

A38 Derby Junctions TR010022

8.80 Human Rights and the Acquisition and Possession of Land for the Scheme

Planning Act 2008

Rule 8 (1)(k)

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

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

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for the Scheme**

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Human Rights and the Acquisition and Possession of Land for the Scheme

The ExA has asked the question:

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.

Highways England has provided a response to the issue of an alternative alignment at Markeaton and draws the ExA's to the points it made in its technical note [REP3-013] - that the Scheme submitted and currently the subject of examination represents Highways England's preferred route and this is the Scheme to be determined by the ExA and the SoS. Highways England does not have the ability to make significant revisions to the alignment within the terms of the current application particularly as the DCO application is for an alteration to an existing strategic highway (under s.22(1)(b) of the Planning Act) and not the construction of a new highway deviating significantly from the line of the existing carriageway. Nevertheless, as requested by the ExA, Highways England considers below the CA issue raised in respect of the Queensway properties in this response, together with consideration of the human rights of those affected by the CA needed to deliver the Scheme.

Alternatives

Highways England submitted a technical note to the Examination which outlines the optioneering undertaken in respect of Markeaton junction [again, see: REP3-013]. The purpose of that note was to explain the balancing exercise undertaken and the need for the compulsory acquisition of the Queensway properties. Of the four options originally considered in respect of the design and layout of Markeaton junction, option 1 (as amended through the further design development) was the preferred option. Part of the conclusion of REP3-013 (and issues which have come out of the consideration of this issue during the Examination) is that any other realignment of the A38 would have resulted in:

1. greater land take at Markeaton Park (circa 26,000m²) which is highly valued and established public open space;
2. the need to compulsorily acquire replacement land for the loss of additional public open space;
3. the need to cross Markeaton lake and the resulting technical and environmental issues
4. extensive removal of mature trees which screen Markeaton Park from the A38;
5. the need to locate the footbridge further into the Park with the need for additional land take in this respect;
6. greater impacts on the existing businesses of McDonald's and Euro Garages;
7. greater impacts on, and compulsory acquisition of the properties at, Ashbourne Road;
8. greater impacts on the Army Reserves Centre;
9. significant amenity impacts on the existing Queensway properties (as raised by a resident of one of the Queensway properties during the CAH1 hearing) whilst still requiring the compulsory acquisition of 5 or 6 of the Queensway properties, including severing the access road to the remainder;
10. the need to provide an alternative access road to the Queensway properties, likely to require compulsory acquisition from the Royal School for the Deaf Derby), including the loss of the Mundy wall; and
11. significant safety issues in respect Stopping Sight Distances departures from Standards.

The Scheme appropriately balances the public interest against private loss as the land required for the Scheme is necessary and any alternative alignment would result in greater impacts on the public comparatively to those private rights which will be interfered with.

Finally, these points need to be considered in the context of there being no objections in principle from the owners of the Queensway properties to the compulsory acquisition of their properties.

Landowner position

The Scheme includes a total of 96 hectares of land within the 'Order limits' (Limits of land to be acquired or used permanently or temporarily). Of this, approximately 44 hectares will be acquired permanently, 37 hectares will be required temporarily and 15 hectares will be subject to powers of temporary possession with acquisition of permanent rights. This includes the required permanent acquisition of 19 residential properties.

Highways England owns 24 hectares (55%) of the land to be acquired permanently and 6.4 hectares (15%) owned by Derby City Council. With regards to temporary possession, 27 hectares (73%) of the land required temporarily is owned by Derby City Council. A summary of acquisitions of residential properties is provided below in Table 1. It is worth noting that eleven of these nineteen landowners have already chosen to compel Highways England to acquire their properties under Statutory Blight.

Highways England have throughout the DCO process used all reasonable endeavours to contact and engage with affected landowners to discuss the impact of the proposals, acquisition and compensation (Annex B of Statement of Reasons provides a status of the discussions).

Table 1 - Summary of Acquisitions of Residential Properties

19	Total Number of residential properties affected including 2 residential care homes.
6	Acquired by Highways England under blight as at 01/03/20
5	Blight notices have been accepted and currently working through statutory process
4	Highways England are in negotiation and acquisition via blight or private treaty anticipated before Secretary of State decision on the DCO
3	Investment properties - occupiers permitted to 2 months' notice to vacate under Assured Shorthold Tenancy
1	Landowner has not responded to our attempts to engage.

