

TRANSPORT AND WORKS ACT 1992

**TRANSPORT AND WORKS (APPLICATIONS AND OBJECTIONS
PROCEDURE)(ENGLAND AND WALES) RULES 2006**

**THE PROPOSED ROTHER VALLEY (BODIAM TO ROBERTSBRIDGE JUNCTION)
ORDER**

EXPLANATORY MEMORANDUM

This memorandum explains the purpose and effect of each article of, and schedule to, the draft Rother Valley Railway (Bodiam to Robertsbridge Junction) Order, as required by Rule 10(2)(b) of the Transport and Works (Applications and Objections Procedure) (England and Wales) Rules 2006 (S.I. 2006 No. 1466).

Application for the Order is made by the Rother Valley Railway Limited (“the Company”), and relates to the former Rother Valley Railway line in East Sussex. The Order would authorise the Company to construct a new railway and to maintain two existing lengths of track between a junction with the existing Kent and East Sussex Railway line at Bodiam and a terminus at Robertsbridge. The Order would authorise the acquisition of land, and the temporary use of land, for the purposes of the new railway and would also authorise level crossings across the B2244 at Udiam, at Northbridge Street and the A21 at Robertsbridge and across one footpath and one combined footpath and bridleway in connection with the new railway. The Order would also authorise ancillary works and make other provisions in relation to the new and existing railways.

The draft Order is based on the Transport and Works (Model Clauses for Railways and Tramways) Order 2006 (S.I. 2006 No. 1954)(“the Model Clauses”) but on occasion it departs from them. Where there is a departure from the model clauses, an explanation is provided below.

PART 1

Preliminary

Part 1 of the Order contains preliminary provisions.

Article 1 (Citation and commencement) provides for the commencement and the proper citation of the Order.

Article 2 (Interpretation) contains provisions for the interpretation of words and phrases used in the Order. Definitions departing from or additional to those set out in the Model Clauses have been included in the article to provide clarity, taking into account the specific provisions of the Order. These include definitions of the railways (“the railway”, “the new railway” and “the existing railways”) which are the subject of the Order and a definition of “limits of land for survey and

investigation” which refers to land of which entry may only be taken for purposes of survey and investigation. A new paragraph (3) explains that references to numbered plots are references to plot numbers on the land plans whilst a new paragraph (5) explains that references in the draft Order to points are references to points so lettered on the Order plans. These provisions are intended to add clarity and have precedent in the Network Rail (Ordsall Chord) Order 2015 (S.I. 2015 No. 780).

Article 3 (Incorporation of Railways Clauses Acts) provides for the incorporation of provisions of the Railways Clauses Consolidation Act 1845. These contain powers necessary for the maintenance and operation of the railway.

Article 4 (Application of the 1991 Act) provides for the application of various provisions of the New Roads and Street Works Act 1991 (c. 22) to the temporary stopping up of streets under article 11 (temporary stopping up of streets) and the carrying out of works under article 10 (power to execute street works), even if no street works (within the meaning of the 1991 Act) are being carried out.

Article 5 (Disapplication of legislative provisions) is not in the model clauses. Paragraph 1(a) provides for the disapplication of an additional consent which would otherwise be required from the Environment Agency under the Environmental Permitting (England and Wales) Regulations (S.1. 2016 No.1154) for a consent to operate a regulated facility (in this case the carrying on of a relevant flood risk activity where necessary for the purposes of the authorised works. This has precedent in the High Speed Rail (London-West Midlands) Act 2017 (c.7) in Schedule 21. This provision has replaced the consenting requirement under section 109 of the Water Resources Act to erect, construct or carry out works to any structure in a water course which is part of a main river. In order to provide certainty therefore that the project can proceed, the Order disapplies the requirements for the in-principle consent. Instead, the Order provides for approval of detailed plans of the works in the protective provisions for drainage authorities (including the Environment Agency) in Part 3 of Schedule 8. Disapplications of section 109 of the Water Resources Act have precedent in the Network Rail (Ordsall Chord) Order 2015.

