

**THE A303 (AMESBURY TO BERWICK DOWN)  
DEVELOPMENT CONSENT ORDER 202[\*]**

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**EXPLANATORY MEMORANDUM**

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**1. SUMMARY**

1.1 This explanatory memorandum has been prepared to explain the purpose and effect of the provisions of the draft A303 (Amesbury to Berwick Down) Development Consent Order 202[\*] ("**the Order**"), in accordance with regulation 5(2)(c) Infrastructure Planning (Applications: Prescribed Forms and Procedure) Regulations 2009. This document should be read alongside the Order and the other documents submitted in respect of this application for the Order.

**2. PURPOSE OF THE ORDER**

*Nationally Significant Infrastructure Project – construction of a highway*

2.1 Highways England Company Limited ("**Highways England**") is the strategic highways company appointed by the Secretary of State under section 1 of the Infrastructure Act 2015 by virtue of The Appointment of a Strategic Highways Company Order 2015. Highways England has made an application pursuant to the Planning Act 2008 ("the 2008 Act") to the Secretary of State for a development consent order for the construction, operation and maintenance of the A303 (Amesbury to Berwick Down) (referred to in the Order as "the authorised development").

2.2 The A303 Amesbury to Berwick Down scheme ("the Scheme") forms part of a programme of improvements for upgrading the A303/A358 corridor, improving this vital connection between the South West and London and the South East and including the upgrade of remaining single carriageway sections on the route to dual carriageway. This investment is stated as a priority project in the National Infrastructure Plan and Government's commitment is confirmed in the Road Investment Strategy (2015-2020). Subject to achieving an approved Development Consent Order ("DCO"), preliminary works are planned to start in 2020 with the main construction works following in 2021, and the Scheme is due to open to traffic in 2026.

2.3 Objectives for the Scheme have been formulated both to address identified problems and to take advantage of the opportunities that new infrastructure would provide. The objectives are defined by the Department for Transport ("DfT"):

- **Transport** - To create a high quality reliable route between the South East and the South West that meets the future needs of traffic;
- **Economic Growth** - to enable growth in jobs and housing by providing a free flowing and reliable connection between the South East and the South West.
- **Cultural Heritage** - To help conserve and enhance the World Heritage Site and to make it easier to reach and explore; and

- **Environment and Community** - To improve biodiversity and provide a positive legacy for nearby communities.

2.4 The objectives would be achieved by providing a high quality, two-lane dual carriageway on the A303 trunk road between Amesbury and Berwick Down in Wiltshire. The Scheme would resolve traffic problems and, at the same time, protect and enhance the Stonehenge, Avebury and Associated Sites World Heritage Site (“WHS”). The Scheme would be approximately 8 miles (13km) long and comprise the following key components:

- a) A northern bypass of Winterbourne Stoke with a viaduct over the River Till valley;
- b) A new junction between the A303 and A360 to the west of and outside the WHS, replacing the existing Longbarrow roundabout;
- c) A tunnel approximately 2 miles (3.3km) in length past Stonehenge; and
- d) A new junction between the A303 and A345 at the existing Countess roundabout.

2.5 The scheme is a nationally significant infrastructure project (“NSIP”) within sections 14(1)(h) and 22(1)(a) of the Planning Act 2008. Under section 22 an NSIP must fall within one of the three categories specified, which are expressly stated to be alternatives. This scheme is the “construction” of a highway within the meaning of section 22(1)(a). The scheme satisfies section 22(2) in that the highway will (when constructed) be wholly located in England, Highways England as strategic highways company will be the highway authority for the highway and the area of development is greater than the relevant limit set out in subsection (4), which in this case is 12.5 hectares, as speed limits will be in excess of 50mph.

2.6 As the proposed development is an NSIP, development consent must be obtained from the Secretary of State to authorise it, and an application for a development consent order must be made to the Secretary of State, care of the Planning Inspectorate, under section 37 of the 2008 Act.

*Associated development*

2.7 The Order also specifically authorises development which is associated with the NSIP. The Secretary of State may, under the provisions of section 115 of the 2008 Act, grant consent for development that is associated with the NSIP.

2.8 Guidance on associated development has been issued by the Secretary of State for Communities and Local Government<sup>1</sup>. 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).

2.9 In some cases there may be some overlap, or the absence of a clear boundary, between associated development and works which form part of the NSIP. There is a danger that separating it out in the Order could potentially lead to an error defining it one way or another incorrectly, given this potential for overlap between the two

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<sup>1</sup> “Guidance on associated development applications for major infrastructure projects” (Department for Communities and Local Government) (April 2013)

categories. For instance, there may be some on-highway, and some off-highway, diversion of the same piece of statutory undertaker equipment.

2.10 Noting that there is no requirement for a development consent order to distinguish between these two categories, Highways England has therefore chosen not to differentiate the NSIP and associated development works in Schedule 1 to the Order. 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.

2.11 In order to ensure that the authorised development is constructed efficiently and without impediment, the Order contains the powers to carry out the ancillary works listed (a) to (b) 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 Scheme Development Consent Order 2016 and the Silvertown Tunnel Order 2018.

### 3. **ANCILLARY MATTERS**

3.1 The draft Order also contains several ancillary matters, i.e. provisions not consisting of development.

3.2 The draft Order seeks to apply and modify statutory provisions in relation to the compulsory acquisition of land. It is for this reason that under sections 117 and 120(5) of the 2008 Act the Order must be made by way of Statutory Instrument. The draft Order is therefore in that form.

3.3 Other ancillary matters include the diversion and stopping up of lengths of existing highways in the vicinity of the route, the classification and re-classification of highways including the trunking and de-trunking of sections of highway, the application of speed limits, the stopping up of private means of access and the creation of new private means of access, and the application and disapplication of legislation relating to the project.

### 4. **DRAFT ORDER**

4.1 The purpose and effect of the provisions of the draft Order are now explained in sequence. Whilst the Infrastructure Planning (Model Provisions) (England and Wales) Order has lapsed, the draft Order is based on those model provisions (general and railway), as well as precedents in development consent orders that have been made to date.

### 5. **PART 1 – PRELIMINARY**

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

5.1 Article 1 sets out the name of the Order.

#### *Article 2 – Interpretation*

5.2 The purpose of article 2(1) is to define terms used in the remainder of the Order.

5.3 The following definitions in particular have been included due to the nature of the scheme:

5.3.1 "the 1984 Act";

5.3.2 "bridleway";

5.3.3 "byway open to all traffic";

- 5.3.4 “carriageway”;
  - 5.3.5 “footway” and “footpath”;
  - 5.3.6 “restricted byway”;
  - 5.3.7 “special road”; and
  - 5.3.8 “trunk road”.
- 5.4 Other definitions to note include:
- 5.4.1 “commence” which makes clear that a number of works that would constitute a ‘material operation’ under the Town and Country Planning Act 1990 do not mean that the authorised development has been ‘commenced’. This enables the undertaker to undertake certain preparatory works prior to the submission of relevant details for approval under the requirements, which the undertaker 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). The undertaker 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.
  - 5.4.2 The definition of commence used is tailored to the requirements of the Scheme but the principle of excluding the listed activities that have minimal potential for adverse impacts or are de minimis is widely precedented (see for example the M20 Junction 10a Development Consent Order 2017, the Silvertown Tunnel Order 2018, the East Anglia ONE Offshore Wind Farm Order 2014 and the East Anglia THREE Offshore Wind Farm Order 2017).
  - 5.4.3 “maintain” which includes inspect, repair, adjust, alter, remove or reconstruct and any derivative of maintain (see paragraph 6.3 below). 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. Indeed the definition does not go as far as other DCOs such as the Norfolk County Council (Norwich Northern Distributor Road (A1067 to A47(T))) Order 2015 and Thames Water Utilities Limited (Thames Tideway Tunnel) Order 2014. In the context of the Scheme it is important for Highways England to be able to undertake all the elements of maintenance that are included within this definition which is discussed further at paragraph 6.3;
  - 5.4.4 “the Order land” refers to land which is shown coloured pink, hatched pink, coloured grey and coloured blue on the land plans, and which, respectively, comprises the land which Highways England can permanently acquire; the land in which Highways England can acquire subsoil and create and acquire new rights above that subsoil; the special category land that Highways England can acquire; and the land over which Highways England can create and permanently acquire new rights;
  - 5.4.5 “Order limits” references the Order limits as shown on the works plans and land plans - the extent of the area within which the authorised development may be carried out; and
  - 5.4.6 “tunnel area” includes both “the tunnel” and “the tunnel approaches” which are also both defined in article 2. All of these definitions stem from the

“tunnel area plan” (application document reference 2.15) that sets out the extent of the tunnel area. Highways England has defined these elements by reference to where it considers it appropriate (and indeed necessary) for control measures, such as the byelaws, to apply. The drafting of these definitions is based on similar drafting in the Silvertown Tunnel Order 2018.

