

## A303 Amesbury to Berwick Down

TR010025

**Deadline 4a**

**8.34 –The Applicant’s Comments on the Positions Adopted at Deadline 4 by Wiltshire Council and the Trail Riders Fellowship in Respect of Proposed Changes to the Order in Relation to Byways 11 and 12**

APFP Regulation 5(2)(q)

Planning Act 2008

The Infrastructure Planning (Examination Procedure) Rules 2010

July 2019

## Infrastructure Planning

Planning Act 2008

**The Infrastructure Planning (Examination Procedure)****Rules 2010****A303 Amesbury to Berwick Down**

Development Consent Order 20[\*\*]

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Fellowship in Respect of Proposed Changes to the Order  
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## THE A303 (AMESBURY TO BERWICK DOWN) DEVELOPMENT CONSENT ORDER

### THE APPLICANT'S COMMENTS ON THE POSITIONS ADOPTED AT DEADLINE 4 BY WILTSHIRE COUNCIL AND THE TRAIL RIDERS FELLOWSHIP IN RESPECT OF PROPOSED CHANGES TO THE ORDER IN RELATION TO BYWAYS 11 AND 12

#### 1. INTRODUCTION

- 1.1 By letter dated 19 June 2019 the Examining Authority made a procedural decision to vary the examination timetable to request additional information, pursuant to Rules 8(3) and 17 of the Infrastructure Planning (Examination Procedure) Rules 2010. The letter included a new deadline 4a inviting comment on the positions established by the Applicant, Wiltshire Council ("**WC**") and the Trail Riders Fellowship ("**TRF**") in respect of changes to the Scheme proposed by WC and TRF in respect of byways 11 and 12.
- 1.2 WC's position is set out in its 'Legal Submission on Byways AMES 11 and 12', submitted at deadline 4 [REP4-039] ("**WC Submission**") and the TRF's Position is set out in its 'Written Summary of Oral Submissions from Issue Specific Hearing Held on 13 June 2019 Relating to Traffic and Transportation and Suggested Amendments to the Draft DCO for Further Consideration by the Examining Authority and Interested Parties' ("**TRF Submission**"). The Applicant's position at deadline 4 is recorded in its 'Written Summaries of Oral Submissions put at Traffic and Transport Hearing on 13 June 2019' [REP4-034], under agenda items 4.9 to 4.12.
- 1.3 Broadly, Wiltshire Council seeks changes to the Scheme that would prohibit the use of byways AMES 11 and AMES 12 (the extent of which is described in Appendix B to the WC Submission) ("**Byways 11 and 12**") to motorised vehicles, save for motorcycles and other limited classes of vehicular use. TRF's favoured change to the Scheme would see the stretch of new restricted byway between Byways 11 and 12 ("**the Link**") being changed to a byway open to all traffic, although alternative amendments proposed by the TRF would see the new restricted byway proposed by the Applicant along the line of the existing A303 to be stopped up, through the World Heritage Site, replaced by a byway open to all traffic, possibly subject to unspecified traffic regulation measures.

#### 2. THE APPLICANT'S VIEWS ON THIRD PARTY CHANGES TO ITS SCHEME

- 2.1 The Applicant submits that it is wholly unprecedented and entirely inappropriate for changes to the Scheme for which it seeks development consent to be imposed upon it by third parties during the examination. In this regard the Applicant concurs with paragraphs 6 and 29 of Wiltshire Council's 'Legal Submission on Byways AMES 11 and 12', submitted at deadline 4 [REP4-039] ("**WC Submission**") at paragraph which outline, respectively:

- (a) that the Council has no independent power to require the DCO to be amended; and
- (b) quote the important advice contained in paragraph 111 of the Department for Communities and Local Government's 2015 Examination Guidance that:

*"It is important for all parties to remember that it is for the applicant to decide whether or not to propose a change to a proposal during the examination. Other parties can highlight those areas where they think a*

*proposal should be changed during their discussion with the applicant in the pre-application period and also in their written representations."*

- 2.2 The Applicant acknowledges the letter dated 28 November 2011, from Mr Bob Neil to the former Infrastructure Planning Commission ("**2011 Letter**") which expresses the then Parliamentary Under Secretary of State's view that section 114 Planning Act 2008 would enable the Secretary of State, having determined an application for development consent, to make an order granting development consent in terms different to those applied for by the Applicant.
- 2.3 What is clear is that the content of the application remains the preserve of the Applicant. Whilst it would be open to the Examining Authority to indicate that it was minded to recommend a change to the Scheme and examine that proposed change appropriately before deciding whether or not to make that recommendation to the Secretary of State, for the reasons set out in this submission, the Applicant considers that such a recommendation is not warranted in this case.
- 2.4 The 2011 Letter also, rightly, refers to the need to adhere to the *Wheatcroft* principles where changes are made to the underlying Scheme upon which the Applicant has previously consulted to ensure that no party is deprived of an opportunity to make representations and for those representations to be taken into account in the decision. If the Examining Authority, despite the Applicant's submissions to the contrary, is minded to recommend to the Secretary of State a change to the Applicant's scheme then the Applicant considers that it will be necessary to follow the procedures set out in section 7 of this document. Any failure to follow these procedures would present risk to the robustness of any decision to make an amended DCO as WC/TRF propose.

