

TRANSPORT AND WORKS ACT 1992

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

LONDON OVERGROUND (BARKING RIVERSIDE EXTENSION) ORDER

EXPLANATORY MEMORANDUM

This memorandum explains the purpose and effect of each article of, and Schedule to the draft London Overground (Barking Riverside Extension) Order (“the 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 has been made by Transport for London (“TfL”). The Order would confer powers on TfL for the construction and operation of a new section of railway and remodelling of existing tracks which form part of Network Rail’s Essex Thameside (Tilbury Loop) Line. The new section of railway would commence at a junction with the existing Essex Thameside (Tilbury Loop) Line and be built partly at grade and partly on a viaduct, passing below the bridge at Renwick Road before rising onto a new viaduct and turning south to pass over existing Network Rail tracks and Choats Road to access a new elevated terminus station at Barking Riverside. The proposed development is located in the London Borough of Barking and Dagenham. The Order authorises the compulsory acquisition and the temporary use of land for the purposes of the works and confers other powers in connection with the construction and operation of the railway.

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 the model clauses. Where there is a material departure from the model clauses, an explanation is provided below.

PART 1

PRELIMINARY

Part 1 contains preliminary provisions.

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

Article 2 (Interpretation) contains provisions for the interpretation of words and phrases used in the Order. Definitions 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.

Article 3 (Application, modification and exclusion of legislative provisions relating to street works) 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 powers conferred by the Order. Article 3(3) disapplies certain of the provisions of the New Roads and Street Works Act 1991 as they are restrictions and requirements that are inappropriate either because they have the potential to affect the construction programme for the Barking Riverside Extension, they are matters that will be covered by the Code of Construction Practice or because they are not necessary given TfL’s role as a transport undertaker.

PART 2

WORKS PROVISIONS

Principal Powers

Article 4 (Power to construct and maintain works) authorises the construction and maintenance of the principal works proposed in the Order, which are described in Schedule 1 (the scheduled works) and shown

on the plans and sections deposited in connection with the application. The scheduled works must be constructed within the limits of deviation for those works. Article 4 also provides for the construction and maintenance of ancillary works necessary or expedient for the purposes of, or for purposes ancillary to, the authorised works which are described in general terms in paragraphs (3), (4) and (5). In an extension to the model clauses, paragraph (3) includes descriptions of categories of works which it is envisaged are likely to be necessary or expedient for the purposes of, or for purposes ancillary to, the construction of the scheduled works. Such variation to the model clauses has precedent in the Network Rail (Nuneaton North Chord) Order 2010 (SI 2010 No. 1721). Paragraph (3) empowers TfL to carry out and maintain (within the Order limits) landscaping and other works to mitigate the effect of construction, maintenance or operation of the authorised works as well as for works which are for the benefit or protection of land affected by the authorised works. Such provision is commonly included in Orders authorising railways, including the Network Rail (Nuneaton North Chord) Order referred to above. Paragraph (9) proposes to disapply certain consents so that the Order is as much of a “one stop shop” as possible. These consents would be replaced by protective provisions in the Order for the benefit of the Environment Agency. Such an approval is preceded in recent TWA Orders, such as the Docklands Light Railway (Woolwich Arsenal Extension) Order 2004 (S.I. 2004 No.757) the London Underground (Northern Line Extension) Order 2014 (S.I. 2014 No.3102).

Article 5 (*Power to deviate*) provides for limits within which TfL can deviate in the construction and maintenance of the proposed works. Paragraph (2) has been inserted to allow TfL sufficient flexibility to construct the scheduled works. A similar approach was used in the Docklands Light Railway (Stratford International Extension) Order 2006 (S.I. 2006 No.2905).

Streets

Article 6 (*Power to alter layout, etc., of streets*) would permit TfL to alter the layout of any street within the Order limits, any street abutting the Order limits and any street which has a junction with such a street. This must be with the consent of the street authority (not to be unreasonably withheld).

Article 7 (*Power to keep apparatus in streets*) would permit TfL to place equipment and apparatus in streets for the purposes of or in connection with the intended works.

Article 8 (*Power to execute street works*) confers authority on TfL to interfere with, and execute works in or under, streets within the Order limits, streets abutting the Order limits and streets which have a junction with streets in the Order limits, for the purposes of the authorised works.

Article 9 (*Stopping up of streets*) provides for the permanent stopping up of certain streets identified in *Schedule 2 (streets to be stopped up)* to the Order. Article 9(2) prevents any stopping up of those streets identified in *Schedule 2* unless one of the conditions specified in Article 9(2) applies.

