TRANSPORT AND WORKS ACT 1992

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

THE PROPOSED NORTHUMBERLAND LINE ORDER

CLOSING SUBMISSIONS ON BEHALF OF
(1) NORTHUMBERLAND ESTATES
AND (2) LORD HASTINGS

Introduction

1. These are the closing submissions 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"). They are structured upon the Objectors' opening statement [INQ-25].

2. As we said in opening, 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.

3. 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.

4. There was some suggestion in XX of Colin Cottage that the Objectors were looking for special treatment. That we reject out of hand. The Objectors share the same rights with any citizen to ensure that if a public authority seeks to interfere with its rights by compulsion, there is a compelling case. The reality is that there is no compelling case for the intervention proposed here.

Land acquisition

5. Before turning to the Article 34 issue, we record the agreed position in relation to land acquisition as confirmed by Russell Mills in XX.

    (i) Plots 76 and 95a have been removed from the revised Book of Reference ("BoR") [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. It is agreed that this modification is insufficient to achieve its purpose and avoid the

acquisition of the freeholders' interest. RM agreed that the freeholders' interest should be expressly excluded from the description of the interest being acquired in the BoR; and

(iii) Whilst the extent of Plot 64 has been cut back on the updated Land and Works Plans (Sheet 2 of 24) [APP-10-1]), the revised BoR retains the multi-storey car park in the description of the interest and the area to be acquired remains the same and, again, this should be amended.

6. As RM agreed, these points can and should be addressed.

7. In relation to Algernon Bridge, we set out our concerns in opening and our understanding is that an agreement has been reached between NR and Nexus under which they agree to share liability for the new structure. The Estate needs sight of this agreement but if it does as advertised that would address the Estate's concern.

The Agreements

Composition and scope

8. There are four Agreements that were entered into with principal landowners at the time the Northumberland Line was originally constructed in the 1850s, one of which, with the Welbeck Estate, is not subject to Article 34. 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, although the details of this are unknown [SAFI, §22]. Any changes that come through GB Railways have nothing to do with the Scheme and any changes to payments would not be as a result of the Scheme but a change to the system that would be captured by the payment mechanisms in the Agreements.

9. 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.

10. Lord Hastings is a party to the third wayleave agreement, dated 20 May 1853.

11. Transcripts of these 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.

12. 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.

13. 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 from the collieries to the north of Seaton Delaval Estate) 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 1 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 and the arrangements may be unusual on the network but the reality is that it remains a workable commercial agreement.

14. It is now clear that there is no material disagreement in relation to the interpretation of the provisions. Mr Holdroyd agreed in XX that:

    (i) Limb 1 does not include biomass;

    (ii) In light of the above, there is no uncertainty in relation to Limb 1;

    (iii) The NR track access charging systems can be used to calculate the rent under Limb 2. All that is required is a "manual intervention" adjustment at the end. In other words, it is entirely workable;

    (iv) NR did not approach the Objectors to see if there was a disagreement over the interpretation of the provisions and so cannot properly assert that there is any disagreement; and

    (v) In any event, the interpretation is agreed – as Colin Cottage made clear in chief.

15. The continued suggestion that the meaning of 2% is unclear in the SAFI, under NCC's position against the second issue in the table following §46, has been overtaken by Mr Holdroyd's oral evidence. The same applies to the suggestion that the rental provisions "*are not workable for passenger fares*" (third issue in the same table).

16. The reality is that NR wish to avoid the inconvenience of the need to make annual calculations and, in doing so, making this manual adjustment. But it is plain that such inconvenience – founded on Agreements freely entered into – is no basis on which to found a case for interference with rights by compulsion.

17. 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.

18. The Agreements expressly provide for any disputes to be determined by arbitration which ought to have been the first port of call in the case of any dispute, as confirmed in the SAFI [at §16].

19. 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 undertakes to the Secretary of State and NR to do so.

NCC's reliance on the Agreements

20. NCC seeks to rely on the rights within the Agreements in order to be able to operate the Scheme. Without them, trains would not be able to run along the Northumberland Line including for passenger services. The rights are not related to any actions taken by the beneficiary of the rights outside of the railway.

Article 34 - no compelling case

21. Article 34 is not a compulsory purchase power. That is clear from the fact that it is not housed within the draft Order under Part 4 which addresses acquisitions and possession of land. This was also confirmed by NCC's lawyers in its response to the Estates' objection (see [OBJ-12-3, CC6, §32]). Pinsent Masons said that Article 35, as it was then, "*is not a compulsory acquisition power*". There was no suggestion otherwise by NCC in XX of Colin Cottage.

