

PROPOSED CHILTERN RAILWAYS (BICESTER TO OXFORD IMPROVEMENTS)

TWA ORDER

THE CASE FOR THE GRANT OF COMPULSORY PURCHASE

POWERS IN THE ORDER SCHEME

1 Introduction

1.1 The Inspector has requested CRCL to provide a consolidated statement that responds to his questions:

(i) whether there is a 'compelling case in the public interest compulsorily to purchase land necessary for the implementation of the East West Rail (EWR) elements of the draft TWA Order;

(ii) specifically, in the case of the additional parking required for EWR at Bicester Town and Water Eaton Parkway stations, whether the compulsory purchase of land can be justified.

These questions, which are 1/5 and 3/4 in **X/8/1**, were addressed, orally, by Ian Gilder in Evidence-in-Chief on Day 3 of the Inquiry.

2 Legal Background

2.1 The two questions are not severable from the legal basis that underpins compulsory purchase. Accordingly, it is considered desirable to restate the legal position prior to any particular consideration of the circumstances that here obtain.

2.2 Section 1 of the Transport and Works Act 1992¹ enables the Secretary of State to make an order relating to the construction or operation of a railway. The making of such an order is a discretionary act on the part of the Secretary of state².

2.3 Section 5 of the 1992 Act provides, without prejudice to the generality of section 1, that the matters, which an order under section 1 can include, are set out in schedule 1 to the Act. Paragraph 3 of the schedule specifies that one such matter is the compulsory acquisition of land. Paragraph 4 specifies that other such matters include the compulsory creation and extinguishment of rights.

2.4 Accordingly, the legislative position is an ability to make an order for compulsory purchase under a Transport and Works Act order. The legislation does not, itself,

¹ CD 5.7

² The section uses the word "may".

place any requirement on the Secretary of State as to the making of an order embracing compulsory purchase. It simply says he may make one³.

- 2.5 However, the common law regards property rights as important and worthy of protection. Thus, the courts have made plain that the power of the Secretary of State cannot be exercised arbitrarily. The position at law can be taken from a consideration of Chesterfield Properties plc v Secretary of State for the Environment [1997] EWHC Admin 709.⁴
- 2.6 In that case a compulsory purchase order had been made under section 226(1) (a) of the Town and Country Planning Act 1990. This provision gives power to a local authority, on being authorised by the Secretary of State, to acquire compulsorily land suitable or required in order to secure the carrying out of development. The judge⁵ in the Chesterfield case made plain⁶ that, notwithstanding the words used in the section, the Secretary of State did not have to judge that the consequence of acquisition would be or would probably be the execution of the scheme. In other words, the statutory words did not require the Secretary of State to judge that the works were likely to proceed.
- 2.7 It can be remembered that in the Transport and Works Act 1992 there is no such language as is used in the Town and Country Planning Act 1990. Accordingly, quite apart from the decision in Chesterfield, it would be more difficult under the Transport and Works Act 1992 to put forward the argument, which failed, used in the Chesterfield case.
- 2.8 The judge in the Chesterfield case also considered the argument that, however the language in the Town and Country Planning Act was construed, given that compulsory purchase was involved, the Secretary of State had to be satisfied that the intended development⁷ would probably occur⁸.
- 2.9 The judge said that, although the Secretary of State had to find a substantial public interest, it could not be implied that he had to conclude that the related development would take place.
- 2.10 Accordingly, what the law demands is that the Secretary of State, if he is to exercise his power to authorise compulsory acquisition of land and rights in land, must consider there to be a substantial public interest supporting that exercise. This is because of the constitutional position adopted in respect of property rights. It can be noted that Chesterfield was recently mentioned by the Supreme Court with seeming approval.⁹

³ See previous footnote.

⁴ 24 July 1997.

⁵ Laws J., now Laws L.J.

⁶ Paragraph 17 et seq

⁷ ie the rationale for the compulsory purchase

⁸ See paragraph 26 of the judgment.

