

## **THE PROPOSED NETWORK RAIL (SUFFOLK LEVEL CROSSING REDUCTION) ORDER**

### **Construction of new bridges: Network Rail's approach to shared value**

1. On Day 18 of the Inquiry (Monday 30<sup>th</sup> April), questions were raised during Mr Kenning's evidence as to Network Rail's approach to commercial agreements / granting of air rights where a third party (developer) was seeking the construction of a bridge over the operational railway.<sup>1</sup>
2. The attached document outlines Network Rail's shared value policy.
3. The closure of Cattishall level crossing has been regarded as a railway enhancement work and this has been factored into the price agreed with the developer in respect of the proposed bridge in this location.
4. Network Rail would highlight that as an arms length central government body it is required to comply with state aid rules, and therefore it would not be able to grant air rights of the railway for construction of the bridge for no consideration.

---

<sup>1</sup> As Mr Kenning explained in evidence, it will usually be Network Rail that constructs the bridge, but at the developer's cost



## **NETWORK RAIL INFRASTRUCTURE LTD SHARED VALUE POLICY**

### **Introduction**

When third parties require use of, or rights over NR land, additional value in that adjacent land can be generated. Network Rail may properly expect to receive a share of this additional value as consideration for its own disposal of land, grant of rights, or the use of its land. This is a valuable source of income to NR and is known as Shared Value. External parties may refer to it as “ransom” but NR does not regard it as such and indeed it is a recognised part of the regulatory targets imposed on NR through the ORR settlement process.

The ORR position on shared value is currently stated in the ORR publication - Investment Framework Consolidated Policy and Guidelines – published on its website and dated October 2010 (page 39, point 9.2).

### **Background**

It is accepted within the property industry and well-established in case law at Upper Tribunal (Lands Chamber) that where land or rights in land are required to enable a development to proceed or otherwise create additional value in property, it is legitimate for the owner of that land to require a payment for the rights or land.

The appropriate level of payment was first established in the *Stokes v Cambridge Corporation* case of 1961. The principles were later confirmed in the *Kent CC v Batchelor* case along with many others. In these cases payments were determined in relation to a share of the additional value created by the grant of enabling rights.

A typical example would arise where access to a development site is needed by a developer across third party land, such as a bridge over the railway. The owner of the access land has the ability to charge an amount related to the uplift in value generated by the additional development that can be derived as a result of the grant of the access rights.

These principles have been established at the Upper Tribunal in CPO cases. They are therefore appropriate principles to adopt in discussions with Local Authorities and development organisations where the rights required deliver increases in land value even where these interests are to be acquired by CPO or threat of CPO. In such cases it will be necessary to establish how much of any value uplift could occur in the absence of compulsory powers. The basic principle is that market value should form the basis for assessing compensation.

Shared value payments can also arise from the need for service media to pass across NR land or the variation of restrictive covenants.

### **Guiding Principles**

In dealing with third parties NR should set out clearly at a very early stage of discussions the basis on which it is prepared to offer rights or other interests in land in shared value

situations. This will avoid misunderstandings and may also identify differences of opinion on the principles involved early in the process and thereby remove any unnecessary delays to projects.

As a basic principle, NR should not seek shared value payments where clearly none are due, but equally it should seek fair value where NR has a clear shared value position. NR should investigate situations where there is doubt but not seek to prolong such discussions beyond the point where it becomes clear that no shared value payment is due or that it is not possible to prove that a payment should be due.

Where there is dispute about whether a shared value situation exists or where there is doubt about whether NR is applying its policy correctly, (which in either case may have implications as regards related ORR policy) such matters should be referred initially to Head of Regulatory Compliance and Reporting for an internal assessment.

It is important that NR is seen to act reasonably and within established case law and valuation principles. In particular NR must be seen to require no more than it is due. The usual starting point where NR is the only key holder should be 50% of the uplift in value. Where more than one keyholder is involved this amount could be split equally amongst the keyholding parties. The split should be determined on the circumstances of the case.

NR should co-operate in respect of the development of technical information and advice, design development and approvals of railway works and should not seek to withhold or delay railway approvals to secure or strengthen a shared value situation.

