

Council – 25 February 2021

Item 16 - General Questions - Answers

2. Question from Councillor Chris Bateson

The long-standing position of Spelthorne Council was to oppose Network Rail's proposal to permanently close the railway crossing at Moor Lane on safety grounds, as clarified in a Council press release prior to the commencement of the Enquiry.

Two-thirds of the way through the proceedings, the Council performed a complete about-turn and dramatically withdrew its opposition to permanent closure and before all objector's presentations had been heard. This decision was reached by a select group of Officers and a Deputy Leader at very short notice.

How we ended up in this situation is of concern to both Councillors and residents of the Borough. In turn, this decision has damaged the Council's reputation within the local community. In the light of the Council's apparent failure to adequately prepare its case, by contrast to National Rail's defence, what financial cost has been incurred by our Authority?

Response from the Deputy Leader Councillor McIlroy:

Thank you for your question Councillor Bateson. Before outlining the financial costs incurred by Spelthorne in relation to this Inquiry, I believe that it is essential to give some important background to this case.

Since the temporary order to close this crossing was first implemented, Spelthorne Borough Council has objected to this and has made a strong commitment to challenge the closure based on the evidence we had before us. Prior to the Inquiry, Network Rail did not provide a clearly evidenced case for closure; in particular, because of a lack of detailed evidence supporting their historical decision-making process, and the underlying reasoning that sought to argue that it was not reasonably practicable to implement additional and/or alternative safety mitigation options.

The Council did not fail to adequately prepare its case as you have intimated. In the run up to the Inquiry, Council officers undertook a great deal of work to prepare evidence to support our arguments and develop our case, based on the information they had available to them prior to the Inquiry. This included liaising with Surrey County Council (SCC), as the authority with responsibility for maintaining such public footpaths.

As the Inquiry moved closer, a number of additional documents were produced by Network Rail, both alongside its proofs of evidence, as well as separately. We also discovered that Network Rail had instructed Counsel to present its case. As a result, our officers made the decision to instruct our own barrister (Jonathan Darby), specialising in this type of work, in order to assist us with preparing and presenting the Council's case. Our officers did enquire whether SCC would like to work with us

and come on board with employing Counsel support in the run up to the Inquiry, but they did not receive a positive response.

It was clear from our Counsel's advice that we were always going to face an uphill challenge to get an Inspector to go against a Network Rail recommendation for extinguishment of the crossing; not least because of the general trend of Inspectors erring on the side of caution in circumstances where fundamental safety issues have been raised as part of the case in favour of extinguishment, with expert evidence having been submitted by Network Rail in support of that position. However, having reviewed the information that became available late in the day, our Counsel's expert view was that there were reasonable grounds to explore and challenge Network Rail's decision-making processes and, in particular, its analysis of alternative safety mitigation options.

Just prior to the Inquiry, and at a number of points as this progressed, Network Rail presented new information which provided a persuasive case that the crossing was dangerous and could not be made safe by any reasonably practicable means. The information their witnesses provided for the first time at the Inquiry, provided significant additional evidence as to why the crossing was inherently unsafe, why it could not reasonably be made safe, and how Network Rail had undertaken their assessment to come to that conclusion. Options such as a bridge and tunnel were explored, but it was obvious that these would be neither physically, nor financially viable in the circumstances. Any remaining chance of succeeding in our arguments was then significantly weakened by the evidence given by SCC.

In giving evidence at the Inquiry, SCC's officer responsible for rights of way agreed that public safety was at the heart of the extinguishment and she stated that it was her professional opinion that the crossing should be closed. The County Council's priority statement for such footpaths listed public safety as second top priority, and she agreed that if the inspector concluded that for the purposes of Network Rail's section 118a case the crossing is unsafe, the wider expediency test would not overturn any of this and warrant reopening of the crossing. Under questioning from Network Rail's barrister, SCC's officer stated that she disagreed that there was a lack of suitable and safe alternative routes and having sought the view of SCC Highways experts, there was nothing to suggest that either the northern or southern alternative connection routes to the Moor were hazardous to pedestrian movements. She further indicated that a number of arguments that had been put forward in the case against closure of the crossing were irrelevant (e.g., the historic usage of the footpath, the fact that it existed before the railway and the existence of a Site of Special Scientific Interest).

This evidence from the officer presenting SCC's case (in combination with the additional information and evidence provided by Network Rail during the course of the inquiry), significantly reduced any residual chance of the Spelthorne succeeding in maintaining our objections against the extinguishment of the footpath.

Taking all of the above factors into consideration as the Inquiry progressed, our Counsel strongly advised that we should consider withdrawing our objection to the extinguishment of the crossing as the Inspector, in the face of all the evidence presented at the Inquiry, would be highly unlikely to agree that the footpath could be

made safe and should re-open. To continue pursuing our case would lead to additional costs to Spelthorne and risk the Borough Council potentially having to pay some of Network Rail's costs.

In presenting our case and challenging Network Rail's evidence, Spelthorne had, however, achieved notable concessions from them in relation to the funding of improvement works to the proposed alternative routes. Although Network Rail indicated that these had always 'been on the table', Spelthorne managed to get a clear undertaking from them that they would designate funding for these improvements, an undertaking which was then provided in writing to Surrey County Council during the Inquiry. In doing so, we could be satisfied that the 'northern' alternative route along Moor Lane could be made sufficiently safe for use by pedestrians as an alternative means of accessing Staines Moor.

Our Counsel also believed that since Network Rail had been so slow in providing important elements of their evidence, which proved that the crossing could not be made safe (much of which was provided just before or during the inquiry), Spelthorne would have reasonable grounds for applying for an award of partial costs in its favour.

Following a meeting to discuss these issues between myself, Spelthorne's officers and our Counsel, reluctantly the difficult decision was taken (in accordance with the scheme of delegations) to withdraw the Borough Council's objection to the extinguishment of the Moor Lane crossing. Based on our Counsel's expert advice this was the only reasonable way forward for the Council in these circumstances. As I have outlined, failure to withdraw our objections on the face of the evidence given to the Inquiry, which appeared to present an overwhelming safety case for closure of the crossing, would have resulted in further costs to Spelthorne, including the significant possibility of the Council having to pay some of Network Rail's costs.

Other than our own officer time, the costs which were incurred for the Council in relation to this case were the Counsel's fees, amounting to around £15,000.