

# **A19 Downhill Lane Junction Improvement**

**Scheme Number: TR010024**

## **3.2(5) Explanatory Memorandum**

APFP Regulation 5(2)(c)  
Planning Act 2008  
Infrastructure Planning (Applications: Prescribed Forms and Procedure)  
Regulations 2009



## Infrastructure Planning

### Planning Act 2008

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

# A19 DOWNHILL LANE JUNCTION IMPROVEMENT

## The A19 Downhill Lane Junction Development Consent Order 202[ ]

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### EXPLANATORY MEMORANDUM

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**Highways England**

**A19 Downhill Lane Improvement**

**The A19 Downhill Lane Junction Development Consent Order 202[ ]**

**Explanatory Memorandum**

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## 1 Summary

1.1 This memorandum explains the purpose and effect of each article of, and the Schedules to, the draft A19 Downhill Lane Junction 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>.

1.1 Regulation 5(2)(c) requires explanatory memoranda to explain "*the purpose and effect of provisions in the draft Order*".

## 2 Purpose of the Order

### *Nationally Significant Infrastructure Project*

1.2 Highways England Company Limited ('Highways England') is applying to the Secretary of State for an Order to improve the A19 Downhill Lane junction. The A19 runs north-south and is a strategic route that provides an alternative to the A1 between North Yorkshire and North Tyneside. It also links the Tyne and Wear conurbation with Teesside.

2.1 The Downhill Lane junction is located just around 4.8km south of the Tyne Tunnel and approximately just over 1km south of the Testo's junction. It forms the junction between the A19 and the A1290, which is one of the main access routes for the Nissan plant, and Washington Road, which runs into north Sunderland.

2.2 The Roads Investment Strategy makes provision for a replacement junction at Downhill Lane to improve capacity and unlock development near the Nissan plant, including the proposed International Advanced Manufacturing Park ("IAMP"). Highways England is therefore applying to the Secretary of State for an Order to upgrade the A19 Downhill Lane Junction.

2.3 The proposed scheme would involve the construction of a new bridge which together with the existing bridge would form an elevated roundabout over the A19. The approach roads and south facing slip roads would be realigned to provide safe entry and exit to the new circulatory junction layout. These changes would relieve congestion and reduce delay associated with the junction and improve road safety for road users and the local community. The highways that would be affected are set out in the table below.

Name	Classification	Responsible Authority
A19(T)	Trunk Road	Highways England
A1290	Local Road	South Tyneside Council
A1290	Local Road	Sunderland Council
Washington Road	Local Road	South Tyneside Council

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<sup>1</sup> SI 2009/2264

Name	Classification	Responsible Authority
Washington Road	Local Road	Sunderland Council
Downhill Lane	Local Road	South Tyneside Council
Bridleway B46	Public Right of Way	South Tyneside Council

- 2.4 The Planning Act 2008 (“the Act”) makes a distinction between three different types of highway NSIPs as set out in section 22(1)(a)-(c): construction, alteration and improvement.
- 2.5 For a project to be a “construction” or “alteration” NSIP the area of development must be greater than the relevant limits set out in section 22(4) of the Act. An improvement NSIP is not required to show that the area of development is greater than any particular limit but must show that it is likely to have a significant effect on the environment.
- 2.6 Construction is not defined in the Act. Alteration is defined as including “*stopping up the highway or diverting, improving, raising or lowering it*” (as per section 235(1) of the Act). Improvement is defined as having the meaning in section 329(1) of the Highways Act 1980. This latter provision states that improvement is the “*doing of any act under powers conferred by Part V of [the Highways Act 1980] and includes the erection, maintenance, alteration and removal of traffic signs, and the freeing of a highway or road-ferry from tolls*”.
- 2.7 The proposed development relates to a highway (section 14(1)(h) of the Act), and in particular the proposed development is considered to be an alteration NSIP. This is because the proposed development involves raising an existing highway and improving it (in accordance with the definition of “alteration” in section 235(1) of the Act). Moreover, it involves the alteration of a highway lying wholly within England for which Highways England is the strategic highways company (section 22(1) and (3) of the Act). This highway, before and after alteration, is not a motorway but is a highway where the speed limit is over 50 miles per hour. The relevant threshold is therefore the one set at section 22(4)(b), namely that the area of development (the area of land on which the highway to be altered is situated, together with adjoining land expected be used in connection with the alteration) must be over 12.5 hectares. The area of development in this case (as shown on the land plans) is 36.81 hectares (and, for information, excluding the construction compound mentioned below, the area of development is just over 30 hectares), in excess of the threshold. Therefore, the proposed development is a highway alteration NSIP.
- 2.8 As the proposed development is an NSIP, consent under the Act is required (section 31 of the Act). Under section 37 of the Act, an order granting development consent may only be made if application for it is made (through the Planning Inspectorate) to the Secretary of State.
- 2.9 Schedule 1 to the Order contains a list of numbered works comprising the NSIP.

### **3 Associated development**

- 3.1 The Order also seeks consent for the development which would constitute associated development, and which is included in the “authorised development” listed in Schedule 1.



- 3.2 Guidance<sup>2</sup> on associated development has been issued by the Secretary of State for Communities and Local Government. 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 "*requires 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).
- 3.3 Annex B of the above-mentioned guidance listed the following as examples of associated development for highway NSIP schemes:
- a) replacement roadside facilities where this becomes necessary due to the elimination of an existing facility by highway improvement;
  - b) infrastructure associated with cycle/pedestrian access;
  - c) off-site landscaping, habitat creation and other environmental works;
  - d) off-site drainage works;
  - e) alteration/diversion/stopping up of local roads, accesses and other rights of way; and
  - f) off-site diversion of statutory undertakers' equipment.
- 3.4 However, in some cases it should be recognised that there may be some overlap, or the absence of the clear boundary, between associated development and works which form part of the NSIP. There is a danger that separating it out in the dDCO 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.
- 3.5 For this reason, and 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 NSIP and associated development works in Schedule 1 to the Order. Ultimately, 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 properly be authorised by the Order.
- 3.6 For the avoidance of doubt, the diversions of statutory undertaker equipment and apparatus required for this scheme do not constitute an NSIP in their own right.
- 3.7 In order to ensure that the authorised development and the associated development are constructed efficiently and without impediment, the Order contains the powers to carry out the works listed (a) to (o) in Schedule 1. The use of such measures was explicitly approved in the A19/A1058 Coast Road (Junction Improvement) Order 2016 and extensive provisions were used in both the A14 Cambridge to Huntingdon Improvement Order 2016 and the M4 Motorway

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<sup>2</sup> Guidance on associated development applications for major infrastructure projects

(Junctions 3 to 12) (Smart Motorway) Order 2016 and the A19/A184 Testo's Junction Alteration Order 2018.

