This document relates to the Waverley Railway (Scotland) Bill as amended at Consideration Stage (SP Bill 8A)

WAVERLEY RAILWAY (SCOTLAND) BILL
[AS AMENDED AT STAGE 2]

REVISED EXPLANATORY NOTES

CONTENTS

1. These revised Explanatory Notes are published to accompany the Waverley Railway (Scotland) Bill as amended at Consideration Stage.

2. These Explanatory Notes have been prepared by John Kennedy & Co., Parliamentary Agents, on behalf of the promoter, Scottish Borders Council (“the Council”), in order to assist the reader of the Waverley Railway (Scotland) Bill and to help inform debate on it. They do not form part of the Bill and have not been endorsed by the Parliament.

3. The Notes should be read in conjunction with the Bill. They are not, and are not meant to be, a comprehensive description of the Bill. So where a section or schedule, or a part of a section or schedule, does not seem to require any explanation or comment, none is given.

THE BILL

4. The Bill will grant powers to the Council and its successors (for an explanation of successors to the Council see the notes on section 30 of the Bill). In the Bill the body exercising the powers is called “the authorised undertaker”. The Bill will enable the authorised undertaker to build a new railway from a point in Midlothian immediately south of Newcraighall (which is in the City of Edinburgh) to Tweedbank in Scottish Borders. All the other powers in the Bill, including the other works described below, are required in connection with the construction of the new railway. In particular, the Bill grants compulsory purchase powers. This will ensure that the authorised undertaker will be able to acquire the land or rights in land that are required for the works to be constructed and operated. Paragraphs 5 to 8 below outline the purpose of the Bill in greater detail.

5. The principal purpose of the Bill is to give statutory authority to the Council and its successors (in the Bill called “the authorised undertaker”) for the construction of a railway from a point immediately south of Newcraighall to Tweedbank, largely following the formation of the former Waverley railway (in the Bill called “the railway works”).
6. In connection with these principal works the Bill also provides for the stopping up\(^1\) of lengths of some roads and other rights of way where they cross or are on the route. Diversions and substituted routes will be provided, including (as part of the railway works) 13 new footbridges. In addition, the Bill enables the authorised undertaker to construct miscellaneous works and do other things that are required in connection with or in consequence of the railway works. In the Bill the works that will enable these miscellaneous things to be done are called “the ancillary works”.

7. The new railway will be able to operate as an integral part of the national rail network, to which it will connect at the northern end. This will require adjustments, in particular to signalling equipment, but all these can be done within the existing network and it is envisaged that the necessary works will be carried out by Network Rail using existing statutory powers.

8. Provision is also included for the compulsory acquisition of land for the scheme, including land for new stations at Shawfair, Eskbank, Newtongrange, Gorebridge, Stow, Galashiels and Tweedbank which will be constructed as part of the scheme.

**RECIPIENTS OF THE POWERS**

9. The powers of the Bill will be conferred initially on the Council. Provision is made for the Council to transfer the railway undertaking and related powers in whole or in part, and to share or delegate any of the powers of the Bill. The intention is that the railway powers will eventually be transferred to another undertaker, expected to be Network Rail.

**RELATIONSHIP WITH PLANNING AND RAILWAYS REGULATION**

10. As explained in paragraph 7 of the Promoter’s Memorandum, the development authorised by the Bill will be permitted development,\(^2\) so that the Act will effectively grant planning permission. The Bill restricts this planning permission so that it applies only to works authorised by the Act where construction has been started within 10 years of the Act receiving Royal Assent. The position is described further in the explanation of section 35 (see paragraphs 205 and 206 below).

11. The Bill does not state that the authorised undertaker may operate the railway and related facilities. This is because statutory authority to operate the railway will be conferred in another way. Under section 6 of the Railways Act 1993 (c.43) the operation (including maintenance) of a railway asset (which includes track and other infrastructure and stations) requires a licence under section 8 of that Act, and section 122 of the Act confers the benefits of statutory authority on a licensed operator. Statutory authority to operate the railway will also result from the incorporation of the Railways Clauses Consolidation (Scotland) Act of 1845 (c.33). (The incorporation of this and other Acts is explained in paragraphs 18 to 21 and 73 and 262 below.)

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1 “Stopping up” a road is the technical expression for closing the road to traffic and terminating public rights of way over it.

2 “Permitted development” means development which is permitted by article 3 of the Town and Country Planning (General Permitted Development) (Scotland) Order 1992 (SI 1992/223) to be carried out without the need to apply for planning permission. The precise scope of the different classes of permitted development and the conditions subject to which it is permitted are set out in Schedule 1 to the 1992 Order. The relevant class in this case is Class 29 (development authorised by private Act, etc.).
THE BILL AND RELATED DOCUMENTS

12. The Bill is the only document that is submitted for enactment by the Parliament. However, although it is free-standing from its accompanying documents, it must be read by reference to the documents referred to in it, namely the Parliamentary plans, the Parliamentary sections and the book of reference. The Parliamentary plans show the lands to be used, the works and facilities to be constructed and (in some cases) the uses to be made of certain areas. The Parliamentary sections show sections of the railway works, including associated road works. The book of reference lists the owners, lessees and occupiers of all lands which may be compulsorily acquired or used or who have interests in any land or water in or over which rights would be extinguished, or interests in the rights that would be extinguished.

13. European legislation on environmental assessment (EC Directive 85/337/EEC as amended by EC Directive 97/11/EC) applies to the Bill. The requirements are transposed into domestic law for development projects authorised under planning legislation through the Environmental Impact Assessment (Scotland) Regulations 1999 (SSI 1999/1) as amended by the Environmental Impact Assessment (Scotland) Regulations 2002 (SSI 2002/324). The requirements of those Regulations are applied to the procedures for Scottish Private Bills authorising works by virtue of Rule 9A.2.3(c)(iii) of the Standing Orders of the Scottish Parliament and the Presiding Officer’s determinations as set out in Annexes K and N to the Parliament’s Guidance on Private Bills. The findings of the environmental assessment that has been carried out in relation to the Bill’s proposals are set out in the Environmental Statement that has been lodged as one of the accompanying documents.

14. The Waverley Railway (Scotland) Bill Committee’s Report on the Preliminary Stage of the Bill required the submission of detailed proposals to enable the construction of a station at Stow. These proposals were the subject of a further environmental statement which was submitted to the Committee as an additional Bill document.

STRUCTURE OF THE BILL

15. Before commenting on the individual sections it may be helpful to explain how the Bill operates.

16. Part 1 confers the powers relating to the works themselves. It distinguishes between—

- those works that are specifically described (the railway works described in schedule 1); and
- works carried out under general powers (the ancillary works as described in schedule 2).

17. Part 2 confers statutory authority for the compulsory purchase of the land required for the scheme. All the sections in this Part are concerned with the implementation of the compulsory purchase powers, so that the Bill will have the same effect as would a compulsory purchase order in other types of scheme e.g. for roads.
18. Fairness demands that compulsory purchase under the Bill must be on the same standardised basis as any other compulsory purchase in Scotland. Departure from what is generally applicable also has human rights implications. This means that in the Bill compulsory purchase must be subject to all the same procedural rules, safeguards and requirements regarding compensation as apply generally. All these provisions are in a large and complex body of law contained in several public Acts of Parliament and case law. So that those affected by the Bill are on the same footing as those affected by compulsory purchase orders, this body of legislation must be applied to the Bill.

19. In theory this might be done either by writing the relevant provisions at length in the Bill or by applying the existing public Acts as if they had been included in the Bill. Section 42 of the Bill proposes the latter. In this it adopts the format for legislation authorising railways and similar infrastructure works which has been in place throughout Great Britain since the mid 19th century and which continues to be utilised.

20. The Bill follows this precedented format because writing the entire statutory code into the Bill is not a practical option. The scheme of the law in question is outlined below in paragraphs 68 to 162 and 262 explaining Part 2 of the Bill and section 42. The Acts applied by section 42 contain a total of some 400 sections. Not all sections are relevant, but in much of this legislation it is not possible to say with absolute certainty that a particular provision is not going to be relevant. In addition, this legislation is written in 19th century legal English that would be unacceptable today. As a result, it could not be written into the Bill at length without being completely rewritten. The result of this would inevitably be that the meaning would be affected. Such an exercise in statute law revision, however desirable, is far outside the scope of any private Bill promoter.

21. The Bill accordingly incorporates provisions of the Acts referred to in section 42. These Acts were passed for the purpose of being incorporated as standard “clauses”. They only have effect if they are referred to and implemented by some other piece of legislation such as the Bill. The effect of the incorporation is that the incorporated provisions become part of the Bill. The Acts in question are—

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3 The relevant law has been described as having “become an unwieldy and lumbering creature” – see ‘Fundamental Review of the Laws and Procedures Relating to Compulsory Purchase and Compensation: Final Report’, Office of the Deputy Prime Minister, January 2003, para. 20.

4 Recent Scottish examples of provisions similar to section 42 are the British Railways (No. 2) Order Confirmation Act 1994 (c.ii), s.3 (authorising an upgrading of the part of the present route between Cambus and Alloa) and the British Railways (No. 3) Order Confirmation Act 1994 (c.iii), s.3 (authorising an upgrading of the railway between Hamilton and Larkhall). More recent examples are in Orders made under the Transport and Works Act 1992, which are the means of authorising most infrastructure works in England and Wales and which apply the equivalent English Law. See for example article 4 of the Leeds Supertram (Extension) Order 2001 (SI 2001/1347), articles 4 and 5 of the Leeds Supertram (Land Acquisition and Road Works) Order 2001 (SI 2001/1348) and articles 3 and 10 of the Heathrow Express Railway Extension Order 2002 (SI 2002/1064).

5 In fact, the law on compulsory purchase throughout the UK is recognised as being ripe for reform and there are current government proposals on the subject. See ‘Compulsory Purchase and Compensation – the Government Proposals for Change’ paras 1.1 and 3.1, Office of the Deputy Prime Minister, June 2002; and the Planning and Compulsory Purchase Bill, a Government Bill pending in the UK Parliament which proposes a number of reforms relating to compensation.
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- the Lands Clauses Acts,\(^6\)
- the Railways Clauses Consolidation (Scotland) Act 1845 (c.33);
- the Railways Clauses Act 1863 (c.92).

The Bill makes a number of adjustments to the incorporated Acts for the purpose of streamlining the 19th century procedures so as to bring them more nearly into line with the more modern legislative improvements that have been made in England and Wales, but not in Scotland\(^7\) and also to allow for the greater flexibility provided for in the Bill. Details of the adjustments are explained in the notes below on sections 14, 17, 21 and 25 of the Bill.

**COMMENTARY ON SECTIONS**

**Part 1 – Works**

22. The meaning of “the railway works” and “the ancillary works” is explained in paragraphs 23 to 26 below. They are collectively described as “the authorised works” (defined in section 43).

**Section 1 – Authority to construct works**

23. Subsection (1) gives the specific statutory authority for the works which is required.\(^8\) In the absence of this section the activities permitted by the Bill would potentially be liable to challenge in the courts e.g. on the ground that the railway constituted a legal nuisance. Such an action could potentially result in an order preventing the nuisance by stopping the works (called an interdict). The protection of statutory authority is therefore important to the viability of the scheme.

24. Subsection (2) makes clear the extent of the works for which authority is given. Section 2 refers to the railway works as being within the limits of deviation shown on the Parliamentary plans. However, the precise position of the works may move (“deviate”) within those limits, in accordance with section 4. Subsection (2) accordingly provides that the extent of the authorised works is the works as constructed within the permitted deviation.

\(^6\) i.e. The Lands Clauses Consolidation (Scotland) Act 1845 (c.19) and the Lands Clauses Consolidation Acts Amendment Act 1860 (c.106), and any Acts for the time being in force amending those Acts – see The Scotland Act 1998 (Transitory and Transitional Provisions) (Publication and Interpretation etc. of Acts of the Scottish Parliament) Order 1999 (SI 1999/1379), Schedule 1. Where a word or expression is defined in the 1999 Interpretation Order, that definition will apply unless a contrary intention appears in the enactment being interpreted. (Bennion, ‘Statutory Interpretation’ (4th edn. 2002) p. 497.) Where, as with this definition, an Interpretation Order definition is intended to apply, the definition is not repeated in the Bill. (“The purpose of an Interpretation Act is by the use of labelling definitions to shorten the language which needs to be used in legislation”. Bennion, p. 491.)

\(^7\) “… it is unfortunate in view of … the criticism which has been levelled at the [Lands Clauses Consolidation (Scotland) Act 1845] that Parliament has not found time to produce more up-to-date legislation as was done in England with the passing of the Compulsory Purchase Act 1965 (c.56).” Stair Memorial Encyclopaedia, Title ‘Compulsory Acquisition and Compensation’ para. 13.

\(^8\) The need for such authority is explained in paragraph 5 of the Promoter’s Memorandum.
25. Subsection (3) provides that, if the authorised undertaker commences construction of the authorised works, it is obliged to construct the whole railway, including all the stations, as described in schedule 1.

