

**M42 Junction 6 Development Consent Order
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THE M42 JUNCTION 6 DEVELOPMENT CONSENT ORDER 202[]

EXPLANATORY MEMORANDUM

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Highways England

M42 Junction 6

The M42 Junction 6 Development Consent Order 202[*]

Explanatory Memorandum

1 Summary

- 1.1 This memorandum explains the purpose and effect of each article of, and the Schedules to, the draft M42 Junction 6 Development Consent Order (“**the Order**”), as required by regulation 5(2)(c) of the Infrastructure Planning (Applications: Prescribed Forms and Procedure) Regulations 2009¹.
- 1.2 Regulation 5(2)(c) requires explanatory memoranda to explain “*the purpose and effect of provisions in the draft order*”.

2 Purpose of the Order

- 2.1 Highways England Company Limited (“**Highways England**”) is applying to the Secretary of State for an Order to undertake works to improve Junction 6 of the M42 and to construct a new dual-carriageway link road connecting a new Junction 5A of the M42 with the existing Clock Interchange, with associated alterations and improvements to junctions and non-motorised user facilities along the length of the route.
- 2.2 The objectives of the proposed development are to:
- 2.2.1 ensure the safe and reliable operation of the road network;
 - 2.2.2 increase the capacity of Junction 6;
 - 2.2.3 improve access to key businesses and support economic growth in the area; and
 - 2.2.4 help cyclists, walkers and other vulnerable users of the network.
- 2.3 In summary, the M42 Junction 6 scheme (“**the Scheme**”) consists of works to the M42 Junction 6 through the construction of a new junction (Junction 5A) approximately 1.8 kilometres south of the existing Junction 6 of the M42 and a new 2.4 kilometre-long dual carriageway link road between the new Junction 5A and Clock Interchange with a free flow slip road to the A45 Coventry Road and another to the Airport Way connector road. The Scheme also includes capacity and junction improvements at Clock Interchange roundabout.
- 2.4 A detailed description of the Scheme is included in chapter 3 of the Environmental Statement (“**ES**”).
- Nationally Significant Infrastructure Project – construction of a highway*
- 2.5 The Scheme is a Nationally Significant Infrastructure Project (“**NSIP**”) within sections 14(1)(h) and 22(1)(a) of the Planning Act 2008² (“**the 2008 Act**”). The 2008 Act makes a distinction between three different types of highway NSIPs as set out in section 22(1)(a)-(c): construction, alteration and improvement. The construction of the new 2.4 kilometre link road and junction arrangement amounts to the ‘construction’ of a highway within the meaning of sections 22(1)(a) and 22(2) of the 2008 Act.

¹ S.I. 2009/2264

² c.29

- 2.6 The construction of the new dual carriageway link road which forms part of the Scheme is within sections 22(1)(a) and 22(2) of the 2008 Act because:
- 2.6.1 it will (when constructed) be wholly in England;
 - 2.6.2 Highways England, as a strategic highway company appointed by the Secretary of State under Part 1 of the Infrastructure Act 2015, will be the highway authority in respect of that that link road; and
 - 2.6.3 the area of the development in respect of the link road is approximately 20 hectares and is therefore greater than the relevant limit set out in section 22(4) of the 2008 Act, which, in the case (as here) of the construction of a highway other than a motorway, where the speed limit for any class of vehicle is expected to be 50 miles per hour or greater, is 12.5 hectares.
- 2.7 As the Scheme is an NSIP, development consent must be obtained from the Secretary of State to authorise it, and an application for a development consent order (DCO) must be made to the Secretary of State, care of the Planning Inspectorate (“**the Inspectorate**”), under section 37 of the 2008 Act.
- 2.8 Schedule 1 to the Order contains a list of numbered works comprising the NSIP.

3 Associated development

- 3.1 The Order also seeks consent for development which is associated with the NSIP. The Secretary of State may, under the provisions of section 115 of the 2008 Act, grant consent for development that is associated with the NSIP.
- 3.2 Guidance³ on associated development has been issued by the Secretary of State for Communities and Local Government. In this guidance associated development is described as being *"typical of development brought forward alongside the relevant type of principal development or of a kind that is usually necessary to support a particular type of project"* (paragraph 6) and *"requires a direct relationship between associated development and the principal development. Associated development should therefore either support the construction or operation of the principal development, or help address its impacts. Associated development should not be an aim in itself but should be subordinate to the principal development"* (paragraph 5).
- 3.3 Annex B of the above-mentioned guidance listed the following as examples of associated development for highway NSIP schemes:
- (a) replacement roadside facilities where this becomes necessary due to the elimination of an existing facility by highway improvement;
 - (b) infrastructure associated with cycle/pedestrian access;
 - (c) off-site landscaping, habitat creation and other environmental works;

³ Guidance on associated development applications for major infrastructure projects

- (d) off-site drainage works;
- (e) alteration/diversion/stopping up of local roads, accesses and other rights of way; and
- (f) off-site diversion of statutory undertakers' equipment.

3.4 However, in some cases it should be recognised that there may be some overlap, or the absence of a clear boundary, between associated development and works which form part of the NSIP. There is a danger that separating the two out in the Order could potentially lead to an error in defining them one way or another, given this potential for overlap between the two categories. For instance, there may be some on-highway, and some off-highway, diversion of the same piece of statutory undertaker equipment.

3.5 For this reason, and noting that there is no requirement for a development consent order to distinguish between these two categories, Highways England has chosen not to differentiate the NSIP and associated development works in Schedule 1 to the Order. Ultimately, all elements of the Scheme either constitute part of the NSIP or are "associated development" within the meaning of section 115(2) of the 2008 Act, and so can properly be authorised by the Order.

3.6 In order to ensure that the authorised development and the associated development are constructed efficiently and without impediment, the Order contains the powers to carry out the works listed (a) to (o) in Schedule 1. The use of such measures was explicitly approved in The A19/A1058 Coast Road (Junction Improvement) Development Consent Order 2016 and extensive provisions were used in The A19/A184 Testo's Junction Alteration Development Consent Order 2018, The A14 Cambridge to Huntingdon Improvement Scheme Development Consent Order 2016 and The M4 Motorway (Junctions 3 to 12) (Smart Motorway) Development Consent Order 2016 and The Silvertown Tunnel Order 2018

4 Ancillary Matters

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

4.2 The main ancillary matter is a power to acquire land or rights over land compulsorily or by agreement, in accordance with section 120(4) of the 2008 Act, required for the authorised development, or to facilitate, or that are incidental to the authorised development under section 122 of the 2008 Act. A justification for these powers is set out in the Statement of Reasons that accompanies the application.

4.3 Further to providing these powers, the Order seeks to apply and modify statutory provisions that relate to the compulsory acquisition of land. Under sections 117 and 120(5) of the 2008 Act, an Order containing provisions of this nature must be made by Statutory Instrument. The Order is therefore presented in that form.

4.4 Other ancillary matters include the temporary and permanent stopping up of lengths of existing highways in the vicinity of the authorised development, the classification of highways including the trunking of sections of the highway, the application of speed limits, the stopping up of private means of access and the creation of new streets and private means of access and the application and disapplication of legislation relating to the Scheme.

5 Draft Order

- 5.1 The purpose and effect of the provisions of the draft Order are now explained in sequence. Whilst the Infrastructure Planning (Model Provisions) (England and Wales) Order 2009 (S.I. 2009/2265) has been repealed, the draft Order draws on the general model provisions (“**the Model Provisions**”) and the model provisions for railways, as well as precedent set by development consent orders that have been made to date.

Part 1 – Preliminary

Article 1 – Citation and commencement

- 5.2 Article 1 sets out the name of the Order, establishing how it may be cited in subsequent legislation. It also states the date on which the Order comes into force.

Article 2 – Interpretation

- 5.3 The purpose of article 2(1) is to define terms used in the remainder of the Order.
- 5.4 The following definitions are used in articles in the remainder of the Order that are typical of highway schemes:
- (a) "the 1984 Act";
 - (b) "carriageway";
 - (c) "cycle track": this term is used interchangeably with "cycle way" in the application documents and both are intended to have the meaning defined in this article;
 - (d) "footway" and "footpath";
 - (e) "street";
 - (f) "street authority"; and
 - (g) "trunk road".
- 5.5 Other definitions to note include:
- (a) “commence”, means “beginning to carry out any material operation (as defined in section 56(4) of the 1990 Act) forming part of the authorised development other than operations consisting of archaeological investigations, ecological surveys and pre-construction ecological mitigation, investigations for the purpose of assessing and monitoring ground conditions and levels, remedial work in respect of any contamination or other adverse ground conditions, erection of any temporary means of enclosure, receipt and erection of construction plant and equipment, diversion and laying of underground apparatus and site clearance, and the temporary display of site notices or advertisements, and “commencement” is to be construed accordingly”;

This makes it clear that a number of works that would constitute a ‘material operation’ under the Town and Country Planning Act 1990 do not mean that the authorised development has been ‘commenced’. This enables Highways England to undertake certain preparatory works prior to the submission of relevant details for approval under the requirements, which Highways England considers proportionate. The works that are excluded from the definition of commencement are either *de minimis* or have minimal potential for adverse impacts, in line with the Planning Inspectorate’s Advice Note 15. They may in some cases need to be carried out in order to comply with the pre-commencement requirements (for example, to inform assessments and proposals required to be submitted for approval). Highways England should be permitted to carry out low impact preparatory works following the grant of the DCO, while it is working to discharge the pre-commencement requirements thereby helping to minimise the construction timetable. This is a widely precedented approach in other made DCOs.

