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SCOTTISH STATUTORY INSTRUMENTS

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**2010 No. 188**

**The Network Rail (Waverley Steps) Order 2010**

**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.

(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(1), 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—
- (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

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(1) 1979 c.33. Section 28 includes a definition of “overriding interest” to which there are amendments not relevant to this Order.

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(2), 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(3) (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;
- (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(4) (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

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(2) 1860 c.106.

(3) 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.

(4) 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) 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

(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<sup>(5)</sup> (which entitles a landowner to require an advance payment of compensation when entry is taken).

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(5) 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.

### **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<sup>(6)</sup> (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.

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<sup>(6)</sup> 1991 c.34; section 78 was amended by the Planning (Consequential Provisions) (Scotland) Act 1997 (c.11), Schedule 2, paragraph 49(1).