

BY EMAIL ONLY

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Dear Madam

PLANNING ACT 2008 - THE A303 (AMESBURY TO BERWICK DOWN) DEVELOPMENT CONSENT ORDER ("THE DRAFT A303 STONEHENGE ORDER")

Justification for provisions in the draft A303 Stonehenge Order relating to the transfer of the benefit of the power to acquire rights over land – article 22 (compulsory acquisition of rights) and article 50 (consent to transfer benefit of the Order)

Pinsent Masons is instructed by Highways England in the matter of the draft A303 Stonehenge Order. We note that the Secretary of State has extended the deadline by which a decision in relation to the application for that Order is due to be made, to Friday 13 November 2020. If it is possible for the drafting issue raised in this letter to be considered by the Department and accounted for within the decision by that date, we should be very grateful. Please note, however, that we do not wish to cause any delay to that decision and ask that this matter be considered with that in mind.

Since the closure of the examination of Highways England's application for the draft A303 Stonehenge Order on 2 October 2019 and the submission of the Examining Authority's report to the Secretary of State on 2 January 2020, we have noted the Secretary of State's Decision Letter published on 30 April 2020 ("**the LLTC Decision Letter**") confirming the making of the Lake Lothing (Lowestoft) Third Crossing Order 2020 ("**the LLTC Order**"). We are also instructed by Suffolk County Council in the matter of the LLTC Order.

This letter has regard to the modifications made by the Secretary of State to the LLTC Order, in connection with drafting related to the compulsory acquisition of rights over land by, and for the benefit of, parties other than the undertaker/Applicant. The reason for our writing to you about these provisions, and the modifications made to them by the Secretary of State, is that the draft A303 Stonehenge Order, which is currently awaiting the Secretary of State's decision, contains similar drafting to that which was not accepted by the Secretary of State in the LLTC Order.

We consider that the equivalent drafting in articles 22 and 50 of the draft A303 Stonehenge Order¹ is both necessary and justifiable, and that it should be included in that Order in the event that it is made by the Secretary of State.

¹ As set out in the version of that Order identified by the Planning Inspectorate as 'examination library reference [AS-121](#)' (i.e. Revision 8, submitted at Deadline 10 of the examination under Highways England Document Reference 3.1(8)).

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The remainder of this letter sets out:

- an **analysis** of the Secretary of State's reasons for rejecting the equivalent drafting in the LLTC Order;
- an **explanation** of why such drafting in the A303 Stonehenge Order is necessary; and
- **justification** for the inclusion of such drafting in the A303 Stonehenge Order, if it is made by the Secretary of State.

ANALYSIS

The LLTC Decision Letter, at paragraph 58, sets out the main modifications which the Secretary of State decided to make to the LLTC Order. At bullet points 6 and 10 of that paragraph, the Secretary of State explained why he had not accepted the entirety of the drafting proposed by Suffolk County Council ("**the Council**") in article 26 (compulsory acquisition of rights) ("**the CA rights article**") and article 49 (transfer of benefit of Order, etc.) ("**the transfer of benefit article**").

These two articles, as drafted by the Council, sought to include in the LLTC Order a mechanism which would allow rights over land to be acquired by, and for the benefit of, parties other than the Council itself – specifically, statutory undertakers whose apparatus was required to be diverted and relocated in order to accommodate the highways scheme for which development consent was granted by the LLTC Order.

The intention was to ensure that the benefit of the rights acquired could be enjoyed by the parties who needed them. The standard drafting in the CA rights article was therefore amended by the Council so that where statutory undertakers' apparatus was required to be diverted and relocated, with the Council's agreement the statutory undertakers so affected would be able to enjoy the benefit of rights to install, access and maintain their relocated apparatus in land to which the CA rights article applied. However, if those rights were acquired in the first instance by the Council (as 'acquiring authority'), it would be the Council – and not the affected statutory undertaker – who would have the benefit of those rights. A transfer of the power to acquire those rights in the first place was therefore necessary.

For this reason, the mechanism proposed by the Council included a 'carve out' in the transfer of benefit article, the effect of which would be to obviate the need for the Secretary of State to give his consent to any transfer (for example to a statutory undertaker) of the benefit (of the LLTC Order) of the power to acquire compulsorily rights over land. Instead, the mechanism required the Council's prior written consent to the exercise, by a statutory undertaker, of the power to acquire rights over land.

The Secretary of State noted the Applicant's intention, but commented, at bullet points 6 and 10 of paragraph 58 of the LLTC Decision Letter, as follows:

- *"Article 26(2) and (3). The Secretary of State is concerned that the drafting of these articles as set out in the DCO may not in practice achieve its intended effect. The changes proposed in subsections (2) and (3) create a parallel power to that set out in article 49 (transfer of benefit of Order). Further the changes proposed provide that the benefit of the powers of compulsory acquisition of rights under the Order may be transferred to the statutory undertakers by way of written consent by the undertaker. This is in contrast to the procedure set out in article 49(1) which require the consent of the Secretary of State. There is no explanation set out in the Explanatory Memorandum for the need of this provision and how it would work, and the Secretary of State notes that these changes are not discussed within the ExA's report. The Secretary of State has further concerns that the effect of the transfer of benefit to any statutory undertaker would not transfer the liability for the payment of compensation to them. The Secretary of State is unclear how this would be expected to work in practice and is concerned that this may result in a lack of understanding or appreciation on the part of any affected landowners, which the Secretary of State does not consider fair or reasonable. For these circumstances in relation to this application, the Secretary of State believes that fairness and transparency requires the removal of these provisions. Any transfer of*



functions or powers under the Order that needs to be made to a statutory undertaker can be undertaken by way of the procedure set out in article 49(1).

