

M25 junction 10/A3 Wisley interchange TR010030 3.2 Explanatory memorandum

Regulation 5(2)(c)
Planning Act 2008

Infrastructure Planning (Applications: Prescribed Forms and Procedure) Regulations 2009



Infrastructure Planning

Planning Act 2008

The Infrastructure Planning (Applications: Prescribed Forms and Procedure) Regulations 2009 (as amended)

M25 junction 10/A3 Wisley interchange

The M25 junction 10/A3 Wisley interchange Development Consent Order 202[x]

3.2 Explanatory Memorandum

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1 Summary

- 1.1 This memorandum explains the purpose and effect of each article of, and the schedules to, the draft M25 Junction 10/A3 Wisley Interchange 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 The M25 junction 10 is on a section of the motorway network that is of national and strategic importance. The M25 is a critical route around London and a key link between the Channel ports and much of the mainland UK, as well as providing the main access route for Heathrow Airport. The A3, which intersects the M25 at junction 10, is a regionally important route between Portsmouth and London and provides access to major employment areas at Guildford, Brooklands and Kingston-upon-Thames. The M25 junction 10 requires improvement as it experiences heavy congestion on a daily basis. This junction also has a poor safety record that needs to be addressed. Highways England records on traffic accidents show that M25 Junction 10 has the highest number of casualties at any junction on the M25.
- 2.2 The scheme (“the Scheme”) includes the following measures:
- 2.2.1 alteration and upgrading of the existing M25 junction 10 roundabout, including: elongation and widening of the circulatory carriageway to increase capacity for right-turning traffic; realignment, lengthening and widening of the junction entry and exit slip roads; and demolition of redundant bridge structures;
 - 2.2.2 provision of four new dedicated free-flow slip lanes at M25 junction 10, to enable all left-turning traffic to pass through the junction unimpeded by traffic signals;
 - 2.2.3 conversion of the existing hard shoulders on the M25 through junction 10 to provide an additional running lane for traffic in both directions, including emergency refuge areas and associated modifications to M25 gantries, signage and road markings;
 - 2.2.4 widening of the A3 to dual four lanes between the Ockham Park junction and the Painshill junction, except where the A3 crosses over M25 junction 10, which will remain as two lanes in each direction;
 - 2.2.5 new sign gantries on the A3 to provide variable speed limits and lane control between Ockham Park and Painshill junctions;
 - 2.2.6 widening of the A245 Byfleet Road to dual three lanes between the Painshill junction and the Seven Hills Road junction to the west;

¹ S.I. 2009/2264

- 2.2.7 provision of a new dedicated slip lane at the Painshill junction, to enable traffic leaving the northbound A3 to join the westbound A245 and traffic leaving the eastbound A245 to join the northbound A3 to avoid having to use the roundabout;
 - 2.2.8 improvement of the Ockham Park junction, including installation of traffic signals at the entries to the roundabout and for new crossing facilities for pedestrians and cyclists;
 - 2.2.9 modification of A3 side road junctions, including: improvement of the Old Lane junction; closure of the Wisley Lane junction and construction of a new road bridging over the A3 to connect Wisley Lane directly with the A3 at Ockham Park junction; and closure of the Elm Lane junction and provision of an alternative access to Elm Corner via Old Lane and an improved section of Byway Open to All Traffic;
 - 2.2.10 closure of private accesses from the A3 carriageways and the provision of substitute local access arrangements, including: a substitute access for properties between Redhill Road and Seven Hills Road (South) via a new road running alongside the A3 northbound carriageway; a substitute access for properties on the edge of Painshill Park via the A3 southbound on-slip; and a substitute access for properties at Wisley Common from Old Lane and crossing the A3 via the replacement Cockcrow Overbridge;
 - 2.2.11 provision of new and improved facilities for pedestrians, cyclists and horse riders, including: a new 6.3km long route along the A3 corridor between the Ockham Park and Painshill junctions; new and replacement bridges for the benefit of non-motorised users to cross both the M25 and the A3; and new and upgraded public rights of way in the area around M25 junction 10;
 - 2.2.12 provision of 39.79 hectares of replacement common land and open space in exchange for that needing to be acquired for the Scheme; and
 - 2.2.13 extensive areas of habitat creation and enhancement and other environmental mitigation work including: measures to compensate for the impacts of the Scheme on the Thames Basin Heaths Special Protection Area and on Bolder Mere; the provision of a new wildlife crossing over the A3 as part of a replacement Cockcrow overbridge; and the reinstatement of landscape and habitats on land used temporarily for Scheme construction.
- 2.3 A detailed description of the Scheme is included in chapter 2 of the Environmental Statement (document reference TR010030/APP/6.3) and the Introduction to the Application and Scheme Description (document reference TR010030/APP/1.2).

Nationally Significant Infrastructure Project – Highway-related development

- 2.4 Section 22 of the Planning Act 2008² (“the Act”) makes a distinction between three different types of highway-related development capable of being a nationally significant infrastructure project (NSIP) within section 14(1)(h) of the Act. The three types of highway related development are set out in subsections (2), (3) and (5) of section 22. Sub-section (2) is

² c.29

concerned with the construction of a highway. Sub-section (3) is concerned with the alteration of a highway. Sub-section (5) is concerned with the improvement of a highway.

