

**A38 Derby Junctions**  
**TR010022**

**8.69 Written Summary of Oral**  
**Submissions to CAH2 18 February 2020**

Planning Act 2008

Rule 8 (1)(i)

Infrastructure Planning (Examination Procedure) Rules 2010

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**The Infrastructure Planning  
(Examination Procedure) Rules 2010**

**A38 Derby Junctions  
Development Consent Order 202[ ]**

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**Written Summary of Oral Submissions to CAH2  
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# 1 INTRODUCTION

## 1.1 Purpose of this Document

- 1.1.1 This document sets out a written summary of the oral submissions made by Highways England at the second Compulsory Acquisition Hearing (CAH) for the A38 Derby Junctions Scheme. The CAH took place at 16:00 on 18 February 2020 at The Best Western - Stuart Hotel.
- 1.1.2 The 'ExA written question no.' referred to in the first column of Table 1-1 below is a reference to the ExA's agenda items relating to this CAH. The ExA's questions (and any additional comments made in the CAH) are reproduced in the second column of the table.

**Table 1-1 Written Summary of Oral Submissions to CAH 2 18 February 2020**

ExA's question/issue no.	ExA's question/issue	Summary of oral responses by Highways England
Item 1	<b>Welcome, opening remarks and introductions</b>	
Item 2	<b>The purpose of CAH2 and how it will be conducted</b>	
Item 3	<b>Book of Reference and Land Plan updates</b> Latest updates and further updates to be provided during the Examination	Highways England confirmed that the updated BoR was submitted at D4, but not Land plans because there were no changes. At the final deadline, the BoR and Land plans will both be refreshed (as standard practice).
Item 4	<b>The need for CA and Temporary Possession (TP) and the minimisation of need</b> a) The case for CA of land and rights due to agreements signed by the Applicant potentially becoming unenforceable. Consistency with DCLG guidance that <i>“As a general rule, authority to acquire land compulsorily should only be sought as part of an order granting development consent if attempts to acquire by agreement fail.”</i>	Highways England noted that it is standard practice for any type of order with CA powers to retain those powers with respect to the whole area covered by the scheme. It is important to step back and look at the guidance in more detail. The question quotes paragraph 25, which goes on to say that it may not always be practicable to acquire by agreement i.e. the guidance recognises that agreement may not be reached. The footnote also acknowledges that it may be preferable to acquire compulsorily, rather than by agreement. It is thus an appropriate approach to include all the land for a scheme within the powers. Highways England's position is that taking plots out of the order limit creates a risk. If agreement is reached with a private landowner, it may not bind successors. Some agreements progress, others do not. If the negotiations have only reached Heads of terms these are not binding, so it is not possible to remove the affected plots. This could create a situation where the scheme could not be delivered. It may well be the case that despite diligent enquiry by the applicant, there may be unknown interests that arise at a later stage. It is therefore necessary to retain all land where CA is sought within the DCO.

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	<p>b) The case for CA of unknown rights and whether the risks and potential consequences of the Applicant being “held to ransom”, would justify the acquisition of the unknown rights of unknown third parties. How unknown human rights could be considered.</p>	<p>Highways England confirmed that it has undertaken diligent enquiry to identify relevant interests by way of Land Registry searches and questionnaires. Only 2 freehold ownerships have not been identified (both unregistered land). Unknown interests are not a separate consideration but are included in the consideration of Human Rights at the point of granting CA powers. The likelihood of additional unknown interests coming forward at this stage is low given the investigation that has been done. For the purposes of Human Rights, Articles 1 and 8 protect those that own and occupy land. Other interests are not protected in the same way and would be dealt with through compensation.</p> <p>Highways England confirmed that leasehold interests (more than 7 years) are captured as these are registerable interests on the title at the Land Registry. Shorter tenancies e.g. are not evident on the face of publicly available documents. Highways England confirmed that there has been a lot of discussion/consultation during development of the scheme during which leasehold owners have had opportunity to engage and landlords have been asked whether there are short hold tenancies in place.</p> <p>Highways England noted that it is important to consider the interests that the law protects. For the purposes of land interests, 7 year+ tenancies and agricultural tenancies are protected. Shorter tenancies are protected by contractual arrangements with a landlord.</p> <p>With regard to due diligence relating to agricultural tenancies Highways England noted that there is not a great deal of agricultural land in scheme and that no 7 year+ tenancies are involved or farm tenancies. Student tenancies have been picked up through landowner discussions.</p>

