

TRANSPORT FOR LONDON

M25 JUNCTION 28 IMPROVEMENTS – DEADLINE 6 SUBMISSION

27 APRIL 2021

I. Introduction

- I.1 This document provides TfL's comments on responses to the Examining Authority's (ExA's) Further Written Questions (WQ2) and any other documents submitted by the Applicant and Interested Parties at Deadline 5. Section 2 of this document covers the Further Written Questions, Section 3 addresses the Applicant's response to TfL's written summary of the hearings, while Section 4 provides comments on the updated draft DCO submitted at Deadline 5.
- I.2 Parallel discussions on the principle of some of the issues, for example protective provisions and split responsibilities, are ongoing in the context of the negotiation of any side agreement and have not been reiterated here to avoid unnecessary duplication of work. TfL understands it will receive a first draft of a side agreement from the Applicant on the day of this submission. If the negotiations on any side agreement do not progress in a timely manner and do not address TfL's concerns, TfL reserves its right to make further comments. Therefore, where TfL does not comment on an issue, it should not be taken to have agreed to it.

2. Comments on responses to Examining Authority's Written Questions 2

Overview

- 2.1 Each question for which TfL wishes to make comments on the responses is set out in this section, covering responses from both the Applicant and other Interested Parties.

BHR 2.1 – The Ecological Habitats and Species Plan and Invasive Species Management Plan

- 2.2 TfL welcomes the commitment from the Applicant to submit outline versions of the Ecological Habitats and Species Plan and the Invasive Species Management Plan at Deadline 6 of the Examination. TfL will review and provide comments on these plans when available.
- 2.3 TfL is satisfied that separate requirements are not necessary for these plans in the DCO as they are secured through Requirement 4 as part of the Construction Environmental Management Plan.

DCO 2.4 – Draft Protective Provisions for Transport for London

- 2.4 TfL notes the comments by the Applicant in response to this question on TfL's draft form of protective provisions. Discussions are ongoing with the Applicant on these issues. TfL's comments in response to the Applicant's position on TfL's proposed protective provisions are set out in this sub-section.
- 2.5 Any statutory undertaker or party having to assume liability under the DCO should have the benefit of protective provisions in a DCO where it is necessary to do so. If needed for commercial or security reasons, protective provisions can be supplemented by side agreements. The fact that few DCOs to date have provided protective provisions for a highway authority does not mean that there should not be protective provisions where they are appropriate. The Applicant states that in many cases, side agreements have been

entered into taking issues that would otherwise have been dealt with in protective provisions outside the DCO. TfL is not privy to these side agreements so cannot comment on their content.

- 2.6 The form of the protective provisions proposed by TfL follows that included in the A303 Sparkford to Ilchester Dualling DCO as made. Many of the points raised by the Applicant are contrary to the protective provisions as made in that DCO.
- 2.7 At this stage, TfL would particularly like to comment on the Applicant's observations on costs and a commuted sum. The matters set out in the draft protective provisions that TfL submitted at Deadline 4 are those costs and additional liabilities that TfL will be subject to if responsibility for the new A12 eastbound off slip road is imposed on TfL. TfL will not receive from anywhere else additional funding to take on and maintain the significantly more complex replacement off slip and associated infrastructure, nor any mitigation put in place to deal with the impact of the new off slip road on adjoining landowners.
- 2.8 TfL particularly notes the comments in the Recommendation Report of the ExA for the A303 Sparkford to Ilchester Dualling DCO where at paragraph I6.6.50 it was noted: "The ExA is of the view that it is only reasonable that SCC [Somerset County Council] should be recompensed for the additional work which is being occasioned by the Proposed Development. If the Proposed Development was not to take place there would be no additional demand on SCC's services. In this context there is no difference between an Application under the PA2008 [Planning Act 2008] being promoted by a public sector organisation and a private sector one. Nor, as pointed out elsewhere, is there any prohibition on one public sector organisation paying an appropriate charge to another where necessary."
- 2.9 The position is no different here. In the A303 Sparkford to Ilchester Dualling DCO it was agreed that a commuted sum should be paid to SCC and it was not a matter of contention in the ExA's Recommendation Report or in the Secretary of State's decision letter. TfL does not see why payment of a commuted sum should be a matter of contention here where the Applicant should be fully funded to deal with all the implications arising from the scheme.
- 2.10 TfL also wishes to note at this point that, in relation to land and rights, Articles 31 (Application of the 1981 Act) and 32 (Modification of the 2017 Regulations) are insufficient for the following reasons:
- it is unclear where the "express authorisation" for the purposes of Article 31 would come from in the draft DCO that would enable land that has been acquired to automatically vest in TfL;
 - TfL would only want property and rights put into its name (and for which it will become responsible) from the point it is responsible for that land under the DCO, i.e. for the operational phase and not the delivery phase;
 - there is no obligation on the Applicant in Articles 31 and 32 to ensure that TfL has the necessary land and rights to operate and maintain the relevant part of the authorised development, only that the Applicant may acquire rights in a third party's name; and
 - Articles 31 and 32 will not provide TfL with rights which need to be granted to TfL either over land the Applicant already owns or which the Applicant will acquire but retain for the purposes of the authorised development, for example access rights to facilitate maintenance of infrastructure.
- 2.11 Finally, TfL wishes to make further comments on specific aspects of the Applicant's response to the protective provisions put forward by TfL:

- Road Safety Audits – it is standard commercial practice to settle all costs prior to agreeing to a final approval document such as a Final Certificate (or Defects Certificate if adopting NEC terminology). The Applicant does not explain why such settlement of costs is not appropriate prior to the Final Certificate being issued in this case.
- Indemnity – the Applicant states that the proposed indemnity provision is too wide but does not explain why; the Applicant should explain why it believes this.

PC 2.3 – Revised Engineering Section Drawings

- 2.12 TfL notes the visual screening proposed by the Applicant that “will be planted on an earthwork slope up to the proposed A12 eastbound off slip carriageway with the trees planted towards the top, providing screening to vehicles on the A12”. The Applicant also proposes a visual screening fence adjacent to the A12 eastbound off slip carriageway. TfL does not accept that it should be responsible for any mitigation arising from the Applicant’s project. The DCO should make clear who is to be responsible for any mitigation, where such mitigation may involve infrastructure for which TfL is being asked to take on responsibility from completion under the terms of the draft DCO.
- 2.13 If TfL is to be made responsible for mitigation that is connected with the new A12 eastbound off slip road, then a further issue arises from split responsibility for such mitigation where it might be connected to other parts of the authorised development for which TfL is not to be responsible. For example, if the visual screening fence is to extend along both the A12 eastbound off slip and M25 northbound on slip, then a split maintenance responsibility for this fence would not provide an efficient use of public funds if different organisations are maintaining different parts.
- 2.14 Regarding the planting proposed by the Applicant on the earthwork slope of the new A12 eastbound off slip embankment for visual screening purposes, TfL will require assurance that planting trees at the top of an embankment constructed as proposed will not affect the stability of the embankment and will not therefore impose additional maintenance requirements on TfL.

PC 2.4 – Grove Farm

- 2.15 TfL notes that an alternative egress route from Grove Farm onto the proposed new A12 eastbound off slip has been put forward as Change Request 8. TfL will review this proposal and respond to the Applicant’s consultation on this matter.

TA 2.2 – Extended Intergreen Signalling at Brook Street Roundabout

- 2.16 TfL welcomes the inclusion of a new requirement being included in the draft DCO to cover the operation of traffic signals on the M25 Junction 28 roundabout (Requirement I4). However, TfL is concerned that as currently worded, the requirement to submit a plan to “manage the risk of delays on the A1023 Brook Street as a result of the authorised development” provides no assurance that delays will not increase on the A1023 caused by the authorised development.
- 2.17 TfL considers that the wording it provided in its Deadline 4 response (REP4-038 Appendix A Schedule 2 Part 2) to require that a plan is submitted “with the aim that delays to traffic on the A1023 Brook Street do not increase as a result of the proposed development” is more appropriate. As a factor to take into account in exercising any powers and discretion, this would not fetter the Applicant’s ability to manage the operation of the Strategic Road Network (previously raised as a concern by the Applicant) as the requirement would not specify how not increasing delays is achieved. This wording would provide greater assurance that bus journey times and delays experienced by general traffic will not

increase, rather than an implied aspiration to not increase delays as currently worded in the draft DCO.

TA 2.4 – Outline Traffic Management Plan

- 2.18 TfL disagrees with the Applicant's view that management of overnight closures of the A12 eastbound off slip road does not need to be included in the outline plan because they are "of a very short duration". Proposed traffic management measures including diversion routes are described in the outline Traffic Management Plan for other night closures including some which are likely to have less impact, for example plans for a single overnight closure of the A12 eastbound on slip are presented (REP4-013 Table 2-8 and Appendix B). TfL sees no reason why arrangements for night closures of the A12 eastbound off slip, where presumably a greater number of overnight closures are required, cannot be included in the outline plan.

TA 2.7 – Integration of Safe Cycle and Walkway Routes

- 2.19 The Applicant has suggested it could submit a change request for improvements to the pedestrian and cycle route around the M25 Junction 28 roundabout in its response to Further Written Question TA 2.7 (REP5-041). TfL considers this would be a suitable approach to secure the improvements to this route which are required to address severance issues caused by the strategic road network at this location. Given the stage that the Examination has reached, TfL suggests this consultation should be started as soon as possible.
- 2.20 TfL considers the only way that the improvement to this route could be secured is through the DCO. TfL provides more detail on this view in its separate Deadline 6 response to the ExA's Rule 17 Request for Further Information (PD-017).

