

PLANNING ACT 2008

INFRASTRUCTURE PLANNING (EXAMINATION PROCEDURE) RULES 2010

**APPLICATION FOR THE M4 MOTORWAY (JUNCTIONS 3 TO 12) (SMART MOTORWAY)
DEVELOPMENT CONSENT ORDER (Reference TR010019)**

SUMMARY WRITTEN REPRESENTATION OF NETWORK RAIL INFRASTRUCTURE LIMITED

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
1993 Act	Railways Act 1993
2008 Act	Planning Act 2008
Application	The application for the DCO dated 30 March 2015.
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 M4 Motorway (Junctions 3 to 12) (Smart Motorway) Development Consent Order 201[*] which is the subject of the Application
Draft DCO	The draft DCO submitted with the Application
EHCR	The European Convention of Human Rights
Facility Owner	has the same meaning as in section 17(6) of the 1993 Act
Highways England	The Highways England Company Limited
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	Plots: <ul style="list-style-type: none"> • 02-16; • 02-17; • 02-18; • 04-06; • 04-08; • 04-10; • 10-07; • 10-08; • 10-09; • 22-22; • 22-22a; • 22-22b; • 22-23; • 22-23a; • 22-23b; • 22-24; • 22-24a; • 22-24b; • 22-25, <p>part of 27-12 and part of 27-13 and possibly part of 22-21 in the Book of Reference</p>
Network Rail Rights Land	Plots: <ul style="list-style-type: none"> • 27-14; • 27-15; and • 27-28, <p>in the Book of Reference</p>
OLE	Overhead Line Equipment (ie the overhead electric line used by electric locomotives)
Promoter	Highways England as the promoter of the Application
Railways	The five operational railway lines shown on Land Plan Sheets 2, 4, 10, 22 and 27
WRLtH	Network Rail's Western Rail Link to Heathrow scheme

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

2. **SUMMARY**

2.1 Subject to the proper protection of Network Rail's statutory undertaking, Network Rail does not object in principle to the making of the DCO. However at the time of submission of this document Network Rail's interests are not adequately protected and its objection is therefore

sustained. Network Rail's objection is limited to those parts of the proposed DCO affecting its operational land and described in this representation.

2.2 Specifically, Network Rail objects to the following:

- 2.2.1 The making of the DCO in its current form as the adverse impacts of the Authorised Development would outweigh its benefits contrary to Section 104(7) of the 2008 Act.
- 2.2.2 The granting of powers of compulsory acquisition over the Network Rail Land and Network Rail Rights Land. These would cause serious detriment to the carrying on of Network Rail's railway undertaking contrary to Sections 127 and 138 of the 2008 Act and it would not be in the public interest to grant such powers under Section 122 of the 2008 Act. The granting of these powers would also be contrary both to the purpose of Network Rail's Network Licence and run contrary to its duty to achieve that purpose.
- 2.2.3 The current wording of the Draft DCO and the Application, including:
 - (a) The absence of protective provisions in favour of Network Rail in a form acceptable to them.
 - (b) The transfer of the benefit of the DCO pursuant to Article 8 of the Draft DCO.
 - (c) The identification of Highways England as owner of land owned by Network Rail in the Book of Reference, in particular Plots 02-17, 04-08, 10-08, 22-23, 22-23a and 22-23b.
 - (d) The non-delineation of Network Rail's interests in Plots 27-12 and 27-13.
- 2.2.4 The effects on the Authorised Development on the Railways including:
 - (a) The potential for increased risk of vehicle incursion;
 - (b) The potential for gantries to affect Network Rail's railway undertaking
 - (c) The potential detrimental effect of Work 17 (Widening of Windsor Branch Railway underbridge) on the electrification of the Railway and the installation of OLE.
- 2.2.5 The potential effect of the Authorised Development on the proposed Western Rail Link to Heathrow (WRLtH).
- 2.2.6 Until the above issues are resolved to Network Rail's satisfaction the making of the DCO.

Bond Dickinson LLP

8 October 2015

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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

1980 Act

Highways Act 1980

1990 Act

Town and Country Planning Act 1990

1993 Act

Railways Act 1993

2008 Act

Planning Act 2008

Acquisition Land

Plots:

- 22-22a;
- 22-22b;
- 22-24a;
- 22-24b;
- 27-12; and
- 27-13,

in the Book of Reference

Application

The application for the DCO dated 30 March 2015.

