Gravesham Borough Council (Registration ID Number: 20035747)

Lower Thames Crossing (Scheme Ref: TR010032)

Issue Specific Hearing 2 (ISH2) on the draft Development Consent Order (22 June 2023)

Comments on the ExA's Observations on Drafting (Annex A to the Agenda for ISH1)

Deadline 1: 18 July 2023

Gravesham Borough Council (GBC) **Comments on the ExA's Observations on Drafting (Annex A to the Agenda for ISH1)**		
ExA Point	**GBC Comment**	**Document Ref**
1. Novel drafting		
Article 2(10)		
This is apparently novel drafting which seeks to amend the meaning of "materially new or materially different environmental effects in comparison with those reported in the ES" to exclude effects which would avoid, remove or reduce an adverse environmental effect reported in the ES. **The phrase "materially new or materially different environmental effects" is used several times in the DCO, including in the definition of maintain, the limits of deviation and requirements securing essential mitigation. The drafting here appears to provide that it is acceptable for work which has the effect of avoiding, reducing or removing an adverse effect to be undertaken without further scrutiny, even if the effect is materially different from that assessed in the ES. Views are sought on the degree to which that approach is being provided for here and, if it is, is acceptable?** **If it is considered acceptable, then there is an argument in favour of amending drafting in this provision and elsewhere in**	GBC agrees that the Applicant has taken a different course from that adopted on recent Highways DCOs by introducing paragraph 2(10) in version 2.0 of the draft DCO. Most recent highways DCOs do not include this paragraph, the effect of which is that references in the DCO to materially new or materially different environmental effects in comparison with those reported in the environmental statement shall not be construed so as to include the avoidance, removal or reduction of an adverse environmental effect that was reported in the environmental statement as a result of the authorised development GBC are concerned about the potential for unintended consequences of excluding from the definition effects which would avoid, remove or reduce any adverse environmental effects. For example, if the Applicant were able to do something which it would otherwise have been prevented from doing without article 2(10), it could have a consequential adverse effect which may not be materially new or different but which nonetheless is of importance to those affected. An example where this might arise, mentioned by the ExA, is in relation to Ancillary works, described in Schedule 1 to the Order, and where the wording is used in the new preamble to the list of Ancillary works, and in paragraph (p) of the list. GBC notes the explanation given by the Applicant for the inclusion of article 2(10) in its cover letter in response to section 51 advice [AS-001], and also in its Annex A responses [AS-089]. In the latter, the Applicant says that for completeness, GBC's point is addressed by its responses, but GBC is unconvinced that it is. If the Applicant is to proceed with this drafting, then	[AS-001]: Additional Submission - Cover Letter in response to S51

Gravesham Borough Council (GBC) Comments on the ExA's Observations on Drafting (Annex A to the Agenda for ISH1)		
ExA Point	**GBC Comment**	**Document Ref**
the dDCO to ensure consistency. Slightly different phraseology is used throughout the dDCO in relation to material new and materially different environmental effects – for example, see the definition of 'maintain', Article 6(3), ancillary works preamble and (p), In Requirements 3, 8, 18, and in the Protective provisions.	GBC suggests that the Applicant be requested to provide a detailed explanation as to why it considers that GBC's concerns about unintended consequences are unfounded. GBC agrees with the ExA's suggestion (whether or not article 2(10) is retained) that the phraseology used for "materially new or materially different" should be consistent throughout the DCO, to avoid confusion.	
Article 27 – time limits for CA, start date		
Article 27 – See comments in section 4 below re novel approach to start date and extent of time limits for Compulsory Acquisition (CA).	See later	
Article 28 – extent of imposition of transfer of CA powers without consent		
Article 28 – See comments in section 4 below re novel approach/ precedent for the extent of imposition of restrictive covenants and the transfer of benefit of imposed covenants.	See later	
Article 56(3), (4) planning permission etc.		
The Applicant states that this novel provision is required as a result of the Supreme Court judgement in Hillside Parks Ltd v Snowdonia National Park Authority 2022 UKSC [30] ('Hillside')	GBC note the submissions provided by the Applicant in its Annex A responses on the implications of the *Hillside* case. GBC suggested at the hearing that if the Applicant is able to identify and provide a list of which existing planning permissions are at issue, then GBC would be better able to say whether article 56(3) and (4) are acceptable to them. The Applicant has referred to Application Document APP-550, which	

Gravesham Borough Council (GBC) Comments on the ExA's Observations on Drafting (Annex A to the Agenda for ISH1)		
ExA Point	**GBC Comment**	**Document Ref**
The ExA does not currently understand why the Applicant considers this provision to be necessary. We understand that Hillside confirmed the existing position established in case law, that a planning permission incapable of being implemented is of no effect. On the basis that Hillside is not understood by the ExA to be a statement of new law, then the rationale for the provisions drafted here is not understood. **The Applicant is requested to:** • **provide detailed legal submissions explaining why it considers these provisions are necessary and to detail the section of PA 2008 which empowers the inclusion of this provision in the dDCO; and** • **provide details of any planning permissions within the order limits that this provision would apply to.** **Consideration will be given as to whether it is permissible or within the purposes and policy relevant to a DCO to include a provision preventing the taking of enforcement action by a local planning authority in a DCO. The views of the relevant local planning authorities will be sought on this point.**	lists a number of Interrelationships with other Nationally Significant Infrastructure Projects and Major Development Schemes in GBC's area. It is not comprehensive because it does not cover all existing planning permissions that come within the scope of the article. The Gravesham example cited in the Applicant's response to the Annex, is also given in the Explanatory Memorandum. It is planning permission reference 20191217 which contains a condition requiring National Highways to restore land at Marling Close, which is included within the Order Limits and is required for use as a site compound during the construction phase, to its former condition by 9 July 2021. In fact, the PP referred to was followed up by a later one (20210675) which requires restoration by 31 December 2023. GBC would wish to ensure that compliance with that condition was not affected by the DCO, so is supportive of article 56(3) and 56(4) so far as they would apply to that case. But as mentioned above, it would assist GBC greatly if a list of other relevant existing permissions were provided by the Applicant before providing a final view.	
Work No. 7R – Traveller site & Requirement 13		

Gravesham Borough Council (GBC) Comments on the ExA's Observations on Drafting (Annex A to the Agenda for ISH1)		
ExA Point	**GBC Comment**	**Document Ref**
Work No. 7R is described in part as "re-provision of a traveller site". In effect, it provides for the grant of consent for change of use of a plot of land within the order limits to use as a Traveller site, which appears to be a use of land that is residential in nature. The ExA's primary question is about whether this is intra vires, within the powers of a DCO. **It is arguable that the proposed work is not a matter that a DCO may in principle provide for, having regard to PA2008 s 120(3), (4) and Part 1 of Schedule 5.** **Further, the proposed work does not appear to be part of the NSIP or NSIPs for which development consent is sought, as (per PA2008 s 115(1)(c)) the development does not appear to be 'related housing development'. It appears that it may not be capable of being consented as associated development, as (per PA2008 s 115(2)) associated development is development that amongst other characteristics 'does not consist of or include the construction or extension of one or more dwellings'.** **The Applicant is requested to provide detailed legal submissions explaining the statutory basis upon which it is possible to include a provision in a DCO granting consent for change of use of land to a traveller site, with particular reference to**	There are no points on Work No. 7R and Requirement 13 from GBC at this stage, given they relate to matters outside Gravesham. Nonetheless, GBC have a potential interest in the subject matter because of the need to address the private traveller sites along the A226 that will be impacted by construction	