Paragraphs (1)(b) and (c) provide for the disapplication of additional consents which would otherwise be required from the drainage authorities under the Land Drainage Act 1991 (c.59). These are the requirements for consent to erect obstructions to the flow of an ordinary watercourse under section 23 of the Land Drainage Act 1991 and for approval under byelaws made or deemed to be made under section 66 of that Act. These are consents for activities which are a necessary part of the project. In order to provide certainty that the project can proceed, the Order disapplies the requirements for in-principle consent. Instead, the Order provides for approval of detailed plans of the works in the protective provisions for the drainage authorities in Part 3 of Schedule 8. There is ample precedent for this provision, including the Network Rail (Buxton Sidings Extension) Order 2017 (S.I. 2017 No. 1150).

PART 2

Principal Powers

Part 2 of the Order contains provisions for and relating to the construction and maintenance of the railway.

Article 6 (Power to construct new railway) authorises the Company to construct and

maintain the new railway which is described in Part 1 of Schedule 1 and shown on the Order plans and Order sections. In an extension to the Model Clause (power to construct and maintain works), paragraph (3) also includes descriptions of works and categories of works which it is envisaged are likely to be necessary for the purposes of, or purposes ancillary to, the construction of the new railway. Such variation to the model clause has precedent in, inter alia, the Network Rail (Ordsall Chord) Order 2015, the Crossrail (Plumstead Sidings) Order 2015 (S.I. 2015 No. 781) and the Blackpool Tramway (Blackpool North Extension) Order (S.I. 2017 No. 1214).

The carrying out or maintenance of ancillary works outside the limits of deviation may be done only on land specified in columns (1) and (2) of Schedule 2 (*Acquisition of certain land for ancillary works*) for the purposes described in column (3) of that Schedule.

The Company may carry out and maintain (within the Order limits) landscaping, ecological and other works to mitigate the effect of construction, maintenance and operation of the authorised works and works for the benefit of other land affected by the authorised works. Such provision is commonly included in Orders authorising railways including the Network Rail (Thameslink 2000) Order 2006 (S.I. 2006 No. 3117) and the Network Rail (Ordsall Chord) Order 2015.

Article 7 (*Power to maintain existing railways*) authorises the Company to maintain the existing railways described in Part 2 of Schedule 1. These railways were constructed pursuant to planning permission, without statutory authority. Article 8 is not based on a Model Clause but has been adapted from Model Clause 4 which is concerned with new works. It is based on Article 8(1) of the South Devon Railway Order 2009 (S.I. 2009 No. 3281).

Article 8 (*Power to deviate*) provides for limits within which the construction and maintenance of the new railway and maintenance of the existing railway can deviate. The purpose of these limits is to allow reasonable flexibility in the laying out and maintenance of the railway. Article 7 is based on Model Clause 5. The vertical limit of 3 metres in the Model Clause has been reduced to 1.5 metres, as no greater power to deviate is considered necessary or appropriate in the context of the scheme.

Streets

Article 9 (*Power to alter layout etc. of streets*) permits the Company to alter the layout of streets in order to accommodate the authorised works, with the consent of the street authority (such consent not to be unreasonably withheld) A street authority which fails to notify the Company of its decision in respect of an application for consent within 28 days of the application being made is deemed to have given its consent. This provision for deemed consent avoids unnecessary delays to the authorised project. A similar time limit has been inserted in the approval processes elsewhere in this Order. This article has precedent in the Welsh Highland Railway Order 1999 (S.I. 1999 No. 2129), the Network Rail (Hitchin (Cambridge Junction)) Order 2011 (S.I. 2011 No. 1072) and the London Overground (Barking Riverside Extension) Order 2017 (S.I. 2017 No. 830).

