

**A38 Derby Junctions**

**TR010022**

**Volume 3**

**3.2(a) Explanatory Memorandum to the  
Draft Proposed Order**

Regulation 5(2)(c)

Planning Act 2008

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

March 2020

Infrastructure Planning

Planning Act 2008

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

A38 Derby Junctions  
Development Consent Order 202[ ]

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**Explanatory Memorandum to the Draft Proposed Order**

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<b>Regulation Number</b>	Regulation 5(2)(c)
<b>Planning Inspectorate Scheme Reference</b>	TR010022
<b>Application Document Reference</b>	3.2(a)
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<b>Version</b>	<b>Date</b>	<b>Status of Version</b>
2	03 March 2020	Deadline 6 submission

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## 1 SUMMARY

- 1.1 This memorandum explains the purpose and effect of each article of, and Schedules 1 and 2 to, the draft A38 Derby Junctions Development Consent Order (the "**Order**"), as required by Regulation 5(2)(c) of the Infrastructure Planning (Applications: Prescribed Forms and Procedure) Regulations 2009<sup>1</sup> and in accordance with other Highways England Development Consent Order applications.
- 1.2 Regulation 5(2)(c) requires this memorandum to explain "*the purpose and effect of provisions in the draft order*".

## 2 PURPOSE OF THE ORDER

- 2.1 Highways England Company Limited (the "**Highways England**") is applying to the Secretary of State for a development consent order for the alteration, realignment and grading of two separate sections of the A38 near Derby, known as the A38 Derby Junctions (the "**Scheme**"). The Scheme is referred to in the Order as "the authorised development".
- 2.2 In summary the Scheme forms part of a programme of improvements to upgrade the wider network in and around the East Midlands to improve connection between Birmingham and the M1 (Junction 28), as set out in the first 'Road Investment Strategy' (RIS), 2015. This includes an aim to make journeys in the Midlands better by operating, maintaining and improving major A roads and motorways to ensure that the region's roads are fit for the future. These improvements are stated in the Highways England Delivery Plan (2015-2020) as a scheme to be delivered within this period. Highways England currently expects works to start on the scheme in 2020, with the first year of opening anticipated to be 2024.
- 2.3 The objectives of the Scheme have been identified by Highways England and include improving economic competitiveness, the environment and quality of life by reducing congestion in the surrounding urban areas and on the A38 inter-regional road. In addition, it is considered that the Scheme would increase the capacity of the strategic road network and facilitate housing and employment growth within the city of Derby.
- 2.4 To achieve these objectives, the Scheme includes the alteration, realignment and grading of two sections of the A38. The Scheme will include the alteration of three at-grade existing roundabouts to grade separated interchanges at locations known as Kingsway, Markeaton and Little Eaton. These roundabouts are respectively located at the junctions of the A38/A5111, A38/A52 and A38/A61. These three junctions span an approximate distance of 5.5km along the A38 to the west and north of Derby.

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<sup>1</sup> S.I. 2009/2264

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- 2.5 In addition, the Scheme would include the lowering of the A38 to pass underneath the altered Kingsway and Markeaton junctions. It would also include the widening of the A38 to three lanes in each direction between the Kingsway and Kedleston Road junctions. Finally, it would include building two new bridges to carry the A38 over the altered roundabout at Little Eaton junction.
- 2.6 As part of the Scheme the connections between the realigned A38 and the A5111, A52 and A61 will also be altered and realigned to connect into the local highway network and the newly configured A38, respectively. The Scheme will include the development of new slip roads to cater for all movements to and from the realigned A38; the demolition and construction of a new footbridge; new link roads to connect to the altered interchanges; new flood compensation areas; a utilities corridors and new gantries.
- 2.7 A detailed description of the Scheme is included in Chapter 2 of the Environmental Statement.

#### **Nationally Significant Infrastructure Project**

- 2.8 The Scheme is a nationally significant infrastructure project ("**NSIP**") within sections 14(1)(h) and 22(1)(b) of the Planning Act 2008 (the "**2008 Act**"). Under section 22 an NSIP must fall within one of the three categories specified, which are expressly stated to be alternatives. This Scheme is the "alteration" of a highway within the meaning of section 22(1)(b). The alteration is to the A38 by the realignment of the route leading to and away from the existing roundabouts known as Kingsway, Markeaton and Little Eaton. It includes the alteration to these three roundabouts and the related highway works necessary to allow the realigned A38 to connect to the realigned A5111, A52 and A61 and to be integrated into the surrounding trunk and classified road network.
- 2.9 The Scheme satisfies section 22(3) because it is located wholly in England, Highways England (being a strategic highways authority) is the highway authority for the highway, the area of development is greater than 12.5 hectares and the speed limit for any class of vehicle is expected to be 50 miles per hour or greater, as per section 22(4).
- 2.10 As the Scheme is an NSIP, development consent must be obtained from the Secretary of State, and an application for a development consent order must be made to the Secretary of State, care of the Planning Inspectorate ("**PINS**"), under section 37 of the 2008 Act.
- 2.11 Schedule 1 (authorised development) to the draft Order contains a list of numbered works comprising the Scheme.

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## Associated development

- 2.12 The draft Order authorises development which is associated with the NSIP. The Secretary of State may, under the provisions of section 115 of the 2008 Act, grant consent for development that is associated with the NSIP.
- 2.13 Guidance on associated development has been issued by the Secretary of State<sup>2</sup>. 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 requiring “*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).
- 2.14 In some cases there may be some overlap between associated development and works which form part of the principal development. If it was to be separated out in the Order this 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.
- 2.15 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 principal development and associated development works in Schedule 1 to the Order. All elements of the proposed development either constitute part of the NSIP or are “associated development” within the meaning of section 115(2) of the Act, and so can be properly authorised by the Order.
- 2.16 In order to ensure that the authorised development is constructed efficiently and without impediment the further works listed (a) to (o) in Schedule 1 have been identified as necessary. The powers to carry out such works have been included in the Order and assessed in the environmental statement. This approach was approved in the A19/A1058 Coast Road (Junction Improvement) Order 2016 and extensive provisions were used in both the A14 Cambridge to Huntingdon Improvement Scheme Development Consent Order 2016 and the Silvertown Tunnel Order 2018.

## 3 ANCILLARY MATTERS

- 3.1 The draft Order also contains a number of ancillary matters, for example provisions not comprising development.

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<sup>2</sup> ‘Guidance on associated development applications for major infrastructure projects’ (Department for Communities and Local Government) (April 2013)

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3.2 The draft Order seeks to apply and modify statutory provisions relating to the compulsory acquisition of land (see Part 5 of the Order). It is for this reason that under section 117 and 120(5) of the 2008 Act the Order must be made by way of Statutory Instrument. The draft Order is therefore in that form.

3.3 Other ancillary matters include the temporary and permanent stopping up of lengths of existing highway and private means of access in the vicinity of the Scheme, the classification of highways, the imposition of traffic regulation measures (including the application of speed limits), the creation of new private means of access and the application and disapplication of legislation.

#### **4 THE DRAFT ORDER**

4.1 The purpose and effect of the provisions of the draft Order are now explained in sequence. Whilst the Infrastructure Planning (Model Provisions) (England and Wales) Order 2009 (S.I. 2009/2265) has been repealed, the draft Order is based on the model provisions as well as other development consent orders that have been made to date.

##### **Part 1 – Preliminary**

###### *Article 1 - Citation and commencement*

4.2 Article 1 sets out the name of the Order and the date on which it comes into force.

4.3 This article did not appear in the model provisions. However, it is a standard article that is included in all development consent orders.

###### *Article 2 - Interpretation*

4.4 Article 2(1) defines terms used in the Order. It is a standard article and was included in the model provisions as article 1.

4.5 Definitions to note include:

- (a) "Commence" makes it clear that a number of works that would constitute a 'material operation' under the Town and Country Planning Act 1990 do not mean that the authorised development has been 'commenced'. This enables Highways England to undertake certain preparatory works (for example assessing ground conditions, ~~remedial work in respect of contamination~~contamination or other adverse ground conditions etc.) prior to the submission of relevant details for approval under the requirements, which Highways England considers proportionate and necessary to facilitate the delivery of the Scheme. The works that are excluded from the definition of commencement are either de minimis or have minimal potential for adverse impacts, as assessed in the Environmental Statement. They may in some cases need to be carried out in order to comply

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with the pre-commencement requirements (for example, to inform assessments and proposals required to be submitted for approval). Highways England should be permitted to carry out low impact preparatory works following the grant of the DCO, while it is working to discharge the pre-commencement requirements, thereby helping to minimise the construction timetable.

- (b) "Maintain" includes inspect, repair, adjust, alter, remove, replace and reconstruct. Highways England considers this to be a reasonable definition that is narrower than definitions which have appeared in some previous orders<sup>3</sup>. The inclusion of 'adjust' or 'alter' is justifiable on the basis that during maintenance operations changes to existing specifications may be required. Similarly, 'remove' is included as it may be necessary to remove something in order to repair, clean or replace it, for example. The proper maintenance of the highway is an essential part of ensuring the safety of road users. It is therefore appropriate to ensure that Highways England can carry out whatever maintenance activities it needs to in order to ensure continued public safety. The power to maintain in article 6 is expressed as being a power to "*maintain the authorised development*" and it does not extend to matters beyond the development as ~~authorised~~authorised and is limited to maintenance activities which do not create any materially new or materially adverse environmental impacts compared to those assessed in the environmental statement.
- (c) "Order land" includes the words 'or used permanently or temporarily' as some of the land may only be used temporarily, rather than acquired.
- (d) "Order limits" means the red line boundary for the Scheme as shown on the Works Plans [TR010022/APP/2.5] and the Land Plans [TR010022/APP/2.2].

4.6 Article 2(2) expands the definition of rights over land which was included in the model provisions as article 1(2) to ensure that there is clarity regarding the effect of imposing restrictive covenants on the land.

4.7 Article 2(3) defines measurements as 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 Order, there is no issue over whether the Order permits the works. Thus this provision allows for a small tolerance and flexibility, although all works will take place within the limits of deviation. It is now common practice to include such provision in development consent orders and the model provisions included similar wording in article 1(3).

