

THE NORTHUMBERLAND LINE ORDER

PUBLIC INQUIRY 9-12, 16-19, 23-26 NOVEMBER, 30 NOVEMBER - 3 DECEMBER 2021

SUMMARY PROOF OF EVIDENCE OF COLIN COTTAGE

**ON BEHALF OF THE NORTHUMBERLAND ESTATES (OBJECTOR 21) AND THE RIGHT
HONOURABLE DELAVAL THOMAS HAROLD LORD HASTINGS BARON HASTINGS
(OBJECTOR 12)**

PLANNING INSPECTORATE AND PLANNING CASEWORK UNIT REFERENCE:

(DPI/P2935/21/19)

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Experience

- 1 I am Colin Michael David Cottage, Managing Director of Compensation at Ardent. Details of my experience are set out at section 1 of my proof of evidence.

Instructions

- 2 I was instructed by the Estate on 22 September 2021, to prepare a proof of evidence in relation to its 7 July 2021 objection to the draft Order. On 30 September 2021, my instruction was extended to be a joint instruction from the Estate and Lord Hastings.
- 3 In particular, I have been asked to provide my opinion on Article 35 of the Order and to consider:
 - i) Whether there is a compelling case for the application of Article 35;
 - ii) Whether the compensation provisions within Article 35, as currently drafted, are fit for purpose;
 - iii) If the compensation provisions within Article 35 are not fit for purpose, what alternative provisions for the payment of compensation could be applied?
- 4 Although I am unable to speak directly to the other grounds for the Estate and Lord Hastings' objection to the Order, Appendices CC1 and CC24 to my proof are Supporting Statements that contain details of matters relevant to both of their objections.

The Wayleave Agreements

- 5 The underlying purpose of Article 35 is to amend three 1,000 year wayleave agreements that were entered into with key landowners at the time the Northumberland Line was originally constructed. The Estate is a party to two of these wayleave agreements, while Lord Hastings is a party to the third wayleave agreement. The wayleave agreements granted rights to add to an existing railway line and full rights of way over the railway line for the purposes of running freight and passenger trains. In return, the wayleave agreements reserved payment of:
 - (i) a rent based on the amount of coal (and coal products) transported; and
 - (ii) (where the coal based rent does not exceed a minimum amount in any year) a rent for passenger trains and trains transporting cattle or other goods.

Article 35

6 Article 35 states:

35(2) On the bringing into use of all or any part of the development any obligation under the relevant wayleave leases to pay the rent is to cease to have effect.

35(3) Network Rail must pay to the landowner capitalised sum by way of compensation for any loss arising from the operation of paragraph 2, such compensation to be determined, in the case of dispute, under part 1 of the 1961 Act.

7 Article 35 does not propose the acquisition of any land for the railway, nor does it seek the wholesale extinguishment of the wayleave agreements. It simply requires the abrogation of the obligation to pay rent under the wayleave agreements

Compelling Case

8 The correct approach to take when considering the compulsory acquisition of land is to ensure that there is a compelling case in the public interest. Although Article 35 is different in nature to a compulsory purchase power it is nonetheless a compulsory interference in a proprietary right and so therefore must be justified. The compelling case in the public interest test still needs to be satisfied.

9 Paragraph 8.54 of NCC's Statement of Case explains that Network Rail considers the rent payment arrangements under the wayleave agreements to no longer be fit for purpose or appropriate. Network Rail considers the language of the wayleave agreements to be uncertain and therefore a risk to the successful implementation of the Scheme.

10 The wayleave agreements are clear in that they provide a right for the railway to pass over the Estate's and Lord Hastings' land. Article 35 does not seek to replace the wayleave agreements altogether, but simply to abrogate that part of the agreements that require the payment of rent.

11 NCC's concerns therefore appear to be limited to the language used to describe how rent should be calculated and possibly the potential implications for non-payment of rent.

- 12 However, the language used to describe how the rent should be calculated is clear. There is nothing unusual, or outdated, about these arrangements. There is also no reason why the continued payment of rent under the wayleave agreements should create a risk to the successful implementation of the Scheme. There is no evidence to suggest that payment of the wayleave rents in some way renders the project, or indeed the existing railway, unviable. The Estate's objection confirms its support for the scheme's broad objectives and I am instructed that Lord Hastings likewise supports those overall objectives. Both are prepared to agree to modifications that would remove re-entry and repossession provisions within the wayleave agreements notwithstanding the various statutory and common law rules and limitations that would almost certainly apply to restrict the ability to exercise those right in any event.
- 13 The application of Article 35 is therefore not a prerequisite for undertaking the Northumberland Line scheme and the aims of the project could all be achieved without the inclusion of Article 35.
- 14 Neither NCC or Network Rail has sought to reach agreement with either the Estate or Lord Hastings over the interpretation of the rent payment provisions, or any of the other terms of the wayleave agreements. This failure is plainly relevant when considering whether or not the power is justified or if there is a compelling case.
- 15 In summary, Article 35 is not justified and there is no compelling case in the public interest to abrogate the wayleave agreement rent provisions. My concerns are that confirmation of Article 35 would result in compulsory powers of abrogation being granted, not because there is a compelling case in the public interest, but because Network Rail would rather rely on statutory powers to address any concerns it has with the wayleave agreements than enter into meaningful, consensual, negotiations.

Article 35 Compensation Provisions

- 16 The compensation provisions in Article 35 are ambiguous and, in large part, contradictory. This creates a significant risk of future dispute. There are essentially two elements to the provisions:
- i) Compensation should equate to a capitalised sum by way of compensation for any loss arising from the operation of paragraph 2, and

ii) In the event of dispute part 1 of the 1961 Act will apply

17 In relation to element ii), Section 1 of the 1961 Act confirms that where a reference is made to the Tribunal disputed compensation

'shall be determined by the Tribunal in accordance with the following provisions of this Act'

18 The following provisions referred to are those within Part 2 of the 1961 Act, which deal with compensation upon the compulsory acquisition of land. However, no interest in land will be acquired under Article 35 and Part 2 of the 1961 Act cannot be applied to the assessment of compensation under Article 35.

19 Article 16 of the draft Order applies Part 1 of the 1965 Act, which might potentially bring into play Sections 7 and 10 of that Act as alternative bases for assessing compensation.

20 However, paragraph 1 of Article 16 says that Part 1 of the 1965 Act only applies to the acquisition of land under the Order. Because Article 35 does not involve the acquisition of land Part 1 of the 1965 Act, including sections 7 and 10, also cannot be applied.

21 In conclusion, it is my opinion that compensation for any loss incurred by the Estate and Lord Hastings as a result of the application of Article 35 cannot be linked to the statutory 'compensation code'. Therefore, Article 35 needs to be amended.

What alternative provisions for the payment of compensation could be applied?

22 A suitable basis upon which to assess compensation would be:

Network Rail must pay the landowner compensation equating to any loss it incurs arising from the operation of paragraph 2 at the date it comes into effect. Any dispute in relation to such compensation must be referred to and settled by a single arbitrator to be agreed between the parties or, failing agreement, to be appointed on the application of either party (after giving notice in writing to the other) by the President of the Royal Institution of Chartered Surveyors. Subject thereto, and unless otherwise agreed between the parties, the Arbitration Act 1996 shall apply to the arbitration.

23 The proposal to refer disputed compensation to arbitration is comparable to and consistent with the arbitration provision contained in section 39 of the draft Order and is not unusual.

Signed.....

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Ardent

12 October 2021

