PLANNING ACT 2008

INFRASTRUCTURE PLANNING (EXAMINATION PROCEDURE) RULES 2010

APPLICATION FOR THE RIVERSIDE ENERGY PARK DEVELOPMENT CONSENT ORDER

Planning Inspectorate Reference: EN010093

Written Representations of

NETWORK RAIL INFRASTRUCTURE LIMITED

Registration Identification Number 20022294

for Deadline 2 of the Examination

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20 May 2019

CONTENTS

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1. DEFINITIONS

1.1 In this written representation the words and phrases in column (1) below are given the meaning contained in column (2) below:

(1) Words and Phrases	(2) Meaning
1990 Act	Town and Country Planning Act 1990
1993 Act	Railways Act 1993
2008 Act	Planning Act 2008
Application	The application for the DCO received by the Planning Inspectorate on 16 November 2018
Authorised Development	The "authorised development" as defined in the Draft DCO
Book of Reference	The Book of Reference submitted with the Application
DCO	The proposed Riverside Energy Park Development Consent Order
DCLG Guidance	Department of Communities and Local Government Guidance "Planning Act 2008: Guidance related to the procedures for compulsory acquisition" (September 2013)
Draft DCO	The draft DCO submitted with the Application
EHCR	The European Convention on Human Rights
Facility Owner	has the same meaning as in section 17(6) of the 1993 Act
Land Plans	The land plans submitted with the Application
Network	The railway network for which Network Rail is the Facility Owner
Network Licence	The network licence granted by the Secretary of State for Transport in exercise of his powers under Section 8 of the 1993 Act to Network Rail (then called Railtrack PLC) on 31st March 1994 as amended or modified from time to time, or any Network Licence granted to a successor of Network Rail, as the context permits;
Network Rail	Network Rail Infrastructure Limited
Network Rail Land	Land belonging to Network Rail in which the Promoter is seeking to acquire new rights being plots: (a) 06/03 (b) 06/04; (c) 07/03; (d) 07/06; (e) 07/07; (f) 07/08;

(g) 10/04;

(h) 11/02;

(i) 11/04;

(j) 12/10;

(k) 12/11;

(l) 12/12; and

(m) 12/13

in the Book of Reference and shown on the Land Plans

Network Rail Rights Land	Land (not belonging to Network Rail) in which Network Rail has rights in respect of which the Promoter is seeking the right to acquire permanently or rights of temporary possession
ORR	Office of Rail and Road
Possession	The closure of a section of the rail network which is placed under the exclusive possession of an engineer
Protective Provisions	Network Rail's standard protective provisions (including the amendments to the Draft DCO set out in Sections 4.2.2 and 4.2.3 below).
Promoter	Cory Environmental Holdings Limited as the promoter of the Application
Richborough Order	The National Grid (Richborough Connection Project) Development Consent Order 2017
Statement of Reasons	The Statement of Reasons submitted with the Application
Track Access Agreement	An agreement in between a Train Operating Company (or Freight Operating Company) and Network Rail allowing them access to the Network and which is subject to ORR approval.
Undertaker	The Undertaker as described in the DCO

1.2 In this written representation references to Plots are references to Plots identified in the Book of Reference and the Land Plans.

2. BACKGROUND

2.1 Network Rail

2.1.1 Network Rail is a company limited by guarantee. It was formerly known as Railtrack PLC, and succeeded British Railways Board as provider of railway infrastructure in the UK.

2.1.2 Network Rail owns and operates the rail infrastructure of Great Britain. Its purpose is to deliver a safe, reliable and efficient railway for Great Britain. Network Rail is primarily responsible for maintenance, repair and renewal of track, stations, signalling

and electrical control equipment. Train services on the Network are operated by Train Operating Companies and Freight Operating Companies to which Network Rail, as Facility Owner of the Network, grants rights to use the Network in the form of track, station, and depot access contracts approved by the ORR.

2.2 Network Licence

2.2.1 Network Rail operates under the Network Licence which was granted under Section 8 of the 1993 Act. This Network Licence contains a set of conditions under which Network Rail must operate in the public interest. As the operator and owner of the national rail infrastructure, Network Rail has a key role to play in railway safety and improving railway performance and efficiency.

2.2.2 Under Part III, Part A, Condition 1.1 of the Network Licence the purpose of the Licence is (amongst other things) to secure the operation and maintenance, improvement, enhancement and development of the Network in accordance with best practice and in a timely, efficient and economical manner. This is both in respect of the quality and capability of the Network and in the facilitation of railway service performance in respect of services for the carriage of passengers and goods by railway operating on the Network. Condition 1.3 of the Network Licence places Network Rail under a duty to achieve this purpose.

2.2.3 Under the obligations set out in its Network Licence, Network Rail is also required to ensure the safe and efficient operation of the Network to the reasonable satisfaction of railway service providers and funders. If the ORR was to find Network Rail in breach of its licence obligations (including its overarching general duty) then the consequences could be an enforcement order or significant financial penalty.

2.2.4 Without Network Rail's standard Protective Provisions, the confirmation of a development consent order allowing the Promoter to acquire rights over and above Network Rail's operational railway would significantly harm Network Rail's role and ability to undertake its obligations as infrastructure owner and operator. It would also be likely to leave Network Rail acting inconsistently with its Network Licence obligations in respect of its residual network

2.2.5 Accordingly Network Rail has objected to the Application.

2.3 The Office of Rail and Road

Network Rail is regulated by the ORR, which monitors and enforces Network Rail's compliance with its Network Licence.

3. COMPULSORY ACQUISITION

3.1 Effect of the proposed Powers of Compulsory Acquisition on Network Rail

3.1.1 There is a long history of including protective provisions for railway undertakers in statutes and statutory instruments in order to protect their undertakings.

3.1.2 This Section 3 examines the effect of compulsory acquisition on the railway and justifies and demonstrates the importance of including Network Rail's Protective Provisions in the DCO when it is made. It also identifies where the effect of compulsory acquisition is mitigated by the protective provisions contained in the DCO and where it is not.

3.1.3 The Draft DCO contains powers of compulsory acquisition in relation to land under the ownership of Network Rail where the Undertake would be empowered to take permanent rights, referred to in this document as the Network Rail Land.

3.1.4 The Draft DCO also contains powers of compulsory acquisition in relation to land which is not under the ownership of Network Rail but in respect of which Network Rail may have rights. This land is referred to in this document as the Network Rail Rights Land.

3.2 Network Rail's General Approach to Asset Protection and Works Affecting the Network

3.2.1 Absent the Protective Provisions Article 18 of the Draft DCO would allow the Undertaker to take entry on to the Network Rail Land to undertake pre-construction and construction works without the appropriate railway protection measures being in place. This would have a major impact on the operation and the safety of the railway.

3.2.2 The Protective Provisions would mean in practice that if the Undertaker needs to undertake survey work and/or tree clearance before construction commences, this must be undertaken following Network Rail procedures and approvals under the appropriate Asset Protection Agreement(s).

