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Dear Sir/Madam

**A63 Castle Street Improvement, Hull (TR010016)
Post-Hearing Note on behalf of HIN Hull Limited and HICP Limited**

1 Introduction

- 1.1 This Post-Hearing Note is provided on behalf of HIN Hull Limited and HICP Limited ("**Holiday Inn**"), for whom we act in respect of the proposed A63 (Castle Street Improvement, Hull) Development Consent Order (the "**Proposed Order**").
- 1.2 It is made further to Holiday Inn's Further Written Representation dated 28 May 2019 and the representations made by Rebecca Clutten, of Counsel, on behalf of Holiday Inn at the DCO Issue Specific Hearing on 6 June 2019.

2 Completion of the Option and Impact Mitigation Deed

- 2.1 Highways England and Holiday Inn have agreed to enter into an Option and Impact Mitigation Deed (the "**Deed**") which:
- a) minimises land take associated with the Proposed Order;
 - b) provides for the voluntary acquisition of land and other interests required by Highways England in lieu of the exercise of powers of compulsory purchase;
 - c) secures appropriate protection for Holiday Inn's existing and future operations; and
 - d) mitigates the adverse impacts anticipated to arise from the carrying out of works associated with the Proposed Order.
- 2.2 The Deed has not yet been completed. However, it has been executed and sealed on behalf of Highways England and on 13 June 2019 was provided to us for execution on behalf of Holiday Inn (and for subsequent completion).

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2.3 Subject to completion of the Deed, Holiday Inn hereby withdraws its requests made to date for the Examining Authority to recommend that protective provisions in the form appended to the Further Written Representation be included on the face of the Proposed Order, and the Examining Authority need not be troubled with these any further. The matters which they were to address are considered to be adequately provided for in the Deed.

3 Ensuring statutory undertakers comply with agreed protections

3.1 However, for the reasons more particularly set out in Holiday Inn's Further Written Representation and the representations of Ms Clutten on its behalf at the DCO Issue Specific Hearing, Holiday Inn proposes (and Highways England is content to accept) that draft article 31 of the Proposed Order of the Order ought to be supplemented by the following wording:

“31(3) Subject to article 31(4), neither the undertaker nor any statutory undertaker may—

(a) carry out any part of the authorised development on; or

(b) for the purposes of carrying out, maintaining and operating any part of the authorised development enter upon, use or acquire any interest in,

the land to which this paragraph (3) applies pursuant to any Act or enactment, or any instrument or subordinate legislation made under any Act or enactment, other than this Order.

31(4) Nothing in article 31(3) applies to a statutory undertaker—

(a) carrying out any activity in relation to its apparatus existing on the date of this Order on the land to which paragraph (3) applies in the ordinary course of its statutory duties necessary absent the proposals for the authorised development; or

(b) after the authorised development on the land to which paragraph (3) applies has been completed and opened for use for the purposes for which it was designed and any interest in the land required for the retention of that part of the authorised development has been acquired in accordance with that paragraph.

31(5) The land to which article 31(3)(b) applies comprises Plots 3/1bd, 3/1bh, 3/1bi, 3/1bp, 3/1ca, 3/1cd, 3/1ce, 3/1cf, 3/1cg, 3/1ch, 3/1be, 3/1bf, 3/1bg3/1c, 3/1cb, 5/2a, 5/2i 5/2f, 5/2g and 5/2j as set out in the book of reference and on the land plans and the land to which article 31(3)(a) applies comprises those Plots and Plots 3/1bv, 3/1by, 3/1cc, 3/2g, 3/9a and 3/9d; and in articles 31(3) and 31(4) “statutory undertaker” includes the persons listed in article 8(4) of this Order and any utility undertaker or operator (which have the meanings given in Schedule 9 (protective provisions)).”

3.2 The important typographical cross-referencing error in the above wording as presented in the Further Written Representation, for which apologies, which was identified by Ms Clutten at the DCO Issue Specific Hearing would be corrected by the underlined numbers in bold in proposed article 31(5) above.

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3.3 As requested by the Examining Authority at the Issue Specific Hearing, this part of this Post-Hearing Note records Holiday Inn's oral submissions as to:

- a) the effect and purpose of the additions;
- b) their limited scope;
- c) the reasons why they are required; and
- d) their acceptability to affected third parties.

Effect and Purpose

3.4 It was explained that the proposed additions to draft article 31 would be effective to achieve two things:

- a) they would prevent, in certain limited instances, Highways England and statutory undertakers otherwise deriving the benefit of powers under draft article 8 of the Proposed Order from carrying out works comprised in the authorised works otherwise than pursuant to the Proposed Order; and
- b) they would prevent, in the same limited circumstances, Highways England and the same statutory undertakers from acquiring any land or rights necessary for the authorised works otherwise than pursuant to the Proposed Order.