- 5.5 Paragraph (2) explains the definition of rights over land and clarifies the purpose of the power within the Order to impose restrictive covenants.
- 5.6 Paragraph (3) expands the definition of rights over land to enable new rights to be created and acquired for the benefit of persons other than the undertaker, or for the benefit of land adversely affected by the Order.
- 5.7 Paragraph (4) defines measurements as 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 Order, there is no issue over whether the works are permitted by the Order. The provision allows for a small tolerance with respect to any distances and points, although all works are to take place within the limits of deviation where these apply, and within the Order limits in any event. It is commonplace to include such provision in legislation authorising linear infrastructure see, for example, the M1 Junction 10a (Grade Separation) Order 2013 at article 2(3), the Lancashire County Council (Torrisholme to the M6 Link (A683 Completion of Heysham to M6 Link Road)) Order 2013 at article 2(3) and the A19/A1058 Coast Road (Junction Improvement) Development Consent Order 2016 at article 2(3).
- 5.8 Paragraph (5) provides that areas given in the book of reference, in relation to plot numbers, are approximate, since these are not covered by article 2(4). This is intended to clarify the status of the area measurements in the book of reference, and the purpose and effect of the term ‘approximately’ in this context is the same as set out in the previous paragraph. The term ‘approximately’ is required to be read in to all plot area measurements in the book of reference, as these measurements are given in square metres, and each measurement is rounded up to the nearest whole square metre.
- 5.9 Paragraphs (6) and (7) tie references to lettered/numbered plots and reference points and numbered works in the Order to the relevant plans.

#### *Article 3 – Disapplication of legislative provisions*

- 5.10 This article provides (in reliance on section 120(5)(a) of the 2008 Act (what may be included in order granting development consent)) for the disapplication of certain requirements which would otherwise apply under public general legislation. Section 120(5)(a) provides that an order granting development consent may apply, modify or exclude a statutory provision which relates to any matter for which provision may be made in the Order.

#### Consents

- 5.11 The article also provides for the disapplication of various additional consents or permits during construction which would otherwise be required.
- 5.12 Specifically, sub-paragraph (1)(a) disapplies section 28E (duties in relation to sites of scientific interest) of the Wildlife and Countryside Act 1981. Section 28E imposes duties on owners and occupiers of land notified as being of special interest to refrain from activities specified in a notice given by Natural England unless those operations are carried out as part of a management agreement or with the consent of Natural England. The disapplication of this provision is necessary to ensure that notification of a proposed SSSI will not impede the delivery of this nationally significant infrastructure project. Highways England consider that this is justified as the Scheme has been subjected to extensive environmental impact assessment, wide ranging public

consultation and will be subject to a public examination during which such matters have and will be addressed. Suitable controls to protect sites of special scientific interest are contained in the Outline Environmental Management Plan (“OEMP”) and are secured by the requirements of the Order. The imposition of the further duties under section 28E would be inappropriate in the context of this nationally significant infrastructure project, if approved. Consent under section 28E of the Wildlife and Countryside Act 1981 is not a consent prescribed for the purposes of section 150 of the Planning Act 2008. The disapplication of this provision has precedent in the A14 Cambridge to Huntingdon Improvement Scheme Development Consent Order 2016.

- 5.13 Sub-paragraphs (1)(b) to (g) provide for the disapplication of consents ordinarily required from the Environment Agency, under the Environmental Permitting (England and Wales) Regulations 2016 (“the EP Regulations”) and the Water Resources Act 1991, and the lead local flood authority in respect of the Land Drainage Act 1991.
- 5.14 Specifically, these are the requirements for consents in respect of a ‘flood risk activity’ under the EP Regulations, and for abstractions, together with the requirements for approval under flood defence byelaws made, or deemed to have been made, under the Water Resources Act 1991. These are consents for activities which may be a necessary part of constructing the authorised development. To provide certainty that the Scheme can proceed, the Order disapplies the requirement for a separate statutory consent to be obtained from the Environment Agency in relation to these activities. The requirement for a separate consent will be replaced by protective provisions for the protection of the drainage authorities in Part 3 of Schedule 11.
- 5.15 In accordance with section 150 of the Act, the consent of the Environment Agency and of the lead local flood authority to the inclusion of these provisions in the Order will be required and accordingly, the consent of these “relevant bodies” (for the purposes of section 15 of the Act) is being sought by Highways England.
- 5.16 A disapplication is also sought in respect of the temporary possession provisions of the Neighbourhood Planning Act 2017. This is required as the relevant sections of the Neighbourhood Planning Act 2017 have not been brought into force and subsidiary regulations to that Act have not yet been made, and there is therefore no certainty as to the requirements of the new temporary possession regime. As such, this enables the temporary possession regime created by this Order to be applied. This approach has recently been accepted by the Secretary of State in the Silvertown Tunnel Order 2018.

#### CIL Regulations

- 5.17 Paragraph (2) in effect disapplies the Community Infrastructure Levy Regulations 2010, by making clear that any building comprised in the authorised development is to be deemed to be of a type that does not trigger liability for payment of the Community Infrastructure Levy.

## 6. **PART 2 – WORKS PROVISIONS**

### *Article 4 – Development consent, etc. granted by the Order*

- 6.1 This article confers the principal power to construct and operate the authorised development. Schedule 1 describes the elements of the authorised development. Development consent is subject in particular to the requirements listed in Schedule 2.
- 6.2 Paragraph (2) has precedent in previous DCOs such as the A14 Cambridge to Huntingdon Improvement Scheme Development Consent Order 2016 and the Silvertown Tunnel Order 2018. It is required to ensure that other schemes or legislation that affect land within the Order limits, or land adjacent to the Order limits, have to take account of the Order. The provision is necessary in this case firstly to ensure that any future enactments affecting land within the Order limits take account

of the Order and secondly to ensure that the historic and redundant Georgian and Victorian instruments authorising turnpike roads in the county of Wiltshire do not adversely affect the Scheme.

#### *Article 5 – Maintenance of the authorised development*

- 6.3 This article sets out the scope within which Highways England may maintain the development. The definition of “maintain” is contained in article 2(1) and matches that which has been approved by the Secretary of State in the making of previous highway development consent orders (see for example the A14 Cambridge to Huntingdon Improvement Scheme Development Consent Order 2016 and more recently the A19/A184 Testo’s Junction Alteration Development Consent Order 2018). Highways England considers it to be appropriate and acceptable to adopt the same definition for this Scheme. The various elements of the definition (“inspect, repair, adjust, alter, remove or reconstruct”) would bear their common sense meanings and would allow Highways England to undertake all types of works reasonably associated with maintenance, as the definition in the Highways Act 1980 is limited to “repair”. “Adjust” and “alter” are necessary constituents of “maintain” in order to provide the ability to carry out minor corrective works as part of routine maintenance. Maintenance of the authorised development, within the meaning that would be authorised by this article, has been assessed in the environmental statement.
- 6.4 It should be noted that powers of maintenance are subject to other provisions in the Order, in particular article 9 (construction and maintenance of new, altered or diverted streets and other structures), which makes provision in relation to maintenance by highway authorities.

#### *Article 6 – Planning permission*

- 6.5 This article permits certain development authorised by a planning permission granted under the Town and Country Planning Act 1990 that is within the Order limits to be carried out pursuant to the terms of the planning permission without breaching the Order. This provision is not a model provision, but ensures that Highways England does not breach section 161 of the 2008 Act in carrying out certain development pursuant to a grant of planning permission. This article has precedent in the M20 Junction 10a Development Consent Order 2017.

