

A38 Derby Junctions

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8.79 Technical Note on Public Open Space Loss and Replacement Land

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Public Open Space and Replacement Land

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Public Open Space Loss and Replacement Land

This note summarises the position of Highways England in respect of the issue of public open space loss and proposed replacement land. It follows recent discussions with Derby City Council and seeks to present the final agreed position on this matter.

CAH2

The ExA posed the following question at CAH2:

'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.'

During CAH2 DCiC read out a statement that referenced an oversupply of POS locally, albeit that this is skewed by the presence of the two City Parks, including Markeaton Park. Whilst DCiC maintained support for the proposed replacement land and acceptance over the loss of POS, the ExA asked that DCiC provide clarity on their position by Deadline 6. This followed representations from Highways England on the need to understand a clear position from DCiC on the apparent oversupply of POS.

Public Open Space Land Supply

Following CAH2, Highways England have held further discussions with DCiC on outstanding matters of concern, including the issue of a potential surplus of POS land raised by the ExA. From these discussions, it is the understanding of Highways England that:

- *There is a surplus of open space land in the locality of the Scheme against the adopted standard of 3.8 hectares per 1000 population;*
- *However, there is also an undersupply of POS land within the City Centre area, which lies close to the A38 corridor and is reliant on the presence of Markeaton Park for its recreational needs;*
- *DCiC consider that open space land supply should be considered on a city wide basis;*
- *DCiC are of the view that POS should be considered from both a quantitative and qualitative basis;*
- *A surplus of open space land, should not in any event equate to an 'over supply' issue, as the standard is used for guidance purposes to ensure a minimum level of accessible high quality POS is provided within Derby;*
- *As such there is no maximum level whereby the loss of POS should be disregarded and replacement land not provided because of an apparent surplus, as the provision above standard provides flexibility and enhancement for the benefit of the population of Derby;*
- *In the case of the A38 Derby Junctions Scheme, DCiC accept that POS loss will result from CA of land at Markeaton Park and as a high value recreational asset, it is necessary that replacement land should be provided, to mitigate for this loss.*

Guidance and Policy Context

The following are relevant to consideration of the loss of open space land and the obligations to provide replacement land by way of mitigation and the position of Highways England on this matter. This is outlined below.

Planning Act 2008

The PA 2008 sets out under Section 131 the application of compulsory purchase powers with respect to the permanent acquisition of open space land. **Section 131 (3) of the PA 2008 states that the compulsory acquisition of land will be subject to special parliamentary procedure unless the SoS is satisfied that one of subsections (4) to (5) applies.** As confirmed previously Highways England consider that Subsection (4) (a) and (4) (b) apply to the Scheme in that replacement land is to be offered in exchange and this replacement land will be vested with the same rights, trusts and incidents as applies to the Order land.

Section 132 relates to the acquisition of rights over land and follows the same approach as Section 131. Highways England have also maintained that Subsection (4) (a) and (4) (b) equally apply to the Scheme in that replacement land is to be offered in exchange and this replacement land will be vested with the same rights, trust and incidents as applies to the order land.

For the purposes of sections 131 and 132 of the PA 2008 open space is defined as having the same meaning as Section 19 of the Land Acquisition Act 1981:

“open space” means any land laid out as a public garden, or used for the purposes of public recreation, or land being a disused burial ground.’

In relation to replacement land the PA 2008 defines this as:

‘replacement land” means land which is not less in area than the order land and which is no less advantageous to the persons, if any, entitled to rights of common or other rights, and to the public.’

Relevant Guidance

In considering the approach to the issue of open space loss regard has been given to the ‘*Guidance Related to Procedures for the Compulsory Acquisition of Land - Department for Communities and Local Government (DCLG) September 2013.*’ Annex A of this guidance highlights ‘Special Categories of Land’ (which includes public open space amongst others) stating that:

‘Certain special categories of land are subject to additional provisions in the Planning Act where it is proposed that they should be compulsorily acquired. This includes the possibility of any compulsory acquisition provision in the development consent order being subject to special parliamentary procedure.’

The DCLG guidance goes on to state that under section 122(2) of the 2008 Planning Act there are three purposes for the acquisition of land as follows:

(i) the land is required for the development to which the development consent relates;

(ii) the land is required to facilitate or is incidental to the proposed development;

(iii) the land is replacement land which is to be given in exchange under section 131 or 132 of the Planning Act.'