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<sup>3</sup> See for example the definition in The M4 Motorway (Junctions 3 to 12) (Smart Motorway) Order 2016, which also includes terms such as "demolish" and "improve", amongst others.



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4.8 Article 2(4) provides that areas given in the Book of Reference [TR010022/APP/4.3] are approximate, since these are not covered by article 2(3). This is intended to clarify the position of the areas in the Book of Reference, and the purpose and effect is the same as set out in paragraph 4.7 above.

4.9 Articles 2(5) and (6) confirm that references to lettered or numbered points and numbered works are to points lettered or numbered on the relevant plans and works numbered in Schedule 1, as appropriate.

*Article 3 – Disapplication of legislative provisions*

4.10 This article provides (in reliance on section 120(5)(a) of the 2008 Act) for the disapplication in relation to the authorised development of certain requirements that would otherwise apply under general legislation. Section 120(5)(a) provides that an order granting development consent may apply, modify or exclude statutory provisions which relate to any matter for which provision may be made in the order.

4.11 Article 3 provides for the disapplication of various consents which would otherwise be required from the relevant drainage boards under the Water Resources Act 1991 and the Land Drainage Act 1991. It also disapplies part of the Environmental Permitting (England and Wales) Regulations 2016 and Traffic Management Permit Schemes which have been made under the Traffic Management Act 2004 and are in place in the administrative areas of Derby City Council and Derbyshire County Council. The consents are disapplication relates to:

(a) ~~imposed by~~ byelaws made or deemed to have been made under the Water Resources Act 1991;

(b) ~~prohibiting~~ the placing of obstructions in waterways which are not main rivers under the Land Drainage Act 1991;

(c) ~~for~~ Secretary of State consent to vary an award which affects the drainage of land;

(d) ~~of~~ byelaws made under the Land Drainage Act 1991 regulating the use and obstruction of watercourses; ~~and~~

(e) insofar as they relate to the temporary possession of land the provisions of the Neighbourhood Planning Act 2017;

(f) a flood risk activity permit ("FRAP") under the Environmental Permitting Regulations (England and Wales) 2016; and

~~(e)(g) the Traffic Management (Derby City Council) Permit Scheme Order 2013 and the Traffic Management (Derbyshire County Council) Permit Scheme Order 2015 created under the Traffic Management Act 2004.~~

These are consents for activities which may be a necessary part of the Scheme.

~~4.12 As the provisions listed above (other than section 32 of the Land Drainage Act 1991, byelaws made under section 66 of the Land Drainage Act 1991 and the Permit Schemes in place under the Traffic Management Act 2004) are prescribed under section 150 of the 2008 Act<sup>4</sup>, the consent of the relevant drainage authorities to the inclusion of these provisions has been agreed. The disapplication of these consents and the inclusion of relevant protective provisions have been included in the DCO.~~

~~4.12.13 Article 3(1) disapplies the provisions of the Neighbourhood Planning Act 2017 relating to the temporary possession of land. This is on the basis that the temporary possession of land is dealt with by articles 32 and 33 and the wording of those provisions is well established, as explained in detail below.~~

~~4.13 As the provisions listed above (other than section 32 of the Land Drainage Act 1991 and byelaws made under section 66 of the Land Drainage Act 1991) are prescribed under section 150 of the 2008 Act<sup>5</sup>, the consent of the relevant drainage authorities to the inclusion of these provisions in the Order will be needed and these consents will be sought. The disapplication of these consents and the relevant protective provisions will be discussed with the relevant regulators.~~

~~4.14 Whilst the Consents and Agreements Position Statement [TR010022/APP/3.3] envisages obtaining all relevant consents from the Environment Agency (EA) separately from the Order, except for a FRAP. To ensure that this is secured (in addition to a number of other protections sought by the Environment Agency), protective provisions for the EA have been included in the draft Order on a precautionary basis as discussions between Highways England and the EA progress.~~

4.15 The Consents and Agreements Position Statement sets out in greater detail Highways England's proposed approach to obtaining the other consents required for the Scheme.

#### *Article 4 – Maintenance of drainage works*

4.16 The purpose of article 4 is to make it clear that any realignment of drainage works 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 drainage works, unless otherwise agreed in writing between Highways England and the responsible party. Responsibility

<sup>4</sup> See regulation 5 of and Part 1 of Schedule 2 to the Infrastructure Planning (Interested Parties and Miscellaneous Prescribed Provisions) Regulations 2015.

<sup>5</sup> See regulation 5 of and Part 1 of Schedule 2 to the Infrastructure Planning (Interested Parties and Miscellaneous Prescribed Provisions) Regulations 2015.

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for maintenance of drainage works may sit with the Environment Agency, an internal drainage board, a lead local flood authority or a landowner.

- 4.17 This article was not included in the model provisions. However, it appears in existing development consent orders<sup>6</sup> and is considered to be a sensible inclusion to clarify who has responsibility for the maintenance of drainage works within the Order limits.

## **Part 2 - Principal Powers**

### *Article 5 - Development consent etc. granted by the Order*

- 4.18 Article 5 provides the principal power to construct and operate the authorised development within the Order limits. Schedule 1 describes the authorised development.
- 4.19 Development consent is subject to the provisions of the Order, including the requirements listed in Schedule 2. This is based on article 2 of the model provisions.
- 4.20 Article 5(2) was not included in the model provisions, but has been included in previous orders<sup>7</sup>. It provides that any enactment applying to land within or adjacent to the Order limits has effect subject to the provisions of the Order. Because the Order amends and disapplies various enactments that apply to and affect the authorised development, or would otherwise do so, this helps to clarify the interaction between the provisions of the Order and other legislation.
- 4.21 Article 5(2) is also necessary to ensure that there are no local acts or other legislation that might hinder the construction and operation of the authorised development. Although Highways England has carried out a proportionate search for local legislation and has not found any that it considers needs to be disapplied or modified by the Order, that is not conclusive and it is possible that such legislation exists. Highways England has therefore taken a precautionary approach in including article 5(2), which has been accepted in other orders. The inclusion of this provision ensures that the construction and operation of this nationally significant infrastructure project is not jeopardised by any incompatible statutory provisions which might exist.
- 4.22 In terms of the limits of the provision and how far “adjacent” extends from the Order limits, it is noted that article 22 (authority to survey and investigate the land) grants Highways England the power to enter not only onto land within the Order limits, but also onto other land “*which may be affected by the authorised development*”. The extent of ‘adjacent’ land would therefore need to be judged on a case by case basis and in practice would be to the extent necessary for the construction and operation of the authorised development.

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<sup>6</sup> See e.g. article 5 of The A19/A184 Testo's Junction Alteration Development Consent Order 2018 and article 4 of The M20 Junction 10a Development Consent Order 2017.

<sup>7</sup> See e.g. article 3(2) of The A19/A184 Testo's Order and article 5(2) of The M20 Junction 10a Order.

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*Article 6 – Maintenance of authorised development*

- 4.23 This article sets out the scope within which the undertaker may maintain the development. The definition of "maintain" is contained in article 2(1). Article 6 was included in the model provisions as article 3.
- 4.24 Powers of maintenance are subject to the other provisions of the Order and any agreements made under the Order.

*Article 7 – Planning permission*

- 4.25 This article permits certain development authorised by a planning permission granted under the Town and Country Planning Act that is within the Order limits to be carried out pursuant to the terms of the planning permission without breaching the Order. This is not a model provision, but ensures that the undertaker does not breach section 161 of the 2008 Act in carrying out certain development pursuant to a grant of planning permission, provided that development is not of itself an NSIP or part of one, or required to complete or enable the use or operation of any part of the authorised development.
- 4.26 This article has been included in recent Highways England orders<sup>8</sup>.

*Article 8 – Limits of deviation*

- 4.27 Article 8 confirms that in carrying out the authorised development the undertaker may:
- (a) [in respect of the A38 mainline carriageway and slip road works](#) deviate laterally from the lines or situations shown [on the Works Plans \[TR010022/APP/2.5\]](#) by a [maximum of one metre and for all other works deviate laterally from the lines or situations as shown](#) on the Works Plans [\[TR010022/APP/2.5\]](#) to a maximum of [0.5 metres](#); and
  - (b) deviate vertically from the levels of the authorised development shown on the Engineering Section Drawings [\[TR010022/APP/2.10\]](#):
    - (i) to a maximum of 0.5 metres upwards or downwards;
    - (ii) in the case of flood [compensation areas and flood](#) storage areas to a maximum of 0.5 metres downwards but without limit upwards to ground level, on the basis that a shallower excavation can be expected to have a lesser impact;

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<sup>8</sup> See for example article 7 of The M20 Junction 10a Order and article 5 of The M4 Motorway (Junctions 3 to 12) (Smart Motorway) Development Consent Order 2016.

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- (iii) in respect of work No. 7 (a link road connecting Kingsway Park Close to the new Kingsway East Roundabout) a maximum of 1 metre upwards or downwards; and
  - (iv) in respect of all gantries up to a maximum of 2 metres below the top of the relevant work.

4.28 These maximum limits of deviation do not apply where the undertaker is able to demonstrate to the Secretary of State's satisfaction, following consultation with the relevant planning authority and the local highway authority, that a deviation in excess of these limits would not give rise to any materially new or worse environmental effects compared to those reported in the Environmental Statement.

4.29 This wording was not included in the model provisions, but has become common wording in development consent orders<sup>9</sup>. The ability to deviate within the prescribed limits of deviation is important to ensure that, if the precise 'as built' alignments or elevations are slightly different to those indicatively shown on the application plans, no question arises as to whether or not the works are permitted by the Order. The detailed design of the scheme will take place following the grant of the Order (see Requirement 12) and the limits of deviation therefore ensure that the undertaker and its contractor have sufficient flexibility to design and construct the authorised development post consent, including making costs savings where possible.

4.30 The limits of deviation referred to in this article and shown on the application plans have been taken into account in the preparation of the Environmental Statement [TR010022/APP/6.1] and the potential impacts of a deviation within the permitted limits have been assessed. The undertaker is only permitted to exceed the limits specified in this article if they can demonstrate to the Secretary of State's satisfaction that no materially new or worse adverse environmental effects would arise.

