

IN THE MATTER OF
THE WAREHAM LEVEL CROSSING

ADVICE

Introduction

1. We are asked to advise the Wareham Town Trust on Dorset County Council's ("the Council") and Network Rail's proposals for the Wareham Level Crossing ("the Level Crossing").
2. In particular, we are asked to advise on the following two points:
 - i) Would Network Rail be in breach of its duties under the Equality Act if it decided to close the existing Wareham Level Crossing without there being an alternative?
 - ii) Would the gradient of the ramps proposed by the Council for the proposed ramped crossing be in compliance with their duties under the Equality Act?

The Facts

3. The Level Crossing is a flat pedestrian level crossing over the railway adjacent to Wareham Railway Station. It provides the only step free pedestrian access over the railway to provide a link between the two halves of Wareham; the north half of Wareham is mainly residential and the south half includes the town centre. The Level Crossing is used by more than 1,200 people per day.
4. Since 2009, the Level Crossing has had locking gates and is operated by attendants from a security company. There have never been any accidents at the Level Crossing.
5. Alternative pedestrian access between the north and south of Wareham is provided by Network Rail in the form of a footbridge over the railway ("the

Footbridge”). However, this is not suitable for use by people with restricted mobility, wheelchairs and scooters and people with prams.

6. The Level Crossing is provided for by a lease between the Council and Network Rail, dated 1988, by which Network Rail grants permissive rights to cross the railway (“**the 1988 Lease**”). The Council renewed this agreement in 2013, so that these rights currently will extend to 2038. Network Rail has stated that it is not prepared to renew this agreement past 2038 due to the safety risk of the Level Crossing.
7. Network Rail and the Council have been trying to find a long-term solution to this crossing at the railway.
8. In August 2013, Purbeck District Council (“**the District Council**”) approved a planning application submitted by Network Rail for ramped access to the existing Footbridge (“**the 2013 Application**”). However, it was not possible to find a manufacturer to construct the approved design.
9. In September 2015, the District Council refused a second planning application submitted by Network Rail, which proposed an amended design to the ramped access to the Footbridge (“**the 2015 Application**”).
10. On 24 February 2016, a report was presented to the Dorset County Council Cabinet (“**the Cabinet**”) to consider the future of the Level Crossing (“**the February 2016 Cabinet Report**”). A decision was deferred to allow further options to be explored.
11. On 26 October 2016, a further report was presented to Cabinet (“**the October 2016 Cabinet Report**”). Several options for alternatives to the Level Crossing were considered. It was recommended that the preferred option was that the Council should proceed with a proposal for ramps, at a constant gradient of 1 : 12 with a series of horizontal resting platforms, to attach to the Footbridge (“**the Ramps Proposal**”).

12. The Council carried out an Equalities Impact Assessment, dated 28 September 2017, on the closure of the Level Crossing and the provision of the Ramps Proposal as an alternative (“**the EqIA**”).
13. The Council has now submitted a planning application for the Ramps Proposal (ref 6/2017/0639), which includes a Planning Statement. It is proposed that once the Ramps Proposal is constructed, the Level Crossing will be closed. The Council has also submitted a listed building application. These applications have not yet been determined.
14. In a letter dated 10 August 2017, Network Rail has stated the following:

“Network Rail’s funding contribution to the Wareham ramp project expires in March 2019. If the planning application is refused for the Council’s proposal to install access ramps, the level crossing will be closed upon the expiry of the 1988 agreement. An alternative crossing point will not be provided.”

Legal Analysis

Would Network Rail be in breach of its duties under the Equality Act if it decided to close the existing Wareham Level Crossing without there being an alternative?