The examples as provided within the guidance in relation to point (iii) states the following:

'This may arise, for example, where land which forms part of an open space or common is to be lost to the scheme, but the applicant does not hold other land in the area which may be suitable to offer in exchange. Again, the Secretary of State will need to be satisfied that the compulsory acquisition is needed for replacement land, that no more land is being taken than is reasonably necessary for that purpose, and that what is proposed is proportionate.'

The guidance also goes on to state under the title of replacement land that:

'Where either section 131(4) or 132(4) of the Planning Act applies, the Secretary of State will have regard to such matters as relative size and proximity of the replacement land when compared with the land it is proposed to compulsorily acquire through the development consent order.'

The guidance also refers to the fact that land which is already subject to rights of common or to other rights, or used by the public, even informally, for recreation, cannot usually be given as replacement land, since this would reduce the amount of such land, which would be disadvantageous to the persons concerned. There may be some cases where a current use of proposed replacement land is temporary (e.g. pending development). In such circumstances, it may be reasonable to give the land in exchange, since its current use can thereby be safeguarded for the future.'

Policy Context

In addition to the relevant guidance above, there is specific policy guidance presented in relation to open space land in the NPSNN. In relation to the loss of POS, paragraph 5.166 relates to existing areas of open space stating (emphasis added):

'Existing open space, sports and recreational buildings and land should not be developed unless the land is surplus to requirements or the loss would be replaced by equivalent or better provision in terms of quantity and quality in a suitable location. Applicants considering proposals which would involve developing such land should have regard to any local authority's assessment of need for such types of land and buildings.'

Paragraph 5.174 relates to the grant of consent for development on open space land and states that:

'The Secretary of State should not grant consent for development on existing open space, sports and recreational buildings and land, including playing fields, unless an assessment has been undertaken either by the local authority or independently, which has shown the open space or the buildings and land to be surplus to requirements, or the Secretary of State determines that the benefits of the project (including need) outweigh the potential loss of such facilities, taking into account any positive proposals made by the applicant to provide new, improved or compensatory land or facilities.'

Highways England Response

Taking into account the legal and policy context as summarised above, Highways England has had regard to the confirmation provided by DCiC that they do not consider there to be an oversupply of public open space land within the City and as such the open space land to be taken as order land

for the Scheme is not judged to be surplus to requirements. Notwithstanding this point, Highways England would also draw attention to the positive proposals that have been put forward for replacement land under the terms of the PA 2008, which will be secured through the DCO and delivered as part of the Scheme.

As the ExA are already aware, agreement has been reached with DCiC previously on this point and as referred to earlier in this note, DCiC remain firmly of the opinion that the replacement land is needed to compensate for the open space land to be lost as a result of the Scheme. Highways England considers that the proposals are compliant with the NPSNN.

Equally, Highways England would also draw attention to the fact that the provision of replacement land is noted as one of the 3 purposes for acquisition of land within the DCLG guidance and in the case of the Scheme, there is open space land to be lost and Highways England does not hold any other land in the area that is suitable or available to be offered in exchange.

Highways England maintain that the compulsory acquisition of replacement land is necessary in order to fulfil its obligations under the PA 2008, with a balance of land being provided that closely matches the land to be taken and no more land is being taken than is reasonably needed for the Scheme and the replacement land is proportionate.

Highways England can also confirm that all of the plots that form replacement land parcels are also needed for and are subject to compulsory purchase for other reasons. This is evidenced by an extract from the Book of Reference on Replacement Land which is enclosed at the end of this Technical Note. As such, the land is not subject to compulsory acquisition for the sole purpose of providing replacement land, but as a consequence of the multi-purpose acquisition, it will be provided as such. Highways England can therefore confirm that in the event that the replacement land was not required the land in question would in any event still be subject to compulsory acquisition for other purposes, as it is otherwise needed to deliver the Scheme. Accordingly, Highways England has followed an approach that in overall terms minimises the need for compulsory acquisition and seeks to make the most efficient use of land in providing replacement land.

