



OFFICE OF RAIL REGULATION

Land disposal by Network Rail: the regulatory arrangements

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1. Introduction

1.1 The Office of Rail Regulation (ORR) regulates how Network Rail Infrastructure Limited (Network Rail) disposes of its land through condition 7 of its network licence. Our objective is to protect land that may be required for future development of the railway network and to prevent the disposal of that land against the public interest. Accordingly, Network Rail must seek our consent for any disposal not covered by a general consent.

1.2 In this document we set out:

- the general consent which allows Network Rail to dispose of land without prior notice in certain situations;
- the criteria we will use in deciding whether we should intervene when notified of a proposed disposal; and
- our policies relating to major air rights, disposals required under an enactment, the subletting of land, and the potential for compensation after a blocked disposal.

1.3 For completeness we include as an annex the text of condition 7 of Network Rail's network licence.

2. General consent to the disposal of land by Network Rail

1. For the purposes of condition 7 of the network licence, Network Rail may dispose of land by entering into any of the following arrangements without giving prior notice:

Disposal under an enactment

- (a) a disposal required by or under any enactment. We shall treat a disposal as being under an enactment if:
- (i) the licence holder agrees to the terms of a disposal which would otherwise be required under an enactment; or
 - (ii) the disposal would have been under an enactment had the acquiring party taken all the steps which were open for it to take providing that the acquiring party has acted with reasonable expedition and diligence;

Disposal of property rights for railway purposes - freehold retained

- (b) (i) a lease, that incorporates the Station Access Conditions, of all or part of a station to a passenger train operator providing railway services under a franchise agreement, under a concession agreement, or to a passenger train operator in the Transport for London Group, or their successors. The lease must be and is capable of termination on or before the termination of the relevant franchise agreement or the concession agreement (if any)¹;
- (ii) a lease or licence:
- of part of a station of which Network Rail is the station operator for the purpose of providing services relating to railways;
 - of all or part of a light maintenance depot (LMD) to any person for the purpose of providing services relating to railways; or
 - of land for the construction of an LMD provided that there are no plans to use the land for other railway purposes and the land is used only for

¹ A franchise agreement or a concession agreement shall not be treated as being terminated if, when it comes to an end, it is replaced by an agreement with the same passenger train operator on similar terms.

such purposes as are permitted by the relevant Depot Access Conditions;

- of a freight depot, freight terminal or freight sidings for the purposes of providing services relating to railways;
 - to a person providing network services for the purpose of providing services relating to railways;
- (iii) a reversionary or concurrent lease pursuant to an obligation contained in any such lease referred to in paragraph 1(b) provided that the grant of the reversionary or concurrent lease does not interfere with the carrying on of railway services at the station or LMD;

Disposal of property rights not necessarily for railway purposes - freehold retained

- (c) (i) a lease or a licence:
- that contains a materially unfettered right permitting Network Rail to terminate the lease or licence if the land is required by Network Rail for the performance of its responsibilities as a provider of network services or for the purpose of the network business or for the purposes of railway and/or integrated transport related redevelopment;
 - of all or part of a building as long as the planned use of that building would not have a reasonably foreseeable adverse effect on, or in connection with, services related to railways;
- (ii) a licence that would not have a material adverse effect on the ability of Network Rail, any network operator, any beneficiary or a holder of a licence under the Act or the Railway (Licensing of Railway Undertakings) Regulations 2005 to use or develop the land for the purpose of providing services relating to railways;
- (iii) to grant or relinquish a wayleave, easement or servitude that would not have a material adverse effect on the ability of Network Rail, any network operator, any beneficiary or any holder of a licence under the Act or the Railway (Licensing of Railway Undertakings) Regulations 2005 to use or develop the land for the purpose of providing services relating to railways;

- (iv) a grant of consent to a lessee under an existing lease permitting the lessee to sublet all or part of the leased premises;
- (v) the renewal or extension of any lease where the renewal is required by operation of law;
- (vi) the grant of sub-surface or air rights that do not infringe on the space which may be needed to facilitate the provision of services relating to railways (major developments are excluded from such grant);

