

Order Decision

Site visit carried out on 9 August 2016

by Peter Millman BA

an Inspector appointed by the Secretary of State for Environment, Food and Rural Affairs

Decision date: 24 August 2016

Order Ref: FPS/J1155/4/59

- This Order is made under Section 119A of the Highways Act 1980 ("the 1980 Act") and is known as the Devon County Council (Footpath No. 26, Exeter) Rail Crossing Diversion Order 2015.
- The Order is dated 6 August 2015 and proposes to divert a footpath as shown on the Order Map and described in the Order Schedule.
- There were two objections outstanding when Devon County Council submitted the Order to the Secretary of State for confirmation.

Summary of Decision: I have confirmed the Order with modifications.

Procedural matters

1. One of the two objections noted above was withdrawn subsequent to the submission of the Order to the Secretary of State.
2. I carried out a site visit accompanied by the objector, Mr D Youll, Mr S Gardner of Devon County Council ("the County Council") and Messrs J Audley and C Marish of Network Rail.

Main issues

3. The Order was made by the County Council because it believed that it was expedient in the interests of the safety of members of the public using, or likely to use, the footpath rail crossing at Alphington that it should be diverted.
 4. A rail crossing diversion order cannot be confirmed if a point of termination of the path proposed to be diverted (where it is on a highway) would be altered otherwise than to another point which is on the same highway, or another highway connected with it (section 119A(5) of the 1980 Act).
 5. This Order cannot be confirmed unless I am satisfied that it is expedient to do so having regard to all the circumstances (section 119A(4) of the 1980 Act). In particular I must consider whether it is reasonably practicable to make the crossing safe for use by the public, and what arrangements have been made for ensuring that, if the Order is confirmed, any appropriate barriers and signs are erected and maintained.
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Reasons

Background

6. The rail crossing proposed to be diverted is on the South Devon Main Line between the stations of Exeter St Thomas and Starcross, although some miles from each. It is known as Alphington crossing. There are two lines of track at that point. Currently the crossing is passed by 74 Inter-city trains, 54 local stopping trains and 3 freight trains daily. These travel at up to 80 m.p.h. although the line can accommodate speeds of up to 100 m.p.h. The crossing is not particularly well-used by pedestrians. Network Rail states that use averages two people per hour, although Mr Youll disputes its figures (see below at paragraph 31)
7. In 2005, when a local councillor raised the question of the safety of the crossing with the County Council, Network Rail was consulted and commented that the crossing was compliant with then current guidance from Her Majesty's Railway Inspectorate. It concluded: *Given that the crossing is in use and that no viable alternative access exists to facilitate the footpath, Network Rail is satisfied that the level of risk is one that is as low as reasonably practicable.* The County Council's Report concluded that it was evident that Network Rail did not consider the crossing to be unsafe and that therefore no order to stop up or divert the footpath away from the crossing was justified.
8. Since then the situation has changed. Planning consent for a new station at Marsh Barton, just to the north of the crossing and south of Clapperbrook Lane East (see copy of the Order plan and the amended plan at the end of this Decision) has been granted. The contract to build the station has been awarded and construction is due to begin towards the end of 2016.
9. There is no doubt that the construction of platforms and structures on them such as waiting shelters would make some difference to the view of oncoming trains looking northwards along the line from the crossing.
10. The County Council's view is that the crossing is not currently unsafe, but would be when the station is built. Network Rail's current view is that the crossing is unsafe and would be even less safe once construction of the new station has started.
11. The Order proposes to stop up not just the crossing of the railway, but stretches of footpath 26 either side (see the plans below). The proposed diversion would link footpath 26 to the southern end of Grace Road South. From there the shortest route to get to point D utilising public highways would be via Grace Road South, Clapperbrook Lane East (which is mistakenly labelled as Alphin Brook Road on the Order plan), and then footpath 23 along the bank of the Exeter Canal. The design for the new station includes a footbridge, which Network Rail intends to be used by the general public. The footbridge would cross the railway line immediately south of Clapperbrook Lane East and the plans provided by the County Council show a pedestrian and cyclist access to the bridge and station from the junction of Grace Road South and Alphin Brook Road on its western side and from a point on Clapperbrook Lane East approximately 30 metres from its junction with footpath 23. Whichever alternative route was used to get from A to D would involve around an additional 600 metres or so of walking.

