Response to Issue Specific Hearing - ISH 2 draft DCO

Introduction

Further to the Issue Specific Hearing 2 ('ISH 2') on the draft Development Consent Order ('dDCO') held on 21 June 2023, the Council sets out below its comments on the Action Points requested by the ExA (EV-030a). Then following this, this response does not analyse every point in the dDCO, instead focusing on the points raised in Annex A to the agenda to ISH 2. A more detailed analysis of the dDCO can be found in the Council's LIR. The Council's comments are made without prejudice to further comments the Council makes on the dDCO as further analysis is undertaken of the documents.

For the Council the following key issues are highlighted by the comments of the ExA in Annex A:

- **Flexibility** – the Council does not disagree that a large degree of flexibility is necessary and in the public interest in relation to a scheme such as LTC. It is acknowledged that the scheme of this scale cannot at this stage predict every issue and therefore the Examination process needs to examine the proposals taking into account the fact that there may be some variation.

  This flexibility can be seen in the dDCO in a number of places including the Limits of Deviation (Article 6), ancillary works (Schedule 1), the disapplication of legislation (Articles 54 and 56) and the limitations on the use of CPO powers (Article 27). However, the applicant fails to acknowledge the negative impacts of this flexibility. The fact that it causes significant uncertainty about who will be impacted and the length of time they will be impacted for needs to be considered. This uncertainty impacts the ability of residents and other stakeholders to engage in the process (because they are unsure if they will be affected, or if they will be affected, the extend of the impact). It also potentially has a chilling effect on investments in and around the vicinity of the scheme, as the uncertainty surrounding the impact of the dDCO order discourages those wanting to make long term financial commitments.

  The applicant highlights in their submission on 6 July 2023 on Annex A that 'there is a public interest in flexibility – it ensures that the Project can be delivered in both an environmentally sensitive and cost-effective way, avoiding where possible unforeseen circumstances and potential impediments to delivery. The flexibility afforded by the dDCO has been assessed as part of the environmental impact assessment'. However, the applicant does not acknowledge that flexibility is not always in the public interest and can have non-environmental effects. For example, it does not acknowledge the potential economic harm caused by the uncertainty or the negative impacts on residents and other stakeholders. This is a significant omission.

- The **lack of explanation for novel approaches**. This is considered further in Annex A, however, the applicant appears to rely heavily on the use of precedent to justify the use of provisions, contrary to paragraph 1.5 of Advice Note 15.

- The **loss of control especially in relation to who is the discharging authority on deemed consent**. This is considered further in Annex 1 below, however, as with flexibility, the applicant has solely focused on what is in the best interest of the applicant, without considering the wider impacts on the Council, its residents and other stakeholders (including other public bodies). It is not sufficient to assert that the scheme as a public interest and should not be delayed. Whilst the Council has concerns regarding the benefits of the scheme as a whole, irrespective of this the applicant needs to

weigh the benefit of convenience to it (which is likely to reduce delay and cost to the applicant), with the costs of this approach in terms of negative impact upon other public bodies, private businesses and residents. This analysis is required to determine an appropriate balance which delivers the greatest public benefit.

- The **extensive nature of compulsory powers sought**, with a lack of consideration to reducing those powers, for example, by reducing the time period for implementation across parts of the Order Limits land. This is explored further in Annex 1 below

Action Point 4

Please see separate note (as Annex 2 below) produced by the applicant and the Council has no objection to those views within the Note.

In summary, the Council does not object to gas and electricity works, when they meet the threshold for being an NSIP, to be treated as such. Where the thresholds are not met, then the applicant will need to demonstrate that they are associated development pursuant to section 115 of the Planning Act 2008. In either scenario it is key that there is certainty is what is being proposed and that there has been effective consultation.

The Council is concerned that the details of these works have not been adequately consulted upon and where they have been consulted upon, the Council's comments do not appear to have been taken into account, as set out in the Council's Submission at Procedural Deadline C (PDC-008).

Action Point 6

Action point 6 asks the Council whether the consultation arrangements with the Council pursuant to the discharge of requirements by the Secretary of State is appropriate. Without prejudice to the fact that the Council considers that for many of the Requirements in Schedule 2 it is the most appropriate discharging authority (see comments below in Annex 1), the Council is concerned by the proposed consultation arrangements. Importantly, there are no details in the dDCO as to how long this consultation will be or how it will take place. However, it is understood from the applicant verbally that the consultation period will be 4 weeks, with the ability to extend to 6 weeks. Accordingly the Council contends that the setting of an 8 week discharge period for the Secretary of State then only allowing 4 to 6 weeks for consultation with local planning authorities is not appropriate, as it does not take into account the complexities of individual matters being discharged. It is also unclear precisely who will be consulted. The Council suggest that a protocol is agreed during the Examination process, which sets out who should be consulted in specific circumstances.

The Council proposes a minimum consultation period of 21 working, which can be extended by up to 50% of the consultation period unilaterally by the Council. The exact length of the consultation can be more than this (but not less). Discussions on consultation length should be held with the Council in advance. The Council suggest that broad agreement on consultation length is reached as part of the protocol discussed above. The consultation period is predicated on all information being provided at the start. If significant additional information is provided, then the consultation period should reset.

Action Point 8 – regarding the ExA's Annex A

Please see our comments on the ExA's Annex A in the Table below.