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	<p>c) The Applicant [REP3-014] has “maintained that the main line and highways edge would not deviate by more than ONE metre”. Clarification of the deviation assumed in the ES. The area of land over the length of the proposed development required for the deviation and how that would be justified.</p>	<p>Highways England stated that it is standard practice to include limits of deviation within CA limits, this scheme is not setting a precedent. These limits are needed to avoid the risk of not being able to deliver the project because of on-site constraints. Even with detailed design, Highways England noted that it is not possible to say precisely where the works would be located Highways England are only seeking the 1m deviation with respect to the junctions and slip roads. The deviation for other works are shown within the order limits on the Works plans.</p> <p>Highways England stated that the limits of deviation for environmental works are justified e.g. flood compensation area where the work may require re-siting due to potential buried archaeological features or specific ground conditions that will be revealed on detailed survey.</p> <p>Highways England confirmed that deviation of works from the areas shown on the plans can only be to the extent that is shown. In terms of justifying the land needed for the scheme and exercising the CA powers, this is a continuing obligation. When it comes to exercising powers under Article 23, Highways England can only acquire such land as is necessary to deliver the scheme.</p> <p>Highways England considers that the limits of deviation should not be seen differently to the rest of the order limits for the purposes of justifying CA powers. They provide necessary flexibility allowing small areas of deviation.</p>
	<p>d) The potential for CA to be reduced during detailed design and whether CA would be justified based on a “reasonable worst- case scenario” preliminary design. How human rights would be considered during detailed design in relation to opportunities to reduce CA identified at that stage.</p>	<p>Highways England stated that the Human Rights of those whose land or rights are subject to CA should be considered at the point of the SoS granting those powers. Article 23 operates to ensure that Highways England can only acquire the land that is needed for the scheme, or is incidental to it or is required as replacement land. If land subject to CA is taken which does not meet these tests then the exercise of the powers could be challenged.</p>

ExA's question/issue no.	ExA's question/issue	Summary of oral responses by Highways England
		<p>Highways England explained that the test is that there must be a legitimate purpose sufficient to justify interference with human rights. All of the order land is needed in accordance with the legal tests</p> <p>Highways England noted that highways schemes cannot provide certainty over where works would take place at this stage (i.e. pre-detailed design). In terms of whether Highways England is asking for CA over a slightly wider area of land, Highways England noted that the limits of deviation are not extensive and that CA powers cannot be exercised other than in accordance with the legal tests in Article 23.</p>
Item 5	<p><b>Alternatives to CA or TP</b> a) Whether it is likely that there is a reasonable alternative A38 alignment that would avoid the need for CA of the Queensway properties. The balance of Human Rights with other factors. Implications for the granting of CA powers.</p>	<p>Highways England summarised the approach that the Scheme has taken. The starting point is that this is a road improvement project, not a new road, and it is being delivered in a very constrained urban area. The properties at Queensway are already significantly affected by the A38. England confirmed that there are discussions ongoing regarding compensation, but that there is no outright objection from affected landowners and none of them is suggesting that the scheme could be delivered in another way and with another alignment. Highways England stressed the importance of this point and noted that it would have expected the owners to make such a case if there were believed to be alternative options that avoided the use of CA powers.</p> <p>In designing the scheme Highways England has had to balance environmental impacts (such as the loss of land and trees at Markeaton Park) with other interests such as EuroGarages and McDonald's. Highways England considers the scheme achieves the right balance of the various interests.</p> <p>Highways England considers it important to look at the scheme in front of the ExA now. Highways England cannot consider alternative options at this stage and no-one has suggested that Highways England could do that without the</p>