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12. The principal questions which need to be answered seem to me to be first, whether the termination of the proposed diversion satisfies the criteria noted in paragraph 4 above, second, how safe the crossing currently is, third, how safe the crossing is likely to be in the future when and if the new station is built, fourth, whether, in either case, it is possible to make the crossing suitably safe so that it would not need to be diverted, and fifth, whether there are any other circumstances such as, for example, how the members of the public who currently use the crossing would get safely to the other side of the railway line if it was closed, which I should take into account in deciding whether or not to confirm the Order.

The termination of the proposed diversion

13. Mr Youll argued that the proposed diversion did not meet the requirement (paragraph 4 above) as to its termination. The proposed diversion ends on Grace Road South. The route via that road, Clapperbrook Lane East and footpath 23 to get to the current termination of footpath 26 runs along continuous public highways. While it might not be a safe or satisfactory route (I consider it further below at paragraphs 25 to 29) it does meet the criteria set out in section 119A(5) of the 1980 Act.

Whether the crossing is currently safe for use by the public

14. I noted above at paragraph 10 the difference between the County Council's view and that of Network Rail about the current safety of the crossing. Network Rail has a policy of extinguishing all footpath crossings of its lines. Its national Health and Safety Policy states: *Even one accident is one too many*. It seems to me that unless a crossing is closed or trains stop running there will always be a risk of harm to members of the public using it. The level of risk which is acceptable must depend upon a number of circumstances, including the safety of the alternative route, and I am not bound by either Network Rail's or the County Council's views, although I must consider both.
15. I consider first the current situation, noting that for any sensible and fully mobile adult following the injunction to stop, look and listen, Alphington crossing would present a very low risk of harm – it is reasonably safe. Not all adults, however, and perhaps fewer children, are fully mobile and sensible, and their safety as users of the crossing must be considered as well. I note here that while I was looking at the crossing, a high speed train went past on the down line, having correctly whistled at the whistle board just south of the Clapperbrook Lane East bridge. After it had passed to the south of the crossing, on a gentle left hand curve, it obscured the view of an approaching train on the up line, and completely masked the sound of its whistle, so that the train on the up line only came into view, with no apparent audible warning, when it was roughly 300 metres from the crossing. This situation cannot happen very often, but I consider it potentially hazardous.
16. Mr Youll, who provided the copy of the 2005 report (paragraph 7 above) on the safety of Alphington crossing, takes the view that if the crossing was safe enough not to be closed in 2005 then it is safe enough now, and that since it is possible that the new station may never be built, no decision about diverting footpath 26 should be taken until it is built. He argues in addition that the figures and calculations given in 2005 are at odds with those provided with the application for the Order and in Network Rail's evidence, and casts doubt on the accuracy of the more recent figures, but he does not state clearly what the

differences are. I have considered the figures and cannot see any evidence of significant miscalculation.