Finally, in respect of the powers sought within the DCO itself, it is worth noting that the draft DCO lists the plots which will form the replacement land (see article 38(5) for the definition of "replacement land"). This does not indicate that these plots would be acquired as replacement land, but is simply to make it clear which plots will form part of the replacement land which is to be secured via a scheme to be certified by the Secretary of State (in consultation with the relevant planning authority) see article 38(1).

Replacement Land

Land Plans Sheet No.	Plot Ref	Description of Land	Freehold owner	Tenure Sought	Work Numbers	Works planned
2	Part of 2/1r	79 square metres of highway (A38 northbound and southbound carriageways that bridge over Brackensdale Avenue) and cycle track	Derby City Council	Temporary	1, 1i, 1m. 7b.	Required for the widening of the Brackensdale Avenue east and west under bridges, the alteration of part of the entry and exit lanes off Brackensdale Avenue which connects to the A38 The reconfiguration of the existing junction between Lyttelton Street and Kingsway Park Close
2	Part of 2/1s	198 square metres of A38 northbound slip road, footway, grassland and trees at Brackensdale Avenue	Derby City Council	Temporary	1j, 1m.	Required for the alteration of part of the entry and exit lanes off Brackensdale Avenue which connects to the A38 and works to affect the stopping up of part of the entry and exit lanes

Land Plans Sheet No.	Plot Ref	Description of Land	Freehold owner	Tenure Sought	Work Numbers	Works planned
						off Brackensdale Avenue which connect to the A38
2	Part 2/2p	23 square metres of A38 northbound carriageway slip road, footways, grassland and trees at Brackensdale Avenue	Highways England	Temporary	1j, 1m.	Required for the alteration of part of the entry and exit lanes off Brackensdale Avenue which connects to the A38 and works to affect the stopping up of part of the entry and exit lanes off Brackensdale Avenue which connect to the A38
2	Part of 2/2q	462 square meters of A38 northbound slip road, footways, grassland and trees at Brackensdale Avenue	Highways England	Permanent	1j.	Works to affect the stopping up and alteration of Brackensdale Avenue slip road.
2	Part of 2/2s	239 square metres of northbound A38 slip road and verge at Brackensdale Avenue	Highways England	Permanent	1j.	Works to affect the stopping up and alteration of

Land Plans Sheet No.	Plot Ref	Description of Land	Freehold owner	Tenure Sought	Work Numbers	Works planned
						Brackensdale Avenue slip road.
2	Part of 2/2t	383 square metres of northbound highway (A38), scrubland and trees are	Highways England	Permanent	1, 1i, 1j.	The alteration, re-alignment and grading of the northbound lane of the A38, works to affect the stopping up and alteration to Brackensdale Avenue slip road and widening of Brackensdale West underbridge.
3	Part of 3/1y	605 square metres of highway (A38) and Queensway footway, cycle track, verge, and trees (Markeaton Roundabout)	Derby City Council	Permanent	10, 10b. 12. 15.	The alteration, realignment and grading of the northbound and southbound lanes of the A38 and sign gantry. The construction of a northbound merge slip road from the Markeaton Junction Roundabout. The construction, improvement and

Land Plans Sheet No.	Plot Ref	Description of Land	Freehold owner	Tenure Sought	Work Numbers	Works planned
						realignment of the existing cycle route.
					16, 16a, 16d. 22.	The alteration realignment and grading of the A52, the construction of the Markeaton Junction Roundabout and north overbridge. The diversion of utilities.
3	Part of 3/2r	98 square metres of highway (A38), verge and footway	Highways England	Permanent	12. 21.	The construction of a northbound merge slip road from the Markeaton Junction Roundabout The diversion and construction of a utility corridor.
3	3/22c	93 square metres of amenity land to the rear of 8 Queensway	RSDD 2016	Permanent	13c.	The construction of an access track and footway/cycle track.

