IN THE MATTER OF A PROPOSED CARRIAGE WASH FACILITY AT CAMBRIDGE STATION

OPINION

Introduction and Summary of Conclusions

1. I am instructed on behalf of Quash the Trainwash ("Quash"). Quash is a local group of Cambridge residents who oppose the development of a carriage-wash facility at Cambridge Station, behind Great Eastern Street, Cambridge ("the Site"). I am asked whether the development requires planning permission or whether it is permitted development under the Town and Country Planning (General Permitted Development) Order 2015 ("the GPDO").

2. The local planning authority is Cambridge City Council ("the Council").

3. In summary, I conclude that the carriage-wash does require planning permission and that it is not permitted development under the GPDO. In any event, even if it is concluded that it is permitted development, prior approval is required.

Factual Background

4. Govia Thameslink Railway ("GTR"), Network Rail ("NR"), and Greater Anglia ("GA") are proposing to build a carriage-wash facility on Network Rail land at the train station in Cambridge. The land is owned by NR. It will be used by Thameslink, Great Northern and GA trains. A description of the proposed project is on the website www.cambridgeraildepotupgrade.co.uk as follows:

> *"This work includes the expansion of the sidings at the south end of the depot closest to the station with new track and the installation of new train servicing facilities to allow the trains to be cleaned internally, toilets emptied, train toilet water tanks refilled, and train hoppers refilled with sand to provide grip in slippery conditions. Also included is a new 12-carriage enclosed train wash north of Mill Road Bridge, replacing the previous 8-carriage open train wash which was situated in the south area…*

In August 2019, Spencer Group, which is the principle contractor for the project, rebuilt part of Mill Road Bridge to enlarge one of the arches to allow trains to pass underneath. The new train wash will connect the existing north sidings with the upgraded south sidings via the larger arch. It is the upgraded south sidings where trains will be serviced, mostly overnight."

5. So far as the proposed carriage-wash is concerned, I understand that this consists of the following ("the Development"):

   (1) Removal of existing life expired carriage wash plant and provision of a twin rotor side brush carriage wash including protective enclosure;

   (2) Provision of associated plant and machinery with water recycling facility including protective enclosure;

   (3) Provision of access road to maintain the carriage-wash, plant and machinery.

6. I am also instructed that the carriage-wash will be 33 metres long x 9 metres high x 7 metres wide. It will operate all day, all year round, with the main times of use being between 6pm and 6am (according to the answer to Question 5 on https://www.cambridgeraildepotupgrade.co.uk/faqs/). I am instructed that residents have been told that peak usage would be between 11pm and 6am. Residents are understandably concerned about the implications of the Development for (amongst other things) daylight and sunlight levels, noise and vibration and pollution.

7. Details of the overall site arrangements for the Development are set out on drawing number F535-GTR-DRG-CV-000081 Rev P01.

8. I understand that the Development does not have planning permission. Whilst prior approval ref: 18/1371/CAP18 was granted in January 2019 order to "*facilitate new sidings"*, that permission (itself granted under the GPDO) does not cover the Development. Rather, the application for prior approval was for the following development:

   Application for Prior Approval under Part 18 for construction of new gated east side stairway from Mill Road to provide access to train drivers walkway, including alterations to arches 5 and 6 to facilitate new sidings, walkway and passive provision for Chisholm Trail.

9. I understand that on 14th February 2020, the Council asked GTR to submit an application for a certificate of lawfulness ("CoL") for the Development. At a community meeting on 24th February 2020, GTR's Engineering Director said that *"Govia Thameslink Railway is not directly involved in the planning application process. Planning application responsibility sits with Network Rail."*

10. On 6th March 2020, Chris Penn (GTR's Stakeholder Manager) sent the campaign an email update letter. This copied in NR's response to the Council, in which it declined the request to apply for a CoL on the basis that the Development amounted to permitted development under the GPDO. So far as is material, the email said as follows:

"I write in respect of the works to provide Carriage Wash facilities to the east of Mill Road Cambridge, as shown in plan F535-GTR-DRG-CV-000081 Rev P01. The works is part of the wider Thameslink Project, which aims to upgrade and increase existing Depot facilities at Cambridge Depot.

