LONDON BOROUGH OF HAVERING – ISH 7 POST HEARING SUBMISSIONS

These post hearing submissions focus on the principal issues discussed at ISH 7 of relevance to the London Borough of Havering (LBH), being:

1. Changes to the draft DCO since v2
2. Protective Provisions and Commuted Sums
3. Wider Impacts Mitigation and Compliance with the NPSNN
4. Silvertown Tunnel Approach

1. Changes to the draft DCO since v2

1.1 LBH submitted its response on the draft DCO v4 at D3 (REP3–183). At the hearing, the Applicant indicated its intention to respond to those representations at D4. LBH await that response and therefore do not seek to repeat all the issues with the drafting of the DCO as set out in its D3 representation. LBH will respond at D5 to the response of the Applicant.

1.2 LBH will however take the opportunity to emphasise a few of the main areas of difference in relation to the drafting of the DCO – without detracting from the importance of other drafting points made in REP3–83. By the Deadline prior to the next DCO hearing it is hoped that a final position will be reached and all outstanding points to be adjudicated upon will be identified.

Article 2 (10) - environmental effects

1.3 LBH remain very concerned regarding the drafting of this article which would enable an adverse impact not assessed under the ES to be deemed acceptable if it was a result of measures to avoid, remove or reduce an adverse effect identified in the ES (see REP 3 – 183 page 2). LBH note that Michael Bedford KC for Gravesham Council also specifically raised the concern at ISH 7.

1.4 LBH suggested some wording in its D1 submissions (REP1-251) to overcome the problem and repeated that wording in its D3 submissions at (page 3 REP3-183). There seems no reason at all for that wording not to be adopted to avoid the unintended consequences referred to in the submissions.

Article 12 – deemed refusal

1.5 The Applicant has purported to accept the LBH comments on deemed refusal set out in REP1 -151 but has not adopted the drafting proposed by LBH. The result is that it is not clear what the effect is of not drawing the deemed refusal provisions to the attention of the relevant party and the consequence of a

deemed refusal is not given the appropriate prominence. The drafting set out in REP1 151 and reiterated in REP3-183 should be used.

1.6 This applies to other deemed refusal provisions in articles 17,19 and 21. It is noted that the Applicant indicated its intention to consider this further.

Article 61 – SAC-R

1.7 LBH maintains its objection to the use of the term "take all reasonable steps" in this article which is supposed to be ensuring that commitments are performed – as set out in REP3-183. There is no reason why commitments within the gift of the Applicant should be qualified.

Article 62 – Correction of Plans

1.8 This article involves the Applicant utilising its own procedure to amend plans rather than those set out in the Planning Act 2008. As set out in REP3-183 LBH object to such a procedure since it does not have all the consultation and safeguards afforded by the Planning Act processes. It is noted that the Applicant indicated its intention to consider this further.

Requirement 10 – Traffic management

1.9 LBH maintain a strong objection to paragraph (2) of this requirement which only requires that the traffic management plan to be approved be "substantially in accordance with" the outline traffic management plan for construction. This also applies to other requirements.

1.10 It is in contrast to para (1) of requirement 10 which requires that the preliminary works be carried out "in accordance " with the outline traffic management plan for construction, which LBH believe is the correct approach.

1.11 LBH has previously drawn the attention of the Examining Authority to the M25 J28 DCO when the use of the term was specifically considered. The full text of the Examining Authority and Secretary of States consideration of that term is set out below:

Ex Auth Report – paragraph 9.3.21 – 9.3.23

> 9.3.21 LB Havering's other principal concern in this regard [REP1-031] was the *wording "substantially in accordance" and "must reflect" remain in Requirement 4 (and in other Requirements) of the final Draft DCO [REP9- M25 JUNCTION 28 IMPROVEMENT SCHEME – TR010029 REPORT TO THE SECRETARY OF STATE: 16 SEPTEMBER 2021 194 012]. The Applicant has stood by its response to WQ1 DCO 1.26 and DCO 1.27 [REP2-011] that the words should be retained to allow for flexibility. LB Havering maintained its objection to the use of this wording, confirmed in its response to the ExA's Consultation Draft DCO [REP8- 028A].*

9.3.22. However, as also discussed below, the ExA does not agree with the Applicant that such wording is appropriate. While the detailed design stage may well result in some refinement of the mitigation, the ExA is of the firm view that the CEMP, secured by Requirement 4 of the Recommended DCO must not be allowed to depart from the outline CEMP other than in terms of minor changes. The ExA considers that allowing the CEMP to only be "substantially" in accordance potentially allows for a significant departure from it, as "substantially" is not defined in the final Draft DCO [REP9-012]. Furthermore, allowing the measures in the CEMP to "reflect" with the REAC also fails to adequately tie the Applicant to the commitments.

