

Our reference ELSEM/BERRRA/43283-2271

6 July 2018

The Planning Inspectorate
National Infrastructure Planning

BY EMAIL

Dear Sir

**Tilbury2 ExA Hearing on the draft Development Consent Order - Agenda, Item 4: Network Rail
Deadline 6**

Introduction

1. In response to the Question addressed by the Panel to Network Rail at Agenda Item 4, we refer to Network Rail's Written Submission in relation to the Issue Specific Hearing on the draft Development Consent Order (**Order**) dated 27 June 2018 and published by the ExA on the 28 June (**Representation by Network Rail**). A copy of the Representation by Network Rail is enclosed.
2. We have listened to the recording of the Issue Specific Hearing into the Order held on 28 June 2018 and are grateful to the ExA for accepting and publishing the Representation by Network Rail.
3. In respect of the questions raised at the hearing, Network Rail responds as follows.

Question 3.8.28 Schedule 10: Protective Provisions

4. We note Mr Owen's comments in relation to the outstanding matters between the Applicant and Network Rail. However Mr Owen appears to have misunderstood that, in addition to the matter of the application of the power in Article 42 (appropriation) to Network Rail property, the parties have not reached agreement as to the application of Article 41.
5. In summary, therefore, there are two outstanding matters of concern to Network Rail with regard to the Protective Provisions for Network Rail's benefit.
6. Network Rail requests that the following powers be included in the list at Paragraph 58 of the Protective Provisions so that Network Rail's consent is required to the operation of those powers in so far as its property is affected:
 - a. Article 42 (appropriation); and
 - b. Article 41 (operation and maintenance).

An explanation of Network Rail's concerns in respect of both powers follows.

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Addleshaw Goddard LLP, Milton Gate, 60 Chiswell Street, London EC1Y 4AG
Tel +44 (0)20 7606 8855 Fax +44 (0)20 7606 4390 DX 47 London
www.addleshawgoddard.com

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Article 42 (appropriation)

7. Network Rail has no objection to the inclusion of this power in the Order and appreciates Mr Owen's comments at the hearing with regard to the use of this power by the Applicant in its operation of the port.
8. However, as explained in the Representation by Network Rail, Network Rail cannot be in a position where its property could be appropriated for an alternative use by the Applicant without Network Rail's consent and without the necessary internal clearance processes having been followed and the express or deemed approval of the Office of Rail and Road being obtained to ensure that Network Rail is not in breach of its licence conditions.
9. With regard to Mr Owen's comments at the hearing in respect of Question 3.8.28, Mr Owen confirmed that the power of appropriation has "nothing to do with Network Rail interests in our view". Therefore, if the power conveyed by Article 42 is not intended to affect Network Rail property, we fail to understand why the Applicant seeks a power to appropriate Network Rail property and diminish Network Rail's beneficial ownership of that land without Network Rail's consent.
10. We therefore request that Article 42 be included in the list of powers at Paragraph 58 of the Protective Provisions that require the consent of Network Rail.

Article 41 (operation and maintenance)

11. For the reasons given in the Representation by Network Rail, until an agreement between the Applicant and Network Rail regulates the manner in which any authorised works which are carried out, operated or maintained in, on under or within a specified distance of railway property, Network Rail requires that its consent is obtained to regulate the manner in which the authorised works are operated and maintained insofar as such activities affect railway property.
12. We therefore request that Article 41 be included in the list of powers at Paragraph 58 of the Protective Provisions which may not be exercised without Network Rail's consent.
13. If Article 41 is not included in the list of powers that may not be exercised without Network Rail's consent, the Network Rail Protective Provisions will not regulate the manner in which the operation and maintenance of the authorised development is carried out in relation to Network Rail. This is because the Network Rail Protective Provisions apply only to "specified work" which is defined as *any of the authorised development as is situated upon, across, under, over or within 15 metres of, or may in any way adversely affect, railway property*. The authorised development is defined in the Order as the development described in Schedule 1 and this definition relates to the construction works but not the operation and maintenance of the development.
14. Accordingly, if Article 41 is not included in the list of powers at paragraph 58 of the Network Rail Protective Provisions, Network Rail requests that the definition of "specified work" in the Network Rail Protective Provisions is amended so that the words "and its operation and maintenance" are added after the words "authorised development".
15. Network Rail notes from the recording of the hearing that there was discussion regarding the conflation of Article 6 and Article 41 of the Order. If this were to occur, there would be implications for Network Rail and further adjustments will have to be made to the Network Rail Protective Provisions for those provisions to operate as intended to protect Network Rail's interests.

Planning Permission and Statutory Authority

16. Network Rail notes from the recording of the hearing that there was some discussion about the need, as a matter of principle, for the inclusion of Article 41 in the Order. A view was expressed at the hearing that Article 41, which provides statutory authority for the operation and maintenance of the authorised works, may not be needed when planning permission is provided for works either expressly or by virtue of permitted development rights.

17. There is a significant difference between planning permission and statutory authority. Planning permission provides consent for built development but does not provide statutory authority for the operation of that development that affords the undertaker the immunity from nuisance actions which is essential to enable an infrastructure project to be operated. Accordingly, Network Rail submits that, as a general principle, operation and maintenance powers and planning permission must both be granted or, where permitted development rights are available, relied on.
18. This principle is important to Network Rail when it is the promoter of new rail infrastructure and it would not wish to see a precedent established that excluded statutory authority for the operation and maintenance of works from a development consent order.

Yours faithfully

Addleshaw Goddard LLP

Direct line +44 (0)20 7160 3246
Email marnix.elsenaar@addleshawgoddard.com