

Application to divert part of public footpath ZR109 from the foot crossing known as Simpsons Crossing, at Bobbing in the Borough of Swale

A report by the Public Rights of Way and Access Service Manager to Kent County Council's Regulation Committee Member Panel on 24 November 2023.

Recommendation: I recommend that the applicant be informed that an Order to divert part of public footpath ZR109 from the foot crossing known as Simpsons Crossing, at Bobbing in the Borough of Swale, will be made.

Local Member: Mike Baldock

Unrestricted item

Introduction and background

1. The County Council has received an application to divert part of public footpath ZR109 where it passes over the at grade rail crossing, known as Simpsons Crossing, at Bobbing. The application to remove the at grade foot crossing from the railway line has been made by Network Rail, in the interests of safety.
2. The crossing sits behind the Bobbing Premier Inn and beside the A249. The footpath leads to the A2 south of the railway and leads to the Premier Inn, The Bobbing Apple Pub and a McDonalds, as well as to various housing estates to the north. There are two schools close by, Grove Park Primary and Westlands School. The crossing is known to be used by pupils from these schools.
3. This is the second application to divert the path. The first proposal in 2013 was to divert the path up the embankment of the A249, utilising the road bridge to cross the railway. This proposal was rejected, primarily due to the risks associated with the proximity to traffic using the A249 and objection by Highways England (now National Highways). Land close to the crossing has been and continues to be developed, which in turn led to an increase in use of the crossing.
4. Since 2013 a number of risk assessments have been undertaken by Network Rail. It is Network Rail's position that Level Crossings are risk assessed on a regular basis and when risk is known to have changed, such as if a new housing development is being built or if the train timetable changes. The risk assessment process includes quantitative as well as qualitative risk assessment. In quantifying risk, Network Rail uses a risk model called the All Level Crossings Risk Model ("ALCRM") which was developed collaboratively by the Rail Safety & Standards Board, Network Rail and others. This model provides a consistent method for assessing risk to crossing users, train passengers and rail staff. The model incorporates over 200 inputs relating to types of trains, number of trains, train speed, public usage, the crossing environment (location etc.), environmental factors (prone to fog, sun glare etc.), layout, sighting distance for approaching trains, incident history, user behaviour and the effectiveness of mitigations in place. The ALCRM reports two measures of risk: collective risk and individual risk of fatality. Collective risk includes total harm in terms of Fatalities and Weighted

Injuries (FWI) – used throughout the UK rail industry – and the individual risk to a single typical user. Coupled with this, Network Rail incorporates qualitative assessment based on the structured expert judgement of the Level Crossing Manager.

5. The most recent risk assessment carried out at this crossing was on 2 March 2020 following a near miss on 21 February 2020. The crossing scored a rating of C3 (it was C5 in 2013) on the ALCRM, which means it has a high to medium level of both individual and collective risk. At that time, the crossing was ranked as 13th out of all crossings in Kent, and 2nd highest for footpath crossings. It should be noted that where this crossing is currently closed under a Temporary Traffic Regulation Order, it comes off Network Rail's risk register. If the crossing were to be opened today (at the time of writing this report) it would be 3rd highest risk, with Teynham West being 2nd highest for footpath crossings, and 10th highest for all crossings.

6. The key risk drivers here are:

- frequency and variety of train movements (including the high-speed passenger services);
- high levels of use particularly of vulnerable users such as the elderly and children;
- increased evidence of misuse.

7. Due to the risks associated with the crossing, use of the footpath has been prohibited by a Temporary Traffic Regulation Order since March 2021, initially for a period of 6 months and then extended for another two years until September 2023. A further extension of 2 years has been granted by the Department of Transport, lasting until September 2025. In this regard, Network Rail has acted in line with the nationally agreed 2019 Memorandum of Understanding ("MoU") (see **Appendix E** for a copy of the MoU), acting on the side of caution to seek the temporary closure ahead of the implementation of whatever measures are deemed appropriate to the crossing. The Public Rights of Way and Access Service and Network Rail understand the inconvenience that the closure of the crossing has had on the community and are looking to provide the best solution possible.

8. The length of public footpath ZR109 to be diverted is shown by a solid bold black line between the points A-B on the plan at **Appendix A**. The proposed new route is shown by bold black dashes between the points B-C-D-E-F-G.

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.