9.3.23. As set out in Tables 9.2 and 9.3 below, the ExA is recommending that all of these imprecise and ambiguous terms are removed. We have recommended that outline documents must be "in accordance with" its outline counterpart. The Applicant has not evidenced that such wording would cause it difficulty.

Secretary of State DL – para 135

135. LB Havering's other principal concern was the wording "substantially in accordance" and "must reflect" remaining in Requirement 4 (and in other requirements). The Applicant stated that these words should be retained to allow for flexibility (ER 9.3.21). The Secretary of State notes the ExA's position that it does not agree with the Applicant that such wording is appropriate. While the detailed design stage may well result in some refinement of the mitigation, the ExA is of the firm view that the CEMP, secured by Requirement 4, must not be allowed to depart from the outline CEMP other than in terms of minor changes. The ExA considers that allowing the CEMP to only be "substantially" in accordance potentially allows for a significant departure from it, as "substantially" in accordance is not defined in the final draft DCO. The Secretary of State notes that, in this Examination, the ExA considered a greater degree of certainty was needed and that it was therefore appropriate to use "in accordance". In the light of this, the Secretary of State agrees with the ExA that these terms should be removed from this Order (ER 9.3.22 – 9.3.23 and Table 9.2). In addition, for the same reason, the Secretary of State agrees with the removal of "substantially" and "must reflect" from the other Requirements, to ensure the documents that come forward are not capable of departing from what has been examined in the application (ER 9.4.4). These changes were included in the recommended DCO at Appendix C to the Report.

1.12 The Applicant has referred to the A47 Wansford to Sutton DL as a more recent DCO where the Secretary of State did not reject the use of the phrase "substantially in accordance with". The relevant part of the Examining Authority's Report and Secretary of State's DL are set out below:

Ex Auth Report – paragraph 18.4.17 – 18.4.18

18.4.17. In the preferred DCO there are two locations, Requirements 4(1) and 11(1) of Part 1 of Schedule 2, where the phrase "substantially in accordance with" has been used. I recommended that these should be amended by the

deletion of the word "substantially". The Applicant resisted this [REP8-032] "so as to provide an element of flexibility, reality and pragmatism".

18.4.18. I note that from the M25 Junction 28 report this matter was also in dispute, and the ExA there (paragraph 9.4.4) recommended that this word be deleted on the basis "the documents that come forward are not capable of departing from what has been examined in the application". The SoST accepted this recommendation. For the same reason I recommend that the word "substantially" should be deleted from the preferred DCO in Requirements 4(1) and 11(1) of Part 1 of Schedule 2.

Secretary of State DL – extract from para 229 (see 2nd bullet point)

• in Part 1 of Schedule 2 (requirements):

- *in paragraphs 3(1) and (2), 4(1), 5(1) and 11(1), the requirement to consult one or both of SPC and WPC is omitted, as the Secretary of State is not persuaded by the reasons given for including this provision [ER 18.4.10 – 18.4.13] and considers that the views of those Authorities can be adequately communicated through PCC;*
- *in paragraphs 4(1) and 11(1), the word "substantially" has been reinstated as the Secretary of State considers its omission is an inappropriate fettering of his discretion;*
- *in paragraph 12, a reference to the Manual of Contract Documents for Highway Works is substituted for that to the EMP (First Iteration), as the there is no reference to standards applicable to fencing in the latter document;*
- *ex-paragraph 13 is omitted given the Secretary of State's conclusions in respect of non-motorised users routes and the WWR; and*
- *the final part of paragraph 13(3)(c) is converted to a tailpiece, in line with precedent*

1.13 It is apparent from the above extracts from the ExA reports and Secretary of States DL's that the more detailed consideration of the phrase was undertaken by the Secretary of State when considering the M25 J28 DCO – which the Ex A for the A47 Wansford to Sutton DCO drew upon. The assertion that the inclusion of substantially would be an inappropriate fettering of the Secretary of State's discretion is not explained in the above extract from the A47 DL and there is no assistance elsewhere in the A47 DL to explain that assertion.