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 M4 Motorway (Junctions 3 to 12) (Smart Motorway) Development Consent Order 201[*] which is the subject of the Application

DCLG Guidance

DCLG 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 of Human Rights
Facility Owner	has the same meaning as in section 17(6) of the 1993 Act
Highways England	The Highways England Company Limited
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	<p>Plots:</p> <ul style="list-style-type: none"> • 02-16; • 02-17; • 02-18; • 04-06; • 04-08; • 04-10; • 10-07; • 10-08; • 10-09; • 22-22; • 22-22a; • 22-22b; • 22-23; • 22-23a; • 22-23b; • 22-24; • 22-24a; • 22-24b; • 22-25, <p>part of 27-12 and part of 27-13 and possibly part of 22-21 in the Book of Reference</p>
Network Rail Rights Land	<p>Plots:</p> <ul style="list-style-type: none"> • 27-14; • 27-15; and • 27-28, <p>in the Book of Reference</p>
OLE	Overhead Line Equipment (ie the overhead electric line used by electric locomotives)

Promoter	Highways England as the promoter of the Application
Railways	The five operational railway lines shown on Land Plan Sheets 2, 4, 10, 22 and 27
Split Land	Plots: <ul style="list-style-type: none"> • 02-17; • 04-08; • 10-08; • 22-23; and • 22-24, <p>in the Book of Reference</p>
Statement of Reasons	The Statement of Reasons submitted with the Application
Temporary Possession Land	Plots: <ul style="list-style-type: none"> • 02-06 • 02-18 • 04-06 • 04-10 • 10-07 • 10-19 • 22-22; and • 22-25, <p>in the Book of Reference</p>
Undertaker	The Undertaker as described in the DCO
WRLtH	Network Rail's Western Rail Link to Heathrow scheme

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

2. **SUMMARY**

2.1 Subject to the proper protection of Network Rail's statutory undertaking, Network Rail does not object in principle to the making of the DCO. However at the time of submission of this document Network Rail's interests are not adequately protected and its objection is therefore sustained. Network Rail's objection is limited to those parts of the proposed DCO affecting its operational land and described in this representation.

2.2 Specifically, Network Rail objects to the following:

2.2.1 The making of the DCO in its current form as the adverse impacts of the Authorised Development would outweigh its benefits contrary to Section 104(7) of the 2008 Act.

- 2.2.2 The granting of powers of compulsory acquisition over the Network Rail Land. These would cause serious detriment to the carrying on of Network Rail's railway undertaking contrary to Sections 127 and 138 of the 2008 Act and it would not be in the public interest to grant such powers under Section 122 of the 2008 Act. The granting of these powers would also be contrary both to the purpose of Network Rail's Network Licence and run contrary to its duty to achieve that purpose.
- 2.2.3 The current wording of the Draft DCO and the Application, including:
- (a) The absence of protective provisions in favour of Network Rail in a form acceptable to them.
 - (b) The transfer of the benefit of the DCO pursuant to Article 8 of the Draft DCO.
 - (c) The identification of Highways England as owner of land owned by Network Rail in the Book of Reference, in particular Plots 02-17, 04-08, 10-08, 22-23, 22-23a and 22-23b.
 - (d) The non-delineation of Network Rail's interests in Plots 27-12 and 27-13.
- 2.2.4 The effects on the Authorised Development on the Railways including:
- (a) The potential for increased risk of vehicle incursion;
 - (b) The potential for gantries to affect Network Rail's railway undertaking
 - (c) The potential detrimental effect of Work 17 (Widening of Windsor Branch Railway underbridge) on the electrification of the Railway and the installation of OLE.
- 2.2.5 The potential effect of the Authorised Development on the proposed Western Rail Link to Heathrow (WRLtH).
- 2.2.6 Until the above issues are resolved to Network Rail's satisfaction the making of the DCO.

