



# Land disposal by Network Rail

The regulatory arrangements

October 2019

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# 1. Introduction

## Context

- 1.1 The Office of Rail and Road (ORR) regulates how Network Rail Infrastructure Limited (Network Rail) disposes of its land through Condition 17 of its network licence.
- 1.2 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.
- 1.3 We are updating our land disposal regulatory arrangements document following the 2018 periodic review of Network Rail's outputs and requirements. As part of that periodic review process, we reviewed and amended its network licence, including the land disposal condition, to reflect devolution and the establishment of the System Operator within Network Rail. The revised condition text is at Annex A.
- 1.4 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 or related to an enactment, and where there are material changes to a disposal.

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

2.1 For the purposes of Condition 17 of its network licence, Network Rail may dispose of land by entering into any of the following arrangements without seeking specific consent from ORR. In doing so, we expect Network Rail to consult with relevant internal<sup>1</sup> and external<sup>2</sup> stakeholders.

### Disposal of property rights for railway purposes - freehold retained

- (a) 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), or to any other regional transport authority. The lease must be capable of termination on or before the termination of the relevant franchise agreement or the concession agreement (if any)<sup>3</sup>.
- (b) A lease or licence<sup>4</sup>:
  - (i) of part of a station of which Network Rail is the station operator for the purpose of providing services relating to railways;
  - (ii) of all or part of a light maintenance depot (LMD) to any person for the purpose of providing services relating to railways;
  - (iii) 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 purposes permitted by the relevant Depot Access Conditions;
  - (iv) of a freight depot, freight terminal or freight sidings for the purposes of providing services relating to railways;
  - (v) to a person providing network services for the purpose of providing services relating to railways;
  - (vi) for the purposes of constructing or enhancing a station facility or a freight facility for the purposes of providing services to railways; or

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<sup>1</sup> Such as relevant Network Services functions (including those responsible for freight and national passenger operators), the relevant Region and the System Operator, in accordance with Condition 17.1(b).

<sup>2</sup> As far as reasonably practicable, we would expect Network Rail to maintain accurate details of its external stakeholders for the purposes of effective consultation.

<sup>3</sup> 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.

<sup>4</sup> We would expect the lease or licence to restrict the land's use to that in the corresponding general consent clause.

- (vii) of land in connection with rail freight activities and/or rail infrastructure activities connected to the network.
- (c) A reversionary or concurrent lease following an obligation contained in a lease referred to in paragraphs above, 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**

- (d) A lease or a licence:
  - (i) 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; or
  - (ii) 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.
- (e) A licence that would not have a material adverse effect on the ability of Network Rail, any infrastructure manager, 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.
- (f) To surrender a lease interest, grant or relinquish a wayleave, covenant, easement or servitude that would not have a material adverse effect on the ability of Network Rail, any infrastructure manager, 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.
- (g) The renewal or extension of any lease where the renewal is a legal requirement.
- (h) 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 and require specific consent from ORR)<sup>5</sup>.

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<sup>5</sup> See chapter 4, *Application of policy*, regarding air rights.

## Disposal where freehold may be divested

- (i) Any disposal of land that forms part of a network or railway facility that has been subject to a closure decision under section 43(9) of the Act, or is permitted to close or its use is discontinued in accordance with sections 22-35 of the Railways Act 2005, unless that decision, or effect of those provisions, states that the licence holder should not dispose of the land.
- (j) The disposal of any land made solely for the purpose of boundary rectification of land in which Network Rail has an estate or interest.
- (k) The disposal of land that has no reasonably foreseeable use:
  - (i) for, or in connection with, services relating to railways; or
  - (ii) 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.
- (l) 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:
  - (i) the disposal would not hinder Network Rail's ability to conduct its network business; and
  - (ii) 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<sup>6</sup>.
- (m) 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.

2.2 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.