- *Article 49 (transfer of benefit of Order, etc.). As a consequence of the matters set out in relation to article 26, paragraph (4) has been reworked so as to remove subparagraph (b)."*

The modifications made by the Secretary of State to the Council's drafting in the CA rights article and the transfer of benefit article are shown in tracked changes in **Annex A** to this letter.

The effect of those modifications is to require the Council, in every instance where a statutory undertaker demands new rights pertaining to the relocation, installation, maintenance and protection of, and access to, its apparatus in land which is owned by a third party and is not proposed to be acquired outright by the Council, to seek the consent of the Secretary of State to a transfer of the benefit of the Order so that those rights can then be acquired by the statutory undertaker under article 26.

The LLTC scheme includes a bridge which crosses the Port of Lowestoft in Lake Lothing; that bridge will link into the highway network either side of the Lake. In so doing, it will require the existing highway (on the south side of the Lake) to rise up on an embankment. To avoid future compromise of the structural integrity of the embankment, it is proposed that statutory undertakers' apparatus which is currently located within the existing (at grade) highway will be relocated in land which skirts the new embankment. In order to minimise the impacts of the Scheme on adjoining property owners and businesses, the Council has not proposed to acquire outright the land skirting the embankment, but only that such land shall be subject to the compulsory acquisition of rights for the benefit of itself (for maintenance of the embankment) and for statutory undertakers (in respect of their relocated apparatus).

Where the necessary rights cannot be acquired by agreement directly for the benefit of the Council or the statutory undertakers (as the case may be), there will be an administrative burden on both the Council and the Secretary of State, whose consent to the transfer of the benefit of the power to acquire rights for any party other than the Council, will need to be sought and granted in each case.

There are other examples in the LLTC scheme, besides that of the embankment, where statutory undertakers' apparatus is proposed to be relocated outwith the highway, or outwith land which is owned, or proposed to be acquired by, the Council. The same issue relating to the provision of rights for the benefit of statutory undertakers will therefore arise in a number of locations across the LLTC scheme. As such, where negotiations to acquire such rights by agreement (on terms requiring landowners to grant rights over their land directly to each of the relevant statutory undertakers) cannot be achieved within the necessary timescale, there will, in each case, be a need for the Secretary of State's consent to transfer the benefit of the Order so that the statutory undertakers concerned can acquire the rights directly themselves under article 26. Our observation is that this is not efficient for any of the parties involved and will increase the administrative burden on both the Council and the Secretary of State during the delivery of the LLTC scheme.

Turning now to the draft A303 Stonehenge Order, we note the Secretary of State's comment (in paragraph 58 of the LLTC Decision Letter) that:

*"For these circumstances **in relation to this application** [i.e. the application for the LLTC Order], the Secretary of State believes that fairness and transparency requires the removal of these provisions."*

We take this as an indication that where similar drafting is proposed in other draft Orders, such as the draft A303 Stonehenge Order, the Secretary of State will be prepared to consider that drafting on its merits, should he be minded to make that Order.

In this context, we set out below a full explanation of why similar drafting has been included in the draft A303 Stonehenge Order, and reasons to justify the Secretary of State's acceptance of such drafting, in the event that the Order is made.



EXPLANATION

The reasons for proposing a similar mechanism in the draft A303 Stonehenge Order are twofold:

1. Diversion of statutory undertaker's apparatus / utilities

Like the LLTC scheme, the A303 Amesbury to Berwick Down Scheme (“the Scheme”) would affect numerous statutory undertakers, insofar as their apparatus would need to be diverted and relocated to accommodate the Scheme.

Highways England's experience of delivering other major infrastructure schemes indicates that where this is the case, a significant contingent of the statutory undertakers affected will demand legally enforceable rights for the benefit and protection of their undertaking, and will expect these rights to be made available in exercise of the compulsory acquisition powers granted to Highways England in a development consent order.²

2. Re-provision of private means of access

In addition, the Scheme proposes significant changes to the highway and public rights of way networks. These proposed changes are shown on Highways England's 'Rights of Way and Access Plans'³ for the A303 Scheme. These proposed changes would affect a large number of private means of access, many of which would need to be stopped up and re-provided along new routes, some of which (with the objective of minimising the impacts of the A303 Scheme) would need to cross land which is not proposed to be acquired outright by Highways England.

Clearly, where this is the case, there is a need for new rights to be created and acquired not for the benefit of Highways England itself, but for the benefit of the land owned by the parties whose private means of access are affected by the Scheme.

For the reasons set out above, we consider that it is essential that the A303 Stonehenge Order, if made, is made in terms which allow for Highways England itself to consent to a transfer of the power to acquire rights by, and for the benefit of, statutory undertakers whose apparatus, and owners of land whose private means of access, are affected by the Scheme.