17. The view that the current situation is the same as it was in 2005 may be broadly true, but it does not follow that conclusions as to risk and safety must inevitably remain the same as were drawn then. There may now be more frequent and faster trains. The views of Network Rail about what is an acceptable level of risk will have almost certainly changed. There may have been incidents at the crossing which have influenced its views about the level of risk. I do not therefore accept the objector's first argument.
18. Network Rail uses the All Level Crossing Risk Model ("ALCRM"), which is a quantitative model, to assess the level of risk which attaches to a particular crossing. This is now supplemented by a narrative (qualitative) assessment. Alphington Crossing is currently assessed under ALCRM as C4 medium to high risk. In Network Rail's Western Region there are 366 'passive' level crossings, i.e. crossings that do not actively warn people of an approaching train by a klaxon or flashing lights or the lowering of gates, and these crossings are ranked for risk. On the ALCRM score alone Alphington is the 55th, i.e. there are 54 crossings ranked as less safe. The narrative assessment takes into account the impact from any 'safety incidents', and Network Rail argues that these 54 crossings *are not exposed to a high level of deliberate dangerous events or the trespass/vandalism that occurs at Alphington*. It states in addition that: *While the existing level crossing does comply with user sighting guidance, and available warning time exceeds pedestrian traverse time for able bodied users, the extent of trespass and vandalism at the site is unacceptable*. A record of incidents of trespass and vandalism was provided in evidence. The majority of these did not involve people 'using' the crossing itself, although they may have accessed the railway via the stiles leading to it. Children playing 'chicken' on the crossing are not using it in my view; neither are trespassers seen on the track or line-side near the crossing
19. It is clear from the evidence considered so far that the existence of Alphington Crossing does pose risks; not particularly great for sensible members of the public using it as a footpath, but more so for those people who misuse it. No firmer conclusions may be reached until other matters have been considered.

Whether the current crossing can be made safer

20. Alphington Crossing has the usual basic safety measures of whistle boards reminding train drivers to whistle as they approach the crossing, notices either side of the crossing telling pedestrians to stop, look and listen and a yellow coloured non-slip surface for pedestrians. Network Rail, in its Statement of Case, mentions various possibilities it has considered for improving safety, such as anti-trespass guards either side of the crossing, miniature stop lights, or a bridge or a subway at the same location as the crossing. It dismisses all of these on the grounds of either their probable ineffectiveness, the likelihood of their being vandalised or their cost relative to the benefit to the public.
21. The objector does not provide any clear argument that miniature stop lights or other warning systems would be more effective than current warning signs. A bridge would make crossing the lines safer, but at an estimated cost of £750,000 for a stepped bridge without the acquisition of any land I consider that it is not unreasonable to reject that option if there is a satisfactory

alternative. I conclude that there is no reasonably cost-effective way of making the crossing safer for the public using it.

The safety of the crossing in the future

22. Network Rail's evidence is that when the new station at Marsh Barton is built (and while it is being built) the sighting distance from the level crossing looking northwards will be significantly reduced because of station buildings. Trains that stop at the platform on the up line will obscure the view of fast trains on the down line. In addition the whistle board on the down line will have to be moved to a position where it would be less effective.
23. The objector argues that trains not stopping at the station will probably be going slower than they do at the moment. I can see no basis for such a supposition. He then argues that since it is not clear when, or even if, the station will be built, nothing should be done about the crossing until the station has been built and the safety of the crossing has been reassessed.
24. I do not accept that argument. Plans for the new station are advanced (see paragraph 8 above). I conclude that it is far more likely than not that it will be built in accordance with the plans provided to me. I am enjoined by the words of section 119A of the 1980 Act to consider the safety of those likely to use the crossing as well as those currently using it. I consider that I should give reasonable weight to the probability of the station's construction. It is not disputed that when and if the station is built, then sighting distances from the crossing to the north will be reduced to at least some extent. At the moment, when looking north from the crossing, there is an uncluttered view of the lines of track and, just beyond the whistle board, the bridge carrying Clapperbrook Lane East. It seems to me that when the station is built the view, with platforms, station buildings and the possibility of stationary trains, will become more complex, and difficult to interpret with, as is possible now in clear weather, a single glance northwards. I conclude that it is inevitable that there will be some decrease in the safety of the crossing, and that it is reasonable to consider it now, rather than after construction of the station, with the consequent delays for risk assessment and a possible subsequent application for an order. In any event I shall propose a modification to the Order to deal with the eventuality of the station not being built.