3.5 The 'limited circumstances' referred to arise where (a) the land upon which they proposed to carry out the works or which they propose to acquire is one of a limited number of parcels identified in article 31(5) and (b) where neither one of the caveats set out in article 31(4) are engaged.

3.6 The practical effect of the additions is to prevent affected undertakers from relying on any other statutory powers they may have in order to acquire land or do works that are within the scope of Proposed Order.

3.7 Such additions are necessary to prevent affected undertakers from avoiding the effect of the protections that have been agreed for Holiday Inn's benefit in the Deed, thereby ensuring their efficacy for the duration of the works.

Scope of the provision

3.8 As was also outlined at the hearing, the scope and application of the additions have been carefully controlled, to ensure that they are proportionate to the mischief they are intended to meet. The controls are fourfold:

- a) First, the provision applies only to works that fall within the definition of authorised works, or to land or rights that need to be acquired for purposes relating to those works; it does not apply to any other works that those undertakers might carry out.

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- b) Second, its application is further limited to the acquisition of parcels of land in Holiday Inn's ownership or works upon that land or adjacent parcels, where works would have the potential to impact upon Holiday Inn's interests.
- c) Third, it expressly does not apply to works required to apparatus that pre-date the Proposed Order (once made), where those works would be required in the ordinary course of the undertaker's duties absent the scheme.
- d) Fourth, it also does not apply after any acquisitions necessary for the permanent retention of the works constructed for the purposes of Highways England's scheme have been completed.

3.9 The effect of all of this is to ensure that any powers that affected undertakers have to acquire land, or to carry on works, other than for the authorised works on Holiday Inn's land, remain available to them in their entirety.

The need for the provision

- 3.10 The land, rights and works that would be subject to the additions are ones that Highways England requires to carry out or have carried out for the purposes of its project.
- 3.11 Highways England has accepted, through engagement with Holiday Inn and its subsequent negotiations relating to the Deed, that Holiday Inn's interests are likely to be adversely affected by its project, such that a range of bespoke, substantive protections are appropriate.
- 3.12 By virtue of article 8 of the draft Proposed Order, it is however possible for the acquisitions and works comprised in that project to be carried out by a third-party statutory undertaker, the most significant example in relation to Holiday Inn's land being the sewer diversion works comprised in Work No. 23, which it is understood will be carried out by Yorkshire Water. There are also substation works on the western end of Holiday Inn's land, which are to be carried out by Northern Powergrid Limited.
- 3.13 Although those works will be carried out by Yorkshire Water/Northern Powergrid, they will still be carried out for the purposes of Highways England's project, not for some other independent purpose, and they will still have the adverse effects that Highways England has recognised and for which they have agreed to make provision in the Deed.
- 3.14 The concern is that Yorkshire Water and Northern Powergrid have (and indeed many statutory undertakers have) wide-ranging powers to undertake works and acquire land. Each of those regimes have varied requirements about notice, compensation and the like, which will be adverse to Holiday Inn's interests in comparison with the powers set out in the Proposed Order which have been, in effect, modified by intensively considered and tailored protections in the Deed.
- 3.15 If the provision at paragraph 3.1 of this Post Hearing Note were not included, there is a material risk of those other powers outwith the Planning Act 2008 being used to carry out the works or even acquire the land instead, the effect of which would be to enable the undertaker to avoid the protections in the Deed that Holiday Inn and Highways England have spent time and money carefully securing.

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- 3.16 As a matter of principle that cannot be right. The acquisition and works are being carried out for Highways England's project and not for the undertakers' own project(s) and, as such, it would be fundamentally inappropriate and an abuse of the DCO process for the protections secured through it to be avoided.

Acceptability to others

- 3.17 Highways England confirmed that during the hearing it was "perfectly content" to accept the inclusion of the proposed additions to the article on the face of the Proposed Order, and it is understood that they will be included within the next iteration of the draft Proposed Order.
- 3.18 No other affected third party has claimed that the proposed additions are objectionable to them, including Yorkshire Water, whom we are aware has been appraised of the proposal.
- 3.19 **In the circumstances, the Secretary of State is respectfully requested to include the additions sought at paragraph 3.1 of this Post Hearing Note in the Proposed Order. Subject to their inclusion in the Order once made and to completion of the Deed, we hereby confirm on behalf of Holiday Inn that any objections it has made in respect of the Proposed Order may be considered withdrawn, as the relationship between Holiday Inn and any party exercising powers under the Order will be governed by the terms of the Deed.**
- 3.20 On that basis, subject to the need for any further representations in respect of the additions sought, Holiday Inn does not anticipate participating further in the Examination.

Please let Sheridan Treger or Tom White of this office know if you have any queries in relation to this Post-Hearing Note.

Yours faithfully



Bryan Cave Leighton Paisner LLP

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