If an acceptable financial arrangement cannot be reached within the timescales required then the matter can be referred to an independent valuer to determine the appropriate level of payment to be required. This might be an expert jointly appointed or alternatively some form of mediation could be adopted, dependent on the issues involved.

In significant, complex or potentially contentious cases consideration should be given to seeking commercial valuation and negotiation advice at an early stage. In such cases it may also be sensible to consider early discussions with the relevant planning authority to ensure that they are aware of the issues.

## **Issues**

### **Access Rights**

This type of shared value situation usually occurs where access is required into a development site, often via a bridge over the railway or through other means requiring the use of or rights over NR land. In such cases Network Rail will seek a fair proportion of the uplift in value created by the rights it grants in line with the principles outlined above.

It must be recognised however that some bridge or access rights are required for schemes that are not commercial. Examples might include a pure road improvement scheme promoted by a statutory body and not directly linked to any commercial development. In such cases scale rates should be charged in the usual way. These charges relate to the number of tracks crossed and the width of the bridge together with indexation. NR costs can and should also be recovered in these cases to the extent that this is possible.

There will also be cases where a scheme is a marginal commercial development such as a grant-aided scheme (whether council or developer promoted) where no current or likely future uplift in land value can be achieved. Scale rates may also be the appropriate basis of charging in these instances. In cases which are currently unviable but may become profit-

making in the future, a clawback/overage type arrangement can be adopted.

There may also be cases where an apparently non-commercial scheme, can in fact be shown to release additional land value in other adjoining land. In these cases the shared value principles should be applied in the same way as for a normal commercial development, if the link can be proved. This situation could occur for example; where land is the subject of CPO for a new road by a local authority, which will enable access to adjoining development land in third party ownership and facilitate valuable development on that land. In such cases it is necessary to be able to make a reasonable link between the grant of the rights in question and the value created. The basic principle adopted is that Network Rail is entitled to the market value of the rights irrespective of who acquires them, if it is reasonable to assume that someone would have been prepared to acquire the rights in the marketplace in the absence of CPO powers.

Where an access across NR land has been shown to be required, landowners and developers often seek to reduce the level of payment or avoid a payment altogether by arguing that it is possible to develop a proportion of the proposed scheme without the access rights from NR. Only the value genuinely added to the development by the grant of the rights should form the basis of shared value discussions.

In the above scenario where access works are accompanied by railway enhancement works, ORR has confirmed that in principle the offer of, or need for railway enhancement works should not prevent NR from seeking shared value payments. Where such works are carried out however NR should be prepared to reduce the shared value payment by the value to NR of the enhancement and take any surplus as a capital payment. Care does need to be exercised in assessing the benefit of enhancement works to NR on an appropriate basis which will usually but not always be the pure cost of the works.

In large access rights cases there may occasionally be a large number of parties who control the access to the site. An alternative approach in this type of negotiation might be to become a partner in the scheme along with the developer and the other keyholders, as opposed to adopting a shared value position. Lands Tribunal decisions have indicated that if more than a few owners are involved the degree of control becomes significantly reduced, if not impossible to prove. Where a reasonably large number of land owners exists a partnership approach may have advantages. NR needs to ensure that it enters into such arrangements on the same or equally beneficial terms as the other parties and NR would benefit from an equal share of the whole value uplift (as opposed to a percentage of it). The appropriateness of this approach will vary dependent on the circumstances.

There are a limited number of cases where the original acquiring acts give landowners rights to bridge over the railway. In such cases no shared value opportunity exists, subject to a number of other criteria being met. This will only be the case for certain land acquired for the railway normally before 1845, after which statutory powers of acquisition usually incorporated the provisions of the Railway Clauses Consolidation Act 1845 which lacks such bridging rights.

Where a third party already has access rights but for example needs to widen or strengthen a bridge to implement a planning consent, this may also represent a grant of rights that enable development to proceed. Whether or not a shared value opportunity exists will depend on whether the original acquiring act gives express or implied rights to the adjoining owner to reconstruct the bridge in a different form sufficient for the needs of the development. The principle of deducting the value to NR of any operational benefit from the shared value payment should be adopted in this situation where a railway enhancement is produced. Consideration should be given as to whether the value of the benefit to NR is the costs of the works or for example only a maintenance saving, or some other appropriate

measure.