3.2.3 A Basic Asset Protection Agreement (**BAPA**) would support the review of the outline design, facilitate access on to the Network Rail Land and allow topographical and geotechnical surveys and the completion of any other necessary legal agreement. A BAPA is a simple contracting agreement between Network Rail and an outside party to allow interaction and to establish roles, responsibilities and liabilities of a project over, under or adjacent to the railway

3.2.4 A BAPA facilitates initial dialogue and enables a promoter to gain access to Network Rail infrastructure for survey works to enable scheme development up to Approval in Principle stage. It also allows for drafting of any other necessary legal agreement By proceeding under a BAPA Network Rail is fulfilling its statutory duty to protect the railway, with the Asset Protection Team managing access, site safety management, engineering services, and possession arrangements as necessary.

3.2.5 The closure of a section of the Network requires what is known as a "Possession":

(a) A "Rules of the Route" Possession is a schedule of engineering access opportunities that do not conflict with the approved planned operational services. The schedule of the Rules of the Route is negotiated with formal consultation with train operators and Network Rail s Integrated Planning Managers. Rules of Route possessions have a minimum of 18 weeks possession and isolation booking timescales.

(b) Any Possession that does not comply with Rules of the Route opportunities is contractually in breach of the conditions with the train operating companies and therefore considered disruptive. Disruptive access requires significant negotiations with Train Operating Companies and Freight Operating Companies and triggers penalties/compensation having to be paid to them under the Schedule 4 (planned disruption) mechanism in Track Access Agreements. Disruptive possessions have booking timescales of approximately 2 years

3.2.6 Some of the rights sought relate to the railway itself. The preliminary and construction works, if not managed under the provisions of Network Rail Asset Protection Agreement(s), would be likely to have a major impact on the safety of the operational railway. Proposed works must be reviewed and approved by the appropriate teams within Network Rail and without this process the Undertaker and its authorised personnel and contractors could take entry on to the Network Rail Land at short notice and without an approved/booked Possession of the railway line, therefore forcing Network Rail to stop the trains. This would be contrary to Network Rail's Network Licence.

3.2.7 The rights sought by the Promoter would not take account of the need to obtain Possessions. Such enforced entry onto the live railway line, without any Network Rail approved Possession, could also mean Network Rail incurring considerable expense

in terms of the penalties/compensation having to be paid to Train Operating Companies and Freight Operating Companies who would be unable to run their trains along this stretch of line. Such compensation is payable under Schedule 8 (unplanned disruption) mechanism in Track Access Agreements.

3.2.8 In this context it is notable that the Promoter has included sub-paragraph 53(6) in the protective provisions in the Draft DCO, which seeks to exclude compensation for indirect or consequential loss of profits (see Section 4.2.3 below).

3.2.9 No railway Possessions have been booked on behalf of the Undertaker and the type of Possession required is not yet known.

3.3 Network Rail's General Approach

3.3.1 As a result of the issues highlighted in the previous section, Network Rail will as a matter of course submit a holding objection to a development consent order which includes powers of compulsory acquisition, in order to allow time for the Authorised Development and land requirements to be fully reviewed and considered. Network Rail will require that its standard Protective Provisions are included in the development consent order as made to ensure that acquisition of land and rights is dealt with in accordance with the following procedure. This will require the amendments to the Draft DCO set out in Sections 4.2.2 and 4.2.3 below.

3.3.2 Following submission of Network Rail's holding objection, the land and rights required under the proposed development consent order will be submitted for approval through Network Rail's internal clearance process (**Clearance**).

3.3.3 Clearance is Network Rail's internal process for authorising the disposal of any interest in land. Although it is not in itself a statutory process, it is a process which allows Network Rail to undertake the due diligence necessary to ensure that it complies with its Network Licence.

3.3.4 Clearance is also a process which must be completed before the ORR will issue consent under Licence Condition 17 of Network Rail's Network Licence.

3.3.5 The Promoter has not yet sought Clearance in relation to the DCO, although discussions are ongoing.

3.3.6 Under Licence Condition 17 of the Network Licence, Network Rail must obtain consent from the ORR before it makes a disposal. The term disposal includes both transfers of land and the granting of easements. The ORR requires Network Rail to provide details of its internal Clearances with the notice of disposal.

3.3.7 Clearance must therefore be approved before the land and rights required for a scheme can be considered for disposal.

3.3.8 Before the holding objection to a development consent order can be withdrawn, Network Rail's standard approach is to require a Promoter to enter into a Deed of Undertaking (sometimes referred to as a framework agreement).

3.3.9 The Deed of Undertaking will usually stipulate that, in return for the Promoter agreeing to not exercise rights under the development consent order in relation to Network Rail's land and interests, Network Rail will make the land and rights required for the Authorised Development available by agreement. Importantly, this allows Network Rail to include its standard railway engineering protective provisions (note these are distinct from the Protective Provisions in a development consent order) and internal Clearance conditions within the legal agreements to ensure that Network Rail's operational assets are adequately protected.

3.3.10 Network Rail's approach to the taking of rights to install apparatus of this nature across a road over rail highway bridge is to grant the Undertaker rights to construct and maintain the apparatus by private treaty.

3.4 Tests in the 2008 Act

3.4.1 When considering whether or not to make a development consent order conferring powers of compulsory acquisition in respect of land which is owned by statutory undertakers or in which statutory undertakers have rights the key tests are set out in Sections 122, 127 and 138 of the 2008 Act.

3.4.2 These tests have not been met in relation to the Network Rail Land or the Network Rail Rights Land and, accordingly, the powers should not be granted, or, if the powers are granted in the DCO, then Network Rail's Protective Provisions must also be included in the DCO. This will require the amendments to the Draft DCO set out in Sections 4.2.2 and 4.2.3 below.

3.5 Section 122 of the 2008 Act

3.5.1 Section 122 of the 2008 Act sets out the principal test for the Secretary of State in determining whether or not to include powers of compulsory acquisition in a development consent order.

3.5.2 Section 122 states as follows:

> ***122 Purpose for which compulsory acquisition may be authorised***
>
> *(1) An order granting development consent may include provision authorising the compulsory acquisition of land only if the Secretary of State is satisfied that the conditions in subsections (2) and (3) are met.*
>
> *(2) The condition is that the land—*
>
> *(a) is required for the development to which the development consent relates,*
>
> *(b) is required to facilitate or is incidental to that development, or*
>
> *(c) is replacement land which is to be given in exchange for the order land under section 131 or 132.*
>
> *(3) The condition is that there is a compelling case in the public interest for the land to be acquired compulsorily.*

3.5.3 Section 159 provides that "Land" includes any interest in or right over land.

3.5.4 The first part of this test is that the land is "required" for the development. This word is not defined in the 2008 Act, however Paragraph 11 of the DCLG Guidance states in relation to Section 122(2)(a):

> *"…the applicant should be able to demonstrate to the satisfaction of the Secretary of State that the land in question is needed for the development for which consent is sought. The Secretary of State will need to be satisfied that the land to be acquired is no more than is reasonably required for the purposes of the development."*

Paragraph 11 continues in relation to Section 122(2)(b):

> *"An example might be the acquisition of land for the purposes of landscaping the project. In such a case the Secretary of State will need to be satisfied that the development could only be landscaped to a satisfactory standard if the land in*

question were to be compulsorily acquired, and that the land to be taken is no more than is reasonably necessary for that purpose, and that is proportionate."