3. **POWERS OF COMPULSORY ACQUISITION**

3.1 **Land Ownership**

- 3.1.1 Network Rail is currently considering the accuracy of the Book of Reference.
- 3.1.2 From the information it has obtained to date, Network Rail offers the preliminary comments in relation to specific plots as set out in the Table at Annex 1.
- 3.1.3 In general the following themes emerge which are of concern to Network Rail:
- (a) Plots 27-12 and 27-13 make no attempt to delineate between the Interests of Network Rail, Highways England and Slough Borough Council. Network Rail owns the railway through these Plots, with Highways England owning, in certain places, parcels of land which appear to be bridge abutments. Network Rail is not aware that Highways England has any title to the land above the railway where the bridges are situated.
 - (b) Freehold title is also claimed by Highways England in respect of road over rail bridges at Plots 02-17, 04-08, 10-08, 22-23, 22-23a and 22-23b. Again

Network Rail is not aware that Highways England has any title to the land above the railway where the motorway bridges are situated, although they may have the right to build and maintain bridges there.

- (c) Network Rail is checking its records but it is not currently aware of any evidence of the dedication highway across the bridges referred to in (a) and (b) above such as might give rise to a fee simple determinable by the operation of Section 263 or 265 of the 1980 Act.
- (d) Without prejudice to the above, and Network Rail's general objection to the granting of powers of compulsory acquisition over its land, there is a lack of consistency between the way that road over rail bridges are treated in the Book of Reference:
 - (i) Plots 02-17, 04-08 and 10-08 appear to seek to make a clear distinction between these plots, which have a road over them in respect of which unrestricted powers to acquire or use would apply to the road but not the railway under it, and the adjacent plots where there is railway where powers are limited to temporary possession.
 - (ii) Although Plots 22-23 and 22-24 are divided to make it clear that unrestricted powers to acquire or use would only apply to the road over the bridge (but not the railway under it) this distinction is not carried through into other Plots owned by Network Rail. Plots 22-22a, 22-22b, 22-23a, 22-23b, 22-24a and 22-24b are all shown as carrying unrestricted powers to acquire or use, notwithstanding that this land does not appear to fall within Highways England's title.
 - (iii) In respect of Plots 27-12 and 27-13 the whole of the land is shown with unrestricted powers to acquire or use whether or not there is a railway, bridge abutment or bridge deck in place.

3.2 **Powers sought by the Promoter**

3.2.1 The Draft DCO contains powers which affect the Network Rail Land which is owned by Network Rail, and the Network Rail Rights Land in which Network Rail has rights. In particular the Draft DCO would authorise:

- (a) In respect of the Acquisition Land:
 - (i) Compulsory acquisition of the land; and
 - (ii) Compulsory acquisition of rights in and the imposition of restrictive covenants affecting the land;
 - (iii) The overriding of easements and other rights; and
 - (iv) The extinguishment of all private rights;
- (b) In respect of the Temporary Possession Land:
 - (i) The taking of temporary possession;
 - (ii) The removal of buildings and construction of temporary works;
 - (iii) Compulsory acquisition of rights in and the imposition of restrictive covenants affecting the land;

- (iv) The overriding of easements and other rights; and
- (v) The extinguishment of all private rights;
- (c) In respect of the Split Land
 - (i) The powers described in paragraph (a) above in respect of the motorway level; and
 - (ii) The powers described in paragraph (b) above in respect of the land below the motorway level.
- (d) In respect of the Network Rail Rights Land the powers described in paragraph (a) above.

3.2.2 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. These tests have not been met and accordingly the powers should not be granted.

3.3 **Section 122 of the 2008 Act**

3.3.1 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.

3.3.2 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)...*

(3) The condition is that there is a compelling case in the public interest for the land to be acquired compulsorily.

3.3.3 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.”

- 3.3.4 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.

- 3.3.5 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.”

- 3.3.6 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 ECHR (protection of property).

- 3.3.7 As land belonging to a statutory undertaker for the purposes of their undertaking, the Network Rail Land is land belonging to a statutory undertaker and 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 3.4 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.

- 3.3.8 The Draft DCO contains powers which would allow the permanent compulsory acquisition of parts of two operational railways (see Plots 22-22a, 22-22b, 22-23a, 22-23b, 22-24a, 22-24b 27-12 and 27-13). In the case of Plots 27-12 and 27-13 this would certainly have the effect of severing the linear railway. In the case of Plots 22-22a, 22-22b, 22-23a, 22-23b, 22-24a and 22-24b it may also have this effect; the narrowing of Network Rail’s ownership would be likely to lead to disruption and delay to the railway line.

