

Transport and Works Act Order Process: What is a TWA Order and what is needed from a TWAO Project Team?

Who is this note for?

This short note is intended to equip its reader with a basic understanding of when and why Transport and Works Act (TWA) Orders authorising railway or light rail infrastructure are necessary and what is needed from a project team in order to deliver them.

It is aimed primarily at newcomers to railway or tramway project management or legal services, but may also be helpful for consultants who are unused to the TWA process.

The note is divided into 2 parts:

- Part 1 : provides a short explanation of the legal background and purpose of a TWA Order.
- Part 2 : sets out what is required from the various disciplines involved in the delivery of a TWA Order.

Planning Act 2008

It is worth mentioning at the outset that the TWA Order regime survives the Planning Act 2008 ("Planning Act"). If a heavy railway development is not a nationally significant infrastructure project ("NSIP"), the current TWA Order regime will continue to apply. Tramways are not considered nationally significant infrastructure and will always be authorised by TWA Order.

In order to be an NSIP for the purpose of the Planning Act, a railway development must meet

the criteria set out in sections 14(1)(k) and 25¹ of that Act; namely that it involves the construction or alteration of a railway that is:

- Wholly in England;
- Part of a network operated by an approved operator (i.e. Network Rail);
- Not permitted development; and
- Will include (when constructed) a stretch a track that is a continuous length of more than 2km that is not on existing operational land of a railway undertaker immediately before the construction work began or is on land that was acquired at an earlier date for the purpose of constructing the railway ("the threshold");

or that involves the construction or alteration of a large rail freight interchange as defined in section 26 of that Act .

The threshold was introduced after the Planning Act had come into force. Without it, the Act captured any Network Rail development that did not come under the umbrella of its permitted development rights under the Town and Country Planning Act 1990, regardless of the scale of the development. As amended, the Planning Act's Development Consent regime applies only to those Network Rail projects that are genuinely of national significance.

The railway criteria of the Development Consent Order regime currently affect only Network Rail

¹ As amended by the Highways and Railways (Nationally Significant Infrastructure Project) Order 2013/1883

and exclude promoters such as, for example, local authorities, Transport for London or heritage railways.

As mentioned above, tramway schemes fall outside the scope of the Planning Act. They require planning consent for the development and, because they generally interfere with the public highway, specific statutory authorisation by TWA Order to provide a defence to public nuisance.

PART 1: What is a TWA Order?

Background

A TWA Order is a statutory instrument made under the Transport and Works Act 1992. It is as much a piece of legislation as an Act of Parliament.

A railway or tramway project involves elements that are not covered by the law as it applies generally. The most obvious is compulsory purchase. This is usually essential to make sure that the necessary land is available and requires specific legal authority related to the scheme being built. There are other more technical legal reasons why a new railway or tramway project needs to be authorised by legislation; for example, the protection afforded by having a defence to statutory nuisance and the ability to carry out protective works to nearby buildings. Lawyers refer to this as obtaining “powers”.

Before the TWA, if an undertaker wanted powers to construct a tram, say, it would have to promote a “private Bill” through both Houses of Parliament. In the 19th century such Bills were very common and were used to authorise the construction of all sorts of infrastructure such as railways, canals, waterworks, harbours and docks. As the promotion of private Bills was (and remains) a complicated business, it was usually undertaken by Parliamentary Agents with specialist knowledge of drafting legislation and of the relevant procedures.

In 1986, the Joint Select Committee on Private Legislation recommended the removal of “works Bills” i.e. Bills authorising the construction of physical works, from the scope of the private Bill procedure and subsequently the TWA was passed. Except where the Planning Act applies (see above), TWA Orders are required to authorise the construction or operation of railways,

tramways, trolley vehicle systems and other guided transport; the construction or operation of canals; the carrying out of certain works that interfere with rights of navigation in waters in and around England and Wales (such as off-shore wind farms); and ancillary matters such as compulsory acquisition of land or powers to transfer an undertaking.