These works do not require planning permission and are permitted by virtue of Part 8 (Transport Related Development) and Part 18 (Miscellaneous Development; Class A – development under local or private Acts or Order) of the Town and Country Planning (General Permitted Development) Order 2015.

Part 8 relates to 'A. Development by railway undertakers on their operational land, required in connection with the movement of traffic by rail'. The proposed works clearly represent works that are required in connection of the movement of traffic by rail, and are to be undertaken on railway operational land.

A.1 of Part 8 details where development is not permitted. Development is not permitted if it consists of 'the construction or erection otherwise wholly within a railway station of – …a building used for an industrial process'. As the proposed carriage wash is for the cleaning of trains within a railway depot, it is not considered that this represents an 'industrial process' and therefore does not meet the definition. The proposed development does not fall into any of the categories listed within these exceptions and is therefore clearly permitted by Part 8.

In respect of Part 18, the works meet the definition of 'A. Development authorised by – (a) a local or private Act of Parliament'. Importantly, the proposed works do not meet the criteria set out within A.1 of Part 18, and an application for Prior Approval is not required

The railway in this location was authorised by the Eastern Counties Railway (Brandon & Peterborough Extension) Act 1844. The subsequent Great Eastern Railway Act 1862 was to apply the Railways Clauses Consolidation Act 1845 (RCC Act 1845) general provisions to all of the Great Eastern Railway.

Section 16 of the RCC Act 1845 enlarges upon the works which may be carried out and this includes the power, stating 'They may erect and construct such houses, warehouses, offices, and other buildings, yards, stations, wharfs, engines, machinery, apparatus and other works and conveniences as they think proper;'. A copy of Section 16 of the Act is attached for your information.

Based on the information above, Network Rail is firmly of the view that the work is permitted development and no planning permission is required."

Legal Framework

11. Section 57 of the Town and Country Planning Act 1990 ("the 1990 Act") provides that, subject to exceptions that do not apply, planning permission is required for the carrying out of any development of land.

12. *"Development"* is defined in section 55 of the 1990 Act as: *"the carrying out of building, engineering, mining or other operations in, on, over or under land, or the making of any material change in the use of any buildings or other land."*

13. Section 55(1A) of the 1990 Act states that *"building operations"* includes (a) demolition of buildings; (b) rebuilding; (c) structural alterations of or additions to buildings; and (d) other operations normally undertaken by a person carrying on business as a builder.

14. *"Building"* is defined as follows in section 336 of the 1990 Act: *"any structure or erection, and any part of a building, as so defined, but does not include plant or machinery comprised in a building"*.

15. Therefore, plant or machinery in the open air would amount to a building, but not plant or machinery contained within a building (although, of course, the erection of the building itself would require planning permission).

16. So far as the question of what amounts to "building operations" (and therefore "development" requiring planning permission) the approach of the courts in construing the definitions has been to ask first whether what has been done has resulted in the erection of a *"building"*. If so, the court *"should want a great deal of persuading that the erection of it had not amounted to a building or other operation"* (Barvis Ltd v Secretary of State for the Environment (1971) 22 P. & C.R. 710 at 715, per Bridge J.).

17. In Skerritts of Nottingham Ltd v Secretary of State for the Environment, Transport and the Regions (No.2) [2000] 2 P.L.R. 102) the Court of Appeal identified three primary factors as being relevant to the question of what was a "building": size, permanence, and physical attachment.

18. Here, whilst ultimately a matter of judgment for the Council, it is clear to me that the Development includes building operations. That is because the so-called "protective enclosure" surrounding the plant is a "building" in light of its size, permanence and physical attachment to the land. Indeed, from the mock-up imagery I have seen, the "protective enclosure" is in reality a large shed, which would undoubtedly be considered a "building". Therefore, its construction will involve "building operations". In addition, the construction of the access road will amount to engineering operations. Therefore, the Development would amount to development as defined in section 55 of the 1990 Act and requires planning permission.