- 3.3.9 The Draft DCO contains powers which could have the effect of closing the Railway for a period of several years. For example Articles 29 and 30 of the Draft DCO would allow the Promoter to take temporary possession of the Temporary Possession Land and the Split Land and to remain in possession for a period of

over six years. This would severely disrupt the four major railway routes, and this would have severe adverse consequences for the wider economy.

- 3.3.10 The consequences of granting the powers of compulsory acquisition set out in the Draft DCO would therefore potentially be very severe both in terms of public and private loss. It follows that the test set out in Section 122 has not been 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.

3.4 **Section 127 of the 2008 Act**

3.4.1 **Compulsory Acquisition of Statutory Undertakers' Land**

- (a) Section 127 contains provisions conveying special protection for statutory undertakers' land by introducing a special test which must be applied by the Secretary of State before powers of compulsory acquisition are granted. Under Section 127(1):

(1) This section applies in relation to land ("statutory undertakers' land") if—

(a) the land has been acquired by statutory undertakers for the purposes of their undertaking,

(b) a representation has been made about an application for an order granting development consent before the completion of the examination of the application, and the representation has not been withdrawn, and

(c) as a result of the representation the Secretary of State is satisfied that—

(i) the land is used for the purposes of carrying on the statutory undertakers' undertaking, or

(ii) an interest in the land is held for those purposes.

- (b) It is clear that Section 127 of the 2008 is engaged:

(i) Statutory undertaker is defined in Section 127(8) of the 2008 Act by reference to Section 8 of the Acquisition of Land Act 1981. Section 8(1)(a) of the 1981 Act includes: "any person authorised by any enactment to construct, work or carry on... any railway... undertaking". Network Rail, as successor to the Company, is authorised to carry on the railway undertaking.

(ii) Network Rail has made a representation in respect of the Application.

(iii) Network Rail is the owner of the Network Rail Land and operates the railway undertakings comprised in the Railways. The Railways continue to be used for rail traffic. It follows that Network Rail is also a statutory undertaker within the meaning of Section 127(8) of the 2008 Act.

- (c) Under Sections 127(2) and (3) a development consent order "may include provision authorising the compulsory acquisition of statutory undertakers' land only to the extent that the Secretary of State is satisfied" that one of the following is satisfied:

(3) ...the nature and situation of the land are such that—

(a) it can be purchased and not replaced without serious detriment to the carrying on of the undertaking, or

(b) if purchased it can be replaced by other land belonging to, or available for acquisition by, the undertakers without serious detriment to the carrying on of the undertaking.

- (d) Sections 127(2) and (3) apply to:
- (i) The power in Article 20 of the Proposed DCO to compulsorily acquire the Acquisition Land and the part of the Split Land which is at motorway level;
 - (ii) The power in Articles 29 and 30 of the Proposed DCO to take temporary possession of the Temporary Possession Land and the part of the Split Land which is below motorway level.
- (e) Permanent acquisition or the taking of temporary possession of parts of Network Rail's operational Railways pursuant to the DCO would severely interrupt rail service. The Draft DCO does not provide adequate safeguards to minimise disruption to services. The granting of these powers would therefore cause serious detriment to the carrying on of Network Rail's undertaking (see paragraphs 3.3.8 and 3.3.9 above).
- (f) The established system of railway possessions under the Network Code provides a far more suitable and balanced mechanism under which these works may be carried out. It is essential that the any closure of the Railways necessitated by the Authorised Development is of a very limited duration (ie limited to a matter of days and not years). As a general principle, the taking of the Network Rail Land should only be with Network Rail's permission, under their supervision and for such period of time as Network Rail stipulates.
- (g) Network Rail is very concerned that at the time of submission of this document the Promoter has not yet provided sufficient information for Network Rail to commence its internal clearance process, not obtained any of the necessary engineering approval agreements that would be necessary in order to carry out the works.
- (h) The Draft DCO contains a number of powers to acquire land both permanently and temporarily which are subject to this test, including Articles 20 (compulsory acquisition of land), 26 (acquisition of subsoil or airspace only), 28 (rights under or over streets), 29 (temporary use of land for carrying out the authorised development), 30 (temporary use of land for maintaining the authorised development) and 31 (statutory undertakers). In light of the issues referred to above Network Rail considers that these powers cannot be taken without serious detriment to the carrying on of its railway undertaking and it therefore objects to these powers applying to the Network Rail Land.
- (i) Network Rail is also particularly concerned about Article 31 which relates to the compulsory acquisition of statutory undertakers' land. This power appears to override Article 29(8) which prevents the permanent acquisition of the Temporary Possession Land and the part of the Split Land below motorway level. The Draft DCO as drafted would therefore allow the compulsory acquisition of the Temporary Possession Land and the and the part of the Split Land below motorway level.