Law and policy

Before assessing the approach to compulsory acquisition and temporary possession, together with the balance of human rights, the legal and policy context within which the application has been submitted to the Secretary of State needs to be considered. Following this, the benefit of the proposed scheme to the public and the wider economy must be considered against the impacts of the Scheme on individuals whose land is affected.

Planning Act 2008

Section 122(3) of the Planning Act 2008 sets out two conditions that the Secretary of the State must be satisfied with before compulsory purchase can be authorised. The first states that powers should only be

sought over land ‘*required for, to facilitate or be incidental to the proposed development, or be required as replacement land*’. The second is the requirement for there to be a ‘*compelling case in the public interest*’.

Policy Context

The National Policy Statement for National Networks (NPSNN) is the primary basis for decision making on DCOs under the Planning Act 2008. The NPSNN outlines ‘*the need for, and Government’s policies to deliver, development of nationally significant infrastructure projects (NSIPs) on the national road and rail networks in England*’ (see paragraph 1.1). Paragraph 2.2 of the NPSNN identifies a “critical need” to improve the national networks to address road congestion to provide safe, expeditious and resilient networks that better support social and economic activity.

The Road Investment Strategy (RIS) sits alongside the NPSNN and sets out the long-term programme and the stable funding needed to plan ahead and ‘*together with the business plans prepared by the relevant delivery bodies, provide detailed articulation of the Government’s funding strategy for the road and rail networks and investment priorities over forthcoming periods.*’ (see paragraph 1.21). The Scheme is included in RIS as a ‘committed scheme’.

Guidance

The guidance (see: *Planning Act 2008, Guidance related to procedures for the compulsory acquisition of land*, notably paragraph 13) provides that ‘*land should only be taken compulsorily where there is clear evidence that the public benefit will outweigh the private loss*’. The Guidance similarly provides that “*Parliament has always taken the view that land should only be taken compulsorily where there is clear evidence that the public benefit will outweigh the private loss.*”

In addition, the same guidance states that an acquiring authority should seek to acquire land by private treaty, using compulsory purchase as a last resort ‘*Applicants should seek to acquire land by negotiation wherever practicable. 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. Where proposals would entail the compulsory acquisition of many separate plots of land (such as for long, linear schemes) it may not always be practicable to acquire by agreement each plot of land. Where this is the case it is reasonable to include provision authorising compulsory acquisition covering all the land required at the outset*’.

This advice is complemented by the Ministry of Housing, Communities and Local Government Guidance on Compulsory purchase process and The Crichel Down Rules, 2019, paragraph 2 which states ‘*Compulsory purchase is intended as a last resort to secure the assembly of all the land needed for the implementation of projects. However, if an acquiring authority waits for negotiations to break down before starting the compulsory purchase process, valuable time will be lost. Therefore, depending on when the land is required, it may often be sensible, given the amount of time required to complete the compulsory purchase process.*’

Should a landowner have any land compulsorily acquired they will be protected by the provisions set out in compulsory purchase legislation and entitled to compensation including market value, disturbance, loss payments and for severance/injurious affection. Subject to meeting the relevant criteria, they may also be able to claim for the purchase of additional land under blight.

Compulsory Acquisition approach

To deliver the Scheme, a number of privately owned properties need to be compulsorily acquired. Highways England has stated in the Statement of Reasons (see para. 5.3.7) that it will only ‘*acquire land permanently needed for the scheme*’, with all other land being taken temporarily or rights being taken to reduce the extent of the compulsory acquisition. In developing the scheme ‘*The limits of land have been drawn as tightly as possible so as to avoid unnecessary land take. In the event that less land proves to be required in a particular area at a later stage, Highways England would only seek to acquire that part of land that is required and, in all*

events, will seek to minimise effects on landowners.’ (Statement of Reasons, 5.3.5). The Statement of Reasons set out in more detail the explicit justification for the compulsory acquisition and temporary possession of the land within the Order limits.

All land to be permanently acquired or temporarily possessed is set out clearly in the Book of Reference, together with detail of the relevant works required for each plot. All of the land identified for either compulsory purchase or temporary acquisition is needed to deliver the scheme.

It is worth noting that notwithstanding this position, it is not in Highways England’s interests to acquire more land than it requires or to retain land post-development as this would not serve a need for its acquisition as it would have no operational value. In addition to this, the Crichel Down Rules provide that any land that has been acquired but is no longer required for the scheme should be offered back to the landowner (or successor in title) from whom it was acquired.