#### **4 Ancillary Matters**

- 4.1 The Order also contains several ancillary matters, i.e. provisions not consisting of development.
- 4.2 The main ancillary matter is a power to acquire land or rights over land compulsorily or by agreement, in accordance with section 120(4) of the Act, required for the authorised development, or to facilitate, or that are incidental to the authorised development under section 122 of the Act. A justification for these powers is set out in the Statement of Reasons that accompanies the application.
- 4.3 Further to providing these powers, the order seeks to apply and modify statutory provisions that relate to the compulsory acquisition of land. Under sections 117 and 120(5) of the Act, an order containing provisions of this nature must be made by Statutory Instrument. The Order is therefore presented in that form.
- 4.4 Other ancillary matters include the stopping up of lengths of existing highways and private means of access in the vicinity of the junction, and the classification of highways.

#### **5 Draft Order**

- 5.1 The purpose and effect of the provisions of the draft Order are now explained in sequence. While the Infrastructure Planning (Model Provisions) (England and Wales) Order 2009 (S.I. 2009/2265) have been repealed, the draft Order draws on the model provisions (general and railway), as well as precedent set by development consent orders that have been made to date.

### **Part 1 – Preliminary**

#### *Article 1 – Citation and commencement*

- 5.2 Article 1 sets out the name of the Order, establishing how it may be cited in subsequent legislation. It is also the states the date on which the Order comes into force.

#### *Article 2 – Interpretation*

- 5.3 The purpose of article 2(1) is to define terms used in the remainder of the Order.
- 5.4 The following definitions are used in articles in the remainder of the Order that are typical of highway schemes:
  - a) "the 1984 Act";
  - b) "carriageway";
  - c) "cycle track": this term is used interchangeably with "cycle way" in the application documents and both are intended to have the meaning defined in this article;
  - d) "footway" and "footpath";

- e) "street";
- f) "street authority"; and
- g) "trunk road".

5.5 Other definitions to note include:

- a) "the Order land", which comprises all of the land to be acquired or used permanently or temporarily as shown on the land plans;
- b) "the Order limits", which references the extent of the area within which the authorised development may be carried out.

1.2.1 "commence" means beginning to carry out any material operation (as defined in section 56(4) of the Town and Country Planning Act 1990) forming part of the authorised development other than archaeological investigations, non-intrusive investigations for the purpose of assessing ground conditions, pre-construction ecology surveys, pre-construction ecological mitigation and works under mitigation licences, remedial work in respect of any contamination or other adverse ground conditions, erection of any temporary means of enclosure, and the temporary display of site notices or advertisements and "commences", "commenced" and "commencement" is to be construed accordingly.

This makes it clear that a number of works that would constitute a 'material operation' does not mean that the authorised development has been 'commenced'. This enables Highways England to undertake certain preparatory works prior to the submission of relevant details for approval under the requirements, which Highways England considers proportionate. The works that are excluded from the definition of commencement are either de minimis or have minimal potential for adverse impacts. They may in some cases need to be carried out in order to comply 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. These provisions are widely precedented (see for example the M20 Junction 10a Development Consent Order 2017, and the Silvertown Tunnel Order 2018).

- (a) "maintain" in relation to the authorised development includes to inspect, repair, adjust, alter, remove or reconstruct and any derivative of "maintain" is to be construed accordingly.

Highways England considers this is appropriate and has precedent in made DCOs to date, such as the A19/A1058 Coast Road (Junction Improvement) Development Consent Order 2016 and the A19/A184 Testo's Junction Alteration Order 2018.

5.6 Article 2(2) provides that a broad definition of 'rights over land' applies to the Order.

5.7 Article 2(3) provides that measurements are 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 DCO, there is no issue over whether the works are permitted by the DCO.

Thus this provision allows for a small tolerance with respect to any distances and points, although works will take place within the limits of deviation. It is common-place to include such provision in an Act or instrument authorising linear infrastructure.

- 5.8 Article 2(4) provides that areas given in the book of reference are approximate as these are not covered by article 2(3). This is intended to clarify the position of the areas in the book of reference, the purpose and effect is the same as set out in the previous paragraph.
- 5.9 Article 2(5) and 2(6) tie references to lettered / numbered points and numbered works in the Order to the rights of way and plans.

## **Part 2 – Principal powers**

### *Article 3 – Development consent etc. granted by the Order*

- 5.10 Article 3(1) grants the development consent by giving Highways England the power to construct the authorised development, which is described in Schedule 1. This article makes the consent subject to the requirements that are listed in Schedule 2.
- 5.11 Article 3(2) states that any enactment applying to land within the order limits has effect subject to the provisions of the Order. This provision ensures that the modifications made in the Order apply to any enactments that may affect the authorised development and further ensures consistency with legislation more generally. There is precedent for such a provision, for example the Secretary of State approved the same wording in the A14 Cambridge to Huntingdon Improvement Order 2016 (see article 5(2)).

### *Article 4 – Maintenance of the authorised development*

- 5.12 This article authorises Highways England to maintain the development. “Maintain” is defined in article 2(1) as including “inspect, repair, adjust, alter, remove or reconstruct”, with these terms bearing their common-sense meanings.
- 5.13 Article 4 supplements the maintenance powers under section 329 of the Highways Act 1980 and ensures that Highways England has the necessary powers to maintain the scheme. It is considered necessary and appropriate to adopt the definition, which is consistent with the A19/A184 Testo’s Junction Alteration Order 2018.
- 5.14 It should be noted that powers of maintenance are subject to other provisions in the Order, in particular article 10, which makes provision in relation to maintenance by highway authorities.

### *Article 5 – Maintenance of drainage works*

- 5.15 The purpose of this article is to make it clear that any realignment of drainage 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 drains, unless this is agreed between Highways England and the responsible party. Responsibility for maintenance of drainage works may sit with the Environment Agency, an internal drainage board, a lead local flood authority or a landowner.
- 5.16 This provision is well precedented (see for example article 4 of the A14 Cambridge to Huntingdon Improvement Order 2016 and article 5 of the A19/A184 Testo’s Junction Alteration Order 2018).

#### *Article 6 - Limits of deviation*

- 5.17 Since the authorised development involves linear works, article 6 provides for limits of deviation to allow for a lateral deviation from the lines and situations of the authorised development within the limits of deviation shown on the works plans, and vertical deviation of the linear works subject to a maximum deviation of 0.5 metres upwards or 0.5m downwards.
- 5.18 The vertical limits can be exceeded where it is demonstrated to the Secretary of State's satisfaction (and the Secretary of State has certified accordingly following consultation with the relevant planning authority) that such deviation would not give rise to any materially new or materially different environmental effects in comparison with those reported in the Environmental Statement.
- 5.19 The purpose of this provision is to provide Highways England with a proportionate degree of flexibility when constructing the scheme, reducing the risk that the scheme as approved cannot later be implemented for unforeseen reasons but at the same time ensuring that any flexibility will not give rise to any materially new or materially different environmental effects.
- 5.20 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 and the potential impacts of a deviation within the permitted limits have been assessed. Highways England 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 different environmental effects would arise.
- 5.21 The limits of deviation set out in article 6 have been developed through the design and EIA process for the authorised development; as such the article is an adaptation of the article set out in the Model Provisions and, in terms of principle, it accords with the majority of DCOs made to date (for example the A19/A184 Testo's Junction Alteration Order 2018, at article 6).

