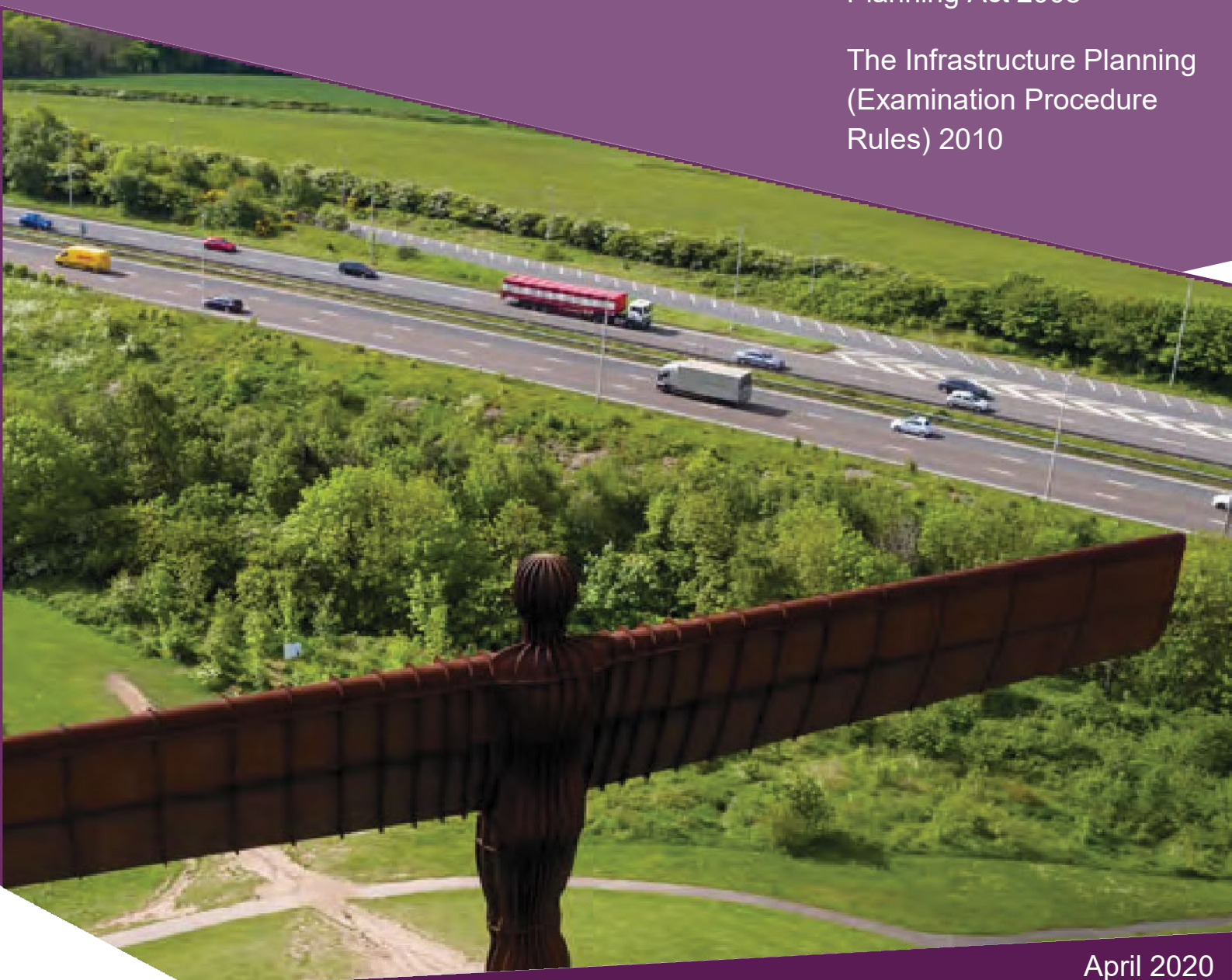


**A1 Birtley to Coal House**  
**Scheme Number: TR010031**  
**Updated Explanatory Memo (Clean)**

Planning Act 2008

The Infrastructure Planning  
(Examination Procedure  
Rules) 2010



Infrastructure Planning

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**The A1 Birtley to Coal House  
Development Consent Order 20[xx]**

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## The A1 Birtley to Coal House Development Consent Order 20[\*] Explanatory Memorandum

### 1. Summary

- 1.1 This memorandum accompanies an application for development consent ("**Application**") by Highways England Company Limited ("**Highways England**"). The memorandum explains the purpose and effect of each article of, and Schedules to, the draft A1 Birtley to Coal House Development Consent Order ("**the Order**") as required by Regulation 5(2)(c) of the Infrastructure Planning (Applications: Prescribed Forms and Procedure) Regulations 2009.
- 1.2 Regulation 5(2)(c) requires explanatory memoranda to explain "*the purpose and effect of the provisions in the draft Order*".

### 2. Purpose of the Order

- 2.1 Highways England is applying to the Secretary of State for Transport ("**Secretary of State**") for development consent to authorise the alteration of that part of the A1 Newcastle-Gateshead Western Bypass which is located between junction 67 (Coal House) and junction 65 (Birtley) ("**Scheme**") and also makes provision for certain more minor works between junction 67 and 68 (Lobley Hill). A detailed description of the Scheme is included in Chapter 2 of the environmental statement.

#### *Nationally Significant Infrastructure Project – alteration of a highway*

- 2.2 The Scheme is a Nationally Significant Infrastructure Project ("**NSIP**") within sections 14(1)(h) and 22(1)(b) of the Planning Act 2008 ("**the 2008 Act**"). The 2008 Act makes a distinction between three different types of highway NSIPs as set out in section 22(1)(a)–(c): construction, alteration and improvement. The Scheme lies wholly within England and includes the alteration of a highway for which Highways England is the strategic highway authority. The speed limit for the highway is expected to be 50 miles per hour or greater and the area of development for the Scheme at 85.57 hectares is greater than threshold of 12.5 hectares set out under 22(4) of the 2008 Act. Under section 37 of the 2008 Act, an application for development consent is required to authorise the alteration of such a highway. Consequently, Highways England has made the Application to the Secretary of State, care of the Planning Inspectorate ("**the Inspectorate**"), of which the Order forms part.
- 2.3 Schedule 1 to the Order contains a list of numbered works comprising the Scheme.

### 3. Associated Development

- 3.1 The Order also seeks consent for development which is associated with the NSIP. The Secretary of State may, under the provisions of section 115 of the 2008 Act, grant consent for development that is associated with the NSIP.

