings. Their objection does however relate to the extent of the rights granted by Network Rail from the public highway to the accommodation bridge, which they contend should not be limited to agricultural vehicles. They seek a broader public right of way to all users.

### Network Rail's position

15. It is in the first instance to be noted that the Order does not explicitly state the nature of the rights to be granted back to St John's. This is addressed further below, under the heading 'Implications of the above for the Order'.
16. The Applicant's position, based on the legal advice that it has received, is that the use of the existing Crossings is limited to use for accessing the farmland for agricultural purposes, including with agricultural vehicles. St John's does not benefit from a general right of way over the Crossings. Network Rail does not therefore propose (and is not required to) to provide a greater extent of rights over the accommodation bridge that they currently enjoy over the Crossings.
17. The Applicant's position is justified as follows.
18. The construction of the railway line over which the Crossings now passed was authorised by the Eastern Counties Railway Act 1844 ('the 1844 Act'). The 1844 Act authorised the Railway Company to compulsorily acquire land for the purpose of its creation.
19. However, by virtue of s.165 of the 1844, the Railway Company was obliged

*"for the purpose of making provision respecting Works required for the Accommodation of the Owners and Occupiers of Lands adjoining the*

*Railway... after any Part of the Railway shall have been formed, and during the Construction"*

to

*"make the following Works at the Times herein-after mentioned...so many Bridges, Arches, Hollows, Culverts, Fences, Ditches, Drains, and Passages over, under, or by the Sides of or leading to or from the Railway, as shall be necessary for the above purposes".*

20. The 'above purposes' referred to included *"the purpose of making good any Interruptions caused by the Railway to the Use of the Lands through which the Railway shall be made"*.
21. In short, the Railway Company was to provide by way of accommodation works such crossings as were necessary for making good the interruption of the existing use of the lands bisected by the new railway.
22. It is established through case law that the right to use an accommodation work is limited to using it to use for the purposes for which it was initially conferred, or which could have been in the reasonable contemplation of the parties at the time: Great Western Railway Co v Talbot [1902] 2 Ch 759 (Court of Appeal). The purpose cannot be subsequently enlarged. As such, it includes (for example) use of the crossing by machinery which is a modern replacement for the horse and cart, but does not include use for an altogether different purpose: British Railways Board v Glass [1965] Ch 538.
23. In the present case, the use of the land served by the accommodation works at the time of the 1844 Act was for the purposes of agriculture (as indeed it remains today).
24. In relation to Webster's, by a Deed dated 1851, Network Rail's predecessor covenanted with St John's to provide a level crossing as an accommodation work at the location of their choosing. The principal relevant parts of that Deed state:

*"[having referred to the sums payable by way of compensation] it was agreed between the said parties should be and include compensation for all damage by severing the said purchased Land and Hereditaments from the other property of the said Master Fellows*

*and Scholars and the said Peter Grain [the tenant] as such Lessee as aforesaid or by otherwise injuriously affecting such other property in exercise of the powers of the said Acts or any of them and should be in full satisfaction for all accommodation works and things which might otherwise be required to be made or done under any of the said Acts for the better enjoyment protection or accommodation of the adjoining property of the said Master Fellows and Scholars and of the said Peter Grain as such Lessee as aforesaid Save and except one level crossing over the said Railway for the use of the said Master Fellows and Scholars and others their lessees or Tenants thereof at any point to be decided upon by the said Master Fellows and Scholars...*"

and

*"...the said Eastern Railway Company for themselves their Successors and assigns do hereby covenant with the said Master Fellows and Scholars their Successors and assigns that they the said Company their successors and assigns shall and will make and at all times hereinafter maintain one level crossing over the said Railway at any point that the said Master Fellows and Scholars may elect for that purpose and permit such Crossing to be used at all times for ever hereafter by the said Master Fellows and Scholars their Successors and assign lessees tenants agents servants and workmen with or without horses carts and carriages..." (emphasis supplied).*

25. What was therefore granted was expressly stated to be an accommodation work, to be carried out by the Railway Company. No right independent of such an accommodation work was granted.
26. The agricultural nature of the accommodation work is further confirmed by a Widening Agreement dated 19 January 1973 to enlarge the gates at Webster's between Network Rails predecessor at St John's College, which explicitly describes Webster's as an "*agricultural accommodation level crossing*".
27. The Deed setting out the covenant for Duke's No. 2 cannot be located. However, given:

- a. That the Railway Company was obliged to provide accommodation works pursuant to s. 165 of the 1844 Act;
- b. the geographic and temporal proximity of the construction of Duke's No. 2 to Webster's, for which a deed does exist; and
- c. the fact that the same parties were involved,

it is considered that there is no basis for concluding anything other than the the rights granted would have been the same.