Gravesham Borough Council (GBC) Comments on the ExA's Observations on Drafting (Annex A to the Agenda for ISH1)		
ExA Point	**GBC Comment**	**Document Ref**
whether it is considered to be 'related housing development', or associated development with a residential element. Consideration should be given to whether the provision of pitches and related facilities on a traveller site fall under the definition of a dwelling (which is expressly excluded from the definition of associated development). **If the change of use to the proposed use arising from Work No. 7R is permissible within a DCO, then the Applicant is requested to consider further drafting for inclusion in the dDCO to secure the change of use of land and to impose those conditions on that new use that would be normal for such a consent, such as limiting the use of the land to Gypsies and Travellers etc.. Observations from the local planning authority about the nature of the conditions that would normally be applied to such a change of use will also be sought.** **Further consideration will also need to be given to the appropriateness of any such conditions being within a DCO (and thus only capable of being changed via a change to the DCO) or whether an alternative approach might be that the applicant submits an application for planning permission to the LPA (under the Town and Country Planning Act 1990)**		

Gravesham Borough Council (GBC) Comments on the ExA's Observations on Drafting (Annex A to the Agenda for ISH1)		
ExA Point	**GBC Comment**	**Document Ref**
seeking approval before works can take place on the existing traveller site, or any CA of that land is authorised. The views of the local planning authority on applicable policy and process for such an approach will be sought, as will views on timing, certainty (or otherwise) of outcome and the effects of a refusal or delay on the deliverability of the dDCO proposed development overall.		
2. Flexibility of operation		
Articles 2, 4, 5, 6 and generally – Definitions, maintenance and limits of deviation **Requirement 4(1) – "carve out" for preliminary works (The Preliminary Works EMP)**		
As a general point, the extent of flexibility provided by the dDCO should be fully explained, such as the scope of maintenance works and ancillary works, limits of deviation and any proposed ability of discharging authorities to authorise subsequent amendments. Drafting which gives rise to an element of flexibility should provide clearly for unforeseen circumstances but also define the scope of what is being authorised with sufficient precision. **One established DCO drafting approach to managing flexibility whilst providing clarity about and security for what is**	GBC made a point at ISH2 that the preamble to the list of ancillary works in Schedule 1 to the DCO (which was not in the first version of the DCO) appeared to allow ancillary works to be carried out outside the Order limits. In its response to Annex 1 [AS-089], the Applicant has confirmed that to be the case and has provided an explanation, saying that its powers of temporary possession and compulsory acquisition cannot be exercised outside the order limits, that the powers cannot be utilised where they give rise to materially new or materially different environmental effects and that there are other controls secured in the dDCO that are considered sufficient to provide appropriate protection in the use of the ancillary powers (e.g. Requirement 3 which only permits carrying out the authorised development in accordance with the preliminary scheme design which is secured in the relevant plans and drawings). Only one precedent is cited (Stonehenge) but GBC are not aware of any others.	Applicant's Response to Issue Specific Hearing (ISH) draft DCO [AS-089]

Gravesham Borough Council (GBC) Comments on the ExA's Observations on Drafting (Annex A to the Agenda for ISH1)		
ExA Point	**GBC Comment**	**Document Ref**
consented is to limit the works (or amendments to them) to those that would not give rise to any materially new or materially different environmental effects to those identified in the environmental statement. Section 17 of Advice Note 15 provides advice on tailpieces that is also relevant. **Observations on novel drafting in Article 2(10) above are relevant here.** **In relation to the flexibility to carry out preliminary works, the nature and extent of the works in the Preliminary Works EMP and hence of the "carve out" in Requirement 4(1) from the definition of "commencement" needs to be fully understood and justified. It should be demonstrated that all such works are de minimis and do not have environmental impacts which are unassessed or materially different from those assessed and or would themselves need to be controlled by requirement (see section 21 of Advice Note 15). None should be works the advance delivery of which could defeat the purpose of this or any other Requirement.** **Submissions from hearing participants on the adequacy and appropriateness of provisions providing flexibility will be sought.**	GBC maintain their concern about the breadth of this provision. The Applicant can, of course, acquire land compulsorily, and the fact that the exercise of the powers must not give rise to materially new or materially different environmental effects does not mean that there will be no effect. It would be the usual expectation in any planning application (and DCO) that the geographical extent of development would be subject to a "red line" of some sort, whereas the wording here could theoretically allow for development anywhere in Gravesham (or anywhere in England for that matter). GBC are examining the DCO carefully and where necessary will seek clarity of what precisely is being permitted (along with mitigation and compensation) to ensure it is all appropriately controlled. GBC are concerned to make sure that the definition of "preliminary works" is not too broad. GBC will continue to carefully consider it in detail, together with the contents of the preliminary works EMP. The definition of "preliminary works" in the requirements is important because of the way it interlinks with the definition of "commence" – "Commence" means beginning to carry out any material operation …. Forming part of the authorised development <u>other than preliminary works</u>" In turn, a number of the recommendations begin "No part of the authorised development is to commence until …". Paragraph 6.6 of the Explanatory Memorandum [APP-057] says: "the list of activities excluded from the definition of commencement closely follows the definition contained in the M42 Junction 6 Development Consent Order 2020, with the exception that (i) excluded utilities works would constitute commencement (which is defined); and (ii) site clearance and accesses is only permitted for advanced construction compounds (identified in the Code of Construction Practice)".	Explanatory Memorandum [APP-057]

Gravesham Borough Council (GBC) Comments on the ExA's Observations on Drafting (Annex A to the Agenda for ISH1)		
ExA Point	**GBC Comment**	**Document Ref**
	In addition to the identified exceptions, the draft Order departs from the precedent by allowing vegetation clearance as part of preconstruction ecological mitigation. GBC are considering the implications of this.	
3. Development consent etc granted by the order		
Article 3(3) – General disapplication of provisions applying to land		
The intent of this article is to avoid inconsistency with other relevant statutory provisions applying in the vicinity and is precedented in highways made Orders. The drafting in its current form has the effect of a general disapplication of other statutory provisions applying to land, including land lying beyond the Order land. However, the proposed development in this instance and the extent of the Order land are very large and understood to be larger than the extent of Order. It follows that the potential effect of the disapplication sought could be very large. **Notwithstanding other precedents, as much information as possible should be provided about "any enactments applying to land within, adjoining or sharing a common boundary" together with clarification about how far from the Order limits the provision might take effect. Additional diligence on and justification**	GBC are concerned about the geographical extent of the disapplication of legislation, and do not consider that the Applicant's response to the Annex [AS-089] meets its concerns. In particular the wording used is different from the usual precedents in that it refers to "adjoining or sharing common boundary" rather than "adjacent to". If there were a large plot of land outside the order limits and only a small part of its boundary shared a common boundary with the order land, then arguably the whole of the plot might fall within the article.	Applicant's Response to Issue Specific Hearing (ISH) draft DCO [AS-089]