### 3. **THE APPLICANT'S COMMENTS ON WILTSHIRE COUNCIL'S DEADLINE 4 POSITION**

- 3.1 Wiltshire Council's proposed change to the Scheme is, in summary, to prohibit the use of Byways 11 and 12 to motor vehicles, save for motorcycles and other limited classes of motor vehicles. The Applicant notes that WC do not propose an amendment to the Scheme that would authorise the use of the Link by motorcycles, but WC states it does not oppose such a measure, which is in turn being promoted by the TRF.

*The Issue which Wiltshire Council's Proposed Change to the Scheme seeks to address*

- 3.2 The justification for the changes proposed in the WC Submission is set out in paragraphs 4 and 5 of that document. WC's position is founded on the assertion that stopping up of the existing A303 proposed by the Scheme, and the consequent loss of the "free view of the stones" from passing vehicles would lead to "a significant increase" in the use of Byways 11 and 12 by motorised vehicles. WC then go on, in paragraph 5, to set out why in its view a "significant increase" in the use of Byways 11 and 12 would be detrimental.
- 3.3 The Applicant notes that this assertion, that the loss of the "free view" would necessarily lead to a "significant increase" in the vehicular use of Byways 11 and 12, is not supported by any evidence or technical justification to contradict the Applicant's assessment in its Environmental Statement (paragraph 13.9.62 [APP-051]) that the effect of the severance of the Link between Byways 11 and 12 would lead to a minor adverse (not significant) effect. All of WC's subsequent concerns expressed in paragraph 5 are predicated on the unsubstantiated assertion that, absent its proposed change, the Scheme would give rise to an increase in the vehicular use of the Byways.
- 3.4 The Applicant questions the rationale underlying WC's assertion that the Scheme would lead to an increase in motorised vehicular use of Byways 11 and 12.
- 3.5 Fixed camera surveys were used to collect data on the use of a number of public rights of way in the area, including at Byway 11. The most recent surveys was undertaken over a 37

day period between 25th March and 1st May 2019, and this survey has been subject to a more detailed analysis which shows:

- (a) There were 643 vehicle movements recording using Byway 11 over the survey period, an average of about 17 per day.
- (b) 292 of these recorded movements, or 146 vehicles (about 4 per day on average), turned off the A303, parked and then returned to the A303. It is unlikely that many of these would, if the Applicant's Scheme is implemented, instead choose to access Byway 11 from the south.
- (c) Of the remaining 351 vehicle movements, 219 (about 6 per day on average) arrived at the A303 having travelled along Byway 11 from the south, and 132 (between 3 and 4 per day on average) turned off from the A303 and travelled in southerly direction along Byway 11.

3.6 The Applicant considers that this shows that there is unlikely to be a significant increase in the use of Byway 11 as approximately half of the movements recorded using Byway 11 obtain access from the north from the existing A303, which would not be possible under the Applicant's proposals.

3.7 For there to be an increase it would require:

- (a) a motorised vehicle driver to be in the vicinity of the Stonehenge monument who plans to stop;
- (b) those plans would require research to discover that motorised vehicles are permitted to use Byways 11 and 12;
- (c) the motorised vehicle driver would then have to leave the A303 and access Byway 11 or 12. None of the accesses would be obvious to the passing motorist; and
- (d) Once at Byway 11 or 12 the motorised vehicle driver would have to decide to illegally park.

3.8 A material increase in the usage of the Byways by motor vehicles as a result of the Scheme is thus highly unlikely to occur. If anything, the removal of the ability to turn into Byway 11 and 12 from the existing A303 is likely to lead to a decrease in its use by motorised vehicles as acknowledged in paragraph 32 of the TRF's Submission.

3.9 The Applicant submits that Wiltshire Council has not establish that any material increase in the usage of the Byways will in fact occur as a result of the Scheme.

3.10 Even were it to be accepted that the Scheme would lead to a "significant increase" in the vehicular use of Byways 11 and 12, which the Applicant does not accept, it is not apparent that all of the consequences listed in paragraph 5 would necessarily follow that increase.

3.11 For example in respect of paragraph 5(e), while the Applicant accepts that every motorised vehicle would be required to turnaround to continue its journey, there does not appear to be any evidence to support WC's assertion that this would lead to a "doubling" of the wear and tear to Byway 11. As is demonstrated above, almost half of the current vehicular movements that access Byway 11 from the north would cease under the Applicant's proposals. The wear and tear, taking into account the doubling of northbound movements that would be required to turnaround, would likely be the same as it is currently.

3.12 In conclusion, Wiltshire Council has to demonstrate that the amendment it proposes is necessary to make the Scheme acceptable. In other words, it has to establish that the Scheme as proposed would give rise to impacts upon the Byways which are so significant

that they would justify the refusal of the DCO unless addressed by the modification proposed. Wiltshire Council has not established that the scheme should be refused absent the modification it proposes. Accordingly, there is no justification for the modification sought.