15. Section 149 of the Equality Act 2010 (“**the Equality Act**”), otherwise known as the “public sector equality duty”, states relevantly as follows:

“(1) A public authority must, in the exercise of its functions, have due regard to the need to—
 - (a) eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under this Act;*
 - (b) advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it;*
 - (c) foster good relations between persons who share a relevant protected characteristic and persons who do not share it.”*

16. In *R (on the application of Buckinghamshire CC) v Secretary of State for Transport* [2013] EWCA Civ 920, the Court of Appeal emphasised two points with regard to the public sector equality duty:

“(i) “Due regard” means the regard that is appropriate in all the particular circumstances in which the public authority is carrying out its function as a public authority. There must be a proper regard for all the statutory goals, in the context of the function that is being exercised at the time by the public authority. At the same time the public authority must also pay regard to any countervailing factors (eg economic factors) which, in the context of the function being exercised, it is proper and reasonable for the public authority to consider: see in particular *Brown's case*, para 82. (ii) The duty to have due regard must be fulfilled before or at the time when a particular policy that will or might affect persons with a protected characteristic is being considered by the public authority in question. Attempts to justify a decision as being consistent with the exercise of the duty when it was not, in fact, considered before the decision was made are not enough to discharge the duty.”

17. Section 150(1) of the Equality Act provides that a “public authority” is a person who is specified in Schedule 19 of the Equality Act. Schedule 19 lists “Network Rail Limited” as a public authority.

18. It is noted that there has been debate in the case law, in contexts other than the public sector equality duty, as to whether Network Rail (or previously, the British Railways Board) is a “public authority” and whether it performs “public functions” (see, for example, *Cameron v Network Rail Infrastructure Limited* [2007] 1 WLR 163).

19. However, it is likely that this previous case law is not relevant here. This is because section 150(3) of the Equality Act provides that a public authority specified in Schedule 19 is subject to the public sector equality duty in relation to the exercise of *all* its functions, unless it has been specified only in respect of *certain* public functions. Unlike other bodies listed in Schedule 19 (for example, the General Medical Council, which is listed in Schedule 19 as: “*The General*

Medical Council, in respect of its public functions”), Network Rail is not limited by reference to certain functions. It follows that the logical reading of the statutory language is that Network Rail is subject to the public sector equality duty in respect of *all* its functions.

20. The present case concerns Network Rail’s function in providing or failing to provide pedestrian crossings over the railway. It is highly likely that a court would find that if Network Rail allowed the Level Crossing to close, and refused to provide an alternative step free access, this would be contrary to the public sector equality duty.

21. This is largely because it has been accepted by the Council and Network Rail, on numerous occasions, that the failure to provide alternative step free access, once the Level Crossing is closed, would discriminate against those with protected characteristics:

21.1. Network Rail made the 2013 Application and the 2015 Application for the provision of alternative step free access across the railway in 2013 and 2015, even though they were not contractually bound to do so. This implies an acceptance by Network Rail that alternative step free access must be provided if the Level Crossing is shut.

21.2. In the February 2016 Cabinet Report, the Council considered the closing of the Level Crossing without providing an alternative in the following terms:

“2.3.2 With half of Wareham’s residences to the north of the railway, then closure of the level crossing without an alternative will severely disadvantage a significant number of people as there are no footways on the adjacent A351 over bridge there will be no safe walking route for anybody other than the existing listed stepped footbridge that cannot be used by people with restricted mobility, wheelchairs and scooters, pram/pushchairs...”

21.3. Similarly, the October 2016 Cabinet Report stated that:

“A simple closure of the pedestrian level crossing without any mitigating measures would negatively impact on those with protected characteristics...as the only available crossing point over the rails would be the stepped footbridge.”

21.4. The EqIA concluded that the closure of the Level Crossing will have a negative impact on users with protected characteristics, including disability, age, pregnancy and maternity and religion, and therefore is it *“deemed necessary that a new form of step free access is designed and constructed.”*

22. However, there is *currently* no evidence that Network Rail has had due regard to the public sector equality duty in this context, or shown that it is conscious of these particular effects that the closure of the Level Crossing without providing alternative step free access is likely to have on people with protected characteristics; and conscious that due weight should be given to these effects in the decisions that have to be made.