19. By section 59 of the 1990 Act: *"The Secretary of State shall by order …provide for the granting of planning permission."*

20. The relevant order is the GPDO. Article 3 of the GPDO grants permission for the classes of development listed in Schedule 2. This is known as permitted development, and avoids the need for an applicant to formally apply for planning permission for those classes of development.

21. Part 8, Class A of Schedule 2 states that the following is permitted development: *"Development by railway undertakers on their operational land, required in connection with the movement of traffic by rail."*

22. Paragraph A.1 states as follows (with added emphasis):

    "A.1. Development not permitted

    Development is not permitted by Class A if it consists of or includes –

    (a) the construction of a railway;

(b) the construction or erection of a hotel, railway station or bridge; or
(c) the construction or erection otherwise than wholly within a railway station of—
(i) an office, residential or educational building, or a building used for an industrial process, or
(ii) a car park, shop, restaurant, garage, petrol filling station or other building or structure provided under transport legislation."

23. *"Building"* has a different definition under the GPDO as that in the 1990 Act. It is defined as follows (with emphasis added):

"(a) includes any structure or erection and, except in [Class F of Part 2, Classes P and PA of Part 3,Class B of Part 11, Classes A to I of Part 14, Classes A, B and C of Part 16 and Class T of Part 19, of Schedule 2][5], includes any part of a building; and

(b) does not include plant or machinery and, in Schedule 2, except in Class F of Part 2 and Class C of Part 11, does not include any gate, fence, wall or other means of enclosure"

24. I will return to the significance of this slightly different description below.

25. Pursuant to article 2(1) of the GDPO, *"industrial process"* is defined as follows:

""industrial process" means a process for or incidental to any of the following purposes—
(a) the making of any article or part of any article (including a ship or vessel, or a film, video or sound recording);
(b) the altering, repairing, maintaining, ornamenting, finishing, cleaning, washing, packing, canning, adapting for sale, breaking up or demolition of any article; or
(c) the getting, dressing or treatment of minerals in the course of any trade or business other than agriculture, and other than a process carried out on land used as a mine or adjacent to and occupied together with a mine"

26. Part 18, Class A of Schedule 2 of the GPDO states that the following is permitted development:

"Development authorised by—

(a) a local or private Act of Parliament,
(b) an order approved by both Houses of Parliament, or
(c) an order under section 14 or 16 of the Harbours Act 1964 (orders for securing harbour efficiency etc, and orders conferring powers for improvement, construction etc of harbours) which designates specifically the nature of the development authorised and the land upon which it may be carried out."

27. Under Paragraph A.1 (with added emphasis):

"Development is not permitted by Class A if it consists of or includes—

(a) the erection, construction, alteration or extension of any building, bridge, aqueduct, pier or dam; or
(b) the formation, laying out or alteration of a means of access to any highway used by vehicular traffic,

unless the prior approval of the appropriate authority to the detailed plans and specifications is first obtained."

28. Finally, a breach of planning control is defined in section 171A of the 1990 Act as: (i) the carrying out of development without planning permission or (ii) failing to comply with any condition or limitation subject to which planning permission has been granted.

29. A breach of planning control entitles the local planning authority to take enforcement action. In particular, it can issue an enforcement notice under section 172 of the 1990. This states as follows:

"(1) The local planning authority may issue a notice (in this Act referred to as an "enforcement notice") where it appears to them—
(a) that there has been a breach of planning control; and
(b) that it is expedient to issue the notice, having regard to the provisions of the development plan and to any other material considerations."

30. A certificate of lawfulness, granted under section 191 of the 1990 Act (for existing development) or section 192 of the 1990 Act (for proposed development) provides conclusive proof that a particular development is lawful (i.e. that no enforcement action can be taken against the development).