*The Scope of Wiltshire Council's Proposed Remedy*

- 3.13 As noted above, the Applicant does not accept that the modification proposed by Wiltshire Council's is justified by the evidence before the Examination. However, even if it were considered to be justified, the Applicant submits that WC's remedy is wholly disproportionate to the impacts it seeks to address.
- 3.14 The amendment goes far beyond addressing the impacts of additional traffic on the Byways that Wiltshire Council suggests would be caused by the Scheme. It seeks the removal of all traffic save motorcycles. In that sense the modification goes far beyond that which is necessary to make the Scheme acceptable even if it were accepted that the Scheme would cause an increase in the use of the Byways (which it is not).
- 3.15 Appendix B to the WC Submission lists the lengths of Byways 11 and 12 on which it proposes to permanently extinguish public rights of motorised vehicular use, save for motorcycles and other limited exceptions. In short, WC proposes permanently extinguishing vehicular rights of access over several kilometres of byway in order to remedy perceived adverse effects purported to arise in the vicinity of the Stonehenge monument on the basis of an unsupported contention that the Scheme would give rise to an increase in motorised vehicular use of Byway 11 and 12. This remedy would appear to go further than the evidence of the harm would suggest is reasonable and appropriate in the circumstances.
- 3.16 In any event, were the concerns anticipated by WC to manifest, WC as the highway and traffic authority for Byways 11 and 12 has sufficient statutory powers to address all of them.

*Wiltshire Council's Proposed Amendments*

- 3.17 The Applicant notes that WC's proposed amendment submitted at deadline 4 differs substantially from that submitted at deadline 3 [REP3-046] which proposed a new traffic regulation measure over Byways 11 and 12 and the Link that would prohibit its use by motorised vehicles, save for motorcycles and certain limited uses of motorised vehicles. This proposal did not address the restrictions on user inherent to the new restricted byway proposed by the Applicant.
- 3.18 In respect of the amendments set out in the WC Submission at deadline 4, the Applicant notes that its approach is to:
- (a) Amend article 10(1) (permanent stopping up of streets and private means of access) to authorise the permanent stopping up of "public vehicular rights";
  - (b) Add a new sub-paragraph to article 10 that excludes motorcycles and other limited classes of vehicular use from the effect of the extinguishment of "public vehicular rights";
  - (c) Add a new sub-paragraph that creates a new offence of causing or permitting a vehicle to be used in contravention of the extinguishment of vehicular rights; and
  - (d) Introduce a new Part 5 in Schedule 3 that sets out the extents of Byways 11 and 12 over which public vehicular rights would be extinguished.
- 3.19 The proposed amendment does not provide for the continued use of the Link by motorised vehicles, albeit WC indicates it would not oppose such a measure were it restricted to motorcycles.

- 3.20 The Applicant considers WC's drafting approach to be unprecedented, against public policy, *ultra vires* and unenforceable.
- 3.21 Firstly, it seeks to create what the Applicant maintains is a novel and unprecedented class of way; one that can be used by motorcycles together with the other excepted motor vehicles, but no other. The Applicant contends that this would be contrary to the statutory regime for the classification of ways and would inevitably lead to confusion. The way would be recorded as a byway open to all traffic yet manifestly would not be such. This lack of clarity is clearly against public policy.
- 3.22 Secondly, by virtue of section 120(8) of the Planning Act 2008, a development consent order is prohibited from creating an offence in circumstances other than those set out in paragraph 32B of Schedule 5 to the Act. Those circumstances relate only to the non-payment of tolls, fares and other charges, a failure of a person to give their name or address in relation to a penalty fare, the enforcement of byelaws and in relation to a harbour. Consequently, the offence provision proposed by Wiltshire Council is manifestly *ultra vires*. The Applicant notes that, in relation to the recognised categories of ways that are not roads there is no need for a development consent order to create an offence, as an offence already exists in section 34(1)(b) Road Traffic Act 1984 of driving a mechanically propelled vehicle, without lawful authority, on any road being a "*footpath, bridleway or restricted byway*". However, WC's proposed approach would leave Byways 11 and 12 classed as a road, being a byway open to all traffic, and consequently no prosecution could succeed under this section. The Council's proposed amendment would thus be beyond the powers of the Secretary of State when making a DCO. In the absence of any means of enforcing the restricted categories of user, making the amendments as proposed by Wiltshire Council would be an exercise in futility.
- 3.23 While the Applicant maintains that an amendment to its draft Order is not justified or appropriate, were the Examining Authority minded to recommend the Secretary of State adopts its proposal, the Applicant considers the appropriate approach to achieve WC's objectives would be to impose a traffic regulation measure, akin to a traffic regulation order under the Road Traffic Regulation Act 1984, which would be enforceable as though it were such an order (see article 49(9) of the draft DCO). This could be achieved by adding an additional sub-paragraph to article 49(1) (traffic regulation measures) introducing a new Part to Schedule 10 setting out the extents of Byways 11 and 12 over which the measure would apply. This would also necessitate new amendments, and the addition of new sheets, to the Traffic Regulation Measures Plans (Clearways and Prohibitions) to show the extent of the prohibition of use. Unlike WC's approach of creating a new offence, the application of a statutory provision is within the scope of what may be authorised by a development consent order, in accordance with section 120(5)(a) Planning Act 2008. However, even with a more appropriate drafting approach the Applicant remains concerned that the proposed change would fall foul of section 120(3) and fall outside the scope of what may be included within a development consent order, based upon the evidence before the examination. This matter is addressed in more detail below.
- 3.24 The Applicant notes that in paragraphs 14 and 15 of the WC Submission the issue of "associated development" is referred to as a "red herring". The Applicant has accepted, in its response to question TR1.31 [REP2-036], that the matters relating to "associated development" set out in section 114 Planning Act 2008 are not relevant to an ancillary measure that does not comprise development. The Applicant agrees with Wiltshire Council that the appropriate section to consider in respect of provisions relating to, or to matters ancillary to, the development for which consent is granted, that themselves do not comprise "development" is section 120(3).
- 3.25 The Applicant considers, in the absence of any other guidance that paragraph 5 of the DCLG's "Guidance on associated development" (April 2013) is relevant to section 120(3) (see the applicant's response to DCO.1.4(ii) [REP2-030] for further information). As a result, and with due regard to paragraph 5 of that Guidance, it is relevant to consider the extent to which the power in question:

- (a) is directly related to the development proposed in the dDCO i.e. the extent to which it supports the construction or operation of the principal development, or helps address its impacts.
  - (b) is subordinate to the principal development; and
  - (c) is proportionate to the nature and scale of the principal development.
- 3.26 The Applicant is of the view that the WC Submission does not demonstrate that its proposed measure, the extinguishment of kilometres of public vehicular access rights, is proportionate to the nature and scale of the principal development. As set out above, there is no evidence which establishes that the scheme will give rise to any material increase in the use of the Byways by vehicles; rather it is likely that there would be a small reduction in usage by vehicles. Further, the amendments proposed go beyond what is necessary to address an alleged increase in vehicular use as a result of the scheme in that what is sought is to ban all vehicles not just the increase alleged to be caused by the Scheme.
- 3.27 The Applicant's view is that WC has not provided sufficient evidence to demonstrate that its proposed amendment is related, or ancillary, to the development for which the Applicant seeks consent and is potentially outside of the scope of section 120(3) Planning Act 2008.

#### 4. **THE APPLICANT'S COMMENTS ON THE TRAIL RIDERS FELLOWSHIP'S DEADLINE 4 POSITION**

*The Issue which the Trail Riders Federation's Proposed Changes to the Scheme seeks to address*

- 4.1 The essence of the TRF's justification for its proposed change to the Scheme is that it objects to the stopping up of the part of the existing A303 trunk road that can be used as a Link between Byways 11 and 12. The Applicant has responded in detail to this previously in its responses to first written question TR.1.28 and TR.1.30 [REP2-036] and in its summary of its oral submissions made at the Issue Specific Hearing on 13 June 2019 [REP4-034]. In essence, the use of the byways and the existing link by motorcycles is minimal. The loss of the Link to use by motorcycles will not give rise to impacts of a scale which would remotely begin to justify the refusal of the DCO. As a consequence, the TRF has not demonstrated that its amendment is justified.
- 4.2 The Applicant notes at paragraph 20 the TRF Submission presupposes that an "engineered turning circle" would be required at the northern terminus of Byway 11 to facilitate vehicles turning around. While the detailed design of the northern terminus of Byway 11 remains to be developed the Applicant considers the current width of the junction between Byway 11 and the A303 is sufficient to enable vehicles to perform this manoeuvre currently, and it is unlikely that it would need to install a turning circle. The current arrangement could be retained. As noted in the WC Submission (paragraph 61(i)), if parking becomes an issue, it would be addressed under WC's powers as highway and traffic authority.

*TRF's Proposed Scheme Changes*

- 4.3 TRF's preferred amendment proposes:
- (a) a new entry in Part 1 of Schedule 3 that would create a new length of restricted byway that would form the Link to be changed to a byway open to all traffic;
  - (b) consequential amendments to the neighbouring lengths of new restricted byways; and
  - (c) deletion of the stopping up of the northern end of AMES11.