Addressing the Secretary of State's concerns set out in the LLTC Decision Letter

We note that the reasons given by the Secretary of State (in paragraph 58 of the LLTC Decision Letter) for rejecting the Council's proposed drafting in the LLTC Order relate to a lack of explanation in the Explanatory Memorandum about the need for 'the provision', and a lack of clarity about how it would work in practice, how compensation would be dealt with, and how affected landowners would comprehend it.

We now examine each of those three reasons in turn and set out our, and Highways England's, position on the points raised.

1. Lack of explanation in the Explanatory Memorandum

“There is no explanation set out in the Explanatory Memorandum for the need of this provision and how it would work” (6th bullet point, para 58, LLTC Decision Letter)

We have reviewed the draft Explanatory Memorandum⁴ accompanying the draft A303 Stonehenge Order and note that it was updated during the examination of Highways England's application for development consent for the Scheme, to include an explanation of the purpose of

² This issue was referred to by Highways England in oral submissions made at the Issue Specific Hearing on the draft Development Consent Order held on 4 June 2020, as is noted in Highways England's written summaries of those oral submissions, submitted at Deadline 4 (Document Reference 8.30.1; PINS examination library reference [REP4-029](#)).

³ Document Reference 2.6(1); PINS examination library reference [AS-119](#).

⁴ Document Reference 3.2(2); PINS examination library reference [AS-124](#).



the drafting in the CA rights article and the transfer of benefit article⁵. We think, however, that it could be further updated to provide more detail about why that drafting is necessary and how it would have effect in practice.

An updated Explanatory Memorandum, including more explanatory detail about the need for the relevant provisions and how they would work, is therefore enclosed with this letter.

Those further updates to the draft Explanatory Memorandum are clarifications, reflecting the intention behind the drafting in articles 22 and 50 of the draft A303 Stonehenge Order, which is readily apparent in many of the application documents (see for example the Statement of Reasons, Annex A, Table 2 (Acquisition of rights and imposition of restrictive covenants – by plot number)⁶ in which it is clear that new rights will need to be acquired pursuant to the Order for the benefit of parties other than Highways England – i.e. for statutory undertakers whose apparatus is to be diverted/relocated and for the owners and/or occupiers of land whose private means of access to that land are to be stopped up and re-provided.

This concept was introduced at an early stage in the examination, in changes made to article 22 in Revision 1 of the draft A303 Stonehenge Order submitted at Deadline 2 of the examination. The rationale for those changes was explained by Highways England⁷ as follows (with the key text emphasised in ***bold italics***):

“This article has been amended in response to the themes arising from the relevant representations, the Examining Authority's First Written Questions and in response to discussions with affected persons and statutory undertakers.

*“Paragraph (1), which provides a general power to acquire rights and impose restrictions over land that the Applicant seeks authorisation to acquire compulsorily (i.e. the land shown in pink on the land plans), has been amended to make it clear that rights and restrictive covenants can be acquired for the benefit of statutory undertakers and other persons. This clarifies the effect of the existing drafting. **The justification for the reference to the acquisition of rights "for the benefit of any other person" is discussed below.***

*“**New paragraph (2) permits the general power in paragraph (1) to be exercised by a statutory undertaker, subject to the Applicant's consent.***

*“**New paragraph (3) ensures that the statutory undertaker exercising the power is to be treated for all purposes, save for those related to the payment of compensation, as though it was the Applicant.** This ensures that all of the relevant controls on the exercise of this power by the undertaker are effective. It is appropriate for statutory undertakers, with existing compulsory acquisition powers and the operational knowledge of their own requirements, to be permitted to exercise those powers to serve their undertaking [...].*

*“**New paragraph (5) regulates the acquisition of rights for the benefit of statutory undertakers and other persons to ensure that they do not preclude one another. In the context of the Scheme these amendments are important. Firstly, the amendments regulate the acquisition of rights for the benefit of statutory undertakers for the benefit of their undertakings. Secondly, the amendments clarify the position with respect to rights that are required for "any other person". This is essential in order to ensure that the necessary vehicular rights of access over restricted byways (without which taking such access would be a criminal offence) can be provided and can be***

⁵ See the Explanatory Memorandum, Revision 2 submitted to the Examination at Deadline 10 (Document Reference 3.2(2); Planning Inspectorate Reference [AS-125](#) – with tracked changes) which includes relevant updates in paragraph 6.6 (re article 2(3) (Interpretation)); paragraph 8.7 (re paragraphs (2), (3) and (5) of article 22 (Compulsory acquisition of rights)); and paragraphs 10.3 to 10.5 (re article 50 (Consent to transfer benefit of Order)).

⁶ See Highways England's Statement of Reasons (Document Reference 4.1; PINS examination library reference [APP-023](#)).

⁷ See Highways England's Explanation of Amendments to the draft DCO (Document Reference 8.15; PINS examination library reference [REP2-043](#)).



granted to benefit the land to which such access relates. Without this provision the Applicant could not be certain that the replacement private means of access to land, and the legal right of vehicular access over restricted byways, would endure for the benefit of the land affected by the stopping up of existing private means of accesses.”