- 3.2 Guidance on associated development has been issued by the Secretary of State for Communities and Local Government. In this guidance associated development is described as being “*typical of development brought forward alongside the relevant type of principal development or of a kind that is usually necessary to support a particular type of project*” (paragraph 6) and “*requires a direct relationship between associated development and the principal development. Associated development should therefore either support the construction or operation of the principal development, or help address its impacts. Associated development should not be an aim in itself but should be sub-ordinate to the principal development*” (paragraph 5).
- 3.3 Annex B of the above-mentioned guidance listed the following as examples of associated development for highway NSIP schemes:
- (a) replacement roadside facilities where this becomes necessary due to the elimination of an existing facility by highways 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.
- 3.4 However, in some cases it should be recognised that there may be some overlap, or the absence of a clear boundary between associated development and works which form part of the NSIP. There is a danger that separating the two out in the Order could potentially lead to an error in defining them one way or another, given this potential for overlap between the two categories. For instance, there may be some on-highway, and some off-highway, diversion of the same piece of statutory undertakers’ equipment.
- 3.5 For this reason, and noting there is no requirement for a development consent order to distinguish between these two categories, Highways England has chosen not to differentiate the NSIP and associated development works in Schedule 1 to the Order. Ultimately, all elements of the Scheme either constitute part of the NSIP or are “associated development” within the meaning of section 115(2) of the 2008 Act, and so can properly be authorised by the Order.
- 3.6 In order to ensure that the authorised development and the associated development are constructed efficiently and without impediment, the Order contains powers to carry out the works listed (a) to (v) in Schedule 1. The use of such measures was explicitly approved in the A19/A1058 Coast Road (Junction Improvement) Order 2016 and extensive provisions were used in the A19/A184 Testo’s Junction Alteration Order 2018; A14 Cambridge to Huntingdon Improvement Order 2016; the M4 Motorway (Junctions 3 to 12) (Smart Motorway) Order 2016; and the Silvertown Tunnel Order 2018.

#### **4. Ancillary Matters**

- 4.1 The Order also contains several ancillary matters ie: provisions not consisting of development.
- 4.2 The main ancillary matter is a power to acquire land or rights over land compulsorily, or by agreement, in accordance with section 120(4) of the 2008 Act, required for the authorised development, or to facilitate, or that is incidental to the authorised development under section 122 of the 2008 Act. A justification for these powers is set out in the statement of reasons that accompanies the application.
- 4.3 Further to providing these powers, the Order seeks to apply and modify statutory provisions that relate to the compulsory acquisition of land. Under sections 117 and 120(5) of the 2008 Act, an Order containing provisions of this nature must be made by Statutory Instrument. The Order is therefore presented in that form.
- 4.4 Other ancillary matters include the temporary and permanent stopping up of lengths of existing highway in the vicinity of the authorised development, the classification of highways and the application and disapplication of legislation relating to the Scheme.

#### **5. Draft Order**

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

#### **6. Part 1- Preliminary**

##### *Article 1 – Citation and commencement*

- 6.1 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*

- 6.2 The purpose of article 2(1) is to define terms used in the remainder of the Order.
- 6.3 The following definitions are used in articles in the remainder of the Order and are typical of highway schemes:-
- (a) “the 1984 Act”;
  - (b) "carriageway”;
  - (c) “cycle track”: this term is used interchangeably with "cycle way" in the application documents and both are intended to have the meaning set out in the DCO;

(d) "footway" and "footpath";

(e) "street";

(f) "street authority"; and

(g) "trunk road"

#### 6.4 Other definitions to note include:

(a) "commence" – the Order distinguishes between two categories of commencement. Under paragraph (a) "commence" is defined as meaning "beginning to carry out any material operation (as defined in section 56(4) of the 1990 Act) forming part of the authorised development other than operations consisting of archaeological investigations, ecological surveys and pre-construction ecological mitigation, investigation for the purpose of assessing and monitoring ground conditions and levels, remedial work in respect of any contamination or other adverse ground conditions, erection of any temporary means of enclosure, receipt and erection of construction plant and equipment, diversion and laying of underground apparatus and site clearance, and the temporary display of site notices or advertisements and "commencement is to be construed accordingly".

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

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

However, it is recognised that it is necessary for some mitigation measures to be approved at an earlier stage in order for those measures to be effective. Accordingly, paragraph (b) provides for a wider definition of "commence" in relation to the measures required by paragraphs 4,5,7,8,9 and 10 of Part 1 to Schedule 2.



(b) “maintain”, which includes to inspect, repair, adjust, alter, improve, landscape, preserve, remove, reconstruct, refurbish or replace, provided such works do not give rise to any materially new or materially different environmental effects to those identified in the environmental statement, and in any derivative of maintain. This builds on the maintenance activities included in the majority of made DCOs for highways development, but Highways England considers that this 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. 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 7.4 below.

(c) "Order land" which comprises all of the land to be acquired or used permanently or temporarily as shown on the land plans;

(d) "Order limits", which references the extent of the area within which the authorised development may be carried out.

6.5 Article 2(2) provides that a broad definition of ‘rights over land’ applies to the Order.

6.6 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 listed in the DCO, there is no question as to whether the works are permitted by the DCO. Thus, this provision allows for a modest tolerance with respect to any distances and points, although works will always take place within the limits of deviation shown on works plans and described in the Order (see further below). It is common-place to include such provision in an Act or instrument authorising linear infrastructure.

6.7 Article 2(4) provides that areas given in the book of reference are approximate as these are not covered by article 2(3). This is intended to clarify the position of the areas in the book of reference, the purpose and effect is the same as set out in the previous paragraph.

6.8 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.

## **7. Part 2 - Principal Powers**

### *Article 3 - Development consent etc. granted by the Order*

7.1 Article 3(1) grants the development consent by giving Highways England the power to construct the authorised development. This article makes the consent subject to the requirements that are listed in Schedule 2.

7.2 Article 3(2) states that any enactment applying to land within the Order limits has effect subject to the provisions of the Order. This provision ensures that the modifications made in the Order apply to any enactments that may affect the authorised development and further ensures consistency with legislation more

generally. 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 A19/A184 Testo's Alteration Order 2018 (see article 3(2)). The Scheme crosses the East Coast Main Line (ECML), Bowes Railway and River Team. The construction of the ECML will have been authorised by private legislation and there is the potential for such legislation to conflict with the Order. There may also be such private legislation in relation to the Bowes railway and River Team, both of which are crossed by the Scheme. There may also be private legislation associated with the Gateshead local authority area. Article 3(2) ensures that consistency with any such legislation.

#### *Article 4 - Maintenance of authorised development*

- 7.4 This article empowers Highways England to maintain the development. The term "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.
- 7.5 This definition is broader than the equivalent in section 329 of the Highways Act 1980, which simply states that maintenance "includes repair". Article 4 therefore supplements the maintenance powers under the Highways Act 1980 and ensures that Highways England has the necessary powers to maintain the Scheme. It is considered necessary and appropriate to adopt the broader definition. Paragraph 6.4(b) above provides further justification for the use of this definition.
- 7.6 It should be noted that powers of maintenance are subject to other provisions in the Order, in particular Article 13, which makes provision in relation to maintenance by highway authorities.

#### *Article 5 - Maintenance of drainage works*

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

#### *Article 6 - Planning permission*

- 7.8 This article permits certain development authorised by a planning permission granted under the Town and Country Planning Act 1990 ("**1990 Act**") that is within the Order limits to be carried out pursuant to the terms of the planning permission without breaching the Order. Without this provision, it would be necessary to make an application to change the Order for what may be a relatively minor development. This provision is not a Model Provision, but ensures that the undertaker does not breach section 161 of the 2008 Act in carrying out certain development pursuant to a grant of planning permission. It has precedent in article 5 of the M4 Motorway



(Junctions 3 to 12) (Smart Motorway) Order 2016.

