

**TRANSPORT AND WORKS ACT 1992**

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

**THE PROPOSED NORTHUMBERLAND LINE ORDER**

**STATEMENT OF AGREED FACTS AND ISSUES**

**between**

**(1) NORTHUMBERLAND ESTATES  
(2) LORD HASTINGS**

**- and -**

**NORTHUMBERLAND COUNTY COUNCIL**

**NOVEMBER 2021**

## **Introduction**

1. Northumberland County Council (“NCC”) is the promoter of the Northumberland Line Order (“the Order”) to which both the Northumberland Estates (“the Estates”) [OBJ21] and The Right Honourable Delaval Thomas Harold Lord Hastings Baron Hastings (“Lord Hastings”) [OBJ12] are statutory objectors (“together the Objectors”).
2. The respective land interests of the Objectors are set out in the Book of Reference.
3. Neither objector objects in principle to the Northumberland Line (“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. The focus of concern is the modification of agreements between what is now Network Rail (“NR”) and the Objectors to remove rental payments.

## **Background**

4. The Estates set out its objection to the Order in its letter dated 7 July 2021 to the Secretary of State for Transport (“the Objection Letter”). A letter of response to the Objection Letter, dated 11 August 2021 was received from Pinsent Masons, acting on behalf of NCC (“Pinsent Masons’ Response”). The Estates submitted a Statement of Case dated 2 September 2021.
5. Lord Hastings objected by email on 24 June 2021.

## **Compulsory Acquisition**

6. The Book of Reference and the Order refers to the relevant interests of the Estates and Lord Hastings. In APP-45 The Applicant’s Update (Issue No.1 dated 12<sup>th</sup> October 2021) and APP-46 Schedule of Proposed Changes to the Application Documents (October 2021) NCC indicate the following with respect to the interests of the Estates:
  - a) Plot 76 will be removed from the scope of the Order
  - b) Plot 95(a) will be removed from the scope of the powers of acquisition sought in the Order
  - c) The proposed closure of Holywell user-worked crossing will be removed from the Order
  - d) Revision of extent of the powers in the Order relating to Plots 102(a) -106 to exclude the Estates interests from the scope of the Order (but with the plots remaining subject to powers generally on a precautionary basis to account for other interests)
  - e) Revision to plot 64 to remove reference to the multi storey car park
7. In relation to Algernon Drive Bridge, it was stated that NCC is liaising with the Estates and others to determine a mutually satisfactory maintenance regime (see para 11.11 of APP-W3-1). NCC informed the Estates on 17 November 2021 that there may be an agreement between Nexus and NR which would address the Estates concerns. NCC is seeking to confirm this.

## **The wayleave agreements (“the Agreements”)**

8. There are three 1,000-year wayleave agreements that were entered into with key landowners at the time the Northumberland Line was originally constructed in the 1850s.

9. The Estates 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.
10. Lord Hastings is a party to the third wayleave agreement, dated 20 May 1853.
11. Transcripts of the three wayleave agreements and the grant of alteration are to be found in Colin Cottage's Appendices CC7, CC8 and CC9.
12. 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.
13. 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 (as then built and added to) for the purposes of running freight and passenger trains. 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").
14. Further detail on both Limb 1 and Limb 2 is set out in paragraphs 3.1-3.5 of the Statement of James Holdroyd (Russell Mill's Appendix D). This further detail is agreed (CC Rebuttal, §3.1), subject to the clarification that the provisions set out at paragraph 3.11.2 only apply to Coals, Coke, Culm and Cinders ("the Four Cs") from the Cowpen Colliery and Collieries north of the River Blyth.
15. 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.
16. The Agreements expressly provide for disputes to be determined by arbitration.

#### **Current use of the railway**

17. NR state that there are currently two existing freight services on the line:
  - (i) Biomass equating to around 30,000 tonnes delivered each week; and
  - (ii) Alumina powder, which equates to around 700 tonnes delivered each week.
18. Transport of coal over the line has now ceased, has not run for around 6 months and is not seen as likely in the foreseeable future.