Consideration of Human Rights

European Convention on Human Rights

Highways England has explained (Statement of Reasons, Chapter 6) how the European Convention on Human Rights (“ECHR”) is incorporated into domestic law, and which articles are relevant to the acquisition of land and the Scheme. These are:

- Article 1 of The First Protocol – protects the rights to peaceful enjoyment of possessions. No one can be deprived of their possessions except in the public interest.
- Article 6 – entitles those affected by compulsory powers to a fair and public hearing.
- Article 8 – protects the right of the individual to respect for their private and family life, their home and correspondence. Interference with this right can be justified if it is in accordance with law and is necessary in the interests of, among other things, national security, public safety or the economic wellbeing of the country.

Section 6 of the Human Rights Act 1998 prohibits public authorities from acting in a way which is incompatible with rights protected by the ECHR. In exercising its powers of compulsory acquisition, the Applicant is acting as a public authority for the purpose of the Human Rights Act 1998 so must be conscious of the need to strike a balance between the rights of the individual and the interests of the public. When developing the scheme, and thus the land take required to enable the development, the project has had full regard to the Human Rights Act.

Policy and guidance

Paragraph 10 of the *Planning Act 2008, Guidance related to procedures for the compulsory acquisition of land* sets out how applicants should take into account Human Rights:

“The Secretary of State must ultimately be persuaded that the purposes for which an order authorises the compulsory acquisition of land are legitimate and are sufficient to justify interfering with the human rights of those with an interest in the land affected. In particular, regard must be given to the provisions of Article 1 of the First Protocol to the European Convention on Human Rights and, in the case of acquisition of a dwelling, Article 8 of the Convention.”

Human Rights approach

Highways England considers that in all cases when considering impacts on human rights a balance needs to be struck between the rights of the individual property owners and the interests of the public.

Compelling case in the public interest and the balance of human rights

Highways England considers that the provisions of section 122(3) of the Planning Act 2008 are met and that there is a compelling case in the public interest for compulsory acquisition of the land and rights identified in the application. In addition, Highways England considers that the human rights of those individuals affected by the Scheme have been appropriately considered and balanced through the optioneering and design approach taken by Highways England.

Taking both the compulsory acquisition and human rights aspects together, Highways England considers:

- all land sought through compulsory acquisition and temporary possession meets the legal and policy tests in that it is all required for the Scheme, or is required to facilitate or is incidental to the proposed A38 development. This is outlined in detail in the Statement of Reasons and the Book of Reference, providing a clear explanation and linkage to the relevant work items explaining the purpose for which the land is required;
- the approach that Highways England has taken is to identify the minimum land necessary to deliver the scheme, following the approach in the DCLG guidance (outlined above), and only the land that is reasonably required for the purposes of the development has been included;
- in respect of ensuring that landowners' human rights have been properly considered and assessed, all proper statutory consultation, notification and publication procedures have been followed and Highways England considers that all interference with these rights is proportionate and justified on the basis of the public benefits of the Scheme which outweigh the impacts on individuals;
- none of the landowners or interests that Highways England is seeking to acquire are objecting to compulsory acquisition or temporary possession on the basis that Highways England's approach does not meet the relevant legal or policy tests;
- the Scheme has significant policy support from both national and local policy and there are clear benefits to the public which will be delivered once the development is completed;
- the Scheme's objectives directly support the Government's wider strategic policy objectives whilst specifically addressing a significant problem of traffic congestion on the strategic road network, providing additional capacity and facilitating long-term development and growth;
- there are clear and significant benefits of the Scheme for the public and these include improving economic competitiveness, the environment and quality of life by reducing congestion in the surrounding urban areas of Derby and on the A38 inter-regional road. In addition, it is considered that the proposed Scheme will increase the capacity of the strategic road network and facilitate housing and employment growth within the Derby City region; and
- Derby and its immediate surrounding area are expected to accommodate significant housing and employment growth in the coming years. The Derby City Local Plan and LTP3 both state that if this Scheme is not delivered that it is likely that any future development to the west of the City of Derby will be severely restricted.

There will clearly be impacts on individual landowners from the Scheme but these impacts need to be weighed and assessed against the significant public benefits of the Scheme which are outlined above. However, Highways England considers that there is a clear justification for compulsory acquisition and temporary use of land as part of the Scheme.