*Article 9 - Benefit of Order*

4.31 Article 9 overrides section 156(1) of the 2008 Act (as permitted by section 156(2)) to give the benefit of the Order to the undertaker 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 apply.

4.32 The purpose of paragraph (2) is to clarify the exceptions where the Order will self-evidently benefit others, e.g. rights for statutory undertakers, and mitigation works outlined in the Schedule 1 description of the works. Without this provision there would be

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<sup>9</sup> Recent examples include The A19/A184 Testo's Order (art. 6); The M20 Junction 10a Order (art. 8); and The M4 Motorway (Junctions 3 to 12) Order (art. 6).

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a contradiction, since strictly speaking only Highways England could benefit from these works.

- 4.33 Paragraph (1) is based on article 4 of the model provisions, amended to clarify that it is subject to paragraph (2) and that it is Highways England that benefits from the provisions of the Order, rather than particular articles applying for the benefit of other specified parties as per the model provisions. Paragraph (2) was not included in the model provisions but has been included in a number of previous orders<sup>10</sup>.

*Article 10 - Consent to transfer benefit of Order*

- 4.34 This article allows the benefit of the Order to be transferred or leased to others by the undertaker. The exercise of any transferred benefits or rights is subject to the same restrictions, liabilities and obligations that would apply under the Order if those benefits or rights were exercised by the undertaker. The consent of the Secretary of State is required for a transfer or grant, except where it is made to a specified company in respect of a particular work.
- 4.35 This article is based on article 5 of the model provisions. It differs in that it allows a transfer or grant to a specified company to take place without the Secretary of State's consent, on the basis that it is appropriate for those companies to be able to carry out those works. The companies listed in paragraph (4) are those whose apparatus is required to be diverted.

**Part 3 – Streets**

*Article 11 – Street works*

- 4.36 Article 11 allows the undertaker to interfere with and execute works in or under the streets within the Order limits for the purposes of the authorised development. The authority given by this article is a statutory right for the purposes of sections 48(3) and 51(1) of the New Roads and Street Works Act 1991. Certain provisions of the 1991 Act apply to works carried out under this article, subject to the provisions of article 12 (application of the 1991 Act).
- 4.37 Article 11 is based on article 8 of the model provisions and article 11 of the M4 Smart Motorway Order 2016 Order. It departs from the model provisions in that it authorises interference with any street within the Order limits, rather than just those specified in a schedule. The application of sections 54 to 106 of the New Roads and Street Works Act 1991 is also expressed to be subject to article 12, which applies and modifies that Act. The definition of 'apparatus' that was included as paragraph (4) in the model provisions is omitted because that term is already defined in article 2.

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<sup>10</sup> Articles 7(2), 9(2) and 7(2) of the A19, M20 and M4 orders respectively.

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*Article 12 – Application of the 1991 Act*

- 4.38 Article 12 provides for the application of the New Roads and Street Works Act 1991. Although not included in the model provisions, there is precedent for these provisions in previous orders<sup>11</sup>.
- 4.39 Paragraphs (1) and (2) provide that certain works carried out under the authority of the Order are to be "major highway works" for the purposes of the 1991 Act. The effect of this is to clarify that the cost-sharing provisions relevant to the diversion of utility apparatus (which would apply to such works under the 1991 Act if carried out by the highway authority) will apply in respect of the works authorised by the Order, irrespective of who carries them out.
- 4.40 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 works by the Order and the specific provisions in the Order which regulate the carrying out of the Order works.
- 4.41 Paragraphs (4) to (6) apply certain provisions of the 1991 Act (listed in paragraph (5)) to streets which are to be temporarily stopped up, altered or diverted under the Order. This is for two reasons: first, it prevents any confusion as to whether works in respect of a temporarily affected 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.
- 4.42 Paragraph (7)(a) provides that nothing in article 13 affects the operation of section 87 of the 1991 Act, which allows a local highway authority to declare that a street in its area is likely to become a maintainable highway and consequently that Part 3 of the 1991 Act applies to that street.
- 4.43 Paragraph (7)(b) confirms that Highways England is not to be taken to be the street authority for a street for the purposes of Part 3 of the 1991 Act merely by being under a duty to maintain it under article 13. Highways England is the highway authority for the strategic road network and is under a duty to maintain it. Accordingly it is also the street authority for the strategic road network. Other bodies are responsible for other parts of the road network, and responsibility is allocated in article 13. However, article 13 also allows Highways England to agree a different maintenance position with the local highway authority in writing on a case by case basis, and this power may be used from time to time in respect of specific works, or parts thereof. This provision therefore ensures that,

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<sup>11</sup> See for example articles 9, 11 and 9 of the A19, M20 and M4 orders respectively.

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if Highways England and the local highway authority did enter into such an agreement, Highways England would not be taken to be the street authority for roads other than those forming part of the strategic road network for the purposes of the 1991 Act.

- 4.44 Paragraph (7)(c) clarifies that the provisions relating to responsibility for maintenance of streets in article 13 do not affect the application of Part 3 of the 1991 Act to maintenance works which are street works for the purposes of the 1991 Act. 'Street works' is defined in section 48(3) of the 1991 Act as including works for the maintenance of apparatus (but excluding works for road purposes) that are executed in pursuance of a statutory right or a street works licence.

*Article 13 - Construction and maintenance of new, altered or diverted streets and other structures*

- 4.45 The purpose and effect of article 13 is as follows:

- (a) Under the Highways Act 1980 and the Appointment of a Strategic Highways Company Order 2015 Highways England is the highway authority for, and therefore is responsible for maintaining trunk roads, including those to be provided as part of the Scheme. For any other highways and streets, this article determines the body that will be liable for maintenance. Liability for maintenance would transfer to the local highway authority or to the street authority as appropriate on completion of the works. Paragraphs (1) to (3) allow Highways England to make contrary agreements with the local highway authority concerned.
- (b) Paragraphs (1) to (3) are subject to paragraphs (4), which makes specific maintenance provisions in relation to bridges which cross trunk roads.
- (c) The effect of paragraphs (5) and (6) is 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 ensures that the provision in section 58 of the Highways Act 1980 applies to Highways England not only in respect of the trunk roads for which it is the highway authority but also other roads and is consistent with the approach taken in previous development consent orders<sup>12</sup>.

- 4.46 Article 13 was not included in the model provisions, but has been included in all Highways England orders made to date.

*Article 14 - Classification of roads, etc.*

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<sup>12</sup> See for example articles 10(4) and (5), 12(6) and (7) and 12(5) and (6) of the A19, M20 and M4 orders respectively.



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4.47 The designation of highways, the specification of the classes of traffic authorised to use a highway and speed limits are ancillary matters which may be included in a development consent order<sup>13</sup>. These and other related matters are addressed by this article. These matters are integral to the implementation of the Scheme and it is therefore appropriate to include them in the Order as ancillary matters.

4.48 Article 14(1) provides for the roads in Part 1 of Schedule 3 to be classified as trunk roads for the purpose of any enactment or instrument which refers to highways classified as trunk roads from a date to be determined by the undertaker.

4.49 Paragraph (2) provides for the roads described in Part 2 of Schedule 3 to be de-trunked.

4.494.50 Paragraph (3) provides for the roads described in Part 3 of Schedule 3 to become classified roads from a date to be determined by the undertaker.

4.504.51 Paragraph (~~43~~) provides for the roads described in Part ~~43~~ of Schedule 3 to become unclassified roads from a date to be determined by the undertaker.

4.52 Paragraph (~~54~~) imposes speed limits on certain sections of the Scheme as described in Part ~~56~~ of Schedule 3.

4.514.53 Paragraph (6) applies traffic regulation measures in respect of clearways and prohibitions on certain sections of the Scheme as described in Part 6 of Schedule 3.

4.524.54 Paragraph (~~76~~) confirms that the public rights of way described in Part ~~87~~ of Schedule 3 will be provided and open for use from the date on which the authorised development is open to traffic from a date to be determined by.

4.534.55 Paragraph (~~87~~) provides that the orders specified in Part ~~76~~ of Schedule 3 are to be varied or revoked as specified in that Part on such day as the undertaker may determine. Again, in practice the relevant date(s) will be agreed with or notified to the local highway authority.

4.544.56 The purpose of paragraph (~~98~~) is to confirm that the matters covered in paragraphs (1) to (~~87~~) could be varied or revoked in the future without the need to apply under the 2008 Act for an amendment to the Order, including where appropriate through the making of a Traffic Regulation Order or with the written consent of the Secretary of State. As paragraphs (1) to (3) deal with the classification of roads as either trunk roads, classified roads or unclassified roads, it is considered that paragraph (~~98~~) is most likely to be used in connection with paragraphs (4) to (~~87~~).

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<sup>13</sup> Planning Act 2008 section 120(5) and Schedule 5, paragraphs 19 and 20.

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[4.554.57](#) Article 14 was not included in the model provisions, but has been included in all Highways England orders made to date except the M4 Smart Motorway Order 2016.

*Article 15 - Temporary stopping up and restriction of use of streets and highways*

[4.564.58](#) This article allows for the temporary stopping up, alteration, diversion or restriction of streets or highways for the purposes of the Scheme, whilst ensuring that essential pedestrian access to and from premises along that street or highway is maintained if necessary (paragraph (3)).

[4.574.59](#) Paragraph (2) confers a power on Highways England where a street or highway has been temporarily stopped up under this article to use it as a temporary working site, a provision which has precedent in a number of development consent orders for example the A556 (Knutsford to Bowdon Improvement) Development Consent Order 2014 and the A14 Cambridge to Huntingdon Improvement Scheme Development Consent Order 2016.

[4.584.60](#) Under paragraph (4) the consent of the street authority is required for any stopping up, alteration, restriction or diversion where Highways England is not the street authority. The street authority may attach reasonable conditions to any consent, but must not unreasonably withhold or delay consent.

[4.594.61](#) Paragraph (5) provides a right to compensation for any person suffering loss due to the suspension of a private right of way under this article.

