

Secretary of State for Transport
c/o Susan Anderson
Head of Transport, Infrastructure & Planning Unit
Department for Transport
Great Minister House
33 Horseferry Road
London
SW1P 4DR

Our Ref
LRT/151216.0031
Date
19 June 2020

By Email

Dear Sir

M42 Junction 6 Development Consent Order - Application for Correction - Section 119 and Schedule 4, Planning Act 2008

We act for Highways England in relation to the M42 Junction 6 Development Consent Order (the **Scheme**) and write further to the Secretary of State making the M42 Junction 6 Development Consent Order 2020 (the **made Order**) and the decision letter dated 21 May 2020.

We are writing to you pursuant to section 119 of, and Schedule 4 to, the Planning Act 2008 (the **2008 Act**) to request the correction of errors in the made Order. This letter is sent within the relevant period as defined in paragraph 1(6) of Schedule 4 to the 2008 Act.

We set out below the matters which we seek to be corrected. These are all “correctable errors” within the meaning of Paragraph 1(4) of the Schedule 4 to the 2008 Act as they are in the “decision document” (i.e. the made Order) and they are not part of the statement of reasons for the decision (i.e. the matters on which correction is sought are not addressed in the decision letter). For your ease of reference, the straightforward typographical errors or omissions have been included in a table below.

To assist you further we also enclose a draft correction order which sets out the corrections we are seeking and which are explained further below.

Article 2 (interpretation) and Article 44

The Secretary of State has, correctly, amended the contents page so that the description of Schedule 13 refers to “Certification of Plans and Documents, etc.” rather than “Documents to be certified”.

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This amendment, however, has not been carried through to the relevant definition in article 2 for each document or plan that is listed in Schedule 13 and is to be certified by the Secretary of State, which still uses the incorrect title for Schedule 13 as can be seen in the example below.

The definition of “crown land plans” in the made Order reads:

““crown land plans” means the plans listed in Schedule 13 (documents to be certified) and certified as the crown land plans by the Secretary of State for the purposes of this Order.” (our emphasis)

The underlined text in each relevant definition should state “(certification of plans and documents, etc.)”. For the avoidance of any doubt the definitions which need correcting are as follows:

“book of reference”
“classification of road plans”
“crown land plans”
“engineering drawings and sections”
“environmental statement”
“the land plans”
“streets, rights of way and access plans”
“works plans”

Accordingly, we are of the opinion that these are correctable errors and would request that the definitions of the above listed plans and documents in Article 2 are corrected to read “(certification of plans and documents, etc.)” rather than “(documents to be certified)”.

A similar consequential change also needs to be made to Article 44(1) of the made Order which is picked up in the table below.

Article 22 (Protective work to buildings) of the made Order

Article 22(3) of the made Order reads:

“22.—(3) For the purpose of determining how the functions under this article are to be exercised the undertaker may enter and survey any building falling within paragraph (1) and any land within its curtilage, and place on, leave on and remove from the land any apparatus and equipment for use in connection with the survey.” (our emphasis)

The term “land” (shown underlined) has been inserted in the made Order in place of the term “building”, which was Highways England’s proposed form of drafting, as the drafting made clear that “building” also included any land within its curtilage.

The revised version of article 22(3) could be read as restricting the power to place on, leave and remove any apparatus and equipment required for use in connection with the survey to just the land within the building’s curtilage and not the building itself.

Highways England does not believe that this is the intended consequence of the drafting change and accordingly we would request that the drafting is corrected so it refers to “any building falling within

paragraph (1) and any land within its curtilage” rather than “*the land*” to make clear that the article applies to both the building and the land within its curtilage which reflects the original meaning of the drafting.

