

Application to divert part of public footpath SR49 from the at grade foot crossing to a stepped bridge at Otford, Sevenoaks

A report by the Head of Regulatory Services to Kent County Council's Regulation Committee Member Panel on Wednesday 1st March 2017.

Recommendation: I recommend that the applicant be informed that an Order to divert public footpath SR49 from the 'at grade' foot crossing to a stepped bridge at Otford, Sevenoaks, is made.

Local Member: Mr Nick Chard

Unrestricted item

Introduction and background

1. The County Council has received an application to divert part of public footpath SR49 at Otford. The application has been made by Network Rail, in the interests of safety, to remove the at grade foot crossing from the railway line and to run the path over a stepped bridge. Planning permission has been granted for the construction of the bridge (Planning reference: SE/15/01863/PART18 granted on 18th September 2015).
2. In respect of danger, this particular crossing is ranked by Network Rail as 29th of 561 level crossings on the South East Route. In terms of risk when considering those crossings which cater for public footpaths, this one ranks 1st of 278 and puts it within the top 1% in the country based on Network Rail's assessment.
3. On a normal week day there are approximately 108 services that stop at Otford station with the number of train movements varying between 156 and 173 per day.
4. The main concerns for Network Rail at this crossing are the insufficient sighting, high level of use and evidence of misuse, coupled with the high level of vulnerable users, in particular unaccompanied children and the elderly. The proposed solution of a footbridge with steps would remove the risk of serious injury to users and allow uninterrupted use.
5. The length of path to be diverted is shown by solid black lines between points A-B on the plan at **Appendix A**.
The proposed new route is shown by bold black dashes between points A-C-D-B. An extract from the Definitive Map can be found at **Appendix B** to show the path in context with the rest of the public rights of way network.
6. A copy of the application and Diversity Impact Assessment can be found at **Appendix C**.

Policy

7. The Countryside Access Improvement Plan, Operational Management document (2013) sets out the County Council's priorities for keeping the Definitive Map and Statement up to date. The main priorities in respect of Public Path Change Orders are:

Public Path Change Orders will normally be processed in the order in which applications are received, except in any of the following circumstances where an Order maybe processed sooner:

- Where it will satisfy one or more of the relevant key principles set out in paragraphs 4.14 – 4.25 of the CAIP Operational Management document,
 - Where an application has been made to the County Council in its capacity as Planning Authority
 - Where the processing of an Order could save significant costs incurred in other Rights of Way functions
 - Where a Public Path Change Order is made concurrently with Orders made under Section 53 of the Wildlife and Countryside Act.
8. The County Council will take into account whether the following criteria are satisfied before promoting a Public Path Change Order. Irrespective of the following, the statutory tests (as set out within the Legal Tests section) for changing public rights of way must apply.
- I. The status of the route must not be in dispute at the time of the application, unless the Public Path Order is being implemented concurrently with an application under Section 53 of the Wildlife and Countryside Act 1981.
 - II. The applicant must agree to meet the County Council's costs of promoting the Order and bringing the new path into a fit condition for public use.
 - III. The applicant must also agree to defray any compensation which may become payable as a result of the proposal.
 - IV. The definitive line should, where it is considered by the County Council to be reasonably practicable be open, clear and safe to use.
9. However, nothing in this policy is intended to prevent the County Council promoting a Public Path Change Order in any case where it considers it appropriate in all the circumstances to do so.

Legal Tests – Rail Crossing Diversion Order

10. Legislation relating to the diversion of a public path is contained within Section 119A of The Highways Act 1980: The Procedure is in Schedule 6 of the same Act.

(i) The Council may make an Order to divert a public path if it is satisfied that it is in the interests of the safety of users or likely users of at grade crossings.

(ii) particular consideration has to be given to whether or not it is reasonably practicable to make the existing crossing safe for the public and what arrangements will be made to erect and maintain barriers and signs at the closed crossing.

Government Guidance

11. Rights of way circular (1/09) Guidance for local Authorities – also states:

Rail crossing diversion orders (section 119A of the 1980 Act) Para 5.51

“While other criteria are not specified in section 119A, the new way should be reasonably convenient to the public and authorities should have regard to the effect that the proposal will have on the land served by the existing path or way and on the land over which the new path or way is to be created. 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.”

Consultations:-

12. Consultations have been carried out as required by the Act:-

County Member and Borough Councillors

13. County Member Mr Nick Chard and District Councillors John Edwards-Winser and Michelle Lowe were consulted. The Public Rights of Way and Access Service ("PROWAS") made a request to Mr Chard that this case should be put before Members for decision, which he agreed to, but he expressed no opinion on the proposal itself.