*Article 7 - Limits of deviation*

- 7.9 Since the authorised development involves linear works, article 7 provides for limits of deviation to allow for a lateral deviation in the horizontal plane from the lines and situations of the authorised development within the limits of deviation shown on the works plans, and vertical deviation of the linear works subject to a maximum deviation of 1 metre upwards or 1 metre downwards.
- 7.10 The lateral and 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.
- 7.11 The purpose of this provision is to provide Highways England with a proportionate degree of flexibility when constructing the Scheme, reducing the risk that the Scheme as approved cannot later be implemented for unforeseen reasons but at the same time ensuring that any flexibility will not give rise to any materially new or materially different environmental effects. It also gives a proportionate amount of flexibility for the detailed design of the Scheme within the set limits. This provision has precedent in the A19/A184 Testo's Junction Alteration Order 2018.
- 7.12 The limits of deviation referred to in this article and shown on the application plans have been taken into account in preparation of the environmental statement and the potential impacts of a deviation within the permitted limits have been assessed. Highways England is only permitted to exceed the limits specified in this article if it can demonstrate to the Secretary of State's satisfaction that no materially new or different adverse environmental effects would arise.
- 7.13 The limits of deviation set out in article 7 have been developed through the design and Environmental Impact Assessment (EIA) process for the Scheme, as such the article is an adaption of the article set out in the Model Provision and in terms or principle, it accords with the majority of DCOs made to date (for example, article 6 of the A19/A184 Testo's Junction Alteration Order 2018).

*Article 8 - Benefit of Order*

- 7.14 This article 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. It would be impracticable for a variety of landowners to implement parts of the Order in an uncoordinated manner, which might be the case if section 156(1) were to remain. Paragraph (1) is based on article 4 of the Model Provisions.
- 7.15 The purpose of paragraph (2) is to clarify the exceptions where the Order will self-evidently benefit others, e.g. rights for statutory undertakers. 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 A19/A184 Testo's Alteration Order 2018 (see article 7(2)).

#### *Article 9 - Consent to transfer benefit of Order*

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

### **8. Part 3 - Streets**

#### *Article 10 - Application of the 1991 Act*

- 8.1 Article 10 modifies the application of the New Roads and Street Works Act 1991 ("**the 1991 Act**") to works carried out under the powers of the Order.
- 8.2 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.
- 8.3 "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 of 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.
- 8.4 Paragraph (3) provides that certain provisions of the 1991 Act do not apply to works executed under the Order. 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 to the undertaker and the

specific provisions in the Order which regulate the carrying out of the authorised development.

- 8.5 Paragraphs (4) to (6) apply certain provisions of the 1991 Act (listed in paragraph (5)) to any streets which are temporarily stopped up under the Order. This is for two reasons: first, it prevents any confusion as to whether works in respect of a temporarily stopped-up street are "street works" for the purposes of the 1991 Act and, secondly, it simplifies the implementation of the works by providing for a single process in respect of streets which are stopped up and those which are not.
- 8.6 Paragraph (7)(a) of article 10 provides that nothing in article 13 shall affect the ability of the local highway authority (under s.87 of the 1991 Act) to declare a street in its area a maintainable highway, which would make maintenance of the street (once completed) the responsibility of the local highway authority, and would mean that the 1991 Act would apply to street works carried out in that street.
- 8.7 Paragraph (7)(b) 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 13.
- 8.8 Paragraph (7)(c) makes it clear that the maintenance obligations imposed by article 10 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.
- 8.9 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 A19/A184 Testo's Junction Alteration Order 2018.

#### *Article 11 - Power to alter layout etc. of streets*

- 8.10 This article is not a Model Provision but is based on Article 11 of the National Grid (North London Reinforcement Project) Order 2014 and Article 11 of the Thames Water Utilities Limited (Thames Tideway Tunnel) Order 2014, amongst others. This article confers a highway power on the undertaker to alter the layout of existing streets within the Order limits for the purpose of constructing and maintaining the authorised development. This is subject to the consent of the street authority who must be given the specified period of notice in advance of exercising the powers. This consent is deemed given if the street authority does not respond to the undertaker's consent request within 6 weeks. Paragraph (2) requires the undertaker to restore any street that has been temporarily altered to the reasonable satisfaction of the street authority. Paragraph (5) provides that paragraphs (2), (3) and (4) do not apply where the undertaker is the street authority for the street in which the works are being carried out. It is self-evident that Highways England, may carry out these works to the mainline of the A1. It is considered appropriate to provide a power for Highways England as a strategic highways company to enter and carry out works to side roads that would otherwise be within the purview of the local highway authorities. It is

unnecessary to list the affected roads, since their location and extent is self-evident from the works, land and streets, rights of way and access plans. This article is necessary under section 120(5)(c) of the 2008 Act to give full effect to articles 3 (development consent etc. granted by the Order) and 4 (Maintenance of authorised development). This article has precedent in article 10 of the M4 Motorway (Junctions 3 to 12) (Smart Motorway) Order 2016.

#### *Article 12 - Street works*

- 8.11 This article allows the undertaker to interfere with and execute works in or under the streets within the Order limits for the purposes of the authorised development. It avoids the need to obtain an additional consent from the relevant local roads authority in order to carry out these works. The authority given by this article is a statutory right for the purposes of section 48(3) (streets, street works and undertakers) and 51(1) (prohibition of unauthorised street works) of the New Roads and Street Works Act 1991. Certain provisions of the 1991 Act apply to works carried out under this article. This is based on the Model Provisions. This article has precedent in article 11 of the M4 Motorway (Junctions 3 to 12) (Smart Motorway) Order 2016.

#### *Article 13 - Construction and maintenance of new, altered or diverted streets*

- 8.12 The standard position in respect of maintenance of streets is that Highways England is responsible for maintaining trunk roads. Other streets are to be maintained by the local highway authority in respect of highways maintainable at the public expense, or whichever body is responsible for the maintenance of the street in respect of streets which are not maintainable at the public expense. This is reflected in paragraphs (1) and (2). These provisions are subject to any agreement to the contrary between Highways England and the relevant street or highway authority.
- 8.13 Paragraph (3) makes specific maintenance provision in relation to any new bridges carrying public rights of way over a trunk road. For these, Highways England is responsible for the maintenance of the bridge structure while the local highway authority is responsible for the maintenance of the highway surface.
- 8.14 The effect of paragraphs (4) and (5) are that in any action for damages against Highways England alleging failure to maintain a street, Highways England will have the defence that it had taken such care as was reasonably required in the circumstances to secure that the street 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 A19/A184 Testo's Junction Alteration Order 2018.
- 8.15 While Highways England would benefit from the equivalent defence in the Highways Act 1980 in respect of trunk roads, for which it is the highway authority, the proposed development includes roads which are not trunk roads and so this article is needed to ensure Highways England is covered by this defence in respect of all the roads that comprise the authorised development.

