

Application to divert part of Public Footpath ZR681 from the railway foot crossing to a new route parallel to the northern platform at Teynham 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 22 November 2023.

Recommendation: I recommend that the applicant be informed that an Order to divert Public Footpath ZR681 from the railway foot crossing to an alignment running parallel to the northern platform of Teynham Station in the Borough of Swale, will be made.

Local Member: Mr. Rich Lehmann

Unrestricted item

Introduction and background

1. The County Council has received an application to divert Public Footpath ZR681 in the Parish of Teynham. The application has been made by Network Rail to remove a level crossing from the railway line in the interests of safety. The proposed diversion would move the Public Footpath to a route parallel to the northern railway platform, across land owned by Network Rail, as shown between Points A – C in **Appendix A**
2. The crossing is located just to the west of Teynham railway station, at the terminus of the station platforms. Teynham village is located to the south, and an outdoor education facility, called Creed Outdoor Learning Trust, is just to the north west of the crossing. This education facility is used throughout the year with a high number of children using the level crossing to access it.
3. A number of risk assessments have been carried out on this crossing, the most recent in December 2021. It should be noted that where this crossing is currently closed under a Temporary Traffic Regulation Order (TTRO) 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 the second highest risk footpath crossing and also the second highest risk level crossing in Kent.
4. As part of a Network Rail Narrative Risk Assessment (see **Appendix D**) the risk score changed from C3 to B2, a significant increase. (See paragraphs 43 & 44 for context).
5. The number of train movements passing over the level crossing is averaged at 183 per day, with an up-line speed of 90mph, and a down-line speed of 75mph. It is noted that the up-line speed has been restricted to 80mph in an attempt to mitigate the risk at the level crossing.

6. The main concerns for Network Rail at the crossing are insufficient sighting, high level of users, misuse of the crossing, the proximity of the level crossing to a railway station, and a large number of vulnerable users, including elderly and children.
7. Due to the risks associated with the crossing, use of the footpath has been prohibited by a Temporary Traffic Regulation Order (TTRO) since December 2022. Initially it was closed under emergency closure, which was then converted into a full 6 month TTRO. This has recently been extended for a further year by the Secretary of State for Transport. In this regard, Network Rail has acted in line with the nationally agreed 2019 Memorandum of Understanding (“MoU”) (**Appendix E**), acting with caution ahead of the implementation of any measures that are deemed appropriate to the level 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 ZR681 to be diverted is shown by a solid black line between the Points A – B on the plan in **Appendix A**. The proposed new route is shown by bold black dashes between the points A – C, also in **Appendix A**. The proposed route will have a width of 2.0 metres.
9. 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.
10. A copy of Network Rail’s application can be found at **Appendix C**, and a copy of the Narrative Risk Assessment can be found at **Appendix D**.

Policy

11. 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 may be 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 incurrent 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.
12. 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.

13. 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

14. Legislation relation to the extinguishment or diversion of a public path at a rail crossing 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

15. 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:-

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

County Member and Borough Councillors

17. County Member Mr. Rich Lehmann and District Councillors Lloyd Bowen and Mike Whiting were consulted.

18. District Councillor Mike Whiting responded with an objection to the proposal. The points of objection are;

- I. there had been no recorded deaths or accidents on the crossing, but there had been injuries and deaths recorded close to the newly proposed termination point of ZR681 (Point C, **Appendix A**).
- II. The construction of a path behind the northern railway platform is unnecessary and could increase risk to people's security in the dark.
- III. there is no pavement on the north side of Lower Road, the road the public would be required to walk to return to the other side of the crossing (Point B, **Appendix A**).
- IV. Creed Outdoor Learning, which is situated to the north west of Public Footpath ZR681 would be affected by the diversion. No further details were given on what this entails.
- V. Network Rail need to find other 'more effective' means for pedestrians to cross the railway line without such an increase in the distance the diversion entails.
Mr Whiting suggests the installation of a bridge across the railway or a lockable gate would be preferable solutions.

19. Councillor Lloyd Bowen and County Member Rich Lehmann did not respond.

Borough Council

20. Swale Borough Council did not respond.

Parish Council

21. Teynham Parish Council responded with objections and comments, drafted from community responses to the proposal. The Parish state that Public Right of Way (PROW) forms an important, 'direct route between Teynham and Conyer', and is a popular walking route for pedestrians to reach the Saxon Shore path and public houses.

