

DATE 6 FEBRUARY 2024

The Network Rail (Leeds to Micklefield Enhancements) Order 20[XX]

Department for Transport reference: TWA/23/APP/03

Transport and Works Act 1992 and The Transport & Works (Applications and Objections) (England and Wales) Rules 2006

Legal Submissions
On behalf of Leeds City Council

1. INTRODUCTION

- 1.1 This statement represents the Legal Submissions submitted by Leeds City Council (**Council**) in support of points previously raised in its Statement of Case dated 17 November 2023 and the corresponding addendum dated 19 January 2024 (together, the **Statement of Case**) relating to points previously raised in the holding objection submitted by the Council on 18 August 2023 (**Objection**). This is in respect of Network Rail Infrastructure Limited's (**Network Rail**) application to the Secretary of State for Transport (**SoSfT**) for an order to be made under the Transport & Works Act 1992 (**Order**) to authorise the construction, maintenance and operation by Network Rail of works on the Transpennine route between Leeds and Micklefield (**Scheme**), details of which are set out in more detail in Network Rail's application document reference NR07.
- 1.2 The Council is, amongst other statutory roles, the relevant highway authority responsible for the public rights of way and public road network for the area concerned, is the relevant planning authority and a landowner affected by the works proposed in the Order. The Council is in receipt of various listed building consent applications from Network Rail.
- 1.3 This legal submission is submitted in support of the Council's objection to Network Rail's proposed closure of the Peckfield Level Crossing and should be read alongside the Proofs of Evidence submitted in support of the same objection by Robert Buckenham and John Booth dated 6 February 2024.
- 1.4 This Legal Submission is submitted as required under rule 7 of the Transport and Works (Inquiries Procedure) Rules 2004.

2. BACKGROUND

- 2.1 This Legal Submission is made in respect of the Council's position in objecting to Network Rail's proposed closure of the Peckfield Level Crossing and sets out the Council's position with regard to the tests in section 5(6) of the Transport and Works Act 1992 that must be applied by the Secretary of State.
- 2.2 In its Statement of Case the Council addressed two key issues with Network Rail's proposal to close the Peckfield Level Crossing:
- 2.2.1 The proposed diversion of the current bridleway is not considered suitable for bridleway users.
 - 2.2.2 Network Rail's proposal to create a footpath diverting through the recreation ground could bring about a risk of deadwood falling on users of the footpath as the area is covered in flora and fauna and mature trees. The proposed diversion also incorporates a tree route protection zone which has potential to cause

damage. It is also not clear who would maintain the footpath through the recreation ground as that is not Council-owned land and it is understood that the owners (the Parish Council) do not support the proposal. In addition, Network Rail's proposals do not show the footpath being built to adoptable standard (and Network Rail has not yet provided information as to the standard the footpath will be built to). These issues would also apply in the event that the same route was given bridleway status under the proposed Order.

2.3 Section 5(6) of the Transport and Works Act 1992 (**1992 Act**) provides that:

'An order under section 1 or 3 above 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.'*

2.4 Given that Network Rail is seeking, as part of its proposals to close the Peckfield Level Crossing, to extinguish a public right of way over the railway, in doing so the Secretary of State must be satisfied that there is an alternative right of way that is being proposed as part of the Scheme.

2.5 Network Rail's alternative proposals are as follows (as shown on Sheet 12 of the Works and Land Drawings (NR09):

2.5.1 Closure of the section of the Mickelfield Definitive Bridleway 8 between points P1, P2 and P3 on Sheet 12;

2.5.2 Replacement routes to be one of the following:

- (a) A new footpath is to be created and users are to be re-routed along the footpath between points P1, P4, P5, and P6 on Sheet 12 (**Option 1**); or
- (b) A new bridleway is to be created and users are to be re-routed along the bridleway between points P1, P4, P5 and P6 on Sheet 12 (**Option 2**),

2.5.3 In consequence of the above changes, in order for users of Definitive Bridleway Micklefield 8 to cross the railway line from the south of the railway line, they will be required to travel east from point P3 along Pit Lane to the junction with Great North Road, where they will pass under the railway line and travel north on Great North Road. On Great North Road, users will join the proposed footpath or bridleway at point P6 and travel west along the route before rejoining Definitive Bridleway Micklefield 8 at P1. Alternatively, users could travel further north on the Great North Road and rejoin Definitive Bridleway Micklefield 8 at the most northerly point that it meets Great North Road.

2.6 This Legal Submission sets out the Council's position that Network Rail's proposals do not meet the tests set out in Section 5(6) of the 1992 Act. The Council's position is that the only acceptable alternative proposal for the closure of the Peckfield Level Crossing is for a bridleway crossing bridge over the railway line to be provided instead of Network Rail's proposals.