The proposed route will have a width of 2.5 metres where possible.

The existing footway along the Sheppey Way will be extended to point G.

9. A copy of the application can be found at **Appendix C** and a copy of the full Narrative Risk Assessment ("NRA") can be found at **Appendix D**.

Policy

10. 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.

11. 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.

12. 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 or Extinguishment Order

13. Legislation relating to the extinguishment or diversion of a public path is contained within Sections 118A (extinguishments) and 119A (diversions) of the Highways Act 1980: The Procedure is in Schedule 6 of the same Act.

(i) The Council may make an Order to extinguish or 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

14. Rights of way circular (1/09) Guidance for local Authorities 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:

15. Consultations have been carried out as required by the Act.

County Member and Borough Councillors

16. County Member Mike Baldock and Borough Councillor James Hunt were consulted. Mike Baldock did not respond to the consultation, but having been provided with an update by the case officer following the consultation deadline, he expressed concerns about the closure of the crossing as there had not been any fatalities along this stretch for a number of years. In addition, he felt the diversion proposal was of no use and requested that the case be put before Committee. Councillor Hunt did not respond to the consultation but had previously contacted Network Rail expressing concerns on behalf of local residents about the temporary closure of the crossing, including submitting a petition against the closure. In addition, Councillor Hunt indicated that from what he had been told by residents “they are happy with the proposal Network Rail have put. Whilst slightly longer than before it still allows access to where they want to get.”

Swale Borough Council

17. Swale Borough Council's Development Manager responded that they agreed the proposal was in the interest of the safety of the public and that the diversion was not substantially less convenient to the public.

Parish Council

18. Bobbing Parish Council was consulted but did not respond. County Member Mike Baldock informed the case officer that the Parish Council was inquorate at the time of the informal consultation, so could not comment although there had been concerns expressed before the elections. The new Chair of Bobbing Parish Council stated that its members were divided on the matter.

User Groups

19. The Open Spaces Society, the Ramblers and the British Horse Society were consulted. The Open Spaces Society representative initially responded that they had no comments to make and were 'neutral'. A few days later another response was received where he expressed doubt over Network Rail's case and stated: "*Accidents are due to people taking their own lives or/and human neglect or stupid irrational behaviour.*" He felt that, as the crossing was already closed, there would be no point in objecting, so would take a neutral stance. The Ramblers and British Horse Society did not respond. The Swale Footpaths Group responded after having discussed the proposal at a recent committee meeting. The Group did not object but commented that where the path would pass under the A249 bridge it should be separated from the railway line by a wall or secure fencing as is footpath ZR111 on the other side of the railway line. In addition, they expressed concern about safety where the path would connect to the Sheppey Way as there are no barriers between walkers and the traffic.

East Kent Area Public Rights of Way Team

20. The East Kent Area Public Rights Officer responded that he had no comments to make.

Kent Highways

21. Kent Highways agreed that the proposed diversion was in the interest of public safety but requested that a footway be added where the diverted path would meet the Sheppey Way.

Statutory Undertakers

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

Local residents

23. Although not sent directly to local residents, the proposal had been more widely circulated. 11 local residents responded with 6 in support of the proposal, 4 objecting and 1 with mixed comments. Objector 1 disagreed that the proposed diversion was in the interest of public safety as they were aware that some people were climbing the bank to the A249 and crossing by that means. They further commented that a lengthy diversion would not stop this. They considered that the proposal would be substantially less convenient to the public as it is substantially longer and would connect to the busy Sheppey Way.
24. Objector 2 disagreed that the proposed diversion was in the interest of public safety as they had witnessed children still accessing the crossing despite it being locked and that the children were in greater danger at risk of being trapped line side as a result. However, they then went on to say that if a diversion was the only option, then they would have to accept it. With regards to convenience, they stated that “any option that involves walking further is going to be an inconvenience to anyone that is lazy enough to just climb the fences or verges anyway.”
25. Objector 3 considers that the alternatives that teenagers are now taking are more dangerous, that is climbing up the steep slopes and racing across the A249. They stated that the proposed diversion is “considerably longer and more inconvenient” meaning that the teenagers are still likely to use the more dangerous option.
26. Objector 4 considers that the proposed new footpath is unacceptable as people would be “*expected to walk along a footpath next to the dangerous Sheppey Way where cars speed past at 50mph, to then pass along the constantly busy garage, carpark and macdonalds under the railway bridge to link to the other side.*” They believe there would be a greater risk of accidents from using the proposed route. In addition, they commented on some of the local community taking “*dangerous shortcuts by climbing a steep embankment and using this as a means to get over the bridge to the other side.*”
27. The respondent who put forward mixed comments seemed to both agree and disagree that the proposed diversion was in the interest of public safety. They commented that the proposed diversion should have taken place before the closure of the crossing, and ultimately, they wanted access of some kind. They then went on to state that they disagreed as people are now crossing in an unsafe manner, “*either crossing the line directly or using the A249 slip*” both of which they felt were more dangerous than the rail crossing was. As regards convenience, they recognised that the proposal was less convenient but that the proposed diversion “*is infinitely better than the hardship we are currently suffering*” as a result of the closure.
28. The responses received indicate a division in local community opinion, which is also reflected within the Parish Council.