Gravesham Borough Council (GBC) Comments on the ExA's Observations on Drafting (Annex A to the Agenda for ISH1)		
ExA Point	**GBC Comment**	**Document Ref**
for the disapplications sought are required, as in general terms a statutory disapplication is a matter that is specifically examined, to avoid the possibility of inadvertent adverse effects or frustration of the intent of Parliament arising from a disapplication of statutory provisions.		
Schedule 1 – Authorised Development Part 1 – Authorised Works		
The authorised works are stated as being co-equally a nationally significant infrastructure project (NSIP) arising under PA2008 s 16 (electric lines), s 20 (gas transporter pipelines, and s 22 (highways). **Having regard to the definition of an electric line NSIP in PA2008 s 16, is it clear that the proposed electric line works meet that definition? Is there any reason why alternatively the electric line works could not proceed as associated development (under PA2008 s 115) to the highway NSIP?** **Having regard to the definition of a gas transporter pipeline NSIP in PA2008 s 20, is it clear that the proposed gas transporter pipeline works meet that definition? Is there any reason why alternatively the gas transporter pipeline works could not proceed as associated development (under PA2008 s 115) to the highway NSIP?**	This point is being addressed in the joint legal note that is being produced by the applicant and local authorities. See above for GBC's comments on the geographical scope of Ancillary Works, which the Applicant has addressed in this section.	

Gravesham Borough Council (GBC) Comments on the ExA's Observations on Drafting (Annex A to the Agenda for ISH1)		
ExA Point	**GBC Comment**	**Document Ref**
4. Compulsory acquisition and extinguishment of rights		
Articles 25 – 34, Articles 35 – 36, Article 66 – Compulsory Acquisition (CA), Temporary Possession (TP) and related powers		
These provisions (and any relevant plans) should be drafted in accordance with the guidance in Advice Note 15, in particular sections 23 (extinguishment of rights) and 24 (restrictive covenants). **The effect of the drafting discussed here will be tested in Compulsory Acquisition Hearing 1 (CAH1) and may be the subject of oral or written submissions by Affected Persons. The purpose of this hearing will be to examine the basis for the drafting approach taken.** **As a general observation, compulsory acquisition (CA) of an interest in land held by or on behalf of the Crown cannot be authorised through an article. Ensuring clarity on this can be achieved through various means, for example:** **• by expressly excluding all interests held by or on behalf of the Crown in the book of reference land descriptions for relevant plots (where the DCO is drafted to tie compulsory acquisition powers to the book of reference entries);** **• by excepting them from the definition of the Order land (if 'Order land' definition is**	No comments at this stage. GBC does have land which is subject to compulsory acquisition and will raise any concerns later at the appropriate time.	

Gravesham Borough Council (GBC) Comments on the ExA's Observations on Drafting (Annex A to the Agenda for ISH1)		
ExA Point	**GBC Comment**	**Document Ref**
not used for other purposes in the DCO); or **• by drafting the relevant compulsory acquisition article to expressly exclude them.** **Where an applicant wishes to CA some other person's interest in the same land where there is a Crown interest, that can still only be done if the appropriate Crown authority consents to it under s135(1) of the Planning Act 2008.** **Where the applicant wishes to create and compulsorily acquire new rights over land, those rights should be fully, accurately and precisely defined for each relevant plot and the compulsory acquisition should be limited to the rights described. This could be done by drafting which limits the compulsory acquisition of new rights to those described in a schedule in the DCO or to those described in the book of reference. There should be no accidental over-acquisition.** **In all respects (including in relation to the book of reference), the applicant should follow Planning Act 2008: Guidance related to procedures for the compulsory acquisition of land published by DCLG (now MHCLG) in September 2013.**		
Article 27 time limit for the exercise of CA powers		

Gravesham Borough Council (GBC) Comments on the ExA's Observations on Drafting (Annex A to the Agenda for ISH1)		
ExA Point	**GBC Comment**	**Document Ref**
Article 27(1), time limit for the exercise of CA powers, allows 8 years for the powers to be exercised. This is longer than the normal 5 years which has been standard for most DCOs to date. The applicant will need to justify the requirement for an additional 3 years to exercise the CA powers in consideration of the additional interference with the rights of persons with an interest in the land and the possibility of blight. **Additionally, Article 27(3) defines the start date for the 8-year period as being the date after the expiry of the period within which a legal challenge could be made under s118 PA 2008, or after the final determination of any legal challenge made under that section. The more normal, certain and precedented drafting in DCOs to date is for a 5-year period to commence on the date of the making of the Order. This amended definition of the start date could have the effect of significantly adding to the 8-year period within which persons with an interest in land will have their land burdened with the threat of CA before it is compulsorily acquired. This represents an additional interference with their rights (over and above those that normally arise from CA) which must be justified. The start date definition adds an additional element of uncertainty, as it is not possible to know**	GBC consider that the usual 5 years is ample time for the exercise of compulsory powers and submits that a longer period should only be allowed in exceptional circumstances, in order to avoid the further continuing uncertainty and continuing blight that landowners would face. In its response to Annex A [AS-089], The Applicant cites the scale and complexity of the development as the reason for the 8 year period, and refers to Thames Tideway and the Hinkley Point C connection DCOs as precedents. These were exceptional cases, and GBC is not convinced that the scale of the works proposed for the LTC is any greater than some of the other DCOs that have been promoted by the Applicant, for example the A14, Black Cat and Stonehenge. The initial time limit for Phases One and Two of HS2 was 5 years and the power to extend has not been used. GBC considers that given the effects of ongoing blight, great care should be taken in allowing for an extension to standard accepted time limits for compulsory acquisition, because to do otherwise may lead to it becoming the norm for NSIPs. GBC understands that a time limit of more than 5 years is unprecedented for a highways DCO, some of which have involved lengthy linear projects with multiple junction arrangements. GBC agrees with the concerns of ExA on the start date being tied to the date on which any legal challenge is finally determined, particularly as the date of ultimate disposal of a legal challenge can never be certain, and the combination of this with the proposed 8 year period would lead potentially to a period of uncertainty and blight being extended to over ten years from the date of the making of the DCO. The Applicant cites only one precedent (Manston). GBC is aware of no others, either in DCOs or other regimes which authorise compulsory purchase.	Applicant's Response to Issue Specific Hearing (ISH) draft DCO [AS-089]