Land Plans Sheet No.	Plot Ref	Description of Land	Freehold owner	Tenure Sought	Work Numbers	Works planned
					15.	The construction, improvement and realignment of the existing cycle route.
3	Part of 3/23	303 square metres of of garden and buildings of 2 Queensway	John Reginald Dutton (Blight notice accepted)	Permanent	10. 13, 13c. 15. 16, 16a.	The alteration, realignment and grading of the southbound lane of the A38. The construction of a southbound diverge slip road off the A38, access track and footway/cycle track. The construction, improvement and realignment of the existing cycle route. The alteration realignment and grading of the A52 and the construction of the

Land Plans Sheet No.	Plot Ref	Description of Land	Freehold owner	Tenure Sought	Work Numbers	Works planned
						Markeaton Junction Roundabout.
					22.	The diversion of utilities.
3	Part of 3/24	248 square metres of of garden and buildings of 4 Queensway	Highways England	Permanent	10. 13, 13c. 15. 22.	The alteration, realignment and grading of the southbound lane of the A38. The construction of a southbound diverge slip road off the A38, access track and footway/cycle track. The construction, improvement and realignment of the existing cycle route. The diversion of utilities.
3	Part of 3/25	206 square metres of garden and buildings of 6 Queensway	Highways England	Permanent	10.	The alteration, realignment and grading

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						of the southbound lane of the A38.
					13, 13a, 13c. 15. 22.	The construction of a southbound diverge slip road off the A38, pumping station, access track and footway/cycle track. The construction, improvement and realignment of the existing cycle route. The diversion of utilities.
3	Part of 3/26	146 square metres of garden and buildings of 8 Queensway	Conway and Lewis (Investment owner, can't use blight but is engaging positively to sell to HE.)	Permanent	10.	The alteration, realignment and grading of the southbound lane of the A38.

Land Plans Sheet No.	Plot Ref	Description of Land	Freehold owner	Tenure Sought	Work Numbers	Works planned
					13, 13a, 13c. 15. 22.	The construction of a southbound diverge slip road off the A38, pumping station, access track and footway/cycle track. The construction, improvement and realignment of the existing cycle route. The diversion of utilities.
3	Part of 3/27	389 square metres of garden and buildings of 10 Queensway	Bhatti (Blight notice accepted)	Permanent	10, 10b. 13, 13c.	The alteration, realignment and grading of the southbound lane of the A38 and sign gantry. The construction of a southbound diverge slip road off the A38, access track and footway/cycle track.

Land Plans Sheet No.	Plot Ref	Description of Land	Freehold owner	Tenure Sought	Work Numbers	Works planned
4	Part 4/1a	4 square metres of highway (A38, southbound slip-road to Kedleston Road), footway, cycle track, parkland, verge, and trees	Derby City Council	Permanent	10, 10b, 10c, 10d, 10e. 13. 15. 18.	<p>The alteration, realignment and grading of the northbound and southbound lanes of the A38, the replacement of footbridge and construction of sign gantries.</p> <p>The construction of a southbound diverge slip road off the A38.</p> <p>The construction, improvement and realignment of the existing cycle route.</p> <p>The realignment and grading of the A38 southbound merge slip road from Kedleston Road.</p>

Land Plans Sheet No.	Plot Ref	Description of Land	Freehold owner	Tenure Sought	Work Numbers	Works planned
					21. 22.	The diversion and construction of a utility corridor. The diversion of utilities.
4	Part of 4/2a	45 square metres of highway A38 and northbound slip-road Keddleston Road)	Highways England	Permanent	10, 10c, 10d, 10e. 12. 17.	The alteration, realignment and grading of the northbound lanes of the A38 and the replacement of footbridge and the construction of sign gantries. The construction of a northbound merge slip road from Markeaton Junction Roundabout. The realignment and grading of the northbound diverge slip road off the A38.

Land Plans Sheet No.	Plot Ref	Description of Land	Freehold owner	Tenure Sought	Work Numbers	Works planned
					21. 22.	The diversion and construction of a utility corridor. The diversion of utilities.
4	Part of 4/2b	236 square metres of 20 Queensway	Highways England	Permanent	10. 13, 13c. 15. 22.	The alteration, realignment and grading of the southbound lane of the A38. The construction of a southbound diverge slip road off the A38, access track and footway/cycle track. The construction, improvement and realignment of the existing cycle route. The diversion of utilities.
4	Part of 4/2c	278 square metres of 22 Queensway	Highways England	Permanent	10.	The alteration, realignment and grading

