



# The Sizewell C Project

## 3.1 Tenth Draft Development Consent Order Addendum - Proposed Changes to the Draft Development Consent Order

October 2021

Planning Act 2008  
Infrastructure Planning (Applications: Prescribed Forms and Procedure) Regulations 2009

Revision: 1.0  
Applicable Regulation: Regulation 5(2)(q)  
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HERBERT  
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**SIZEWELL C (NUCLEAR GENERATING STATION) ORDER  
SCHEDULE OF CHANGES TO THE DRAFT DEVELOPMENT CONSENT ORDER (Deadline 10)  
FROM REV 10.0 TO REV 11.0**

**Abbreviations**

**CPMMP – Coastal Processes Monitoring and Mitigation Plan**

**EA1N – East Anglia One North Limited**

**EA2 – East Anglia Two Limited**

**ESC – East Suffolk Council**

**ESW – Essex and Suffolk Water**

**ExA – Examining Authority**

**LMP – Lighting Management Plan**

**MMO – Marine Management Organisation**

**NE – Natural England**

**NG – National Grid**

**ONR – Office for Nuclear Regulation**

**SCC – Suffolk County Council**

DCO Ref (Art/Sched)	Stakeholder/ Applicant	Change made	Comment from stakeholder/rationale	DCO Version
Table of contents and recitals	Applicant	Fully updated, and 'five' added to refer to number of Panel members	N/A	Rev 11
Changes made throughout the Order	Applicant	<p>All article numbers, Schedule numbers and requirement numbers have been updated to reflect the renumbering of the DCO in this final version. The titles of articles and Schedules cross-referred to have been checked and updated. We have adopted the convention of only putting the name of a Schedule or article cross-referred to in brackets on the first occasion used. Typos and similar minor errors have also been picked up throughout.</p> <p>Specific reference to all such changes is not made in this Schedule of Changes unless the reason is not obvious.</p>	N/A	
Art 2(1)	Applicant	All definitions which refer to certified documents (and are therefore by convention capitalised definitions for ease of reference) have been reviewed and where necessary revised such that they are described as follows: "means the document certified as such by the Secretary of State under article 80 (Certification of plans, etc)"	Consistency	Rev 11

DCO Ref (Art/Sched)	Stakeholder/ Applicant	Change made	Comment from stakeholder/rationale	DCO Version
Art 2(1)	SCC	Definition of bridleway added	Definition added at SCC request and form of words agreed with SCC	Rev 11
Art 2(1)	Applicant	Definition of 'commence', limb (g) updated	New Work numbers inserted, and for ease of reference the nature of the three works referred to are inserted in brackets	Rev 11
Art 2(1)	SCC	Definitions of 'cycle track' and 'cycleway' added	Definition added at SCC request and form of words agreed with SCC	Rev 11
Art 2(1)	Applicant	Definition of 'Deed of Obligation' expanded to include 'the deed of covenant made between the undertaker and the Environment Agency (EA) on 8 October 2021 under section 37 of the Environment Act 1995 and section 30 of the Anglian Water Authority Act 1977.	As the EA are receiving funds directly under the Deed of Obligation, SZC Co and the EA entered into a different agreement to the template deed of covenant appended to the Deed of Obligation which will be entered into by the parties who are receiving monies received by the Councils for 'onward payment' under the Deed of Obligation. Definition also re-configured to make it clearer that modifications to the deeds sitting beneath the Deed of Obligation are also subject to article 11, and once varied will also continue to form part of the Deed of Obligation for the purpose of enforcement and variation provisions of this Order.	Rev 11
Art 2(1)	Applicant	New definitions added: <ul style="list-style-type: none"> <li>Draft Coastal Processes Monitoring and Mitigation Plan</li> <li>Draft Fen Meadow Plan</li> </ul>	These documents are referred to in the Requirements and will be certified. They are therefore also listed in Schedule 22 (Certified Documents)	Rev 11