So, promoters of works projects covered by the TWA still need statutory powers but these are now obtained by means of secondary legislation (a statutory instrument made by the appropriate Secretary of State) rather than primary legislation (Act of Parliament).

As a result of devolution, applications for orders relating to works solely in Wales are now made to, and determined by, the National Assembly for Wales and Scotland now has its own Transport and Works Order procedure under the Transport and Works (Scotland) Act 2007.

When considering a potential scheme, the first point for a promoter to consider is what powers are needed to implement it and whether a TWA Order is required. These questions always call for legal advice. In theory, if a tramway were to be constructed entirely on private land without any crossing of the public highway or interference with third party property, it could be authorised merely by planning consent under Part 3 of the Town and Country Planning Act 1990 with passengers travelling on a purely contractual basis.

In relation to railway schemes in particular, a crucial aspect for lawyers is whether the works can be constructed, wholly or partly, using permitted development rights and, if powers are needed, whether the scheme meets the criteria for an NSIP?

What does a TWA Order provide?

A typical TWA Order will authorise:

- The construction and maintenance of the works specified in the Order;
- Compulsory acquisition of land or rights over land for the works;
- Compulsory acquisition of any other land required either temporarily or permanently (for construction sites and access or environmental mitigation, for example);

- Closure or diversion of roads or paths or creation of new rights of way;
- Other matters needed for the scheme, such as powers to use watercourses, protect adjoining buildings, move utility apparatus, make bylaws or transfer an existing undertaking;
- Traffic regulation orders and powers relating to traffic signs.

The scope of TWA Orders is potentially very wide and may include developments such as tram stops, station car parks, “park and ride” sites or new or altered roads or bridges related to the scheme.

A TWA Order will ONLY grant the powers specified in its articles and schedules. Thus it is essential that the draft TWA Order includes **all** the powers required for the scheme. For this reason, just like private Bills, TWA Orders should be drafted by lawyers, normally by specialist Parliamentary agents. The draftsman is dependent on the rest of the Project Team to provide the detailed information required to prepare the Order.

Part 2: What is needed from a TWAO Project Team

Project management

Any proposed scheme needs to be thought through methodically at an early stage in order to define both the desired end result and the component parts required to achieve it. This will require input from several disciplines and one of the most important functions of the project manager is to assist in the appointment of appropriate people/external consultants and coordinate their activities.

The project manager should expect to:

- See that all project team members know what is expected of them and understand how their contributions fit into the overall project;
- Co-ordinate the input from all the different disciplines;
- Put in place necessary administrative procedures, in particular for document control, communication between team members and lines of responsibility;

- Have an overall understanding of, and familiarity with, the procedures so as to be alert to the need for actions on the ground (for example, the need for site notices concerning the application to be inspected daily throughout the objection period, to check that the notices have not been vandalised or removed);
- Maintain an overview of (a) the application as a whole and (b) the wider context into which it fits e.g. as part of a larger regeneration scheme; and
- Ensure that project team members deliver the outputs for which they are responsible.

The last item is the fundamental one into which everything else feeds.

The project management role involves a myriad of tasks that must be organised and controlled during the application process. The Department for Transport has produced a guide to TWA procedures (June 2006) which, read together with the Transport and Works (Applications and Objections Procedure)(England and Wales) Rules 2006 (“the Applications Rules”), provides a helpful starting point.

The following work areas will always be involved. They will determine the composition of the project team.

Legal services/Order application management

The legal team (whether in-house and/or external) should work as an integral part of the project team providing an appropriate level of advice, and project input (training, guidance and reporting) to enable the application to proceed as smoothly and efficiently as possible.

Specific areas of input can be expected to cover:

- Strategic and legal advice on the:
- promotion, including advice on its scope, planning and environmental issues, consultation and compatibility with the European Convention on Human Rights, statutory consents and waivers;

- Preparation of the TWA Order and preparing and/or advising on supporting documents, including the Environmental Statement (“ES”) and consultation report;
- Advising on the presentation of plans and sections and ensuring their consistency with the Order provisions and the Applications Rules;
- Managing the application, preparing notices, action lists and programmes and liaising with the Department for Transport;
- Assisting and advising on objection management, negotiating with affected parties, preparing undertakings and agreements to secure the formal withdrawal of objections; and
- Handling any public inquiry, including advising on the preparation of the Statement of Case and evidence and instructing Counsel.