1.14 The concept that the exclusion of the word "substantially" would inappropriately fetter the Secretary of States discretion in the context of approvals under a requirement is not understood. Restrictions or prescription relating to the content of the submission of details in requirements is commonplace and, indeed essential. The circumstances when that fettering would be inappropriate, or appropriate, is not explained.

1.15 The more detailed consideration of the position contained in the M25 J28 DL should be preferred, which supports the position of LBH.

1.16 It is particularly important for there to be full compliance required when one is dealing with framework documents which in themselves include substantial flexibility. The idea of framework documents is to ensure that details which come forward must be compatible with that framework but the framework is deliberately broad to ensure flexibility. If detailed plans are not required to be in accordance with the framework document then details that come forward can sit outside even the broad framework set by the framework documents with inherent uncertainty as to what is being authorised by the DCO and what the boundaries are of it, including any environmental effects. This undermines the Rochdale envelope approach.

1.17 The idea of framework plans is to provide flexibility within those plans – within the boundaries set by those plans. There should be no additional flexibility added to that inherent flexibility.

2. Protective Provisions and Commuted Sums

2.1 LBH sent draft protective provisions to the Applicant and the other LHA and TfL in late July. All the other authorities confirmed their agreement to the principle of their inclusion. No response was received from the Applicant.

2.2 It is noted from its response at Issue Specific Hearing 7 that the Applicant now intends to submit some draft protective provisions and LBH will co-operate in seeking to discuss and reach agreement as far as possible.

2.3 It is noted that the Applicant indicated that it would not be including any provision for payment of commuted sums in respect of new structures required for the scheme the maintenance of which will become the responsibility of the local highway authorities.

2.4 The Applicant's explanation for this at ISH 7 was predominantly based on the ability of local highway authorities to receive funding for such maintenance under the Central Governments formula-based road maintenance funding. This, as a principle, is not accepted and is not aligned with other DCO approved by the Secretary of State where commuted sums have been paid.[1] Other commuted sums will likely have been secured through side agreements which are not open to scrutiny.

2.5 In any event, LBH does not have the benefit of that funding. LBH is entirely reliant on funding from TfL and its own Council Tax payers. The Applicant has not recognised or addressed this.

2.6 The detail of the funding for LBH is set out in LBH's Response to the Applicant's comments on LBH's written representations (REP3-186). The main points being that:

- LBH has received no maintenance funding in recent years from TfL

[1] A303 Sparkford to Ilchester Dualling 2021 and M25 J28 2022.

- There are no alternative funding sources
- All maintenance must therefore be paid out of Council Tax payments
- The level of Council Tax is capped by statute
- The money available to LBH to maintain structures will not be increased to reflect the additional burden of the LTC structures

2.7 As a matter of principal, the Applicant should therefore provide funding to enable LBH to maintain the structures required as a result of the scheme to be appropriately maintained.

2.8 The Applicant, in arguing against commuted sums at ISH 7, said they did not want an "ongoing and indeterminate responsibility". That would not be the case. As is commonplace with dealing with commuted sums in respect of highways, the commuted sum is capable of being calculated by reference to relevant formula and it can be agreed prior to works commencing and paid prior to maintenance passing. The liability of the Applicant would then cease at that point.

2.9 Whilst the justification for payment of commuted sums is a general one, there are specific structures which LBH would draw attention to:

a) The structure over the railway supporting Footpath 252 will be complex to maintain and will be an additional maintenance burden given the need to satisfy Network Rail;

b) The NMU structure of the A127 is proposed by the Applicant to address severance issues as a result of changes the Applicant is making to M25/J29. The changes to M25/J29 on the southern section of that junction will result in the existing NMU crossing points being removed. The Applicant has proposed installing crossing points on the northern side of the junction to enable NMU's to safely navigate this junction. The footbridge is needed to ensure that residents from Upminster and Cranham wishing to travel east of M25/J29 have the ability to do so, and vice versa. It is therefore an essential structure to mitigate the impact of the scheme at this junction. Whilst the crossing will clearly improve connectivity for non-motorised users and does support Havering's Local Implementation Plan and Local Plan policies, Havering would suggest that its principle rational is to reduce severance and meet compliance with para 3.25 of the NPSNN. Whilst this structure would be maintained by Transport for London as the Local Highway Authority for the A127, the Council fully supports TfL in its endeavours to receive a commuted sum for ongoing maintenance.

