

Your reference EN010133

Our reference HENSM/ROGEJC/43283-4277

27 February 2024

National Infrastructure Planning
Temple Quay House
2 The Square
Bristol
BS1 6PN

Dear Sirs

DCO Scheme: Cottam Solar Project

Our client: Network Rail Infrastructure Limited (Registration Identification Number: 20036993)

Applicant: Cottam Solar Project Limited

Subject: Network Rail Infrastructure Limited's Response to the Request for Further Information

This Firm is instructed by Network Rail Infrastructure Limited (**NR**) in relation to the DCO Scheme and we write in response to the Request for Further Information dated 13 February 2024.

1. 3.1.2 Applicant/ Network Rail

The Applicant and Network Rail are requested to submit a single, jointly prepared set of PPs, identifying any areas where agreement cannot be reached and providing details of each party's position in respect of them together with any alternative drafting proposed. This should be provided no later than Deadline 5.

NR Response:

The application for the DCO Scheme includes provisions which, if granted, will authorise the Applicant to carry out works in and in close proximity to the operational railway. Network Rail must therefore ensure that if the Application is granted (if the Examining Authority is minded to do so) it is done so subject to the Protective Provisions which provide the appropriate protection for the safe and efficient operation of the railway.

The form of the Protective Provisions that have been submitted by the Applicant (and those that are currently contained in the draft Development Consent Order) for the benefit of Railway Interests substantially reflect Network Rail's standard Protective Provisions, however they omit to include the following provisions:

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The undertaker must not exercise the powers conferred by—

- (a) article 3 (development consent granted by the Order);*
- (b) article 5 (maintenance of authorised development);*
- (c) article 16 (discharge of water);*
- (d) article 19 (authority to survey and investigate the land);*
- (e) article 20 (compulsory acquisition of land);*
- (f) article 22 (compulsory acquisition of rights);*
- (g) article 25 (acquisition of subsoil only);*
- (h) article 26 (power to override easements and other rights);*
- (i) article 29 (temporary use of land for carrying out the authorised development);*
- (j) article 30 (temporary use of land for maintaining the authorised development);*
- (k) article 31 (statutory undertakers);*
- (l) article 23 (private rights of way);*
- (m) article 38 (felling or lopping of trees or shrubs);*
- (n) article 39 (trees subject to tree preservation orders);*
- (o) the powers conferred by section 11(3) (power of entry) of the 1965 Act;*
- (p) the powers conferred by section 203 (power to override easements and rights) of the Housing and Planning Act 2016;*
- (q) the powers conferred by section 172 (right to enter and survey land) of the Housing and Planning Act 2016;*
- (r) any powers under in respect of the temporary possession of land under the Neighbourhood Planning Act 2017;*

in respect of any railway property unless the exercise of such powers is with the consent of Network Rail.

(2) The undertaker must not in the exercise of the powers conferred by this Order prevent pedestrian or vehicular access to any railway property, unless preventing such access is with the consent of Network Rail.

(3) The undertaker must not exercise the powers conferred by sections 271 or 272 of the 1990 Act, article 31 (statutory undertakers), article 26 (power to override easements and other rights or private rights of way) or article 23 private rights, in relation to any right of access of Network Rail to railway property, but such right of access may be diverted with the consent of Network Rail.

(4) The undertaker must not under the powers of this Order acquire or use or acquire new rights over, or seek to impose any restrictive covenants over, any railway property, or extinguish any existing rights of Network Rail in respect of any third party property, except with the consent of Network Rail.

(5) The undertaker must not under the powers of this Order do anything which would result in railway property being incapable of being used or maintained or which would affect the safe running of trains on the railway.

(6) Where Network Rail is asked to give its consent pursuant to this paragraph, such consent must not be unreasonably withheld but may be given subject to reasonable conditions, but it shall never be unreasonable to withhold consent for reasons of operational or railway safety (such matters to be in Network Rail's absolute discretion).

(7) The undertaker must enter into an asset protection agreement prior to the carrying out of any specified work.

NR is unable to agree to the omission of this provision from the Protective Provisions on the basis that NR cannot permit the exercise of powers of compulsory purchase (of rights (both permanently and temporarily)) over its land without NR's prior consent being obtained.

More specifically, the Applicant proposes to compulsorily acquire rights over the railway both permanently and temporarily and if NR has no ability to require its prior consent to such acquisition, it would give rise to a significant, unacceptable risk that the Applicant could compulsorily acquire rights over railway land which would not be subject to the conditions, limitations and restrictions typically required by NR (including as required through NR's business and technical clearance process) to facilitate the safe and efficient operation of the railway. This risk could lead to a failure by NR in its capacity as a statutory undertaker to comply with its Network Licence (further details of which are set out below).