DCO Ref (Art/Sched)	Stakeholder/ Applicant	Change made	Comment from stakeholder/rationale	DCO Version
		<ul style="list-style-type: none"> <li>• Draft Fish Impingement and Entrainment Monitoring Plan</li> <li>• Draft Marine Mammal Mitigation Protocol</li> <li>• Draft Rail Noise Mitigation Plan</li> <li>• Draft Sabellaria Reef Management and Monitoring Plan</li> <li>• Draft Site Integrity Plan</li> <li>• Draft Water Monitoring and Management Plan</li> <li>• Draft Wet Woodland Plan</li> <li>• Estate Wide Management Plan</li> <li>• On-site Marsh Harrier Compensatory Habitat Strategy</li> <li>• Outline Vessel Management Plan</li> <li>• Sizewell Link Road Landscape and Ecology Management Plan</li> <li>• Terrestrial Ecology Monitoring and Mitigation Plan</li> <li>• Two Village Bypass Landscape and Ecology Management Plan</li> <li>• Westleton Marsh Harrier Compensatory Habitat Strategy</li> </ul>		



DCO Ref (Art/Sched)	Stakeholder/ Applicant	Change made	Comment from stakeholder/rationale	DCO Version
Art 2(1)	SCC	Definition of 'footway' expanded to refer also to 'footpath'	Response to request from SCC	Rev 11
Art 2(1)	Applicant	New definition added, of 'main platform works' to describe Work No. 1A(a) to (h), which are referred to in art 9, 10 and 11.	The 'main platform' is a recognised term used by nuclear engineers to describe this set of works, and it appeared neater to use this term in the relevant articles.	Rev 11
Art 2(1)	Applicant	Definition of 'marine works' updated to include in brackets a description of the relevant elements referred to.	For ease of reference.	Rev 11
Art 2(1)	Natural England	Definition of 'Natural England' included, and definition of 'Statutory Nature Conservation Body' deleted.	Natural England requested to be referred to by name throughout.	Rev 11
Art 2(1)	Applicant	Definition of 'new Sizewell B relocated facilities permission' amended to add "prior to service of notice under article 5 (Effect of the Order on the Sizewell B relocated facilities permission)'	Clarification to ensure that article 5 does not prevent the obtaining or enforcement of any future permissions that Sizewell B may wish to obtain going forward.	Rev 11
Art 2(1)	Applicant	Definition of 'permanent limits' revised to remove reference to article 26 (now article 28).	This term is used in a number of articles, and there does not appear to be any need to refer to article numbers in the definition.	Rev 11
Art 2(1)	Applicant	Definition of 'rail work' revised to refer to 'Work No. 4', as the interpretation provisions specify that this incorporates Work No 4A, 4B, 4C and 4D	Consistency	Rev 11



DCO Ref (Art/Sched)	Stakeholder/ Applicant	Change made	Comment from stakeholder/rationale	DCO Version
Art 2(1)	Applicant	'Sizewell B relocated facilities permission 2' definition – deletion of words 'and reference to 'SZC relocation site 2' means the area within the boundary of Work No. 1E as shown on the Works Plans'	The term 'SZC relocation site 2' is not used	Rev 11
Art 2(1)	Applicant	'Sizewell B relocated facilities permission 1' definition – deletion of words 'and reference to 'SZC relocation site 1' means the area within the boundary of Work No. 1E as shown on the Works Plans'	The term 'SZC relocation site 1' is not used.	Rev 11
Art 2(1)	SCC	Definition of 'street' amended	At SCC request	Rev 11
Art 2(1)	Applicant	Definition of 'terrestrial works' – inclusion of 'mean high water springs' rather than 'MHWS' and deletion of unnecessary statement that 'Works below MHWS are marine works'	Clarification, and deletion of unnecessary statement in relation to 'marine works' (which are defined separately)	Rev 11
Art 2(13)	SCC	Interpretive provisions relating to meaning of a 'highway (NMUs)' revised to refer to a highway 'over which only non-motorised users may pass, but which is not a highway shown or required to be shown on the definitive map and statement (as defined in section 53 of the Wildlife and Countryside Act 1981).'	SCC considers this formulation clearer than referring to 'public rights of way'. However, in substance the meaning is unchanged.	Rev 11



