

Transport and Works Act 1992

The Network Rail (Old Oak Common Great Western Mainline Track Access) Order

**APPLICATION ON BEHALF OF BELLAVIEW PROPERTIES LIMITED FOR A PARTIAL
AWARD OF COSTS**

Introduction

1. Bellaview Properties Limited (“BPL”) applies for an award of part of its costs in preparing for the public inquiry into Network Rail’s (“NR”) application for the above order.
2. The application for costs is made against NR.
3. The application is made pursuant s.11(5) of the Transport and Works Act 1992 and s.250(5) of the Local Government Act 1992.
4. The application is made having regard to the guidance given in the NPPG at Paragraph: 058 (Reference ID: 16-058-20140306) to Paragraph: 064 (Reference ID: 16-064-20140306). The application made by NR under the Transport and Works Act 1992 includes an application for power to compulsorily acquire a right in land from BPL and temporarily possess land. The NPPG, within the paragraphs set out above, is therefore engaged, it is submitted.
5. The application for a partial award of costs is made on the basis of unreasonable behaviour on the part of NR which has led to unnecessary expenditure on the part of BPL (see NPPG Paragraph: 060 (Reference ID: 16-060-20140306)).
6. This application has been made before the close of the public inquiry and in writing, in accordance with the advice set out in the NPPG at the paragraph reference given in para.5, above.

Particulars of unreasonable behaviour

7. NR's application for an Order made pursuant to the Transport and Works Act 1992 was made on 17 April 2023. A draft Order and Land Plans were submitted to accompany that application (CD 01, CD 08). The draft Order, schedule 2, when considered together with the Land Plans, confirmed that NR was seeking powers of temporary possession over parcels 2, 3 and 4 as show on the Land Plans. These parcels, combined, comprise the whole of the land at 239 Horn Lane owned by BPL, including its warehouse, the associated external storage and sales space, the car park and the circulation space. It was not proposed or suggested through the application, the draft Order nor in any accompanying document that site sharing was possible within any part of BPL's land over which powers of temporary possession were sought. Moreover, by article 7(1)(b) of the draft Order, NR sought, in respect of that part of BPL's land over which powers of temporary possession were sought, power to "remove any buildings ... from that land"; the only existing building was and is BPL's warehouse. The effect of the extent of powers of temporary possession which were sought through the application, as it was made, would have resulted in the use of the warehouse as a builders' merchant being terminated for the duration of the period of temporary possession and, for that building, potentially at least, to be demolished (see BPL's Objection, (Inq Doc. OBJ.08.2) para.11).
8. BPL, in its Objection of 5 June 2023, (Inq Doc. OBJ.08.2), submitted that if (which it did not and does not accept) there was a compelling case for any powers of temporary possession to be taken over BPL's land, the extent of land over which the powers were sought through the application was excessive and NR did not require the exclusion of BPL and its tenant from the warehouse building and associated space (see para.20-21 of BPL's Objection).
9. Moreover, and notwithstanding BPL's Objection concerning the excessive extent of the powers of temporary possession sought through the application, NR, in its Statement of Case (Inq Doc SoC 01), reaffirmed that the whole of BPL's landholding, including the warehouse and all external space, was required temporarily for the purpose of the proposed temporary RRAP and its use. In its Statement of Case, NR stated, in respect of the area over which powers of temporary possession were sought pursuant to its application, as follows:

“6.2 ... three plots of land identified in the Book of Reference ... current within private ownership are required for the Project on a temporary basis.

...

6.5 All areas of land subject to powers in the draft Order are necessary for the Project and no land will be used unless essential to facilitate the Project ...

...

6.12 Land is required for a temporary worksite to facilitate the works, which will include construction of the temporary RRAP.

6.13 Plots required on a temporary basis are described as Plots 2 and 4 on the Land Plan. However, in practice they constitute one parcel of land, which is owned by Bellaview and occupied by STARK Building Materials Limited, trading as Jewson

...

6.14 ... the full extent of Plots 2 and 4 will be required for the Project (on a temporary basis) ...

...

6.16 Plots 2 and 4 provide enough storage space for plant and machinery, welfare facilities and off-street staff parking and enable the temporary construction compound to be located in close proximity to the temporary RRAP.” (underlining added)

10. At p.32 of its Statement of Case, NR sought to address BPL’s Objection, including that the powers of temporary possession sought through the application were excessive and that NR did not need to exclude BPL or its tenant from occupation of the warehouse and associated space. NR resisted this ground of objection and stated, inter alia, that “during the period of use of the temporary RRAP, the land is required for the other purposes described including storing materials and providing associated construction facilities. The temporary acquisition is appropriate in the circumstances.” (NR Statement of Case pages 32-33) (underlining added).