22. 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. Again, this much appears to be agreed. These are high thresholds.

23. There is no compelling case for the inclusion of Article 34 nor any justification or proportionality in the context of human rights for the following reasons which are addressed in more detail below:

    (i) Article 34 was only included late in the day. It is not an integral part of the Scheme. It is not necessary;

    (ii) Article 34 has not been approached as a last resort as it should have been. Indeed, as Mr Holdroyd agreed in XX it was rather the opposite, a first resort;

    (iii) The Agreements contain arbitration provisions, and these should be the first port of call in a disagreement;

    (iv) The original rationale for the inclusion of Article 34 did not stand up to scrutiny in XX of Mr Holdroyd;

    (v) The more recent justification in relation to forfeiture is not relevant where the Objectors are prepared to give an undertaking; and

    (vi) There is no viability point.

(i) Late inclusion

24. Article 34 was only included late in the day. RM described it as "very late on" [CC App, p.87]. It was not an integral part of the Scheme. It was a late addition. Mr Holdroyd said in XX that NR requested the addition of the provision two weeks before the order was submitted to the Secretary of State on 26 May 2021. This is a clear indication that it is not necessary for the Scheme. This is further demonstrated by the fact that it is not thought necessary to apply Article

34 to the Welbeck Estates agreement which is in similar terms and under which the Welbeck Estates could demand rent at any time. If it is not necessary to include the Welbeck Estates agreement, it equally cannot be necessary to include the other agreements. If Article 34 is not necessary, there is, by definition, neither compelling case nor justification.

(ii) First resort

25. It is agreed (Mr Holdroyd in XX) that, as set out in 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).

26. 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.

27. In XX we took Mr Holdroyd to the schedule of communications between the Estate and NR [CC App.4]. A clear picture emerges of the Estate seeking to engage and NR not responding. Mr Holdroyd agreed in XX that NR's responses have been at best sporadic and were, putting the matter in the most modest way, unimpressive.

28. 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.

29. NCC only brought Article 34 to the Objectors' attention on 26 May 2021, the day of the submission of the draft order to the Secretary of State.

30. There were simply no proper negotiations. Mr Holdroyd agreed in XX that whilst he had said he would come back to the Estate within a couple of weeks of the June 2021 meeting [CC App, p.92], there was no further response from him or NR until after the PIM in September 2021 and even then the Estate had to chase for a meeting which finally happened this month [CC App, p.95 and p.96].

31. Mr Holdroyd agreed that it was not unfair to characterise this approach as compulsion as a first resort. That is plainly contrary to the CPO Guidance which is clear that powers of compulsion (albeit in relation to the acquisition of land but the same approach is apposite here) should be used only as a last resort. It is not right as a matter of principle to seek to use powers of compulsion as a first resort.

(iii) Arbitration

32. It is now clear that there is no dispute about the meaning of Limb 2. Even if there had been, the inquiry would not have been the correct forum to resolve such a dispute, where there is an existing arbitration provision within the Agreements themselves.

33. 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.

34. There can be no justification for Article 34 in circumstances where the Agreements contain provisions to deal with disputes and there has been no negotiations. Plainly this does not 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.

(iv) Rationale

35. RM summarised the rationale at the 15 June 2021 meeting. He said according to the meeting notes: "*it was very late on that Northumberland County Council (NCC) felt the situation should be used to streamline the current arrangements which was complicated mechanism for payments and caused Network Rail issues in calculating payments*" [CC App.87]. Article 34 was about streamlining. Adjusting a commercial contract for convenience – which is what streamlining amounts to – falls far short of a compelling case in the public interest;

36. 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 19th 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.*"

37. The justification here was based on the potential for disagreements. The same justification was used in NCC's SoC dated 3 September 2021 [APP-44, §8.54] which refers to "*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*".

38. Mr Holdroyd confirmed in XX that NR's concern related to uncertainty arising from the interpretation of the provisions. However, as set out above, it is now quite clear that there is no such disagreement on the interpretation of the provisions. Really what it seemed to come down to is administrative convenience in NR. Mr Holdroyd said it was difficult to get the information but the reality is that he described an automated system (comprising TOPS and TABS) which requires a manual adjustment at the end to allow calculation of the rent under the Agreements.