The proposed alternative route

25. I described the route that a pedestrian would follow to get from A to D if the crossing were closed above at paragraph 11. The distance from A to D utilising the crossing is about 390 metres. The alternative route from A to D is about 1005 metres (the reason for figures different from those in the Order as made is given below at paragraph 37), about 250 metres of which is along a narrow public vehicular road with no footway or verges.
26. Neither the County Council nor Network Rail appears to have considered the safety or suitability of this route in any detail. The County Council states: *Technically, the objections about safety on the alternative route do not apply as the alternative route ends at point F on the Order map.* Whatever 'technically' is supposed to mean, I reject that argument. Guidance in Government Circular 1/09 is that (at paragraph 5.51): *the new way should be reasonably convenient to the public... Consideration should also be given to the effect that the diverted way will have on the rights of way network as a whole*

and the safety of the diversion, particularly where it passes along or across a vehicular highway.

27. The County Council notes that there have been no accidents on the diverted route, but it seems to have taken no account of any increase in pedestrian traffic along Clapperbrook Lane East which might result from the closure of the crossing. Network Rail states: *[The County Council] agrees with Network Rail that a reasonably convenient and inherently safer route for the public across the railway exists at Clapperbrook Lane bridge and this will be strengthened by incorporating use of the station footbridge when built.* Why it should be 'inherently safer' is not explained. Network Rail's application for the Order stated that the diverted route would be 'fundamentally safer', without stating why this would be the case.
28. Mr Youll states that he would not be as safe on the diverted route as on the crossing. I can understand that that might be his perception, arising from the likely proximity of vehicular traffic to pedestrians on Clapperbrook Lane East, but no clear evidence to support his statement has been produced.
29. During the site visit I observed that Clapperbrook Lane East is narrow. The bridge over the railway is only wide enough for a single line of traffic. It is a hump-back bridge on a curve, and the views to it from both sides are very limited. The Lane, at the time of the visit, was fairly busy. In only a few minutes it was used by four or five cars and three or four cyclists. The cars, however, were travelling slowly, and could only have been driven slowly by reasonable drivers. There are no verges to the Lane, which has a wire fence immediately to the sides of the metalled carriageway. It seems to me that in these circumstances a pedestrian's experience of using the road would be considerably less pleasant than using the footpath incorporating the rail crossing. Watchfulness would be needed for the whole 250 metre distance rather than for just a few metres over the railway line. There might even be a higher risk of an accident, but such an accident would probably not have the almost certainly fatal consequences of a collision between a train and a pedestrian because of the much lower speed of a road vehicle.
30. The status of the proposed footbridge and the approaches to it at the new station are not certain. At paragraph 14.6 of Network Rail's statement of case is the statement: *once the station is open then the new station footbridge can also be used as a pedestrian access over the railway*, and additionally: *Network Rail will also work with the [County] Council to improve footpath links on the east side of the railway, leading to the station and bridge, and joining into the canal footpath [i.e. footpath 23].* This wording could be taken as expressive of an intention to dedicate a route to the public, but on the other hand, the County Council seems clear that such a route would only be permissive.
31. The County Council counted pedestrian traffic on the crossing on one day in January 2015. Twelve people used it between 7 a.m. and 7 p.m. Network Rail did a much more detailed count between 10 and 19 March 2016, when use averaged 38 persons per day. This count, however, was taken during a period when the crossing was subject to a temporary closure order, although clearly the crossing itself cannot have been physically closed. The figures, therefore, cannot be considered reliable.
32. Mr Youll produced a photograph of the proposed diversion between E and F on the plan attached below, showing it flooded. His evidence was that that section

was prone to flooding. It is not clear to me from his evidence whether this was an isolated incident or a regular occurrence, and I cannot give it significant weight. The path between E and F, however, does have a solid metal surface and would not get muddy, even if wet.

