

**Re The Network Rail (Suffolk Level Crossing Reduction) Order**  
**Public Inquiry February – May 2018**

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Joint Submissions on Behalf of  
Suffolk County Council and St Edmundsbury District Council  
Concerning Network Rail's Request for Deemed Planning Permission

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**Introduction**

1. On 26 February 2018, Network Rail submitted a note on the request for deemed planning permission (NR-INQ-55). These submissions are made in response to that note on behalf of both Suffolk County Council (SCC) and St Edmundsbury Borough Council (SEBC).

**The Department for Transport's Guidance Applies**

2. The case of *R (on the application of Samuel Smith Old Brewery (Tadcaster)) v Secretary of State for Energy & Climate Change* [2012] EWHC 46 (Admin) (referred to in Network Rail's note at para 7) concerned a decision made by the Secretary of State to give a direction, under section 90(2) of the Town and Country Planning Act 1990 (TCPA 1990) that planning permission for overhead electricity cables, in an area south-west of Tadcaster in North and West Yorkshire, would be deemed to be granted. The Court held that the Secretary of State – in making that decision – was not under a statutory duty to determine the matter in accordance with section 38(6)<sup>1</sup> of the Planning and Compulsory Purchase Act 2004 (PCPA 2004).
3. Whilst recognising that *Samuel Smith* does not concern proceedings under the Transport and Works Act 1992 (and, therefore, does not decide the matter definitively<sup>2</sup>)

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<sup>1</sup> Section 38(6) sets out the following statutory test:

"If regard is to be had to the development plan for the purpose of any determination to be made under the planning Acts the determination must be made in accordance with the plan unless material considerations indicate otherwise." (Emphasis added.)

<sup>2</sup> Nor is there any known authority which does.

SCC and SEBC agree with Network Rail<sup>3</sup> that there would appear to be no proper basis for adopting a different approach, in this regard, where a request for deemed planning permission is made under section 90(2A) of the TCPA 1990.

4. On this basis, SCC and SEBC accept that the Secretary of State is not under a statutory duty to consider Network Rail's request for deemed planning permission in accordance with section 38(6) of the PCPA 2004.
5. However, in the Department for Transport's guidance on the Transport and Works Act 1992, *A Guide to TWA Procedures* (2006), it states as follows:

### ***Planning Policies and Development Plans***

*1.28 In determining an application for a TWA order to authorise works, and any related application for deemed planning permission, the Secretary of State will have regard to, amongst other things, relevant national, regional and local planning policies. Therefore, in drawing up works proposals, prospective applicants should pay particular attention to relevant national policy guidance and development plan policies, including those in regional spatial strategies and local development documents. In line with the plan led system for determining planning applications, projects that conflict with relevant policies in the development plan are unlikely to be authorised, unless material considerations indicate otherwise.*

*1.29 Prospective applicants are advised to consult the local planning authorities and other statutory and non-statutory organisations with relevant responsibilities and expertise at the formative stage of a project. They should seek to work with the local authorities and other key consultees in taking forward their project - see Part 2 for more detailed advice on pre-application consultation.*

*1.30 Where a relevant development plan is in draft form and is subject to consideration at a public inquiry before being formally adopted, a prospective applicant may wish to consider whether there may be benefit in delaying making a TWA application until that process has been concluded. This is not essential, however, and there may be circumstances where the applicant would not be willing or able to await the outcome of a separate planning process. Any public inquiry into a TWA order application will consider the planning merits of the proposals having regard to relevant published policies and plans, whether formally adopted or in draft form. Applicants should nevertheless be aware that, in deciding whether to make a TWA order, the Secretary of State might need to take into account any relevant development plan which is adopted after the application is made. Depending on timing, this could result in the need for a reference back to interested parties after the close of any inquiry into the proposed TWA order.*

(Emphasis added.)

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<sup>3</sup> NR-INQ-55, para 9.

6. The second sentence underlined in para 1.28 of this guidance clearly shows that the Secretary of State will be unlikely to make a determination that planning permission should be deemed granted in situations where a project conflicts with relevant policies in the development plan and where no material considerations indicate otherwise. Essentially, this means – as a matter of policy – that the Secretary of State will need to apply the test set out in section 38(6) of the PCPA 2004 (or a very similar test) when considering Network Rail’s request for deemed planning permission.
7. Network Rail acknowledges this policy statement but submits that the Guidance pre-dates the decision in *Samuel Smith* and has not been updated since.<sup>4</sup> Network Rail states that “*to the extent it remains valid as guidance as to how the Secretary of State will approach decision making, it cannot be equated to the statutory test contained in s.38(6) PCPA 2004 which the Court has confirmed does not apply to requests for deemed planning permission under s.90 TCPA 1990*”.<sup>5</sup>
8. SCC and SEBC do not agree with this statement. The Secretary of State is free to adopt any rational policy guidance for determining Transport and Works Act applications. It cannot be assumed that following the decision in *Samuel Smith*, the Secretary of State would have, or should have, updated the Guidance so as to remove or alter the wording in para 1.28.
9. Firstly, *Samuel Smith* only determined whether or not a statutory duty applied to the Secretary of State in the circumstances of that case. It did not in any way determine, or restrict, what the Secretary of State could consider by way of policy. It is open to the Secretary of State to choose to apply the statutory test contained in section 38(6) PCPA 2004 as a matter of policy, even if he is not required to do so.
10. Secondly, as is noted above *Samuel Smith* did not concern the Transport and Works Act 1992. It concerned a decision to grant consent under section 37 of the Electricity Act 1989. It is a notable feature of the Electricity Act 1989 that it contains “*its own*

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<sup>4</sup> NR-INQ-55, para 11.