28. Certainly, there is no evidence of any kind of a more extensive right being granted than that the Railway Company was obliged to provide. Nor is there any factual evidence of wider user. In the absence of such evidence, the Applicant considers that the statutory obligations set out the scope of what would have been provided.
29. The approach taken by the Applicant in relation to Duke's No. 2 is consistent with that taken by the High Court in Taff Vale Railway Co v Canning [1909] 2 Ch 48.
30. It is noted that the decisions relied upon were taken in relation to cases where the accommodation works were to be provided under s.68 of the Railway Clauses Consolidation Act 1845. However, since s.68 is in like terms to s.165 of the 1844 Act, there is no reasonable basis upon for concluding that a different approach would be taken in relation to it.

#### Resolution of the issue

31. The issue is intended to be the subject of continuing discussions with St John's, with a view to reaching a mutually satisfactory resolution. However, to the extent that the issue is not ultimately the subject of voluntary resolution, the Applicant intends to grant rights consistent with its view of the scope of rights enjoyed by St John's at present.
32. It is further to be noted that, to the extent that St John's is able to demonstrate that it has suffered loss as a result of the extinguishment of its private right to use the level crossings, it will be compensated for the same pursuant to Art 8(4) of the Proposed Order.

### Implications of the above for the Proposed Order

33. The drafting of the Proposed Order is such that it does not require the Secretary of State to conclusively determine the issue of the nature of the rights enjoyed by St John (determination is only required to such extent as is considered necessary for considering whether the grant of the Order is justified).
34. Art 8(3) of the Proposed Order prevents the power to stop up, and extinguish private rights over, the Crossings until such time as "*the new access specified in column (4) [of Schedule 5] in relation to that level crossing has or have been provided for authorised users and is or are open for use*". It is noted that the reference to column (4) is a typographical error; it should read 'column (3)'.
35. Column (3) confirms that in respect of the closure of both of the Crossings, the new access is the accommodation bridge specified in Work No. 11. It does not specify the precise nature of the rights to be granted over that accommodation bridge; all that it is required is that the bridge has been provided and is open for use by the authorised users. It is submitted that this requires the grant of rights sufficient for the authorised user's existing purposes. A grant of rights to use the new bridge coterminous with the rights that they have now would satisfy this requirement.
36. Finally, it is noted that the power to acquire new rights that is being sought over Plot 8a is sufficiently extensive to enable it to grant such rights as may be agreed between the Applicant and St John's as being appropriate, or the abovementioned rights comparable to those existing, which the Applicant has indicated it is committed to providing (**NR02-1**, Schedule 3, column (3)).

### **Legal Tests for Closure of Level Crossings**

37. The Transport and Works Act 1992 ('the 1992 Act') provides, in s.5, that an order under section 1 or 3 of that Act (such as the proposed TWAO):

"(6)[...] shall not extinguish any public right of way over land unless the Secretary of State is satisfied—

- (a) *that an alternative right of way has been or will be provided, or*
- (b) *that the provision of an alternative right of way is not required”*

38. The DfT’s own TWA Guidance<sup>1</sup> supplements this as follows:

*“Paragraph 4 provides for orders to authorise the creation or extinguishment of rights over land, including rights of navigation over water, either compulsorily or by agreement. [...] Where, for example, a proposed railway crosses a public right of way, it may be necessary to stop up the right of way or two diverted by the construction of the bridge will underpass the power to extinguish a public right of way is however restricted by section 5(6). This provides that a section 1 or 3 orders shall not extinguish a public right of way over land unless the Secretary of State is satisfied that alternative right away has been or will be provided, or that one is not required. 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”.*