#### *Article 7 – Limits of deviation*

- 6.6 The authorised development involves linear and non-linear works. Linear works are shown on the works plans by way of a centre line (shown as a green dashed line). The areas within which non-linear works are to be delivered are also shown on the works plans, edged with a dashed blue line. This article provides for limits of deviation both laterally (by reference to the Order limits and to the centre lines shown on the works plans), vertically (by reference to the levels shown on the engineering section drawings (plan and profiles) and the engineering section drawings (cross sections)) and for the variation of the commencement and termination points of the numbered works.
- 6.7 Paragraph (2) provides that non-linear works comprised in the authorised development may deviate laterally within the limits of deviation shown by the dashed blue line denoting non-linear works on the works plans.
- 6.8 Paragraph (3)(a) permits the centre line of linear works constructed under the Order to deviate from the centrelines shown on the works plans by a maximum of 3 metres. Paragraph (3)(b) provides for the lateral limits of deviation for Work No.1F to be by reference to the Order limits rather than the centreline shown on the works plans. Paragraph (3)(c) provides that Work No. 6(a) (the conversion of the existing A303 to be de-trunked under this Order and converted to a restricted byway) must be carried out within the carriageway and verges of the existing A303.

- 6.9 Paragraph (4) provides for the vertical limits of deviation by reference to the levels shown on the engineering section drawings (plan and profiles) and the engineering section drawings (cross sections). Paragraphs (4)(a) and (b) permit an upwards vertical deviation of 0.5 metres and a downwards vertical deviation of 1 metre, save in the case of the numbered works listed in the table in paragraph (4), where different vertical limits of deviation are specified in respect of certain numbered works or parts of numbered works.
- 6.10 Paragraph (5) provides for the vertical limits of deviation for Work No.1F (the bored tunnel) which may deviate vertically upwards to the upper limit of deviation for the crown of the tunnel and the upper limit of the finished road levels, as shown on the tunnel limits of deviation plan, and to any extent downwards.
- 6.11 Paragraph (6) provides for the disapplication of the vertical limits of deviation specified in paragraphs (4) and (5) where the Secretary of State certifies that a deviation in excess of those vertical limits would not give rise to any materially new or materially worse adverse environmental effects in comparison with those reported in the environmental statement.
- 6.12 Paragraph (7) allows for a deviation of the commencement and termination points of the linear works by up to 3 metres, and, in the case of the works listed in the table (which relate to each end of the tunnel), different limits of deviation, which would enable a proportionate degree of extension to the length of the tunnel in either a generally westerly or easterly direction, are permitted as specified in that table.
- 6.13 The purpose of this article is to provide Highways England with a necessary but proportionate degree of flexibility when constructing the authorised development, reducing the risk that the authorised development as approved cannot later be implemented for reasons which, at the time the application was made and the development consent was granted, could not reasonably have been foreseen. It also gives a proportionate amount of flexibility for the detailed design of the scheme, within the set limits.
- 6.14 The limits of deviation set out in article 7 have been developed through the design and EIA process for the Scheme; 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.

#### *Article 8 – Application of the 1991 Act*

- 6.15 This article provides for the application of the New Roads and Street Works Act 1991 (defined in article 2 as “the 1991 Act”). There is precedent for these provisions in respect of the development consent orders granted for other major highways schemes, for example The A14 Cambridge to Huntingdon Improvement Scheme Development Consent Order 2016 and The A556 (Knutsford to Bowdon Improvement) Development Consent Order 2014.
- 6.16 Paragraphs (1) and (2) provide that certain works carried out under the authority of the Order are to be “major highway works” for the purposes of the 1991 Act. The effect of this is to clarify that the cost-sharing provisions relevant to the diversion of utility apparatus (which would apply to such works under the 1991 Act if 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.
- 6.17 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 4 and

Schedule 1), and the specific provisions in the Order which would regulate the carrying out of the Order works.

- 6.18 Paragraphs (4) to (6) apply certain provisions of the 1991 Act (listed in paragraph (5)) to streets which are to be 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.
- 6.19 Paragraph (7)(a) provides that nothing in article 9 of the Order (which provides that the streets constructed, altered or diverted under the Order are to be maintained by the local highway authority) affects the ability of the local highway authority (under s.87 of the 1991 Act) to apply Part 3 of the 1991 Act to such streets in advance of those streets becoming publicly maintainable. Paragraph (7)(b) limits the operation of article 9 to off-street works.
- 6.20 The provision is required in order to clarify the treatment of the authorised works in relation to streets for the purposes of the New Roads and Street Works Act 1991 and is essential to ensure the timely delivery of this nationally significant infrastructure project.

*Article 9 – Construction and maintenance of new, altered or diverted streets and other structures*

- 6.21 The purpose and effect of this article is as follows:
- 6.21.1 Under the Highways Act 1980 and the Appointment of a Strategic Highways Company Order 2015 Highways England is the highway authority for, and therefore is responsible for maintaining, trunk roads, including those to be provided as part of the Scheme. For any other streets paragraphs (1), (2), (3), (4) and (5) specify the body that will be liable for maintenance. Liability for maintenance would transfer to the local highway authority (for new public highways constructed, altered or diverted) and to the street authority (for all other streets constructed, altered or diverted) on completion of the works. Where a footpath or bridleway is altered or diverted along a vehicular private means of access, liability for maintenance lies with the person with the benefit of the vehicular private means of access. In the case of the de-trunked sections of road under the Order, maintenance liability would transfer from the date of de-trunking. Maintenance liability for such de-trunked sections is transferred to the local highway authority and the works must be completed to the local highway authority's reasonable satisfaction. Paragraphs (1), (2), (3), (4) and (5) allow Highways England to make alternative agreements with the local highway (or street) authority concerned.
- 6.21.2 Paragraphs (1), (2), (3) and (5) are subject to paragraphs (6) to (8) inclusive, which make specific maintenance provision in relation to new bridges carrying public and private rights of way.
- 6.21.3 The effect of paragraphs (9) and (10) is 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.
- 6.22 This article has precedent in the A14 Cambridge to Huntingdon Improvement Scheme Development Consent Order 2016 and similar provisions have appeared in other highways development consent orders. The provision is necessary to clarify

maintenance liabilities following the completion of streets comprised in the authorised development.

*Article 10 - Permanent stopping up of streets and private means of access*

- 6.23 This article allows streets and private means of access named in Parts 1, 2, 3, and 4 of Schedule 3 to be stopped up (i.e. the legal right of way along them to be extinguished).
- 6.24 For the streets and private means of access to be stopped up as specified in Parts 1 and 3 of the Schedule, a substitute street is to be provided. The existing street or private means of access cannot be stopped up until either the street authority is satisfied that the new street or private means of access is fit for purpose, or a temporary street or private means of access is made available while the existing one is stopped up and before the new street or private means of access is ready.
- 6.25 For the streets or private means of access to be stopped up as specified in Parts 2 and 4 of Schedule 3, no substitute street or private means of access is to be provided. Such a street or private means of access may not be stopped up unless the conditions referred to in paragraph (4) are met in relation to all the land which abuts either side of the street to be stopped up.
- 6.26 The article has precedent in other made highways DCOs and is required for this Scheme to make appropriate adjustments to the surrounding highway network and to make provision for private means of access that are affected by the Scheme.

*Article 11 – Temporary stopping up of and restriction of use of streets*

- 6.27 This article allows for the temporary stopping up, alteration, diversion or restriction of streets for the purposes of the authorised development, whilst ensuring that pedestrian access is provided.
- 6.28 Paragraph (2) 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, a provision which has precedent in a number of development consent orders for example the A556 (Knutsford to Bowdon Improvement) Development Consent Order 2014 and the A14 Cambridge to Huntingdon Improvement Scheme Development Consent Order 2016. Subject to article 59 (consents, agreements and approvals) the consent of the street authority is required where Highways England is not the street authority.
- 6.29 The article is required for the Scheme to enable appropriate management of traffic for the purposes of carrying out the Scheme.

*Article 12 – Access to works*

- 6.30 This article allows works accesses to public highways to be created. It would give Highways England a general power to form means of access, the intention being to provide equivalent powers to those available for schemes authorised under the Highways Act 1980.
- 6.31 Originally envisaged by the Model Provisions, this wording has been used in Orders such as the Northumberland County Council (A1-South East Northumberland Link Road (Morpeth Northern Bypass)) Development Consent Order 2015 and the Silvertown Tunnel Order 2018.

