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All Interested Parties

Your Ref:

Our Ref: TR010025

Date: 27 September 2019

Dear Sir/ Madam

Planning Act 2008 – Section 89

Application by Highways England for an Order Granting Development Consent for the A303 Amesbury to Berwick Down

Notification of Procedural Decision in respect of eight proposed changes to the application (NMC-01 to NMC-08) put forward by the Applicant in [[AS-067](#)], as amended in relation to NMC-02, NMC-06 and NMC-07 in [[REP8-015](#)]

Decisions

The Examining Authority (ExA) has decided to accept eight changes to the application put forward by the Applicant, namely, NMC-01, NMC-02, NMC-03, NMC-04, NMC-05, NMC-06, NMC-07 and NMC-08. The ExA considers that the proposed changes represent non-material changes to the original application dated 26 October 2018. They are not so material as to constitute a new application and the development now being proposed is in substance that which was originally applied for. The Applicant is required to submit the requisite documentation in support of these non-material changes, as set out in the Proposed Changes Consultation Report (Non-Statutory) submitted at Deadline 8 (the Consultation Report) [[REP8-015](#)], by the close of the Examination. These Procedural Decisions are made under section 89(3) of the Planning Act 2008 (PA2008). The background to, and the ExA's reasoning for, these decisions is set out below.

Background

The Applicant's letter submitted to the Planning Inspectorate on 21 June 2019 [[REP4-038](#)] gave notice of its intention to propose non-material changes to the application. The Applicant's subsequent letter to the Planning Inspectorate dated 26 July 2019 [[REP6-003](#)] confirmed that the non-statutory consultation on the eight proposed changes had started on 26 July 2019 and would close at 11:59 on 26 August 2019.

The Proposed Changes Application [[AS-067](#)] was submitted to the Planning Inspectorate on 5 August 2019. This comprises the Applicant's request to the ExA to accept into the examination of the application the eight proposed changes to the Proposed Development for which development consent is sought. The Proposed Changes Application also contains a copy of the Proposed Changes Consultation Booklet, along with a correction sheet relating to an amendment to the proposed change NMC-06.

The Consultation Report was submitted at Deadline 8. This explains that, in response to the ExA's request, the Applicant undertook non-statutory consultation on the eight proposed changes. This involved: The publication of notices in the local press; the erection and maintenance of site notices; the deposit of documents for public inspection at two libraries; and promotion through the project website and social media. In addition, the Applicant mailed 194 letters to "*Prescribed parties; those with an interest in the relevant land; and other interested parties*". The report confirms that the Applicant has had regard to whether or not there may be persons who may be affected by the proposed changes but who are not yet participating in the examination of the application.

It explains that NMC-06 Options A and B both require a small amount of 'additional land'. Since the Applicant does not seek to engage the procedure in The Infrastructure Planning (Compulsory Acquisition) Regulations 2010, it needs the consent of all those with an interest in any 'additional land' to deliver either Option A or B.

The Consultation Report also states that where modifications to the proposed changes have been sought by consultees – in relation to NMC-02, NMC-06 and NMC- 07 – the Applicant has responded by engaging further with the relevant parties in relation to their requests, and then amending the proposed changes. The amended proposals are presented and explained in Chapter 5 of the Consultation Report. Where the proposals remain unchanged following the consultation, this is also confirmed in Chapter 5. The report concludes by requesting the ExA's acceptance of all the proposed changes, as described in Chapter 5.

The Applicant's post-consultation position in relation to each of the changes sought in summary is as follows:

NMC-01 - Existing lay-by west of Winterbourne Stoke to be de-trunked

This remains as set out in the Proposed Changes Application and the Proposed Changes Consultation Booklet (Appendix 1 to the Consultation Report).

NMC-02 - Countess Roundabout to be de-trunked

NMC-02 is amended to reflect comments received from Wiltshire Council regarding the extent of the de-trunking at Countess Roundabout, as set out in full at Appendix G to the Consultation Report. Revised 'after' sketches, showing NMC-02 as now proposed, are provided at Figure 5-1 of the Consultation Report.

NMC-03 – Change to the proposed road classification of the former A303 west of Winterbourne Stoke

NMC-03 remains as originally proposed in the Proposed Changes Application and the Proposed Changes Consultation Booklet (Appendix A1 to the Consultation Report).