- 39. It shall be observed that there is no “*public right of way*” over Duke’s No. 2 or Webster’s Crossings for the reasons given above. Consequently, the requirement for an alternative crossing, and the related guidance requiring that alternative to be ‘a convenient and suitable replacement’ do not formally apply.
- 40. There is no comparable statutory or policy test in relation to the extinguishment of a private right of way.
- 41. Nevertheless, Network Rail has sought to provide a “*convenient and suitable replacement for existing users*”, consistent with what would be required by the 1992 Act and associated guidance.
- 42. The alternative access being provided is indicated in Annex 1, Fig 1 to this note. Rather than requiring the existing users to (i) phone up the signallers, (ii) wait for permission from the signallers (iii) open the gates, (iv) cross the

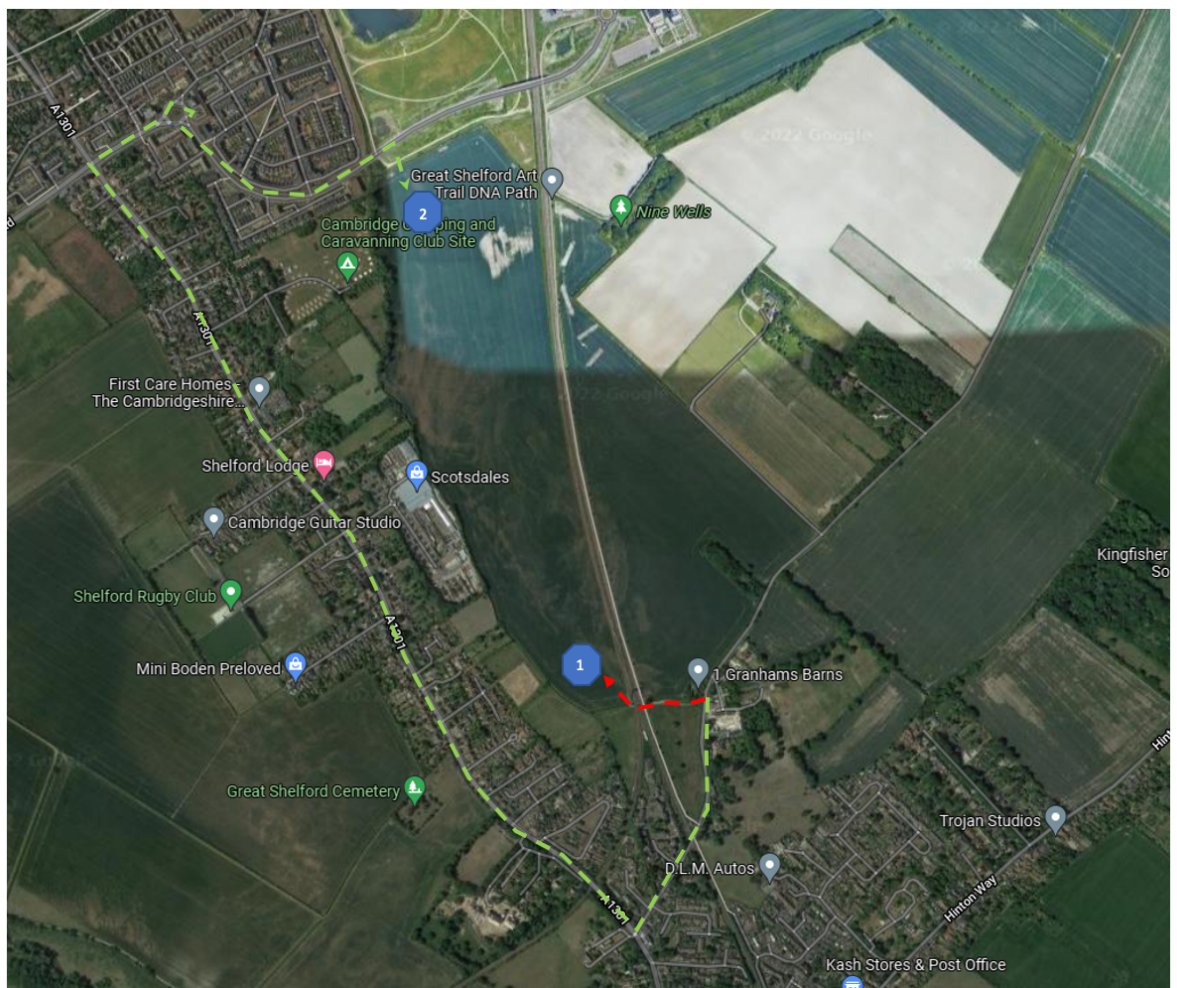
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<sup>1</sup> See Department for Transport, *A Guide to TWA Applications*, Annex 2: Commentary on Schedule 1 to the TWA (2006)