DCO Ref (Art/Sched)	Stakeholder/ Applicant	Change made	Comment from stakeholder/rationale	DCO Version
Art 4(1)	Applicant	Addition of reference to Work No. 18	Previously missed, in error.	Rev 11
Art 4(3)(b)	Applicant	'indicated on' replaced with 'shown or noted on'	Consistency with rest of article 4	Rev 11
Art 9(6)(2)	Applicant	The term 'main platform works' now used in place of 'Work No 1A(a) to (h)'	For clarity it appeared to us to be more helpful to create and use a defined term, given these works are referred to in several articles	Rev 11
Art 9(3A)	Applicant	We have not made any change to this article, but have kept it in square brackets and numbered as paragraph 3A	We have adopted this approach on the basis that we do not consider this paragraph to be necessary legally, for reasons explained in our submissions, however in the event that the Secretary of State wishes to include it we are content for it to be included, noting that the Councils consider that it provides additional comfort	Rev 11
Art 9(5), 9(6) and 9(7)	Applicant  SCC	Minor changes made to clarify the drafting, and to employ the term 'main platform works' rather than 'Work No. 1A9a) to (h)'  Inclusion of the phrase 'in accordance with article 10 (Enforcement of the Deed of Obligation)' in paragraph (7)	Clarification of drafting at SCC request	Rev 11
The remainder of art 9 (formerly paragraphs	Applicant	Deleted	Not needed as all transfers under article 9 require Secretary of State consent in latest drafting.	Rev 11

DCO Ref (Art/Sched)	Stakeholder/ Applicant	Change made	Comment from stakeholder/rationale	DCO Version
(6), (7), (8) and (9))				
Art 10(7)	Applicant	Replacement of 'subsection 5 of this section' with 'paragraph 5 of Schedule 7 to the Courts Act 2003'	Correction. Erroneous cross-reference previously included when this article was first drafted.	Rev 11
Art 10(9)	Applicant	Replacement of reference to 'Work No 1A(a) to (h)' in definition of 'undertaker' with new defined term 'main platform works'	Use of new defined term, for clarity and ease of reference	Rev 11
Art 11(3)	Applicant	Deletion of paragraph (3)	See explanation in Drafting Note 16 (see Appendix).	Rev 11
New art 11(3)	Applicant	Inclusion of ", taking into account their responses,"	See explanation in Drafting Note 16 (see Appendix).	Rev 11
Art 11(4)	Applicant	Addition of words 'or such other date as the Secretary of State may determine'	To allow for any circumstances where for any particular reason the Secretary of State considers it appropriate for the change to take effect on a particular date other than the date of their determination.	Rev 11
Art 11(10)	Applicant	Replacement of reference to 'Work No 1A(a) to (h)' in definition of 'undertaker' with new defined term 'main platform works'	Use of new defined term, for clarity and ease of reference	Rev 11
Article 14	SCC	Addition of new paragraphs (4) and (5): "(4) The authority given by paragraph (1) or (2) is a statutory right for the	Change agreed with SCC	Rev 11



DCO Ref (Art/Sched)	Stakeholder/ Applicant	Change made	Comment from stakeholder/rationale	DCO Version
		<p>purposes of sections 48(3) (streets, street works and undertakers) and 51(1) (prohibition of unauthorised street works) of the 1991 Act.</p> <p>(5) The provisions of sections 54 to 106 of the 1991 Act (unless disapplied through the operation of article 13 (application of the 1991 Act)) apply to any street works carried out under paragraph (1) or (2)."</p>		
Art 15	SCC	Changes to this provisions, which deals with the application of the New Roads and Street Works Act 1991.	All changes agreed with SCC	Rev 11
Art 16(10)	Applicant	Deletion of paragraph (10)	No need for a bespoke definition of street for the purpose of this article.	Rev 11
Art 18(2), (3) and (4)	Applicant	Changes made to refer to 'owners and occupiers' consistently in all paragraphs; and more clarity provided in paragraph (4) as to on whom the notice needs to be served by reference to the table in Schedule 12.	Consistency and clarity	Rev 11
Article 19	Applicant	Deletion of paragraph (11)	No need for a bespoke definition of street for the purpose of this article.	Rev 11
Article 23(3) and (4)	Applicant	Definition of 'rail-related works' added to refer to all level crossing works authorised by the Order, and paragraph	To ensure that any highway works necessitated by these 'rail-related works' are also covered by this article.	Rev 11

DCO Ref (Art/Sched)	Stakeholder/ Applicant	Change made	Comment from stakeholder/rationale	DCO Version
		(3) expanded to make clear that any highway works necessitated by these 'rail-related works' are also covered by this article.		
Article 61 and 63	Applicant / MMO	Change to notice provisions for confirmation of byelaws and publication of general directions – removal of duty to publish in London Gazette (in art 61) and in Lloyds List or other newspaper specialising in shipping news (in art 63). Both articles now made consistent – duty instead to publish 'once in each of two successive weeks in <u>two</u> local newspapers circulating in the district of East Suffolk Council' (and on the undertaker's website).	Consistency	Rev 11
Art 61(2)(b)	Applicant	Deletion of 'or the harbour authority' (given that the 'undertaker' and 'harbour authority' are the same entity)	Consistency with change previously made to art 63(1)(b)	Rev 11
Sch 1	Applicant	Minor updates to various works descriptions	Corrections	Rev 11
Sch 2, para. 1(4)	Applicant	", or any subsequent version of the details, scheme, plan or document approved under a requirement" added to the end of this sub-paragraph	Correction so as to align sub-paragraph (4) with sub-paragraph (2)	Rev 11

