



Department for Transport

Winckworth Sherwood
Solicitors and Parliamentary Agents
Minerva House
5 Montague Close
London
SE1 9BB

Natasha Kopala
Head of the TWA Orders Unit
Department for Transport
Zone 1/14 -18
Great Minster House
33 Horseferry Road
London
SW1P 4DR

Enquiries:
transportandworksact@dft.gsi.gov.uk

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Dear Sirs,

TRANSPORT AND WORKS ACT 1992: APPLICATION FOR THE PROPOSED MIDLAND METRO (PENALTY FARES) ORDER

1. I am directed by the Secretary of State for Transport (“the Secretary of State”) to advise you that consideration has been given to the application made on 27 February 2018 by your client, the West Midlands Combined Authority (“WMCA”), for the proposed Midland Metro (Penalty Fares) Order (“the Order”) to be made under sections 1 and 5 of the Transport and Works Act 1992 (“TWA”).

2. The Order, as applied for, would amend sections 5 and 9 of the Midland Metro (Penalty Fares) Act 1991 (“the 1991 Act”) and confer powers on the WMCA allowing it to make changes to the penalty fare regime that applies to the West Midlands Metro Light Rail System (“the West Midlands Metro”), including the level of penalty fare. The amendments would empower the WMCA to make such changes without the need to seek an order from the Secretary of State.

3. The amendments to section 5 would impose a requirement on the WMCA to consult the Secretary of State and other listed consultees¹ in reaching a decision on the penalty fare arrangements. At the point the WMCA reach a decision, that decision is required to be published by way of a notice in the local newspaper(s) circulating in each area where passengers may get on and off Metro vehicles. The proposals also provide that the maximum level of the penalty fare that the WMCA can impose would not exceed level 2 on the standard scale of fines for summary offences as set out in the Criminal Justice Act 1982. Section 5 would also be amended to provide for the WMCA to alter the period for payment of the penalty fare and to introduce a two-tier system, whereby a

¹ Consultees are:

- a) such persons or bodies representative of local authorities,
- b) such persons or bodies representative of those who travel on the Metro, and
- c) such other persons or bodies as the Executive considers it appropriate to consult.

lesser amount of penalty fare is payable if payment is made within a specified shorter period.

4. The amendment proposed to section 9(1) of the 1991 Act ensures that the period within which no proceedings can be brought against a person for non-payment of a penalty fare takes account of any new period set by the WMCA utilising the power given to them by the new section 5(3).

Summary of Secretary of State's decision

5. For the reasons given in this letter, the Secretary of State has decided to make the Order with changes as set out below.

The Order application

6. In making this application, WMCA has complied with the publicity requirements of the Transport and Works (Applications and Objections Procedure) (England and Wales) Rules 2006. This included serving copies of the application and accompanying documents on the persons specified in those Rules and making the documents available for public inspection. As also required by those Rules, the WMCA published notices giving information about the application and how to make representations.

7. In response to the application the Secretary of State has received no objections or any other representations.

Purposes of the Order

8. The WMCA explained in their application that the current penalty fare regime was introduced on the West Midlands Metro by the 1991 Act and that the current penalty fare of £10 has not changed since that time. They consider that the impact of inflation on ticket prices has meant that this level of penalty fare no longer serves as an effective deterrent to potential fare evaders. Under the current section 5(2) of the 1991 Act, the level of the penalty fare can only be changed by order of the Secretary of State, which must be made via statutory instrument. The Order as applied for would amend section 5 permitting the WMCA to change the level of the penalty fare on the West Midlands Metro as it considered appropriate without the need for an order of the Secretary of State.

Secretary of State's consideration and decision

9. The Secretary of State has considered the information in the Order application. The Secretary of State is satisfied that the WMCA is a statutory body established by the West Midlands Combined Authority Order 2016 (S.I. 2016/653) under the Local Democracy, Economic Development and Construction Act 2016 and notes that it is the successor body to the West Midlands Passenger Transport Executive. The Secretary of State is content that the WMCA is responsible for the West Midlands Metro and that it has the necessary legal powers to set penalty fares on this network.

Provisions set out in the Order

10. The Secretary of State notes that the powers sought, would allow the WMCA to set the level of the penalty fares to be imposed on the West Midlands Metro rather than the level being set by order of the Secretary of State. He notes that the WMCA would however be required to consult the Secretary of State, along with other consultees, on any proposed change to certain aspects of the penalty fare regime, including the level of the penalty fare. The Secretary of State is content that as a statutory body made up of public authorities, the WMCA are required to make reasonable decisions that are in the best interests of their local area and that such decisions are judicially reviewable.

11. The Secretary of State notes that the Order would enable the WMCA to introduce a two-tier penalty fare system, with a reduction in the level of the penalty fare if it was paid within a shorter period. The Secretary of State is satisfied that such a two-tier system provides West Midlands Metro users subject to the imposition of a penalty fare with the opportunity to pay a reduced fare. The Secretary of State is content that such a provision is appropriate.

12. The Secretary of State notes that before the WMCA can change the level of the penalty fare to be imposed on the West Midlands Metro, it is required to consult the Secretary of State and other listed consultees. The Secretary of State has added a requirement that imposes a requirement on the WMCA to take account of the consultation responses before making decisions about the penalty fare arrangements.