3.5.5 The word "required" in Section 122 of the 2008 Act also mirrors the wording of Section 226(1)(a) of the 1990 Act (as that Section was originally enacted). The meaning of that word was considered by the Court of Appeal in *Sharkey v Secretary of State for the Environment (1992) 63 P. & C.R. 332* where McGowan LJ stated:

> *"…the local authority do not have to go so far as to show that the compulsory purchase is indispensable to the carrying out of the activity or the achieving of the purpose; or, to use another similar expression, that it is essential. On the other hand, I do not find the word 'desirable' satisfactory, because it could be mistaken for 'convenient' , which clearly, in my judgment, is not sufficient. I believe the word 'required' here means 'necessary in the circumstances of the case'."*

Although *Sharkey* related to a different piece of legislation, in light of the DCLG Guidance set out above it would seem reasonable to conclude that the word "required" in Section 122(1)(a) and (b) should be interpreted in the same manner.

3.5.6 The Secretary of State must also be satisfied that there is a "compelling case in the public interest" for the land to be acquired compulsorily. Paragraph 13 of the DCLG Guidance states:

> *"For this condition to be met, the Secretary of State will need to be persuaded that there is compelling evidence that the public benefits that would be derived from the compulsory acquisition will outweigh the private loss that would be suffered by those whose land is to be acquired. Parliament has always taken the view that land should only be taken compulsorily where there is clear evidence that the public benefit will outweigh the private loss."*

3.5.7 Paragraphs 14 to 16 of the DCLG Guidance continue by explaining that "…the Secretary of State will weigh up the public benefits that a scheme will bring against any private loss to those affected by compulsory acquisition." When addressing the question of whether to grant powers of compulsory acquisition the decision maker is also bound to have regard to Article 1 of the First Protocol of EHCR (protection of property).

3.5.8 Land and rights belonging to a statutory undertaker is a special species of land. This is recognised by the special protection applied to such land by virtue of Section 127 of the 2008 Act (see Section 3.6 below). These protections are necessary because such undertakings provide a public service. The public interest test in Section 122(3) of the 2008 Act therefore falls to be determined not just by weighing the public benefits of the scheme against the private loss of Network Rail, but also against the public dis-benefits caused by the disruption of Network Rail's undertaking, which are inseparable from Network Rail's private interest.

3.5.9 In order to ensure that it is able to continue to comply with the terms of its Network Licence after it grants rights in the land, Network Rail requires that the Deed of Grant of rights affords it adequate protection. The rights are required in order to ensure that Network Rail is able to continue to comply with the terms of its Network Licence after it grants rights.

3.5.10 Equally, these safeguards are entirely lacking from the power to extinguish the rights which Network Rail has reserved over the Network Rail Rights Land.

3.5.11 The Draft DCO also contains powers which could have the effect of closing the Railway for a period of several years. For example the rights being sought over plots 07/03, 07/06, 07/07 and 07/08 would effectively allow the Undertaker to take temporary possession of the operational railway and to remain in possession for an indefinite

period. This would prevent the passage of trains and cause severe disruption to passengers, and would be contrary to the terms of the Network Licence.

3.5.12 The nature of the restrictive covenants to be imposed on the operational railway is not specified. It must therefore be assumed that the power is drawn very widely. This does not provide the necessary careful balance between the operational needs of the railway and those of the Undertaker and would be very likely to lead to Network Rail not being able to comply with its Network Licence.

3.5.13 The consequences of granting the powers of compulsory acquisition set out in the Draft DCO without including the Protective Provisions would therefore potentially be very severe both in terms of public and private loss. It would be likely to impact safety and operational efficiency, and ultimately lead to passenger delay and cancelled services. It would also be likely to require Network Rail to pay compensation to Train Operating Companies and Freight Operating Companies under the Schedule 8 (unplanned disruption) mechanism in Track Access Agreements It follows that the test set out in Section 122 would not be satisfied in respect of the Network Rail Land and the Network Rail Rights Land and that the powers of compulsory acquisition which the Promoter is seeking in relation to this land should not be granted unless they are properly constrained by Network Rail's standard Protective Provisions.

3.6 Section 127 of the 2008 Act

3.6.1 Compulsory Acquisition of New Rights over Statutory Undertakers' Land

(a) Under Sections 127(5) and (6) a development consent order "may include provision authorising the compulsory acquisition of a right over statutory undertakers' land by the creation of a new right over land only to the extent that the Secretary of State is satisfied" that one of the following is satisfied:

(6) …that the nature and situation of the land are such that—

(a) the right can be purchased without serious detriment to the carrying on of the undertaking, or

(b) any detriment to the carrying on of the undertaking, in consequence of the acquisition of the right, can be made good by the undertakers by the use of other land belonging to or available for acquisition by them.

(b) Sections 127(5) and (6) apply to the Network Rail Land.

(c) The rights which may be taken are not specified and it must be assumed that the power is drawn very widely. This does not provide the necessary careful balance between the operational needs of the railway and those of the Undertaker and would be very likely to lead to Network Rail not being able to comply with its Network Licence.

(d) Absent the Protective Provisions, the taking of unspecified rights over the Network Rail Land in the uncontrolled way provided for by the Draft DCO would be likely to have detrimental impacts on Network Rail's statutory undertaking. The extent and nature of these impacts is uncertain, but due to the wide discretion which is afforded by the Draft DCO they could be very severe indeed.

(e) The Draft DCO contains a number of powers to acquire rights which are subject to this test. The Statement of Reasons does not demonstrate that the land can be purchased without serious detriment to the carrying on of the undertaking and the powers which are being sought in relation to Network Rail's interests in the Network Rail Land should not be granted unless the Protective Provisions are included in the DCO.

3.7 Section 138 of the 2008 Act

3.7.1 Section 138 contains a special test which must be applied by the Secretary of State before powers of compulsory acquisition are granted which would extinguish "a right or way, or a right of laying down, erecting, continuing or maintaining apparatus on, under or over land" where that right is vested in a statutory undertaker for the purposes of their statutory undertaking. Under Section 138(4):

> *(4) The order may include provision for the extinguishment of the relevant right, or the removal of the relevant apparatus, only if the Secretary of State is satisfied that the extinguishment or removal is necessary for the purpose of carrying out the development to which the order relates.*

3.7.2 The Draft DCO contains a number of powers to extinguish rights. No justification has been made out for the removal of Network Rail's rights in the Network Rail Land or the Network Rail Rights Land. Accordingly no case has been made out that the extinguishment of Network Rail's rights is necessary to allow the development to proceed and unless Network Rail's standard the Protective Provisions are included in the DCO the powers which are being sought in relation to Network Rail's interests in the Network Rail Rights Land should not be granted.

3.7.3 It is important in this regard to note that Articles 12, 13, 29 and 33 are rights of this type, but that they do not benefit from the protective provisions included in the Draft DCO. See Section 4.2.2 below which sets out how this may be remedied by including Network Rail's standard Protective Provisions in the DCO.

