

Application by Highways England for the A19 Downhill Lane Junction Improvement

The Examining Authority's Further Written Questions and Requests for Information (ExQ2)

Issued on 19 November 2019

The following table sets out the Examining Authority's (ExA's) Further Written Questions and requests for information – ExQ2. Responses are required by **Deadline 5 in the Examination Timetable, Thursday 28 November 2019**. Please note that if this deadline is missed the ExA is not obliged to take account of your response.

Column 2 of the table indicates which Interested Parties (IPs) each question is directed to. The ExA would be grateful if all persons named could answer all questions directed to them, providing a substantive response, or indicating that the question is not relevant to them for a reason. If the answer to a question is set out in, for example, a Statement of Common Ground (SoCG) then a cross reference to where the issue is addressed is acceptable.

This does not prevent an answer being provided to a question by a person to whom it is not directed, should the question be relevant to their interests.

Each question has a unique reference number which starts with 2 (indicating that it is from ExQ2) and then has an issue number and a question number. For example, the first question on General and Cross-topic Questions is identified as ExQ2.1.1. When you are answering a question, please start your answer by quoting the unique reference number.

In some areas there may be a degree of overlap between the answers to questions and it is acceptable to provide a single answer which responds to multiple questions or answer questions individually and provide cross references between multiple answers where appropriate. If you do so, please use all number references and ensure all elements are addressed.

If you are responding to a small number of questions, answers in a letter will suffice. If you are answering a larger number of questions, it will assist the ExA if you use a table based on this one to set out your responses. An editable version of this table in Microsoft Word is available on request from the case team: please contact A19DownhillLaneJunction@planninginspectorate.gov.uk and include A19 Downhill Lane Junction ExQ2 in the subject line of your email.

Responses are due by **Thursday 28 November 2019**.

Abbreviations

PA2008	<i>The Planning Act 2008 as amended</i>	NPS	<i>National Policy Statement</i>
Art	<i>Article</i>	NSIP	<i>Nationally Significant Infrastructure Project</i>
dDCO	<i>Draft DCO [REP3-005]</i>	R	<i>Requirement</i>
EM	<i>Explanatory Memorandum [REP2-006]</i>		
ES	<i>Environmental Statement [APP-020 – APP-043]</i>		
ExA	<i>Examining Authority</i>		
LIR	<i>Local Impact Report</i>		

The Examination Library

References in these questions set out in square brackets (eg [APP-010]) are to documents catalogued in the Examination Library. The Examination Library can be obtained from the following link:

<http://infrastructure.planninginspectorate.gov.uk/document/TR010024>

It will be updated as the examination progresses.

Citation of Questions

Questions in this table should be cited as follows:

Question reference: issue reference: question number, eg **ExQ2.1.1** – refers to question 1 in this table.

Ref No.	Respondent:	Question:
1	General and Cross-topic Questions	
Q2.1.1	Applicant	<p>Paragraph 3.1.3 of the Consents and Agreements Position Statement [APP-013] provides details of permits, consents and agreements which may also need to be sought separately from the DCO. Paragraph 3.1.4 indicates that at the time of submission of the application they were not sufficiently developed to confirm the requirements and therefore not practicable to include them within the DCO.</p> <p>Can the Applicant provide an update on the position with regard to the need for permits, consents and agreements?</p>
Q2.1.2	Applicant Local authorities	<p>At Deadline (D)4 the Applicant confirmed [REP4-001] that the joint local authority Statement of Common Ground (SoCG) as submitted at D3, and the private side agreement (relating to the adoption of roads) had been agreed and that the submission of the signed SoCG would be submitted in advance of D5. Paragraph 5.16 of [REP3-017] also refers.</p> <p>The Applicant and the local authorities are asked to confirm the position with regard to the SoCG. In addition, please explain why it is necessary for matters relating to the adoption of roads to be subject to a side agreement. It is stated that this is a private agreement and implied that it will not be submitted to the Examination. If this is the correct interpretation explain why it is not appropriate to submit the agreement to the Examination.</p>
2	Air Quality and Emissions	
	The ExA does not have any specific questions relevant to this issue.	
3	Biodiversity, Ecology and Natural Environment (including Habitats Regulations Assessment)	
Q2.3.1	The Applicant	<p>Paragraph 7.15 of the Local Impact Report (LIR) [REP2-021] states that "<i>the delivery of compensation measures, including biodiversity offsets, is likely to involve access to land, or land purchase, outside a scheme footprint and a commitment to long-term management through legal agreements. They therefore require early</i></p>