The Rt Hon Michael Fallon MP

14. Although not consulted directly, a number of residents and a Parish Councillor contacted Michael Fallon MP to express their concerns about the consultation process and the impact of the crossing on disabled access and to ask him to facilitate a site meeting. The process and procedure was explained to Mr Fallon, and the consultation deadline was extended and a further site meeting was held.

Sevenoaks District Council

15. Sevenoaks District Council stated it had no objection to the proposed diversion. A site visit had been carried out as part of the assessment and the District Council considered the proposal is in the interest of public safety and that the diversion does not significantly increase the distance of the path or make it substantially less convenient for the public.

Otford Parish Council

16. Otford Parish Council agrees with the proposal. However, Parish Councillor Philip Clucas responded to the consultation separately. He had previously suggested an alternative bridge crossing in 2014, which Network Rail rejected mainly due to cost and time factors. Despite having had several meetings, Network Rail did not address the following issues that Councillor Clucas raised:
- Consideration of local resident Tom Housden's disability (cerebral palsy);
 - On-going maintenance and other safety features such as lighting, wet / freezing weather;
 - Accidents related to steps on a footbridge greater than that on level crossings;
 - Many parents with buggies & young children would find it very hard to negotiate the 60+ steps on the bridge. He believes that this group of people would end up having to walk further to avoid the bridge and cross the dangerous Station Road (possibly twice) to get to and from the school;
 - Clarification on who would clear / grit the steps in snow and icy weather; who would be responsible if an accident occurred?
 - Councillor Clucas attended a further site meeting with PROWAS Officers.

The Otford Society

17. The Otford Society does not object to the proposal.

User Groups

18. The Open Spaces Society, the Ramblers and the British Horse Society were consulted. The Ramblers' representative agrees with the proposal but noted that a bridge would be less convenient for the elderly and physically disabled.

West Kent Area Public Rights of Way Officer

19. The PROW Officer responsible for the Sevenoaks area does not agree with the proposal. She considers that the increased risk to personal attack (there will be seven changes of direction within the new route and no sight of anyone hiding) outweighs the danger to pedestrians of collisions with rolling stock. The proposed new route will be longer and the bridge would contain 62 steps as opposed to two stiles currently on the footpath.

Statutory Undertakers

20. No objections were received from any Statutory Undertakers who responded to the consultation.

Kent County Council Traffic Schemes (Highway Services)

21. No response was received from Kent Highway Services.

Tom Housden

22. Tom Housden is a local resident and has cerebral palsy. He attended the site meeting with PROWAS Officers. He objects to the proposal as the existing two stiles leading to the level crossing do not present him with any difficulty, but the large amount of steps on the proposed bridged crossing would be more dangerous and more inconvenient for him. He has not had any response from Network Rail to his disability issues. Network Rail has stated to the County Council that it is unable to assess the needs of individuals.

Barry Davies

23. Barry Davies attended the site meeting with PROWAS Officers. He objects to the proposal, stating that, in his opinion, accidents on level crossings are very rare; the risk only exists when the hazard (the moving train) is present. At all other times, the risk is zero. However, falls from staircases are one of the most common causes of accidents in the UK, and can also prove fatal. Every user will be exposed to this hazard every time. He further suggested that the collective risk of injury is likely to be greater than that from the occasional passing train. Mr Davies also considered that users with pushchairs or bicycles would not be able to use the bridge and so would have to go a significant distance further and along the main road. The road does not have a footway all the way along and so could carry a greater risk than that associated with the level crossing.

The Case - the proposed diversion of part of Public Footpath SR49 at Otford

24. In dealing with the application to divert a public right of way, consideration must be given to the following criteria of Section 119A of the Highways Act 1980: -

- a) Whether it is in the interests of the safety of users or likely users of at grade crossings
- b) 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.
- c) whether the diversion order alters a point of termination of the path or way, if that point is not on a highway over which there subsists a like right of way or, otherwise than to another point which is on the same highway, or another such highway connected with it.
- d) whether the order should make provision requiring the operator of the railway to maintain all or part of the right of way created by the order.

25. To be taken into account but not listed as criteria under Section 119A of the Act but in Rights of Way Circular (1/09):

- a) Whether the right of way will be reasonably convenient to the public;
- b) The effect the proposal will have on the land served by the existing path or way and on land over which the new path or way is to be created.
- c) The effect that the diverted way will have on the rights of way network as a whole.
- d) The safety of the diversion, particularly where it passes along or across a vehicular highway.