#### **Proposed operation of the railway**

19. Passenger services ceased on the railway in the 1960s. Under the Northumberland Line Scheme, it is proposed to reopen the railway to passenger services. Passenger services will be operated by Northern Trains and run as a shuttle between Ashington and Newcastle Central Station, with c. 66 trains each day. Six new stations are proposed. NCC's modelling predicts that there will be 1.45 million return journeys by 2039.

20. Consistently with the current operating model of the railway network, Northern Trains will operate the line as modification to its existing franchise and receive passenger fare income. NR will receive a track access charge.
21. Freight trains will continue to use the line together with passenger services.
22. There are currently proposals to change the arrangements for the operation and management of the railway through the creation of Great British Railways under which the railway may receive fare income directly. The details of these arrangements are not yet known.

#### **Article 34**

23. The objectors' principal concern is the inclusion in the Order of Article 34. Under Article 34 NCC seeks to modify the Agreements in order to delete the rent provisions and to provide the Objectors with the payment of a capitalised sum instead of an annual rental payment.
24. Article 34(2) provides: *"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."*
25. Article 34(3) states *"Network Rail must pay to the landowner a capitalised sum by way of compensation for any loss arising from the operation of paragraph (2), such compensation to be determined, in case of dispute, under part 1 of the 1961 Act."*
26. The Explanatory Memorandum to the Order states:

*"Article 35 ...makes provision to modify agreements relating 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 Acts.*

*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 rise to the potential for disagreement between the parties, particularly as the use of the railway is increased to include passenger services. Paragraph (2) therefore provides 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."*

27. Article 23(4) is related to Article 34. It provides:

*"In assessing the compensation payable to any person in respect of the loss of entitlement to rental payments under article 35 (modification of agreements relating to land) in relation to the wayleave leases referred to in that article the tribunal must set off against the value of that lost entitlement to rental payments any increase in value of any contiguous or adjacent land belonging to that person in the same capacity which will accrue to that person by reason of the construction or operation of any part of the development."*

28. Following discussions between NR and the Objectors, NCC proposes a modified form of article 34 as follows:

*"34. – (1) In this article –*

*"the landowner" means the person who for the time being holds the reversionary interest in the land comprised in any of the relevant wayleave leases;*

*"the relevant wayleave lease" means each of the following indentures conferring rights to construct, maintain and use the railway –*

*(a) the indenture made on 10th May 1853 between Algernon Duke and Earl of Northumberland and the Blyth and Tyne Railway Company;*

*(b) the indenture made on 20th May 1853 between the Jacob Lord Hastings Baron Hastings and the Blyth and Tyne Railway Company;*

*(c) the indenture made on 29th July 1867 between the Duke of Northumberland and the Blyth and Tyne Railway Company; and*

*(d) the indenture made the 30th July 1867 between George Duke of Northumberland and the Blyth and Tyne Railway Company; and*

*"the rent" means the rent or other sums calculated by reference to the use of the railway which is payable to the landowner under the relevant wayleave leases.*

*(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.*

*(3) Network Rail must pay to the landowner compensation equating to any loss it suffers arising from the operation of paragraph 2 at the date it comes into effect and in assessing such compensation no account may be taken of any prospective increase or decrease in the rent by virtue of the construction or operation of any part of the development.*

*(4) In assessing compensation under paragraph 2 there must be set off any enhancement in the value of any contiguous or adjacent land of the landowner which will accrue to that landowner by reason of the construction or operation of any part of the development.*

*(5) Any dispute in relation to compensation under this article 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."*