*Article 13 - Discharge of water*

- 6.32 This article sets out the circumstances in which Highways England is entitled to discharge water into a sewer, watercourse or drain, and its purpose is to establish statutory authority for doing so.
- 6.33 The effect of this article is that discharge can only be done with the consent of the owner, but consent cannot be withheld unreasonably.
- 6.34 Paragraph (6) makes clear that this article does not obviate the need for an environmental permit for such discharge where this is relevant.
- 6.35 This article has precedent in many DCOs, including, for example, the A14 Cambridge to Huntingdon Improvement Scheme Order 2016 and is necessary for this Scheme in order to establish and regulate Highways England's authority to discharge water.

*Article 14 – Protective works to buildings*

- 6.36 The purpose of this article (which is included in the Model Provisions and the majority of made DCOs to date) is to allow Highways England to undertake protective works such as underpinning to buildings affected by the authorised development and to set out the procedure that will apply in those circumstances.
- 6.37 Paragraph (4)(b) provides that Highways England is authorised to enter and survey (and monitor) land lying outside the Order limits but which is adjacent to a building (or the curtilage of a building) in respect of which Highways England has the power to undertake protective works, should it be necessary or expedient. This is because certain buildings that may require protective works are on the edge of the Order limits, and it is considered necessary to include the power to be able to access land to undertake survey and monitoring work outside of the Order limits on land adjacent to these buildings to ensure sufficient access, should it be necessary.
- 6.38 Paragraph (4) provides Highways England with a power to take possession, or to take exclusive possession, where reasonably required, for the purpose of carrying out protective works.
- 6.39 Paragraph (10) applies section 13 of the Compulsory Purchase Act 1965, thereby providing an enforcement mechanism (by way of a warrant) where entry onto, or possession of, land under the article is refused.
- 6.40 The article is necessary to make appropriate provision to carry out protective works in the unlikely event that the need to do so arises.

*Article 15 – Authority to survey and investigate land*

- 6.41 This article gives Highways England the power to enter certain land for the purpose of surveying and testing. It provides that Highways England must give 14 days' notice before exercising the power of entry, and that compensation is payable for any loss or damage caused.
- 6.42 Paragraph (6) applies section 13 of the Compulsory Purchase Act 1965, thereby providing an enforcement mechanism (by way of a warrant) where entry onto land under the article is refused.
- 6.43 Paragraphs (1) to (5) have precedent in the Model Provisions and the majority of made DCOs to date. Paragraphs (6) and (7) have precedent in the A14 Cambridge to Huntingdon Improvement Scheme Development Consent Order 2016. The drafting in paragraph (1) departs from the model provisions by authorising surveys, where reasonably necessary, on land outside but adjacent to the Order limits. This extension beyond the Order limits has precedent in the Silvertown Tunnel Order 2018. The ability to survey land adjacent to the Order limits where reasonably necessary is required so that Highways England can be confident that the surveys can be

conducted to assess the effects of the Scheme, or on the Scheme, from outside its limits. It imposes a lesser burden than seeking compulsory acquisition of such land.

#### *Article 16 - Removal of human remains*

- 6.44 The purpose and effect of this article is to disapply section 25 of the Burial Act 1857 and replace it with an alternative procedure for managing the removal of any human remains disturbed during the course of carrying out the authorised development. Article 16 follows a Model Provision and is required to ensure that the appropriate treatment of such remains does not delay the implementation of authorised development.
- 6.45 This article departs from the Model Provision in that paragraph (12) excludes the requirement to give notice before the removal of remains which the undertaker is satisfied were interred more than 100 years ago and that no relative or personal representative of the deceased is likely to object to their removal. This approach has precedent in the Crossrail Act 2008.
- 6.46 Paragraph (17) applies section 239 of the Town and Country Planning Act 1990 to land, and rights over land, acquired under the Order and permits the use of such land notwithstanding any obligation or restriction imposed under ecclesiastical law or law relating to burial grounds, save as provided for in the remainder of the article. Paragraph (18) excludes the application of Town and Country Planning (Churches, Places of Religious Worship and Burial Ground) Regulations 1950. The drafting in paragraphs (17) and (18) has precedent in the River Humber Gas Pipeline Replacement Order 2016, although the Order does not apply section 238 (use and development of consecrated land) of the Town and Country Planning Act 1990 as there is no consecrated land within the Order limits.
- 6.47 Taken together the effect of Article 16 is to replace the existing and disparate regimes for regulating the removal of human remains and consolidate the applicable provisions in a single article in the Order. It is required by Highways England to ensure that archaeological remains are recovered appropriately without causing unacceptable delay to the implementation of this nationally significant infrastructure project.

#### *Article 17 – Felling or lopping of trees and hedgerows*

- 6.48 This article allows any tree or shrub that is overhanging the authorised development to be felled or lopped, or have its roots cut back, if it is considered to obstruct the construction, operation or maintenance of the authorised development or endanger anyone using it. Compensation is payable for any loss or damage caused.
- 6.49 The article is included to ensure that Highways England has adequate powers to construct, operate and maintain the authorised development. The powers available to Highways England under the Highways Act 1980 are inadequate as they are predicated on vegetation overhanging a highway. This is insufficient to protect the tunnel comprised in the authorised development. The article is not required to authorise works under the Hedgerow Regulations 1997 as regulation 6(1)(h) thereof permits Highways England to remove hedgerows when carrying out its functions.
- 6.50 This article is included in the Model Provisions and the majority of made DCOs to date and is required for the Scheme to ensure that trees or hedgerows do not obstruct the construction, operation or maintenance of this nationally significant infrastructure project.

#### *Article 18 – Maintenance of drainage works*

- 6.51 The purpose and effect of this article is to make it clear that any realignment of award drains or other works to them that are carried out as part of the authorised development do not affect the existing allocation of responsibility for maintenance of those drains, unless this is agreed between Highways England and the responsible party.

## 7. **PART 3 – POWERS OF ACQUISITION AND POSSESSION OF LAND**

### *Article 19 – Compulsory acquisition of land*

- 7.1 This article authorises the compulsory acquisition of the Order land. It grants Highways England the power to acquire such land as is required for the authorised development. This is subject to articles 22 (compulsory acquisition of rights) and 27 (acquisition of subsoil, etc., only), which are explained below.

- 7.2 The drafting of this provision broadly follows the approach taken in the Network Rail (North Doncaster Chord) Order 2012, the Lancashire County Council (Torrisholme to the M6 Link (A683 Completion of Heysham to M6 Link Road)) Order 2013, the A556 (Knutsford to Bowdon Improvement) Development Consent Order 2014 and the Silvertown Tunnel Order 2018. 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.

### *Article 20 – Compulsory acquisition of land – incorporation of the minerals code*

- 7.3 By incorporating Parts 2 and 3 of Schedule 2 to the Acquisition of Land Act 1981, this article exempts existing rights in minerals from the scope of compulsory acquisition unless they are expressly named and conveyed. It also makes provision for a situation where the owner of mines or minerals wishes to work such mines or minerals. Such an article is included in the Model Provisions and the majority of made transport DCOs to date and is necessary to exempt mines and mineral interests from compulsory acquisition under the Order.

### *Article 21 – Time limit for exercise of powers to possess land temporarily or to acquire land compulsorily*

- 7.4 This article gives Highways England five years to issue ‘notices to treat’ or to execute ‘general vesting declarations’ to acquire the land that is subject to the power of compulsory acquisition. These are the two procedural methods by which the process of compulsorily acquiring land may be undertaken should the Order be made. The article also provides that land subject to the power of temporary possession for the carrying out of the authorised development, under article 29 (temporary use of land for constructing the authorised development), may not be occupied after the end of that same period unless the land is already being occupied by Highways England in exercise of the powers of the Order. Such an article is included in the Model Provisions and the majority of made DCOs to date.

### *Article 22 – Compulsory acquisition of rights*

- 7.5 This article allows for rights over land to be acquired as well as (or instead of) the land itself, and also for new rights to be created over land.

- 7.6 It provides for such rights as may be required to be acquired by Highways England over land which it is authorised to acquire under article 19 (compulsory acquisition of land). The public benefit of this is that it would allow Highways England, if appropriate, to reduce the area of outright acquisition and rely on the creation and acquisition of 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 development consent orders, for example the Network Rail (North Doncaster Chord) Order 2012, the Lancashire County Council (Torrisholme to the M6 Link (A683 Completion of

Heysham to M6 Link Road)) Order 2013 and the A556 (Knutsford to Bowdon Improvement) Development Consent Order 2014.