- 2.5 The Scheme comprises the alteration of two highways, namely the M25 motorway and the A3 trunk road. Sub-section 22 (3) provides that the alteration of a highway is an NSIP if the three criteria set out in the sub-section are met. In relation to the alteration of both the M25 and the A3 all three criteria are met, and so the Scheme comprises two NSIPs, one in relation to the alteration of the M25 and one in relation to the alteration of the A3. The three criteria are met for both roads in that both are in England (thereby meeting the requirement in sub-section 22(4)(a)), a strategic highways company, namely Highways England, is the highway authority for both the M25 and the A3 (thereby meeting the requirement in sub-section 22(4)(b), and for both roads the area of development comprising the alteration (the term “area of development” being defined in sub-section 22(9)) is greater than the limits prescribed in subsection 22 (4) (thereby meeting the requirement in sub-section 22(3)(c)).
- 2.6 The relevant limits for the area of development are prescribed in sub-section 22(4)(a) as regards the alteration of motorways and in sub-section 22(4)(b) as regards the alteration 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. The area of development in respect of the alteration to the M25 exceeds the limit prescribed in sub-section 22(4)(a), which is 15 hectares. The area of development in respect of the alteration of the A3 exceeds the limit prescribed in sub-section 22(4)(b), which is 12.5 hectares, as the speed limit of the relevant part of the A3 is and will continue to be over 50 miles per hour.
- 2.7 As the Scheme comprises two NSIPs, development consent must be obtained from the Secretary of State to authorise it. The Order authorises both NSIPs; the works involved being set out in Schedule 1 of the Order.

3 Associated Development

- 3.1 The Order also seeks consent for development which is associated with the NSIPs, and which is included in the “authorised development” listed in Schedule 1. The Secretary of State may, under the provisions of section 115 of the Act, grant consent for development that is associated with an NSIP.
- 3.1 Guidance³ on associated development was 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).
- 3.2 Annex B of the above-mentioned guidance lists the following as examples of associated development for highway NSIP schemes:

³ Guidance on associated development applications for major infrastructure projects; DCLG (2013)

- (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;
 - (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.
- 3.3 In some cases there may be some overlap or the absence of a clear boundary between associated development and works which form part of the NSIP.
- 3.4 For this reason, and as there is no requirement for a development consent order ("DCO") to distinguish between these two categories, Highways England has chosen not to differentiate the NSIPs and the associated development works in Schedule 1 to the Order. Ultimately, all elements of the Scheme either constitute part of the NSIPs or are "associated development" to one or both of the NSIPs within the meaning of section 115(2) of the Act and so can properly be authorised by the Order.
- 3.5 For the avoidance of doubt, the diversions of statutory undertakers' equipment and apparatus required for the Scheme do not constitute an NSIP in their own right.
- 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 (q) in Schedule 1. This is a widely precedented approach in other made DCOs.

4 Ancillary Matters

- 4.1 The Order also provides for 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 Act, required for the authorised development, or to facilitate, or that are incidental to the authorised development under section 122 of the Act. Justification for these powers is set out in the Statement of Reasons that accompanies the application (document reference TR010030/APP/4.1).
- 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 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 and private means of access in the vicinity of the junction, the classification of highways, the application of speed limits, the creation of new private means of access, and the application and disapplication of legislative provisions.

5 Draft Order

- 5.1 The purpose and effect of the provisions of the draft Order are now explained in sequence. Although the Infrastructure Planning (Model Provisions) (England and Wales) Order 2009 (S.I. 2009/2265) (the “Model Provisions”) has been repealed, the draft Order draws on the Model Provisions (general and railway), as well as precedent set by DCOs that have been made and particularly those relating to highways NSIPs.

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) “bridleway”;
 - (b) “carriageway”;
 - (c) “cycle track”;
 - (d) “cycle way”;
 - (e) “footway” and “footpath”;
 - (f) “restricted byway”;
 - (g) “special road”;
 - (h) “street”;
 - (i) “street authority”; and
 - (j) “trunk road”.
- 5.5 Other definitions to note include:
- (a) “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 adverse or materially worse adverse environmental effects to those identified in the environmental statement, and any derivative of maintain (see paragraph 5.17 below). 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 Environmental Statement. A similar approach has been taken by other DCO promoters (see, for example, the National Grid (Hinkley Point C Connection Project) Order 2016). 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 5.18.

- (b) "the Order land", which comprises all of the land to be acquired or used permanently or temporarily as shown on the Land Plans (document reference TR010030/APP/2.2);
- (c) "the Order limits", which means the limits of the land that may be acquired or used permanently or temporarily within which the authorised development may be carried out as shown on the Land Plans (document reference TR010030/APP/2.2) and the Works Plans (document reference TR010030/APP/2.3).

5.6 Article 2(2) provides that a broad definition of 'rights over land' applies to the Order.

5.7 Article 2(3) 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 mentioned 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 commonplace to include such provision in an Act or instrument authorising linear infrastructure.

5.8 Article 2(4) provides that areas given in the Book of Reference (document reference TR010030/APP/4.3) 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(5) and 2(6) tie references to lettered / numbered points and numbered works in the Order to the Streets, Rights of Way and Access plans (document reference TR010030/APP/2.4) and Schedule 1 of the Order, respectively.

Article 3 – Disapplication of legislative provisions

5.10 This article provides (in reliance on section 120(5)(a) of the 2008 Act) for the disapplication in relation to the construction of the authorised development of certain requirements which would otherwise apply under 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.

5.11 Article 3 provides for the disapplication of various consents which would otherwise be required from the Environment Agency, internal drainage boards, lead local flood authorities or Natural England under the Environmental Permitting (England and Wales) Regulations 2016/1154, the Water Resources Act 1991, the Land Drainage Act 1991 or the Wildlife and Countryside Act 1981. These are the requirements for consents to place structures on or over rivers or other watercourses under the Environmental Permitting (England and Wales) Regulations 2016/1154, the requirements for approval under flood defence and land drainage byelaws made or deemed to have been made under the Water Resources Act 1991, the prohibition on placing obstructions in waterways which are not main rivers under the Land Drainage Act 1991, the requirement for Secretary of State consent to vary an award which affects the drainage of

land, byelaws made under the Land Drainage Act 1991 regulating the use and obstruction of watercourses, and duties in relation to sites of special scientific interest under the Wildlife and Countryside Act. These are consents for activities which may be a necessary part of the Scheme.