- 4.4 It is important to note that the Applicant's draft DCO would not authorise the stopping up of public rights of vehicular access over any part of byway AMES 11. This is clear from the absence of any entry in Schedule 3. The "zebra hatching" on sheet 7 of the Rights of Way and Access Plans in the vicinity of the junction of the existing A303 with the northern end of AMES11 is constrained to being within the highway boundary of the existing A303. The solid black bar, labelled reference "p", relates to the stopping up of a private means of access (see Part 3 of Schedule 3) and not public highway. Consequently, no deletion of the stopping up of public vehicular access of the northern end of AMES11 is necessary.
- 4.5 Notwithstanding the Applicant's view that the change is not substantiated, subject to detailed drafting, the general drafting approach would achieve the objective of enabling the lawful use of the Link by motorcycles. However, the Applicant is concerned that the impacts of the proposed amendments have not been appropriately assessed. This concern is addressed further in paragraphs 6.12 to 6.17 below.
- 4.6 The TRF proposes a series of variations on this theme:
- (a) Amendment 2 would add a traffic regulation measure to Part 2 of Schedule 10 prohibiting the use by motorised vehicles, save for motorcycles and invalid carriages, of the Amendment 1 byway open to all traffic;
  - (b) Amendment 3 would be to amend the whole of the new restricted byway along the alignment of the existing A303 through the World Heritage Site with a byway open to all traffic and to include a traffic regulation measure prohibiting its use by motorised vehicles, save for motorcycles with a cylinder capacity of the engines of less than 50 cubic centimetres. A variation of this amendment would be to amend the extent of stopping up of the existing A303.
  - (c) Amendment 4 suggests either amending the width of the stopping up of the existing A303 so as to preserve a strip of highway for the length through the World Heritage Site or to change the whole of the new restricted byway in to byway open to all traffic and impose unspecified traffic regulation measures.
- 4.7 In terms of drafting approach alone, the Applicant strongly objects to any change to the extent of stopping up of the existing A303 to retain a strip of existing highway that is not stopped up. That approach would fix at this stage the precise width, alignment and highway boundary of the retained way which would unnecessarily and inappropriately constrain the Applicant's flexibility to the deliver this element of the Scheme. While the Applicant strongly resists this approach, should it be adopted it would also be necessary to amend Part 9 of Schedule 9 and add additional sheets to the De-Trunking Plans to ensure that the any preserved "strip" would no longer have trunk road status and references to private vehicular rights over restricted byways in Schedule 4 (Land in which only new rights etc. may be acquired) would need to be carefully reviewed.

## 5. MATERIALITY OF THE PROPOSED CHANGES TO THE APPLICANT'S SCHEME

- 5.1 The starting point for considering the appropriate procedure to adopt in respect of the proposed changes to the Applicant's Scheme must be the materiality of the change. A material change would engage the *Wheatcroft* principle requiring consultation before the Secretary of State could exercise his discretion under section 114(1) of the Planning Act 2008 to make a DCO in terms different to that applied for. Additionally the Planning Inspectorates' own practice, Advice Note 16 and the advice given to the Applicant in respect of the changes it proposes, indicates the consultation may be appropriate even in respect of Scheme changes that are not material.

- 5.2 While materiality will be context dependent, the DCLG Guidance on Changes to Development Consent Orders (December 2015) suggests that the following factors ought to be considered when determining the materiality of a Scheme change:
- (a) the degree of change in the context of the Scheme as a whole (i.e. whether it is significant or minor);
  - (b) the effect of the change in environmental terms (i.e. whether it would result in a change to the findings of the environmental impact assessment);
  - (c) the effect of the change on the local community (i.e. what effect, if any, it would have on the local community);
  - (d) the likely level of public interest in the change (i.e. whether the general public would be likely to be interested in or concerned by the change) taking into account consultation carried out to date.
- 5.3 Paragraph 58 of the WC Submission indicates WC considers its proposed changes to the Applicant's Scheme may be material, and invites the Examining Authority to proceed on that basis. The Applicant does not disagree with WC's stance on the materiality of its proposed change.
- 5.4 Paragraph 44 of the TRF Submission suggests that the TRF's preferred amendment, converting approximately 400m of the Applicant's proposed restricted byway between Byways 11 and 12 to a byway open to all traffic, would not be material. The TRF submission fails to consider the DCLG Guidance referred to in paragraph 5.2 above. Other amendments proposed, in particular the proposal in alternative amendment 4 to convert the whole of the Applicant's proposed restricted byway through the World Heritage Site into a byway open to all traffic, run a greater risk of being considered to be material in the context of the Applicant's Scheme.
- 5.5 The Applicant considers that even TRF's preferred amendment, which would see the smallest degree of change from the Applicant's proposal, would be a material change. The degree of change from the Applicant's proposal is significant. The change would see a 400m stretch of what would be a restricted byway accessible only by restricted byway users, within the sensitive WHS landscape, becoming a byway open to all traffic available to use by any vehicle capable of using it, subject to any traffic regulation measures imposed. This would introduce the sights and sounds of public traffic where previously none was proposed. Without further environmental and heritage appraisal there can be no reasoned conclusion that it would not result in a change to the findings of the environmental impact assessment. The Applicant proposals for addressing these shortcomings are set out in section 7 below.

