

February 1994

TRANSPORT AND WORKS ACT 1992

BRIDGE AND TUNNEL ORDERS UNDER SECTION 48

STOPPING UP AND DIVERSION OF FOOTPATHS AND BRIDLEWAYS CROSSING RAILWAYS AND TRAMWAYS

INTRODUCTION

1. The Transport and Works Act 1992 (Commencement No 4) Order 1992 (SI 1992 No 3144) brought into effect on 31 January 1993 section 47, Schedule 2 and section 48 of the Transport and Works Act 1992 ("the Act"). Section 47 and Schedule 2 of the Act amend the Highways Act 1980 to enable local authorities to make an order (a "rail crossing order") to stop up or divert a footpath or bridleway crossing a railway or tramway on the level if the authority considers it expedient to do so in the interests of the safety of those members of the public who use, or are likely to use, the crossing. A railway and tramway operator (a "rail operator") will in practice be the person normally responsible for making the application for the order to the authority in whose area the crossing is located. Where a railway or tramway has more than one operator, the applicant will be the undertaking responsible for the permanent way. It is for the local authority to decide whether it is expedient to make the order, although the rail operator will normally take the initiative to identify potentially dangerous crossings, taking into account guidance issued by HM Railway Inspectorate in the Health and Safety Executive. The British Railways Board, for example, is surveying all its footpath and bridleway crossings, giving priority to those on high speed lines. The Secretary of State for the Environment has prescribed the form of the application and the particulars to be provided with it (the Rail Crossing Extinguishment and Diversion Orders Regulations 1993, SI 1993 No 9). Advice on the new order-making powers is contained in Department of the Environment Circular 2/93 (Welsh Office 5/93).

2. This Circular contains advice on section 48 of the Act, whereby the Secretary of State for Transport may make an order requiring a rail operator to provide a bridge or tunnel, or improve an existing bridge or tunnel. Such an order is known as a bridge or tunnel order.

PURPOSE OF SECTION 48

3. The purpose of section 48 is to enable the Secretary of State for Transport to make a bridge or tunnel order in circumstances where:

- (a) an existing footpath or bridleway crossing a railway or tramway on the level is unsafe;
- (b) it is not reasonably practicable to make the crossing safe; and
- (c) a means of crossing is nevertheless needed at or reasonably close to the site of the existing crossing.

The ability to make such an order resolves this dilemma by requiring instead the installation of a bridge or tunnel at or near the crossing point. An order may also be made to enable an existing bridge or tunnel to be improved. The section also provides the requisite statutory authority to attract grant for the installation and maintenance of such works by British Rail or Railtrack as appropriate which would not otherwise be available having regard to the constraints imposed by EC Regulations 1192/69 and 1107/70. A full description of section 48 is contained in Annex A to this Circular.

PROCEDURE FOR SECTION 43

4. Where a crossing constitutes a danger to members of the public using it or likely to use it

and, following consultation by the operator with the local authority and other parties, it is apparent to all concerned that a stopping-up or a diversion to another crossing point is not appropriate, the Secretary of State for Transport may step in and propose a bridge or tunnel order. The Department has established administrative procedures whereby operators may liaise with it on applications for rail crossing orders. The Secretary of State will, in all cases, consult the Health and Safety Executive before proposing an order.

5. The Secretary of State cannot formally propose to make a bridge or tunnel order (under section 48(4)) until the rail operator has made a request for a rail crossing order (RCO) and the other requirements of section 120(3A) of the Highways Act 1980 have been met.¹ Exceptionally an application for an order under section 1 of the Act might trigger the section 48 procedure but the rail operator should consult the Department before pursuing this course. If such an application was made involving the construction of a bridge or tunnel and consequential extinguishment or diversion of a rail crossing, the section 48 procedures could not be applied because the operator would have pre-empted the Secretary of State's powers under section 48.

6. The operator must first therefore apply to the local authority using the appropriate form prescribed in the Rail Crossing Orders Regulations. Where the local authority, the operator and the Department of Transport are agreed on the need for a bridge or tunnel, the Secretary of State will give notice to the operator and to the relevant local authority of his proposal to make a bridge or tunnel order. This will enable the local authority to consider the implications for the rail crossing order application.

7. When the Secretary of State has made the bridge or tunnel order (which will be not less than 2 months after giving notice of the proposal) the operator must use his best endeavours to comply with the order, if necessary by obtaining any powers or rights required to enable the bridge or tunnel to be constructed.

