

A63 Castle Street Improvement, Hull

Scheme Number: TR010016

3.2 Explanatory Memorandum

APFP Regulation 5(2)(c)

Planning Act 2008

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



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Infrastructure Planning

Planning Act 2008

**The Infrastructure Planning
(Applications: Prescribed Forms
and Procedure) Regulations 2009**

A63 (Castle Street Improvement, Hull)
Development Consent Order 20[]

EXPLANATORY MEMORANDUM

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Highways England

A63 (Castle Street Improvement, Hull) Development Consent Order 20[*]

Explanatory Memorandum

1 Summary

- 1.1 This memorandum explains the purpose and effect of each article of, and the Schedules to, the draft A63 (Castle Street Improvement, Hull) Development Consent Order ('the Order'), as required by regulation 5(2)(c) of the Infrastructure Planning (Applications: Prescribed Forms and Procedure) Regulations 2009¹.

2 Purpose of the Order

Nationally Significant Infrastructure Project – improvement of a highway

- 2.1 Highways England is applying to the Secretary of State for an Order to improve the A63 by upgrading the Mytongate junction to a grade separated junction, with associated improvements to junctions and non-motorised user facilities along the length of the route.
- 2.2 The objectives of the upgrade are:
- 2.2.1 to reduce traffic congestion;
 - 2.2.2 to improve journey time and reliability;
 - 2.2.3 to improve safety and convenience for road users and the local community; and
 - 2.2.4 to remove the severance of the town centre of Hull caused by the current configuration of the A63.
- 2.3 The Planning Act 2008² ('the Act') makes a distinction between three different types of highway NSIPS as set out in section 22(1)(a)-(c): construction, alteration and improvement.
- 2.4 Improvement is defined at s.235 of the Act (in relation to a highway) as having the meaning in section 329(1) of the Highways Act 1980 ('the 1980 Act'). Section 329(1) of the 1980 Act defines improvement as the doing of an act under powers conferred by Part V of the 1980 Act. The powers conferred by Part V of the 1980 Act are wide and include powers to change the levels of highways and to construct footbridges over highways.
- 2.5 The proposed development relates to a highway (section (14)(1)(h) of the Act), and in particular the proposed development is considered to be a highway improvement NSIP. This is because the proposed development includes raising the level of an existing highway, constructing footbridges over the highway, and otherwise improving it in accordance with the definition of 'improvement' in the Act. Moreover it involves the improvement of a highway lying wholly within England for which Highways England is the strategic highways company (section 22(1) and (5) of the Act) which is likely to have a significant effect on the environment. Therefore, the proposed development is a highway improvement NSIP.
- 2.6 As the proposed development is an NSIP, development consent must be obtained from the Secretary of State to authorise it, and an application for a development consent order must be

¹ S.I. 2009/2264

² c.29

made to the Secretary of State, care of the Planning Inspectorate ('PINS'), under section 37 of the Act.

2.7 Schedule 1 to the Order contains a list of numbered works comprising the NSIP.

3 Associated development

3.1 The Order also seeks consent for the development which would constitute associated development, and which is included in the "authorised development" listed in Schedule 1.

3.2 Guidance³ on associated development has been issued by the Secretary of State for Communities and Local Government. In this guidance associated development is described as being "*typical of development brought forward alongside the relevant type of principal development or of a kind that is usually necessary to support a particular type of project*" (paragraph 6) and "*requires a direct relationship between associated development and the principal development. Associated development should therefore either support the construction or operation of the principal development, or help address its impacts. Associated development should not be an aim in itself but should be subordinate to the principal development*" (paragraph 5).

3.3 Annex B of the above-mentioned guidance listed the following as examples of associated development for highway NSIP schemes:

- (a) replacement roadside facilities where this becomes necessary due to the elimination of an existing facility by highway improvement;
- (b) infrastructure associated with cycle/pedestrian access;
- (c) off-site landscaping, habitat creation and other environmental works;
- (d) off-site drainage works;
- (e) alteration/diversion/stopping up of local roads, accesses and other rights of way; and
- (f) off-site diversion of statutory undertakers' equipment.

3.4 However, in some cases it should be recognised that there may be some overlap, or the absence of the clear boundary, between associated development and works which form part of the NSIP. There is a danger that separating it out in the Order could potentially lead to an error defining it one way or another incorrectly, given this potential for overlap between the two categories. For instance, there may be some on-highway, and some off-highway, diversion of the same piece of statutory undertaker equipment.

3.5 For this reason, and noting that there is no requirement for a development consent order to distinguish between these two categories, Highways England has chosen not to differentiate the NSIP and associated development works in Schedule 1 to the Order. Ultimately, all elements of the proposed development either constitute part of the NSIP or are "associated

³ Guidance on associated development applications for major infrastructure projects

development” within the meaning of section 115(2) of the Act, and so can properly be authorised by the Order.

- 3.6 For the avoidance of doubt, the diversions of statutory undertaker equipment and apparatus required for this scheme do not constitute an NSIP in their own right.
- 3.7 In order to ensure that the authorised development and the associated development are constructed efficiently and without impediment, the Order contains the powers to carry out the works listed (a) to (o) in Schedule 1. The use of such measures was explicitly approved in the A19/A1058 Coast Road (Junction Improvement) Order 2016 and extensive provisions were used in both the A14 Cambridge to Huntingdon Improvement Order 2016 and the M4 Motorway (Junctions 3 to 12) (Smart Motorway) Order 2016.

4 Ancillary Matters

- 4.1 The Order also contains several ancillary matters, i.e. provisions not consisting of development.
- 4.2 The main ancillary matter is a power to acquire land or rights over land compulsorily or by agreement, in accordance with section 120(4) of the Act, required for the authorised development, or to facilitate, or that are incidental to the authorised development under section 122 of the Act. A justification for these powers is set out in the Statement of Reasons that accompanies the application.
- 4.3 Further to providing these powers, the Order seeks to apply and modify statutory provisions that relate to the compulsory acquisition of land. Under sections 117 and 120(5) of the Act, an order containing provisions of this nature must be made by Statutory Instrument. The Order is therefore presented in that form.
- 4.4 Other ancillary matters include [the deemed grant of a marine licence, the stopping up of lengths of existing highways and private means of access in the vicinity of the junction, and the classification of highways].

