

# **Suffolk County Council (20031377)**

SCC's comments on the ExA's Commentary on, or Schedule of Changes to, the draft Development Consent Order

## **Sunnica Energy Farm (EN010106)**

**Deadline 9**

**17 March 2023**

### **Preamble:**

This document contains Suffolk County Council (**SCC**)'s comments on the amendments included in the ExA's Commentary on the draft Development Consent Order as set out below.

<b>ExA's Suggested Change</b>	<b>Page</b>	<b>SCC's Comment on the Provision</b>
Article 2 Definition of "maintain"	2	SCC defers to West Suffolk Council and East Cambridgeshire District Council with regard to this change.
Article 2 Definition of "preliminary works"	2	SCC welcomes this change.
Article 9(1)(b) Power to alter layout etc., of streets	2	SCC welcomes this change
Article 9(3) Reference to protective provisions	2	SCC welcomes this change.
Article 11(1) Reference to CTMP	2	SCC notes this change.
Article 27 Deletion of "vegetation"	3	SCC welcomes this change.

ExA's Suggested Change	Page	SCC's Comment on the Provision
Article 36 Deletion of "except for where not practically possible"	3	SCC welcomes this change.
R.6 Securing of pre- commencement surveys	3	SCC welcomes this change.
R.7(3) Replacement of "substantially" with "entirely"	3	SCC welcomes the deletion of "substantially" which eliminates unhelpful ambiguity and provides greater confidence that necessary mitigation will be delivered. However, in the Council's view the replacement of "substantially" with "entirely" should be dependent on the ExA and SoS having confidence that the Applicant's submitted control documents are suitably detailed at the time of making their recommendation and subsequent decision.
R.8(1) Replacement of "substantially" with "entirely"	4	
R.11(6) Provision for maintenance	4	SCC welcomes this change.
R.14 Replacement of "substantially" with "entirely"	4	See SCC's comment on requirements 7 and 8 above.

ExA's Suggested Change	Page	SCC's Comment on the Provision
R.15 Replacement of "substantially" with "entirely"	4	
R.16(1) Replacement of "substantially" with "entirely"	4	
R.16(3)	4-5	SCC welcomes this change.
R.24 New requirement	5	SCC defers to West Suffolk Council and East Cambridgeshire District Council on this change.
Schedule 1 Work No.1	5-6	SCC is grateful to the ExA for taking account of the Council's suggestions with regard to this change. SCC has previously provided commentary on this change in [REP7-073]. The Applicant's response [REP7-064] refers to a number of issues it sees with the drafting proposed. The Councils' joint comments at Deadline 8 [REP8-051] address these issues, and we do not repeat our response here.
Schedule 1 Work No. 2C	6-7	
Schedule 1 Work No. 6	7-8	
Schedule 1 Work No. 10	9	SCC welcomes this change and the examiner's suggested approach to Work No. 10: i.e. that it should be deleted only if all panels are removed from E05, E12 and E13 <u>and</u> that the ExA and SoS are satisfied that the remaining parts of the scheme do not require any stone curlew offsetting measures.

<b>ExA's Suggested Change</b>	<b>Page</b>	<b>SCC's Comment on the Provision</b>
Schedule 5	9-10	SCC welcomes this change
Schedule 10	10	SCC welcomes this change.
Schedule 12 Part 13	10-11	SCC included a preferred form of Protective Provisions in the joint Councils' comments on D7 submissions at D8 [REP8-051]. Since then, SCC and CCC have had further discussions and have agreed some updates to the preferred form, which both LHAs are now content with. This updated for is attached to this response as Annex A.

## **Annex A – LHA’s preferred form of Protective Provisions with explanatory notes**

### **Background**

SCC and CCC (“**the LHAs**”) have considered the local highway authorities protective provisions together, as proposed to be included at Schedule 12 to the DCO. The comments in this document, and the proposed amendments to Schedule 12 itself, reflect the joint position of LHAs, and is updated from that position described in SCC’s D8 submission [**REP8-051**]. The updated provisions are: paragraph 2 (definition of “specified work”); paragraph 3(b): provision of certain information for approval; and new paragraph 10: provision of documents post-completion of specified works. New sub-headings have been included above (renumbered) paragraphs 20 and 21.

The LHAs understands the PPs are based on those included in Part 7 of Schedule 10 to the [Port of Tilbury \(Expansion\) Order 2019](#) (“**Tilbury**”), which provided for the construction of a port terminal on the river Thames.