Network Rail are unable to agree to the omission of these provisions from the Order as to do so would not only be at the detriment of a safe and efficient railway, but it may put Network Rail in breach of the Network Licence that has been granted to Network Rail by the Office of Rail and Road (ORR). Under this Licence, Network Rail are obliged to ensure compliance with a wide number of standards imposed by the Rail Safety and Standards Board that pertain to maintaining the safe and efficient railway. In order to regulate its ability to comply with such standards, Network Rail must retain stringent restrictions, controls and procedures over any interfaces with the railway by third parties, including by reason of persons exercising rights on, over, or under the railway.

Accordingly, where a right is compulsorily acquired over railway land, such right is created outside of NR's control and may not be subject to the necessary restrictions and conditions that NR would reasonably regard as sufficient so as to enable it to comply with its Network Licence. For example, NR may require that rights granted to the Applicant are subject to reservations allowing NR to interrupt the exercise of such right in certain circumstances (such as enabling NR to deal with emergencies on the railway or carry out necessary works). There is a risk of reservations such as this not being imposed where a right over railway land is compulsorily acquired and as a result, NR's control over its ability to appropriately manage the safety of the railway could be compromised. The consequences of which could be catastrophic and crucially, this could lead to a failure by NR to comply with its Network Licence which is not a position which can be accepted by NR, nor would it be acceptable to the ORR as NR's regulator. Network Rail is of course willing to engage with the Applicant to agree the terms of the rights sought and is under a duty to act reasonably in doing so. It cannot however relinquish this degree of control over rights being exercised on the railway where the consequences of doing so could be significantly adverse. Network Rail is in discussions with the Applicant to agree the grant of the necessary rights through private agreement, but these negotiations are still in the early stages and so the relevant agreements are not yet in place.

A restriction on the compulsory acquisition of rights over railway land is a widely accepted and longstanding principle and has been accepted by the Examining Authority and Secretary of State on numerous DCOs, including but not limited to: the A47/A11 Thicket Junction DCO, Thurrock Flexible Generation Plant DCO, Yorkshire and Humber CCS Cross Country Pipeline DCO, Sunnica Energy Farm DCO, Longfield Solar Farm DCO and South Humber Bank Energy Centre DCO. The purpose of this restriction is not to impede the implementation of the Applicant's scheme nor hold the Applicant to ransom (NR is required by the Protective Provisions to act reasonably), but is to secure the necessary protection to NR as a statutory undertaker over its assets in order that it can properly regulate the rights to be exercised over its railway network, which is an appropriate function and purpose of protective provisions. It is inconceivable that the Applicant should have the ability to exercise powers to acquire rights over operational railway land without NR's prior consent having been provided as to how those rights can be exercised.

S.127 and S.138 of the Planning Act 2008

In addition to the points set out above, without the inclusion of these provisions of Network Rail's standard protective provisions, NR must also maintain its objection to the DCO on the basis that the proposed compulsory acquisition of rights over railway property does not satisfy the test in section 127 Planning Act 2008 in that:

- (a) the rights sought cannot be acquired without serious detriment to the carrying on of the undertaking;
- and
- (b) such detriment cannot be made good by Network Rail by use of other railway property.

The reason for which is that:

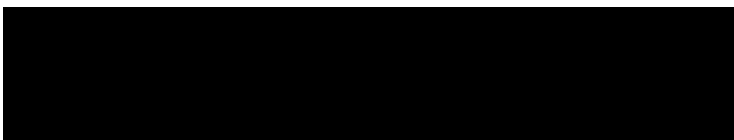
- 1) all of the plots (over which rights are proposed to be compulsorily acquired and temporary possession is proposed to be taken) comprise an operational railway line;
- 2) unless NR has the ability to require its prior consent and/or require the Applicant to enter into an asset protection agreement prior to the acquisition of such rights/temporary possession in order to ensure any such rights can be carried out in harmony with the operational railway, the proposed rights/temporary use have the capacity to cause serious detriment to the carrying on of NR's undertaking as it could interfere with the operational railway line and the safe running of trains; and
- 3) as this is an operational railway line such detriment cannot be made good as the line cannot be relocated to other land in the possession of NR (and not least to say requiring NR to relocate its operational railway to facilitate such rights would be entirely disproportionate both in cost and nature).

Accordingly, in order for such proposed compulsory acquisition and temporary possession of the plots to pass the test in section 127 Planning Act 2008, the provisions above requiring NR's prior consent to be sought must be imposed before powers authorising the compulsory acquisition of such rights are exercised. Network Rail's position is that in the absence of such a Protective Provision, the test in section 127 is not satisfied.

There are also a number of plots whereby the Applicant proposes to extinguish existing rights belonging to NR and NR submits that the test in section 138 Planning Act 2008 is not satisfied on the same grounds as set out above.

Should you have any queries, please don't hesitate to contact us on the details below.

Yours faithfully



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Direct line

Email



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