NMC-04 - *Turning head on the old Stonehenge Road*

NMC-04 remains as originally proposed in the Proposed Changes Application and the Proposed Changes Consultation Booklet (Appendix A1 to the Consultation Report).

NMC-05 - *Revised proposal for access to land next to the existing A360 north of Longbarrow*

NMC-05 remains as originally proposed in the Proposed Changes Application [[AS-067](#)] and the Proposed Changes Consultation Booklet (Appendix A1 to the Consultation Report). However, a replacement 'after' sketch for NMC-05 (Sheet 14 of the Rights of Way and Access Plans [[APP-009](#)]) has been provided, in which the omission, in the version of the sketch in the Consultation Booklet, of a directional label for 'Insets 1A & 1B', has been rectified.

NMC-06 - *Public right of way to Stonehenge Visitor Centre*

The Applicant seeks acceptance of NMC-06 Option B in the first instance; and, if such acceptance is not possible because the consent of one or more relevant affected persons remains outstanding, then a 'substitute solution' which would obviate the need for the additional land consents would be adopted. For the substitute solution, the 'after' sketches for NMC-06 (Options A and B) as shown in the Proposed Changes Consultation Booklet (Appendix A1 to the Consultation Report) and the Proposed Changes Application would be replaced in the draft Development Consent Order (dDCO) drawings by the north-south length of shared-use facility for pedestrians and cyclists which is shown in Figure 5-3 of the Consultation Report.

NMC-07 - *Additional private means of access*

The owner of the land on which the proposed PMA 42 would be constructed has objected to this element of NMC-07 but has no objection to the proposed PMA 41. It is therefore proposed that PMA 42 will be removed from the proposal for NMC-07. A revised 'after' sketch, showing NMC-07 as now proposed (ie featuring new PMA 41 only), is provided at Figure 5-4 of the Consultation Report. This replaces the 'after' sketch for NMC-07 in the Proposed Changes Consultation Booklet (Appendix A1 to the Consultation Report) and the Proposed Changes Application.

NMC-08 - *Revised private means of access off the new restricted byway south of Green Bridge No.4*

NMC-08 remains as originally proposed as set out in the Proposed Changes Application and the Proposed Changes Consultation Booklet (Appendix A1 to the Consultation Report).

The Consultation Report observes that none of the consultees expressed a view that the proposed changes were material, as opposed to non-material. It also notes that a significant majority of the persons consulted on the proposed changes did not respond to the consultation. The Applicant relies upon the report in support of its request to the ExA to accept all the proposed changes as part of the application to be examined.

The proposed changes were also discussed by Interested Parties at Issue Specific Hearing 9 which dealt with matters relating to traffic and transportation, held on 22 August 2019 (ISH9). The oral representations made at ISH9 included those put

forward on behalf of Classmaxi Limited objecting, on both procedural and substantive grounds, to NMC-07 and these are set out in its written summary of oral submissions put at ISH9 [[REP8-039](#)]. The Applicant responded to these objections as set out in its own summary of oral submissions put at ISH9 [[REP8-017](#)].

The comments on the Consultation Report were submitted to the Planning Inspectorate on 20 September 2019; Deadline 8a in the Examination Timetable. A total of five submissions were received at that stage from Freeths LLP on behalf of English Heritage Trust; Waves Training Solutions Limited on behalf of Mr F W G Whiting; Wiltshire Council; Historic England; and Mr Alistair Falconer Hall on behalf of Lincoln College.

The Examining Authority's reasoning

In making this decision, the ExA has taken account of the guidance in paragraphs 109 to 115 of DCLG Guidance¹ for the examination of applications for development consent and the Planning Inspectorate's Advice Note 16: How to request a change that may be material² (AN16). Paragraph 113 of the DCLG guidance makes specific reference to the principles of fairness and reasonableness set out in the Wheatcroft³ case. Paragraph 2.5 of AN16 refers to the case of Holborn Studios and the need for consultation.