4. NETWORK RAIL'S OBJECTION

4.1 The Draft DCO: Limits of Deviation

4.1.1 Network Rail is concerned about the vertical limits of deviation contained in Article 3(3) of the Draft DCO:

> *(3) In carrying out and maintaining the authorised development the undertaker may deviate vertically from the levels of the authorised development to any extent downwards not exceeding 2 metres.*

4.1.2 Some of the rights sought appear to be limited to specified bridges over the railway. Where this is the case, this limit of deviation appears to allow installation below this level. This appears to provide an option to construct the bridge in such a manner and in such situation as would require the removal of Network Rail's overhead line equipment (ie the overhead electric line used by electric locomotives) and block the line to the passage of trains. This is not acceptable to Network Rail and would be contrary to the terms of its Network Licence.

4.1.3 The Draft DCO must be amended to remove reference to this limit of deviation on any Network Rail Land.

4.2 Protective Provisions

4.2.1 Background

(a) There are protective provisions for the benefit of Network Rail which are well precedented both in orders under the Transport and Works Act 1992 and development consent orders.

(b) Examples of those protective provisions can be found in recent A14 Cambridge to Huntingdon Improvement Scheme Development Consent Order 2016 and the M4 Motorway (Junctions 3 to 12) (Smart Motorway) Development Consent Order 2016.

(c) In practice, the effect of the Protective Provisions is to encourage and require the Promoter to enter into private treaty agreements with Network Rail in order to obtain the rights and interests it requires. Most of these agreements are based on precedent form agreements published on Network Rail's website. This system is transparent and has a track record of delivering infrastructure.

(d) The Draft DCO contains protective provisions which broadly follow these precedents. However they differ in two significant respects which mean that they are not acceptable to Network Rail in their current form. These are assessed in Sections 4.2.2 and 4.2.3 below.

4.2.2 Schedule 10, Part 5, Paragraph 42(1)

(a) Paragraph 42 limits the application of the Draft DCO and prevents a number of powers being exercised by the Promoter in respect of Network Rail's land and rights.

(b) Based on the precedent orders referred to above, however, the protective provisions also need to include – and there is precedent for them to include – restrictions on exercising the following additional Articles of the Draft DCO:

(i) 5. Operation of the authorised development

(ii) 12. Temporary prohibition or restriction of use of streets and public rights of way

(iii) 13. Permanent stopping up of streets

(iv) 14. Access to works

(v) 16. Traffic regulation

(vi) 17. Discharge of water

(vii) 29. Rights under or over streets

(viii) 33. Apparatus and rights of statutory undertakers in stopped up streets

(ix) 34. Recovery of costs of new connections.

(c) A justification for the inclusion of these Articles is set out in Sections **Error! Reference source not found.** and 3.7.3 above.

4.2.3 Sub-paragraph 53(6)

(a) This sub-paragraph relates to the costs/damages clause and states:

(6) In no circumstances is the undertaker liable to Network Rail under sub-paragraph (1) for any indirect or consequential loss of profits, except that the sums payable by the undertaker under that sub-paragraph include a sum equivalent to the relevant costs in circumstances where—

(a) Network Rail is liable to make payment of the relevant costs pursuant to the terms of an agreement between Network Rail and a train operator; and

(b) the existence of that agreement and the extent of Network Rail's liability to make payment of the relevant costs pursuant to its terms has previously been disclosed in writing to the undertaker, but not otherwise.

(b) This clause appears to have two main effects:

(i) It removes the Undertaker's liability for any indirect – or consequential – loss of profits; and

(ii) It removes the Undertaker's liability to refund Network Rail in respect of Network Rail's liability for the costs, direct losses and expenses of TOs – except where Network Rail has told the undertaker about the existence of the agreement under which that liability arises.

(c) This sub-paragraph has no real precedent in development consent orders and should be deleted.

(d) The clause appears to be a provision which was included in protective provisions (contrary to Network Rail's wishes) in the Richborough Order in 2017.

(e) The Richborough Order appears to be a unique departure from Network Rail's standard Protective Provisions in relation to this provision. The precise circumstances of the promoter of the Richborough Order or the land or rights sought may have given rise to this departure from Network Rail's standard Protective Provisions: the precise reasons are not apparent from the decision.

(f) Moreover, unusually, Network Rail is placed under specific statutory duties to provide compensation to Train Operating Companies and Freight Operating Companies where there is an interruption to the availability of the Network. It is not practicable and may not in all circumstances be lawful for Network Rail to disclose those agreements to the Undertaker.

4.3 Arbitration Provisions

4.3.1 Network Rail is currently considering the detailed provisions about arbitration in Article 41 and Schedule 13 (Procedures in relation to certain approvals etc) and reserves the right to make further written representations in relation to those provisions.

5. SUMMARY AND CONCLUSIONS

5.1 Network Rail owns and operates the rail infrastructure of Great Britain. Its purpose is to deliver a safe, reliable and efficient railway for Great Britain. Network Rail is primarily responsible for maintenance, repair and renewal of track, stations, signalling and electrical control equipment. Train services on the Network are operated by Train Operating Companies and Freight Operating Companies to which Network Rail, as Facility Owner of the Network, grants rights to use the Network in the form of track, station, and depot access contracts approved by the ORR.

5.2 Network Rail operates under the Network Licence which was granted under Section 8 of the 1993 Act. This Network Licence contains a set of conditions under which Network Rail must operate in the public interest. As the operator and owner of the national rail infrastructure, Network Rail has a key role to play in railway safety and improving railway performance and efficiency.

5.3 Under Part III, Part A, Condition 1.1 of the Network Licence the purpose of the Licence is (amongst other things) to secure the operation and maintenance, improvement, enhancement and development of the Network in accordance with best practice and in a timely, efficient and economical manner. This is both in respect of the quality and capability of the Network and in the facilitation of railway service performance in respect of services for the carriage of passengers and goods by railway operating on the Network. Condition 1.3 of the Network Licence places Network Rail under a duty to achieve this purpose.

5.4 Under the obligations set out in its Network Licence, Network Rail is also required to ensure the safe and efficient operation of the Network to the reasonable satisfaction of railway service providers and funders. If the ORR was to find Network Rail in breach of its licence obligations

(including our overarching general duty) then the consequences could be an enforcement order or significant financial penalty.

5.5 Without Network Rail's standard Protective Provisions, the confirmation of a development consent order allowing the Promoter to acquire rights over and above Network Rail's operational railway would significantly harm Network Rail's role and ability to undertake its obligations as infrastructure owner and operator. It would also be likely to leave Network Rail acting inconsistently with its Network Licence obligations in respect of its residual network

5.6 Network Rail submits that its standard Protective Provisions should be included in the DCO if it is made.

5.7 Network Rail's general approach to applications for powers of compulsory acquisition in development consent orders is set out in Section 3.2 and 3.3 above. In essence, in order to comply with its Network Licence it requires that the acquisition of the rights required for a scheme are dealt with by private treaty via a series of template agreements. The Protective Provisions provide the protections for Network Rail which allow this to happen.

5.8 Network Rail does not object in principle to the construction of the works through the airspace of the railway and has been working with the Undertaker in order to agree terms which would allow Network Rail to withdraw its objection.

5.9 However the making of the DCO in the form of the Draft DCO would be likely to cause serious harm to the carrying out of Network Rail's statutory undertaking contrary to Sections 127 and 138 of the 2008 Act. In particular:

5.9.1 The permanent acquisition of the Network Rail Land and Network Rail's rights over the Network Rail's Rights Land would not contain the necessary rights and reservations (established under the Clearance Process – see Section 3.3.3 above) to Network Rail such that it would be able to comply with its Network Licence (which would be secured for Network Rail if Network Rail's preferred method of transfer by private treaty is relied on) (see Section 3.6 above).