Recent examples of other shared value situations have included cases where NR has been asked to carry out works to its own infrastructure to facilitate the access to a development site or enable the implementation of a planning consent. Here also the value of any operational or safety improvement to NR could be reflected in the financial arrangements, but the fact that use of NR land is required will constitute a shared value position. The test in these situations should be whether, if the developer used a contractor to carry out the works, rights would be required from NR that would constitute a shared value position. The fact that NR acts as the developer's contractor should not negate a shared value position.

Occasionally, access is required to facilitate a commercial freight development by a developer. NR should not seek payments based on any form of track access; however if road access or other rights are required over NR land to enable the scheme to proceed then the normal shared value principles should apply.

### **New Stations**

Planning consents for large development projects often require a new station to be provided to enable these schemes to proceed. ORR guidance states that NR should seek shared value payments from these opportunities, where the scheme cannot proceed without the provision of a station.

The same principles would apply to this scenario in terms of deducting the value of the new station facility. In addition, where a developer wishes to provide a higher specification station than NR would otherwise provide, NR should not be obliged to reduce the shared value payment to reflect this additional cost as it would not be a requirement of the railway.

Where the developer's S106 obligations give it the option to spend a fixed amount on either, station or other transport improvement works, a slightly different approach may be adopted. Whilst no shared value opportunity exists over the base scheme in such a situation, NR may argue that although the rights are not required to develop the scheme, these rights if granted would give the developer a windfall benefit of uplift in house/flat prices due to proximity to the station. NR commissioned research by property consultants Rapleys, which demonstrated that a new station would add in the region of 6.4% to house prices in the area of study. More recent research by CBRE has pointed to an average uplift of 5%. The percentage uplift will vary dependent on location, and whether the station accesses a commuter route. In this scenario the share of the uplift in house prices would need to be researched and would need to exceed the station cost for a cash payment to be justified.

### **Restrictive Covenants**

NR also receives approaches from adjoining owners over whose land NR has the benefit of restrictive covenants. In some cases the release of these covenants can constitute a shared value opportunity. In general, if the release or modification of rights is necessary to allow a scheme to proceed, then shared value principles should apply. Alternatively, if the rights merely enable increased density or value to be derived from a larger scheme, then only that additional value should be the subject of the shared value negotiation.

It should be noted that there are some standard NR conveyance clauses which are solely for the protection of the operational railway and which it would be inappropriate to use to seek to argue for shared value. For example, clauses preventing construction without NR approval of plans and method statements are generally for the protection of the railway and are not intended for commercial gain. These clauses should not be used to require shared value payments.

Other clauses such as use restrictions and no-build restrictions are however often imposed specifically to ensure that if future value increases accrue through change of use or development, NR can take a share of that value. In these cases the shared value approach is therefore appropriate.

In assessing requests for the release of a restrictive covenant, consideration should be given to the options of modifying the covenant or issuing a specific consent under it, rather than releasing it altogether. This may allow a specific proposal to proceed, whilst ensuring that any future scheme or increased density would require a further consent from NR and a further payment could then be sought.

## **Easements**

It is quite common for NR to get requests for service easements through its land for the benefit of adjoining developments. These can come from a number of sources. Most commonly requests arise from statutory service providers. These organisations have compulsory powers to requisition rights and the compensation payable for such rights is not a shared value payment but merely the diminution in the value of the land as a result of having the services running underneath it. This is usually a nominal sum.

Requests can also be of a type which might appear to be the usual statutory easement request, for example further to the development of a power station or wind farm, but are distinctly different. These are often commercial projects to which shared value principles should be applied. These schemes are often carried out with compulsory powers but the basis of valuation can be commercial value, in these circumstances. Care therefore needs to be taken to establish at an early stage the correct basis for assessment of compensation.

Occasionally third parties approach Network Rail for easements for services where the statutory provider does not wish to be involved. Here, a significant shared value opportunity may exist where the use of NR land is the only option. More commonly however services can be achieved via more than one route and often an alternative but more costly route will exist through other land. In these cases the value to be shared could equate to the cost saving of taking the cheaper route through NR land.