*The Wheatcroft Principle*

- 5.6 The essence of the Wheatcroft principle is to ensure that no party is prejudiced through being deprived of the opportunity to make representations on a substantial change to an application. This is particularly the case in respect of applications under the Planning Act 2008 where applicants are required to carry out extensive and detailed public consultation prior to submitting their application. Any consultation on a proposed change to the Scheme must also conform to the Sedley principles (see *R. v Brent LBC Ex p. Gunning* (1985) 84 L.G.R. 168), namely that the proposals have not yet been decided upon, that sufficient information is given to afford intelligent consideration, that there is adequate time for consideration and response and that conscientious consideration is given to consultation responses by the decision maker before a decision is made.
- 5.7 The Wiltshire Submission proposes following a procedure that broadly mimics the procedures that it would be obliged to follow were it seeking to make a Traffic Regulation Order under the Road Traffic Regulation Act 1984 (see paragraphs 58 to 60). The TRF

Submission suggests that nothing further is required beyond the Examining Authority's procedural decision to invite representations on the topic at deadline 4a.

- 5.8 In respect of WC's approach the Applicant notes firstly that the examination is concerned with an application under the Planning Act 2008 and not a traffic regulation order. This is particularly notable in view of the fact that what is proposed in WC's Submission is not a traffic regulation measure but the creation of a unique class of way that would extinguish public rights of access over several kilometres of byway open to all traffic.
- 5.9 In respect of the TRF submission, there is no discrete and unambiguous amendment proposed. Rather there are a series of alternative amendments containing further sub-variations. It would be difficult for a person who may have an interest in its proposed changes to understand which of the changes are being given consideration, or the relative merits of the alternatives or sub-variations, so as to enable intelligent consideration. This is further complicated by the fact that both WC and TRF are proposing changes around a similar issue but without the consequences of those changes being consulted on in a form that would be difficult for persons potentially affected to digest or understand whether, or how, they would interrelate.
- 5.10 Since WC already accepts that its proposals in isolation would be a material amendment, it must follow any amendments that sought to combine both the TRF and the WC amendments (i.e. amendments which would ban vehicles other than motorcycles on Byways 11 and 12 and which would also allow motorcycles to use the Link) would be material. However, no party is seeking to assess the impacts of such combined amendments and none is proposing consultation on them. As a result, the combined amendments cannot be considered by the Secretary of State since the necessary procedures will not have been followed.
- 5.11 The Applicant considers that both approaches fail to recognise that both the WC and TRF propose changes that, absent evidence to the contrary, may be material, to the Applicant's Nationally Significant Infrastructure Project being examined under the Planning Act 2008. The Applicant is of the firm view that both the WC and TRF proposals in respect of the *Wheatcroft* principle, and established practice, would not be sufficient or robust. The procedure that should be followed is set out below in section 7. In the absence of that procedure being followed the Secretary of State will not be in a position to be able lawfully to make the TRF or WC amendments.

## 6. ADEQUACY OF ASSESSMENT OF THE PROPOSED CHANGES

- 6.1 The Infrastructure Planning (Environmental Impact Assessment) Regulations 2017 ("**EIA Regulations 2017**") prohibit the making of an order granting development consent unless an EIA has been carried out "in respect of that application". EIA is the process of preparing an environmental statement, carrying out any consultation, publication and notification as required by the EIA Regulations.

### *Wiltshire Council's Proposed Changes*

- 6.2 The WC Submission contends at paragraph 61 that no further environmental information is necessary to support its proposed change.
- 6.3 The Applicant has significant concerns with the analysis underpinning that conclusion, which in part relies upon TRO procedures generally and on previous TROs in the vicinity (notwithstanding that no TRO or equivalent traffic regulation measure is proposed in the WC Submission). The analysis also refers, at Appendix C, to the Applicant's assessment of Byways 11 and 12 as they would be affected by the Applicant's application, and refers to landowners and users being aware of the issues through the application process.
- 6.4 The Applicant's Environmental Statement has not assessed Wiltshire Council's proposed prohibition of vehicular use of the extent of Byways 11 and 12 and the analysis at paragraph