It is the responsibility of the applicant to ensure that the TWA Order is drafted so as to provide all the powers needed to implement the scheme in question. The drafting is expected to be clear, concise and modern in style. Where novel/bespoke clauses are used, they must be explained in the accompanying explanatory memorandum. Besides this particularly specialist input, the legal team can generally provide practical assistance, where required, on any aspect of the Order application.

Environmental assessment

The requirements of the Environmental Impact Assessment (“EIA”) Directive apply to TWA Orders. This means that where the project falls into one of the categories listed in Annex I or II to the EIA Directive, the application for the Order must include an Environmental Statement (“ES”). Annex I projects include the construction of a long distance railway line and Annex II projects include other railways and tramways.

The assessed scheme **MUST** be consistent with the draft Order and the works and land plans. One of the major risks to an application programme is not having the ES ready on time, or having a defective ES. An objector’s challenge to the form and content of an ES can delay a scheme or, at

worst, prevent it from going ahead. A good ES, on the other hand, can be a useful means of explaining a scheme and its impact to the people affected, and to the general public. It can also be a vital tool at any public inquiry. Depending on the complexity of the scheme there might be a need for the expert input of environmental consultants in specific areas such as wildlife, transport/highways, the built environment, risks to human health or water quality.

Not all schemes require an ES, however. If the proposed scheme does not constitute an Annex I or II project, then there is no statutory requirement for an ES, although the applicant may wish to produce a written appraisal of the likely environmental effects of the project on a voluntary basis to persuade potential objectors that environmental considerations have been taken fully into account.

If, as would be the case for a rail or tramway scheme, the project falls into one described in the list in Annex II, the Secretary of State for Transport may (on request) issue a “screening decision” confirming that an EIA is not required as the project would be unlikely to have a significant effect on the environment. The request for a screening decision is made before the TWA Order application and will usually require the input of an environmental consultant.

Where an ES is required, the applicant may (at any time prior to making the application) request a “scoping opinion” from the Secretary of State setting out what matters should be included in it. Again, one would expect specialist input into the request. It is apparent from the above that environmental consultants need to be engaged at a very early stage of the development of a scheme. There may be several options for achieving the desired end result and the impact on the environment must be considered for each option. Also, wildlife or other surveys that are likely to be required may have to be carried out at specific times of the year, and will need to be completed before the application is submitted. The environmental consultants will work closely with those responsible for designing the scheme to ensure that their assessment covers the scheme as eventually promoted.

Design and engineering

Draft maps, plans and sections drawn up for the scheme will ultimately need to comply with the Applications Rules and be translated by the legal team into the written powers set out in the TWA Order and its Schedules. The degree of detail required is an outline design broadly to the level of outline planning permission. (Greater detail can be provided, if wanted, but this should be done only with caution so as to ensure that there is adequate flexibility when the scheme is constructed.)

The plans and sections involve considerable work and detailed checking to ensure that they and the information they impart is the same as that contained in the TWA Order and consistent with the descriptions in the book of reference. They must also be compatible with the basis of environmental assessment and as both the design of the works and the environmental assessment develop, the plans, sections and ES may need to be revised and/or reconsidered. For example, as the development of the scheme becomes more detailed, it may become clear that further land is required (perhaps for environmental mitigation, for example) or bespoke Order provisions are required.

Communications

With today's emphasis on early and extensive stakeholder consultation, communications must also be managed from the outset. There are specific consultation requirements which must be complied with and which are quite separate from any general consultative/public relations exercise that a promoter might be expected to undertake with stakeholders and the general public. The Applications Rules specify certain bodies and persons who must be consulted, notified of the scheme and provided with copies of the application. In addition, the TWA Order application must include a Consultation Report. It is therefore important that consultation is carried out with the dual (but compatible) aims of consulting adequately with potential stakeholders and complying with the Applications Rules.

