

## SCHEDULES

### SCHEDULE 10

#### PROTECTIVE PROVISIONS

#### PART 3

#### FOR THE PROTECTION OF THE TYNE & WEAR PASSENGER TRANSPORT EXECUTIVE

**25.** The following provisions of this Part of this Schedule have effect, unless otherwise agreed in writing between the Council and Nexus.

**26.** In this Part of this Schedule—

“construction” includes execution, placing, alteration and reconstruction and “construct” and “constructed” have corresponding meanings;

“the engineer” means an engineer appointed by Nexus for the purposes of this Order;

“Nexus” means the Tyne & Wear Passenger Transport Executive;

“plans” includes sections, designs, design data, software, drawings, specifications, soil reports, calculations, descriptions (including descriptions of methods of construction), staging proposals, programmes, monitoring schemes and details of the extent, timing and duration of any proposed occupation of railway property;

“protective works” means any works specified by the engineer under paragraph 29(4);

“railway operational procedures” means procedures specified under any access agreement (as defined in the Railways Act 1993) or station lease;

“railway property” means any railway belonging to Nexus and—

- (a) any station, land, works, apparatus and equipment belonging to Nexus or connected with any such railway; and
- (b) any easement or other property interest held or used by Nexus for or connected with the purposes of such railway or works, apparatus or equipment; and

“specified work” means so much of any of the development as is, or is to be, situated upon, across, under, over or within 15 metres of, or may in any way adversely affect, railway property.

**27.—(1)** Where under this Part of this Schedule Nexus is required to give its consent or approval in respect of any matter, that consent or approval is subject to the condition that Nexus complies with any relevant railway operational procedures and any obligations under statute.

(2) In so far as any specified work or the acquisition or use of railway property or rights over railway property is or may be subject to railway operational procedures, Nexus must—

- (a) co-operate with the Council with a view to avoiding undue delay and securing conformity as between any plans approved by the engineer and requirements emanating from those procedures; and

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- (b) use its reasonable endeavours to avoid any conflict arising between the application of those procedures and the proper implementation of the development under this Order.

**28.—**(1) The Council must not exercise the powers conferred by—

- (a) article 4 (power to survey and investigate the land);
- (b) article 5 (discharge of water);
- (c) article 6 (felling or lopping of trees);
- (d) article 7 (closing of level crossings subject to opening of new rights of way);
- (e) article 14 (power to acquire land);
- (f) article 17 (power to acquire new rights);
- (g) article 18 (power to acquire subsoil or airspace only);
- (h) article 19 (temporary use of land in connection with the development);
- (i) article 20 (temporary use of land for access);
- (j) article 23 (extinction or suspension of private rights of way); or
- (k) the powers conferred by section 11(3) (powers of entry) of the 1965 Act,

in respect of any railway property unless the exercise of such powers is with the consent of Nexus.

(2) The Council must not in the exercise of the powers conferred by this Order prevent pedestrian or vehicular access to any railway property, unless preventing such access is with the consent of Nexus.

(3) The Council must not exercise the powers conferred by sections 271 (extinguishment of rights of statutory undertakers: preliminary notices) or 272 (extinguishment of rights of telecommunications code system operators: preliminary notices) of the 1990 Act in relation to any right of access of Nexus to railway property, but such right of access may be diverted with the consent of Nexus.

(4) The Council must not under the powers of this Order acquire or use, or acquire new rights over, or seek to impose any restrictive covenants over, any railway property, or extinguish any existing rights of Nexus in respect of any third party property except with the consent of Nexus.

(5) Where Nexus is asked to give its consent under this paragraph, such consent must not be unreasonably withheld but may be given subject to reasonable conditions.

**29.—**(1) The Council must, before commencing construction of any specified work, supply to Nexus proper and sufficient plans of that work for the reasonable approval of the engineer and the specified work must not be commenced except in accordance with such plans as have been approved in writing by the engineer or settled by arbitration under article 366 (arbitration).

(2) The approval of the engineer under sub-paragraph (1) must not be unreasonably withheld, and if by the end of the period of 28 days beginning with the date on which such plans have been supplied to Nexus the engineer has not intimated disapproval of those plans and the grounds of disapproval the Council may serve upon the engineer written notice requiring the engineer to intimate approval or disapproval within a further period of 28 days beginning with the date upon which the engineer receives written notice from the Council. If by the expiry of the further 28 days the engineer has not intimated approval or disapproval, the engineer is deemed to have approved the plans as submitted.

