

TRANSPORT AND WORKS ACT 1992

**TRANSPORT AND WORKS (APPLICATIONS AND OBJECTIONS PROCEDURE) (ENGLAND AND WALES)
RULES 2006**

THE PROPOSED NORTHUMBERLAND LINE ORDER

**OPENING STATEMENT ON BEHALF OF
(1) NORTHUMBERLAND ESTATES
AND (2) LORD HASTINGS**

Introduction

1. We act for Northumberland Estates (“the Estate”) [OBJ-21] and The Right Honourable Delaval Thomas Harold, Baron Hastings (“Lord Hastings”) [OBJ-12] who are statutory objectors (“together the Objectors”) to the draft Northumberland Line Order (“the Order”).
2. The Objectors’ objections were made in two capacities: first, as owners of land and rights that are to be subject to compulsory acquisition; and secondly, as having the benefit of Wayleave Agreements (“the Agreements”) between what is now Network Rail (“NR”) and the Objectors that are affected by what is now proposed as Article 34 of the draft Order.
3. Neither objector objects in principle to the Northumberland Line proposals (“the Scheme”). Both welcome the broad objectives of the Scheme in so far as it seeks to promote economic regeneration in Northumberland and the wider region overall objectives.
4. The focus of concern is the modification of the Agreements to abrogate rental payments by compulsion through Article 34. These rental payments have always been part of the Agreements and were agreed in exchange for the rights to construct and operate a railway on the Objectors’ land.
5. Although the Estate’s objection and its Statement of Case (at paragraphs 14 to 20) raised some broader queries these points are not now pursued as part of its case, save in so far as that may relate to Article 34.
6. The Estate has two remaining heads of objection: the first relates to the inclusion of excessive areas of land for compulsory acquisition and the absence of clarity as to the use of the powers in respect of Algernon Bridge. The second relates to the inclusion of what is now Article 34 which now incorporates an amended version of Article 23(4).
7. This second ground comprises the single ground of objection made by Lord Hastings.

Land acquisition

8. Agreement has largely been reached on land acquisition:
- (i) Plots 76 and 95a is now shown in the revised Book of Reference (“BoR”) to be removed from the BoR [APP12-1 and APP12-2];
 - (ii) Plots 102a, 103, 103a, 104, 104a, 105, 105a and 106 have been modified in the revised BoR but only by removing the name of the freeholders from the relevant column. This modification is insufficient to achieve its purpose and avoid the acquisition of the freeholders’ interest. Rather, the freeholders’ interest should, in the normal way, be expressly excluded from the description of the interest being acquired; and
 - (iii) The extent of Plot 64 has been cut back on the updated Land and Works Plans (Sheet 2 of 24) [APP-10-1]) but the revised BoR retains the multi-storey car park in the description of the interest and the area to be acquired remains the same.
9. It is expected that these are just administrative errors. Assuming that the Applicant’s position has not changed since Update 1 [APP-45] these are errors which are capable of being, and should be, readily addressed.
10. In relation to Algernon Bridge, the Estate is waiting to hear from the Applicant in respect of its proposals (see [APP-W3-1, Tables 11.10 and 11.11] and [Mills p/e, p.21]). The Estate set out its concerns in relation to Algernon Bridge, where permanent rights and temporary possession is sought, in its Statement of Case (see paragraph 22). The concern is that, as part of the Order, works are proposed to be undertaken to construct a staircase / lift shaft and “tie-in” these works to the structure of the Bridge. The Estate is concerned as to the significant additional liability that could arise as a result of these works both during construction and as part of any subsequent use. The Estate requires clarification as to who is to take on responsibility for such works and how this will be addressed through the Order so as to ensure that the Estate is not left with any liability in relation to the maintenance and use of the Bridge or any part of it. The Order does not deal with this issue despite this point having been raised by the Estate on numerous occasions in meetings with NCC and its agent. It was indicated last night to us that a solution has been reached between NR and Nexus, and we await sight of this.
11. We note that the Applicant’s Update on Acquisitions 11 November 2021 [INQ-16] refers to heads of terms having been provided to Lord Hasting but in relation to the Estate states “*The Estate has indicated it will not negotiate for the acquisition of the necessary land and rights until the dispute in connection with Article 34 is resolved.*” That is not quite right. It is rather that the Estate has said that it cannot progress negotiations based on the terms proffered by NCC which includes the withdrawal of the objection and so the Estate’s ability to object to Article 34. As far as the Estate is concerned, its position is that it has always been clear that it is willing to assist and negotiate any aspect of the proposal.