Land Plans Sheet No.	Plot Ref	Description of Land	Freehold owner	Tenure Sought	Work Numbers	Works planned
						of the southbound lane of the A38.
					13, 13c. 15. 22.	The construction of a southbound diverge slip road off the A38, access track and footway/cycle track. The construction, improvement and realignment of the existing cycle route. The diversion of utilities.
4	Part of 4/2d	322 square metres of 24 Queensway	Highways England	Permanent	10. 13, 13b, 13c.	The alteration, realignment and grading of the southbound lane of the A38. The construction of a southbound diverge slip road off the A38, drainage pond, access

Land Plans Sheet No.	Plot Ref	Description of Land	Freehold owner	Tenure Sought	Work Numbers	Works planned
						track and footway/cycle track.
					15. 22.	The construction, improvement and realignment of the existing cycle route. The diversion of utilities.
4	Part 4/2e	1 square metre of column supporting pedestrian bridge (A38)	Highways England	Permanent	10c.	The replacement of a footbridge.
4	Part of 4/2g	2 square metres of column supporting pedestrian bridge (A38)	Highways England	Permanent	10c.	The replacement of a footbridge.
4	Part of 4/2h	19 square metres of column supporting pedestrian bridge (A38)	Highways England	Permanent	10c.	The replacement of a footbridge.
4	Part of 4/2j	3 square metres of column supporting pedestrian bridge (A38)	Highways England	Permanent	10c.	The replacement of a footbridge.
4	Part of 4/2m	6 square metres of column supporting pedestrian bridge (A38)	Highways England	Permanent	10c.	The replacement of a footbridge.

Land Plans Sheet No.	Plot Ref	Description of Land	Freehold owner	Tenure Sought	Work Numbers	Works planned
4	Part of 4/2n	5 square metres of column supporting pedestrian bridge (A38)	Highways England	Permanent	10c.	The replacement of a footbridge.
4	Part of 4/2o	5 square metres of column supporting pedestrian bridge (A38)	Highways England	Permanent	10c.	The replacement of a footbridge.
4	Part of 4/3	419 square metres of garden and buildings of 12 Queensway	Gartside (No blight notice yet but engaging positively with HE)	Permanent	10, 10b. 13, 13c. 15. 22.	The alteration, realignment and grading of the southbound lane of the A38 and sign gantry The construction of a southbound diverge slip road off the A38, access track and footway/cycle track. The construction, improvement and realignment of the existing cycle route. The diversion of utilities.

Land Plans Sheet No.	Plot Ref	Description of Land	Freehold owner	Tenure Sought	Work Numbers	Works planned
4	Part of 4/4	154 square metres of garden and buildings at 14 Queensway	Highways England	Permanent	10. 13, 13c. 15. 22.	<p>The alteration, realignment and grading of the southbound lane of the A38.</p> <p>The construction of a southbound diverge slip road off the A38, access track and footway/cycle track.</p> <p>The construction, improvement and realignment of the existing cycle route.</p> <p>The diversion of utilities.</p>
4	Part of 4/5	85 square metres garden and buildings at 16 Queensway	Roberts Blight Notice Accepted	Permanent	10. 13, 13c.	<p>The alteration, realignment and grading of the southbound lane of the A38.</p> <p>The construction of a southbound diverge slip road off the A38, access</p>

Land Plans Sheet No.	Plot Ref	Description of Land	Freehold owner	Tenure Sought	Work Numbers	Works planned
						track and footway/cycle track.
					15. 22.	The construction, improvement and realignment of the existing cycle route. The diversion of utilities.
4	Part of 4/6	73 square metres of garden and buildings at 18 Queensway	Khan Blight notice expected imminently	Permanent	10. 13, 13c. 15.	The alteration, realignment and grading of the southbound lane of the A38. The construction of a southbound diverge slip road off the A38, access track and footway/cycle track. The construction, improvement and realignment of the existing cycle route.

