

THE PLANNING ACT 2008

M4 (JUNCTIONS 3 TO 12) (SMART MOTORWAY) DEVELOPMENT CONSENT ORDER APPLICATION

PINS REFERENCE NO: TR010019

Discharge of DCO requirements - Update Explanatory Note

Deadline V - 8 January 2016

Introduction

1. On 5 November Highways England Company Limited (“**Highways England**”) submitted, as part of its Deadline III documents, an explanatory note setting out its proposals for the discharge of requirements under Schedule 1 of the draft Development Consent Order (“**DCO**”). That note explained that the discharge of requirements was to be undertaken by the Secretary of State for Transport (“**Secretary of State**”), rather than by the Local Planning Authorities (“**LPAs**”) interested in the Scheme. This process was proposed to avoid the potentially significant costs, delays, complications and inconsistencies that would arise from having to have up to eleven LPAs discharging the requirements for the Scheme.
2. Following the submission of that explanatory note at Deadline III, a number of queries were raised by the Examining Authority and other parties at the issue specific hearing into the draft DCO, which was held on 19 November 2015. Following that hearing, Highways England was asked to consider the following matters, which are addressed individually below:
 - 2.1 whether consultation in relation to the discharge of requirements would be undertaken by Highways England, by the Secretary of State or both parties;
 - 2.2 the form that such consultation would take;
 - 2.3 whether an 8 week discharge period by the Secretary of State was sufficient;
 - 2.4 whether a fee could be paid to the LPAs for consultation under the requirements; and
 - 2.5 whether a service level agreement was an appropriate alternative to discharge by the Secretary of State.

Dual Consultation

3. The Examining Authority has identified that it would like clarification within the DCO as to whether there is an obligation for dual consultation; that is, consultation initially undertaken by Highways England and subsequently by the Secretary of State. At paragraph 3.8 of the explanatory note submitted at Deadline III, Highways England stated its understanding that

the Secretary of State would carry out his own form consultation with third parties in addition to that already carried out by Highways England. Having considered the position at the request of the Examining Authority, Highways England does not believe that it is appropriate to mandate that the Secretary of State be obligated to consult during the process of discharge of the requirements. The Secretary of State remains free to consult should he or she choose to, but should not be dictated by the terms of the DCO to do so. The alternative would undermine the autonomy and decision making of the Secretary of State.

4. Paragraph 4 of Part 2 of Schedule 2 to the draft DCO provides that, when submitting details to the Secretary of State for approval, Highways England must submit to the Secretary of State details of the consultation undertaken by Highways England pursuant to the requirements. Consequently, the Secretary of State will be fully informed of all consultation undertaken relating to the discharge of each requirement and will be in a position to decide whether or not to undertake separate consultation on a case-by-case basis.

Form of Consultation

5. A concern was raised by the Examining Authority over the form that any consultation would take, particularly in relation to the manner in which LPAs would be consulted and whether local residents would have the ability to input their views of the requirements.
6. As Highways England explained at the issue specific hearing into the draft DCO on 19 November 2015, it is not usual for a DCO to be prescriptive as to the form of consultation to be undertaken when discharging the requirements; the only matter which is prescribed under a DCO is the body to be consulted in discharging the requirement. As such, it would not be appropriate for the draft DCO to be prescriptive as to the method of consultation to be undertaken on the discharge of requirements for this Scheme.
7. However, as requested by the LPAs at the issue specific hearing, Highways England has amended the requirements in Schedule 2 to make it clear in each case that the relevant LPA is to be consulted. Schedule 2 has also been amended to make clear that the details of all consultation undertaken must be submitted to the Secretary of State and that any responses to such consultation will be reflected and accepted in the details submitted for approval. However, this will only apply where it is appropriate, reasonable and feasible to do so, taking into account considerations including, but not limited to, cost and engineering practicality. This should provide additional comfort to the consultees that Highways England will take their suggestions on-board, though always in light of the caveats described above.