Corresponding amendments were also made to article 50 at Deadline 2⁸; in addition, at Deadline 9, related amendments were made to articles 22 and 50 to enable the acquisition of rights for the benefit of Esso Petroleum Company Limited and its undertaking, pursuant to a corresponding ‘carve out’ from the requirement for the Secretary of State’s consent to such transfer of the benefit of the Order.⁹

The need for the acquisition of rights for the benefit of statutory undertakers and land owners and occupiers was also communicated to all parties during the examination of the draft A303 Stonehenge Order, through Highways England’s oral submissions made at the Issue Specific Hearing on the draft Development Consent Order held on 4 June 2019. It was also explained in Highways England’s written summaries of its oral submissions made at that hearing¹⁰ (submitted to the examination at Deadline 4), as follows (with the key text emphasised in **bold italics**):

“The Applicant noted that article 22 is essential for the delivery of the Scheme and outlined the structure of the provision. Article 22(1) enables the acquisition of rights or imposition of restrictive covenants over land that the Applicant would otherwise be authorised to acquire outright. This enables a proportionate exercise of compulsory powers if only rights and restrictions prove sufficient. This responds to the policy requirement in para 8 of DCLG CA guidance (September 2013) to consider alternatives to outright CA. An illustration of how this could work in practice is provided in the Applicant’s response to the Examining Authority’s first written questions, reference DCO.1.42(v) [REP2-030].

“The Applicant explained that in addition to the general power to acquire only rights and restrictive covenants over land otherwise authorised for compulsory acquisition outright, article 22(4) requires that rights and restrictive covenants over the land shown in blue on the land plans may only be acquired for the purposes specified in Schedule 4.

“The justification for this provision is therefore one of proportionality, allowing a lighter touch approach to compulsory acquisition when it is all that is required. Specific justification in relation to the land in question is set out on a plot by plot basis in the Annexes to the Statement of Reasons [APP-023].

“The Applicant outlined that the changes to article 22 made in revision 1 of the DCO [REP2-003] were made in response to developments in practice. Where other schemes are being implemented problems have been encountered with the precedent drafting where it is used to establish rights for the benefit of land belonging to third parties. The amendments to article 22 address these difficulties by (i) expressly providing for rights to be acquired for the benefit of land belonging to third parties and (ii) by allowing statutory undertakers already entrusted with compulsory powers, to exercise article 22 directly for their own benefit, with the consent of the Applicant. Without these provisions there is a real risk that the necessary rights to ensure private rights of vehicular access are enjoyed by the

⁸ See Revision 1 of the draft DCO (Document Reference 3.1(1)); PINS examination library reference [REP2-004](#) – (the corresponding Explanation of Amendments to the draft DCO (references as per footnote 8 above) focuses on the changes to article 50 which arise from the cancellation of proposals to deliver the Scheme by way of a private finance initiative).

⁹ See the references to articles 22 and 50 in Highways England’s Explanation of Amendments to Revision 7 of the draft DCO (Document Reference 8.57 / PINS examination library reference [REP9-024](#)).

¹⁰ See Highways England’s Written summaries of oral submissions put at the Development Consent Order hearing held on 4 June 2019 (Document Reference 8.30.1; PINS examination library reference [REP4-029](#)) at agenda item 3.12(i) – Article 22 – Compulsory acquisition of rights – the scope of and justification for this provision.



affected landowners and to ensure that statutory undertakers' apparatus is appropriately diverted and protected, would prove ineffective."

Given the above, we do not consider that there is any reason for the Secretary of State, in considering the drafting in articles 22 and 50 of the draft A303 Stonehenge Order, to have concerns about "fairness and transparency" in relation to affected persons' understanding of the need for such drafting and of how it would work in practice (as articulated in paragraph 58 of the LLTC Decision Letter).

As is clear from the above excerpts from Highways England's examination submissions, the relevant drafting was added to the draft A303 Stonehenge Order early in the examination (in revision 1, submitted at Deadline 2¹¹) and the principles underlying the need for it were openly discussed in the first Issue Specific Hearing on the draft Development Consent Order, and reported subsequently in written summaries.¹² The matter was not raised subsequently, e.g. it was not further examined in the Examining Authority's Second Written Questions published on 5 July 2019¹³, nor was it raised in the second Issue Specific Hearing on the draft Development Consent Order held on 30 August 2019.

In this context, it is fair and reasonable to assume that the proposed drafting was generally considered to be suitably appropriate and justified, and that the relevant statutory undertakers and land owners will have an expectation that the A303 Stonehenge Order, if made by the Secretary of State, will include such drafting, and will have an understanding of why it is so included.

2. Liability for the payment of compensation to owners/occupiers of land which is subject to the acquisition of rights for the benefit of parties other than the undertaker

"The Secretary of State has further concerns that the effect of the transfer of benefit to any statutory undertaker would not transfer the liability for the payment of compensation to them." (6th bullet point, para 58, LLTC Decision Letter)

The drafting in the CA rights article which was proposed by the Council and rejected by the Secretary of State in the made LLTC Order did include reference to the liability for the payment of compensation to the owners/occupiers of land which was proposed to be subject to the acquisition of rights for the benefit of parties other than the Council (see deleted paragraph (3) in article 26 of the LLTC Order, reproduced in Annex A below).

The drafting in the CA rights article, it is submitted, seeks to *exclude* from the transfer of the benefit of the power to acquire rights the liability for the payment of compensation. The intention behind the drafting is that the liability to pay compensation to the owners and occupiers of the land burdened by the new rights would remain with the Council, notwithstanding that the benefit of the rights acquired would be enjoyed by parties other than the Council. This is considered to be fair, given that the rights need to be acquired in consequence of the Council's scheme.