Analysis

31. I turn first to consider whether the Development is permitted development under Schedule 2, Part 8, Class A of the GPDO. This grants planning permission for the following: "*Development by railway undertakers on their operational land, required in connection with the movement of traffic by rail."*. Applying these criteria here:

(1) NR is a "Railway undertaker". This term is not specifically defined in the GPDO. However, it is well established that reference should be made to the definition of statutory undertakers set out in section 262 of the 1990 Act. This materially states as follows, under the heading *"meaning of "statutory undertakers"":*

"(1) Subject to the following provisions of this section, in this Act "statutory undertakers" means persons authorised by any enactment to carry on any railway, light railway, tramway, road transport, water transport, canal, inland navigation, dock, harbour, pier or lighthouse undertaking or any undertaking for the supply of hydraulic power and a relevant airport operator (within the meaning of Part V of the Airports Act 1986).

(2) Subject to the following provisions of this section, in this Act "statutory undertaking" shall be construed in accordance with subsection (1) and, in relation to a relevant airport operator (within the meaning of that Part), means an airport to which that Part of that Act applies."

Therefore, NR is a railway undertaker since it is authorised by statute to carry out a rail undertaking.

(2) The Site is "operational land". Section 263 of the 1990 Act defines "operational land" as follows:

"in relation to statutory undertakers—
(a) land which is used for the purpose of carrying on their undertaking; and
(b) land in which an interest is held for that purpose.
Paragraphs (a) and (b) of subsection (1) do not include land which, in respect of
(2)its nature and situation, is comparable rather with land in general than with land which is used, or in which interests are held, for the purpose of the carrying on of statutory undertakings."

NR have an interest in the Site which is held for the purpose of carrying on their undertaking.

(3) The Development is required in connection with the movement of traffic by rail since the purpose of the carriage-wash is to clean trains for use on the railway.

32. Therefore, the Development is permitted under Class A, provided that it is not excluded by paragraph A.1.

33. In this respect, paragraph A.1(c)(i) excludes from the scope of Class A *"an office, residential or educational building, or a building used for an industrial purpose"*.

34. It appears clear to me that the carriage-wash is *"used for an industrial purpose"*. This is defined in the GPDO as including the *"cleaning"* of *"any article"*: see art. 2(1) of the GPDO. In turn, *"article"* includes a *"ship or vessel"*. Given this, an *"article"* almost certainly includes a train. As such, the process of cleaning a train is an industrial purpose. Indeed, I struggle to see how any other conclusion can be reached.

35. The exclusion in paragraph A.1(c)(i) only applies to *"a building"* used for an industrial process. However, for the reasons set out above (at paragraph 17-18) I consider that the correct position is that the carriage-wash is a building that includes plant within it. Therefore, whilst the plant within the carriage-wash is not a "building", the surrounding structure is and the structure as a whole is a *"building used for an industrial process"*.

36. Given this, in my opinion, the carriage-wash is not permitted development under Class 8. However, the access road would be since it would not be caught by the restriction in paragraph A.1.

37. Turning next to Part 18, Class A of the GPDO:

38. This grants planning permission for development specifically authorised by a local or private Act of Parliament. The permission does not allow any building works or means of access to any highway used by vehicular traffic without the prior approval of the local planning authority. The grounds upon which that prior approval may be refused are limited to the location of the development on the site ("*where it ought to be and can reasonably be carried out elsewhere on the land"*) and its appearance ("*if it would injure the amenity of the neighbourhood and is reasonably capable of modification to avoid such injury"*).

39. There are four questions that must be answered before the permitted development can be relied on:

    (1) Is the development in question authorised by a local or private Act of Parliament?

(2) Does the Act designate specifically the nature of the development authorised and the land upon which it may be carried out?

(3) Does the development in question consist of or include the erection, construction, alteration or extension of any building, bridge, aqueduct, pier or dam?

(4) If the answer to (3) is yes, was the prior approval of the local planning authority to the detailed plans and specifications first obtained?

40. I will deal first with questions (1) and (2), i.e. is the development authorised by a local or private Act of Parliament, which *"designates specifically the nature of the development authorised and the land upon which it may be carried out"*?