Section 2 – The railway works

26. Section 2 gives effect to schedule 1, which contains the detailed descriptions of the works comprised in the railway and related physical structures (access roads and footbridges).

27. The main railway work is the railway comprising Works Nos. 1, 2, 3, 4, 5, 6, 7, 8, 9 and 10 shown on sheet nos. 1 to 78 of the Parliamentary plans. The railway commences immediately south of Newcraighall in Midlothian and terminates at Tweedbank in the Scottish Borders. It largely follows the route of the former Waverley railway. The northern end of the railway will join the national rail network (the Niddrie North to Bilston Glen railway operated by Network Rail as part of the Edinburgh CrossRail) at a point south of Newcraighall Station. The railway will then continue for approximately 49.2 km through Shawfair, Eskbank, Newtongrange, Gorebridge, Stow and Galashiels to Tweedbank, where the railway will terminate. Stations are to be provided at all those places. The construction of the railway will necessitate numerous works to bridges including in particular—

- a bridge to carry the intended railway (Work No. 1) under the City of Edinburgh Bypass (A720) (sheet nos. 1 to 6 of the Parliamentary plans);
- the strengthening of Glenesk Viaduct carrying the intended railway (Work No. 2) over the river North Esk (sheet no. 7 of the Parliamentary plans); and the strengthening of Newbattle Viaduct carrying Work No. 2 over the river South Esk (sheet nos. 11 and 12);
- a viaduct carrying the intended railway (Work No. 3) over the A7 road at Gore Glen Country Park (sheet no. 17 of the Parliamentary plans);
- the replacement of Little Gala, Crookston Mill, Hollowshank and Bower bridges carrying the intended railway (Work No. 6) over Gala Water (sheet nos. 39, 42 and 43 of the Parliamentary plans);
- the reconstruction of Plenploth North, Torquhan South and Watherston bridges to carry the intended railway (Work No. 7) over Gala Water (sheets nos. 47, 48 and 51 of the Parliamentary plans); and the replacement of the decking of the bridge to carry the intended railway (Work No. 7) over Gala Water at Galabank (sheet no. 52);
- the replacement of the decking of Ferniehirst Water and Bowshank South bridges carrying the intended railway (Work No. 8) over Gala Water (sheet nos. 59 and 60 of the Parliamentary plans); and the bridge (Bowland Bridge) carrying the intended railway over the Caddonfoot to Bowland road (B710) (sheet no. 62); and the improvement of Bowshank Tunnel (sheet no. 60);
- the replacement of the decking of Whin Underbridge carrying the intended railway (Work No. 9) over Gala Water at Robin’s Knowe (sheet no. 65 of the Parliamentary plans); and a bridge (Torwoodlee Water Underbridge) to carry the intended railway (Work No. 9) over Gala Water at Torwoodlee (sheet no. 70);
28. As a result of the construction of the railway works road and bridge works will be required including the following—

Resulting from Work No. 1

- Work No. 1A – a bridge over the intended railway to provide access for the proposed Shawfair development;
- Work No. 1B – an access road to provide continued access to the CPL Distribution Depot on the unnamed road forming the western continuation of Newton Church Road at Harelaw;
- Work No. 1E – a footbridge over the intended railway to provide access for the proposed station at Shawfair;
- Work No. 1K – a road including a bridge over the intended railway to provide continued access to Sheriffhall Mains.

Resulting from Work No. 2

- Work No. 2A – a footbridge over the intended railway to provide access to the proposed station at Eskbank;
- Work No. 2B – an access road into the proposed station car park at Eskbank;
- Works Nos. 2C and 2D – roads providing continued access to the goods entrance to Tesco and to K&I Coachworks at Hardengreen;
- Work No. 2E – a footbridge over the intended railway at Newtongrange between Redwood Walk and Station Road;
- Work No. 2F – a footbridge over the intended railway at Deanpark between New Star Bank and Station Road.

Resulting from Work No. 3

- Works Nos. 3A and 3B – footbridges over the intended railway at Gore Glen Country Park;
- Work No. 3C – a short length of railway forming a turnback siding at Gorebridge, which will be laid adjacent to the intended railway before it connects into it at a point west of the Main Street/Station Road bridge;
- Work No. 3D – a footbridge at Gorebridge to carry the path between Robertson’s Bank and Vogrie Road over the intended railway.

Resulting from Work No. 5

- Work No. 5A – a realignment of the A7 road, including a bridge over the intended railway, at Falahill;
- Work No. 5B – a road to provide continued access to Falahill Farm.
Resulting from Work No. 7

- Work No. 7B – an access road to provide continued access to Allanshaugh.

Resulting from Work No. 10

- Work No. 10A – a footbridge over the intended railway to replace a length of Plumtreehall Brae (DG84), Galashiels, which is to be stopped up;
- Work No. 10B – a reconstruction of the bridge carrying Plumtreehall Brae (DG84) over Gala Water north-east of the junction with King Street (A72), Galashiels;
- Works Nos. 10F and 10G – access roads to the car parks adjoining Our Lady and St Andrew Church and adjoining Anderson’s Chambers, Galashiels;
- Work No. 10H – an access road into the Landhaugh Industrial Estate, Galashiels;
- Work No. 10K – an access road to the proposed station car park at Tweedbank.

Section 3 – The ancillary works

29. Section 3 gives effect to schedule 2, which describes the types of works which may be provided in connection with the railway works. Works of this nature will only be authorised by the Bill if they are necessary or expedient\(^9\) in connection with the construction of the railway works, or are required as a consequence of those works being constructed.

30. Schedule 2 catalogues types of works and operations that are normally necessary for the operation of a railway. The “railway” itself is only the railway track as laid along the route.\(^10\) The ancillary items accordingly range from the provision of stations and platforms to operations such as discharging water during construction\(^11\) and moving utility apparatus.\(^12\) The ancillary works will accordingly form an essential part of the authorised works.

31. Unlike the specifically authorised railway works, which are a known quantity and the position of which is certain within a margin, section 3 does not need to prescribe any limits within which the ancillary works may be constructed. Also, as the nature of the ancillary works is known but at this stage not the precise ancillary works or their positions, the Bill does not identify any land to be compulsorily purchased for the purposes of ancillary works. Accordingly, the places where ancillary works can be carried out will be limited by the need for the works to be ancillary to the railway works. As there are no compulsory purchase powers for land to accommodate ancillary works, the location of these works will be further limited by the fact that they can only be constructed on land which the authorised undertaker has been able to acquire, or in which it has acquired appropriate rights.

32. Examples of ancillary works that will be required are stations, platforms, landscaping and the repairs and other works affecting the listed structures specified in schedule 9.

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\(^9\) i.e. advantageous; suitable, appropriate (Concise Oxford English Dictionary).
\(^10\) See, by virtue of section 81(3) of the Railways Act 1993 (c.43), the definition of “railway” in section 67(1) of the Transport and Works Act 1992 (c.42).
\(^11\) e.g. when pumping away water from a site so as to be able to lay track on dry ground.
\(^12\) e.g. water mains and power supply cables.
33. The authorised works will necessitate some apparatus belonging to utility undertakers being moved away from the works, or in the case of any sewers protected from the works. Such accommodation works are usually conduits or other similar apparatus. Section 3(2) accordingly authorises the authorised undertaker to construct these works for the benefit of others e.g. utility undertakers whose apparatus is moved.

Section 4 – Permitted deviation within limits

34. The Parliamentary plans show the centre lines of the works and also show limits of deviation around those centre lines. Section 2 specifically states that the railway works are situated within the limits of deviation. The Bill will not accordingly permit the construction of those works outside these lateral limits.

35. The Parliamentary sections show the vertical dimensions and situation of the proposed works. The Bill authorises the works in accordance with those dimensions and levels, subject to the flexibility permitted by section 4.

36. Section 4 allows for a degree of flexibility. It permits movement or variance from the precise lines and sections. In the Bill this is described as “deviation”. Every work as constructed or maintained may deviate laterally within the limits of deviation, and vertically by up to 3 metres upwards and to any extent downwards. This reflects the outline nature of the authorisation being given by the Bill. The works are not being authorised in the fine detail which will be formulated at a later stage when the railway is finally designed. The permission to deviate therefore allows for the normal design process.

37. The ability to deviate vertically to any extent downwards that may be necessary or expedient enables the authorised undertaker to construct the works at whatever depth is needed to achieve stability. It also allows for e.g. the undertaking of ground stabilisation works in the event of mine workings or other geological conditions. If it came to light that at any point along the route the ability to deviate downwards created an impact that should be catered for, that could be dealt with by way of amendment to the Bill, if appropriate, or agreement with any person affected.

Section 5 – Access to works

38. It will be necessary for the authorised undertaker to provide access from existing roads to land to be used for the authorised works. Section 5 will enable the authorised undertaker to facilitate such access by constructing drop kerbs and similar works both at the points shown on the Parliamentary plans and at other points approved by the roads authority. In the absence of this section such works, amounting to an interference with the road, could not be carried out by the authorised undertaker without first obtaining the consent of the roads authority under section 56 of the Roads (Scotland) Act 1984 (c.54).

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13 Utilities are gas, electricity, water and telecommunications. Sewers are also treated as utilities. Utility undertakers are suppliers of these utilities, or in the case of sewers, the providers of sewerage services. Utility undertakers normally own their apparatus.

14 Sewers are protected rather than moved because moving them would involve a change in their levels. Sewers usually rely on gravity and so their levels cannot readily be altered. The works to provide alternative apparatus for utility apparatus that is being moved, or to protect sewers, are called “accommodation works”.
Section 6 – Construction and maintenance of new or altered roads

39. The roads associated with the railway works other than private accesses are all to become public roads. In accordance with standard arrangements when a new road is built, section 6 provides for the relevant works to be completed to the reasonable satisfaction of the roads authority, and to become maintainable by the roads authority after an initial 12 month maintenance period during which the authorised undertaker remains liable for any maintenance. This is normal practice to allow any defects that emerge once the roads are first commissioned after construction to be remedied at the expense of the authorised undertaker.

Section 7 – Vesting of private roads

40. Works Nos. 1B and 7B are private access roads which will be constructed for the benefit of individual landowners to replace existing private accesses. These works will not therefore become public roads and section 7 accordingly makes provision similar to section 6, but with the roads vesting in named landowners.

Section 8 – Private crossings

41. There are two categories of private crossing, namely—

- those where the railway crosses a private road; and
- those where a person (generally a landowner) has private rights to cross the railway.

Such crossings may be above, beneath or on the level with the railway. As the railway authorised by the Bill will be a new railway along a route where no railway exists at present, it is appropriate to provide for any special requirements for crossings on the basis of present needs rather than past entitlements. However, where there were previously entitlements to cross the former railway, there are circumstances in which there may still be vestigial present rights of way, and these must also be taken into account.

42. There are 47 points along the route where there were formerly private crossings and where rights of way appear to subsist. 42 of these are to be reinstated so that they can be used, with the new railway in place. This is provided for in subsection (1) of section 8 and Part 1 of schedule 4, which details the private crossings in question (in the Bill called “the continuing private crossings”).

43. Subsection (2) provides that the use of the continuing private crossings is to be on the same terms as govern the use of the existing private crossings at those points. Existing private rights (if any) are therefore protected.

44. Subsection (3) requires the authorised undertaker to provide equipment at each continuing private crossing which complies with the requirements of the Secretary of State under subsection (4) or subsection (5) (i.e. the requirements enforced by HM Railway Inspectorate).

45. Subsection (4) requires the equipment provided at continuing private crossings to comply with the Secretary of State’s requirements for that sort of railway equipment. Subsection (5) requires the...
makes clear that any equipment provided under this section must also comply with any specific HMRI requirements relating to a particular crossing.

46. Subsection (6) is concerned with section 60 of the Railways Clauses Consolidation (Scotland) Act 1845 (c.33) (in the Bill called “the 1845 Act”) which is incorporated in the Bill.16 Section 60 requires a railway undertaker when building a railway to provide, among other things, means of crossing the railway for owners and occupiers of land adjoining (and divided by) the railway. Some of the former private crossings of the former railway will have been constructed by way of discharging the section 60 obligation when the original railway was built.

47. Conditions have changed considerably since the former railway was constructed. In particular, land that was then in single ownership and divided by the railway has now been divided for many years. The existing private crossings therefore reflect the needs and patterns of ownership existing today. Those will not change by reason of the route being re-opened.

48. The purpose of subsection (6) is accordingly to ensure that the section 60 obligation is discharged in relation to the railway by the provision of the continuing private crossings, and that the re-opening of the route does not enable landowners to seek crossings for the benefit of land that has long been divided by a railway at that point.

49. Five private crossings of the route are to be closed with private rights across them being extinguished. This is provided for in subsection (7) and Part 2 of schedule 3, which details the crossings in question.

50. Subsection (8) provides for compensation to be payable to any person who suffers loss as the result of the extinguishment of rights over a private crossing under subsection (7). The effect of applying the Land Compensation (Scotland) Act 1963 (c.51) (in the Bill called “the 1963 Act”) is that the amount of compensation will be assessed on the same basis as compensation is assessed on compulsory acquisition. This is explained further in paragraphs 78 and 79 below.