- 5.12 As these provisions (other than section 32 of the Land Drainage Act 1991, section 28E of the Wildlife and Countryside Act, and byelaws made under section 66 of the Land Drainage Act 1991) are prescribed under section 150 of the 2008 Act, the consent of the Environment Agency and the relevant drainage authorities to the inclusion of these provisions in the Order will be needed and these consents are being sought. The relevant protective provisions are being discussed with the relevant regulators.
- 5.13 The Applicant has produced a Consents and Agreements Position Statement (document reference TR010030/APP/3.3) as part of this application. This sets out in greater detail the Applicant's proposed approach to obtaining the other consents required for the Scheme.

Part 2 – Principal Powers

Article 4 – Development consent etc. granted by the Order

- 5.14 Article 4(1) grants the development consent by giving Highways England the power to construct the authorised development, which is comprised of the works listed in Schedule 1. This article makes the consent subject to the requirements that are listed in Schedule 2.
- 5.15 Article 4(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. There is precedent for such a provision, for example the Secretary of State approved the same wording in the A14 Cambridge to Huntingdon Improvement Order 2016 (see article 5(2)) and the Testo's Junction Alteration Order 2018 (see article 3(2)).
- 5.16 Article 4(3) provides that certain preliminary works may commence immediately on the coming into force of the Order.

Article 5 – Maintenance of the authorised development

- 5.17 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.
- 5.18 This definition is broader than the equivalent in section 329 of the Highways Act 1980, which simply states that maintenance "includes repair". Article 5 therefore supplements the maintenance powers under the Highways Act 1980 and ensures that Highways England has the necessary powers to maintain the Scheme. Paragraph 5.5(a) above provides further justification for the use of this definition.
- 5.19 The powers of maintenance are subject to other provisions in the Order, in particular article 11 which makes provision in relation to maintenance by highway authorities.

Article 6 – Maintenance of drainage works

- 5.20 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 drainage works, 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.
- 5.21 The provision is well precedented (see for example article 4 of the A14 Cambridge to Huntingdon Improvement Order 2016 and article 5 of the Testo's Junction Alteration Order 2018).

Article 7 - Limits of deviation

- 5.22 Since the authorised development involves linear works, article 7 provides for limits of deviation to allow for a lateral deviation from the lines and situations of the authorised development within the limits of deviation shown on the Works Plans (document reference TR010030/APP/2.3), and vertical deviation of the linear works subject to a maximum deviation of 0.50 metres upwards or 0.50 metres downwards.
- 5.23 The vertical limits can be exceeded where it is demonstrated 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 (document reference TR010030/APP/6.3).
- 5.24 The purpose of this provision is to provide Highways England with a proportionate degree of flexibility when constructing the authorised development, reducing the risk that the authorised development 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.

Article 8 – Benefit of the Order

- 5.25 Article 8 paragraph (1) overrides section 156(1) of the 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 the subject of the Order. It would be impracticable and inappropriate for the authorised development to be carried out by all of those that have an interest in the land required for the Scheme.
- 5.26 The purpose of article 8 paragraph (2) is to clarify the exceptions where the Order will self-evidently benefit others, e.g. rights for statutory undertakers in Work Nos. 56-59. 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 Order 2016 (see article 8(2)), the M4 Motorway (Junctions 3 to 12) (Smart Motorway) Order 2016 (see article 7(2)) and the Testo's Junction Alteration Order 2018 (see article 7(2)).
- 5.27 Paragraph (1) is based on article 4 of the Model Provisions.

Article 9 – Consent to transfer benefit of Order

- 5.28 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 Highways England. 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.
- 5.29 This article is based on article 5 of the Model Provisions. It differs in that it allows a transfer or grant to certain specified companies 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 without the Secretary of State needing to consider whether or not consent for them to do should be given. The companies listed in this article are those whose apparatus is required to be diverted.

Article 10 – Planning permission

- 5.30 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 the Order (i.e. the implementation of that planning permission will not constitute a breach of the terms of the Order).

Part 3 – Streets

Article 11 – Application of the 1991 Act

- 5.31 Article 11 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.
- 5.32 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 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.
- 5.33 "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.

⁴ c.22

- 5.34 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 works by the Order (particularly article 4 and Schedule 1), and the provisions in the Order (including the requirements) which would regulate the carrying out of the Order works.
- 5.35 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, second, 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.
- 5.36 Paragraph (7)(a) provides that nothing in article 11 shall affect the ability of the local highway authority (under section 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.
- 5.37 Paragraph (7)(a) also 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 12.
- 5.38 Paragraph (7)(b) makes it clear that the maintenance obligations imposed by article 12 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.
- 5.39 These modifications reflect those made in other highway DCOs, for example the M4 Motorway (Junctions 3 to 12) (Smart Motorway) Order 2016, the A19/A1058 Coast Road (Junction Improvement) Order 2016 and the Testo's Junction Alteration Order 2018.

Article 12 – Construction and maintenance of new, altered or diverted streets and other structures

- 5.40 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) to (3). These provisions are subject to any agreement to the contrary between Highways England and the relevant street or highway authority.
- 5.41 Paragraph (4) makes specific maintenance provision in relation to any new bridges carrying public rights of way over a special road or 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.
- 5.42 The effect of paragraphs (4) and (5) are 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) Order 2016, article 12 of the M4 Motorway (Junctions 3 to 12) (Smart Motorway) Order 2016 and article 10 of the Testo's Junction Alteration Order 2018.

