M25 junction 10/A3 Wisley interchange TR010030

9.148 Applicant's comments to Park Barn Farm's Submission

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1. Introduction

1.1.1 This document sets out Highways England's comments to the deadline 11 submission made on behalf of Mr Ronald Alderson of Park Barn Farm [REP11-031].

2. Comments on written summary of objector's oral case: CAH 1 session 2, part 3 (17 June 2020)

2.1.1 Highways England's case for the acquisition of land at Park Barn Farm as replacement land is well-known and it is not necessary for it to comment in detail on the affected party's case other than to note that it is not accepted by Highways England that it would not be lawful for the Secretary of State to grant development consent for the replacement land required for the Scheme [para 8 on page 2 of REP11-031] nor that the compulsory acquisition of some of the land at Park Barn Farm would constitute a wholly unjustified interference with the objector's human rights [para 15 on page 3 of REP11-031].

2.1.2 The following specific comments on the affected party's summary of oral case are made in order to assist the examining authority.

Land falling within the curtilage of Park Barn Farm

2.1.3 At paragraph 4 of REP11-031 on page 2, the affected party asserts that the "*the Order Land ('OL') forms part of the domestic curtilage of PBF*.' It is not accepted that all of the land comprised in parcels PBF1, PBF2 and PBF3 comprises part of the domestic curtilage of Park Barn Farm. The affected party describes areas of PBF2 and PBF3 as 'fields' and refers to PBF1 as being "less intimately associated with the curtilage..." This is an issue in dispute between the parties in the related blight notice proceedings currently before the Lands Chamber of the Upper Tribunal and due to be heard in December 2020.

Special human rights considerations

2.1.4 As to the comments at paragraph 18 of REP11-031 on page 4, Highways England does not accept that the compulsory acquisition of land at Park Barn Farm requires special human rights justification beyond the usual justification which it must demonstrate or that the acquisition of the land will affect 'the ordinary use and enjoyment' of the three properties within Park Barn Farm.

2.1.5 The effect of the proposed acquisition of land on the amenity and convenience of the retained land is another matter in dispute between the parties in the related blight notice proceedings. In the event that compulsory acquisition powers are conferred, the affected party will retain approximately 50 acres of land within his wider land holding, including the 3 dwellings and means of access to them and will be entitled to compensation under the compensation code for the acquisition of the land from his holding which is required for the Scheme.

Use of target ratios and the correct interpretation of the "blended" ratios

2.1.6 As to the affected party's comments at paragraph 21 of REP11-031 on page 4, Highways England does not accept that it has been "closely wedded" to target ratios which have been derived from the scheme for the original construction of

the M25. The replacement land ratios used for the Scheme are lower than those used for the original M25 scheme as is explained at section 7.3 of REP11-011.

2.1.7 Nor does Highways England accept that it has exceeded the target ratios 'in the final reckoning' by 'a distance' as is claimed. Highways England understands this reference to be to the "blended" ratios identified in paragraph 6.4.6 of REP8-015 and at 7.3.4 of REP11-011. As explained at 7.3.5 of REP11-011, the ExA should be very wary about placing reliance on the blended ratios as they do not provide a complete picture of the effect of the acquisition of permanent rights over some of the special category land which will impose a burden on it and which accordingly justifies the provision of replacement land.

2.1.8 That is because the "blended" ratios referred to only compare the special category land subject to permanent acquisition with the *overall* amount of replacement land provided (including that for permanent acquisition of special category land and permanent acquisition of rights). Once the area of land which will be subject to the acquisition of permanent rights which impose a burden on the land is factored in, it becomes apparent that the "blended" ratios do not provide a complete picture of the effect of the Scheme on special category land as a whole.

2.1.9 Contrary to the affected party's assertion, Highways England's position, which is compliant with section 131 and 132 Planning Act 2008, does not amount to a "serious error of approach" when the replacement land ratios which have been applied are considered in their proper context.

2.1.10 For the same reasons Highways England does not accept the statement made at paragraph 7 of REP11-031 on page 6 that *'the ratio is actually much greater now than it was for the historic road schemes when land under the second definition of RL is removed from the equation. Land affected by order rights did not form any component of the calculation in relation to the 1970's and 1980's road schemes. And so it must be recognised that the current level of RL provision is not even a like-for-like comparison with those schemes*.' The correct position is explained at section 7 of REP11-011. There was no common or open space land subject to permanent rights acquisition in the original M25 scheme. Accordingly, the current Scheme is distinguished on that basis. The ratio of replacement land is not 'much greater' than those applied to the original M25 scheme as explained above.