Paragraph 109 of the DCLG Guidance accepts that applicants may need to change a proposal after an application has been accepted for examination and gives examples of reasons why such an application might be made. However, that list is neither exhaustive, nor is it intended to preclude other circumstances that might lead to changes. The Proposed Changes Application explains that since the application was submitted the Applicant has continued to engage and negotiate with those with an interest in land affected by the Proposed Development and with other Interested Parties. The eight changes now proposed are as a result of that engagement and negotiation.

The materiality of the Applicant's proposed changes to the application

The ExA takes the view that these revisions are properly regarded as changes to the original proposal. However, as the Applicant has pointed out in the Proposed Changes Application, the proposed changes are all relatively localised in their effect and would not materially change the effects of the Proposed Development on the local community. In environmental terms each of the proposed changes has been reviewed and appraised in the context of the original Environmental Impact Assessment carried out in respect of the Proposed Development and none of the proposed changes has been found to result in any new or materially different likely significant effects in comparison to those assessed and reported in the Environmental Statement [[APP-038 to APP-054](#)]. They would not alter the substance of the development for which development consent is sought, nor would they result in any Compulsory Acquisition implications.

¹ The Department for Communities and Local Government Planning Act 2008: Guidance for the examination of applications for development consent, available at: <https://www.gov.uk/government/publications/planning-act-2008-examination-of-applications-for-development-consent>

² Available at: <https://infrastructure.planninginspectorate.gov.uk/wp-content/uploads/2015/07/Advice-note-16.pdf>

³ Bernard Wheatcroft Ltd v Secretary of State for the Environment (1982) 43 P & CR 222

The ExA has taken into account the explanation for the changes provided by the Applicant, the significance of the changes in the context of the original application as a whole and the information regarding the environmental impacts. Whilst we acknowledge the concerns expressed by certain Interested Parties regarding the specific impacts upon their interests, the extent of these perceived impacts must be considered against the implications of the Proposed Development as a whole. Having regard to the nature and scope of the proposed changes, the ExA concludes that they represent non-material changes to the application, and we do not believe that their acceptance would result in a materially different project being considered. In the light of AN16, we have also considered whether the combined impact of a series of incremental non-material changes collectively would result in a material change to the original application but we do not find that to be the case in the context of the Proposed Development as a whole. What is proposed can therefore still be considered under the existing application, provided that issues of fairness can be satisfactorily addressed.

Whether the changes can be fairly accepted and examined

The ExA recognises that in accepting the proposed non-material changes it needs to act reasonably, in accordance with the principles of natural justice and those arising from the Wheatcroft and Holborn Studios cases. It must be satisfied that anyone affected by the changes should have a fair opportunity to have their views known and to have those views properly taken into account.

In the interests of fairness, the Applicant has undertaken consultation on the proposed non-material changes on a non-statutory basis. The scope of the consultation is set out in Chapter 2 of the Consultation Report. The consultation sought to engage all persons identified in the PA2008 under section 42(1)(a) to (d) who would be affected by the proposed changes, including any section 42 persons not originally consulted on the application but who may now be affected by the proposed changes. In addition, the Applicant confirms that no new persons or parties not previously consulted have been identified as a consequence of all or any of the proposed changes themselves.

The consultation process invited those persons notified to submit their responses direct to the Applicant who, in turn, was required to compile any responses to the notification about the proposed changes and provide this report to the ExA at Deadline 8 in the Examination Timetable. The comments upon that report were received at Deadline 8a. In addition, the proposed changes were discussed, and oral submissions were made in relation to them at ISH9.

The ExA therefore has the benefit of the Consultation Report, the comments on that report and the oral submissions made at ISH9. There is therefore sufficient information before the ExA to enable these Procedural Decisions to be made.

The various submissions on this topic include both expressions of support for, and objections to, the proposed changes on substantive grounds. In relation to NMC-07, procedural as well as substantive grounds of objection were raised by Mr Graham Eves on behalf of Classmaxi Limited and Amesbury Property Company Limited both in response to the non-statutory consultation and at ISH9. The ExA has given careful consideration to the points made by Mr Eves on their behalf together with the Applicant's response. Our conclusions on the procedural points raised now follow.

On the question of whether the change application is premature, pre-determines the outcome of the consultation exercise and is unfair, we consider that the consultation carried out has enabled all Interested Parties and the wider community to be involved in the process of the ExA's consideration of the proposed changes. Whilst the Applicant has applied for the changes in advance of the consultation exercise, the decision as to whether they are able to be considered as part of the decision on the Proposed Development as a whole, remains that of the ExA.