ExA Observations on Drafting

General Observations

Provision	Issues or questions raised	Thurrock Council Comments
1 Novel Drafting		
	The purpose of and necessity for any provision which uses novel drafting and which does not have a clear precedent in a made DCO or similar statutory order should be explained in the Explanatory Memorandum. The Planning Act 2008 power on which any such provision is based should also be identified in the Explanatory Memorandum. The drafting should: • be unambiguous; • be precise; • achieve the purpose sought for the proposed development by the applicant; • be consistent with any related definitions or expressions in other provisions of the dDCO; and, • follow guidance and best practice for SI drafting.	The Council has previously raised this point. It is also the view of Thurrock Council that the inclusion of novel drafting in one DCO does not mean that this is the current established preference of the SoS (see also paragraph 1.5 of Advice Note 15). There are a number of instances where wording has been chosen to provide a significant amount of flexibility to the applicant, with little explanation except that a project of this size should not be delayed. For example, no explanation has been provided to the Council as to why such broad Order Limits are in the public interest (Article 6), how deemed consent is in the public interest (Articles 12,17,19,21 and Requirement 13) and how the applicant intends to establish whether remains were interred more than a hundred years ago (Article 22). The Council has many broader comments on the DCO (please refer to the Council's the LIR). However, in this document the Council will only be commenting on the specific points raised by the ExA.
Article 2(10) –	This is apparently novel drafting which seeks to amend the meaning of '*materially new or materially different*	It is accepted that similar wording has been used in other the applicant DCOs. The Council does not.

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	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 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. See comments in section 2 below.	The Council's main concern is that although new measures might avoid, remove or reduce an adverse effect reported in the ES, the proposed wording does not consider other adverse effects, which are not in the ES (for example, land ownership and economic effects). This is especially true in relation to Article 6 and the extension of the maximum limits of deviation. This creates uncertainty, which makes it more difficult for those affected by the proposed DCO to fully engage in the examination process. The applicant notes that the purpose of this wording is to limit the need for material and non material amendments to the DCO, as this would cause delay. It is the Council's position that although delay should be minimised, it should not be at the expense of issues being properly considered. Significant changes, for example, exceeding the stated Limits of Deviation, should in the Council's opinion usually go through the material or non-material amendment process to ensure that all impacts are properly considered.
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).	Please see comments below in Section 4. The applicant has adopted consistent/standard periods for temporary occupation of land. The Council strongly considers that the applicant should have given greater consideration as to the extent, in each instance and on a plot by plot basis, whether a shorter period is sufficient. This has been rejected

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		by the applicant, but the Council consider could be achieved with simple drafting.
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.	Please see comments below in Section 4 .
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')* 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	The Council does not object to these provisions. Although Hillside was not a statement of new law – there was, and still is, some ambiguity in this area that future cases are going to have to resolve. For certainty, the Council consider it beneficial that this provision is included. In the Council's opinion this falls within the range of broad powers for the DCO, see Section 120 of the Planning Act 2008. However, the Council suggests that the applicant should identify where this may be applied as this will provide added certainty.

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	planning authority in a DCO. The views of the relevant local planning authorities will be sought on this point. In relation to Article 56(4), the ExA notes that *Hillside* relates to the grant of a planning permission, and it is not clear from the judgment that it would apply equally to consent granted under a DCO. The Applicant's legal submissions on this point are sought. On a drafting point, there appear to be some words missing in the second line of Article 56(4): '*under the authority of a granted under section 57 of the 1990 Act*'. Amended drafting is sought.	
Work No. 7R – Traveller site & Requirement13	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 location and broad design of the traveller's site is something that the Council and the applicant broadly agree on and is covered in Design Principles, a secured Indicative Plan, the Requirement 13 and the applicant has offered an additional commitment to be added into the SAC-R (APP-554). However, the Council notes and agrees with the points raised by the ExA. Although Section 120(3) and (4) is very broad, Section 115 of the PA 2008 does limit what consent can be granted for. Dwelling is not defined and our concern is that a Traveller site would not fall under the definition of a dwelling. The applicant's additional submissions of 6 July do not address this point. The Council are not aware of any precedent for similar provisions in other DCOs. The Council does not consider that conditions are required, as consent for the use of the site is contained within the DCO. The Council are aware that the applicant has agreed to update the Stakeholder Actions and Commitment Register to secure the occupation of the site prior to the start of significant

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	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 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) 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	construction works (as referred to above).

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	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 preliminaryworks (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 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	The issue of excess flexibility is a key concern to the Council. strongly agree on the issue of flexibility. It is accepted that a scheme of this size requires some flexibility to overcome unforeseen technical issues and avoid the need to amend the DCO. However, that flexibility needs to be within defined parameters, so that those potentially impacted can input into the DCO process. The Council's main concern is about the uncertainty caused by flexibility, especially in relation to Order Limits. No explanation explaining why this is required has been provided, despite requests to do so. Notwithstanding that, in light of the lack of design work, the applicant is unable to demonstrate that every parcel identified is required there remains a risk that the Limits of Deviation could extend the Project onto land not previously within the Order Limits (if the deviation does not give rise to any materially new or materially different environmental effects in comparison with those reported in the Environmental Statement). The Council requires sufficient certainty to the scheme, to allow it to fully comment on the impacts, and allow those potentially affected to take an effective role in the Examination. In relation to the Preliminary Works EMP, this is a new concept when compared with the previous DCO. Thurrock Council has not been consulted on this document (ES Appendix 2.2, Annex C). In our the Council's opinion the proposed preliminary works could have quite significant environmental effects (they involve vegetation clearing). If they were part of the EMP (Second

