
SCOTTISH STATUTORY INSTRUMENTS

2010 No. 188

The Network Rail (Waverley Steps) Order 2010

PART 1

PRELIMINARY

Citation and commencement

1. This Order may be cited as the Network Rail (Waverley Steps) Order 2010 and comes into force on 1st June 2010.

Interpretation

2.—(1) In this Order—

“the 1845 Lands Act” means the Lands Clauses Consolidation (Scotland) Act 1845(1);

“the 1963 Act” means the Land Compensation (Scotland) Act 1963(2);

“the 1984 Act” means the Roads (Scotland) Act 1984(3);

“the 1991 Act” means the New Roads and Street Works Act 1991(4);

“the 1997 Act” means the Town and Country Planning (Scotland) Act 1997(5);

“the 2003 Act” means the Title Conditions (Scotland) Act 2003(6);

“the 2007 Act” means the Transport and Works (Scotland) Act 2007(7);

“the authorised works” means the scheduled works and any other works authorised by this Order;

“the Balmoral Hotel” means 1 Princes Street, Edinburgh EH2 2EQ as registered in the Land Register of Scotland under Title No. MID5396;

“benefited property” has the meaning given by section 122(1) of the 2003 Act;

“the book of reference” means the book of reference certified by the Scottish Ministers as the book of reference for the purposes of this Order and deposited at the offices of the Scottish Ministers, Victoria Quay, Edinburgh, EH6 6QQ;

“building” includes any structure or erection or any part of a building, structure or erection;

“burdened property” has the meaning given by section 122(1) of the 2003 Act;

“constitutive deed” has the meaning given by section 122(1) of the 2003 Act;

(1) 1845 c.19.
(2) 1963 c.51.
(3) 1984 c.54.
(4) 1991 c.22.
(5) 1997 c.8.
(6) 2003 asp 9.
(7) 2007 asp 8.

“construction” includes execution, placing, altering, renewal, replacing, relaying and removal and, in its application to works which include or comprise any operation, means the carrying out of that operation; and “construct” and “constructed” shall be construed accordingly;

“in” in a context referring to apparatus or alternative apparatus in land, includes under, over or upon land;

“the limits of deviation” means the limits for the scheduled works shown on sheet no. 1 of the Order plans;

“Network Rail” means Network Rail Infrastructure Limited (company no. 2904587) whose registered office is at Kings Place, 90 York Way, London N1 9AG;

“operational land” has the meaning given by section 215 of the 1997 Act⁽⁸⁾;

“the Order limits” means—

(a) the limits of deviation; and

(b) the limits of land to be acquired or used shown on sheet no. 1 of the Order plans;

“the Order plans” means the plans certified by the Scottish Ministers as the Order plans for the purposes of this Order and deposited at the offices of the Scottish Ministers, Victoria Quay, Edinburgh, EH6 6QQ;

“the Order sections” means the sections certified by the Scottish Ministers as the Order sections for the purposes of this Order and deposited at the offices of the Scottish Ministers, Victoria Quay, Edinburgh, EH6 6QQ;

“Princes Mall” means 3 Princes Street, Edinburgh EH2 2QP as described in a Notice of Title in favour of the City of Edinburgh District Council recorded in the Division of the General Register of Sasines applicable to the county of Midlothian on 29th March 1982;

“private rights” means rights of any sort that are vested in a person but not in the general public;

“real burden” has the meaning given by section 122(1) of the 2003 Act;

“roads authority” has the meaning given by section 151(1) of the 1984 Act⁽⁹⁾;

“the road works authority” has the meaning given by section 108 of the 1991 Act⁽¹⁰⁾;

“the scheduled works” means the works described in Schedule 1;

“the tribunal” means the Lands Tribunal for Scotland; and

“Waverley Steps” means the existing flight of steps within plots nos. 1 and 11, between points P1 and P2.

(2) Any reference to “ancillary works” is to any works referred to in article 3(3).

(3) Any reference to an “interest” in land shall be construed as a reference to a right in land and as including a reference to ownership of land.

(4) Any reference to a numbered work is to the scheduled work so numbered, and includes any ancillary works which are ancillary to that scheduled work.

(5) Any reference to a numbered plot or to a point is to the plot or point so numbered on sheet no. 1 of the Order plans.

⁽⁸⁾ There are amendments to section 215 which are not relevant to this Order.

⁽⁹⁾ Section 151(1) was relevantly amended by the Local Government etc. (Scotland) Act 1994 (c.39), Schedule 13, paragraph 135(10) and S.I. 2001/1400.

⁽¹⁰⁾ Section 108 was relevantly amended by the Transport (Scotland) Act 2005 (asp 12), section 19(2).

PART 2

WORKS PROVISIONS

Principal Powers

Power to construct, operate and maintain works

3.—(1) Network Rail may construct, operate and maintain the scheduled works.

(2) Subject to article 4, the scheduled works may only be constructed in the lines or situations shown on sheet no. 1 of the Order plans and in accordance with the levels shown on the Order sections.

(3) Subject to paragraph (5), Network Rail may carry out, operate and maintain such ancillary works of the sort broadly described in Schedule 2 as may be necessary or expedient for the purposes of, in connection with or in consequence of the construction or use of the scheduled works.

(4) Network Rail may carry out ancillary works of the sort broadly described in paragraph 7 of Schedule 2 to provide for, or share with, the apparatus or street furniture of any other person, and may permit the use of those works on terms and conditions agreed with that other person.

(5) Paragraph (3) only authorises the carrying out, operation or maintenance of ancillary works of the sort broadly described—

- (a) in paragraphs 2 and 8 of Schedule 2 within the limits of deviation; and
- (b) in paragraphs 1, 3, 9 and 11 of that Schedule within the Order limits.