The Agreements

Composition and scope

12. There are three Agreements that were entered into with principal landowners at the time the Northumberland Line was originally constructed in the 1850s. They may have been agreed in the 1850s and 1860s but they were for up to 1,000 year terms and so clearly intended to last. It

was inevitable that there would be changes over precisely how the railway would operate over such a long period- that would have been obvious at the time they were entered into. These changes include the proposed unified system involving GB Railways.

13. The Estate is a party to two of these 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.
14. Lord Hastings is a party to the third wayleave agreement, dated 20 May 1853.
15. Transcripts of the three Agreements are to be found in Colin Cottage's Appendices CC7, CC8 and CC9 [OBJ-12/3]. A plan showing the approximate extent of the land to which the Agreements apply (and as affected by the proposed Order) is at Colin Cottage's Appendix CC25, as well as APP-W3-3 Appendix A.
16. The three Agreements grant 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 for the purposes of running freight and passenger trains.
17. In return, the Agreements reserved payment of: (i) a rent based on the amount of coal (and coal products) transported ("Limb 1"); 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 ("Limb 2"). The calculation of the rents is not in itself complex. Limb (i) is quantified and advantageous to the railway as it is not index linked (although this advantage may now fall away given the prospects for coal traffic). Limb 2 is a percentage of charges paid to the railway in relation to other traffic. Some of the language may be quaint but the reality is that remains a workable commercial agreement.
18. It is evident that the rental payment is tied to the railway traffic passing on specific stretches of the railway to which the Agreements relate. They are not tied to what the railway operator may choose to do outside the ambit of the Agreements, whether in the form of station development or otherwise.
19. Under the Agreements, what is now NR is responsible for making the rental payments and for complying with the obligations in the Agreements to provide the relevant information. It is in the provision of the information that any historic problems in relation to rental payments has arisen. It is not appropriate to rely on the failures of NR to produce such information to justify the abrogation of the rental provisions.
20. The Agreements expressly provide for any disputes to be determined by arbitration.
21. The Agreements also include a power of forfeiture for failure to comply with the terms of the Agreements. Although this issue was not raised originally as part of the rationale for Article 34, NCC do now seek to invoke it as a reason to support Article 34. However, as Colin Cottage has made clear [OBJ-12-1-1, § 3.14 and OBJ/12-4, §4.10], first, if the issue between the parties were simply to be the amount of rent to be paid, rather than a failure or refusal to pay an agreed rent at all, the Estate's and Lord Hastings' remedy would be to invoke the arbitration proceedings within the Agreements rather than claim forfeiture or seek an injunction, and secondly, the

Objectors are willing to forgo this power in the event that Article 34 is removed from the draft Order and will undertake to the Secretary of State do so.

NCC's reliance on the Agreements

22. NCC seeks to rely on the rights within the Agreements in order to be able to operate the Scheme. These rights are an integral part of the Scheme without which trains would not be able to run along the Northumberland Line.

Article 34

Absence of justification

23. Article 34 is not a compulsory purchase power. That is clear both from the fact that it is not housed within the draft Order under Part 4 which addresses acquisitions and possession of land. The same was confirmed by NCC's lawyers in its response to the Estates' objection (see OBJ-12-3, CC6, §32) in which Pinsent Masons said that Article 35, as it was then, "*is not a compulsory acquisition power*".
24. Article 34 is a provision that abrogates the rental provisions in the Agreements by compulsion. As Colin Cottage sets out this is a compulsory interference in a proprietary right and the compelling case in the public interest applied to compulsory acquisition of land is apposite [OBJ-12-1, §3.10]. Moreover, because it is an interference with proprietary rights, it engages Article 1 of the First Protocol of the European Convention of Human Rights and so must be justified and proportionate.
25. There is no proper justification for Article 34:
 - (i) Article 34 was only included late in the day. This much is clear from the statements from the Objectors' agents [OBJ-12-3, CC1 and CC24]. There were no discussions between NCC/NR and the Estate prior to the publication of the draft Order in relation to Article 34 (or its predecessor Article 35). NCC wrote to the Estate on 19 April 2021 with Heads of Terms for a Land and Works Agreement between the Estate and NCC to formalise the arrangements for the relevant land and rights but this did not refer to the Agreements or changes to them. The first discussion on Article 34 was in a meeting between the Estates and NCC on 15 June 2021 when Mr Holdroyd was present. Lord Hastings' discussions with NCC and NR are set out in a Statement on his behalf [CC24]. There have also been no discussions on Article 34 between Lord Hastings and NCC and no indication to Lord Hastings that the draft Order would include what is now Article 34 prior to its publication. NCC only brought Article 34 to the Objectors' attention on 26 May 2021 on or following submission of the draft order to the Secretary of State;
 - (ii) The rationale for inclusion as set out in the Explanatory Memorandum [APP-02-0] justifies the inclusion on the basis that the provisions are "*do not reflect the way in which the modern railway is owned and operated and give rise to the potential for disagreement between the parties*" is no justification at all in circumstances where the Agreements contain provisions to deal with disputes and there has been no negotiations. This cannot meet the test of compelling case (in particular, where compulsory interference ought to be a last resort) and nor could it be considered proportionate and justified from a Human Rights perspective;

