

**Planning Review Committee 15 March 2017 – applications Network Rail
16/02507/CND and 16/02509/CND**

Monitoring Officer's Note to accompany the report of the planning officer

Rail damping

The decisions before members relate to approvals required under planning conditions imposed by the Secretary of State (SoS). There is nothing unusual about the SoS granting permission subject to a requirement for further approvals. What is unusual is the subject matter of these approvals.

The condition (19) imposed by the SoS required the submission of schemes of noise and vibration attenuation together with independent experts' reports as to their robustness. The requirement for robustness reports was a response to criticisms as to the expertise of local planning authorities to address operational railway noise raised at the public inquiry that led to the SoS granting planning permission. The Council has gone further than this and has sought its own expert opinion from Arup and the opinion of Queen's Counsel.

The Opinion of Queen's Counsel has been published and included as part of the Committee papers. Its core reasoning is set out in the Officer's Report to which it is appended so that is not repeated. Attention is however drawn to the statement that "...NR's approach to the application of the NVMP is permissible (and I think correct) On that approach, the potential role of [rail damping] for section H is very limited." (para 78).

There are two distinct categories of issues with these applications:

The first goes to the scope of the decisions before the Council. These include issues such as the claimed ability of the Council to rewrite condition 19, the consideration of effects other than those at "noise sensitive receptors" and, in broad terms, the achievement of what the Council might see as a satisfactory noise/vibration environment. The Council has no power to do this. It cannot look behind C.19 as drafted by the SoS.

Thus the consideration of effects other than those at "noise sensitive receptors" would be the taking into account of a matter not relevant to the condition. Similarly the achievement of a particular noise environment is not what the condition requires i.e. the Council cannot impose its own standards of noise or vibration control..

The condition requires that, "The submitted schemes of assessment shall show how the standards of noise mitigation set out in the Policy will be achieved..." (c19.6). The SoS when granting that planning permission determined that achieving those

standards was acceptable. This Council cannot revisit those standards regardless of what view it might have as to whether those standards are now acceptable or were ever acceptable.

This first category of issues do not go to the planning merits but to what it material to the determination of the applications. As members will be aware, immaterial considerations must be disregarded. It is unlawful to do otherwise.

The second category of issues relate to that “very limited” “potential role” for rail damping within the scope of c19 and the NVMP. Queen’s Counsel has advised that is to be informed by but not dictated to by the WEBTAG assessment.

The advice from officers and Arup on this is clear, particularly once one discounts those matters which are legally irrelevant. Matters of planning judgement are matters for the Council unlawfulness arising only where a decision takes account of an immaterial consideration, fails to take account of a material consideration or is so unreasonable that no reasonable local planning authority could have reached that decision. An example of an unreasonable decision in this context is an arbitrary decision; one that cannot be supported by relevant reasoning/evidence. On the material seen it is at least arguable that decisions to maintain rail damping would be unreasonable in this sense.

An unlawful refusal of approval could result in a potential challenge via judicial review. That prospect is however extremely unlikely (and unusual) as the statutory right of appeal to the Secretary of State would almost always be a more appropriate and preferred basis for challenge.

If appeals were lodged it would seem likely that a local public inquiry would be arranged. This is because of the level of public interest (and participation) and the issues being raised. (N.B. The scope of the decisions at appeal would be no different to those before the Council. The SoS (or Inspector) would not be considering issues beyond the scope of condition 19 and the NVMP.) The expected length of an public inquiry is a matter of conjecture but, for the same reasons, it would be prudent to anticipate at least a second week and perhaps longer. WAPC was advised that the current team (officers and consultants) would not be able to present a case in support of the Council in such an appeal so external representation would be required.

It will be clear from the officer’s report that officers advice is that such an appeal would be lost.

The Council will have to bear its own costs. It will only have to bear the costs of NR if a costs award was made by the SoS (or Inspector). Costs awards are only made where “unreasonable behaviour” had led to additional costs being incurred. In cases where an appeal would otherwise not have been necessary the entirety of the appeal costs would be such additional costs.

Unreasonable behaviour does not bear the meaning described above. It bears its common English meaning albeit the SoS has provided examples in the planning practice guidance. One example is failure to produce evidence to substantiate each reason for refusal on appeal. Another is vague, generalised or inaccurate assertions about a proposal's impact, which are unsupported by any objective analysis.

Another is persisting in objections to a scheme or elements of a scheme which the SoS or an Inspector has previously indicated to be acceptable. Yet others concern refusing to approve matters that properly relate to outline matters (i.e. the SoS permission of 2012) and, imposing conditions that do not accord with national policy.

As matters currently stand, there appears to be no cogent response to any of those.

As such it has to be advised that the expected consequences of refusals would be allowed appeals with the Council bearing the costs of both itself and NR.

Restriction on Train Numbers

The issues here are clear. As Queen's Counsel notes noise mitigation is to be designed based on the train numbers and timing assumptions (NVMP paras 1.8 to 1.10) (para 80). It is made clear that future train growth need not be taken into account (para 84) and that "Given that no condition was imposed on the Permission [2012 deemed permission granted by SoS], NR could increase the number of trains on the line without being in breach of any condition." (para 85).

This is quintessentially an example of something that the SoS could have done at that stage but did not do. For the reasons given above in connection with rail damping it is equally clearly not a condition that can be imposed on condition 19 approvals; it is addressing what is perceived as an omission on the part of the SoS which is plainly not within the scope of a condition 19 approval.

The likely consequences of refusing to approve condition 19 schemes without this condition are similar to the likely consequences to requiring rail damping albeit with more certainty as this issue is one of pure legality and involves no planning judgement.

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