#### *Article 7 – Benefit of the Order*

- 5.22 Article 7 overrides section 156(1) of the Act (as permitted by section 156(2)) to give the benefit of the Order to Highways England rather than anyone with an interest in the land. It would be impracticable for a variety of landowners to be afforded powers to implement parts of the Order in an uncoordinated manner, which might be the case if section 156(1) were to remain.
- 5.23 Paragraph (1) is based on article 4 of the Model Provisions.
- 5.24 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. The same wording has been accepted and approved by the Secretary of State in other orders, for instance the A14 Cambridge to Huntingdon Improvement Order 2016 (see article 8(2)) and the M4 Motorway (Junctions 3 to 12) (Smart Motorway) Order 2016 (see article 7(2)).

#### *Article 8 – Consent to transfer benefit of the Order*

- 5.25 This article allows the benefit of the Order to be transferred or leased to others by Highways England. The exercise of any transferred benefits or rights is subject to the same restrictions, liabilities and obligations as would apply under the Order if those benefits or rights were executed

by Highways England. The consent of the Secretary of State is required for a transfer or grant, except where it is made to specified companies in relation to certain utility diversion works.

5.26 This article is based on article 5 of the Model Provisions.

### **Part 3 – Streets**

#### *Article 9 – Application of the 1991 Act*

5.27 Article 9 modifies the application of the New Roads and Street Works Act 1991<sup>3</sup> (the 1991 Act) to works carried out under the powers of the Order.

5.28 Paragraph (1) provides that works carried out under the powers of the Order which match the description of "major highway works" in the 1991 Act will be treated major highways works for the purposes of the 1991 Act. The effect of this is to clarify that the provisions for sharing the burden of dealing with apparatus in the street (under sections 84 and 85 of the 1991 Act), which would normally apply only to major works carried out by the highway authority, will apply in respect of the works authorised by the Order irrespective of who in fact carries them out.

5.29 "Major Highways Works" are defined at section 86 of the 1991 Act. The definition includes, at sub-sections 86(3)(b) and (f), works undertaken under powers conferred by sections 64 and 184 the Highways Act 1980. As that would not be relevant in this context (where the works will be undertaken under the powers of the Order), these sub-sections are omitted from paragraph (1)(a). Works equivalent to works undertaken under those sections of the Highways Act 1980, but carried out under powers conferred by the Order, are included through paragraph 1(b). The effect is that any works which would be "major highway works" under the 1991 Act if carried out by a highway authority in relation to one of its streets are also "major highway works" if carried out under the powers of the Order regardless of who carries them out.

5.30 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 (particularly article 3 and Schedule 1), and the provisions in the Order (including the requirements) which would regulate the carrying out of the Order works.

5.31 Paragraphs (4) to (6) apply certain provisions of the 1991 Act (listed in paragraph (5)) to any streets which are temporarily stopped up under the Order. This is for two reasons: first, it prevents any confusion as to whether works in respect of a temporarily stopped-up 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.

5.32 Paragraph (7)(a) of article 9 provides that nothing in article 10 in shall affect the ability of the local highway authority (under s.87 of the 1991 Act) to declare a street in its area a maintainable highway, which would make maintenance of the street (once completed) the responsibility of the local highway authority, and would mean that the 1991 Act would apply to street works carried out in that street.

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<sup>3</sup> c.22

- 5.33 Paragraph (7)(b) provides that Highways England will not be under the duties that apply to a “street authority” for the purposes of the 1991 Act by virtue of being responsible for the maintenance of a street under article 10.
- 5.34 Paragraph (7)(c) makes it clear that the maintenance obligations imposed by article 10 do not override the provisions of the 1991 Act that govern procedures for street works, i.e. works in streets involving the placing of or alteration to apparatus in the street. After the implementation of the Order it is appropriate that the 1991 Act should govern such works as it is specifically designed to ensure a fair and efficient procedure for the various parties affected by such works.
- 5.35 These modifications reflect those made in other highway DCOs, for example the M4 Motorway (Junctions 3 to 12) (Smart Motorway) Order 2016, the A19/A1058 Coast Road (Junction Improvement) Order 2016 and the A19/A184 Testo’s Junction Alteration Order 2018.

*Article 10 – Construction and maintenance of new, altered or diverted streets*

- 5.36 The standard position in respect of maintenance of streets is that Highways England is responsible for maintaining trunk roads. Other streets are to be maintained by the local highway authority in respect of highways maintainable at the public expense, or whichever body is responsible for the maintenance of the street in respect of streets which are not maintainable at the public expense. This is reflected in paragraphs (1) and (2). These provisions are subject to any agreement to the contrary between Highways England and the relevant street or highway authority.
- 5.37 Paragraph (3) makes specific maintenance provision in relation any new bridges carrying public rights of way over a trunk road. For these, Highways England is responsible for the maintenance of the bridge structure while the local highway authority is responsible for the maintenance of the highway surface.
- 5.38 The effect of paragraphs (4) and (5) are 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 extends the provision in s.58 of the Highways Act 1980 to Highways England and draws on the approach taken in article 21 of the A556 (Knutsford to Bowdon Improvement) Development Consent Order 2014 and repeated in in article 9 of the A19/A1058 Coast Road (Junction Improvement) Order 2016, article 12 of the M4 Motorway (Junctions 3 to 12) (Smart Motorway) Order 2016 and article 10 of the A19/A184 Testo’s Junction Alteration Order 2018.
- 5.39 While Highways England would benefit from the equivalent defence in the Highways Act 1980 in respect of trunk roads, for which it is the highway authority, the proposed development includes roads which are not trunk roads and so this article is needed to ensure Highways England is covered by this defence in respect of all the roads that comprise the authorised development.

*Article 11 – Classification of roads etc.*

- 5.40 The designation of highways and the specification of the classes of traffic authorised to use a highway, are ancillary matters which may be included in a development consent order. These matters are addressed by this article, which is integral to the implementation of the scheme,

and therefore are considered appropriate to be included in the Order as an ancillary matter under section 120(3) of the Act.