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	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.	Iteration) the Council would have to be consulted. Accordingly the applicant needs to fully explain how all environmental considerations have been taken into account. It is also of concern that the purpose of the Preliminary Works EMP is to trigger the need to begin the development pursuant to Requirement 5. This appears to be an acknowledgment that the applicant does not intend to commence substantive works within the 5-year period. Delaying the commencement of works further adds to the uncertainty of those potentially impacted, having a chilling effect on local development and unfairly impacting local residents. It also impacts the validity of the assessments undertaken in relation to other aspects underpinning the application, such as traffic modelling and environmental impacts. The Council understands the need to balance flexibility for the applicant with certainty for local residents. It is the Council's position that the balance has not been set fairly in the current drafting of the DCO, with too much emphasis on flexibility for Thurrock. The applicant's response of 6 July does not address how the balance of flexibility vs. certainty for local residents has been set. Instead it relies upon a broad statement that flexibility is in the public interest, without considering the extent of that flexibility and negative impacts associated with that flexibility.
3. Development consent etc granted by the order		
Article 3(3) – General disapplicationof 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	The wording 'adjoining or sharing a common boundary' causes uncertainty as the extent of other enactments being subject to the provisions of the draft Order. The Council suggest that these refer to specific areas of land to avoid uncertainty. The applicant's position that 'how far this extends as a matter of fact and degree to be considered on a case-by-case basis', (comments from 6 July 2023)

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	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 for the dis-applications 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.	creates significant uncertainty. Considering the scale of development this uncertainty is likely to have a significant negative impact. It is the Council's position that justification for the disapplication of legislation should have been provided prior to submission to allow Council input (as the public body representing local residents). The Council agree that NSIPs should usually take precedence. However, the Council is concerned that the precise impacts have not been considered. Therefore, having a blanket provision, where the specific impacts of different legislation being disapplied has not been considered, could lead to unexpected adverse impacts. It is not an answer to the Council's concerns to highlight the fact that this is not an unusual provision in NH DCOs. The Council's concern is not primarily about the position, but the analysis which has been undertaken to justify it and avoid unintended consequences.
Schedule 1 – Authorised DevelopmentPart 1 – Authorised Works	The authorised works are stated as being co-equally a nationally significant infrastructure project (NSIP) arising under PA2008 S16 (electric lines), S20 (gas transporter pipelines, and S22 (highways). Having regard to the definition of an electric line NSIP in PA2008 S16, 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 S115) to the highway NSIP? Having regard to the definition of a gas transporter pipeline NSIP in PA2008 S20, is it clear that the proposed gas transporter pipeline works meet that definition? Is there any	The Council notes that the applicant has undertaken an analysis of whether the electric lines and gas transporter pipelines are NSIPs in their own right. The Council has no comment with the applicant's analysis. The applicant's position is that because these works are NSIPs in their own right, they should be considered as such rather than as associated development pursuant to Section 115 of the Planning Act 2008. The Council is not aware of any precedent on this point, however, on the natural construction of legislation the Council agree that it is appropriate for these to be included as separate NSIPs.

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	reason why alternatively the gas transporter pipeline works could not proceed as associated development (under PA2008 S115) to the highway NSIP?	From the Council's perspective the key point is that the impact of these need to be properly understood and those potentially impacted need the ability to understand the proposals and engage with them. As the Council have noted in its Procedural Deadline C submission (PDC-008), the Council is concerned that although there has been engagement with utility companies, there has been very little engagement with the Council. The Council would have expected separate utilities document outlining the gas and electrical diversions, with drawings highlighting each one. These have not been provided. The Council have made a number of comments on the gas and electrical diversions over the last two years, but these not appear to have been considered by applicant.
4. Compulsory acquisition and extinguishmentof rights		
Articles 25 – 34 – Articles 35 – 36 –	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.	The Council agrees with these comments.
Article 66 – Compulsory Acquisition (CA),	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:	The Council agrees with the general observation that the provisions should be drafted in accordance with Advice Note 15.

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Temporary Possession(TP) and related powers	• 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 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.	As set out in further detail in the provisions below, the Council is concerned that the extent of the powers sought is not sufficiently refined, due to the project stage of design reached by the applicant at this stage. The applicant should be seeking to limit the impact of compulsory purchase rights by acquiring the minimum necessary. The applicant has suggested that the '*Council's comments on the extent of compulsory acquisition requires further particularisation, and can be addressed as part of any Compulsory Acquisition Hearings the ExA decides to hold*'. The Council has already set out substantive points of principle on the timing and extent of the rights acquired both in correspondence with the Applicant and as summarised in the paragraphs below. The Council has raised fundamental concerns with the approach taken and provided alternative approaches, which have been rejected. These comments remain. Further, the Council considers it is for the applicant to fully justify the extent of the powers they are seeking.
Article 27 time limit for the exercise of CA powers	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	The Council agrees with the questions raised by the ExA and has raised these points with the applicant on previous occasions. The overwhelming majority of DCOs provide a 5-year time period

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	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 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?	for acquisition. Where the applicant is seeking a longer period, this must then place a substantive burden on them to justify this extended period of time. The limited examples provided in response to the Council's comments which have granted a longer time period, being the Thames Tideway Tunnel (a 25km Super Sewer) and Hinkley Point C (a National Grid project delivering 57km electricity connection), do not provide any meaningful comparison. Furthermore the majority of NSIPs have sought and secured powers with powers extending to only 5 years The Council are not aware of any highways project of this nature, which has been granted such an extended period. The new change to amend the definition of 'start date' at 27(3) exacerbates this position, increasing the level of time and uncertainty faced by landowners. This is on top of the already extended time period. The applicant refers to the Manston Airport DCO as precedent for this practice. The applicant has not explained why this single example provides justification for the wording in this case. As stated above, the change to the wording comes on top of the 8-year period, which the Council already considers to be excessive. The Council has suggested that where elements of the project may require a period in excess of 5-years, that the time period is extended to these sections of the land only. In particular, consideration be given to: • limiting the land to which this provision applies