Ref No.	Respondent:	Question:
	Local Authorities	<p><i>consideration in project design. The principles of offsetting should be agreed with the competent authority at an early stage, particularly where this is not clearly set out in a policy or biodiversity offsetting strategy.</i>" The Applicant responded [REP3-012], indicating that the scheme will deliver all biodiversity offsetting within the DCO boundary and so does not require access to land outside the scheme footprint.</p> <p>The Applicant is asked to demonstrate where within the scheme boundary biodiversity offsetting is proposed to take place.</p> <p>The Local Authorities are asked to comment on the Applicant's response to paragraph 7.15 of the LIR.</p>
Q2.3.2	The Applicant Local Authorities	<p>Paragraph 7.16 of the LIR [REP2-021] states that "<i>it is important that [the] scheme is sustainable and that it produces a net gain for biodiversity and nature conservation. National policy promotes the inclusion of measures to enhance biodiversity within development proposals. Enhancement of biodiversity should be an objective of this project.</i>" In response [REP3-012] the Applicant noted that Chapter 9 of the ES [APP-020] outlines the habitat gain and loss of the scheme and demonstrates a net biodiversity gain.</p> <p>The Applicant is asked to confirm how a net biodiversity gain for the scheme has been achieved.</p> <p>The Local Authorities are asked to explain the policy basis for seeking a net biodiversity gain.</p>
Q2.3.3	Sunderland City Council	<p>Paragraph 15.6.5 of the ES [APP-020] notes that Sunderland City Council raised a concern regarding temporary impacts on farmland birds and the ability to displace into adjacent habitats. However, the Applicant concluded that the contribution to the effect by the scheme did not justify the need for mitigation.</p> <p>Can the Council confirm that it is content with this finding?</p>
4	Compulsory Acquisition and / or Temporary Possession	
Q2.4.1	Applicant	At D4 the Applicant and Hellens Land Limited submitted a Joint Statement on the status of discussions between the parties [REP4-004]. The Applicant also set out its position separately [REP4-001] as did Hellens Land Limited

Ref No.	Respondent:	Question:
	Hellens Land Limited South Tyneside Council	[REP4-005]. The parties are asked to confirm the outcome of any further discussions on this matter by D5 and at subsequent deadlines if the matter remains unresolved.
5 Draft Development Consent Order		
Q2.5.1	Applicant	<p>Paragraph 5.7 of [REP3-017] indicated that Art 7 is not concerned with transferring powers (eg compulsory acquisition powers) but instead addressed a legal peculiarity of PA2008. The Applicant went on to state that <i>'absent specific provisions to address the benefit of the Order, the powers would run with the land and not with the undertaker'</i>.</p> <p>The EM [REP2-006] states that the purpose of paragraph (2) is to clarify the exceptions where the Order will self-evidently benefit others, e.g in relation to the construction of a new private means of access. Absent this provision, there would be a contradiction since strictly speaking only Highways England could benefit from these works.</p> <p>Notwithstanding that the same wording has been used in other DCOs the Applicant is asked to clarify why paragraph (2) is needed and the effect of having it. In answering, the Applicant is asked to identify where paragraph (2) would apply in the context of the Order ie who are the persons who would benefit from the grant of powers under this sub-section.</p>
Q2.5.2	Applicant	<p>In Revision 1 of the dDCO [AS-002] paragraphs (2) and (3) of Art 23 in respect of the submitted version [APP-011] were deleted. The relevant EM [AS-004] does not explain why the change was made and the matter was not addressed in Q29 of the ExA's Questions on the dDCO (which related to Art 23) or the Applicant's response to those questions [REP1-010].</p> <p>The Applicant is asked to clarify the reasoning for this proposed change which would allow wider powers to create new rights in all of the Order land.</p>
Q2.5.3	Applicant	At paragraph 3.28 of the Applicant's Written Submission of Case at the Compulsory Acquisition Hearing [REP3-016] it was confirmed that Art 29 would allow temporary possession over all of the plots in the scheme boundary



