

**THE NORTHUMBERLAND LINE ORDER**

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

**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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## 1. INTRODUCTION

### Experience

- 1.1 I am Colin Michael David Cottage, Managing Director of Compensation at Ardent Management Limited (“**Ardent**”), an independent firm of property consultants specialising in compulsory purchase and compensation. I have worked in the property industry for more than 30 years since obtaining an Honours Degree in Land Administration in 1988. I qualified as a Chartered Surveyor in 1991 and I am also a member of the Compulsory Purchase Association. I was chairman of the Association in 2016-2017.
- 1.2 I joined Ardent on 1 September 2018, where I direct a team advising on a wide range of regeneration, transport and utilities infrastructure projects involving site assembly through compulsory purchase. Prior to joining Ardent, from 2004, I was a partner at Glenny LLP, where I led the firm’s Regeneration & Infrastructure Division; the primary function of which was to provide advice in relation to compulsory purchase and compensation. Although Glenny LLP is predominantly a regional practice, operating in North, East and South East London, Essex, Hertfordshire and Kent, the Regeneration & Infrastructure Division operated nationwide.
- 1.3 I have provided advice on compulsory purchase and compensation matters for circa 25 years and have specialised in this area of work since 2004. My experience includes advising acquiring authorities on land assembly for regeneration and transport infrastructure in locations across England. I was one of the London Development Agency’s key advisors for the CPO used to acquire land for the 2012 Olympic Games and I am currently the compensation lead for the East West Rail project that will provide a railway link between Oxford and Cambridge.
- 1.4 In addition to acting for acquiring authorities, I also act for businesses and individuals affected by compulsory acquisition. I am currently advising claimants in relation to HS2, the Lower Thames Crossing, the Trafford Metrolink and the A3/M25 Interchange at Wisley.
- 1.5 I have provided written and oral expert evidence at Public Inquiry, the High Court and the Upper Tribunal (Lands Chamber). I also gave oral evidence in parliament to the Bill Committee considering compensation issues for the Neighbourhood Planning Act 2017. I am a RICS accredited expert witness.

## **2. MY INSTRUCTIONS AND THE SCOPE OF MY EVIDENCE**

2.1 I was instructed by the Northumberland Estates (“**the Estate**”), on 22 September 2021, to prepare a proof of evidence in relation to its 7 July 2021 objection to the draft Northumberland Line Order (“**the Order**”) and to provide further oral evidence at Public Inquiry, if required. In particular, I was 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?

2.2 On 30 September 2021, my instruction was extended to be a joint instruction from the Estate and The Right Honourable Delaval Thomas Harold Lord Hastings Baron Hastings ("Lord Hastings"). Lord Hastings is the other party that will be affected by Article 35 and he has also objected to the Order, with his principal concern being the inclusion of Article 35.

2.3 This proof of evidence addresses the questions set out at paragraph 2.1 above on behalf of both the Estate and Lord Hastings.

2.4 In addition, although I am unable to speak directly to the other grounds for the Estate and Lord Hastings’ objections to the Order, Appendix CC1 to this proof is a Supporting Statement from Mr Rory Wilson, CEO of the Estate, and Appendix CC24 is a Supporting Statement from Mr Roddy Finlay, agent to Lord Hastings. Both Supporting Statements contain details of factual and historical matters relevant to the Estate and Lord Hastings’ objections, together with appendices.

### **3. ARTICLE 35**

#### The Wayleave Agreements

- 3.1 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 in the 1850's. The Estate is a party to two of these wayleave agreements, the first dated 10 May 1853, which was subsequently varied by way of a "grant of alteration" on 29 July 1867, and the second dated 30 July 1867. Lord Hastings is a party to the third wayleave agreement, dated 20 May 1853. Transcripts of the three wayleave agreements and the grant of alteration are attached at Appendix CC7, CC8 and CC9, while a plan showing the approximate extent of the land to which the wayleave agreements apply (and as affected by the proposed Order) is attached at Appendix CC25.
- 3.2 The three wayleave agreements granted rights in favour of the original grantee (and for the benefit of its successors in title) to add to an existing railway line, then known as the Blyth and Tyne railway line, along with full rights of way over the railway line (as then built and added to) 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, such rent to be 2% of all charges paid to the grantee in respect of such trains.
- 3.3 In Appendix CC1 to this proof, the Estate provides a more detailed summary of the position with regard to the payment of rents under the two Estate wayleave agreements, but for the purposes of this proof of evidence the key points are as follows.
- 3.4 I am advised that, up until around 2010, payments were made to the Estate in accordance with the wayleave agreements without any notable issues or difficulties. Subsequently, I understand, that difficulties have arisen in securing payments from Network Rail, not because of any issues over the method of calculation of the rents, but rather as a result of Network Rail consistently failing to provide the information required to calculate the rents due. This is despite the wayleave agreements containing a clear obligation for Network Rail to provide such information.