3. LEGAL POSITION

3.1 Section 5(6) of the 1992 Act provides that:

'An order under section 1 or 3 above 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.'*

3.2 When looking at what is considered an "alternative", guidance¹ suggests that the main point to consider is whether the alternative route is "suitable and convenient".

3.3 Whether an alternative right of way is to be considered "suitable and convenient" was considered by the Inspector and the Secretary of State in the recent decision (16 March 2022) which confirmed (with modifications) The Network Rail (Essex and Others Level Crossing Reduction) Order 2022 (**Essex Order**).

3.4 Under the application for the Essex Order Network Rail proposed the closure of level crossings with the provision of alternatives rejected by interested parties on various grounds.

3.5 In their consideration of the application for the Essex Order, the Inspector reiterated the above guidance and stated that "*[i]f 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*".

3.6 The Secretary of State also provided in that decision that he "*notes that the Inspector considers that the test in section 5(6) does not include consideration of the 'enjoyment' to be derived from a particular PROW and that what is required is consideration of the proposed alternative route in terms of whether it would provide a 'suitable and convenient' route by which users could continue to make their journey without affecting the purpose of that journey.*"

3.7 The Secretary of State also stated that he "*agrees with the Inspector that an assessment of a proposed alternative route cannot be made simply in the light of those currently using the crossing (who may be young and without mobility impairments) as this is unlikely to discharge the Public Sector Equality Duty ("PSED"). Consideration therefore needs to be given to the needs of*

¹ Guide to Transport and Works Act Procedures, DfT (2006) Annex 2 Commentary on Schedule 1 to the TWA Para 4

both current and potential users to ensure that a proposed alternative does not perpetuate restrictions on those who might qualify as 'existing users' of a crossing (IR 2.92)."

3.8 The following points were considered by the Inspector and Secretary of State when considering whether to include the closures with modification, or not include the closures in the made Essex Order:

- 3.8.1 Is the alternative excessive or unreasonable? Is the proposed alternative longer and more inconvenient for users?
- 3.8.2 Is the current route used mainly for recreation? Where the route was used for utilitarian use it was viewed more negatively than where the alternative was longer and less convenient.
- 3.8.3 Safety concerns of the alternative. Would the alternative be exposing users to an unacceptable level of risk? Is that a safe alternative bearing in mind traffic levels/site lines? Are the alternatives part of the public right of way network.
- 3.8.4 Is the alternative likely to affect those users with protected characteristics?
- 3.8.5 Are there any modifications that can be made, and how they are justified?

3.9 It should be noted that in relation to a number of the proposed closures of the level crossings as part of the Essex Order, the Secretary of State decided that the alternatives proposed by Network Rail were not considered to be "suitable and convenient" and therefore were not included in the made Essex Order.

4. ASSESSMENT OF LEGAL POSITION

4.1 Taking each question above in turn:

4.1.1 Is the alternative excessive or unreasonable? Is the proposed alternative longer and more inconvenient for users?

- (a) The proposed changes to the public right of way and the additional distances are set out in the proof of evidence supplied by both Robert Buckenham and John Booth.
- (b) In the decision for the application for the Essex Order the Secretary of State considered that, at paragraph 88, "*The Secretary of State notes the Inspector's view that E13 provides a utilitarian route between two sides of the village of Littlebury, and that the proposed alternative would be circuitous and counterintuitive and would significantly increase journey times and distances (IR 5.11.42). The Inspector considered that for most current users, the proposed alternative would be highly inconvenient (IR 5.11.42).*"

- (c) Furthermore at paragraph 89, the Essex Order decision states that "*The Secretary of State also notes the Inspector's conclusion that the proposals could restrict access for those with mobility impairments and other 'non-visible' characteristics (IR 5.11.46) such that there is a likelihood the PSED would not be met if E13 were included in the Order (IR 5.11.47). The Secretary of State further notes the Inspector's view that the safety benefits of E13's closure are outweighed by the negative impacts of the proposed alternative (IR 5.11.46). The Inspector therefore considered that the benefits of its closure, including the ability for NR to raise the line speed should E13 be closed (IR 5.11.34), would not outweigh the resulting inconvenience to users (IR 5.11.48). The Secretary of State agrees with the Inspector's conclusions that, taking account of these matters, E13 should not be included in the Order as the proposed alternative would not be suitable and convenient (IR 5.11.49).*"
- (d) As can be seen in the Essex Order decision, the weight that was attached to the inconvenience to the users was greater than the safety benefits put forward by Network Rail. Accordingly and as is demonstrated in the proof of evidence of both Robert Buckenham and John Booth, the safety benefits in relation to the proposed Order can not be said to outweigh the inconvenience to the users of the existing level crossing.

