

## **THE PROPOSED NETWORK RAIL (SUFFOLK LEVEL CROSSING REDUCTION) ORDER**

### **NETWORK RAIL POSITION STATEMENT ON S22 WEATHERBY**

#### Status of the crossing

1. Network Rail's position is that there are no public rights of way over S22 Weatherby.
2. There are no public rights of way recorded on the Definitive Map and Statement.
3. There is no historical evidence of public rights of way existing across the railway alignment prior to the railway being constructed. The documentary evidence is to the effect that the level crossing point was provided to accommodate a private occupation road in existence when the railway was built.<sup>1</sup>
4. Network Rail understands that whilst allegations have been made to Suffolk County Council that a public right of way exists over the crossing<sup>2</sup> – it is assumed, by reason of long user – it has discovered no evidence to support this, and there has been no formal application to alter the DMS to record a public right of way over the crossing.
5. Network Rail maintains that any application to modify the DMS to record public rights of way over S22 Weatherby by reason of 20 years' use under s.31 of the Highways Act 1980, would be bound to fail.
6. Section 31 provides, so far as is material, as follows:

“(1) Where a way over any land, other than a way of such a character that use of it by the public could not give rise at common law to any presumption of dedication, has been actually enjoyed by the public as of right and without interruption for a full period of 20 years, the way is to be deemed to have been dedicated as a highway unless there is sufficient evidence during that period to dedicate it.

...

(8) Nothing in this section affects any incapacity of a corporation or other body or person in possession of land for public or statutory purposes to dedicate a way over that land as a highway if the existence of a highway would be incompatible with those purposes.”
7. In order for a claim to succeed that a public right of way has arisen by long use, whether at common law or under s.31, there must be a landowner with capacity to dedicate the land for use as a right of way by the public.

---

<sup>1</sup> See the Note attached to this Position Statement, which sits behind the account provided by Andrew Kenning in his rebuttal proof of evidence for S22 [NR30-4-7]

<sup>2</sup> See para 2 of the 'Submissions on behalf of Suffolk County Council on the Rights of Way Status of S22 Weatherby' (OP-INQ-20)

8. Network Rail maintains that dedication of a public right of way over the operational railway would be incompatible with its statutory objectives with regard to the safe and efficient operation of the railway and its duty to ensure the safety of the public and its passengers. It does not, therefore, have capacity to dedicate a public right of way across the operational railway. It will rely, to the extent necessary, on *Ramblers Association v Secretary of State for Environment, Food and Rural Affairs* [2017] EWHC 716 (Admin) as authority for that position.
9. A claim that a public right of way had arisen by long use under s.31 of the 1980 Act could not, therefore, succeed.
10. It is Network Rail's position that the Secretary of State may therefore properly proceed to determine this application on the basis that there are no public rights of way under the Order.

#### The effect of the Order

11. The effect of the Order, if confirmed would be to extinguish any private rights of way which might exist over S22 Weatherby. It would also confirm, beyond doubt, that no public rights of way could be claimed over the crossing point itself. The request for deemed planning permission connected with the application would, if granted, authorise Network Rail to carry out any works connected with the closure of the level crossing.
12. Network Rail maintains, therefore, that S22 Weatherby is properly included within the Order, even though there are no public rights of way over the crossing.

#### The right forum?

13. It is common ground between Network Rail and Suffolk County Council<sup>3</sup> that this Transport and Works Act Order Inquiry is not the appropriate forum for determining whether an alleged public right of way may exist over S22 Weatherby.
14. A specific statutory regime for examining claims as to public right of way not recorded on the DMS is provided for in Part III of the *Wildlife and Countryside Act 1981*. By s.53 of the 1981 Act, the highway authority is under a duty to keep the DMS under review. This duty includes, in s.53(2):

“As regards every definitive map and statement, the surveying authority shall –

- (a) As soon as reasonably practicable after the commencement date, by order make such modifications to the map and statement as appear to them to be requisite in consequences of the occurrence, before that date, of any of the events in subsection (3)
- (b) as from that date, keep the map and statement under continuous review and as soon as reasonably practicable after the occurrence, on or after that date, of any of

---

<sup>3</sup> See para 6 of OP-INQ-20

those events, by order make such modifications to the map and statement as appear to them to be requisite in consequence of the occurrence of that event.”

15. The ‘events’ in s.53(3) include:

“(c) the discovery by the authority of evidence which (when considered with all other relevant evidence available to them) shows –

- (i) That a right of way which is not shown in the map and statement subsists or is reasonably alleged to subsist over land in the area to which the map relates, being a right of way such that the land over which the right subsists is a public path, a restricted byway or, subject to section 54A, a byway open to all traffic...”

16. It is clear from Suffolk County Council’s submissions that allegations to the effect that a public right of way exists over S22 Weatherby have been made to them. It is also clear, however, that the County Council have not considered that the evidence they have been provided with, to date, when viewed with other relevant evidence held by them would justify a modification of the DMS to reflect the existence of a public right of way over this crossing.

17. Thus, there is a procedure which exists for asserting the existence of a public right of way where none is recorded on the map. That procedure has not, to date, resulted in it being established that a public right of way does so exist, in spite of the fact that closure of the level crossing has been mooted in the public domain since 2012.

18. In those circumstances, Network Rail does not consider that any issues arise with seeking to close this level crossing through the current procedure in circumstances where that alternative procedure exists and where allegations have been made in the past that such rights exist but sufficient evidence has not been put forward to justify further action being taken under Part III of the 1981 Act.

#### The test to be applied

19. Network Rail maintains that given the matters set out in paragraphs 1 – 10 above, the Secretary of State may properly proceed on the basis that there are no public rights of way over S22 Weatherby. Section 5(6) of the Transport and Works Act 1992 is thus simply not engaged, and the guidance in Annex 2 to the DfT ‘A Guide to TWA Procedures’ does not apply.<sup>4</sup>

20. The ‘test’ for the Secretary of State in considering whether to confirm the provisions within the Order relating to S22 Weatherby (specifically, its inclusion within Part 2 of Schedule 2 to the draft Order) is simply whether Network Rail has made out its strategic case for the Order. Network Rail acknowledges that as part of that consideration, the Secretary of State will wish to consider whether an alternative crossing point of the railway exists for persons currently using the S22 level crossing: as Network Rail has made clear in its evidence, in

---

<sup>4</sup> That is, the guidance 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” only applies to the situation where an alternative right of way has been or will be provided under s.5(6)(a) TWA 1992.

Phase 1 of its Strategy<sup>5</sup> it was looking for opportunities to rationalise its level crossing estate where it could divert users to alternative crossings points of the railway.

21. However, there is no requirement either under the Act, or in policy guidance (specifically, the DfT Guide to TWA Procedures) that that alternative be 'suitable and convenient'. Nor does the Act (or guidance) specify any other 'test' that should be applied in considering the proposed alternative route. It must also be borne in mind, in this respect, that members of the public currently have no established rights to use the crossing: the use is, at best, 'permitted' by Network Rail, which permission it has the right to revoke at any point.
22. Strictly without prejudice to that legal position, Network Rail remains of the view, for the reasons set out in the evidence of Sue Tilbrook, that the diversionary route it has identified for persons currently using the level crossing, is a suitable and convenient route.

JACQUELINE LEAN

7th March 2018

Landmark Chambers  
180 Fleet Street  
London, EC4A 2HG

---

<sup>5</sup> See NR18