ExA's question/issue no.	ExA's question/issue	Summary of oral responses by Highways England
		need for CA of Queensway properties. Highways England agreed to provide a separate written summary of this oral submission.
	<p>b) The case for CA of Ashbourne Road and Sutton Close gardens:</p> <ul style="list-style-type: none"> <li>• clarification of safety and convenience considerations for a left-in left-out access alternative for 253 and 255 Ashbourne Road and the related consideration of CA at 14 Sutton Close (plot 3/17);</li> <li>• the need for a turning head at 255 Ashbourne Road (plot 3/15a) and whether the proposed access road needs to be designed to an adoptable standard; and the need for CA at 1 Sutton Close (plot 3/19).</li> </ul>	<p>Highways England stated that a left-in left-out option is not part of the A38 scheme. Highways England cannot support this option because of safety issues. Highways England explained that this would remove the ability to access the property in any direction which will result in a 3-6 minute detour. Highways England has produced a document (ref: 8.52) which considers how the extensive detour might lead to drivers undertaking dangerous manoeuvres. Highways England confirmed that an independent safety audit has been completed and that this would be submitted to the Examination at Deadline 6.</p> <p>Highways England noted that in terms of discussions with owners, the owner number 255 does not want a left-in left-out option. The owner of 253 is preparing a blight notice, so does not have a concern about the access. Highways England considers that the land at 255 is required to deliver access to an adoptable standard.</p> <p>Highways England acknowledge that 14 Sutton Close gardens would need to be acquired for a new access road, whereas with left-in left-out they would not. The justification for CA is the safety argument supported by the independent safety audit (which HE will provide to the ExA).</p> <p>Highways England stated that the proposed turning head would need to be towards the end of the road. If it were to be located outside 253, it would be too far away from the proposed access road. Highways England's concern is that this would also remove too much parking space from 253. Highways England noted that the layout here is not like a turning head on a typical housing estate because of the constraints on the front of the site.</p>

ExA's question/issue no.	ExA's question/issue	Summary of oral responses by Highways England
		Highways England explained that the garden 1 Sutton Close (plot 3/19) was needed to form a new access point onto Ashbourne Road. Highways England would like to move the existing access further east away from the proposed junction. Safety concerns are the primary reason for this.
	c) The potential acquisition of 253 and 255 Ashbourne Road due to blight.	Highways England confirmed that meetings with the owners of 253 and leaseholders of 255 took place some months ago. Both properties have vulnerable residents and have concerns about construction period and subsequent impact on properties. Both owners have been provided with the relevant forms to submit blight notices and both have expressed a preference to relocate. Highways England noted that submission of the blight notices is largely in the agent's hands. The lead-in period for relocation has been discussed, but this is dependent on blight notices being submitted. Highways England agreed to provide an update the position later in the examination.
<b>Item 6</b>	<b>Individual objections and issues</b> a) Progress in finalising voluntary agreements and SoCG: <ul style="list-style-type: none"> <li>• CA schedule</li> <li>• Residents of 12 Queensway</li> <li>• Millennium Isle of Man Limited</li> <li>• Royal School for the Deaf Derby</li> </ul>	Highways England confirmed that CA Schedule: Annex B to Statement of Reasons (issued to Examination at D4) gives the latest position. 30 Queensway: a blight notice has been submitted. Market value agreed. A disturbance claim will be agreed in due course. Acquisition is dependent on a future replacement property. 32 Queensway: blight notice submitted in line with market value. Awaiting response. Highways England has followed up several times. Millennium Isle of Man: temporary land acquisition only for the purposes of a construction compound. Meetings to discuss technical matters regarding future use of the land are ongoing. Changes to schedule are at properties on Queensway and Ashbourne Road: Queensway 10: blight notice received.

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		<p>257 Ashbourne and 10 Queensway are student properties. Students will leave in June when Highways England will be in a position to acquire the properties.</p> <p>259 Ashbourne has not given a substantive response despite attempts at engagement by Highways England and the District Valuer. It is the only house on this scheme where no discussions have taken place. No particular reasons for this (e.g. health-wise) are known to Highways England.</p> <p>Royal School for the Deaf: technical issues around fencing – there has been very positive discussion regarding acquisition by agreement.</p> <p>12 Queensway: a business is run from the property. This is moving forward towards relocation with backstop as extinguishment. Discussions were held with the agent on 18 February.</p> <p>If agreement is not reached, and no alternative property is found, then this would require a compensation package associated with extinguishment and disturbance.</p> <p>Highways England will update the Statement of Reasons and CA Schedule for end of Examination.</p>
	<p>b) Potential permanent loss of car parking at 253 and 255 Ashbourne Road. Potential temporary loss of car parking elsewhere. Impacts and mitigation for loss of car parking.</p>	<p>Highways England provided an update as follows:</p> <p>253: the current layout for the new access would mean shortening of driveway. Final scheme would allow for 2-3 cars.</p> <p>255: whole frontage currently provides parking for 7 cars. Current proposals would retain at least 3 spaces and, depending on whether a turning head is required at this property, it may be possible to retain all the current parking spaces.</p> <p>Highways England noted that there are compensation provisions based on a financial equivalent as a backstop, although alternative parking may be possible.</p> <p>253: no discussions have taken place due to anticipated blight notice.</p> <p>255: discussion took place in last few days and a meeting is to be arranged.</p>