The drafting reflects the types of preparatory works which Highways England may need to undertake prior to submission of relevant details for approval under the requirements. Similar wording has been approved in other Orders (see The M20 Junction 10a Development Consent Order 2017) and The Silvertown Tunnel Development Consent Order 2018.

- (b) “maintain” which includes to inspect, repair, adjust, alter, improve, landscape, preserve, remove, reconstruct, refurbish or replace, provided such works do not give rise to any materially new or materially different environmental effects to those identified in the environmental statement, and any derivative of maintain (see paragraph 6.3 below). This builds on the maintenance activities included in the majority of made DCOs for highways development, but Highways England considers that this is an appropriate definition, given the proviso that any works to maintain the authorised development must not give rise to any materially new or materially different environmental effects to those identified in the ES. In the context of the Scheme, it is important for Highways England to be able to undertake all the elements of maintenance that are included within this definition, which is discussed further at paragraph 5.15 below.
- (c) "the Order land", which comprises all of the land to be acquired or used permanently or temporarily as shown on the land plans; and
- (d) "the Order limits", which references the extent of the area within which the authorised development may be carried out.

5.6 Articles 2(2)-(3) provide that a broad definition of ‘rights over land’ and ‘creation of rights over land’ applies to the Order.

5.7 Article 2(4) provides that measurements are approximate. The purpose of this is to ensure that if, upon construction of the works, it transpires that the distances are marginally different to those listed in the Order, there is no issue over whether the works are permitted by the Order. Thus this provision allows for a small tolerance with respect to any distances and points, although works will take place within the limits of deviation. It is common-place to include such provision in an Act or instrument authorising linear infrastructure.

- 5.8 Article 2(5) provides that areas given in the book of reference are approximate as these are not covered by article 2(3). This is intended to clarify the position of the areas in the book of reference, the purpose and effect is the same as set out in the previous paragraph.
- 5.9 Article 2(6) clarifies that references to any statutory body include that body's successors from time to time.
- 5.10 Article 2(7) and 2(8) tie references to lettered / numbered points and numbered works in the Order to the streets, rights of way and access plans and Schedule 1, respectively.
- 5.11 Article 2(9) confirms that the expression "includes", when used in the Order, is to be constructed without limitation.

Part 2 – Principal powers

Article 3 – Development consent etc. granted by the Order

- 5.12 Article 3(1) grants the development consent by giving Highways England the power to construct the authorised development, which is described in Schedule 1, subject to the requirements in Schedule 2.
- 5.13 Article 3(2) states that any enactment applying to land within the Order limits has effect subject to the provisions of the Order. This provision ensures that the modifications made in the Order apply to any enactments that may affect the authorised development and further ensures consistency with legislation more generally.
- 5.14 There is precedent for such a provision, for example the Secretary of State approved the same wording in The A14 Cambridge to Huntingdon Improvement Scheme Development Consent Order 2016 (see article 5(2)) and The A19/A184 Testo's Junction Alteration Development Consent Order 2018 (see article 3(2)).

Article 4 – Maintenance of the authorised development

- 5.15 This article authorises Highways England to maintain the development. "Maintain" is defined in article 2(1) as including "inspect, repair, adjust, alter, improve, landscape, preserve, remove, reconstruct, refurbish or replace", with these terms bearing their common-sense meanings.
- 5.16 This definition is broader than the equivalent in section 329 of the Highways Act 1980, which simply states that maintenance "includes repair". Article 4 therefore supplements the maintenance powers under the Highways Act 1980 and ensures that Highways England has the necessary powers to maintain the authorised development. It is considered necessary and appropriate to adopt the broader definition. Paragraph 5.5(b) above provides further justification for the use of this definition.
- 5.17 It should be noted that powers of maintenance are subject to other provisions in the Order, in particular article 14 which makes provision in relation to maintenance by highway authorities. In addition, any maintenance works must not give rise to any materially new or materially different environmental effects to those identified in the environmental statement.

Article 5 – Maintenance of drainage works

- 5.18 The purpose of this article is to make it clear that any realignment of drainage works or other works to them that are carried out as part of the authorised development do not affect the existing allocation of responsibility for maintenance of those drains, unless this is agreed between Highways England and the responsible party. Responsibility for maintenance of drainage works may sit with the Environment Agency, an internal drainage board, a lead local flood authority or a landowner.
- 5.19 The provision is well precedented (see for example article 4 of The A14 Cambridge to Huntingdon Improvement Scheme Development Consent Order 2016 and article 5 of The A19/A184 Testo's Junction Alteration Development Consent Order 2018).

Article 6 - Limits of deviation

- 5.20 Article 6 provides for limits of deviation to allow:
- 5.20.1 for a lateral deviation from the lines and situations of the authorised development within the limits of deviation shown on the Works plans; and
 - 5.20.2 for a vertical deviation from the levels shown on the engineering drawings and sections to a maximum of 0.5 metres upwards or downwards, save in respect of the new Solihull Road Overbridge (comprised in Work No. 3), where a maximum deviation of 1.5 metres upwards or downwards is authorised.
- 5.21 These maximum limits of deviation do not apply where the undertaker is able to demonstrate to the Secretary of State's satisfaction (and the Secretary of State has certified accordingly following consultation with the relevant planning authority) that such deviation would not give rise to any materially new or materially different environmental effects in comparison with those reported in the Environmental Statement.
- 5.22 The purpose of this provision is to provide Highways England with a proportionate degree of flexibility when constructing the Scheme, reducing the risk that the Scheme as approved cannot later be implemented for unforeseen reasons but at the same time ensuring that any flexibility will not give rise to any materially new or materially different environmental effects. It also gives a proportionate amount of flexibility for the detailed design of the Scheme, within the set limits.
- 5.23 The limits of deviation referred to in this article and shown on the application plans have been taken into account in the preparation of the ES and the potential impacts of a deviation within the permitted limits have been assessed. Highways England is only permitted to exceed the limits specified in this article if it can demonstrate to the Secretary of State's satisfaction that no materially new or worse adverse environmental effects would arise.
- 5.24 The limits of deviation set out in article 6 have been developed through the design and Environmental Impact Assessment process for the Scheme; as such the article is an adaptation of the article set out in the Model Provisions, and in terms of principle, it accords with the majority of DCOs made to date.

Article 7 – Benefit of the Order

- 5.25 Article 7 overrides section 156(1) of the 2008 Act (as permitted by section 156(2)) to give the benefit of the Order to Highways England rather than anyone with an interest in the land. It would be impracticable for a variety of landowners to implement parts of the Order in an uncoordinated manner, which might be the case if section 156(1) were to remain.
- 5.26 The purpose of paragraph (2) is to clarify the exceptions where the Order will self-evidently benefit others. Absent this provision, there would be a contradiction since strictly speaking only Highways England could benefit from these works. The same wording was accepted and approved by the Secretary of State in The A14 Cambridge to Huntingdon Improvement Scheme Development Consent Order 2016 (see article 8(2)), The M4 Motorway (Junctions 3 to 12) (Smart Motorway) Order 2016 (see article 7(2)) and The A19/A184 Testo's Junction Alteration Development Consent Order 2018 (see article 7(2)).

Article 8 – Consent to transfer benefit of the Order

- 5.27 This article allows the benefit of the Order to be transferred or leased to others by Highways England. The exercise of any transferred benefits or rights is subject to the same restrictions, liabilities and obligations as would apply under the Order if those benefits or rights were executed by the undertaker. The consent of the Secretary of State is required for a transfer or grant, except where it is made to specified companies in relation to certain utility diversion works.
- 5.28 This article is based on article 5 of the Model Provisions. It differs in that it allows a transfer or grant to a specified company to take place without the Secretary of State's consent, on the basis that it is appropriate for those companies to be able to carry out those works. The companies listed in paragraph (4) are those whose apparatus is required to be diverted.

Article 9 - Application of the 1990 Act

- 5.29 This article applies to specified works which, though temporary in nature, would be in place for a considerable period of time (e.g. temporary worksites). The article applies section 57(2) of the Town and Country Planning Act 1990 ('the 1990 Act') to those works to clarify that planning permission is not required for the resumption, at the end of that period, of the purpose for which that land was normally used before the development consent was granted.

Article 10 - Application of the Community Infrastructure Levy Regulations 2010

- 5.30 This article again applies to specified works which, though temporary in nature, would be in place for a considerable period of time. It provides that the development consent granted for the temporary works is to be treated for the purposes of the Community Infrastructure Levy Regulations 2010 as a planning permission granted for a temporary period. The community infrastructure levy ("CIL") is not chargeable on temporary planning permissions, so this would have the effect of excluding the specified temporary works from the CIL charging provisions.