33. I conclude the following from the matters discussed thus far. The current crossing, while not risk free, is not dangerously unsafe for members of the public using it such that it should be immediately closed, given that the alternative is much longer and that there has been no proper assessment of the risks to pedestrians using Clapperbrook Lane East. When and if the new station is constructed, however, the crossing will become less safe, so that it would be expedient in the interests of safety to divert it. The proposed diversion is not particularly satisfactory for pedestrians, but it is unlikely to be more dangerous to life than the crossing would become. I should give some weight to the likelihood of the pedestrian approaches to the station and the overbridge, which would be much safer, being permanently available to the public.

Arrangements for barriers and signs

34. Network Rail states that when the Order comes into operation it will close off the line of the footpath by continuing the line-side fence across it on both sides of the tracks, and maintaining it. Signs will also alert the public to the route of the diversion.

Other relevant circumstances

35. The Ramblers, an organization which supports the interests of walkers, was consulted about the application for the Order and supported it. I give this only limited weight as supporting the view that it would be expedient in the interest of the public using the crossing that it should be diverted, because it is not clear to me that The Ramblers were aware of the proposed alternative route.
36. Network Rail was particularly concerned about people, especially children, misusing the crossing by, for example, placing ballast on the line. It is not clear how much of the reported misuse was carried out on the crossing by people who had accessed the line via the stiles each side of it. During the site visit some of the lineside fencing near the crossing was seen to be broken. It does seem, however, that if the crossing were closed, the stiles removed and the nearby fences maintained in good condition, there would be less scope for misuse.

Other matters

37. The Order plan does not correctly show the line of the footpath to be diverted. Before the site visit the County Council produced a plan showing the correct line. This correction alters nothing on the ground, so I do not consider that anyone would have been prejudiced by this error. I shall modify the plan so that it shows the correct line because, in general, it is important that maps and plans, especially those in legal orders, should be accurate. I shall delete the grid reference given for point A. I shall also modify the plan by showing Clapperbrook Lane East with the correct name. The figures for the distances between point A and other points mentioned in the Order must also be changed as a consequence.

38. Paragraph 1 of the Order states that it will not come into effect until the County Council has certified that work required to bring the diverted footpath into fit condition has been carried out. It seems to me that if I add 'and that work to construct a new railway station at Marsh Barton has commenced' then that should allay the fears of Mr Youll that the path over the crossing might be diverted yet the station never built. Such a modification would be in agreement with my conclusion above about the safety of the current crossing. A consequence might be that there is a period when the crossing is closed but the new footbridge at the station is not available, but that is unavoidable.
39. I have considered whether I should modify paragraph 3 of the Order, which creates the diverted route of the footpath, so that it is also dependent on construction of the new station, but since the diverted route is already in place between A and F I do not consider there is any need to do so.