Article 39 (Felling or lopping of trees and removal of hedgerows) of the made Order

Article 39(1) of the made Order states:

“39.—(1) Subject to paragraph (4), the undertaker may fell or lop any tree or shrub with the exception of ancient woodland within or overhanging land within the Order limits, or cut back its roots, if it reasonably believes it to be necessary to do so to prevent the tree or shrub —

a) from obstructing or interfering with the construction, maintenance or operation of the authorised development or any apparatus used in connection with the authorised development; or

(b) from constituting a danger to persons using the authorised development.” (our emphasis)

The drafting amendment (shown underlined) suggested by the Examining Authority (the **ExA**) and implemented by the Secretary of State in the made Order potentially means that Highways England cannot remove any tree which forms part of an ancient woodland within the order limits, even where that tree is within the proposed footprint of the authorised development. The term “ancient woodland” is not defined in the made Order.

Highways England does not believe that this is the intended consequence of the drafting as it is clear from the ExA’s report that the ExA recommend that the order be made noting, notwithstanding the potential harm to ancient woodland, which the ExA considered was outweighed by the benefits of the Scheme. This is an explicit acknowledgement that ancient woodland would be felled and lopped if the order was to be made.

Highways England’s view is that the ExA was concerned to protect ancient woodland from any damage caused by the exercise of the *general* powers conferred by article 39, rather than protect it from any impacts at all. There is no indication in the ExA’s report that any of the authorised development set out in Schedule 1 to the made Order should be restricted in any way to avoid impacts on ancient woodland. Rather, paragraph 9.2.150 of the ExA’s report clearly shows that the ExA was concerned regarding the general powers contained in Article 39. It is also clear from paragraph 9.2.153 of the report that the ExA recommended that Article 39 be changed ‘*to prevent the general powers of paragraph (1) being applied to ancient woodland*’.

It would appear that the intention of the ExA was to limit Highways England’s powers in this regard to the proposals set out in *Ancient Woodland Clarifications and Proposed Additional Measures Technical Note* (Document 8.64) which explained how Highways England would seek to mitigate the loss of ancient woodland. The ExA acknowledges at 9.2.150 that these measures have subsequently been incorporated in the updated REAC and made binding through the OEMP.

We consider that the recommended drafting change to Article 39, as accepted by the Secretary of State in the made Order, is inconsistent both with the reasoning of the ExA as set out within the ExA’s

recommendation report and the effect and intention of the article, which is to allow for the felling and lopping of trees to be carried out in accordance with the authorised development.

The apparent contradiction between the ExA's recommendations and the drafting amendment can be seen from the following points:

- i. the ExA has not recommended, and the Secretary of State has not made, any change to the Limits of Deviation for Works Nos 3, 4 & 5, all of which necessitate the felling of trees within the ancient woodland;
- ii. the ExA confirmed that Article 39 as proposed in the draft Order “meets good practice point 6 of Advice Note 15”;
- iii. the ExA has not recommended, and the Secretary of State has not made, any changes to requirement 4(3), obliging the CEMP to reflect the mitigation set out in the REAC which, as the ExA notes, includes the commitments given in document 8.64;
- iv. at paragraph 9.2.151, the ExA notes Highways England’s submission at Issue Specific Hearing 7 (DCO 4) that Highways England would require the powers in article 39 to apply to ancient woodland. However, the ExA draws attention to paragraph 5.32 of NNNPS which states that the Secretary of State should not grant development consent for any development that would result in the loss or deterioration of irreplaceable habitats including ancient woodland unless the national need for and benefits of the development, in that location, clearly outweigh the loss;
- v. on this basis, the ExA concludes that, “*it is not considered appropriate to allow for **further** felling or lopping of ancient woodland **beyond** that which has specifically been considered*” (emphasis added). It is our client’s view that this confirms the ExA’s understanding that lopping/felling of some ancient woodland was permissible;
- vi. at paragraph 9.2.153 the ExA confirmed its recommendation that the article be amended, “*to prevent the **general powers** of paragraph (1) being applied to ancient woodland*” (emphasis added). This appears to imply that felling/lopping permitted to ancient woodland identified in the REAC, or within the LoDs for Work Nos. 3, 4 and 5, is acceptable.

It is noted that in the decision letter the Secretary of State makes no reference to the ExA’s deliberations regarding its recommended drafting changes to this article.