Article 11 - Planning permission

- 5.31 This provision does not feature in the Model Provisions but is included to make clear that, where Highways England needs to obtain any other planning permission for anything relating to the proposed development (i.e. to facilitate its completion, construction, use or operation), there is

no question as to the interface between that planning permission and this Order (i.e. the implementation of that planning permission will not constitute a breach of the terms of this Order).

Part 3 – Streets

Article 12 – Street Works

5.32 Article 12 allows the undertaker to interfere with and execute works in or under the streets within the Order limits for the purposes of the authorised development. The authority given by this article is a statutory right for the purposes of section 48(3) and 51(1) of the New Roads and Streets Works Act 1991. Certain provisions of the 1991 Act apply to works carried out under this article, subject to the provisions of article 13 (application of the 1991 Act).

5.33 Article 12 adopts article 8 of the Model Provisions in that it authorises interference with any street listed in Schedule 3 to the Order within the Order limits..

5.34 The definition of ‘apparatus’ that was included as paragraph (4) in the Model Provisions is omitted because that term is already defined in article 2.

Article 13 – Application of the 1991 Act

5.35 Article 13 modifies the application of the New Roads and Street Works Act 1991⁴ (“**the 1991 Act**”) to works carried out under the powers of the Order.

5.36 Paragraph (1) provides that works carried out under the powers of the Order which match the description of "major highway works" in the 1991 Act will be treated as major highways works for the purposes of the 1991 Act. The effect of this is to clarify that the provisions for sharing the burden of dealing with apparatus in the street (under sections 84 and 85 of the 1991 Act), which would normally apply only to major highway works carried out by the highway authority, will apply in respect of the works authorised by the Order irrespective of who in fact carries them out.

5.37 “Major highways works” are defined at section 86 of the 1991 Act. The definition includes, at sub-sections 86(3)(b) and (f), works undertaken under powers conferred by sections 64 and 184 the Highways Act 1980. As that would not be relevant in this context (where the works will be undertaken under the powers of the Order), these sub-sections are omitted from paragraph (1)(a). Works equivalent to works undertaken under those sections of the Highways Act 1980, but carried out under powers conferred by the Order, are included through paragraph 1(b). The effect is that any works which would be “major highway works” under the 1991 Act if carried out by a highway authority in relation to one of its streets are also “major highway works” if carried out under the powers of the Order, regardless of who carries them out.

5.38 Paragraph (3) provides that certain provisions of the 1991 Act listed in that paragraph will not apply. The disapplication of these provisions (which are designed primarily to regulate the carrying out of street works by utility companies in respect of their apparatus) is appropriate given the scale of works proposed under the Order, the specific authorisation given for those

⁴ c.22

works by the Order (particularly article 3 and Schedule 1), and the provisions in the Order (including the requirements) which would regulate the carrying out of the Order works.

- 5.39 Paragraphs (4) to (6) apply certain provisions of the 1991 Act (listed in paragraph (5)) to any streets which are temporarily stopped up under the Order. This is for two reasons: first, it prevents any confusion as to whether works in respect of a temporarily stopped-up street are "street works" for the purposes of the 1991 Act and, secondly, it simplifies the implementation of the works by providing for a single process in respect of streets which are stopped up and those which are not.
- 5.40 Paragraph (7)(a) provides that nothing in article 14 shall affect the ability of the local highway authority (under s.87 of the 1991 Act) to declare a street in its area a maintainable highway, which would make maintenance of the street (once completed) the responsibility of the local highway authority, and would mean that the 1991 Act would apply to street works carried out in that street.
- 5.41 Paragraph (7)(a) provides that Highways England will not be under the duties that apply to a "street authority" for the purposes of the 1991 Act by virtue of being responsible for the maintenance of a street under article 14.
- 5.42 Paragraph (7)(b) makes it clear that the maintenance obligations imposed by article 14 do not override the provisions of the 1991 Act that govern procedures for street works, i.e. works in streets involving the placing of or alteration to apparatus in the street. After the implementation of the Order, it is appropriate that the 1991 Act should govern such works as it is specifically designed to ensure a fair and efficient procedure for the various parties affected by such works.
- 5.43 These modifications reflect those made in other highway DCOs, for example The M4 Motorway (Junctions 3 to 12) (Smart Motorway) Development Consent Order 2016, The A19/A1058 Coast Road (Junction Improvement) Development Consent Order 2016 and The Testo's A19/A184 Junction Alteration Development Consent Order 2018.

Article 14 – Construction and maintenance of new, altered or diverted streets and other structures

- 5.44 The standard position in respect of maintenance of streets is that Highways England is responsible for maintaining special roads and trunk roads. Other streets are to be maintained by the local highway authority in respect of highways maintainable at the public expense, or whichever body is responsible for the maintenance of the street in respect of streets which are not maintainable at the public expense. This is reflected in paragraphs (1) and (2). These provisions are subject to any agreement to the contrary between Highways England and the relevant street or highway authority.
- 5.45 Paragraph (3) makes specific maintenance provision in relation any new bridges carrying public rights of way over a trunk road. For these, Highways England is responsible for the maintenance of the bridge structure while the local highway authority is responsible for the maintenance of the highway surface.
- 5.46 The effect of paragraphs (4) and (5) is that in any action for damages against Highways England alleging failure to maintain a street or other structure, Highways England will have the defence that it had taken such care as was reasonably required in the circumstances to secure that the street or structure was not dangerous for traffic. This extends the provision in section 58 of the Highways Act 1980 to Highways England and draws on the approach taken in article 21 of The

A556 (Knutsford to Bowdon Improvement) Development Consent Order 2014 and repeated in article 9 of The A19/A1058 Coast Road (Junction Improvement) Development Consent Order 2016, article 12 of The M4 Motorway (Junctions 3 to 12) (Smart Motorway) Development Consent Order 2016 and article 10 of The A19/A184 Testo's Junction Alteration Development Consent Order 2018.

- 5.47 While Highways England would benefit from the equivalent defence in the Highways Act 1980 in respect of special roads or trunk roads, for which it is the highway authority, the proposed development includes roads which are not special roads or trunk roads and so this article is needed to ensure Highways England is covered by this defence in respect of all the roads that comprise the authorised development.

Article 15 – Classification of roads etc.

- 5.48 The designation of highways, the specification of the classes of traffic authorised to use a highway and speed limits are ancillary matters which may be included in a development consent order under section 120(3) of the 2008 Act. These and other related matters are addressed by this article. These matters are integral to the implementation of the authorised development, and it is therefore considered appropriate to include them in the Order as ancillary matters under section 120(3) of the Act.
- 5.49 Paragraphs (1) and (2) provide for the roads described in Part 1 of Schedule 4 to become special roads. Under paragraph (1) they will be classified as special roads for the purpose of any enactment or instrument which refers to highways classified as special roads, and will be provided for the use of traffic of Classes I and II as set out in the Highways Act 1980. Paragraph (2) provides for the roads in Part 1 of Schedule 4 to be classified as trunk roads for the purpose of any enactment or instrument which refers to highways classified as trunk roads from the date on which the undertaker notifies the Secretary of State that they are completed and open for through traffic.
- 5.50 Paragraph (3) provides for the roads described in Part 2 of Schedule 4 to become trunk roads from the date that they are complete and open to traffic. Paragraph (4) provides for the roads described in Part 3 of Schedule 4 to become classified roads from the date that they are complete and open to traffic. Paragraph (5) provides for the roads described in Part 4 of Schedule 4 to become unclassified roads from the date that they are complete and open to traffic. Paragraph (6) imposes speed limits along certain sections of the authorised development as described in Part 5 of Schedule 4. Paragraph (7) confirms that from the date on which the slip roads to be constructed as part of Work Nos 4 and 5 are open for traffic the provisions of the M42 (Junction 3A to 7) (Actively Managed Hard Shoulder and Variable Speed Limits) Regulations 2005 (the 2005 Order) are amended. This is to ensure that the new slip roads are subject to variable speed limits imposed by the 2005 Order in relation to the section of motorway between junctions 3A to 7.
- 5.51 Paragraph (8) confirms that the public rights of way in Part 6 of Schedule 4 will be provided, and can be open as soon as reasonably practicable following completion of the public right of way in agreement with the relevant planning authority.
- 5.52 The purpose of paragraph (9) is to confirm that the matters covered in paragraphs (1) to (8) could be varied or revoked in the future without the need to apply under the 2008 Act for an amendment to the Order.