Disposal where freehold may be divested

- (d) (i) any disposal of land to the extent it comprises a network or railway facility (or part of a network or railway facility) which has been the subject of a decision on closure under section 43(9) of the Act (or the effect of the provisions set out in sections 22-35 of the Railways Act 2005 is that it is permitted to be closed or its use discontinued) and that decision (or effect of those provisions) does not explicitly require that the licence holder does not dispose of the land;
- (ii) the disposal of land that has no reasonably foreseeable use:
 - for, or in connection with, services relating to railways; or
 - for any other public transport use, which would provide benefit for rail passengers, through better integration of public transport modes;where appropriate rights of access for a railway use are maintained or improved and where recent prior consultation with relevant stakeholders has left no issue unresolved;
- (iii) the disposal of land wholly for a public transport use, which would provide benefit for rail passengers through better integration of public transport modes, and where:
 - the disposal would not hinder Network Rail's ability to conduct its network business; and
 - recent prior consultation with relevant stakeholders has not identified a reasonably foreseeable competing railway or integrated transport use for the land or left any other issue unresolved;

- (iv) the disposal of land to a governmental or local authority, agency or department for the purposes of or in connection with a highway (including approaches to and over level crossings), where such land does not otherwise form part of the operational rail network and where recent prior consultation with relevant stakeholders has left no issue unresolved;
 - (v) the disposal of any land made solely for the purpose of boundary rectification of land in which Network Rail has an estate or interest.
2. ORR may after consulting the licence holder modify or revoke this general consent if it appears to ORR requisite or expedient to do so by reason of any change of circumstances having regard to the duties imposed on ORR by section 4 of the Act.

3. In this general consent:

“the Act”	is the Railways Act 1993;
“franchise agreement”	means a franchise agreement made with the appropriate franchising authority;
“concession agreement”	means a concession agreement made with a Passenger Transport Executive;
“existing lease”	means a lease entered into by Network Rail prior to 15 November 2001;
“lease”	includes a tenancy;
“prior notice”	means a notice to ORR under condition 7.3 of Network Rail’s network licence;
“Station Access Conditions”	means the National Station Access Conditions or such bespoke station access conditions, based on the National Station Access Conditions, in force at the relevant station, modified from time to time with the approval of ORR;
“Depot Access Conditions”	means the National Depot Access Conditions or such bespoke depot access conditions, based on the National Depot Access Conditions, in force at the relevant depot, modified from time to time with the approval of ORR;

and any other words and phrases in this direction shall have the same meaning as in the Act or network licence.

3. ORR's decision criteria

3.1 Where Network Rail has given notice to ORR and its stakeholders of any proposed land disposal, we will use the decision criteria in paragraph 3.5 below to decide whether to let the transaction proceed.

3.2 We will expect Network Rail to have consulted the following parties about the development of any land disposal proposals:

- (a) in England & Wales the Department for Transport (DfT) or successor franchising authority;
- (b) in Scotland, Transport Scotland, the Regional Transport Partnerships and the Scottish Council for Development & Industry;
- (c) in Wales, the Welsh Government;
- (d) in Greater London, and in adjacent or surrounding areas that might impact upon strategic transport plans for Greater London and on London Underground Limited's duties as an infrastructure controller, Transport for London and London TravelWatch;
- (e) the local planning authority, County Council and Passenger Transport Authority (PTA) or the associated Passenger Transport Executive (PTE) (where appropriate), for the area in which the site is located;
- (f) train operating companies (passenger and freight);
- (g) the Rail Freight Group and the Freight Transport Association;
- (h) Passenger Focus;
- (i) Community Rail Partnerships and the Association of Community Rail Partnerships;
- (j) key transport infrastructure providers such as port and airport authorities; and
- (k) British Transport Police.

3.3 We may require Network Rail to provide further information within seven days, or such further time as allowed, if its proposals are so unclear that we cannot consider them. In the

event that Network Rail cannot provide the required information, the notification will be rejected. No formal notice directing Network Rail not to proceed with the disposal will be necessary.

