

Our reference ELSEM/43283-4013

20 October 2023

FAO The Inspector, c/o The Programme Officer
By email: joanna.vincent@gateleyhamer.com

Dear Sir

**TRANSPORT AND WORKS ACT 1992
NETWORK RAIL (OLD OAK COMMON GREAT WESTERN MAIN LINE TRACK ACCESS) ORDER
LOCAL PUBLIC INQUIRY**

- 1 Thank you for your letter of 19 October 2023 and for your constructive engagement on this issue in advance of the scheduled Public Inquiry.
- 2 We note that you consider that the proposed amended description of the activities for which deemed planning permission is requested would still constitute "works" *"under any normal and reasonable interpretation of that word"*. We set out Network Rail's position in respect of that issue, and also in respect of a potential way forward, in the following paragraphs.

Network Rail's position on whether the draft Order seeks powers for works and the need for consultation

- 3 Section 1 of the Transport and Works Act 1992 (**TWA**) authorises the Secretary of State to make an order relating to, or in respect of matters ancillary to, the construction or operation of a transport system in England and Wales, including a railway. The draft Order seeks powers which are ancillary to the operation of the Great Western Mainline, a railway operated by Network Rail in its capacity as statutory undertaker. The Secretary of State's powers to make an order under section 1(1)(a) of the TWA therefore apply.
- 4 The draft Order, primarily, confers powers on Network Rail to acquire rights over land, and to use land temporarily in connection with the operation of a transport system in England.
- 5 Section 90(2A) of the Town and Country Planning Act 1990 (**TCPA**) states that on making an order under section 1 of the TWA which includes provision for development, the Secretary of State may direct that "planning permission for that development shall be deemed to be granted".
- 6 Network Rail has, alongside its application for the draft Order, applied for a direction from the Secretary of State under section 90(2A) of the Town and Country Planning Act 1990 that planning permission shall be deemed to be granted for the development provided for in the Order.
- 7 Development, referred to in section 90(2A), is defined by section 55 of the TCPA as *"the carrying out of building, engineering, mining or other operations, in, on, over or under land, or the making of any material change in the use of any buildings or other land"* (emphasis added).
- 8 It is in respect of the second limb of the definition that Network Rail seeks a direction that planning permission shall be deemed to be granted; namely for the material change in the use

SECOND LETTER TO THE INSPECTOR (19 OCTOBER 2023).DOCX [10-76920417-143283-4013]

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of the land. Section 90(2A) provides that the application for deemed planning permission must relate to a TWA order which "includes provision for development".

- 9 Article 3 of the draft Order sets out the relevant "provision for development"; in effect what would be the description of development in planning permission granted under the TCPA. That description relates to the use of the Order Land as a temporary construction compound to store machinery and materials to support works, which will be undertaken pursuant to Network Rail's Permitted Development rights.
- 10 Rule 4 of The Transport and Works (Applications and Objections Procedure) (England and Wales) Rules 2006 (**2006 Rules**) defines works as *"any works that may be authorised by an order made under section 1"*.
- 11 However, Network Rail is not seeking authority for works. The Order merely seeks a direction from the Secretary of State that planning permission shall be deemed to be granted for a temporary change in the use of the Order Land. The deemed planning permission would authorise the use of the land, such as the storage of plant and machinery, and we submit, that such activities should not properly be described as "works".
- 12 The draft Order is what Network Rail refers to as primarily a "land order" because the primary powers it seeks are for the compulsory acquisition of land and/or rights in land. This contrasts with what it describes as a "works order"; namely an order that seeks powers to carry out and construct works. A works order includes a description of the scheduled works in respect of which powers are sought and those works are listed in a schedule to the order. For example, the Network Rail (Bicester to Bedford Improvements) Order 2020 includes, at article 6, a power to construct and maintain the scheduled works. Schedule 1 lists the works in respect of which powers are sought; for example, Work No. 1 is described as a "railway (8,185 metres in length)". Article 6(3) provides powers to carry out works which are ancillary to the scheduled works including signalling works and works to alter structures in a public highway. The Bicester to Bedford Order was accompanied by deemed planning permission that provides planning permission for the works authorised by the order.
- 13 The draft Order does not include a schedule of works because no powers are sought for works. Unhelpfully, article 3 of the draft Order is headed "power to construct and maintain works". However, this is a symptom of our wish to avoid deviating from the model clauses any more than is strictly necessary and not an indication that powers are sought for works.
- 14 Accordingly, Network Rail is of the firm view that consultation with the Mayor of London, the relevant Fire and Rescue Authority, the London Borough of Ealing in its capacity as local highway authority and His Majesty's Railway Inspectorate is not required.

A suggested way forward in the event that the Inspector disagrees with Network Rail's analysis

- 15 In the event you disagree with its analysis as set out above, Network Rail is nevertheless very keen to work constructively with you to progress the draft Order. In such circumstances it will carry out the necessary consultation at your direction. What we would propose by means of a way forward is as follows.
- 16 Network Rail is extremely keen to retain the current Inquiry dates. The timing of the Project, as the Inspector may already have understood from the supporting documentation submitted by Network Rail, is very important and Network Rail (and HS2 Limited) would be very concerned about any delays to the programme that would result from a delay to the Inquiry.
- 17 All parties are primed to proceed with the Inquiry as scheduled. Not only in terms of the practical logistics – the Inquiry venue, for example – but also in terms of securing the availability of the parties' professional representatives (both their legal teams and also specialist consultants). In addition, there is your own availability as Inspector to conduct the Inquiry. It is on this basis that Network Rail proposes that the Inquiry opens on 14 November 2023, as scheduled. Network Rail would send consultation documents to the relevant parties immediately and would seek to have secured a response from them before the start of the Inquiry. On that basis you, as Inspector, would be in a position to take into account any comments which may be received by the relevant consultees.

- 18 In the event that Network Rail is not in receipt of the relevant consultees' comments by the start of the Inquiry or substantially before the last scheduled sitting day, we would ask that the Inquiry remains open for a period of 2 weeks after 22 November 2023 to allow the consultation period of 42 days to expire. Insofar as any matters arise out of the consultation, you would be able then either to seek written opinions from the relevant parties or, in the event that substantive points were to be raised, reconvene the Inquiry.
- 19 We hope the above clearly explains Network Rail's position and hope to hear back from you or the Inspectorate as to the proposed next steps as soon as possible.

Yours faithfully

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