5 Draft Order

- 5.1 The purpose and effect of the provisions of the draft Order are now explained in sequence. While the Infrastructure Planning (Model Provisions) (England and Wales) Order 2009 (S.I. 2009/2265) have been repealed, the draft Order draws on the model provisions (general and railway), as well as precedent set by development consent orders that have been made to date.

Part 1 – Preliminary

Article 1 – Citation and commencement

- 5.2 Article 1 sets out the name of the Order, establishing how it may be cited in subsequent legislation. It also states the date on which the Order comes into force.

Article 2 – Interpretation

- 5.3 The purpose of article 2(1) is to define terms used in the remainder of the Order.

- 5.4 The following definitions are used in articles in the remainder of the Order that are typical of highway schemes:
- (a) "the 1984 Act";
 - (b) "carriageway";
 - (c) "cycle track": this term is used interchangeably with "cycle way" in the application documents and both are intended to have the meaning defined in this article;
 - (d) "footway" and "footpath";
 - (e) "street";
 - (f) "street authority"; and
 - (g) "trunk road".
- 5.5 Other definitions to note include:
- (a) "the Order land", which comprises all of the land to be acquired or used permanently or temporarily as shown on the land plans;
 - (b) "the Order limits", which references the extent of the area within which the authorised development may be carried out.
- 5.6 Article 2(2) provides that a broad definition of 'rights over land' applies to the Order.
- 5.7 Article 2(3) provides that measurements are approximate. The purpose of this is to ensure that if, upon construction of the works, it transpires that the distances are marginally different to those listed in the DCO, there is no issue over whether the works are permitted by the DCO. Thus this provision allows for a small tolerance with respect to any distances and points, although works will take place within the limits of deviation. It is common-place to include such provision in an Act or instrument authorising linear infrastructure.
- 5.8 Article 2(4) provides that areas given in the book of reference are approximate as these are not covered by article 2(3). This is intended to clarify the position of the areas in the book of reference, the purpose and effect is the same as set out in the previous paragraph.
- 5.9 Article 2(5) and 2(6) tie references to lettered / numbered points and numbered works in the Order to the rights of way and plans.

Part 2 – Principal powers

Article 3 – Development consent etc. granted by the Order

- 5.10 Article 3(1) grants the development consent by giving Highways England the power to construct the authorised development, which is described in Schedule 1. This article makes the consent subject to the requirements that are listed in Schedule 2.

- 5.11 Article 3(2) states that any enactment applying to land within the Order limits has effect subject to the provisions of the Order. This provision ensures that the modifications made in the Order apply to any enactments that may affect the authorised development and further ensures consistency with legislation more generally. There is precedent for such a provision, for example the Secretary of State approved the same wording in the A14 Cambridge to Huntingdon Improvement Order 2016 (see article 5(2)).

Article 4 – Maintenance of the authorised development

- 5.12 This article empowers Highways England to maintain the development. “Maintain” is defined in article 2(1) as including “inspect, repair, adjust, alter, remove or reconstruct”, with these terms bearing their common-sense meanings.
- 5.13 This definition is broader than the equivalent in section 329 of the Highways Act 1980, which simply states that maintenance “includes repair” – there is no explicit mention of inspect, adjust, alter, remove or reconstruct. Article 4 therefore supplements the maintenance powers under the Highways Act 1980 and ensures that Highways England has the necessary powers to maintain the scheme. It is considered necessary and appropriate to adopt the broader definition.
- 5.14 It should be noted that powers of maintenance are subject to other provisions in the Order, in particular article 10, which makes provision in relation to maintenance by highway authorities.

Article 5 – Maintenance of drainage works

- 5.15 The purpose of this article is to make it clear that any realignment of award drains or other works to them that are carried out as part of the scheme do not affect the existing allocation of responsibility for maintenance of those drains, unless this is agreed between Highways England and the responsible party. The provision is well precedented (see for example article 4 of the A14 Cambridge to Huntingdon Improvement Order 2016).

Article 6 - Limits of deviation

- 5.16 Since the authorised development involves linear works, article 6 provides for limits of deviation to allow for a lateral deviation from the lines and situations of the authorised development within the limits of deviation shown on the works plans, and vertical deviation of the linear works subject to a maximum deviation of 0.5 metres upwards or downwards.
- 5.17 The vertical limits can be exceeded where it is demonstrated to the Secretary of State’s satisfaction (and the Secretary of State has certified accordingly following consultation with the relevant planning authority) that such deviation would not give rise to any materially new or materially worse adverse environmental effects in comparison with those reported in the Environmental Statement.
- 5.18 The purpose of this provision is to provide Highways England with a proportionate degree of flexibility when constructing the scheme, reducing the risk that the scheme as approved cannot later be implemented for unforeseen reasons but at the same time ensuring that any flexibility will not give rise to any materially new or materially worse adverse environmental effects.

Article 7 – Benefit of the Order

- 5.19 Article 7 overrides section 156(1) of the Act (as permitted by section 156(2)) to give the benefit of the Order to Highways England rather than anyone with an interest in the land. It would be impracticable for a variety of landowners to implement parts of the Order in an uncoordinated manner, which might be the case if section 156(1) were to remain.
- 5.20 The purpose of paragraph (2) is to clarify the exceptions where the Order will self-evidently benefit others, [e.g. rights for statutory undertakers in Work No. []]. Absent this provision, there would be a contradiction since strictly speaking only Highways England could benefit from these works. The same wording was accepted and approved by the Secretary of State in the A14 Cambridge to Huntingdon Improvement Order 2016 (see article 8(2)) and the M4 Motorway (Junctions 3 to 12) (Smart Motorway) Order 2016 (see article 7(2)).

Article 8 – Consent to transfer benefit of the Order

- 5.21 This article allows powers under the Order to be transferred to others by Highways England. The consent of the Secretary of State is required for a transfer or grant, except where it is made to specified companies in relation to certain utility diversion works.