Identical drafting is included in paragraph (3) of the CA rights article in Highways England's draft A303 Stonehenge Order. However, given the Secretary of State's comments about the lack of clarity around liability for compensation, Highways England now proposes drafting amendments to ensure that the point is wholly clear.

The proposed amendments to paragraph (3) of article 22 (compulsory acquisition of rights) and to paragraph (3) of article 50 (consent to transfer benefit of the Order) of the draft A303 Stonehenge Order are presented in **Annex B** and **Annex C**, respectively, to this letter.

The proposed amendments also include additional wording (in paragraphs (2) and (3) of article 22, and in paragraph (4) of article 50) to make it clear that, as has always been intended¹⁴, the

¹¹ Document Reference 3.1(1) (tracked); PINS examination library reference [REP2-004](#).

¹² Ibid footnote 10 above.

¹³ Document Reference 3.1(1); PINS examination library reference [PD-014](#).

¹⁴ See application and examination documentation referenced above – e.g. at footnotes 2 to 11 (inclusive) above.



relevant provisions are to apply to the owners and occupiers of land affected by changes to private means of access, as well as to statutory undertakers – these amendments are necessary for the reasons set out above. More particularly, they are necessary in order to ensure that the draft A303 Stonehenge Order fully reflects the position which was presented to land owners and occupiers during the examination. As such, those proposed amendments are essential and need to be made in the interests of those owners and occupiers of land.

3. The need to explain how the acquisition of rights for the benefit of third parties would work in practice

“The Secretary of State is unclear how this would be expected to work in practice and is concerned that this may result in a lack of understanding or appreciation on the part of any affected landowners, which the Secretary of State does not consider fair or reasonable”. (6th bullet point, para 58, LLTC Decision Letter)

In terms of how the process would work in practice, we envisage that if the drafting proposed in the draft A303 Stonehenge Order (as supplemented by the amendments presented in Annexes B and C to this letter) was accepted by the Secretary of State, the process would be as follows:

- a) The ‘carve out’ provision in paragraph (4) of article 50 would obviate the need for Highways England to seek the Secretary of State’s consent to the transfer of the benefit of the Order, where such benefit was required to be transferred to statutory undertakers or to landowners to enable them to acquire (and enjoy the benefit of) rights over land, where it was necessary for them to do so in consequence of the diversion, relocation or replacement of their apparatus or their private means of access to land or premises, as the case may be (and as referenced in Schedules 4 and 3 to the draft A303 Stonehenge Order respectively).
- b) In place of the Secretary of State’s consent to the transfer of the benefit of the Order, Highways England would have authority to, and would be required, by paragraph (2) of article 22, to give its prior consent in writing to the transfer of the benefit of the Order in each case.

From this point onwards, the process would be the same irrespective of whether there is a transfer of the benefit of the Order under article 22 or 50.

- c) Highways England would enter into an agreement with the person(s) to whom the benefit of the provisions of the Order were to be transferred under article 22 or article 50; and, in consequence of the transfer of the benefit of the Order, the acquiring authority in respect of the relevant right over land would be the statutory undertaker whose apparatus was being relocated, or the land owner whose private means of access was being stopped up and re-provided.
- d) Notwithstanding the above, Highways England would retain liability for the payment of compensation to the owner (and, if separate, the occupier) of the land burdened with the right so acquired.

In the event that it was not possible for Highways England to negotiate with the parties involved to secure acquisition by agreement, the mechanism outlined at (a) to (c) above could be relied upon to deploy the compulsory acquisition powers in the Order to provide, where necessary, legally enforceable rights for the benefit of third parties affected by the Scheme, and to ensure that the delivery of the Scheme was not impeded or delayed by inefficient or unwieldy procedures.

Given that the need for and effect of these powers was fully explained and questioned during the examination of the application, we do not consider that there is any unfair or unreasonable lack of understanding or appreciation of the process set out above on the part of any affected landowners.



JUSTIFICATION

Legal background

It is our understanding that where rights need to be acquired for the benefit of parties affected by the Order, it is not possible for such rights to be acquired by Highways England in the first instance and then transferred to the relevant third parties, in the form of easements on which those parties can then legally rely for the purposes of diverting and maintaining their apparatus, or for the purposes of accessing their land or property.

This is because an easement must be appurtenant to and run with the land; it is a proprietary right exercisable by an owner for the time being by virtue of the owner's estate in the land.

Moreover, it is not legally possible for a 'sub-easement' to be created out of an easement; whilst Highways England, having acquired an easement, would be in a position to grant to a third party a licence to enter that land, a licence is a contractual rather than a proprietary interest and is therefore insufficient for the purposes of providing permanent legal rights to enable future access to land (via private means of access) and to facilitate diversions and future maintenance of utilities apparatus.

In this context, a transfer of the benefit of the Order is necessary to enable the acquisition of rights by and for the benefit of statutory undertakers and owners/occupiers of land. There is therefore a genuine need for the drafting proposed in articles 22 and 50 of the draft A303 Stonehenge Order (as set out in Annexes B and C to this letter).