Permitted deviation

4. In constructing or maintaining any scheduled work Network Rail may—

- (a) deviate laterally from the lines or situations shown on sheet no. 1 of the Order plans within the limits of deviation for that work shown on that sheet; and
- (b) deviate vertically from the levels shown on the Order sections—
 - (i) in the case of Work No. 1, upwards by a maximum of 0.5 metres;
 - (ii) in the case of Work No. 3, upwards by a maximum of 1.5 metres; and
 - (iii) in the case of so much of Work No. 1 as is within plots nos. 1 and 11, and Work No. 3, to any extent downwards.

Power to execute road works

5.—(1) For the purpose of exercising the powers conferred by this Order to construct and maintain any scheduled work having a junction with a road⁽¹¹⁾, Network Rail may enter upon any road and execute any works required for or incidental to the exercise of those powers.

(2) In exercise of the powers of paragraph (1) Network Rail may break up or open the road, or any sewer, drain or tunnel under it, may tunnel or bore under or open the road and may remove and use the soil or other materials in the road.

⁽¹¹⁾ For the relevant definition of “road” see the Transport and Works (Scotland) Act 2007 ([asp 8](#)), section 23(1) and the New Roads and Street Works Act 1991 ([c.22](#)), section 107.

Access to works

6.—(1) Network Rail may, for or in connection with the authorised works, form and lay out means of access, or improve existing means of access, to or from any public road—

- (a) at the points shown on sheet no. 1 of the Order plans; and
- (b) in such other location or locations within the Order limits as may be approved by the roads authority.

(2) Approval of the roads authority under paragraph (1)(b) shall not be unreasonably withheld or delayed and any dispute as to whether an approval has been unreasonably withheld or delayed shall, unless the parties otherwise agree, be determined by arbitration.

Agreements with roads authority

7.—(1) Where this Order authorises the execution of road works, Network Rail may enter into agreements with the roads authority concerning the construction (or contribution towards the expense of construction) of those road works and any related matters.

(2) Network Rail may, by agreement with the roads authority, delegate to that authority the power of executing the road works.

Permanent stopping up of road

8.—(1) Subject to the provisions of this article, Network Rail may, in connection with the construction of Work No. 1, stop up Waverley Steps.

(2) Not less than seven days before stopping up Waverley Steps under this article Network Rail shall place notices of the stopping up in conspicuous positions at either end of Waverley Steps.

(3) Network Rail shall take all reasonable steps to secure that the notices displayed in accordance with paragraph (2) shall continue to be displayed in a legible form throughout the seven days preceding the stopping up under this article.

(4) On the stopping up of Waverley Steps under this article all rights of passage over Waverley Steps (other than any such right created under this Order) shall be extinguished.

(5) Where a private right of passage is exercisable over land, in addition to Waverley Steps, which is within Network Rail's operational land outside the Order limits, the right extinguished by paragraph (4) shall be the whole of that right as affecting all the operational land to which it relates.

(6) Any person who suffers loss by the extinguishment of any private right of passage under this article shall be entitled to compensation.

(7) Any dispute as to a person's entitlement to compensation under paragraph (6), or as to the amount of compensation, shall be determined under the 1963 Act.

Construction, maintenance and vesting of Work No. 2

9.—(1) Work No. 2 shall, unless otherwise agreed between Network Rail and the roads authority, be completed to the reasonable satisfaction of the roads authority.

(2) Following completion of Work No. 2, that work shall, unless otherwise agreed—

- (a) between Network Rail and the roads authority under this article; or
- (b) by agreement under article 38,

be maintained by and at the expense of Network Rail for a period of 12 months from its completion.

(3) On the date provided by paragraph (7), Work No. 2 shall by virtue of this article vest in the roads authority as a public road.

(4) Network Rail shall give the roads authority notice in writing with a certificate that Work No. 2 is complete.

(5) The roads authority may, within 21 days after such service, give Network Rail a counter-notice in writing that the notice is disputed on the ground that Work No. 2 is not complete.

(6) Any dispute as to—

(a) the completion of Work No. 2 (other than a dispute as to the date referred to in paragraph (7)(c)); or

(b) the appointment of a consultant for the purpose of paragraph (8),

shall be determined by arbitration, and the determination of the arbiter (or other person to whom the dispute is referred) shall be final and binding.

(7) Work No. 2 shall vest—

(a) 28 days after the service of notice under paragraph (4);

(b) on the date of a determination under paragraph (6) that Work No. 2 is complete; or

(c) on the date on which Network Rail complies with any conditions for completion that are specified in the determination,

whichever is the latest.

(8) A certificate issued by or on behalf of Network Rail as to the date on which Network Rail complied with any conditions of the sort referred to in paragraph (7)(c) together, if so requested by the roads authority, with a report from a consultant to be agreed between Network Rail and the roads authority confirming such compliance, shall for the purposes of this article be conclusive evidence of such compliance.

(9) Nothing in this article shall prejudice the operation of section 146 of the 1991 Act (which enables the local roads authority to declare that a road shall become a public road); and Network Rail shall not by reason of any duty under this article to maintain a road be taken to be the roads authority in relation to that road for the purposes of Part 4 of that Act.

Supplementary powers

Temporary stopping up, alteration or diversion of roads

10.—(1) During and for the purposes of the execution of the authorised works Network Rail may temporarily stop up, alter or divert any road and may for any reasonable time—

(a) divert the traffic from the road; and

(b) subject to paragraph (4), prevent all persons from passing along the road.

(2) Without prejudice to the generality of paragraph (1), Network Rail may exercise the powers conferred by paragraph (1) in relation to so much of Princes Street and Waverley Bridge as is within an area of temporary stopping up shown on sheet no. 1 of the Order plans.

(3) Without prejudice to the generality of paragraph (1), Network Rail may use any road temporarily stopped up under the powers of this article as a temporary work site.

(4) Network Rail shall provide reasonable access for pedestrians going to or from premises abutting on a road affected by the exercise of the powers conferred by paragraph (1) if there would otherwise be no such access.

(5) Network Rail shall not exercise the powers conferred by paragraph (1) without the consent of the road works authority.