Article 16 – Temporary stopping up and restriction of use of streets

- 5.53 This article allows for the temporary stopping up, alteration, diversion or restriction of streets for the purposes of the authorised development.
- 5.54 Paragraph (2) differs from the Model Provisions and confers a power on Highways England, where the use of a street has been temporarily stopped up under this article, to use it as a temporary working site. This provision has precedent in a number of made development consent orders, including The A19/A184 Testo's Junction Alteration Development Consent Order 2018.
- 5.55 Paragraph (3) states that reasonable access for pedestrians going to or from premises abutting a street must be provided if there would otherwise be no such access.
- 5.56 Without limitation on the scope of paragraph (1) of article 16, paragraph (4) provides for the temporary stopping up, alteration, diversion or restriction of streets specified in Schedule 5, subject to the provision of temporary diversions as specified in Schedule 4 where the consent of the street authority is not required.
- 5.57 Paragraph (5) confirms that, in respect of streets for which it is the street authority, Highways England must not stop up, alter or divert those streets listed in Schedule 5 without first consulting the street authority and, in respect of any other street, without the consent of the street authority (such consent not to be unreasonably withheld or delayed).
- 5.58 Paragraph (6) confirms that any temporary diversion provided under paragraph (4) in respect of the streets stopped up, diverted or altered listed in Schedule 5, is not required to be of a higher standard than the temporarily stopped up street.
- 5.59 Paragraph (7) provides a right to compensation for any person suffering loss due to the suspension of a private right of way under this article.
- 5.60 Paragraph (8) states that where a street authority which fails to notify Highways England of its decision in respect of an application for consent within 28 days of the application being made, it is deemed to have given its consent to the application. It is considered necessary to remove the possibility for delay and provide certainty that the authorised development can be delivered by Highways England in a timely fashion. The article is a standard provision in highways development consent orders (see for example, article 11 of The A19/A1058 Coast Road (Junction Improvement) Development Consent Order 2016 and article 12 of The A19/A184 Testo's Junction Alteration Development Consent Order 2018).
- 5.61 Paragraph (9) has been added to make clear that in circumstances where deemed consent provisions apply the application for such consent must include a statement confirming that such deemed consenting provisions apply.
- 5.62 Deemed consenting provisions are also included in article 20 (Traffic regulation), article 21 (Discharge of water) and article 23 (Authority to survey and investigate the land).

Article 17 – Permanent stopping up and restriction of use of streets, public rights of way and private means of access

- 5.63 This article is based on article 9 of the Model Provisions and allows streets, public rights of way and private means of access listed in Parts 1 to 6 of Schedule 6 to be stopped up (i.e. the legal right of way along them to be extinguished).
- 5.64 Paragraph (2) relates to the street, public rights of way and private means of access to be stopped up as specified in Parts 1, 3 and 5 of Schedule 6, for which a substitute is to be provided. It requires the substitute to be completed and open for use, or a temporary alternative route to be available, before the street, public right of way or private means of access in question is stopped up.
- 5.65 For the streets, public rights of way and private means of access to be stopped up as specified in Parts 2, 4 and 6 of Schedule 6, no substitute means of access is to be provided. In this case, the street, public right of way or private means of access may not be stopped up unless one of the conditions referred to in paragraph (4) is met.
- 5.66 Paragraph (6) provides that highways England may alter the private means of access listed in Part 7 of Schedule 6 to the Order. These are alterations which can be undertaken without formally stopping up the private means of access under article 17.
- 5.67 Paragraph (7) provides a right to compensation for any person suffering loss due to the suspension or extinguishment of a private right of way under this article.
- 5.68 Since the definition of a “street” in section 48 of the 1991 Act includes highways and footways, the stopping up and diversion of footpaths and footways are also dealt with in this article and Schedule 5. The wording is substantially based on numerous highways DCOs, see for example article 12 of The A19/A1058 Coast Road (Junction Improvement) Development Consent Order 2016 and article 13 of The A19/A184 Testo’s Junction Alteration Development Consent Order 2018.

Article 18 – Access to works

- 5.69 This article is based on article 12 of the Model Provisions and allows works accesses to public highways to be created within the Order limits. It provides Highways England with a general power to form means of access rather than accesses set out in a schedule, to provide an appropriate degree of flexibility in case the need for an access only becomes apparent at a later stage in the implementation of the proposed development. These powers are equivalent to those available to Highways England when implementing schemes under the Highways Act 1980.
- 5.70 The provisions of this article confer slightly broader powers than those contained in the 1980 Act, which allows a highway authority to provide “*a new means of access to any premises*” where it considers it “*necessary or expedient in connection with the construction, improvement or alteration of a highway*” to do so. The statutory power is subject to securing the consent of the authority which is, or which will become, the highway authority for that highway. The inclusion of this article is considered to be appropriate as it will help to ensure that the authorised development can be carried out expeditiously by allowing Highways England to create new temporary accesses as and where required, particularly in response to requests from landowners, occupiers and other affected parties.

- 5.71 This provision has precedent in a number of made development consent orders including The A19/A184 Testo's Junction Alteration Development Consent Order 2018

Article 19 – Clearways, prohibitions and restrictions

- 5.72 This article makes it unlawful for road users to stop on the roads or prohibits entry to the roads specified in Part 1 of Schedule 7 or to use any vehicle which exceeds the weight restrictions specified in relation to the roads set out in Part 2 of Schedule 6, except upon the direction of or with the permission of a constable or a traffic officer in uniform, or for emergency and other unavoidable reasons.
- 5.73 The purpose of this article is to ensure the safe and proper operation of the authorised development, and to ensure the Scheme delivers its intended benefits. It is therefore considered appropriate for this provision to be included in the Order as an ancillary matter under section 120(3) of the 2008 Act or a provision which is necessary or expedient for giving full effect to other provisions of the Order (for example, the powers to construct and maintain the authorised development).
- 5.74 Such traffic regulation measures are normally made by Traffic Regulation Order (“**TRO**”) under the Road Traffic Regulation Act 1984 (“**the 1984 Act**”), with such Orders subject to consultation and publicity requirements. Inclusion within the DCO is appropriate as the consultation, publicity and examination processes within the DCO procedure provide a more than adequate substitute for the consultation and publicity requirements associated with TROs.
- 5.75 The proposed restrictions sought under Article 19 are similar to those which would apply to a clearway established under section 2 of the 1984 Act. This provides that a TRO may make provision prohibiting, restricting or regulating the use of a road, or any part of the width of a road, by vehicular traffic, or by vehicular traffic of any class specified in the Order either generally or subject to exceptions specified in the Order or determined in a manner provided for it or with reference to periods of time.
- 5.76 Paragraph (5) also clarifies that paragraphs (1), (2), (3) and (4) have effect as if made by an Order under the 1984 Act, and can be varied or revoked by an Order made under that Act or any other enactment which provides for the variation or revocation of such Orders, without the need to apply under that Act for an amendment to the Order.
- 5.77 The wording in this article has been approved and the principle for the inclusion of traffic regulation measures accepted in The A19/A1058 Coast Road (Junction Improvement) Development Consent Order 2016 (see article 14) and The A19/A184 Testo's Junction Alteration Development Consent Order 2018 (see article 15).

Article 20 – Traffic regulation

- 5.78 The purpose of this article is to provide Highways England with powers to make traffic regulation orders in relation to roads for which it is not the highway authority, so that it can implement traffic management measures (e.g. restrictions on the use of roads) necessary to construct the authorised development. This provision is not included in the Model Provisions but has been consistently approved in DCOs granted under the 2008 Act. The drafting adopted draws on the approach taken in article 37 of The A556 (Knutsford to Bowdon Improvement) Development Consent Order 2014, article 43 of The M4 Motorway (Junctions 3 to 12) (Smart Motorway)

Development Consent Order 2016 and article 16 of The A19/A184 Testo's Junction Alteration Development Consent Order 2018.

- 5.79 This article would, at any time prior to 12 months following the opening of the authorised development for public use, allow Highways England, in so far as it is necessary or expedient for the purposes of the construction, maintenance or operation of the authorised development, to:
- (a) revoke, amend or suspend in whole or in part any order made under the 1984 Act;
 - (b) permit, prohibit or restrict the stopping, waiting, loading or unloading of vehicles on any road;
 - (c) authorise the use as a parking place of any road;
 - (d) make provision as to the direction or priority of vehicular traffic on any road; and
 - (e) permit or prohibit vehicular access to any road.
- 5.80 Paragraph (2) has been amended to allow a traffic regulation order to be applied for by Highways England for the purpose of preventing the use of a road or for preserving or improving the amenity of the road.
- 5.81 Implementation of any of the measures is subject to the prior approval of the traffic authority in whose area the roads are situated. Requirement is also made for the chief officer of police and the relevant traffic authority to be notified in advance. This complies with the consultation and publicity requirements for TROs under the Secretary of State's Traffic Orders (Procedure) (England and Wales) Regulations 1990/1656.