22. Teynham Parish Council note that the diversion route would increase walking time between Conyer and Teynham town centre by approximately 5 to 10 minutes each way. They also commented on safety concerns for people walking along the platforms. It is noted here that the diversion does not encourage the use of the platforms, as the proposed diversion is located on a separate stretch of land just north of the platform.

23. The Parish Council's objection mentioned the location of the Creed Outdoor Learning centre, to the north of the railway line, and how the diversion would negatively affect the company.

24. Recommendations were made that alternative routes, installation of safety equipment such as self-closing gates and improved signage, lighting and CCTV should be investigated.
25. A site meeting was held on Thursday 13 July with the Chair and Vice-Chair of Teynham Parish Council, a member of the Ramblers, a representative from Network Rail and PROW Officers to discuss the closure, including the points made above.
26. During the meeting the Parish Council expressed that they wished to investigate alternatives to the proposed diversion, such as increasing safety equipment on the crossing and that they considered the meeting a fact-finding mission. The representative from Network Rail, Operations Risk Advisor Gemma Kent, detailed the research undertaken on level crossing furniture. A breakdown of this can be found in the Narrative Risk Assessment in **Appendix D**.
27. One suggestion made was for access restriction furniture to be installed at the level crossing, similar to that at the vehicle level crossing located to the east of the station. However, Gemma Kent noted that no such furniture exists for a pedestrian crossing. She also commented that there was an increase in risk for such furniture, as it would prevent anyone from leaving the level crossing if the gates closed during use.
28. At the end of the meeting no agreement was reached between the parties, but the Parish Council did agree that there was a high level of risk at the level crossing.

User Groups

29. The Open Spaces Society, the Ramblers and the British Horse Society were consulted. The Open Spaces Society responded without objection. The British Horse Society did not respond.
30. Alan Smith, on behalf of the Ramblers, responded to the consultation with an objection. He noted misuse of the crossing, and questioned if the diversion would alleviate this as 'misusers [will] still be able to access the line from the station platform and from the level crossing to the east of the station'. He also noted a low barrier to the west of the southern platform could be climbed over.
31. Mr. Smith also questioned the ownership of the land the proposed diversion would cross. The land is wholly within the ownership of Network Rail.
32. Prior to the diversion consultation Network Rail held two public consultations in Teynham to discuss the proposal with local residents. During the meetings two alternative routes were discussed that would cross land to the north of the railway, and Mr. Smith notes these are not mentioned in the diversion proposal. The land is outside of Network Rail ownership, so permission to create new Public Rights of Way would need to be sought from the landowner. Following consideration the alternative options were not taken forward.

East Kent Area Public Rights of Way Team

33. The East Kent Area Officer and Area Manager did not respond.

Statutory Undertakers

34. No objections were received from any Statutory Undertakers that responded to the consultation.

Members of Public

35. A total of 23 responses were received from Members of Public, of which one was in support of the diversion.

36. The response in support of the diversion expressed disappointment in the TTRO placed across the level crossing, but stated 'the proposed diversion by Network Rail behind the railway station's northern platform is a good and safer alternative and we welcome it.'

37. The objections made by Members of Public followed broad themes and have been collated and listed below. The number of respondents for each category of concern is also listed.

- I. Network Rail's reason of safety is only an excuse used to divert the path. 11 respondents.
- II. The road crossing by Public Footpath ZR239 (near Point C, **Appendix A**) is more dangerous than the level crossing due to road layout and/or the behaviour of cars. 9 respondents.
- III. The length of the diversion is too long. 8 respondents.
- IV. The diversion would negatively increase footfall along neighbouring Public Footpath ZR238. 4 respondents.
- V. The proposed diversion behind the northern platform would be dangerous or too dark to navigate. 8 respondents.
- VI. This same route would also suffer from littering. 4 respondents.
- VII. Not enough was done to let local path users know about the proposed diversion and that consultation was minimal. 3 respondents.
- VIII. The diversion route is unnecessary, the public should just be allowed to walk along the platforms. 1 respondent.
- IX. Furniture should be implemented across the level crossing to improve safety, as an alternative to diversion. 9 respondents.
- X. The diversion route could endanger animals kept in fenced fields near the proposed diversion. 2 respondents.
- XI. The route is older than the trainline, therefore it should not be moved. 4 respondents.
- XII. There have not been any recorded deaths on the level crossing, so there is no safety concern. It is worth noting that one respondent did claim to remember that there was a death near the crossing several decades ago. However, it was a Network Rail worker and not a local resident. 6 respondents.