- 5.41 Article 11(1)(a) provides for the roads described in Part 1 of Schedule 3 to be trunk roads when complete and open for traffic. Article 11(1)(b) provides that the roads described in Part 2 of Schedule 3 to be classified roads from the date that they are complete and open to traffic. Article 11(1)(c) and Part 3 of Schedule 3 describes the status of non-motorised user routes provided or altered as part of the scheme. Article 11(2) ensures that the roads specified in Part 4 of Schedule 3 are able to be subject to a speed limit of 40mph.
- 5.42 The purpose of article 11(3) is to confirm that the matters covered in paragraphs (1) and (2) can be varied or revoked in the future using existing enactments for such matters, without the need to apply under the Act for an amendment to the Order.

#### *Article 12 – Temporary stopping up and restriction of use of streets*

- 5.43 This article allows for the temporary stopping up, alteration, diversion or restriction of streets for the purposes of the scheme.
- 5.44 Paragraph (2) differs from the Model Provisions and confers a power on Highways England where the use of a street has been temporarily stopped up under this article to use it as a temporary working site. This provision has precedent in a number of made development consent orders including the A19/A184 Testo's Junction Alteration Order 2018
- 5.45 Paragraphs (3) and (4) state that reasonable access for pedestrians going to or from properties abutting a temporarily stopped up or restricted street must be provided and that, where Highways England is not the street authority, consent to any such stopping up or restriction must be sought from the street authority.
- 5.46 Paragraph (5) provides a right to compensation for any person suffering loss due to the suspension of a private rights of way under this article.
- 5.47 Paragraph (6) states that where 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. It 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. The article is a standard provision in highways development consent orders (see for example, article 11 of the A19/A1058 Coast Road (Junction Improvement) Order 2016 and article 12 of the A19/A184 Testo's Junction Alteration Order 2018).

#### *Article 13 – Permanent stopping up and restriction of use of streets and private means of access*

- 5.48 This article allows streets and private means of access named in Parts 1, 2 and 3 of Schedule 4 to be stopped up (i.e. the legal right of way along them to be extinguished). In the case of Parts 1 and 2, a substitute is to be provided. In the case of Part 3, no substitute is to be provided. In the case it may not be stopped up unless one of the conditions referred to in paragraph (4) is met – in the case of the private means of access listed in Part 3 of Schedule 4, condition (c) – reasonably convenient alternative access – is met.
- 5.49 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.



- 5.50 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 also dealt with in this article and Schedule 4. The wording is based on numerous highways DCOs, see for example article 12 of the A19/A1058 Coast Road (Junction Improvement) Order 2016 and article 13 of the A19/A184 Testo’s Junction Alteration Order 2018.

#### *Article 14 – Access to works*

- 5.51 This article allows works accesses to public highways to be created. It provides Highways England with a general power to form means of access rather than accesses set out in a schedule, to provide an appropriate degree of flexibility in case the need for an access only becomes apparent at later stage in the implementation of the proposed development. These powers are equivalent to those available to Highways England when implementing schemes under the Highways Act 1980.
- 5.52 The provisions of this are broadly similar to the powers than those contained in the Highways Act 1980, 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 statutory power is subject to securing the consent of the authority which is, or will become, the highway authority for that highway. 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 and improve existing accesses as and where required, particularly in response to requests from landowners, occupiers and other affected parties.
- 5.53 This provision has precedent in a number of made development consent orders including article 14 of the A19/A184 Testo’s Junction Alteration Order 2018.

#### *Article 15 – Clearways*

- 5.54 This article makes it unlawful for road users to stop on the road except upon the direction of or with the permission of a constable or a traffic officer in uniform, or for emergency and other unavoidable reasons. The purpose is to ensure safe and proper operation of the authorised development, and to ensure the scheme delivers its intended benefits. It is therefore considered appropriate to be included in the Order as an ancillary matter under section 120(3) of the Act.
- 5.55 Such traffic regulation measures are normally made by order under the Road Traffic Regulation Act 1984, with such orders subject to consultation and publicity requirements. Inclusion within the DCO is appropriate as the consultation, publicity and examination processes within the DCO procedure provide a more than adequate substitute for the consultation and publicity requirements of traffic regulation orders.
- 5.56 The proposed restrictions sought under this article are similar to those which would apply to a clearway established under section 2 of the Road Traffic Regulations Act 1984. This provides that a traffic regulation order may make provision prohibiting, restricting or regulating the use of a road, or any part of the width of a road, by vehicular traffic, or by vehicular traffic of any class specified in the order either generally or subject to exceptions specified in the order or determined in a manner provided for it or with reference to periods of time.
- 5.57 Paragraph (4) also clarifies that paragraphs (1), (2) and (3) have effect as if made by an order under the 1984 Act, and can be varied or revoked by an order made under that act or other

enactment which provides for the variation or revocation of such orders, without the need to apply under the Act for an amendment to the Order.

- 5.58 The wording in this article has been approved and the principle of inclusion of traffic regulation measures accepted in the A19/A1058 Coast Road (Junction Improvement) Order 2016 (see article 14) and the A19/A184 Testo's Junction Alteration Order 2018 (see article 15).
- 5.59 Paragraph (5) reflects the identical insertion in the A19/A184 Testo's Junction Alteration Development Consent Order to make it clear that traffic officer means an officer designated under the Traffic Management Act 2004.

#### *Article 16 – Traffic regulation*

- 5.60 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. This draws on the approach taken in article 37 of the A556 (Knutsford to Bowdon Improvement) Development Consent Order 2014 and article 43 of the M4 Motorway (Junctions 3 to 12) (Smart Motorway) Order 2016.
- 5.61 This article would, at any time prior to 12 months following 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 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.
- 5.62 Implementation of any of the measures is subject to the prior approval of the traffic authority in whose area the roads are situated. Requirement is also made for the chief officer of police and the relevant traffic authority to be notified in advance. This complies with the consultation and publicity requirements for Traffic Regulation Orders under the Secretary of State's Traffic Orders (Procedure) (England and Wales) Regulations 1990/1656.

#### **Part 4 – Supplemental powers**

##### *Article 17 – Discharge of water*

- 5.63 This article establishes statutory authority for Highways England to discharge water into a sewer, watercourse or drain in connection with the carrying out or maintenance of the authorised development.

- 5.64 This statutory authority is subject to Highways England obtaining the consent of the owner of the sewer, watercourse or drain, but that consent cannot be withheld unreasonably.
- 5.65 Paragraph (6) requires the undertaker to take reasonably practicable steps to ensure that any water that is discharged is free from gravel, soil or other solid substance, oil or matter in suspension.
- 5.66 Paragraph (7) makes clear that this article does not obviate the need for an environmental permit for such discharge where it is relevant.
- 5.67 Paragraph (9) states that a person who fails to notify the undertaker of their decision in respect of an application for consent/approval within 28 days of the application being made is deemed to have 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 the undertaker in a timely fashion. As a nationally significant infrastructure project the authorised development should not be at risk of being held up to due to a failure to respond to an application for consent/approval.
- 5.68 This article has been included in previous Highways England orders (see for example article 18 of the M20 Junction 10a Development Consent Order 2017 and article 17 of the A19/A184 Testo's Junction Alteration Order 2018).