(3) If by the end of the period of 28 days beginning with the date on which written notice was served upon the engineer under sub-paragraph (2), Nexus gives notice to the Council that Nexus desires itself to construct any part of a specified work which in the opinion of the engineer will or may affect the stability of railway property or the safe operation of traffic on the railways of Nexus then, if the Council desires such part of the specified work to be constructed, Nexus must construct it without unnecessary delay on behalf of and to the reasonable satisfaction of the Council

in accordance with the plans approved or deemed to be approved or settled under this paragraph, and under the supervision (where appropriate and if given) of the Council.

(4) When signifying approval of the plans the engineer may specify any protective works (whether temporary or permanent) which in the engineer's opinion should be carried out before the commencement of the construction of a specified work to ensure the safety or stability of railway property or the continuation of safe and efficient operation of the railways of Nexus or the services of operators using the same (including any relocation de-commissioning and removal of works, apparatus and equipment necessitated by a specified work and the comfort and safety of passengers who may be affected by the specified works), and such protective works as may be reasonably necessary for those purposes must be constructed by Nexus or by the Council, if Nexus so desires, and such protective works must be carried out at the expense of the Council in either case without unnecessary delay and the Council must not commence the construction of the specified works until the engineer has notified the Council that the protective works have been completed to the engineer's reasonable satisfaction.

**30.—**(1) Any specified work and any protective works to be constructed by virtue of paragraph 29(4) must, when commenced, be constructed—

- (a) without unnecessary delay in accordance with the plans approved or deemed to have been approved or settled under paragraph 29;
- (b) under the supervision (where appropriate and if given) and to the reasonable satisfaction of the engineer;
- (c) in such manner as to cause as little damage as is possible to railway property; and
- (d) so far as is reasonably practicable, so as not to interfere with or obstruct the free, uninterrupted and safe use of any railway of Nexus or the traffic on it and the use by passengers of railway property.

(2) If any damage to railway property or any such interference or obstruction is caused by the carrying out of, or in consequence of the construction of a specified work or a protective work, the Council must, regardless of any such approval, make good such damage and must pay to Nexus all reasonable expenses to which Nexus may be put and compensation for any loss which it may sustain by reason of any such damage, interference or obstruction.

(3) Nothing in this Part of this Schedule imposes any liability on the Council with respect to any damage, costs, expenses or loss attributable to the negligence of Nexus or its servants, contractors or agents, or any liability on Nexus with respect of any damage, costs, expenses or loss attributable to the negligence of the Council or the Council's employees, contractors or agents.

**31.** The Council must—

- (a) at all times afford reasonable facilities to the engineer for access to a specified work or protective work during its construction; and
- (b) supply the engineer with all such information as the engineer may reasonably require with regard to a specified work or protective work or the method of constructing it.

**32.** Nexus must at all reasonable times afford reasonable facilities to the Council and the Council's agents for access to any works carried out by Nexus under this Part of this Schedule during their construction and must supply the Council with such information as the Council may reasonably require with regard to such works or the method of constructing them.

**33.—**(1) If any permanent or temporary alterations or additions to railway property, are reasonably necessary in consequence of the construction of a specified work or a protective work, or during a period of 24 months after the completion of that work in order to ensure the safety of railway property or the continued safe operation of the railway of Nexus, such alterations and additions may be carried out by Nexus and if Nexus gives to the Council reasonable notice of its intention

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to carry out such alterations or additions (which must be specified in the notice), the Council must pay to Nexus the reasonable cost of those alterations or additions including, in respect of any such alterations and additions as are to be permanent, a capitalised sum representing the increase of the costs which may be expected to be reasonably incurred by Nexus in maintaining, working and, when necessary, renewing any such alterations or additions.

(2) If during the construction of a specified work or a protective work by the Council, Nexus gives notice to the Council that Nexus desires itself to construct that part of the specified work or protective work which in the opinion of the engineer is endangering the stability of railway property or the safe operation of traffic on the railways of Nexus then, if the Council decides that part of the specified work or protective work is to be constructed, Nexus must assume construction of that part of the specified work or protective work and the Council must, regardless of any such approval of a specified work or protective work under paragraph 29(3), pay to Nexus all reasonable expenses to which Nexus may be put and compensation for any loss which it may suffer by reason of the execution by Nexus of that specified work or protective work.

(3) If the cost of maintaining, working or renewing railway property is reduced in consequence of any such alterations or additions a capitalised sum representing such saving is to be set off against any sum payable by the Council to Nexus under this paragraph.

(4) The engineer must, in respect of the capitalised sums referred to in this paragraph and paragraph 34(a) provide such details of the formula by which those sums have been calculated as the Council may reasonably require.