Ref No.	Respondent:	Question:
		<p>including those that were subject to full acquisition of the freehold. This would allow temporary possession in the first instance with acquisition coming at a later stage. Paragraph 3.30 refers specifically to Art 29(9) and the power to impose rights in respect of land proposed to be used temporarily. The Applicant also referred to the fact that it had carried out diligent inquiry to understand the nature of the land and right ownership across the scheme boundary. Reference was also made to answers to Questions 29 and 32 in [REP1-010] in support of the Applicant's position.</p> <p>Notwithstanding the numerous made DCOs where a similar approach to drafting was taken in relation to temporary possession powers the Applicant is asked to explain how, in acquiring as yet unspecified rights, a judgement can be made as to whether they meet the compulsory acquisition tests in PA2008 or address Human Rights issues.</p> <p>The Applicant is also asked to consider how the proposed approach conforms to the DCLG PA2008 Guidance for compulsory acquisition and in particular paragraph 10 of Annex D which states that "<i>where it is proposed to create and acquire new rights compulsorily they should be clearly identified</i>".</p> <p>Schedule 6 identifies '<i>Land of Which Temporary Possession May Be Taken</i>'. Other application documents such as the Statement of Reasons, Land Plans and Book of Reference also describe the land in Schedule 6 as being for temporary possession. It is noted that in answer to Q32 in [REP1-010] the Applicant confirmed that it had consulted all persons as necessary on the basis of its intended use of the land. Nevertheless, the Applicant is asked to demonstrate that persons with an interest in that land have been appropriately consulted and given adequate opportunity to effectively participate in the Examination on the basis that their land may be subject to the compulsory acquisition of new rights.</p> <p>Without further clarification on these matters the ExA's dDCO / DCO Commentary recommends an amendment to Art 29(9) to exclude the power to compulsorily acquire undefined new rights in land listed and described as being for temporary possession in Schedule 6.</p>
Q2.5.4	Applicant	Paragraphs 5.8 to 5.10 of the Applicant's Written Submission in respect of ISH3 [REP3-017] explain the reasoning for the temporary possession of Plot 1/14/b in the event that Plots 2/1, 2/2a and 2/2b (the Testo's construction compound) were to be used for construction activities for the Downhill Lane Junction scheme. The Applicant has made amendments to Art 30 [REP3-005] to allow the temporary possession of Plot 1/14b whilst



Ref No.	Respondent:	Question:
		<p>ensuring that there were no physical works take place on Plot 1/14b.</p> <p>Notwithstanding that Plot 1/14b would be landlocked by the scheme and not capable of being used whilst Plot 1/14a was being occupied temporarily for construction, the Applicant is asked to clarify how it could lawfully possess the land temporarily if it did not require the land for the purposes specified in Schedule 6 namely <i>"the main site compound to include, but not limited to, site offices, welfare facilities, parking provisions, storage of plant and materials, and the treatment of site generated waste"</i>.</p>
Q2.5.5	Applicant	<p>The ExA has proposed an amendment to Art 36(1) to ensure that the proposed changes to the Testo's scheme are only implemented provided that work on the original Testo's NMU scheme has not commenced. This is intended to ensure that the A19 Downhill Lane Junction Scheme's proposals for NMU users would not be prevented from implementation and would remove the uncertainty which could arise in the unlikely event that Works 4 and 6 of the Testo's scheme had commenced.</p> <p>The Applicant is asked to comment on the proposed amendment to Art 36(1) and specifically whether it would affect the flexibility which the Applicant seeks to have in implementing the Testo's scheme alongside the Downhill Lane Junction proposals and IAMP proposals. Would this have any implications for the assessment undertaken for the Environmental Statement?</p>
6	Economic and Social Effects	
	The ExA does not have any specific questions relevant to this issue.	
7	Historic Environment	
	The ExA does not have any specific questions relevant to this issue.	

Ref No.	Respondent:	Question:
8	Landscape and Visual	
		The ExA does not have any specific questions relevant to this issue.
9	Noise and Vibration	
		The ExA does not have any specific questions relevant to this issue.
10	Other Strategic Projects and Proposals	
		The ExA does not have any specific questions relevant to this issue.
11	Traffic and Transport	
		The ExA does not have any specific questions relevant to this issue.
12	Water Environment	
Q2.12.1	Applicant	Paragraph 14.8.16 of the ES refer to the limited change in water environment risks at the Testo's compound. Please clarify what the risk is?
Q2.12.2	Applicant Local Authorities	In the SoCG with the Environment Agency [AS-029] under Other Matters it is stated any change to the Pond 6 layout would be a non-material design change for environmental benefit that would be secured through DCO Requirements 3, 5 and 8. Are the parties confident that <u>any</u> change to the Pond 6 layout would be non-material?