Part 4 – Supplemental powers

Article 21 – Discharge of water

- 5.82 This article establishes statutory authority for Highways England to discharge water into a sewer, watercourse or drain in connection with the carrying out or maintenance of the authorised development.
- 5.83 This statutory authority is subject to Highways England obtaining the consent of the owner of the sewer, watercourse or drain, but that consent cannot be withheld unreasonably (paragraph (3)).
- 5.84 Paragraph (6) requires the undertaker to take such steps as are reasonably practicable to ensure that any water that is discharged is as free as may be practicable from gravel, soil or other solid substance, oil or matter in suspension.
- 5.85 Paragraph (7) makes clear that this article does not obviate the need for an environmental permit for such discharge where this is relevant.
- 5.86 Paragraph (9) states that a person who fails to notify the undertaker of its decision in respect of an application for consent/approval within 28 days of the application being made is deemed to have granted consent/approval. This time limit is considered necessary to remove the

possibility for delay and provide certainty that the authorised development can be delivered by the undertaker in a timely fashion. As an NSIP, the authorised development should not be at risk of being held up due to a failure to respond to an application for consent/approval.

- 5.87 This article is based on article 14 of the Model Provisions and has been included in previous Highways England Orders (see for example article 18(7) of The M20 Junction 10a Development Consent Order 2017). It is required for this Scheme in order to establish and regulate Highways England's authority to discharge water to watercourses, public sewers and drains.

Article 22 – Protective work to buildings

- 5.88 The purpose of this article is to allow Highways England to undertake protective works to buildings affected by the authorised development, such as underpinning, and to set out the procedure that will apply in these circumstances.
- 5.89 The article is based on article 15 of the Model Provisions and has broad precedent (see article 16 of The A19/A1058 Coast Road (Junction Improvement) Development Consent Order 2016, article 18 of The A14 Cambridge to Huntingdon Improvement Scheme Development Consent Order 2016 and article 18 of The A19/A184 Testo's Junction Alteration Development Consent Order 2018).
- 5.90 Paragraph (10) applies section 13 of the Compulsory Purchase Act 1965, thereby providing an enforcement mechanism (by way of a warrant) where entry onto, or possession of, land under the article is refused.

Article 23 – Authority to survey and investigate the land

- 5.91 This article gives Highways England the power to enter certain land for the purpose of surveying and investigating the land. The article provides that Highways England must give 14 days' notice before exercising the powers of entry, and that compensation is payable for any loss or damage.
- 5.92 Paragraph (7) applies section 13 of the Compulsory Purchase Act 1965, thereby providing an enforcement mechanism (by way of a warrant) where entry onto, or possession of, land under the article is refused.
- 5.93 Paragraphs (1) to (5) are based on the Model Provisions and have precedent in a number of made DCOs to date. Paragraphs (6) and (7) have precedent in The A14 Cambridge to Huntingdon Improvement Scheme Development Consent Order 2016.
- 5.94 The drafting in paragraph (1) departs from the Model Provisions by authorising surveys, where reasonably necessary, on land outside but adjacent to the Order limits. This extension beyond the Order limits has precedent in the Silvertown Tunnel Order 2018. Powers to make excavations and boreholes, to investigate groundwater and discharge water onto land are also included, to ensure that Highways England is able to undertake all necessary activities in connection with surveying the land.
- 5.95 The ability to survey land adjacent to the Order limits where reasonably necessary is required so that Highways England can be confident that the surveys can be conducted to assess the effects of the Scheme, or on the Scheme, from outside its limits. It imposes a lesser burden than seeking compulsory acquisition of such land.

Part 5 – Powers of acquisition

Article 24 – Compulsory acquisition of land

- 5.96 This article authorises the acquisition of land by compulsory purchase. It grants the power to acquire such of that land as is required for the authorised development, or to facilitate it, or is incidental to it. The power of acquisition over the Order land is qualified and restricted by subparagraph (2), in the case of parcels of land specified in the Order where only rights and restrictive covenants can be acquired (article 23 (2)-(3)), where possession of land parcels as specified in the Order may be taken temporarily only (article 3329(9)) or where Crown rights apply.
- 5.97 The provision is necessary to secure the delivery of the Scheme as set out in more detail in the Statement of Reasons accompanying the application

Article 25 – Compulsory acquisition of land – incorporation of the mineral code

- 5.98 This article incorporates Parts 2 and 3 of Schedule 2 to the Acquisition of Land Act 1981. This means that where Highways England acquires land under the powers of the Order, it will not acquire any mineral deposits present in the land (other than those necessarily extracted or used in constructing the authorised development) unless they are expressly included in the conveyance. The drafting is based on article 19 of the Model Provision and has been approved in a number of DCOs granted under the 2008 Act.

Article 26 – Time limit for exercise of authority to acquire land compulsorily

- 5.99 This article gives Highways England five years to issue 'notices to treat' or to execute a 'general vesting declaration' to acquire the land that is subject to the power of compulsory purchase. These are the two main procedural methods by which the process of compulsorily acquiring land may be undertaken should this Order be made.
- 5.100 The article also sets a 5-year time limit on Highways England's power to take temporary possession of land, although it does not prevent Highways England from remaining in possession of land after that time if it took possession within the 5-year limit (this has consistently been approved by the Secretary of State, see for example article 22 of The A14 Cambridge to Huntingdon Improvement Scheme Development Consent Order 2016 and article 22 of The A19/A184 Testo's Junction Alteration Development Consent Order 2018).

Article 27 – Compulsory acquisition of rights and restrictive covenants

- 5.101 This article allows for existing rights in land to be acquired as well as the land itself, and also for the acquisition of new rights and the imposition of restrictive covenants over land.
- 5.102 This article provides for such rights and restrictive covenants as may be required to be acquired or imposed by Highways England over land which it is authorised to acquire under article 24. The public benefit of this is that it would allow Highways England, if possible, to reduce the area of outright acquisition and rely on rights or restrictive covenants instead. A provision of this kind is usual in Transport and Works Act orders and Hybrid Bills, and has been followed in a number of DCOs granted (for example article 23 of The A14 Cambridge to Huntingdon Improvement Scheme Development Consent Order 2016 and article 23 of The A19/A184 Testo's Junction Alteration Development Consent Order 2018).

- 5.103 Paragraph (2) provides that in respect of the land described in Schedule 8, Highways England's powers of compulsory acquisition are limited to the acquisition of such rights or the imposition of such restrictive covenants as may be required for the purposes set out in that Schedule.
- 5.104 Paragraph (3) provides that where Highways England needs only to acquire rights or impose restrictive covenants over land, it shall not be obliged to acquire any greater interest in that land.
- 5.105 Paragraph (4) applies Schedule 9 which imposes modifications to the compulsory purchase and compensation provisions under general legislation. They do not affect the entitlement to compensation, but generally ensure that the compensation procedure applies to the additional categories of acquisition covered by the Order – the creation of new rights and the imposition of restrictive covenants in particular. This is a consequence of the extension of land acquisition powers to these categories (included to allow lesser land interests to be acquired).
- 5.106 For the purposes of section 126(2) of the 2008 Act, the relevant compensation provisions are modified only to the extent necessary to ensure that they apply properly to the acquisition of rights, and not to affect the amount of compensation to which landowners would be entitled. Furthermore, the provisions have been amended so that the time limits are consistent with the Order (five years as opposed to three years) and the appropriate references to the 2008 Act are made.
- 5.107 Paragraphs 2 and 4 to 10 of Schedule 9 are amendments to ensure that the relevant compulsory purchase and compensation provisions apply to acquisition of rights/restrictive covenants (and not just land). Paragraph 3 relates to correcting the references for the relevant time period (i.e. 5 years under the Order rather than 3 years under legislation).
- 5.108 The modifications are applicable generically to Orders of this kind and are based on changes made consistently in most schemes granted under the 2008 Act (see, for example, Schedule 6 to The A14 Cambridge to Huntingdon Improvement Scheme Development Consent Order 2016 for a recent example).
- 5.109 As a result of changes contained in the Housing and Planning Act 2016, the Order has also been updated to ensure that the correct provisions are modified. These changes are based on the amendments contained in High Speed Rail (London - West Midlands) Act 2017 and have also been adopted in the London Overground (Barking Riverside Extension) Order 2017.

Article 28 – Private rights over land

- 5.110 In order for it to be possible to implement the Scheme, provision is needed for the extinguishment of private rights in the Order land that would be incompatible with that implementation. Article 28 supplies that provision.
- 5.111 Article 28(1) provides for the extinguishment of private rights over Order land subject to compulsory acquisition under the Order, from the moment of acquisition or occupation of that land.
- 5.112 Article 28(2) provides for the extinguishment of existing private rights over land that is subject to the compulsory acquisition of new rights or imposition of restrictive covenants (but where the underlying land is not subject to powers of compulsory acquisition), if the exercise of those existing rights is inconsistent with the implementation of the Scheme, from the date of

acquisition of the right, imposition of the restrictive covenant or occupation of the underlying land.

- 5.113 Article 28(3) provides that rights over Order land that is already owned by Highways England are also extinguished, at the point that any activity authorised by the Order interferes with or breaches those rights.
- 5.114 Article 28(4) provides for the temporary suspension of private rights over Order land that is not acquired but is occupied temporarily by Highways England in order to construct the proposed development. The suspension is for the duration of the occupation.
- 5.115 Paragraphs (5) to (8) of article 28 make provision for compensation and for circumstances where rights are preserved.
- 5.116 Article 28(9) sets out a list of matters deemed to be private rights to provide certainty as to the scope of the article. The list of deemed private rights is broad in order to ensure that any right which could potentially interfere with the implementation of the proposed development can be extinguished. A similar list appears in the equivalent article in The A14 Cambridge to Huntingdon Improvement Scheme Development Consent Order 2016 (see article 25), The A19/A1058 Coast Road (Junction Improvement) Development Consent Order 2016 (see article 24) and The A19/A184 Testo's Junction Alteration Development Consent Order 2018 (see article 24).