<b>DCO Ref (Art/Sched)</b>	<b>Stakeholder/ Applicant</b>	<b>Change made</b>	<b>Comment from stakeholder/rationale</b>	<b>DCO Version</b>
Sch. 2, Req 3(4)	Applicant	Reference to Work No. 1A(ii) added	Correction	Rev 11
Sch 2, Req 3(6)(a)	ESC	"in accordance with the Overarching Archaeological Written Scheme of Investigation" added to this sub-paragraph1	So that site-specific post excavation assessments must be in accordance with the Overarching Archaeological Written Scheme of Investigation	Rev 11
Sch 2, Req 5	SCC	New paragraph (1) and other amendments	To respond to SCC comments regarding the need for submission of a final drainage strategy.	Rev 11
Sch 2, Req 6	SCC	New paragraph (2) and other amendments	To respond to SCC comments regarding review and approval of the construction emergency plan and the need for the ONR to decide if agreement of the plan is not reached.	Rev 11
Sch 2, Req 7	Applicant	Various minor updates	Corrections	Rev 11
Sch 2, Req 8	NE	Natural England added as a consultee.	At the request of NE	Rev 11
Sch 2, Req 9	Applicant	Reference to main development site added	Correction	Rev 11
Sch 2, Req 10(1)	SCC	Minor drafting amendment	To clarify that that the public rights of way implementation plans referred to in paragraphs (2) and (3) are a subset of the public rights of way implementation plans referred to in paragraph (1)	Rev 11
Sch 2, Req 10(3)	SCC	Work Numbers updated to reflect the works that have public rights of way proposals within them	Correction	Rev 11



DCO Ref (Art/Sched)	Stakeholder/ Applicant	Change made	Comment from stakeholder/rationale	DCO Version
Sch 2, Req 11	Applicant	Minor drafting updates	Corrections	Rev 11
Sch 2, Req 12	ESC	Reference to "terrestrial" added and updates made to the details required to be included in the CPMMP.	To reflect discussions with ESC around jurisdictional issues and details required to be submitted.	Rev 11
Sch 2, Req 13(1)	ESC / SCC	Reference to "Work No.1" changed to "the authorised development"	To ensure it is clear on the face of the requirement that the Construction Method Statement relates to more than just Work No. 1	Rev 11
Sch 2, Req 13(2)	Applicant	"within" replaced with "forming part of"	To ensure it is clear that the car parking thresholds relate to car parking associated with Work No. 1A and not parking associated with other Work Nos which is within the Work No. 1A area (e.g. accommodation campus parking) as that is not the intention of the requirement.	Rev 11
Sch 2, Req 14	ESC / SCC	Reference to "Work No.1" changed to "the authorised development"	To ensure it is clear on the face of the requirement that the LMP relates to more than just Work No. 1	Rev 11
Sch 2, Req 15	Applicant	"is" replaced with "must"	Correction	Rev 11
Sch 2, Req 17	Applicant	Minor updates to drafting	Corrections to align with works descriptions	Rev 11
Sch 2, Req 18	Applicant	Reference to "buildings" deleted	Correction as there are no buildings to be approved under this requirement	Rev 11
Sch 2, Req 19	Applicant	Minor updates to drafting	Clarifications	Rev 11
Sch 2, Req 20	Applicant	Minor updates to drafting including adding (i) EA as a consultee in para	Corrections and clarifications	Rev 11