**34.** The Council must repay to Nexus all reasonable fees, costs, charges and expenses reasonably incurred by Nexus—

- (a) in constructing any part of a specified work on behalf of the Council as provided by paragraph 29(3) or in constructing any protective works under the provisions of paragraph 29(4) including, in respect of any permanent protective works, a capitalised sum representing the cost of maintaining and renewing those works;
- (b) in respect of the approval by the engineer of plans submitted by the Council and the supervision by the engineer of the construction of a specified work or a protective work;
- (c) in respect of the employment or procurement of the services of any inspectors, signallers, watchkeepers and other persons whom it is reasonably necessary to appoint for inspecting, signalling, watching and lighting railway property and for preventing, so far as may be reasonably practicable, interference, obstruction, danger or accident arising from the construction or failure of a specified work or a protective work;
- (d) in respect of any special traffic working resulting from any speed restrictions which may in the opinion of the engineer, require to be imposed by reason or in consequence of the construction or failure of a specified work or a protective work or from the substitution of diversion of services which may be reasonably necessary for the same reason; and
- (e) in respect of any additional temporary lighting of railway property in the vicinity of the specified works, being lighting made reasonably necessary by reason or in consequence of the construction or failure of a specified work or a protective work.

**35.—(1)** In this paragraph—

“EMI” means, subject to sub-paragraph (2), electromagnetic interference with Nexus apparatus generated by the operation of the development where such interference is of a level which adversely affects the safe operation of Nexus’s apparatus; and

“Nexus’s apparatus” means any lines, circuits, wires, apparatus or equipment (whether or not modified or installed as part of the development) which are owned or used by Nexus for the purpose of transmitting or receiving electrical energy or of radio, telegraphic, telephonic, electric, electronic or other like means of signalling or other communications.

(2) This paragraph applies to EMI only to the extent that such EMI is not attributable to any change to Nexus's apparatus carried out after approval of plans under paragraph 29(1) for the relevant part of the development giving rise to EMI (unless the Council has been given notice in writing before the approval of those plans of the intention to make such change).

(3) Subject to sub-paragraph (5), the Council must in the design and construction of the development take all measures necessary to prevent EMI and must establish with Nexus (both parties acting reasonably) appropriate arrangements to verify their effectiveness.

(4) In order to facilitate the Council's compliance with sub-paragraph (3)—

- (a) the Council must consult with Nexus as early as reasonably practicable to identify all Nexus's apparatus which may be at risk of EMI, and must continue to consult with Nexus (both before and after formal submission of plans under paragraph 29(1)) in order to identify all potential causes of EMI and the measures required to eliminate them;
- (b) Nexus must make available to the Council all information in the possession of Nexus reasonably requested by the Council in respect of Nexus's apparatus identified under sub-paragraph (a); and
- (c) Nexus must allow the Council reasonable facilities for the inspection of Nexus's apparatus identified under sub-paragraph (a).

(5) In any case where it is established that EMI can only reasonably be prevented by modifications to Nexus's apparatus, Nexus must not withhold its consent unreasonably to modifications of Nexus's apparatus, but the means of prevention and the method of their execution may be selected at the reasonable discretion of Nexus, and in relation to such modifications paragraph 29(1) has effect subject to this sub-paragraph.

(6) If at any time prior to the completion of the development and regardless of any measures adopted under sub-paragraph (3), the testing or commissioning of the development causes EMI then the Council must immediately upon receipt of notification by Nexus of such EMI either in writing or communicated orally (such oral communication to be confirmed in writing as soon as reasonably practicable after it has been issued) cease to use (or procure the cessation of use of) the Council's apparatus causing such EMI until all measures necessary have been taken to remedy such EMI by way of modification to the source of such EMI or (in the circumstances, and subject to the consent, specified in sub-paragraph (5)) to Nexus's apparatus.

(7) In the event of EMI having occurred—

- (a) the Council must afford reasonable facilities to Nexus for access to the Council's apparatus in the investigation of such EMI;
- (b) Nexus must afford reasonable facilities to the Council for access to Nexus's apparatus in the investigation of such EMI; and
- (c) Nexus must make available to the Council any additional material information in its possession reasonably requested by the Council in respect of Nexus's apparatus or such EMI.

(8) Where Nexus approves modifications to Nexus's apparatus under sub-paragraphs (5) or (6)—

- (a) Nexus must allow the Council reasonable facilities for the inspection of the relevant part of Nexus's apparatus; and
- (b) any modifications to Nexus's apparatus approved under those sub-paragraphs must be carried out and completed by the Council in accordance with paragraph 30.

(9) To the extent that it would not otherwise do so, the indemnity in paragraph 39(1) applies to the costs and expenses reasonably incurred or losses suffered by Nexus through the implementation of the provisions of this paragraph (including costs incurred in connection with the consideration of proposals, approval of plans, supervision and inspection of works and facilitating access to Nexus's apparatus) or in consequence of any EMI to which sub-paragraph (6) applies.