13. Once a decision has been made by the WMCA, the Order imposes a requirement on the WMCA to publish a notice in the local newspaper(s) circulating in each area where passengers may get on and off the Metro vehicles not later than 28 days before the new penalty fare is to have effect. The Secretary of State is aware that information about public transport is often accessed online. The Secretary of State has therefore added a provision in the Order for the WMCA to make the notice available on, or accessible from a prominent link located on, its homepage and the homepage of any website which contains ticketing information for the West Midlands Metro (as per an agreement with the WMCA). As with the newspaper notices, the notice must be published on those websites for at least 28 days before the date the changes are to have effect. The Secretary of State is satisfied that with this provision in place there are adequate mechanisms for those travelling on the West Midlands Metro to be aware when new penalty fares come into force. The Secretary of State also notes that section 7 of the 1991 Act already provides that warning notices stating the circumstances in which a person may become liable for a penalty fare, and the amount of that penalty fare, must be posted in a readily visibly position in every West Midlands Metro stop and vehicle. It is noted, however, that the WMCA does not currently provide this information prominently on the West Midlands Metro website or the Network West Midlands website². Given that any notice in respect of altering the penalty fare will be published on those websites the Secretary of State is of the view that the section 7 notice should also be made available on those websites. The applicant has agreed to this and section 7 is being amended accordingly.

² Reference to penalty fares on the West Midlands Metro website (www.westmidlandsmetro.com) could only be found within the General Ticket Terms & Conditions which can be downloaded from that site, and no reference is made to the level of the penalty fare. Similarly the Network West Midlands website (www.networkwestmidlands.com) only referred to the Metro penalty fare in terms of how to pay it, and again did not refer to the amount.

14. The Secretary of State notes that the WMCA's application proposed that the maximum level of the penalty fare that the WMCA could impose would not exceed the maximum amount for which a person failing to comply with the requirements of section 8(1) would be liable on summary conviction. Section 8(1) of the 1991 Act provides:

"8(1) A person who is required to pay a penalty fare shall, unless he pays, immediately and in cash, the amount of the penalty fare to an authorised person requiring such payment, give to that authorised person, if that person requires him to do so, his name and address; and any person failing to do so is guilty of an offence and liable on summary conviction to a fine not exceeding level 2 on the standard scale."

The reference in section 8(1) to level 2 on the standard scale is to level 2 on the standard scale of fines for summary offences as set out in the Criminal Justice Act 1982. Given that the standard scale of fines is a criminal law penalty, and only imposed once a person has been found guilty of a summary offence, the Secretary of State does not consider that it is reasonable to use this in respect of penalty fares, which are a matter of civil law. In addition, currently a level 2 fine is up to £500. In the Secretary of State's view, a penalty fare of £500 is clearly excessive, yet imposing a cap which is the equivalent to £500 suggests that a penalty fare of any amount up to £500 could be reasonable. As such this provision has been removed. While this means that there is no cap in place, the Secretary of State is satisfied that the WMCA would have to go through due legal process including a consultation exercise before changing the level of a penalty fare. The Secretary of State therefore takes the view that this should provide an appropriate mechanism to test the reasonableness of any proposed change. The Secretary of State is also satisfied that as the WMCA is a statutory body made up of locally elected bodies which are answerable to their electorate, it is unlikely that the WMCA will set unreasonable levels of penalty fares. However, any perceived unreasonable decision made by WMCA on the level of the penalty fare could be subject to legal challenge by way of judicial review.

15. As required by section 13(4) of the TWA where the Secretary of State proposes to make an Order which gives effect to the proposals concerned with modifications which will in his opinion make a substantial change to the proposals:

- (a) he shall notify any persons who appears to him to be likely to be affected by the modifications,
- (b) he shall give that person an opportunity of making representations to him about the modifications within such period as he may specify in the notice, and
- (c) he shall, before making the order, consider any representations duly made to him.

16. The Secretary of State wrote to the WMCA on 29 May 2019, 19 June 2019 and 10 July 2019, setting out the details of the proposed changes set out in paragraphs 12, 13 and 14 above as he considered these changes to be substantial. The WMCA replied on 7 June 2019, 20 June 2019 and 17 July 2019 indicating that they were content with the changes proposed subject to a minor drafting amendment. The Secretary of State considers that, as there were no objections or representations to the Order, no other persons would likely be affected by these modifications, so has notified no other persons.

17. The Secretary of State has, therefore, decided to make the Order subject to the changes set out in paragraphs 12, 13 and 14.

Notice of determination

18. This letter constitutes the Secretary of State's notice of determination to make the Order for the purposes of section 14(1)(a) and (2) of the TWA. Your clients are required to publish a notice of determination in accordance with section 14(4) of the TWA.

Challenge to decision

19. The circumstances in which the Secretary of State's decision may be challenged are set out in the note annexed to this letter.

Yours faithfully,

Natasha Kopala

ANNEX

RIGHT TO CHALLENGE ORDERS MADE UNDER THE TWA

Any person who is aggrieved by the making of the Order may challenge its validity, or the validity of any provision in it, because—

- it is not within the powers of the TWA; or
- any requirement imposed by or under the TWA has not been complied with.

Any such challenge may be made, by application to the High Court, within the period of 42 days beginning with the day on which notice of this determination is published in the London Gazette as required by section 14(1)(b) of the TWA. This notice is expected to be published within 3 working days of the date of this decision letter.

A person who thinks they may have grounds for challenging the decision to make the Order is advised to seek legal advice before taking any action.