Part 3 – Streets

Article 9 – Application of the New Roads and Street Works Act 1991

- 5.22 Article 9 modifies the application of the New Roads and Street Works Act 1991⁴ (the 1991 Act) to works carried out under the powers of the Order.
- 5.23 Paragraph (1) provides that works carried out under the powers of the Order which match the description of "major highway works" in the 1991 Act will be treated as major highways works for the purposes of the 1991 Act. The effect of this is to clarify that the provisions for sharing the burden of dealing with apparatus in the street (under sections 84 and 85 of the 1991 Act), which would normally apply only to major works carried out by the highway authority, will apply in respect of the works authorised by the Order irrespective of who in fact carries them out.
- 5.24 "Major Highways Works" are defined at section 86 of the 1991 Act. The definition includes, at sub-sections 86(3)(b) and (f), works undertaken under powers conferred by sections 64 and 184 the Highways Act 1980. As that would not be relevant in this context (where the works will be undertaken under the powers of the Order), these sub-sections are omitted from paragraph (1)(a). Works equivalent to works undertaken under those sections of the Highways Act 1980, but carried out under powers conferred by the Order, are included through paragraph 1(b). The effect is that any works which would be "major highway works" under the 1991 Act if carried out by a highway authority in relation to one of its streets are also "major highway works" if carried out under the powers of the Order regardless of who carries them out.
- 5.25 Paragraph (3) provides that certain provisions of the 1991 Act listed in that paragraph will not apply. The disapplication of these provisions (which are designed primarily to regulate the carrying out of street works by utility companies in respect of their apparatus) is appropriate given the scale of works proposed under the Order, the specific authorisation given for those

⁴ c.22

works by the Order (particularly article 3 and Schedule 1), and the provisions in the Order (including the requirements) which would regulate the carrying out of the Order works.

- 5.26 Paragraphs (4) to (6) apply certain provisions of the 1991 Act (listed in paragraph (5)) to any streets which are temporarily stopped up under the Order. This is for two reasons: first, it prevents any confusion as to whether works in respect of a temporarily stopped-up street are "street works" for the purposes of the 1991 Act and, secondly, it simplifies the implementation of the works by providing for a single process in respect of streets which are stopped up and those which are not.
- 5.27 Paragraph (7)(a) of article 9 provides that nothing in article 10 shall affect the ability of the local highway authority (under s.87 of the 1991 Act) to declare a street in its area a maintainable highway, which would make maintenance of the street (once completed) the responsibility of the local highway authority, and would mean that the 1991 Act would apply to street works carried out in that street.
- 5.28 Paragraph (7)(c) makes it clear that the maintenance obligations imposed by article 10 do not override the provisions of the 1991 Act that govern procedures for street works, i.e. works in streets involving the placing of or alteration to apparatus in the street. After the implementation of the Order it is appropriate that the 1991 Act should govern such works as it is specifically designed to ensure a fair and efficient procedure for the various parties affected by such works.
- 5.29 These modifications reflect those made in other highway DCOs, for example the M4 Motorway (Junctions 3 to 12) (Smart Motorway) Order 2016 and the A19/A1058 Coast Road (Junction Improvement) Order 2016.

Article 10 – Construction and maintenance of new, altered or diverted streets and other structures

- 5.30 The standard position in respect of maintenance of streets is that Highways England is responsible for maintaining trunk roads. Other streets are to be maintained by the local highway authority in respect of highways maintainable at the public expense, or whichever body is responsible for the maintenance of the street in respect of streets which are not maintainable at the public expense. This is reflected in paragraphs (1) and (2). These provisions are subject to any agreement to the contrary between Highways England and the relevant street or highway authority.
- 5.31 Paragraph (3) makes specific maintenance provision in relation any new bridges carrying public rights of way over a trunk road. For these, Highways England is responsible for the maintenance of the bridge structure while the local highway authority is responsible for the maintenance of the highway surface.
- 5.32 The effect of paragraphs (4) and (5) are that in any action for damages against Highways England alleging failure to maintain a street, Highways England will have the defence that it had taken such care as was reasonably required in the circumstances to secure that the street was not dangerous for traffic. This extends the provision in s.58 of the Highways Act 1980 to Highways England and draws on the approach taken in article 21 of the A556 (Knutsford to Bowdon Improvement) Development Consent Order 2014 and repeated in in article 9 of the A19/A1058 Coast Road (Junction Improvement) Order 2016 and article 12 of the M4 Motorway (Junctions 3 to 12) (Smart Motorway) Order 2016.

5.33 While Highways England would benefit from the equivalent defence in the Highways Act 1980 in respect of trunk roads, for which it is the highway authority, the proposed development includes roads which are not trunk roads and so this article is needed to ensure Highways England is covered by this defence in respect of all the roads that comprise the authorised development.

Article 11 – Classification of roads etc.

5.34 The designation of highways and the specification of the classes of traffic authorised to use a highway, are ancillary matters which may be included in a development consent order. These matters are addressed by this article, which is integral to the implementation of the scheme, and therefore are considered appropriate to be included in the Order as an ancillary matter under section 120(3) of the Act.

5.35 Article 11(1)(a) provides for the roads etc. described in Part 1 of Schedule 3 to become trunk roads when the scheme is open for traffic. Paragraphs (1)(b) and (c) provide for the other classifications described in Part 2 of Schedule 3

5.36 Paragraphs (2) and (3) impose speed limits on certain sections of the scheme as described in Parts 3 and 4 of Schedule 3.

5.37 Paragraph (4) imposes weight restrictions on certain sections of the scheme as described in Part 5 of Schedule 3.

5.38 Paragraph (5) imposes one way restrictions on certain roads described in Part 6 of Schedule 3.

5.39 Paragraph (6) removes one way restrictions on certain roads as described in Part 7 of Schedule 3.

5.40 Paragraph (7) imposes restrictions on certain roads as described in Part 8 of Schedule 3.

5.41 Paragraph (8) imposes restrictions on a road as described in Part 9 of Schedule 3.

5.42 Paragraph (9) confirms that the cycle tracks and footways in Part 10 of Schedule 3 will be provided unless otherwise agreed with the relevant planning authority.

5.43 Paragraph (10) confirms that certain new private accesses set out in Part 11 of Schedule 3 will be provided unless otherwise agreed with the landowner. This is to address the situation where there is not already an access to the land but one is now required as a result of the authorised development (for example where works have severed a plot of land).

