

**M42 Junction 6 Improvement Project
Agenda for Issue Specific Hearing 4 (DCO 3) on the draft Development
Consent Order (dDCO)**

Date: **Wednesday 21 August 2019**

Time: 10.00am
Hearing room opens from 9.30am

Venue: Ramada Hotel, The Square, Solihull, West
Midlands, B91 3RF

Access and Parking: Free parking at the venue

Purpose of Issue Specific Hearing 4 (DCO 3)

The purpose of DCO 3 is to continue to work through all areas of the latest version of the dDCO [REP3-002], including Articles, Requirements, protective provisions and any other matters, together with actions required to take matters forward. There are also issues and questions left over from DCO 2 ISH, which are also intended to be dealt with.

If all the items on the agenda are not addressed, a further hearing on the dDCO has been programmed in the Examination Timetable appended to our Rule 8 letter of 31 May 2019.

This hearing will not examine the detailed content of provisions relating to the compulsory acquisition of land or rights, or temporary possession of land. Separate Compulsory Acquisition Hearings are programmed in the Examination Timetable to deal with these issues.

Participation, conduct and management of hearing

This hearing, and the intended subsequent hearing on the dDCO in October 2019 will be held without prejudice to the ExA's consideration of the broader planning merits of the Application.

All Interested Parties (IPs) are welcome to attend the DCO 3. In consideration of its purpose however, it follows that the hearing will be of interest mainly to the Applicant and those organisations who have a direct contribution to the drafting of the Order and its implementation, should it be granted.

The ExA requests that the following attendees participate in DCO 3:

- The Applicant
- Solihull Metropolitan Borough Council
- Warwickshire County Council
- Birmingham Airport
- Network Rail
- The Gooch Estate



The Planning Inspectorate

- Warwickshire Gaelic Athletic Association
- Any other IPs or Other Persons with an interest in the drafting of the DCO; implementation or discharge of proposed articles, requirements or other provisions; seeking protective provisions or any related side agreements

Guidance under the Planning Act 2008 (PA 2008)¹ and the Infrastructure Planning (Examination Procedure) Rules 2010 provide that it is the ExA that will probe, test and assess the evidence through direct questioning of persons making oral representations at hearings. Questioning at the hearing will be led by the ExA.

Cross-questioning of the person giving evidence by another person will only be permitted if the ExA decides it is necessary to ensure representations are adequately tested or that a person has had a fair chance to put their case. The hearing will run until all IPs have made their representations and responded to the ExA's exploration of the matters in accordance with the agenda set.

Please note that the following agenda is indicative and may be amended by the ExA at the start of the hearing session. Furthermore, the ExA may wish to raise other matters arising from oral submissions and pursue lines of inquiry in the course of the discussion which are not on the agenda.

Agenda

- 1. Welcome, introductions and arrangements for the Hearing**
- 2. Specific issues and questions bearing on the DCO raised by the Examining authority in the attached questions. These relate to:**
 - General matters
 - Precedents
 - Guillotine Provisions
 - Articles
 - Schedule 1 - Authorised Development
 - Schedule 2 - Requirements
 - Schedule 11- Certification of Plans and Documents
- 3. Protective Provisions update:**
 - Updates will be sought from the Applicant and relevant Interested Parties on the progress of protective provisions and any issues arising.
- 4. Other issues arising from Deadline 3 submissions**
- 5. Review of issues and actions arising**

¹ DCLG: 'Planning Act 2008: Guidance for the examination of applications for development consent', March 2015.

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/418015/examinations_guidance-final_for_publication.pdf

6. **Next steps**
7. **Closure of the hearing**

TR010027 - Application by Highways England for an Order Granting Development Consent for the M42 Junction 6 Improvement

Schedule of the Panels' issues and questions relating to the draft Development Consent Order

The issues and questions set out below will be referred to in the Issue Specific Hearing (ISH) into the draft Development Consent Order (DCO 3) on Wednesday 21 August 2019. They are principally addressed to the Applicant. However, Column 3 of the table indicates where questions are also directed to Interested Parties.

Other Interested Parties attending the hearing may also wish to respond.