5.9.2 The powers sought plots 07/03, 07/06, 07/07 and 07/08 would prevent the passage of trains and would place Network Rail in breach of its Network Licence (see paragraph 3.5.111 above)).

5.9.3 The powers sought in relation to the Network Rail Land are not acceptable to Network Rail and must be secured via private treaty. This would include provisions under which the Undertaker would contact Network Rail's Asset Protection and Optimisation (ASPRO) Team and enter into a BAPA to facilitate access.

5.10 Network Rail is also concerned about the Limits of Deviation contained in Article 3 of the Draft DCO. Details of this objection are set out in Section 4.1 above.

5.11 It is respectfully requested that the Examining Authority recommend to the Secretary of State that the Draft DCO should not be made in its current form.

5.12 However in the event that:

5.12.1 The Limits of Deviation are amended as described in paragraph 4.1 above; and

5.12.2 The protective provisions in the Draft DCO are amended as follows

(a) Reference to Articles 5, 12, 13, 14, 16, 17, 29, 33 and 34 of the Draft DCO is added to paragraph 42(1); and

(b) Sub-paragraph 53(6) is deleted,

(and subject to paragraph 5.13 below) Network Rail would be in a position to withdraw its objection to the Application. However unless and until that occurs, Network Rail's objection must stand.

5.13 Network Rail is currently considering the detailed provisions about arbitration in Article 41 and Schedule 13 (Procedures in relation to certain approvals etc) and reserves the right to make further written representations in relation to those provisions.

Womble Bond Dickinson (UK) LLP

20 May 2019

APPENDIX 1

Sharkey v Secretary of State for the Environment (1992) 63 P. & C.R. 332

SHARKEY AND ANOTHER v. SECRETARY OF STATE FOR THE ENVIRONMENT AND SOUTH BUCKINGHAMSHIRE DISTRICT COUNCIL

COURT OF APPEAL (Parker, McCowan and Scott L.JJ.): October 14, 1991

Compulsory purchase order—Land required for a planning purpose—Meaning of "required"—Whether local authority should exhaust other planning enforcement powers before using compulsory purchase powers—Town and Country Planning Act, 1971, s.112(1)(b)

Gipsies brought mobile homes onto eight plots in the metropolitan green belt, where there was a presumption against development, without obtaining planning permission. They intended to settle permanently there. The local authority proceeded against the gipsies, initially by way of enforcement notices and then by obtaining injunctions, but finally, finding that these procedures were cumbersome, expensive and ineffective, made a compulsory purchase order seeking to purchase all eight plots on the ground that the land was "required" to achieve proper planning of the area within the Town and Country Planning Act 1971, s.112(1)(*b*).

After holding a public inquiry into the compulsory purchase order, the inspector, while accepting that the development was inappropriate and unacceptable in the green belt, recommended that the order should not be confirmed, on the grounds that the council had not satisfactorily shown that this was the only reasonable means of achieving proper planning of the area and that the order was premature. This was not accepted by the Secretary of State, who confirmed the order in respect of four plots on the ground that, on the evidence, successful restoration of the land without the compulsory purchase order would be unlikely in these cases, but deferred his decision in respect of the other four plots where time for compliance with the enforcement notices had not yet expired.

Certain gipsies appealed against the decision of Roch J.,[1] who had dismissed their application to quash the compulsory purchase order. They contended that the land was not "required" by the local authority within section 112(1)(*b*), since there were various ways in which the clearance of the land could be achieved without compulsory purchase.

Held, dismissing the appeal, that in order to show that land was "required" for a purpose which it was necessary to achieve in the interests of proper planning within the Town and Country Planning Act 1971, s.112(1)(*b*), a local authority did not have to show that compulsory purchase of the land was indispensable to the achieving of that purpose, but that it was necessary in the circumstances of the case. It was not enough, however, that such compulsory purchase might be desirable. The Secretary of State was entitled to find that the council was unlikely to achieve successful restoration of the land without compulsory purchase in respect of four plots and to defer a decision in respect of the four further plots where there was a possibility that this might be achieved.

Cases cited:

(1) *Company Developments (Property) Ltd.* v. *Secretary of State for the Environment and Salisbury District Council* [1978] J.P.L. 107.

(2) *R.* v. *Secretary of State for the Environment, ex p. Leicester City Council* (1988) 55 P. & C.R. 364.

[1] *See* (1991) 62 P. & C.R. 126.

(3) *Runnymede Borough Council* v. *Ball* [1986] 1 W.L.R. 353; [1986] 1 All E.R. 629; 53 P. & C.R. 117, C.A.

Legislation construed:
Town and Country Planning Act 1971 (c. 78), s.112(1)(*b*) (see now Planning Act 1990, s.226(1)). The provision is set out at page 335, *post*.

Appeal by L. Sharkey and C. Fitzgerald from a decision of Roch J. on May 11, 1990 (*see* 62 P. & C.R. 126) in which he dismissed their application to quash a compulsory purchase order made by the South Buckinghamshire District Council on October 8, 1985, relating to certain plots of land at Swallow Street, Iver, Buckinghamshire, in the metropolitan green belt, upon which they had installed mobile homes without planning permission. The appellants contended that the district council only required clearance of the land, which could be achieved by prosecution, by the council entering upon the land and clearing it, by injunction or by providing a suitable alternative site. Compulsory purchase was not "required."

Harry Sales for the appellants (applicants).
W. Robert Griffiths for the first respondent.
R. J. Rundell for the second respondent.

PARKER L.J. I will ask McCowan L.J. to give the first judgment.

McCOWAN L.J. This is an appeal from a decision of Roch J. given on the May 11, 1990, dismissing an application by the appellants that the South Bucks District Council (Ivor No. 1) Compulsory Purchase Order 1985 be quashed. The first respondent is the Secretary of State for the Environment and the second respondent is the South Bucks District Council.

The order in question, as made by the South Bucks District Council on October 8, 1985, related to plots 1 to 6, 7A and 7B Swallow Street, Iver. The order as confirmed by the Secretary of State related only to plots 1, 5, 6 and 7A. Postponement of consideration of the order in so far as it related to plots 2, 3, 4 and 7B was directed by the Secretary of State.

Between September 15 and 17, 1987, an inspector held a public inquiry into the compulsory purchase order and also into various enforcement notices with which neither the hearing before Roch J. nor the appeal have been concerned. The reason for that, as we understand it, is that before the case started in front of Roch J. it was agreed between the parties that the appellants would not pursue their appeals against the enforcement on the basis that the council for their part would not take action in respect of them before some date in 1991. Those enforcement notices are therefore effective.

That inspector described the site covered by the order thus:

> The order land is on the west side of Swallow Street and in a generally open area between the north-western and south-western extremities of the built-up areas of Iver and Iver Heath respectively. It is approximately 0.28 (0.69 acres) in area and divided into 7 plots, numbered 1 to 7 consecutively from south to north (Plan A). At the time of the inquiry Plot 7 had been sub-divided into 2, the southern part referred to as Plot 7A and the northern as Plot 7B (Plan Q).