However, several important provisions which are included in Tilbury have been omitted from the Sunnica PPs and the LHAs considers they ought to be included. These include –

### Indemnification

The Sunnica PPs do not include an indemnity for the local highway authority against losses etc. which may be incurred because of, amongst other things, the construction or maintenance of highway works. The Tilbury PPs include a detailed indemnity provision (paragraph 103) and the LHAs consider, as a matter of principle, an indemnity ought to be provided in the Sunnica PPs because of a loss is incurred because of (say) the construction or maintenance of highway works, the person responsible for that loss should be responsible for its cost, not the LHA. It is essential the indemnity covers third party claims (as Tilbury does).

The LHAs note the following recent DCOs include an indemnity for the highway authority –

- A303 Sparkford to Ilchester Dualling DCO 2021 (Schedule 8, Part 4, paragraph 45);
- Port of Tilbury (Expansion) Order 2019 (Schedule 10, Part 7, paragraphs 103 to 105); and
- Silvertown Tunnel Order 2018 (Schedule 13, Part 6, paragraph 74).

The LHAs do not understand why an indemnity should not be included in the Sunnica PPs for the local highway authority.

It will be noted that Part 9 of Schedule 12 to the Sunnica dDCO includes PPs for National Highways and paragraph 104 concerns indemnification. Since the LHAs and NH are all highways authorities, the LHAs can see no sensible reason from the departure from recent precedents or the departure from other highways PPs contained in the same dDCO.

#### Notice of commencement of specified works

The Tilbury PPs require the undertaker to give to the local highway authority (i) 3 months' notice of its intention to commence construction of each highway work and (ii) notice of the completion of each highway work not later than 7 days after the date on which the work was brought into use.

The LHAs consider this provision should be included in the Sunnica PP for administrative convenience (e.g. to manage other works in the area at the same time etc.). It should be noted that the same would be expected of any developer which was undertaking any works in the LHAs' highways. Moreover, the LHAs assumes there will be a point in time when the applicant will have a more detailed programme and, at that point, the LHAs would be pleased to receive the more detailed document from the applicant.

#### Deposit of materials on highways

The Tilbury PPs prohibit the deposit of soil and other materials, or the standing of any vehicle or plant on any highway, so as to obstruct the use of the highway without the highway authority's consent.

Again, the LHAs consider this provision should be included in the Sunnica PPs.

#### **Payment mechanism**

The Sunnica PPs include a payment mechanism which is based on that included in the Tilbury PPs. Put simply, they require the undertaker, on submission of the plans for a specified (highway) work, to pay the local highway authority 2% of the anticipated cost of constructing the specified work to cover the authority's reasonable fees etc. in approving the plans for and in supervising construction of the specified work (paragraph 11). Subsequent provisions allow this amount to be increased to up to 6% of the anticipated cost in certain circumstances.

The LHAs would prefer that, on submission of the plans, the undertaker pays £5,000 to the local highway authority and, before approval of the plans is granted, pay 7.5% of the anticipated cost mentioned above. (The £5,000 will be discounted from the 7.5%). [This point was explained in SCC's Responses to ExQ2: Annex A; LIR Ref. 13.142 [**REP5-084**]].

This payment mechanism because is consistent with the mechanism used by SCC for its s.278 agreements and so, as a tried-and-tested mechanism for Suffolk, is more relevant than the mechanism agreed in 2019 between Port of Tilbury London Limited and Thurrock Council in respect of Thurrock's highways. While the proposed payment mechanism is slightly different from that operated by CCC, it is closer than that proposed by the applicant. CCC is therefore content with adopting SCC's usual payment mechanism for this application.

### **Other amendments**

#### Definition of "plans"

The LHAs would propose that the definition of "plans" is extended to include "methods of ... detailed ground investigation". This information is relevant to the work the LHAs understand the applicant will be doing in their areas. Its inclusion is consistent with the inclusion in paragraph 98(2) of the National Highways PPs in the dDCO (i.e. the provision, within "detailed design information" of the applicant's "regime of California Bearing Ratio testing").

#### Definition of "specified work"

The LHAs have changed this definition since submitting their proposed amendments at D8 [REP8-051].

The D8 definition provided that the definition of "specified work" is extended to include any work adjacent to the highway which could have an impact on the highway, including accommodation works such as SUDS, or other infiltration device. This aspect of the definition has been narrowed so that it captures "any work which could introduce water onto the highway (including SuDS or any infiltration device)".

The definition has also been amended to include any work which is underneath the highway.