Abbreviations Used:			
Art	Article	ES	Environmental Statement
SoS	Secretary of State	EM	Explanatory Memorandum
LA	Local Authority	R	Requirement
LPA	Local Planning Authority	Sch	Schedule
DCO	Development Consent Order	SoCG	Statement of Common Ground
dDCO	Draft DCO		

M42 JUNCTION 6

QUESTIONS ON SUBMISSION DRAFT DEVELOPMENT CONSENT ORDER

DCO 3	DCO Article – No. and title	Question to:	Questions or comments:
1	General		<p>The ExA welcome the corrections to consistently use 'materially new or materially different environmental effects' in the 2nd Draft Development Consent Order (2nd dDCO) [REP3-002], as per the Secretary of State's decision for the A19/A184 Testo's Junction Alteration Order.</p>
2	Precedents	Applicant	<p>An agreed action from DCO2 ISH is for the Applicant to provide further information on precedents for Articles 11, 19, 39 and 50. However, paragraphs 2.17 and 2.1.10 of the 'Written Submission of Applicant's Case at the Second ISH on 2 July 2019' [REP3-015] refer to Article 23 rather than 50. The reader is also directed to Appendix B of that document for the list of precedents but from that list only Articles 11 and 39 are provided.</p> <p>Please could the Applicant therefore provide precedents, if any, for Articles 19 and 50. If these have been provided elsewhere, please direct the ExA accordingly.</p>

3	General: 'guillotine' provisions	Applicant, SMBC, WCC and the Gooch Estate	<p>The ExA note that both SMBC and WCC have now confirmed that they raise no objections to the proposed guillotine provisions.</p> <p>The ExA also note the 'Responses to ExA's Questions on Development Consent Order' (question 1.4) [REP2-008] which states that <i>'Any notice given by the Applicant, or its contractor, will reflect the provision of the application documents (including the dDCO) and so will stipulate that if a decision is not given within the specified deadline that consent is deemed to have been given.'</i> It is also stated that <i>'If the determining authority is not able to reach a decision in that time it is open to that body to request additional information from the Applicant or to notify the Applicant that consent is not given, thereby allowing the Applicant to instigate the arbitration provisions set out in article 47.'</i></p> <p>The views of the Applicant, SMBC, WCC and the Gooch Estate are therefore sought as to whether those provisions could be made explicit by adding to the end of the relevant clause in the relevant Article (eg at the end of paragraph 8 in Article 16): 'The application shall specify that if a decision is not made within 28 days, the application will be deemed to be granted. And, if a decision cannot be made in that time that it may be appropriate to request additional information or to notify the Applicant that consent is refused, thereby potentially instigating the provisions of Article 47.'</p> <p>Furthermore, as the Gooch Estate were not present at the DCO2 ISH the ExA requested that a written response be provided to its D2 submissions by the Applicant for D3. This has been provided at Appendix A to the 'Written Submission of Applicant's Case at the Second ISH on 2 July 2019' [REP3-015]. The comments of the Gooch Estate are therefore invited, either orally at the DCO3 ISH or by D4, including the provisions relating to Article 6 (limits of deviation).</p>
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DCO 3	DCO Article – No. and title	Question to:	Questions or comments:
4	12 - Street Works	Applicant, SMBC and the Gooch Estate	<p>The ExA note that the Applicant does not believe it necessary to list all of the affected streets in a schedule, citing unnecessary duplication and that that it is proposed to carry out at least some works in relation to almost all streets in the Order limits.</p> <p>However, the ExA also note SMBC’s preference for all streets to be listed. Moreover, whilst the table provided in Appendix B of REP2-008 indicates that street works would not be required in only 5 of the 43 streets listed, this would at least be more precise and give a greater degree of certainty. As acknowledged, the current approach also departs from the Model Provisions.</p> <p>The Applicant is therefore asked whether the Appendix B list could be added for information as an appendix to the DCO? Perhaps a new paragraph 12(4) might include something like: For information purposes only, Appendix X lists the streets where works are planned.</p> <p>The comments from the Gooch Estate are invited on this issue, either orally at the DCO3 ISH or by D4, and in respect of Appendix A (question 9) to the ‘Written Submission of Applicant’s Case at the Second ISH on 2 July 2019’ [REP3-015].</p>