The inspector went on to make findings of fact about, among other things, the state of occupation of the various plots. He said:

> 5. Plot 1, Cherry Orchard, contains a mobile home and hardstanding and garden areas, and is residentially occupied by Mr. Sharkey and family.
> 6. Plot 2, Springfield Rose, contains a mobile home and hardstanding area, and is residentially occupied by Mr. And Mrs. Carey.
> 7. Plot 3, Little Apple, contains a mobile home, touring caravan and hardstanding area, and is residentially occupied by Mr. M. Smith and family.
> 8. Plot 4, Mill Place, contains a mobile home, touring caravan and hardstanding area, and is residentially occupied by Mr. J. Smith and family.
> 9. Plot 5, Silver Birch, contains a mobile home and hardstanding area, and is residentially occupied by Mr. Fitzgerald and family.
> 10. Plot 6, Swallows Nest, contains a mobile home and patio, garden and hardstanding areas, and is residentially occupied by Mr. Stubbings and family.
> 11. Plot 7A, Summerset Place, contains a touring caravan and hardstanding area, and is residentially occupied by Mr. Brown and family.
> 12. Plot 7B, Meadowside, contains a touring caravan and hardstanding and garden areas, and is residentially occupied by Mr. Price and family.

Plots 1 and 5, it is to be noticed, are occupied by the two appellants. The learned judge summarised the situation in this way[2]:

> Those plots were occupied by travellers or gypsies. Often the occupant was the person who had purchased the plot. Entrances were made on to Swallow Street in most cases, although in some cases it was said that existing entrances were used. Hardstanding was put down for caravans and for vehicles, walls were built and gardens cultivated. In addition some septic tanks were constructed.
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> It seems that the travellers who bought and occupied those plots were travellers who wished to settle, to send their children to school, and to avoid having to move their children from one school to another. In short that the occupants were responsible and orderly people.
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> However, Swallow Street is within the Metropolitan Green Belt and there was and is a presumption against such development which is only to be displaced in certain exceptional cases. The second respondent, as the local planning authority, were against this unpermitted development and took steps to terminate this unauthorized use of this land.
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> Enforcement notices were prepared and served under section 87 of the Town and Country Planning Act 1971. In respect of some of the plots there was more than one enforcement notice.
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> The history in relation to plot 1 was this: that in 1984 four enforcement notices were served. In August 1985 the second respondent used its powers under section 91 of the Town and Country Planning Act 1971 to enter plot 1 and execute the work set out in the four enforce-

[2] (1991) 62 P. & C.R. 126 at p. 128.

ment notices. Consequently, by October 8, 1985 plot 1 was unoccupied and the hardstanding, fences and vehicular access which had existed on plot 1 had been removed.

In May 1986 a High Court injunction was obtained to prevent plot 1 being used by a traveller. In August of 1986 a second such injunction was obtained by the second respondent. In February 1987 further action under section 91 of the Act was taken. In April 1987 a writ was served on the then occupant of plot 1. Nevertheless by September 1987, at the time that a public inquiry was held by a planning inspector, Mr. Brock, plot 1 was being used by a traveller who had a caravan on the plot sited on hardstanding.

The inspector's report indicates that four enforcement notices were served in respect of plot 2, the first on May 15, 1985 and the remaining three on September 3, 1985. Three enforcement notices were served in respect of plot 6, two on September 5, 1985 and the third on September 20, 1985. Five enforcement notices were served in respect of plot 4, four on September 5, 1985 and the fifth on March 7, 1986. One enforcement notice was served in respect of plot 7 on August 8, 1987.

On October 8, 1985 the second respondent promulgated a compulsory purchase order under section 112(1)(b) of the Town and Country Planning Act 1971 seeking authorization to purchase compulsorily the land described in the schedule which was all eight plots, that is to say, plots 1 to 6 7A and 7B which were described in the schedule simply as plot 7; "For the purpose which it is necessary to achieve in the interests of the proper planning in the area in which the land is."

It is convenient at this point to read section 112 of the Town and Country Planning Act 1971. In so far as it is material it provides as follows:

(1) A local authority to whom this section applies shall, on being authorised to do so by the Secretary of State, have power to acquire compulsorily
   (a) any land which is in their area and which is suitable for and is required in order to secure the carrying out of one or more of the following activities, namely, development, redevelopment and improvement;
   (b) any land which is in their area and which is required for a purpose which it is necessary to achieve in the interest of the proper planning of and area in which the land is situated.

As the judge said, the council relied in this case on subsection 1(*b*). The council's case under that subsection before the inspector was summarised by him as follows:

> 167. The need for a compulsory purchase order is due to deliberate flouting of planning control by the occupiers of the land or their predecessors. Normal legal procedures have been shown to be cumbersome, expensive and ineffective. Enforcement procedure has been satisfactory up to a point, but thereafter has been ineffective; prosecutions depend on identification, which is difficult when occupiers come and go, the level of fines imposed is low and injunctions obtained apply only to the persons named. On the Cherry Orchard site [I interpolate that is a reference to plot 1] section 91 action has been found ineffective; twice the land has been cleared, and twice reinstated. A stop

notice on Plot 7 has been ineffective. No grounds exist for expecting that the land would revert to an appropriate Green Belt use even if section 91 powers were again to be used. All except one of the present occupiers have said that they would not reinstate their land to the condition in which it formerly was. Public money would be wasted by the use of section 91 powers, and the aim of protecting the Green Belt would be rendered futile.

168. The only effective means of protection is by compulsory purchase. As a housing action area is purchased for the benefit of the community as a whole, so would the purchase of this Green Belt land be of benefit to the community. In the light of that consideration the order should be confirmed. Even if it is thought that it should not be confirmed in respect of Plots 2 to 6 on the grounds that all other avenues have not yet been fully explored, it should be confirmed in respect of Plots 1, 7A and 7B.

The inspector's conclusion on this issue was:

189. . . . I find the development which has taken place on the land to be inappropriate and unacceptable. In my opinion the location is such that the land should not be left in a derelict or neglected state, but should be put to a suitable rural use. That aim seems to me to be one which it is necessary to achieve in the interests of the proper planning of the area.

190. However, I do not consider that, with the possible exception of Plot 1, the Council have satisfactorily shown that the only practicable means of achieving the aim is by compulsory purchase. With regard to Plots 3 to 6, there is no evidence of prosecutions or attempted prosecutions for non-compliance with those enforcement notices which are not the subject of appeal and should by now have been complied with. Regarding Plots 7A and 7B, action in respect of a breach of the stop notice is apparently still being pursued, and I note that the period for compliance with the enforcement notice issued on September 11, 1987 is not due to and until November 16, 1987. I find insufficient evidence to substantiate a claim that the general level of fines imposed for non-compliance with enforcement notices is so low as to vitiate the value of prosecution.

191. As to the notices currently under appeal, it might be that the appellants would now decide to accept what I believe to be the inevitability of the situation, and would choose to comply with the requirements within the time allowed. The evidence is that, in the event of non-compliance with the notices if upheld, and of the order not being confirmed, the Council would seek to use its powers under section 91 of the 1971 Act. This course of action would no doubt be open to the Council to pursue if it wished, and it does not seem to me necessarily to follow that, because Plot 1 has been reoccupied after such action in the past, further action would fail to have the desired effect in the future.