(6) Consent under paragraph (5) shall not be unreasonably withheld or delayed but may be given subject to any reasonable conditions which the road works authority may require.

- (7) Any dispute as to whether—
- (a) consent under paragraph (5) has been unreasonably withheld or delayed; or
 - (b) a condition imposed under paragraph (6) is unreasonable,
- shall, unless the parties otherwise agree, be determined by arbitration.

Discharge of water

11.—(1) Subject to the provisions of this article, Network Rail may use any watercourse or any public sewer or drain for the drainage of water in connection with the construction, operation or maintenance of the authorised works and for that purpose, may—

- (a) lay down, take up and alter pipes; or
- (b) make openings into, and connections with, the watercourse, public sewer or drain,

on any land within the Order limits.

(2) Network Rail shall not discharge any water into any artificial watercourse, or any public sewer or drain, except with the consent of the person to whom it belongs; and that person may impose reasonable terms and conditions but shall not unreasonably withhold consent or delay giving it.

(3) Network Rail shall not make any opening into any public sewer or drain except in accordance with plans approved by, and under the superintendence (if provided) of, the person to whom the sewer or drain belongs, but that person shall not unreasonably withhold consent or delay giving it.

(4) Network Rail shall take all reasonably practicable steps to secure that any water discharged under the powers conferred by this article is as free as is practicable from gravel, soil or other solid substance or oil or matter in suspension.

(5) Any dispute under this article arising between Network Rail and the owner of an artificial watercourse or a public sewer or drain shall, unless the parties otherwise agree, be determined by arbitration.

(6) Nothing in this article affects the operation of Part 4 of the 1991 Act or the Water Environment (Controlled Activities) (Scotland) Regulations 2005⁽¹²⁾.

(7) In this article—

“public sewer or drain” means a sewer or drain which belongs to Scottish Water, a private provider who has made an agreement with Scottish Water under section 1(2)(b) of the Sewerage (Scotland) Act 1968⁽¹³⁾ (provision of private sewer connections) or a roads authority; and

“watercourse” includes all rivers, streams, ditches, drains, culverts, dykes, sluices, sewers and passages through which water flows except a public sewer or drain.

Safeguarding works to buildings

12.—(1) Subject to the provisions of this article, Network Rail may at its own expense and from time to time carry out such works of the sort described in paragraph (2) as Network Rail considers to be necessary or expedient.

(2) The works referred to in paragraph (1) are safeguarding works, whether within or outside the Order limits, to any building situated wholly or partly on land within those limits.

(3) Safeguarding works may be carried out—

- (a) at any time before or during the construction of any part of the authorised works; or

⁽¹²⁾ S.S.I. 2005/348; relevant amending instruments are S.S.I. 2006/553, 2007/219 and 2008/54.

⁽¹³⁾ 1968 c.47; section 1(2) was substituted by the Local Government etc. (Scotland) Act 1994 (c.39), Schedule 13, paragraph 75(2) (b) and was amended by the Water Industry (Scotland) Act 2002 (asp 3), schedule 5, paragraph 3.

- (b) after the completion of the construction of the authorised works, at any time up to the end of the period of five years beginning with the day on which the authorised works are first opened for public use.

(4) Schedule 3 has effect.

(5) Network Rail shall compensate the owners and occupiers of any building or land in relation to which the powers conferred by this article and Schedule 3 have been exercised for any loss or damage arising to them by reason of the exercise of those powers.

(6) Where—

- (a) safeguarding works to a building are carried out under this article; and
- (b) within the period of 12 years beginning with the day on which the authorised works are first opened for public use, it appears that the safeguarding works are inadequate to protect the building against damage caused by the construction or operation of the authorised works,

Network Rail shall compensate the owners and occupiers of the building for any damage sustained by them.

(7) Nothing in this article relieves Network Rail from any liability to pay compensation under the Lands Clauses Acts.

(8) Any dispute as to a person's entitlement to compensation under paragraph (5) or as to the amount of compensation shall be determined under the 1963 Act.

(9) In this article and Schedule 3 "safeguarding works", in relation to a building, means—

- (a) underpinning, strengthening and any other works the purpose of which is to prevent damage which may be caused to the building by the construction, operation or maintenance of the authorised works; and
- (b) any works the purpose of which is to remedy any damage which has been caused to the building by the construction, operation or maintenance of the authorised works.

Power to survey and investigate land

13.—(1) Network Rail may, in relation to any land within the Order limits, for the purposes of this Order—

- (a) survey or investigate the land;
- (b) without prejudice to the generality of paragraph (a), make trial holes in such positions as the Network Rail thinks fit on the land to investigate the nature of the surface layer and subsoil and remove water and soil samples;
- (c) without prejudice to the generality of paragraph (a), carry out archaeological investigations on the land;
- (d) take steps to protect or remove any flora or fauna on the land where the flora or fauna may be affected by the carrying out of the authorised works;
- (e) place on, leave on and remove from the land, or, where the land is occupied by a building any part of which is on adjoining land outside the Order limits, that adjoining land, apparatus for use in connection with the exercise of any power conferred by paragraphs (a) to (d); and
- (f) enter on the land, or, where the land is occupied by a building any part of which is on adjoining land outside the Order limits, that adjoining land, for the purpose of exercising any power conferred by paragraphs (a) to (e).

(2) Before exercising any powers conferred by paragraph (1), Network Rail shall give—

- (a) on the first occasion at least seven days'; and

- (b) on subsequent occasions not less than three days',
notice in writing to every owner and occupier of the land.
- (3) Any person entering land under this article on behalf of Network Rail—
- (a) shall, if so required, before or after entering the land produce written evidence of authority to do so; and
- (b) may enter with such vehicles and equipment as are necessary for the purpose of exercising any of the powers conferred by paragraph (1).
- (4) No trial hole may be made under this article in a carriageway⁽¹⁴⁾ or footway without the consent of the road works authority, but such consent shall not be unreasonably withheld.
- (5) Any dispute as to whether consent has been unreasonably withheld under paragraph (4) shall, unless the parties otherwise agree, be referred to arbitration.
- (6) Network Rail shall pay compensation for any damage occasioned, by the exercise of the powers conferred by this article, to the owners and occupiers of the land.
- (7) Any dispute as to a person's entitlement to compensation under paragraph (6), or as to the amount of compensation, shall be determined under the 1963 Act.
- (8) For the purposes of this article "footway" shall be construed in accordance with section 151(2) of the 1984 Act.