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<sup>6</sup> Where Network Rail identifies a competing railway or transport use but considers that it can be reasonably accommodated by the railway or integrated transport scheme already proposed, so that the proposed railway or integrated transport operations are not affected adversely, Network Rail may consider this to be a resolved issue.

## 2.3 In these regulatory arrangements:

“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;
“Disposal” or “Dispose”	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;
“Disposal Notice”	means a notice to ORR under Condition 17.3 of Network Rail’s network licence;
“existing lease”	means a lease entered into by Network Rail prior to 15 November 2001;
“franchise agreement”	means a franchise agreement made with the appropriate franchising authority;
“Land”	includes buildings and other structures, land covered by water, and any estate, interest, easements, servitudes or rights in or over land.
“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;
“the Act”	is the Railways Act 1993;

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 of any proposed land disposal in accordance with Condition 17.2 of the network licence, we will use the decision criteria in paragraph 3.5 below to decide whether to grant consent.
- 3.2 In accordance with Condition 17.1(b), Network Rail will consult the relevant Route Business and the System Operator<sup>7</sup>. We will also expect Network Rail to consult its business function responsible for freight and national passenger operators where relevant, as well as the following external stakeholders about the development of any land disposal proposals:
- in England & Wales, the Department for Transport (DfT) or successor franchising authority;
  - in Scotland, Transport Scotland, the Regional Transport Partnerships and the Scottish Council for Development & Industry;
  - in Wales, Transport for Wales;
  - 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<sup>8</sup>;
  - the local planning authority, County Council and Passenger Transport Authority (PTA) or the associated Passenger Transport Executive (PTE)<sup>9</sup> (where appropriate), for the area in which the site is located;
  - train operating companies (passenger and freight), shortlisted franchise/concession bidders, infrastructure managers, service facility operators and other interested rail connected parties;
  - the Rail Freight Group and the Freight Transport Association;
  - Transport Focus;
  - Community Rail Partnerships and the Association of Community Rail Partnerships;
  - key transport infrastructure providers such as port and airport authorities; and
  - British Transport Police.

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<sup>7</sup> In the event that Network Rail changes its organisation, in accordance with Condition 4 of its network licence, we would expect it to consult with the business functions that have the responsibilities of those listed in Paragraph 3.2.

<sup>8</sup> The London TravelWatch geographical service area extends further than Greater London area as shown in the area map [here](#).

<sup>9</sup> For example, Transport for Greater Manchester.



- 3.3 When giving its Disposal Notice to ORR, we expect Network Rail to provide us with complete details of its stakeholders' consultation and the responses received. Where Network Rail has given a Disposal Notice, it shall provide such further information as ORR may reasonably require<sup>10</sup>. Such information shall be provided within seven days or such other time as ORR allows. In the event that Network Rail cannot provide the information reasonably required, the Disposal Notice will be rejected. A formal notice directing Network Rail not to proceed with the disposal will not be necessary.
- 3.4 When we have received the Disposal Notice (and any other information we may reasonably require), we will conduct our own internal review and will inform Network Rail of our decision within two months of the Disposal Notice.
- 3.5 We will have regard to the following criteria when considering a notification from Network Rail about a proposed disposal of land:

ORR's duties under section 4 of the Act, and in particular our duties to:

- promote improvements in railway service performance;
- otherwise to protect the interests of users of railway services;
- 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;
- contribute to the development of an integrated system of transport of passengers and goods;
- contribute to the achievement of sustainable development; and
- enable persons providing railway services to plan the future of their businesses with a reasonable degree of assurance.

- 3.6 It is unlikely that ORR will consent to the disposal of land by Network Rail 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 for purposes ancillary to the future development of the railway network;

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<sup>10</sup> We expect to receive for every notification, clear plans that show the size and shape of the land, and its proximity to the rail network, with clear information in supporting evaluation and consultation documents.

- (ii) DfT (or successor franchising authority), Transport Scotland, Transport for Wales, Transport for London, 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 core duties and/or network management responsibilities under its network licence.

