TRANSPORT AND WORKS ACT 1992: APPLICATION FOR THE PROPOSED NETWORK RAIL (EAST WEST RAIL BICESTER TO BEDFORD IMPROVEMENTS) ORDER

LAND OFF GREAT HORWOOD ROAD, WINSLOW, BUCKINGHAMSHIRE PLOTS 0670, 0677, 0681

CLOSING STATEMENT
(Obj 228-231; Spooner, Fox, Gladman)

INTRODUCTION

Purpose

1. The purpose of these objections is to invite you to recommend that the order scheme should be modified. There is one outstanding objection for which modification is sought: deletion of ECS B10, namely parcel 0677.

Principle

2. These objections are not objections to the principle or route of the scheme. They are in respect of land proposed to be taken in association with the scheme. The objections are therefore not concerned with relevant tests for the grant of planning permission under the deemed grant in the draft order, but rather with CPO.

Powers

3. The Secretary of State has power to make such a modification [s13 TWA]:

> **Making or refusal of orders under section 1 or 3**
> (1)Where an application has been made to the Secretary of State under section 6 above, or he proposes to make an order by virtue of section 7 above, and (in either

case) the requirements of the preceding provisions of this Act in relation to any objections have been satisfied, he shall determine—

(a) to make an order under section 1 or 3 above which gives effect to the proposals concerned without modifications, or

(b) to make an order which gives effect to those proposals with modifications, or

(c) not to make an order.

(2)Where an application has been made to the Secretary of State under section 6 above and he considers that any of the objects of the order applied for could be achieved by other means, he may on that ground determine not to make the order (but this subsection is without prejudice to subsection (3) below).

(3)The power of the Secretary of State to make a determination under subsection (1) above includes power to make a determination in respect of some only of the proposals concerned, while making a separate determination in respect of, or deferring consideration of, others (and accordingly the power to make an order under section 1 or 3 above includes power to make two or more orders on the same application).

(4)Where the Secretary of State proposes to make an order which gives effect to the proposals concerned with modifications which will in his opinion make a substantial change in the proposals—

(a)he shall notify any person who appears to him to be likely to be affected by the modifications,

(b)he shall give that person an opportunity of making representations to him about the modifications within such period as he may specify in the notice, and

(c)he shall before making the order consider any representations duly made to him.

(5)An order under section 1 or 3 above shall come into operation on the date on which the notice required by subsection (1)(b) of section 14 below is first published, or on such later date, if any, as may be specified in the order.

4. The particularly relevant power is under s13(1)(b).

Policy

5. The law and the Government's policy in respect of the interests of persons in their land set a high threshold to interfere with a person's property. It follows that if land is to be taken away from a person, against their wishes, that the justification to do so must be substantial and in the public interest.

6. In contrast to disputed planning issues where an applicant wishes to develop their own land, the issues here arise from an application to develop somebody else's land, against their wishes.

7. The following principles are common ground:

   (a) A compulsory purchase order should only be made where there is a compelling case in the public interest;

   (b) compulsory purchase is matter of last resort and so the acquiring authority will be required to show that it has taken reasonable steps to acquire the land by agreement;

   (c) it is for the acquiring authority to demonstrate for each parcel of land in the draft order, and in respect of each landowner affected, that the purpose of acquisition of the particular land justifies the interference with the landowner's rights, and;

   (d) in considering the justification advanced by the acquiring authority, the Minister will consider any alternative land which is available to meet the needs of the scheme which does not require the use of compulsory acquisition.

8. All four of the policy principles above are in play in respect of these objections.

ES

9. I also draw attention to the requirement that an Environmental Statement is to comply with Rule 11 of the Transport and Works (Applications and Objections Procedure) (England and Wales) Rules 2006, particularly as to sufficiency of information to assess likely significant effects. Environmental Statement is defined in Rule 4:

> "environmental statement" means a statement that contains—
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> (a) the information referred to in rule 11(1) ; and
> (b) such of the information referred to in Schedule 1 to these Rules as may reasonably be required in order to assess the environmental effects of the proposed works and which the applicant can, having regard in particular to current knowledge and methods of assessment, reasonably be required to compile,
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> and the "applicant's statement of environmental information" means a statement submitted by an applicant as the environmental statement in relation to his application;

10. So, the Environmental Statement comprises both the ES (and FEI), and the information required to assess environmental effects, i.e. the material which is emerging during the Inquiry is environmental information.

11. Net gain for biodiversity has been an evolving topic as between other parties at the Inquiry. It is not a topic which is relevant to ecological compensation sites. Policy on 'net gain' does not form a valid basis for acquiring land compulsorily, as Network Rail is only obliged pursuant to the Habitats Regulations to mitigate impacts of the project and not to provide enhancement, as set out in NR's Statement of Case, e.g. para. 10.9.8:

"*Whilst Network Rail is under an obligation to mitigate all of the impacts of EWR2,* ***it does not consider that there is any statutory or policy basis which require provision of a net gain, nor that it has the compulsory purchase powers to achieve it***."