DCO 3	DCO Article – No. and title	Question to:	Questions or comments:
5	15 – Classification of roads etc	Applicant, SMBC and the Open Space Society	<p>Answer (c) to question 11 in the Applicant’s ‘Responses to ExA’s Questions on Development Consent Order’ [REP2-008]’ states that <i>‘The Applicant considers it appropriate for the new PROWs to be open for use from the date on which the authorised development is open for traffic, so interfering with or severing the existing PROWs. The new PROWs could be open earlier by agreement between the Applicant and the LHA.’</i></p> <p>However, interference with, or the severing of, existing PROWs may occur well before the authorised development is brought into use, so that replacement footpaths would be useful if they could be made available. The views of the Applicant, SMBC and the Open Space Society are sought on the merits of an addition to the end of 15(7) which might read: unless there are good reasons for opening a PROW earlier, as may be agreed with the LHA.</p>
6	16 – Temporary stopping up and restriction of use of streets	The Applicant and the Gooch Estate	<p>With reference to Appendix A (question 12) to the ‘Written Submission of Applicant’s Case at the Second ISH on 2 July 2019’ [REP3-015], the Applicant is asked what mechanisms are envisaged which could be agreed with the Gooch Estate to ensure that alternative vehicular access is available to their land where access is prevented by temporary stopping up?</p> <p>The comments from the Gooch Estate are also invited.</p>
7	23 – Authority to survey and investigate land	The Gooch Estate	<p>As the Gooch Estate were not present at the DCO2 ISH the ExA requested that a written response be provided to its D2 submissions by the Applicant for D3. This has been provided at Appendix A (question 17) to the ‘Written Submission of Applicant’s Case at the Second ISH on 2 July 2019’ [REP3-015]. The comments of the Gooch Estate are therefore invited, either orally at the DCO3 ISH or by D4.</p>

DCO 3	DCO Article – No. and title	Question to:	Questions or comments:
8	37 – Crown rights	The Applicant	The Applicant is asked to provide a progress report further to its 'Responses to ExA's Questions on Development Consent Order' [REP2-008], relating to the transfer of land from Crown Ownership.
9	39 - Felling or lopping of trees and removal of hedgerows	Applicant and SMBC	<p>Because article 39 applies to any tree within the Order limits, the test imposed by 39(1) on topping and lopping is wider than that applying to a highway authority; much must depend on the methods employed. Nor is the power analogous to a planning permission because the detailed need for such works is not stated explicitly. Table 1 of the Tree Survey Results [APP-128] does not itself indicate whether the trees are in a CA or subject to a TPO (although the latter is indicated in the text of the report) and it categorises numerous specimens as 'to retain or remove'. The test relating to hedgerows is very wide, their removal need only be 'required'. Only hedgerows important for wildlife and landscape reasons are noted as 'important: archaeological and historical criteria are explicitly omitted. The estimated loss of about 4.5km of hedgerow does not distinguish between 'important' and other hedgerows.</p> <p>Notwithstanding the precedents cited by the Applicant, the ExA consider the guidance in Advice Note 15 should apply or an appropriate approach set out in a SoCG with SMBC. In respect of the latter, the ExA note that SMBC wishes to explore hedgerow mitigation further with the Applicant and intend to update the SoCG accordingly. An update on this issue is sought.</p>

DCO 3	DCO Article – No. and title	Question to:	Questions or comments:
10	48 – Removal of human remains	Applicant, SMBC/ County Archaeologist	The ExA note the precedents cited for this Article, albeit with some differences in the drafting, and that SMBC does not consider there to be a conflict between the Article and Requirement 9 (archaeological remains). Nevertheless, the County Archaeologist considers that it would be useful if Article 48 explicitly recognised that human remains may have an archaeological interest. The Applicant is asked for its response to this and how this might be achieved.
11	50 – Amendment of local legislation	Applicant, SMBC and Network Rail.	<p>The ExA note that following a review of the extent of local legislation the Applicant is seeking to disapply, a number of Acts have been removed from the 2nd dDCO. The Applicant has also provided extracts of the residual legislation for D3 as requested by the ExA.</p> <p>Whilst SMBC’s D3 submission confirmed that it has reviewed Article 50 and has no comment to make at this time, the ExA is conscious that the aforementioned extracts of local legislation would not have been made available at that time. Please could SMBC therefore confirm whether or not it has any comments on the amended Article 50, in light of the extracts provided?</p> <p>The ExA would also welcome comment from Network Rail.</p>
12	Schedule 1 – Authorised Development	Warwickshire Gaelic Athletic Association	The response of Warwickshire Gaelic Athletic Association is invited to paragraph 3.1.1 of the ‘Written Submission of Applicant’s Case at the Second ISH on 2 July 2019’ [REP3-015], relating to its request to amend the wording to Work No. 68, to include the relocation of the clubhouse.