- 3.5 In Appendix CC24 to this proof, Lord Hastings provides a more detailed summary of the position with regard to his dealings with Network Rail in relation to his wayleave agreement, but for the purposes of this proof of evidence the key points are as follows.
- 3.6 I am advised that whilst dealings between Lord Hastings and Network Rail have not been as extensive as the Estate's dealings, Lord Hastings has also encountered similar difficulties to the Estate in securing information to enable the calculation of rents due under the wayleave agreement. This despite the wayleave agreement also containing a clear obligation for Network Rail to deliver such information.

Article 35

- 3.7 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.<sup>1</sup>*

- 3.8 An explanation of the reasoning behind the introduction of Article 35 can be found in the Explanatory Memorandum to the Order which states:

*Article 35 (Modification of agreements relation to land) makes provision to modify agreements relating to the land on which parts of the railway are built. These agreements date back to the 19<sup>th</sup> century and were entered into by the railway company and the landowners when the railway between Ashington and Newcastle was originally constructed following authorisation by local Act of Parliament.*

*The agreements include wayleave leases for terms of up to 1000 years which confer rights on the railway company to construct, maintain and use the railway on the land, and contain provisions relating to payments to the landowner in respect of the transport of freight and passengers on the railway. The provisions in respect of payments do not reflect the way in which the modern railway is owned and operated and give potential for disagreement between the parties, particularly as the use of the railway is increased to include passenger services. Paragraph (2) therefore provides*

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<sup>1</sup> The Land Compensation Act 1961

*that Network Rail must pay to the relevant landowner a capitalised sum by way of compensation for such losses arising as a result of paragraph (2) with such compensation to be determined in case of dispute under part 1 of the Land Compensation Act 1961.*

- 3.9 It can be seen from the Order and the Explanatory Memorandum that 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 so that Network Rail can continue to enjoy the rights the wayleave agreements confer without having to meet an ongoing cost for those rights.

#### Compelling Case

- 3.10 At paragraph 8.39 of Northumberland County Council's ("**NCC's**") Statement of Case, it recognises that 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. That is plainly right. Article 35 is different in nature to a compulsory purchase power (that it is not a compulsory acquisition power appears to be common ground – see paragraph 32 of Pinsent Masons' letter, dated 11 August 2021 in response to the Estate's objection at Appendix CC6). However, Article 35 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.

- 3.11 NCC's justification for Article 35 is set out in paragraphs 8.51- 8.58 of its Statement of Case and in particular paragraph 8.54 which says:

*'Network Rail considers the existing rent payment arrangements under the wayleave leases to no longer be fit for purpose given the uncertainty as to their interpretation in a modern context. The agreements were put in place in the 19<sup>th</sup> century, when the ownership and operational arrangements of the railways were very different from the situation that exists today. Network Rail considers the arrangements in respect of the payment of rent under the wayleave leases, whilst perhaps appropriate then, to not be so now. The uncertainty of the language in the relevant leases, when read in the modern context, creates uncertainty and therefore a risk to the successful implementation of the Scheme should there be a dispute in relation to the use of the Railway for the Scheme because of the terms of the leases.'*