*Article 18 – Protective work to buildings*

- 5.69 The purpose of this article is to allow Highways England to undertake protective works to buildings affected by the authorised development. The wording has broad precedent (see article 16 of the A19/A1058 Coast Road (Junction Improvement) Order 2016 and article 18 of the A14 Cambridge to Huntingdon Improvement Order 2016). This article is necessary to make appropriate provision to carry out protective works in the unlikely event that such a need arises.

*Article 19 – Authority to survey and investigate the land*

- 5.70 This article gives Highways England the power to enter certain land for the purpose of surveying and investigating. The article provides that Highways England must give 14 days' notice before exercising the powers of entry, and that compensation is payable for any loss or damage. This, again, is a standard provision with broad precedent.

**Part 5 – Powers of acquisition**

*Article 20 – Compulsory acquisition of land*

- 5.71 This article authorises the acquisition of land by compulsory purchase. It grants the power to acquire such of that land as is required for the project. The power of acquisition over the Order Land is qualified and restricted by sub-paragraph (2), where possession of land parcels as specified in the Order may be taken temporarily only (article 29(9)).
- 5.72 The provision is necessary to secure the delivery of the scheme as set out in more detail in the Statement of Reasons accompanying the application. There is precedent for this form of article (see for example article 20 of the A19/A184 Testo's Junction Alteration Order 2018).

*Article 21 – Compulsory acquisition of land – incorporation of the mineral code*

- 5.73 This article incorporates Part 2 of Schedule 2 of the Acquisition of Land Act 1981. This means that where Highways England acquires land under the powers of the Order, it will not acquire any mineral deposits present in the land (other than those necessarily extracted or used in constructing the authorised development) unless they are expressly included in the conveyance.

*Article 22 – Time limit for exercise of authority to acquire land compulsorily*

- 5.74 This article gives Highways England five years to issue 'notices to treat' or to execute a 'general vesting declaration' to acquire the land that is subject to the power of compulsory purchase. These are the two main procedural methods by which the process of compulsorily acquiring land may be undertaken should this Order be made.
- 5.75 The article also sets a 5 year time limits on the power of Highways England to take temporary possession of land, although it does not prevent Highways England from remaining in possession of land after that time if it took possession within the 5 year limit (this has consistently been approved by the Secretary of State, see for example article 22 of the A14 Cambridge to Huntingdon Improvement Order 2016 and article 22 of the A19/A184 Testo's Junction Alteration Order 2018).

*Article 23 – Compulsory acquisition of rights*

- 5.76 This article allows for rights in land to be acquired as well as the land itself, and also for new rights to be created over land.
- 5.77 This article provides for such rights as may be required to be acquired by Highways England over land which it is authorised to acquire under article 20. The public benefit of this is that it would allow Highways England, if possible, to reduce the area of outright acquisition and rely on rights instead. A provision of this kind is usual in Transport and Works Act orders and Hybrid Bills, and has been followed in a number of DCOs for example article 23 of the A14 Cambridge to Huntingdon Improvement Order 2016.
- 5.78 Paragraph (2) provides that where Highways England needs only to acquire rights over land, it shall not be obliged to acquire any greater interest in that land.
- 5.79 Paragraph (3) and Schedule 5 impose 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 procedure applies to the additional categories of acquisition covered by the order – the creation of new rights 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). For the purpose of section 126(2) of the Act, the relevant compensation provisions are modified only to the extent necessary to ensure that they apply properly to the acquisition of rights, and not to affect the amount of compensation to which landowners would be entitled. Furthermore, the provisions have been amended so that the time limits are consistent with the Order (five years as opposed to three years) and the appropriate references to the Act.
- 5.80 The modifications are based on changes made consistently in most schemes granted under the Act, and reflect amendments to compulsory purchase legislation effected by the Housing

and Planning Act 2016. The form of drafting accords with the A19/A184 Testo's Junction Alteration Order 2018.

*Article 24 – Private rights over land*

- 5.81 In order for it to be possible to implement the authorised development, provision is needed for the extinguishment of private rights in the Order land that would be incompatible with that implementation. Article 24 supplies that provision.
- 5.82 Article 24(1) provides for the extinguishment of private rights over Order land subject to compulsory acquisition under the Order, from the moment of acquisition or occupation of that land.
- 5.83 Article 24(2) provides for the extinguishment of existing private rights over land that is subject to the compulsory acquisition of new rights (but where the underlying land is not subject to powers of compulsory acquisition), if the exercise of those existing rights is inconsistent with the implementation of the scheme, from the date of acquisition of the right or occupation of the underlying land.
- 5.84 Article 24(3) provides that rights over Order land that is already owned by Highways England are also extinguished, at the point that any activity authorised by the Order interferes with or breaches those rights.
- 5.85 Article 24(4) provides for the temporary suspension of private rights over Order land that is not acquired but is occupied temporarily by Highways England in order to construct the proposed development. The suspension is for the duration of the occupation.
- 5.86 Paragraphs (5) to (8) of article 24 make provision for compensation and for circumstances where rights are preserved.
- 5.87 Article 24(9) sets out a list of matters deemed to be private rights to provide certainty as to the scope of the article. The list of deemed private rights is broad in order to ensure that any right which could potentially interfere with the implementation of the proposed development can be extinguished. A similar list appears in the equivalent article in the A14 Cambridge to Huntingdon Improvement Order 2016 (see article 25) and the A19/A1058 Coast Road (Junction Improvement) Order 2016 (see article 24) and the A19/A184 Testo's Junction Alteration Order 2018 (see article 24).

*Article 25 - Application of Part 1 of the Compulsory Purchase Act 1965*

- 5.88 The purpose of this article is ensure consistency between the standard terms of highways development consent orders and the Compulsory Purchase Act 1965 (as amended by the Housing and Planning Act 2016) as applied by section 125 of the Act. These modifications have broad precedent in Schedule 14 to the High Speed Rail (London – West Midlands) Act 2017 and the Silvertown Tunnel Order 2018.

*Article 26 – Application of the Compulsory Purchase (Vesting Declarations) Act 1981*

- 5.89 This article applies (with minor modifications to make the provisions appropriate to the context of acquisition under powers in a development consent order) the provisions of the 1981 Act to compulsory acquisition under the Order so that Highways England has the option of acquiring Order land that is subject to the powers of compulsory acquisition by vesting declaration.