- Article 10 (Power to execute street works)* authorises the Company to break up streets specified in Schedule 3 (*streets subject to street works*) and to carry out work in connection with the placing, maintaining or moving of apparatus.
- Article 11 (Stopping up of a street)* provides for the permanent stopping up of a footpath (Footpath S&R 31) between the points shown on the Order plans. The provision broadly follows the model clause. In particular, the footpath may not be stopped up until either the new street to be substituted for it has been constructed to the reasonable satisfaction of the highway authority, and is open to public use, or a temporary alternative route has been provided.
- Article 12 (Temporary stopping up of streets)* provides for the temporary stopping up of streets. Where the street is specified in Schedule 4 (*streets to be temporarily stopped up*), the Company is obliged merely to consult the relevant street authority. This is on the basis that such stoppings up will have already been considered in the application for this Order. If the Company wishes temporarily to stop up streets which are not specified in Schedule 4, paragraph (4)(b) provides that it requires the consent of the relevant street authority, which may attach reasonable conditions to any such consent but may not unreasonably withhold it. In an extension to the model clause, a time limit of 28 days is given, after which a street authority which fails to respond to an application for consent is deemed to have given its consent. This has precedent in recent TWA Orders including the Network Rail (Ordsall Chord) Order 2015. The provision for deemed consent after 28 days avoids unnecessary delays to the authorised project.
- Article 13 (Access to works)* gives the Company the power to provide or improve means of access at locations given in paragraph (1)(a). In addition, the Company may, with the approval of the highway authority, provide or improve means of access at any additional locations within the Order limits as the Company may reasonably require. For the reasons given above, an additional paragraph (2) has been inserted providing that if the highway authority does not respond within 28 days, it shall be deemed to have granted approval.
- Article 14 (Agreements with street authorities)* allows the Company to enter into agreements with street authorities regarding any street created under or affected by the Order. These agreements would allow the Company and the street authority to agree such matters as who was responsible for undertaking certain works affecting streets under this Order, a time period for completion of the works and setting out the terms of any payment which may be made. The model clause is extended so as to include agreements relating to the strengthening, improvement, repair or construction of any street. This amendment has precedent in the Network Rail (Ordsall Chord) Order.
- Article 15 (Level crossings)* authorises the Company to construct level crossings across the highways specified in Schedule 5 (*level crossings*). It provides for the Company to provide and operate barriers and other protective equipment with consent of the Secretary of State (which has precedent in the Welsh Highland Railway Order 1999) or as may be required by through an order under the Level Crossings Act 1983 (c. 16). The model clause is extended to provide that any traffic sign placed pursuant to this article is to be treated for the purposes of section 64(4) (general provisions as to traffic signs) of the Road Traffic Regulation Act 1984 as having been placed as provided by that Act. The clause is further extended so as to disapply the provisions of the Highway

(Railway Crossings) Act 1839 and section 9 of the Railway Regulation Act 1842 as these are matters that will be covered by level crossing orders.

Supplemental powers

Article 16 (Discharge of water) enables the Company to discharge water into any watercourse, public sewer or drain, in connection with the construction, operation and maintenance of the authorised works with the approval and (if provided) superintendence of the person to whom it belongs (such approval may be subject to reasonable terms and conditions but must not be unreasonably withheld). The extension of this provision to cover operation has precedent in the Midland Metro (Wolverhampton City Centre Extension) Order 2016 (S.I. 2016 No. 684). The model clause is extended so as to provide that any relevant person who fails to respond to an application for consent within 28 days of the application being made is deemed to have given consent. This has precedent in recent TWA Orders including the Network Rail (Ordsall Chord) Order 2015. In paragraph (7) the wording of the model provision has been updated to refer to the environmental permitting regime introduced by the Environmental Permitting (England and Wales) Regulations 2016¹

Article 17 (Power to survey and investigate land) confers upon the Company power (upon notice to every owner and occupier of that land) to survey and investigate land within the Order limits and to make trial holes, carry out ecological or archaeological investigations and place on, leave on and remove apparatus. It includes provision for payment of compensation. Approval for the making of trial holes (which may not be unreasonably withheld) is, in the case of land located within the highway boundary, to be obtained from the highway authority, or, in the case of a private street, from the street authority. In a departure from the model clause a highway authority or street authority that fails to respond to an application for consent within 28 days of the application being made is deemed to have given consent. Such provision has precedent in the same context in article 15 of the Network Rail (Hitchin (Cambridge Junction)) Order 2011 (S.I. 2011 No. 1072).

New paragraphs (3) to (8) are not in the model clauses but are adapted from the provisions recently enacted in and now in force under the Housing and Planning Act 2016 (c. 67) under sections 173 to 177 to allow for use of a warrant to enforce the powers in this article. This brings the surveying arrangements in relation to works authorised by Transport and Works Act Order in line with recent changes in the general law.