ISSUES WHICH HAVE SUBSTANTIALLY RESOLVED

12. The objections fall into four key areas:
    (i) Access;
    (ii) flood risk and the consultation
    (iii) land take for ecological reasons – ECS B10
    (iv) failings in respect of each of these elements of the order scheme.

Plot 0670 – Access

13. The use of Plot 0670 (temporary acquisition and permanent rights required), is said to be required to access to a proposed Compensatory Flood Storage Area (CFSA) and Ecological Compensation Site (ECS) B10, through Mr Spooner's business premises.

14. NR and GDL agree that instead of acquiring plot 0670, subject to obtaining the necessary local authority and EA/LLFA/IDB approvals within project time limitations, an alternative access(es) on land owned by Mrs J Spooner and GW Fox Limited can be used to access the CFSA and ECS. An agreement has been reached between the parties to provide an alternative route.

15. Evidently, if there had been any real point to the four years of consultation, this discussion could have occurred prior to the drafting of proposed order.

The use of Plot 0681 (permanent acquisition) for the proposed CFSA.

16. Rather like the movable feast in respect of the ecological mitigation, the order scheme announced, out of the blue, the need for a compensation area for flood mitigation. Meetings have taken place on this topic. NR needed better topographic data to hone their flood risk model. If the consultation had been real consultation on that which actually appeared in the order scheme, then the topographic data for the relevant land would have been freely given to NR's consultants. We have now given it to them. It is a further example to show the

merit, if your organisation is to seek to compulsory acquire somebody's land, of asking first.

17. This issue has resolved by agreement.

THE PUBLIC INTEREST IN THE LAND

18. Plot 0677 is a part of an allocation for 585 dwellings in the submission draft of the Vale of Aylesbury Local Plan. That emerging plan has been the subject of an EiP. Network Rail were not represented at these Examination sessions. The Inspector's interim findings are consistent with that allocation and indicate that the plan may be found to be sound with appropriate modification[1]. The public interest in the site is immediately obvious.

19. The Planning Statement in support of the TWAO refers to the emerging VALP but fails to refer to allocation WIN001. The loss of part of an emerging allocation for residential development is material to the assessment of the public interest. The justification for the scheme as shown on Sheet 25 does not address this element of emerging policy, fails to engage with the public interest in that regard

[1] The Inspector's Interim Findings (29th August 2018) following the Examination Hearings have now been published. Whilst the Inspector concluded that there is additional work for the Council to undertake on the plan, he has stated that he considers it is capable of being made sound and subsequently adopted. Has made no suggestion that any of the proposed allocations should not be included. Indeed, he has indicated that higher housing need exists than the plan currently provides for. It is therefore understood that land, south of the brook and covered by the order, will be allocated for residential development upon adoption of the plan. A planning application for residential development has been submitted to Aylesbury Vale District Council in September 2018. The application is for 235 dwellings and includes land on plan sheet number 25, numbered 0670, 0677, 0677a, 0683 and 0683a.

and fails to balance that public interest in the justification for the compulsory acquisition.

20. Having made this point plainly in the objectors Statement of Case, one might have thought that Ms Stephenson (NR's planning witness) would have at least alluded to this feature of the scheme in her proof of evidence (NR 49). She has not. She was not called to give evidence on the objection. She provided no rebuttal of Ms Tilston's proof of evidence.

21. It follows that the only planning evidence in this regard is that provided by the objectors. Questions asked on behalf of NR are not evidence. Submissions made by NR on the basis of the questions which were asked should be given no weight because they are no more than ideas which came out of an advocate's head, unheralded and not available to be tested.

22. The only reasonable conclusion open to the Secretary of State is that there is a considerable public interest in not taking land which is to be allocated for housing in a local plan to which significant weight may be attached, it having been the subject of an examination in public.

THE ORDER SCHEME AND THE CONSULTATION

23. It is not disputed that:
    (i) the published order varies significantly from the options which have been consulted upon;
    (ii) no approaches to purchase the land have been made by the promoters.

24. There were three separate consultations by NR: September 2015; June 2017; January 2018. Detailed responses were made on each occasion. In particular, it was pointed out that a joined-up approach to ecological mitigation was required between Network Rail, Aylesbury Vale District Council and the owners of land adjacent to the proposed East west Rail scheme. This was required so that the

importance and extent of the mitigation required, based on surveys and reports (seen by all parties), could be understood and accommodated.

25. The January 2018 consultation differed significantly from that published in June 2017. The accompanying drawings included significant additional land in the ownership of Mrs Spooner. No explanation within the consultation was given to explain the change.