#### Paragraph 3 (relevant local highway authority approval of specified works)

Paragraph 3 has been amended so that the undertaker must submit to the LHA "relevant highway asset data as required and to be confirmed by the relevant local highway authority" and the corresponding work must not commence until that data has been provided.

#### Paragraph 5: time frame

By paragraph 5, if within 28 days of submission to the LHA of certain information, the LHA has not intimidated its disapproval and grounds for disapproval, the LHA is deemed to have approved that



information. The LHAs consider 28 days is too short a period which should be extended to 56 days, which is consistent with the time frame set out in Schedule 13 to the dDCO.

Paragraph 7: inclusion of information in submissions made under paragraph [3]

By paragraph 3, before commencing the construction of any specified work, the applicant must submit certain information to the LHA and, by paragraph 5, if within 56 days of submission the LHA has not intimated its disapproval and grounds for disapproval, the LHA is deemed to have approved that information. New paragraph 7 has been inserted for consistency with paragraph 2(5) of Schedule 13 to the dDCO, and provides that any submission made under paragraph 3 must include a statement which states that if the LHA does not disapprove the submission within 56 days, approval will be deemed. This provision is needed for administrative convenience and the LHAs understand the applicant agrees to its inclusion.

New paragraph 10: provision of documents

New paragraph 10 provided certainty as to the documents the undertaker is to provide to the LHA after completion of any specified work.

Paragraph [16]: payment of the local highway authority's fees, costs etc.

The LHAs would propose paragraph 16 is extended to cover other fees etc. that the applicant could be responsible for and which don't appear to the LHAs to be covered in paragraph 15 as proposed by the applicant. For instance, the fees payable in approving any land operations assessment, noise assessment or application for any additional traffic regulation order not covered by article 44 of and Schedule 14 to this Order (or any revised, or any revised application made under article 44 of and Schedule 14 to this Order).

# SCHEDULE 12

## PART 12

### FOR THE PROTECTION OF THE RELEVANT LOCAL HIGHWAY AUTHORITIES

#### Application

1. The provisions of this Part of this Schedule have effect, unless otherwise agreed in writing between the undertaker and the relevant local highway authority.

#### Interpretation

2. In this Part of this Schedule—

“highway” means, notwithstanding article 2(1) of this Order, a street vested in or maintainable by the relevant local highway authority under the 1980 Act;

“plans” includes sections, drawings, specifications and particulars (including descriptions of methods of construction and detailed ground investigation);

“relevant local highway authority” means—

- (a) Cambridgeshire County Council, in relation to any specified work constructed in the area of that council;
- (b) Suffolk County Council, in relation to any specified work constructed in the area of that council.

“specified work” means so much of any part of the authorised development as forms part of or is intended to become a highway, or part of any such highway, or any work which could introduce water onto the highway (including SuDS or any infiltration device) which is adjacent to the highway and could have an impact on the highway or any work which is underneath the highway;

“structure, apparatus or surface” means any highway drainage structure or drainage apparatus, street furniture or carriageway comprised in a specified work;

“SuDS” means sustainable drainage system-

#### Relevant local highway authority approval of specified works

3. Without affecting the application of sections 59(a) (general duty of street authority to co-ordinate works) and 60(b) (general duty of undertakers to co-operate) of the 1991 Act, before commencing the construction of any specified work, the undertaker must submit to the relevant local highway authority for its approval:

a) -proper and sufficient plan and specifications; and s

b) relevant highway asset data as required and to be confirmed by the relevant local highway authority

and must not commence the construction of a specified work until the plans for that specified work paragraphs (a) and (b) above have been complied with and approved by the relevant local highway authority or settled by arbitration.

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(a) As amended by section 42 of the Traffic Management Act 2004 (c. 18).

(b) As amended by section 40(1) and (2) of, and Schedule 1 to, the Traffic Management Act 2004 (c. 18).

**3-4.** When signifying approval of plans submitted under paragraph [(3)], the relevant local highway authority may specify any protective works (whether temporary or permanent) which in its reasonable opinion must be carried out before the commencement of the construction of a specified work to ensure the safety or stability of the highway and such protective works must be carried out at the expense of the undertaker.

**4-5.** If, within 28-56 days after any plans have been submitted to the relevant local highway authority under paragraph [(3)], it has not intimated its disapproval and the grounds of disapproval, the relevant local highway authority is deemed to have approved them.