Section 9 – Permanent stopping up of roads

51. Subsection (1) authorises the permanent stopping up17 of 65 lengths of track, path and other areas over which there are or may be public rights of way, all of which have the status of roads. They are detailed in Part 1 of schedule 4.

52. 49 of these stopped up roads will be replaced by the substitutes specified in column (4) of Part 1 of schedule 4. Where there is a substitute subsection (2) prevents any stopping up until the substitute has been completed to the reasonable satisfaction of the roads authority and is open for public use.

53. In the 16 cases where there is no substitute, subsection (3) prevents the stopping up of a length of road under the section unless the conditions in paragraphs (a) to (d) are satisfied as

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16 Section 60 is included in the provisions incorporated by section 42.
17 For explanation see paragraph 7 above and footnote.
regards that length of road. These conditions ensure that owners and occupiers who use the road are not left without reasonably convenient means of access.

54. Where a road is closed, subsection (4) extinguishes all rights of way over it and allows the undertaker to use the site for the purposes of the authorised works. In the event that there are private rights of way over any length of stopped up road, subsection (5) provides for the payment of compensation to any person who suffers loss by the extinguishment or suspension of such rights. This subsection operates in the same way as section 8(8) (see above).

Section 10 – Temporary stopping up, alteration or diversion of roads

55. It will be necessary for the authorised undertaker during construction temporarily to stop up, alter, or divert roads. Precise details of the roads, timing and duration of closures will be developed as the scheme is designed. Subsection (1) will enable such temporary stoppings up by the authorised undertaker provided consent is obtained from the road works authority under subsection (4). By subsection (5) consent could not be unreasonably withheld but could be given subject to conditions. Under subsection (6) disputes as to the reasonableness of any condition would be determined by arbitration. (Section 32 provides for the way in which any arbiter is appointed.)

56. In addition to any condition imposed by the road works authority, the authorised undertaker will be obliged by subsection (2) to provide continued pedestrian access to premises abutting on the temporarily stopped up road.

57. Necessary temporary stoppings up have been identified at this stage as being required at the locations and for the purposes specified in Part 2 of schedule 4. For this reason subsection (3) authorises these temporary closures and, unlike the unspecified closures, subsection (4)(a) requires consultation with the road works authority but not consent.

Section 11 – Discharge of water

58. Section 11 ensures that the authorised undertaker can effectively drain its works, both during construction and thereafter. Subsection (1) enables the authorised undertaker to use any available watercourse or any public sewer or drain for drainage purposes. It provides that within the limits of deviation or the limits of land to be acquired or used the authorised undertaker may lay down, take up or alter pipes or make openings into or connections with the watercourse, sewer or drain.

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18 i.e. in the case of a public road, the roads authority for the road, and in the case of any other road the road managers (New Roads and Street Works Act 1991 (c.22), s.108(i)). The road works authorities for public roads potentially affected by this section will therefore be Midlothian Council and Scottish Borders Council in their respective areas and the Scottish Executive as regards trunk roads.

19 “Premises” is used in its ordinary meaning i.e. places, landholdings (including buildings). Except where it is especially defined, as in some legislation, it is not a technical term. “Premises” is an ordinary word of the English language which takes colour and content from the context in which it is raised … it has, in my opinion, no recognised and established primary meaning.” Maunsell v Olins [1975] 1 All ER 16 at 19, HL, per Viscount Dilhorne.

20 For explanation of this expression see paragraph 71 below and footnote and paragraph 81 below.
59. Under subsection (2) water may not be discharged into a public sewer or drain without the consent of the person to whom it belongs (Scottish Water or the roads authority), but although consent may be given subject to reasonable terms and conditions, it cannot be unreasonably withheld.

60. Under subsection (3) an opening into a sewer or drain will have to be made in accordance with plans approved by the person to whom the sewer or drain belongs and subject to such supervision as the person provides, but plan approval cannot be unreasonably withheld.

61. Subsection (4) requires the authorised undertaker to take such steps as are reasonably practicable to secure that water is free from gravel, soil or other solid substances or from oil or matter in suspension. This might include installation of gullies, filter drains or settlement ponds to separate out such matter from clean water before the water is discharged into a stream, watercourse or public sewer or drain. The precise means of separating such matter from clean water will be determined during the design process in consultation with all appropriate people and bodies, including the roads authority and the Scottish Environment Protection Agency.

62. Subsection (5) provides that any disagreement between the authorised undertaker and a person who owns a public drain or sewer shall be resolved by arbitration. (Section 32 provides for the way in which any arbiter is appointed.)

63. Subsection (7) provides for the continued operation of Part IV of the New Roads and Street Works Act 1991 (c.22) in tandem with this section. Part IV contains a detailed code regulating the carrying out of works in roads by utilities and others. As a result of subsection (7), the authorised undertaker will have to comply with all the requirements of Part IV as to the giving of notice of the works, the compliance with directions given by the road works authority, the duty to co-operate with the road works authority and other undertakers, safety measures, and the provisions for the avoidance of danger, delay or obstruction.

64. In the absence of section 11, effective drainage of the works would be subject to the risk of legal action for nuisance in respect of discharges, and subject also to successful private negotiation as regards the use of public sewers or drains. The section will ensure that works authorised by the Parliament can be drained without the risk of legal action or failed private negotiations and will also ensure that drainage from these works is subject to the same pollution controls as other railway and road works.

Section 12 – Safeguarding works to buildings

65. The ground conditions along the route may give rise to a need to prevent or remedy damage to buildings caused by the construction, operation or maintenance of the authorised works. This will call for underpinning, strengthening or other works for the same purposes all

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21 A “gully” is a concrete box with a pipe and a metal grid on top: solid materials settle on the bottom of the box and water to be discharged continues along the pipe. A “filter drain” (also known as a “French drain”) is a ditch filled with stones which act to remove large solid particles from the water before the water is discharged into the ground or a drainage system. A “settlement pond” is a large pond that allows water to sit while slow settlement of particles takes place.
in the Bill called “safeguarding works”). The area where there is a possibility of such works being required is the land within 20 metres of the authorised works (or any part of them).

66. Subsection (1) accordingly enables the authorised undertaker at its own expense to carry out such safeguarding works to any building within the 20 metre distance as the authorised undertaker considers to be necessary or expedient. Safeguarding works may be carried out during construction or at any time during the five years after any part of the authorised works is first opened for public use.

67. The detailed procedure that must be adopted is set out in schedule 5. This allows for the carrying out of preliminary surveys and (except in an emergency) the service of 14 days’ notice prior to entry and carrying out the safeguarding works. A landowner may question the necessity for safeguarding works and require the issue to be referred to arbitration. Where damage is caused by safeguarding works, or where safeguarding works prove to be inadequate within five years after the opening of the relevant authorised works, the authorised undertaker must pay compensation.

Part 2 – Land

Introduction

68. Without provision in the Bill the authorised undertaker will not have any compulsory purchase powers to acquire land for construction of the railway and associated infrastructure, or to acquire rights in land e.g. for the purpose of re-routeing statutory undertakers’ apparatus. Provisions are therefore required in the Bill to confer appropriate compulsory purchase powers.

69. The principal purposes for which compulsory purchase powers are needed are for the acquisition of—

- land and rights to access land to construct and then maintain the railway;
- land for signalling and level crossing equipment;
- land for the new Shawfair Station and car park;
- land for pedestrian and vehicular access to premises;
- land for relocation of apparatus;
- land for road improvements and landscaping;
- land for riverbank protection works;
- rights to undertake ground stabilisation work;
- rights to install and maintain drainage.

The promoter has also identified land which the authorised undertaker will not need to acquire permanently but which will need to be used to allow temporary access or to be occupied temporarily during the construction period e.g. as construction sites. (In the Bill temporary occupation is referred to as “temporary possession”.)
70. In many cases (roads and housing are examples) powers are given by compulsory purchase order made by the authority that is to have the powers, or by the relevant Minister. In the present case compulsory purchase is authorised by the Bill itself: there will not be a separate compulsory purchase order. The compulsory purchase powers are in Part 2 of the Bill, either set out in full or applying the compulsory purchase and compensation law that applies to compulsory purchase orders. This suite of provisions gives the authorised undertaker powers for the compulsory purchase of land and rights over land, access and temporary possession all of which are needed in connection with the authorised works. It also deals with issues concerning compulsory purchase procedures, entry on land, the assessment of compensation and procedures relating to compensation, as well as the particular issues dealt with in specific sections of the Bill. The effect of the provisions is explained in greater detail below.

71. The land affected by the compulsory purchase powers in the Bill is the land described – that is, given a description and not merely referred to as an unused plot number – in the book of reference. On the Parliamentary plans it is all the land within the limits of deviation and within the limits of land to be acquired or used. References to the book of reference and Parliamentary plans include the separate book of reference and the plan prepared by the promoter in connection with Stow Station (see above).

72. The compulsory purchase powers conferred by the Bill will enable the authorised undertaker to acquire the land necessary to construct the works authorised by the Bill. In the absence of compulsory purchase powers this would not be possible if landowners refused to make their land available. The acquisition of land under compulsory powers (including to purchase by agreement but where compulsory purchase powers have been conferred) also operates to extinguish all rights and claims which are inconsistent with the scheme and thus might inhibit the construction of the works. These include private rights of way as well as rights to maintain plant and equipment in the land.

Other compulsory purchase legislation

73. The provisions in the Bill simply grant compulsory purchase powers. They do not include the detailed procedures required for implementation. Implementation is governed by an existing body of law relating to the detailed procedure for any compulsory purchase (whether authorised by Bill, compulsory purchase order or some other means) and the way in which compensation is determined. This law is all applied to the compulsory purchase powers conferred by the Bill. An outline of this applied legislation is given below.

Compulsory purchase procedures

74. After the Bill has been enacted, the first stage of the procedures will be the service on each landowner whose land is required of a notice (called a notice to treat) under section 17 of the Lands Clauses Consolidation (Scotland) Act 1845 (c.19) (in the Bill called “the 1845 Lands Act”). This notice will inform those with an interest in land of the intention of the authorised undertaker...
undertaker to acquire the land or the rights described in the notice. A notice to treat will create a contract between the authorised undertaker and the landowner.

75. The authorised undertaker may need to enter land to start the works in advance of completing its purchase. Before it can do so it must serve a notice (called a notice of entry) on the landowner.

76. Where a landowner is unwilling or unable to sell the authorised undertaker may acquire the land by executing notarial instrument. The same procedure applies where the authorised undertaker has made diligent efforts to find the landowner but has been unable to do so. These provisions are intended to ensure that a landowner cannot hold up the scheme unreasonably by refusing to sell and that the scheme can go ahead even if the landowner cannot be traced.

77. In practice an authority having compulsory purchase powers will often be able to buy land by agreement without having to resort to the formal statutory procedures. When this happens the Lands Clauses Acts give powers of sale to landowners (such as trustees) who otherwise might not be at liberty to sell. Although land may be purchased by agreement, the compensation rules will be the same as if the land had been purchased compulsorily.

**Compensation**

78. The money paid for lands and rights purchased compulsorily is known as compensation. The body of law governing rights to compensation where there are compulsory purchase powers and the rules for calculating the basis and amount of compensation are in part in the common law, part in the Lands Clauses Acts and partly in Part I of the Land Compensation (Scotland) Act 1963 (c.51). This detailed body of law will apply to compulsory purchase under the Bill. Disputes about compensation will be referred to the Lands Tribunal for Scotland.

79. The Bill applies the Railways Clauses Consolidation (Scotland) Act 1845 (c.33), in the Bill called “the 1845 Act”. This Act includes a detailed code relating to minerals under the railway. These provisions (as amended by the Mines (Working Facilities and Support) Act 1923 (c.20)) restrict mineral extraction where this risks damaging the railway. If these restrictions apply the authorised undertaker may be required to pay compensation to the person with the right to work the mine.

25 “Notarial instrument”: the term used in sections 74 to 76 of the 1845 Lands Act when referring to the formal document that in these circumstances will vest land in the authorised undertaker. The expression is only a description. There is no special style laid down for this type of deed.

26 The Lands Tribunal for Scotland was set up under the Lands Tribunal Act 1949 (c.42). Section 8 of the Land Compensation (Scotland) Act 1963 (c.51) makes the tribunal responsible for determining disputes about compensation for compulsory purchase. The tribunal’s composition is governed by section 2(1) and (9)(b) of the 1949 Act (substituted by section 50(1) of the Conveyancing and Feudal Reform (Scotland) Act 1970 (c.35)). It comprises a President (who must be a suitably qualified lawyer) and such number of other members as is determined by the Lord President of the Court of Session. The other members must be either suitably qualified lawyers or persons with experience in the valuation of land. The President and other members are all appointed by the Lord President (in the case of valuer members after consultation with the Royal Institution of Chartered Surveyors).
Section 13 – Authority to acquire land

80. Section 13(1)(a) is the power for the authorised undertaker to acquire land within the limits of deviation. The land that may be acquired must be within those limits, it must be described\(^{27}\) in the book of reference and it must be land that may be required for the purposes of the authorised works.