- 5.90 Vesting declarations are one of two ways of acquiring land that is subject to compulsory purchase. The other method involves serving a notice to treat on the land owner to commence the process of establishing the acquisition price, after which title in the land is transferred. The date on which title will transfer is uncertain under the notice to treat method.
- 5.91 A vesting declaration, in contrast, sets the date on which title in the land is transferred to the acquiring authority. Compensation is negotiated or determined and paid later. Vesting declarations, therefore, allow title in the land to pass to the acquirer more quickly than using the notice to treat method, and also allow several parcels to be acquired at once. Their use is subject to serving notices and observing time limits as required by the 1981 Act (as amended by the Housing and Planning Act 2016).
- 5.92 The modifications ensure consistency with the standard five year period sought under the Order for acquisition rights. It further ensures that the appropriate references are made to the Act. The modifications are based in large part on previous highways NSIPs, including following amendments to the 1981 Act in the Housing and Planning Act 2016.

*Article 27 - Acquisition of subsoil or airspace only*

- 5.93 This article allows Highways England to acquire land below the surface or above the surface, rather than having to acquire all of the land. Any subsoil or airspace acquired under this provision can only be used for the same purposes for which Highways England could have acquired any of the land. This provision allows acquisition of the minimum interest needed to deliver the authorised development.
- 5.94 The purpose of this article 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 affected landowners, and lower payments of compensation which is in the public interest. This too is a standard provision used in many highways development consent orders (see for example article 27 of the A14 Cambridge to Huntingdon Improvement Order 2016).

*Article 28 - Rights under or over streets*

- 5.95 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 full 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.
- 5.96 This article was included in the Model Provisions and the majority of DCOs made to date. It is considered that the article remains necessary for the authorised development notwithstanding the effect of the Housing and Planning Act 2016, and it was retained in the Silvertown Tunnel Order 2018. It is necessary to enable Highways England to use temporary structures to divert non-motorised user routes during the construction of the authorised development.

*Article 29 – Temporary use of land for carrying out the authorised development*

- 5.97 The purpose of this article is to allow the land set out in Schedule 6 to be occupied temporarily while the works are carried out. This is land which is required during construction of the scheme but is not required permanently. The authorisation of temporary possession prevents Highways England having to permanently acquire land which is required to construct the authorised

development but which is not needed permanently and therefore assists in minimising the interference with landowners' rights.

- 5.98 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. The article has precedent in many development consent Orders (see for example article 29 of the A19/A184 Testo's Junction Alteration Order 2018).
- 5.99 Paragraph 1(a)(i) allows the land set out in Schedule 6 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 outright permanently, and includes land which will be occupied temporarily and then subject to permanent rights (e.g. diversion of utilities apparatus). Paragraph (9) prevents this land from being acquired permanently, although confirms that acquisition of rights over this land, or of subsoil / airspace only, is not prevented and is required in respect of certain parcels. Likewise some land taken temporarily will have permanent works undertaken to it, e.g. accommodation works (see further paragraph (4)(b), and Schedule 6).
- 5.100 Paragraph 1(a)(ii) allows for the temporary occupation of any of the land that is subject to the powers of permanent acquisition, but in respect of which no process for acquisition has yet been commenced. The rationale for this is that it reduces the amount of land that is required to be subject to outright acquisition. Thus article 20 with article 29(1)(a)(ii) makes it possible for Highways England to occupy land temporarily initially and only proceed to acquire permanently that part which is necessary for the scheme as constructed. The benefits of this are lesser impacts on landowners and lower costs to Highways England, which is in the public interest. In line with this, paragraph (1)(d) confirms that the authorised development as listed in Schedule 1 can be undertaken on land that has been temporarily occupied.

#### *Article 30 – Temporary use of land for construction compounds*

- 5.101 This article provides that where Highways England is commencing works in relation to the authorised development, and the main construction compound used in relation to the A19/A184 Testo's Junction alteration scheme has not been vacated, Highways England is permitted to use that construction compound for the purposes of the Downhill Lane junction scheme. The purpose of this is to take advantage of the close proximity of the two schemes and reduce the need to use additional land and the environmental impacts associated with a standalone construction compound for the A19 Downhill Lane junction scheme.
- 5.102 Paragraph (1) makes clear that Highways England is only permitted to enter on and take possession if the construction compound has not been vacated for the purposes of the A19/A184 Testo's Junction alteration scheme. Paragraph (2) makes clear that if the Testo's construction compound is being utilised, plot 1/14b may not be used for construction activities. That plot is only required where the Testo's construction compound is not being utilised.
- 5.103 Highways England notes that the Environmental Statement has assessed both eventualities.

#### *Article 31 – Temporary use of land for maintaining the authorised development*

- 5.104 This article provides that Highways England may take temporary possession of land within the Order limits required for the purpose of maintaining the authorised development and to construct such temporary works as may be reasonably necessary for that purpose for a period of five years from the date on which that part of the authorised development is first used. Provision is made for notice and compensation. This power does not apply with respect to houses, gardens or any other buildings for the time being occupied. 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.
- 5.105 Both the A19/A1058 Coast Road (Junction Improvement) Order 2016 (see article 28) and the M4 Motorway (Junctions 3 to 12) (Smart Motorway) Order 2016 (see article 29) reflect the wording used in this article.
- 5.106 This article is required to enable Highways England to carry out maintenance and is considered appropriate as it would impose a lesser burden than permanently acquiring rights to achieve the same purpose.

#### *Article 32 – Statutory undertakers*

- 5.107 This article provides Highways England with clear statutory authority to acquire rights over land owned by statutory undertakers (i.e. utilities such as electricity and gas companies).
- 5.108 It also allows Highways England to extinguish rights that statutory undertakers have over the Order land, and to 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 impracticable to show and describe all such apparatus and so a general power for the extinguishment of rights and removal or relocation of apparatus belonging to statutory undertakers over or within any Order land is required.
- 5.109 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.
- 5.110 Paragraph (2) restricts Highways England's power to extinguish rights or move apparatus by excluding apparatus in streets. It applies alternative provisions more appropriate to balancing the interests of the various affected parties where the apparatus in question is in a street.
- 5.111 This article is subject to Schedule 7 which contains provisions for the protection of certain statutory undertakers to ensure their continued ability to carry out their functions despite the interference with their rights / apparatus required to facilitate the proposed development.
- 5.112 This article has broad precedent (see the A14 Cambridge to Huntingdon Improvement Order 2016 (see article 32), the A19/A1058 Coast Road (Junction Improvement) Order 2016 (see article 29) and the M4 Motorway (Junctions 3 to 12) (Smart Motorway) Order 2016 (see article 30).