Consideration of the approach taken in other development consent orders made by the Secretary of State for Transport

Highways England notes that the concept outlined above has been accepted by the Secretary of State in other recently-made highways development consent orders¹⁵. In those orders, the transfer of benefit article generally includes a series of 'carve outs' obviating the need for the Secretary of State's consent to the transfer of the benefit to certain named statutory undertakers in respect of certain numbered works authorised by the order.

This 'itemised' approach has not been followed in the draft A303 Stonehenge Order for the following reasons:

- it is **inflexible**: it makes no provision for a situation in which other (previously unidentified) statutory undertakers' equipment comes to light or in which known apparatus may need to be diverted on a different route or in a different location, not previously predicted due to circumstances which may not be known until detailed ground investigations have been carried out post consent – this is particularly important in relation to the location of the Scheme to which the draft A303 Stonehenge Order relates, given its location within the World Heritage Site;
- it is **incompatible** with the way in which numbered works, and utilities diversions, have been identified in Schedule 1 (authorised development) to the draft A303 Stonehenge Order and in its related Works Plans¹⁶, where, for reasons of expedience and flexibility (as well as for the avoidance of lengthy and unnecessarily repetitious drafting), utility diversions and installations are not identified as separate numbered works, but are instead included in the catch-all at the end of Schedule 1, given their multifarious nature and the fact that they will necessarily be present in most, if not all, of the numbered works. In addition, Schedule 4 to the draft A303 Stonehenge Order clearly sets out the rights which are proposed to be acquired for the benefit of those statutory undertakers

¹⁵ [The A30 Chiverton to Carland Cross Development Consent Order 2020](#); [The A63 \(Castle Street Improvement, Hull\) Development Consent Order 2020](#); [The A585 Windy Harbour to Skipool Highway Development Consent Order 2020](#); [The M42 Junction 6 Development Consent Order 2020](#); and [The A19/A184 Testo's Junction Alteration Development Consent Order 2018](#).

¹⁶ Document Reference 2.5; PINS examination library reference [APP-008](#).



or land owners and occupiers whose apparatus or private means of access will be affected; and

- it is **inappropriate and impracticable**, first due to the number of diversions of statutory undertakers' apparatus which will be required in consequence of the Scheme, and which, for the reasons set out in the two bullet points above, have not been itemised within the draft A303 Stonehenge Order; and secondly due to the fact that the relevant private means of access are already described on a clearly itemised basis in Part 3 of Schedule 3 to the draft A303 Stonehenge Order, such that the inclusion of all such information within the transfer of benefit article is neither appropriate nor practicable.

Justification for the approach proposed in the draft A303 Stonehenge Order

Further to the considerations identified above, the draft A303 Stonehenge Order includes, in the interests of conciseness, clarity and flexibility, proposed drafting which is based on a less granular approach, but which would enable equivalent outcomes to that of the itemised approach previously accepted by the Secretary of State and referred to above.

Whilst the itemised approach may be appropriate for a smaller scheme requiring a smaller number of rights to be acquired for the benefit of third parties, and where the detailed scheme design has been further advanced, it is unworkable in relation to this Scheme.

Furthermore, if the modifications made by the Secretary of State to the LLTC Order were also made to the draft A303 Stonehenge Order, this would result in a very significant number of requests to the Secretary of State for his consent to the transfer of the benefit of the Order for the purposes of providing rights in connection with each of the utility diversions and many of the replacement private means of access required in connection with the Scheme.

It is submitted that the consequential administrative burden on both the Secretary of State and Highways England is unwarranted, and could be avoided – in the interests of delivering the Scheme in an expedient manner – if the drafting is accepted as proposed in the draft A303 Stonehenge Order, together with the amendments to that drafting which are now proposed in Annexes B and C to this letter, and if the updated Explanatory Memorandum now enclosed with this letter, is accepted by the Secretary of State as confirming the process envisaged by, and the intentions of, Highways England as made known and discussed during the examination.

In our view, consultation on the proposed drafting changes (as set out in Annexes B and C to this letter) and on the related revisions to the Explanatory Memorandum, is unnecessary, for two reasons. First, because the proposed drafting amendments, if accepted, would make no material change to the impact of the exercise of the Order powers on third parties; and secondly, because the relevant provisions, and the reasons for their inclusion in the draft A303 Stonehenge Order, were fully aired early on in the examination of the application and were not contended at that stage; furthermore, they did not remain or re-occur as examination issues subsequently.

We would therefore formally request, on behalf of Highways England, that should the Secretary of State be minded to approve its application for development consent for the Scheme, the amendments proposed in the draft articles 22 and 50 as presented in Annexes B and C respectively, to this letter, are made to the draft Order before it is made.

If it would be helpful to discuss any of the issues raised in this letter, please do not hesitate to contact Heidi Slater (heidi.slater@pinsentmasons.com / 0121 626 5770) or Robbie Owen (robbie.owen@pinsentmasons.com / 0207 490 6420).

Yours faithfully

Pinsent Masons LLP

Enclosure(s): Updated Explanatory Memorandum



ANNEX A

Article 26 (compulsory acquisition of rights) (“**the CA rights article**”)
and
Article 49 (transfer of benefit of Order, etc.) (“**the transfer of benefit article**”)
as modified by the Secretary of State for Transport on making the LLTC Order

Compulsory acquisition of rights, etc.