- 61 of the Wiltshire Submission does not provide any environmental appraisal of any likely significant effects. Paragraph 61 does not consider whether or not the extent of its proposed change, which would extend beyond the Order limits, would fall within the study areas of the various topics assessed. Furthermore, it does not consider on a topic by topic basis, whether the proposed change would alter the conclusions of the Environmental Statement. The Applicant considers the analysis at paragraph 61 to be insufficient for a reasoned conclusion to be drawn on whether or not WC's proposed change would give rise to significant environmental effects that differ from those assessed by the Applicant in respect of its application.
- 6.5 The Applicant notes that the proposed change would take place within the World Heritage Site (WHS) and as such would potentially affect the findings of both the environmental impact assessment (reported in the Environmental Statement – [APP039-054]) and the Heritage Impact Assessment (HIA, Appendix 6.1 to the ES – [APP- 195]).
- 6.6 EIA Regulations require an EIA development to be accompanied by an ES which includes “a description of the likely significant effects of the proposed development on the environment” (Regulation 14). Schedule 4 of the EIA Regulations goes on to say, at item 5, that “The description of the likely significant effects on the factors specified in regulation 5(2) should cover the ..... positive and negative effects of the development.”
- 6.7 With regard to the baseline situation:
- (a) Byway Open to All Traffic (BOAT) AMES 12 passes to the west of the Stones and crosses the existing A303 connecting Larkhill to Druids Lodge settlement on the A360 route (ES para 13.6.24).
  - (b) Byways AMES 11 and 12 pass through the Normanton Down barrow cemetery; vehicular use of the byways has an adverse impact on the setting of the monuments within the cemetery and in some cases directly impacts the fabric of the monuments. (ES para 6.6.99).
  - (c) Byway AMES 12 passes within 250m of the Stonehenge monument to the west and the presence of vehicles parking on the BOAT adversely affects the setting of the monument (ES para 6.6.101).
  - (d) The Stones are seen in the context of vehicles on the existing A303 Andon AMES 12 which substantially detract from the scenic quality of the view and the perception of the Stones within an open landscape (ES para 7.6.140).
- 6.8 The restriction of public motorised vehicular access along these byways to only motorcycles and other limited classes of vehicular use, could have an adverse impact on motorised users of Byway AMES 12 between the locations identified in (a) above, and beneficial impacts for each of the three aspects identified in (b) to (d) above. It would contribute to the Scheme objective to remove the sight and sound of traffic from much of the WHS landscape, a key aspiration of the WHS Management Plan.
- 6.9 An appraisal would be required to establish whether the adverse and beneficial effects of the proposed change would constitute significant effects in accordance with the EIA Regulations.
- 6.10 The Applicant contends that a focussed appraisal of the heritage impacts should be undertaken, with reference to the Scheme HIA, to detail the changes proposed by Wiltshire Council, and to assess whether that would lead to changes to the impacts as reported on Asset Groups and discrete or isolated assets that contribute to conveying the OUV of the WHS, as well as relevant thematic topics (e.g. impacts on solstitial alignments, contemporary cultural practices, visitor experience). Following this, an assessment should be made of the impacts on the Attributes which convey the OUV of the WHS, its Integrity

and Authenticity. It should also consider policy tests, including those in the 2015 WHS Management Plan. Finally, conclusions should be drawn as to whether the Council's proposed changes would affect the overall conclusion as set out in the Scheme HIA.

- 6.11 In addition, Stonehenge is spiritually significant to druid, pagan and other groups. The proposed change would affect a means of access to this significant site. The Equality Act 2010 is designed to ensure that projects do not discriminate against or disadvantage groups having 'protected characteristics', which include religion or faith. As such, the change would potentially affect the findings of the Equality Impact Assessment (EqIA – APP-296) and an appraisal should be undertaken to ascertain whether an updated assessment would consequently be required.

*TRF's Proposed Changes*

- 6.12 The TRF submission takes a similar, if briefer, tack. While all relevant environmental topics should be considered, clearly there is the potential for a difference in significance of effect to cultural heritage to arise between the assessment of the Applicant's application, which proposes no public rights of vehicular access along the Link, and the TRF's various proposals which at a minimum would involve the use of the Link by motorcycles and at a maximum would see the whole length of the restricted byway within the World Heritage Site being subject to unrestricted vehicular use, subject to unspecified traffic regulation measures.
- 6.13 The Scheme does not include a connection between Byways AMES 11 and 12 for motorised vehicles, and this is specifically assessed in paragraph 13.9.62 of the ES [APP1-051]. Consequently, the statement at paragraph 50 of the TRF Submission that the ES "is inadequate as it does not assess the positive or negative impacts of stopping up the link" is clearly inaccurate.
- 6.14 The Scheme presented at the statutory public consultation between February 2018 and April 2018, did include a link for motorised vehicles between AMES 11 and AMES 12. This was located in a dry valley to the south of the existing A303 alignment. Further to stakeholder feedback, the option not to provide a new connection south of the existing A303 to provide a motorised connection between byways 11 and 12 was presented at the supplementary consultation between July and August 2018 and was well supported, including by the heritage bodies. The option was considered preferential as it avoids having an additional route open to vehicle traffic within the WHS. This route would likely have adversely affected the setting of the Normanton Down Barrow Group and increased disturbance of nesting stone curlew in the Normanton Down RSPB reserve. The option without the link was taken forward within the Scheme design (ES para 3.3.14) and was consequently assessed in the ES and HIA.
- 6.15 The removal of the link for motorised vehicles between Byways AMES 11 and 12 contributes to the Scheme's objective to remove the sight and sound of traffic from much of the WHS landscape, a key aspiration of the 2015 WHS Management Plan.
- 6.16 The ES identifies a substantial number of significant beneficial effects. These apply to 72 scheduled monuments (65 contained within 12 asset groups, plus seven discrete assets), together with two non-designated assets. All are within the WHS and all are considered as having Very High value (ES para 6.9.27). Reintroduction of a link for motorised vehicles between AMES 11 and 12, along the old A303, could reduce the beneficial impact currently assessed, potentially to the extent that some of the significant effects identified in the ES would no longer be significant. An appraisal would be required to assess this and any similar implications for the HIA.
- 6.17 If there are implications for the HIA, these should be assessed through a focussed Heritage Impact Assessment, with reference to the Scheme HIA, to detail the changes proposed by the TRF, and to assess whether that would lead to changes to the impacts as reported on Asset Groups and discrete or isolated assets that contribute to conveying the OUV of the

WHS, as well as relevant thematic topics (e.g. impacts on solstitial alignments, contemporary cultural practices, visitor experience). Following this, an assessment should be made of the impacts on the Attributes which convey the OUV of the WHS, its Integrity and Authenticity. It should also consider policy tests, including those in the 2015 WHS Management Plan. Finally, conclusions should be drawn as to whether the TRF's proposed changes would affect the overall conclusion as set out in the Scheme HIA.

