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By email only

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Our Ref: TWA 8/1/2

22 June 2012

Dear Ms Gorlov,

**PLANNING ACT 2008
APPLICATION FOR THE PROPOSED NETWORK RAIL (IPSWICH CHORD) ORDER**

As you are probably aware, the Planning Inspectorate submitted the Examining Authority's Report of Findings and Conclusions to the Secretary of State for Transport on 12 June. Under section 107 of the Planning Act 2008 the Secretary of State is required to issue a determination of the application within three months. This team will be handling the determination on the Secretary of State's behalf (as with all DCO determinations for the Secretary of State for Transport).

We have been considering the report and the draft development consent order (DCO) which Network Rail is seeking and have some questions on the DCO on which we would be grateful for your comments. This letter is, of course, sent without prejudice to our consideration of the report and the Secretary of State's eventual decision on the application and should not be regarded as an indication of what that decision might be.

Article 4(2)

We note the proposal to disapply section 6 of the Party Wall etc. Act 1996 in relation to excavations or the erection of buildings or structures for the purposes of this scheme. You will wish to be aware that in the context of various applications for Orders under the Transport and Works Act 1992 (TWA) to authorise the construction of railways such a provision has not previously been accepted. This is because in none of those cases (which include the West Coast Main Line upgrade and Thameslink 2000 projects) were we persuaded that there was a compelling case for disapplying provisions in a public general Act designed to protect the public interest. In particular, arguments that the provisions of the 1996 Act might cause inconvenience or delay for developers have not been considered by this Department or DCLG – which is responsible for policy under the 1996 Act - to present sufficient justification for disapplying these provisions.

We are interested to know the rationale for this provision with particular reference to the reasons why it is considered necessary in relation to this scheme and your arguments in support of the proposal to disapply the 1996 Act.

Article 18

We note that Network Rail is seeking powers to impose restrictive covenants over the Order land (as defined). The Explanatory Memorandum (EM) submitted with the DCO application refers to precedents in a number of TWA Orders (including one authorising an extension to the Docklands Light Railway). The EM indicates that this power may be used to impose restrictions for the protection of the railway, for the purposes of environmental mitigation, and more generally to reduce the area of outright acquisition.

I should explain that in the context of the DLR and certain other rail schemes authorised by TWA Order, the principle of a power to impose restrictive covenants has been accepted only in relation to the situation where a railway was to be constructed on a viaduct or in a tunnel. This has been on the basis that in such circumstances it was considered likely to be a better option for both the landowner and the promoter of the scheme for suitable restrictive covenants to be imposed on land situated above or beneath the railway to secure its safe operation, rather than outright acquisition of that land.

We have not otherwise been persuaded of the case for giving a much wider-ranging power to impose restrictive covenants on any land which would otherwise be subject to compulsory acquisition under an Order. This is because we do not think it necessarily follows that this will always be a more acceptable and appropriate option than outright acquisition of the land in question. We would wish to consider very carefully the implications (including for human rights) of setting a potentially far-reaching precedent of this nature.

We are mindful that, as the DCO has been drafted, a landowner would not have a choice between retaining their land subject to a restrictive covenant, or not owning it at all. That choice would rest with Network Rail. If, however, the power to impose restrictive covenants were not included in the DCO it would still be possible for Network Rail and a relevant landowner to reach a voluntary agreement for the creation of restrictive covenants, as an alternative to the land being purchased outright.

For the purposes of our consideration of this point of principle, it would be helpful if you could explain why a power to impose restrictive covenants is considered necessary in the circumstances of this scheme, for example, by reference to the particular features of the proposed works. Please could you also let us know the sorts of restrictions which Network Rail would want to impose on land owners by way of restrictive covenants, and whether the notices served on landowners of the acceptance of the DCO application referred to the power to impose restrictive covenants.

Powers of entry

You may be aware that the Home Office has introduced a requirement for a gateway review of any proposal to create new powers of entry. Further details are at: <http://www.homeoffice.gov.uk/crime/powers-entry/>. The Home Office has to date taken

the line that the gateway arrangements apply to all forms of secondary legislation, including Orders authorising infrastructure projects. We have therefore been asking applicants for TWA Orders to complete the relevant gateway proformas in relation to proposed powers of entry included in their draft Orders. As we have had no indication that the Home Office is likely to exempt DCOs from this process, please could you complete and send to **us** the template form linked at the foot of the above web page, which we will then submit it to the Home Office gateway team. The articles in the draft DCO which we consider are relevant are: article 3(1) in relation to the incorporation of section 83 of the Railways Clauses Consolidation Act 1845; and articles 14, 15 and 23.

Timetable

In view of the statutory requirement to issue a determination within three months of receiving the Examining Authority's report, I must request your substantive response to this letter **within two weeks,** please. We will then consider your response in coming to a decision. Please be advised that given the tight statutory timescale to which we are working we do not anticipate having further exchanges on these matters. It is therefore important that you provide as full an answer to these questions as possible.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Robert Fox', with a small mark to the right.

Robert Fox