The responses received do suggest opposition to the diversion proposal for a range of reasons, with a large number of respondents disagreeing with the closure for reasons of safety.

The Case – proposed diversion of Public Footpath ZR681, Teynham

38. 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 the 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 highways 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.

39. 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 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.

40. 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.*

41. A number of risk assessments have been undertaken by Network Rail, the most recent dated December 2021, with a follow up risk assessment due March 2023. The 2023 risk assessment has been put on hold as a Temporary Traffic Regulation Order (TTRO) has been applied to the level crossing.

42. The TTRO was made following a near miss in November 2022. A full 6 month closure of the level crossing was subsequently made. Recently this has been extended by the Department for Transport by a further year.
43. 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 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 behaviours 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 structure expert judgement of the Level Crossing Manager.
44. In the most recent assessment, ZR681 scored a rating of B2, which means it has a high level of both individual and collective risk. This crossing, if it was reopened, would hold the second highest risk of any level crossing in Kent and the second highest risk of a footpath crossing in Kent. The narrative risk assessment can be found in **Appendix D**.
45. Two camera censuses were taken at the level crossing, one in 2019 and the most recent in March 2022. The latest census showed an increase in use of the level crossing compared to 2019 census, which also showed an increase in misuse. Through the censuses the number of daily users was averaged at 120 in 2019, and by 2022 the average had increased to 164.
46. Another substantial increase was in the number of vulnerable users. In 2019, 50 children were seen using the level crossing, 363 were recorded in 2022. As mentioned before, an outdoor education centre is located north of the railway and Teynham Village, so a large number of children may be expected to use the crossing. Dog walkers increased from 358 to 695, and there was a slight increase to elderly crossing users of 37 to 44. It is important to note that the 2019 census ran for 9 days, whereas the 2022 census ran for 14 days, so an increase in user numbers is to be expected. However, the substantial increase of children likely relates to the outdoor education centre and shows a pattern of change to the average user of the level crossing.
47. Safety incidents have been recorded at the level crossing, with three near misses recorded in 2022. The last near miss, recorded in November 2022, caused the train driver to apply the emergency brake as four males crossed in front of the train.

48. While most path users use the crossing safely and considerately, there has been a high level of misuse recorded on the level crossing. Some respondents to the consultation expressed that they have used the level crossing without incident for a number of years and that crossing safely is down to the individual. The high number of children using the crossing, categorised as being vulnerable, along with reported misuse by some children, indicates that such awareness of the danger and risk of the crossing is not inherent.
49. The crossing is located just to the west of the Teynham Station, with the crossing next to the terminus of the north and south platforms. An average of 183 trains use the lines each day, with just under half on the High Speed (HS1) route. The proximity to the platform means that when trains stop at the platform a clear line of sight of both lines is not possible. There is also the risk of level crossing users seeing a train stopped at the platform and assuming the crossing is safe not taking account of the potential use of the other track. Some trains along the lines do not stop at Teynham, and will continue at high speed.
50. Taking into account the number of trains along the line, the speed of the trains (a reduced speed of 80mph has been applied to the up-line and the down-line has a speed of 75mph), the proximity of Teynham Station and the number of recorded near misses and misuse, Kent County Council considers, on balance, it is expedient to divert the footpath in the interests 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.*
51. As part of Network Rail's Narrative Risk Assessment further safety measures were reviewed. A footbridge was considered but discounted, the land surrounding the level crossing is heavily built up on the south side, requiring land purchase. Steps would also limit some users from accessing the crossing, and there is not enough space for a step-free ramped bridge.
52. Overlay Miniature Stop Lights (OMSL) were also considered. These are essentially crossing lights with an audible alarm to assist path users with knowing when it is safe to cross. However, the proximity of Teynham Station and the increased complexity of train movements in the locale means that OMSLs are not suitable.
53. Integrated Miniature Stop Lights (IMSL) are similar to the above mentioned OMSL, but they are tied into the signalling system. However, the misuse seen in the census data, such as crossing users playing 'chicken' with the train, would not be expected to be reduced by such a system. Network Rail consider that the IMSL may even exacerbate misuse.