3.4 Once a notification is sufficient for us to consider we will conduct our own internal review.

3.5 We will have regard to the following criteria when considering a notification from Network Rail about a proposed disposal of land:

- (a) ORR's duties under section 4 of the Act, and in particular our duties to:
 - (i) promote improvements in railway service performance;
 - (ii) otherwise to protect the interests of users of railway services;
 - (iii) promote the use of the railway network in Great Britain for the carriage of passengers and goods, and the development of that railway network, to the greatest extent that it considers economically practicable;
 - (iv) contribute to the development of an integrated system of transport of passengers and goods;
 - (v) contribute to the achievement of sustainable development; and
 - (vi) enable persons providing railway services to plan the future of their businesses with a reasonable degree of assurance.
- (b) Where ORR has considered Network Rail's notification and any supplementary information, including representations from third parties, and:
 - (i) there is evidence of a clear, feasible and funded plan or plans put forward by a passenger or freight train operator or funder for the site for future development of the railway network; or
 - (ii) the DfT (or successor franchising authority), Transport Scotland, the Welsh Government, PTA/PTE or other local transport authority provides evidence that the site is needed for future development of the railway network or for the development of integrated transport facilities; or
 - (iii) there is evidence which indicates that the proposed disposal would conflict with Network Rail's obligations under condition 1 of its network licence;

it is unlikely that ORR will consent to the disposal of land by Network Rail.

- (c) In reaching a decision ORR may have regard to relevant considerations including:
 - (i) whether the site is identified or reserved for transport use in any local transport plan or local statutory plan, and whether funding has been identified;
 - (ii) whether the site is likely to be required as a result of a regional transport strategy developed in accordance with national or regional planning guidance;
 - (iii) whether the site features in the business or marketing plans of the local train operators, Network Rail, PTAs/PTEs, or freight operators or any other party involved in the provision of services relating to railways; and
 - (iv) the financing of projects relevant to the site.
- (d) Where:
 - (i) Network Rail provides evidence that it has received no objections in respect of any proposed disposal within the six months preceding its notification to ORR; or
 - (ii) the only objection(s) are from individuals, a local or national pressure group without support from a train operator or funder and ORR concludes from Network Rail's submission and its further statements and evidence that there are no major issues at stake;

it is likely that ORR will allow Network Rail to dispose of the land.

3.6 We will also evaluate land disposal submissions against our equalities duty under Section 149 of the Equalities Act 2010 which requires us to have due regard to the need to:

- (a) eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under this Act;
- (b) advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it (relevant protected characteristics are: age; disability; gender reassignment; pregnancy and maternity; race; religion or belief; sex; sexual orientation); and
- (c) foster good relations between persons who share a relevant protected characteristic and persons who do not share it.

3.7 With regard to paragraph 1(d)(ii) of the general consent to the disposal of land by Network Rail, ORR will need to be satisfied with any changes to Network Rail's internal screening process for identifying possible use for, or in connection with, services relating to railways, including the extent to which that process allows other parties to register an interest in rail-related development for particular sites.

4. Application of policy

Introduction

4.1 In this section we set out our policies relating to major air rights, disposals required under an enactment, subletting, and the potential for compensation in the event that we block a disposal.

Major air rights disposals

4.2 From time to time Network Rail may wish to dispose of airspace rights above land that it owns. The general consent in chapter 2 allows Network Rail to dispose of land by *“the grant of sub-surface or air rights that do not infringe on the space which may be needed to facilitate the provision of services relating to railways”*. The intention behind this provision was that it would be used only for minor disposals which would not interfere with the running of the railway. Disposals of this type could include, for example, transactions for advertising space, the laying of telecommunications wires and pipes, and bridges over the railway that are considered as routine in nature.

4.3 We do not expect disposals for major airspace construction to fall within this provision since the necessary deck/raft/building etc supports could subsequently impose physical constraints on the ability to expand railway facilities beneath and around the development and therefore impinge on the operation of the railway. Further, significant construction work above the operational railway creates a degree of additional risk of disruption, with potentially severe economic consequences for Network Rail and train operators.

4.4 We expect that Network Rail should consider a “major development” to include the situation where it would need to grant an interest in its land to provide support for a structure that could not be regarded as being of a routine nature. We also expect Network Rail to notify us its proposals for air rights disposals that would, for example, facilitate the construction of new tunnels or any constructions above stations. Before notification, we would expect Network Rail to consult the industry fully on issues of potential railway expansion and operational risk.

4.5 In considering the grant of a specific consent for such cases, we will wish to see that Network Rail has, where appropriate, addressed the wider industry risks, including the position regarding economic loss for train operators, arising from construction work above the operational railway.