3. Wider Impacts Mitigation and Compliance with the NPSNN

3.1 The Applicant is suggesting that it is not required to secure mitigation reasonably required to mitigate effects on the wider local highway network. because other funding frameworks would apply to those works and the DCO would therefore circumvent those frameworks. The Applicant asserts that its

position is in accordance with the NPSNN. This proposition is encapsulated in paragraph 1.8.3 of App F of the Transport Assessment (APP-538).

3.2 Effectively the Applicant argues that it is exempt from the exhortations in the NPSNN to secure mitigation reasonably required as a result of the impacts of its scheme and that instead separate mechanisms should be used to try and secure such mitigation.

3.3 This is a remarkable proposition. Such a proposition, or even any support for it, is not found within the pages of the NPSNN nor the draft NPSNN, which post-dates the changes arising from the Infrastructure Act 2015 to which relevance was attributed by the Applicant.

3.4 A significant number of the DCO to which the NPSNN applies have been promoted by the Applicant and it is reasonable to expect that any exemption for the Applicant in respect of the delivery of mitigation would be clearly stated within the NPSNN. This would especially be the case if, as the Applicant is suggesting, the funding by the Applicant of mitigation reasonably required on local roads as a result of the scheme were viewed as subverting/circumventing other funding regimes.

3.5 None of the above is to be found in the NPSNN nor at ISH7 did the Applicant seek to defend the proposition it advanced by reference to any paragraph in the NPSNN.

3.6 It is clear from made DCO that there is no such exemption or objection in principle to National Highways funding such mitigation. [2]

3.7 At ISH 7 the Applicant referred to a number of made DCO in support of its proposition, which LBH will respond to when the detail of those DCO have been explained in the Applicants Post Hearings submissions. However, from current understanding it seems that none of those DCO directly addressed the issue of whether failing to secure mitigation reasonably required as a result of the scheme is NPSNN compliant and in at least one of those DCO it is known that there was a side agreement between National Highways and the local highway authority, the precise contents of which are not known, which may well have secured funding for such mitigation.[3]

3.8 The Applicant is therefore subject to the requirement to accord with the NPSNN and the exhortations within with regard to the identification and delivery of mitigation reasonably required.

3.9 Section 104 (3) of the Planning Act requires that the Secretary of State must decide the application in accordance with the NPSNN "except to the extent that one or more of subsections (4) to (8) applies". None of those sub-paragraphs apply. It is notable that subsection (7) allows non-accordance with the NPSNN if *"the adverse impact of the proposed development would outweigh its*

[2] A303 Sparkford to Ilchester Dualling DCO 2021
[3] A47 Blofield to North Burlingham 2022

benefits". There is no exemption from compliance with the NPSNN on the basis of an assertion that the overall benefits outweigh the adverse impacts.

4. Silvertown Tunnel Approach

4.1 As set out by LBH in Appendix 1 to their Written Representations (REP1-253) in order to comply with the NPSNN it is necessary to identify and secure mitigation reasonably required. Therefore a Silvertown Tunnel type approach to secure monitoring and mitigation strategy is essential.

4.2 It is not accepted that a Silvertown Tunnel approach was uniquely suitable for a project promoted by TfL and is unsuitable for project promoted by the Applicant.

4.3 The points advanced by the Applicant, to the effect that the Silvertown Tunnel DCO is not comparable, are distinction without a difference and are not based on anything within the NPSNN. As with the LTC DCO Silvertown Tunnel is a large complex scheme, including a river crossing, promoted by a promoter who has strategic highway functions with existing investment and funding arrangements frameworks.

4.4 It is welcome that the ExA have exhorted the Applicant to at least address that approach, albeit it without prejudice to its position. LBH look forward to seeing the drafting produced by the Applicant and responding to it.