26.—(1) Subject to ~~paragraphs (2) and (4)~~paragraph (2), the undertaker may acquire such rights over the Order land or impose such restrictive covenants affecting the Order land, including rights and restrictive covenants for the benefit of a statutory undertaker or any other person, as may be required for any purpose for which that land may be acquired under article **Error! Reference source not found.** (compulsory acquisition of land), by creating them as well as acquiring rights already in existence.

~~(1) — The powers of paragraph (1) may be exercised by a statutory undertaker instead of by the undertaker in any case where the undertaker has given its prior consent to that in writing, and that consent may be given subject to terms and conditions.~~

~~(2) — Where in consequence of paragraph (2) a statutory undertaker exercises the powers of paragraph (1) in place of the undertaker, except in relation to the payment of compensation, the statutory undertaker is to be treated for the purposes of this Order, and by any person with an interest in the land in question, as being the undertaker in relation to the acquisition of the rights and the imposition of the restrictive covenants in question.~~

~~(2)~~ (3) In the case of the Order land specified in columns (1) and (2) of Part 1 (land in which only new rights etc., may be acquired) and Part 2 (rights for the benefit of Cadent) of Schedule 6 (land in which only new rights etc., may be acquired), the undertaker’s powers of compulsory acquisition under paragraph (1) are limited to the acquisition of such wayleaves, easements, new rights in the land or the imposition of such restrictive covenants as the undertaker may require for or in connection with the authorised development for the purposes specified in the corresponding entry in column (3) of Part 1 and Part 2 of Schedule 6 in relation to that land.

~~(3)~~ (4) The power under paragraph (1) to acquire the rights and to impose the restrictive covenants described in Part 2 of Schedule 6 for the benefit of Cadent—

- (a) does not preclude the acquisition of such other rights and the imposition of such other restrictive covenants in respect of the same land in accordance with Part 1 of Schedule 6 as may be required for the benefit of any other statutory undertaker; and
- (b) must not be exercised by the undertaker in a way that precludes the acquisition of such other rights and the imposition of such other restrictive covenants in respect of the same land in accordance with Part 1 of Schedule 6 as are required for the benefit of any other statutory undertaker.

~~(4)~~ (5) Subject to section 8-~~(17)~~⁽⁴⁵¹⁸⁾ (other provisions as to divided land) of, and Schedule 2A⁽⁴⁵¹⁸⁾ (counter-notice requiring purchase of land) to, the 1965 Act (as substituted by paragraph ~~5(115)~~⁽⁸⁾ of Schedule 7 (modification of compensation and compulsory purchase enactments for ~~the~~ creation of new rights), where the undertaker acquires a right over land or the benefit of a restrictive covenant under paragraph (1), ~~the~~ undertaker is not required to acquire a greater interest in that land.

~~(5)~~ (6) Schedule 7 (modification of compensation and compulsory purchase enactments for creation of new rights) has effect for the purpose of modifying the enactments relating to compensation and the provisions of the 1965 Act in their application to the compulsory acquisition under this article of a right over land by the creation of a new right or the imposition of a restrictive covenant.

⁽¹⁷⁾ Section 8 was amended by paragraphs 1 and 2 of Schedule 17 to the Housing and Planning Act 2016 and S.I. 2009/1307.

⁽⁴⁵¹⁸⁾ As amended — Schedule 2A was inserted by paragraphs 1 and 3 of Schedule 17 to the Housing and Planning Act 2016 ~~(6:22) and S.I. 2009/1307.~~



Transfer of benefit of Order, etc.

49.—(1) The undertaker may, with the consent of the Secretary of the State—

- (a) transfer to another person (“the transferee”) any or all of the ~~benefits~~benefit of the provisions of this Order that apply to ~~that transferor~~the undertaker; and such statutory rights as may be agreed between the ~~transferor~~undertaker and the transferee; or
- (b) grant to another person (“the grantee”) for a period agreed between the ~~transferor~~undertaker and the grantee any or all of the benefit of the provisions of this Order that apply to ~~that transferor~~the undertaker and such related statutory rights as may be so agreed.

(2) Where an agreement has been made in accordance with paragraph (1) references in the provisions of this Order that apply to the undertaker must include references to the transferee or the grantee, as the case may be.

(3) The exercise by a person of any benefits or rights conferred in accordance with any transfer or grant under paragraph (1) is subject to the same restrictions, liabilities and obligations as would apply under this Order if those benefits or rights were exercised by the undertaker.

(4) The consent of the Secretary of State under this article is not ~~required~~required where the transfer of any provisions of this Order is to be made between the undertaker and the harbour authority or the harbour master; ~~or.~~

- ~~(b) where the powers of article 26(1) (compulsory acquisition of rights, etc.) are, with the consent of the undertaker given under article 26(2), proposed to be exercised by a statutory undertaker rather than by the undertaker.~~

(5) The undertaker must notify the MMO of any transfer of benefit made by the undertaker under this article.

(6) Before giving consent under this article to any transfer or grant under paragraph (1), the Secretary of State must consult Cadent and any other party as the Secretary of State considers appropriate.