Gravesham Borough Council (GBC) Comments on the ExA's Observations on Drafting (Annex A to the Agenda for ISH1)		
ExA Point	**GBC Comment**	**Document Ref**
how long any challenge may take to be finally determined – and it is not impossible that one running through an appeal to the Court of Appeal and thence to the Supreme Court might take a long time. **Are these approaches to drafting acceptable, considering their effect on the rights of persons with an interest in land and the possibility of blight?**		
Article 28 restrictive covenants and transfer		
Article 28(1) of this order contains a wide power to impose undefined restrictive covenants over all of the order land (save for land contained in schedule 11 – see article 35(10)(a)). The Secretary of State for Transport's decision in the M4 Motorway (Junctions 3 to 12) (Smart Motorway) DCO) should be noted: "to remove the power to impose restrictive covenants and related provisions as he does not consider that it is appropriate to give such a general power over any of the Order land as defined in article 2(1) in the absence of a specific and clear justification for conferring such a wide-ranging power in the circumstances of the proposed development and without an indication of how the power would be used" (paragraph 62).	GBC have sympathy with the concern of ExA as regards the scope of article 28(1) but are keen to ensure that the DCO includes sufficient powers to ensure that mitigation areas are properly managed in cases where they remain under the ownership and/or control of third parties. That could be achieved by the imposition of covenants. GBC would be keen to ensure that the Applicant has the ability to retain power to do so in cases where article 28 is intended to enable preservation of mitigation areas. On the second point about consistency between article 8 and article 28, GBC agrees that if the principle is accepted that statutory undertakers should be able to exercise the powers to impose covenants, then ultimately the liability to pay compensation remains with the Applicant and GBC notes that the Applicant has agreed to address this.	

Gravesham Borough Council (GBC) Comments on the ExA's Observations on Drafting (Annex A to the Agenda for ISH1)		
ExA Point	**GBC Comment**	**Document Ref**
Other DfT decisions have included similar positions, eg, the A556 (Knutsford to Bowdon Improvement) DCO and the Lancashire County Council (Torrisholme to the M6 Link (A683 Completion of Heysham to M6 Link Road)) DCO. **The applicant has not explained in the Explanatory Memorandum (EM) (see para 5.122 – 5.130) [APP-057] why undefined restrictive covenants are justified in this case. The EM only contains a short justification for rights and restrictive covenants taken together and does not appear to provide reasons to justify a departure from the SoS' previous positions on this matter.** **Article 28 (3) and (4) purport to enable the power to acquire rights and impose restrictive covenants compulsorily to be transferred to a statutory undertaker (defined by reference to s127 PA 2008), save for the requirement to pay compensation. This provision is linked to the approach taken to the transfer of benefit article (Article 8), but the two provisions do not appear to be fully consistent in their drafting. The drafting of Article 8(3) may require amendment to reflect Article 28(3) and (4). It will be very important to ensure that the drafting of the DCO ensures that the undertaker always remains liable for all compensation for CA.**		

Gravesham Borough Council (GBC) Comments on the ExA's Observations on Drafting (Annex A to the Agenda for ISH1)		
ExA Point	**GBC Comment**	**Document Ref**
If the DCO is to permit CA powers to be exercised by unknown individuals or statutory undertakers whose ability to meet CA costs has not been examined, there is potential for a power to acquire to be transferred to a person who is not 'good' for the related liability in compensation. Precision of intent and effect are very important here. **At present Article 8(6) implies that article 28(3) enables the CA powers to be transferred to be exercised by persons other than statutory undertakers. Article 28(3) as presently drafted only permits the transfer of CA powers to statutory undertakers. If 28(3) reflects the correct intention, article 8(6) should be amended to remove reference to "any other person".**		
Articles 35 & 36 – Temporary Possession		
These articles follow a well-precedented form. However, Article 35(1)(a)(ii) and Article 36 (1)(b) enable Temporary Possession (TP) to be taken of any Order land (subject only to limited exceptions). The proposed development in this instance and the extent of the Order land are very large. It follows that the potential effect of the TP powers sought could be very large and could arise in locations in	No comment from GBC at this stage	

Gravesham Borough Council (GBC) Comments on the ExA's Observations on Drafting (Annex A to the Agenda for ISH1)		
ExA Point	**GBC Comment**	**Document Ref**
respect of which persons may not expect it to arise. **Notwithstanding other precedents, as much information as possible should be provided about land potentially capable of being subject to TP. Additional diligence on and justification for the extent of TP sought are required, as in general terms possession of land is a matter that is specifically examined, to avoid the possibility of inadvertent adverse effects.**		
Article 66 – power to override easements etc.		
Article 66 grants a wide power for the undertaker or those acting on its behalf, to interfere with interests and rights and breach restrictions on any land within the order limits either temporarily or permanently. Despite the inference in the EM that it only applies to land vested in the undertaker, the power is not limited to land subject to CA but applies to all land within the Order limits (including but not limited to that subject to temporary possession). It follows that it creates a class of acquisition applicable to persons who may not be aware that they are subject to it over a very large area of land. **As with any such general powers, diligence and care is required to ensure that unintended or unjustified**	No comments from GBC at this stage	

Gravesham Borough Council (GBC) Comments on the ExA's Observations on Drafting (Annex A to the Agenda for ISH1)		
ExA Point	**GBC Comment**	**Document Ref**
consequences do not flow from the operation of this power and that compensation can be paid at the right time and to the right persons. **Are all such persons considered to be Category 3 Persons. Are they all identified in the Book of Reference at Part 2?**		
5. Special category land		
If it is argued that Special Parliamentary Procedure (SPP) is not to apply (before authorising CA of land or rights in land being special category land), full details should be provided to support the application of the relevant subsections in PA2008 Sections 130, 131 or 132, for example (in relation to common, open space or fuel or field garden allotments) : **• where it is argued that land will be no less advantageous when burdened with the order right, identifying specifically the persons in whom it is vested and other persons, if any, entitled to rights of common or other rights, and clarifying the extent of public use of the land** **• where it is argued that any suitable open space land to be given in exchange is available only at prohibitive cost, identifying specifically those costs.**	Land designated by GBC as open space is subject to acquisition under the order (at Shorne Woods Country Park). Provision is made for replacement land under the Order. GBC is concerned to ensure that the replacement land is secured by the DCO and will be properly managed as open space thereafter. In that regard, GBC notes the unusual wording of article 40(1), which requires the replacement land to have been "acquired in the undertaker's name or is otherwise in the name of the persons who owned the special category land" which appears to be unprecedented. GBC would welcome an explanation as to why this wording was used, particularly what the words "in the undertaker's name" contemplate and whether "otherwise in the name of the person" is intended to be "otherwise in the ownership of the person". Also in the second part of the requirements in article 40(1) is that the Secretary of State merely needs to have certify that they have received (but not approved) a scheme for the provision of the replacement land. GBC considers that there ought to be a requirement for approval, even though there is a requirement that the scheme must not conflict with the outline LEMP. This is brought into focus by the requirement in article 40(1) for the local planning authority to be consulted. Given that there is no requirement for approval, it is not clear what the LPA would be consulted about.	