ExA's question/issue no.	ExA's question/issue	Summary of oral responses by Highways England
	c) Matters raised by any Affected Persons present.	
<b>Item 7</b>	<p><b>Crown interests and consent</b> Update on securing written agreement and s135 consent.</p>	<p>Highways England confirmed that it has been in negotiation with the local Territorial Army (TA) which has control over the land. The agreement is being considered by the MOD at the moment and negotiation is taking place. Highways England is working to agree this before the end of the Examination. Highways England are waiting for an update re s135 consent. Highways England has been informed that this does not need to come from Defence Infrastructure Organisation (DIO), and can be dealt with by the local TA. Highways England agreed to submit the email from DIO confirming this to the Examination.</p>
<b>Item 8</b>	a) Progress on protective provisions and SoCG	<p>Highways England confirmed that PPs are being negotiated with Cadent Gas. Cadent comments were provided to Highways England on 16 February. Highways England is looking at these at the moment. Highways England confirmed that its current position is that the PPs in the dDCO are adequate, but also that these provisions are under negotiation. Highways England is confident that agreement can be reached before the end of the Examination.</p>
	b) Concerns raised by Cadent Gas [REP4-032] [REP5-012]. Whether their standard protective provisions should be adopted. Provision for the diversion of Cadent Gas' apparatus.	<p>Highways England confirmed that provisions relating to Cadent's infrastructure are under discussion. An update will be provided to the ExA in writing at Deadline 6.</p>

ExA's question/issue no.	ExA's question/issue	Summary of oral responses by Highways England
	c) Evidence of any serious detriment, PA2008 s127 and s138 tests.	Highways England is of the view that the PPs secured in the dDCO are adequate. Highways England is confident that issues can be settled by end of the Examination.
	d) Justification for permanent acquisition of rights from Network Rail. Whether the Applicant's need for rights should take precedence over that of Network Rail. The alternative of a deed of easement, a bridge agreement, a framework agreement and Relevant Asset Protection Agreement(s) suggested by Network Rail Limited.	<p>Highways England confirmed that the main outstanding issue is the deed of easement which it is waiting for Network Rail to provide. Highways England is seeking to acquire NR's land to ensure that it owns the land it operates i.e. the bridge and the supporting abutments.</p> <p>Highways England explained the need for CA and acquisition of rights. Plots 8/5 to 8/8, owned by Network Rail, are required temporarily to undertake works to extend the road bridge. Plots 8/7 and 8/9 are required permanently to accommodate the extended bridge deck. 8/6 is needed to secure air rights to replicate the current situation. Highways England noted that acquisition would not affect the ongoing Network Rail operation once constructed. Network Rail will be able to access the track as before.</p> <p>Highways England confirmed that it is seeking air rights to maintain and manage its own structures. Everything from the track bed to the bridge soffit will remain with Network Rail. The operating space for the railway will not be affected.</p> <p>HE confirmed that it would provide an overview of outstanding points with Network Rail to the ExA.</p>
	e) Matters raised by any Statutory Undertakers present.	
<b>Item 9</b>	<b>Special Category Land, including open space and replacement land</b>	Highways England asked whether DCiC's position is that there is no oversupply of POS or whether Highways England should now look at the underlying basis for the