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(10) For the purpose of paragraph 34(a) any modifications to Nexus's apparatus under this paragraph are deemed to be protective works referred to in that paragraph.

(11) In relation to any dispute arising under this paragraph the reference in article 366 (arbitration) to a single arbitrator to be agreed between the parties is to be read as a reference to an arbitrator being a member of the Institution of Engineering and Technology to be agreed.

**36.** If at any time after the completion of a specified work or a protective work, not being a work vested in Nexus, Nexus gives notice to the Council informing it that the state of maintenance of any part of the specified work or protective work appears to be such as adversely affects the operation of railway property, the Council must, on receipt of such notice, take such steps as may be reasonably necessary to put that specified work or protective work in such state of maintenance as to not adversely affect railway property.

**37.** The Council must not provide any illumination or illuminated sign or signal on or in connection with a specified work or a protective work in the vicinity of any railway belonging to Nexus unless the Council has first consulted Nexus and the Council must comply with Nexus's reasonable requirements for preventing confusion between such illumination or illuminated sign or signal and any railway signal or other light used for controlling, directing or securing the safety of traffic on the railway.

**38.** Any additional expenses which Nexus may reasonably incur in altering, reconstructing or maintaining railway property under any powers existing at the making of this Order by reason of the existence of a specified work or a protective work must, provided that 56 days' previous notice of the commencement of such alteration, reconstruction or maintenance has been given to the Council, be repaid by the Council to Nexus.

**39.—(1)** The Council must pay to Nexus all reasonable costs, charges, damages and expenses not otherwise provided for in this Part of this Schedule which may be occasioned to or reasonably incurred by Nexus—

- (a) by reason of the construction or maintenance of a specified work or a protective work or the failure of it; or
- (b) by reason of any act or omission of the Council or of any person in the Council's employ or of the Council's contractors or others whilst engaged upon a specified work or a protective work,

and the Council must indemnify and keep indemnified Nexus from and against all claims and demands arising out of or in connection with a specified work or a protective work or any such failure, act or omission; and the fact that any act or thing may have been done by Nexus on behalf of the Council or in accordance with plans approved by the engineer or in accordance with any requirement of the engineer or under the engineer's supervision will not (if it was done without negligence on the part of Nexus or of any person in its employ or of its contractors or agents) excuse the Council from any liability under the provisions of this sub-paragraph.

(2) Nexus must give the Council reasonable notice of any such claim or demand and no settlement or compromise of such a claim or demand is to be made without the prior written consent of the Council.

(3) The sums payable by the Council under sub-paragraph (1) may include a sum equivalent to the relevant costs.

**40.** Nexus must, on receipt of a request from the Council, at a frequency to be agreed between the Council and Nexus, provide the Council free of charge with written estimates of the costs, charges, expenses, future cost forecasts and other liabilities for which the Council is or will become liable under this Part of this Schedule (including the amount of the relevant costs mentioned in paragraph 39) and with such information as may reasonably enable the Council to assess the

reasonableness of any such estimate or claim made or to be made under this Part of this Schedule (including any claim relating to those relevant costs).

**41.** In the assessment of any sums payable to Nexus under this Part of this Schedule there must not be taken into account any increase in the sums claimed that is attributable to any action taken by or any agreement entered into by Nexus if that action or agreement was not reasonably necessary and was taken or entered into with a view to obtaining the payment of those sums by the Council under this Part of this Schedule or increasing the sums so payable.

**42.** The Council and Nexus may enter into, and carry into effect, agreements for the transfer to the Council of—

- (a) any railway property shown on the works plans or land plans and described in the book of reference;
- (b) any lands, works or other property held in connection with any such railway property; and
- (c) any rights and obligations (whether or not statutory) of Nexus relating to any railway property or any lands, works or other property referred to in this paragraph.

**43.** Nothing in this Order, or in any enactment incorporated with or applied by this Order, prejudices or affects the operation of Part 1 of the Railways Act 1993.

**44.** The Council must give written notice to Nexus where any application is required and is proposed to be made for the Secretary of State's consent under article 27 (power to transfer benefit of the Order) and any such notice must be given no later than 28 days before any such application is made and must describe or give (as appropriate)—

- (a) the nature of the application to be made;
- (b) the extent of the geographical area to which the application relates; and
- (c) the name and address of the person acting for the decision-maker to whom the application is to be made.

**45.** The Council must no later than 28 days from the date that the documents referred to in article 333 (certification of plans, etc.) are submitted to and certified by the Secretary of State provide a set of those documents to Nexus in a format specified by Nexus.