Gravesham Borough Council (GBC) Comments on the ExA's Observations on Drafting (Annex A to the Agenda for ISH1)		
ExA Point	**GBC Comment**	**Document Ref**
Article 40(1) prevents the special category land from vesting in the undertaker until the replacement land has been acquired and the SoS has certified that a scheme has been received from the undertaker for provision of the replacement land. The second element of this provision (certification by the SoS that a scheme has been received) appears to permit the undertaker to CA the special category land and rights without the scheme having been at that time fully implemented and the replacement land vested in those with rights in the special category land. The ExA asks whether this is sufficiently secure to enable the SoS to certify that replacement land will be given in exchange for the order land or right in accordance with s.131(4) and s.132(4)? **Although Article 40(3) provides that the applicant must implement the certified scheme, and that once it is implemented the replacement land must vest in the persons with an interest in the special category land, it would still appear to allow the undertaker to CA the special category land before the replacement land is available to use and without any particular security or limitation preventing or confining the prolongation of the time between the certification of a scheme and the completion of the transfer of the replacement land. If the undertaker did not**	GBC notes the Applicant's response to Annex A [AS-089] on the ExA's concerns that the scheme might not be implemented before the special category land vests. The Applicant says that there is no legislative provision in sections 131/132 which requires the replacement land to be laid out prior to acquisition of the replacement land. That is true but those sections are not about setting requirements for what has to happen per se when special category land is proposed to be taken, instead they set out the requirements that must be met to avoid Special Parliamentary Procedure. It is open for the ExA to recommend that the scheme should be implemented before the special category land vests. Article 40(1) also talks of rights "vesting" under the Order, which would suggest a reference to existing rights, not new ones, which are surely "acquired", if that is the intention.	Applicant's Response to Issue Specific Hearing (ISH) draft DCO [AS-089]

Gravesham Borough Council (GBC) Comments on the ExA's Observations on Drafting (Annex A to the Agenda for ISH1)		
ExA Point	**GBC Comment**	**Document Ref**
then implement the scheme or delays implementing the scheme it could fall to the LPA to seek to enforce this provision, which could take a significant time, during which persons would be deprived of access to the special category land. This does not seem to align in spirit with the intention of the legislative provisions on special category land, which seek (amongst other provisions) its replacement without a period of delay. **The drafting of Article 40 generally is confusing and the ExA remains unsure of whether it meets the intention of the applicant. For example, Article 40(1) refers to the "special category land" which appears to be defined in the article as including all the special category land; however Article 40(1) is presumably only intended to apply to the special category land which requires replacement land to be given in exchange (i.e not including "excepted land"). The applicant should consider revised drafting where possible to simplify this provision and clarify its intention.** **Article 40(6)(a) provides that the certified scheme "must not conflict with the outline LEMP". (The outline LEMP refers to the Outline Landscape and Ecology Management Plan). In general terms, such drafting should by preference be positive**		

Gravesham Borough Council (GBC) Comments on the ExA's Observations on Drafting (Annex A to the Agenda for ISH1)		
ExA Point	**GBC Comment**	**Document Ref**
and provide that it "must comply with the outline LEMP".		
6. Statutory undertakers and apparatus: Articles 37 & 38		
Where a representation is made by a statutory undertaker (or some other person) that engages section 127(1) of the Planning Act 2008 and has not been withdrawn, the Secretary of State will be unable to authorise compulsory acquisition powers relating to that statutory undertaker land unless satisfied of specified matters set out in section 127. If the representation is not withdrawn by the end of the examination, the ExA will need to reach a conclusion whether or not to recommend that the relevant statutory test has been met in accordance with s.127. **The Secretary of State will be unable to authorise removal or repositioning of apparatus (or extinguishment of a right for it) unless satisfied that the extinguishment or removal is necessary for the purpose of carrying out the development to which the order relates in accordance with section 138 of the Planning Act 2008. Justification will be needed to show that extinguishment or removal is necessary.**	No comments from GBC	
7. Planning permission: Article 56		

Gravesham Borough Council (GBC) Comments on the ExA's Observations on Drafting (Annex A to the Agenda for ISH1)		
ExA Point	**GBC Comment**	**Document Ref**
This article is intended to allow development not authorised by the DCO to be carried out within the Order limits pursuant to planning permission. This would appear to obviate the need, in such circumstances, to apply to change the DCO (through section 153 of the Planning Act 2008). This article should be justified.	As mentioned at the hearing, GBC are unclear at this stage whether some development that may follow as a consequence of the development will be brought forward under the powers of the DCO or later under a TCPA planning application, The example given was public facilities that may be provided at the proposed Chalk Park. The Applicant has provided further details in its response to Annex A as to what is proposed for Chalk Park, which GBC will consider further, and will discuss any further similar points on other sites in its area with the Applicant. In the meantime, GBC reserves its position on this issue. GBC acknowledges that obtaining an amendment to a DCO as a material or non-material change is not straightforward, but GBC is concerned that this article could give the Applicant reason for not dealing with some difficult issues, such as the two traveller sites affected in GBC's area.	
8. Classification of roads; 9. Clearways, prohibitions and restrictions; 10. Speed restrictions; Articles 15, 16 and 17		
Variation of the application of provisions in these articles is apparently possible using extensive means including by agreement. Arguably, this has the effect of disapplying PA2008 section 153 which provides a procedure for changing a DCO. Is this approach necessary and justified? There may be precedent in other made DCOs for the same drafting, but the Applicant needs to be clear under which section 120 power these articles are made and if necessary provide justification as to why the provisions are necessary or expedient to	No comment from GBC at this stage	

Gravesham Borough Council (GBC) Comments on the ExA's Observations on Drafting (Annex A to the Agenda for ISH1)		
ExA Point	**GBC Comment**	**Document Ref**
give full effect to any other provision of the DCO.		
11. Temporary stopping up and restriction of use of streets		
Notwithstanding other precedents, justification should be provided as to why the power is appropriate and proportionate having regard to the impacts on pedestrians and others of authorising temporary working sites in these streets. **The power to temporarily stop up streets and use as a temporary working site in article 12 is not limited to streets within the Order limits. To the extent that this can take effect outside the Order limits this is a wide power that needs to be justified. It is also uncertain in effect.** **Article 14 relates to permanent stopping up of streets. Should 14(4)(e) be a new paragraph (5)?**	No comment from GBC at this stage	
12. Power to alter layout of streets: Articles 53 & 55		
This is a wide power – authorising alteration etc. of any street within the Order limits. It should be clear why this power is necessary and consideration given to whether or not it should be limited to identified streets, locations or in relation to specific Works.	No comment from GBC at this stage	
13. Disapplication or amendment of legislation/ statutory provisions: Articles 53 and 55		