*Article 14 - Classification of roads etc.*

- 8.16 The designation of highways and the specification of the classes of traffic authorised to use a highway, are ancillary matters which may be included in a development consent order. These matters are addressed by this article, which is integral to the implementation of the Scheme, and therefore are considered appropriate to be included in the Order as an ancillary matter under section 120(3) of the Act.
- 8.17 Article 14(1) provides for the roads etc. described in Part 1 of Schedule 3 which are trunk roads when the Scheme is open for traffic.
- 8.18 Article 14(2) and Part 2 of Schedule 3 describes the status of other rights of way provided or altered as part of the authorised development.
- 8.19 The purpose of article 14(3) is to confirm that the matters covered in paragraphs (1) to (3) could be varied or revoked in the future using existing enactments for such matters, without the need to apply under the Act for an amendment to the Order. There is a procedure under section 10 of the Highways Act 1980 for trunking and de-trunking roads. Article 14(3) simply ensures that the normal process for re-classification of roads of the 1980 Act applies notwithstanding that the initial classification of the roads is undertaken through the Order. This provision has precedent in the A19/A184 Testo's Junction Alteration Order 2018.

*Article 15 - Temporary stopping up and restriction of use of streets*

- 8.20 This article allows for the temporary stopping up, alteration, diversion or restriction of streets for the purposes of the authorised development.
- 8.21 Paragraph (2) differs from the Model Provisions and confers a power on Highways England where the use of a street has been temporarily stopped up under this article to use it as a temporary working site. As the Scheme will require works on top of existing roads and to tie in the new road layout into the existing highways, powers are required to temporarily stop up streets whilst such works are being undertaken. This may require the temporary use of the streets as working areas whilst the works are completed. This provision has precedent in a number of made development consent orders including the A19/A184 Testo's Junction Alteration Order 2018.
- 8.22 Paragraph (3) states that reasonable access for pedestrians must be provided, and where Highways England is not the street authority, consent to any such stopping up or restriction must be sought from the street authority.
- 8.23 Paragraph (4) gives a specific power to temporarily stop up, alter or divert the streets specified in columns (1) and (2) of Schedule 5.
- 8.24 Paragraph (5) confirms that in respect of streets for which it is not the street authority, Highways England must not stop up, alter or divert those streets listed in Schedule 5, without first consulting the street authority and, in respect of any other street, without the consent of the street authority (such consent must not be unreasonably withheld or delayed).

- 8.25 Paragraph (6) provides a right to compensation for any person suffering loss due to the suspension of a private right of way under this article.
- 8.24 Paragraph (7) states that where a street authority which fails to notify Highways England of its decision in respect of an application for consent within 28 days of the application being made is deemed to have given its consent. It is considered necessary to remove the possibility for delay and provide certainty that the authorised development can be delivered by Highways England in a timely fashion. The article is a standard provision in highways development consent orders (see for example, article 11 of the A19/A1058 Coast Road (Junction Improvement) Order 2016 and article 12 of the A19/A184 Testo’s Junction Alteration Order 2018).

*Article 16 - Permanent stopping up and restriction of use of streets, public rights of way and private means of access*

- 8.25 This article is based on article 9 of the Model Provisions and allows streets, public rights of way and private means of access named in Parts 1, 2 and 3 of Schedule 4 to be stopped up (i.e. the legal right of way along them to be extinguished).
- 8.26 Paragraph (2) relates to the street, public rights of way and private means of access to be stopped up specified in Parts 1, 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, public right of way or private means of access in question is stopped up.
- 8.27 Paragraph (4) 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.
- 8.28 Since the definition of a “street” in section 48 of the 1991 Act includes highways and footways the stopping up and diversion of footpaths and footways are also dealt with in this article and Schedule 4. The wording is based on numerous highways DCOs, see for example article 12 of the A19/A1058 Coast Road (Junction Improvement) Order 2016 and article 13 of the A19/A184 Testo’s Junction Alteration Order 2018).

*Article 17 - Access to works*

- 8.29 This article allows works accesses to public highways to be created. It provides Highways England with a general power to form means of access rather than accesses set out in a schedule, to provide an appropriate degree of flexibility in case the need for an access only becomes apparent at later stage in the implementation of the proposed development. These powers are equivalent to those available to Highways England when implementing schemes under the Highways Act 1980.
- 8.30 The provisions of this are broadly similar to the powers than those contained in the Highways Act 1980, which allows a highway authority to provide “*a new means of access to any premises*” where it considers it “*necessary or expedient in connection with the construction, improvement or alteration of a highway*” to do so. The statutory power is subject to securing the consent of the authority which is, or will become, the highway authority for that highway. The inclusion of this article is considered to be

appropriate as it will help to ensure that the authorised development can be carried out expeditiously by allowing Highways England to create new temporary accesses as and where required, particularly in response to requests from landowners, occupiers and other affected parties.

- 8.31 This provision has precedent in a number of made development consent orders including article 14 of the A19/A184 Testo's Junction Alteration Order 2018.

*Article 18 - Modification of road traffic regulation orders*

- 8.32 This article provides for various existing road traffic regulation orders made under the Road Traffic Regulation Act 1984 which currently regulate the A1 between junction 67 (Coal House) and junction 65 (Birtley) to apply to specified new sections of the roads constructed under the Order. The restrictions which are provided are:-

(a) the A1 Trunk Road (Birtley Interchange to Scottish Border) (24-Hour Clearway) Order 2004 makes it unlawful for road users to stop on the road 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;

(b) The A1 Trunk Road (Gateshead/Newcastle Western Bypass) (Width Restriction) Order 2016 makes it unlawful for road users to cause or permit any vehicle with an overall width exceeding six feet six inches from entering or proceeding along the offsidemost lane of the northbound and southbound carriageways except upon the direction of or with the permission of a constable or a traffic officer in uniform, for emergency or unavoidable reasons, by emergency service vehicles, or where the vehicle is being used for specified maintenance purposes;

(c) The A1 Trunk Road (Birtley to North Brunton) (Prohibition of Slow Moving Vehicles) Order 2001 makes it unlawful for road users to cause or permit any agricultural motor vehicle or industrial tractor from entering or proceeding along the road except upon the direction of or with the permission of a constable or a traffic officer in uniform, or for maintenance or lawfully authorised works; and

(d) The A1 Trunk Road (Gateshead/Newcastle Western Bypass) (Birtley Interchange to Blaydon Viaduct) (50 Miles Per Hour Speed Restriction) Order 2010 makes it unlawful for road users to cause or permit any vehicle to be driven along the road at a speed exceeding 50 miles per hour.

- 8.33 The purpose of applying these orders to the new sections of road to be constructed under the Order is to ensure safe and proper operation of the authorised development, and to ensure the Scheme delivers its intended benefits. Article 18 will ensure that the existing road traffic regulation orders will be replicated on the new sections of road. It is considered appropriate for the restrictions to be included in the Order as an ancillary matter under section 120(3) of the Act.

- 8.35 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 DCO is appropriate as the consultation, publicity and examination processes within the DCO procedure provide a more than adequate



substitute for the consultation and publicity requirements of traffic regulation orders.