To save an NR employee from making a manual adjustment to a calculation does not amount to a compelling case.

39. Mr Holdroyd further confirmed in XX that the case articulated by NCC in the Explanatory Memorandum, NCC's Statement of Case and through his evidence does not refer at all to the removal of compensation in respect of running passenger services in those documents. That simply was not part of the rationale for the inclusion of Article 34.

40. Passenger services have always formed part of the Agreements and the reality is that the Estate and Lord Hastings has lost revenue since the Beeching closure in the 1960s which had hitherto been part of the rental payments whilst still having the same burden of the railway running on their land.

(v) Forfeiture

41. Reliance is now placed on the forfeiture provisions [INQ-01, §29] 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 (we note in passing that the figure of c.£200,000 per annum rent referred to in the July 2021 Ward Hadaway letter was not based on the rental provision of the Agreements but rather on a proposed modification of it [JH App, p.94]); (iv) it was only by mentioning the forfeiture provisions that the Estate managed to get NR to engage and make an interim payment, as indicated at paragraph 4.12 of Mr Holdroyd's statement and confirmed in XX (which payment, Mr Holdroyd agreed, was subject to confirmation of tonnages which are now available). By contrast, the gentler approach taken by Lord Hastings has not yielded any rental payments at all in recent years; and (v) the forfeiture provisions are irrelevant in circumstances where the Objectors have confirmed that they are prepared to undertake to remove them if Article 34 is removed. In short, there is no threat.

(vi) Viability

42. As we said in opening, the existence of the rental provisions does not cast any doubt on the viability of the Scheme.

43. First, Mr Holdroyd confirmed that it was the uncertainty as to the level of rental payments that led to NCC/ NR's concerns in relation to viability. That uncertainty is now resolved, and NR can determine the level of payments. As such that point goes away.

44. Secondly, in any event, 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 NR. It would just be represented in the form of a single capital payment, rather than ongoing annual payments.

45. Thirdly, as the Inspector identified through his questions, the capitalised rent as an alternative to annual rental payments under the Agreements is not a Scheme cost. It is not included in the

property costs estimate and NCC do not believe it is a line item in the overall budget. It is not a cost related to the Scheme. If that is so, there can be no impact on viability. The absence of these costs as part of the Scheme is consistent with the inclusion of Article 34 in the draft Order at the last moment.

46. Fourthly, we note that the amendment of the Agreements is not part of the aims of the Scheme [APP-03].

No justification whatsoever in relation to freight

47. NCC/ NR state that it would be wrong to compensate for passenger use where that use is enabled by the wider Scheme works. We address that point below. But it was not suggested, and could not be, that the same applies to freight which is wholly unrelated to the Scheme and yet NCC/ NR seek to abrogate payments for freight traffic. There is simply no basis for doing so.

Conclusion on justification

48. 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.

Article 34 – form

49. On the assumption that a compelling case for abrogation can be made out, contrary to the submissions above, the separate issue arises as to the form of what is now Article 34.

50. There should be no conflation of the contentions in support of the proposed abrogation of rent with the form of Article 34. The question of whether there should be incorporation of the no-scheme principle in the wording of Article 34 is not put forward as in itself a justification for the interference. There is no mention of the no-scheme principle providing any justification for abrogation in any of the documents submitted with the Application, including the Explanatory Memorandum, the Applicant's Statement of Case [APP-44] or in any of the written evidence submitted by the Applicant, including Mr Holdroyd's Statement [APP-W3-3, Appendix D]. Mr Turney sought to conflate the two in XX of Mr Cottage. However, that is simply not the basis on which the Order was made.

51. Article 34 removes the earlier reference to the Land Compensation Act 1961, in apparent recognition of the points made by Mr. Cottage that this is not a suitable basis upon which to assess compensation for the proposed abrogation, as the 1961 Act only applies in the event of compulsory acquisition. Article 34 also removes reference to the Lands Chamber and replaces that with a reference to arbitration, as suggested by Mr. Cottage. NR also now propose that Article 34(4), which sought to import the set-off provisions, albeit in a varied form be removed [SAFI, §34]; accordingly, we do not address you on that. The issue as to form therefore relates to whether Article 34(3) is appropriate.