The Case - the proposed diversion of part of public footpath ZR109 at Bobbing where it passes over the at grade rail crossing

29. 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.

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

- i) Whether the right of way will be reasonably convenient to the public.
- ii) 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.
- iii) The effect that the diverted way will have on the rights of way network as a whole.
- iv) The safety of the diversion, particularly where it passes along or across a vehicular highway.

31. 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.

- i) A number of risk assessments have been undertaken by Network Rail at this crossing. The most recent was on 2 March 2020 following a near miss on 21 February 2020, the result of which was to temporarily close the crossing using an Emergency Traffic Regulation Order. Due to the nature and frequency of incidents at the crossing (supported by a 9-day census that provided clear evidence of misuse and inappropriate behaviours at the crossing), Network Rail applied to temporarily close the crossing until a more permanent solution could be found. The Temporary Traffic Regulation Order has been extended until September 2025.

ii) It is Network Rail's position that Level Crossings are risk assessed on a regular basis or when risk is known to have changed, such as if a new housing development is being built or if the train timetable changes. The risk assessment process includes quantitative as well as qualitative risk assessment. In quantifying risk, Network Rail uses a risk model called the All Level Crossings Risk Model ("ALCRM") which was developed collaboratively by the Rail Safety & Standards Board, Network Rail and others. This model provides a consistent method for assessing risk to crossing users, train passengers and rail staff. The model incorporates over 200 inputs relating to types of trains, number of trains, train speed, public usage, the crossing environment (location etc.), environmental factors (prone to fog, sun glare etc.), layout, sighting distance for approaching trains, incident history, user behaviour and the effectiveness of mitigations in place. The ALCRM reports two measures of risk: collective risk and individual risk of fatality. Collective risk includes total harm in terms of Fatalities and Weighted Injuries (FWI) – used throughout the UK rail industry – and the individual risk to a single typical user. Coupled with this, Network Rail incorporates qualitative assessment based on the structured expert judgement of the Level Crossing Manager.

iii) In the most recent assessment, this crossing scored a rating of C3, which means it has a high level of both individual and collective risk. Prior to its closure, the crossing was currently ranked 13th out of all crossings in Kent, and 2nd highest for footpath crossings. The full NRA can be found at **Appendix D** to this report.

iv) The main concerns for Network Rail at this crossing are frequency and variety of train movements (including the high-speed passenger services), high levels of use particularly of vulnerable users such as elderly and children, and evidence of an increase in misuse of the crossing.

v) There are some users in the community who do not consider that the crossing is unsafe and that when used carefully and sensibly there is little or no risk. There will be people who can testify that they have used the crossing without incident for many years. However, there is an inherent risk when crossing any railway line, and at this particular crossing evidence of misuse, particularly by children, has increased, which significantly affects the level of risk. The current observed behaviour of some younger people climbing the steep embankments and racing across the A249 indicates that careful and sensible use is not always present. Therefore, for all the reasons given above, the County Council considers that, on balance, it is expedient to divert the footpath in the interests of the safety of the 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.

i) Network Rail has considered various options to mitigate the risks associated with this crossing. Train warning systems such as Miniature Stop Lights, have been considered but discounted for both feasibility and effectiveness reasons. Taking into account that many of the recorded incidents have involved children and youths deliberately crossing in front of fast approaching trains, Network Rail conclude that warning systems would not prevent unsafe behaviour.

ii) Another option that was considered included the construction of a footbridge at the crossing. This was discounted as there is insufficient land available for ramped approaches. The construction of an underpass has also been discounted due to the difficulties associated with such a construction as well as environmental impact.