PART 3 ACQUISITION AND POSSESSION OF LAND

Powers of acquisition

Article 18 (Power to acquire land) confers on the Company powers of compulsory acquisition of land within the limits of deviation and identified on the Order plans and described in the book of reference, for the purposes of the authorised works or for any other purposes that are ancillary to the Company's railway undertaking. It also authorises the compulsory acquisition of land specified in Schedule 2 (*acquisition of certain lands for ancillary works*) for the purpose specified in relation to that land in that Schedule.

¹ S.I. 2016/1154

Article 19 (*Application of Part 1 of the 1965 Act*) applies, with modifications, the provisions of Part 1 of the Compulsory Purchase Act 1965 (c.56). This provision is altered from the model clause to reflect changes made to the 1965 Act by the Housing and Planning Act 2016 (c. 22) as applied in the recent Network Rail (Buxton Sidings Extension) Order 2017.

Article 20 (*Application of the Compulsory Purchase (Vesting Declarations) Act 1981*) provides for the Order to apply as if it were a compulsory purchase order for the purposes of the Compulsory Purchase (Vesting Declarations) Act 1981 (c.66) and provides for that Act to have effect subject to certain modifications. It gives the Company the option to acquire land by this method rather than through the notice to treat procedure. This provision is altered from the model clause to reflect changes made to the Compulsory Purchase (Vesting Declarations) Act by the Housing and Planning Act 2016 (c. 22) as applied in the recent Network Rail (Buxton Sidings Extension) Order 2017.

Article 21 (*Power to acquire air space only*) is adapted from the model clause (power to acquire subsoil only) and enables the Company to acquire airspace where it needs to do so rather than being obliged to acquire any greater interest in that land

Temporary possession of land

Article 22 (*Temporary use of land for construction of works*) enables the Company, in connection with the carrying out of the authorised works, to take temporary possession of (i) land listed in columns (1) and (2) of Schedule 7 (*land of which temporary possession may be taken*) and (ii) any other Order land which is subject to compulsory acquisition under the Order provided the compulsory acquisition process has not begun in relation to it. This is an extension of the model clause but follows the approach adopted in a number of TWA Orders (e.g. the Midland Metro (Wednesbury to Brierley Hill and Miscellaneous Amendments) Order 2005 (S.I. 2005 No. 927). It allows greater flexibility in the event that following further detailed design of the works it is decided that only temporary occupation rather than permanent acquisition of land is required. This sub-paragraph is expressly subject to a new paragraph (11) which identifies parcels of land within the Order limits where no powers of temporary possession are exercisable.

The article also departs from the model clause in allowing (as well as temporary works), mitigation works which have been placed in that land to facilitate construction of the authorised works to be constructed and left on the land, without a requirement for these to be removed. This would apply, for example, where mitigation is provided on behalf of a local flood authority but the Company does not need to retain a permanent interest or rights in the land. Specific provision has been made so that the Company will not be required to restore an existing pond in plot 76. The notice period for entry onto the land in paragraph (2) has been extended from 14 to 28 days.

Article 23 (*Temporary use if land for maintenance of works*) empowers the Company to take temporary possession of any land within the Order limits for the purpose of maintaining the new railway at any time within the period of five years beginning with the date on which the new railway is opened for use. Provision is made for notice and compensation. This power does not apply with respect to houses, gardens or occupied buildings.

Compensation

Article 24 (Disregard of certain interests and improvements) provides that in assessing the compensation payable in respect of compulsory acquisition, the Upper Tribunal shall disregard any interest in land or any enhancement of an interest in land caused by improvements which the Upper Tribunal is satisfied were created or undertaken with a view to obtaining compensation or increased compensation.

Supplementary

Article 25 (Extinction or suspension of private rights of way) provides for the extinguishment of private rights of way over land compulsorily acquired, and the suspension of private rights of way in respect of land temporarily occupied and for payment of compensation. In an extension to the model clause, paragraph (6) of this article specifically excludes from its application any right of way to which the specific protective provisions in Schedule 6 (*provisions relating to statutory undertakers*) apply.