PART 3

ACQUISITION AND POSSESSION OF LAND

Powers of acquisition

Power to acquire land

- 14.**—(1) Network Rail may acquire compulsorily—
- (a) such of the land described in the book of reference and shown on sheet no. 1 of the Order plans within the limits of deviation; and
- (b) as respects land so described and shown within the Order limits, and specified in Part 1 or Part 2 of Schedule 4, such servitudes or other rights as are authorised by article 16,
- as may be required by Network Rail for or in connection with the authorised works.
- (2) As respects plot no. 3, the acquisition permitted by paragraph (1) is limited to the acquisition of servitudes or other rights under sub-paragraph (b).

Acquisition of subsoil, servitudes and other rights

- 15.**—(1) In exercise of any of the powers conferred by article 14 Network Rail may, as regards any land authorised to be acquired under that article, compulsorily acquire—
- (a) so much of the subsoil of the land; and
- (b) such servitudes or other rights in, on or over the land,
- as may be required for any purpose for which the land may be acquired under that article.

⁽¹⁴⁾ See the definition in the Roads (Scotland) Act 1984 (c.54), section 151, applied by the Transport and Works (Scotland) Act 2007 (asp 8), section 23(1).

(2) Servitudes and other rights may be acquired under paragraph (1) by creating them as well as by acquiring servitudes and other rights already in existence.

(3) Section 90 of the 1845 Lands Act and paragraph 20 of Schedule 15 to the 1997 Act (which provide in certain circumstances for the owner of the land to require the compulsory purchase of the whole rather than part of that property) shall not apply to any compulsory purchase under this article or under article 16.

(4) Subject to paragraphs (5) and (6), the Lands Clauses Acts, as incorporated with this Order, shall have effect with the modifications necessary to make them apply to the compulsory acquisition of servitudes or other rights under this article or under article 16 as they apply to the compulsory acquisition of land.

(5) As so having effect, references in those Acts to land shall be treated as, or as including, references to servitudes or other rights or to the land over which such servitudes or other rights are to be exercisable.

(6) Section 61 of the 1845 Lands Act (estimation of purchase money and compensation) shall apply to the compulsory acquisition of such a right as if for the words from “value” to “undertaking” there were substituted the words “extent (if any) to which the value of the land in or over which the right is to be acquired is depreciated by the acquisition of the right”.

Purchase of specific servitudes or other new rights

16.—(1) Network Rail may acquire compulsorily in, on or over any of the land specified in columns (1) and (2) of Part 1 of Schedule 4 such permanent servitudes or other new rights as it requires for the purposes mentioned in column (3) of that Part or in order to give effect to any provision of Part 2 of Schedule 8 or article 38.

(2) Network Rail may acquire compulsorily in, on or over any of the land shown specified in columns (1) and (2) of Part 2 of Schedule 4, such temporary new rights as it requires for the purposes mentioned in column (3) of that Part or in order to give effect to any provision of Part 2 of Schedule 8.

Imposition of obligations

17.—(1) Network Rail may impose compulsorily as an encumbrance on any land within the Order limits such obligations on that land as it requires for or in connection with the authorised works.

(2) In addition to the powers conferred by paragraph (1), Network Rail may impose compulsorily as an encumbrance on the Balmoral Hotel and, separately, Princes Mall such obligations as it requires in order to give effect to any provision of Part 2 of Schedule 8 or, in the absence of an agreement under article 38, for any purpose which might be provided for in such an agreement.

(3) Without prejudice to the generality of paragraph (2), the obligations imposed under paragraph (2) may include, in relation to the land specified in columns (1) and (2) of Schedule 5, obligations for any purpose specified in relation to that land in column (3) of that Schedule.

(4) An obligation imposed under this article shall be a real burden affecting the land and shall be enforceable in accordance with the 2003 Act as having effect in accordance with this article.

(5) Notwithstanding the provisions of section 90 of the 2003 Act (powers of the Lands Tribunal as respects title conditions), a real burden created in accordance with this article shall remain in full force and effect without limit of time and shall not be capable of discharge, variation or termination except on the application of Network Rail made in accordance with the 2003 Act.

(6) An obligation under paragraph (1), and an obligation under paragraph (2), shall be imposed by—

- (a) the service on every affected person of a notice in writing that complies with paragraph (7); and