⁹ Sainsbury's v Wolverhampton [2010] UKSC 20 paragraph 39

- 2.11 It is in the context of the principles of law just enunciated that the Secretary of State's policy must be seen.
- 2.12 The policy, as opposed to the legal position, is recorded in circular 06/2004. Plainly, it reflects the imperative that there must be a substantial public interest. In that regard it should be noted that the existence of a substantial public interest has a logical connection with the likelihood of something happening. In other words, if the proposition is advanced that the public interest would be advanced by the provision of a new swimming pool, there is unlikely to be a substantial public interest in making the compulsory purchase order if it is improbable that the swimming pool could ever be provided because, for example, its proposed location was entirely unsuitable for a swimming pool. However, the legal test is the existence of a substantial public interest.
- 2.13 The guidance in the circular reflects the point just made and the legal principles that have been set out above.
- 2.14 Thus, paragraph 17 speaks of only making a compulsory purchase order where there is a compelling case in the public interest. That paragraph occurs in a sequence of paragraphs under the heading "Justification for Making a Compulsory Purchase Order". Paragraph 19 indicates that if an acquiring authority does not have a clear idea of how it intends to use the land and cannot show that all the necessary resources are likely to be available within a reasonable timescale to achieve the end in view, it will be difficult to show that the compulsory acquisition is justified in the public interest¹⁰.
- 2.15 The circular, within the paragraphs dealing with justification, has two paragraphs¹¹ headed resource implications and two paragraphs¹² headed impediments. These are paragraphs intended to assist in the consideration of justification for an order or, to put the matter in terms of the law, to provide assistance in formulating or gauging the existence or otherwise of a substantial public interest.
- 2.16 It should be noted that the justification which is being discussed is justification for the scheme. The noun, scheme, is used in all four paragraphs. Thus, focus is called for by the circular on the scheme and by the law on whether there is substantial public interest in making the order comprising the scheme.
- 2.17 It follows that one should have clearly in mind what the scheme is and bear in mind that the legal test is whether there is a substantial public interest in its achievement. The determination of that question may well be profoundly influenced by questions of likely occurrence of the scheme including impediments to it. But it is, nonetheless, the case that the test, in law, as regards the making of the order is substantial public interest or, to use the language of the circular, a compelling case in the public interest.

¹⁰ Thus, the author of the circular is using the touchstone of resources to achieve an end as factors to be deployed in considering whether there is a public interest.

¹¹ Paragraphs 20 and 21.

¹² Paragraphs 22 and 23.

- 2.18 There may well be circumstances when one wants, in the public interest, to provide a base for something even though that something may be coming later or conceivably not at all. Thus, it may be desirable to acquire land for military purposes as prospectively to be used if a national emergency occurs even though it is hoped such an emergency will never take place. In that instance the public interest, which is the test, is met because the Secretary of State would be satisfied that it was in the public interest to acquire land for the potential construction of say military equipment even though it was actually hoped the construction would never occur.
- 2.19 The scheme, which is here sought to be justified, consists of identifiable phases. It is not entirely accurate to speak of them in the following terms but they could be put as activities and paving. By this is meant the fact that phase 1 secures the activity of Chiltern Railways running passenger trains between Oxford and Marylebone and phases 2a and 2b provide a base or pavement for something else namely the east-west route¹³.
- 2.20 The question therefore becomes whether there is a substantial public interest in the provision of a railway service between Oxford and Marylebone and in providing a base for the east – west rail service. In other words, is it in the public interest to pave the way for something such as the east – west rail route? That is a question which can easily be answered affirmatively.
- 2.21 The questions which inform the view about public interest are questions about the scheme. In other words, will the paving occur? Thus, one is not looking at a generalised future question about the east west rail scheme.
- 2.22 In actual fact more than mere paving is provided by the Order.

3 The Case for the Grant of the Order as a Whole

- 3.1 CRCL, as Promoter of the TWA Order, has always been aware of the need to establish that the Order, as a whole, is fully justified and meets the tests summarised in paragraphs 16 to 23 of Circular 06/2004 (**CD/5.19**).
- 3.2 This has been reflected throughout the application documents, from the draft Order (**CD/1.2/1**) through the Environmental Statement (**CD/1.15 to 1.18**) to the Statements of Aims (**CD/1.4**) and Funding (**CD/1.7**).
- 3.3 It has been clearly established in evidence (see Graham Cross (**CRCL/P/1/A**) sections 4,5,6,7,8 and Allan Dare (**CRCL/P/2/A**) at section 8) that Phase 1 of the Order Scheme (to enable the Chiltern Railways service) and Phase 2A (the gauge widening, principally to Wolvercot tunnel) are deliverable. These are to be funded by Chiltern Railways (Phase 1) and the Department for Transport (Phase 2A) and that funding is fully committed and available for the immediate implementation of those two phases following confirmation of the Order.

¹³ This has deliberately been put in terms which do not fully represent what is proposed. It is an understatement of what is to occur.