[4.604.62](#) Paragraph (6) states that 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. This time limit 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. As a nationally significant infrastructure project the Scheme should not be at risk of being held up due to a failure to respond to an application for consent. This provision has been included in previous Highways England orders<sup>14</sup>.

*Article 16 - Permanent stopping up and restriction of use of streets and private means of access*

[4.614.63](#) This article allows the streets and private means of access identified in Schedule 4 to be stopped up (i.e. the legal right of way along them to be extinguished).

[4.624.64](#) Paragraph (2) relates to the highways and private means of access to be stopped up as specified in Parts 2 and 4 of Schedule 4, for which a substitute is to be provided. It

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<sup>14</sup> See for example articles 12(6), 14(6) and 14(6) of the A19 and M20 orders and The A14 Cambridge to Huntingdon Improvement Scheme Development Consent Order 2016 respectively.

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requires the substitute to be completed and open for use, or a temporary alternative route to be available, before the highway or private means of access in question is stopped up.

[4.634.65](#) For the highways and private means of access to be stopped up as specified in Parts 1 and 3 of Schedule 4, no substitute is to be provided. Such a highway or private means of access may not be stopped up unless the condition referred to in paragraph (3) and set out in paragraph (4) is met.

[4.644.66](#) Paragraph (6) provides a right to compensation for any person suffering loss due to the suspension or extinguishment of a private right of way under this article.

[4.654.67](#) 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 dealt with by article 16 and Schedule 4 as well and there is no need for a separate provision.

[4.664.68](#) This article was included in the model provisions as article 9.

#### *Article 17 - Access to works*

[4.674.69](#) This article allows accesses to be created within the Order limits. It is anticipated that this article will be relied on by Highways England to provide temporary accesses as required during the construction period, with all permanent means of access (including private means of access) forming part of the authorised development. This article departs from the model provisions (article 12) to provide Highways England with a general power to provide means of access, the intention being to provide similar powers to those available under the Highways Act 1980<sup>15</sup>.

[4.684.70](#) The provisions of this article confer slightly broader powers than those contained in the Act, which allows a highway authority to provide “*a new means of access to any premises*” where it considers it “*necessary or expedient in connection with the construction, improvement or alteration of a highway*” to do so. The inclusion of this article is considered to be appropriate as it will help to ensure that the authorised development can be carried out expeditiously by allowing Highways England to create new temporary accesses as and where required, particularly in response to requests from landowners, occupiers and other affected parties.

#### *Article 18 - Clearways*

[4.694.71](#) This article is necessary to ensure safe and proper operation of the authorised development, and to ensure that the Scheme delivers its intended benefits. It is therefore

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<sup>15</sup> See section 129 (further provisions with respect to new means of access).

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appropriate to include it in the Order as an ancillary matter under section 120(3) of the 2008 Act.

[4.704.72](#) Paragraph (1) prohibits waiting on any part of a road specified as a clearway in Part 7 of Schedule 3 except on the direction of, or with the permission of, a uniformed constable or traffic officer.

[4.714.73](#) Paragraphs (2) and (3) set out a list of circumstances in which it would be lawful for a vehicle to wait on any part of a road specified in Part 7 of Schedule 3.

[4.724.74](#) Paragraph (4) confirms that the clearway provisions can be varied or revoked in the future without the need to apply under the 2008 Act for an amendment to the Order.

[4.734.75](#) This article was not included in the model provisions but has been included in all Highways England orders made to date except the M4 Smart Motorway Order 2016.

*Article 19 - Traffic regulation*

[4.744.76](#) 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.

[4.754.77](#) Article 19 would, at any time up to 12 months after 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 or having effect 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.

[4.764.78](#) Under paragraph (3) any restriction etc. made before the end of the 12 month period may continue to have effect after that period has expired.

[4.774.79](#) Implementation of any of the measures is subject to the consent of the traffic authority in whose area the roads are situated. Requirement is made in paragraphs (4)

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and (5) for the chief officer of police and the relevant traffic authority to be consulted and notified in advance. The notification period varies depending on what is being proposed.

[4.784.80](#) Any restrictions etc. may be suspended, varied or revoked by the undertaker within a period of 24 months from the opening of the authorised development (paragraph (7)).

[4.794.81](#) This article was not included in the model provisions but has been included in all previous Highways England orders<sup>16</sup>.

#### **Part 4 – Supplemental powers**

##### *Article 20 - Discharge of water*

[4.804.82](#) This article sets out the circumstances in which Highways England is entitled to discharge water into a watercourse, public sewer or drain, and its purpose is to establish statutory authority for doing so.

[4.814.83](#) The effect of paragraph (3) is that this can only be done with the consent of the owner of the relevant watercourse, public sewer or drain. Consent can be given subject to reasonable terms and conditions, but cannot be unreasonably withheld.

[4.824.84](#) Paragraph (5) requires the undertaker to take reasonably practicable steps to ensure that any water that is discharged is as free as may be practicable from gravel, soil or other solid substance, oil or matter in suspension.

[4.834.85](#) Paragraph (7) states that a person who fails to notify Highways England of their decision in respect of an application for consent/approval within 28 days of the application being made is deemed to have granted consent/approval. This time limit 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. As a nationally significant infrastructure project the scheme should not be at risk of being delayed due to a failure to respond to an application for consent/approval. This provision has been included in previous Highways England orders<sup>17</sup>.

##### *Article 21 - Protective works to buildings*

[4.844.86](#) The purpose of this article is to allow Highways England to undertake protective works to buildings affected by the authorised development. It was included in the model provisions as article 15.

##### *Article 22 - Authority to survey and investigate the land*

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<sup>16</sup> See for example article 16 of the A19 order, article 47 of the M20 order and article 43 of the M4 order.

<sup>17</sup> See for example article 17(9) of the A19 order, article 18(7) of the M20 order and article 17(8) of the A14 order.

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[4.854.87](#) This article gives Highways England the power to enter land within the Order limits and which may be affected by the authorised development for the purpose of surveying and investigating. It provides that Highways England must give 14 days' notice before exercising the powers of entry. Compensation is payable for any loss or damage caused. Paragraphs (1) to (5) were included in the model provisions as article 16. Paragraph (6), which provides for deemed consent in cases where there is no response to an application for consent under this article, was not included in the model provisions but has been included in previous orders<sup>18</sup>.

## **Part 5 - Powers of Acquisition**

### *Article 23 - Compulsory acquisition of land*

[4.864.88](#) This article authorises the acquisition of land by compulsory purchase. It grants the power to acquire the land that is required for the Scheme. This is subject to articles 26 (compulsory acquisition of rights) and 33 (temporary use of land for carrying out the authorised development), which are explained below.

[4.874.89](#) Article 23 is based on article 18 of the model provisions, with the following differences:

- (a) Paragraph (2) is omitted as the vesting of land is governed by the Compulsory Purchase (Vesting Declarations) Act 1981, which applies as though the Order were a compulsory purchase order by virtue of article 30 (application of the 1981 Act). Article 28 (private rights over land) also provides for all private rights over land subject to compulsory acquisition to be extinguished.
- (b) Paragraph (3) relating to compensation for loss arising due to the extinguishment or suspension of a private right of way is omitted because that is dealt with separately in articles 15(5), 16(6) and 28(5).
- (c) Paragraph (2) refers to article 26 (compulsory acquisition of rights) rather than model article 25, which related to the acquisition of land limited to subsoil lying more than 9 metres beneath the surface and is not included in the Order.

### *Article 24 - Compulsory acquisition of land – incorporation of the mineral code*

[4.884.90](#) This article incorporates Parts 2 and 3 of Schedule 2 to the Acquisition of Land Act 1981, exempting existing rights in minerals from the scope of compulsory acquisition unless they are expressly named and conveyed. It also makes provision for a situation where the owner of mines or minerals wishes to work such mines or minerals.

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<sup>18</sup> See for example article 19(6) of the A19 order, article 20(6) of the M20 order and article 19(6) of the M4 order.

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[4.894.91](#) Article 24 was included in the model provisions as article 19.

*Article 25 - Time limit for exercise of authority to acquire land compulsorily*

[4.904.92](#) This article gives Highways England five years to issue notices to treat or to execute a general vesting declaration to acquire the land that may be compulsorily acquired under the Order. These are the two main procedural methods by which the process of compulsorily acquiring land may be undertaken should the Order be made.

[4.914.93](#) The article also sets a five year time limit on the power to take temporary possession of land under article 33, although it does not prevent Highways England from remaining in possession of land after that time if it took possession within the five year limit.

[4.924.94](#) This article was included in the model provisions as article 20.

*Article 26 - Compulsory acquisition of rights*

[4.934.95](#) This article allows for rights over land to be acquired as well as the land itself, and also for new rights to be created over land. This includes the power to impose restrictive covenants.

[4.944.96](#) It provides for such rights as may be required to be acquired by Highways England over land which it is authorised to acquire under article 23 (Compulsory acquisition of land). The public benefit of this is that it would allow Highways England, if appropriate, to reduce the area of outright acquisition if possible and rely on the creation and acquisition of rights instead. A provision of this kind is usual in Transport and Works Act Order and Hybrid Bills, and has been followed in a number of development consent orders, for example the Network Rail (North Doncaster Chord) Order 2012, the Lancashire County Council (Torrisholme to the M6 Link (A683 Completion of Heysham to M6 Link Road)) Order 2013 and the A556 (Knutsford to Bowdon Improvement) Development Consent Order 2014.

[4.954.97](#) 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, and the imposition of such restrictive covenants, as may be required for the purposes set out in that Schedule.

[4.964.98](#) The power to impose restrictive covenants will allow for the possibility of reducing the area of outright acquisition and thus enable a more proportionate exercise of compulsory powers. It is therefore in the public interest and has precedent in Transport and Works Act Orders and the Silvertown Tunnel Order 2018.

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[4.974.99](#) Paragraph (3) provides that the power to impose restrictive covenants under paragraph (1) is exercisable only in respect of the plots specified in column (1) of Schedule 5.