81. Section 13(1)(b) relates to the permanent outright acquisition of land within the limits of land to be acquired or used. The authorised undertaker is authorised to acquire the land within those limits if (a) it is specified in columns (1), (2) and (3) of Part 1 of schedule 6 to the Bill and (b) it may be required for the purposes specified in relation to that land in column (4). Part 1 of schedule 6 lists specific plots of land within the limits of land to be acquired or used and specifies against each entry the purpose for which the land may be acquired. An example is acquisition for the new station and car park at Shawfair. This is only some of the land within the limits of land to be acquired or used. The rest of the land within those limits is not to be acquired permanently and is dealt with in separate sections of the Bill.\(^ {28}\)

82. Subsection (2) provides that subsection (1) does not confer powers of compulsory acquisition in respect of plots nos. 31 and 32 in Scottish Borders. This reflects on agreements made between the Council and the landowner that that land will not be acquired.

83. The powers of section 13 are subject to the time limit in section 26 of the Bill. They are also subject to the restrictions on compulsory acquisition that are imposed by sections 27 and 28(4).\(^ {29}\)

Section 14 – Acquisition of subsoil or rights

84. Section 14 applies to any land that is authorised to be compulsorily acquired under section 13. Section 13 authorises outright purchase of the land i.e. including the airspace above the surface and the subsoil and bedrock beneath it. The purpose of section 14 is to ensure that when exercising those powers the authorised undertaker is able to acquire less than that total interest in cases where all that is required is the subsoil under the land or some right over the land.

85. Subsection (1) accordingly enables the authorised undertaker to acquire only the subsoil beneath land or servitudes\(^ {30}\) or other rights in relation to land.

86. By subsection (2) rights acquired under subsection (1) may be heritable or moveable\(^ {31}\) in nature. Subsection (2) also covers the case where the rights required by the authorised

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\(^{27}\) See paragraph 71 above.

\(^{28}\) See sections 14, 15 and 17.

\(^{29}\) See notes explaining those sections.

\(^{30}\) “Servitudes” are rights created for the benefit of one plot of land (known as the dominant tenement) over another plot of land (known as the servient tenement). A servitude binds the servient tenement itself and so has to be observed by every owner of the servient tenement, not just the owner who agreed to the servitude at the outset. Only certain types of rights are servitudes e.g. the right to have a building supported, a right of way, a right to lay water pipes.

\(^{31}\) Heritable rights are rights connected with land e.g. leases, or which will yield periodical profits e.g. annuities. All other rights are moveable.
undertaker do not already exist. The subsection expressly allows for the creation of new rights, which will then be compulsorily acquired by the authorised undertaker.

87. Subsection (3) provides that by exercising the powers of section 14 the authorised undertaker will not be required to acquire the land itself or any interest in the land greater than the rights acquired under the section. In the absence of this provision the authorised undertaker will be required to buy land outright, even though all that is required for the authorised works is the subsoil (e.g. because the authorised undertaker will only need to dig a culvert under the land), or some right of access to the railway.

88. This anomaly is the result of the rules in the 1845 Lands Act, which reflect land ownership and compensation rules as existing at that time. The modern compensation code is well developed so as to provide proper compensation including where the property interest acquired is less that the whole of the land. As a result, it is now unnecessary for outright purchase automatically to be the norm where a less disruptive approach is possible. Subsection (4) accordingly provides that section 90 of the 1845 Lands Act (which states that landowners cannot be required to sell part of any house or building or manufactory) does not apply to the acquisition of subsoil or rights under this section. This modernises the 19th century compulsory purchase law in a way that is standard in legislation of this sort.32

89. Subsection (5) applies the other provisions of the Lands Clauses Acts to the compulsory acquisition of new rights under section 14. In subsection (7), the modifications in the 1845 Lands Act reflect similar provision in the Land Compensation (Scotland) Act 1973 (c.56).

Section 15 – Purchase of specific new rights under land

90. In addition to section 14, in relation to the land within the limits of land to be acquired or used which is specified in columns (1), (2) and (3) of Part 2 of schedule 6, section 15 enables the authorised undertaker to acquire new rights over that land for the specific purposes mentioned in column (4). This is mainly to allow access for construction and then maintenance of the railway. Rights that have been specifically identified also include ground stabilisation and installation of closed circuit television and lighting. The powers in section 15 are subject to the time limit in section 26 of the Bill.

Section 16 – Rights in roads or public places

91. Section 16 applies to any road or public place that is included in the land that may be compulsorily acquired under section 13. In relation to such land, the section allows subsoil or airspace to be used for the works without the need for compulsory purchase.

92. Subsection (1) enables the authorised undertaker to enter and use the subsoil of or airspace over such land for the purposes of the authorised works. The subsection permits the authorised undertaker to do this without serving notice on the roads authority or other owner of the land involved.

32 See e.g. British Railways (No. 2) Order Confirmation Act 1994 (c.ii) (the BR precursor to the present scheme), section 13, City of Edinburgh (Guided Busways) Order 1998 (c.iii), section 7.
93. By subsection (2), the authorised undertaker may exercise these powers without being obliged to acquire the road or place or any servitude or right in relation to it.

94. Subsection (3) is a technical provision to ensure that anything done under the section will automatically have effect even if it is not registered. The subsection provides that the powers in subsection (1) are taken to constitute a real right, and to be an overriding interest. An overriding interest takes effect as against the registered owner of land even though it is not registered.

95. The section enables the public works authorised by the Bill to occupy the public space under and over roads and public places on the same basis as the usual public use of those places, that is without the authorised undertaker having any owning interest. The section recognises that there may also be private interests in this land (for example, the subsoil under roads is often owned by the owners of land adjoining the road). Subsection (4) accordingly provides for the payment of compensation to any private owner of land to which the section applies who suffers loss as the result of the use of his or her land under subsection (1).

96. Subsection (5) provides that subsection (2) shall not apply where subsoil to which the section applies is occupied by an underground subway or building or by an underground part of an adjoining building. This recognises that in these cases the authorised undertaker will be occupying an integral part of a larger structure. Where what is occupied is a part of a structure the authorised undertaker ought not to be able to avoid the obligation to acquire the relevant land or obtain appropriate rights. Accordingly, subsection (5) obliges the authorised undertaker to acquire the relevant land, or an appropriate servitude or right, before using it for the authorised works.

Section 17 – Temporary use of land for construction of works

97. Where the authorised undertaker only needs to occupy land for a temporary period, purchase of the land cannot be justified (see paragraph 69 above). Section 17 allows for the authorised undertaker to take temporary possession of specified land for the period required for specific authorised works. Provision of this sort is standard in legislation authorising works.

98. By subsection (1) the authorised undertaker may take temporary possession of the land specified in columns (1), (2) and (3) of schedule 7 for the various purposes mentioned in column (4) of that schedule. (These are purposes such as the provision of construction compounds, working spaces and access.) On exercising these powers the authorised undertaker may remove buildings and vegetation and construct temporary works (including means of access) and temporary buildings on the land.

99. Subsection (2) requires the authorised undertaker to serve 28 days’ prior notice of entry on the owners and occupiers of the land.

100. Subsection (3) provides that, except with the landowner’s agreement, the authorised undertaker may not remain in temporary possession for more than one year after the date of

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33 See Land Registration (Scotland) Act 1979 (c.33) s.28(1), definition of “overriding interest” paragraph (h).
34 Land Registration (Scotland) Act 1979 (c.33) s.3(1)(a).
completion of the works for the purposes of which entry was made. The relevant work is specified, in relation to each plot, in column (5) of schedule 7. The authorised undertaker is allowed to remain in possession for this further year so that he can do all the work required during the 12 month maintenance period immediately after construction has been completed. It is normal in construction contracts for contractors to be liable to maintain works for a given period (usually 12 months) after the works have been completed. This makes the contractor responsible to rectify any defects that come to light while the works are ‘bedding in’.

101. Subsection (4) provides that before giving up possession the authorised undertaker must remove temporary buildings and restore the land to the reasonable satisfaction of its owners. The authorised undertaker is not required to replace buildings that have been removed on the basis that the character of the land has fundamentally changed as the result of its temporary use.35

102. Subsection (5) requires the authorised undertaker to pay the owners and occupiers of land of which temporary possession has been taken compensation for any loss they suffer as the result of the temporary possession.

103. By subsection (6) the amount of any compensation is to be determined in case of dispute under the Land Compensation (Scotland) Act 1963 (c.51). The compensation payable under section 17 is in respect of loss or damage arising from the temporary possession. The same landowner might be entitled to compensation in respect of the same land arising from the construction of the authorised works. Accordingly, subsection (7) provides that any compensation payable under this section is additional to any other compensation that may be payable in respect of the land.

104. Subsection (8) provides that the powers of compulsory acquisition do not apply to land which is used temporarily under this section. This, however, does not preclude the authorised undertaker from acquiring subsoil, new rights or land within the limits of land to be acquired or used which is specifically identified in schedule 6.

Section 18 – Disregard of certain interests and improvements

105. Under the rules applicable to the assessment of compensation land is valued at its market value. The purpose of section 18 is to ensure that landowners do not act to enhance the value of their land solely for the purpose of obtaining compensation or increased compensation. Subsection (1) accordingly provides that when assessing compensation payable on the acquisition of the land the Lands Tribunal for Scotland shall not take into account the creation of any interest in land, the erection of buildings or the carrying out of works, improvements or alterations which will increase market value.

35 This is standard in provisions of this sort – see e.g. City of Edinburgh (Guided Busways) Order Confirmation Act 1998 (c.iii), s.8(4)(b). It reflects the legal rule that where land that has been compulsorily acquired outright for a particular authorised purpose is no longer needed for that purpose and is to be sold, the original owner has no right to be given first refusal if the character of the land has fundamentally changed as the result of its use for the authorised purpose.
Section 19 – Set-off of betterment against compensation

106. Development may enhance the value of adjoining or nearby land. Section 19 accordingly provides for compensation to be reduced by an amount equivalent to any enhanced value of other contiguous\(^{36}\) or adjacent\(^{37}\) land of the person seeking the compensation.

Section 20 – No double recovery

107. Section 20 ensures that those entitled to compensation under the Bill and any other enactment, contract or rule of law are not compensated twice in respect of the same item of compensation.

Section 21 – Acquisition of part of certain properties

108. Section 21 lays down special procedures in place of section 90 of the 1845 Lands Act, which would otherwise be applicable where an acquiring authority wishes to acquire part only of certain types of property required for the works. Section 90 provides that the owner of a house, building or manufactory cannot be compelled to sell only part of his or her property if he or she is willing to sell the whole. This would enable a landowner to insist on the acquisition of the whole of his or her property, however large, even where the purchase of the part proposed for compulsory acquisition is insignificant in relation to the whole. The replacement procedures allow the authorised undertaker to acquire only part of a property where this can be done without material detriment\(^{38}\) to the rest of the property and, in the case of a house with a park or garden, without also seriously affecting the amenity or convenience of the house.\(^{39}\) These replacement provisions reflect the modernised state of the law in England and Wales (under section 8 of the Compulsory Purchase Act 1965 (c.56)). Their application in legislation of this sort is standard.\(^{40}\)

109. Subsection (1) applies this section to any case where a notice to treat\(^{41}\) relates to land forming part of a house, building or factory or to land consisting of a house with a park or garden. For the section to apply a copy of the section must also be served with the notice to treat.

110. Subsection (2) provides that where a notice to treat is served under subsection (1), the owner may serve a counter-notice on the authorised undertaker within 21 days, objecting to the sale of part of the land and stating that the owner is willing to sell the whole of the land.

111. Subsection (3) provides that if the owner does not serve a counter-notice within 21 days, he or she is obliged to sell the land the authorised undertaker wishes to acquire.

\(^{36}\) “contiguous”: touching or immediately next to, sharing a common boundary with [other land].

\(^{37}\) “adjacent” includes land that is not contiguous, but which is close to or near other land.

\(^{38}\) “Material detriment” to the remainder of the property: the test is whether the remainder, after the part is compulsorily acquired, is less useful or less valuable in some significant degree compared with the property as existing before the acquisition took place (McMillan v Strathclyde Regional Council 1984 S.L.T. Lands Tr. (Scot)) 25.

\(^{39}\) “Seriously affecting the amenity and convenience of the house”: the test is whether after the part has been compulsorily acquired the house has less amenity and less convenience in some significant degree compared with the property as existing before the acquisition took place (see McMillan v Strathclyde Regional Council).

\(^{40}\) See e.g. City of Edinburgh (Guided Busways) Order Confirmation Act 1998 (c.iii), s.6.

\(^{41}\) For an explanation of this expression see paragraph 74 above.
112. Under subsection (4), if the authorised undertaker does not agree to acquire the whole of the land the issue is referred to the Lands Tribunal for Scotland. The Tribunal is required to determine whether or not part of the land can be taken without material detriment to the remainder or (in the case of a house with a park or garden) without seriously affecting the amenity or convenience of the house.