192. Even if past experience provided a good reason for the compulsory purchase of Plot 1, the purpose which it is necessary to achieve would be unlikely to be realised by the acquisition of an individual plot in isolation. The Council's restoration and landscaping scheme could not be implemented by the use only of Plot 1. With regard to that

> scheme, it seems to me that an appropriate rural use would equally lie in the return of the land to grazing land, whether as a parcel on its own or in conjunction with adjoining land. It could be that the present owners of the land, notwithstanding the evidence given at the inquiry, would be finally convinced that they should dispose of their land, and would offer it for sale to an owner of adjoining or adjacent land for use by him for an appropriate purpose.

I interrupt the reading at this point to make the comment that nothing has happened since to justify the inspector's optimism. He continued:

> 193. I conclude that, whereas it may eventually be found that, in order to achieve the necessary purpose on planning grounds, no practicable alternative exists to compulsory purchase of the land, the making of the order at this stage is, at the least, premature.

He went on to recommend that the compulsory purchase order be not confirmed.

In turn the Secretary of State had this to say on the issue in his decision letter of the February 24, 1989:

> The Secretary of State agrees that the interests of the proper planning of an area within the Metropolitan Green Belt are served by the removal of development which is detrimental to the visual amenities of that area.
>
> 5. In considering the Inspector's conclusions in the light of the council's statement of reasons, the Secretary of State agrees that the development which has taken place on the order land is inappropriate and unacceptable in this generally open area which is within the Metropolitan Green Belt and the Colne Valley Park. He shares the Inspector's opinion that the implementation of the council's proposed landscaping scheme (which was prepared only after the order had been submitted for confirmation) whilst consistent with Green Belt policy, is not the only purpose to which the land could appropriately be put. He agrees that the land should not be left in a derelict or neglected state.
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> 6. On the basis of the evidence presented at the inquiry, the Secretary of State does not accept in its entirety the Inspector's conclusion that the council have not satisfactorily shown that the only practicable means of achieving the aim of putting the order land to a suitable rural use is by compulsory acquisition. The Secretary of State has had particular regard to the evidence presented by the council as to the result of enforcement action in respect of various sites in the district, including sites which are also the subject of this order. He has concluded, on the balance of probabilities, that successful restoration of the land as a consequence of the upholding of the enforcement notices is unlikely as respects plots 1, 5, 6 and 7A since the evidence of the owners of those plots is to the effect that they would not, or in one case could not afford to restore the land, even if the notices were upheld. Accordingly he has decided to confirm the order in relation to those plots.
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> 7. The evidence given by the owners of plots 3 and 4 suggests that the land would be restored if the enforcement notices were upheld. In relation to plots 2 and 7B the owners either expressed no view or were undecided about restoration. The Secretary of State considers that it

> would be appropriate in relation to these plots to defer his decision on the order until the period for compliance with the relevant enforcement notices has elapsed. He will then form a view as to the necessity for confirmation of the order in respect of those plots.

I need not read paragraph 8, which deals with certain modifications. In paragraph 9 he went on to say:

> 9. Accordingly, in exercise of the power conferred on him by section 132(2) of the Town and Country Planning Act 1971, he hereby confirms the South Bucks District Council (Iver No. 1) Compulsory Purchase Order 1985 insofar as it relates to plots 1, 5, 6 and 7A subject to the modifications shown thereon in red ink. He hereby directs that consideration of the order insofar as it relates to plots 2, 3, 4 and 7B be postponed until September 28, 1989.

In challenging this decision in the courts the appellants put forward two grounds in their notice. First, it is said that:

> the first respondent treated the likelihood of the applicants carrying out works of restoration in accordance with enforcement notices as the determining factor and in so doing ignored the powers of the Second Respondent to carry out works of restoration under section 91 of the Town and Country Planning Act 1971.

Secondly, that:

> the first respondent considered it unnecessary to confirm the compulsory purchase order in respect of plots owned by other than the applicants and thereby and by his express conclusions concluded that the avowed purpose of the order in the form of the second respondent's proposed landscaping scheme did not justify confirmation of the compulsory purchase order.

The provisions of section 91(1) of the Town and Country Planning Act 1971 there referred to read as follows:

> If, within the period specified in an enforcement notice for compliance therewith, or within such extended period as the local planning authority may allow, any steps which by virtue of section 87(7)(a) of the Act are required by the notice to be taken (other than the discontinuance of a use of land) have not been taken, the local planning authority may enter the land and take those steps, and may recover from the person who is then the owner of the land any expenses reasonably incurred by them in doing so.

It is to be observed, however, that, in practical terms, to do this it would be necessary first to get occupiers off the site.

The appellants submitted before Roch J. that compulsory purchase of the land was not required for the purpose in question, because that purpose could be achieved by other means, notably under section 91. Roch J. was referred to two authorities on the word "required" in this context, as have we. Both cases involve consideration of section 112(1)(*a*) but, as the judge said, and it has not been disputed, the word "required" must have the same meaning in (*b*) as in (*a*).

In *Company Developments (Property) Ltd.* v. *Secretary of State for the Environment and Salisbury District Council* Sir Douglas Frank held that

the word "required" in this context does not mean "essential," but only that the acquiring authority and the Secretary of State consider it desirable to acquire the land to secure the carrying out of the activity in question.

In *R.* v. *Secretary of State for the Environment, ex p. Leicester City Council* McCullough J. considered that the word "required" meant more than mere desirability. Roch J., in this case, dealt with that argument as follows.[3]

> Because of the nature of the power given to local authorities by section 112, namely, to deprive the owner of his land against that owner's will, I prefer and adopt the stricter meaning of the word "required" suggested by the judgment of McCullough J. In my judgment the word means that the compulsory acquisition of the land is called for; it is a thing needed for the accomplishment of one of the activities or purposes set out in the section. However, I accept the dictum of Sir Douglas Frank QC to this extent that neither the local authority nor the Secretary of State have to go so far as to show the compulsory acquisition of the land is indispensable to the carrying out of the activity or the achieving of the necessary planning purpose. The local authority need not have tried to use all their other powers before resorting to compulsory purchase, provided there is evidence on which they and the Secretary of State can conclude that, without the use of compulsory purchase powers, the necessary planning purpose is unlikely to be achieved.
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> In this case the Secretary of State in paragraph 5 of the letter of his decision correctly, in my view, identified the purpose which it was necessary to achieve in the interest of proper planning of the area in which the land was situated, namely, to remove the development which had taken place and which was inappropriate and unacceptable and to ensure that the land should not be left in a derelict or neglected state. The Secretary of State then went on to consider whether acquisition of the land by compulsory powers was required in the sense of being needed for the accomplishment of the purpose because he has concluded, on the balance of probabilities, that successful restoration of the land was unlikely in respect of plots 1, 5, 6 and 7A, unless the order was confirmed in relation to those plots. In my judgment there was evidence on which the Secretary of State was entitled to reach that conclusion. If the Secretary of State had asked himself the question, is the compulsory acquisition of this land desirable for the accomplishment of the purpose, I would have held that he had applied the wrong test.
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> Had the Secretary of State gone on to refuse to confirm the compulsory purchase order with regard to the other four plots, then in my opinion there may have been some prospect of his decision being overturned on the grounds of irrationality. However, that is not the decision reached by the Secretary of State and I assume, in his favour, that he will confirm the compulsory purchase order in respect of those plots if, despite the removal of caravans and so forth from those plots, those plots are not restored to some use suitable for the area but are

[3] (1991) 62 P. & C.R. 126 at pp. 133–134.

left in a state where they become or are likely to become derelict and neglected.