26. Upon publication of the TWAO it became apparent that the land outlined to be compulsory purchased, and of rights in, and rights to use land acquired differed significantly from that outlined in the January 2018 consultation.

27. Some of the ecological mitigation areas had altered in shape and location and there were also additional parcels included that had not been part of the previous consultations. Additional areas of land were also included within the TWAO in relation to access.

28. None of these matters are factually contentious. Ms Tilston was not cross-examined on this topic.

29. Over four years have elapsed during which accurate information could have been obtained, or supplied where it already exists. When properly understood, the ecological issues could have been solved in a manner which optimises the ecological mitigation, without trespassing on other public interests. Instead, we have been driven to address this via the Inquiry, and that process still continues. Indeed, we do not even know with any precision what information is required to complete the environmental information, still less what that information will actually be.

30. What is the consequence arising from these circumstances? The consequence is that you should find as a fact that there has been no consultation on the compulsory acquisition of these parcels of land and thus it is appropriate to

modify the order by their deletion. To do otherwise would be to fail to give effect to the clear policy and guidance. It would be to render the guidance of no effect and to undermine the protections which have been put in place to avoid peremptory CPOs.

31. Such conclusions are reinforced by the fact that no approach has been made to acquire the land by private treaty – see paragraph 7b above.

THE ISSUES TO BE DETERMINED

The use of Plot 0677 (permanent acquisition) for the proposed ECS B10.

32. GDL does not agree with the proposed size/ siting of ECS B10 on Plot 0677. Its ecological justification is inadequate, and the environmental information is similarly inadequate.

Great Crested Newts

33. The over-arching context here is mitigation of loss over the whole length of the proposed route. The scheme provides for 33 more ponds than are lost and 31 ha of habitat than is lost, even on NR's estimates of loss which are not to be relied upon because they are over-estimates. This is not a circumstance where compensatory land has been pared down and the question of its adequacy is obviously marginal. Rather, the starting position in numerical terms is very advantageous. The same position is apparent in respect of B10: NR's view is that it would provide 'more than enough' carrying capacity for translocated GCN[2]. I turn to the uncertainties below, but it is important to bear this basic fact well in mind at the outset particularly where the promoter admits that it is proposing to

[2] See NR 238 at p3-11, first bullet point (the Moco Farm technical note)

take more land than is enough, even when based on extreme worst case assumptions.

34. Next it is important to eliminate reasons for which B10 is not required.

35. First, it is very difficult to learn from the environmental information whether ECS B10 is required for any sort of GCN mitigation. So, for example, the FEI refers to ECS B7, B13 and C1 as compensating "*for the long-term effect to great crested newts from habitat loss during construction."* – but nothing is said about B10[3]. It should not be necessary to attend the inquiry in order to understand the environmental information.

36. Secondly, it is now common ground that no waterbodies (e.g. ponds or ditches) supporting breeding of Great Crested Newts ('GCN') are to be lost within 500m of ECS B10. It is therefore apparent that ECS B10 is not required to compensate for the loss of aquatic habitat for GCN at this location. This was agreed by Dr Wray in XX.

37. Thirdly, it was originally intimated that ECS B10 was needed to compensate for Old Quarry BNS and the LWS off Magpie Way. But that position has not been maintained through the Inquiry, and rightly so because half of the area lost (some 0.05ha) will be re-instated and there will also be 0.2ha of woodland planted to the east of the BNS, outside B10. As Dr Simpson observes, it is self-evident that B10 is not required[4]. So far as these areas are to be affected by construction, the effects will be mitigated on those sites and nearby. The mitigation and compensation will exceed the loss by a factor of two or more. It is therefore untenable to suggest that ECS B10 is needed as compensation because there is no need to do so. The job has already been done. Moreover, the idea that there is any connection between ECS B10 and the affected areas to the south is self-evidently misconceived: the connectivity is cut by the railway which NR promote.

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[3] See Dr Simpson's proof at §3.1.5 of Dr Simpson's proof

[4] Dr Simpson's proof at §4.1.2

38. Fourthly, it has now been explained at the Inquiry that ECS B10 is very much about terrestrial mitigation. In that context, it is very important to observe that the habitat lost to construction works has only been estimated by NR from aerial imagery. In contrast, GDL has looked carefully at this question, including using Phase 1 Habitat Survey data. NR have over-estimated by a factor of 5 or 6 and so have started from the wrong point[5]. One understands that NR has a substantial infrastructure project to assess. However, we are not aware of any law or policy which relaxes the burden on an acquiring authority to demonstrate that its CPO is justified simply because the task is large – the policy is not "*If something is hard to do, then it is not worth doing"*[6].