5.44 Paragraph (11) confirms that the public rights of way set out in Part 12 of Schedule 3 will be provided unless otherwise agreed with the landowner.

5.45 The purpose of article 11(12) is to confirm that the matters covered in paragraphs (1) to (11) could be varied or revoked in the future without the need to apply under the Act for an amendment to the Order.

Article 12 – Temporary stopping up and restriction of use of streets

- 5.46 This article allows for the temporary stopping up, alteration, diversion or restriction of streets for the purposes of the scheme.
- 5.47 Access for pedestrians must be provided, and where Highways England is not the street authority, consent to any such stopping up or restriction must be sought from the street authority.
- 5.48 Paragraph (2) confers a power on Highways England where the use of a street has been temporarily stopped up under this article to use it as a temporary working site.
- 5.49 Paragraph (6) states that where a street authority which fails to notify Highways England of its decision in respect of an application for consent within 28 days of the application being made is deemed to have given its consent. It is considered necessary to remove the possibility for delay and provide certainty that the authorised development can be delivered by Highways England in a timely fashion. The article is a standard provision in highways development consent orders (see for example, article 11 of the A19/A1058 Coast Road (Junction Improvement) Order 2016).

Article 13 – Permanent stopping up and restriction of use of streets and private means of access

- 5.50 This article allows streets and private means of access named in Parts 1, 2, 3 and 4 of Schedule 4 to be stopped up (i.e. the legal right of way along them to be extinguished). In the case of Parts 1 and 3 a substitute is to be provided and is described. In the case of Parts 2 and 4 no substitute means of access is to be provided. In this case it may not be stopped up unless one of the conditions referred to in paragraph (4) is met.
- 5.51 Since the definition of a “street” in section 48 of the New Roads and Street Works Act 1991 includes highways and footways the stopping up and diversion of footpaths and footways are also dealt with in this article and Schedule 4. The wording is based on numerous highways DCOs, see for example article 12 of the A19/A1058 Coast Road (Junction Improvement) Order 2016.

Article 14 – Access to works

- 5.52 This article allows works accesses to public highways to be created. It provides Highways England with a general power to form means of access rather than accesses set out in a schedule, to provide an appropriate degree of flexibility in case the need for an access only becomes apparent at later stage in the implementation of the proposed development. These powers are equivalent to those available to Highways England when implementing schemes under the Highways Act 1980.

Article 15 – Clearways

- 5.53 This article makes it unlawful for road users to stop on the road except upon the direction of or with the permission of a constable or a traffic officer in uniform, or for emergency and other unavoidable reasons. The purpose is to ensure safe and proper operation of the authorised development, and to ensure the scheme delivers its intended benefits. It is therefore considered appropriate to be included in the Order as an ancillary matter under section 120(3) of the Act.

- 5.54 Such traffic regulation measures are normally made by order under the Road Traffic Regulation Act 1984, with such orders subject to consultation and publicity requirements. Inclusion within the DCO is appropriate as the consultation, publicity and examination processes within the DCO procedure provide a more than adequate substitute for the consultation and publicity requirements of traffic regulation orders.
- 5.55 The proposed restrictions sought under Article 15 are similar to those which would apply to a clearway established under section 2 of the Road Traffic Regulations Act 1984. This provides that a traffic regulation order may make provision prohibiting, restricting or regulating the use of a road, or any part of the width of a road, by vehicular traffic, or by vehicular traffic of any class specified in the Order either generally or subject to exceptions specified in the Order or determined in a manner provided for it or with reference to periods of time.
- 5.56 Article 15(4) also clarifies that paragraphs (1), (2) and (3) have effect as if made by an order under the 1984 Act, and can be varied or revoked by an order made under that act or other enactment which provides for the variation or revocation of such orders, without the need to apply under the Act for an amendment to the Order.
- 5.57 The wording in this article has been approved and the principle of inclusion of traffic regulation measures accepted in the A19/A1058 Coast Road (Junction Improvement) Order 2016 (see article 14).

Article 16 – Traffic regulation

- 5.58 The purpose of this article is to provide Highways England with powers to make traffic regulation orders in relation to roads for which it is not the highway authority, so that it can implement traffic management measures (e.g. restrictions on the use of roads) necessary to construct the authorised development. This draws on the approach taken in article 37 of the A556 (Knutsford to Bowdon Improvement) Development Consent Order 2014 and article 43 of the M4 Motorway (Junctions 3 to 12) (Smart Motorway) Order 2016.
- 5.59 This article would, at any time prior to 12 months following the opening of the authorised development for public use, allow Highways England, in so far as it is necessary or expedient for the purposes of the construction, maintenance or operation of the authorised development, to:
- (a) revoke, amend or suspend in whole or in part any order made under the Road Traffic Regulation Act 1984;
 - (b) permit, prohibit or restrict the stopping, waiting, loading or unloading of vehicles on any road;
 - (c) authorise the use as a parking place of any road;
 - (d) make provision as to the direction or priority of vehicular traffic; and
 - (e) permit or prohibit vehicular access to any road.
- 5.60 Implementation of any of the measures is subject to the prior approval of the traffic authority in whose area the roads are situated. Requirement is also made for the chief officer of police and the relevant traffic authority to be notified in advance. This complies with the consultation and

publicity requirements for Traffic Regulation Orders under the Secretary of State's Traffic Orders (Procedure) (England and Wales) Regulations 1990/1656.

Part 4 – Supplemental powers

Article 17 – Discharge of water

5.61 This article establishes statutory authority for Highways England to discharge water into a sewer, watercourse or drain in connection with the carrying out or maintenance of the authorised development.

5.62 This statutory authority is subject to Highways England obtaining the consent of the owner of the sewer, watercourse or drain, but that consent cannot be withheld unreasonably.

Article 18 – Protective work to buildings

5.63 The purpose of this article is to allow Highways England to undertake protective works to buildings affected by the authorised development. The wording has broad precedent (see article 16 of the A19/A1058 Coast Road (Junction Improvement) Order 2016 and article 18 of the A14 Cambridge to Huntingdon Improvement Order 2016).