In a further departure from the model clause, paragraph (7) provides for the Company to exclude the application of any or all of the provisions of this article to any particular right of way and to enter into agreements making contrary provision. Such provision has precedent in article 40 of the Merseytram (Liverpool City Centre to Kirkby) Order 2005 (S.I. 2005 No. 120) and the Network Rail (Ordsall Chord) Order 2015 and is useful for purposes of flexibility. That precedent has been adapted so that restrictions on powers to extinguish or suspend private rights of way in agreements are only effective if made in contemplation of this article.

Article 26 (Time limit for exercise of powers of acquisition) imposes a time limit of five years from the coming into force of this Order for the exercise of powers of powers of compulsory acquisition of land.

PART 4

Miscellaneous and General

Article 27 (Defence to proceedings in respect of statutory nuisance) provides the Company with a defence to a claim in statutory nuisance brought under section 82(1) of the Environmental Protection Act 1990 (c. 43) if it can show that works are being carried out in accordance with a notice served under section 60, or a consent given under section 61 of the Control of Pollution Act 1974 (c. 40), or that the nuisance complained of is a consequence of the operation of the works authorised by the Order and that it cannot reasonably be avoided. Although not one of the model clauses, this is a provision which has now become common, see for example article 10 of the Llangollen and Corwen Railway Order 2010 (S.I. 2010 No. 2136 (W.1920) and article 29 of the Network Rail (Buxton Sidings Extension) Order 2017.

Article 28 (Power to lop trees overhanging the authorised works) enables the Company to fell or lop trees and shrubs for the purposes of preventing obstruction or interference with the authorised works (or any apparatus used on the authorised works) and danger to passengers or persons using the authorised works. Provision is included for the payment of compensation.

- Article 29 (Power to operate and use railway)* allows the Company to operate the railway.
- Article 30 (Power to transfer undertaking)* authorises the Company with the consent of the Secretary of State to transfer to another person its right to construct, maintain, use or operate the railway (or any part of it) and such related statutory rights as may be agreed between the Company and the transferee. In a departure from the Model Clause, paragraph (1) empowers the Company to transfer the railway or any part of it to the Kent and East Sussex Railway Limited without the need for further consent of the Secretary of State.
- Article 31 (Power to charge fares)* authorises the Company to charge fees for the use of the authorised works or for any other services or facilities in connection with the operation of the railway.
- Article 32 (Application of landlord and tenant law)* provides that any restrictions on the application of landlord and tenant law are only effective if the agreements containing such restrictions are made in contemplation of this article.
- Article 33 (Obstruction of construction of authorised works)* makes it a criminal offence for a person, without reasonable excuse, to obstruct anyone acting with proper authority to construct the works, or to interfere with apparatus belonging to such a person.
- Article 34 (Removal of obstructions)* is adapted from the model clauses for tramways. It authorises the Company to remove any obstruction to the railway by a vehicle waiting, unloading or breaking down, unless the same is removed by the person in charge of such vehicles and to recover expenses reasonably incurred in doing so from any person who caused an obstruction or who was the owner of the vehicle. This has precedent in the context of a heritage railway undertaking in the Welsh Highland Railway Order 1999 and would prevent disruption to the undertaking caused, for example, by persons using private accommodation crossings.
- Article 35 (Trespass)* makes it a criminal offence for a person to trespass on any part of the railway or in dangerous proximity to the railway or apparatus used for or in connection with the railway.
- Article 36 (Saving for highway authorities)* is not a model clause. It permits a highway authority to carry out works in the highway along which the railway is located.
- Article 37 (Statutory undertakers)* introduces Schedule 6 (*provisions relating to statutory undertakers etc.*) to the Order which contains specific safeguards for statutory undertakers.
- Article 38 (Certification of plans, etc)* requires the undertaker to submit copies of the plans and sections referred to in the Order to the Secretary of State for certification as true copies following the making of the Order.
- Article 39 (Service of notices)* makes provision as to the service of notices or other documents for the purposes of the order.
- Article 40 (Protection of interests)* introduces Schedule 8 (*protective provisions*) which contains detailed protection for specific bodies.
- Article 41 (No double recovery)* prevents compensation being payable in respect of the same matter both under the Order and under any enactment, contract or other

rule of law.

Article 42 (*Arbitration*) makes provision for differences arising under any provision of this Order to be determined by arbitration.