Article 10 (*Temporary stopping up and diversion of streets*) provides for the temporary stopping up of streets. Where the street is specified in *Schedule 2* (streets to be temporarily stopped up), TfL is obliged only to consult the relevant street authority. If TfL wishes to temporarily stop up streets which are not specified in *Schedule 2*, it will need to obtain the consent of the relevant street authority, but such consent shall not be unreasonably withheld. Provision is made for compensation. In an extension to the model clauses, paragraph (2) also confers a power on TfL to use any street stopped up under the article 10 powers as a temporary working site. Such provision was included within article 9 of the Network Rail (Nuneaton North Chord) Order 2010 (S.I. 2010 No.1721) and article 10 of the London Underground (Northern Line Extension) Order 2014 (S.I. 2014 No.3102).

Article 11 (*Access to works*) confers on TfL the power (for the purposes of the authorised works) to form and lay out means of access, or improve existing means of access, within the Order limits at the points marked on the deposited plans. Such power may be exercised without the approval of the highway authority. In respect of locations within the Order limits, but which are not marked on the deposited plans, TfL’s exercise of powers to provide access or improve existing access must be approved by the highway authority, such approval not to be unreasonably withheld.

Article 12 (*Agreements with street authorities*) would authorise street authorities and TfL to enter into agreements respecting works in or affecting streets.

Article 13 (*Use of private roads for construction*), which is not in the model clauses, is modelled on the provision in paragraph 3 of Schedule 5 to the Crossrail Act 2008 (c. 18) and was included within article 13 of the London Underground (Northern Line Extension) Order 2014 (S.I. 2014 No.3102). It authorises the temporary passage of persons or vehicles along private roads situated within Order limits for the purpose of, or in connection with, the construction of the authorised works without the necessity for TfL to acquire an easement over that land. Provision is made for compensation.

Supplemental Powers

Article 14 (*Discharge of water*) enables TfL to discharge water into any watercourse, public sewer or drain in connection with the construction and maintenance of the proposed works, with the approval and (if provided) superintendence of the authority to which the watercourse, public sewer or drain belongs (such approval not to be unreasonably withheld) and subject to other conditions. The model clauses are extended so as to provide that a relevant authority which fails to respond to an application for consent within 28 days of the application being made is deemed to have given its consent. This has precedent in recent TWA Orders including the Network Rail (Nuneaton North Chord) Order 2010 and the London Underground (Northern Line Extension) Order 2014 (S.I. 2014 No.3102). The addition of this requirement effectively forces a decision and consequently a refusal of consent can be referred to arbitration under article 46. Without the application of article 46 there would be no appeal mechanism against a decision of the body from whom the consent or approval is sought. In paragraph (7), the wording of the model clause has been updated to refer to the environmental permitting regime introduced by the Environmental Permitting (England and Wales) Regulations 2010 (S.I. 2010 No.675).

Article 15 (*Water abstraction*) disapplies the requirement under section 24(1) of the Water Resources Act 1991 (c. 57) that anyone abstracting water from any course of supply must have a licence from the Environment Agency. The disapplication of section 24(1) only applies where the abstraction is required for the purposes of, or in connection with, the construction of the authorised works and the Environment Agency will have the ability to approve details of and impose conditions on any such construction under the protective provisions in Part 3 of Schedule 8 to the Order. Paragraph 15 of Schedule 14 of the Crossrail Act 2008 (c. 18) and article 17 of the London Underground (Northern Line Extension) Order 2014 (S.I. 2014 No.3102) are precedent for this provision. Paragraph 2 disapplies section 48A(1) of the Water Resources Act 1991 (duty not to cause loss or damage to another by the abstraction of water) which would otherwise impose an absolute prohibition on abstracting water if it causes loss or damage to another person. Such a restriction could prevent or delay the construction of the authorised works. Paragraph 3 provides for the payment of compensation where loss or damage is caused. The effect of this disapplication is that the duty to avoid damage by water abstraction creates the possibility of compensation for damage, but not the possibility of a court injunction. However, any such abstraction is subject to approval by the Environment Agency pursuant to Part 2 of Schedule 8 to the Order. Section 46 of the Crossrail Act and article 17 of the London Underground (Northern Line Extension) Order 2014 (S.I. 2014 No.3102) is precedent for this provision.

Article 16 (*Protective works to buildings*) would enable TfL, at its own expense, to carry out, from time to time, such protective works to any building lying within the Order limits as TfL considers to be necessary or expedient. The model clause has been added to for clarification that monitoring equipment can be taken onto land in order to help to decide whether protective works are required and to make it clear that, if necessary, the right of entry onto land for the purposes of carrying out works can be an exclusive right requiring the occupants to leave temporarily, if the nature of the works makes this necessary.