- 3.4 The draft Order (and other application documents) also include provisions (including the powers for the compulsory purchase of small areas of land) to pave the way for or enable the delivery of the EWR project. This is not only in accordance with the Memorandum of Understanding between EWR and CRCL (**CD/2.6**), but has been an integral part of the development of the Order Scheme.
- 3.5 Neil Gibson (**CRCL/P/3/A**) and Patrick O'Sullivan (**CRCL/P/4/A**) have appeared at the Inquiry as witnesses for the Promoter, in order to demonstrate the 'seamless nature' of the Order Scheme, and also to provide the Inspector with up to date professional evidence about the commitments that exist to the design, consenting and delivery of the EWR Western Section proposals to Bletchley and Milton Keynes. The Western Section of EWR has reached the well advanced GRIP4 stage in Network Rail's scheme development procedure and they have set out clearly the continuing commitment of the Consortium and other public sector bodies to the delivery of the Western Section
- 3.6 Although the evidence to the Inquiry focuses on the first, Western Section, EWR has always been an interregional railway project, linking Oxford to Bedford (and beyond into East Anglia). The section from Bletchley to Bedford, for example, is already an existing operational railway, on which substantial investment in track and signalling has recently been undertaken.
- 3.7 Since the opening of the Inquiry, the Minister of State for Transport has provided further confirmation that the EWR Consortium's outline business case for the Western Section of EWR (OBC) will be put forward as a candidate scheme for The Higher Level Output Statement (HLOS) for public investment in the period April 2014 to April 2019. A copy of the letter from the Department's Head of Rail Network Strategy confirming this is in Appendix A and he notes that Departmental officials have been instructed to work closely with the EWR Consortium to effect this.
- 3.8 There are several reasons why the Order Scheme should be considered by this Inquiry as a single entity for the purposes of the tests in Circular 06/2004. These are already in evidence to the Inquiry and are summarised below:
- (i) As set out in the Statement of Case (**CD/1.27**), the costs of the EWR elements of the Order Scheme will be around £74 million out of a total of about £185 million. The substantial additional capacity and connectivity provided by EWR can only be delivered for this small additional cost if the principal engineering works, including the lowering of the Wolvercot tunnel and the construction of the stations are delivered as a single cost-effective Phase 1 and 2A contract with the railway closed under 'blockade'.
 - (ii) The high Benefit Cost Ratios reported for EWR in the OBC are, in part, a result of the prior investment being made by Chiltern Railways and DfT in Phase 1 and 2A of the Order Scheme. This substantial investment committed by Chiltern Railways and DfT helps to underpin the Business Case for the EWR Western Section and increases the likelihood that it will secure public funding, instead of other, competing schemes. This 'future proofing' should be given considerable weight in the determination of the public interest.

- (iii) Apart from the cost savings that arise through the delivery of most of the engineering works needed as a single contract, there will also be the considerable environmental and accessibility benefits that arise because the works in Phases 1 and 2A will be delivered swiftly under 'blockade' conditions, avoiding the prospect of two distinct periods of 'disruption during construction' along much of the Oxford to Bicester route. Phase 2B will be deliverable with only short possessions when works need to be tied in to the previously completed Phase 1 and 2A works. Construction will be arranged to ensure that, for most residents, there will only be one period of construction noise etc (during the Phase 1 and 2A works). Where appropriate, environmental mitigation needed for Phase 2B will be in Phases 1 and 2A.
- (iv) The DfT decision to fund the 'gauge enhancement' works at Wolvercot tunnel and elsewhere is indicative of the strength of the underlying case for EWR. This reflects the inclusion of the Oxford-Bletchley-Bedford EWR route in the Department's "Strategic Rail Freight Network" report (2009), included in Appendix 6 of **CRCL/P/2/B**.

3.9 There are parts of the route e.g., from the A41 overbridge at Bicester to Islip station, where there will need to be separate Phase 2B sets of works, but overall there are strong practical engineering and environmental reasons for approving the Order Scheme as a whole.

3.10 There are precedents for the inclusion of 'paving' or 'enabling' powers in TWA Orders and similar private or hybrid legislation. Examples known to the CRCL team include: (i) the provisions for the junction to later phases of the Merseytram scheme in Liverpool, included in the first Merseytram Order in 2005, despite the later phases only appearing in the Local Transport Plan and draft Business Case (ii) The Nottingham Express Transit System Order 2008 and the Docklands Light Railway (London City Airport) Order, which both included land provisions which were only required for intermediate stations, which would only be funded separately by developers and for which there was no committed funding (iii) The London Underground (East London Line Extension) Order 1997, which provided for a section of railway at Dalston Junction to link to the North London Line, which would only be brought forward by Railtrack plc at some future date. Similar provisions were made in the Thameslink Order, for Crossrail.