8. In parallel with initiating action for the design and construction of the bridge or tunnel, therefore, the rail operator will need to seek the necessary powers. In a simple case where a bridge or tunnel can be constructed entirely over or under the operator's own land, the operator will need to make an application for an appropriate rail crossing diversion order reflecting the obligation to construct a bridge or tunnel. (See DOE Circular 2/93 WO 5/93 Annex C, paras 52-54).

9. The local authority should make the rail crossing order as soon as practicable. It is possible that there will be objections to the order in which case the authority will usually refer it to the Secretary of State for the Environment (or Wales) for confirmation and a local public inquiry may be required. The Departments involved, Transport and Environment (or Wales), have ensured (by suitable administrative arrangements) that each is kept informed of applications for and of the progress made in dealing with rail crossing and bridge or tunnel orders so that appropriate decisions are taken.

10. It is likely, however, that in some cases a rail crossing diversion order by itself may not be sufficient. The rail operator may need to acquire land on which to construct the bridge or tunnel. In such cases, the operator should negotiate the purchase of the land with relevant landowners. Compulsory purchase powers should be sought only where such negotiations are unsuccessful. The most obvious solution in such cases would be for an operator to apply for an order under section 1 of the Act and obtain all necessary powers, consents and so on (including planning permission, if required) in one order. An operator should treat each case on its merits.

11. The procedure will be somewhat different if the rail operator, the local authority and the Secretary of State for Transport are not in agreement on the need for a bridge or tunnel. In these circumstances the operator will apply for a rail crossing order and seek to persuade the local authority, or failing that, the Secretary of State for the Environment (or Wales), to make the order. If it is opposed, the authority should refer it to the Secretary of State for the Environment (or Wales) for confirmation and he will usually arrange for a public inquiry to be held. If the inquiry Inspector concludes that (a) the crossing is unsafe, (b) it could not be reasonably practicably made safe by increased protection, (c) it should not be closed (because it is needed), and (d) a bridge or tunnel should be provided, the Secretary of State for Transport will then consider whether to make a bridge or tunnel order. It should be noted, however, that his power to make such an order expires two years from the date of the application for the rail crossing order. If the Secretary of State for Transport accepts the Inspector's recommendation, notice of a bridge or tunnel order proposal will be issued. Once the order is made, the Secretary of State for the Environment (or Wales) will then consider whether the rail crossing order should be confirmed either in its original form or with modifications.

¹ Added by section 47 and Schedule 2 to the Act

CONSULTATION AND REPRESENTATIONS

12. It should be noted that there is no provision for a local authority or an operator to "apply for" a bridge or tunnel order. It is triggered by a closure or diversion application. However, before making a bridge or tunnel order, the Secretary of State must publish a draft and serve a copy on the operator and on each local authority in whose area the crossing is situated. This allows the local authority and operator to make representations. It is recommended that the local authority seeks the views of local liaison groups and other interested parties on the draft order (See DOE Circular 2/93 WO 5/93 para 6). The Secretary of State is to give at least two months written notice before making an order.

CONTENTS OF A BRIDGE OR TUNNEL ORDER

13. An order may include particulars as to the tunnel or bridge which is to be provided or as to the improvements which are to be made to an existing tunnel or bridge. The Secretary of State does not intend to mention particular matters at length since, by and large, it is anticipated that a works order under section 1 or (where none is required) the planning permission will deal with the physical details. Safety issues relating to the bridge or tunnel will be covered by the Secretary of State's power to approve new works, plant and equipment under regulations to be made under section 41 of the Act. Detailed design of the bridge or tunnel will be a matter for the operator, taking into account the needs of users and planning requirements.

RELATIONSHIP BETWEEN OPERATIVE DATES FOR A RAIL CROSSING DIVERSION ORDER AND BRIDGE OR TUNNEL ORDER

14. Where possible, the Secretary of State for the Environment (or Wales), in the case of an opposed rail crossing diversion order, or the local authority, for an unopposed order, should time the date of coming into force of the order so as to allow for the time needed to construct and bring into use the bridge or tunnel which is the subject of the corresponding bridge or tunnel order. If there is some doubt as to how long consultation will take, the confirming authority might issue a letter stating that it is intended to confirm the order

once the bridge or tunnel has been built. If the operator needs to close the crossing to enable the construction of the bridge or tunnel to take place, this may be achieved either by applying for a Traffic Regulation Order or by seeking the powers under a Section 1 order.