Article 17 (*Planning permission*) modifies planning legislation to ensure that, once constructed, the railway will enjoy permitted development rights under Part 8 of the Town and Country Planning (General Permitted Development) Order 2015 (S.I. 2015 No.596).

Article 18 (*Power to survey and investigate land, etc.*) confers power on TfL (upon notice to every owner and occupier) to survey and investigate land within the Order limits, and to make trial holes. It includes

provision for payment of compensation. Approval for the making of trial holes (which may not be unreasonably withheld) is required, in the case of a carriageway or footway, from the highway authority, or in the case of a private street, from the street authority. A deemed consent provision, in a paragraph (6), has been added to the model provision. Reference to scheduled monument consent, which is included in the model clause, has been excluded here as there are no scheduled monuments affected.

Article 19 (Power to lop trees overhanging the authorised works) enables TfL 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 other persons using the authorised works.

Article 20 (Obstruction of construction of authorised works) makes it a criminal offence without reasonable cause to obstruct the construction of the authorised works and to interfere with TfL's apparatus.

PART 3

ACQUISITION AND POSSESSION OF LAND

Powers of acquisition

Part 3 of the Order contains provisions for the compulsory acquisition of land and rights in land and for the temporary possession of land for the purposes of, or in connection with, the authorised works. It further provides for the payment of compensation.

Article 21 (Power to acquire land) confers on TfL powers of compulsory acquisition of land within the limits of deviation and identified on the deposited plans and described in the book of reference, for the purposes of the authorised works. In the case of land specified in Schedule 6 the power of compulsory acquisition is limited to land no more than 10 metres beneath the level of the surface of the land.

Article 22 (Application of Part 1 of the 1965 Act) applies, with modifications, the provisions of Part 1 of the Compulsory Purchase Act 1965 (c. 56).

Article 23 (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 the Act to have effect subject to certain modifications. It gives TfL the option to acquire land by this method rather than through the notice to treat procedure.

Article 24 (Power to acquire new rights, etc.) makes ancillary provision where rights over land are acquired. In an extension to the model clauses, article 24 enables TfL to impose restrictive covenants, required for the protection of the authorised railway, over the land beneath and/or adjacent to the railway and the new elevated station. It is modelled on the provision in article 20 of the Network Rail (Hitchin (Cambridge Junction)) Order 2011. The power to impose restrictive covenants is limited to these locations and will enable TfL to minimise the amount of land which it might otherwise be necessary to acquire outright. Schedule 3, which is introduced by paragraph (4), modifies relevant enactments concerning compensation and compulsory powers in relation to such acquisitions of rights and impositions of restrictive covenants.

Article 25 (Power to acquire subsoil only) authorises TfL to acquire the subsoil in any of the land subject to powers of compulsory acquisition under the proposed Order without acquiring the whole of that land. In certain cases it may be necessary to acquire only a stratum of land below the surface and, in the absence of article 25, TfL would be obliged to acquire the whole interest in the land. It follows the model clause relating to the acquisition of subsoil.

Article 26 (New rights only to be acquired under or in certain lands) is not taken from the model clauses but has been included to provide certainty to property owners, in that TfL may only acquire easements and other rights or impose restrictive covenants over land specified in Schedule 4, as opposed acquiring the land as a whole. The purpose of Schedule 4 is to make it clear that the land itself will not be acquired compulsorily. The principle behind this provision has precedent in a number of orders including the Docklands Light

Railway (Woolwich Arsenal Extension Order 2004 (S.I. 2004 No. 757) and the London Underground (Northern Line Extension) Order 2014 (S.I. 2014 No. 3102).

Article 27 (*Rights under or over streets*) permits TfL to use a street within the Order limits without being required to acquire any part of the street or any easement or right in the street. Provision is made for the payment of compensation.

Temporary possession of land

Article 28 (*Temporary use of land for construction of works*) enables TfL, in connection with the carrying out of the authorised works, to take temporary possession of (i) certain land listed in Schedule 5 (land of which temporary possession may be taken) and (ii) any other land included in the Order limits which it may acquire compulsorily, provided that it has not yet begun the compulsory acquisition process in relation to it. This second category of land is an addition to the model clauses but follows the approach adopted in a number of recent orders including the Network Rail (Hitchin (Cambridge Junction)) Order 2011 (S.I. 2011 No.1072) and the London Underground (Northern Line Extension) Order 2014 (S.I. 2014 No. 3102). It allows greater flexibility, e.g. in the event that following detailed design of the works it is decided that only temporary occupation rather than permanent acquisition of some land is required. Paragraph (3) departs from the model clauses as it provides for temporary possession powers to expire at different times for works specified in Schedule 5. Paragraph (4) provides that all temporary works above a level of 1 metre below the surface of the ground shall be removed on vacating the land. This is a departure from the model clauses and provides for the situation where TfL has to place items in the ground as part of the construction process and it is not necessary or possible to remove them. Provision is made for the payment of compensation.