The decision letter does confirm, at paragraph 56, that “*The Secretary of State agrees that the harm to ancient woodland weighs against the Order being made but considers that the national need for, and benefit of the development in that location, outweigh the loss*”.

In light of the clear contradictions in the ExA’s report highlighted above this does appear to be an error or omission which is correctable. Accordingly, suggested drafting changes have been included in the draft correction order to make it clear that Article 39 does not apply to ancient woodland that is within the Limits of Deviation for Works No 3, 4 or 5.

Schedule 2 - Requirement 10 (Traffic Management)

The requirement was amended by the ExA as set out below (additional wording suggested by the ExA underlined).

- (1) *“No part of the authorised development is to commence until a traffic management plan for that part has been submitted to and approved in writing by the Secretary of State, following consultation with the relevant planning authority on matters related to its function and the Royal Mail.”* (our emphasis)

This change was recommended by the ExA on the basis that the operation of the Royal Mail is in the public interest and this may be affected by the construction of the Scheme.

The ExA also stated, however, at paragraph 9.2.190:

“Before inclusion in the DCO, if made, the ExA recommends that the SoS seek clarification from the Applicant and Royal Mail as to whether an agreement has been finalised, thereby negating the need to amend R10.”

The Secretary of State made such a request in its letter of the 7 April 2020 and Highways England’s response to this letter explained that the agreement had been completed on 5 November 2019. Please see Highways England letter of 21 April 2020 submitted to the Department for Transport in response to this request. The agreement between the parties includes an obligation on Highways England to consult with the Royal Mail in respect of the traffic management plan.

In light of the recommendation in the ExA’s report and the Secretary of State seeking clarification of this point, which was provided as explained above, this does appear to be an error or omission which is correctable. It is noted that in the decision letter the Secretary of State makes no reference to the Royal Mail

Accordingly, suggested drafting changes have been included in the draft correction order to remove the requirement to consult with the Royal Mail in respect of the traffic management plan.

Table of further corrections sought

| Provision | Correction | Justification |
|--|----------------------------------|----------------------------------|
| Article 2.— (3) (a) to an affected person directly, <u>whether</u> that person’s land or rights over land have been adversely affected by this Order | For “whether” substitute “where” | To correct a typographical error |

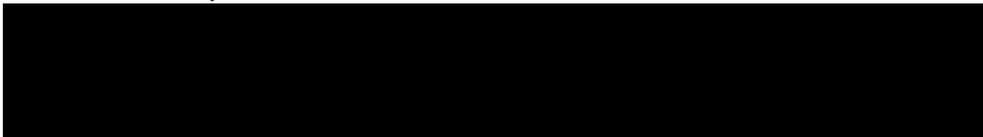
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|--|---|---|
| <p>Article 44.—(1) As soon as practicable after the making of this Order, the undertaker must submit copies of each of the plans and documents set out in Schedule 13 (<u>documents to be certified</u>) to the Secretary of State for certification as true copies of those plans and documents</p> | <p>For “documents to be certified”, substitute “certification of plans and documents, etc.”</p> | <p>Consequential on the amendment of the title of Schedule 13 to “(<i>certification of plans and documents, etc.</i>)”.</p> |
| <p>In Schedule 11 (Felling or lopping of trees and removal of hedgerows) Part 1</p> | <p>After row “G6 Bickenhill” remove blank row</p> | <p>This appears to be an erroneous blank row in the made Order.</p> |

The majority of the above errors reflect typographical errors that are capable of correction as set out in Schedule 4 to the Planning Act 2008. Where some of the corrections sought are not ‘typographical corrections’ they are still considered to fall within the scope of ‘correctable errors’ as set out in Schedule 4 to the 2008 Act.

We would welcome the opportunity to discuss the above and the enclosed draft correction order with you if this would be helpful.

We look forward to hearing from you, and in the meantime should be grateful if you would confirm safe and timely receipt of this letter.

Yours faithfully



BDB Pitmans LLP

enc Draft correction order