crossing, potentially in a large/slow agricultural vehicle (v) close the gates, all across live railway tracks that are in constant use, the alternative access provides permanent access to the lands adjacent to the railway without requiring any pre-authorisation from signallers. It removes the dangerous, uncontrolled interface between the users and the tracks and as such is a marked improvement in safety terms from the current position.

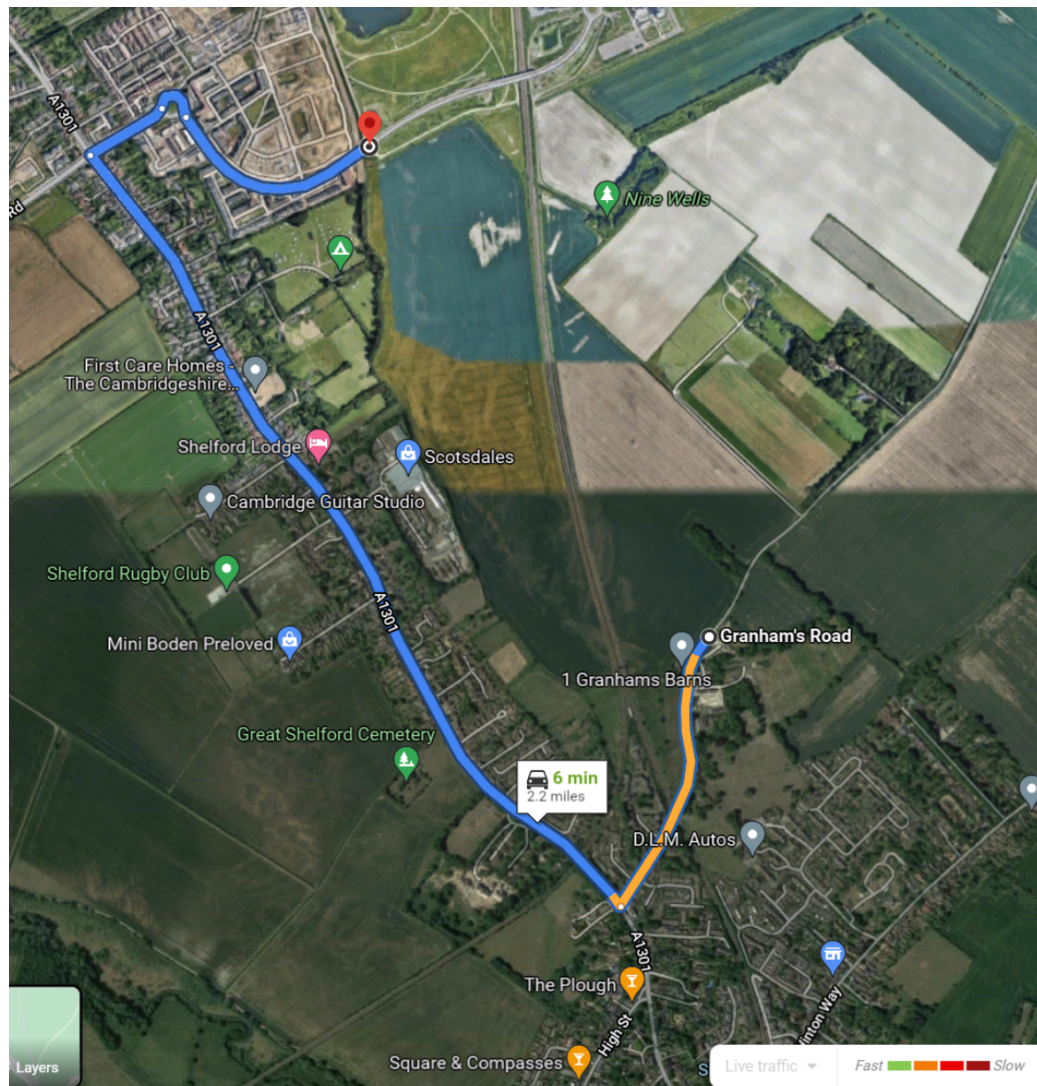
## ANNEX 1

**Fig. 1: Existing and Alternative Access Routes**

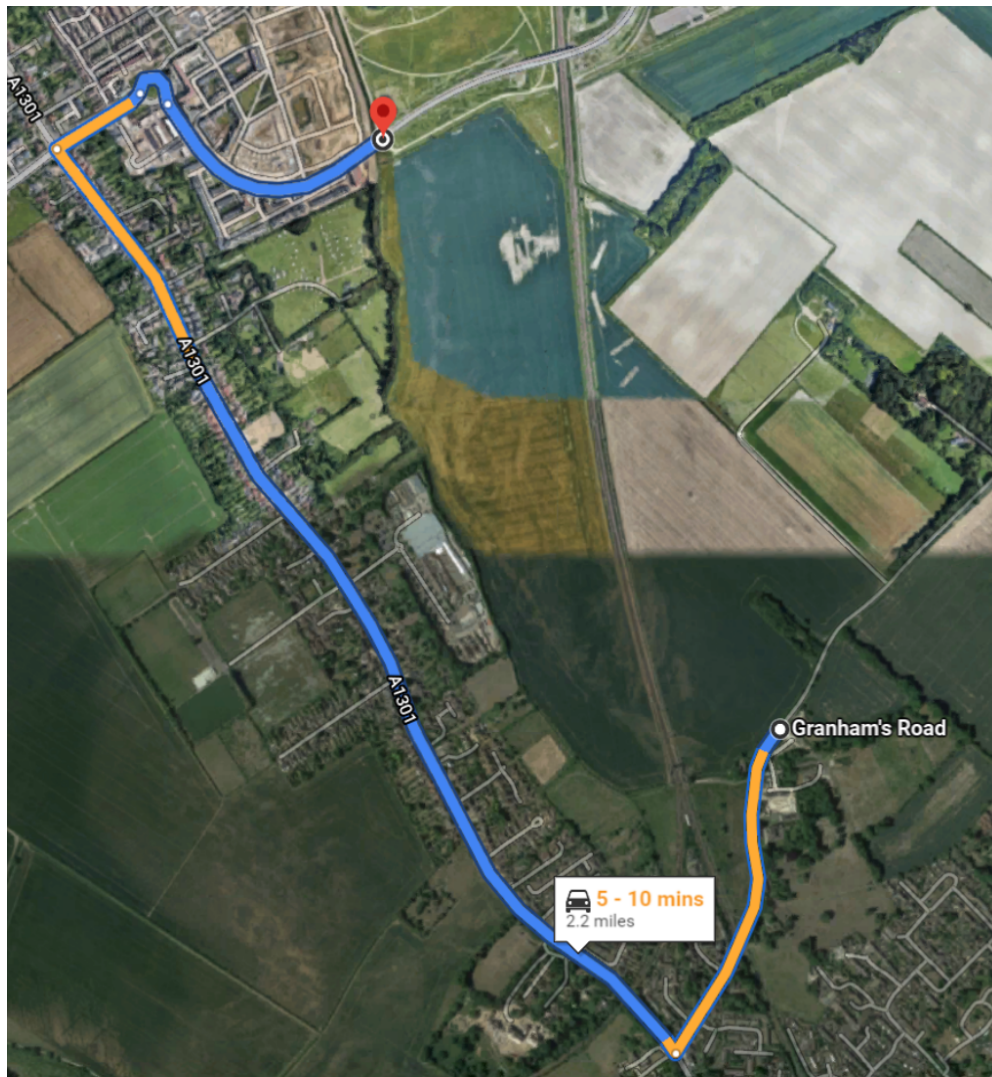


- (1) Current access over Websters level crossing to agricultural field from Granhams Road
- (2) Proposed replacement access over accommodation bridge (Work No.11) to agricultural field from Addenbrookes Road