- 7.7 Paragraph (2) provides that, for the land described in Schedule 4, Highways England's powers of compulsory acquisition are limited to the acquisition of such rights, and the imposition of such restrictive covenants, as may be required for the purposes of the authorised development as specified in Schedule 4.
- 7.8 The power to impose restrictive covenants allows for the possibility of reducing the area of outright acquisition and therefore enables a more proportionate exercise of compulsory acquisition powers. It is in the public interest and has precedent in Transport and Works Act Orders and the Silvertown Tunnel Order 2018. This is of particular importance to the Scheme as restrictive covenants for the protection of the tunnel would impose a lesser burden on the retained surface of the land than would be the case were it to be acquired outright.
- 7.9 Paragraph (3) 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.
- 7.10 Paragraph (4) introduces Schedule 5 which modifies the compulsory purchase and compensation provisions under general legislation. The modifications do not affect the entitlement to compensation, but generally ensure that the compensation code applies equally to the additional categories of acquisition covered by the Order – the creation of new rights and the imposition of restrictive covenants in particular. This is a consequence of the extension of land acquisition powers to these categories and is commonplace in Transport and Works Act Orders and DCOs such as the A14 Cambridge to Huntingdon Improvement Scheme Development Consent Order 2016. 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.
- 7.11 Highways England confirms that this article and Schedule 5 have been drafted to take account of the Housing and Planning Act 2016 and the precedent in this regard created by the Silvertown Tunnel Order 2018 and followed in recently made Orders such as the A19/A184 Testo's Junction Alteration Development Consent Order 2018.

#### *Article 23 – Private rights over land*

- 7.12 This article applies to extinguish private rights generally. This enables Highways England to take land with a clear, unencumbered title, thereby minimising impediments to the delivery of the Scheme. It also provides for the extinguishment of private rights over such parts of the Order land as are already in the ownership of Highways England, when any activity authorised by the Order interferes with or breaches those rights. In respect of land subject to the compulsory acquisition of rights or imposition of restrictive covenants, existing rights are extinguished only to the extent that the continued exercise of the existing right would be inconsistent with the enjoyment by Highways England of the rights acquired, or restrictive covenants imposed, compulsorily. This approach is proportionate and draws on the precedents of Rookery South (Resource Recovery Facility) Order 2011, the Lancashire County Council (Torrisholme to the M6 Link (A683 Completion of Heysham to M6 Link Road)) Order 2013, the A556 (Knutsford to Bowdon Improvement) Development Consent Order 2014 and the A19/A1058 Coast Road (Junction Improvement) Development Consent Order 2016. Further information on Highways England's requirement for this provision is set out in the Statement of Reasons accompanying the application.

#### *Article 24 – Power to override easements and other rights*

- 7.13 This article provides a power to override easements and other rights and reflects the terms of section 120(3) and (4), and paragraphs 2 and 3 of Part 1 of Schedule 5 to the

2008 Act. This article has precedent in, for example, article 32 of the Thames Water Utilities Limited (Thames Tideway Tunnel) Order 2014. It provides statutory authority for carrying out any authorised activity that interferes with any of the interests listed in paragraph (3) including restrictions on user of land arising by the virtue of a contract. Paragraph (4) provides for compensation to be payable where the interests listed in paragraph (3) are overridden.

*Article 25 – Modification of Part 1 of the 1965 Act*

- 7.14 This article modifies the provisions of Part 1 of the Compulsory Purchase Act 1965 as applied to the Order by section 125 of the Planning Act 2008.
- 7.15 This provision reflects recent changes introduced by the Housing and Planning Act 2016. Paragraphs (1) to (3) amend the provisions of the Compulsory Purchase Act 1965 so they are consistent with the terms of the Order and paragraph (5) makes it clear that the notice periods introduced by the Housing and Planning Act 2016 do not apply to the temporary possession or use of land under articles 29 and 30 of this Order. 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 1981 Act*

- 7.16 This article applies the provisions of the 1981 Act to compulsory acquisition under the Order. Vesting declarations are one of two procedures for the compulsory acquisition of land (the other being by means of serving a notice to treat). Vesting declarations allow title in the land concerned to pass to the acquiring authority more quickly than using the notice to treat method. They also enable several parcels of land to be acquired under the same legal instrument and therefore more efficiently than under the notice to treat procedure and are Highways England's preferred procedure for the compulsory acquisition of land.
- 7.17 Such an article has been included in the Model Provisions and the majority of DCOs made to date but the drafting used in the Order has been adapted, following the M20 Junction 10a Development Consent Order 2017, the Silvertown Tunnel Order 2018 and the A19/A184 Testo's Junction Alteration Development Consent Order 2018, to take account of the Housing and Planning Act 2016.

*Article 27 – Acquisition of subsoil, etc., only*

- 7.18 This article allows Highways England to compulsorily acquire land, rights or both, below the surface or in the airspace, as required for the Scheme and its protection from subsequent development and other conflicting events or actions, instead of acquiring all of the land up to and including the surface and airspace.
- 7.19 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 landowners and lower compensation payments. It is considered to be in the public interest to provide this flexibility at the point at which Highways England begins to acquire the necessary land.
- 7.20 Paragraph (2) introduces Schedule 6 (Land in which only subsoil or new rights in and above the subsoil and surface may be acquired) and provides that only the 'subsoil' contained in plots listed in that schedule can be acquired.
- 7.21 Paragraph (6) makes clear, for the purposes of paragraph (2), the meaning of 'subsoil'.
- 7.22 The drafting of this article is based on the precedents found in the Model Provisions and DCOs such as the Northumberland County Council (A1-South East

Northumberland Link Road (Morpeth Northern Bypass)) Development Consent Order 2015 and the Silvertown Tunnel Order 2018.

*Article 28 - Rights over or under streets*

- 7.23 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 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.
- 7.24 This article has been included in the Model Provisions and the majority of DCOs made to date. It is considered that the article remains necessary for the Scheme notwithstanding 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 Scheme.

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

- 7.25 The purpose of this article is to allow the land set out in Schedule 7 (land of which only temporary possession may be taken) to be occupied and used temporarily while the works are carried out. This is land which is required during construction of the authorised development but not required permanently.
- 7.26 This article also allows for the temporary occupation of any of the land intended for permanent acquisition, or for the acquisition of new rights, but which has, or which have, not yet been acquired.
- 7.27 The drafting is broadly in line with such articles in made DCOs such as the A556 (Knutsford to Bowdon Improvement) Development Consent Order 2014, but has been adapted to make it clear as to what can be done on Schedule 7 land, and what can be done on land intended for permanent acquisition.
- 7.28 Such possession requires not less than 14 days' prior notification to the owner and occupier of the land. This period accords with the precedent of the Silvertown Tunnel Order 2018.
- 7.29 The article provides for any of the authorised development listed in Schedule 1 (authorised development), in particular, to be built and remain on land that has been temporarily occupied. The rationale for this is that it enables Highways England to carry out permanent works on land occupied temporarily prior to permanent acquisition. On the completion of the works Highways England will know, with a precision that is not available at an earlier stage, the land it requires permanently and can ensure that no more land than is actually required to accommodate the scheme once implemented, is acquired permanently.
- 7.30 The time limits set out in article 21 (time limit for exercise of powers to possess land temporarily or to acquire land compulsorily) apply to this article.

*Article 30 – Temporary use of land for maintaining the authorised development*

- 7.31 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. Owners and occupiers of the land must be given not less than 28 days' notice and that notice must include details of the purpose for which Highways England requires the land. They are also entitled to compensation. The power is exercisable within a period of 5 years from the time the particular part of the

authorised works is first (a) opened for use; or (b) brought into operational use (as the case may be).

- 7.32 This power does not apply with respect to houses, gardens or any other buildings for the time being occupied.
- 7.33 The drafting reflects precedents such as the Northumberland County Council (A1-South East Northumberland Link Road (Morpeth Northern Bypass)) Development Consent Order 2015, the A14 Cambridge to Huntingdon Improvement Scheme Order 2016 and the Silvertown Tunnel Order 2018. This article is required to enable Highways England to carry out maintenance during the maintenance period and is considered appropriate as it would impose a lesser burden than permanently acquiring rights to achieve the same purpose.