Part 1 of the Proposed Changes Application explains that the change application was submitted shortly after the start of the consultation period to enable the ExA to consider the proposed changes before then considering the comments on them. This also enabled the issues to be discussed at ISH9 which was attended by Mr Eves and at which he was able to submit and explain his clients' objections to the proposed change on procedural and substantive grounds.

The Applicant accepts that the press notice at Appendix E to the Proposed Changes Application, the text of which was also included in the site notice and the information sent to consultees, only refers to an 'Additional access off the new link to the Allington track' and does not refer to the second private means of access from the proposed AMES1 between Equinox Drive and Amesbury Road (PMA 42). Given that the position in relation to the second access was made clear in the other information made available to parties, we do not believe that any prejudice has been caused by this omission. In any event, the revised proposed change for NMC-07 now only relates to PMA 41 and PMA 42 has been removed from the proposal.

It was also submitted on behalf of Classmaxi Limited that paragraph 10.2.4 of the Consultation Booklet (Appendix 1 to the Consultation Report) is misleading as it suggests that the proposed changes within NMC-07 have the support of the relevant landowner. Whilst it may have the support of the owner and occupier of Earl's Down Field, it does not have the support of Classmaxi Limited or Amesbury Property Company Limited. In response, the Applicant confirms that Lincoln College, the owner of the field served by PMA 42 and the tenant P J Rowland & Sons (Farmers) Limited support the proposal. This is also confirmed by Mr Alistair Falconer Hall in his Deadline 8a comments. The ExA considers that the contentious nature of NMC-07, and indeed other proposed changes, has been made clear through the consultation process and that no prejudice has been thereby caused to Interested Parties. In addition, the revised NMC-07 proposal now only relates to PMC 41 and not PMC 42.

In terms of the Gunning⁴ principles, the Applicant has sought to amend certain proposals in the light of the consultation response which reflects the formative nature of the initial request. The facts indicate that the consultation exercise was undertaken with an open mind. Furthermore, the ExA considers that the consultation documentation gave sufficient reasons for the proposals to permit intelligent consideration and that adequate time was allowed for consideration and response. We do not find that the consultation process was unfair or failed to reflect the Gunning principles.

The ExA is satisfied that the consultation procedure and the Examination Timetable has enabled everyone who would have wished to comment upon the changes an opportunity to do so and that the impacts associated with the changes to the application can be fairly considered. This will ensure that there is no prejudice to any

⁴ See R v Brent London Borough Council ex parte Gunning [1985] 84 LGR 168

person. In reaching this conclusion, we have borne in mind the imminent date of closure of the Examination. Given the non-material nature of the changes proposed, the reasons for those changes being put forward, the amendments made as a result of the consultation process, the opportunities already afforded for comments on those changes and the content of those comments, we do not consider that their acceptance at this stage of the Examination would be unfair.

Taking into account the submissions made by Interested Parties including those made at ISH9 and at Deadline 8a, and given the scope for the wider community to comment upon the impacts of the change during the non-statutory consultation process, the ExA is satisfied that the changes NMC-01 to NMC-08 (inclusive) can fairly be accepted into the Examination as part of the original application.

Conclusions

The ExA considers that the acceptance of the changes NMC-01 to NMC-08 (inclusive) would represent non-material changes to the original application. We do not consider, in the context of the whole application, that the materiality of the changes applied for, whether considered on their own or cumulatively, are of such a degree that it constitutes a new application. In the interests of fairness, the Applicant has undertaken non-statutory consultation and there have been opportunities within the Examination Timetable for those with an interest in the Proposed Development to make their views known and for those views to be taken into account as part of the Examination process. The ExA concludes that the Wheatcroft and Holborn Studios tests have been met and that the non-material changes NMC-01 to NMC-08 (inclusive) can fairly be considered within the scope of the original application.

The Applicant is required to submit the requisite documentation in support of these non-material changes by the close of the Examination.

Yours faithfully

Wendy McKay

Wendy McKay

Lead Member of the Examining Authority, on behalf of the Panel

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