- (b) the recording or registration of a statutory declaration in the General Register of Sasines or the Land Register of Scotland, as the case may be.
- (7) A notice served under paragraph (6)(a) shall—
- (a) state that this Order has come into force;
 - (b) specify the terms of the obligation imposed and identify the burdened property and the benefited property;
 - (c) state that the obligation is a real burden on the land; and
 - (d) notify every affected person that—
 - (i) Network Rail is about to apply for registration of a statutory declaration creating the real burden; and
 - (ii) the real burden will take effect on the date specified in the notice (which shall be not less than 28 days after the date of the notice).
- (8) For the purposes of section 4 of the 2003 Act, a statutory declaration referring to a notice served under paragraph (6)(a) and—
- (a) including the information referred to in paragraph (7)(a) to (c); and
 - (b) specifying, as the date on which the real burden will take effect, the date specified in the notice,
- shall be treated as a constitutive deed.
- (9) Network Rail shall pay compensation—
- (a) for any obligation imposed under this article that is an affirmative burden, compensation to the owner equivalent to the capitalised cost of compliance with the obligation assessed—
 - (i) in the case of an obligation relating to an asset, by reference to its present day value; and
 - (ii) in any other case, by reference to such reasonable period as may be agreed or determined, reasonable allowance being made for the receipt by the owner of compensation in advance of the expenditure to which the compensation relates,
 such compensation to be reduced by such sums as would have been payable by the owner in respect of the asset or other thing in the absence of the authorised works, such that the owner is financially in no worse a position than would have been the case had the authorised works not been constructed; and
 - (b) for any obligation imposed under this article that is a negative burden or an ancillary burden, compensation to any affected person in respect of the amount (if any) by which the value of—
 - (i) the land on which the obligation is to be imposed; or
 - (ii) the affected person’s interest in that land,
 is depreciated by the imposition of the obligation.
- (10) Any dispute as to a person’s entitlement to compensation under paragraph (9), or as to the amount of compensation, shall be determined by arbitration.
- (11) Section 17 of the 1845 Lands Act (as incorporated with this Order by article 23) shall apply to the imposition of obligations under this article, and as so applied shall require notice to treat to be served on any protected person.
- (12) In this article—
- “affected person” in relation to burdened property means any person who is the owner or tenant of that property or who has the right to use it, and in relation to the service of notice means every person who is an affected person on the date of service;

“asset” means any physical thing other than land, and includes anything erected or placed on or affixed to land;

“Network Rail” includes any successor of Network Rail;

“owner” includes any person who is within the definition of that word in section 123 of the 2003 Act, and in relation to the service of a notice “the owner” means every person who is an owner on the date of service; and

“present day value” means the cost of compliance with the obligation in question assessed by reference to the whole life cycle cost information for the asset (as provided by the asset supplier) and reduced as provided in paragraph (9).

Rights in roads or public places

18.—(1) Network Rail may—

(a) enter upon and appropriate so much of the subsoil of, or air-space over, any road or public place comprised within plot no. 4, 10, 11, or 12, or shown on sheet no. 1 of the Order plans as an area of temporary stopping up, as may be required for the purposes or in consequence of the authorised works; and

(b) use the subsoil or air-space for those purposes.

(2) Subject to paragraph (3) the powers conferred by paragraph (1) may be exercised in relation to a road or public place without Network Rail being required to acquire any part of the road or place or any servitude or other right in relation to it.

(3) Paragraph (2) does not apply to—

(a) any subway or underground building; or

(b) any cellar, vault, arch or other construction in or on a road which forms part of a building fronting onto the road or public place.

(4) Network Rail is not required to pay compensation for the exercise of the powers conferred by paragraph (1) to the roads authority in respect of a public road or to the authority in which any public place is vested.

(5) Any person other than an authority mentioned in paragraph (4) who—

(a) is an owner or occupier of land in respect of which the power conferred by paragraph (1) is exercised without Network Rail acquiring any part of that person’s interest in the land; and

(b) suffers loss by reason of the exercise of that power,

shall be entitled to compensation.

(6) Any dispute as to a person’s entitlement to compensation under paragraph (5), or as to the amount of compensation, shall be determined under the 1963 Act.

(7) For the purposes of section 28 of the Land Registration (Scotland) Act 1979⁽¹⁵⁾, the powers conferred by this article shall constitute a real right and shall be an overriding interest.

Temporary possession of land

Temporary use of land for construction of works

19.—(1) Network Rail may, in connection with the carrying out of the authorised works—

⁽¹⁵⁾ 1979 c.33. Section 28 includes a definition of “overriding interest” to which there are amendments not relevant to this Order.

- (a) enter upon and take temporary possession of any of the land specified in columns (1) and (2) of Schedule 6 for the purpose specified in relation to that land in column (3) of that Schedule;
 - (b) remove any apparatus, buildings or vegetation from that land;
 - (c) construct temporary works (including the provision of apparatus or means of access) and buildings on the land.
- (2) Not less than 28 days before entering upon and taking temporary possession of land under this article Network Rail shall serve written notice of the intended entry on the owners and occupiers of the land.
- (3) Network Rail may not, without the agreement of the owners of the land, remain in possession of any land under this article after the end of the period of one year beginning with the date of completion of the authorised works.
- (4) Before giving up possession of land of which temporary possession has been taken under this paragraph, Network Rail shall remove all temporary works and restore the land to the reasonable satisfaction of the owners of the land; but Network Rail shall not be required to replace a building removed under this article.
- (5) Network Rail shall pay compensation to the owners and occupiers of land of which temporary possession has been taken under this article for any loss or damage arising from the exercise in relation to the land of the powers conferred by this article.
- (6) Any dispute as to a person's entitlement to compensation under paragraph (5), or as to the amount of compensation, shall be determined under the 1963 Act.
- (7) Without prejudice to article 22 (no double recovery), nothing in this article affects any liability to pay compensation under any enactment in respect of loss or damage arising from the execution of any works, other than loss or damage for which compensation is payable under paragraph (5).
- (8) Where Network Rail takes possession of land under this article, it shall not be required to acquire the land or any interest in it.

Compensation

Disregard of certain interests and improvements

20.—(1) In assessing any compensation payable to any person under this Order in respect of land (including any servitude, right or obligation such as is referred to in article 15, 16 or 17) or the use of land, the tribunal shall not take into account—

- (a) any interest in land; or
- (b) any enhancement of the value of any interest in land by reason of any building erected, works executed or alteration made on relevant land,

if the tribunal is satisfied that the creation of the interest, the erection of the building, the execution of the works or the making of the alteration was not reasonably necessary and was undertaken with a view to obtaining compensation or increased compensation.

- (2) In paragraph (1) “relevant land” means—
 - (a) the land or other thing acquired from the person concerned;
 - (b) the land of which temporary possession has been taken from the person concerned; or
 - (c) any other land with which that person is, or was at the time when the building was erected, the works executed or the alteration made, directly or indirectly concerned.