4.1.2 Is the current route used mainly for recreation?

- (a) The Council has set out in the proof of evidence of John Booth the extent of the current use of the level crossing. Specifically the route is used not only for recreation but also for utility as it provides a traffic-free walking route to the local primary school, and an almost traffic-free walking route to the GP surgery from the south of the railway line.
- (b) In addition to the above, the figures for use as provided by Network Rail in their options assessment, do not take into account future users that would be generated by future residential and commercial developments to the north and south of the railway. This is discussed in more detail in the proof of evidence of Robert Buckenham and this Legal Submission at paragraph 3.7 above discusses the Secretary of State's views on this.
- (c) The Secretary of State in the decision letter for the Essex Order noted "*the Inspector's conclusion that the proposed alternative would add to the journey times of utilitarian users of E05 (IR 5.4.39, 5.4.40), who are likely to use the crossing on a regular basis (IR 5.4.36). The Inspector concludes that this circuitous alternative route would be likely to inconvenience utilitarian users (IR 5.4.44).*"

- (d) In light of the above, the Council's view is that the Order should not include the proposed closure of Peckfield Level Crossing without the provision of a suitable alternative which has been demonstrated in the evidence provided, is not provided in the alternative proposed by Network Rail to meet the statutory test. The Council's position is that the only acceptable alternative would be the provision of a bridleway bridge.

4.1.3 Safety concerns of the alternative.

- (a) The Council has set out its position in relation to its safety concerns of Network Rail's proposed alternative. This is further evidenced through the proofs of evidence of Robert Buckenham and John Booth.
- (b) In relation to the application for the Essex Order, the Secretary of State found that, at paragraph 79, "*whilst there would be safety benefits to E10's closure, these were outweighed by the negative impacts of the proposed alternative (IR 5.9.57)*". The Council's position in relation to the proposed Order is that whilst there may be safety benefits to the closure of the level crossing, as is set out in the proof of evidence, these are not outweighed by the safety implications of the proposed alternative put forward by Network Rail as demonstrated in the proof of evidence of Robert Buckenham.

4.1.4 Is the alternative likely to affect those users with protected characteristics?

- (a) The Council has requested, but is not aware of, any equality impact assessment that has been carried out in relation to the closure of the Peckfield Level Crossing. The Council understands from Network Rail that no equality impact assessment had yet been carried out by Network Rail and this is detailed further in the proof of evidence submitted by Robert Buckenham. As such the Secretary of State cannot be satisfied that those with protected characteristics have been considered and as such that the public sector equality duty (**PSED**) has been met.
- (b) In the decision letter for the Essex Order, the Secretary of State noted, at paragraph 47, that "*The Secretary of State also notes that the Inspector raises two issues with the alternative route's accessibility to users of E05. The first issue is that, as noted in the Equality and Diversity Overview report (NR-121), the increased gradient of the proposed alternative route may restrict its use for some groups such as older people, wheelchair users, and parents with pushchairs (IR 5.4.41), and the feasibility of any solution would not be revealed until the detailed design stage (IR 5.4.38). The second issue is that NR's proposed surfacing material would likely limit the alternative route's accessibility to users with mobility impairments (IR 5.4.42). Hence it is the Inspector's conclusion that the inclusion*

of E05 in the Order would lead to a likelihood that the PSED would not be met (IR 5.4.43)."

- (c) Furthermore, the Secretary of State noted that, at paragraph 79, "*The Inspector considered that the proposed alternative would restrict access for those with mobility impairments (IR 5.9.57), and that if E10 were included in the Order, there is a likelihood that the PSED would not be met (IR 5.9.58). The Secretary of State further notes the Inspector's view that whilst there would be safety benefits to E10's closure, these were outweighed by the negative impacts of the proposed alternative (IR 5.9.57). The Secretary of State agrees with the Inspector's conclusions that, taking account of these matters, E10 should not be included in the Order as the proposed route would not be a suitable or convenient alternative (IR 5.9.59).*"
- (d) On the basis of the decision letter for the Essex Order, the Council's position is that the proposals by Network Rail are not considered to be "suitable and convenient" and accordingly the Secretary of State should find that the test in Section 5(6) of the 1992 Act has not been met.