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

iv) 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 a like right of way or, otherwise than to another point which is on the same highway, or another such highway connected with it.

i) Although the public footpath numbered ZR109 itself does not currently connect to the Sheppey Way, there is a continuous footpath connection from ZR109 to the Sheppey Way (via footpaths numbered ZR111 and ZR112). The numbering of public rights of way is an administrative process within the Public Rights of Way and Access Service, serving to identify their locations as shown on the Definitive Map. Therefore, it is considered that the new termination point for ZR109 connecting with the Sheppey Way at a different point on that highway, satisfies this test.

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.

i) The County Council will maintain the surface of the new route except where it passes alongside the railway lines under the A249 bridge. This section is to be maintained by Network Rail.

Tests to be considered under Circular (1/09)

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

The existing route is approximately 14 metres in length where it crosses the railway lines. The section to be diverted is approximately 185 metres in length. Taking distances from the rail crossing to the nearby McDonalds as an example (which is a known popular destination from this footpath) it is currently 257 metres but will be 450 metres once the path is diverted. In addition, the majority of the existing route is on the level, whereas part of the proposed route will run up to the Sheppey Way on an incline through a field. However, the environment at the crossing limits where a new route might be diverted to. An earlier proposal included a zig-zagged approach up the embankment to the A249, which would have been shorter than the current proposal. However, there were various factors which meant this could not be implemented, not least an objection from National Highways (formerly Highways England) who considered the A249 too dangerous for the public to be walking beside. If the crossing remains closed (as currently under the temporary Traffic Regulation Order) the possible alternatives are even longer than the proposed diversion. Therefore, the County Council recognises that although the diversion will inconvenience some people as it is much longer than the existing route, the alternative options are particularly limited in this case.

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 effect the proposal will have on land served by the existing path will be to enable Network Rail to remove the rail crossing and thereby the risk of danger to the public.

The land over which the new path is to be created is in three ownerships additional to Network Rail: Kent County Council, National Highways and A Hinge and Sons. Each affected landowner has provided written consent to the proposal. The effect of the new public right of way is to preclude the use of the land by the landowners for any purpose which is incompatible with the public's rights. This impact is acceptable to the landowners.

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

The diverted way will have the effect of providing continuous connection with the public rights of way network as a whole, despite it requiring a further distance to be walked.

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

The proposed diversion is considered to be safe for the public. The new path will be separated and secured away from the railway lines where it passes under the A249 bridge, and the footway will be extended from where the new path connects to the Sheppey Way to the existing footway.

Further considerations

33. 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:
34. There is a relevant provision within the County Council's Rights of Way Improvement Plan at EN03 SAFE TRAVEL at 2.12 "Look to improve safety of railway and road crossings where possible".
35. 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.
36. 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.
37. 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 or High Weald AONB and as such there is no adverse effect.
38. 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.
39. The County Council is subject to the public sector duty regarding socio-economic inequalities set out in section 1 of the Equality Act 2010. An assessment in this regard has been undertaken and although the new route will incorporate an incline through the field, there is no other adverse impact on the use of the affected path as a result of the diversion.
40. Finally, in signing the application form the applicant has agreed to defray any compensation which may become payable following a successful claim made under section 28 of the Highways Act 1980.

Conclusion

41. In this case Network Rail has put forward a safety case to warrant a temporary Traffic Regulation Order closing the crossing until a suitable alternative can be found. Due to site limitations, it is recognised that alternative solutions are also limited. While it is understood that the new route will inconvenience some users of the path, this diversion appears to be the best proposal that can be found.
42. The County Council is therefore satisfied that the legal test of safety is met and that other considerations have been applied.

Recommendation

43. Therefore, it is recommended that the applicant be informed that an Order to divert part of public footpath ZR109 from the foot crossing, known as Simpsons Crossing, at Bobbing in the Borough of Swale, as shown in **Appendix A** to this report, will be made on the grounds that it is expedient to divert the path on the grounds of safety of the public.

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The documents on the case file are 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 088 (TQ86SE)
- Appendix C - Copy of the application
- Appendix D - Narrative Risk Assessment
- Appendix E - Memorandum of Understanding

Case file reference - PROW/ZR109/12/NR