## 7. THE APPLICANT'S VIEW OF THE APPROPRIATE PROCEDURE TO ADOPT IN THE CIRCUMSTANCES

7.1 The Applicant considers that the appropriate approach would be for the Examining Authority to invite WC and TRF to submit formal change requests based on the Planning Inspectorate's advice contained in Advice Note 16.

7.2 The request should:

- (a) clearly explain why the change is necessary and justified addressing the Applicant's concerns, and the concerns of any other party in Deadline 4a submissions;
- (b) Clearly consider the materiality of the proposed change in the *Wheatcroft* sense, with reference to the 2015 CLG Guidance on proposed changes to development consent orders. This assessment of materiality should also consider the combined effects of all of the proposed changes;
- (c) In WC's case, include a list identifying the 'new persons' who are to be consulted to the extent its proposals exceed the Order limits. In this regard Wiltshire Council ought to confirm:
  - (i) whether any new interests in land would be affected by its proposals who would not previously have been consulted on or notified of the Application's application under sections 42(1)(d) and 56(1)(d) Planning Act 2008;
  - (ii) whether or not the Infrastructure Planning (Compulsory Acquisition) Regulations 2010 would be engaged by its proposal and
  - (iii) whether its proposal would entail any development, and if so, the nature of that development
- (d) Clearly and unambiguously set out the precise changes proposed to the Order. If options or alternatives are proposed information on the comparative merits should be provided and a clear description of each option or alternative be provided; and
- (e) The proposed change requests should be accompanied by appraisals of the likely significant environmental effects of the proposed change, and if relevant, should consider HIA and equalities, to enable the Examining Authority, and the Secretary of State to come to a reasoned view on the effects of the proposed change, in the context of the assessments required under those regulations.
- (f) In the event the appraisals suggest that the proposed amendment would give rise to any different or new likely significant (whether positive or negative), a supplementary environmental statement should be required which would need to be publicised in accordance with the requirements of the EIA Regulations and within the time remaining for the examination. The same approach ought to apply to any updated HIA or EqIA.

- (g) In the event that it were concluded that the proposed amendment amounted to a "material" change, the Applicant is of the clear view that the Secretary of State would only be in a position to lawfully exercise the power pursuant to section 114(1) of the Planning Act 2008 if those affected by those proposals have had a fair opportunity to have their views taken into account. The Applicant is also aware that such consultation has been required by PINS in relation to non-material changes, as outline in Advice Note 16. Accordingly, a third party seeking such a proposed amendment to a DCO will have to ensure that full and fair consultation is undertaken in respect of the change proposed.
- (h) Such consultation would have to comply with the Sedley principles elucidated in *R v Brent LBC Ex p. Gunning (1985) 84 L.G.R 168*. consequently, any consultation would have to provide sufficient information to permit those consulted (including the Applicant) to make a meaningful response, weigh the comparative merits where options are presented and it must allow adequate time for consideration and response within the Examination timeframe.
- (i) The Applicant considers that as a minimum all of the above-mentioned documents would need to be made the subject of full and fair public consultation in order to ensure that the Secretary of State could be in a position to amend the DCO at the behest of an interest party to the Examination on a lawful and robust basis.
- (j) Finally, the Applicant is of the view that any request to change the Applicant's Scheme would have to be considered against the DCLG guidance for the examination of applications for development consent (March 2015) at paragraph 109-115. In particular:
  - (i) whether sufficient consultation on the change to the Scheme can be undertaken to allow for the examination to be completed within the remaining statutory table;
  - (ii) whether any other procedural requirements can still be met; and
  - (iii) whether the application can be examined within the statutory timetable without breaching the principles of fairness and reasonableness.

7.3 The Applicant considers it would be appropriate to require such requests to be submitted for Deadline 6. This would afford WC and the TRF time to prepare their requests and would dovetail with the proposed timeline for consideration of the Applicant's own requests for a procedural decision to change the Scheme. It would appear sensible to consider all of the proposed changes in the round.

7.4 Having prepared and submitted their requests, the Applicant considers that it would be appropriate for each of the parties proposing changes should publish notice of the proposed changes and consult in the same fashion that the Examining Authority has advised the Applicant in respect of its proposed non-material changes, by way of its procedural decision dated 27 June 2019 [PD-013] and in the same way, should compile a consultation report considering the feedback received from that consultation.

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