Conclusion

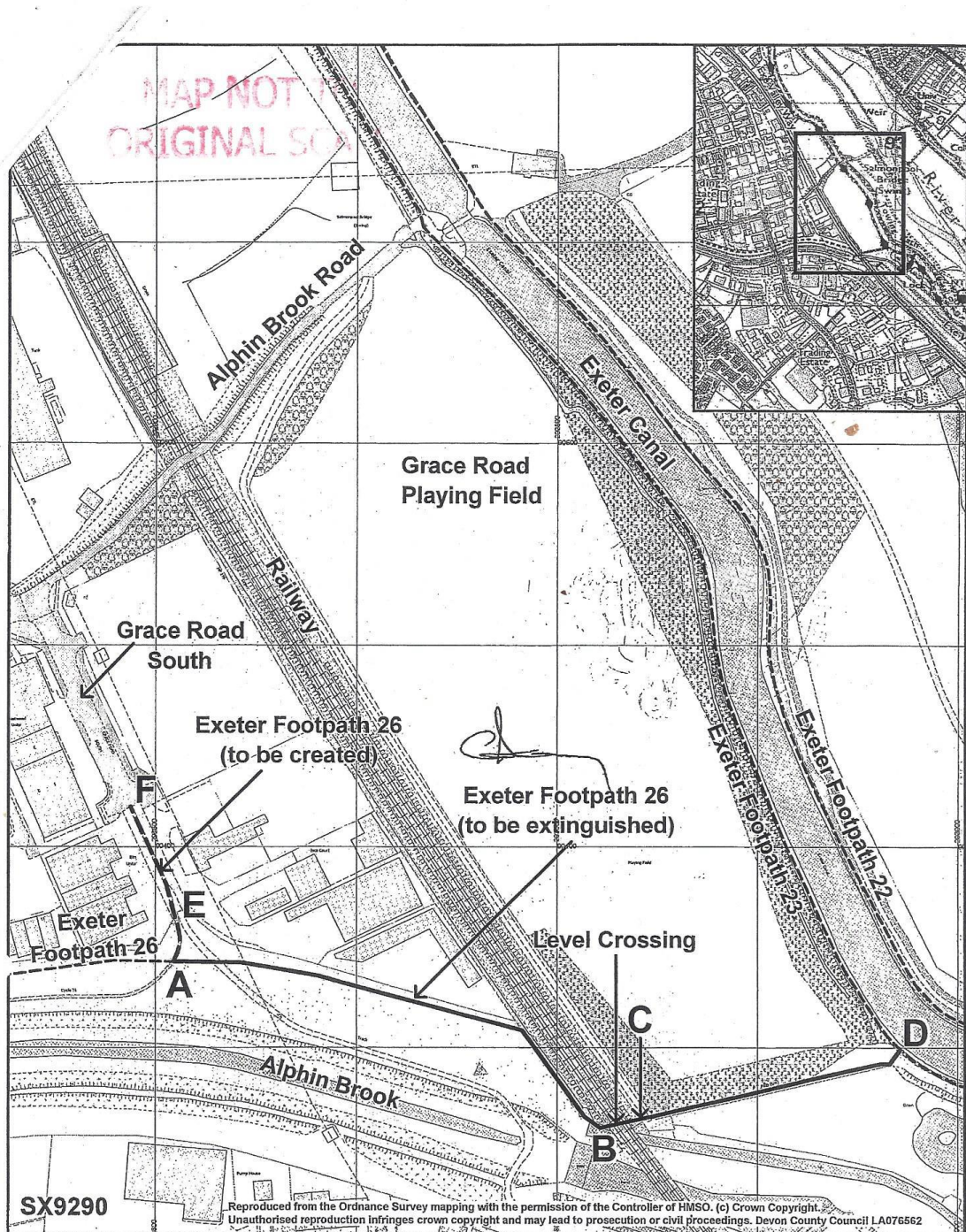
40. Having regard to these and all other matters in the written representations I conclude that the Order should be confirmed with modifications.

Formal Decision

41. I confirm the Order with the following modifications (shown where applicable on the second map attached to this decision):
- On the Order map, delete the line representing footpath 26 east of point B, delete the letter A, and insert a new line for footpath 26 and a new point A. Insert an additional length of footpath to be created between the old point A and the new point A. In the key to the map, delete '85m' and insert in its place '105m'. Delete '400m' and insert '390m' in its place.
 - Also on the Order map, delete 'Alphin Brook Road' and insert 'Clapperbrook Lane East' in its place.
 - In part 1 of the Schedule to the Order, delete the grid reference for point A. Delete '400 metres' and insert '390 metres'. In part 2 of the Schedule, delete '85 metres' and insert '105 metres'.
 - In paragraph 1 of the Order, add at the end 'and that work to construct a new railway station at Marsh Barton has commenced'.

Peter Millman

Inspector



DEVON COUNTY COUNCIL
EXETER FOOTPATH No. 26
RAIL CROSSING DIVERSION ORDER 2015

HCW/PROW/15/009
Drawn by SCG
13 07 2015

NORTH
 Scale 1:2,500 (at A4)

- Footpath No. 26 (to be extinguished) A-B-C-D 400m
- - - Footpath No. 26 (to be created) A-E-F 85m
- Existing public footpaths

DAVID WHITTON
 Head of Highways, Capital Development and Waste