#### *Article 33 – Apparatus and rights of statutory undertakers in stopped-up streets*



- 5.113 This article governs what happens to statutory undertakers' apparatus (pipes, cables) under streets that are stopped up by the Order. Without the article, the statutory undertaker would not have access to the apparatus, since there will no longer be a right of way along the street.
- 5.114 Under paragraph (2), the statutory undertaker may remove, relocate or replace any affected apparatus of its own volition, or must do so if it is reasonably requested by Secretary of State.
- 5.115 Under paragraph (3), the statutory undertaker would receive compensation from Highways England for any relocation works and associated costs. Paragraphs (4)-(5) discount from this compensation the cost associated with a higher specification in the replacement apparatus. Paragraph (6) discounts from this compensation the increase in value to the statutory undertaker for having new rather than old (i.e. older than 7½ years) apparatus.
- 5.116 Paragraph (7) provides that where statutory undertakers are affected by a stopping up in relation to those parts of the project that constitute "major bridge works", "major transport works" or "major highways works", as defined in the New Roads and Street Works Act 1991, the cost sharing provisions under that Act will apply instead of the compensation provision in this article.
- 5.117 This article is a standard provision for highways development consent orders (see, for example, article 30 of the A19/A1058 Coast Road (Junction Improvement) Order 2016).

#### *Article 34 – Recovery of costs of new connections*

- 5.118 This article provides that if any statutory undertaker's apparatus is removed and this cuts a service to anyone, such that they have to seek a connection to other apparatus, then the cost of establishing a new service can be claimed from Highways England. It has precedent in a number of development consent orders including article 33 of the A19/A184 Testo's Junction Alteration Order 2018.

### **Part 6 – Operations**

#### *Article 35 – Felling or lopping of trees and removal of hedgerows*

- 5.119 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 project or endanger anyone using it. Compensation is payable for any loss or damage caused. This article also allows for the removal of hedgerows as defined in the Hedgerow Regulations 1997. This article has been inserted into numerous orders (see, for example, article 36 of the A14 Cambridge to Huntingdon Improvement Order 2016).

### **Part 7 – Miscellaneous and General**

#### *Article 36 – Disapplication of legislative provisions*

- 5.120 Paragraph (1) of this article amends the A19/A184 Testo's Junction Alteration Development Consent Order 2018 (the **Testo's Order**). [The amendment is contingent on the commencement of the A19 Downhill lane scheme.](#) The purpose of these amendments, set out in Schedule 8, is to authorise the modification of plans approved in that scheme so that a proposed non-motorised user route proposed for the Testo's scheme (~~and the associated stopping up of the B46~~) is removed. A full description of the proposed change is contained in the Revised plans,

drawings and sections for the A19/A184 Testo's Junction Alteration Scheme (application document reference: TR010024/APP/7.5)

- 5.121 Schedule 8 modifies references to plans consented under the Testo's scheme so that they refer to plans in the aforementioned Revised Testo's plans, drawings and sections document submitted as part of the Scheme application. Schedule 8 also removes the descriptions of the work ~~no. 4s~~ in Schedule 1 to the Testo's Order associated with the non-motorised user route being removed, and ensures that the revised plans are certified for the purposes of the Testo's scheme
- 5.122 The Environmental Statement has assessed the removal of the proposed non-motorised user route (Work No. 4 in Schedule 1 to the Testo's Order) ~~and the maintenance (rather than alteration) of the B46 (i.e., Work No. 6 of that Order). These works have not yet been constructed, nor has the B46 been stopped up under the Testo's Order to date.~~
- 5.123 The basis for amending the A19/A184 Testo's Junction Alteration Development Consent Order 2018 is section 120 of the Planning Act 2008 which allows an order to "apply, modify or exclude a statutory provision which relates to any matter for which provision may be made in the order" and "make such amendments, repeals or revocations of statutory provisions of local application as appear... to be necessary or expedient in consequence of a provision of the order or in connection with the order." In this context, a statutory provision includes a DCO as it includes "a provision of an Act or of an instrument made under an Act" as per section 120(6) of the Planning Act 2008. For the reasons given in the Revised Testo's plans, drawings and sections document, the amendment of the Testo's order is necessary and a matter for which provision may be made in the Order.
- 5.124 ~~Highways England notes that the removal of the non-motorised user route in the A19/A184 Testo's Junction alteration scheme could be carried out under Requirement 3 in Schedule 2 to the Testo's Order if the A19 Downhill Lane Junction scheme was consented, because the alternative provision would be secured and there would be no environmentally new or environmentally adverse worse effects. In this case~~ Highways England has taken to opportunity to promote the change in the Scheme application, both for clarity and to avoid the need for two separate applications to the Secretary of State. In addition, the requirement to extinguish a further part of the B46 means that it is expedient to deal with this matter as part of the A19 Downhill Lane scheme application. This is explained in greater detail in the aforementioned Revised Testo's plans, drawings and sections document submitted as part of the Scheme application.
- 5.125 The provisions of the Neighbourhood Planning Act 2017 (the 2017 Act) have not yet commenced and the regulations required to be made under them in respect of temporary possession have not been made, with no known date for implementation. Highways England considers it appropriate to apply the existing temporary possession regime which has been included in numerous DCOs, including those made following the passing of the 2017 Act. These provisions have been the basis of the consultation with landowners and statutory undertakers. Highways England is delivering the A19/A184 Testo's Junction improvement scheme adjacent to the Scheme and the provisions under article 29 mirror the temporary possession article in the A19/A184 Testo's Junction Alteration Development Consent Order 2018. It would be disruptive to have two different regimes applying across the two schemes.
- 5.126 Accordingly, Paragraph (2) makes clear that the 2017 Act does not apply, and avoids any uncertainty concerning the future coming-in-force of the 2017 Act. The provision is precedent

and was contained in the Silvertown Tunnel Order 2018 and the A19/A184 Testo's Junction Alteration Development Consent Order 2018.

*Article 37 - Application of landlord and tenant law*

5.127 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.

*Article 38 - Operational land for the purposes of the Town and Country Planning Act 1990*

5.128 This article means that the land within the Order limits in which Highways England holds an interest shall be treated as "operational land of a statutory undertaker" for the purposes of the Town and Country Planning Act 1990.

5.129 The effect of that Order land being treated as operational land is that the person responsible for operating and maintaining the proposed development (Highways England or any transferee of its powers) will benefit from certain permitted development rights on that land in connection with the operation of the road. Article 38 of the A19/A184 Testo's Junction Alteration Order 2018 followed the same approach.

*Article 39 – Defence to proceedings in respect of statutory nuisance*

5.130 Section 158 of the Act confers statutory authority for the purposes of a defence in statutory nuisance generally, subject to any contrary provision made by a particular DCO. This article is such a contrary provision, amending the terms of the defence in the case of noise nuisance (other types of nuisance continue to have the general defence afforded by s158).

5.131 The defence is available if the noise relates to:

- a) the construction or maintenance of the project, and is in accordance with any controls imposed by the local authority under the Control of Pollution Act 1974, or cannot reasonably be avoided; or
- b) the use of the project and cannot reasonably be avoided.