3. Comments on London Borough of Greenwich and Others v SoS for the Environment and SoS for Transport [1993] Env. L.R 344

3.1.1 Highways England's comments on the approach which the ExA and Secretary of State should take to the judgment in *Greenwich* is set out at section 10 of its comments at REP11-011.

3.1.2 Highways England has no further comments to make on the matter other than to reject the assertion made by the affected party at paragraph 24 of REP11-031 at page 54 that its approach amounts to *Wednesbury* irrationality. To the contrary, it would not be irrational for the Secretary of State in this case to conclude that the provision of replacement land at the ratios sought by Highways England is reasonable.

4. Comments on Application of the statutory test for the compulsory acquisition of replacement land under the PA 2008: the "bottom-up" approach

4.1.1 Highways England does not dispute that section 122(3) Planning Act 2008 requires a compelling case in the public interest to be demonstrated in order for compulsory acquisition powers to be conferred in an order granting development consent. Its position is that a compelling case in the public interest has been made out for the acquisition of PBF1, BF2 and PBF3.

4.1.2 Whilst the "bottom-up" approach postulated by the affected party provides one way of applying the statutory test in practice, as the affected party concedes it does not need to be applied in "mechanistic fashion".

4.1.3 The affected party's proposed "bottom-up" approach acknowledges that the critical question of whether replacement land provides equality of advantage is ultimately a question of judgement for the decision-maker. In this case, the consistent evidence of Highways England, the local authorities and Natural England is that the current replacement land proposal is reasonable and that a reduction in the extent of replacement land would not be welcomed.

4.1.4 The affected party suggests that the correct application of the test in this case would be to conclude that a replacement ratio of about 1:1 would be appropriate (at paragraph 24 of REP11-031 on page 54 the affected party state '*there is nothing within the evidence which warrants a RL ratio in excess of 1:1*') and that the relevant ratio should be applied in practice to exclude all of the land at Park Barn Farm from the order limits. Highways England rejects both contentions.

4.1.5 Were a reduction in replacement land provision recommended by the ExA or made by the Secretary of State, the consistent view of Highways England and the local authorities is that the land at Park Barn Farm should be retained in preference to the other replacement land locations at Chatley Farm and Hatchford End [see e.g. REP10-012 at page 2-3].

4.1.6 In assessing whether replacement land (whether on the current basis or some reduced basis) would be equally advantageous as is required under section 131 Planning Act 2008, it is important to emphasise that the ExA and Secretary of State have before the consistent views of Highways England, the local authorities and Natural England that (a) in the first instance the replacement land provision should not be reduced at all and that (b) if it is to be reduced, the land at Park Barn Farm should be retained. Highways England submits that the ExA should place weight on this consistent evidence.

4.1.7 On the other hand, the individual view of a single affected landowner is that the replacement land ratio applied by Highways England is too high and that his land should be excluded from the order limits following the application of a reduced replacement land ratio. On the information available to the ExA and Secretary of State, it would not be appropriate to omit the land at Park Barn Farm from the order limits given the consistent evidence that its acquisition it will serve a valuable public amenity function that would not be performed to the same degree by the other replacement land parcels.

4.1.8 In relation to the extent of replacement land to be provided in respect of the acquisition of permanent rights over land, Highways England accepts that the statutory definition in section 132(12) Planning Act 2008 allows for the possibility in appropriate cases that replacement land may be provided at a lower ratio than 1:1 (in contrast to the position under section 131 where special category land is acquired permanently).

4.1.9 However, Highways England does not accept that this is a case where a replacement land ratio lower than 1:1 in respect of special category land subject to the acquisition of permanent rights which will burden the land would be appropriate. This is not a case of the kind contemplated by the affected party in paragraph 13a. of REP11-031 at page 58 where the burden imposed by the order rights would be 'negligible' or 'minor'.

4.1.10 Nor in relation to the argument made at paragraph 13b would it be appropriate not to provide any replacement land whatsoever for the taking of order rights which will burden the land on the basis that the replacement land provided in exchange for land permanently acquired would itself be sufficient to compensate additionally for the burdens imposed by the order rights. Such an approach would amount to an unacceptable "double-counting" of replacement land and would be likely to lead to objections from local authorities and other consultees such as Natural England and the Open Spaces Society.

4.1.11 In summary, the application of the so-called "bottom-up" approach set out by the affected party in this case should not lead the ExA or Secretary of State to conclude that a replacement land ratio close to 1:1 would be appropriate or that in applying such a ratio the affected party's land at Park Barn Farm should be excluded from the order limits.

4.1.12 As the affected party accepts, ultimately this is a matter of judgement for the decision-maker and there is insufficient evidence before the ExA that a reduction in the area of replacement land of the kind proposed by the affected party would be 'no less advantageous' as is required by sections 131 Planning Act 2008.

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