DCO Ref (Art/Sched)	Stakeholder/ Applicant	Change made	Comment from stakeholder/rationale	DCO Version
		(1), (ii) reference to Chapter 5 of the MDS DAS in para (2)(a), and "single" before "span" in para (2)(b)(iii)		
Sch 2, Req 21	ESC	Various updates to the drafting including (i) replacing "commence" with "carried out" and (ii) adding reference to Figure 3D.29 of the Construction Method Statement as the document that the method statements must be in general accordance with	Corrections and clarifications	Rev 11
Sch 2, Req 23(3)	SCC	Cross-reference to the final drainage strategy approved pursuant to Requirement 5 added	To ensure that the drainage details secured by this Requirement align with the final drainage strategy	Rev 11
Sch 2, Req 24	ESC	Minor updates to drafting including adding reference to the construction measures set out in Table 6.1 of the Outline Landscape and Ecology Management Plan	Corrections and clarifications	Rev 11
Sch 2, Req 25	SCC	Minor updates to drafting including change to SCC's capacity as discharging authority	To accurately reflect that SCC is discharging in its capacity as local planning authority, not Lead Local Flood Authority	Rev 11
Sch 2, Req 27	Applicant	Updates to the names of the strategies	Corrections	Rev 11
Sch 2, Req 29	ExA	Reference to Work No. 1A(ii) (temporary desalination plant) added in response to ExA comments	Correction	Rev 11

<b>DCO Ref (Art/Sched)</b>	<b>Stakeholder/ Applicant</b>	<b>Change made</b>	<b>Comment from stakeholder/rationale</b>	<b>DCO Version</b>
Sch 2, Req 30	ESC	Reference to relevant construction parameter plan added	Correction	Rev 11
Sch 2, Req 31	Applicant	Reference to vertical limits of deviation deleted	To align with revised drafting of article 4	Rev 11
Sch 2, Req 34	Applicant	Minor updates to the works descriptions in brackets	Corrections to align with Requirement 35	Rev 11
Sch 2, Req 35(2)	Applicant	Reference to vertical limits of deviation deleted	To align with revised drafting of article 4	Rev 11
Sch 2, Req 35(3)	SCC	Cross-reference to the final drainage strategy approved pursuant to Requirement 5 added	To ensure that the drainage details secured by this Requirement align with the final drainage strategy	Rev 11
Sch 2, Req 36	SCC	SCC added as a consultee in respect of any proposals within the highway boundary	At the request of SCC	Rev 11
Sch 2, Req 38	Applicant	Trigger for submission of Associated Development land restoration scheme added	Clarification	Rev 11
Sch 2, Req 40	ESC / SCC	New requirement added	To place a limit on operational noise levels	Rev 11
Sch 4	Applicant	Various updates to revision numbers	Corrections	Rev 11
Sch 5	Applicant	Various updates to revision numbers and removal of duplicate	Corrections	Rev 11
Sch 7	Applicant	Various updates to revision numbers	Corrections	Rev 11



<b>DCO Ref (Art/Sched)</b>	<b>Stakeholder/ Applicant</b>	<b>Change made</b>	<b>Comment from stakeholder/rationale</b>	<b>DCO Version</b>
Sch 9	Applicant	Update to revision number	Correction	Rev 11
Sch 10	Applicant / SCC	Updates to label references	Corrections to respond to SCC comments	Rev 11
Sch 11	Applicant / SCC	Updates to statuses in column (3) and "cyclepath" replaced with "cycle track"	Corrections to respond to SCC comments	Rev 11
Sch 14	Applicant / SCC	Various updates to descriptions and extents	Corrections to respond to SCC comments	Rev 11
Sch 19, Part 3	Applicant	Minor updates to drafting	Corrections	Rev 11
Sch 19, Part 4	Applicant	Minor updates to drafting	Corrections	Rev 11
Sch 19, Part 5	NG	Protective provisions updated	Updated at NG's request to reflect agreed position reached with NG	Rev 11
Sch 19, Part 6	Cadent	Protective provisions removed	Removed at Cadent's request to reflect agreed position reached with Cadent	Rev 11
Sch 19, (new) Part 6	ESW	Protective provisions updated	Updated to reflect agreed additional protections relating to water supply	Rev 11
Sch 19, Parts 9 and 10	EA1N and EA2	Protective provisions added	As agreed with EA1N and EA2 respectively	Rev 11
Sch 21	MMO / Applicant	Various drafting changes	To reflect corrections and discussions with MMO	Rev 11
Sch 24	Applicant	Certified Documents schedule updated	All new certified documents included in updated Schedule	Rev 11

<b>DCO Ref (Art/Sched)</b>	<b>Stakeholder/ Applicant</b>	<b>Change made</b>	<b>Comment from stakeholder/rationale</b>	<b>DCO Version</b>
Sch 25, para 4(14)	SCC	Exclusion from the appeal procedure in relation to Requirement 6 added	At the request of SCC	Rev 11
Sch 26	Applicant	Control of Pollution Act 1974 provisions deleted	Correction. Not required in addition to article 12	Rev 11