- 3.12 The wayleave agreements are, however, clear in that they provide a right for the railway to pass over the Estate's and Lord Hastings' land. There is no dispute over that fact and 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. NCC's concerns over uncertainty therefore appear to be limited to the language used in the wayleave agreements to describe how rent should be calculated and (although this is not expressly stated in its justification) possibly the potential implications for non-payment of rent.
- 3.13 In relation to the calculation of rent, NCC's contention that the language used in the wayleave agreements is uncertain has not been substantiated in any way, either by NCC or Network Rail. On the contrary, the language used is very clear. There is nothing unusual, or indeed outdated, about these arrangements. The coal based rent is akin to a modern royalty rent arrangement you might see in a quarrying lease and the non-coal based rent is akin to a modern day 'turnover rent'. I understand that the issues that have arisen in relation to the rent provisions of the wayleave agreement have had nothing to do with how the rent should be calculated, but stem from the failure by Network Rail to provide the information it is obliged to provide under the wayleave agreements; information required so that the Estate and Lord Hastings are able undertake rent calculations. When the information is made available, the calculation is straightforward. This is evident from the information contained in Appendices CC1 and CC24 (and the documents referred to in those Appendices).
- 3.14 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 Northumberland Line 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. Moreover, the Estate's objection confirms its support for the scheme's broad objectives<sup>2</sup> and I am instructed that Lord Hastings likewise supports the overall objectives of the scheme. In addition, while the wayleave agreements currently allow the Estate or Lord Hastings to re-enter and repossess the land on which the railway is situated if rent is not paid, if there are concerns that this creates a risk for the railway, I am advised that the Estate and Lord Hastings are both prepared to agree to modifications that would remove these provisions notwithstanding the various

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<sup>2</sup> See paragraph 4 of the objection



statutory and common law rules and limitations that would almost certainly apply to restrict the ability of the Estate or Lord Hastings to exercise those rights in any event.

- 3.15 The application of Article 35 is therefore not a prerequisite for undertaking the Northumberland Line scheme and the aims of the project (as set out in NCC's Statement of Aims) could all be achieved without the inclusion of Article 35 at all. In the circumstances, Article 35 is not justified nor is there a compelling case for it.
- 3.16 While NCC says at paragraph 8.32 of its Statement of Case that its aim is to minimise the use of compulsory powers and that it has engaged with affected landowners to reach negotiated agreements,<sup>3</sup> I understand that 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. There was also no discussion or negotiation as to the inclusion of this power prior to the submission of the application despite its compulsory nature. This failure is plainly relevant when considering whether or not the power is justified or if there is a compelling case.
- 3.17 It is also worth noting that if Article 35 were to be implemented, whatever approach is taken to the assessment of compensation, Network Rail will still have to provide the accounting information and records necessary to calculate a rent under wayleave agreements, as well as a genuine estimate of future use and charges so that a calculation of likely future rents can be undertaken. This will be an essential first step in determining the Estate and Lord Hastings' compensatable loss. Article 35 will not, in some way, sidestep this issue.
- 3.18 In summary, Article 35 is not justified and there is no compelling case in the public interest to abrogate the wayleave agreement rent provisions where: (a) it is not necessary for the delivery of the Scheme; (b) it interferes by compulsion with proprietary rights in circumstances where there is no necessity to do so and (c) there were no proper negotiation prior to the compulsion.
- 3.19 Whilst the commercial benefit to Network Rail of seeking the inclusion of Article 35 in the draft Order can be understood, my concerns are that confirmation of Article 35

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<sup>3</sup> While the reference is to compulsory acquisition powers, best practice and Government Guidance require acquiring authorities to attempt to minimise all compulsory powers over land including powers to create and extinguish rights and powers of temporary possession

would result in compulsory powers of abrogation being granted, not because they are justified or 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

3.20 In my opinion the compensation provisions set out in Article 35 as drafted are ambiguous and, in large part, contradictory. They are also inappropriate in the context of the rights being sought. 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 Land Compensation Act 1961 (**“the 1961 Act”**) will apply

3.21 In relation to element ii), Part 1 of the 1961 Act deals with references to the Upper Tribunal (Lands Chamber) (**“the Tribunal”**) in the event of a dispute over compensation as well as cost issues connected to that process. 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’*

3.22 The following provisions referred to in section 1 are those contained within Part 2 of the 1961 Act, which deal with compensation upon the compulsory acquisition of land. It is therefore Part 2 of the 1961 Act that would apply in the event a compensation dispute resulting from the application of Article 35 was referred to the Tribunal.

3.23 However, no interest in land will be acquired under Article 35 and Part 2 of the 1961 Act simply cannot be applied to the assessment of compensation arising from the cessation of rent as envisaged under Article 35.