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		• limiting the categories of work to which this provision will apply. The applicant have consistently rejected this approach, citing a lack of precedent for a mechanism which would allow for different time periods to be applied over different parts of the Order land. Given the applicant is seeking a much extended time period, the fact that a proposal has not been used in previous DCOs, clearly should not preclude a full consideration of its appropriateness. The drafting to achieve this is not complicated and the applicant should by this stage have a clear project plan on a plot by plot basis. For example, for a second category, an single extra subjection and schedule could be added, as follows: 27.—(1) After the end of the period of 8-years beginning on day on which this Order comes into force — (a) no notice to treat is to be served under Part 1 of the 1965 Act as modified by this Order; And, (b) no declaration is to be executed under section 4 (execution of declaration) of the 1981 Act as applied by article 31 (application of the 1981 Act), in relation to the Order land (other than land specified in Schedule [ ]) for the purposes of this Order. 27.-- (2) The [8]-year time period specified in subsection (1) shall not apply to the Order land listed in Schedule [ ] to which a [5] year time period shall apply

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		As such, the Council considers it inconceivable that there are not any plots where the applicant are confident at this stage that they will be able to make a determination on requirements in less than 8-years. Even if the number of plots affected by this provision were limited, it would be entirely consistent with compulsory purchase principles that the applicant should seek to have the minimum possible impact on land owners. At this stage, the Council are not satisfied that evidence for an 8-year period has been provided.
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). 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	The Council agrees with the questions raised by the ExA and has raised several of these points with the applicant on previous occasions. The Council considers that the applicant should be ensuring they cause the least impact possible on landowners. The blanket power set out at Article 28(1) creates significant uncertainty and could stagnate the local property market and impact prices/the ability to lease commercial land etc. The Council does not accept that the applicant has provided sufficient justification either in the Statement of Reasons or in its formal responses, to demonstrate that it has taken all reasonable steps to reduce the area of land which are not subject to the restrictions at Section 28(2). The applicant has previously referred to not being able to make a more specific determination 'at this juncture because of the stage of design development'. Similar comments have not been made by the applicant in their ISH2 response. In order to demonstrate

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	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. 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".	a compelling case, the applicant should be taking every step to advance the progress of the design to ensure that the powers used are the minimum possible. The Council is concerned by wider powers being used with references to the Project design not being advanced sufficiently to limit these. The Council's comments about time limits at Article 27(1) above apply equally to the use of powers to acquire rights, as they do to the compulsory acquisition of land. The Council has undertaken a further review of land to be taken temporarily. The extent of this land is subject to a further review and the Council is waiting on the applicant for this together with a draft the legal agreement that has been proposed by the applicant.
Articles 35 &	These articles follow a well-precedented form. However,	The Council agrees with the questions raised by the ExA and has

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36 – Temporary Possession	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 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.	raised similar concerns with the applicant on previous occasions. See points on time limits at Article 27. 8-years is a too long a time period to create uncertainty over such a large area of land. Further justification should be provided in relation to the power at 35(a)(ii) to temporarily possess Order Land that isn't specifically set out in Schedule 11. Consideration to be given to: • limiting the land to which this provision applies • limiting the categories of work to which this provision will apply. The same principle points, as set out at Article 35 below, apply to maintenance period at Article 36. Again, simple wording, as set out by the Council in its response at 27 above, could be used to establish different time periods for different categories of land. **<u>Notification – General</u>** The Council considers that owners should be made aware at the outset if their land may be subject to temporary acquisition; when this might occur; how many times (the extent to which an AA can take entry, pull out and re-enter is the subject of some debate, but we are sure there is a precedent for it), for how long; and, what will be returned at the end of that period (i.e. demolition of buildings etc.). The applicant has indicated that they would not wish to use this approach on the basis that '*There is a risk that, by setting estimated timescales, National Highways will create expectations*

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		that cannot subsequently be met and may even be required to serve notice of temporary possession, which would incur further delay, cost and frustration for landowners.' The Council considers the balance here is in favour of providing as much information as possible. This allows for owners to prepare and to better mitigate any losses. The Council therefore suggest that the Explanatory Memorandum makes a commitment to: (a) outlining estimated timescales as accurately as possible to landowners when notices are given; and, (b) keeping them updated as to evolving timescales. **Notification – 28 day period** The Council do not consider the 28-day notice period sufficient, given that possession can potentially be for a significant period. The Council notes that the recent Lake Loathing (Lowestoft) Third Crossing Order 2020 includes a three-month notice period. Therefore, it not accepted that the Council are holding the dDCO to a higher standard than other DCOs or that a 3-month period is inconsistent with a desire to ensure NSIPs are expeditiously delivered, as has been suggested by the applicant. Instead, this simply requires an appropriate level of planning and coordination to ensure that notices are served on time to allow this. It is not for the Council to evidence why a 3-month period is justified, but instead for the applicant to justify why it cannot in this case provide a longer period than 28 days. Further, this would also appear likely to increase the likelihood of increased compensation, where a landowner has increased notice, there will clearly be cases where this gives them a better opportunity to mitigate any losses.