23. Accordingly, if Network Rail close the Level Crossing when the 1988 Lease expires (at the moment it seems that the 1988 Lease will expire in 2038) or close the Level Crossing at an earlier point in time, and refuse to provide alternative step free access, while still failing to have due regard the effects on those with protected characteristics, it is highly likely that a court would find that Network Rail have acted unreasonably and contrary to their duties under the Equality Act.

ii) Would the gradient of the ramps proposed by the Council for the proposed ramped crossing be in compliance with their duties under the Equality Act?

24. The Council, as a *“public authority”*, is clearly also subject to the public sector equality duty. The issue here is whether approval and construction of the Ramps Proposal, which proposes a constant ramp gradient of 1 : 12 and a series of horizontal landings, would be compliant with the public sector equality duty.

25. Currently, the Council’s main justification for the 1 : 12 gradient is contained in the EqIA. Thus, our analysis here is based on the reasoning set out in the EqIA;

if the Ramps Proposal is granted planning permission, consideration would have to be given to the reasoning in any officer's report, committee minutes or decision notice.

26. In the EqIA, the Council are clearly conscious of the public sector equality duty. The Council also relies on both the Design Manual for Roads and Bridges ("**the DMRB**") and the Department for Transport guidance on Design Standards for Accessible Railway Stations ("**the DFT Guidance**"), which both do state that a ramp of 1 : 12 is acceptable in certain circumstances.
27. However, there are strong arguments that the reasoning in the EqIA is not sufficient to comply with the public sector equality duty and does not address all material considerations:
 - 27.1. The EqIA finds that a ramp of gradient 1 : 12 is acceptable for users with pushchairs, and those with mobility scooters and assisted wheelchairs. However, it states that for "*manual wheelchair users who travel without assistance, it is unknown if the ramps will provide a suitable form of step free access. Evidence and literature reviewed is inconclusive.*" In the context of the DFT Guidance stating that "*Ramps steeper than 1 : 20 can be difficult for some people who propel their wheelchair themselves*", there is a good argument that the current reasoning in the EqIA here does not show due regard to the effect on unassisted wheelchair users.
 - 27.2. The 2015 Application (which was eventually refused permission by the District Council) involved a ramp of 1 : 20 gradient. The case officer's report for the 2015 Application considered that even though this resulted in longer ramps, this was the gradient "*necessary...in order to achieve Equality Act (2010) compliance and ensure that it caters for all users*"; there was no suggestion that steeper, shorter ramps could be used and it is reasonable to imply that the officer did not consider steeper, shorter ramps to be Equality Act compliant. It follows that it is reasonable to expect the Council to explain why it now considers that a gradient of 1 : 12 is Equality Act compliant.

- 27.3. The DFT Guidance provides that ramps of 1 : 12 gradient “*should not be longer than 2 metres.*” The ramps in the Ramps Proposal are longer than 2 metres, and this is a point which has not been addressed in the EqIA.
- 27.4. The DMRB says that a 1 : 12 gradient can only be used in cases of “*extreme difficulty*” and the DFT Guidance says that such a gradient can only be used where it is “*unavoidable*”. It is reasonable to argue that the Council has not satisfied these high thresholds; in particular given that the ramps in the 2013 and 2015 Applications both used a 1 : 20 gradient.
28. Accordingly, there are strong arguments that the EqIA fails to consider certain material considerations and does not sufficiently show that the 1 : 12 gradient is compliant with the Equality Act, especially in relation to due regard being given to the effect on unassisted wheelchair users.

Conclusion

29. In conclusion, the Wareham Town Trust are right to be concerned about a breach of the Equality Act if the Level Crossing is shut without the provision of alternative step free access over the railway.
30. They are also right to be concerned that the proposal for ramps of a 1 : 12 gradient in the current Ramps Proposal has not been sufficiently justified in the EqIA.
31. Accordingly, it would be appropriate for the Wareham Town Trust to show this advice to Network Rail and the Council to put them on notice of their potential failings to comply with the public sector equality duty.
32. If there are any queries arising from the advice contained herein then do not hesitate to contact us in Chambers.

13 December 2017.

SASHA WHITE Q.C.

ANJOLI FOSTER

LANDMARK CHAMBERS

180 FLEET STREET

LONDON

EC4A 2HG.