I may confess in this case that had the decision been mine, I would have reached the same conclusion as that reached by the inspector, namely, that the making of the compulsory purchase order at that stage was premature. However, it is a well established principle of administrative law that such judgments are for the local authority and the Secretary of State and not for this court.

Consequently the conclusion that I have reached is that I must dismiss these applications for judicial review.

I agree with Roch J. that the local authority do not have to go so far as to show that the compulsory purchase is indispensable to the carrying out of the activity or the achieving of the purpose; or, to use another similar expression, that it is essential. On the other hand, I do not find the word "desirable" satisfactory, because it could be mistaken for "convenient," which clearly, in my judgment, is not sufficient. I believe the word "required" here means "necessary in the circumstances of the case."

Before this court the appellants put their case in this way. It is said by Mr. Sales that the seven grounds of appeal in the notice of appeal all relate to different aspects of the same point, which is that the land, the subject of a compulsory purchase, is not required by the second respondent. Compulsory purchase by, for example, local authorities can be authorised when they require land for the carrying out of their function, such as by-ways, housing, parks, etc. In all cases it is the land itself which is required for the purpose for which there is statutory authority to acquire compulsorily. In the case of section 112(1)(*b*) of the 1971 Act, this, he points out, is an express requirement. But, he says, in this case there is no requirement whatever of the second respondents for the land itself. Their requirement is only the clearance of the land and that could be achieved without compulsory purchase of the land itself by any of the following methods or a combination of them: (1) prosecutions under section 179 of the 1990 Act for non-compliance with enforcement notices; (2) execution of work by the local planning authority plus entry on to the land for that purpose, pursuant to section 178 of the 1990 Act, coupled with a right to recover from the owner expenses reasonably incurred in so doing; (3) injunction proceedings pursuant to section 222 of the Local Government Act 1972; (4) the provision of an acceptable alternative site for the appellants.

I am bound to say, however, that the planning history of the site, notably that of plot 1, gives one little faith in the efficacy of these remedies in dealing with these occupiers. It is indeed important, in my judgment, not to lose sight of two sections of the evidence which was before the Secretary of State. The first of these was the history of the unsuccessful attempt by the council using other methods to get these plots cleared, which history was recounted by Roch J. in a passage which I have quoted from his judgment.

The second section concerned the intentions of the occupants themselves. These the inspector summarised on the evidence they gave as follows. He recounted that Mr. Sharkey, one of the appellants, who occupies plot 1, said in evidence that "they could not afford to restore it to green field land." Mr. Carey's evidence in respect of plot 2 was that he would not be prepared to move to any council owned site. Mr. M. Smith said in respect of plot 3 that he would be prepared, with the council's help, to

reinstate it. Mr. J. Smith from plot 4 said that he would reinstate it to green meadow. Mr. Fitzgerald, the other of the appellants, said of plot 5 that he could not reimburse the council for any costs of reinstatement. Mr. Stubbings from plot 6 said that he would not restore it to its former condition. Mrs. Brown from plot 7A said that they would not themselves clear it. Mr. Price from plot 7B on the other hand, said that he did not know if he would reinstate it.

In the light of all that evidence the Secretary of State was, in my judgment, entitled to arrive at the conclusion that the council were not likely to achieve successful restoration of the land including plots 1, 5, 6 and 7A without compulsory purchase but that in respect of the remaining plots it was still possible that they might.

I agree with Roch J. that, had the Secretary of State refused to confirm a compulsory purchase order with regard to those remaining four plots, some force might have been given to an argument that he had acted irrationally, but, as it is, the plain implication of his decision is that if these plots are not restored to a use suitable for their area he will confirm the compulsory purchase order in respect of them.

As I indicated, a subsidiary argument was advanced by the appellants that by deferring a decision in respect of those plots the Secretary of State has put it out of the council's power to carry out their landscaping scheme. I am satisfied however that this scheme was only put forward at the inquiry as a possible scheme should the order be confirmed in respect of all eight plots. The scheme is not essential to the planning purpose, which is to restore the land to rural use. That purpose can be achieved in respect of a single plot by removal of a caravan, hardstanding, etc., and reversion to grass or shrubs and trees.

For all these reasons I agree with Roch J.'s decision and would dismiss the appeal.

SCOTT L.J. I agree with the judgment that McCowan L.J. has given and would add only one point.

Both before us and before Roch J. Mr. Sales submitted that the power of compulsory purchase given by section 112 of the 1971 Act was a power which should be used only as "a last resort," as he put it. That may be so as between the various statutory powers available to the local authority under the Town and Country Planning Acts. If, however, the choice is between an exercise of the power of compulsory purchase and the alternative route by means of which a local authority may seek to enforce the planning law, namely High Court proceedings for a civil injunction, then I do not agree.

There are statements in a number of cases at levels all the way up to the House of Lords to the effect that the use of civil proceedings for injunctions in order to enforce the public law should be confined to exceptional cases (see, *e.g. Runnymede Council* v. *Ball* and the cases there cited). A civil injunction involves the substitution of an unlimited power of imprisonment, available in contempt of court proceedings against persons who disobey the injunction, for the limited penalties for disobedience of the law prescribed by Parliament. I do not doubt that in many cases local authorities are entirely justified in taking High Court proceedings for injunctions so as to obtain the additional sanction of committal for contempt in order to enforce obedience to the statutory offences in question. But to say that a compulsory purchase power is only to be used as a matter of last

resort after a civil injunction has been shown to be ineffective is a proposition I find entirely unacceptable. Which of the two, compulsory purchase or High Court proceedings, is to be preferred may depend upon the facts of a particular case. Which ought to be the last resort may be a matter of debate in a number of cases. But in the circumstances with which the council was faced in the instant case, I do not regard an application for a High Court injunction, with the possibility of contempt proceedings following, as something which had to be tried before the compulsory purchase procedure could be invoked. I agree that this appeal should be dismissed.

PARKER L.J. I agree. Both the inspector and the Secretary of State came to the clear conclusion that this land was necessary to be acquired in the interests of proper planning and that, unless that purpose could be achieved by other means, a compulsory purchase order was justified. The inspector had a somewhat rosier view of the situation than the Secretary of State and apparently took the view that the purpose might be achieved without a compulsory purchase order. The Secretary of State considered that it could not be achieved in respect of certain of the plots, but that it might conceivably be achieved in respect of others and therefore deferred his decision with respect to those others.

In my view the Secretary of State not only came to the right conclusion but no other conclusion was really open to him. I would also dismiss this appeal.

Appeal dismissed with costs.
Application for leave to appeal to the House of Lords refused.

Solicitors—Lance Kent & Co. Chesham, Buckinghamshire; the Treasury Solicitor; the Solicitor to the South Buckinghamshire District Council.