41. There are two parts to these questions:

42. The first part is geographical: whether the Development is authorised by an Act which designates specifically the land on which it may be carried out. This is a question of fact and requires consideration of the two Acts relied on by NR, namely the Eastern Counties Railway (Brandon & Peterborough Extension) Act 1844 and the Great Eastern Railway Act 1862. It will be necessary to obtain copies of these Acts to determine whether the Site falls within the scope of either (for example, through considering the attached maps). For now, I have proceeded on the basis that all of the works fall within the geographical scope of the Acts, given that they are associated with, and adjacent to, the existing railway.

43. The second part is whether the relevant Act "*designates specifically the nature of the development"* in question. NR claim that the 1862 Act incorporates the whole of the Railway Clauses Consolidation Act 1845 ("the 1845 Act") into its provisions (this will need to be checked, but this was commonplace at the time). Section 16 of the 1845 Act provides:

"Subject to the provisions and restrictions in this and the special Act, and any Act incorporated therewith, it shall be lawful for the company, for the purpose of constructing the railway, or the accommodation works connected therewith, herein-after mentioned, to execute any of the following works; (that is to say,)

They may make or construct in, upon, across, under, or over any lands, or any streets, hills, valleys, roads, railroads, or tramroads, rivers, canals, brooks, streams, or other waters, within the lands described in the said plans, or mentioned in the said books of reference or any correction thereof, such temporary or permanent inclined planes, tunnels, embankments, aqueducts, bridges, roads, ways, passages, conduits, drains, piers, arches, cuttings, and fences, as they think proper;

They may alter the course of any rivers not navigable, brooks, streams, or watercourses, and of any branches of navigable rivers, such branches not being themselves navigable, within such lands, for the purpose of constructing and maintaining tunnels, bridges, passages, or other works over or under the same, and divert or alter, as well temporarily as permanently, the course of any such rivers or streams of water, roads, streets, or ways, or raise or sink the level or any such rivers or streams, roads, streets, or ways, in order the more conveniently to carry the same over or under or by the side of the railway, as they may think proper;

They may make drains or conduits into, through, or under any lands adjoining the railway, for the purpose of conveying water from or to the railway;

They may erect and construct such houses, warehouses, offices, and other buildings, yards, stations, wharfs, engines, machinery, apparatus, and other works and conveniences, as they think proper;

They may from time to time alter, repair, or discontinue the before-mentioned works or any of them, and substitute others in their stead; and

They may do all other acts necessary for making, maintaining, altering, or repairing, and using the railway:

Provided always, that in the exercise of the powers by this or the special Act granted the company shall do as little damage as can be, and shall make full satisfaction, in manner herein and in the special Act, and any Act incorporated therewith, provided, to all parties interested, for all damage by them sustained by reason of the exercise of such powers."

44. Accommodation works are *"works for the accommodation of the owners and occupiers of lands adjoining the railway"*: see section 68.

45. There is no doubt that the Development is authorised by section 16 in the sense that it is within the undertaker's power to construct them. They all fall within the terms *"Roads…Buildings…Engines, Machinery, Apparatus and other works and conveniences"*. However, the test under the GPDO, is different. The 1845 Act must *"designate specifically the nature of the development authorised"*. I am unaware of any authority on the point. If it is simply sufficient for the carriage-wash to fall within the scope of section 16, then it is *"specifically"* designated and would be permitted development under Class 18. However, if this requires the type of development to be expressly mentioned in the list of items

permitted in section 16 (in the way that houses, warehouses, offices etc are), then it would not be (although the access road would be permitted, since "roads" are expressly mentioned).

46. Ultimately, this is a legal point that can only be resolved by the Courts. However, I consider that the latter interpretation is correct given the use of the word *"specifically"*, which suggests that an express reference to the type of development proposed is necessary.

47. On that basis, I consider that the carriage-wash is not permitted development under Class 18.

48. However, in any event, the carriage-wash would require prior approval on the basis that it is a "building" (see paragraphs 17-18 and 35 above); however, the access road would not require prior approval since it does not appear to connect to *"any highway used by vehicular traffic"*.

49. Therefore, overall, I consider that the carriage-wash requires planning permission and that it does not amount to permitted development.

Conclusion

50. My conclusions are set out above at paragraph 3.

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