THE PROPOSED NETWORK RAIL (SUFFOLK LEVEL CROSSING REDUCTION) ORDER

The request for deemed planning permission

NOTE

1. As part of its application for the proposed Order, Network Rail has made a request, pursuant to rule 10(6) of the Transport and Works (Applications and Objections Procedure) (England) Regulations 2006 for deemed planning permission pursuant to s.90(2A) of the Town and Country Planning Act 1990.

2. A copy of the request can be found at NR/10.

3. The request seeks deemed planning permission for the works which would be authorised by the Order, if confirmed, if and to the extent that planning permission is in fact required for those works.

4. The Scheduled Works are set out in Schedule 1 to the Order. Draft Article 5(3) sets out other works which may be carried out by Network Rail within Order limits, being such works as are required (a) to provide the public rights of way specified in column (5) of Part 1 of Schedule 2; (b) in connection with the extinguishment of the rights of way specified in column (4) in Parts 1 and 2 of that Schedule; and (c) in connection with the redesignation of the highway specified in column (1) of Schedule 3 to the extent specified in that column.

5. The request for deemed planning permission does not fall to be determined in accordance with section 38(6) of the Planning and Compulsory Purchase Act 2004: namely, that the determination must be made in accordance with the development plan documents for the area unless material considerations indicate otherwise.

6. Section 90 TCPA 1990 provides, so far as is material, as follows:

> "(1) Where the authorisation of a government department is required by virtue of an enactment in respect of development to be carried out by a local authority or National Park authority , or by statutory undertakers who are not a local authority or National Park authority, that department may, on granting that authorisation, direct that planning permission for that development shall be deemed to be granted, subject to such conditions (if any) as may be specified in the direction.
>
> …

(2A) On making an order under section 1 or 3 of the Transport and Works Act 1992 which includes provision for development, the Secretary of State may direct that planning permission for that development shall be deemed to be granted, subject to such conditions (if any) as may be specified in the direction.

…

(4) For the purposes of this section development is authorised by a government department if—

(a) any consent, authority or approval to or for the development is granted by the department in pursuance of an enactment;

(b) a compulsory purchase order is confirmed by the department authorising the purchase of land for the purpose of the development;

(c) consent is granted by the department to the appropriation of land for the purpose of the development or the acquisition of land by agreement for that purpose;

(d) authority is given by the department—

(i) for the borrowing of money for the purpose of the development, or

(ii) for the application for that purpose of any money not otherwise so applicable; or

(e) any undertaking is given by the department to pay a grant in respect of the development in accordance with an enactment authorising the payment of such grants;

and references in this section to the authorisation of a government department shall be construed accordingly.

…"

7. In *R (on the application of Samuel Smith Old Brewery (Tadcaster)) v Secretary of State for Energy & Climate Change* [2012] EWHC 46 (Admin), the Court (Edwards-Stuart) rejected the Claimant's contention that in deciding whether to give a direction under s.90(2) TCPA 1990 that planning permission be deemed to have been granted, the Secretary of State was under a duty to determine the request in accordance with s.38(6) PCPA 2004. The material passages of the judgment are set out below for ease of reference[1]:

"*75 Mr Village[2] submitted that the giving of a direction under section 90(2) of the 1990 Act is a determination under the planning acts. I do not agree. On the contrary, as a matter of construction I consider that it is a direction that such a determination is not required. It is worth noting that the SoS does not have to give such a direction: it would be possible to make no such direction and let the planning application process take its own separate course, although it has to be said that no-one in court appeared to know of a case in which this had been done.*

76 NG[3] and the SoS point out that the Electricity Act 1989 contains its own statutory code as to the matters that the SoS is required to consider when deciding whether or not to grant a consent under section 37 of the Electricity Act 1989 . That code includes the "planning" and "environmental" considerations listed in paragraph 1 of Schedule 9 to the Electricity

[1] A full copy of the judgment will be included in the Legal Bundle

[2] Peter Village QC appeared for the Claimant, referred to in the judgment as 'SSOTB'

[3] National Grid, the Interested Party

Act 1989 . Miss Natalie Lieven QC, who appeared for the SoS, also pointed out that the justification for excluding section 90(2) deemed consents from section 38(6) of the 2004 Act is that applications for overhead lines are generally part of regional or national networks, so that one would not expect the SoS to have the same statutory duty as when determining an application for another form of development under section 77 of the 1990 Act.

77 Mr Village relied on the wording of section 90(3) of the 1990 Act, namely that: "The provisions of this Act … shall apply in relation to any planning permission deemed to be granted by virtue of a direction under this section as if it had been granted by the Secretary of State on an application referred to him under *section 77". This brought the response from Miss Lieven that the provisions of the Act only apply to the deemed planning permission itself: they do not relate to the process by which that planning permission comes about. She submitted that the effect of section 90(3) is to ensure that where there is a deemed consent under section 90 other relevant provisions of the 1990 Act will then apply, for example, section 257 of the 1990 Act (which relates to the stopping up or diverting of footpaths and bridleways).*

78 Mr Mark Lowe QC, who appeared for NG, made a similar submission. He submitted that, in so far as there was any determination, it was a determination under the Electricity Act 1989 and not under the planning Acts. Further, he submitted that section 90(3) of the 1990 Act applied once a direction has been made and to the resulting deemed planning permission. It did not apply to the SoS's power to make the direction.

79 In my view the first difficulty with SSOBT's submission is the one that I have already mentioned, namely that the effect of the deeming provision is to dispense with the need for any determination of the planning permission, so that limb (3) of SSOBT's process never happens. In addition, I agree with the submissions of NG and the SoS — namely that section 90(3) applies to the deemed planning permission, not to the process that gave rise to it — which, to my mind, are unanswerable.

80 The result of this conclusion is that it is unnecessary to consider the extent to which the SoS may or may not have complied with section 38(6) of the 2004 Act because there was no duty on him to do so. Further, it follows also that the SoS was under no duty to resolve the issue between the parties as to whether or not such a duty existed."

8. Paragraph 90.03 of the Encyclopaedia of Planning Law and Practice states that:

> *"It would appear that this reasoning would also apply such that s.38(6) of the 2004 Act does not apply to determinations to make a Transport and Works Act Order which would also involve the making of a direction granting planning permission as a result of s.90."*

9. It is Network Rail's submission that there would be no proper basis for adopting a different approach where the request for deemed planning permission is made under s.90(2A) TCPA 1990.

10. Network Rail acknowledges that para 1.28 of the DfT 'Guide to TWA Procedures', the guidance provides that "*In determining an application for a TWA order to authorise works, and any related application for deemed planning permission, the Secretary of State will have*

regard to, amongst other things, relevant national, regional and local planning policies….In line with the plan led system for determining planning applications, projects that conflict with relevant policies in the development plan are unlikely to be authorised, unless material considerations indicate otherwise".

11. Network Rail would stress, however, that this Guidance pre-dates the decision in *Samuel Smith Old Brewery (Tadcaster)* (the guidance was published in June 2006) and has not been updated following that decision, and that to the extent it remains valid as guidance as to how the Secretary of State will approach decision making, it cannot be equated to the statutory test contained in s.38(6) PCPA 2004 which the Court has confirmed does not apply to requests for deemed planning permission under s.90 TCPA 1990.

12. Network Rail has, however, considered the extent to which its proposals comply with relevant national and local policies. Its position, as set out in the evidence of Mr Brunnen, Dr Algaard and Ms Tilbrook, is that the proposals do comply with relevant policy, but this will be addressed in more detail in due course.

JACQUELINE LEAN
26th February 2018