- 5.43 While Highways England would benefit from the equivalent defence in the Highways Act 1980 in respect of trunk roads or special roads, for which it is the highway authority, the proposed development includes roads which are not trunk roads or special 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 13 – Classification of roads, etc.

- 5.44 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 DCO. 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 appropriate to include them in the Order as ancillary matters under section 120(3) of the Act.
- 5.45 Paragraph (1)(a) provides for the roads described in Part 1 of Schedule 3 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 (1)(b) provides for the roads in Part 2 of Schedule 3 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 they are complete and open for through traffic.
- 5.46 Paragraph (1)(c) provides for the roads described in Part 3 of Schedule 3 to become classified roads from the date that they are complete and open to traffic.
- 5.47 Paragraph (1)(d) provides for the roads described in Part 4 of Schedule 3 to become unclassified roads from the date that they are complete and open to traffic.
- 5.48 Paragraph (1)(e) provides that the public rights of way in Part 8 of Schedule 3 will be of the types described in that Part.
- 5.49 Paragraph (2) imposes speed limits on certain sections of the authorised development as described in Part 5 of Schedule 3.
- 5.50 Paragraph (3) imposes restrictions on certain sections of the authorised development as described in Part 6 of Schedule 3.
- 5.51 Paragraph (5) revokes and varies existing traffic regulations measures as described in Part 7 of Schedule 3.
- 5.52 The purpose of paragraph (6) is to confirm that the matters covered in paragraphs (1) to (5) could be varied or revoked in the future without the need to apply under the Act for an amendment to the Order.

Article 14 – Temporary closure and restriction of use of streets

- 5.53 This article allows for the temporary closure alteration, diversion or restriction of streets for the purposes of the Scheme.
- 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 closed under this article to use it as a temporary working site. This provision has precedent in a number of DCOs including the A19/A184 Testo's Junction Alteration 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 Paragraph (4) provides that, in respect of streets for which it is not the street authority, Highways England must not close, alter or divert those streets without the consent of the street authority which may attach reasonable conditions to any consent but such consent may not be unreasonably withheld or delayed.
- 5.57 Paragraph (5) provides a right to compensation for any person suffering loss due to the suspension of a private right of way under this article.
- 5.58 Paragraph (6) provides that where a street authority has failed 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. This is necessary in order 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 DCOs (see for example, article 11 of the A19/A1058 Coast Road (Junction Improvement) Order 2016 and article 12 of the Testo's Junction Alteration Order 2018).

Article 15 – Permanent stopping up and restriction of use of streets and private means of access

- 5.59 This article allows streets and private means of access named in Parts 1, 2, 3 and 4 of Schedule 4 to be stopped up (i.e. the legal right of way along them to be extinguished).
- 5.60 Paragraph (2) relates to the streets and private means of access to be stopped up as specified in Parts 2 and 3 of Schedule 4, 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 or private means of access in question is stopped up.
- 5.61 For the highways and private means of access to be stopped up as specified in Part 4 of Schedule 4, no substitute means of access is to be provided. In this case it may not be stopped up unless one of the conditions referred to in paragraph (4) is met. In this case the relevant condition is the condition specified in paragraph (4)(c) namely that there is reasonably convenient access to the land concerned otherwise than from the street or private means of access to be stopped up.
- 5.62 Paragraph (5) provides that the private means of access specified in Part 5 of Schedule 4 are to be altered to the extent described in column 3 of the table in Part 5 of Schedule 4.
- 5.63 Paragraph (6) 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.

Article 16 – Access to works

- 5.64 This article 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 in addition to the accesses provided for specifically on the Order, to provide an appropriate degree of flexibility in case the need for an access only becomes apparent at later stage in the implementation of the Scheme. These powers are equivalent to those available to Highways England when implementing schemes under the Highways Act 1980.

Article 17 – Clearways

- 5.65 This article makes it unlawful for road users to stop on the roads specified in column (2) of Part 6 of Schedule 3 that are to become clearways 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. The purpose is to ensure safe and proper operation of the authorised development. It is therefore appropriate to be included in the Order as an ancillary matter under section 120(3) of the Act.
- 5.66 Such traffic regulation measures are normally made by order under the Road Traffic Regulation Act 1984, with such orders subject to consultation and publicity requirements. Inclusion within the Order is appropriate as the consultation, publicity and examination processes within the Order procedure provide a more than adequate substitute for the consultation and publicity requirements of traffic regulation orders.
- 5.67 The proposed restrictions sought under article 17 are similar to those which would apply to a clearway established under section 2 of the Road Traffic Regulations Act 1984 ('the 1984 Act'). This provides that a traffic regulation order 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.
- 5.68 Paragraph (4) also clarifies that paragraphs (1), (2) and (3) 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 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.
- 5.69 The wording in this article has been approved and the principle of inclusion of traffic regulation measures accepted in the A19/A1058 Coast Road (Junction Improvement) Order 2016 (see article 14) and the Testo's Junction Alteration Order 2018 (see article 15).

Article 18 – Traffic regulation

- 5.70 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 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) Order 2016 and article 16 of the Testo's Junction Alteration Order 2018.
- 5.71 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.
- 5.72 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 Traffic Regulation Orders under the Secretary of State's Traffic Orders (Procedure) (England and Wales) Regulations 1990/1656.

Part 4 – Supplemental powers

Article 19 – Discharge of water

- 5.73 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.
- 5.74 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)).
- 5.75 Paragraph (5) requires the undertaker to take reasonably practicable steps 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.
- 5.76 Paragraph (6) provides that the power to discharge water conferred by this article is subject to any requirement which may exist for the undertaker to obtain an environmental permit under the Environmental Permitting (England and Wales) Regulations 2016.