29. Article 23(4) is proposed to be deleted.
30. A revised order was submitted to the Inquiry on 9 November 2021, renumbering Article 35 to Article 34.
31. On 5 November 2021 a revised draft of Article 34 was provided by the applicant to the Objectors. The Applicant will ask the Inspector to recommend the inclusion of this revised draft in the Order.
32. The revised article:
  - 32.1.1. removes reference to compensation for loss being assessed pursuant to Part 1 of the Land Compensation Act 1961; and
  - 32.1.2. provides that any dispute about the amount of compensation due to the Objectors shall be referred to arbitration rather than being determined by the Land Chamber of the Upper Tribunal.
33. A revised article 34 was submitted to the Inquiry on 15 November 2021. The Applicant will provide an updated Explanatory Memorandum.
34. Following further discussions between Network Rail and the Objectors, Network Rail's solicitors confirmed to the Objectors' solicitors that Network Rail is content to ask NCC to delete paragraph (4) (set off) from draft Article 34.

#### **Discussions in relation to Article 34**

35. There were no discussions between NCC/NR and the Objectors prior to the publication of the draft Order in relation to Article 34.
36. NCC wrote to the Estates on 19 April 2021 with Heads of Terms for a Land and Works Agreement between the Estates and NCC to formalise the arrangements for the relevant land and rights but this did not refer to the Agreements or changes to them.
37. The first discussion on Article 34 was in a meeting between the Estates and NCC on 15 June 2021 when Mr Holdroyd was present.
38. A history of the discussions between NCC and the Estates is included in the Statement on behalf of the Estates (Colin Cottage Appendix CC1 and CC1A).
39. Lord Hastings discussions with NCC and NR are set out in a Statement on his behalf (Colin Cottage, Appendix CC24). There have been no discussions on Article 34 between Lord Hastings and NCC and no indication to Lord Hastings that the draft Order would include Article 34 prior to its publication. NCC first brought Article 34 to Lord Hastings' attention on 26 May 2021 (Colin Cottage, Appendix CC24, §7 and §8).

#### **History of payments to the Estates under the Agreements**

40. Until approximately 2010 payments under the Agreements were made by NR (and its predecessor) to the Estates without any material issues upon submission of a rent demand.

41. The Estates' agent appointed to manage the arrangements would contact the relevant freight operators direct for details of coal tonnages and other freight. Following receipt of that information, the agent would undertake a calculation of the rent due under the Agreements, issue a rent demand to NR and payment would then subsequently be forthcoming.
42. In around 2010 the freight operators became reluctant to pass the information requested direct to the agent. In the result, the agent had to liaise direct with NR in respect of obtaining the tonnage and other information required.
43. A schedule of correspondence and between the agent and NR is included as Colin Cottage's Appendix CC4. Appendix CC5 is a summary of rent charged and paid from 25 March 2011 to 24 March 2021. The correspondence indicates that there were difficulties in procuring the necessary information to calculate the rent.
44. Notwithstanding anything stated in the correspondence between NR and the Estates, NR has made and the Estates have accepted on account payments as payment towards the rental payment obligations in the Agreements and the latest payment was received by the Estates in September 2021. These payments were made on an interim basis subject to the provision of information on tonnages.
45. As to Lord Hastings, he has corresponded with NR to seek the necessary information to allow the calculation of rent under the Agreement but no information has been provided and no rent paid by NR (Colin Cottage, Appendix CC24, §6).

#### **Key issues to be determined**

46. The following are the principal issues that remain in dispute and the respective positions of the parties:

Issue in dispute	Objectors' position	NCC's position
<b>Whether the objectors should retain the power to prevent the operation of the railway where there is a dispute over rent</b>	The Objectors will undertake to the Secretary of State that the forfeiture provisions will not be relied upon in circumstances where Article 34 is excluded from the terms of the Order.	In light of the clear public benefits of the Scheme, it is unacceptable for the delivery of the Scheme to be threatened by a dispute over rents payable under historic lease arrangements and these arrangements should be modified to remove that risk.
Whether the formula for calculating non coal rents under the Agreements is sufficiently clear	There is no lack of clarity. See paragraphs 3.1-3.5 of Mr Holdroyd's evidence. The calculation requires information as to track use. This does not mean it lacks clarity. NR should have provided that information as opposed to seek abrogation through the Order. If NR thought the provisions were unclear, arbitration was	There are two limbs to the formula (paragraphs 3.2-3.3 of Mr Holdroyd's evidence). Transport of the coals, coke, culm or cinders has now ceased and the principal freight flow consist of biomass and alumina powder. Therefore, Limb 2 has to be applied.  Limb 2 refers to 2% of the gross amount payable in

