

APPLICATION BY HIGHWAYS ENGLAND FOR AN ORDER GRANTING DEVELOPMENT CONSENT FOR THE A63 CASTLE STREET IMPROVEMENT SCHEME

NOTE TO EXAMINING AUTHORITY REGARDING THE INCLUSION OF ALTERNATIVE SITES IN THE DRAFT DEVELOPMENT CONSENT ORDER

- (1) We act for Highways England and have prepared this note following a request from the Examining Authority (ExA) at the Preliminary Meeting and Open Floor Hearing in respect of the application for development consent for the A63 Castle Street Improvement Scheme (the Application) on 26 March 2019.
- (2) Following representations from Shulmans LLP on behalf of Princes Quay Retail Limited, Princes Quay Estates Limited and Princes Quay Developments Limited, the ExA asked Highways England to prepare a note setting out the position agreed between Highways England and Shulmans LLP. This was in relation to when the examination might be updated as to which of the two alternative sites included in the Application is likely to be selected, and also its case that the choice of site did not constitute a material amendment to the Application.
- (3) The Application currently contains two site options for a batching compound (Site A and Site B). Highways England disagrees with Shulmans LLP that the inclusion of alternative sites in the Application is unlawful. There is precedent for the inclusion of alternative options in a draft DCO on other schemes, including the Hinkley Point C Connection DCO.
- (4) Section 122 of the Planning Act 2008 (the Act) restricts the power to include the compulsory acquisition of land in a development consent order (DCO). The restriction and conditions in Section 122 relate to “an order granting development consent” and not to the draft order which accompanies an application. In other words, these are conditions that the decision-maker must be satisfied about in making the DCO; they are not in themselves restrictions on what may be included in a draft order.
- (5) Highways England accepts that there would be evidential difficulties for the ExA or the Secretary of State in being satisfied that two alternative areas of land were both required and, indeed, in being satisfied that there was a compelling case in the public interest for acquiring both alternatives. However, Highways England only ever intended to seek compulsory powers for one of the sites following further detailed assessments and negotiations in relation to both.
- (6) Highways England agreed with Shulmans LLP at the Preliminary Meeting that it expects to be able to provide an update to the Examining Authority in relation to which site it intends to take forward by 17 May. This will allow for the relevant planning application for Site A to be determined and, assuming such application is granted, the relevant six week judicial review period to expire.
- (7) If planning permission is granted for Site A (and there are no outstanding judicial review proceedings on 17 May), Highways England will be in a position to inform the Examining Authority that Site B will be withdrawn from the application. If planning permission is not granted, or if there are ongoing judicial review proceedings, then Highways England will not be able to confirm the removal of Site B on 17 May 2019.

- (8) We consider that the removal of Site B from the draft DCO will not amount to a material amendment to the application for development consent. The Planning Inspectorate's advice note sixteen considers what changes might constitute a 'material change'. There is no definition of a material change, but the tests that apply consider whether the change is "*substantial or whether the development now being proposed is not in substance that which was applied for*".
- (9) We consider that removal of one of the sites from the application is not a substantial change and that the application will remain in substance the same as that which was applied for. The application has always contained both sites and it was always the intention for one site to be removed, so making the choice of site is merely fulfilling what was already contemplated in the application (e.g. see paragraph 2.3.1 of the Statement of Reasons [[APP-018](#)]). Furthermore, the Application was consulted upon with both sites included and therefore those entitled to be consulted were able to make representations in relation to both sites.
- (10) No new or revised information will need to be put before the ExA for consideration following the removal of one of the sites. All of the relevant information is already contained in the Application and any documentation submitted will merely be confirming which parts of the Application should be ignored. Therefore, removing one of the sites will not substantially change the application and cannot be said to be a 'material change'.
- (11) It is proposed that the Applicant will withdraw Site B by way of an addendum to the application which will explain that Site B is no longer to be considered a part of the application and that the application documents should be read as such.

BDB Pitmans

01 April 2019