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		Article 35(5) The applicant is required at Article 35(5) to restore the land to the reasonable satisfaction of the owner. However, the wording at Article 35(8) does not stop the applicant giving up possession of the land. The Council considers that the applicant should be required to comply with the requirement prior to giving up temporary possession of the land. The wording in this article 35(8) is regularly excluded, for example, the Silvertown Tunnel Order 2018; Lake Lothing (Lowestoft) Third Crossing Order 2020; A19/A1058 Coast Road (Junction Improvement) DCO 2016; Great Yarmouth Third River Crossing DCO 2020; and, Hinkley Point C Connection and indeed the Model Provisions. **Article 35(13)** The applicant confirmed in the Issue Specific Hearing 2 that the DCO allows multiple temporary possessions. The Council has reservations about this provision as currently drafted. It recognises that, in some cases, two shorter entries *may* be better thana prolonged stay. But the applicant should provide further justification for the inclusion of this power. As identified by the ExA below, the ability for owners to require acquisition rather than temporary possession should be considered. If the power remains, all the points set out in this section are more important, i.e. notice periods, extent of land which the provision covers etc. and require extensive justification from the applicant.

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Article 66 – power to override easementsetc.	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 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?	The Council agree with the general comments about very broad powers in the DCO, seemingly not supported by detailed analysis. This creates a risk of unintended consequences.
5. Special category land		
Article 40 – (and preamble)	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	The Council agrees with the ExA's comments. These are points the Council has previously raised with the applicant**.** There currently appears to be a significant risk of delay in replacement land being provided. The wording should follow the Model Provisions, i.e. the replacement land should be delivered before the special category land is vested in the applicant. Otherwise there is a least a temporary loss of open space and a potential long term risk of loss/non delivery. Clear justification is needed if fully implemented replacement land is not in place prior to vesting.

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	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. 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 S131(4) and S132(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 then	The Model Provisions specifically require that the approved scheme has been implemented on the replacement land prior to the special category land being discharged from its rights, trusts and incidents. The Council does accept that the wording has been approved in other DCOs, but this is not considered to be a scheme where it is appropriate for the land to be vested, until the alternative land has been delivered. The Council does not agree with the wording at Article 40(5), i.e. that replacement land should be provided for special category land that is in existence at the date of DCO. Otherwise there may be an incentive to delay providing replacement land if there is a risk of de-registration.

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	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 and provide that it 'must comply with the outline LEMP'.	
6. Statutory undertakersandapparatus		
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	Noted and the Council agree with the comments of the ExA. It is noted from the applicants ISH2 response that they are engaged in discussions with statutory undertakers. The Council defers to those undertakers on their requirements, however, there is a clear question as to whether a compelling case can be made by the

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	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 S127. 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.	applicant to interfere with the relevant land and apparatus when it does not have a fully designed scheme. There is a clear risk of overestimation of the land required.
7. Planning permission		
Article 56 –	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.	The Council agree that this should be justified. However, from the Council's perspective, so long as the usual planning provisions apply then the Council does not object to this provision.
8. Classificationof roads **9. Clearways,prohibitionsandrestrictions** **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	Article 15 concerns the classification of roads. Article 16 concerns prohibit patients and restrictions and Article 17 concerns traffic regulation on local roads. All 3 contain provisions to vary the effect of these articles (see Article 15(3) and (4), Article 16(6) and Article 17(2). Whilst it is important that these are properly justified, the Council

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	provisions are necessary or expedient to give full effect to any other provision of the DCO.	does not have any specific concerns regarding these provisions.
11. Temporary stopping up and restriction of use of streets		
Articles 12 & 13 –	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 Council agrees with the ExA's comments. The Council has a number of concerns on these provisions, including: • they should not contain deemed consent provisions, • there should be a 90-day response period, which is the standard permit notification period Diversions should be to roads that are of a similar classify classification. Current wording allows the applicant to provide a temporary diversion to either a lower road classification and or construct a lower category road for diversion purposes. This does not sit well with the Council's permit rules on • appropriate diversions and could result in a signed route of A13 traffic being diverted along country lanes. This should be removed or altered to identify a similar classification requirement for diversions, i.e. if the A13 (3 lane) section is closed, diversion to the A127 (2 lane) route should be made rather than the A1013 (single lane) routes. • What constitutes an application for 12(8)? It should say using forms and accompanied by all information reasonably requested by the street authority. • Article 12 needs to be limited to Order Limits. • Article 13(1) - there is no time limit on this provision so does that mean following completion that the undertaker maintains their rights under this section?

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		• Article 13(2) - does the landowner have to evidence the damage or does the undertaker provide a before survey and then periodically assess for damage? This needs to be expanded.
Article 14 –	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)?	
12. Power to alter layout of streets		
	This is a wide power, authorising alteration 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.	This appears to be about Article 12. The applicant will say that it is needed to respond to unexpected issues. The Council agree with the need for flexibility, although the applicant needs to make every effort to properly identify those streets and locations which will be impacted.
13. Disapplication or amendmentof legislation/ statutoryprovisions		
Articles 53 & 55 –	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 o 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 o (by reference to section 120 of and Schedule	Whilst it is not unusual to disapply certain legislative provisions, this amount of disapplied legislation is greater than in many other DCO's. The Council requests that applicant explains the impact of the disapplication of statutory provisions, including the analysis which justifies this. In our opinion significant additional justification is required to explain the rationale for such a wide approach. Despite this we do not disagree with the fact that primarily the DCO should take precedence, the Council's position is that we need to understand the impact better so we can assess whether any specific