113. Under subsection (5) if the Tribunal decides that the part subject to the notice to treat can be taken without material detriment or, in the case of a house with a park or garden, without seriously affecting the amenity or convenience of the house, the owner is obliged to sell the land the authorised undertaker wishes to acquire.

114. Under subsection (6) the Tribunal may make a similar decision in relation to part of the land subject to the notice to treat. In that case the notice is deemed to apply only to that part, which can then be acquired.

115. Subsection (7) provides for the case where the Tribunal finds that there is material detriment or serious effect on amenity or convenience, but limited to part of the land subject to the counter-notice. The notice to treat is then deemed to apply to both the land referred to in that original notice and, in addition, the land affected by the material detriment.

116. Under subsection (8), where the authorised undertaker agrees to acquire the land subject to a counter-notice, or the Tribunal determines that there will be material detriment or an adverse effect on amenity or convenience, and also determines that any material detriment extends to all the land subject to the counter-notice, the notice to treat is deemed to apply to all the land included in the counter-notice.

117. Under subsection (7) or (8) a notice to treat can be deemed to include other land whether or not that land is subject to compulsory acquisition under the Bill.

118. Subsection (9) covers the situation where the Tribunal determines that the authorised undertaker should acquire either more or less land than was included in the original notice. Either of these circumstances could have serious implications for the design or operation of the authorised works. The authorised undertaker is allowed 6 weeks within which to withdraw the notice to treat rather than proceed with the acquisition of the land determined by the Lands Tribunal. If the authorised undertaker withdraws the notice to treat it is obliged to pay the owner compensation for any expense caused by the giving and withdrawal of the notice to treat. This enables the authorised undertaker to take any available alternative options. This might for example involve re-designing works or methods of construction so that none of the land is required. Where the Lands Tribunal determination can exclude land that is essential to the scheme, the authorised undertaker might re-start the process so as to acquire the whole of the property in question.

119. By subsection (10), where this section results in an owner being required to sell only part of—

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42 Where material detriment extends to only part of the land subject to the counter-notice subsection (7) applies.
the authorised undertaker is not required to buy the whole property. However, the authorised undertaker must in addition to paying compensation for the value of the interest acquired, pay compensation for any loss resulting from severance of the land.\(^\text{43}\)

\textbf{Section 22 – Extinction or suspension of private rights of way}

120. The Bill provides for necessary public and private means of access.\(^\text{44}\) The authorised works cannot accommodate further rights of way over the land that may be compulsorily acquired under the Bill. Section 22 accordingly extinguishes\(^\text{45}\) private rights of way over this land or, where the land is subject only to temporary possession, suspends the rights of way while the authorised undertaker remains on the land.

121. Subsection (1) provides for the extinguishment of private rights of way over land which may be compulsorily acquired under the Act. It applies where the land is actually acquired by the authorised undertaker, both where the purchase has been by using the compulsory purchase procedures and where the authorised undertaker and the landowner have instead agreed terms without recourse to the formal procedures. The private rights of way will be extinguished as from the date when the land is acquired. Where the authorised undertaker enters the land and takes possession before completion under section 24, the extinguishment or suspension takes place instead as from the date on which possession is taken.

122. Subsection (2) provides for the suspension of private rights of way over land of which the authorised undertaker takes temporary possession. The suspension continues while the authorised undertaker is in temporary possession of the land. This suspension is subject to the provisions of subsection (7) (see below).

123. Under subsection (3) a person who suffers loss as a result of the extinguishment or suspension is entitled to compensation. Any dispute as to the amount is determined by the Lands Tribunal for Scotland under the Land Compensation (Scotland) Act 1963 (c.51).

124. Subsection (4) provides that the section does not apply to rights of way of statutory undertakers to which section 224 or 225 of the Town and Country Planning (Scotland) Act 1997 (c.8) apply. (The position of statutory and utility undertakers is separately dealt with in section 31 and schedule 8.)

125. Subsection (5) allows for the extinction or suspension of private rights of way under the section to be subject to agreement between the authorised undertaker and the person entitled to the right of way. For example, the authorised undertaker might be able to agree to a right of way

\(^{43}\) i.e. diminution in value of the remaining land due to the loss of the compulsorily acquired land.

\(^{44}\) See Works Nos. 1B, 1D, 1E, 1F, 1G, 1H, 1K, 2A, 2B, 2C, 2D, 2E, 2F, 3A, 3B, 3D, 5B, 5C, 5D, 5E, 5F, 7B, 10A, 10C, 10F, 10G, 10H, 10J and 10K and the private railway crossings authorised by section 8 and schedule 3.

\(^{45}\) i.e. terminates the rights, so that they cease to exist.
This document relates to the Waverley Railway (Scotland) Bill as amended at Consideration Stage (SP Bill 8A)

continuing between the date of acquisition and the commencement of construction works, or to a diversion of the route used.

126. By subsection (6) the authorised undertaker may determine that particular rights of way can be exercised compatibly with the use of the land under the Act. In such cases the right will continue. A determination under this subsection must be made before the land is acquired or (if sooner) before entry on the land.

127. Subsection (7) is a similar provision relating to rights of way that may be suspended under subsection (2). Where the statutory undertaker determines that the right of way can be exercised compatibly with the temporary use of the land under the Act, the rights of way are not suspended. A determination under this subsection may be that the right of way may be used, but only to a limited extent. In that case the suspension will relate to the right of way only so far as the right is incompatible with the temporary use.

128. Subsection (8) provides for notice of a determination under section 22 to be posted on the land to which the determination relates.

129. The object of subsections (5) to (7) is to ensure that the interference with private rights which results from their extinction or suspension under this section is kept to the minimum necessary to accommodate the construction and maintenance of the authorised works.

130. The purpose of section 22 is to ensure there are no incompatible rights of way over land on which the authorised undertaker is to construct works. This protection is unnecessary on land where the authorised undertaker is only acquiring rights. Accordingly, under subsection (9) the automatic extinguishment effected by subsection (1) or (2) will not apply on land where the authorised undertaker is only acquiring rights.

Section 23 – Power to enter land for survey, etc.

131. The Lands Clauses Acts do not allow adequately for the carrying out of survey and similar work before acquiring land. Surveys and the other activities described in subsection (1) are a necessary part of the detailed design and preparatory work that is required in advance of starting construction. It is impracticable for survey work to await completion of formal purchase procedures, which can include Lands Tribunal hearings. This is recognised in section 83 of the 1845 Lands Act which allows entry before purchase for survey and a limited number of other purposes (drilling and soil samples). Section 23 of the Bill extends these purposes to include what is necessary for a modern construction project. It is a standard provision in modern legislation of this sort.

132. Subsection (1) enables the authorised undertaker to enter any land within the limits of deviation or the limits of land to be acquired or used for the purposes of carrying out surveys and investigations (including archaeological investigations) and to protect or remove flora or fauna.

46 See section 15 and Part 2 of schedule 6.
47 See e.g. British Railways (No. 2) Order Confirmation Act 1994 (c.ii), s.21, City of Edinburgh (Guided Busways) Order Confirmation Act 1998 (c.iii), ss. 12 and 13.
133. Subsection (2) requires the authorised undertaker to give, on the first occasion seven, and thereafter three days’ notice to the owner and occupier.

134. Subsection (3) requires a person entering under these powers to produce written evidence of authority, and authorises such a person to enter with vehicles and equipment.

135. By subsection (4) no trial holes may be made in a carriageway or footway without the consent of the road works authority.

136. Subsection (5) requires the authorised undertaker to pay compensation for damage caused to owners and occupiers.

Section 24 – Further powers of entry

137. Section 24 is also a standard provision. The 1845 Lands Act permits entry on land under compulsory purchase powers only after full payment has been made (1845 Lands Act, section 83) or after the body with the compulsory purchase powers has deposited in a bank as security either the compensation claimed by the landowner or a sum representing the value of the land as valued by a valuer appointed by the sheriff (section 84). Sections 85 and 86 require the money to remain in the bank as a security to be distributed as directed by the sheriff. Section 87 imposes financial penalties on entering land without complying with the procedures, and in the event of a landowner refusing entry even after full payment has been made, the only recourse is to apply to the sheriff for a possession order. The procedures are cumbersome and time consuming. In England and Wales they have been simplified and modernised so as to allow entry after the landowner has been given notice. The purpose of section 24 of the Bill is to allow this modern procedure to apply.

138. Where a notice to treat has been served in respect of any land subject to compulsory purchase subsection (1) enables the authorised undertaker to enter the land and take possession of it.

139. Under subsection (2), at least three months’ prior notice of entry must be given to the owner and the occupier of the land.

140. Subsection (3) enables the authorised undertaker to exercise these powers without complying with sections 83 to 89 of the 1845 Lands Act, which prevent taking entry in this way.

141. Where the authorised undertaker enters land under section 24, subsection (4) provides that the authorised undertaker must pay compensation as though sections 83 to 89 had been complied with. Section 24 does not therefore alter a landowner’s right to compensation.

142. One such right is the entitlement to an advance payment of compensation if entry is taken under subsection (1). Under the 1845 Lands Act procedure this is required by section 84, which

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48 See e.g. British Railways (No. 2) Order Confirmation Act 1994 (c.ii), s.22, City of Edinburgh (Guided Busways) Order Confirmation Act 1998 (c.iii), s. 14.
49 See Compulsory Purchase Act 1965 (c.56), s.11.
is disapplied by the Bill. The current statutory equivalent to section 84 is section 48 of the Land Compensation (Scotland) Act 1973 (c.56). Subsection (5) expressly provides that section 24 does not affect the operation of section 48.

143. The object of section is to ensure that the works are not delayed by negotiations with landowners about the compensation to which they are entitled. As landowners are to be obliged to give up their land in any event, the amount of compensation is a completely separate issue from possession of the land.

Section 25 – Persons under disability may grant servitudes, etc.

144. Section 25 applies to persons such as trustees who are only able to convey the land because they are empowered to do so by the 1845 Lands Act. People who are legally disabled from doing something (in this case selling land) are described as being under a disability. Section 7 of the 1845 Lands Act enables such people to convey existing rights, but not to create new rights. Provision is accordingly required to ensure that it will always be possible for the authorised undertaker to acquire new rights under section 15 of the Bill.

145. Subsection (1) accordingly allows persons under a disability to grant to the authorised undertaker servitudes, rights or privileges over their land. If they remained unable to do this such people in this position could only sell the whole of the land. The authorised undertaker could be left with land it did not need and an increased compensation liability.

146. By subsection (2), rights cannot be granted in relation to water in which others have an interest. 51

147. Subsection (3) ensures that all the associated provisions of the Lands Clauses Acts relating to the conveyancing treatment of land and feu duties or ground annuals relating to land are also applied to the grant of new rights under this section.

Section 25A – Parliamentary plans and book of reference: adjustments agreed with landowners and correction of errors

148. Section 25A provides a procedure to enable corrections to be made in the parliamentary plans or the book of reference in certain circumstances.

149. Under subsection (1), the procedure may be triggered where the authorised undertaker has entered into a binding obligation (referred to as “the obligation”) not to acquire land and either the authorised undertaker or the landowner wishes that obligation to be reflected on the face of either or both the Parliamentary plans or the book of reference. Either the authorised

50 “Privileges”: rights that are of benefit to the person entitled to exercise them, for example fishing rights.

51 Where several landowners have interests in the same water, the law treats them as sharing a common interest: one of them cannot therefore do something that affects the others. Subsection (2) is needed to prevent section 25 being used to override these general property rights.

52 The references to land and feu duties and ground annuals are simply to describe which are the relevant sections of the 1845 Lands Act. They are feudal duties on land which have been superseded by the Land Tenure Reform (Scotland) Act 1974 (c.38).
undertaker or the owner may apply to the sheriff after giving notice as required by subsection (3).

150. Subsection (2) provides for the procedure also to be triggered in relation to any inaccuracy in the Parliamentary, plans or the book of reference regarding the description of any land or the ownership or occupation of any land. The authorised undertaker may apply to the sheriff to have the errors corrected, giving the notice required by subsection (3).

151. Subsection (3) requires the person making the application to give 10 days’ prior notice. The authorised undertaker must notify the owner, lessee and occupier of the land. An owner must notify the authorised undertaker and any lessee or occupier of the land.

152. Subsection (4) enables the recipient of such a notice to give a counter-notice disputing that the amendment proposed accurately reflects the obligation (where the application is under subsection (1)) or disputing that there is an inaccuracy which may be amended (in the case of an application under subsection (2)).

153. Subsection (5) provides that where an application has been made and there has not been a counter-notice, if the sheriff is satisfied that the proposed amendment accurately reflects the obligation, or that the inaccuracy arose from a mistake, the sheriff must certify that fact.

154. By subsection (6), a certificate correcting an inaccuracy under subsection (2) must identify the misstatement or wrong description that is to be corrected.

155. Subsection (7) requires that if the application has been the subject of a counter-notice the sheriff must hold a hearing before making any decision.

156. Under subsection (8) the certificate by the sheriff is deposited with the Clerk of the Parliament.

157. Subsection (9) provides that following such deposit the document requiring correction is deemed to be corrected according to the certificate.