- 5.77 Paragraph (8) states that a person who fails to notify the undertaker of their 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 necessary to remove the possibility for delay and provide certainty that the authorised development can be delivered by the undertaker in a timely fashion.
- 5.78 This article has been included in previous Highways England orders (see for example article 18(7) of the M20 Junction 10a Development Consent Order 2017) and is required for this Scheme in order to establish and regulate Highways England's authority to discharge water.

Article 20 – Protective work to buildings

- 5.79 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.
- 5.80 The wording has broad precedent (see article 16 of the A19/A1058 Coast Road (Junction Improvement) Order 2016, article 18 of the A14 Cambridge to Huntingdon Improvement Order 2016 and article 18 of the Testo's Junction Alteration Order 2018).
- 5.81 The article is necessary to make appropriate provision to carry out protective works in the unlikely event that such a need arises.

Article 21 – Authority to survey and investigate the land

- 5.82 This article gives Highways England the power to enter certain land for the purpose of surveying and investigating. 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.
- 5.83 Paragraphs (1) to (5) have precedent in the Model Provisions and the majority of made DCOs to date. Paragraph (6) has precedent in the A14 Cambridge to Huntingdon Improvement Scheme Development Consent Order 2016.

Part 5 – Powers of acquisition and possession of land

Article 22 – Compulsory acquisition of land

- 5.84 This article authorises the acquisition of certain 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 sub-paragraph (2) of article 22, in the case of parcels of land specified in the Order where only rights and restrictive covenants can be acquired (article 25 (2)), or where possession of land parcels as specified in the Order may be taken temporarily only (article 32(1)(a)(i)).
- 5.85 The provision is necessary to secure the delivery of the Scheme as explained more detail in the Statement of Reasons accompanying the application (document reference TR010030/APP/4.1).

Article 23 – Compulsory acquisition of land – incorporation of the mineral code

5.86 This article incorporates Part 2 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.

Article 24 – Time limit for exercise of authority to acquire land compulsorily

5.87 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 acquiring land compulsorily may be undertaken should the Order be made.

5.88 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 Order 2016 and article 22 of the Testo's Junction Alteration Order 2018).

Article 25 – Compulsory acquisition of rights and restrictive covenants

5.89 This article allows for existing rights in land to be acquired compulsorily, and also for the acquisition of new rights and the imposition of restrictive covenants over land.

5.90 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 22. 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 (for example article 23 of the A14 Cambridge to Huntingdon Improvement Order 2016 and article 23 of the Testo's Junction Alteration Order 2018).

5.91 Paragraph (2) provides that for the land described in Schedule 5, 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 the Schedule (to the extent that the purpose relates specifically to such part of the Scheme as is specified in column (3) of Schedule 5).

5.92 Paragraph (3) provides power to impose restrictive covenants under paragraph (1) is exercisable only in respect of plots specified in column (1) of Schedule 5.

5.93 Paragraph (4) 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.

- 5.94 Paragraph (5) applies Schedule 6 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, in particular the creation of new rights and the imposition of restrictive covenants. This is a consequence of the extension of land acquisition powers to these categories (which have been included to allow lesser land interests to be acquired).
- 5.95 For the purpose of section 126(2) of the 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 Act.
- 5.96 Paragraphs 2 to 5 are amendments to ensure that the relevant compulsory purchase and compensation provisions apply to acquisition of rights/restrictive covenants (and not just land).
- 5.97 The modifications are applicable generically to orders of this kind and are based on changes made consistently in most orders made under the Act (see, for example, Schedule 6 of the M20 Junction 10a Development Consent Order 2017 for a recent example).

Article 26 – Extinguishment of public rights of way

- 5.98 Article 26(1) provides for the public rights of way identified in Parts 1 and 2 of Schedule 4 to the Order and shown on the Streets, Rights of Way and Access Plans (document reference TR010030/APP/2.4) to be stopped up. The rights of way are stopped up following the expiry of a site notice which must be erected at either end of the way to be extinguished.

Article 27 – Private rights over land

- 5.99 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 27 supplies that provision.
- 5.100 Article 27(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.
- 5.101 Article 27(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.
- 5.102 Article 27(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.

- 5.103 Article 27(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.
- 5.104 Paragraphs (5) to (8) of article 76 make provision for compensation and for circumstances where rights are preserved.
- 5.105 Article 27(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 Order 2016 (see article 25), the A19/A1058 Coast Road (Junction Improvement) Order 2016 (see article 24) and the Testo's Junction Alteration Order 2018 (see article 24).

Article 28 – Modification of Part 1 of the 1965 Act

- 5.106 The purpose of this article is to ensure consistency between the standard terms of highways DCOs and the Compulsory Purchase Act 1965 (as more recently amended by the Housing and Planning Act 2016) as applied by section 125 of the Act. These modifications have broad precedent in The A19 / A184 Testo's Junction Alteration Order 2018 and the Silvertown Tunnel Order 2018.

Article 29 – Application of the 1981 Act

- 5.107 This article applies (with minor modifications to make the provisions appropriate to the context of acquisition under powers in a DCO) the provisions of the Compulsory Purchase (Vesting Declarations) 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.
- 5.108 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.
- 5.109 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.
- 5.110 The modifications ensure consistency with the standard five year period sought under the Order for acquisition rights. It further ensures that the appropriate references are made to the 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 30 - Acquisition of subsoil or airspace only

- 5.111 This article allows Highways England to acquire the subsoil or airspace below or above land, rather than having to acquire all of the land.
- 5.112 The purpose of this article is to give Highways England the flexibility to minimise so far as is possible 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.
- 5.113 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.
- 5.114 This too is a standard provision used in many highways DCOs (see for example article 27 of the A14 Cambridge to Huntingdon Improvement Order 2016 and article 27 of the Testo's Junction Alteration Order 2018).