Application Fee

8. The London Borough of Hillingdon raised an issue during the issue specific hearing in relation to the topic of fees received for the discharge of requirements, and explained that under the current process a LPA would receive a fee for each application it receives for the discharge of a requirement. This monetary compensation would be lost under the proposed procedure whereby the LPA would not be paid a fee when being consulted under a requirement, as it is not the discharging body.
9. Highways England is of the view that it is not appropriate for a fee to be paid for consultation under the DCO. It is a common occurrence under DCOs for various bodies to be consultees as is proposed here. For example Natural England, Historic England and the Environment Agency frequently provide consultation responses on the discharge of requirements under myriad DCOs. However, Highways England is not aware of any DCO which provides that payment will be made to those bodies in engaging in consultation in such circumstances. Given the number of bodies that would be required to be consulted on a linear scheme of this

nature, Highways England is of the view that it would place an undue financial burden on a Scheme that is being funded by tax-payers and set a precedent for future Highways England schemes.

10. Further, whilst Highways England appreciates that the LPAs will give their consultation responses due consideration, requiring the dedication of time and resources, there is a fundamental difference between providing a consultation response on a matter, and having to consider all aspects of a proposal as the decision-making body.

8 Week Discharge Period

11. Paragraph 1(1) of Part 2 of Schedule 2 to the draft DCO specifies that the Secretary of State must give notice to the undertaker of his decision on an application for discharge of a requirement within a period of 8 weeks. During the issue specific hearing into the draft DCO, the Examining Authority questioned whether 8 weeks was sufficient time for a decision to be made by the Secretary of State, particularly given the need for third party consultation.
12. Highways England is of the view that the requirements of Part 2 of Schedule 2 to the draft DCO are appropriate. First, Highways England believes that 8 weeks is an appropriate amount of time for the discharge of requirements. Even were a 4 week period to be allowed for consultation of third parties, which is standard period for consultation, for example under s.42 and s.56 of the Planning Act 2008 (see Regulation 4(3)(i) and Regulation 9(4)(j) of the Infrastructure Planning (Prescribed Forms and Procedure) Regulations 2009), this would allow sufficient time for a decision to be taken, without compromising the timely delivery of the Scheme.
13. Secondly, paragraph 1 of Schedule 2 makes it clear that the 8 week period is not prescriptive. Paragraph 1(c) provides for a longer decision-making period to be agreed between the parties. Further, it is always open to the Secretary of State to request further information from the undertaker, in which case he has a further 8 weeks to consider the application for discharge of the requirement (paragraph 1(b) of Part 2 of Schedule 2).
14. Given the above, Highways England is of the view that the procedure for the discharge of requirements by the Secretary of State provided in Part 2 of Schedule 2 to the draft DCO strikes an appropriate balance between allowing for comprehensive consideration of the application for discharge of the requirements and the need to ensure the delivery of the Scheme is not subject to undue delay.

Service Level Agreement

15. At the issue specific hearing into the draft DCO, the Examining Authority asked Highways England to consider the use of a service level agreement, where by the LPAs form a body akin to a joint planning board, which would then be responsible for the discharge of the requirements. Highways England has considered this proposal, but is of the view that it is not appropriate for the following reasons:
 - 15.1 the M4 forms part of the Strategic Road Network (“**SRN**”), an England-wide asset whose integrity Highways England must manage and maintain. A central aim of the SRN is to ensure consistency of design and standards across the network in order to preserve high levels of safety, resilience under pressure and efficient operation. This consistency is best served by single body sign-off. Given that the Department for Transport is the policy leader for national highway policy, Highways England considers that it is best placed to sign off requirements, as has occurred on previous highways DCO schemes;

- 15.2 the M4 Scheme is different from other Nationally Significant Infrastructure Projects due to its linear nature. Non-linear projects are largely discrete entities, whose strategic value (both individually and collectively) is less dependent on consistency of design and standards across the network than is the case with the M4 as part of the wider SRN, where it is critical. Consistency across the SRN is potentially undermined by LPA sign-off of the Scheme due to the complexity of the process, the flexibility of design and the significant interactions with local communities, the environment and the local road network; and
- 15.3 Highways England believes that some LPAs may be reluctant or unable to undertake the rigorous analysis which may be essential to discharging the requirements, especially for highly technical areas, such as air quality. Whilst LPAs will be consulted on the requirements to be discharged, that is a different process to coming to a final decision on the schemes that should be put in place pursuant to them. Given the difference in sizes and location of LPAs, their skills set, capacity and priorities are variable. However, with sign off by the Secretary of State, as key 3rd party consultees LPAs will be supported and informed by Highways England, and their views will be crucial to decision-making, particularly as those views will be in the public domain (on the Project website as part of the Requirements Register).

DLA Piper UK LLP

On behalf of Highways England

8 January 2016