158. Subsection (10) obliges the Clerk to keep the certificate with the maps, plans and sections and book of reference to which it relates.

159. Subsection (11) provides that an application under section 25A can only be made in respect of land identified in the book of reference and on the Parliamentary plans.

Section 26 – Period for compulsory acquisition of land

160. Subsection (1) provides that the compulsory purchase powers of the Act will expire five years from the date on which the Act comes into force (i.e. five years after the date on which it receives Royal Assent). Subsection (2) provides that for the purposes of this deadline the powers are deemed to have been exercised if notice to treat has been served before that date.
161. A time limit on exercising the compulsory purchase powers is needed so that landowners are not prejudiced. Without a time limit landowners would be likely to find that for so long as land was at risk of compulsory purchase it would be difficult if not impossible to sell, or its value would be reduced. Section 39 provides for the situation where a landowner needs to sell land that is affected in this way.

162. It is normal for legislation authorising the construction of works to impose time limits on the exercise of compulsory purchase powers.53

Section 27 – Acquisition of land for Work No. 1B

163. In consequence of the permanent stopping up of parts of Newton Church Road, Longthorn and the unnamed road forming the western continuation of Newton Church Road (see Part 1 of schedule 4 and sheet no. 3 of the Parliamentary plans), access will be lost from those roads to the land lying to the north of them, the former Monkton Hall colliery. At present this land is largely unused and the only premises that make use of this access route are believed to be the CPL distribution depot which is shown on sheet no. 3 of the Parliamentary plans.

164. All this land, including the site of the depot, is proposed for redevelopment. When the redevelopment takes places the developer will provide its own accesses for the new development. For the moment, however, the Bill must provide for what currently exists on the ground. Accordingly, Work No. 1B is a replacement private access road to serve the depot.

165. The prospective developer has expressed concern that Work No. 1B could interfere with the redevelopment proposals. The Council and the developer are in agreement that there will be no purpose in constructing Work No. 1B or acquiring the land for it if a new access road serving the depot has already been constructed. Section 27 therefore ensures that the powers cannot be exercised if the new access road is in place by the time the railway development is under way.

Section 28 – Acquisition of land for Work Nos. 1C and 1E

166. Work No. 1C is a realignment of the two roads mentioned in paragraph 163 above. It includes a bridge over the railway (Work No. 1). Work No. 1E is a footbridge over the railway to provide access to the new station at Shawfair. Both works will be integrated into the proposed redeveloped Shawfair town centre and when that development is complete they will be surrounded by buildings. To construct the bridges after the buildings would be prohibitively expensive and disruptive. It is therefore essential that the bridge infrastructure should be in place before the construction of the adjoining parts of the Shawfair development.

167. The bridge works affect four plots of land that are particularly important for the Shawfair development. Plots Nos. 46 and 46a (defined in subsection (5) as “the development land”) are at the foot of the town centre end of the footbridge (Work No. 1E) and will be integrated into that development. These plots are to be permanently acquired for the footbridge. Plots Nos. 43 and 43a are required temporarily as working space for works including Works Nos. 1C and 1E. The Shawfair developer has expressed concern that the development land need not be altogether lost.

53 See e.g. British Railways (No.2) Order Confirmation Act 1994 (c.ii), s.15; City of Edinburgh (Guided Busways) Order 1998 (c.iii), s.20.
to the Shawfair development, and that the construction of the bridge works ought not to delay the Shawfair developer’s use of the working space. Section 28 addresses both issues.

168. Subsection (1) requires that, as soon as may be after Works Nos. 1C and 1E have been opened for public use, the authorised undertaker must transfer to the owner of the land abutting the northern boundary of the development land i.e. the Shawfair developer, so much of the development land as is not permanently required for the purpose of Works Nos. 1C and 1E. The extent of the land that the authorised undertaker needs permanently will be reduced by the ability in subsection (2) to transfer the land subject to servitudes or other rights for the authorised undertaker for the purpose of the maintenance or operation of any of the authorised works. The effect of subsections (1) and (2) is accordingly to minimise the permanent acquisition of the development land and allow for its shared use with the Shawfair development.

169. Subsections (3) and (4) address the possibility that the Shawfair development may move ahead of the railway. If the Shawfair developer is ready to proceed it may itself construct the two bridges so that it can construct its own development without having to wait for the railway works to be constructed first. In that event the authorised undertaker will not need to take temporary possession of plots nos. 43 and 43a as working space for Works Nos. 1C and 1E (although it may still need those plots in connection with Works Nos. 1 and 1D).

170. Subsection (3) therefore provides that if before implementing the compulsory purchase powers (serving notice to treat or making a vesting declaration) it finds that there are existing bridges that meet its requirements for the bridge comprised in Work No. 1C and for Work No. 1E, subsection (4) will operate to prevent the compulsory acquisition or use of plots nos. 43 and 43a for the purposes of those two works.

Part 3 – Miscellaneous and general

Section 29 – Power to fell, etc. trees or shrubs

171. Subsection (1) enables the authorised undertaker to fell, lop or cut back the roots of any tree or shrub that is near either any part of the authorised work or any land proposed to be used for the authorised works. The power is exercisable if the authorised undertaker reasonably believes it to be necessary in order to prevent the tree or shrub—

- from obstructing or interfering with the maintenance or operation of the authorised works or associated apparatus; or
- from constituting a danger to those using the authorised works.

The powers are exercisable in relation to any tree or shrub that comes within the tests in subsection (1), whether inside or outside the limits of deviation and the limits of land to be acquired or used.

172. Subsection (2) requires that the authorised undertaker is not to damage a tree or shrub unnecessarily.

173. Subsection (3) requires the authorised undertaker to pay compensation to any person who suffers loss or damage arising from the exercise of this section.
174. Subsection (4) disapplies any tree preservation order or prohibition on interfering with trees in conservation areas which might otherwise apply.

Section 30 – Powers of disposal, agreements for operation, etc.

175. Section 30 is required because, although the Council is the promoter of the Bill, there has never been any intention for the Council to operate the railway. The expectation is that the powers conferred by the Bill or the completed railway will be transferred to Network Rail as the national rail infrastructure operator. Section 30 therefore gives effect to the intention that the Council might not be more than the procurer of the powers. In the absence of section 30 the powers in the Bill would not be transferable.

176. Subsection (1) states expressly that the authorised undertaker is legally competent to enter into agreements making the sort of provision described in subsection (2).

177. Subsection (2) lists, as matters that may be provided for in agreements, transfer of the authorised undertaker’s functions under the Bill, disposal of all or part of the authorised undertaker’s undertaking (i.e. the authorised works and any land held with them) and the creation of any heritable security or charge secured on that undertaking. In the absence of this provision, the general law would or might not enable valid agreements to be made regarding these matters.

178. Subsection (3) deals with restrictions, liabilities or obligations to which the authorised undertaker is subject, either under the Bill or under any undertaking or commitment given by the Council or any authorised undertaker. The subsection captures undertakings and commitments given before or after the passing of the Bill. Such restrictions, liabilities and obligations are equally binding on any authorised undertaker.

179. Subsection (4) requires that where an agreement transfers any of the authorised undertaker’s statutory functions, the authorised undertaker making the transfer must notify the Scottish Ministers. Notice must be given within 21 days of the agreement being completed.

180. Under subsection (5) failure to give the notice required by subsection (4) is a criminal offence attracting a maximum level 3 penalty (currently £1,000).

181. The principal object of section 30 is to assist in the procurement of the authorised works. Ultimately, it is the expectation that the railway works will vest in, and be operated by, Network Rail as an integral part of the national rail network. At the point at which the railway works are transferred to Network Rail, that object will have been achieved and section 30 will have served its purpose. Subsection (6) provides that once any agreement vests any of the authorised works in Network Rail or transfers any power to Network Rail, no further agreement can be made under this section in relation to those works or powers.

Section 31 – Statutory undertakers, etc.

182. Section 31 introduces schedule 8 to the Bill. This schedule is concerned with the rights of the providers of water, gas, electricity, sewerage and telecommunications services to maintain
their supplies through apparatus that will or may be affected by the Bill. These providers (frequently described in legislation as “undertakers”) have historically been legislated for as “statutory undertakers”. In particular, “statutory undertakers” is the expression used in sections 224 to 227 of the Town and Country Planning (Scotland) Act 1997 (c.8) (in the Bill called “the 1997 Act”). Sections 224 to 227 provide a statutory code that applies in certain cases where the use of land for planning purposes makes it necessary to extinguish undertakers’ rights to maintain apparatus.

183. It is known that there is undertakers’ apparatus in some of the land required for the authorised works. The Bill when enacted will therefore give rise to the situation for which sections 224 to 227 are designed. Schedule 8 accordingly applies the code in sections 224 to 227 to the authorised works.

184. Paragraph 1 of schedule 8 provides for those sections to apply. Paragraph 2 applies all other provisions of the 1997 Act that are needed for the operation of sections 224 to 227, including the provisions regarding compensation.

185. Paragraph 4 of schedule 8 allows affected undertakers to recover compensation from the authorised undertaker in respect of expenditure incurred in moving apparatus.

186. Sewers are not susceptible to being moved in the same way as other undertakers’ apparatus.\(^{54}\) As a result, paragraph 5 of schedule 8 provides that where a public sewer is moved, compensation is payable to the persons who will have to make different drainage arrangements, namely the owner or occupier of premises drained by the sewer, or the owner of a private sewer that connected with the public sewer that has been moved.

187. Part IV of the New Roads and Street Works Act 1991 (c.22) (in the Bill called “the 1991 Act”) is a separate code governing works in public roads. It covers works involving the removal or laying of undertakers’ apparatus in roads, and it applies automatically. Accordingly, paragraph 6 of schedule 8 provides that this schedule will not apply to cases that are governed by Part IV.

188. Schedule 8 is well preceded. Legislation authorising infrastructure provides protection for undertakers’ apparatus in one of two ways. Either it applies the statutory code in the 1997 Act or it sets out at length the arrangements between the promoter and each of the affected undertakers. The latter course would call for the Bill to include detailed provisions concerning the approval or agreement of detailed works, the methods of carrying them out and the provision of alternative undertakers’ apparatus. These are all matters that can be agreed privately between the parties and recorded in formal agreements. Schedule 8 seeks to put in place a baseline framework that will ensure that the authorised undertaker is obliged to make the necessary arrangements, and which will operate in the absence of any separate private agreement.

\(^{54}\) This is because sewers operate by gravity so that, unlike gas pipes, water pipes or electricity cables, their levels are essential to their functioning properly. Moving a sewer calls for more than finding a new horizontal route. It also involves finding a route that allows sufficient fall for the flow in the sewer to be maintained.
Section 32 – Arbitration

189. Section 32 lays down the procedures applicable in cases where the Act provides for disputes (other than those to which the Lands Clauses Acts apply\textsuperscript{55}) to be settled by arbitration. Under subsection (1), the arbiter is to be agreed by the parties to the dispute or, failing agreement, by the President of the Institution of Civil Engineers. By subsection (2) the arbiter is entitled to obtain a ruling on points of law from the Court of Session. This is standard practice for resolving such disputes.

190. Subsection (3) provides that section 108 of the Housing Grants, Construction and Regeneration Act 1996 (c. 53) is not to apply to disputes under the Bill. Section 108 gives parties to construction contracts the right to settle disputes by way of a dispute resolution process called adjudication. The definition of construction contract in the 1996 Act is wide enough to be capable of encompassing certain disputes to which section 32 will apply.

191. Subsection (4) provides that the disapplication of section 108 does not apply to construction or funding contracts.

Section 33 – Service of notices, etc.

192. Section 33 lays down detailed procedures for the services of notices under the Act. The section allows notices to be served in person, by hand to someone’s address or by post. It also specifies how notices and letters may be properly addressed.

Section 34 – Listed buildings and conservation areas

193. Section 34 introduces schedule 9. The schedule makes special provisions as to the listed buildings which will be affected by the railway works.

194. As explained in paragraph 10 above, the Bill will grant planning permission for the authorised works. It is appropriate that all planning issues should be considered at the same time, but the way in which the legislation is framed means that, but for section 34 and schedule 9, the authorised undertaker would have to obtain listed building consent and conservation area consent separately from the Bill. This section and schedule 9 accordingly disapply this separate statutory requirement so that the Bill will, effectively, also grant these consents.

195. Paragraph 1(1) of the schedule specifies the provisions in the Planning (Listed Buildings and Conservation Areas) (Scotland) Act 1997 (c.9) (“the Listed Buildings Act”) and the actions that may be taken under the Act which are not to apply. They are—

- section 6 (the requirement for listed building consent);
- any notice under section 34(1) (in the Listed Buildings Act called an enforcement notice) by which the local planning authority may require actions in relation to any of the buildings specified in the table which would render ineffective, or substantially ineffective, the works authorised by the Bill;

\textsuperscript{55} Disputes under these Acts are referred to the Lands Tribunal for Scotland (see above).
in relation to an enforcement notice to which paragraph 1(1)(b) above applies, the
power under section 38(1) of the Listed Buildings Act for the local planning
authority to do the things required by an enforcement notice if the recipient of the
notice fails to comply; and
• the ability under section 49 for the local planning authority to carry out urgent
preservation works if those works would render ineffective, or substantially
ineffective, the works authorised by the Bill.