#### *Article 31 – Statutory undertakers*

- 7.34 This article allows Highways England to extinguish rights of statutory undertakers, and 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 the removal or relocation of apparatus belonging to statutory undertakers over or within any of the Order land is required.
- 7.35 As the land where this power may be exercised is shown on the land plans, and the beneficiaries of such rights are identified 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.
- 7.36 This article has precedent in a number of made orders, for example, in the M20 Junction 10a Development Consent Order 2017 and is necessary to ensure the timely delivery of this nationally significant infrastructure project. The exercise of this article is subject to the protective provisions contained in Schedule 11.

#### *Article 32 – Apparatus and rights of statutory undertakers in stopped up streets*

- 7.37 This article (which reflects the Model Provisions) governs what happens to statutory utilities' apparatus (pipes, cables, etc.) under streets that are stopped up by the Order. Without the article, the statutory utility would not have access to the apparatus, since there would no longer be a right of way along the street. Highways England may require such a statutory utility to relocate the apparatus elsewhere, although it will compensate the statutory utility for doing so. Paragraph (6) discounts from this compensation the increase in value to the statutory utility of having new rather than old (i.e. older than 7½ years) apparatus.
- 7.38 Paragraph (7) provides that in certain cases (most notably where an existing highway is crossed by a trunk road) the cost of relocating apparatus will be subject to alternative cost sharing arrangements between Highways England and the statutory utility which are provided for in regulations made under section 85 of the 1991 Act.

#### *Article 33 – Recovery of costs of new connection*

- 7.39 This article (which reflects the Model Provisions) provides that if a gas, water, electricity or sewerage undertaker's or public communications provider's apparatus is removed thereby interrupting the service to owners or occupiers of premises, their costs incurred in obtaining a new service can be recovered from Highways England.

#### *Article 34 – Special category land*

- 7.40 Under section 131 of the 2008 Act an order granting development consent is subject to Special Parliamentary Procedure when it authorises compulsory acquisition of land to which section 131 applies (i.e. a common, open space or fuel or field garden allotment). The exception is if the Secretary of State is satisfied that certain tests under section 131(3) are met, including if the Secretary of State is satisfied that replacement land has been or will be given in exchange for the order land, and the replacement land has been or will be vested in the prospective seller and subject to the same rights, trusts and incidents as attach to the order land. Highways England submits that this is the case, for the reasons set out in the Statement of Reasons.
- 7.41 This article deals with the replacement of open space special category land that is required for the authorised development. The article makes provision for the special category land to be acquired and the special category (rights) land to vest in the undertaker once the Secretary of State has certified (in consultation with the planning authority) that a scheme for the provision of the replacement land as open space, and a timetable for the implementation of that scheme, has been received from the undertaker.
- 7.42 On the date on which the replacement land is laid out and provided in accordance with the scheme, the replacement land will vest in the person in whom the special category land was previously vested and will be subject to the same rights, trusts and incidents as attached to the special category land.

*Article 35 – Disregard of certain interests and improvements*

- 7.43 This article provides for the Tribunal to disregard certain interests in and enhancements to the value of land for the purposes of assessing compensation with respect to its compulsory acquisition where the creation of the interest or the making of the enhancement was designed with a view to obtaining compensation or increased compensation.
- 7.44 It complies with section 126 of the 2008 Act as it does not have the effect of modifying or excluding the application of an existing provision relating to compulsory purchase compensation. The article has precedent in the Thames Water Utilities Limited (Thames Tideway Tunnel) Order 2014 and the River Humber Gas Pipeline Replacement Order 2016, and TWAOs such as the London Underground (Northern Line Extension) Order 2014 and the Midland Metro (Wolverhampton City Centre Extension) Order 2016.
- 7.45 The wording of this article mirrors section 4 (assessment of compensation) of the Acquisition of Land Act 1981 (in this paragraph "the 1981 Act"). It is necessary to specifically apply the effect of section 4 of the 1981 Act in the Order. This is because the 1981 Act only applies to a compulsory purchase to which any other statutory instrument has applied its provisions and the 2008 Act (nor standard Order provisions) does not apply these. Sections 120(3) and 120(5)(a) and Schedule 5 (by virtue of section 120(3)) of the Act allow the application in a DCO of statutory provisions which relate to the payment of compensation.

*Article 36 – Set-off for enhancement in value of retained land*

- 7.46 This article provides that in assessing the compensation payable to any person in respect of the acquisition of any land, the Tribunal shall set off against the value of the land any increase in value of any contiguous or adjacent land belonging to that person arising out of construction of the authorised development.
- 7.47 This article complies with section 126(2) of the 2008 Act as it does not have the effect of modifying the application of an existing provision relating to compulsory purchase compensation. The article has precedent in the Thames Water Utilities Limited (Thames Tideway Tunnel) Order 2014 and TWAOs such as the London Underground

(Northern Line Extension) Order 2014 and the Midland Metro (Wolverhampton City Centre Extension) Order 2016.

- 7.48 The principle in this article is established in section 7 of the Land Compensation Act 1961 (effect of certain actual or prospective development of adjacent land in same ownership), which needs to be applied. Sections 120(3) and 120(5)(a) of and Schedule 5 (by virtue of section 120(3)) to the 2008 Act allow the application in a DCO of statutory provisions which relate to the payment of compensation.

*Article 37 – No double recovery*

- 7.49 This article provides that compensation is not payable both under this Order and other compensation regimes for the same loss or damage. In addition, the article provides that there is not to be double recovery under two or more different provisions of this Order.
- 7.50 The principle of equivalence, namely that a claimant in a compulsory purchase matter shall be compensated for no more than and no less than his loss, is long established and no part of the compensation code conflicts with this principle.
- 7.51 This article has precedent in the Thames Water Utilities Limited (Thames Tideway Tunnel) Order 2014, the National Grid (Richborough Connection Project) Development Consent Order 2017 and the North London Heat and Power Generating Station Order 2017.

*Article 38 – Crown rights*

- 7.52 This article protects the Crown's position in relation to its own estates, rights, powers, privileges, authorities and exemptions and ensures that the Crown's written consent is required where any land, hereditaments or rights are to be taken, used or interfered with under the Order. The Order land includes areas of land within the ownership of the Secretary of State for Defence and the ownership of the Secretary of State for Digital, Culture, Media and Sport. Given the known presence of Crown landholdings in the Order Land, this article has been included to ensure that any acquisition of other landholdings, or the creation or extinguishment of rights over land, cannot create any interference with the rights of the Crown. This article reflects the provisions of section 135 of the 2008 Act. It is unnecessary to define in the Order the terms "Crown Land" and "the appropriate Crown authority" as a definition is provided in section 227 of the Planning Act 2008.

**8. PART 3 - OPERATIONAL PROVISIONS**

*Article 39 - Power to operate and use the tunnel*

- 8.1 This article authorises Highways England to operate and use the tunnel.

*Article 40 – Closing the tunnel*

- 8.2 This article permits Highways England to close the tunnel when in its opinion such closure is necessary. Except in an emergency (as defined in paragraph (3)), Highways England must follow the notice procedure set out in this article.
- 8.3 This is considered a critical power necessary for Highways England to safely operate the tunnel should there be an incident and closure was not permitted. This article has precedent in the recent Silvertown Tunnel Order 2018.

*Article 41 – No apparatus in the tunnel area without consent*

- 8.4 This article prohibits the placing of statutory utilities' apparatus in the tunnel, and the use of that tunnel in connection with such apparatus, without the consent of Highways England.
- 8.5 This is considered necessary on the basis that whilst the Scheme will form part of the wider network it is inappropriate (for obvious reasons) for the usual provisions to apply to a tunnel in respect of the powers of statutory undertakers to lay apparatus in roads. Comparable provisions are included in authorising legislation for tunnels (see for example, article 37 of the River Tyne Tunnels Order 2005 and the recent Silvertown Tunnel Order 2018).