DCO 3	DCO Article – No. and title	Question to:	Questions or comments:
13	Schedule 1 authorised development – further development within the Order limits	Applicant and Gooch Estate	<p>The ExA note the 'Responses to ExA's Questions on Development Consent Order' (question 28) [REP2-008] states, amongst other things, that <i>'In terms of definition and scope, the 'lettered works' of further development works are listed in Schedule 1 and support, and are ancillary to, the carrying out of the numbered works and are not to give rise to any materially new or materially worse (now different) adverse environmental effects than those assessed in the Environmental Statement.'</i></p> <p>However, only in work (o) is the materially new or materially worse test explicitly referred to. Although it is probably intended that 'working sites, storage areas, works of demolition or works of whatever nature' is intended to include everything, the ExA consider it would be clearer if the start of (o) read 'the works entailed in (a)–(n) above and such other works...'. The ExA also consider the table at Appendix C to the aforementioned document should also be appended to the dDCO for information purposes.</p> <p>The views of the Applicant and the Gooch Estate are sought on these points.</p>
14	Schedule 2 part 1 – R1 (interpretation); R3 (detailed design); R4 (OEMP); R5 (landscaping); and R8 (surface water and foul drainage)	Birmingham Airport	<p>The views of Birmingham Airport are sought on the additional definitions relating to the airport safeguarding zone, Birmingham Airport and Birmingham Airport Limited (R1) and the additions to R3, R4, R5 and R8 in respect of its concerns expressed at DCO2 ISH for changes to the Proposed Development which may affect the aerodrome safeguarding zone?</p>

DCO 3	DCO Article – No. and title	Question to:	Questions or comments:
15	R7 – Protected species	SMBC	<p>The views of SMBC are sought on the revisions to R7.</p> <p>An agreed action from DCO2 ISH is that the Applicant was to provide more information by D3 as to how this requirement would work in practice. This does not appear to have been provided and the Applicant is asked to address this or refer the ExA to the document where this response can be found.</p>
16	R9 – Archaeological remains	Applicant and SMBC/ County Archaeologist	<p>Paragraph 4.1.5 of the 'Written Submission of Applicant's Case at the Second ISH on 2 July 2019' [REP3-015] confirms the Applicant's commitment to consider the ExA queries relating to the extent of the buffer and whether 14 days would be sufficient time for the relevant Local Authority to determine the importance of previously unidentified remains.</p> <p>A further agreed action from DCO2 ISH is for the Applicant to provide information by D3 as to how this requirement would work in practice.</p> <p>These actions do not appear to have been addressed and the Applicant is requested to respond or refer the ExA to the document(s) where the information can be found.</p>
17	Schedule 10 - Protective Provisions	Applicant and all relevant IP's	<p>Please could the Applicant and relevant Interested Parties indicate what progress is being made on agreeing protective provisions, including addressing HS2's concerns on the powers sought under Article 3?</p>

DCO 3	DCO Article – No. and title	Question to:	Questions or comments:
18	Schedule 11 – Certification of Plans and Documents	The Gooch Estate	As the Gooch Estate were not present at the DCO2 ISH the ExA requested that a written response be provided to its D2 submissions by the Applicant for D3. This has been provided at Appendix A to the 'Written Submission of Applicant's Case at the Second ISH on 2 July 2019' [REP3-015]. The comments of the Gooch Estate are therefore invited, either orally at the DCO3 ISH or by D4.