3.4.2 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 power in Article 22 of the Draft Order, which would allow the Undertaker to acquire new rights in or impose restrictive covenants over any part of the Network Rail Land.
- (c) 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 (see Paragraph 3.3.1(e) above). 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.
- (d) Network Rail is also very concerned for the potential for the reintroduction of settlement of Network Rail embankments which could arise due to the loads imposed during and following the road embankment construction.
- (e) The Draft DCO contains a number of powers to acquire rights which are subject to this test, including Articles 15 (access to works), 17 (discharge of water), 18 (protective works to buildings), 19 (authority to survey and investigate land), 2 (compulsory acquisition of rights), 31 (statutory undertakers), 32 (Apparatus and rights of statutory undertakers in stopped up streets) 38 (felling and lopping of trees).
- (f) The Statement of Matters makes no reference to Section 127, and no justification has therefore been given or made out for the acquisition of the Network Rail Land. Accordingly no case has been made out 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.

3.5 **Section 138 of the 2008 Act**

- 3.5.1 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.*
- 3.5.2 The Draft DCO contains a number of powers to extinguish rights, including Articles 13 (permanent stopping up of streets and private means of access), 23 (power to override easements and other rights), 25 (private rights over land) and 31 (statutory undertakers).
- 3.5.3 Although the Statement of Matters makes reference to Section 138, 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 the powers which are being sought in relation to Network Rail's interests in the Network Rail Rights Land should not be granted.

3.6 **Network Licence**

- 3.6.1 Network Rail operates under the Network Licence, which was made under Section 8 of the 1993 Act.
- 3.6.2 Under Part III, Part A, Clause 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. Clause 2 of the Network Licence places Network Rail under a duty to achieve this purpose.
- 3.6.3 The granting of compulsory powers over the Railway is contrary to both the purpose of the Network Licence and Network Rail's duty to achieve that purpose.

4. **THE DCO**

4.1 **Protective Provisions**

- 4.1.1 Network Rail has standard protective provisions which it requires to be included in any development consent order or Transport and Works Act order which is likely to affect its railway undertaking. Although the precise detail of protective provisions needs to be agreed on each occasion, a useful starting point is the protective provisions contained in the A160/A180 (Port of Immingham Improvement) Development Consent Order 2015.
- 4.1.2 Network Rail's protective provisions are designed to balance the needs of the Undertaker against the operational requirements of Network Rail's undertaking. The protective provisions deal with issues such as the restriction of the powers of the Undertaker to exercise powers of compulsory acquisition except with the consent of Network Rail, the approval of plans, the carrying out of protective works and damage and obstruction arising from the works.
- 4.1.3 The Draft DCO contains protective provisions in favour of Network Rail which broadly conform with these standard protective provisions, however there remain some outstanding issues with the drafting which will need to be resolved. Unless and until such time as such protective provisions are included in the DCO in a form approved by Network Rail, Network Rail must sustain in the strongest possible terms its objection to the making of the DCO.

4.2 **Transfer of the Benefit of the DCO**

- 4.2.1 Article 8 of the Draft DCO authorises the transfer of any or all of the benefit of the provisions of the DCO to a third party either permanently or for a limited period. Under article 8(3) the exercise by that person of such benefits and rights is subject to "the same restrictions, liabilities and obligations as would apply" under the DCO.
- 4.2.2 Network Rail is concerned in relation to the open-ended nature of this power and considers that the following principles should apply:

- (a) The consent of the Secretary of State should be required for any transfer;
- (b) Any transfer of powers which affect Network Rail's undertaking should only be made to another competent authority approved by Network Rail;
- (c) Any transferee should expressly be subject to all restrictions, liabilities, and obligations (including those under contract) as the Undertaker. Article 8(3) goes some way towards this position, but does not appear to extend to contractual restrictions, liabilities, and obligations.
- (d) Where the benefit of the Order is transferred for only a limited period (rather than permanently) under Article 8(1)(b) Network Rail considers that the Order should expressly state that the obligations on the undertaker will continue upon transfer, albeit that they will also be enforceable against the Lessee.