Land Plans Sheet No.	Plot Ref	Description of Land	Freehold owner	Tenure Sought	Work Numbers	Works planned
					22.	The diversion of utilities.
4	Part of 4/7a	223 square metres of access and school grounds between Queensway and the Royal School for the Deaf Derby	RSDD 2016	Permanent	10. 13, 13c. 15. 22.	The alteration, realignment and grading of the southbound lane of the A38. The construction of a southbound diverge slip road off the A38, access track and footway/cycle track. The construction, improvement and realignment of the existing cycle route. The diversion of utilities.
4	Part of 4/7b	50 square metres of school grounds Royal School for the Deaf Derby	RSDD 2016	Temporary and Rights	13.	Required for the construction and

Land Plans Sheet No.	Plot Ref	Description of Land	Freehold owner	Tenure Sought	Work Numbers	Works planned
						maintenance of a noise barrier.
4	Part of 4/7c	388 square metres of sensory garden and school grounds to the south east of 26 Queensway are sought)	RSDD 2016	Temporary and Rights	13b.	The construction of drainage pond.
4	Part of 4/8	223 square metres of plot 4/8 (where all interests in land comprising approximately 537 square metres of garden and buildings (26 Queensway) are sought)	Conway and Lewis (Investment owner, can't use blight but is engaging positively to sell to HE.)	Permanent	10. 13, 13b, 13c. 15.	The alteration, realignment and grading of the southbound lane of the A38. The construction of a southbound diverge slip road off the A38, drainage pond, access track and footway/cycle track. The construction, improvement and

Land Plans Sheet No.	Plot Ref	Description of Land	Freehold owner	Tenure Sought	Work Numbers	Works planned
						realignment of the existing cycle route.
					22.	The diversion of utilities.
4	Part of 4/9	190 square metres of plot 4/9 of vacant building plot the east of 26 Queensway	Highways England	Permanent	10. 13, 13b, 13c. 15. 22.	The alteration, realignment and grading of the southbound lane of the A38. The construction of a southbound diverge slip road off the A38, drainage pond, access track and footway/cycle track. The construction, improvement and realignment of the existing cycle route. The diversion of utilities.
4	Part of 4/10	271 square metres of plot 4/10 of garden and buildings at 30 Queensway	Ogunjimi and Dutton	Permanent	10.	The alteration, realignment and grading

Land Plans Sheet No.	Plot Ref	Description of Land	Freehold owner	Tenure Sought	Work Numbers	Works planned
			Blight Notice Accepted			of the southbound lane of the A38.
					13, 13c. 15. 22.	The construction of a southbound diverge slip road off the A38, access track and footway/cycle track. The construction, improvement and realignment of the existing cycle route. The diversion of utilities.
4	Part of 4/11	171 square metres of plot 4/11 of school grounds to the south-east of 30 Queensway	Official Custodian for Charities on Behalf of RSDD	Permanent	13c.	The construction of an access track and footway/cycle track.
4	Part of 4/12	857 square metres of plot 4/12 of garden and buildings at 32 Queensway	Al Ryan Bank Blight Notice Accepted	Permanent	10.	The alteration, realignment and grading of the southbound lanes of the A38.

Land Plans Sheet No.	Plot Ref	Description of Land	Freehold owner	Tenure Sought	Work Numbers	Works planned
					13, 13c. 15. 22.	The construction of a southbound diverge slip road off the A38, access track and footway/cycle track. The construction, improvement and realignment of the existing cycle route. The diversion of utilities.
4	Part of 4/13a	889 square metres of plot 4/13a of grassland and trees (Markeaton Lodge)	University of Derby	Permanent	10. 13, 13c. 15.	The alteration, realignment and grading of the southbound lanes of the A38. The construction of a southbound diverge slip road off the A38, access track and footway/cycle track. The construction, improvement and

Land Plans Sheet No.	Plot Ref	Description of Land	Freehold owner	Tenure Sought	Work Numbers	Works planned
						realignment of the existing cycle route.
					22.	The diversion of utilities.
4	Part of 4/14	37 square metres of plot 4/14 of land, footway and ramp to pedestrian bridge (A38)	Unknown - Derby City Council or Highways England	Permanent	10, 10c. 21. 22.	The alteration, realignment and grading of the northbound lanes of the A38 and the replacement of footbridge. The diversion and construction of a utility corridor. The diversion of utilities.
4	Part of 4/15	57 square metres of plot 4/15 of land, footway and ramp to pedestrian bridge (A38)	Derby City Council	Permanent	10, 10c. 15.	The alteration, realignment and grading of the southbound lanes of the A38 and the replacement of a footbridge. The construction, improvement and

Land Plans Sheet No.	Plot Ref	Description of Land	Freehold owner	Tenure Sought	Work Numbers	Works planned
						realignment of the existing cycle route.
					21.	The diversion and construction of a utility corridor.