- 8.35 Article 18(2) also clarifies that paragraph (1) 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 the Act for an amendment to the Order. This is achieved by the use of s120(5) of the 2008 Act.
- 8.36 Article 18(3) provides that the roads to be constructed under the Order would cease to be restricted roads for the purpose of section 81 of the Road Traffic Regulation Act. As the roads will be lit, they would ordinarily be classed as restricted roads under section 81 of the Road Traffic Regulation Act 1984 and subject to a speed limit of 30 miles per hour. Such a speed limit would not deliver the benefits of the Scheme and would contradict the provisions of Article 18(1)(d). It is therefore considered appropriate to be included in the Order as an ancillary matter under section 120(3) of the Act. De-restriction measures are normally undertaken by means of a Direction under section 82 of the Road Traffic Regulation Act 1984. Inclusion within the DCO is appropriate as the consultation, publicity and examination processes within the DCO procedure provide a more than adequate substitute for the consultation and publicity requirements of derestriction directions.

#### *Article 19 - Traffic regulation*

- 8.37 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 and article 43 of the M4 Motorway (Junctions 3 to 12) (Smart Motorway) Order 2016.
- 8.38 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 Road Traffic Regulation Act 1984;
  - 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; and
  - e) permit or prohibit vehicular access to any road.
- 8.39 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.

## **9. Part 4 - Supplemental Powers**

### *Article 20 - Discharge of Water*

- 9.1 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.
- 9.2 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.
- 9.3 Paragraph (6) requires the undertaker to take reasonably practicable steps to ensure that any water that is discharged is free from gravel, soil or other solid substance, oil or matter in suspension.
- 9.4 Paragraph (7) makes it clear that this article does not obviate the need for an environmental permit for such discharge where it is relevant.
- 9.5 Paragraph (9) 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 consent/approval. This time limit is considered necessary to remove the possibility of delay and provide certainty that the authorised development can be delivered by the undertaker in a timely fashion. As a nationally significant infrastructure project the authorised development should not be at risk of being held up due to a failure to respond to an application for consent/approval.
- 9.6 This article has been included in previous Highways England development consent orders (for example see article 18 of the M20 Junction 10a Development Consent Order 2017 and article 17 of the A19/A184 Testo's Junction Alteration Order 2018).

### *Article 21 - Protective work to buildings*

- 9.7 The purpose of this article is to allow Highways England to undertake protective works to buildings affected by the authorised development. The wording has broad precedent and is based on article 15 of the Model Provisions (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 A19/A184 Testo's Junction Alteration Order 2018). The Scheme will involve substantial engineering works. Although every effort will be made to avoid impacts on existing buildings in the proximity of the works, the final impacts will be dependent on detailed design and site investigations. It is necessary to include appropriate provision to carry out protective works in the unlikely event such a need arises.

### *Article 22 - Authority to survey and investigate the land*

9.8 This article gives Highways England the power to enter certain land for the purpose of surveying and investigating. Prior to the construction of the Scheme, it will be necessary to undertake ground investigations and surveying in order to develop the detailed design of the Scheme. This will necessarily involve access to land and the Scheme cannot be progressed with powers of access. 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. This, again, is a standard provision with broad precedent.

## **10. Part 5 - Powers of Acquisition and Possession**

### *Article 23 - Compulsory acquisition of land*

10.1 This article authorises the acquisition of land by compulsory purchase. It grants the power to acquire such of that land as is required for the authorised development. The power of acquisition over the Order land is qualified and restricted by sub-paragraph (2), in the case of parcels of land specified in the Order where only rights are required (article 26(2)) or where possession of land parcels as specified in the Order may be taken temporarily only (article 32(8)).

10.2 This provision is necessary to secure the delivery of the Scheme as set out in more detail in the statement of reasons accompanying the application, There is precedent for this form of article (see for example article 20 of the A19/A184 Testo's Junction Alteration Order 2018),

### *Article 24 - Compulsory acquisition of land - incorporation of the mineral code*

10.3 This article incorporates Part 2 of Schedule 2 of 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. This drafting is based on article 19 of the Model Provisions and has broad precedent in a number of made development consent orders.

### *Article 25 – Time limit for exercise of authority to acquire land compulsorily*

10.4 This article gives Highways England five years to issue 'notices to treat' or to execute a 'general vesting declaration' to acquire the land that is subject to the power of compulsory purchase. These are the two main procedural methods by which the process of compulsorily acquiring land may be undertaken should this Order be made.

10.5 The article also sets a 5 year time limit on the power of Highways England 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 A19/A184 Testo's Junction Alteration Order 2018).

*Article 26 – Compulsory acquisition of rights and restrictive covenants*

- 10.6 This article allows for rights in land to be acquired as well as the land itself, and also for new rights to be created over land.
- 10.7 This article provides for such rights as may be required to be acquired by Highways England over land which it is authorised to acquire under article 23. 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 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 A19/A184 Testo’s Junction Alteration Order 2018.
- 10.8 Paragraph (2) provides that for the land described in Schedule 6 Highways England’s powers of compulsory acquisition are limited to the acquisition of such rights as may be required for the purposes set out in the Schedule.
- 10.9 Paragraph (3) provides power to impose restrictive covenants under paragraph (1) is exercisable only in respect of plots specified in column (1) of Schedule 6.
- 10.10 Paragraph (4) provides that where Highways England needs only to acquire rights over land, it shall not be obliged to acquire any greater interest in that land.
- 10.11 Paragraph (5) and Schedule 7 impose modifications to the compulsory purchase and compensation provisions under general legislation. They do not affect the entitlement to compensation, but generally ensure that the compensation procedure applies to the additional categories of acquisition covered by the Order – the creation of new rights and the imposition of restrictive covenants in particular. This is a consequence of the extension of land acquisition powers to these categories (done to allow lesser land interests to be acquired). 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.
- 10.12 The modifications are applicable generically to Orders of this kind and are based on changes made consistently in most schemes granted under the Act (see, for a recent example, Schedule 6 of the A14 Cambridge to Huntingdon Improvement Order 2016). As a result of changes contained in the Housing and Planning Act 2016, the Order has been updated to ensure that the correct provisions are modified. These changes have precedent in the A19/A184 Testo’s Junction Alteration Development Consent Order 2018.

*Article 27 - Private rights over land*

- 10.13 In order for it to be possible to implement the proposed development, 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.

- 10.14 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.
- 10.15 Article 27(2) provides for the extinguishment of existing private rights over land that is subject to the compulsory acquisition of new rights (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 or occupation of the underlying land.
- 10.16 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.
- 10.17 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.
- 10.18 Paragraphs (5) to (8) of article 27 make provision for compensation and for circumstances where rights are preserved.
- 10.19 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), A19/A1058 Coast Road (Junction Improvement) Order 2016 (see article 24) and the A19/A184 Testo's Junction Alteration Order 2018 (see article 24).

#### *Article 28 - Application of Part 1 of the 1965 Act*

- 10.20 The purpose of this article is to ensure consistency between the standard terms of highways development consent orders and the Compulsory Purchase Act 1965 (as amended by the Housing and Planning Act 2016) as applied by section 125 of the Act. These modifications have broad precedent in Schedule 14 to the High Speed Rail (London – West Midlands) Act 2017 and article 25 of the A19/A184 Testo's Junction Alteration Development Consent Order 2018.