5.132 This is an article has precedent in recent highway orders made, for example article 38 of the M4 Motorway (Junctions 3 to 12) (Smart Motorway) Order 2016 and is necessary to clarify the scope of the defence of statutory authority arising from the grant of the Order.

*Article 40 – Protection of interests*

5.133 This article simply gives effect to Schedule 7, which contains provisions protecting the interests of third parties. This schedule is based on the standard protective provisions approved by the Secretary of State in the A14 Cambridge to Huntingdon Improvement Order 2016 and the M4 Motorway (Junctions 3 to 12) (Smart Motorway) Order 2016. Highways England has sought the views of the undertakers who have interests affected by the authorised development and continues to negotiate with the undertakers to ensure any concerns are dealt with appropriately. Highways England will provide a full update of the status of the negotiations throughout the examination.

*Article 41 – Certification of documents etc.*

- 5.134 This article provides for various plans and other documents (including those listed in Schedule 9 and the revised plans associated with the A19/A184 Testo's Junction scheme) to be certified by the Secretary of State.

#### *Article 42 – Service of notices*

- 5.135 This article governs how any notices that may be served under the order shall be deemed to have been served properly. In particular it allows service by email with the consent of the recipient, and deals with the situation of service on an unknown landowner.
- 5.136 It is common to have such an article in an order authorising development such as this. The article has precedent in a number of DCOs including the A14 Cambridge to Huntingdon Improvement Order 2016 (see article 42).
- 5.137 The provision is useful because it provides clarity on the issue. It is noted that the service of notice provisions under sections 229 and 230 of the Act apply to notices served under that Act rather than notices served under a development consent order made under that Act.

#### *Article 43 – Arbitration*

- 5.138 This article governs what happens when two parties disagree in the implementation of any provision of the order. The matter is to be settled by arbitration, and if the parties cannot agree on who the arbitrator should be, this is decided by the President of the Institution of Civil Engineers. Precedent is provided by most DCOs, including article 42 of the A19/A184 Testo's Junction Alteration Order 2018.

## **6 Schedule 2 - Requirements**

- 6.1 The requirements in Schedule 2 are the equivalents of planning conditions. They reflect the processes and procedures usually employed by Highways England when implementing a scheme such as this. Approvals are to be sought from the Secretary of State for Transport, following consultation with the local planning authority and / or other relevant third party. Again, this is consistent with the processes and procedures employed by Highways England when implementing a scheme such as this.
- 6.2 The requirements in Schedule 2 provide that the various schemes, details and plans to be approved must reflect the mitigation measures set out in the Register of Environmental Actions and Commitments ("REAC", at appendix 1.2 of the Environmental Statement) which contains all of the mitigation commitments made in the Environmental Statement. This is the mechanism to ensure that environmental mitigation is secured by the Order, and the approach here is consistent with other DCOs which have been made. Further, the requirements provide that the approved schemes, details and plans must be implemented as approved, unless the Secretary of State approves further amendments to them.
- 6.3 It should be noted that the requirements mirror those approved in the nearby A19/A184 Testo's Junction Alteration Order 2018. Turning to the purpose and effect of requirements 1 to 12:
- a) Requirement 1 contains a number of definitions used in Part 1 of Schedule 2.
  - b) Requirement 2 provides that the authorised development must not commence later than 5 years from the date of the Order coming into force.

- c) The effect of Requirement 3(1) is that where the authorised development is carried out, it must be carried out in accordance with the scheme design shown on the engineering drawings and sections unless otherwise agreed in writing by the Secretary of State provided that any amendments to the engineering drawings and sections showing departures from the preliminary scheme design would not give rise to any materially new or materially different environmental effects in comparison with those reported in the environmental statement.
- d) Requirement 4 requires the preparation of a construction environmental management plan ("CEMP") in consultation with the relevant planning authority and for its approval by the Secretary of State. The CEMP will be based substantially on the outline CEMP prepared as part of the scheme application. The CEMP will fulfil the construction-related objectives and measures as outlined in the REAC and must be in accordance with ISO14001. Further details of what must be contained in the CEMP are set out in sub-paragraph (2). Following the construction of the authorised development, the CEMP will be replaced by a Handover Environmental Management Plan ("HEMP") which will address the matters set out in the approved CEMP that are relevant to the operation and maintenance of the authorised development. Further details of what must be contained in the HEMP are set out in sub-paragraph (5).
- e) Requirement 5 requires the preparation of a landscaping scheme covering all hard and soft landscaping works for approval by the Secretary of State. There is a requirement that the proposed landscaping scheme must reflect the relevant mitigation measures in the REAC and must be based on the illustrative Environmental Masterplan annexed to the Environmental Statement. Further details of what must be contained in the landscaping scheme are set out in sub-paragraph (3).
- f) Requirement 6 makes provision for dealing with any contaminated land and groundwater discovered during construction of the works, in consultation with the relevant planning authority and the Environment Agency.
- g) Requirement 7 states Highways England must carry out final pre-construction survey work to establish whether European or nationally protected species are present on any of the land affected or likely to be affected by any part of the relevant works, or in any of the trees and shrubs to be lopped or felled as part of the relevant works.

Where, following pre-construction survey work or at any time when carrying out the authorised development the conditions listed in sub-paragraph (2) are met then the relevant parts of the relevant works must not begin until a scheme of protection and mitigation measures has been submitted to and approved in writing by the Secretary of State. Consultation with Natural England is required unless a qualified ecologist determines that the works in question do not require a protected species licence.

- h) Requirement 8 provides that no part of the authorised development can commence until written details of a surface and foul water drainage system, reflecting the mitigation measures in the REAC and including means of pollution control, have been prepared in consultation with the relevant planning authority and approved in writing by the Secretary of State.

- i) Requirement 9 requires Highways England to retain in situ any archaeological remains it discovers during the construction of the authorised development which have not previously been identified, and report these to the local planning authority. Temporary limitations are then placed on construction activity within 10 metres of the archaeological remains to allow assessment of whether further investigation is required. If so, the investigation and recording of the remains must be undertaken in accordance with a written scheme approved by the local planning authority.
  - j) Requirement 10 provides that no authorised development can commence until a traffic management plan has been prepared and approved by the Secretary of State following consultation with the relevant planning authority.
  - k) Requirement 11 makes clear that where the authorised development must be carried out in accordance with approved details / schemes, those details / schemes are taken to include any subsequent amendments that are approved or agreed in writing by the Secretary of State.
  - l) Requirement 12 provides that permanent and temporary fencing must be constructed and installed in accordance with Volume 1, Series 0300 of the Manual of Contract Documents for Highway Works.
- 6.4 Part 2 of Schedule 2 (Requirements 13-16) 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. Part 2 as drafted reflects the discharge of requirements provisions approved in previous “made” DCOs including the A19/A184 Testo’s Junction Alteration Order 2018.
- 6.5 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.