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	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 excluding the application of enactments, orders and byelaws where they are inconsistent with the order.	mitigation is required. The Council is concerned about the disapplication of parts of the Wildlife and Countryside Act 1981. The uncertainty in the application (for example, with the significant flexibility of order limits) means that it is going difficult to fully assess the potential impact on sites of special scientific interest. The requirements of the Wildlife and Countryside Act 1981 should therefore apply to avoid harm being caused to these sites.
14. Crown rights		
Article 43 –	The word 'take' should be removed from this article. Consent under section 135 (1) and (2) should also be obtained from the Crown authority.	The Council have no additional comments to make on this section.
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 has not 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?	In relation to Article 23(1), to aid stakeholders in understanding the full impact of the scheme, a schedule and plan should be included identifying the relevant trees or shrubs. In relation to Article 23(2), the industry best practice for tree work can be found in British Standard BS3998:2010. The DCO should reflect this provision. At Article 23(4), in accordance with Advice Note 15 (paragraph 22

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		and good practice point 6) either a schedule and plan should be included identifying the relevant hedgerows should be included, or there should be a requirement for consent from the local authority In relation to Article 24(1), Advice Note 15 (paragraph 22.3) sets out that it is not appropriate to include the power to fell trees subject to TPO or trees in a conservation area on a precautionary basis. Proper identification of affected trees will enable the ExA to give full consideration to the particular characteristics they gave rise to their designation and desirability of continuing such protection. The details in Schedule 7 are noted, however, the provision of a plan identifying the TPOs will help understand the impact of this provision. This should also include trees in a Conservation Area.
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 has not been followed justification should be provided as to why this is the case. In the South Humber Energy Bank Centre DCO BEIS Secretary of State removed an article which sought to apply the S78 and S79 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	The Council are broadly content with this provision. The Council had previously suggested to the applicant that certain approvals should be subject to an appeal to the Secretary of State, combined with deemed refusal provisions. The applicant has adopted the appeal provisions, but not the deemed refusal provisions. It is the view of the Council that the 10 business day period for responding appears unnecessarily short. While there is precedent for the 10 business days (see A14 Cambridge to Huntington), we suggest a minimum of 20 days considering the scale of the scheme.

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	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 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.	The Council suggest that the Control of Pollution provisions use their own statutory appeal process – this is something that the applicant needs to explain this further. The reference to the need for 'certainty and expeditious resolution' is not in our opinion sufficient. In the Council's opinion changing the appeal method makes it less rather than more certain.
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.	The Council is concerned that proper due diligence to support the inclusion of those bodies listed in Article 8(5) has not been carried out.

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	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 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.	The Council's concern is about those who do not have an interest in land being used in connection with the Project, who are nevertheless being adversely affected impacted. For example, with discharges into watercourses, which adversely impacts flooding some distance from the Project. It is our understanding that this situation compensation would not be payable on the DCO, as currently drafted (despite comment from the applicant that compensation provisions were adequate – a comment which has yet to be tested). Accordingly we suggest that specific compensation provisions are provided. In Article 19(8), it is not appropriate to have deemed consent provisions. Please see comments in the Council's LIR.
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,	The Council agrees with the comments of the ExA. In relation to Article 35(1), see points on time limits at Article 27. 8-years is an unacceptable period of time to create uncertainty over such a large area of land. Further justification should be provided in relation to the power at 35(a)(ii) to temporarily possess Order Land that is not specifically

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	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. 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 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,	set out in Schedule 11. Consideration to be given to: • limiting the land to which this provision applies • limiting the categories of work to which this provision will apply. **Notification – General:** The Council considers that owners should be made aware at the outset if their land may be subject to temporary acquisition; when this might occur; how many times (the extent to which an AA can take entry, pull out and re-enter is the subject of some debate, but the Council is sure there is a precedent for it), for how long; and, what will be returned at the end of that period (i.e. demolition of buildings etc.). The applicant has indicated that it would not wish to use this approach on the basis that 'There is a risk that, by setting estimated timescales, the applicant will create expectations that cannot subsequently be met and may even be required to serve notice of temporary possession, which would incur further delay, cost and frustration for landowners.' The Council considers the balance here is in favour of providing as much information as possible. This allows for owners to prepare and to better mitigate any losses. The Council therefore suggest that the Explanatory Memorandum makes a commitment to: (a) outlining estimated timescales as accurately as possible to landowners when notices are given; and, (b) keeping them updated as to evolving timescales. The same principal points set out at Article 35 below, apply to maintenance period at Article 36. At Article 35(2), the Council do not consider the 28 day notice period sufficient, given that possession can potentially be for a

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	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'?	significant period. The Council notes that the recent Lake Loathing (Lowestoft) Third Crossing Order 2020 includes a three-month notice period. Therefore, it not accepted that the Council are holding the dDCO to a higher standard than other DCOs or that a 3-month period is inconsistent with a desire to ensure NSIPs are expeditiously delivered, as has been suggested by the applicant. Instead, this simply requires an appropriate level of planning and co-ordination to ensure that notices are served on time to allow this. It is not for the Council to evidence why a 3-month period is justified, but instead for the applicant to justify why it cannot in this case provide a longer period than 28 days. Further, this would also appear likely to increase the likelihood of increased compensation, where a land owner has increased notice, there will clearly be cases where this gives them a better opportunity to mitigate any losses. At Article 35(3), Council expects principle that safety issues may negate the requirement for a notice period to be served. The Council suggests further wording be provided in either the DCO or the EM to explain what these safety concerns might be, to ensure that the definition is not to broadly interpreted. In relation to Articles 35(5),(7) and (8), the applicant is required at 35(5) to restore the land to the reasonable satisfaction of the owner. However, the wording at 35(8) does not stop the applicant giving up possession of the land. The Council considers that the applicant should be required to comply with the requirement prior to giving up temporary possession of the land. In relation to Article 35(11), The Council will be carrying out a