[4.984.100](#) Paragraph (4) provides that where Highways England only needs to acquire rights over land it is not obliged to acquire any greater interest in that land.

[4.994.101](#) Paragraph (5) applies Schedule 6, which imposes 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 code applies to the additional categories of acquisition covered by the Order and 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).

[4.1004.102](#) For the purpose of section 126(2) of the 2008 Act, the relevant compensation provisions are modified only to the extent necessary to ensure that they apply properly to the acquisition/creation of rights and the imposition of restrictive covenants, and not to affect the amount of compensation to which landowners would be entitled.

[4.1014.103](#) Article 26 is based on article 21 of the model provisions and previous Highways England orders<sup>19</sup>. It differs from the model provisions in the following respects:

- (a) Paragraph (1) allows Highways England to acquire existing rights and create new rights over any of the Order land, rather than just the rights described in the Book of Reference. Although Highways England has sought to identify all of the plots which are to be subject to the acquisition or creation of rights and has set these out in the Book of Reference, Land Plans and Schedule 5 to the Order, this provision ensures that Highways England retains the flexibility to acquire or create rights over land where that land might otherwise have to be acquired outright.
- (b) Paragraph (2) of the model article is omitted, for the same reasons set out in paragraph [4.89\(a\)](#)~~4.87(a)~~ above.
- (c) Paragraph (2) is included to clarify that the land identified in Schedule 5 may only be subject to the acquisition or creation of rights or imposition of restrictive covenants, and may not be subject to outright acquisition.
- (d) Paragraph (3) provides that restrictive covenants may only be imposed under this article in relation to the land specified in Schedule 5.

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<sup>19</sup> See for example article 23 of the A19 order, article 24 of the M20 order and article 22 of the M4 order.



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- (e) Paragraph (4) refers to Schedule 2A to the Compulsory Purchase Act 1965, as modified by Schedule 6, rather than section 8 of the Compulsory Purchase Act 1965. The effect is to limit the possible exceptions to this article to cases where part only of a house, building, factory, park or garden belonging to a house is being acquired.
- (f) Paragraph (5) does not refer to compensation for the extinguishment or suspension of any private right of way under this article, since that is dealt with by article 28. Instead it confirms that Schedule 6 of the Compulsory Purchase Act 1965 has effect for the purpose of modifying compensation provisions to ensure that they apply to the compulsory acquisition or creation of rights, or imposition of restrictive covenants, under this article.

*Article 27 – Public rights of way*

[4.1024.104](#) Article 27(1) provides for the public rights of way specified in Parts 1 and 2 of Schedule 4 and shown on the Rights of Way and Access Plans to be extinguished. The rights of way are extinguished following the expiry of a site notice which must be erected at each end of the way to be extinguished no less than 28 days prior to the extinguishment.

[4.1034.105](#) The creation of substitute and new public rights of way is dealt with in article 14(9) (classification of roads, etc.). Justification for the stopping up of public rights of way where no substitute is being provided is included in the Statement of Reasons [TR010022/APP4.1].

[4.1044.106](#) Article 27 is based on article 10 of the model provisions and previous Highways England orders<sup>20</sup>. It differs from the model provisions in that it refers to the rights of way set out in Schedule 4, rather than rights of way specified in the article itself. It also provides a different trigger for the extinguishment of existing rights of way, rather than the various options specified in paragraph (1) of the model provision (which included the date of publication of the order). Paragraph (2) of the model provision, which dealt with the creation of alternative sections of rights of way, is omitted on the basis that article 14(9) deals with the creation and opening for use of any new or replacement public rights of way. Instead, paragraph (2) requires the undertaker to erect a site notice at each end of the right(s) of way to be extinguished at least 28 days in advance. The definitions in paragraph (3) of the model provision are omitted as they are not used in this article.

*Article 28 - Private rights over land*

[4.1054.107](#) This article provides for the extinguishment of private rights over land that is subject to compulsory acquisition under the Order. In so far as Highways England

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<sup>20</sup> See for example article 25 of the M20 order and article 24 of the A14 order.

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acquires land or creates new rights over land under the Order, where the continuance of private rights over that land would be inconsistent with the exercise of the right being acquired or created then the private rights in question will be extinguished.

[4.1064.108](#) Paragraph (3) provides that rights over Order land that is already owned by Highways England are extinguished on commencement of any activity authorised by the Order which interferes with or breaches those rights.

[4.1074.109](#) Paragraph (4) provides that all private rights over land which the undertaker takes temporary possession of under the Order will be suspended and unenforceable for as long as the undertaker remains in lawful possession of the land.

[4.1084.110](#) Paragraphs (5) to (8) make provision for compensation and for circumstances where rights are preserved.

[4.1094.111](#) Paragraph (9) sets out a list of matters deemed to be private rights.

[4.1104.112](#) Article 28 is based on article 22 of the model provisions and previous Highways England orders<sup>21</sup>. It differs from the model provisions in the following respects:

- (a) It applies to all private rights, not just private rights of way. This is to reflect the broad nature of private rights that may exist over the Order land.
- (b) Paragraph (2) is included to confirm that where land is subject to the acquisition or creation of rights or the imposition of restrictive covenants, any other rights in that land are extinguished if their continuance would be incompatible with the right or covenant being acquired or created by the undertaker.
- (c) Paragraph (3) (paragraph (2) of the model provisions) is amended to refer to the land within the Order limits, rather than "the limits of land which may be acquired shown on the land plan", and to clarify the circumstances in which other rights in land owned by Highways England will be extinguished.
- (d) Paragraph (4) is included to clarify the position where Highways England takes temporary possession of land.
- (e) Paragraph (5) (paragraph (4) of the model provisions) is modified to include a reference to section 152 of the Planning Act 2008.
- (f) Sub-paragraph (6)(a)(i) is amended to also refer to the acquisition of rights or imposition of restrictive covenants.

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<sup>21</sup> See for example article 24 of the A19 order, article 26 of the M20 order and article 25 of the A14 order.

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- (g) Paragraph (9) sets out what are considered to be 'private rights over land'. This is necessary to clarify the nature of the private rights to which this article applies.

*Article 29 – Modification of Part 1 of the 1965 Act*

[4.1114.113](#) The purpose of this article is to ensure consistency between the terms of the Order and the Compulsory Purchase Act 1965, as applied by section 125 of the 2008 Act. It has been included in the most recent Highways England orders<sup>22</sup>.

*Article 30 – Application of the 1981 Act*

[4.1124.114](#) This article applies (with minor modifications to ensure consistency between the terms of the Order and the Act) the provisions of the Compulsory Purchase (Vesting Declarations) Act 1981 to compulsory acquisition under the Order so that Highways England has the option to acquire land via the vesting declarations procedure.

[4.1134.115](#) The modifications to the 1981 Act contained in this article can be summarised as follows:

- (a) Paragraph (3) modifies section 1(2) so that section 1 applies to Highways England.
- (b) Paragraph (4) modifies section 5 to remove the reference to situations where the compulsory purchase order is subject to special parliamentary procedure.
- (c) Paragraph (5) omits section 5A, on the basis that the Order prescribes the time limit for compulsory acquisition in article 25.
- (d) Paragraph (6) modifies the statutory reference in section 5B(1), on the basis that the 2008 Act contains equivalent provisions that apply in respect of development consent orders. The cross-reference to section 5A is also modified, to reflect that the time limit is set out in article 25.
- (e) Paragraph (7) modifies the statutory references in section 6(1)(b), on the basis that the 2008 Act contains equivalent provisions that apply in respect of development consent orders.
- (f) Paragraph (8) [modifies section 7\(1\)\(a\) in respect of constructive notice to treat under the Acquisition of Land Act 1981.](#)
- ~~(f)~~(g) Paragraph (9) modifies paragraph 1(2) of Schedule A1 to change the reference to compulsory purchase orders excluding land that is 9 metres or more below the

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<sup>22</sup> See article 25 of the A19 order and article 27 of the M20 order.

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surface from the counter-notice procedure to article 31(3), which has the same effect in relation to the acquisition of subsoil or airspace only.

~~(g)~~(h) Paragraph (910) clarifies that references to the Compulsory Purchase Act 1965 in the 1981 Act are to be construed as references to the 1965 Act as applied by section 125 of the 2008 Act and as modified by article 29, on the basis that both section 125 and article 29 modify the provisions of the 1965 Act.

[4.1144.116](#) Vesting declarations are one of two ways of acquiring land that is subject to compulsory purchase (the other being by means of a notice to treat). They allow several parcels to be acquired at once and therefore more efficiently than under the notice to treat procedure.

[4.1154.117](#) Article 30 is based on article 23 of the model provisions and previous Highways England orders<sup>23</sup>. Due to extensive changes to the relevant provisions of the 1981 Act since the model provisions came into force, the wording of this article departs significantly from the model provisions and Highways England has instead sought to follow the precedent established by recent orders.

*Article 31 - Acquisition of subsoil or airspace only*

[4.1164.118](#) This article allows Highways England to acquire, or acquire or create rights in, the subsoil or airspace below or above land, rather than having to acquire the land itself.

[4.1174.119](#) The purpose of article 31 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 landowners and lower payments of compensation, both of which are in the public interest.

[4.1184.120](#) This article is based on article 24 of the model provisions, which related to subsoil only, and previous Highways England orders<sup>24</sup>.

*Article 32 - Rights under or over streets*

[4.1194.121](#) 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 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.

[4.1204.122](#) This article was included in the model provisions as article 27.

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<sup>23</sup> See for example article 26 of the A19 order, article 28 of the M20 order and article 24 of the M4 order.

<sup>24</sup> See for example article 27 of the A19 order, article 29 of the M20 order and article 25 of the M4 order.

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*Article 33 - Temporary use of land for carrying out the authorised development*

[4.1214.123](#) 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 which is not required permanently. Article 33 also allows for the temporary occupation of any of the land intended for permanent acquisition that has not yet been acquired.