	the proper first step under the terms of the Agreements themselves.	respect of the "passing and conveying of passengers, cattle and goods". In the modern context – it is unclear how the "gross amount payable" should be calculated (as further explained in paragraphs 4.8 and 4.9 of Mr Holdroyd's evidence).
<b>Whether the formula for calculating passenger rents under the Agreements is workable for the modern railway</b>	There is no lack of clarity and the provisions are workable. See paragraphs 3.1-3.5 of Mr Holdroyd's evidence. The calculation requires information as to track use. This does not mean it lacks clarity or is unworkable. NR should have provided that information as opposed to seeking abrogation through the Order. If NR thought the provisions were unclear or unworkable, it should have approached the Objectors and seek to negotiate an alternative arrangement. In the absence of agreement on an alternative, arbitration would be the next proper step under the terms of the Agreements themselves.	The arrangements for the receipt of fare income under modern arrangements (a) mean that NR does not receive fare income and (b) do not provide a means of attributing fare income to particular sections of track. Accordingly, the rental provisions are not workable for passenger fares.
Whether the inclusion of Article 34 is justified	Article 34 is not necessary to allow the Scheme to proceed and accordingly is not justified. Moreover, the Agreements themselves contain arbitration provisions and these should have been utilised before abrogation by compulsion. NCC has not negotiated. Compulsion should be as a last resort.  In so far as reliance is placed on the forfeiture provisions by NR in this regard, the Objectors will undertake to the Secretary of State that the forfeiture provisions will not be relied upon in circumstances	The Agreements contain forfeiture provisions. The Estates have previously threatened to forfeit/terminate the wayleaves and to seek an injunction to prevent NR from using the railway line. If these powers are exercised it would mean that trains could not be run on the railway so that the Scheme could not be operated and placing NR in breach of its Network Licence.



	where Article 34 is excluded from the terms of the Order.	
Whether the rent under the Agreement impacts on Scheme viability	No evidence has been provided to substantiate this point. In any event, compensation for the loss of rent would have a similar financial impact to on-going payments	Until the sums are quantified the effect on the viability of the line will not be clear. It is wrong to suggest that compensation for loss will have similar impacts since that will not include sums for passenger fare income.
Whether NCC or NR sought to negotiate in advance of seeking to abrogate the Agreements by compulsion	Neither NCC nor NR sought to negotiate with either Objector prior to the publication of the draft Order either in the context of the draft Order itself or the operation of the Agreements themselves	NCC did not negotiate on the terms of the Article but informed the Objectors of the proposal to include the Article on 26 May 2021 on or following submission of the draft order to the Secretary of State.
Whether interference with the Objectors' proprietary rights is proportionate and justified	It is not where the interference is unnecessary to deliver the Scheme; there was no prior negotiations; and the Agreements themselves provide for arbitration.	<p>The uncertain nature of the existing rent provisions, when read in the modern context, creates risks to the successful implementation of the Scheme and inherent risk to all parties, including NR's ability to comply with its statutory duties.</p> <p>Article 34 enables the scheme to be delivered, and the existing use of the railway to be maintained, whilst minimising the interference with the Objectors' property interests.</p>
If against, the Objectors' primary case, Article 34 is included in the Order, its drafting	NCC has been clear that Art.34 is not a compulsory purchase power (see Colin Cottage Appendix CC6, §32). Consistent with this, where NCC seek to rely on the Agreements, the appropriate basis of compensation is on ordinary commercial terms. An alternative formulation is put forward by Colin Cottage (Proof, §3.32)	