4.3 Calcott – Land Plan 2

4.3.1 The Railway shown on Land Plan 2 is affected by:

- (a) Works 1a and 1b (Improvements including the making of the hard shoulder into a running lane);
- (b) Works 2a and 2b (Realignment of J12 on and off bound slip roads.
- (c) The installation of Gantry Type 3 over railway

4.3.2 Network Rail is concerned about the potential for increased risk of vehicle incursion as a result of these works and requires further information about the gantry to ensure that its construction and operation will not affect Network Rail's railway undertaking. It is also seeking details of the realignment of the slip roads.

4.3.3 There have been no discussions between Network Rail and Highways England about these proposals which have the potential to severely affect the Railway in this location. Highways England should contact Network Rail's Asset Protection about these works.

4.4 Pingewood – Land Plan 4

4.4.1 The Railway shown on Land Plan 4 is affected by:

- (a) Works 1a and 1b (Improvements including making the hard shoulder a running lane).
- (b) The installation of emergency refuge area eastbound just after the railway.

4.4.2 Network Rail is concerned about the potential for increased risk of vehicle incursion as a result of these works and requires further information about the gantry and new westbound emergency refuge area to ensure that their construction and operation will not affect Network Rail's railway undertaking.

4.4.3 There have been no discussions between Network Rail and Highways England about these proposals which have the potential to severely affect the Railway in this location. Highways England should contact Network Rail's Asset Protection about these works.

4.5 Wokingham – Land Plan 10

4.5.1 The Railway shown on Land Plan 10 is affected by:

(a) Works 1a and 1b (improvements including making the hard shoulder a running lane).

(b) Work 5a (realignment of off-slip beginning at a point over the Railway).

4.5.2 Network Rail is concerned about the potential for increased risk of vehicle incursion as a result of these works. It is also seeking details of the realignment of the off-slip road.

4.5.3 There have been no discussions between Network Rail and Highways England about these proposals which have the potential to severely affect the Railway in this location. Highways England should contact Network Rail's Asset Protection about these works.

4.6 **Chalvey– Land Plan 22**

4.6.1 The Railway shown on Land Plan 22 is affected by:

(a) Works 1a and 1b (Improvements including making the hard shoulder a running lane).

(b) Works 16b and 16c (Realignment of Junction 6 east and west bound junction on and off slips over railway).

(c) Work 17 (Widening of Windsor Branch Railway underbridge “ to south side of the existing bridge at the location shown... including widening of foundations, substructure and bridge deck to accommodate works 16b and 16c”).

4.6.2 Network Rail is concerned about the potential for increased risk of vehicle incursion as a result of these works. It is also seeking details of the realignment of the off-slip road.

4.6.3 Discussions have taken place between Highways England and Network Rail and Highways England has entered into a Basic Asset Protection Agreement in relation to these works, in particular to enable Network Rail to develop a structures Approval in Principle in respect of the bridge-widening comprised in Work 17.

4.6.4 Network Rail remains concerned about Work 17, and that it may prejudice the planned electrification of this Railway which would involve the installation of OLE. Highways England is resisting a design of Work 17 that would make provision to allow OLE supports to be attached to the underside of the bridge. The proper spacing of supports for OLE is operationally critical to the Railway and Network Rail is concerned that provision should be made to enable OLE to be installed safely and efficiently under the widened bridge (ie along the longer length of railway covered over by the new bridge).

4.7 **M4/M25– Land Plan 27**

4.7.1 The Railway shown on Land Plan 27 is affected by Works 1a and 1b (improvements including making the hard shoulder a running lane).

4.7.2 Network Rail is concerned about the potential for increased risk of vehicle incursion as a result of these works.

4.7.3 There have been no discussions between Network Rail and Highways England about these proposals which have the potential to severely affect the Railway in this location. Highways England should contact Network Rail's Asset Protection about these works.