**6.** In the event of any disapproval of plans by the relevant local highway authority under paragraph [(3)], the undertaker may re-submit the plans with modifications and, in that event, if the relevant local highway authority has not intimated its disapproval and the grounds of disapproval within 28 days of the plans being re-submitted, it is deemed to have approved them.

7. The undertaker must include in any submission made to the relevant authority under paragraph [3] or any re-submission under paragraph [6], a statement that the provisions of paragraph [5] or paragraph [6] apply, as the case may be, and if the submission fails to be do, it is null and void.

#### **Inspection, and supervision and notice of specified works**

**8.** Any specified work, and all protective works required by the relevant local highway authority in accordance with paragraph [(4)], must be constructed in accordance with the approved plans for that specified work and an officer of the relevant local highway authority is entitled on giving such notice as may be reasonable in the circumstances, to inspect and watch the construction of such works and any such notice may require that any work is left uncovered for inspection.

9. The undertaker must give to the relevant local highway authority not less than [three] months' notice of its intention to commence construction of any specified work and the undertaker must give to the relevant local highway authority notice of completion of a specified work not later than [7 days] after the date on which it is brought into operational use.

10. Within 56 days of completion of a specified work the undertaker will provide the relevant local highway authority with as built plans, specifications and relevant highway asset data as required and to be confirmed by the relevant local highway authority.

#### **Maintenance of specified works by the undertaker**

**5-11.** If any specified work is not maintained by the undertaker in accordance with article 10 (construction and maintenance of altered streets) of this Order to the reasonable satisfaction of the relevant local highway authority, it may by notice require the undertaker to maintain the specified work or any part of it in accordance with article 10 to such extent as the relevant local highway authority reasonably requires for as long as the obligation to maintain the specified work under article 10 applies.

**6-12.** If the undertaker has failed to begin taking steps to comply with the reasonable requirements of any notice issued under paragraph [(811)] and has not subsequently made reasonably expeditious progress towards their implementation within 28 days beginning with the date on which a notice in respect of any work is served on the undertaker, the relevant local highway authority may do what is necessary for such compliance and may recover any expenditure reasonably incurred by it in so doing from the undertaker.

**7-13.** In the event of any dispute as to the reasonableness of any requirement of a notice served under paragraph [(810)], the relevant local highway authority must not, except in a case of emergency, exercise the powers conferred by paragraph [(912)], until the dispute has been finally determined.

## Payment of fees for approving and supervising the construction of specified works

**8.14.** On submission of the plans for a specified work, the undertaker must pay the relevant local highway authority £5,000 and, before approval of the plans is granted, pay 7.52% of the anticipated cost of constructing the specified work to cover the relevant local highway authority's reasonable fees, costs, charges and expenses in approving the plans for and in supervising construction of the specified work.

**9.15.** ~~For the purposes of calculating the figure of the 7.5% anticipated cost of constructing the specified work mentioned in paragraph 14, The the sum of £5,000, also mentioned in paragraph, must be included in that figure. relevant local highway authority may apply to the undertaker for up to two further payments (limited in each case to a maximum of 2% of the anticipated cost of constructing the specified work) if it reasonably considers that its fees, costs, charges and expenses in approving plans for and supervising construction of the specified work will exceed the amount the undertaker must pay under paragraph [(11)].~~

~~The undertaker must use reasonable endeavours to agree to pay any amount reasonably sought by the relevant local highway authority under paragraph [(12)] (having regard to the extent of the outstanding work in respect of which the relevant local highway authority is likely to incur fees, costs, charges and expenses) and following agreement must pay any such amount.~~

**16.** The undertaker must repay to the relevant local highway authority—,

- (a) all reasonable fees, costs, charges and expenses reasonably incurred by it in approving the plans for and supervising construction of a specified work which have not otherwise been covered by a payment made under paragraphs [(114)] to [(13)] and
- (b) any other fees, costs, charges and expenses reasonably incurred by it in approving any other matter ancillary to those included in this Schedule including, but not limited to, any land operations assessment, noise assessment or application for any additional traffic regulation order not covered by article 44 of and Schedule 14 to this Order (or any revised, or any revised application made under article 44 of and Schedule 14 to this Order).

**10.17.** The relevant local highway authority must repay to the undertaker (or, with the undertaker's agreement, offset against any amounts for which the undertaker is otherwise liable to that relevant local highway authority) any payment or part of a payment made under paragraphs [(114)] to [(13)] which exceeds the fees, costs, charges and expenses it has incurred in approving plans for and in supervising the construction of a specified work and in response to a written request from the undertaker (served no earlier than after the final adoption or restoration of all of the specified works under article 10(1) and (3) as the case may be) the relevant local highway authority must provide to the undertaker a financial summary containing ~~detailed~~ evidence of how the payments received by the relevant local highway authority under paragraphs [(114)] to [(13)] have been spent.