Article 29 – Modifications of Part 1 of the 1965 Act

- 5.117 The purpose of this article is to ensure consistency between the standard terms of highways development consent orders and the Compulsory Purchase Act 1965 (as amended by the Housing and Planning Act 2016) as applied by section 125 of the Act. In accordance with section 126(2) of the 2008 Act, these provisions are modified only to the extent necessary to ensure that they apply properly to the compulsory acquisition powers authorised by the Order. These modifications have broad precedent in Schedule 14 to the High Speed Rail (London – West Midlands) Act 2017 and the Silvertown Tunnel Order 2018.

Article 30 – Application of the 1981 Act

- 5.118 This article applies (with minor modifications to make the provisions appropriate to the context of acquisition under powers in a development consent order) the provisions of the 1981 Act to compulsory acquisition under the Order, so that Highways England has the option of acquiring Order land that is subject to the powers of compulsory acquisition by vesting declaration.
- 5.119 Vesting declarations are one of two ways of acquiring land that is subject to compulsory purchase. The other method involves serving a notice to treat on the land owner to commence the process of establishing the acquisition price, after which title in the land is transferred. The date on which title will transfer is uncertain under the notice to treat method.
- 5.120 A vesting declaration, in contrast, sets the date on which title in the land is transferred to the acquiring authority. Compensation is negotiated or determined and paid later. Vesting declarations therefore allow title in the land to pass to the acquiring authority more quickly than using the notice to treat method, and also allow several parcels to be acquired at once. Their use is subject to serving notices and observing time limits as required by the 1981 Act (as amended by the Housing and Planning Act 2016).

5.121 The modifications ensure consistency with the standard 5-year period sought under the Order for acquisition of rights. It further ensures that appropriate references are made to the 2008 Act. The modifications are based in large part on previous highways NSIPs and, following amendments to the 1981 Act in the Housing and Planning Act 2016, the High Speed Rail (London - West Midlands) Act 2017.

Article 31 - Acquisition of subsoil or airspace only

5.122 This article is based on article 24 of the Model Provisions but, in addition to the acquisition of subsoil interests, allows Highways England to acquire the airspace above land, rather than having to acquire all of the land.

5.123 The purpose of this article is to give Highways England the flexibility to minimise the extent of interests to be acquired, with consequently less impact on affected landowners, and lower payments of compensation, both of which are in the public interest.

5.124 Any subsoil or airspace acquired under this provision can only be used for the same purposes for which Highways England could have acquired all of the land. This provision allows acquisition of the minimum interest needed to deliver the Scheme.

5.125 This too is a standard provision used in many highways development consent orders (see for example article 27 of The A14 Cambridge to Huntingdon Improvement Scheme Development Consent Order 2016 and article 27 of The A19/A184 Testo's Junction Alteration Development Consent Order 2018).

Article 32 - Rights under or over streets

5.126 The purpose of this article, which follows article 27 of the Model Provisions, is to allow Highways England to appropriate and use land above or below streets within the Order limits, without having to acquire the street or any right or easement in it. The exercise of this power, without full acquisition, is prohibited in the circumstances set out in paragraph (3). Compensation is payable for any loss or damage caused to an owner or occupier of land affected by the power of appropriation where no acquisition has taken place.

5.127 This article has been included in the majority of DCOs made to date. It is considered that the article remains necessary for the Scheme notwithstanding the Housing and Planning Act 2016, and it was retained in The Silvertown Tunnel Order 2018. It is necessary to enable Highways England to use temporary structures to divert non-motorised user routes during the construction of the Scheme.

Article 33 – Temporary use of land for carrying out the authorised development

5.128 The purpose of this article, which is adapted from article 28 of the Model Provisions, is to allow the land set out in Schedule 10 to be occupied temporarily while the works are carried out. This is land which is required during construction of the Scheme but is not required permanently. The authorisation of temporary possession prevents the undertaker having to permanently acquire land which is required to construct the authorised development but which is not needed permanently and therefore assists in minimising the interference with landowners' rights.

5.129 The land in respect of which Highways England may take temporary possession falls into two categories, as follows:

- (a) Paragraph 1(a)(i) allows the land set out in Schedule 10 to be occupied temporarily while the works are carried out. This is land which is required during construction of the Scheme but which is not required outright permanently, and includes land which will be occupied temporarily and then subject to permanent rights (e.g. diversion of utilities apparatus). Paragraph (9) prevents this land from being acquired permanently, although confirms that acquisition of rights over this land, or of subsoil / airspace only, is not prevented and is required in respect of certain parcels. Likewise, some land taken temporarily will have permanent works undertaken to it, e.g. accommodation works (see further paragraph (4)(b), and Schedule 10); and
- (b) Paragraph 1(a)(ii) allows for the temporary occupation of any of the land that is subject to the powers of permanent acquisition, but in respect of which no process for acquisition has yet been commenced. The rationale for this is that it reduces the amount of land that is required to be subject to outright acquisition. Thus article 24 with article 33(1)(a)(ii) makes it possible for Highways England to occupy land temporarily initially and only proceed to acquire permanently that part which is necessary for the Scheme as constructed. The benefits of this are reduced impacts on landowners and lower costs to Highways England, which is in the public interest. In line with this, paragraph (1)(d) confirms that works comprised within the authorised development can be undertaken on land that has been temporarily occupied.

5.130 The inclusion of this article is important to ensure that the Scheme can be carried out efficiently and expeditiously following the making of the Order. Highways England is entitled to either occupy and use land pending its permanent acquisition, or to temporarily occupy and use land that is not to be permanently acquired, with provision made for the restoration of the land and the payment of compensation to the affected landowners and occupiers for any loss or damage arising. These powers are considered to be reasonable given the status of the Scheme as an NSIP.

5.131 In a departure from article 28 of the Model Provisions, article 33(4) specifies that Highways England is not required to:

- 5.131.1 restore the land on which any permanent works have been constructed under paragraph (1)(d). This is required, given Highways England's ability to construct the Scheme (i.e. including permanent works) under the powers in this article (as described above);
- 5.131.2 restore the land of which temporary possession has been taken to a better condition than it was in before temporary possession. It is considered reasonable for any reinstatement of land to be on a like-for-like basis;
- 5.131.3 remove any ground strengthening works which have been placed on the land to facilitate the construction of the Scheme. This is included to ensure, as far as possible, the safe operation of the Scheme;
- 5.131.4 remove any measures installed over or around statutory undertakers' apparatus to protect that apparatus. This is included to ensure that the apparatus of statutory undertakers is expressly protected under the Order; and

5.131.5 remove or reposition any apparatus belonging to statutory undertakers or necessary mitigation works. This safeguards the interests of statutory undertakers in relation to their apparatus and also ensures that necessary mitigation of the adverse impacts of the Scheme can be retained on land of which temporary possession has been taken.

5.132 Under paragraph (7), any dispute as to the satisfactory removal of temporary works and restoration of land under paragraph (4) does not prevent Highways England from giving up possession of the land. This provision is considered to be reasonable as it clarifies that Highways England is able to give up possession of land, and bring to an end any obligations associated with that possession, without affecting any duty on Highways England to undertake restorative work on land in the event that a dispute under paragraph (4) is resolved in a landowner's favour.

Article 34 – Temporary use of land for maintaining the authorised development

5.133 This article provides that Highways England may take temporary possession of land within the Order limits as required for the purpose of maintaining the authorised development and to construct such temporary works as may be reasonably necessary for that purpose for a period of five years from the date on which that part of the authorised development is first used.

5.134 This power does not apply with respect to houses, gardens or any other buildings for the time being occupied (paragraph 2).

5.135 Under paragraph (6), all temporary works must be removed before Highways England gives up possession under this article and the land must be restored to the reasonable satisfaction of the owners. In the same way as article 33, any dispute as to the satisfactory restoration of land is not to prevent Highways England from giving up possession of the land.

5.136 Provision is made for giving notice and compensation (paragraphs 3, 6 and 8), save in the circumstances described in paragraph 4. A departure from the normal notice requirements in cases of emergency is precedent and was approved in article 28 of the River Humber Gas Pipeline Replacement Order 2016.

5.137 This article is substantially based on the wording used in The A19/A1058 Coast Road (Junction Improvement) Development Consent Order 2016 (see article 28), The M4 Motorway (Junctions 3 to 12) (Smart Motorway) Development Consent Order 2016 (see article 29) and The A19/A184 Testo's Junction Alteration Development Consent Order 2018 (see article 30). It is also based on article 29 of the Model Provisions.