4 What is likely to occur if EWR from Bicester to Bletchley is not reopened?

4.1 This question has not been expressly considered in Chiltern Railways' application for the TWA Order nor in the Environmental Statement. However, it can be inferred from Leo Eyles' evidence in relation to demand and merits discussion as an alternative or 'fall back' scenario in relation to the Order application. Chiltern Railways is anticipating operating 4 trains per hour (tph) (i.e. 2 in each direction) between Oxford and London via Bicester Town, from 2013. After 2017, the anticipated opening of EWR from Bicester to Bletchley, 4 additional trains per hour would provide an enhanced service (and passenger capacity) from Bicester to Oxford and vice versa.

4.2 These would cater for (and encourage) additional traffic from Bicester to Oxford, which is, in part, consequent upon on the current and planned house-building in

Bicester. If EWR from Bicester to Bletchley is not provided, Chiltern Railways (or any successor franchisee) is likely to step in to meet that demand. This could well be sufficient to support some, if not all, of the addition 4 tph, triggering the need to provide double track between the Bicester MoD Depot and Islip.

- 4.3 Under this scenario, it is acknowledged that there is unlikely to be significant additional freight traffic over and above the Phase 1 and 2A services, but there are no provisions in the Order itself solely to cater for this freight traffic.

5 The Extent of the Compulsory Purchase Powers Solely required for East West Rail

- 5.1 These are very limited in extent. Chiltern Railways accepts that the overall test in Circular 06/2004 that there needs to be 'clear evidence that the public benefit will outweigh the private loss' has to be met, but the limited extent of land required is a factor to be noted.

- 5.2 The powers of compulsory acquisition that would only be required to deliver Phase 2B for EWR are principally to:

- (i) construct the widening of the A41 overbridge at Bicester to enable the provision of a third track to hold trains waiting to enter the Bicester MoD Depot;
- (ii) reinforce or extend embankments between Bicester MoD Depot and Islip Station;
- (iii) reconstruct Islip station to provide two platforms for the double track; and
- (iv) lay a second track and reconfigure junction layouts at Wolvercote.

- 5.3 At Wolvercot tunnel, the need for CPO powers is extremely limited and will in any event be undertaken in Phase 1 and 2A. The reconstruction of the tunnel, including the lowering may be entirely possible using land already owned by Network Rail. The 'tunnel lowering' may require the installation of ground anchors, for which powers are being sought on a precautionary basis. All of these works, except the provision of the second track, will be carried out as part of the first, Phase 1 and 2A contract.

- 5.4 In relation to car parking, the position is clear. At Water Eaton, even without EWR, all the land will be needed to provide surface car parking to meet the demand from Chiltern Railways in 2026. Any parking to meet EWR demand will be provided as a deck over the surface parking already constructed for CRCL Phase 1. This position is set out in Leo Eyles' evidence (**CRCL/P/5/A**) in Table 3.2.

- 5.5 The position at Bicester Town is essentially the same, as can be read from the same table in Leo Eyles' evidence and Paul Tregear's note, **CRCL/P/8/E** in para 3.3. Surface parking occupying all of the land subject to CPO will be required to meet the Chiltern Railways Phase 1 passenger demand in 2026. Any parking for EWR,

estimated to be 145 weekday spaces in 2026, will be provided as a deck over the surface parking already constructed for CRCL.