#### *Article 29 - Application of the 1981 Act*

- 10.21 This article applies (with minor modifications to make the provisions appropriate to the context of acquisition under powers in a development consent order) the provisions of the 1981 Act to compulsory acquisition under the Order so that Highways England has the option of acquiring Order land that is subject to the powers of compulsory acquisition by vesting declaration.
- 10.22 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.

- 10.23 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 acquirer more quickly than using the notice to treat method, and also allow several parcels to be acquired at once. Their use is subject to serving notices and observing time limits as required by the 1981 Act (as amended by the Housing and Planning Act 2016).
- 10.24 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. These changes have precedent in the A19/A184 Testo's Junction Alteration Development Consent Order 2018.

*Article 30- Acquisition of subsoil and airspace only*

- 10.25 This article allows Highways England to acquire land below the surface or above the surface, rather than having to acquire all of the land.
- 10.26 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 which is in the public interest. This too is a standard provision used in many highways development consent orders (see for example article 27 of the A14 Cambridge to Huntingdon Improvement Order 2016 and article 27 of the A19/A184 Testo's Junction Alteration Order 2018).

*Article 31 - Rights under or over streets*

- 10.27 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.
- 10.28 This article was included in the Model Provisions and the majority of development consent orders made to date. It is considered that the article remains necessary for the authorised development notwithstanding the effect of the Housing and Planning Act 2016, and it was retained in the Silvertown Tunnel Order 2018. It is necessary to enable Highways England to use temporary structures to divert non-motorised users during the construction of the authorised development

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

- 10.29 The purpose of this article is to allow the land set out in Schedule 8 to be occupied temporarily while the works are carried out. This is land which is required during construction of the Scheme but is not required permanently. The authorisation of temporary possession prevents Highways England having to permanently acquire land which is required to construct the authorised development but is not needed

permanently and therefore assists in minimising the interference with landowners' rights.

10.30 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 8 to be occupied temporarily while the works are carried out. This is land which is required during construction of the Scheme but which is not required outright permanently, and includes land which will be occupied temporarily and then subject to permanent rights (e.g. diversion of utilities apparatus). Paragraph (9) prevents this land from being acquired permanently, although confirms that acquisition of rights over this land, or of subsoil/airspace only, is not prevented and is required in respect of certain parcels. Likewise some land taken temporarily will have permanent works undertaken to it, e.g. accommodation works (see further paragraph (4)(b), and Schedule 8).
- 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 23 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)(d) confirms that the authorised development as listed in Schedule 1 can be undertaken on land that has been temporarily occupied.

10.31 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 occupy and use land pending its permanent acquisition, or to temporarily occupy and use land that is not to be permanently acquired, within provision made for the restoration of the land and payment of compensation to affected landowners and occupiers for any loss or damages arising. These powers are considered to be reasonable given the status of the authorised development as a nationally significant infrastructure project. The article has precedent in many development consent orders (see for example article 29 of the A19/A184 Testo's Junction Alteration Order 2018).

10.32 In a departure from article 28 of the Model Provisions, article 32(4) specifies that Highways England is not required to:

- (a) restore the land on which any permanent works have been constructed under paragraph 1(d);
- (b) restore the land of which temporary possession has been taken to a better condition than it was before temporary possession. It is considered reasonable for any reinstatement of land to be on a like-for-like basis;
- (c) remove any ground strengthening works which have been placed on the land to facilitate the construction of the Scheme. This is to ensure, as far as



- possible, the safe operation of the Scheme;
- (d) remove any measure installed over or around statutory undertakers to protect the apparatus. This is included to ensure that the apparatus of statutory undertakers is expressly protected under the Order; and
  - (e) remove or reposition any apparatus belonging to statutory undertakers or necessary mitigation works. This safeguards the interests of statutory undertakers in relation to their apparatus and also ensures the necessary mitigation of adverse impacts of the Scheme can be retained on land of which temporary possession has been taken.

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

*Article 33 - Temporary use of land for maintaining the authorised development*

10.34 This article provides that Highways England may take temporary possession of land within the Order limits 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. Provision is made for notice and compensation. This power does not apply with respect to houses, gardens or any other buildings for the time being occupied. Under paragraph (6) all temporary works must be removed before Highways England gives up possession under this article and the land must be restored to the reasonable satisfaction of the owners. Compensation is payable under paragraph (7) for loss or damage caused by temporary possession. In the same way as article 32 any dispute as to the satisfactory restoration of land does not prevent Highways England from giving up possession of the land.

10.35 Provision is made in paragraph (3) for giving 28 days' notice prior to taking temporary possession in terms of Article 33. However, the notification requirement is removed in the emergency circumstances set out in paragraph (4). A departure from the normal notice requirements in cases of emergency is preceded in article 29 of the River Humber Gas Pipeline Replacement Order 2016.

10.36 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 A19/A184 Testo's Junction Alteration Order 2018 (see article 30) It is also based on article 29 of the Model Provisions.

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

*Article 34 - Statutory undertakers*

- 10.38 This article provides Highways England with clear statutory authority to acquire rights over land owned by statutory undertakers (i.e. utilities such as electricity and gas companies)
- 10.39 It also allows Highways England to extinguish rights that statutory undertakers have over the Order land, and to remove and reposition their apparatus. Reference is made to the Order land so that this power is not restricted to apparatus which has been specifically shown on the land plans and described in the book of reference. In practice it is impracticable to show and describe all such apparatus and so a general power for the extinguishment of rights and removal or relocation of apparatus belonging to statutory undertakers over or within any Order land is required.
- 10.40 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.
- 10.41 This article is subject to Schedule 11 which contains provisions for the protection of certain statutory undertakers to ensure their continued ability to carry out their functions despite the interference with their rights/apparatus required to facilitate the proposed development.
- 10.42 This article has broad precedent (see the A14 Cambridge to Huntingdon Improvement Order 2016 (article 32), the A19/A1058 Coast Road (Junction Improvement) Order 2016 (article 29), the M4 Motorway (Junctions 3 to 12) (Smart Motorway) Order 2016) (article 30) and the A19/A184 Testo's Junction Alteration Order 2018 (article 31). The Scheme involves substantial works to the existing A1. Apparatus belonging to statutory undertakers will be present under the existing road and verge as well as potentially being present under land which is not currently incorporated in the highway. The alterations to the road will inevitably involve interference with existing apparatus. Powers to move apparatus are therefore essential in order for the Scheme to be implemented.

*Article 35 - Apparatus and rights of statutory undertakers in stopped up streets*

- 10.43 This article is based on article 32 of the Model Provisions and governs what happens to statutory undertakers' apparatus 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.
- 10.44 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 the Secretary of State.
- 10.45 Under paragraph (3), the statutory undertaker would receive compensation from Highways England for any relocation works and associated costs. 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.

- 10.46 Paragraph (7) provides that where statutory undertakers are affected by a stopping up in relation to those parts of the Scheme that constitute “major bridge works”, “major transport works” or “major highways works”, as defined in the 1991 Act, the cost sharing provisions under that Act will apply instead of the compensation provision in this article.
- 10.47 This article is standard for highways development consent orders (see, for example, the A19/A1058 Coast Road (Junction Improvement) Order 2016 (article 30) and the A19/A184 Testo’s Junction Alteration Order 2018 (article 34)). The Scheme is required to make substantial alterations to the A1 and this will inevitably involve interference with existing apparatus in the road. Powers to move apparatus are essential in order for the Scheme to be implemented.