PAYMENT OF GRANT FOR BRIDGES OR TUNNELS

15. Where a bridge or tunnel order has been made, the Department will pay a grant to British Rail (in future Railtrack) under EC Regulation 1192/69 or 1107/70 as appropriate. The regulation prescribes that the grant shall be equal to the proportion of the cost borne by the British Railways Board or Railtrack as appropriate, less any additional costs for modification made at the request of the operator and the value of any benefit that they derive from work carried out. Grant will be net of any contributions to costs made by local authorities or other persons. The costs to be taken into account will include construction and maintenance costs. The grant paid will be treated as part of British Rail's external finance limit.

16. As with level crossing grants, it is not possible to say how much grant will be paid in any one year for bridges or tunnels. The total will depend on the number of orders made under section 48 and the cost of the bridge or tunnel, which will vary from site to site. The total number of orders will reflect in part the outcome of public inquiries into applications for extinguishment or diversion, which are impossible to predict.

17. Whilst a tramway or light rail operator might theoretically be involved in closing an unsafe footpath or bridleway level crossing, this is likely to be a rare event, because light railway vehicles are relatively slow and usually have a better stopping ability than a conventional train. Furthermore, most systems are relatively new so potential problems of this kind should have been dealt with at the planning stage, with the costs of a footbridge or tunnel being included in the project as a whole.

MANPOWER AND EXPENDITURE IMPLICATIONS

18. This Circular has no additional manpower or expenditure implications for local authorities. Responsibility for making section 48 orders rests with the Secretary of State for Transport.

ENQUIRIES

19. Enquiries about this Circular should be addressed to Room S19/16A, Department of Transport, 2 Marsham Street, London SW1P 2EB, telephone 071-276-5880. Enquiries about rail crossing orders should be addressed to Room 920, Department of the Environment, Tollgate House, Houlton Street, Bristol BS2 9DJ, telephone 0272 218666 or; Legal Group, Welsh Office, Crown Buildings, Cathays Park, Cardiff CF1 1NQ, telephone 0222 8233323.

Dr J D DENNING **Assistant Secretary in the Department of Transport**

The Chief Executive	
Metropolitan District Councils	} in England and Wales
District Councils	
County Councils	
London Borough Councils	

The Town Clerk, City of London

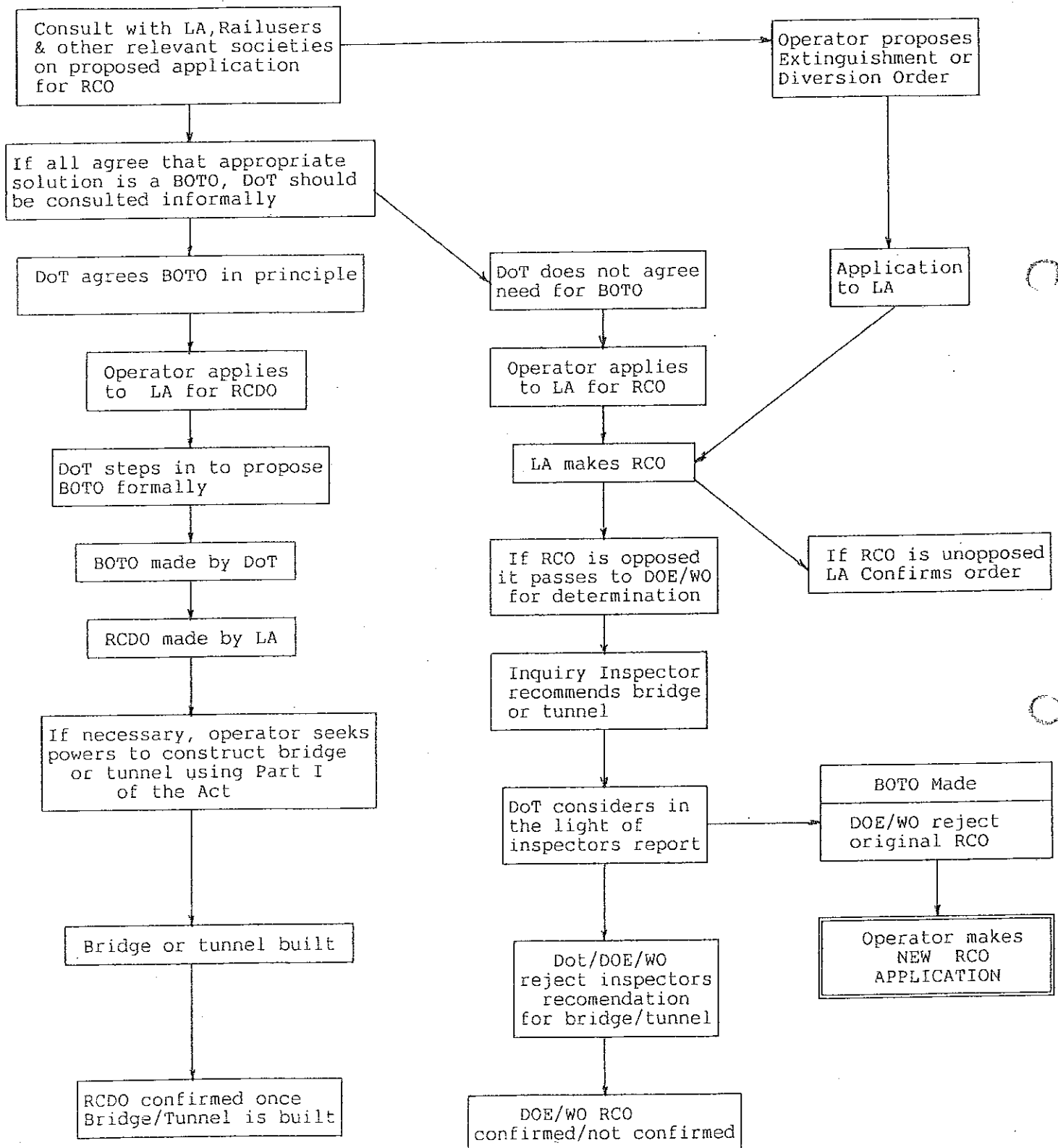
The National Park Officer
Peak Park Joint Planning Board
Lake District Special Planning Board
The Chief Executive, The Broads Authority