3.7 In reaching a decision, ORR will 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; or
  - in a strategy being developed by such parties and there are plans with milestones or timescales to either include or eliminate the site from a confirmed strategy; and
- (iv) the financing of projects relevant to the site.

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

3.9 We will also evaluate land disposal submissions against our equalities duty under Section 149 of the Equality Act 2010, which requires ORR to have due regard to the need to:

- eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under the Equality Act 2010;
- 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
- foster good relations between persons who share a relevant protected characteristic and persons who do not share it.

3.10 With regard to paragraph 2.1(k) of the general consent, 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

4.1 In this section we set out our policies relating to major air rights and disposals required under an enactment.

### 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. Also, 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 routine in nature. We also expect specific notification from Network Rail of 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 on issues of potential railway expansion and operational risk.

4.5 In considering the grant of a specific consent for such cases, we would want 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 A CPO would require Network Rail to dispose of land which would normally be referred to us for specific consent. Under Condition 17.1(a) of Network Rail’s network

licence, Network Rail can dispose of land without notifying us when the land is required by or under any enactment.

- 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 must 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 Condition 17.
- 4.10 Network Rail may also be subject to the Crichel Down Rules. Essentially, these Rules are a non-statutory government policy which requires public bodies, (including Network Rail) under certain circumstances, to offer to sell back surplus land to the former owner once the land has become surplus to requirements - providing the land was originally acquired by, or under threat of, compulsion<sup>11</sup>.
- 4.11 Where the Crichel Down Rules require Network Rail to offer surplus land to its former owners, we will consider that to apply in the same way as an enactment and Network Rail will not require our specific consent.
- 4.12 We conduct audits of Network Rail's general consent transactions annually and, in doing so, will check for details of enactment related disposals such as those conducted under CPOs and the Crichel Down Rules.

### **Material changes to disposals under general or specific consent**

- 4.13 Where Network Rail has determined there to be material changes to the terms of a consented disposal (general or specific), we expect, where appropriate, Network Rail to revert to all consultees, advising them of the changes and to seek stakeholders' views so as to assess whether it remains appropriate to rely on the consent. We expect Network Rail to notify ORR of its intention to rely on an existing specific consent or to resubmit an application for consent, as appropriate.

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<sup>11</sup> The Government has published guidance about the applicability of the Crichel Down Rules at <https://www.gov.uk/guidance/crichel-down-rules-on-land-ownership>.

# Annex A: text of Condition 17 of Network Rail's network licence

The text of Condition 17 of Network Rail's network licence is repeated below.

## Condition 17: Land disposal

### *Disposal of Land by the licence holder*

17.1 The licence holder shall not Dispose of any Land except:

- (a) where the Disposal is required by or under any enactment; or
- (b) where:
  - (i) if the Disposal relates to Land within a Route Business's Route Area, the Route Business has been consulted in relation to the Disposal and has not objected;
  - (ii) the System Operator has been consulted in relation to the Disposal and has not objected; and
  - (iii) ORR has consented to the Disposal.

### *Applying for ORR's consent*

- 17.2 Where the licence holder seeks ORR's consent to a particular Disposal of Land, it shall give written notice to ORR (in such form and containing such details as specified by ORR from time to time) specifying the Disposal of Land which it intends to make (the "Disposal Notice").
- 17.3 Where the licence holder proposes to make the Disposal by a particular date or within a particular period, it shall give the Disposal Notice to ORR at least two months before that date or period.
- 17.4 Where it has given a Disposal Notice, the licence holder shall provide any further information which ORR requires.
- 17.5 Unless otherwise agreed between ORR and the licence holder, where ORR does not inform the licence holder that it consents or refuses to consent to the Disposal within two months of the date on which ORR received the Disposal Notice, ORR will be deemed to have consented.

### *Route Business and System Operator responsibilities*

- 17.6 The Route Businesses and the System Operator shall not cause the licence holder to Dispose of Land in breach of this condition.



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