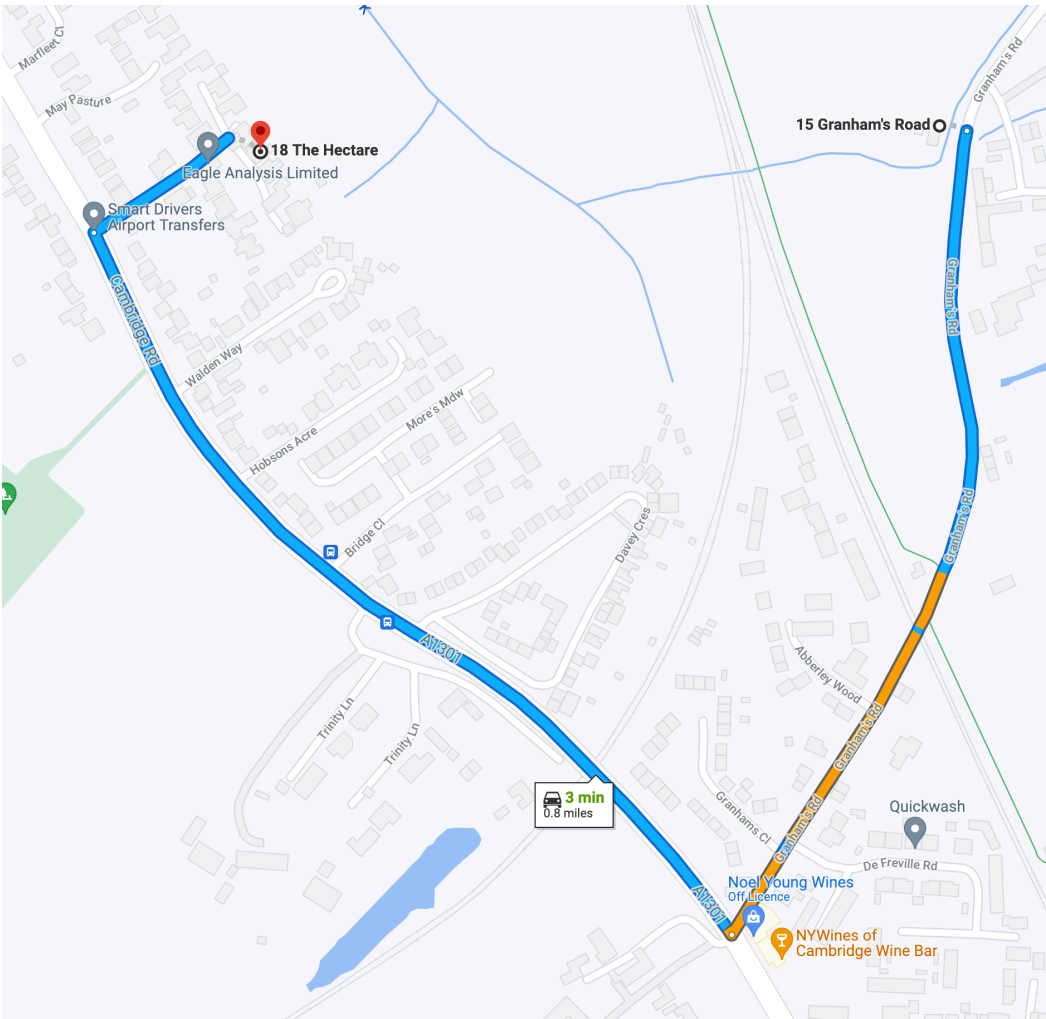
**Fig 2a: Timing for Alternative Access Route (non-peak hour weekday)**



**Fig 2b: Timing for Alternative Access Route (Monday morning rush hour)**



**Fig 3: Existing Access to Western Field via “The Hectare”**



**Fig 4: Detail of Access to Western Field via “The Hectare”**