Article 19 – Authority to survey and investigate the land

5.64 This article gives Highways England the power to enter certain land for the purpose of surveying and investigating. The article provides that Highways England must give 14 days' notice before exercising the powers of entry, and that compensation is payable for any loss or damage. This, again, is a standard provision with broad precedent.

Part 5 – Powers of acquisition

Article 20 – Compulsory acquisition of land

5.65 This article authorises the acquisition of land by compulsory purchase. It grants the power to acquire such of that land as is required for the project. The power of acquisition over the Order Land is qualified and restricted by sub-paragraph (2), in the case of parcels of land specified in the Order where only rights are required (article 23 (2)-(3)), or where possession of land parcels as specified in the Order may be taken temporarily only (article 29(9)).

Article 21 – Compulsory acquisition of land – incorporation of the mineral code

5.66 This article incorporates Part 2 of Schedule 2 of the Acquisition of Land Act 1981. This means that where Highways England acquires land under the powers of the Order, it will not acquire any mineral deposits present in the land (other than those necessarily extracted or used in constructing the authorised development) unless they are expressly included in the conveyance.

Article 22 – Time limit for exercise of authority to acquire land compulsorily

5.67 This article gives Highways England five years to issue 'notices to treat' or to execute a 'general vesting declaration' to acquire the land that is subject to the power of compulsory purchase.

These are the two main procedural methods by which the process of compulsorily acquiring land may be undertaken should this Order be made.

- 5.68 The article also sets a 5 year time limits on the power of Highways England to take temporary possession of land, although it does not prevent Highways England from remaining in possession of land after that time if it took possession within the 5 year limit (this has consistently been approved by the Secretary of State, see for example article 22 of the A14 Cambridge to Huntingdon Improvement Order 2016).

Article 23 – Compulsory acquisition of rights and restrictive covenants

- 5.69 This article allows for rights in land to be acquired as well as the land itself, and also for new rights to be created over land.
- 5.70 This article provides for such rights as may be required to be acquired by Highways England over land which it is authorised to acquire under article 20. The public benefit of this is that it would allow Highways England, if possible, to reduce the area of outright acquisition and rely on rights instead. A provision of this kind is usual in Transport and Works Act orders and Hybrid Bills, and has been followed in a number of DCOs for example article 23 of the A14 Cambridge to Huntingdon Improvement Order 2016.
- 5.71 Paragraph (2) provides that for the land described in Schedule 5, Highways England's powers of compulsory acquisition are limited to the acquisition of such rights as may be required for the purposes set out in the Schedule.
- 5.72 Paragraph (3) provides power to impose restrictive covenants under paragraph (1) is exercisable only in respect of plots specified in column (1) of Schedule 5.
- 5.73 Paragraph (4) provides that where Highways England needs only to acquire rights over land, it shall not be obliged to acquire any greater interest in that land.
- 5.74 Paragraph (5) and Schedule 6 impose modifications to the compulsory purchase and compensation provisions under general legislation. They do not affect the entitlement to compensation, but generally ensure that the compensation procedure applies to the additional categories of acquisition covered by the Order – the creation of new rights and the imposition of restrictive covenants in particular. This is a consequence of the extension of land acquisition powers to these categories (done to allow lesser land interests to be acquired).
- 5.75 For the purpose of section 126(2) of the Act, the relevant compensation provisions are modified only to the extent necessary to ensure that they apply properly to the acquisition of rights, and not to affect the amount of compensation to which landowners would be entitled. Furthermore, the provisions have been amended so that the time limits are consistent with the Order (five years as opposed to three years) and the appropriate references to the Act.
- 5.76 Paragraphs 2 and 4 to 10 of Schedule 6 are amendments to ensure that the relevant compulsory purchase and compensation provisions apply to acquisition of rights/restrictive covenants (and not just land). Paragraph 3 relates to correcting the references for the relevant time period (i.e. 5 years under the Order rather than 3 years under legislation).
- 5.77 The modifications are applicable generically to Orders of this kind and are based on changes made consistently in most schemes granted under the Act (see, for example, Schedule 6 of the

A14 Cambridge to Huntingdon Improvement Order 2016 for a recent example). As a result of changes contained in the Housing and Planning Act 2016, the Order has been updated to ensure that the correct provisions are modified. These changes are based on the amendments contained in High Speed Rail (London - West Midlands) Act 2017 and have also been adopted in the London Overground (Barking Riverside Extension) Order 2017.

Article 24 – Private rights over land

- 5.78 In order for it to be possible to implement the proposed development, provision is needed for the extinguishment of private rights in the Order land that would be incompatible with that implementation. Article 24 supplies that provision.
- 5.79 Article 24(1) provides for the extinguishment of private rights over Order land subject to compulsory acquisition under the Order, from the moment of acquisition or occupation of that land.
- 5.80 Article 24(2) provides for the extinguishment of existing private rights over land that is subject to the compulsory acquisition of new rights (but where the underlying land is not subject to powers of compulsory acquisition), if the exercise of those existing rights is inconsistent with the implementation of the scheme, from the date of acquisition of the right or occupation of the underlying land.
- 5.81 Article 24(3) provides that rights over Order land that is already owned by Highways England are also extinguished, at the point that any activity authorised by the Order interferes with or breaches those rights.
- 5.82 Article 24(4) provides for the temporary suspension of private rights over Order land that is not acquired but is occupied temporarily by Highways England in order to construct the proposed development. The suspension is for the duration of the occupation.
- 5.83 Paragraphs (5) to (8) of article 24 make provision for compensation and for circumstances where rights are preserved.
- 5.84 Article 24(9) sets out a list of matters deemed to be private rights to provide certainty as to the scope of the article. The list of deemed private rights is broad in order to ensure that any right which could potentially interfere with the implementation of the proposed development can be extinguished. A similar list appears in the equivalent article in the A14 Cambridge to Huntingdon Improvement Order 2016 (see article 25) and the A19/A1058 Coast Road (Junction Improvement) Order 2016 (see article 24).

Article 25 - Modification of Part 1 of the 1965 Act

- 5.85 The purpose of this article is ensure consistency between the standard terms of highways development consent orders and the Compulsory Purchase Act 1965 (as amended by the Housing and Planning Act 2016) as applied by section 125 of the Act. These modifications have broad precedent in Schedule 14 to the High Speed Rail (London – West Midlands) Act 2017.