54. Demarcation, such as yellow decking and cats' eyes and the removal of steps were also reviewed, but the risk reduction would be minimal to the public and would not deliver a reduction in the ALCRM risk rating.
55. Further reduction of the line speed was also considered, but it is noted line speed reduction is only enacted in exceptional circumstances: a second, further reduction would not be feasible. Network Rail also note that any reduction in line speed results in financial compensation from Network Rail to rail providers.
56. As part of the TTRO, the raised crossing platform has been removed and fencing installed along the crossing point to prevent trespass. Network Rail has agreed to provide any signage required by the Council at the crossing (and any other points).
- 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 highways, or another such highway connected with it.*
57. Public Footpath ZR681 currently terminates at its connection to Lower Road. The termination point would be altered by the Order to connect the footpath to Public Footpath ZR239, a point on another highway to the east.
- 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.*
58. Network Rail will maintain the surface of the new route, as Section 119A(6) of the Highways Act 1980 provides.

Tests to be considered under Circular (1/09)

- a) Whether the right of way will be reasonably convenient to the public.*
59. The convenience of the proposed diversion is one of the major objections from the public. The length of path to be diverted is approximately 21 metres long. The proposed diversion length is approximately 276 metres. This is only the increase of length to the Public Right of Way, if a member of public wished to return to the other side of the level crossing, they would be required to travel approximately 613 metres.
60. An issue with any diversion of a level crossing will always be the length of the alternative route. Railway lines bisect the land and limit options to cross safely. The closest and safest crossing location is via Public Footpath ZR239. A possible alternative crossing point, to the north-west, is of a further distance than the proposed, and would require permissions from multiple landowners to divert the PROW over their land.

61. Despite the length of the diversion route the land is of minimum gradient and crossfall meaning that despite the length the route is accessible for most path users.
62. Many of the public objectors note the path is used for the Creed Outdoor Centre, or for travel to and from Conyer, north of Teynham. It is worth noting there is another public footpath, ZR238, from Conyer that travels to Teynham, which would not be affected by the diversion. This path offers a more direct route to the crossing at ZR239 and would not require the public to double-back as would be required by the proposal, the route can be found in the Definitive Map extract in **Appendix B**.
63. The options for alternative diversion routes are limited, and of the available options, the proposed diversion is the most feasible.
- 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.*
64. 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.*
65. The diverted route will have the effect of providing continuous connection with public rights of way network as a whole, despite the increased distance.
- d) The safety of the diversion, particularly where it passes along or across a vehicular highway.*
66. The proposed diversion is considered safe for the public. The path primarily follows a route parallel to the northern Teynham Station platform, but it will be separated by the station platform's fence. The new termination point is at Station Row/ Public Footpath ZR239.

Further Considerations

67. 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:
68. 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 the safety of railway and road crossings where possible".

69. 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.
70. 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.
71. 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.
72. 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.
73. 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. The new route will see an increase in walking distance to the public. The proposed diversion is limited due to the nature of the path crossing over a railway and finding safe alternative crossings. It is possible that the increase in walking length of the proposed diversion may limit use for the elderly or people with certain disabilities. Compared to a stepped bridge, which has the potential to exclude more path users, the proposed route is a more viable candidate. There is no other adverse impact on the use of the affected path as a result of the diversion.
74. 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

75. It is considered that this case is finely balanced, but slightly weighted in Network Rail’s favour. Network Rail does have a safety case and the tests under Section 119A of the Highways Act 1980 are met. Some members of the public that responded to the consultation object to the considerably longer route and its convenience.
76. Rail crossing orders are invariably finely balanced, especially when the reason is on a basis of safety. It is believed that Network Rail’s safety case needs

to be considered with greater weight. Two recent rail diversion orders, in Otford and Whitstable, were made where safety was noted as the primary motivator for the diversion. Should the committee conclude an order be made, we expect that Network Rail will lead a public inquiry, if necessary.

Recommendation

77. Therefore, it is recommended that the applicant be informed that an Order to divert Public Footpath ZR681 from the railway foot crossing to an alignment running parallel to the northern platform of Teynham Station in the Borough of Swale, will be made.

Accountable Officer:

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Case 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 diversion proposal
- Appendix B – Extract from the Definitive Map
- Appendix C – Copy of the application
- Appendix D – Network Rail Narrative Risk Assessment
- Appendix E – Memorandum of Understanding

Case file - PROW/ZR681/11/NR