26. Those criteria are considered individually and conclusions drawn below: -

a) *Whether it is expedient in the interests of the safety of users or likely users of the crossing.*

A number of risk assessments have been undertaken by Network Rail, the most recent in October 2015. This latest risk assessment increased the risk score from a rating of C3 (high risk) to C2 (higher risk), due to usage figures and an increase in numbers of vulnerable users. This is despite the fact there is a temporary speed restriction in force limiting trains to 45mph rather than the usual 60mph. The temporary speed restriction was imposed due to the insufficient sighting available at the level crossing. Whistle boards had previously been installed in order to mitigate the insufficient sighting at the crossing; however, following a Noise Abatement Notice, they had to be removed. The resulting impact was the implementation of the speed restriction.

In terms of danger, this particular crossing is ranked by Network Rail as 29th of 561 level crossings on the South East Route. In terms of risk, when considering those crossings which cater for public footpaths, this one ranks 1st of 278 and puts it within the top 1% in the country based on Network Rail's assessment. The main concerns for Network Rail at this crossing are insufficient sighting, high level of use and evidence of misuse, coupled with the high level of vulnerable users, in particular unaccompanied children and the elderly. An incident log provided by Network Rail can be found at **Appendix C**. These incidents are not weighted however. As part of the risk modelling, Network Rail's *All Level Crossing Risk Model* asks a number of questions and one of them is whether there have been any incidents in the last three years. If the answer is yes, then the box is ticked and the *All Level Crossing Risk Model* will add this information into its risk score. Network Rail considers the proposed solution of a footbridge with steps would remove the risk of serious injury to users and allow uninterrupted use.

Network Rail has calculated that 13.5 seconds are required for vulnerable users to cross a level crossing. The traverse time is calculated based on the length of the crossing between decision points. For this crossing, this was calculated by taking an average person 9 seconds to cross. Due to the amount of vulnerable users that cross the crossing an additional 50% was added to the traverse time.

It is difficult to fully assess the safety case Network Rail has put forward and so witness statements relating to the logged incidents were requested by the County Council under Freedom of Information. This was to ascertain which incidents were relevant and what the criteria was for reporting a 'near miss'. The incident (logged at **Appendix C**) that was deemed a suicide, for example, could not be seen as relevant in this case; nor some of the other incidents logged such as "contractor working unsafely." Network Rail has confirmed that the only criteria for reporting a 'near miss' is if the driver considers it to be; it is totally dependent on the driver's perception of the incident. Unfortunately, Network Rail has only recently responded that it does not hold the information requested and that it is held by the British Transport Police so a further FOI request would have to be made to them.

It is evident that there have been some incidents on this level crossing, particularly in relation to misuse, although it is too difficult to accurately assess the near misses. There is, of course, an inherent risk with any level crossing, but, as Mr Davies has pointed out, when no train is present, neither is the risk. Network Rail considers that the stepped bridge will be a safer option for the public, also enabling uninterrupted use of the crossing. There is an argument that for at least one member of the public who uses the crossing regularly (Tom Housden), a stepped bridge will be more dangerous. However, for those who are blind or partially-sighted for example, a bridge will be much safer.

Taking into account all of the above, this case is very finely balanced; but taking into account the number of trains using this line, the ever increasing speeds of those trains and the number of incidents at this crossing, the County Council considers that, on balance, it is expedient to divert the footpath in the interests of the safety of users or likely users of the crossing.

b) 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.

Whistle boards had previously been installed on both approaches in order to mitigate the insufficient sighting at the crossing. However, due to noise complaints and the serving of a Noise Abatement Notice, the whistle boards had to be removed. The resulting impact was the implementation of the speed restriction, which affects train performance and causes delays. Vegetation management has been undertaken, and is regularly required to maintain current sighting distances, but due to track curvature no further improvement could be made to available sighting.

Network Rail has not identified any other works that could be undertaken to improve safety of the crossing.

The existing level crossing will be securely fenced off in order to prevent unauthorised access to the railway. Any signage required by the Council at the crossing (and any other points) will be provided.

c) whether the diversion order alters a point of termination of the path or way, if that point is not on a highway over which there subsists alike right of way or, otherwise than to another point which is on the same highway, or another such highway connected with it.

The new route does not alter the point of termination of the path.

d) whether the order should make provision requiring the operator of the railway to maintain all or part of the right of way created by the order.

Network Rail will maintain the structure of the bridge and future maintenance of the surface of the footpath where it forms part of the bridge.

Tests to be considered under Circular (1/09)

27. a) Whether the right of way will be reasonably convenient to the public.