[4.1224.124](#) The article is based on article 28 of the model provisions, with a number of changes:

- (a) First, the ability to occupy land temporarily that is subject to powers of permanent acquisition but that has not yet been acquired (paragraph (1)(a)(ii)) has been added. This allows Highways England to occupy land without having to acquire it immediately. There is a consequential amendment to paragraph (3) to cater for the two types of land.
- (b) Secondly, paragraph (1)(d) has been added so that permanent works specified in column (3) of Schedule 7, and any other permanent mitigation works in connection with the authorised development, may be left on land that has been temporarily occupied, without the need to acquire the land for this purpose. The rationale for this is that it reduces the amount of land that is required to be subject to outright acquisition. The intended scope of 'mitigation works' is any permanent works necessary and appropriate to mitigate the impacts of the Scheme (e.g. landscaping or ecological mitigation works).
- (c) There has been a minor amendment to paragraph (2) to require the notice of intended entry to specify the purpose for which entry is to be taken where land is being entered under paragraph (1)(a)(ii).
- (d) There are amendments to the requirements for restoring the land before returning it to reflect the changes in respect of permanent works, which have been added as paragraph (4)(b). Paragraph (4)(c) is also added in respect of protective works for statutory undertaker apparatus.
- (e) There is a minor amendment to paragraph (6) where 'any power conferred by' has been omitted, since the provisions are of the article, not of the powers.
- (f) Finally, paragraph (11) has been added to ensure clarity about the extent of the land Highways England may take temporary possession of.

[4.1234.125](#) The amended article reflects the wording of recent Highways England orders<sup>25</sup>.

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<sup>25</sup> See for example article 29 of the A19 order, article 31 of the M20 order and article 28 of the M4 order.

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[4.1244.126](#) The inclusion of this article is important to ensure that the authorised development can be carried out efficiently and expeditiously following the making of the Order. Highways England is entitled to either occupy and use land pending its permanent acquisition, or to temporarily occupy and use land that is not to be permanently acquired, with provision made for the restoration of the land and the payment of compensation to the affected landowners and occupiers for any loss or damage arising. These powers are considered to be reasonable given the status of the authorised development as a nationally significant infrastructure project.

[4.1254.127](#) If the powers conferred by this article were not included then Highways England would be forced to seek permanent rights over, or the permanent acquisition of, all of the land required for the authorised development, which would be disproportionate for those plots which have been identified as being suitable for temporary occupation and use.

*Article 34 - Temporary use of land for maintaining the authorised development*

[4.1264.128](#) This article provides that Highways England may take temporary possession of land within the Order limits, as required for the purpose of maintaining the authorised development, at any time within a period of five years from the date on which that part of the authorised development is first opened for use.

[4.1274.129](#) Paragraph (1)(c) authorises the construction of such temporary works and buildings on the land as may be reasonably necessary for that purpose. Under paragraph (5) all temporary works must be removed before Highways England gives up possession under this article and the land must be restored to the reasonable satisfaction of the owners.

[4.1284.130](#) This power does not apply in relation to houses, gardens or any other buildings for the time being occupied (paragraph (2)).

[4.1294.131](#) Paragraph (3) requires at least 28 days' notice of intended entry to be served on the owners and occupiers of the land in question.

[4.1304.132](#) Paragraphs (6) to (8) provide for compensation to be paid to owners and occupiers of land of which temporary possession is taken under this article.

[4.1314.133](#) This article was included in the model provisions as article 29.

*Article 35 - Statutory undertakers*

[4.1324.134](#) This article allows Highways England to extinguish rights of statutory undertakers and 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 impractical to show and

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describe all such apparatus and so a general power for the extinguishment of rights and the removal or relocation of apparatus belonging to statutory undertakers over or within any of the Order land is required.

[4.1334.135](#) As the land over which this power may be exercised is shown on the Land Plans, and the beneficiaries of such rights are described in the Book of Reference, the requirements of Regulations 5(2)(i)(iii) and 7(1)(c) of the Infrastructure Planning (Applications: Prescribed Forms and Procedure) Regulations 2009 are satisfied.

[4.1344.136](#) Paragraph (2) restricts ~~the~~ Highways England's power to extinguish rights or remove or reposition apparatus by excluding apparatus in streets. If the streets in question are to be stopped up as part of the authorised development then the provisions of article 36 will apply.

[4.1354.137](#) This article is based on article 31 of the model provisions and previous Highways England orders<sup>26</sup>. It differs from the model provisions in the following respects:

- (a) The article is expressed to be subject to article 26(3), the protective provisions and paragraph (2).
- (b) Sub-paragraph (1)(a) refers to the acquisition of rights and the imposition of restrictive covenants. It also refers to the Order land rather than "within the limits of the land to be acquired and described in the book of reference".
- (c) Sub-paragraph (c) is omitted as rights are referred to in sub-paragraph (a).
- (d) Paragraph (2) is included to clarify that this article does not apply where statutory undertakers have apparatus in a street which is to be stopped up under the Order. In those circumstances the provisions of article 36 will apply.

*Article 36 - Apparatus and rights of statutory undertakers in stopped up streets*

[4.1364.138](#) This article governs what happens to statutory undertakers' apparatus (pipes, cables etc.) under streets that are stopped up by the Order. Without the article, the statutory undertaker would not have access to the apparatus, since there would no longer be a right of way along the street.

[4.1374.139](#) Under paragraph (2) Highways England may require a statutory undertaker to remove and relocate the apparatus (or apparatus provided in substitution) elsewhere. Paragraph (3) requires Highways England to compensate the statutory undertaker for the reasonable costs it incurs in doing so.

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<sup>26</sup> See for example article 31 of the A19 order, article 33 of the M20 order and article 30 of the M4 order.

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[4.1384.140](#) Paragraph (4) provides for a reduction to the amount payable to the statutory undertaker in certain circumstances, including where replacement apparatus is provided that is of a better type, of greater capacity or of greater dimensions and those improvements or increases are not necessary. Paragraph (5) clarifies that the placing of apparatus of a greater length does not count for the purposes of paragraph (4), since it is likely that for most diversions apparatus of greater length will need to be installed. Similarly, joints in apparatus may be necessary and if so that will not lead to a reduction of the amount payable.

[4.1394.141](#) Paragraph (6) discounts from the amount payable to the statutory undertaker any financial benefit to the statutory undertaker that arises as a result of having new rather than old (i.e. older than 7.5 years) apparatus due to the deferment of the timetable for renewal of the apparatus.

[4.1404.142](#) Paragraph (7) provides that for those parts of the Scheme that involve major highway works, major bridge works or major transport works (which are defined in Part 3 of the New Roads and Street Works Act 1991 and do not include the construction of a new highway), the compensation provisions of that Act will apply instead.

[4.1414.143](#) Article 36 was included in the model provisions as article 32.

*Article 37 - Recovery of costs of new connections*

[4.1424.144](#) This article provides that if any statutory undertaker's apparatus is removed and this halts a supply from that apparatus to owners or occupiers of premises such that they have to seek a connection to other apparatus, then their reasonable costs in obtaining a new supply can be claimed from Highways England.

[4.1434.145](#) This article was included in the model provisions as article 33.

*Article 38 – Special category land*

[4.1444.146](#) 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 (e.g. open space). As part of the Scheme public open space will be compulsorily acquired.

[4.1454.147](#) The exception to being subject to special parliamentary procedures is where the Secretary of State is satisfied that certain tests under section 131(3) are met, including where 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 (subsection (4)). Highways England submits that this is the case, for the reasons set out in the Planning Statement and the Statement of Reasons.



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[4.1464.148](#) Article 38 deals with the replacement of open space that is required for the authorised development. The article makes provision for the special category land and the rights to be acquired in the special category (rights) land. This is 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 the replacement land as open space, and a timetable for the implementation of that scheme, have been received from the undertaker to the Secretary of State's satisfaction.

[4.1474.149](#) Paragraph (4) provides that 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.

[4.1484.150](#) This article is based on article 30 of the model provisions and article 36 of the M20 Junction 10a Development Consent Order 2017. It differs from the model provisions in that it does not require the approved scheme for the provision of replacement land to be implemented before the special category land can vest in Highways England. Highways England is however still required to acquire the replacement land before the special category land can vest. Although it is likely that the replacement land will be provided prior to, or at the same time as, the vesting of the special category land, there may be circumstances in which it is not possible for Highways England to provide the replacement land in advance of the special category land vesting and this provision grants Highways England that flexibility, subject to the Secretary of State certifying that they are content with the timetable for the provision of the replacement land.

## **Part 6 - Operations**

### *Article 39 - Felling or lopping of trees and removal of hedgerows*

[4.1494.151](#) 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 Scheme or endanger anyone using it. Compensation is payable for any loss or damage caused.

[4.1504.152](#) Further, this article also authorises the removal of any hedgerow [that is required to be removed as part of the authorised development](#) as defined in the Hedgerow Regulations 1997 [and as shown on the hedgerows plans](#).

[4.1514.153](#) This article is based on article 39 of the model provisions and recent Highways England orders<sup>27</sup>. It differs from the model provisions in the following respects:

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<sup>27</sup> See for example article 34 of the A19 order, article 38 of the M20 order and article 35 of the M4 order.

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- (a) Paragraph (1) refers to any vegetation on or overhanging land within the Order limits, rather than any tree or shrub “near any part of the authorised project”.
  - (b) Sub-paragraph (2)(c) requires Highways England to take steps to avoid a breach of the Wildlife and Countryside Act 1981 and the Conservation of Habitats and Species Regulations 2017.
  - (c) Paragraphs (4) and (5) are added to extend the powers of the undertaker to also apply to hedgerows, since these may also need to be removed in order for the authorised development to be carried out.

*Article 40 – Trees subject to tree preservation orders*

[4.1524.154](#) This article allows Highways England to fell, lop or carry out other works to any tree subject to a tree preservation order described in Schedule 8 if Highways England believes it is reasonably necessary to do so. Where possible, Highways England is to seek to replace any trees which are removed under this article. Highways England is also required to consult with the relevant planning authority prior to the relevant work taking place.

[4.1534.155](#) This article was included in the model provisions as article 40.

**Part 7 - Miscellaneous and General**

*Article 41 - Application of landlord and tenant law*

[4.1544.156](#) 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.

[4.1554.157](#) This article was included in the model provisions as article 35.