Set-off of betterment against compensation

21.—(1) In determining the amount of compensation or purchase money payable to any person in respect of an interest in land acquired under this Order in a case where—

- (a) the person has an interest in any other land contiguous with or adjacent to the land so acquired; and
- (b) the value of the person’s interest in any such contiguous or adjacent land is enhanced by reason of the works authorised by this Order or any of them,

the amount of the enhancement in value shall be set off against the compensation or purchase money.

(2) For the purposes of this article any reduction in expenditure that would have been required in order to comply with an obligation under any enactment with respect to any land is to be treated as an enhancement in the value of the interest in the land.

No double recovery

22. Compensation shall not be payable in respect of the same matter both under this Order and under any other enactment, any contract or any rule of law.

Supplementary

Application of Lands Clauses Acts

23.—(1) The Lands Clauses Acts, except sections 15, 16, 18, 20 to 60, 62 to 66, 81, 116, 120 to 124, 130, 131, 135, 139, 142 and 143 of the 1845 Lands Act and the Lands Clauses Consolidation Acts Amendment Act 1860⁽¹⁶⁾, are incorporated with this Order so far as applicable for the purposes of and not inconsistent with, or varied by, the provisions of this Order.

(2) In construing the Lands Clauses Acts as so incorporated—

- (a) this Order shall be deemed to be the special Act;
- (b) Network Rail shall be deemed to be the promoter of the undertaking or the company; and
- (c) the authorised works shall be deemed to be the works or the undertaking.

General vesting declarations

24.—(1) Subject to paragraph (3), section 195 of, and Schedule 15 to, the 1997 Act⁽¹⁷⁾ (which make provision for the vesting of land subject to compulsory purchase orders) apply to the compulsory acquisition of land under this Order as if this Order were a compulsory purchase order so as to enable Network Rail to vest by general vesting declaration any land authorised to be compulsorily acquired under this Order.

(2) The notice required by paragraph 2 of that Schedule (as so applied) shall be a notice—

- (a) that this Order has come into force;
- (b) containing the particulars specified in sub-paragraph (1) of that paragraph;

⁽¹⁶⁾ 1860 c.106.

⁽¹⁷⁾ Schedule 15 was amended by the [Abolition of Feudal Tenure etc. \(Scotland\) Act 2000 \(asp 5\)](#), schedule 12, Part 1, paragraph 60 and schedule 13, Part 1.

- (c) published and served in accordance with the requirements of paragraphs 6 to 6C of the First Schedule to the Acquisition of Land (Authorisation Procedure) (Scotland) Act 1947⁽¹⁸⁾ (publication and service of notice of confirmation of compulsory purchase orders); and
- (d) given at any time after this Order comes into force.

(3) In its application to this Order paragraph 15 of Schedule 15 to the 1997 Act shall have effect as if—

- (a) in sub-paragraph (2)(a), for the words “the statutory maximum” there were substituted the words “level 3 on the standard scale”; and
- (b) sub-paragraph (2)(b) was omitted.

Acquisition of part only of certain properties

25.—(1) This article shall apply instead of section 90 of the 1845 Lands Act in any case where—

- (a) a notice to treat is served on a person (“the owner”) under that Act (as incorporated with this Order by article 23) in respect of part only of a building (“the land subject to the notice to treat”); and
- (b) a copy of this article is served on the owner with the notice to treat.

(2) In such a case, the owner may, within the period of 21 days beginning with the day on which the notice was served, serve on Network Rail a counter-notice objecting to the sale of the land subject to the notice to treat and stating that the owner is willing and able to sell the whole (“the land subject to the counter-notice”).

(3) If no such counter-notice is served within that period, the owner shall be required to sell the land subject to the notice to treat.

(4) If such a counter-notice is served within that period and Network Rail agrees to take the land subject to the counter-notice, the notice to treat shall be deemed to be a notice to treat for the land subject to the counter-notice.

(5) If such a counter-notice is served within that period and Network Rail does not agree to take the land subject to the counter-notice, the question as to what land the owner shall be required to sell shall be referred to the tribunal.

(6) If on such a reference the tribunal determines that the land subject to the notice to treat can be taken without material detriment to the remainder of the land subject to the counter-notice, the owner shall be required to sell the land subject to the notice to treat.

(7) If on such a reference the tribunal decides that only part of the land subject to the notice to treat can be taken without material detriment to the remainder of the land subject to the counter-notice, the notice to treat shall be deemed to be a notice to treat for that part.

(8) If on such a reference the tribunal determines that—

- (a) the land subject to the notice to treat cannot be taken without material detriment to the remainder of the land subject to the counter-notice; but
- (b) the material detriment is confined to a part of the land subject to the counter-notice,

the notice to treat shall be deemed to be a notice to treat for the land to which the material detriment is confined in addition to the land already subject to the notice.

(9) If the tribunal determines that—

- (a) none of the land subject to the notice to treat can be taken without material detriment to the remainder of the land subject to the counter-notice; and

⁽¹⁸⁾ 1947 c.42. Paragraphs 6A to 6C were inserted by the [Title Conditions \(Scotland\) Act 2003 \(asp 9\)](#), section 109, which was amended by [S.S.I. 2003/507](#).

(b) the material detriment is not confined to the part of the land subject to the counter notice, the notice to treat shall be deemed to be a notice to treat for the land subject to the counter-notice.

(10) A notice to treat shall have the effect it is deemed to have under paragraphs (4), (8) or (9) whether or not the additional land is land that Network Rail is authorised to acquire compulsorily under this Order.

(11) In any case where by virtue of a determination of the tribunal under this article a notice to treat is deemed to be a notice to treat for less land or more land than that specified in the notice, Network Rail may, within the period of 6 weeks beginning with the day on which the determination is made, withdraw the notice to treat.

(12) If Network Rail withdraws the notice to treat in accordance with paragraph (11), it shall pay the owner compensation for any loss or expense occasioned to the owner by the giving and withdrawal of the notice, to be determined in case of dispute by the tribunal.