<sup>5</sup> NR-INQ-55, para 11.

*statutory code as to the matters that the [Secretary of State] is required to consider when deciding whether or not to grant a consent under section 37...*".<sup>6</sup> The same cannot be said for the Transport and Works Act 1992. In such circumstances, the Secretary of State's policy for determining whether or not to grant deemed planning permission in relation to a TWA matter is particularly important.

11. SCC and SEBC therefore submit that the Secretary of State will be expected to follow the TWA guidance, as interpreted in accordance with its natural and ordinary meaning (and without any "reading in" of an implied reference to the *Samuel Smith* case, as suggested by Network Rail).

#### **A relevant consideration in any event**

12. Furthermore, even if the *Guide to TWA Procedures* had been silent on the question of how to determine a request for deemed planning permission, SCC and SEBC would have submitted that whether or not a project would be likely to obtain planning permission through the planning system would be a relevant consideration for the Secretary of State to consider, when determining such a request. In granting a request for deemed planning permission, the Secretary of State effectively decides that the need for a determination of planning permission can be dispensed with.<sup>7</sup> Whether or not planning permission is likely to be granted through the planning system would clearly be a relevant consideration for purposes of making that decision.
13. In this regard, it is notable that the *Guide to TWA Procedures* provides, in relation to planning permission for TWA projects generally:

#### ***Planning Permission for TWA schemes***

*1.17 Where a proposed TWA order would include provision for new works, or for a material change in the use of land, it is likely that planning permission would need to be obtained for such development, unless it is permitted development under the Town and Country Planning (General Permitted Development) Order 1995 (SI 1995/418). An exception would be proposed works in the sea which would fall outside the*

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<sup>6</sup> *R (on the application of Samuel Smith Old Brewery (Tadcaster)) v Secretary of State for Energy & Climate Change* [2012] EWHC 46 (Admin) at [76].

<sup>7</sup> *Samuel Smith* at [79], "...namely that the effect of the deeming provision is to dispense with the need for any determination of the planning permission..."

*jurisdiction of the local planning authority. If in doubt, the local planning authority should be consulted.*

*1.18 By virtue of section 16 of the TWA, the Secretary of State may, when making an order, issue a direction under section 90(2A) of the Town and Country Planning Act 1990 deeming planning permission to be granted for any development authorised by the order. If the applicant wants the Secretary of State to grant deemed planning permission, this must be applied for at the same time as applying for the order. The application requirements are explained in Part 2. Alternatively, a prospective applicant may prefer to apply (separately) for planning permission to the local planning authority in advance of a TWA order application.*

*1.19 The main advantages of applying for deemed planning permission at the same time as applying for a TWA order are that:*

- it avoids any duplication of documentation, newspaper and other public notices which would arise with separate TWA and planning applications;*
- any objections to the order and to the granting of planning permission are considered by one determining authority at the same time; and*
- for most linear projects, or other projects covering a wide area, it avoids the need for separate planning applications to be made to two or more planning authorities.*

*Applying for planning permission to the local planning authority in advance of a TWA application may nevertheless be preferred where the applicant wants the assurance of planning approval before proceeding to the more costly TWA process. This might apply particularly to private sector applicants and where only one local planning authority is involved.*

14. It is evident from the above quote that section 16 of the TWA 1992 is designed to offer applicants a streamlined procedure for obtaining planning permission. It is, however, open to an applicant to seek planning permission separately by way of the planning system. A local planning authority dealing with such a request for planning permission under the planning system would need to apply the statutory test set out in section 38(6) of the PCPA 2004. A request for deemed planning permission must be seen in this context. Whether or not planning permission would be granted, were the applicant to choose to apply for it separately, must be a relevant consideration to any decision by the Secretary of State to grant a request for deemed planning permission.

## **Conclusion**

15. In summary, whilst SCC and SEBC agree with Network Rail that the Secretary of State is not under a statutory duty to apply the test in section 38(6) PCPA 2004, the TWA

Guidance reflects this test as a matter of policy and the Secretary of State will be expected to follow that policy unless there is a rational reason not to do so.

16. Furthermore, and in any event, whether or not Network Rail's application would comply with the section 38(6) test is clearly a relevant consideration for the Secretary of State to consider when determining the request for deemed planning permission.

**MERROW GOLDEN**

**16 APRIL 2018**

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