*Article 42 - Operational land for purposes of the 1990 Act*

[4.1564.158](#) This effect of this article is that the land within the Order limits is to be treated as the operational land of a statutory undertaker for the purposes of the Town and Country Planning Act 1990 and the Town and Country Planning (General Permitted Development) (England) Order 2015/596. Although section 264 is entitled “cases in which land is to be treated as not being operational land”, subsections (3) and (4) set out cases in which land is to be treated as operational land.

[4.1574.159](#) This article was included in the model provisions as article 36.

*Article 43 - Defence to proceedings in respect of statutory nuisance*

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[4.1584.160](#) Section 158 of the 2008 Act confers statutory authority for the purposes of a defence in civil or criminal proceedings for nuisance. This article provides a defence to proceedings brought in a magistrates' court under section 82(1) of the Environmental Protection Act 1990 in relation to a variety of nuisances set out in paragraph 79(1) of that Act.

[4.1594.161](#) This provision is often misunderstood. A broad defence to civil and criminal proceedings for nuisance is provided by section 158 of the 2008 Act. However, the view taken under the NSIP regime is that section 158 does not extend to the relatively rare situation by which if somebody considers that the local authority ought to be tackling a nuisance using its statutory nuisance powers, but it is not, that person may apply to the magistrates' court under section 82 of the Environmental Protection Act 1990. Accordingly, this article is seeking to fill a legislative lacuna by extending the effect of section 158.

[4.1604.162](#) Because section 158 does not distinguish between different types of nuisance, the logical position is that this article should also apply to all categories of nuisance. However, as a matter of practice other schemes have been more discriminating and have asked whether there is any possibility of a statutory nuisance occurring, leading to specific types of nuisance being referred to. Highways England has followed this approach by seeking to restrict the application of this article so that it only applies to nuisances that have been identified as potentially resulting from the authorised development, as set out in the Nuisances Statement accompanying the application. This ensures that this article is focused only on those nuisances that may be of relevance, whilst also reflecting the logic of section 158.

[4.1614.163](#) The defence is available if the nuisance relates to:

- (a) the use of premises by the undertaker for the purposes of or in connection with the construction or maintenance of the authorised development and is attributable to the carrying out of the authorised development in accordance with a notice served, or consent given, under the Control of Pollution Act 1974; or
- (b) the construction, maintenance or use of the Scheme and cannot reasonably be avoided.

[4.1624.164](#) This article is based on article 7 of the model provisions and recent Highways England orders<sup>28</sup>. It differs from the model provisions in that it does not just apply to nuisances arising under paragraph (g) of section 79(1) of the Environmental Protection Act. The references to section 65 of the Control of Pollution Act 1974 are omitted because

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<sup>28</sup> See for example article 38 of the A19 order, article 42 of the M20 order and article 38 of the M4 order.

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that section has been repealed. Sub-paragraph (b)(i) of the model provisions is omitted as it is not relevant and sub-paragraph (b)(ii) is included as sub-paragraph (1)(a)(iii).

*Article 44 – Protective provisions*

~~4.1634.165~~ This article gives effect to Schedule 9, which contains provisions protecting the interests of third parties. It was not included in the model provisions but is a standard article in development consent orders that include protective provisions.

~~4.164~~ ~~A copy of the protective provisions has been provided to relevant parties in advance of the submission of the application.~~

*Article 45 – Crown Rights*

~~4.1654.166~~ This article prevents the undertaker from acquiring any Crown land, or from otherwise interfering with it, without the written consent of the relevant Crown authority. Under paragraph (1)(b) the undertaker also requires the written consent of the relevant Crown authority to compulsorily acquire an interest belonging to any other person in any Crown land. The Crown's consent may be given unconditionally or subject to terms and conditions.

~~4.1664.167~~ This article reflects the provisions of section 135 of the 2008 Act. It was not included in the model provisions but was included in the A19/A1058 Coast Road (Junction Improvement) Order as article 37.

*Article 46 – Certification of plans etc.*

~~4.1674.168~~ This article provides for various application plans and documents listed in Schedule 10 (documents to be certified) to be certified by the Secretary of State as true copies of those documents following the making of the Order. This is based on article 41 of the model provisions, the difference being that the documents are listed in Schedule 10 rather than the article itself.

*Article 47 - Service of notices*

~~4.1684.169~~ This article governs the service of notices required to be given under the Order. In particular it allows service by email with the consent of the recipient (paragraph (1)(c)), and deals with the situation of service on an unknown landowner (paragraph (4)).

~~4.1694.170~~ This article was not included in the model provisions but is a sensible addition that has been included in previous orders<sup>29</sup>.

*Article 48 - Arbitration*

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<sup>29</sup> See for example article 41 of the A19 order, article 45 of the M20 order and article 41 of the M4 order.

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[4.1704.171](#) This article governs what happens when two parties disagree about any provision of the Order. Unless the Upper Tribunal (Lands Chamber) has jurisdiction the matter is to be settled by arbitration. If the parties cannot agree on who the arbitrator should be then this will be decided by the President of the Institution of Civil Engineers.

[4.1744.172](#) This article was included in the model provisions as article 42.

*Article 49 – Removal of human remains*

[4.1724.173](#) This article prescribes a process for the removal and re-interment or cremation of any human remains present within the Order limits. Under paragraph (3) the undertaker is required to publish public notices of the intended removal of the remains. There is then a period of 56 days for any personal representative or relative of the deceased person to give notice to the undertaker that they intend themselves to carry out the removal, which if accepted by the undertaker will be carried out at the undertaker's cost. Paragraph (14) confirms that section 25 of the Burial Act 1857 (which makes it an offence to remove human remains unless the conditions in that section are complied with) does not apply to a removal carried out in accordance with this article.

[4.1734.174](#) Article 41 was included in the model provisions as article 17.

*Article 50 - Appeals relating to the Control of Pollution Act 1974*

[4.1744.175](#) This article establishes an appeal process in circumstances where a local authority issues a notice under section 60, or does not grant consent or grants conditional consent under section 61, of the Control of Pollution Act 1974. Its aim is to prescribe a streamlined appeal process, thereby providing certainty and minimising the potential for unnecessary delay to the scheme.

[4.1754.176](#) Both sections 60 and 61 include provisions which allow the recipient of a notice, or Highways England for consent (as the case may be), to appeal to a magistrates' court within 21 days. Section 70 states that any appeal shall be by way of complaint for an order and that the Magistrates' Court Act 1980 applies to the proceedings. Further provisions as to appeals under these sections are included in Regulation 5 (in respect of appeals under section 60) and Regulation 6 (in respect of appeals under section 61) of the Control of Noise (Appeals) Regulations 1975.

[4.1764.177](#) Part 2 of the Magistrates' Court Act 1980 contains provisions for the hearing of civil complaints. It does not however prescribe specific timescales. Section 144 of the Act contains an enabling provision for the making of rules for regulating and prescribing the procedure and practice to be followed in magistrates' courts in civil matters. An extensive number of statutory instruments have been made under this section, but the primary rules are considered to be those set out in the Magistrates' Court Rules 1981. Those rules

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impose a duty on the court to actively manage cases, and confer extensive powers to do so. However, they do not prescribe a specific procedure for the hearing of complaints.

[4.1774.178](#) Due to the need for certainty and the expeditious resolution of any disagreements under sections 60 and 61 of the Control of Pollution Act 1974 to ensure that the construction of the authorised development is not subject to unnecessary delay, this article prescribes a clear procedure for the resolution of appeals by the Secretary of State.

[4.1784.179](#) This article was not included in the model provisions but was included in the A14 order as article 44. It has also been included in other non-highways orders<sup>30</sup>.

## 5 SCHEDULES

### *Schedule 1 – Authorised development*

5.1 Schedule 1 describes the authorised development, which is described in detail in Chapter 2 of the Environmental Statement.

### *Schedule 2 - Requirements*

5.2 The requirements in Schedule 2 are the equivalent of planning conditions. They apply to the carrying out and operation of the authorised development and reflect the processes and procedures usually employed by Highways England when implementing a scheme such as this.

5.3 Most approvals will be sought from the Secretary of State for Transport. In practice this will involve certain internal approvals being obtained from independent teams within Highways England before the details are formally submitted by the project team within Highways England to the Secretary of State for Transport for approval.

5.4 Highways England understands that decision-making by the Secretary of State would follow similar internal processes to those employed in taking other quasi-judicial decisions (for example, in deciding whether to make a DCO or a Transport and Works Act Order), meaning a separation within the Department for Transport's Strategic Roads Division of those involved in discharging requirements from those involved in delivery of the Scheme through their relationships with Highways England.

5.5 The requirements provide that the various schemes, details and plans to be approved must, where appropriate, reflect the measures included in the Environmental Statement. The requirements also provide that the approved schemes, details and plans must be implemented as approved, unless further amendments to them are approved. A general provision to this effect is provided at requirement 17.

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<sup>30</sup> See paragraph 4 of Schedule 17 to The Thames Water Utilities Limited (Thames Tideway Tunnel) Order 2014.

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- 5.6 Requirement 1 contains a number of definitions used in the requirements. This was included in the model provisions as requirement 1.
- 5.7 Requirement 2 specifies the time limit for commencing the authorised development as being five years from the date on which the Order comes into force. This was included in the model provisions as requirement 2.
- 5.8 Requirement 3 requires a construction environmental management plan (“CEMP”) to be submitted to and approved by the ~~relevant planning authority~~ Secretary of State prior to commencement of the relevant part of the authorised development. It specifies that the CEMP must be substantially in accordance with the outline environmental management plan (OEMP) [TR00022/APP/6.12] submitted as part of the application. The OEMP is included with the application documents and specifies what the full CEMP is to include.
- 5.9 The requirement also specifies the authorised working hours for the scheme, which are to be from 07:30 to 18:00 Monday to Friday and 08:00 to 13:00 on Saturdays, with certain permitted exceptions.
- 5.10 On completion of the authorised development the CEMP must be converted into the handover environmental management plan ('HEMP'), which sets out the information and measures that are required for the continued operation and maintenance of the authorised development.
- 5.11 Requirement 3 is based on requirement 19 of the model provisions, which referred instead to a code of construction practice. It is also based on recent Highways England orders<sup>31</sup>.
- 5.12 Requirement 4 provides that where Highways England is required to consult other organisations under a requirement, it must when applying for the discharge of that requirement include a report setting out the consultation it has undertaken and its response to any comments received as a result of the consultation. A copy of the report must be provided to the consultees in question when the application to discharge the requirement is submitted.
- 5.13 Highways England is required to ensure that any consultation responses it receives under the requirements are reflected in the details that it submits for approval, but only so far as it is appropriate, reasonable and feasible for it to do so, taking into account such matters as cost and engineering practicality (paragraph (3)). If consultation responses are not incorporated then Highways England must explain why in its report (paragraph (4)).