Article 31 - Rights under or over streets

- 5.115 The purpose of this article 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.
- 5.116 This article was in the Model Provisions and has been included in the majority of DCOs made to date.

Article 32 – Temporary use of land for carrying out the authorised development

- 5.117 The purpose of this article is to allow the land set out in Schedule 7 to be occupied temporarily for the purpose specified in column 2 of the table in Schedule 7. 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 Scheme but which is not needed permanently and therefore assists in minimising the interference with landowners' rights.
- 5.118 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 7 to be occupied temporarily for the purpose specified in column 2 of the table in Schedule 7. This is land which is required during construction of the Scheme but which is not required 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 sub-paragraph (5)(c), and Schedule 7).

- (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 22 with article 32(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 lesser impacts on landowners and lower costs to Highways England, which is in the public interest. In line with this, paragraph (1)(c) confirms that works comprised within the Scheme can be undertaken on land that has been temporarily occupied.

5.119 The inclusion of this article is important to ensure that the authorised development 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 reasonable given the status of the authorised development as comprising two nationally significant infrastructure projects, and their inclusion in DCOs is well precedented.

Article 33 – Temporary use of land for maintaining the authorised development

- 5.120 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.
- 5.121 This power does not apply with respect to houses, gardens or any other buildings for the time being occupied (paragraph (2)).
- 5.122 Under paragraph (5), but subject to the exceptions in sub-paragraph (a) to (d), 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.
- 5.123 Provision is made for giving notice and compensation (paragraphs (3), (6) and (8)).
- 5.124 This article is substantially based on the wording used in the A19/A1058 Coast Road (Junction Improvement) Order 2016 (see article 28), the M4 Motorway (Junctions 3 to 12) (Smart Motorway) Order 2016 (see article 29) and the Testo's Junction Alteration Order 2018 (see article 30).
- 5.125 This article is required to enable Highways England to carry out maintenance during the maintenance period and is appropriate as it would impose a lesser burden than permanently acquiring rights to achieve the same purpose.

Article 34 – Crown rights

5.126 This article makes clear the position regarding the acquisition of interests in Crown land. No interest in Crown land may be acquired pursuant to the Order without the appropriate Crown authority consenting to any such acquisition.

Article 35 – Statutory undertakers

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

5.128 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 (document reference TR010030/APP/2.2) and described in the Book of Reference (document reference TR010030/APP/4.3). 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.

5.129 As the land over which this power may be exercised is shown on the Land Plans (document reference TR010030/APP/2.2) for the purpose specified in column 2 of the table in Schedule 7, and the beneficiaries of such rights are described in the Book of Reference, the requirements of regulations 5(2)(i)(iii) and 7(1)(c) of the Infrastructure Planning (Applications: Prescribed Forms and Procedure) Regulations 2009 are satisfied.

5.130 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 34).

5.131 This article is subject to Schedule 9 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 Scheme.

5.132 This too is an article with broad precedent (see the following approved highways DCOs: the A19/A1058 Coast Road (Junction Improvement) Order 2016 (see article 29) the M4 Motorway (Junctions 3 to 12) (Smart Motorway) Order 2016 (see article 30); and the Testo's Junction Alteration Order 2018 (see article 31)

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

5.133 This article concerns 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.

5.134 Under paragraph (2), the statutory undertaker may remove, relocate or replace any affected apparatus of its own volition, or must do so if it is reasonably requested by Highways England.

5.135 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.

- 5.136 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.
- 5.137 This article is standard for highways DCOs (see, for example, article 32 of the Testo’s Junction Alteration Order 2018).

Article 37 – Recovery of costs of new connections

- 5.138 This article 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.

Article 38 – Special category land

- 5.139 Under section 131 of the 2008 Act an order granting development consent is subject to special parliamentary procedure when it authorises the compulsory acquisition of land to which section 131 applies (i.e. a common, open space or fuel or field garden allotment). The exception is if the Secretary of State is satisfied that certain conditions under section 131(3) are met, including if the Secretary of State is satisfied that replacement land has been or will be given in exchange for the order land, and the replacement land has been or will be vested in the prospective seller and subject to the same rights, trusts and incidents as attach to the Order land. This is the case, for the reasons set out in the Statement of Reasons (document reference TR010030/APP/4.1).
- 5.140 Under section 132 of the 2008 Act an order granting development consent is subject to special parliamentary procedure when it authorises the compulsory acquisition of a right over land to which section 132 applies (i.e. a common, open space or fuel or field garden allotments). The exception is if the Secretary of State is satisfied that certain conditions under section 132(2) are met, including if the Secretary of State is satisfied that replacement land has been or will be given in exchange for the order land, and the replacement land has been or will be vested in the prospective seller and subject to the same rights, trusts and incidents as attach to the Order land. A further exception applies where the Order land, when burdened with the Order rights, will be no less advantageous to the persons in whom it is vested, other persons (if any) entitled to exercise rights of common over it and the public. This is the case, for the reasons set out in the Statement of Reasons (document reference TR010030/APP/4.1).
- 5.141 Article 38 and Schedule 10 deal with the replacement of special category land (being common land and open space land) that is required for the Scheme. The article makes provision for the special category land and the rights to be acquired in the special category (rights) land to vest in Highways England once the Secretary of State (in consultation with the relevant planning authority) has certified that a scheme for the provision of the replacement land as open space and/or common land, and a timetable for the implementation of that scheme, has been approved by the Secretary of State under requirement 7 of Schedule 2.
- 5.142 On the date on which the replacement land is laid out and provided in accordance with the approved scheme, the replacement land will vest in the person in whom the relevant special

category land was previously vested and will be subject to the same rights, trusts and incidents as attached to that special category land.