**APPENDIX TO DCO SCHEDULE OF CHANGES**

**DCO DRAFTING NOTE 16**

**Modification of discharge of Deed of Obligation**

**Removal of article 11(3) (formerly article 9B(3))**

**1. INTRODUCTION**

- 1.1 At Deadline 10, SZC Co's final version of the DCO (Rev 11) includes art 11 (Modification and discharge of Deed of Obligation) in the form below. The text struck through has been deleted, and the text underlined in red added. The latter at East Suffolk Council's ('ESC') request. This note explains the rationale for these proposed change.

**Modification and discharge of Deed of Obligation**

- 11.—(1) An obligation in the Deed of Obligation may not be modified or discharged except—
- (a) by agreement between the undertaker and the beneficiary of the obligation, executed as a deed; or
  - (b) further to a determination by the Secretary of State under this article.

- (2) The undertaker may apply to the Secretary of State for the obligation—

- (a) to have effect subject to such modifications as may be specified in the application; or
- (b) to be discharged,

and must notify East Suffolk Council and Suffolk County Council as soon as any such application is made.

~~(3) An application under paragraph (2) for the modification of an obligation in the Deed of Obligation may not specify a modification imposing an obligation on any other person against whom the Deed of Obligation is enforceable.~~

- (3) Where an application is made to the Secretary of State under paragraph (2), the Secretary of State must consult East Suffolk Council and Suffolk County Council and, taking into account their responses to consultation, may determine—

- (a) that the obligation shall continue to have effect without modification;
- (b) if the obligation no longer serves a useful purpose, that it shall be discharged; or
- (c) if the obligation continues to serve a useful purpose, but would serve that purpose equally well if it had effect subject to the modifications specified in the application, that it shall have effect subject to those modifications,

and shall give notice of his or her determination to the applicant, East Suffolk Council and Suffolk County Council within three months of the application and provide full reasons for the decision.

- (4) Where the Secretary of State determines under this article that an obligation shall have effect subject to modifications specified in the application, the obligation as modified shall be enforceable as if it had been entered into on the date on which notice of the determination was given to the applicant, East Suffolk Council and Suffolk County Council or such other date as the Secretary of State may determine.

- (5) An application to the Secretary of State under paragraph (2) shall include the following information—





<p>(a) the name and address of the undertaker;</p> <p>(b) sufficient information to enable identification of the obligation which the undertaker wishes to have modified or discharged;</p> <p>(c) the undertaker's reasons for applying for the modification or discharge of that obligation; and</p> <p>(d) such other information as the Secretary of State considers necessary to enable them to determine the application.</p> <p>(6) When the Secretary of State receives an application for the modification or discharge of an obligation under paragraph (2) the undertaker shall arrange for the application to be publicised by—</p> <p>(a) posting notice of the application on or near the land to which the obligation relates for not less than 21 days; or</p> <p>(b) publishing notice of the application in a local newspaper circulating in the locality in which that land is situated and on the undertaker's website.</p> <p>(7) The notice referred to in paragraph (6) must include the name of the undertaker, details of the obligation that is proposed to be modified or discharged, an address or website where members of the public may inspect copies of the application, the address or email address to which any person who wishes to make a representations may write, and a date (no later than 21 days beginning on the date that the notice is posted or published) by which such representations should be made to the Secretary of State.</p> <p>(8) Where it is proposed that either East Suffolk Council or Suffolk County Council is not to be a party to any deed entered into under paragraph (1)(a), the council not proposed to be a party must be provided with the information set out in paragraphs (5)(a) to (c), and be given not less than 21 days to make representations.</p> <p>(9) Section 84 of the Law of Property Act 1925 (power to discharge or modify restrictive covenants affecting land) does not apply to an obligation in the Deed of Obligation.</p> <p>(10) In this article "undertaker" means the undertaker authorised to construct or operate the main platform works, being the undertaker bound by the Deed of Obligation.</p>
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- 1.2 Following discussion with SZC Co's Counsel, SZC Co considers that paragraph (3) could be read as inappropriately restricting the ability of the Secretary of State to vary certain arrangements in the Deed of Obligation. The inclusion of paragraph (3) could, therefore, frustrate the purpose of paragraph (2), which is for the Secretary of State to be able to intervene and consent a variation to the Deed in circumstances where this is not agreed with one or other of the counterparties to the Deed (the two Councils), but is considered by the Secretary of State to be appropriate.
- 1.3 Paragraph (3) provides that: **"An application under paragraph (2) for the modification of an obligation in the Deed of Obligation may not specify a modification imposing an obligation on any other person against whom the Deed of Obligation is enforceable."**
- 1.4 This provision replicates an equivalent provision in the Town and Country Planning Act 1990, which deals with modifications of s106 agreements with the Secretary of State's consent (s106A(5) TCPA).
- 1.5 In putting forward the 'Evolving Approach', SZC Co has sought insofar as possible and appropriate to replicate the arrangements for enforcement and variations of agreements made under s106 TCPA. Nevertheless, it is important to look critically at how that regime