Article 26 – Application of the 1981 Act

- 5.86 This article applies (with minor modifications to make the provisions appropriate to the context of acquisition under powers in a development consent order) the provisions of the Compulsory

Purchase (Vesting Declarations) Act 1981 to compulsory acquisition under the Order so that Highways England has the option of acquiring Order land that is subject to the powers of compulsory acquisition by vesting declaration.

- 5.87 Vesting declarations are one of two ways of acquiring land that is subject to compulsory purchase. The other method involves serving a notice to treat on the land owner to commence the process of establishing the acquisition price, after which title in the land is transferred. The date on which title will transfer is uncertain under the notice to treat method.
- 5.88 A vesting declaration, in contrast, sets the date on which title in the land is transferred to the acquiring authority. Compensation is negotiated or determined and paid later. Vesting declarations, therefore, allow title in the land to pass to the acquirer more quickly than using the notice to treat method, and also allow several parcels to be acquired at once. Their use is subject to serving notices and observing time limits as required by the 1981 Act (as amended by the Housing and Planning Act 2016).
- 5.89 The modifications ensure consistency with the standard five year period sought under the Order for acquisition rights. It further ensures that the appropriate references are made to the Act. The modifications are based in large part on previous highways NSIPs, and following amendments to the 1981 Act in the Housing and Planning Act 2016, the High Speed Rail (London - West Midlands) Act 2017.

Article 27 - Acquisition of subsoil or airspace only

- 5.90 This article allows Highways England to acquire land below the surface or above the surface, rather than having to acquire all of the land.
- 5.91 The purpose of this article is to give Highways England the flexibility to minimise so far as is possible the extent of interests to be acquired, with consequently less impact on affected landowners, and lower payments of compensation which is in the public interest. This too is a standard provision used in many highways development consent orders (see for example article 27 of the A14 Cambridge to Huntingdon Improvement Order 2016).

Article 28 - Rights under or over streets

- 5.92 The purpose of this article is to allow Highways England to appropriate and use land above or below streets within the Order limits, without having to acquire the street or any right or easement in it. The exercise of this power, without full acquisition, is prohibited in the circumstances set out in paragraph (3). Compensation is payable for any loss or damage caused to an owner or occupier of land affected by the power of appropriation where no acquisition has taken place.

Article 29 – Temporary use of land for carrying out the authorised development

- 5.93 The purpose of this article is to allow the land set out in Schedule 7 to be occupied temporarily while the works are carried out. This is land which is required during construction of the scheme but is not required permanently. This article also allows for the temporary occupation of any of the land for permanent acquisition that has not yet been taken possession of. In particular:
- (a) Paragraph 1(a)(i) allows the land set out in Schedule 7 to be occupied temporarily while the works are carried out. This is land which is required during construction of

the scheme but which is not required outright permanently, and includes land which will be occupied temporarily and then subject to permanent rights (e.g. diversion of utilities apparatus). Paragraph (8) prevents this land from being acquired permanently, although confirms that acquisition of rights over this land, or of subsoil / airspace only, is not prevented and is required in respect of certain parcels. Likewise some land taken temporarily will have permanent works undertaken to it, e.g. accommodation works (see further paragraph (4)(b), and Schedule 7).

- (b) Paragraph 1(a)(ii) allows for the temporary occupation of any of the land that is subject to the powers of permanent acquisition, but in respect of which no process for acquisition has yet been commenced. The rationale for this is that it reduces the amount of land that is required to be subject to outright acquisition. Thus article 20 with article 29(1)(a)(ii) makes it possible for Highways England to occupy land temporarily initially and only proceed to acquire permanently that part which is necessary for the scheme as constructed. The benefits of this are lesser impacts on landowners and lower costs to Highways England, which is in the public interest. In line with this, paragraph (1)(d) confirms that the authorised development as listed in Schedule 1 can be undertaken on land that has been temporarily occupied.

Article 30 – Temporary use of land for maintaining the authorised development

- 5.94 This article provides that Highways England may take temporary possession of land within the Order limits required for the purpose of maintaining the authorised development and to construct such temporary works as may be reasonably necessary for that purpose for a period of five years from the date on which that part of the authorised development is first used. Provision is made for notice and compensation. This power does not apply with respect to houses, gardens or any other buildings for the time being occupied. Both the A19/A1058 Coast Road (Junction Improvement) Order 2016 (see article 28) and the M4 Motorway (Junctions 3 to 12) (Smart Motorway) Order 2016 (see article 29) reflect the wording used in this article.

Article 31 – Statutory undertakers

- 5.95 This article provides Highways England with clear statutory authority to acquire rights over land owned by statutory undertakers (i.e. utilities such as electricity and gas companies).
- 5.96 It also allows Highways England to extinguish rights that statutory undertakers have over the Order land, and to remove and reposition their apparatus. Reference is made to the Order land so that this power is not restricted to apparatus which has been specifically shown on the land plans and described in the book of reference. In practice it is impracticable to show and describe all such apparatus and so a general power for the extinguishment of rights and removal or relocation of apparatus belonging to statutory undertakers over or within any Order land is required.
- 5.97 Paragraph (2) restricts Highways England's power to extinguish rights or move apparatus by excluding apparatus in streets. It applies alternative provisions more appropriate to balancing the interests of the various affected parties where the apparatus in question is in a street.
- 5.98 This article is subject to Schedule 8 which contains provisions for the protection of certain statutory undertakers to ensure their continued ability to carry out their functions despite the interference with their rights / apparatus required to facilitate the proposed development.

- 5.99 This too is an article with broad precedent (see the last three approved highways development consent orders: the A14 Cambridge to Huntingdon Improvement Order 2016 (see article 32), the A19/A1058 Coast Road (Junction Improvement) Order 2016 (see article 29) and the M4 Motorway (Junctions 3 to 12) (Smart Motorway) Order 2016 (see article 30).