ANNEX B

Proposed amendments to Article 22 (compulsory acquisition of rights) of the draft A303 Stonehenge Order

Compulsory acquisition of rights

22.—(1) Subject to the following paragraphs of this article, the undertaker may acquire such rights over the Order land or impose such restrictive covenants affecting the Order land, including rights and restrictive covenants for the benefit of a statutory undertaker or any other person, as may be required for any purpose for which that land may be acquired under article **Error! Reference source not found.** (compulsory acquisition of land), by creating them as well as acquiring rights already in existence.

(2) The powers of paragraph (1) may be exercised by a statutory undertaker or by an owner or occupier of land as identified in column (4) of the table in Part 3 of Schedule 3 (permanent stopping up of highways and private means of access and provision of new highways and private means of access) to this Order. instead of by the undertaker in any case where the undertaker has given its prior consent to that in writing, and that consent may be given subject to terms and conditions.

(3) Where in consequence of paragraph (2) a statutory undertaker or an owner or occupier of land exercises the powers in paragraph (1) in place of the undertaker, except in relation to the payment of compensation the liability for which must remain with the undertaker, the statutory undertaker or the owner or occupier of land, as the case may be, is to be treated for the purposes of this Order, and by any person with an interest in the land ~~in question~~ affected, as being the undertaker in relation to the acquisition of the rights and the imposition of the restrictive covenants in question.

(4) In the case of the Order land specified in columns (1) and (2) of Schedule 4 (land in which only new rights etc., may be acquired) the undertaker's powers of compulsory acquisition under paragraph (1) are limited to the acquisition of such wayleaves, easements, new rights over the land or the imposition of such restrictive covenants as the undertaker may require for or in connection with the authorised development for the purposes specified in column (3) of Schedule 4 in relation to that land.

(5) The power under paragraph (1) to acquire the rights and to impose the restrictive covenants described in Schedule 4 for the benefit of statutory undertakers or for the benefit of any other person—

- (a) does not preclude the acquisition of such other rights and the imposition of such other restrictive covenants in respect of the same land in accordance with Schedule 4 as may be required for the benefit of any other statutory undertaker or any other person; and
- (b) must not be exercised by the undertaker in a way that precludes the acquisition of such other rights and the imposition of such other restrictive covenants in respect of the same land in accordance with Schedule 4 as are required for the benefit of any other statutory undertaker or any other person.

(6) Subject to section 8 (other provisions as to divided land) of, and Schedule 2A⁽¹⁹⁾ (counter-notice requiring purchase of land) to, the 1965 Act (as substituted by paragraph **Error! Reference source not found.** of Schedule 5 (modification of compensation and compulsory purchase enactments for the creation of new rights)), where the undertaker acquires a right over land or the benefit of a restrictive covenant, the undertaker is not required to acquire a greater interest in that land.

(7) Schedule 5 has effect for the purpose of modifying the enactments relating to compensation and the provisions of the 1965 Act in their application to the compulsory acquisition under this article of a right over land by the creation of a new right or the imposition of a restrictive covenant.

(8) For the purposes of this article “statutory undertaker” includes Esso.

⁽¹⁹⁾ As inserted by paragraphs 1 and 3 of Schedule 17 to the Housing and Planning Act 2016 (c.22).



ANNEX C

Proposed amendments to Article 50 (consent to transfer benefit of Order) of the draft A303 Stonehenge Order

Consent to transfer benefit of Order

50.—(1) The undertaker may, regardless of any provision in any enactment, with the consent of the Secretary of State—

- (a) transfer to another person (“the transferee”) any or all of the benefits of the provisions of this Order that apply to that transferor; and such statutory rights as may be agreed between the transferor and the transferee; or
- (b) grant to another person (“the grantee”) for a period agreed between the transferor and the grantee any or all of the benefit of the provisions of this Order that apply to that transferor and such related statutory rights as may be so agreed.

(2) Where an agreement has been made in accordance with paragraph (1) references in the provisions of this Order and any document certified under it that apply to the undertaker are to [be](#) read as references to the transferee or the grantee, or any other person who may exercise, enjoy or be responsible for any functions of the undertaker pursuant to that agreement, as the case may be.

(3) The exercise by a person of any benefits or rights conferred in accordance with any transfer or grant under paragraph (1) is subject to the same restrictions, liabilities and obligations as would apply under this Order if those benefits or rights were exercised by the undertaker, [save where those benefits or rights are exercised by a statutory undertaker or by an owner or occupier of land pursuant to paragraph \(2\) of article 22 \(compulsory acquisition of rights\) of this Order, in which case liability for the payment of compensation must remain with the undertaker.](#)

(4) The consent of the Secretary of State under this article is not required where the powers of article 22(1) (compulsory acquisition of rights) are, with the consent of the undertaker given under article 22(2), proposed to be exercised by a statutory undertaker rather than by the undertaker, [or are proposed to be exercised for the express benefit or accommodation of owners and occupiers of land, as identified in column \(4\) of the table in Part 3 of Schedule 3 \(permanent stopping up of highways and private means of access and provision of new highways and private means of access\) to this Order.](#)

(5) The consent of the Secretary of State is not required for a transfer or grant under this article where the transfer or grant is made to Southern Electric Power Distribution plc for the purposes of undertaking Work No. 1C(v) and associated ancillary works.

(6) For the purposes of this article “statutory undertaker” includes Esso.