The proposed route will run over a new stepped bridge which has been granted planning permission. The bridge will have 28 steps on its eastern side with a mid-way level and 34 steps on its western side with a mid-way level. The existing route has a stile and a series of approximately 6 wide-spaced steps leading to the east side of the level crossing and a stile on the west side. Network Rail has been asked if the stiles could be removed to make access easier but it has stated that this would increase the risk to the crossing as more vulnerable users would be able to use the crossing, further increasing the level crossing risk. This is unacceptable to Network Rail. Although not easily negotiable, it is known that some people with pushchairs do use this route; it is unlikely they would be able to use the stepped bridge. As already stated, local resident Tom Housden, currently uses the level crossing without issue, but would find the bridge very inconvenient and dangerous so may not be able to use it. Network Rail has stated that it is unable to assess the needs of individuals. Wheelchair users cannot use the existing route and would not be able to use the stepped bridge either. People who are visually impaired or blind would find the bridge more convenient and easier to use. Taking the above into account, it is evident that the stepped bridge will inconvenience some users of the crossing.

b) The effect the proposal will have on the land served by the existing path or way and on land over which the new path or way is to be created.

The proposal will have no impact on the land served by the existing right of way or on land over which the new path is to be created.

c) The effect that the diverted way will have on the rights of way network as a whole.

The diverted way will have little impact on the rights of way network as a whole. The termination points are unchanged and there is very little added distance as a result. However, the bridge will possibly exclude some walkers who can currently use the level crossing.

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

The safety of the new route over the stepped bridge has been queried. Network Rail was asked to provide accident statistics on its current stepped bridges (in relation to falls, etc.) so that a comparison of risk could be made. See **Appendix D** for a table showing the accident statistics. These are recorded via Network Rail's National Helpline and entered into its Safety Management Information System. It is recognised that there may be many more incidents that are never reported to Network Rail. There is, therefore, a concern that the proposed new route running over the stepped bridge is not significantly safer than the level crossing.

Further considerations

28. In addition to the tests set out in section 119A of the Highways Act 1980, the County Council must also have regard to the following issues when considering an application to divert a public right of way:

29. Under section 29 of the Highways Act 1980, the County Council has a duty to have regard to the needs of agriculture (including the breeding and keeping of horses), forestry and the desirability of conserving flora, fauna and geological and physiographical features. In this case, there is no adverse effect caused by the diversion of the path.

30. Section 40 of the Natural Environment and Rural Communities Act 2006 requires that every public authority must have regard "*so far as is consistent with the proper exercise of [its] functions, to the purpose of conserving biodiversity*". In this case, there is no adverse effect caused by the diversion of the path.

31. Where the affected land forms part of an Area of Outstanding Natural Beauty (AONB), section 85 of the Countryside and Rights of Way Act 2000 requires that the County Council shall have regard to "*the purpose of conserving and enhancing the natural beauty*" of the AONB. In this case the land does not form part of the Kent Downs AONB and as such there is no adverse effect.

32. Under section 17 of the Crime and Disorder Act 1998, the County Council has a duty to exercise its functions "*with due regard to the likely effect of the exercise of those functions on, and the need to do all that it reasonably can to prevent, crime and disorder in its area*". In this case, there is no adverse effect caused by the diversion of the path.

33. Finally, the County Council is subject to the public sector duty regarding socio-economic inequalities set out in section 1 of the Equalities Act 2010. Network Rail has conducted a Diversity Impact Assessment (see **Appendix C**). Although this Assessment did not consider all disabilities, and in particular that of Tom Housden, it is clear that the new route running over the stepped bridge will be better for some users (including those who are visually impaired), but detrimental to and exclude others.

Conclusion

34. As already stated, it is considered that this case is very finely balanced. Network Rail does have a safety case and the tests under section 119A of the Highways Act 1980 are met. However, the new route runs over a high stepped bridge, which includes its own risks, and will exclude some members of the public that are currently able to access the existing route. On balance it is considered that an Order should be made. However, in view of the fine balance here, this is one case where the evidence both for and against the application lends itself to being tested at a Public Inquiry. Therefore, if objections are received and the Order is submitted to the Secretary of State for the Environment, Food and Rural Affairs for determination, the County Council should take a neutral stance at a Public Inquiry.

Recommendation

35. Therefore, it is recommended that the County Council makes an Order under Section 119A of the Highways Act 1980 to divert part of Public Footpath SR49 at Otford as shown in Appendix A to this report, on the grounds that it is expedient to divert the path and that the Definitive Map and Statement are amended accordingly. It is further recommended that, if objections are received and the Order is submitted to the Secretary of State for the Environment, Food and Rural Affairs, the County Council will take a neutral stance.

Accountable Officer:

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The case file is available for viewing on request at the PROW & Access Service, Invicta House, County Hall, Maidstone, Kent, ME14 1XX. Please contact the Case Officer for further details.

List of appendices

Appendix A - Plan of proposal

Appendix B - Extract from the Definitive Map, sheet 019 (TQ55NW)

Appendix C - Copy of the application and Diversity Impact Assessment

Appendix D - Statistics in relation to falls from steps

Case file - PROW/SR49/7/NR

