

THE OLD MEON VALLEY RAILWAY LINE

ADVICE

1. I am asked to advise as to whether certain works ("the Works") undertaken by or on behalf of the Hampshire County Council ("Hampshire") and/or the South Downs National Park Authority ("SDNPA") require planning permission in light of Parts 9, 12 and 13 of Schedule 2 of the General Permitted Development Orders of 1995 or 2015¹ ("the Orders").

Summary of advice

2. For the reasons set out below I have concluded that the Works do require planning permission.

Reasons

3. The Works, in essence, comprise works to some 10 miles of track along the length of the Old Meon Valley Railway line. In undertaking the Works the following steps were taken:

¹ The 2015 order came into force on 15 April 2015. I have assumed the Works were substantially undertaken prior to that date and so applied the 1995 Order in the first instance, but where relevant I have taken into account changes in the Order which might affect a decision on whether to enforce now.

- a. The existing surface was excavated, scraped and removed and replaced by a new surfacing material which is plainly different to that existing before;
 - b. The width of the track has more than doubled from under 2 metres in width to 4 metres;
 - c. The excavations now form small banks at the side of the new track;
 - d. The laying of the new surface over such an extended area has changed the character of the area by reason of the type, covering and extent of the new stones;
 - e. In addition, new drainage ditch run offs have been installed outside the extended width of the track;
 - f. There has been partial width surfacing where no a previous track did exist, and full width surfacing where the surface was previously mud²;
 - g. The operations have altered the existing camber of the track;
 - h. The construction of timber steps has also cut into the banks.
4. An essential question is whether the Works are mere works of *"maintenance or improvement"* of an existing track.
5. Thus, to fall within Class A of Part 9 of the 1995 Order – repairs to unadopted streets and private ways - such works must be (a) for the maintenance or improvement of the street or way; and (b) carried out within the boundaries of

² This appears to be common ground – see the letter of 2.2.15 describing the Works.

the street or way.³ Class E to that Part of the 2015 makes materially identical provision.

6. To fall within Part 12 – development by local authorities - the works must (a) be to items falling within the description of given in Class A⁴; (b) by for the maintenance, improvement or other alteration of those items. In any event, for the first limb of Part 12 to apply the works must not exceed 200m³.
7. The old Part 13 has now moved to Part 9 Class A (above).

Discussion

Part 9

8. The parties agree that the leading guidance in relation to what may be repair or improvement is found in Cowen v Peak District National Park Authority (2000) 79 P&CR 457, CA. It is a matter of planning judgment. But that judgment must be exercised on correct principles and it must lead to a reasonable result. It is clear from Cowen that:
 - a. “*improvements*” are limited to changes which do not alter the basic character of the thing which is improved [10].
 - b. The nature (and potentially location) of the way are important to assessing whether works are works of improvement of that way [11].

³ The analogous provisions of the 2015 Order are broader. Part 9 is now headed “Development relating to roads”. For works to fall within Class A of the 2015 Order they must be (a) carried out by the highway authority; (b) for the maintenance or improvement of the road; (c) be to land within the boundaries of a road (insofar the road is not a highway)

⁴ Acknowledging that A(b) has a catch-all of “similar structures or works”. In my view those words must be construed ejusdem generis by reference to the earlier list of items in A(b). In other words, to fall within the catch-all an item would have to be of a similar type.

9. In my clear view it cannot reasonably be said that these works are works for the “*maintenance or improvement*” of an existing track. It is important to look at the cumulative effect of the changes described above. Taking them together, and bearing in mind the length, increased width, differing camber, the new and different surfaces, new drainage arrangements, and the altered appearance of the track; it would in my view be nonsense to describe the works as either works or maintenance of mere improvement of the existing. Applying normal language, it is the making of a new track of (in at least material part) a different kind to that existing before. That conclusion is only strengthened if, as I understand it, the track is not intended or designed to carry vehicles (by way of contrast to the track in Cowen). It is a way for use by walkers and horses.
10. Moreover, considering the increase in width which, as I understand it, amounts to a doubling of the width of the track, it cannot be said that the new track falls within the boundaries of the existing way.

Part 12

11. As I understand it Winchester City Council and/or SDNPA (the relevant local planning authorities) have founded their view as to the lawfulness of the Works on this Part of the Order.
12. In my clear view Part 12 cannot apply. On any fair reading the Works do not fall within the kinds of works being described in Part 12. It is notable that roads and ways are dealt with elsewhere in the Orders. The Works are not works for a small ancillary building, works or equipment on land required for the exercise of the functions of Hampshire or SDNPA. The reference to

works or equipment in Class A has to be read in the context of what has gone before – the reference to small ancillary buildings, as well as the list of items which is found in A(b), all of which help to provide the statutory context of what Government was by the Order deciding could be done without even seeking planning permission.

13. Even if Part 12 was capable of applying to the Works they are, 15 times the size of what would be permitted by reference to the 200m³ cap.

14. Insofar as Hampshire contend that cap cannot be applied, to my mind that rather demonstrates the inaptness of relying on Part 12 to suggest that a track some 15,000m long does not require planning permission due to this Part. In that vein, Hampshire has suggested – and I agree – that the condition in A.2 only applies to A(a). To contend that the Works fall within A(b) Hampshire would have to persuade the local planning authority that the track was a “*similar structure or work*” to a lamp standard, information kiosk or public shelter. The reference to “*associated infrastructure*” in the new version of A(a) found in the 2015 Order is plainly to that required for, for example, the erection of the lamp standard. It is not for the construction of a 15,000m track. Again, in my view, it is simply nonsense to suggest that such a track falls within the descriptions of works provided in Part 12.

Part 13

15. The same essential problem confronts Hampshire in relying on Part 13 as relying on Part 9: The Works are simply not works of maintenance or improvement.

16. Whilst Hampshire have suggested in their email of 13.4.15 that Part 13 also authorises works may be undertaken outside the boundary of the existing highway that is not a full statement of Part 13. As set out above, any such works must still relate to improvement and maintenance of the highway, and the work must adjoin the boundary and must be for the improvement and maintenance of the existing highway. Thus, for example, for more than doubling of the width of the highway is not capable of falling within this definition. It amounts to creating a newer much broader highway, rather than merely improving the old highway.

17. Lastly, as has been observed, such works must be carried out by the highway authority. In my clear view that does not mean physically undertaken by the highway authority as an agent for another, but rather done by the highway authority in the discharge of its own statutory functions. As I understand it in this case the former has occurred. If so, Part 13 cannot be relied upon for that reason alone.

Conclusion

18. For those reasons I have reached the clear view that the Works are not permitted development and accordingly require planning permission.

WAYNE BEGLAN

CORNERSTONE BARRISTERS

29 May 2015