Guide to section 48 of the Transport and Works Act 1992

1. Subsection (1) defines the circumstances in which the new power is to be exercisable. It applies to footpath and bridleway level crossings on railways and tramways in England and Wales. The operator must have applied for a rail crossing diversion order, a rail crossing extinguishment order or a works order under Part I of the Act proposing the diversion or extinguishment of a public right of way. The Secretary of State must be of the opinion that the crossing constitutes a danger to users.
2. Subsection (2) provides that an order may require provision of a tunnel or bridge, or (because it may be cheaper or more convenient to do so) the improvement of an existing tunnel or bridge at, or reasonably near to, the existing level crossing.
3. Subsection (3) provides that an order may include particulars as to the tunnel or bridge which is to be provided or as to the improvements which are to be made. Bridge and tunnel orders are likely to be fairly simple documents. Detailed aspects of construction are likely to be contained in the works order under Part I of the Act. Such an accompanying order will be necessary in most cases, for example, to acquire land and other rights for the bridge or tunnel. In other cases it will fall to the planning authority to approve the design.
4. Subsection (4) provides that an order must be made within two years of the operators' closure or diversion application. Some time limit is necessary so that the Secretary of State's action is linked to the decision about the future of the crossing. Before making an order the Secretary of State for Transport is to give at least two months written notice to the operator and to each local authority in whose area the crossing or any proposed new crossing is situated.
5. Subsection (5) provides that the notice must include a draft of the proposed order, and that the made order may differ from the proposed one.
6. Subsection (6) provides that an operator is not to be treated as being in breach of the duty in a bridge or tunnel order if he has used his best endeavours to comply with the order.
7. Subsection (7) provides that where an operator cannot provide or improve a bridge or tunnel as ordered, because he does not have the necessary powers or rights (eg compulsory purchase powers or planning permission), he is not to be taken to have used his best endeavours to comply with the order unless he has used his best endeavours to obtain those powers or rights.
8. Subsections (6) and (7) are necessary because of the unusual situation in which an operator may be required to build a bridge or tunnel for which he will then need to seek the necessary powers, lands and rights to bring the bridge or tunnel order into effect. He will be obliged to use his best endeavours to obtain such powers, lands and rights, probably by means of an order under section 1. If he cannot do so, for example because the bridge proposal is found to have an unacceptable impact on landowners' interests or local amenity, then the bridge or tunnel order will not be enforceable. Enforcement of a statutory duty imposed by an order would be by means of an order of mandamus.
9. Subsection (8) lists a number of expressions used in the section and defines their meaning.

Parties in Agreement

Parties Not in Agreement



Abbr RCDO - Rail Crossing Diversion Order
BOTO - Bridge or Tunnel Order
DoT - Department of Transport
WO - Welsh Office

RCO - Rail Crossing Order
LA - Local Authority
DOE - Department of the Environment