- (iii) There is no need at this Inquiry to resolve the meaning of Limb 2, assuming there is a genuine dispute. This is not the forum, where there is an existing arbitration provision within the Agreements themselves. In any event, any dispute as to meaning is not avoided by Article 34 as it requires compensation for the removal of the rental provisions – in short, these provisions must be engaged with at some point. The right response for NCC/NR was, therefore, to first negotiate, and, second, if agreement was not reached to arbitrate. We are here because that did not happen and instead Article 34 was included late in the day without warning;
- (iv) It now appears (from the Applicant's Opening Statement [INQ-01, §29]) that reliance is placed on the forfeiture provisions to justify Article 34 but: (i) this did not form part of the rationale on the publication of the draft Order; (ii) the forfeiture provisions have never been used; (iii) the mention of them in recent past by the Estates has been in frustration arising from the lack of engagement by NR in relation to use of the line and payments; and (iv) is irrelevant in circumstances where the Objectors have confirmed that they are prepared to undertake to remove the forfeiture provisions if Article 34 is removed.
- (v) In so far as it is intimated by Mr. Holdroyd that the existence of the rental provisions casts any doubt on the viability of the Scheme, this is a bad point unless it is being said that the Scheme cannot afford to properly compensate the Objectors. As Colin Cottage points out [OBJ-12-4, §4.9], NCC has provided no evidence to demonstrate the extent to which the viability of the Scheme would be impacted if Network Rail had to pay rent under the Agreements. Moreover, if the payment of rent would significantly impact Scheme viability, the payment of compensation for loss of rent is likely to have a similar impact. The payment of full and fair compensation for loss of rent in the form of a capital sum would have to represent the net present value of the loss of rents over the remaining term of the Agreements. The value of the rents would still be a cost incurred by the Scheme. It would just be represented in the form of a single capital payment, rather than ongoing annual payments. Furthermore, it begs this question: if NCC is worried about viability, how does proposing an upfront payment assist; moreover, the quantum would not be known until a claim is made and resolved.

- 26. For all these reasons, the Objectors' case is that seeking to compulsorily abrogate the rental provisions is premature. Existing routes within the Agreements to address any issues raised have not been explored. There is no compelling case for this interference.

Form

- 27. On the basis that capitalisation is considered justified, then the form of what is proposed is not.
- 28. What is now Article 34 is an amendment to what was previously Article 35. Reference to the Land Compensation Act 1961 has been removed. This is clearly appropriate where there is no acquisition of land. That seems to have been recognised by NCC in submitting the new Article 34.
- 29. However, Article 34 as revised is inappropriate. It seeks to apply the Compensation Code by the back door. Worse, it does so selectively. Article 34 selects two parts, and only two parts, of the Compensation Code, which happen to be the two parts that favour NCC or rather NR. This partial approach is inherently problematic.

30. It effectively takes away the right to rent from passenger services in circumstances where the proposals rely on the wayleave rights for their implementation and operation. That could scarcely be less fair. Further, it seeks to interfere with the rights to rent for the use of the line for freight which is not part of what NCC are proposing.
31. The short point is that NCC/ NR should not be applying the Code at all. The Code is predicated on compulsory purchase of land rather than a simple capitalisation of rent. NCC/ NR should certainly not be seeking to apply selected (and preferential parts) of it.
32. If an Article 34 is to remain, the straightforward version suggested by Colin Cottage [OBJ-12-1, §3.3.2] should be preferred.

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