39. Likewise, one understands that there are legal tests to address in respect of the grant of planning permission (see *Morge*). But the TWA order does more than deem the grant of planning permission – it seeks powers of compulsory purchase too, and this is what these objections are about. NR has been distracted by the particular requirements for planning permission for the whole route and for satisfying the requirements of EPS licences. It has failed to discharge the heavy burden on it in respect of compulsory acquisition and in respect of each parcel of land.

40. Consistent with this submission, and in this context, NE and BCC/AVDC are presently unable to reach a conclusion in respect of mitigation/compensation for Route 2B. They point to the inadequacy of the environmental information. In particular, Miss Crutchley confirmed[7]:

    (i) She was unable to say whether the terrestrial habitat compensation within Route 2B was justified or not;

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[5] Dr Simpson's proof at §3.1.4; not contradicted, and unchallenged

[6] Homer Simpson (no relation to Dr Simpson): "*The Otto Show*"; third series.

[7] 12 April 2019, in the morning

(ii) It may be that further information, to be supplied after all of the ecologists have given evidence, will resolve this;

(iii) But at present there was no compelling case to support the need to take B10, nor to say that it would not be needed, nor to say whether it was in the appropriate place or of the appropriate type;

(iv) And further, that it could not be said whether Moco Farm or B10 were preferable for the purpose of GCN terrestrial habitat compensation.

41. The constant theme of the objector's evidence which you have heard on GCN is that the environmental information is not adequate. In XX on March 13, Dr Simpson explained that the evidence as to presence of GCN on the track areas was in fact assumption, rather than survey. That is important because you need to know with some clarity what it is that you are compensating for, before you decide how to compensate for it. Most importantly in this regard, this is the view of NE.

42. The environmental information is inadequate. If that were not so, then there would be no need for still further information to be produced so very late. It is wholly unclear how an objector is to participate properly in testing and responding to such information.

<u>Alternatives – Moco Farm ('MF')</u>

43. NR's position on MF is set out in NR238. It is a document which is intended to assess MF as an alternative to, amongst other sites, B10.

44. NR's evidence is very clear, via Dr Wray, having considered the factors weighing on each side of the balance, MF is a good site and a suitable alternative. NR is plainly of that view more corporately, having purchased the site for this purpose. NE has not stated its concluded view yet, but it is notable that NE has not presented any evidence which concludes against it.

45. This issue is a further good example of the consequences of failing to consult. The series of unfortunate events proceeded thus:

(i) No consultation on the land actually included within the order (B10);
(ii) No survey of B10 for its principle purpose (GCN terrestrial habitat), resulting in overestimation of requirements and uncertainty which persists;
(iii) Inadequate environmental information for GCN along Route 2B to be able to satisfy the key statutory consultee on FCS, even towards the end of the Inquiry;
(iv) An alternative which emerges during the Inquiry;
(v) Comparative assessment information obtained during the course of evidence (NR238);
(vi) Position statements emerging from both NE and NR after the objector's appearance at the Inquiry;
(vii) Those position statements not being sent to objectors who were active participants in the Inquiry – they were only obtained during the examination in chief of Miss Crutchley, by attending the Inquiry to obtain them and to hear the evidence;
(viii) The position remains fluid and uncertain even when all of the ecology expert evidence has been heard.

COSTS

46. If the objectors succeed, then their costs of the objection will be paid by the promoter in any event.

47. However, in this case the objectors seek their costs of their objection whether they succeed or not, for these reasons.

48. First, there is no answer to the points on consultation and negotiation by private treaty. That suffices for the Secretary of State to make an award of costs in the objectors' favour because it is plainly unreasonable and contrary to well established policy.

49. Secondly, in circumstances where even the statutory nature conservation advisor has had to appear at the Inquiry to explain the significant uncertainties in the environmental information, it is clear that the objectors were obliged to appear and to follow the evolution of the evidence in order to protect their interests in the land which the promoter proposes to take on the sole justification of ecological compensation.

50. If the promoter had properly justified its ecological case upon publication of the order, and the objector sought to challenge that and lost, then the objector could not expect its costs to be awarded. However, in these circumstances the promoter's approach has required participation in the Inquiry.

CONCLUSION

51. The overall position is that the promoter has not been able to show that B10 is justified and comprise a compelling case in the public interest because:
    (i) There is an alternative;
    (ii) The environmental information does not support that conclusion;
    (iii) There was no consultation on the order scheme as promoted;
    (iv) There has been no engagement whatsoever with the public interest to be lost by taking part of an emerging housing allocation – that part of the public interest has not been acknowledged by the promoter;
    (v) There has been no attempt to deal by private treaty.

52. The Secretary of State should make the order with the appropriate modifications and that is what you are asked to recommend.

Richard Kimblin QC 16th April 2019

No. 5 Chambers