11. As such, BPL was required to prepare its case for the public inquiry and prepare its evidence on the basis that NR was seeking and would seek to justify the taking of powers of temporary possession in accordance with its application, the draft Order and Land Plans. This included the power to take temporary possession of the whole of parcels 2, 3 and 4, namely the warehouse (which NR was seeking a power to remove) and all external space, and that site sharing was not feasible, so far as NR was concerned.

12. However, on day 1 of the public inquiry (on 14 November 2023, having submitted its application on 17 April 2023), in its opening statement (Inq doc INQ-01), at paras. 47-48, NR stated that, consistent with its requirements for construction and use of a temporary RRAP, (a) it was possible for BDL to retain possession of the warehouse, (b) it was possible for BDL (or Stark) to continue to use the warehouse, (c) it was possible for BDL to implement the planning permission which the London Borough of Ealing had resolved to grant for the redevelopment of the Horn Lane site. NR further confirmed in its opening statement at para. 49 that within at least parts of the land over which rights of temporary possession were sought, that site sharing with BPL was possible. NR indicated that it would provide revised Land Plans accordingly (para.50). At para. 39 of its opening statement, NR stated that Art.7 of the draft order was proposed to be modified to exclude the power to remove any buildings from the area of temporary possession.
13. What then followed was the submission by NR to the inquiry of various revisions of the draft Order and Land Plans NR to reflect what was conceded in its opening statement on day 1 of the public inquiry.
14. It is the case that during without prejudice discussions, NR had indicated that it may not need to occupy the warehouse and that some form of site sharing may be possible. However, at no stage until the first day of the public inquiry did NR confirm formally and openly that it now accepted that the extent of powers of temporary possession which it was seeking through its application were excessive, that possession of the warehouse was not in fact needed for the temporary RAPP and its operation, that the warehouse could remain trading and that site sharing was possible. Moreover, at no stage until the first day of the public inquiry did NR commit to seeking the modification of the draft Order and the submission of amended Land Plans to reflect this. As such, in its preparation for the public inquiry into NR's application and in its evidence, BPL were required to, and, acting reasonably, did, prepare its case on the basis that NR was seeking the powers and the extent of those powers as set out in the draft Order and Land Plans as originally submitted by NR with its application and which NR thereafter sought to reaffirm and justify in its Statement of Case of 4 August 2023 and its evidence submitted before the inquiry.

15. It was plainly unreasonable for NR to have substantially changed its case on day one of the inquiry including to reduce the temporary land take by 70% and not to have sought, formally, modifications to the draft Order and Land Plans well in advance of the inquiry opening; NR must have and plainly did realise well before the opening of the public inquiry that the powers sought through its application were excessive and unnecessary and that modifications would be needed to the application, the draft Order and the Land Plans. NR should have revealed its position and confirmed that modifications would be sought to the draft Order and plans, and what those modifications were to be, before the inquiry opened and before evidence was required to be submitted. Had it done so, then the expense incurred by BPL in preparing evidence to support its objection that the powers sought by NR through the draft order were excessive would have been avoided.
16. NR's failure in this respect of, it is submitted, clearly amounts to procedural unreasonable behaviour.

Unreasonable behaviour causing unnecessary expense.

17. NR's unreasonable behaviour as particularised above has caused unnecessary costs and expense by BPL in preparing (including preparing evidence) for a public inquiry into an Order by which powers were being sought which are very different and more extensive than NR conceded on day one of the inquiry were in fact (on its case) required. As noted above, the extent of powers sought by NR until day one of the public inquiry would have had a significantly different and more onerous effect on BPL than the powers which NR latterly conceded that, on its, case were required.
18. The wasted expenditure is that incurred by BPL in addressing the terms of the draft Order concerning the extent of powers of temporary possession as those terms were until day 1 of the public inquiry.
19. Moreover, following day one of the inquiry the draft Order was amended again and is now on its 4th iteration, with the Land Plans now reduced to a single plan having been through even more iterations and successive refinements, each of which refinements have necessitated assessment by BPL's professional team. This

expenditure too should not have been incurred and is a direct consequence of NR changing its case at such a late stage.

Conclusion

20. It is submitted that NR's change of case on day one of the public inquiry and its failure to seek modification of the draft Order to reduce the extent of powers of temporary possession being sought until day one of the public inquiry was unreasonable and amounts to unreasonable behaviour for the purposes of the applicable costs regime.
21. BPL has sustained wasted costs in responding in evidence and in preparation generally to the powers as sought by until NR confirmed its intention to seek substantial modification to the application, the draft Order and Land Plans on day 1 of the inquiry.
22. BPL seeks a partial award of costs accordingly.

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