## Commuted sums

**11.18.** In respect of a structure, apparatus or surface installed or altered as result of a specified work in relation to which the relevant local highway authority is, or is to become, liable to maintain, the undertaker must pay to the relevant local highway authority (at the time when the relevant structure, apparatus or surface is, in accordance with this Order, to become maintainable by the relevant local highway authority) a commuted sum to reflect any additional cost that may be incurred by the relevant local highway authority over an appropriate timeframe in maintaining that structure, apparatus or surface.

**19.** The amount of the commuted sum referred to in paragraph [(1618)] is to be determined with reference to the detailed design of that structure, apparatus or surface and agreed between the relevant local highway authority and the undertaker, both acting reasonably.

### Soil, subsoil or materials

20. The undertaker must not, except with the consent of the relevant local highway authority, deposit any soil, subsoil or materials or stand any vehicle or plant on any highway (except on so much of it as is for the time being temporarily stopped up or occupied under the powers conferred by this Order) so as to obstruct the use of the highway by any person or, except with the same consent, deposit any soil, subsoil or materials on any highway except within a hoarding.

### Indemnity

21. The undertaker must, if reasonably so required by the relevant local highway authority, provide and maintain during such time as the undertaker may occupy any part of a highway for any purpose connected to the construction of any part of the authorised development, temporary ramps for vehicular traffic or pedestrian traffic, or both, and any other traffic measures required to protect the safety of road users in accordance with the standard recommended in Chapter 8 of the Traffic Signs Manual issued for the purposes of the Traffic Signs Regulations and General Directions 1994 in such position as may be necessary to prevent undue interference with the flow of traffic in any highway.

22. Regardless of the other provisions of this Part of this Schedule but subject to paragraph [24] the undertaker must, within 28 days of receiving written notification from the relevant local highway authority, indemnify the relevant local highway authority from all losses, expenses, actions, charges, cost, liabilities, claims, demands, proceedings or damages, which may be incurred, made or taken against, or recovered from the relevant local highway authority by, in connection with or incidental to a specified work including by reason of—

- (a) the construction or maintenance of a specified work or the failure of the specified work;
- (b) any subsidence of, or damage to, any highway or any retained sanitary convenience, refuge, sewer, drain, pipe, cable, wire, lamp column, traffic sign, bollard, bin for refuse or road materials or associated apparatus or any other property or work belonging to, or under the jurisdiction or control of, or maintainable by the relevant local highway authority or a statutory undertaker;
- (c) any act or omission of the undertaker or of its agents, contractors, employees or servants whilst engaged upon a specified work;
- (d) a claim in respect of noise nuisance or pollution under the 1974 Act;
- (e) damage to property including property owned by third parties; or
- (f) injury to or death of any person.

23. The relevant local highway authority must give to the undertaker reasonable notice of any such claim or demand and no settlement or compromise of any such claim or demand is to be made without the consent of the undertaker which, if it withholds such consent, is to have the sole conduct of any settlement or compromise or of any proceedings necessary to resist the claim or demand.

~~12.24.~~ The fact that any work or thing has been executed or done in accordance with a plan approved or deemed to have been approved by the relevant local highway authority, or to its satisfaction, does not (in the absence of negligence on the part of the relevant local highway authority, its officers, contractors or agents) relieve the undertaker from any liability under the provisions of this Part of this Schedule.

### **Consents and agreements**

~~13.25.~~ Wherever in this Part of this Schedule provision is made with respect to the approval or consent of the relevant local highway authority, that approval or consent must be in writing and may be given to such reasonable terms and conditions as the relevant local highway authority may

require in the interests of safety or to ensure highway construction standards are met in order to minimise inconvenience to persons using the highway, but must not be unreasonably withheld.

### **Disputes**

**14.26.** Any difference or dispute arising between the undertaker and the relevant local highway authority under this Part of this Schedule must, unless otherwise agreed in writing between the undertaker and the relevant local highway authority, be determined by arbitration in accordance with article [39] (arbitration) of this Order.

### **Saving for the 1991 Act**

**15.27.** This Part of this Schedule does not apply to any works comprised in the authorised development in respect of which the relations between the undertaker and the relevant local highway authority are regulated by Part 3 (street works in England and Wales) of the 1991 Act.