4.8 **Western Rail Link to Heathrow (WRLtH)**

- 4.8.1 Network Rail is currently developing plans for a new rail tunnel leaving the Great Western main line between Langley and Iver to London Heathrow, allowing passengers to travel to the airport from Reading via Slough without going into Paddington station. Although the precise route has yet to be determined, it is likely that the WRLtH will cross the M4 west of the Iver South Sludge Dewatering Centre (shown on Land Plan 26 as “Iver South SDW”)
- 4.8.2 Initial public consultation has been undertaken in relation to the WRLtH project, and Network Rail’s anticipated timetable would see works starting and completed on site within Network Rail’s Control Period 6 (2019 – 2024)..
- 4.8.3 Network Rail is concerned about potential conflicts between the Authorised Development and the WRLtH and is seeking:
- (a) Indicative dates of construction of the Authorised Development west of Junction 4B (especially in respect of the demolition of Old Slade Lane).
 - (b) The planned diversionary route between the M40 and M4 in order to identify where they are similar to forecast WRLtH construction routes.
 - (c) Any planned diversionary routes which follow Hollow Hill Lane.
 - (d) Any planned diversionary routes which would contain forecast construction traffic.
- 4.8.4 Network Rail is seeking assurances to ensure that Highways England will work with it to ensure that potential conflicts can be identified and solutions and mitigation measures developed.

Bond Dickinson LLP

8 October 2015

ANNEX 1
LAND OWNERSHIP

KEY	
	Unrestricted Powers to Acquire or Use Land
	Powers Limited to Temporary Use of Land
	Unrestricted Powers to Acquire or Use Land at Motorway Level
	Powers Limited to Temporary Use of Land Below Motorway Level

Sheet	Area Name	Plots/Rights (see Land Plans)	Comments
2	Calcott	02-16	Network Rail owned.
		02-17	Network Rail owned. Highways England has the right to construct a bridge over this land only.
		02-18	Network Rail owned.
4	Pingewood	04-05 (Book of Reference states NR occupier only)	Network Rail will confirm whether it considers that it occupies this land.
		04-06	Network Rail owned.
		04-07 (Book of Reference states NR occupier only)	Network Rail will confirm whether it considers that it occupies this land.
		04-08	Network Rail owned. Highways England has the right to construct a bridge over this land only.
		04-09 (Book of Reference states NR occupier only)	Network Rail will confirm whether it considers that it occupies this land.
		04-10	Network Rail owned.
10	Wokingham	10-06	Land Registry suggests that this is owned by Highways England. Network Rail will confirm if it has any title.
		10-07	Network Rail owned.
		10-08	Network Rail owned. Highways England has the right to construct a bridge over this land only.
		10-09	Network Rail owned.
		10-12	Land Registry suggests that this is owned by Highways England. Network Rail will confirm if it has any title.
22	Chalvey	22-21 (Slough BC)	This land is registered to Slough Borough Council: Network Rail is checking whether it owns any land at the eastern boundary.
		22-22	Network Rail owned.
		22-22a	Network Rail owned.
		22-22b	Network Rail owned.
		22-23	Network Rail owned. Network Rail is not aware of any title in this land being vested in Highways England, and is considering what rights Highways England may have.

		22-23a	Network Rail owned. Network Rail is not aware of any title in this land being vested in Highways England, and is considering what rights Highways England may have.
		22-23b	Network Rail owned. Network Rail is not aware of any title in this land being vested in Highways England, and is considering what rights Highways England may have.
		22-24	Network Rail owned. Network Rail is not aware that Highways England has any title to this land.
		22-24a	Network Rail owned.
		22-24b	Network Rail owned.
		22-25	Network Rail owned.
27	M4/M25	27-12	Network Rail owns the railway through this land. Highways England owns some strips of land adjacent to the railway. Network Rail is considering what rights Highways England may have above the railway.
		27-13	Network Rail owns the railway through this land. Highways England owns some strips of land adjacent to the railway. Network Rail is considering what rights Highways England may have above the railway.
		27-14 (NR access rights)	Network Rail access rights.
		27-15 (NR access rights)	Network Rail access rights.
		27-18 (NR access rights)	Network Rail access rights.

ANNEX 2
CASELAW

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

Status: ■ Positive or Neutral Judicial Treatment

***332 Sharkey and Another v Secretary of State for the Environment and South Buckinghamshire District Council**

Court of Appeal

14 October 1991

(1992) 63 P. & C.R. 332

(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*](#) . *333

(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."

Representation

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).

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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 hard-standing 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.

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.

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.

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.

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 ***335** 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 ***336** 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 *337 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.

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.

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 *338 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 *339 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.

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.

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 *340 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 ***341** 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 ***342** 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.

Representation

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

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

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

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

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

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