Gravesham Borough Council (GBC) Comments on the ExA's Observations on Drafting (Annex A to the Agenda for ISH1)		
ExA Point	**GBC Comment**	**Document Ref**
The guidance in section 25 of Advice Note 15 should be followed and, if not already provided, additional information sought such as **• the purpose of the legislation/statutory provision** **• the persons/body having the power being disapplied** **• an explanation as to the effect of disapplication and whether any protective provisions or requirements are required to prevent any adverse impact arising as a result of disapplying the legislative controls** **• (by reference to section 120 of and Schedule 5 to the Planning Act 2008) how each disapplied provision constitutes a matter for which provision may be made in the DCO.** **Where the consent falls within a schedule to the Infrastructure Planning (Interested Parties and Miscellaneous Prescribed Provisions) Regulations 2015 evidence will be required that the regulator has consented to removing the need for the consent in accordance with s.150 Planning Act 2008.** **Article 55 is headed the application of local legislation, but it is actually an article**	GBC have not yet considered in detail the impact of the disapplication of the local enactments listed in article 55. GBC will examine: Kent County Council Act 1981 Channel Tunnel Rail Link Act 1996 Thong Lane Sportsground Byelaws 1970	

Gravesham Borough Council (GBC) Comments on the ExA's Observations on Drafting (Annex A to the Agenda for ISH1)		
ExA Point	**GBC Comment**	**Document Ref**
excluding the application of enactments, orders and byelaws where they are inconsistent with the order.		
14. Crown rights - Article 43		
The word "take" should be removed from this article.	No comment	
15. Felling or lopping of trees and removal of hedgerows **16. Trees subject to tree preservation orders** **Articles 23 & 24**		
The guidance in section 22 of Advice Note 15 should be followed. If it hasn't been followed justification should be provided as to why this is the case. **If the 'felling or lopping' article is drafted to allow such actions to trees both within and 'near' the Order limits, should consideration be given to amending that, so that it only applies to trees within or 'encroaching upon' the Order limits?**	GBC will want to make sure that all the relevant trees have been identified in the ES, and that proper investigations have been carried out in that regard. Therefore, more research is to be done by GBC on the National Highways environmental surveys and whether it is sufficiently detailed and will liaise with Woodland Trust.	
17. Procedure for discharge of requirements: Article 65 – Schedule 2 Part 2		
Advice Note 15 provides standard drafting for articles dealing with discharge of requirements. If this guidance hasn't been followed justification should be provided as to why this is the case.	There are no rights of appeal in relation to requirements in Schedule 2 part 2, either for the Applicant or for the local planning authority. The latter is one of the reasons GBC considers that the LPA should be the discharging authority. More generally on discharge of requirements, the time limits for responding to consultations under paragraph 20 of Schedule 2 must be sufficient to allow	

Gravesham Borough Council (GBC) Comments on the ExA's Observations on Drafting (Annex A to the Agenda for ISH1)		
ExA Point	**GBC Comment**	**Document Ref**
In the South Humber Energy Bank Centre DCO BEIS Secretary of State removed an article which sought to apply the s.78 and s.79 TCPA 1990 appeal provisions to the discharge of requirements and replaced it with a specific appeal procedure in the article itself. BEIS Secretary of State explained in their decision letter that the specific appeal procedure was the "preferred approach for appeals". **Advice Note 15 suggests that the specific appeal procedure should be included in a schedule to the DCO rather than in the article itself. Although the Secretary of State in South Humber did include the specific procedure in the article itself, the decision letter refers to the specific appeal procedure being the preferred approach rather than the inclusion of it in the article. It is therefore considered acceptable for the specific appeal procedure to be set out in a schedule to the DCO as set out in the Advice Note.** **It is also worth noting that the South Humber decision is from BEIS Secretary of State and does not necessarily reflect the views of any other Secretary of State.** **Article 65 permits a number of appeals to the SoS, including from an LPA decision under certain articles and a notice issued under the Control of Pollution Act. I have**	GBC to consider and provide a proper response. It is likely that a number of applications will be made together or in short succession. Paragraph 20 gives 28 days at present with an ability for an agreement to be made to extend that period, agreement not to be unreasonably withheld. But of course there can be no guarantee of an agreement. GBC considers that the period should be extended to 42 days. In a similar vein, in order to assist the process, GBC considers that the DCO should be amended, or a commitment given by the Applicant so that local planning authorities will be properly consulted in advance, and a running future timetable of applications and consultations is maintained so applications and consultations do not arrive without notice. GBC notes the response of the Applicant to the ExA's query about article 65. GBC's main concern about article 65 is about paragraph (1)(d) which would replace the existing section 60 and 61 Control of Pollution Act appeals procedure (by which appeals could be made by the Applicant against the local authorities' decisions to the magistrates' court) with an appeal to the Secretary of State. This is another example where GBC considers that there are questions about the independence of the process being sought by the Applicant and, in this case, there appear to be very few precedents. Only two highways DCOs are mentioned by the Applicant in its response to Annex A [AS-089], and it is noted that the Secretary of State removed the provision in another case. The Applicant argues that an appeal process to the Secretary of State provides more certainty as regards timescales but provides no evidence of the magistrates' courts process having caused difficulties on other DCOs where it hasn't been disapplied, or of the local courts in this case being a cause for concern. The Applicant should be put to strict proof of the need for this provision.	Applicant's Response to Issue Specific Hearing (ISH) draft DCO [AS-089]

Gravesham Borough Council (GBC) Comments on the ExA's Observations on Drafting (Annex A to the Agenda for ISH1)		
ExA Point	**GBC Comment**	**Document Ref**
not seen this provision before and query whether the SoS will want to undertake this role? In relation to appeals from notices under the Control of Pollution Act the applicant will need to explain why it is necessary for the provisions in the DCO to replace the existing appeal procedures under the Control of Pollution Act and explain any discrepancies between the procedures set out in the DCO and those that would normally apply. A direct comparison between the two may be helpful.		
18. Benefit of the Order: Article 7		
Where this article is drafted so as to allow any transfer of benefit by the applicant (undertaker) to any other named person or category of person without the need for the Secretary of State's consent, then the applicant should provide full justification as to why a transfer to such person is appropriate. Where the purpose of the provision is to enable such person(s) to undertake specific works authorised by the DCO the transfer of benefit should be restricted to those works. If the provision seeks to permit transfer of compulsory acquisition powers the applicant should provide evidence to satisfy the Secretary of State that such person has sufficient	GBC notes this point and its main concern would be to ensure that all the obligations on the Applicant (including obligations contained in documents other than the DCO), as well as the powers, where it is appropriate, would be transferred to the transferee. So for example, this might include obligations in a section 106 agreement.	