3. Applicant's response to TfL's written summary of hearings (REP5-049)

Compulsory acquisition

- 3.1 With regard to response reference REP4-038-07, TfL remains of the view that the New Roads and Street Works Act 1991 (NRSWA) provides the Applicant with sufficient powers to deliver the utility diversions affecting Plot 1/1a, therefore the permanent rights sought in the DCO over the whole of this plot are not necessary to deliver the proposed development.
- 3.2 For Plot 1/3 (REP4-038-10), as most of this plot is not currently highway land, the NRSWA cannot be used to undertake the works and therefore TfL accepts that permanent rights are required in the DCO.
- 3.3 However, TfL maintains that for the part of Plot 1/3 that forms part of the new private means of access to maintain the proposed development, the Applicant should seek permanent acquisition rather than permanent rights (see REP4-038-12). This is because TfL does not wish to have ownership of a small part of the private means of access that does not form part of the TfL Road Network (TLRN). This point was not addressed by the Applicant's response.

Pedestrian and cycle route

- 3.4 TfL does not consider that the lack of any accidents involving pedestrians and cyclists at the crossings of the slip roads demonstrates that the crossings are safe (REP4-038-40), given the current low usage due to the unattractiveness of the existing route around the roundabout, contributing to severance issues. This data provides only an indicative view of the operation of these crossings. The lack of accidents does not provide evidence to justify not improving the pedestrian and cycle route in line with the policy aims of the National Policy Statement for National Networks Paragraph 3.17 which states that applicants should

address barriers to cycling and walking by “correcting historic problems, retrofitting the latest solutions and ensuring that it is easy and safe for cyclists to use junctions”..

Split of maintenance responsibilities

- 3.5 The Applicant provided further information on its position regarding maintenance responsibilities for the new A12 eastbound off slip road (reference REP4-038-61). The points made by the Applicant do not address TfL’s concerns and therefore TfL’s previously made comments in various submissions still stand.
- 3.6 TfL is not confident that a side agreement will be completed with the Applicant before the end of the Examination. Accordingly, TfL considers that the split of maintenance responsibilities should be dealt with on the face of the DCO (assuming operation and maintenance of the new A12 eastbound off slip road is imposed on TfL). It is also in the public interest that the split of maintenance responsibility between the Applicant and TfL in connection with the new off slip is clear and visible for the public including by way of a plan illustrating the description in the draft DCO of the split.

Claims for compensation under the 1973 Act

- 3.7 In Section 3 of the Applicant’s response to TfL’s written summary of hearings, the Applicant rejected TfL’s proposal for a new Article 31 to ensure that the undertaker is responsible for compensation claims despite part of the authorised development becoming a GLA Road upon completion. The Applicant stated this additional article is unnecessary as it would remain responsible for compensation as it would be the “appropriate highway authority” that carried out the construction/alteration of the road under the Applicant’s interpretation of Part I of the 1973 Act.
- 3.8 TfL’s proposed Article 31 would remove any doubt that the Applicant would be the relevant authority responsible for dealing with any claims arising from Part I of the 1973 Act. By making this clear on the Order this would be both beneficial to the public and remove any doubt about the interpretation of the “appropriate highway authority” in this context. TfL sees no adverse impact to the Applicant in this change being made to the DCO.

4. Changes to the draft Development Consent Order

London Permit Scheme

- 4.1 TfL notes the addition of sub-paragraphs to Article 10 of the draft DCO regarding the London Permit Scheme. For the record, TfL notes that both TfL¹ and the London Borough of Havering² have signed up to the London Permit Scheme. Under this scheme, the ‘Activity Promoter’ is defined as “a person entitled by virtue of a statutory right to carry out street works or works for road purposes”. TfL wishes to understand whether the Applicant considers it falls within the definition of an Activity Promoter in the London Permit Scheme. It is not clear if the power sought under the DCO brings the Applicant within the definition of Activity Promoter.

Deer fencing

- 4.2 The requirement for deer fencing to be installed prior to the opening of the new loop road to traffic (Work No. 6) is set out in Requirement 13 (2) of the draft DCO. TfL considers that the opening of Work No. 2 (the new A12 eastbound off slip road) to traffic should also be

¹ <https://www.legislation.gov.uk/ukxi/2009/3186/contents/made>

² <https://www.legislation.gov.uk/ukxi/2012/3103/made>

conditional on deer fencing being in place, given the potential for deer to seek to access the part of the slip road on an embankment west of Maylands Bridge.

- 4.3 TfL considers there is a strong risk of both the construction and the operation of the scheme changing the movement patterns of deer in the area which could result in them having an increasing propensity to seek to cross or travel along the A12 or other roads. While the strategy for deer fencing secured by Requirement I3 addresses the operational phase of the scheme, TfL is concerned that the draft DCO and accompanying plans do not sufficiently address the impact on the deer arising from the scheme more generally. TfL therefore seeks for measures to reduce the risk of deer coming into contact with traffic to be secured during the construction phase. This would most appropriately be achieved by specifying mitigation in the Register of Environmental Actions and Commitments (REAC). The current version of the REAC submitted at Deadline 5 (REP5-028) contains no commitments regarding deer.