(13) Where the owner is required under this article to sell only part of a building, Network Rail shall pay the owner compensation for any loss sustained by the owner due to the severance of that part in addition to the value of the interest acquired.

(14) Any notice or counter-notice served under this article shall be in writing.

Extinction of private rights

26.—(1) Subject to paragraph (2), all private rights (other than private rights of passage that are extinguished by article 8) over land within plots nos. 1 and 11 shall be extinguished—

- (a) in the case of land vested in Network Rail on the commencement of the works authorised by this Order; and
- (b) in the case of any land not so vested—
 - (i) as from the acquisition of the land by Network Rail, whether compulsorily or by agreement; or
 - (ii) on the entry on the land by Network Rail under article 27 (further powers of entry),

whichever is the sooner.

(2) Paragraph (1) shall have effect subject to any—

- (a) agreement made expressly in respect of this article (whether before or after this Order comes into force) between Network Rail and the person entitled to the private right;
- (b) determination made by Network Rail limiting the application of paragraph (1) to the extent specified in the determination.

(3) A determination made under paragraph (2) shall be made before the date on which the right in question would have been extinguished.

(4) Notice of such a determination must be given to the person entitled to the private right to which it relates as soon as practicable after the making of the determination.

(5) Any person who suffers loss by the extinguishment of any private right under this article shall be entitled to compensation.

(6) Any dispute as to a person's entitlement to compensation under paragraph (5), or as to the amount of compensation, shall be determined under the 1963 Act.

Further powers of entry

27.—(1) At any time after notice to treat has been served in respect of—

- (a) any land; or

(b) any servitudes or other rights in, on or over land,

which may be purchased compulsorily under this Order, Network Rail may enter on and take possession of or use the land or exercise the right.

(2) No land may be entered, and no right may be exercised under paragraph (1) unless at least 28 days' written notice has been given to the owner and the occupier of the land specifying the land, or part of the land, of which possession is to be taken or which is to be used, or specifying the nature of the right.

(3) Network Rail may exercise the powers of this article without complying with sections 83 to 89 of the 1845 Lands Act (payment of deposit prior to entry) before such exercise.

(4) Compensation for the land of which possession is taken under this article, or for the exercise of the right, together with interest on the compensation awarded, shall be payable as if sections 83 to 89 of the 1845 Lands Act had been complied with.

(5) Nothing in this article affects the operation of section 48 of the Land Compensation (Scotland) Act 1973⁽¹⁹⁾ (which entitles a landowner to require an advance payment of compensation when entry is taken).

Persons under disability may grant servitudes, etc.

28.—(1) Persons empowered by the Lands Clauses Acts to sell and convey or dispose of land may grant to Network Rail a servitude or other right required for any of the purposes of this Order in, over or affecting any such land.

(2) A person may not under this paragraph grant a servitude, right or privilege of water in which persons other than the grantor have an interest.

Time limit for exercise of powers of acquisition

29.—(1) The powers conferred by articles 14, 16 and 17 for the compulsory acquisition of land and of servitudes or other rights and the imposition of obligations shall cease after five years beginning on the date on which this Order comes into force.

(2) The powers conferred by articles 14, 15, 16 and 17 for the compulsory acquisition of such lands and of servitudes or other rights and the imposition of obligations shall, for the purposes of this article, be deemed to have been exercised in relation to any land, servitude or right or obligation, if before the expiry of five years beginning on the date on which this Order comes into force—

- (a) a notice to treat has been served;
- (b) a notice has been served under article 17(6)(a) in respect of that obligation; or
- (c) a declaration has been executed under paragraph 1 of Schedule 15 to the 1997 Act in respect of that land, servitude or right.

Time limit on validity of notices to treat

30. Section 78 of the Planning and Compensation Act 1991⁽²⁰⁾ (which provides for notices to treat to be subject to a time limit) shall apply in relation to a notice to treat served under section 17 of the 1845 Lands Act (requirement for notice to treat) as incorporated with this Order.

⁽¹⁹⁾ 1973 c.56. Section 48 is amended by the Planning and Compensation Act 1991 (c.34), section 73(1), Schedule 17, Part 2, paragraph 21 and Schedule 19, Part 4.

⁽²⁰⁾ 1991 c.34; section 78 was amended by the Planning (Consequential Provisions) (Scotland) Act 1997 (c.11), Schedule 2, paragraph 49(1).

PART 4

MISCELLANEOUS AND GENERAL

Enforcement and registration of rights and obligations

31.—(1) Notwithstanding any enactment or rule of law, a servitude or other right acquired by Network Rail under article 15 or 16 or an obligation imposed under article 17 shall be enforceable—

- (a) in the case of permanent rights over plot no. 3 acquired for the purpose of Work No. 2, by the roads authority; and
- (b) in any other case, by Network Rail.

(2) A servitude, right, or obligation of the sort mentioned in paragraph (1) shall, unless otherwise expressly stated in the instrument by which it is created, be treated for all purposes as benefiting—

- (a) in the case of paragraph (1)(a), the road comprised in Work No. 2; and
- (b) in the case of paragraph (1)(b), the land from time to time held by Network Rail for the purpose of the authorised works.

(3) Notwithstanding sections 4(5) and 75 of the 2003 Act (which requires a real burden and a positive servitude to be registered against both the benefited property and the burdened property), where a servitude, right or obligation falls to be treated as mentioned in paragraph (2), the deed by which it is created shall be effective whether or not it is registered against the benefited property.

Real burdens and servitudes, etc. affecting land acquired

32. Any land acquired under or by virtue of this Order shall be treated as if it were acquired by virtue of a compulsory purchase order and the provisions of section 106 of the 2003 Act⁽²¹⁾ (extinction of real burdens and servitudes affecting land that has been compulsorily acquired) shall apply to it.

Disapplication of existing height restrictions

33. Any provision in any enactment other than this Order or in any deed, writing or other instrument, or any rule of law, which has the effect of limiting the height of any building or other structure within the Order limits shall not apply to the authorised works.