*Article 42 – Removal of vehicles*

- 8.6 This article makes provision enabling vehicles causing an obstruction to be removed from the tunnel area. Provision is made for steps to be taken to find the owner of a vehicle which has been removed so that notice might be sent to him. The owner may reclaim the vehicle on payment of all charges for the removal, storage and disposal of the vehicle. Provision is made for the disposal of the vehicle in circumstances where the owner cannot be traced or where the owner declines to recover the vehicle.
- 8.7 This article is based on sections 99 to 102 of the Road Traffic Regulation Act 1984 and The Removal and Disposal of Vehicles (Traffic Officers) (England) Regulations 2008. The principle of applying an equivalent power in a development consent order has precedent in the Silvertown Tunnel Order 2018 and the provision is necessary to facilitate the safe operation of the tunnel area. The drafting here departs from the equivalent article in the Silvertown Tunnel Order 2018 in order to take account of the differences in traffic regulation in London, compared with the Scheme which is located outside of London, and the powers of Highways England's traffic officers to remove vehicles and the subsequent treatment of the vehicles so removed. It is necessary to include this provision in the DCO to ensure that there is a consistent and consolidated scheme of regulation for this nationally significant infrastructure project.

*Article 43 – Removal of obstructions*

- 8.8 This article enables obstructions falling from motor vehicles in the tunnels and the approaches to be removed. Except in the case of perishable items (which can be disposed of immediately), an owner of the goods (providing that person can be traced) will have 5 weeks to claim and take possession of the load. The owner will need to account for any expenses incurred in removing and storing the load. The power is required by Highways England to safely manage the operation of the tunnel and has precedent in the recent Silvertown Tunnel Order 2018 which it follows.

*Article 44 – Dangerous goods*

- 8.9 The purpose of this article is to ensure that Highways England has the same enforcement powers as certain bodies mentioned in the Carriage of Dangerous Goods and the Use of Transportable Pressure Equipment Regulations 2009 to prosecute those carrying dangerous goods in the tunnel. It has precedent in the Silvertown Tunnel Order 2018 which it follows, save for provisions relating to road user charging which are omitted as they are not relevant to the Scheme.

*Article 45 – Byelaws relating to the tunnel area*

- 8.10 Paragraph (1) authorises Highways England to make and enforce byelaws to regulate the use and operation of the tunnel.
- 8.11 Paragraph (2) provides for the byelaws contained in Schedule 8 to have effect and be treated as confirmed by the Secretary of State.

- 8.12 The procedure to be adopted in the Local Government Act 1972 for the making of byelaws is applied by paragraph (3). That provision is supplemented by paragraph (4) which applies the fast-track procedure in the Byelaws (Alternative Procedure) (England) Regulations 2016 to byelaws under this article.
- 8.13 Paragraph (5) provides that a breach of the byelaws constitutes an offence (as permitted by section 120(8) of the 2008 Act).
- 8.14 The byelaws included in Schedule 8 broadly follow those included in the Silvertown Tunnel Order 2018. Highways England requires byelaws, and the power to amend them, in order to safely regulate the conduct of persons within the tunnel area.

*Article 46 – Fixed penalty notices*

- 8.15 This article gives an authorised person the power to serve a fixed penalty notice on a person who has committed an offence under byelaws made under it. A person who has breached a byelaw can avoid prosecution by paying the penalty. The amount of the fixed penalty is expressed as a percentage of the maximum fine which may be imposed, i.e. the maximum amount that applies from time to time under level 3 on the standard scale (currently £1,000). A person who pays the penalty in 7 days will only pay one fifth of the maximum amount of the fine; otherwise the penalty will be one half of the maximum amount of the fine. Failure to pay within 14 days exposes the offender to the risk of prosecution. Provision is made for a deposit to be taken from those offenders who cannot provide a UK residential address.
- 8.16 The ability for development consent orders to include such an article has precedent in the recently made Silvertown Tunnel Order 2018 and is required to enable the efficient enforcement of the byelaws regulating the use of the tunnel.

*Article 47 - Classification of roads, etc.*

- 8.17 The designation of highways is an ancillary matter which may be included in a development consent order in accordance with section 120(5) of, and paragraph 19 of Schedule 5 to, the 2008 Act. These and other related matters (e.g. de-trunking) are addressed by this article, which is integral to the implementation of the authorised development.
- 8.18 Paragraph (1)(a) provides for the classification of roads described in Parts 1, 2, and 6 of Schedule 9 as a trunk road forming part of the A303. Paragraphs (1)(b) and (c) provide for the classification of other roads affected by the Scheme.
- 8.19 Paragraphs (2) to (5) provides for a procedure to vary the classification of the roads provided for in paragraph (1) (including the designation of a trunk road as a special road) without also amending the Order. This is necessary in order to provide equivalent powers as would be available were the Scheme proceeding under the Highways Act 1980.
- 8.20 Paragraphs (6) and (7) provide for the de-trunking of part of the existing A303 specified in Part 9 of Schedule 9 and shown on the de-trunking plans.
- 8.21 The inclusion of the article is integral to the delivery of the Scheme and makes appropriate provision to integrate it within the surrounding highway network.

*Article 48 – Clearways*

- 8.22 This article applies clearways to new A303 mainline elements of the Scheme. It is necessary to ensure safe and proper operation of the authorised development, and to ensure that 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 2008 Act.

- 8.23 Paragraph (1) prohibits waiting on any part of a road specified as a clearway in Part 2 of Schedule 10 except upon the direction, or with the permission, of a uniformed constable or uniformed traffic officer. Paragraphs (2) and (3) set out the circumstances in which it would be lawful for a vehicle to wait on any part of a road specified in Part 2 of Schedule 10. Paragraph (4) provides that the clearway provisions can be varied or revoked without the need to apply under the Act for an amendment to the Order.

*Article 49 – Traffic regulation measures*

- 8.24 The specification of the classes of traffic authorised to use a highway, and speed limits to be applied to highway, are ancillary matters which may be included in a development consent order in accordance with section 120(3) of, and paragraph 20 of Schedule 5 to, the 2008 Act. The purpose of this article (which has precedent in, for example, the A19/1058 Coast Road (Junction Improvement) Development Consent Order 2016 and the A14 Cambridge to Huntingdon Improvement Scheme Development Consent Order 2016), is to provide Highways England with powers to make deemed traffic regulation orders, so that it can implement traffic regulation measures (e.g. restrictions on the use of roads) in connection with the authorised development.
- 8.25 It includes a number of specific traffic regulation measures that are required to enable the Scheme to operate properly and to be integrated into the existing highway network. These measures are set out in Schedule 10 (and brought into effect by paragraph (1)), as well as more general powers by virtue of paragraph (6).
- 8.26 Paragraphs (3) to (5) are needed to give effect to the variable speed limits provided for in Schedule 10 and are based on the M1 Motorway (Junctions 23A to 25) (Variable Speed Limits) Regulations 2018.
- 8.27 Implementation in certain circumstances is subject to the prior approval of the traffic authority in whose area the roads are situated and consultation with the relevant chief officer of police.
- 8.28 The inclusion of the article in the Order is essential for the safe operation of the Scheme.

**9. PART 4 – MISCELLANEOUS AND GENERAL**

*Article 50 – Benefit of the Order*

- 9.1 This article overrides section 156(1) of the 2008 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 implement parts of the Order in an uncoordinated manner, which might be the case if section 156(1) were to apply.
- 9.2 The purpose of paragraph (2) is to clarify the exceptions where the Order will self-evidently benefit others e.g. rights for statutory undertakers, and mitigation works outlined in the Schedule 1 description of the works. Without this provision, there would be a contradiction since strictly speaking only Highways England could benefit from these works.

*Article 51 – Consent to transfer benefit of Order*

- 9.3 This article would allow powers under the Order to be transferred to others by Highways England.
- 9.4 This would allow Highways England to enter into agreements facilitating the delivery of the Scheme. The structure of this provision has precedent in orders made under the

Transport and Works Act 1992, such as the London Cable Car Order 2012, and under the 2008 Act with the recent Silvertown Tunnel Order 2018.

- 9.5 The transfer of the benefit of the Order would require the consent of the Secretary of State and, where the transfer of compulsory acquisition or temporary possession functions was proposed, the Secretary of State would have to be satisfied that the proposed transferee had sufficient resources to enable it to discharge all associated compensation liabilities.

*Article 52 – Application of landlord and tenant law*

- 9.6 This article provides that landlord and tenant law will be overridden so as not to prejudice the operation of any agreement entered into under article 51 (consent to transfer benefit of Order).

*Article 53 – Operational land for purposes of the 1990 Act*

- 9.7 This article declares that the Order land is to be treated as the operational land of a statutory undertaker for the purposes of the Town and Country Planning Act 1990.