196. The purpose of disapplying these statutory controls in relation to the buildings specified
in the table is only to allow the construction of the authorised works. Accordingly, paragraph
1(2) of schedule 9 makes clear that the only works that are not affected by the controls
mentioned in paragraph 1(1) are the works described in column (4) of the table at the end of
paragraph 1.

197. The purpose of schedule 9 is to give listed building consent in all cases where it is
needed. The buildings mentioned in the table are the only buildings that were listed as at 21
March 2003. Paragraph 1(3) ensures that if any further buildings are listed the schedule will
apply to them, as well.

198. Paragraph 1(4) makes similar provision as regards conservation area consent. It
disappplies section 66 of the Listed Buildings Act (requirement for conservation area consent) in
relation to the things specified in column (4) of the table.

199. Paragraph 1(5) of schedule 9 makes clear that objects or structures fixed to or within the
curtilage of a building (for example lamp brackets or door furniture) are to be treated as a part of
the building for the purpose of this schedule.56

200. The listed buildings and the works to which the schedule will apply are described in the
table at the end of paragraph 1. They are all bridges along the route which require works ranging
from minor repairs to total or partial demolition and replacement. These works are needed in
order to make the bridges fit for purpose (including compliant with current safety standards as
part of the new railway).

201. Paragraph 2 of schedule 9 disappplies section 53 of the Listed Buildings Act in relation to
the works authorised by Part 1 of the Bill. Section 53(1) of the Listed Buildings Act makes it a
criminal offence to do or permit anything which causes or is likely to result in damage to a listed
building. The works described in the table would amount to damage giving rise to an offence.
Section 53(3) provides that subsection (1) does not apply (which means that the offence is not
committed) to the execution of works authorised by a planning permission or for which listed
building consent has been given. As the Bill amounts to an effective grant of planning
permission, and the effect of section 34 of and schedule 9 to the Bill is effectively to grant listed
building consent for the specified works, section 53 ought not to apply to the works.

56 The Listed Buildings Act provides that these things are deemed to be part of a listed building, but only for the
purposes of that Act (Listed Buildings Act, s.1(4)).
202. Paragraph 3 of the schedule applies the definitions of “building”\(^{57}\) and “listed building”\(^{58}\) in the Listed Buildings Act.

203. Paragraph 1 of schedule 9 refers to the Planning (Listed Buildings and Conservation Areas) (Scotland) Act 1997 (c.9) (in the schedule called “the Listed Buildings Act”). This is the Act that requires special consent (called listed building consent) for works and operations affecting buildings that are listed under the Act as being of special architectural or historic importance and conservation area consent for the demolition or alteration of the external appearance of buildings in areas that are listed under the Act as being of special architectural or historic importance.

204. In the absence of this section it would be necessary to obtain separate listed building consent and conservation area consent in respect of works affecting the specific listed buildings or certain works in the conservation areas in which they are situated. This section enables listed building issues to be dealt with at the same time as the rest of the scheme.

Section 35 – Saving for Town and Country Planning
205. Subsection (1) provides for planning legislation to apply in relation to the works authorised by the Bill.

206. As explained in paragraph 10 above, development authorised by the Bill is permitted development. Subsection (2) lays down an eight-year limit in respect of these permitted development rights. By section (3) the time limit does not apply to the alteration, maintenance or repair of the authorised works, or the substitution for those works of new works. The Bill therefore operates to grant planning permission for the works subject to a condition that development must be begun within eight years.

Section 36 – Interpretation of sections 37 and 38
207. Section 36 is the first of three sections dealing with the discrete topic of planning agreements, that is agreements between developers and local planning authorities entered into under section 75 of the Town and Country Planning (Scotland) Act 1997 (c.8) (in the Bill called “the 1997 Act”).

208. Subsection (1) contains specific definitions. A planning agreement relates to particular developments of specified land. For the purposes of sections 37 and 38 subsection (1) has a definition of a “relevant planning agreement”. This is a planning agreement entered into in connection with land that is specifically benefited by the works authorised by the Bill. The test is that development on the land can be expected to benefit from or be enhanced by the authorised works. An example would be a proposed housing development where, if the railway were built, the houses would command a higher price because of the good transport links.

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\(^{57}\) “Building” includes any structure or erection, and any part of a building, as so defined, but does not include plant or machinery comprised in a building (Town and Country Planning (Scotland) Act 1997 (c.8), s.277(1), applied by Listed Buildings Act s.81).

\(^{58}\) “Listed building”: A building which is for the time being included in a list compiled by the Secretary of State under section 1 of the Listed Buildings Act (Listed Buildings Act, ss.1 and 81).
209. Sections 37 and 38 deal, among other things, with financial contributions towards the cost of providing the authorised works under a “financial support contract”. Subsection (1) of section 36 has a detailed definition of this expression, which contemplates three different categories of binding contract, namely—

- a funding commitment or approval, whereby one of the parties is committed to procuring funding for the provisions of the authorised works or approves a relevant local planning authority incurring expenditure or entering into a financial obligation for that purpose (intended to cover Scottish Executive approval of expenditure, which might be given together with a commitment for the Executive to procure funds for the works);

- a contract that obliges one party to provide money to pay for the provision of the authorised works and obliges the authorised undertaker to pay interest or give other monetary consideration (intended to catch the widest possible range of money provision agreements from interest bearing loans to capitalised payments); and

- a contract that obliges one party to provide or procure the provision of all or part of the authorised works for a consideration all or part of which consists of the transfer or grant of assets or benefits, in either case other than money (intended to cover the full range of possible procurement contracts such as design and build; design, build, operate and maintain; franchised operations).

210. Sections 37 and 38 apply to relevant planning authorities. Subsection (2) of section 36 provides that the relevant planning authorities are Scottish Borders Council, Midlothian Council and City of Edinburgh Council.

**Section 37 – Planning agreements**

211. The legislation governing planning agreements is in section 75 of the 1997 Act. Section 75 provides that “a planning authority may enter into an agreement with any person interested in land in their area (in so far as the interest of that person enables him to bind the land) for the purpose of restricting or regulating the development or use of that land”. Section 75(2) permits agreements made under section 75 to include incidental and consequential provisions, including financial provisions. A planning agreement may be recorded in the Register of Sasines or registered in the Land Register of Scotland, with the result that the agreement will bind persons whose title derives from the landowner who entered into the agreement.

212. Planning authorities may require planning agreements to be entered into as a condition of granting planning permission. Policy guidance on the reasonable exercise of this power is in Scottish Office Development Department Circular 12/1996 which requires that a planning agreement meets certain criteria. In particular—

- planning authorities should only require planning agreements to be entered into if, in land use planning terms, it would be wrong to grant planning permission without them;\(^\text{60}\)

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\(^{59}\) For an explanation of this expression see section 36(2) and paragraph 210 below.

\(^{60}\) Circular 12/1996, paragraph 5.
an applicant’s need for planning permission should not be treated as an opportunity to obtain a benefit, financial or environmental, which is unrelated in nature, scale or kind to the development proposed;

• a planning agreement should serve a planning purpose, relate to the development being proposed by overcoming some difficulty – such as a need for particular facilities – that the proposed development would create, should be related in scale and kind to the proposed development and should meet the test of reasonableness;

• the provision of contributions towards public transport or community facilities may be acceptable provided the requirements are directly related to the development proposed and the need for them arises from its implementation.

213. The guidance in the Circular, and particularly the first and fourth bullet point items, restricts the ability of planning authorities to insist upon planning agreements to cases where the agreement is a direct necessity if planning permission is to be granted. The guidance concerning contributions to transport or community facilities also means that contributions can only be required in relation to facilities that follow the proposed development. In practice developers may sometimes be prepared voluntarily to go beyond the scope of the guidance, but the guidance does not allow planning authorities to require planning agreements by way of support for planned infrastructure that will benefit a development but which is not necessitated by the development alone. As a result of this guidance, planning agreements are of limited application as a means of supporting the provision of infrastructure that is of benefit to a wide development area.

214. In addition to the powers under the 1997 Act, section 69 of the Local Government (Scotland) Act 1973 (c.65) and Part 3 of the Local Government in Scotland Act 2003 (asp 1) give local authorities wide powers to do things, including entering into agreements, for the purpose of promoting or improving the well-being of its area. Unlike planning agreements, however, an agreement to advance well-being cannot be required to bind land to which it relates.

215. Section 37 extends the scope of what may be dealt with by a relevant planning agreement so as to allow for developers to be required to contribute towards or support the provision of the authorised works which will benefit their proposed developments.

216. Section 37 is additional to the general law, not in substitution for it. Subsection (1) accordingly provides that the legislation explained in paragraphs 212 to 214 above is to have effect, but in accordance with the provisions of section 37. It automatically follows that Circular 12/1996 will also have effect subject to section 37.

217. Subsection (2) enables a relevant planning agreement to include provision relating to, or to development that supports or is otherwise connected with, the authorised works. This would

61 The same, paragraph 9.
62 The same, paragraph 10.
63 The same, paragraph 11.
64 The same, paragraph 12.
65 The same, paragraph 13.
66 For an explanation of this expression see paragraph 208 above.
cover provision directly connected with ("relating to") the authorised works, such as the construction of works that are subsequently to be integrated into surrounding developments, as may happen with Work No. 1E and the bridge comprised within Work No. 1C (bridges at Shawfair) (see explanation of section 28). Supporting or connected development would extend to, for example, a developer providing a link road from a proposed development to facilitate access to the railway infrastructure.

218. As explained above, a planning agreement must relate to the proposed development. The special nature of a linear work such as a railway is that its effect in one locality is referable to the whole length of the work. Subsection (3) therefore puts it beyond doubt that a planning agreement can validly relate to the authorised works notwithstanding that they are wholly or partly outwith the local government area of the relevant planning authority concerned. The subsection does not remove the need for the particular development to relate to the authorised works. It merely recognises the possibility of there being such a relationship notwithstanding geographical remoteness.

219. Subsection (4) provides that in a relevant planning agreement financial provisions relating to the authorised works may require the payment of developer contributions, that is contributions by the developer towards the cost of providing the authorised works or any development relating to, supporting or otherwise connected with the authorised works. For this purpose section 36 defines “provision” as meaning design, construction or financing of any part of the railway works as defined in section 2. The definition includes maintenance and operation so far as provided in conjunction with design, construction or financing. This would mean that the relevant cost of providing the works could include the cost of a DBOM (design, build, operate, maintain) contract.

220. The reference to supporting or connected development reflects subsection (2).

221. The object of developer contributions pursuant to this section will be to assist in the provision of the authorised works only. Subsection (5) accordingly caps the aggregate developer contributions that can be secured. Aggregate contributions cannot exceed the total of the sums necessary for the purpose of providing the authorised works.

222. It is also important that there should be an end date for financial contributions. Subsection (6) provides that a developer contribution cannot be required more that 30 years after the opening of the railway for public use. The period reflects the likely length of financial support contracts.

223. The true cost of providing the authorised works is, in addition to the nominal capital cost, the cost of securing that capital, whether by interest payments, loan charges or any other sums payable under a financial support contract. Subsection (7) provides that all these sums are included in the cost of providing the authorised works for which contributions may be required.

224. It follows that developer contributions may be used while there is any outstanding loan agreement or financial support contract. Subsection (8) accordingly enables a relevant planning authority to require developer contributions at any time during the currency of such an agreement or contract.
225. Section 22(7) of the Local Government in Scotland Act 2003 (asp 1) prohibits a local authority from using the powers to advance well-being to impose a levy or imposition. Subsection (9) makes clear that developer contributions required under section 37 do not infringe this rule.

226. The effect of these provisions is to extend the developments that could be requested to contribute towards the authorised works to any development that will benefit from the existence of the railway, whether the railway is built before or after the contributing development. The provisions also recognise that the generally beneficial effect of transport infrastructure on development values extend beyond the provision of infrastructure that is purely for or necessitated by any one development. Sections 37 and 38 also reflect the fact that it can be reasonable for developers to contribute towards the cost of infrastructure that benefits particular developments even though the developments are acceptable for planning purposes without such infrastructure being provided.

227. These are extensions of existing policy as set out in Circular 12/1996. They reflect the increasingly wide effects of transport infrastructure schemes. The provisions therefore build on existing policy, without replacing it. As a result, all the current criteria, as extended in the Bill, will continue to apply.

Section 38 – Application of developer contributions

228. Subsection (1) makes the relevant local planning authority responsible for securing that any developer contributions it obtains towards the cost of providing the authorised works is applied for the purpose for which it was obtained. The planning authority may pay the authorised undertaker direct, but it is likelier that the relevant contracts will be procured through some dedicated entity. These would provide a ‘pot’ into which all contributions could be put.

229. As a safeguard to paying developers, subsection (2) allows a period of 12 months for a developer contribution to be applied as provided in subsection (1). If a developer contribution is not applied within that period, the relevant planning authority must repay it.