Gravesham Borough Council (GBC) Comments on the ExA's Observations on Drafting (Annex A to the Agenda for ISH1)		
ExA Point	**GBC Comment**	**Document Ref**
funds to meet the compensation costs of the acquisition. **See 23 below in relation to references to arbitration in this article.**		
19. Discharge of Water: Article 19		
The applicant should be aware of and mindful of section 146 of the Planning Act 2008.	No comment from GBC at this stage	
20. Temporary Possession: Articles 35 & 36		
Temporary possession is not itself compulsory acquisition. **Articles giving temporary possession powers will be considered carefully to check whether or not they allow temporary possession of any land within the Order limits, regardless of whether or not it is listed in any Schedule to the DCO which details specific plots over which temporary possession may be taken for specific purposes listed in that Schedule. If they do, then the applicant should justify why those wider powers (which also allow temporary possession of land not listed in that Schedule) are necessary and appropriate and explain what steps they have taken to alert all landowners, occupiers, etc. within the Order limits to this possibility.**	On the issue of notice, GBC notes that in other schemes, Promoters have agreed to longer than 28 days. On Phase 2a of HS2, for example (a scheme that is considerably more complex) the Promoter committed to a period of 3 months' notice (see paragraph 6.1.2 of the Phase 2a Farmers and Growers Guide). GBC sees no reason why the period should not be extended further in the case of the Lower Thames Crossing, particularly considering that the period for which land could be occupied could extend to a number of years.	HS2 Phase 2a Farmers and Growers Guide

Gravesham Borough Council (GBC) Comments on the ExA's Observations on Drafting (Annex A to the Agenda for ISH1)		
ExA Point	**GBC Comment**	**Document Ref**
If not already clearly present, consideration should also be given to adding in a provision obliging the applicant (undertaker) to remove from such land (on ceasing to occupy it temporarily) any equipment, vehicles or temporary works they carry out on it (save for rebuilding demolished buildings under powers given by the DCO), unless, before ceasing to occupy temporarily, they have implemented any separate power under the DCO to compulsorily acquire it. **Given the parliamentary approval to the temporary possession regime under the Neighbourhood Planning Act 2017 ('NPA 2017'), which were subject to consultation and debate before being enacted, should any provisions relating to notices/counter notices which do not reflect the NPA 2017 proposed regime (not yet in force) be modified to more closely reflect the incoming statutory regime where possible? As examples:** **• The notice period that will be required under the NPA 2017 Act is 3 months, longer than the 28 days required under article 35. Other than prior precedent, what is the justification for only requiring 28 days' notice in this case?** **• Under the NPA 2017, the notice would also have to state the period for which the**		

Gravesham Borough Council (GBC) Comments on the ExA's Observations on Drafting (Annex A to the Agenda for ISH1)		
ExA Point	**GBC Comment**	**Document Ref**
acquiring authority is to take possession. Should such a requirement be included in this case? **• Powers of temporary possession are sometimes said to be justified because they are in the interests of landowners, whose land would not then need to be acquired permanently. The NPA 2017 Act provisions include the ability to serve a counter-notice objecting to the proposed temporary possession so that the landowner would have the option to choose whether temporary possession or permanent acquisition was desirable. Should this article make some such provision – whether or not in the form in the NPA 2017?** **Article 36(13) defines the maintenance period as the period of 5 years beginning with the date on which that part of the authorised development is first opened for use – is it sufficiently clear what this means? Will it be obvious what constitutes a "part" and when that "part" is "first open for use"?**		
21. Arbitration: Article 64		
Whilst arbitration provisions have been a dynamic field of practice in dDCO drafting, recent decisions suggest that it is unlikely	GBC notes the Applicant's response to Annex A [AS-089] on this point and in particular the prospect that unless there were an exclusion, then article 64 could apply to decisions of the Secretary of State, and in particular, decisions	

Gravesham Borough Council (GBC) Comments on the ExA's Observations on Drafting (Annex A to the Agenda for ISH1)		
ExA Point	**GBC Comment**	**Document Ref**
that a consenting Secretary of State will allow the arbitration provision wording to apply arbitration to decisions s/he, or, if relevant the Marine Management Organisation ('MMO') may have to make on future consents or approvals within their remit. **By way of example:** **The Secretary of State for BEIS included the following drafting in the arbitration article in the Norfolk Vanguard Offshore Windfarm DCO and the draft Hornsea Three Offshore Windfarm DCO (published with a minded to approve decision) to remove any doubt about the application of arbitration to decisions of the Secretary of State and the MMO under the DCO:** **Any matter for which the consent or approval of the Secretary of State or the Marine Management Organisation is required under any provision of this Order shall not be subject to arbitration.** **The Secretary of State for BEIS also agreed with an ExA recommendation to remove reference to arbitration in the transfer of the benefit article and the deemed marine licences (DMLs) in the Hornsea and Norfolk Vanguard DCOs. The Hornsea ExA recommendation report at 20.5.9 details the reasons for removal from the transfer of benefit article, and at 20.5.17 – 20.5.24**	or approvals which the Secretary of State may be called upon to give under the dDCO, for example under the Requirements in Schedule 2 to the dDCO. GBC have expressed concerns elsewhere about the lack of any appeal mechanism in Schedule 2, so would be averse to the arbitration provision being amended in the way proposed by the Applicant if to do so would close down a dispute mechanism for GBC in relation to discharge decisions (assuming that the DCO would continue to provide that the Secretary of State is the discharging authority). No other comment from GBC at this stage	Applicant's Response to Issue Specific Hearing (ISH) draft DCO [AS-089]

Gravesham Borough Council (GBC) Comments on the ExA's Observations on Drafting (Annex A to the Agenda for ISH1)		
ExA Point	**GBC Comment**	**Document Ref**
regarding removal from the DMLs. The Thanet Extension, East Anglia ONE North and East Anglia TWO Examinations addressed similar considerations. Whilst these are all energy cases, the same point appears to apply, that an arbitration provisions should not apply to the exercise of decision-making powers by a duly constituted and authorised public authority or Minister of the Crown. **It should also be noted that the Secretary of State removed the following from the arbitration clause in both DCOs:** **Should the Secretary of State fail to make an appointment under paragraph within 14 days 42 of a referral, the referring party may refer to the Centre for Effective Dispute Resolution for appointment of an arbitrator.**		
22. Defence to proceedings in respect of statutory nuisance: Article 58		
Are the controls on noise elsewhere in the DCO sufficient to justify the defence being provided by this article to statutory nuisance claims relating to noise? If the defence has been extended to other forms of nuisance under section 79(1) Environmental Protection Act 1990, the same question will apply to those nuisances.	GBC notes that recent highways DCOs (Black Cat, Wisley and Silvertown, for example) limit the scope to paragraph (g) only - noise from premises - and would like to know why in this case it is thought necessary to extend beyond that The Applicant has included the following paragraphs of section 79(1) within the scope of article 58 and GBC considers that the Applicant should fully justify each, by reference to precedent and examples from any other schemes where not including them has caused difficulties:	A428 Black Cat to Caxton Gibbet Development Consent Order 2022 https://www.legislation.gov.uk/uksi/2022/934/article/46