4.1.5 Are there any modifications that can be made, and how they are justified?

- (a) The Council has previously set out in the Statement of Case, its alternative to the diversion of the public right of way, being the provision of a bridleway bridge. In the Council's view this would meet the tests set out in Section 5(6) of the 1992 Act on the basis that it would constitute an alternative right of way, and would be considered to be suitable and convenient to all users of the right of way.
- (b) The provision of a bridleway bridge crossing the railway line at the current location of the level crossing (or within the vicinity of the current location of the railway line) would:
 - (i) not require users to take a longer route to make the same crossing;
 - (ii) not require users, including horse riders and cyclists to enter onto the existing highway and share space with vehicles;
 - (iii) address a number of safety concerns raised by the Council in respect of the proposed diversion routes being:
 - (A) potential falling deadwood when going through the MRG;
 - (B) lack of lighting proposed in the MRG;

- (C) use of the shared access under Network Rail's current proposals which would bring into contact users on foot, and potentially horse riders and cyclists with vehicles, as well as the height restrictions for use of the same access way;
 - (D) uncertainty around maintenance of the public rights of way and the Council's position that the proposals would not currently meet the adoptable standard required for footpaths or bridleways.
- (c) The Council's position is that Network Rail's proposals do not provide a suitable and convenient alternative to the existing level crossing, and accordingly does not meet the tests in Section 5(6). The reasons for both are as set out in the proofs of evidence submitted by Robert Buckenham and John Booth.

5. OTHER MATTERS

5.1 Section 106 Contributions

5.1.1 As is set out in the proof of evidence of Robert Buckenham, one of the arguments put forward by Network Rail for not providing a replacement bridge is that the costs of doing so exceed the benefit that will be gained by having the bridge, and that it is within the Council's gift to obtain contributions from nearby developments through the use of planning obligations under Section 106 of the Town and County Planning Act 1990 (**1990 Act**).

- (a) The Council rejects that it is possible for Section 106 contributions to be used in this way. Planning obligations may only be required by local planning authorities if they meet the tests set out in the Community Infrastructure Levy Regulations 2010 (**CIL Regs**). Regulation 122 of the CIL Regs sets out the tests that must be met when determining if a planning obligation may be a reason for granting planning permission for a development. The obligation must be:
- (i) necessary to make the development acceptable in planning terms;
 - (ii) directly related to the development; and
 - (iii) fairly and reasonably related in scale and kind to the development.

5.1.2 In light of the above, and in relation to the existing consented development in the vicinity of the Peckfield Level Crossing, the Council is not able to retrospectively require planning obligations unless there is any material change to the developments. In addition, the Council, in its capacity as local planning authority must assess each planning application on its own merits and is not able to predetermine what, if any, planning obligations will be necessary to make the development acceptable in planning terms, particularly in relation to future

developments that may exist. As such the Council is not able to rely on funding from third party developers to retrospectively fund the cost of a replacement bridleway bridge in the way suggested by Network Rail.

- 5.1.3 The Council's position remains that the bridge is required as a direct result of the proposal to close Peckfield Level Crossing by Network Rail without a suitable alternative route provide for users of the public right of way being proposed; not as a consequence of other developments being brought forward in the area and as such, would not meet the tests set out in Regulation 122.

5.2 Deemed Planning Conditions

- 5.2.1 The Council notes that the Deemed Planning Conditions (NR12) that have been agreed between the Council and Network Rail include a condition (condition 13) requiring further details to be submitted in relation to the public rights of way in Micklefield.
- 5.2.2 Whilst the Council's view is that the Deemed Planning Conditions are approved, this is on the understanding that Network Rail needs to provide further information than has not been provided to-date in relation to the closure of the Peckfield Level Crossing, and as has been set out in evidence submitted in relation to this issue.
- 5.2.3 The Council has agreed with the wording of the condition in the event that the Secretary of State determines the Order as proposed.
- 5.2.4 The wording of the condition provides for the Council to approve that the surface and width of the alternative route through the MRG are appropriate when details are submitted by Network Rail, if and when the Order is made.
- 5.2.5 Whilst the Council understands from Network Rail that the route through the MRG can be constructed to an acceptable standard and using a construction methodology which avoid the veteran tree, on the basis that Council does has not yet had any details of this, the only deliverable option of Network Rail's current proposals would be to provide the diversion by way of the adopted highway.
- 5.2.6 The approval of the Deemed Planning Conditions does not seek to fetter the Council's position in relation to the closure of the Peckfield Level Crossing,

6. CONCLUSION

- 6.1 This Legal Submission sets out the Council's position in relation to the proposed closure of the Peckfield Level Crossing, and specifically whether the test in Section 5(6) of the 1992 Act has been met. The Council submits that the Secretary of State should find that the proposed

alternatives put forward by Network Rail are not "suitable and convenient" and accordingly the test in Section 5(6) has not been met. As such the Secretary of State should be concluding that the proposed Order should be modified to provide for a suitable alternative in the form of a replacement bridleway bridge for the closure of the Peckfield Level Crossing.

Womble Bond Dickinson (UK) LLP

6 February 2024