Article 32 – Apparatus and rights of statutory undertakers in stopped-up streets

- 5.100 This article governs what happens to statutory undertakers' apparatus under streets that are stopped up by the Order. Without the article, the statutory undertaker would not have access to the apparatus, since there will no longer be a right of way along the street. The statutory undertaker may remove, relocate or replace any affected apparatus of its own volition, or must do so if it is reasonably requested by Secretary of State.
- 5.101 The statutory undertaker would receive compensation from Highways England for any relocation works and associated costs. Paragraphs (4)-(5) discount from this compensation the cost associated with a higher specification in the replacement apparatus. Paragraph (6) discounts from this compensation the increase in value to the statutory undertaker for having new rather than old (i.e. older than 7½ years) apparatus.
- 5.102 Paragraph (7) provides that where statutory undertakers are affected by a stopping up in relation to those parts of the project that constitute "major bridge works", "major transport works" or "major highways works", as defined in the New Roads and Street Works Act 1991, the cost sharing provisions under that Act will apply instead of the compensation provision in this article.
- 5.103 This article is standard for highways development consent orders (see, for example, article 30 of the A19/A1058 Coast Road (Junction Improvement) Order 2016).

Article 33 – Recovery of costs of new connections

This article provides that if any statutory undertaker's apparatus is removed and this cuts a service to anyone, then the cost of establishing a new service can be claimed from Highways England.

Article 34 – Special Category Land

- 5.104 Under section 131 of the 2008 Act an order granting development consent is subject to special parliamentary procedure when it authorises the compulsory acquisition of land to which section 131 applies (i.e. a common, open space or fuel or field garden allotment). The exception is if the Secretary of State is satisfied that certain tests under section 131(3) are met, including if the Secretary of State is satisfied that replacement land has been or will be given in exchange for the order land, and the replacement land has been or will be vested in the prospective seller and subject to the same rights, trusts and incidents as attach to the order land. The Applicant submits that this is the case, for the reasons set out in the Statement of Reasons.
- 5.105 Under section 132 of the 2008 Act an order granting development consent is subject to special parliamentary procedure when it authorises the compulsory acquisition of new rights over land to which section 132 applies (i.e. a common, open space or fuel or field garden allotment). The exception is if the Secretary of State is satisfied that certain tests under that section are met. One of those tests is that the order land, when burdened with the order right, will be no less advantageous than it was before to the persons in whom it is vested, persons entitled to commons or other rights over the land and the public.

- 5.106 Article 34 deals with the effect of the authorised development on open space special category land. The article makes provision for the special category land and the rights to be acquired in the special category (rights) land and the benefit of any restrictive covenants imposed over the special category (rights) land to vest in the undertaker once the Secretary of State (in consultation with the relevant planning authority) has certified that a scheme for the provision of replacement land as open space, and a timetable for the implementation of that scheme, has been received from the undertaker.
- 5.107 On the date on which the replacement land is laid out and provided in accordance with the scheme, the replacement land will vest in the person in whom the special category land was previously vested and will be subject to the same rights, trusts and incidents as attached to the special category land.

6 Part 6 – Operations

Article 35 – Felling or lopping of trees and removal of hedgerows

- 6.1 This article allows any tree or shrub that is near the project to be felled or lopped, or have its roots cut back, if it is considered to obstruct the construction, operation or maintenance of the project or endanger anyone using it. Compensation is payable for any loss or damage caused. This article also allows for the removal of hedgerows as defined in the Hedgerow Regulations 1997. This article has been inserted into numerous orders (see, for example, article 36 of the A14 Cambridge to Huntingdon Improvement Order 2016).

Part 7 – Miscellaneous and General

Article 36 – Removal of human remains

- 6.2 This provision provides a process by which the undertaker can disturb human remains when they are discovered during construction. There is a process for publishing notices in local newspapers and providing notice to the relevant local authority. Representations as to the identification of human remains and process for their re-interment are provided for, as is a process for the undertaker paying reasonable expenses of removing and re-interring or cremating discovered remains.

Article 37 – Application of landlord and tenant law

- 6.3 This article governs the leasing of land by Highways England to any other person. Essentially it allows the terms of the lease to override any statutory provisions relating to landlord and tenant law.

Article 38 - Operational land for the purposes of the Town and Country Planning Act 1990

- 6.4 This article means that the land within the Order limits in which Highways England holds an interest shall be treated as “operational land of a statutory undertaker” for the purposes of the Town and Country Planning Act 1990.
- 6.5 The effect of that Order land being treated as operational land is that the person responsible for operating and maintaining the proposed development (Highways England or any transferee

of its powers) will benefit from certain permitted development rights on that land in connection with the operation of the road.

Article 39 – Defence to proceedings in respect of statutory nuisance

6.6 Section 158 of the Act confers statutory authority for the purposes of a defence in statutory nuisance generally, subject to any contrary provision made by a particular DCO. This article is such a contrary provision, amending the terms of the defence in the case of noise nuisance (other types of nuisance continue to have the general defence afforded by s158).

6.7 The defence is available if the noise relates to:

- (a) the construction or maintenance of the project, and is in accordance with any controls imposed by the local authority under the Control of Pollution Act 1974, or cannot reasonably be avoided; or
- (b) the use of the project and cannot reasonably be avoided.

6.8 This is an article has precedent in recent highway orders made, for example article 38 of the M4 Motorway (Junctions 3 to 12) (Smart Motorway) Order 2016.

Article 40 – Protection of interests

6.9 This article simply gives effect to Schedule 8, which contains provisions protecting the interests of third parties. This schedule is based on the standard protective provisions approved by the Secretary of State in the A14 Cambridge to Huntingdon Improvement Order 2016 and the M4 Motorway (Junctions 3 to 12) (Smart Motorway) Order 2016. Highways England has sought the views of the undertakers who have interests affected by the authorised development and continues to negotiate with the undertakers to ensure any concerns are dealt with appropriately. Highways England will provide a full update of the status of the negotiations throughout the examination.

Article 41 – Deemed marine licence

6.10 This article deems that a marine licence is granted to carry out works described in Schedule 9 subject to conditions set out in that Schedule.

Article 42 – Certification of documents, etc.

6.11 This article provides for various plans and other documents (including those listed in Schedule 10) to be certified by the Secretary of State.