Part 6 – Operations

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

5.143 This article allows any tree or shrub that is near the Scheme 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. 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.

5.144 This article has been included in numerous orders (see, for example, article 34 of the Testo's Junction Alteration Order 2018).

Article 40 – Trees subject to tree preservation orders

5.145 This allows Highways England to fell or lop any trees subject to tree preservation orders described in Schedule 8. This is based on a Model Provision which has been used in numerous DCOs (see for example article 35 of the Testo's Junction Alteration Order 2018).

Part 7 – Miscellaneous and General

Article 41 – Application of landlord and tenant law

5.146 This article governs the leasing of the Scheme or any part of it 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 42 - Operational land for purposes of the Town and Country Planning Act 1990

5.147 This article 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.

5.148 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 as regards that land.

Article 43 – Defence to proceedings in respect of statutory nuisance

5.149 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).

5.150 The defence is available if the noise relates to:

- (a) the construction or maintenance of the Scheme, 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 Scheme and cannot reasonably be avoided.

5.151 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.

5.152 This article has precedent in recent highway DCOs 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 44 – Protection of interests

5.153 This article gives effect to Schedule 9, which contains provisions protecting the interests of third parties.

5.154 Schedule 9 contains protective provisions for the benefit of electricity, gas, water and sewerage undertakers; electronic communications code network operators; the Environment Agency; and Surrey County Council in respect of Ordinary Watercourses.

5.155 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 Order 2016, the M4 Motorway (Junctions 3 to 12) (Smart Motorway) Order 2016 and the A19/A184 Testo's Junction Alteration Order 2018.

5.156 Highways England has sought the views of the undertakers who have interests which may be affected by the Scheme and continues to negotiate with the undertakers to ensure any concerns are dealt with appropriately.

Article 45 – Certification of documents, etc.

5.157 This article provides for various plans and other documents (being those listed in Schedule 11) to be certified by the Secretary of State.

Article 46 – Service of notices

5.158 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.

- 5.159 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 Order 2016 (see article 42) and the Testo's Junction Alteration Order 2018 (see article 41).
- 5.160 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 DCO made under that Act.

Article 47 – Amendment of local legislation

- 5.161 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.
- 5.162 Highways England considers that, in the context of the Scheme being of national significance, the Order should be the predominant authorising instrument for the Scheme. 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

Article 48 – Arbitration

- 5.163 This article governs what happens when two or more parties disagree in the implementation of any provision of the Order. The matter is to be settled by arbitration (save in respect of a dispute which falls to be determined by the Upper Tribunal or where the parties agree otherwise) and if the parties cannot agree on who the arbitrator should be, this is decided by the President of the Institution of Civil Engineers.

6 Schedule 1 – Authorised Development

- 6.1 Schedule 1 sets out the authorised development, which is described in detail in Chapter 2 of the Introduction to the Application and Scheme Description (document reference TR010030/APP/1.2) and the Environmental Statement (document reference TR010030/APP/6.3).

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, following consultation in some cases with the local planning authority and / or other relevant third party.
- 7.2 The requirements in Schedule 2 provide that the various schemes, details and plans to be approved must reflect the mitigation measures set out in the Register of Environmental Actions and Commitments (“REAC”, document reference TR010030/APP/7.3) 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 Requirement 1 (*Interpretation*) contains a number of definitions used in Schedule 2.
- 7.4 Requirement 2 (*Time limits*) provides that the authorised development must not commence later than 5 years from the date of the Order coming into force.
- 7.5 Requirement 3 (*Construction and handover environmental management plans*) requires the preparation of a construction environmental management plan ("CEMP") in consultation with the relevant planning authority and for its approval by the Secretary of State. The CEMP will be based substantially on the outline CEMP prepared as part of the Scheme application (document reference TR010030/APP/7.2). The CEMP must be written in accordance with the principles of ISO14001 and reflect the commitments made in the REAC and mitigation measures detailed in the Environmental Statement, to avoid, reduce or mitigate environmental effects or risks during construction. Further details of what must be contained in the CEMP are set out in sub-paragraph (2). 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 (5).
- 7.6 Requirement 4 (*Traffic management during construction*) provides that no authorised development can commence until a traffic management plan has been prepared and approved by the Secretary of State following consultation with the relevant highway authority.
- 7.7 Requirement 5 (*Detailed design*) provides that the authorised development must be designed in detail and carried out in accordance with the preliminary scheme design shown on the Scheme Layout Plans (document reference TR010030/APP/2.8) unless otherwise agreed in writing by the Secretary of State, following consultation with the relevant planning authority.
- 7.8 Requirement 6 (*Landscaping*) provides for the preparation of a landscaping scheme covering all hard and soft landscaping works for approval by the Secretary of State, following consultation with the relevant planning authority. There is a requirement that the proposed landscaping scheme must reflect the relevant mitigation measures in the REAC and must be substantially in accordance with the Scheme Layout Plans (document reference TR010030/APP/2.8) and the Landscape and Ecology Management and Monitoring Plan (appendix 7.20 to the environmental statement document reference TR010030/APP/6.5). Further details of what must be contained in the landscaping scheme are set out in sub-paragraph (3).
- 7.9 Requirement 7 (*Design, layout and implementation of Replacement Land*) provides that Work No. 59 may not commence until details of the layout and design of the relevant area of Replacement Land have been submitted to and agreed in writing by the Secretary of State following consultation with the relevant planning authority and with Surrey County Council.
- 7.10 Requirement 8 (*Thames Basin Heaths Special Protection Area (SPA) Compensatory Habitat Creation and Enhancement Measures*) provides that details of the compensatory habitat creation and enhancement measures to be undertaken in respect of the Thames Basin Heaths

SPA must be submitted to and approved in writing by the Secretary of State, following consultation with the relevant planning authority and Natural England. There is a requirement that the details must reflect the preliminary Scheme designs set out in the Environmental Statement, the REAC, and in the Habitats Regulations Assessment (document reference TR010030/APP/5.3).