ExA's question/issue no.	ExA's question/issue	Summary of oral responses by Highways England
	<p>a) The potential oversupply of Public Open Space. Whether there is enough certainty that CA of replacement land is necessary to justify the CA powers being granted. Whether CA of Replacement Land to avoid Special Parliamentary Procedure would be justified.</p>	<p>need for POS. Highways England has not been provided with evidence of an oversupply of POS. DCiC confirmed it is happy with the current proposal regarding replacement POS. Highways England confirmed that it will clarify what policy requires. However it has sought to provide POS on the basis of replacing it as per the statutory tests. Highways England noted that the D3 submission from DCiC gave figures for POS within the City but the supporting data had not been provided. Highways England confirmed its extensive discussions with DCiC regarding the loss of POS and the replacement land and that its position would be changed if it now transpires that there is an oversupply. The ExA noted that special parliamentary procedure under s131 could be required if POS is not provided.</p>
	<p>b) The Markeaton Park 'Mundy covenant'. Any successor in title and consideration of their rights. The case for removing the covenant from the land that would be acquired by the Applicant.</p>	<p>DCiC understands that the covenant is not breached because there are to be no buildings on Markeaton Park. Highways England noted that there is the potential for the covenant to be breached. Highways England is seeking to acquire rights to use the land contrary to the wording of the covenant. Highways England confirmed that the issue will be discussed with DCiC. Highways England stated that any rights secured by the covenant would potentially become compensatable interests when the GVD is effective. Highways England noted that the covenant is private in nature from a 1930s conveyance by the owner to DCiC. The benefit to the general public is a permissive right given by DCiC. To clarify, Highways England stated that the land interests are registrable private rights.</p>

ExA's question/issue no.	ExA's question/issue	Summary of oral responses by Highways England
		<p>Highways England agreed to address the point about whether there are wider beneficiaries due to their use of the land as protected by the covenant (the public amenity point) in writing.</p> <p>The current title is registered to a deceased estate. A potential successor can be identified (though DCiC), but Highways England does not consider there is a statutory duty to do so. Highways England will discuss this further with DCiC. No representation has been made to the Examination. DCiC agreed to pass details of this potential beneficiary to Highways England so they can be contacted.</p>
Item 10	<p><b>The availability and adequacy of funds</b> a) Government priorities and Road Investment Strategy updates.</p>	<p>Highways England confirmed that there has been no update in relation to government strategy.</p> <p>In relation to para 4.5.2 of the Funding Statement, eight blight notices have now been served.</p>
	b) Funding statement, land cost estimate and other updates.	<p>Highways England confirmed that land costs remain as before. Highways England stated that it is not aware of revised air quality requirements impacting on the cost of the Scheme.</p>
Item 11	<p><b>Potential impediments to the Proposed Development</b> The updated Consents and Agreements Position Statement. Progress in obtaining other consents, whether there are any known impediments.</p>	<p>Highways England confirmed that it will provide an update at end of Examination.</p>
Item 12	<b>Human rights and the compelling case in the public interest</b>	



ExA's question/issue no.	ExA's question/issue	Summary of oral responses by Highways England
<b>Item 13</b>	<b>Any other CA or TP matters</b> a) DCiC concerns [REP4-029] regarding Part 1 and Section 10 claims for injurious affection and the Applicant's response [REP5-010].	Highways England noted that these concerns are to do with how to assess claims against the baseline. Part 1 claims have been identified through the ES process. Section 10 claims will be identified through the construction phase. Highways England's aim is to ensure, as far as possible, that no section 10 claims arise.
	b) DCiC concerns [REP4-029] regarding the need for a trigger mechanism for 28 days or 44 days and the Applicant's response [REP5-010].	This item concerns Article 3(2) – temporary use of land and providing not less than 14 days' notice. Highways England confirmed that it will be working very closely with DCiC during construction. Providing 14 days' notice is a standard approach and engagement regarding when works will take place is covered in the OEMP. In Highways England's view it is therefore unlikely that only 14 days' notice would be given. Highways England agreed to set out the other provisions in writing to give DCiC comfort as to how these work together.
	c) Time permitting, and at its discretion, the ExA may invite any parties present to raise any other CA or TP matters.	None raised.
<b>Item 14</b>	<b>Issues and actions arising, the audio record of the hearing and the next steps in the Examination.</b>	
<b>Item 15</b>	<b>Any other business and close of CAH2</b>	