#### *Article 36 - Recovery of costs of new connections*

- 10.48 This article follows article 33 of the Model Provisions and provides that if any statutory undertaker's apparatus is removed and this cuts a service to anyone, then the cost of establishing a new service can be claimed from Highways England. It has precedent in a number of development consent orders including article 33 of the A19/A184 Testo’s Junction Alteration Order 2018.

### **11. Part 6 - Operations**

#### *Article 37 - Felling or lopping of trees and removal of hedgerows*

- 11.1 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 Scheme or endanger anyone using it. Compensation is payable for any loss or damage caused. This article has been inserted into numerous orders (see, for example, article 36 of the A14 Cambridge to Huntingdon Improvement Order 2016 and article 34 of the A19/A184 Testo’s Junction Alteration Order 2018). This power is required for the Scheme as there are trees which will need to be felled or lopped in order for the Scheme to proceed. This article also allows for the removal of hedgerows as defined in the Hedgerow Regulations 1997. It is not anticipated that it will be necessary to remove any hedgerows and this power has therefore been incorporated as a precautionary measure. In line with paragraph 22 of Planning Inspectorate Advice Note Fifteen, provision has been included for the removal of unidentified hedgerows to be subject to the consent of the relevant planning authority.

#### *Article 38- Trees subject to tree preservation orders*

- 11.2 This allows Highways England to fell or lop any trees subject to tree preservation orders described in Schedule 9. This is a model provision which has been used in numerous orders (see for example article 36 of the M4 Motorway (Junctions 3 to 12) (Smart Motorway) Order 2016).

#### *Article 39 - Scheduled Monuments*

11.3 This article permits the carrying out of specified works to scheduled monuments as set out in Schedule 10. In terms of section 32(3)(e), works for the purpose of making any alterations or additions to a scheduled monument are part of the Scheme which requires development consent.

## **12. Part 7 - Miscellaneous and general**

### *Article 40 - Application of landlord and tenant law*

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

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

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

12.3 The effect of that Order land being treated as operational land is that the person responsible for operating and maintaining the proposed development (Highways England or any transferee of its powers) will benefit from certain permitted development rights on that land in connection with the operation of the road. Article 36 of the A19/A184 Testo’s Junction Alteration Order 2018 followed the same approach.

### *Article 42 - Defence to proceedings in respect of statutory nuisance*

12.4 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).

12.5 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.

12.6 This is an article based on article 7 of the Model Provisions and has precedent in recent highway Orders made, for example article 38 of the A19/A184 Testo’s Junction Alteration Order 2018 and is necessary to clarify the scope of the defence of statutory authority arising from the grant of the Order.

### *Article 43 - Protection of interests*

- 12.7 This article simply gives effect to Schedule 11, which contains provisions protecting the interests of third parties. This schedule is based on the standard protective provisions approved by the Secretary of State in the A14 Cambridge to Huntingdon Improvement Order 2016 and the M4 Motorway (Junctions 3 to 12) (Smart Motorway) Order 2016. Highways England has sought the views of the undertakers who have interests affected by the authorised development and continues to negotiate with the undertakers to ensure any concerns are dealt with appropriately. Highways England will provide a full update of the status of the negotiations throughout the examination.
- 12.8 This article is standard for highways development consent orders (see for example, article 32 of the A19/A184 Testo's Junction Alteration Order 2018).

*Article 44 - Certification of documents, etc.*

- 12.9 This article provides for various plans and other documents (including those listed in Schedule 12) to be certified by the Secretary of State.

*Article 45 - Service of notices*

- 12.10 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.
- 12.11 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 A19/A184 Testo's Junction Alteration Order 2018 (see article 41).
- 12.12 The provision is useful because it provides clarity on the issue. It is noted that the service of notice provisions under sections 229 and 230 of the Act apply to notices served under that Act rather than notices served under a development consent order made under that Act.

*Article 46 - Arbitration*

- 12.13 This article governs what happens when two parties disagree in the implementation of any provision of the Order. The matter is to be settled by arbitration, and if the parties cannot agree on who the arbitrator should be, this is decided by the President of the Institution of Civil Engineers. Precedent is provided by most development consent orders, including article 42 of the A19/A184 Testos Junction Alteration Order 2018.

## **SCHEDULE 1 - AUTHORISED DEVELOPMENT**

Schedule 1 describes the authorised development, which is described in detail in Chapter 2 of the environmental statement (Application Document Reference: TR010031/APP/6.1). As explained in section 3 of these Explanatory Notes, no distinction has been made between NSIP Development and associated development.

This schedule specifies the authorised development comprising the scheduled works, separating the various works into sections.

Note should be taken in particular of Work No.5, which provides for the construction of a new offline structure crossing the ECML in substitution for the existing Allerdene Bridge.

As set out elsewhere in the application documents, there are two main options applicable to the delivery of this new work:

- A single span bridge crossing the ECML with embankments either side; or
- A multi-span viaduct consisting of either six or seven spans (over the ECML) and a greater area of land, with shorter embankments either side.

The works plans (Application Document Reference: TR010031/APP/2.3) show a work in this location comprising the new Allerdene Bridge at a *maximum* length, with the shorter structure being within the conceptual envelope of the longer structure. Both options are assessed in the environmental statement and shown to be acceptable (Application Document Reference: TR010031/APP/6.1), meaning that the Order can provide for this level of optionality, and leaving the final decision to Highways England following consent and selection of the party delivering the works.

## **SCHEDULE 2 - REQUIREMENTS**

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. In place of a design statement, the Scheme requirements in Schedule 2 have been expanded where necessary to take into account the assumed parameters of environmental assessment in accordance with the Rochdale Envelope principle. Any necessary approvals under the requirements are to be sought from the Secretary of State for Transport, following consultation with the local planning authority and/or other relevant third party. Again, this is consistent with the processes and procedures employed by Highways England when implementing a Scheme such as this.

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) at Table 3-1 of the Outline Construction Management Plan which contains all of the mitigation commitments made in the environmental statement. This is the mechanism for ensuring that environmental mitigation is secured by the Order, and the approach here is consistent with other development consent orders 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.