5.138 This article is required to enable Highways England to carry out maintenance during the maintenance period and is considered appropriate as it would impose a lesser burden than permanently acquiring rights to achieve the same purpose.

Article 35 – Statutory undertakers

5.139 This article provides Highways England with clear statutory authority to acquire rights over land owned by statutory undertakers (i.e. utilities such as electricity and gas companies).

5.140 It also allows Highways England to extinguish rights that statutory undertakers have over the Order land, and to remove and reposition their apparatus. Reference is made to the Order land

so that this power is not restricted to apparatus which has been specifically shown on the land plans and described in the book of reference. In practice, it is impracticable to show and describe all such apparatus and so a general power for the extinguishment of rights and removal or relocation of apparatus belonging to statutory undertakers over or within any Order land is required.

- 5.141 As the land over which this power may be exercised is shown on the Land Plans, the requirements of Regulation 5(2)(i)(iii) of the Infrastructure Planning (Applications: Prescribed Forms and Procedure) Regulations 2009 are satisfied.
- 5.142 Paragraph (2) restricts Highways England's power to extinguish rights or move apparatus by excluding apparatus in streets. It applies alternative provisions more appropriate to balancing the interests of the various affected parties where the apparatus in question is in a street (article 36).
- 5.143 This article is subject to Schedule 12 which contains provisions for the protection of certain statutory undertakers to ensure their continued ability to carry out their functions despite the interference with their rights / apparatus required to facilitate the proposed development.
- 5.144 This too is an article with broad precedent (see the last three approved highways development consent orders: The A19/A1058 Coast Road (Junction Improvement) Development Consent Order 2016 (see article 29), The M4 Motorway (Junctions 3 to 12) (Smart Motorway) Development Consent Order 2016 (see article 30); and The A19/A184 Testo's Junction Alteration Development Consent Order 2018 (see article 31)).

Article 36 – Apparatus and rights of statutory undertakers in stopped-up streets

- 5.145 This article is based on article 32 of the Model Provisions and governs what happens to statutory undertakers' apparatus (pipes, cables etc.) under streets that are stopped up by the Order. Without the article, the statutory undertaker would not have access to the apparatus, since there will no longer be a right of way along the street.
- 5.146 Under paragraph (2), the statutory undertaker may remove, relocate or replace any affected apparatus of its own volition, or must do so where reasonably requested by Highways England.
- 5.147 The statutory undertaker would receive compensation from Highways England for any relocation works and associated costs (paragraph (3)). Paragraphs (4)-(5) discount from this compensation the cost associated with a higher specification in the replacement apparatus. Paragraph (6) discounts from this compensation the increase in value to the statutory undertaker for having new rather than old (i.e. older than 7½ years) apparatus.
- 5.148 Paragraph (7) provides that where statutory undertakers are affected by a stopping up in relation to those parts of the project that constitute "major bridge works", "major transport works" or "major highway works", as defined in the New Roads and Street Works Act 1991, the cost sharing provisions under that Act will apply instead of the compensation provision in this article.
- 5.149 This article is standard for highways development consent orders (see, for example, article 32 of The A19/A184 Testo's Junction Alteration Development Consent Order 2018).

Article 37 – Crown rights

5.150 This article does not feature in the Model Provisions but is included in order to protect the Crown's position in relation to its own estates, rights, powers, privileges, authorities or exemptions and to ensure that the Crown's written consent is required where any land, hereditament or rights are to be taken, used, entered or interfered with under the powers conferred by the Order. This reflects the statutory position set out in section 135 of the 2008 Act and has been included in substantially the same form in a number of Orders, including The A19/A1058 Coast Road (Junction Improvement) Development Consent Order 2016 (article 37).

Article 38 – Recovery of costs of new connections

5.151 This article follows article 33 of the Model Provisions and provides that if any statutory undertaker's apparatus is removed and this cuts a service to anyone such that they have to seek a connection to other apparatus, then the reasonable cost of establishing a new service can be claimed from Highways England.

Part 6 – Operations

Article 39 – Felling or lopping of trees and removal of hedgerows

5.152 This article allows any tree or shrub that is near, or overhanging, the proposed development to be felled or lopped, or have its roots cut back, if it is considered to obstruct the construction, operation or maintenance of the proposed development or endanger anyone using it. The article is also amended to allow for the removal of trees listed in a Conservation Area and which are identified in Part 1 of the accompanying schedule to this article. Compensation is payable for any loss or damage caused. This article also allows for the removal of hedgerows as defined in the Hedgerow Regulations 1997, including important hedgerows which are specified in Part 2 of the accompanying schedule to this article.

5.153 This article has been inserted into numerous orders (see, for example, article 34 of The A19/A184 Testo's Junction Alteration Development Consent Order 2018).

Part 7 – Miscellaneous and General

Article 40 – Application of landlord and tenant law

5.154 This article follows article 35 of the Model Provisions and governs the leasing of the authorised development by Highways England to any other person. Essentially it allows the terms of the lease to override any statutory provisions relating to landlord and tenant law.

Article 41 - Operational land for the purposes of the Town and Country Planning Act 1990

5.155 This article follows article 36 of the Model Provisions and means that the land within the Order limits in which Highways England holds an interest shall be treated as "operational land of a statutory undertaker" for the purposes of the Town and Country Planning Act 1990.

5.156 The effect of the Order land being treated as operational land is that the person responsible for operating and maintaining the proposed development (Highways England or any transferee of its powers) will benefit from certain permitted development rights on that land in connection with the operation of the road.

Article 42 – Defence to proceedings in respect of statutory nuisance

5.157 Section 158 of the Act confers statutory authority for the purposes of a defence in statutory nuisance generally, subject to any contrary provision made by a particular DCO. This article is such a contrary provision, amending the terms of the defence in the case of noise nuisance (other types of nuisance continue to have the general defence afforded by s158).

5.158 The defence is available if the noise relates to:

- (a) the construction or maintenance of the project, and is in accordance with any controls imposed by the local authority under the Control of Pollution Act 1974, or cannot reasonably be avoided; or
- (b) the use of the project and cannot reasonably be avoided.

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

5.160 This article is based on article 7 of the Model Provisions and has precedent in recent highway Orders made, for example article 38 of the Testo's Junction Alteration Order 2018, and is necessary to clarify the scope of the defence of statutory authority arising from the grant of the Order.

Article 43 – Protection of interests

5.161 This article gives effect to Schedule 12, which contains provisions protecting the interests of third parties.

5.162 The Schedule currently contains protective provisions for the benefit of electricity, gas, water and sewerage undertakers and also electronic communications code network operators.

5.163 These provisions are based on the standard protective provisions approved by the Secretary of State on other schemes, including The A14 Cambridge to Huntingdon Improvement Scheme Development Consent Order 2016, the M4 Motorway (Junctions 3 to 12) (Smart Motorway) Order 2016 and the Testo's Junction Alteration Order 2018.

5.164 Highways England has sought the initial views of the undertakers who have interests affected by the authorised development and will negotiate with the undertakers to ensure any concerns are dealt with appropriately. Highways England will provide a full update of the status of the negotiations throughout the examination.

Article 44 – Certification of documents, etc.

5.165 This article provides for various plans and other documents (listed in Schedule 13) to be certified by the Secretary of State.

Article 45 – Service of notices

- 5.166 This article governs how any notices that may be served under the Order shall be deemed to have been served properly. In particular it allows service by email with the consent of the recipient, and deals with the situation of service on an unknown landowner.
- 5.167 It is common to have such an article in an order authorising development such as this. The article has precedent in a number of DCOs including The A14 Cambridge to Huntingdon Improvement Scheme Development Consent Order 2016 (see article 42) and the Testo's Junction Alteration Order 2018 (see article 41).
- 5.168 The provision is useful because it provides clarity on the issue. It is noted that the service of notice provisions under sections 229 and 230 of the Act apply to notices served under that Act rather than notices served under a development consent order made under that Act.

Article 46 – No double recovery

- 5.169 This article makes it clear that compensation is not payable both under this Order and any other enactment, contract or other rule of law. It follows the well-established principle of equivalence that a claimant is compensated for no more and no less than their loss. It has been included in numerous made Orders, including article 38 of the Silvertown Tunnel Order 2018.

Article 47 – Arbitration

- 5.170 This article governs what happens when two parties disagree in the implementation of any provision of the Order. The matter is to be settled by arbitration, and if the parties cannot agree on who the arbitrator should be, this is decided by the President of the Institution of Civil Engineers.