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		review of the extent of the land included within Schedule 10 and may have further comments accordingly. Article 35(13) allows multiple temporary possessions. The Council has reservations about this provision. It recognises that, in some cases, two shorter entries may be better thana prolonged stay. But the applicant should provide further justification for the inclusion of this power. If the power remains, all the points set out in this section are more poignant, i.e. notice periods, extent of land which the provision covers etc. In relation to Article 36(1), the Council does not take issue with the principle of this provision, but the Council is not satisfied that the applicant has taken all steps reasonably possible to reduce the area of land. The Council considers that the area covered by this power can be reduced. This would remove the uncertainty for those landowners. Wherever the applicant can reasonably rule out a need for maintenance on an area of land, that area land should be excluded from this provision. At Article 36(3), the Notice period is considered insufficient. See comments at Article 35(2). For Article 36(8), please see comments at 18(3) which apply equally to this provision. In relation to Article 36(11), the Council will be carrying out a review of the extent of the proposed Order Limits land and may have further comments accordingly. In respect of Article 36(13), see actions at Article 27, which are in addition to the maintenance period.

Provision	Issues or questions raised	Thurrock Council Comments
		Further justification to be provided: As per actions at 36(1), power to be limited to specific areas. Necessity for 5-year period (as opposed to any permanent right of maintenance) to be justified. This should include assessment of whether areas of land can have a lower time limit. Rights of landowner during the maintenance period to carry out activity on the land to be clarified.
21. Arbitration		
Article 64	Whilst arbitration provisions have been a dynamic field of practice in dDCO drafting, recent decisions suggest that it is unlikely 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 Council agrees with the comments made by the ExA. It is for this reason that the Council's consenting provisions are subject to appeal to SoS rather than arbitration. This is because decisions which are normally required by Parliament to be made by a public body, should not be given to a private arbitrator.

Provision	Issues or questions raised	Thurrock Council Comments
	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 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 proceedingsin respect of statutorynuisance		
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.	This article sets out the scope of the defence to proceedings in respect of statutory nuisance. It remains the Council's position that the purpose of this section is only to provide the statutory defence to nuisance where it is demonstrated that the nuisance is likely to be caused and it is not practicable to mitigate against it. In those situations the greater good of undertaking the project justifies the nuisance being caused. However, it is not appropriate to have a blanket defence as this discourages appropriate steps to reduce nuisance. It is also contrary to precedent from other highways DCOs. This is a long-term project and the impacts on local residents need to be carefully considered.

Provision	Issues or questions raised	Thurrock Council Comments
		If the applicant states that it is required, due to the scale of the project, the applicant needs to demonstrate why is it required.
23. Deemed MarineLicences(DMLs)		
Article 60 – Schedule 15	It is unlikely that a consenting Secretary of State will allow bespoke appeal procedures to apply to the Marine Management Organisation ('MMO') decisions on discharge of conditions in a deemed marine licence. By way of example: The Secretary of State for BEIS removed drafting in the Norfolk Vanguard Offshore Windfarm DCO and the Hornsea Three Offshore Wind Farm DMLs creating a bespoke appeal procedure against MMO decisions on discharge of conditions. The ExA recommendation report for Hornsea Three provides reasons at 20.5.25 – 20.5.29.	This is a question for the MMO.
24. Powers in relation to relevant navigation and watercourses		
Article 18	This Article permits the undertaker to, among other things, remove or relocate any moorings so far as it may be reasonably necessary for the purposes of carrying out and maintaining the authorised development, regardless of any interference with any private rights. It appears that this could permit the relocation of a houseboat? This could represent interference with HRA rights with no apparent mechanism for the person affected to challenge the applicant's decision that the interference is reasonably necessary, to the extent that the undertaker considers it to be necessary or reasonably convenient. Notwithstanding precedent cited in the EM, consideration needs to be given to the acceptability of this.	The Council is concerned that even is loss is to be compensated, this might not be provided in a timely manner and this could negatively impact the those affected. The Council suggests that the establishment of a separate compensation scheme would be more appropriate.

Provision	Issues or questions raised	Thurrock Council Comments
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 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?	The Council agrees with the ExA's proposed amendment.
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	The Council is concerned about the concept of preliminary works. It appears to have been included so as to satisfy the requirement to 'begin' rather than 'commence' the DCO within 5-years (requirement 2). The purpose of this appears to be to preserve the DCO with minimal works. This provides greater uncertainty, as if consented, the longer it takes the applicant to develop the scheme, the greater the time the uncertainty created by the order will impact residents. In addition, the Council has not been consulted on this document (ES Appendix 2.2, Annex C). In our opinion the proposed preliminary works could have quite significant environmental effects (they involve vegetation clearing). If they were part of the EMP (Second Iteration) then the Council would have to be consulted, so we need to make sure they are acceptable.