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

- (a) Requirement 1 contains a number of definitions used in Part 1 of Schedule 2;
- (b) Requirement 2 provides that the authorised development must not commence later than 5 years from the date of the order coming into force;

- (c) Requirement 3 states that the authorised development must be carried out in accordance with the preliminary Scheme design shown on the engineering drawings and sections and engineering section drawings unless otherwise agreed in writing by the Secretary of State, provided that the Secretary of State is satisfied that any amendments would not give rise to any materially new or materially different adverse environmental effects to those reported in the environmental statement. Requirement 3(3) requires details of the external appearance of Work Nos.10 and 12 to be submitted to and approved by the Secretary of State before Work No.10 or 12 is commenced. Work Nos. 10 and 12 are buildings to contain gas transfer stations and it is appropriate to require the detailed design of these buildings to be approved before construction start on the building;
- (d) Requirement 4 requires the preparation of a construction environmental management plan (CEMP) in consultation with the relevant planning authority and environment agency and for its approval by the Secretary of State. The CEMP must be based substantially on the outline construction environmental management plan prepared as part of the application. The CEMP will fulfil the construction-related objectives and measures as outline in the REAC and must be written in accordance with ISO14001. Further details of what must be contained in the CEMP are set out in sub-paragraph (2) of the requirement. Sub-section (3) requires the authorised development to be carried out in accordance with the CEMP and also allows for the Secretary of State to authorise amendments to the CEMP. 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);
- (e) Requirement 5 requires the preparation of a landscaping scheme covering all hard and soft landscaping works for approval by the Secretary of State. There is a requirement that the proposed landscaping scheme must reflect the relevant mitigation measures in the REAC and must be based on the illustrative environmental masterplan annexed to the environmental statement. Further details of what must be contained in the landscaping scheme are set out in sub-paragraph (3);
- (f) Requirement 6 makes provision for dealing with any contaminated land and groundwater discovered during construction of the works, in consultation with the relevant planning authority and the Environment Agency. The ground investigation carried out as part of the ES has identified locations where asbestos is present. In order to mitigate the risk to human health from asbestos in any areas of soft landscaping to be provided as part of the Scheme on areas of made ground where asbestos is present, a suitable capping layer requires to be provided. The details of such capping would require to be approved by the Secretary of State under Requirement 6(2);
- (g) Requirement 7 provides that where any previously unidentified protected species are found during construction, works in proximity to the location of



those species are to cease and Highways England must immediately report their presence to Natural England and the relevant planning authority. Highways England must prepare a written protection and mitigation scheme for any previously unidentified protected species found during construction and must implement the written scheme immediately;

- (h) Requirement 8 provides that no part of the authorised development can commence until written details of a surface and foul water drainage system, reflecting the mitigation measures in the REAC and including means of pollution control, have been prepared in consultation with the relevant planning authority and approved in writing by the Secretary of State. Requirement 8(2) requires that culvert design is included in the drainage scheme. In order to mitigate the effects of fragmentation for fish populations, this requirement also requires that, where possible, natural beds are included within new culverts. Mitigation within existing culverts is to be provided by baffles or similar structures.
- (i) Requirement 9 states 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 including in the REAC, have been submitted to and approved in writing by the Secretary of State following consultation with the relevant planning authority. The requirement places 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;
- (j) Requirement 10 provides that no part of the authorised development must commence until a traffic management plan has been prepared and approved by the Secretary of State following consultation with the relevant planning authority on matters relating to its function;
- (k) Requirement 11 makes clear that the authorised development must be carried out in accordance with approved details/schemes, those details/schemes are taken to include any subsequent amendments that are approved or agreed in writing by the Secretary of State;
- (l) Requirement 12 requires the provision of the replacement North Dene Footbridge, The demolition of the existing bridge and replacement bridge is Work No. 18. Sub-paragraph (2) requires that details of the design of the replacement bridge are approved by the Secretary of State in consultation with the relevant planning authority before the bridge is constructed.;
- (m) Requirement 13 provides that permanent and temporary fencing and other means of enclosure for the authorised development must be constructed and installed in accordance with Volume 1, Series 0300 of the Manual of Contract Documents for Highway Works;
- (n) Requirement 14 restricts the carrying out of Work 5a. Work 5a is for the construction for a new offline structure to carry the widened highway over the ECML and provides the undertaker with the option of the structure either

being a single span bridge (described in paragraph (i) of Work 5a) or a viaduct (described in paragraph (ii) of Work 5a). The undertaker is only authorised to carry out the works specified in either paragraph (i) or (ii). Work 5a is further restricted so that, depending on whether the viaduct or bridge option is pursued, the works must be carried out generally in accordance with a specified drawing in the structures engineering drawings and sections;

- (o) Requirement 15 requires specific primary design mitigation.

Part 2 of Schedule 2 (Requirements 16-19) provides a clear procedure for the discharge of requirements by the Secretary of State. It sets out clear time limits for decisions to be made and makes provision for circumstances where the Secretary of State requires further information to be provided in relation to an application for the discharge of requirements. Part 2 as drafted reflects the discharge of requirements provisions approved in previous made development consent orders including the A14 Cambridge to Huntingdon Improvement Order 2016 and the A19/A184 Testo's Junction Alteration Order 2018.

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

### **SCHEDULE 3 - ARTICLES 14 AND 18 - CLASSIFICATION OF ROADS, ETC**

This schedule sets out the classification of streets, other classified roads and other public rights of ways following completion of the works.

### **SCHEDULE 4 - ARTICLE 16 - PERMANENT STOPPING UP OF STREETS, PUBLIC RIGHTS OF WAY AND PRIVATE MEANS OF ACCESS**

This schedule sets out those streets that are to be permanently stopped up pursuant to Article 16 (Permanent stopping up of streets)

### **SCHEDULE 5 - ARTICLE 15 -PUBLIC RIGHTS OF WAYS TO BE TEMPORARILY STOPPED UP AND FOR WHICH A SUBSTITUTE IS TO BE PROVIDED**

This schedule sets out those streets that are to be temporarily stopped up pursuant to Article 15 (Temporary stopping up of streets)

### **SCHEDULE 6 - ARTICLE 26 - LAND IN RESPECT OF WHICH ONLY NEW RIGHTS ETC. MAY BE ACQUIRED**

This schedule sets out land in which new rights may be required pursuant to Article 26 (Compulsory acquisition of rights).

### **SCHEDULE 7 - ARTICLE 26 - MODIFICATION OF COMPENSATION AND COMPULSORY PURCHASE ENACTMENTS FOR CREATION OF NEW RIGHTS AND IMPOSITION OF RESTRICTIVE COVENANTS**

This schedule sets out the modification of legislation on compensation and compulsory purchase for the purpose of creating new rights and imposing restrictive covenants.

**SCHEDULE 8 - ARTICLE 32 - LAND OF WHICH TEMPORARY POSSESSION MAY BE TAKEN**

This schedule sets out the land of which temporary possession may be taken pursuant to Article 32 (Temporary possession of land for carrying out the authorised development).

**SCHEDULE 9 - ARTICLE 38 - TREES SUBJECT TO TREE PRESERVATION ORDERS**

This schedule sets out the trees subject to tree preservation orders in respect of which the undertaker may exercise powers pursuant to Article 38 (Trees subject to tree preservation orders).

**SCHEDULE 10 - ARTICLE 39 - SCHEDULED MONUMENTS**

This schedule sets out the scheduled monuments in respect of which the undertaker may exercise powers pursuant to Article 39 (Scheduled monuments).

**SCHEDULE 11 - ARTICLES 34 AND 43 - PROTECTIVE PROVISIONS**

This schedule sets out any protective provisions for the benefit of Electricity, Gas, Oil, Water and Sewerage Undertakers, the Operators of Electronic Communications Code Networks, Railway Undertakers and the Environment Agency.

**SCHEDULE 12 - ARTICLE 45 - DOCUMENTS TO BE CERTIFIED**

This schedule sets out the list of documents to be certified by the Secretary of State in terms of Article 45 (Certification of documents, etc.).

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