Consultation and objector/third party management are very closely related and those responsible will want to develop a communications strategy that encompasses both issues. Often it is failure to identify, engage with and explain the details of the scheme with affected parties that leads to

objections that could otherwise have been avoided.

Land Referencing

Land referencing is the process of thoroughly examining and identifying the ownership and occupancy of land and rights in land subject to compulsory powers, including anyone outside the limits of the Order but who has rights over land inside the limits, and statutory undertakers with apparatus that may be affected.

Expert land referencers will usually be needed if scheme options demonstrate a requirement for the temporary or permanent use of other people's land. In those circumstances, rule 10(4) of the Applications Rules requires the applicant to submit with the application a land plan (showing the affected land) and book of reference. The land referencer provides the information required to fulfil this legal obligation. If the book of reference is defective, the application could be delayed or could fail.

It is through the land referencing exercise that the applicant for a TWA Order will identify people who are entitled to service of documents or legal notices both in respect of the Order application and, once the Order is made, in respect of the compulsory purchase procedures. Those will mainly be people whose land is within the Order limits. In addition, the applicant must also use diligent inquiries to identify any person whose land is outside the Order limits and who may have a right to compensation for injurious affection pursuant to section 10 of the Compulsory Purchase Act 1965.

Good referencing can protect a scheme from problems later on by identifying land interests that may have an influence on land take or design. It follows that land referencing can be a complicated process for which sufficient time must be allowed in the pre-application programme. Depending upon how much time has passed between the referencing taking place and the application for the Order being made it is good practice to 'refresh' the referencing before the application is made in order to identify any changes in land interests.

Planning advice

Unless proposed ancillary works are permitted development under the Town and Country

Planning (General Permitted Development) Order 2015, planning permission is likely to be required.

The procedures for obtaining planning permission have been assimilated into the TWA Order process. Either outlined or detailed consent may be sought.

Applying for planning with the TWA Order has the advantages of ensuring that all matters are dealt with contemporaneously by one body and avoiding duplication of documentation; especially where the project straddles more than one local authority.

An applicant will want to liaise with local planners at an early stage to obtain their views of the proposals and to settle any planning conditions and matters to be reserved for the authorities' later approval, so as to avoid the local planning authority objecting to the application. Expert input on planning policy and related matters may also be required; particularly if the Order is opposed on planning grounds.

If listed heritage structures are affected, any necessary listed building, conservation area or scheduled monument consents will be required. Application for listed building consent or conservation area consent must be made to the local planning authority and is subject to "call-in" by the Secretary of State for his decision. Application for scheduled monument consent is made to the Secretary of State. These applications, therefore, can also be dealt with as part of the TWA application. An applicant should as early as possible discuss the proposals and any conditions with heritage officers of local planning authorities and, where appropriate, Historic England.

Financial and Economic Issues

Applicants are required to submit proposals for funding the cost of implementing the TWA Order and an estimate of the cost of carrying out any works that it would authorise. Under the Applications Rules, this need only take the form of a broad indication, but should include the proportion of any cost to be publicly funded and any costs for acquiring blighted land. This is a role undertaken by a commercial sponsor or similar. Although not referred to in the Applications Rules, at least in in publically funded projects, the documents available to the Secretary of State will include an explanation of the benefits to cost ratio

of the scheme supported by a robust business case. This will be particularly important where the economic benefits of a scheme are used to justify compulsory acquisition.

Summary

The key point to take away is that the TWA Order process is a statutory regime calling for close team-working by experts across several areas of expertise. Although, as an exception, some of the statutory requirements may be waived in certain circumstances, the statutory framework must be adhered to. The extent to which the roles and functions described above should be undertaken by specialists will depend on the nature and complexity of the particular scheme. For example, where the promotion concerns a small development undertaken by a heritage railway trust, some of the above roles may be carried out by volunteers. Whatever the scheme, however, the promotion of a successful application requires individuals and their teams representing a variety of disciplines to operate as a single functioning unit that can produce a flow of relevant and timely input.

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