Section 39 – Blighted land

230. Section 39 applies the planning blight provisions of sections 100 to 122 of the Town and Country Planning (Scotland) Act 1997 (c.8) (which applies in cases mentioned in Schedule 14 to the Act). These provisions ordinarily apply where compulsory purchase is authorised by a variety of legislative instruments, including a private Act of the UK Parliament, but on devolution this was not extended to apply automatically where the authorisation is by a private Act of the Scottish Parliament. This section is therefore needed to ensure that these provisions apply to the works authorised by the Bill.

231. The effect of section 39 is that—

- a resident owner-occupier of a residential dwelling;
This document relates to the Waverley Railway (Scotland) Bill as amended at Consideration Stage (SP Bill 8A)

- an owner-occupier of land with an annual (i.e. in most cases rateable) value of (currently) £21,500,\(^67\) or
- an owner-occupier of an agricultural unit,

whose land is subject to compulsory purchase under the Bill may require the authorised undertaker to purchase the land at market value if, having tried to sell the property, the landowner has been unable to sell except at a substantially lower price than might reasonably have been expected had the land not been subject to compulsory purchase.

Section 40 – Method of vesting land

232. The compulsory purchase procedures under the Lands Clauses Acts as outlined in paragraphs 74 to 77 above provide for land to be vested in the acquiring authorised undertaker by means of a conveyance or in certain circumstances a notarial instrument executed by the authorised undertaker. Section 40 applies a further procedure that is available generally to vest land that has been compulsorily acquired.

233. Section 195 of and Schedule 15 to the Town and Country Planning (Scotland) Act 1997 (c.8) apply to any Minister or any local or other public authority that is authorised to acquire land by means of a compulsory purchase order (called an acquiring authority). Where a compulsory purchase order has come into operation, the acquiring authority may execute a general vesting declaration (for which there is a prescribed form) vesting in themselves any of the land which they are authorised to acquire. A single declaration may relate to all or any of the land subject to compulsory purchase. Schedule 15 includes requirements as to the giving of prior notice and the date on which any declaration takes effect.

234. The effect of a general vesting declaration is to vest the land to which it relates in the acquiring authority. The making of the declaration has the same effect as service of a notice to treat in triggering the landowner’s right to claim compensation.

235. Subsection (1) applies this procedure to compulsory acquisition under the Bill.

236. Paragraph 2 of Schedule 15 makes detailed provision for the giving of notice to trigger the vesting declaration procedure. Subsection (2) adopts this for the Bill. The vesting declaration provisions will apply on publication of a notice that the Act has received Royal Assent, giving details about the general vesting declaration procedure and stating that compensation may be payable. Subsection (2) provides that such a notice may be given at any time after the Act comes into force. The requirements for publication and service referred to in subsection (2)(c) are for newspaper publication and service on landowners who previously received notice of the proposals.

Section 40A – Certification of plans, etc.

237. Section 40A sets up a mechanism for certification of copies of the book of reference, Parliamentary plans and Parliamentary sections. Subsection (1) requires the authorised undertaker to submit copies of these documents to the Clerk of the Parliament for certification.

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\(^{67}\) Designed to catch small businesses.
238. Subsection (2) provides that on being satisfied as to the accuracy of the documents submitted, the Clerk must then certify them.

239. Under subsection (3), the effect of certification is that the certified copy becomes admissible as evidence in court as if it were the actual document referred to in the Bill. In the absence of this provision the authorised undertaker could be required by a court to prove the authenticity of copy documents.

Section 40B – Registration of new rights

240. Section 40B addresses two issues in relation to positive servitudes that is, rights relating to the doing of some positive thing in relation to property (“burdened property”) for the benefit of other property (“benefited property”).

241. Subsection (1) provides that a servitude or other right acquired compulsorily under the powers to be conferred by the Bill benefits all the land held by the authorised undertaker for the purposes of the authorised works. In the case of a linear work such as a railway, the benefit of a positive servitude (such as a right of access to the railway) may be capable of benefiting significant parts of the railway system, considerably more than the land immediately adjoining the burdened property. It is a principal of Scottish land law that a servitude is construed restrictively. This means that the servitude must be clear and precise. If the deed creating a servitude does not define land as being benefited by the servitude then the servitude cannot be used to benefit that land. In the context of the Bill, an access servitude that defines the benefited property as being only some of the land comprised within the railway could not be used to access other land belonging to the authorised undertaker further down the route. Subsection (1) ensures that statutory servitudes acquired under the powers in the Bill for the benefit of the railway will have that effect and are not reduced in scope by this principle of general Scots property law.

242. Subsection (2) provides that such a servitude is effective whether or not the deed creating it is registered against both the benefited property and the burdened property. Section 75 of the Title Conditions (Scotland) Act 2003 (asp 9) requires that a deed creating a positive servitude must be registered against both the burdened and the benefited property. An ordinary reading of section 75 leads to the conclusion that if registration is against only some of the benefited property, the deed will not be enforceable for the benefit of the remainder of the benefited property, against which it has not been registered. This subsection therefore ensures that statutory servitudes acquired under the powers in the Bill for the benefit of the railway will have that effect in relation to all the land occupied by the authorised works, whether or not they are registered against all that land. Servitudes must still be registered against the burdened property.

Section 40C – Mitigation of environmental impacts

243. Subsection (1) imposes a general obligation on the authorised undertaker to use all reasonably practicable means to ensure two separate things identified in subsections (1)(a) and (1)(b) as regards the delivery of environmental mitigation. In subsection (1)(a), the obligation is to deliver mitigation as identified in the environmental statement. The environmental impacts of construction and operation are not to be worse than what the ES identifies as “residual impacts” i.e. the environmental impacts of construction or operation after carrying out the mitigation
measures identified in the environmental statement. Subsection (1)(b) is an obligation to deliver additional environmental mitigation measures identified in undertakings given to the Waverley Railway (Scotland) Bill Committee or to any person in connection with the Bill. The authorised undertaker must ensure that those additional mitigation measures are carried out or that the environmental impacts of construction or operation are not worse than they would have been had those mitigation measures been carried out.

244. Subsection (2) contains definitions. “Environmental statement” is specifically stated to include the environmental statement prepared in relation to the Stow station proposals.

Section 40D – Compliance with Code of Construction Practice and Noise and Vibration Policy

245. Subsection (1) imposes an obligation to comply with the code of construction practice relating to the authorised works; any local construction code dealing with specific works or areas; and the noise and vibration policy. Using the standard of all reasonably practicable means, the authorised undertaker is obliged to ensure compliance with these documents in relation to the use and operation of the authorised works.

246. Subsection (2) requires that no amendment or replacement of the code of construction practice or the noise and vibration policy can reduce the standards of mitigation and protection that was provided for in any earlier version.

247. Subsection (3) introduces schedule 9A, which sets out the detailed procedure for approval, amendment, replacement and the effect of the code of construction practice. As provided by schedule 9A, the authorised undertaker cannot commence construction of the authorised works in the area of a local authority until it has submitted to that authority the code of construction practice and any draft local construction codes for the local planning authority to approve (schedule 9A, paragraph 1). Paragraph 2 requires the local planning authority to send a copy of every code, including any amendment or replacement, to SNH and SEPA. Those two bodies do not have to respond but, if they do, the local planning authority must take account of their representations. The authorised undertaker may amend or replace the code of construction practice or a local construction code but only with the approval of the local planning authority (paragraph 3). Paragraph 4 provides for the code of construction practice and any local construction code to have effect as a condition to which section 40F applies. This has the effect that the obligation to comply with these documents is enforceable as if it were a planning condition.

248. Subsection (4) defines the noise and vibration policy by reference to a specific document that was produced to the Committee and has been lodged with the Clerk of the Parliament.

Section 40E – Works affecting the River Tweed Special Area of Conservation

249. Section 40E specifically deals with those works that could potentially adversely affect the integrity of the River Tweed Special Area of Conservation (the ‘SAC’) and are the subject of the appropriate assessment by the Parliament on which SNH has advised. This new section relates to the construction of the works specified in subsection (1). These are the works that have been identified by Scottish Natural Heritage and the promoter as affecting, or potentially affecting, the SAC.
250. Subsection (2) introduces a new schedule 9B. Part 1 of the schedule sets out in paragraph 1 general descriptions of the sites identified by SNH as requiring special mitigation measures to be taken so as to avoid adverse impact on the SAC. The remainder of Part 1 provides for specific things to be done in relation to the sites listed in the schedule.

251. Subsection (3) deals with the operation of regulation 60 of the Conservation (Natural Habitats, etc) Regulations 1994 (SI 1994/2716). Regulation 60 comes into play where a developer (in this case the authorised undertaker) undertakes work that has been authorised by an Act of Parliament. It requires an application to the local planning authority, which must carry out an appropriate assessment of its own. By the time implementation takes place the works and operations at the locations described in Parts 1 and 2 of schedule 9B will have been appropriately assessed by the Parliament. To avoid the need to carry out a second appropriate assessment duplicating the Parliament’s, subsection (3) provides that the local planning authority is not obliged to carry out a further appropriate assessment of its own. This applies only to the extent that the works in question have been the subject of an approval by an appropriate assessment of the Parliament.

Section 40F – Regulation of mitigation measures

252. Section 40F provides a machinery by which the provision of environmental mitigation measures can be enforced. Subsection (1) provides that the requirements imposed by—

- sections 40C, 40D and 40E,
- schedules 9A and 9B,
- any agreement for mitigation made with a local planning authority (under paragraph 6 of schedule 9B),
- the code of construction practice or any local construction code,

shall be enforceable as valid planning conditions. The local planning authority is made subject to a positive duty to enforce them.

253. Subsection (2) is a technical provision. So as to give effect to subsection (1), for the purpose only of enforcement of the things deemed to be conditions, planning permission for the authorised works is deemed to have been given subject to the imposition of the deemed conditions.

254. By subsection (3) the local planning authority (in this case, Scottish Borders Council and Midlothian Council) is obliged to appoint an Environmental Clerk of Works whose function is to monitor the authorised undertaker’s carrying out of the environmental measures referred to in subsection (1).

Section 40G – Application of the Crichel Down Rules

255. Section 40G imposes an obligation on the authorised undertaker to comply with the guidelines known as the Crichel Down Rules. These rules, which are set out in Scottish Development Department Circular 38 of 1992, require local authorities in respect of land acquired by compulsory purchase or under the threat of compulsory purchase to offer back to the original owner any land that is not ultimately required. Although called rules, they are
guidelines. They also apply to authorities to which the Circular applies, but not to bodies in general. In the absence of this section, therefore, the Crichel Down rules would not automatically apply to the authorised undertaker.

Section 41 – Application of original enactments

256. This section deals with the Acts (in the Bill called “the original enactments”) that either authorised the former railways which the new railway will replace or are other local enactments relating to any former railway.

257. The original enactments listed in schedule 10 relate to former local authority undertakings. They contain protective provisions for the benefit of structures comprised in the former railways. As these structures are to be used for the railway authorised by the Bill, these protective provisions are still relevant. Subsection (1) provides for them to apply to the authorised works.

258. Many of the enactments that authorised the former railways have not been repealed. However, the effect of the railways themselves having ceased to exist is that the enactments are spent.68 The only possible exceptions are obligations relating to any private crossings that remain. As explained in relation to section 8, the provisions in the Bill will replace any remaining rights under the original enactments. Subsection (2) accordingly makes clear that these other original enactments will not apply to the authorised works.

259. Subsection (3) is concerned with the historic statutory liabilities now vested in BRB (Residuary) Limited (“BRBR”). These liabilities, inherited by BRBR in respect of former railway assets, arise from statutory provisions relating (in this case) to the former railway.69 The subsection provides that on the authorised undertaker acquiring any land, or entering and taking possession of it under section 24, BRBR is discharged from any obligation to which it is subject in relation to that land.

Section 41A – Rights of the Scottish Ministers

260. Subsection (1) provides that nothing in the Bill is to have a prejudicial effect on any estate, right, privilege or the like that is vested in the Scottish Ministers. Subsection (2) provides that the powers to be conferred by the Bill do not authorise the acquisition of any land belonging to the Scottish Ministers without their consent in writing.

261. The Bill cannot authorise the forced acquisition of any Crown interest. This immunity of the Crown extends to land held by the Scottish Ministers, some of which is affected by the Bill.

68 i.e. their factual basis having ceased to be, the enactments no longer have any legal effect.

69 For definition of “the former railway” see section 43(1).
Part 4 – Supplementary

Section 42 – Incorporation of enactments

262. As explained earlier in these Explanatory Notes, the legal machinery for compulsory acquisition is in Acts that only apply if they are specifically incorporated. Section 42 accordingly incorporates the relevant legislation.

Section 44 – Short title

263. Section 44 does not make any special provision for the commencement of the Act once passed. It will come into force when the Bill receives Royal Assent.
This document relates to the Waverley Railway (Scotland) Bill as amended at Consideration Stage (SP Bill 8A)

WAVERLEY RAILWAY (SCOTLAND) BILL
[AS AMENDED AT STAGE 2]

REVISED EXPLANATORY NOTES


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