*Article 54 – Defence to proceedings in respect of statutory nuisance*

- 9.8 This article provides a defence to statutory nuisance proceedings brought under the Environmental Protection Act 1990 in respect of noise emitted from premises. The defence is only available if:

9.8.1 the noise is created in the course of the carrying out or maintenance of the works authorised by the Order in accordance with a notice given under sections 60 or 61 of the Control of Pollution Act 1974; or

9.8.2 is a consequence of the construction, maintenance or use of the authorised development and cannot reasonably be avoided.

- 9.9 Section 61(9) of the Control of Pollution Act 1974 does not apply if the consent relates to the use of premises by Highways England for the purposes of or in connection with the construction or maintenance of the authorised development.

- 9.10 This article has been included in a number of development consent orders to date including for example the A14 Cambridge to Huntingdon Improvement Scheme Development Consent Order 2016, and is necessary to clarify the scope of the defence of statutory authority arising from the grant of the Order.

*Article 55 – Protective provisions*

- 9.11 This article introduces Schedule 11, which contains provisions protecting the interests of third parties.

- 9.12 Schedule 11 currently contains protective provisions for the benefit of the following parties affected by the Scheme:

9.12.1 electricity, gas, water and sewerage undertakers;

9.12.2 electronic communications code network operators, updated to take account of recent changes to the Electronic Communications Code;

9.12.3 drainage authorities; and

9.12.4 Esso Petroleum Company Limited.

- 9.13 These provisions are based on those agreed on other schemes. Highways England is in continuing discussions with the affected statutory undertakers and intends to agree protective provisions with them as soon as possible.

*Article 56 – Certification of plans, etc.*

- 9.14 This article provides for various plans and other documents to be certified by the Secretary of State as true copies of those documents referred to in the Order. The documents in question (with their reference and revision numbers) are listed in Schedule 12. A form of this article is included in the Model Provisions and in the majority of DCOs made to date.

*Article 57 – Service of notices*

- 9.15 This article, governs how any notices that may be served under the Order are 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. The provision is necessary because the service of notice provisions under sections 229 and 230 of the Act only apply to notices served under the Act itself and do not apply to notices served under the Order. This article has precedent in a number of development consent orders, for example, the A14 Cambridge to Huntingdon Improvement Scheme Development Consent Order 2016.

*Article 58 – Arbitration*

- 9.16 This article governs what happens when two parties disagree in relation to the implementation or interpretation of any provision of the Order. A dispute must be referred to arbitration, and if the parties cannot agree on an arbitrator the appointment will be decided by the President of the Institution of Civil Engineers. A form of this article is in the Model Provisions and in the majority of made DCOs to date.

*Article 59 – Consents, agreements and approvals*

- 9.17 This article provides for the mechanics of certain consents, agreements and approvals that need to be obtained by Highways England under the Order. In summary, it ensures that any consents, agreements or approvals (a) cannot be unreasonably withheld or delayed; and (b) are deemed to be granted after a period of 28 days if no decision is made, beginning with the day any application for a consent, agreement or approval is made.
- 9.18 Any application for a consent, agreement or approval must include a written statement that the 28 day 'guillotine' provision is in force.
- 9.19 The purpose of the article is to draw together the usual provisions for consents, agreements and approvals under the Order, rather than including them for each consent, agreement or approval required under the Order which Highways England considers is repetitive.

## 10. **SCHEDULES**

### *Schedule 1 - Authorised development*

- 10.1 Schedule 1 describes the authorised development, which is described in more detail in Chapter 2 of the environmental statement.

### *Schedule 2 - Requirements*

- 10.2 The requirements in Part 1 of Schedule 2 are broadly the equivalent of planning conditions. They reflect the processes and procedures usually employed by the Highways England when implementing a scheme such as this.

- 10.3 Most approvals will be sought from the Secretary of State for Transport. In practice this would involve certain internal approvals being obtained from independent teams within Highways England before the details are formally submitted by the project team within Highways England to the Secretary of State for Transport for approval.
- 10.4 Highways England understands that decision-making by the Secretary of State would follow similar internal processes to those employed in taking other quasi-judicial decisions (for example, in deciding whether to make a DCO or Transport and Works Act Order), meaning a separation within the Department for Transport's Strategic Roads Division of those involved in discharging requirements from those involved in delivery of the Scheme through their relationships with Highways England.
- 10.5 The requirements provide that the various schemes, details and plans to be approved must, where appropriate, be based on the measures included in the environmental statement. The requirements provide that the approved schemes, details and plans must be implemented as approved, unless further amendments to them are approved. Turning to the purpose and effect of requirements 1 to 10:
- 10.5.1 Requirement 1 contains a number of definitions used in Part 1 of Schedule 2. These include the definitions of 'preliminary works' and of 'preliminary works OEMP', the purpose and effect of which are discussed in paragraph 10.5.5.
- 10.5.2 Requirement 2 provides that the authorised development must not commence later than 5 years from the date of the Order coming into force.
- 10.5.3 Requirement 3 provides that the authorised development must be carried out in accordance with the scheme design shown on certain plans, unless otherwise agreed by the Secretary of State following consultation with the local planning authority. This means that any variations to the scheme design (which must be within the limits of deviation) are subject to approval and must not give rise to any materially new or materially worse adverse environmental effects in comparison with those reported in the environmental statement.
- 10.5.4 Requirement 4 provides that the authorised development, save for the preliminary works, must be carried out in accordance with the Outline Environmental Management Plan ("OEMP"). The OEMP sets out the framework for environmental mitigation for the Scheme.
- 10.5.5 The preliminary works are required to be carried out in advance of the commencement of the main works comprised in the Scheme. The preliminary works have been assessed in the environmental statement as resulting in no likely significant environmental effects provided that the measures required to avoid or mitigate adverse environmental effects specified in the preliminary works OEMP are carried out. Sub-paragraph (2) requires the preliminary works to be carried out in accordance with the preliminary works OEMP.
- 10.5.6 Requirement 5 provides that the authorised development must be carried out in accordance with the Detailed Archaeological Mitigation Strategy ("DAMS"). The DAMS sets out the framework for archaeological mitigation for the Scheme. Paragraph (2) clarifies that carrying out of the activities required by the DAMS is not prohibited by any other requirement of this Schedule.
- 10.5.7 Requirement 6 provides that no part of the authorised development is to commence until final pre-construction survey work for that part has been carried out to ascertain the presence or absence of protected species. Where such species are present, or are reasonably likely to be present,

works cannot commence until a scheme of protection and mitigation measures has been approved by the Secretary of State following consultation with Natural England. The relevant works must then be carried out in accordance with the approved scheme.

- 10.5.8 Requirement 7 makes provision for dealing with any contaminated land or contaminated groundwater discovered during construction of the authorised development, in consultation with the local planning authority and the Environment Agency.
  - 10.5.9 Requirement 8 requires the preparation and implementation of a landscaping scheme covering all hard and soft landscaping works including those listed in sub-paragraph (2). Provision is also made in sub-paragraph (2)(g) for replacing trees and shrubs which become diseased or damaged.
  - 10.5.10 Requirement 9 requires that a construction traffic management plan must be prepared prior to the commencement of the authorised development, approved and implemented.
  - 10.5.11 Requirement 10 requires that details of the drainage system, based on the mitigation measures in the environmental statement, must be prepared prior to commencement of the authorised development, approved and implemented.
- 10.6 Part 2 of Schedule 2 provides a clear procedure for the discharge of requirements by the Secretary of State. The drafting follows Part 2 of Schedule 2 to the M20 Junction 10a Development Consent Order 2017. 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. This also includes an obligation on the Applicant to publish a register of requirements, which would track where each requirement is in the process.
- 10.7 Any steps the Applicant 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.
- 10.8 Part 2 of Schedule 2 departs from the drafting set out in Appendix 1 to Advice Note 15 (Version 2). Highways England is in a unique position as the strategic highways company and anticipates that the person responsible for determining applications under the requirements of the Order will be the Secretary of State, in consultation with the bodies specified in the relevant requirements. The drafting in Appendix 1 to Advice Note 15 envisages a two tier process whereby applications are considered in the first instance by the “discharging authority” and, in the case of refusal or non-determination or inappropriate requests for further information, appeals may be made to the Secretary of State. The “discharging authority” under the Order will be the Secretary of State in both the first and last instance. Highways England considers that it is appropriate to retain the drafting previously accepted by the Secretary of State in respect of the discharge of its requirements.