Network Rail's handling of disposals required under an enactment

4.6 There may be occasions when Network Rail is required to sell its land through, for example, the execution of a compulsory purchase order (CPO) or in circumstances of leasehold enfranchisement (under the Leasehold Reform Act 1967 and Leasehold Reform, Housing and Urban Development Act 1993).

4.7 Under the general consent, Network Rail can dispose of land without notifying us when the land is required by or under any enactment. However, there may be circumstances where an enactment, such as a CPO, would require Network Rail to dispose of land which would normally be referred to us for specific consent under condition 7.

4.8 There may also be occasions when Network Rail proceeds with a land disposal that, while not made under an enactment, would have been under an enactment had the acquiring party taken the steps to do so.

4.9 We expect Network Rail to operate appropriate procedures for dealing with proposed or likely CPOs, enfranchisements, or other disposals required under an enactment. These shall include notification to its relevant customers and funders of its receipt, and if appropriate, appeal against it, where the disposal of land would not be covered by the general consent of condition 7.

4.10 We will check that the company is taking appropriate action in our audits of general consent transactions.

Network Rail's approach to granting consent to sublet

4.11 Network Rail is the freehold owner of a large number of long-term leases, for example those that were granted to freight companies in 1994 as part of privatisation. Many leases have terms which allow the tenant to sublet all or part of the land with Network Rail's consent.

4.12 The terms of such a lease may mean that Network Rail is not able to gain control of the land in question for many years. Given Network Rail's limited control in such situations, it appears to be an unnecessary burden for Network Rail to consult its stakeholders in relation to disposal of such land, particularly as Network Rail is unable to give effect to such views. Instead, it would be for stakeholders to engage directly with Network Rail's tenant in the first instance.

4.13 We expect Network Rail to form its own views on the appropriateness of it granting its consent to a proposal to sublet a lease. Prior to granting any consent, we expect Network Rail to consider whether the proposal to sublet all or part of the lease:

- (a) might have a negative effect on any current or potential railway use of the land; and
- (b) is consistent with its network management obligations under condition 1 of its network licence.

4.14 Paragraph 1(c)(iv) of the general consent permits all sublettings under an existing lease. We will audit such transactions on a regular basis to ensure that Network Rail is granting such consents appropriately.

The award of compensation

4.15 Network licence condition 7.6 says that if ORR refuses consent to a land disposal, Network Rail *“will be informed of any entitlement to appropriate compensation for the loss of value (if any) as a result of not being able to make such disposal”*.

4.16 However, Network Rail should be able to anticipate potential rail use and should not propose to dispose of land needed for the railway. It follows that it is unlikely that there will be circumstances where Network Rail can demonstrate a loss of value arising from our refusal to consent to the disposal of land, and therefore it is unlikely that compensation would be appropriate.

Annex A: text of condition 7 of Network Rail's network licence

The text of condition 7 of Network Rail's network licence is repeated below. The numbering used in the licence has been retained.

Condition 7: Land disposal

7.1 The licence holder shall not dispose of any land otherwise than in accordance with this condition.

7.2 The licence holder may dispose of any land where:

- (a) ORR consents to such disposal; or
- (b) the disposal is required by or under any enactment.

7.3 Where the licence holder seeks ORR's consent it must give a minimum of 2 months' prior written notice specifying the land disposal it intends to make (the notice). A notice under this condition shall be in such form and contain such particulars as ORR specifies.

7.4 Having given such notice, the licence holder shall provide further information as ORR may require.

7.5 Unless otherwise agreed between ORR and the licence holder, if ORR does not inform the licence holder of a consent or refusal of consent within the time specified in the notice, the licence holder will be deemed to have consent and may dispose of land in accordance with the notice.

7.6 If ORR refuses consent to the disposal of land specified in the notice, the licence holder will be informed of any entitlement to appropriate compensation for the loss of value (if any) as a result of not being able to make such disposal.

7.7 In this condition:

“disposal” includes any sale, assignment, gift, lease, licence, the grant of any right of possession, loan, security, mortgage, charge or the grant of any other encumbrance or knowingly permitting any encumbrance to subsist (other than an encumbrance subsisting on the date when the land was acquired by the licence holder or on 15 November 2001) or any other disposition to a third party, and “dispose” shall be construed accordingly;

“land” includes buildings and other structures, land covered by water, and any estate, interest, easements, servitudes or rights in or over land.

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