6 The Issue of Timing

- 6.1 As set out in para 21 of Circular 06/2004, 'the timing of the availability of funding is also likely to be a relevant factor'. The best available indications are that EWR will receive sufficient funding in stages to enable its completion and commencement of services by 2017.
- 6.2 Although the EWR Consortium has not as yet produced a full programme to approval and construction, it is likely that construction would need to commence (in the sections covered by the Order) by 2016 with any of the powers of compulsory acquisition in the Order needing to be triggered no later than 2014 or 2015.
- 6.3 For the EWR Western Section beyond the Order Scheme, the Consortium has, for the reasons explained by Patrick O'Sullivan, Section 12, not yet decided exactly which method of securing detailed consents it will use. The Consortium may well decide to proceed under an application for a DCO to the IPC or its successor body, but may adopt a piecemeal approach, using planning applications and other consents as necessary. There are no obvious reasons why the consents required should be withheld and the EWR north of Bicester has support through the development plans (CRCL/P/12/H).
- 6.4 The Secretary of State should not be especially concerned that the exact consenting arrangements are not yet settled, for two reasons:
- (i) The East West Rail line between Bicester Town station and Claydon LNE junction (approximately 7 miles east of Bicester) is extant, and currently in use for freight trains. Between the Claydon LNE Junction and Bletchley the line was taken out of operational use in 1993, but technically remains an open railway, having never formally been closed. It may therefore be entirely possible for Network Rail to reinstate track and signalling etc under permitted development powers in Part 11 Class A of the Town and Country (General Development Management Procedure) Order 2010. Indeed, 1 mile 28ch of the line east from Bletchley to the Newton Road bridge was reinstated in 2005/6, and is currently used for freight trains, leaving a gap of approximately 10 miles of track to be relaid.
- 6.5 Physically, there are no impediments to the reinstatement of the track and signalling, although EWR may choose to secure express planning permissions for the construction of buildings and parking for intermediate stations on land outside Network Rail's existing operational land. As para 18 of Circular 06/2004 makes clear, it is not necessary to demonstrate that all of the land required is required immediately. and required for EWR will be acquired once the project is ready to proceed. The evidence of Patrick O'Sullivan and Neil Gibson indicates that this is likely to be within the statutory 5 year period for implementation following confirmation of the Order before this inquiry.

7 Conclusions

7.1 The case for approving the Order as a whole is compelling.

7.2 There is a 'compelling case in the public interest' for confirmation including the paving works required for EWR. Each of the 'factors to which a confirming Minister may have regard' is met. In summary these are:

- (i) The Order is clear as to the intended use of all of the land to be acquired;
- (ii) The Order Scheme as a whole delivers public transport and environmental benefits that outweigh the private loss of land interests;
- (iii) There are strong financial, engineering and environmental benefits associated with the Order Scheme as a single entity not least the opportunity to make advanced provision for environmental mitigation for EWR or other rail services;
- (iv) There is sufficient indication of likely public sector commitment to the approval and resourcing, including funding, of EWR and evidence of the ways in which multiple funding streams are likely to be available to warrant approval of the order as a whole. The approval of the Order as a whole would substantially reinforce EWR's ability to meet the 'value for money' tests for any public funding needed;
- (v) EWR is well advanced in terms of scheme development and, to the extent that they are needed, there are no 'obvious reasons why permissions needed' for EWR are likely to be withheld. All of the planning and other consents for the Order Scheme itself including Phases 1, 2A and 2B are in the Planning Direction or are in hand; and
- (vi) There is a reasonable expectation that EWR will proceed within the statutory period for the Order and, in the event that it does not, any land that is not thereby required will not be acquired compulsorily.

Timothy Straker QC
Tim Comyn
Ian Gilder
24 November 2010

APPENDIX A: DEPARTMENT OF TRANSPORT LETTER 4 NOVEMBER 2010

Department for
Transport

Neil Gibson
Chairman - East West Rail Consortium
Buckinghamshire County Council
County Hall
Walton Street
Aylesbury
Buckinghamshire
HP20 1UA

David Sexton
HLOS Development Manager
Rail Network Management
Department for Transport
Great Minster House
76 Marsham Street
London
SW1P 4DR
Direct Line: 020 7944 2760
Divisional Enquiries: 020 7944 6629
Fax: 020 7944 2158
E-Mail Timothy.Wellburn@dft.gsi.gov.uk

Web Site: www.dft.gov.uk

4 November 2010

Dear Mr Gibson,

Rail High Level Output Specification for 2014/15 - 2018/19

I am writing to confirm the Minister of Transport's decision yesterday that the East West Rail Consortium's business case for the western section will be considered as a candidate scheme for funding in the next High Level Output Specification (HLOS), encompassing rail investment during the five years period from 2014/15 to 2018/19.

It is likely there will be a number of rail enhancement schemes competing for investment, most of them being put forward by the rail industry as an outcome from Route Utilisation Strategies. The amount of public funds available has yet to be determined but is unlikely to extend to cover all candidate schemes.

The format of the next HLOS will be shaped by current work on rail franchising and the McNulty value for money. We anticipate the HLOS will be published in summer 2012. The Minister has committed department officials to continue to work closely with the East West Rail Consortium and we will use this link to request any further material we may require to inform evaluation.

Yours sincerely,

Timothy Wellburn
Head of Rail Network Strategy