might work in relation to this specific project when deciding how to word the provisions of the Order.

- 1.6 For most s106 agreements, s106A(5) TCPA (equivalent to our deleted art 11(3)) is unlikely to cause difficulties. Most developers are likely to be seeking the removal or reduction of a payment provision, or the removal of a duty to take some action, or the delaying of a trigger. It is unlikely that the changes required in respect of most schemes, would require the imposition of a new (or modification of an existing) obligation on a Council under the s106 agreement.
- 1.7 However, the nature of the arrangements provided for in the Deed of Obligation are more complex and collaborative than the obligations in most s106 agreements. A great deal of the Deed of Obligation provides for governance arrangements, decisions by 'review groups' and 'working groups' of which the two Councils are part, and related commitments by the two Councils to spend money or do things agreed by the groups.
- 1.8 It may be the case, for example, that a set of drafting changes are required to the Deed of Obligation, which change the governance arrangements on all parties, and change the consequential obligations on the Councils to spend money or take action as a result of those changed arrangements.
- 1.9 In such a case it is likely to be impossible to re-craft the relevant provisions of the Deed without modifying an existing (or creating a new) obligation on the Councils - both of which would appear to be outside what the Secretary of State is allowed to authorise by virtue of paragraph (3). SZC Co would be stuck in such circumstances, only being able to make such a change with the agreement of SCC and ESC.
- 1.10 That would appear to us to undercut the important purpose of paragraph (2), which is to give SZC Co some recourse in those rare circumstances where the Deed is causing difficulties for the project and there is a need for the Secretary of State to have the opportunity to intervene where either or both Councils will not agree to a change. In our view, paragraph (3) simply does not work well for the sorts of arrangements we have in the Deed and is unnecessarily restrictive on the Secretary of State's powers.
- 1.11 It is also possible in future that one Council, but not the other, considers that a modification to the existing arrangements under the Deed is appropriate and is willing to vary the Deed. But given that the Deed is tri-partite, any variation would require the agreement of both Councils. This further underlines the importance of recourse to the Secretary of State in those rare circumstances where SZC Co (and possibly also one of the two Councils) considers a change to be essential but fails to get agreement of both Councils.
- 1.12 We and ESC in our discussions with them, acknowledge that without paragraph (3) there is, in principle, a risk that the Secretary of State could impose an obligation on the Councils against their will – just as the Secretary of State could (even with the inclusion of paragraph (3)) make a change to the Deed of Obligation which the Councils do not like (eg cancelling some significant contribution by SZC Co).
- 1.13 However we, and ESC, take the view that we should trust the Secretary of State to make the right decision in either case. If one accepts the principle that the Secretary of State should be given the power to vary the Deed of Obligation even if one or other Council does not like the change and will not therefore 'agree' it, it seems logical that we give the Secretary of



State the discretion he or she needs to make such variation under paragraph (2) effective for the sort of complex Deed we have. This requires the deletion of paragraph (3).

2. **POSITION OF THE COUNCILS**

- 2.1 We have consulted both ESC and Suffolk County Council ('SCC') about the change.
- 2.2 ESC has confirmed they are supportive of the change, requesting only that the provision in article 11 which requires the Secretary of State to consult the two Councils is strengthened by the addition of the words 'taking into account their responses to consultation' (as set out in the box above). This is provided for in the new art 11(3) of the DCO.
- 2.3 SCC is opposed to the change and we understand will make its own submission on the point. SCC's position is essentially that they do not consider it appropriate that the Secretary of State should be able to impose obligations on the Councils as part of any variation.

**Herbert Smith Freehills LLP**