Article 48 – Removal of human remains

- 5.171 The purpose and effect of this article is to disapply section 25 of the Burial Act 1857 and replace it with an alternative procedure for managing the removal of any human remains disturbed during the course of carrying out the authorised development. Article 16 follows a Model Provision and is required to ensure that the appropriate treatment of such remains does not delay the implementation of authorised development.
- 5.172 This article departs from the Model Provision in that paragraph (12) excludes the requirement to give notice before the removal of remains which the undertaker is satisfied were interred more than 100 years ago and that no relative or personal representative of the deceased is likely to object to their removal. This approach has precedent in the Crossrail Act 2008.
- 5.173 Paragraph (17) applies section 239 of the Town and Country Planning Act 1990 to land, and rights over land, acquired under the Order and permits the use of such land notwithstanding any obligation or restriction imposed under ecclesiastical law or law relating to burial grounds, save as provided for in the remainder of the article.
- 5.174 Paragraph (18) excludes the application of Town and Country Planning (Churches, Places of Religious Worship and Burial Ground) Regulations 1950. The drafting in paragraphs (17) and (18) has precedent in the River Humber Gas Pipeline Replacement Order 2016, although the

Order does not apply section 238 (use and development of consecrated land) of the Town and Country Planning Act 1990 as there is no consecrated land within the Order limits.

- 5.175 Taken together, the effect of Article 48 is to replace the existing and disparate regimes for regulating the removal of human remains and consolidate the applicable provisions in a single article in the Order. It is required by Highways England to ensure that archaeological remains are recovered appropriately without causing unacceptable delay to the implementation of this NSIP.
- 5.176 Paragraph (19) provides that Requirement 9 (archaeological remains) applies in respect of any disturbed human remains deemed to be of archaeological interest.

Article 49 – Application, disapplication and modification of legislative provisions

- 5.177 This article provides (in reliance on section 120(5)(a) of the 2008 Act) (what may be included in order granting development consent)) for the disapplication of certain requirements which would otherwise apply under public general legislation. Section 120(5)(a) provides that an order granting development consent may apply, modify or exclude a statutory provision which relates to any matter for which provision may be made in the order.
- 5.178 Highways England considers that, in the context of the Scheme being of national significance, the Order should be the predominant authorising instrument for the works. The purpose of the regime created by the 2008 Act is to ensure that DCOs provide a unified consent for nationally significant infrastructure projects and the undertaker considers that disapplying and modifying certain legislative provisions, as set out in the Order, is proportionate in this context.
- 5.179 A disapplication is sought in respect of the temporary possession provisions of the Neighbourhood Planning Act 2017. This is required as the relevant sections of the Neighbourhood Planning Act 2017 have not been brought into force and subsidiary regulations to that Act have not yet been made, and there is therefore no certainty as to the requirements of the new temporary possession regime. As such, this enables the temporary possession regime created by this Order to be applied. This approach has recently been approved by the Secretary of State in the Silvertown Tunnel Order 2018.

Article 50 – Amendment of local legislation

- 5.180 This article provides (in reliance on section 120(5)(a) of the 2008 Act) (what may be included in order granting development consent)) for the disapplication of certain requirements which would otherwise apply under local legislation. Section 120(5)(a) provides that an order granting development consent may apply, modify or exclude a statutory provision which relates to any matter for which provision may be made in the order.
- 5.181 Highways England considers that, in the context of the Scheme being of national significance, the Order should be the predominant authorising instrument for the works. The purpose of the regime created by the Act is to ensure that DCOs provide a unified consent for nationally significant infrastructure projects and the undertaker considers that disapplying and amending certain legislative provisions, as set out in the Order, is proportionate in this context.

6 Schedule 1 – Authorised Development

- 6.1 Schedule 1 describes the authorised development, which is described in detail in Chapter 3 of the Environmental Statement (document reference TR010027/APP/6.1).

7 Schedule 2 - Requirements

- 7.1 The requirements in Schedule 2 are the equivalents of planning conditions. They reflect the processes and procedures usually employed by Highways England when implementing a scheme such as this. Approvals are to be sought from the Secretary of State for Transport, following consultation with the local planning authority and / or other relevant third party. Again, this is consistent with the processes and procedures employed by Highways England when implementing a scheme such as this.

- 7.2 The requirements in Schedule 2 provide that a number of the schemes, details and plans to be approved must reflect the mitigation measures set out in the Register of Environmental Actions and Commitments ("**the REAC**", at appendix 3.1 of the Environmental Statement Appendices (document reference TR010027/APP/6.3) which contains all of the mitigation commitments made in the Environmental Statement. This is the mechanism to ensure that environmental mitigation is secured by the Order, and the approach here is consistent with other DCOs which have been made. Further, the requirements provide that the approved schemes, details and plans must be implemented as approved, unless the Secretary of State approves further amendments to them.

- 7.3 Turning to the purpose and effect of requirements 1 to 12:

- (a) Requirement 1 contains a number of definitions used in Part 1 of Schedule 2.
- (b) Requirement 2 provides that the authorised development must not commence later than 5 years from the date of the Order coming into force.
- (c) Requirement 3 states that the authorised development must be carried out in accordance with the Scheme design shown on the Works plans and the engineering section drawings unless otherwise agreed in writing by the Secretary of State, provided that the Secretary of State is satisfied (following consultation with Birmingham Airport Limited) that any amendments would not give rise to any materially new or materially different environmental effects to those reported in the Environmental Statement or result in significant operational limitations being imposed on the airport.
- (d) Requirement 4 requires the preparation of a construction environmental management plan ("**CEMP**") in consultation with the relevant planning authority, Birmingham Airport Limited and Natural England to the extent that it relates to matters relevant to its functions and for its approval by the Secretary of State (sub-paragraph (4)). The CEMP must be based substantially on the outline environmental management plan prepared as part of the application. The CEMP will fulfil the construction-related objectives and measures as outlined in the REAC and must be written in accordance with ISO14001. Further details of what must be contained in the CEMP are set out in sub-paragraph (3) of the requirement, including an adherence to any working hours set out in the REAC or, where no such hours are

set, to the working hours set out in this requirement. Following the construction of the authorised development, the CEMP will be replaced by a Handover Environmental Management Plan (“HEMP”), which will address the matters set out in the approved CEMP that are relevant to the operation and maintenance of the authorised development. Further details of what must be contained in the HEMP are set out in sub-paragraph (7).

- (e) Requirement 5 requires the preparation of a landscaping scheme covering all hard and soft landscaping works for approval by the Secretary of State. There is a requirement that the proposed landscaping scheme must reflect the relevant mitigation measures in the REAC and must be based on the illustrative Environmental Masterplan annexed to the Environmental Statement. Further details of what must be contained in the landscaping scheme are set out in sub-paragraph (3).
- (f) Requirement 6 makes provision for dealing with any contaminated land and groundwater discovered during construction of the works, in consultation with the relevant planning authority and the Environment Agency.
- (g) Requirement 7 provides that where any previously unidentified protected species are found during construction, works in proximity to the location of those species are to cease and Highways England must immediately report their presence to Natural England and the relevant planning authority. Highways England must prepare a written protection and mitigation scheme for any previously unidentified protected species found during construction and must implement the written scheme immediately. Construction within 10 metres of the protected species must not recommence until any necessary licences are obtained.
- (h) Requirement 8 provides that no part of the authorised development can commence until written details of a surface and foul water drainage system, reflecting the mitigation measures in the REAC and including means of pollution control, have been prepared in consultation with the relevant planning authority and approved in writing by the Secretary of State.
- (i) Requirement 9 states no part of the authorised development is to commence until for that part a written scheme for the investigation (WSI) of areas of potential archaeological interest, reflecting the mitigation measures included in the REAC, has been submitted to and approved in writing by the Secretary of State following consultation with the relevant planning authority. The authorised development must be carried out in accordance with the WSI..
- (j) Requirement 10 provides that no part of the authorised development must commence until a traffic management plan has been prepared and approved by the Secretary of State following consultation with the relevant planning authority on matters related to its function.
- (k) Requirement 11 makes clear that where the authorised development must be carried out in accordance with approved details / schemes, those details / schemes are taken to include any subsequent amendments that are approved or agreed in writing by the Secretary of State.

- (l) Requirement 12 provides that permanent and temporary fencing and other means of enclosure for the authorised development must be constructed and installed in accordance with Volume 1, Series 0300 of the Manual of Contract Documents for Highway Works.
- (m) Requirement 13 provides that no part of the authorised development that affects Bickenhill Meadows SSSI is to commence until a a detailed monitoring and management plan has been approved by the Secretary of State following consultation with relevant planning authority and Natural England on matters related to its function. The monitoring and management plan confirms the requirements for biological and hydrological monitoring and the actions to be taken where trigger measures are met. Sub-paragraph (4) confirms that Works No 76 for the installation of a pumped system to mitigate impacts on the SSSI must be carried out in accordance with the monitoring plan.

7.4 Part 2 of Schedule 2 (Requirements 14-17) provides a clear procedure for the discharge of requirements by the Secretary of State. It sets out clear time limits for decisions to be made and makes provision for circumstances where the Secretary of State requires further information to be provided in relation to an application for the discharge of a requirement. Part 2 as drafted reflects the discharge of requirements provisions approved in previous 'made' DCOs including The A14 Cambridge to Huntingdon Improvement Scheme Development Consent Order 2016 and The A19/A184 Testo's Junction Alteration Development Consent Order 2018.

7.5 Any steps Highways England takes to comply with the requirements before the Order is made will be treated as effective in complying with the requirements once the Order is made, thereby avoiding the need to repeat such steps.

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