- 7.11 Requirement 9 (*Cockcrow Green Bridge*) provides that Work No. 35(b) may not commence until details of the green bridge design features, substantially in accordance with the preliminary design shown on the Engineering Drawings and Sections (document reference TR010030/APP/2.9) have been approved in writing by the Secretary of State, following consultation with the relevant planning authority and Natural England.
- 7.12 Requirement 10 (*Bolder Mere Mitigation and Enhancement Area*) provides that Work No.5(c) may not commence until details of the environmental mitigation and enhancement measures to be undertaken in the Bolder Mere mitigation and enhancement area (Work No. 55) have been submitted to and approved in writing by the Secretary of State, following consultation with the relevant planning authority, the Environment Agency and Natural England. There is a requirement that the details of the mitigation and enhancement measures must substantially accord with the measures described in the Environmental Statement and in the Water Framework Directive Assessment Report. Further details of what must be contained within the mitigation and enhancement measures is set out in sub-paragraph (1). The requirement also provides that no part of Work No. 5(c) is to commence until details of the surface water drainage through the Bolder Mere culvert and means of pollution control, reflecting the results of a detailed drainage survey, have been submitted to and approved in writing by the Secretary of State, following consultation with the Environment Agency, Natural England and the relevant planning authority.
- 7.13 Requirement 11 (*Buxton Wood Environmental Mitigation Area*) provides that Work No. 25 may not commence until details of the mitigation measures to be undertaken have been submitted to and approved in writing by the Secretary of State, following consultation with the relevant planning authority. There is a requirement that the details of the mitigation measures must substantially accord with the measures described in the Environmental Statement and in the REAC. Further details of what must be contained within the mitigation measures is set out in sub-paragraph (2).
- 7.14 Requirement 12 (*Stratford Brook Environmental Mitigation Area*) provides that Work No. 33(b) and Work No. 54 may not commence until details of the mitigation measures to be undertaken have been submitted to and approved in writing by the Secretary of State, following consultation with the Environment Agency and the relevant planning authority. There is a requirement that the details of the mitigation measures must substantially accord with the measures described in the Environmental Statement and in the REAC. Further details of what must be contained within the mitigation measures is set out in sub-paragraph (2).
- 7.15 Requirement 13 (*Contaminated land and groundwater*) provides that no part of the authorised development is to commence until for that part a contamination risk assessment has been submitted to and approved in writing by the Secretary of State, following consultation with the Environment Agency and the relevant planning authority. The assessment must include a number of measures as set out in sub-paragraph (2). The requirement also makes provision for dealing with any contaminated land discovered during construction of the works, in consultation with the relevant planning authority and the Environment Agency.

- 7.16 Requirement 14 (*Archaeology*) provides that no part of the authorised development is to commence until for that part a written scheme for the investigation of areas of archaeological interest, reflecting the mitigation measures included in the Environmental Statement and REAC, has been submitted to and approved in writing by the Secretary of State following consultation with the relevant planning authority and the County Archaeologist. The requirement puts further limitations on construction activity within 10 metres of any archaeological remains which were not previously identified but are revealed when carrying out the authorised development.
- 7.17 Requirement 15 (*Protected species*) provides that no part of the authorised development is to commence until for that part, final pre-construction survey work has been carried out to establish whether European or nationally protected species are present on any of the land affected or likely to be affected. The requirement puts limitations on construction activity within 10 metres of any European or other protected species or nesting bird which was not previously identified but is revealed when carrying out the authorised development.
- 7.18 Requirement 16 (*Fencing*) provides that permanent and temporary fencing must be constructed and installed in accordance with the Applicant's Manual of Contract Documents for Highway Works except where agreed otherwise by the Secretary of State.
- 7.19 Requirement 17 (*Restoration and/or landscaping of land used temporarily for construction*) provides that within three months of the authorised development being completed, a scheme substantially in accordance with the Scheme Layout Plans for the restoration and/or landscaping of any Order land used temporarily for construction purposes, including a programme for the restoration and/or landscaping work, must be submitted to and approved in writing by the Secretary of State, following consultation with the relevant planning authority. The restoration of that land must then be carried out, maintained, managed and monitored in accordance with that plan. Sub-paragraph (3) provides that where the land used temporarily is within the boundary of the Thames Basin Special Protection Area or the boundary of the Ockham Wisley Commons Site of Special Scientific Interest, the scheme must be submitted to and approved by the Secretary of State, following consultation with the relevant planning authority and Natural England. Sub-paragraph (4) provides that where such land is common and or open space, a scheme must be submitted to and approved by the Secretary of State, following consultation with the relevant planning authority and Surrey County Council.
- 7.20 Requirement 18 (Protection of certain tree roots at RHS Garden Wisley) provides that no intrusive works in connection with the authorised development within specific areas being the root protection areas in respect of certain valuable trees at RHS Garden Wisley.
- 7.21 Requirement 19 (*Approvals and amendments to approved details*) provides that with respect to any requirement that stipulates the authorised development must be carried out in accordance with the approved details, the approved details are taken to include any amendments that may subsequently be approved or otherwise agreed in writing by the Secretary of State.
- 7.22 Part 2 of Schedule 2 (Requirements 19-23) provides a procedure for the discharge of requirements by the Secretary of State. It sets out 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.

- 7.23 Paragraph 23 of Schedule 2 provides that any steps which 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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