Planning permission: operational land

34. The land used by Network Rail for the purposes of Works Nos. 1 and 3 in accordance with any planning permission or deemed planning permission relating to those works or the works ancillary to them shall be deemed to be operational land within the meaning and for the purposes of the 1997 Act.

Status of Work No. 1

35. In consequence of the land held for the purposes of Work No. 1 forming part of Network Rail's operational land in accordance with article 34, that land shall not be, nor be capable of becoming, subject to any right established by prescription.

Statutory undertakers, etc.

36. The provisions of Schedule 7 (statutory undertakers) shall have effect.

(21) Section 106 was amended by [S.S.I. 2003/503](#).

Protective provisions

37. Schedule 8 (which contains protective provisions for the benefit of specified gas, electricity, water and sewerage undertakers and the owners of land adjoining the authorised works) shall have effect.

Provision as to Work No. 2

38.—(1) Network Rail, the roads authority and the owner may from time to time enter into one or more agreements under this article in relation to Work No. 2.

(2) An agreement under this article may make provision to secure that the roads authority does not incur additional expense by reason of the vesting of Work No. 2 effected by article 9(3), and including in particular provision for—

- (a) the owner to be responsible for carrying out the maintenance of Work No. 2;
- (b) the lighting of Work No. 2 by the owners;
- (c) the protection of Princes Mall;
- (d) the provision and maintenance of support for Work No. 2;
- (e) entitling the roads authority to enter on Princes Mall and carry out any works necessary by reason of the failure of any person to perform any obligation which that person is liable to perform by virtue of an agreement under this article or of paragraph (3);
- (f) the closure of Work No. 2 in connection with works to Princes Mall, the provision of a temporary alternative and the inclusion in any redevelopment of Princes Mall of a permanent alternative walking route that fulfils the requirements of paragraph (3);
- (g) the reimbursement by Network Rail of reasonable expenses reasonably incurred by the roads authority or any owner in connection with the discharge of specified functions under the agreement;
- (h) the making of payments by the roads authority; and
- (i) any incidental and consequential matters.

(3) The alternative walking route shall be a pedestrian walkway between Princes Street and Work No. 3 which—

- (a) is not significantly longer than Work No. 2;
- (b) may pass within any redeveloped building;
- (c) if not all on the same level as Princes Street, provides a means of traversing its entire length without using stairs, steps or escalators;
- (d) satisfies all relevant accessibility requirements imposed under the Disability Discrimination Act 1995⁽²²⁾ or the Disability Discrimination Act 2005⁽²³⁾ so as to make the alternative walking route accessible for use by disabled persons within the meaning of those Acts; and
- (e) is available for use by the public without charge at such times as Network Rail and the owner may agree at the time of the redevelopment having regard to the times when Waverley station is open to the public, the use of the redeveloped building and its hours of regular use and the cost of making the alternative walking route available outside those hours.

(4) For the purposes of the 2003 Act any burden or obligation contained in an agreement under this article shall be a real burden and—

(22) 1995 c.50.

(23) 2005 c.13.

- (a) the agreement shall be the constitutive deed by which it is created;
 - (b) any such burden on Network Rail shall be treated as a burden on Network Rail's Waverley Station;
 - (c) any such burden on an owner shall be treated as a burden on Princes Mall; and
 - (d) any such burden shall be treated as benefiting Work No. 2 and shall be enforceable by the roads authority.
- (5) An agreement made under this article shall have effect by virtue of this article and without the consent or approval of any third party from whom an owner would otherwise be obliged to seek such consent or approval.
- (6) Part 4 of the 1991 Act shall not apply to Work No. 2.
- (7) Any dispute arising between Network Rail and an owner in respect of an agreement under this article shall be determined by arbitration.
- (8) In this article—
- “the owner” means any person who is from time to time the owner or head tenant of Princes Mall, and if there is more than one such person means all of them jointly and severally; and
 - “redevelopment” , in relation to Princes Mall, means the reconstruction or replacement of Princes Mall such that Work No. 2 is removed or reconstructed.

Certification of plans, etc.

39. Network Rail having, as soon as practicable after the Scottish Ministers determined to make this Order, submitted copies of the book of reference, the Order plans and the Order sections to the Scottish Ministers for certification that they are, respectively, the book of reference, Order plans and Order sections referred to in this Order; a document so certified, or a document certified by the Scottish Ministers as being a copy of a document so certified, is admissible in any proceedings as evidence of the contents of the document of which it is a copy.

Dispute resolution

40.—(1) Where under this Order any dispute (other than a dispute to which the provisions of the Lands Clauses Acts apply) is to be determined by arbitration (in default of other agreed dispute resolution procedure), the dispute shall be referred to, and settled by, a single arbiter to be agreed between the parties or, failing agreement, to be appointed on the application of either party (after notice in writing to the other) by the President for the time being of the Institution of Civil Engineers.

(2) An arbiter appointed under this article shall be entitled to state a case for the opinion of the Court of Session pursuant to section 3 of the Administration of Justice (Scotland) Act 1972⁽²⁴⁾.

(3) Section 108 of the Housing Grants, Construction and Regeneration Act 1996⁽²⁵⁾ (right to refer disputes to adjudication) shall not apply to any dispute in respect of a provision of this Order (whether or not it is a dispute of the sort described in subsection (1)).

Rights of the Crown

41. Nothing in this Order affects prejudicially any estate, right, power, privilege, authority or exemption of the Crown.

⁽²⁴⁾ 1972 c.59, section 3 was amended by the Trade Union and Labour Relations (Consolidation) Act 1992 (c.52), Schedule 1.
⁽²⁵⁾ 1996 c.53.

Status: This is the original version (as it was originally made). This item of legislation is currently only available in its original format.

St Andrew's House,
Edinburgh
11th May 2010

D B CARMICHAEL
A member of staff of the Scottish Ministers