52. The importation of a small component of the Compensation Code, which was what in effect Article 34(3) would do, is wholly inappropriate. It is lifted from part of section 6A of the Land Compensation Act 1961 which only applies to compulsory acquisition of land, not to other forms of loss including disturbance, temporary possession or injurious affection.

53. Article 34(3) also does not, as currently drafted, include the crucial cancellation assumption, central to the No-Scheme principle, which would require the valuation process to proceed on the basis that the Northumberland Line scheme has been cancelled. Article 34(3) provides that the Scheme remains in place but no value is to be attached to it; it therefore does not permit the valuation process to assume cancellation of the Scheme, or anything that might flow from that. This selective approach could well lead to a worse position for the Objectors than if the land to which the Wayleaves relate had been compulsorily required, far removed from the principle of equivalence. For example, without the cancellation assumption, any prospect of there being an increase in rail freight in the absence of passenger services would not be taken into account.

54. If the land to which the Agreements relate were to be acquired, instead of there being an abrogation of rent, the no-scheme principle would apply fully, not just partially, allowing the valuation to take account of no-scheme world prospects denied under Article 34. It would also allow additional potential heads of claim for, for example, the value of the land, injurious affection and disturbance. How these factors would operate in this particular case would depend on the facts and it cannot be concluded that this would necessarily put the Objectors in a better or worse position than would be the position with abrogation under Mr Cottage's version of Article 34.

55. More fundamentally, importation of any part of the Compensation Code is not appropriate. There is no compulsory acquisition of land, as confirmed by the Applicant's solicitors (see OBJ-12-3, CC6, §32]) but rather a reliance on the Agreements, which are pre-existing rights, to implement the Scheme. Continued reliance on these rights is essential to any use of the railway, including the Scheme. That is entirely distinct from compulsory purchase of land, where the pre-existing rights are extinguished. Here, the rights remain and are still to be relied on. As Mr. Cottage explained, whilst the principle of equivalence should apply, the question needs to be asked: equivalent to what? Article 34(3) is not being applied to land acquisition but to an existing commercial agreement which provides for payment irrespective of other interventions, by public or private bodies. So there is no question of a "windfall"- there was no compensation payable for loss of rent by reason of the Beeching cuts and nor should there be compensation removed by reason of the current proposals. Article 34, as drafted, attempts to remove the principle of equivalence from the valuation of the loss, by effectively treating the abrogation as compulsory purchase, whereas it should be a straightforward exercise in capitalisation. The abrogation cannot, and should not be treated, as a compulsory purchase. Effectively, Article 34(3) involves rewriting these commercial agreements to suit NR and reduce payments under it. Whilst in isolation any savings to the public purse may be in the public interest as Mr Cottage recognised, it is not a proper approach to valuation and does not arise as a result of the Scheme but as a result of commercial agreements that were entered into some time ago. NR now seek to extract itself from parts of those agreements for convenience but not as a result of a need arising out of the Scheme.

56. The Wayleaves granted in respect of the Welbeck Estate are not subject to Article 34. Mr Holdroyd stated that these are in the same form as those before the Inquiry. The reason given by Mr. Holdroyd for not abrogating this agreement is that there have been no demands for rent from the Welbeck Estate in recent years – although that of course does not absolve NR of the requirement to pay rent, which is not dependent on there being a demand for it. In the event that there was a demand, and for that reason NR sought to abrogate the agreement, it could do so by applying for an order in its own right. There would be no question in those circumstances of any Scheme to be ignored, simply by reason of it being a separate Order. This sheds light on a significant feature of this proposal. The abrogation proposed in Article 34 is not

a function of the Scheme and the costs related to it do not form part of the Scheme costs; it could just as well be made independently of the draft Order, in which case there is no question of ignoring value related to the Scheme, as suggested by the Applicant here.

57. If Article 34 were to remain, the straightforward version suggested by Mr Cottage [OBJ-12-1, §3.32] should be preferred, which is the version which would result from the deletion of Article 34(3) and (4) (in relation to the latter this is now agreed [SAFI, §34]). This avoids the partial and unfair application of only a small part of the Code in a way which does not achieve equivalence.

Undertaking

58. If Article 34 is not included in the Order, and additionally during the period prior to final determination of the Order by the Secretary of State, Northumberland Estates and Lord Hastings hereby separately undertake not to seek injunctive relief or forfeiture or termination of the Agreements in the event of late or non-payment of rent. This undertaking is made to the Secretary of State and to Network Rail and its successors.

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