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<sup>31</sup> See for example requirement 4 of the A19 order and requirement 3 of the M20 order.

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- 5.14 Requirement 4 was not included in the model provisions, but has been included in recent Highways England orders<sup>32</sup>.
- 5.15 Requirement 5 requires the preparation of a landscaping scheme for approval by the Secretary of State prior to commencement of the relevant part of the authorised development. The relevant planning authority and the local highway authority must both be consulted on the scheme, which must be based on the environmental management plan and the results of the arboricultural walkover survey and tree survey required under sub-paragraph (2).
- 5.16 Requirement 5 is based on requirement 7 of the model provisions and recent Highways England orders<sup>33</sup>. It differs from the model provisions in that Highways England is also required to carry out surveys prior to commencement, and the landscaping scheme that is prepared must be based on the [OEMP environmental management plan](#) and the results of those surveys (submitted with the application). The details that the scheme is required to include also differ, which is considered to be appropriate given that the scheme is for landscaping and not, for example, to show the location of below ground services.
- 5.17 Requirement 6 provides for the implementation and maintenance of landscaping in accordance with the scheme approved under Requirement 5. Sub-paragraph (3) provides for the replacement of trees and shrubs which become diseased or damaged within a period of 5 years after planting.
- 5.18 Requirement 6 was included in the model provisions as requirement 8.
- 5.19 Requirement 7 provides that permanent and temporary fencing must be constructed and installed in accordance with the *Manual of Contract Documents for Highway Works* unless otherwise agreed in writing with the Secretary of State. It is based on requirements 12 and 13 of the model provisions, amended to reflect that standards are already set out in the *Manual of Contract Documents*, which is an industry-wide publication. This wording has been included in recent Highways England orders<sup>34</sup>.
- 5.20 Requirement 8 makes provision for dealing with any contaminated land or groundwater discovered during construction of the works. Prior to commencement of development Highways England must prepare a contamination risk assessment in respect of controlled waters for approval by the Secretary of State.
- 5.21 Sub-paragraphs (3) to (5) specify additional requirements that will apply if any unexpected contamination is encountered during construction.

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<sup>32</sup> See for example requirement 4 of the M20 order and requirement 30 of the M4 order.

<sup>33</sup> See for example requirement 5 of the A19 order and requirement 5 of the M20 order.

<sup>34</sup> See for example requirement 12 of the A19 order and requirement 7 of the M20 order.



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- 5.22 This requirement is based on recent Highways England orders<sup>35</sup>. Although a model requirement dealing with contamination was included in the model provisions (requirement 15), it was less comprehensive and only required the undertaker to deal with contamination likely to cause “*significant harm to persons or pollution of controlled waters or the environment*”. It also made no provision for dealing with unexpected contamination encountered during construction.
- 5.23 Requirement **9** sets out requirements for archaeological investigations. A written scheme of archaeological investigation (WSI) must be prepared and approved by the Secretary of State before any part of the authorised development can commence. Sub-paragraphs (4) to (6) put in place a process for investigating and recording remains that are revealed during construction that were not previously identified. The WSI must be prepared in consultation with the relevant planning authority and local highway authority and agreed with the County Archaeologist.
- 5.24 This requirement is based on recent Highways England orders<sup>36</sup>. Although a model archaeology requirement was included in the model provisions (requirement 16), it was less comprehensive and made no detailed provision for dealing with unexpected remains discovered during construction, that detail being left for the scheme.
- 5.25 Requirement **10** provides that where any previously unidentified protected species or nesting birds are found during construction, construction works near their location are to cease and the undertaker must immediately report it to the Ecological Clerk of Works. The undertaker must then prepare a written protection and mitigation scheme.
- 5.26 Under sub-paragraph (3) the undertaker must implement the written scheme immediately and construction in the area specified in the written scheme must not recommence until any necessary licences are obtained to enable mitigation measures to be implemented.
- 5.27 This requirement is based on requirement 34 of the model provisions and recent Highways England orders<sup>37</sup>. It differs from the model provisions in that it does not just relate to European protected species. It also does not require further survey work, on the basis that survey work will have already been carried out as part of the environmental impact assessment. Instead it sets out the procedure to be followed if protected species are found that have not already been identified and for which appropriate mitigation measures may not therefore have already been secured.
- 5.28 Requirement **11** provides that no part of the authorised development may commence until a traffic management plan for the construction of the authorised development has been prepared and approved by the Secretary of State following consultation with the

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<sup>35</sup> See for example requirement 8 of the M20 order and requirement 12 of the M4 order.

<sup>36</sup> See for example requirement 9 of the A19 order and requirement 9 of the M20 order.

<sup>37</sup> See for example requirement 10 of the M20 order and requirement 13 of the M4 order.

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relevant highway authority. This requirement is based on recent Highways England orders<sup>38</sup>. The model provisions did not include a requirement specifically requiring the submission and approval of a traffic management plan, the closest similar requirement being 22 (construction traffic), which required the submission and approval of details of the preferred route for construction traffic.

- 5.29 Requirement **12** provides that the authorised development must be designed in detail and carried out so that it is compatible with the preliminary scheme design shown on the Works Plans and the Engineering Section Drawings, unless otherwise agreed in writing by the Secretary of State following consultation with the relevant planning authority and local highway authority, where appropriate. This means that any variations to the Scheme design (which must be within the limits of deviation) are subject to approval.
- 5.30 The Secretary of State must be satisfied that any amendments to the preliminary design would not give rise to any materially new or worse adverse environmental effects compared to those reported in the Environmental Statement.
- 5.31 This requirement consolidates requirements 4 to 6 of the model provisions and is also based on recent Highways England orders<sup>39</sup>.
- 5.32 Requirement **13** provides that no part of the authorised development may commence until written details of a surface and foul water drainage system, reflecting the mitigation measures in the Environmental Statement and including means of pollution control, have been prepared in consultation with the relevant planning authority, the local highway authority and approved in writing by the Secretary of State.
- 5.33 This requirement was included in the model provisions as requirement 14.
- 5.34 Requirement **14** provides that no part of the authorised development may commence until a detailed flood ~~compensatory compensation and storage schemes are~~ submitted to and approved in writing by the Secretary of State following consultation with the relevant planning authority. The schemes must provide (i) suitable floodplain compensation storage for any flood waters that would be displaced by the authorised development, in the 1 in 100 year plus 50% climate change allowance event; and (ii) suitable flood storage for any flood waters that would be displaced by the authorised development, in the 1 in 100 year plus 40% climate change allowance event.
- 5.35 This requirement is based on recent Highways England orders<sup>40</sup>.
- 5.36 Requirement **15** provides that no part of the authorised development may commence until written details of proposed noise mitigation, including noise barriers and any very

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<sup>38</sup> See for example requirement 10 of the A19 order and requirement 11 of the M20 order.

<sup>39</sup> See for example requirement 3 of the A19 order and requirement 12 of the M20 order.

<sup>40</sup> See for example requirement 14 of the M20 order.

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low noise surfacing, have been submitted to and approved in writing by the Secretary of State following consultation with the relevant planning authority.

- 5.37 Under sub-paragraph (2) the written details must either reflect the mitigation measures referred to in the Environmental Statement (and must include including the installation of the noise barriers in the locations shown on the environmental mitigation plan(s)) or, where the mitigation proposed is materially different, include evidence that the mitigation proposed would not give rise to any materially new or worse adverse environmental effects compared to those reported in the Environmental Statement.
- 5.38 This requirement is based on requirement 25 of the model provisions and previous Highways England orders<sup>41</sup>.
- 5.39 Requirement **16** provides that no part of the authorised development may commence until a written scheme of the proposed highway lighting for that part of the authorised development has been submitted to and approved in writing by the Secretary of State following consultation with the relevant planning authority and the local highway authority (where appropriate).
- 5.40 Under paragraph (2) the standard of the highway lighting to be provided must either reflect the standard of highway lighting referred to in the Environmental Statement or, where the standard of highway lighting proposed is materially different, include evidence that the standard of highway lighting proposed would not give rise to any materially new or worse adverse environmental effects compared to those reported in the Environmental Statement.
- 5.41 The standard of the highway lighting must include the specification, level of provision, light spillage, intensity and brightness of the highway lighting.
- 5.42 This requirement is based on requirements 21 (external lighting) and 27 (control of artificial light emissions) of the model provisions and previous Highways England orders<sup>42</sup>. It goes into more detail as to the standard of highway lighting to be provided than the model provisions did.
- 5.43 Paragraph (4) confirms that this requirement does not restrict the lighting that may be used during the construction or maintenance of the authorised development. Lighting during the construction phase will be regulated by the CEMP.
- 5.44 Requirement **17** confirms that details approved pursuant to the requirements include any amendments that may subsequently be approved by the Secretary of State. This was included in the model provisions as requirement 37.

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<sup>41</sup> See for example requirement 12 of the A14 order.

<sup>42</sup> See for example requirement 14 of the A14 order.

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- 5.45 Part 2 of Schedule 2 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. This also includes an obligation on Highways England to publish an electronic register of requirements under paragraph 20, which would track where each requirement is in the process.
- 5.46 Under paragraph 21 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.
- 5.47 In the event of a dispute between Highways England and the Secretary of State regarding the discharge of any of the requirements, that dispute would stand to be referred to arbitration in accordance with article 48.