Article 43 – Service of notices

6.12 This article governs how any notices that may be served under the Order shall be deemed to have been served properly. In particular it allows service by email with the consent of the recipient, and deals with the situation of service on an unknown landowner.

6.13 It is common to have such an article in an order authorising development such as this. The article has precedent in a number of DCOs including the A14 Cambridge to Huntingdon Improvement Order 2016 (see article 42).

- 6.14 The provision is useful because it provides clarity on the issue. It is noted that the service of notice provisions under sections 229 and 230 of the Act apply to notices served under that Act rather than notices served under a development consent order made under that Act.

Article 44 – Arbitration

- 6.15 This article governs what happens when two parties disagree in the implementation of any provision of the Order. The matter is to be settled by arbitration, and if the parties cannot agree on who the arbitrator should be, this is decided by the President of the Institution of Civil Engineers.

Article 45 – Crown rights

- 6.16 This article provides that, while any part of the Order land remains Crown land, the powers conferred by the Order on RiverOak to compulsorily acquire such land are not exercisable over that land without the consent of the Crown. However, this article does not prevent RiverOak from exercising powers conferred by this Order to extinguish or interfere with any rights exercisable by any other persons over that land. This wording has been used in numerous development consent orders such as the A19/A1058 Coast Road (Junction Improvement) Order 2016 (see article 37).

7 Schedule 2 - Requirements

- 7.1 The requirements in Schedule 2 are the equivalents of planning conditions. They reflect the processes and procedures usually employed by Highways England when implementing a scheme such as this. Approvals are to be sought from the Secretary of State for Transport, following consultation with the local planning authority and / or other relevant third party. Again, this is consistent with the processes and procedures employed by Highways England when implementing a scheme such as this.
- 7.2 The requirements in Schedule 2 provide that the various schemes, details and plans to be approved must reflect the mitigation measures set out in the Register of Environmental Actions and Commitments (“REAC”, at appendix B to the “OCEMP”) which contains all of the mitigation commitments made in the Environmental Statement. This is the mechanism to ensure that environmental mitigation is secured by the Order, and the approach here is consistent with other DCOs which have been made. Further, the requirements provide that the approved schemes, details and plans must be implemented as approved, unless the Secretary of State approves further amendments to them.
- 7.3 Turning to the purpose and effect of requirements 1 to 13:
- (a) Requirement 1 contains a number of definitions used in Part 1 of Schedule 2.
 - (b) Requirement 2 provides that the authorised development must not commence later than 5 years from the date of the Order coming into force.
 - (c) Requirement 3 states that the authorised development must be carried out in accordance with the scheme design shown on the engineering drawings and sections unless otherwise agreed in writing by the Secretary of State.

- (d) Requirement 4 requires the preparation of a construction environmental management plan ("CEMP") in consultation with the relevant planning authority and for its approval by the Secretary of State. The CEMP will be based substantially on the outline CEMP prepared as part of the scheme application. The CEMP will fulfil the construction-related objectives and measures as outlined in the REAC and must be in accordance with ISO14001. Further details of what must be contained in the CEMP are set out in sub-paragraph (2). Following the construction of the authorised development, the CEMP will be replaced by a Handover Environmental Management Plan ("HEMP") which will address the matters set out in the approved CEMP that are relevant to the operation and maintenance of the authorised development. Further details of what must be contained in the HEMP are set out in sub-paragraph (5).
- (e) Requirement 5 requires the preparation of a landscaping scheme covering all hard and soft landscaping works for approval by the Secretary of State. There is a requirement that the proposed landscaping scheme must reflect the relevant mitigation measures in the REAC and must be based on the illustrative Environmental Masterplan annexed to the Environmental Statement. Further details of what must be contained in the landscaping scheme are set out in sub-paragraph (3).
- (f) Requirement 6 makes provision for dealing with any contaminated land and groundwater discovered during construction of the works, in consultation with the relevant planning authority and the Environment Agency.
- (g) Requirement 7 states Highways England must carry out final pre-construction survey work to establish whether European or nationally protected species are present on any of the land affected or likely to be affected by any part of the relevant works, or in any of the trees and shrubs to be lopped or felled as part of the relevant works.

Where, following pre-construction survey work or at any time when carrying out the authorised development the conditions listed in sub-paragraph (2) are met then the relevant parts of the relevant works must not begin until a scheme of protection and mitigation measures has been submitted to and approved in writing by the Secretary of State. Consultation with Natural England is required unless a qualified ecologist determines that the works in question do not require a protected species licence.

- (h) Requirement 8 provides that no part of the authorised development can commence until written details of a surface and foul water drainage system, reflecting the mitigation measures in the REAC and including means of pollution control, have been prepared in consultation with the relevant planning authority and approved in writing by the Secretary of State.
- (i) Requirement 9 states no part of the authorised development is to commence until for that part a written scheme for the investigation of areas of archaeological interest, reflecting the mitigation measures included in the REAC, has been submitted to and approved in writing by the Secretary of State following consultation with the relevant planning authority. The requirement puts further limitations on construction activity within 10 metres of any archaeological remains which were not previously identified but are revealed when carrying out the authorised development.

- (j) Requirement 10 provides that no authorised development can commence until a traffic management plan has been prepared and approved by the Secretary of State following consultation with the relevant planning authority.
 - (k) Requirement 11 makes clear that where the authorised development must be carried out in accordance with approved details / schemes, those details / schemes are taken to include any subsequent amendments that are approved or agreed in writing by the Secretary of State.
 - (l) Requirement 12 provides that permanent and temporary fencing must be constructed and installed in accordance with Volume 1, Series 0300 of the Manual of Contract Documents for Highway Works.
- 7.4 Part 2 of Schedule 2 (Requirements 13-16) provides a clear procedure for the discharge of requirements by the Secretary of State. It sets out clear time limits for decisions to be made and makes provision for circumstances where the Secretary of State requires further information to be provided in relation to an application for the discharge of a requirement. Part 2 as drafted reflects the discharge of requirements provisions approved in previous 'made' DCOs including the A14 Cambridge to Huntingdon Improvement Order 2016.
- 7.5 Any steps Highways England takes to comply with the requirements before the Order is made will be treated as effective in complying with the requirements once the Order is made, thereby avoiding the need to repeat such steps.