Observations on Requirements

Requirement	Comment	Thurrock Council Comments
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.	There is uncertainty the in this requirement due to the SoS be able to approve amendments if they don't give rise to materially new or materially different environmental effects in comparison with those reported in the environmental statement. This means that the design could change and not take into account non-environmental effects, such as new land ownership. It could lead to changes in assumed construction and methodologies that were used to assess impacts in the ES that make such assessments invalid. It could also include adverse effects on businesses.
Requirements4, 5, 10,11	The phrase 'substantially in accordance with' is uncertain and imprecise.	The Council does not object to the use of the phase 'substantially in accordance with'. Alternatively it could be worded to 'reflect' a particular outline plan, or be 'in accordance' with a strategy document, as has been done in other DCOs (such as the A14 Cambridge to Huntington).
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?	In the Council's opinion this is sufficiently clear.
Requirement 9	Is the phrase 'reflecting the relevant mitigation measures' sufficiently certain?	Whilst the Council does not have any specific objections, it could be altered so that documents are 'in accordance with', or 'incorporates the relevant mitigation measures in document….'.
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 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	The Council have agreed the location and broad design of the traveller's site. This is covered in Design Principles, a secured Indicative Plan and the Requirement 13, together with a new commitment to be added to the SAC-R (APP-554).

Requirement	Comment	Thurrock Council Comments
	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	It is not clear why this work is only necessary if the Thurrock Flexible Generation Plant Development Consent Order 2022 is commenced. What happens if it is not commenced but remains a live proposal? What happens if it is commenced but the undertaker decides not to carry out work TFGP1 in any event? The EM does not explain the interaction between the works and the other DCO so it is not possible to know if this requirement is adequately drafted. The Applicant is asked to direct the ExA to other application documents that deal with this point. Alternatively it will be raised in later questions or hearings.	The Council is unclear why this is only necessary if the Flexible Generation Plant Development Consent Order 2022 is commenced. Further explain is needed to that the Council can fully assess the impacts.
Part 2, discharge of	Is it permissible or appropriate to have a deemed discharge	This highlights two key areas of concern for the Council; deemed

Requirement	Comment	Thurrock Council Comments
requirements Requirement 18	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?	consent and the relevant discharging authority. <u>Deemed consent</u> Deemed consent is found in: A12- Temporary closure, alteration, diversion and restriction of use of streets A17- traffic regulation local roads A19 – discharge of water (not the council) A21- authority to survey and investigate the land Requirement 13 – travellers site The Council considers that deemed consent in this situation would not be in the public interest, despite numerous highways DCOs containing these provisions. The Council understands the need to ensure there is not any unnecessary delay. However, inflexible deemed consent provisions will result in unnecessary delay. In the Council's opinion, the public interest and the interests of the applicant would be better served if there was the ability for the parties to agree a mutually agreed extension of time (which we would be prepared to cap at a maximum of 3-months). This would avoid unnecessary appeals and also avoid delay by having to refuse applications that could have been approved if a short extension could have been agreed. The Council note the applicant's position that there is no need for this, as the Council can simply refuse consent and the applicant can then submit a further application when ready. However, in our opinion this would be more less efficient. The provisions were deemed refusal rather than deemed consent. This will continue to incentivise the Council to work within the specified timeframes, but avoid the risk of decisions being deemed

Requirement	Comment	Thurrock Council Comments
		as having consent when they have not been considered by either the Secretary of State or the Council. <u>Discharging Authority and Local Authority Consultation</u> The applicant is strongly of the view that the DCO Requirements (currently set out in Schedule 2 of the draft DCO) should largely be discharged by the Secretary of State. It is the Council's position that Requirements 3 (detailed design), 4 (Construction and Handover EMPs), 5 (landscaping and ecology), 6 (contaminated land), 8 (surface and foul water drainage at a local level (with the Environment Agency responsible for those elements not at a local level), 9 (historic environment), 10 (traffic management), 11 (construction travel plans), 12 (fencing), 14 (traffic monitoring), 16 (carbon and energy management plan) and 17 (amendments to approved details) should be discharged by the relevant local planning authority, with any appeal going to the Secretary of State. Whilst it is not uncommon for transport DCOs to have the Secretary of State as the discharging authority, it is by no means universal (there are at least four other transport DCOs where this is not the case). In addition, the Council are not aware of any other Secretary of State (for example DHLUC, DEFRA or BEIS) being the discharging authority in connection with non-transport DCOs. In relation to this scheme, the Council is the local highways authority for 70% of the route. Accordingly the applicant's concerns regarding co-ordinated discharge of functions is not well founded in relation to this LTC scheme. In the Council's view, locally elected local authorities, who are experienced in discharging similar planning conditions, should be the discharging authority. It is precisely because of the complexity of the project that a detailed understanding of the locality, including

Requirement	Comment	Thurrock Council Comments
		the local highway network, is required. It is accepted that changes to local highway sections will need to consider the impact of those changes on trunk road sections (and vice versa), and accordingly it is suggested that the relevant planning authority will discharge requirements in consultation with relevant parties, such as the applicant and other key stakeholders. The current proposal, of the Secretary of State being the discharging authority, after consulting the Council, is likely to lead to unnecessary expenditure as the relevant local planning authority will have to commit significant resources to explaining to the Secretary of State the impact of proposals. A number of the requirements (as currently drafted) refer to consultation with the relevant planning authority. There are no details in the draft DCO as to how long this consultation will be or how it will take place. However, it is understood from the applicant verbally that the consultation period will be four weeks, with the ability to extend to 6 weeks. Accordingly, the Council contends that the setting of 8-week discharge period for the Secretary of State and then only allowing only 4-6 weeks for consultation with local planning authorities is not appropriate or fair, as it does not take into account the complexities of the individual matters being discharged.