3.24 Within Part 2 of the 1961 Act Rule 2, section 5 states that:

*'The value of land shall, subject as hereinafter provided, be taken to be the amount which the land if sold in the open market by a willing seller might be expected to realise'*

but the abrogation of a requirement to pay rent pursuant to the wayleave agreements would not involve the sale of the land to which the wayleaves apply. Therefore Rule 2 cannot be applied.

- 3.25 Similarly, while Rule 6, section 5 of the 1961 Act allows for the payment of compensation for

*'disturbance or any other matter not directly based on the value of land'*

neither the Estate nor Lord Hastings will be 'disturbed' as they will not have to physically move from the land (which will remain in their ownership subject to the wayleave agreements) and at least part of the loss they will suffer will be loss of rental income, which is a matter based directly on the value of land. i.e. the Estate and Lord Hastings' land will be diminished in value through the loss of rent.

- 3.26 Moreover, case law precedent confirms that an entitlement to compensation under Rule 6 is only claimable if there is a causal connection between the loss and compulsory acquisition, the loss has been reasonably incurred and the loss is not too remote. As there will be no compulsory acquisition under Article 35, the first condition is not satisfied and so Rule 6 also cannot be applied for this reason.

- 3.27 Moving away from the 1961 Act, Article 16 of the draft Order applies Part 1 of the Compulsory Purchase Act 1965 ("**the 1965 Act**"), which might potentially bring into play Sections 7 and 10 of the 1965 Act as alternative bases for assessing compensation.

- 3.28 However, paragraph 1 of Article 16 makes it clear that Part 1 of the 1965 Act only applies to the acquisition of land under the Order and as I have previously noted, Article 35 does not involve the acquisition of land. Therefore, Part 1 of the 1965 Act, including sections 7 and 10, also cannot be applied to the assessment of compensation under Article 35.

- 3.29 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 (if it were to be determined that

it can be justified at all) needs to be amended in order to provide a clear route to the assessment of compensation.

- 3.30 If Network Rail, or NCC had engaged constructively with the Estate and Lord Hastings over the issue of how compensation should be assessed, I believe that a solution could have been found to the problem that exists with the Article 35 compensation provisions. However, I am advised that no such discussions have taken place.

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

- 3.31 Although Article 35 does not provide a suitable basis for assessing compensation for the proposed abrogation of rent, this does not mean that (assuming it is determined that there is a compelling case for article 35 in the first place) a suitable valuation methodology could not be included in the Order, with only relatively minimal alteration to paragraph 3 of Article 35.

- 3.32 In my opinion, recognising that any direct or implied reference to Part 1 of the 1961 Act is unhelpful, a sensible approach to adopt to the assessment of 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.*

- 3.33 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. A provision to refer disputed compensation to arbitration by agreement is also not unusual in relation to the use of compulsory powers.

#### **4 DECLARATION**

- 4.1 I believe that the facts stated in this report are true and the opinions expressed are correct. I confirm that I have made clear which facts and matters referred to in this report are within my own knowledge and which are not. The opinions I have expressed represent my true and complete professional opinions on the matters to which they refer.
- 4.2 I understand that proceedings for contempt of court may be brought against anyone who makes, or causes to be made, a false statement in a document verified by a statement of truth without an honest belief in its truth.
- 4.3 I am aware of the requirements set out in Part 35 of the Civil Procedure Rules and the accompanying Practice Direction, the Guidance for the Instructions for Experts to give Evidence in Civil Claims and the Practice Direction for Pre-action conduct.
- 4.4 I confirm that this report has drawn attention to all material facts which are relevant and have affected my professional opinion.
- 4.5 I confirm that I understand and have complied with my duty to the Public Inquiry as an expert witness which overrides any duty to those instructing or paying me, that I have given my evidence impartially and objectively, and that I will continue to comply with that duty as required.
- 4.6 I confirm that neither I, nor my firm, are instructed under any conditional or other success-based fee arrangement.
- 4.7 I confirm that I have no conflicts of interest.
- 4.8 I confirm that my report complies with the requirements of the RICS – Royal Institution of Chartered Surveyors, as set down in the RICS practice statement *Surveyors acting as expert witnesses*.

**5 STATEMENT OF TRUTH**

I declare that the evidence set out in this proof for the inquiry is true and follows accepted good practice. The opinions expressed are my own and are formed from professional judgements based on my experience.

Signed.....

**Colin Cottage BSc (Hons) MRICS  
Managing Director, Compensation  
Ardent**

**12 October 2021**