Article 29 (*Temporary use of land for maintenance of works*) empowers TfL to take temporary possession of any land within the Order limits for the purpose of maintaining the scheduled or any ancillary works at any time within the five years following the opening of the extension. Temporary works can be constructed on the land as reasonably necessary and provision is made for notice and compensation. This power does not apply to any house, garden, occupied building or, in a departure from the model clauses, to land within a highway or land over which only new rights are to be acquired.

Compensation

Article 30 (*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 they are satisfied were created or undertaken with a view to obtaining compensation or increased compensation.

Article 31 (*Set-off for enhancement in value of retained land*) provides that in assessing the compensation payable to any person under the Order, the Upper Tribunal shall set off against the value of the land any increase in value of any contiguous or adjacent land belonging to that person arising out of the construction or use of the authorised works. This departs from the model clause so that betterment can be taken into account in the case of those claiming compensation for temporary possession of land. This provision has precedent in article 33 of the London Underground (Northern Line Extension) Order 2014 (S.I. 2014 No.3102).

Supplementary

Article 32 (*Acquisition of part of certain properties*) sets out an alternative procedure where TfL acquires compulsorily part only of certain types of properties subject to the right of the owner to require the whole of the property to be acquired, if part cannot be taken without material detriment to the remainder. This replaces section 8(1) of the Compulsory Purchase Act 1965.

Article 33 (*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

(5) of this article specifically excludes from its application any right of way to which the specific protective provisions in Schedule 8 apply. In a further departure from the model clause, paragraph (6) provides for TfL 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 35 of the London Underground (Northern Line Extension) Order 2014 (S.I. 2014 No.3102) and is useful for the purposes of flexibility.

Article 34 (Time limit for exercise of powers of acquisition) imposes a time limit of 5 years from the coming into force of the Order for the exercise of powers of compulsory acquisition of land.

PART 4

OPERATION OF AUTHORISED WORKS

Article 35 (Power to operate and use the authorised works) authorises TfL to operate and use the authorised works.

PART 5

PROTECTIVE PROVISIONS

Article 36 (Statutory undertakers, etc.) introduces Schedule 7 to the Order (provisions relating to statutory undertakers, etc.) which contains specific safeguards for statutory undertakers.

Article 37 (Protection of interests) introduces Schedule 8 to the Order (protective provisions) which is in four parts containing detailed protection for specific bodies.

PART 6

MISCELLANEOUS AND GENERAL

Article 38 (Temporary traffic regulation) and *Schedule 9 (Temporary traffic regulation)* enables TfL to make provision for traffic regulation during construction of the works, principally in relation to suspension of parking waiting or loading bays, shuttle working with traffic control and pedestrian crossings but a general power is proposed in addition. This approach is well precedented; see, for example, article 50 of The Nottingham Express Transit System Order 2009 and article 40 of The London Underground (Northern Line Extension) Order 2014 (S.I. 2014 No.3102)

Article 39 (Powers of disposal, agreements for operation, etc.) would confer powers for the sale, lease, charging and disposal of the authorised works. This article departs from the model clauses materially and has been amended to allow TfL to make the kind of agreements that need to be made for the procurement of a project like the Barking Riverside Extension. The article has precedent in article 44 the Docklands Light Railway (Stratford International Extension) Order 2006 (S.I. 2006 No.2905) and article 41 of The London Underground (Northern Line Extension) Order 2014 (S.I. 2014 No.3102).

Article 40 (Application of landlord and tenant law) would override the application of landlord and tenant law in so far as it may prejudice agreements for the leasing of the authorised works.

Article 41 (Defence to proceedings in respect of statutory nuisance) provides TfL 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 or section 65 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. Article 26 of the Network Rail (Nuneaton North Chord) Order 2010 (S.I. 2010 No.1721) is a recent precedent.

Article 42 (*Disclosure of confidential information*) makes it a criminal offence to disclose certain confidential information obtained upon entry to certain premises under article 18 (power to survey and investigate land, etc.).

Article 43 (*Certification of plans, etc.*) requires TfL to submit copies of the book of reference, the deposited plans and sections and the traffic regulation plans to the Secretary of State for certification after the making of this Order.

Article 44 (*Service of notices*) makes provision as to the service of notices or other documents for the purposes of the Order.

Article 45 (*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 46 (*Arbitration*) makes provision for differences arising under any provision of this Order to be determined by arbitration.

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