

M25 junction 28 improvement scheme

TR010029

9.137 Applicant's response to Secretary of State's consultation - 8 November 2021

Planning Act 2008

Infrastructure Planning (Examination Procedure) Rules 2010

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1. Introduction

- 1.1.1 This is National Highways' response to the letter dated 8 November 2021 from the Department for Transport and in particular paragraph 2 "New Route for Non-Motorised Users".

2. Non-motorised users

- 2.1.1 National Highways' response to the Secretary of State's consultation letter of 14 October 2021 explained, at paragraph 3, why the unilateral obligation under section 106 of the Town and Country Planning Act 1990 (examination document REP10-023) satisfactorily deals with the upgrading of facilities for NMUs at junction 28.
- 2.1.2 That response explained that the wider scheme is a substantial scheme in itself, consideration of which was not before the Examining Authority (ExA), and that it requires the full co-operation of the relevant highway authorities for its delivery. This is because National Highways has no powers to deliver it, as it involves upgrading of the highway network (the junction aside) not on the Strategic Road Network (SRN). Nonetheless, as was explained in submissions to the ExA (see examination document AS-041), National Highways has awarded "designated funds" for the provision of the entire scheme and will be proceeding to arrange for its delivery, in conjunction with the relevant highway authorities, in due course.
- 2.1.3 As the Secretary of State's focus will be on the application for a development consent order (DCO) to improve junction 28 and not the delivery of the wider NMU scheme, which extends for a considerable distance either side of the junction, well beyond the geographical scope of the DCO scheme, this state of affairs, together with the executed section 106 unilateral obligation, suffices.
- 2.1.4 In addition to the point above about the scope of the DCO application;
- a. it would be manifestly inappropriate to impose a requirement compelling National Highways to enter into a unilateral undertaking to deliver the entire NMU scheme by March 2025 (or by any specified date). Although one would hope that the co-operation of the relevant authorities would be forthcoming, this cannot be guaranteed and such an obligation would make National Highways beholden to them. This would put National Highways in an unacceptable position and would be unreasonable.
 - b. the joint response dated 29 October 2021 submitted by the London Borough of Havering on behalf of itself, Essex County Council and TfL suggests that if a requirement upon National Highways to enter into a unilateral undertaking to deliver the entire NMU scheme by March 2025 is considered unreasonable, then the Secretary of State should consider imposing an obligation upon National Highways to use its "best endeavours" to enter into agreements with the relevant highway authorities to do so. This point is echoed in TfL's letter of 28 October 2021 at paragraph 2.3. Such a requirement would also be unreasonable. Meeting a "best endeavours" obligation is an onerous obligation, and may require, for example, National Highways to pay the highways authorities sums demanded or meet other demands, that it

considers excessive and unreasonable. In addition this or any similar “endeavours” formulation introduces an unacceptable element of uncertainty.

3. Transport for London’s letter of October 2021

- 3.1.1 As well as commenting upon the position as regards provision for NMUs TfL’s letter makes a number of points under the heading “*Status of side agreement between Applicant and TfL*”.
- 3.1.2 Suffice to say that the points made here by TfL have already been dealt with in submissions to the ExA made by National Highways. For ease of reference the Secretary of State is referred to National Highways’ responses at REP10-008, REP9-056 (with reference to TfL REP8-038-12 regarding the A303 Sparkford to Ilchester Dualling DCO) and REP7-022 (with reference to TfL REP6-044-04 as regards protective provisions).

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