Gravesham Borough Council (GBC) Comments on the ExA's Observations on Drafting (Annex A to the Agenda for ISH1)		
ExA Point	**GBC Comment**	**Document Ref**
	(d) any dust, steam, smell or other effluvia arising on industrial, trade or business premises and being prejudicial to health or a nuisance; (e) any accumulation or deposit which is prejudicial to health or a nuisance; (fb) artificial light emitted from premises so as to be prejudicial to health or a nuisance;] (g) noise emitted from premises so as to be prejudicial to health or a nuisance; (ga) noise that is prejudicial to health or a nuisance and is emitted from or caused by a vehicle, machinery or equipment in a street .	M25 Junction 10/A3 Wisley Interchange Development Consent Order 2022 https://www.legislation.gov.uk/uksi/2022/549/article/43 Silvertown Tunnel Order 2018 (SI 2018/574) https://www.legislation.gov.uk/uksi/2018/574/article/63
23. Deemed Marine Licences (DMLs)		
N/A	GBC has no comments on the DML	
24. Powers in relation to relevant navigation and watercourses: Article 18		
N/A	GBC has no comments on this article	
25. Suspension of road user charging: Article 46		
Article 46(1) provides that the SoS may suspend the operation of any road user charge imposed under article 45 if they consider it necessary to do so in the event	No comment from GBC at this stage on this particular provision. GBC makes separate representations on the question of a Gravesham residents discount for the existing Dartford Crossing.	

Gravesham Borough Council (GBC) Comments on the ExA's Observations on Drafting (Annex A to the Agenda for ISH1)		
ExA Point	**GBC Comment**	**Document Ref**
of an emergency… However, 46(7) defines "emergency" as any circumstance which the undertaker considers is likely to cause danger… Should 46(7) say SoS instead of undertaker? Or should 46(1) refer to the undertaker instead of the SoS?		
Observations on Requirements		
Requirement 1 Preliminary works		
These works are permitted prior to discharge of any requirement. Consideration should be given to whether it is permissible to undertake these works before discharge of the requirements which secure essential mitigation	See comments earlier in relation to point 2, flexibility of operation.	
Requirement 3 Detailed design		
The requirement firstly states that the authorised development must be designed in accordance with the design principles scheme etc but then contains a tailpiece which essentially permits the SoS to amend these documents. Although this is limited to amendments which do not give rise to any material new or materially different environmental effects, consideration should be given to whether this flexibility is necessary and acceptable.	GBC also notes that any departure from the design principles scheme etc can only be made following consultation with the local planning authority. That provides some comfort but GBC agrees that there must be proper justification for any such departure. Some of the design principles conflict with one another (as would be expected for general ones) – for example, detailed design of Green Bridges where the best place for planting may not be optimum for ecology or the footpath link. On a matter of detail, this provision and others refer to the "relevant planning authority" which is defined in article 2 as the planning authority for the area to which the provision relates. Whilst it may be said to be easy to imply that this should be GBC in its area, the point is that Kent County Council (KCC) are also a planning authority in respect of various functions, so the definition	

Gravesham Borough Council (GBC) Comments on the ExA's Observations on Drafting (Annex A to the Agenda for ISH1)		
ExA Point	**GBC Comment**	**Document Ref**
	could be tighter. This point is dealt with in GBC's post-hearing written representations.	
Requirements 4, 5, 10,11		
The phrase "substantially in accordance with" is uncertain and imprecise.	GBC sympathises with the ExA's assessment and notes the Applicant's response [AS-089]. GBC understands the point made by the Applicant about the need to allow some differential between successive versions of a document and would be happy to explore alternative wording. The removal of the word "substantially" is one possibility.	Applicant's Response to Issue Specific Hearing (ISH) draft DCO [AS-089]
Requirements 7,8,9,10,11,16		
The requirements permit discharge for part of the authorised development. Is it sufficiently clear what a "part" of the authorised development is?	GBC has no comments on this issue at this stage.	
Requirement 9		
Is the phrase "reflecting the relevant mitigation measures" sufficiently certain?	GBC has no comments at this stage but will continue to review this wording as the examination progresses.	
Requirement 13: Travellers' site		
See comments above on Work 7R and questions regarding the acceptability of provision of the site via the DCO in principle. **This requires replacement of a Traveller site. The only consultation required is consultation of "any person the undertaker considers appropriate". The ExA understands that the existing traveller site**	The travellers' site is not in the area of GBC	

Gravesham Borough Council (GBC) Comments on the ExA's Observations on Drafting (Annex A to the Agenda for ISH1)		
ExA Point	**GBC Comment**	**Document Ref**
is currently occupied and the closure of it may represent an interference with Human Rights Act 1998 (HRA1998) Schedule 1 Part 1 Article 8 rights of the occupants, as caravans may be their only home. The ExA's starting point is that the undertaker should be required to consult with all occupants, the LPA and the highways authority on their proposal for the replacement site. **Should there also be a requirement to replace like for like the facilities and number of pitches on the existing site?** **It also contains a deemed approval provision which seems unlikely to be appropriate when the undertaker is in effect applying for approval of permission for a number of homes for travellers.** **Should there be a further provision in the DCO granting a specific planning permission for use of works number 7R as a traveller site to ensure that it will remain as a traveller site in perpetuity and to ensure that it is controlled by the appropriate conditions. Or if this is not permissible (see comments above) then should there be a requirement to submit a planning permission application to the LPA?**		
Requirement 15 Thurrock Flexible Generation Plant		

Gravesham Borough Council (GBC) Comments on the ExA's Observations on Drafting (Annex A to the Agenda for ISH1)		
ExA Point	**GBC Comment**	**Document Ref**
N/A	GBC has no comment on this Requirement	
Part 2, discharge of requirements Requirement 18		
Is it permissible or appropriate to have a deemed discharge provision relating to the discharge of requirements that secure essential mitigation? **Is it clear that the Secretary of State is content with the extent of the discharging powers provided to them by the Order?** **Where the Secretary of State is the discharging authority, are there any circumstances in which there should be additional obligations to seek the views of other local and public authorities before discharge?** **Is there any argument that persons other than the Secretary of State (including local and other public authorities) should be the discharging authorities for any particular requirements and if so which ones?**	On the first point (which refers to paragraph 18(2) of Schedule 2)), GBC acknowledges that there must be some provision in the DCO to cater for cases where no decision is made by the discharging within the relevant time frame set out in the DCO. In most DCOs, where the LPA is the discharging authority, there would be a right of appeal for the applicant. This is another reason for GBC's view that the LPA should be the discharging authority. GBC has no comment on the second point: it is for the Secretary of State. On the third point, GBC would suggest that if the SoS is to be the discharging authority then the SoS should be required to seek the views of the LPA if for example an application has been made for discharge which is not in accordance with the response given by the LPA in a consultation. Whilst this would not meet GBC's fundamental objection to the SoS being the LPA, it would provide some additional comfort. GBC refers to its written submissions relating to ISH2 where this topic is covered.	