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text relay 

Date: 31st October 2023

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Dear Sir,

RE: Joint Local Highway Authority Response to Applicant’s Deadline 4 Submission REP4-094.

The enclosed note is submitted as a joint response from all five local highway authorities (LHA) to the protective provisions for the benefit of the LHA inserted into the DCO by the Applicant at Deadline 4 (REP4-094). The note includes the amendments to those protective provisions felt necessary by the respective authorities.

Yours faithfully,

	<p>Daniel Douglas – Team Leader Transport Planning London Borough of Havering</p>
	<p>Simon Jones - Corporate Director for Growth, Environment and Transport (GET) Kent County Council</p>
	<p>Graham Thomas – Head of Planning Essex County Council</p>
	<p>Matthew Rheinberg - Major Projects and Urban Design Manager Transport for London</p>
	<p>Mark Bradbury – Interim Director of Place Thurrock Council</p>

RESPONSE TO THE PROTECTIVE PROVISIONS FOR THE BENEFIT OF LOCAL HIGHWAY AUTHORITIES PUT FORWARD BY THE APPLICANT IN THE DRAFT DCO AT D4 (REP4-094)

Introduction

1. This note and its Appendices is submitted on behalf of all five local highway authorities whose assets are affected by the proposals. These comprise Kent County Council, Essex County Council, Thurrock Council, Transport for London and the London Borough of Havering.
2. On 21 July 2023 the London Borough of Havering sent draft protective provisions (PP) for the benefit of local highway authorities to the Applicant. No response was received and LBH submitted the draft PP to the Examination at D2 (REP2-087). Subsequently the Applicant confirmed it intended to insert its preferred form of PP in the draft DCO and did so in the dDCO submitted at D4 (REP4-094).
3. This note responds to the PP that were put forward by the Applicant with suggested amendments in the form of a version showing tracked changes to the Applicant's PP (Appendix A) and a clean version which incorporates the LHA amendments for ease of reference (Appendix B).

Background

4. The role of protective provisions in a DCO is to provide safeguards to protect assets not under the control of the undertaker but which are affected by its proposed works. Normally these are assets in which there is a public interest in ensuring they are adequately protected, a common example being gas and electricity infrastructure. It also commonly applies to the guardians of the transport network, such as railways and canals. That rationale for PP applies also to the local highway network.
5. PP for highway authorities tend to be based on the type of safeguards that would be included in agreements under the Highways Act 1980 which are required to be entered into before any party can carry out works on the local or national network. That is what these PP are based on. They are similar to PP included for the benefit of National Highways and Local Highway Authorities in approved DCO.
6. Prior to inserting PP in the dDCO, the Applicant sought to provide safeguards in proposed side agreements. The side agreements proposed were, in the view of the LHA, clearly insufficient on their own and were, by definition, not susceptible to any adjudication by the ExA.
7. The paragraphs below explain the rationale behind the amendments set out in Appendix A to the extent they are not self explanatory.

Explanation of Amendments

8. The PP submitted by LBH at D2 were based upon PP included in favour of local highway authorities in previous DCO and also reflected elements of the draft Side Agreement provided to the London Borough of Havering by the Applicant. The draft PP inserted by the Applicant appear to be based upon the LBH PP but excluding some material.

9. The amendments made to the draft PP in Appendix A substantially reinstate some of the missing elements of the LBH PP but have also now had the benefit of drafting input from other LHA.
10. There is set out below an explanation for those amendments which benefit from explanation. Dealing with the amendments in turn:

Para 141 - Definitions

“as built drawings” definition added since this phrase is used in para 150 (d) both as drafted by the Applicant and amended. It was not defined in the Applicant’s draft. The list is a list commonly inserted in PP for the benefit of the local highway authorities and National Highways¹. It is the information required to be provided by highway authorities when work is done on the network they are to be responsible for after the works have been concluded.

“detailed information” – this definition has been expanded to include all the information the LHA believe is necessary in order for them to properly consider and provide input into the detailed design to be approved under Sch 2 of the DCO.

“maintenance period” – the amendment to this definition ensures that maintenance of the works would be the responsibility of the Applicant until the Final Certificate is issued – not for a fixed period of 12 months which may be insufficient if the Final Certificate is issued beyond that period.

Para 142 – amendments have been made to make the process of consultation clearer and ensure adequate opportunity for meaningful consultation and response. This includes an obligation to explain the Applicant’s consideration of the LHA response. Para 142 (2) also sets out matters to be agreed prior to the work in question being commenced. The intention being to provide an imperative upon the Applicant to agree such matters which would not exist once the works had commenced.

Para 143 – amends some of the scope of the local operating agreement to encompass all the matters that the LHA would expect such an agreement to cover. Para 143(3) as amended imposes an obligation to comply with the local operating agreement.

Para 145 (6) has been deleted since it is not accepted that, where test results reasonably indicate that works are deficient in some way but that turns out not to be the case, that is due to a failure of the LHA for which it should be liable.

Para 146 – amendments have been made to secure more involvement in the LHA in the Road Safety Audits and to ensure that the recommendations in the audits are carried out.

Para 147 – has been amended to address the making good of any defects in advance of the issue of the Final Certificate and also to provide for latent defects to be rectified.

Para 148 – tightens up the criteria for the issue of the Provisional Certificates.

Para 150 - tightens up the criteria for the issue of the Final Certificates.

¹ See The West Midlands Rail Freight Interchange Order 2020 Sch 13 Part 2 and Part 3; The Northampton Gateway Rail Freight Interchange Order 2019 Sch 13 Part 2 and Part 3; The East Midlands Gateway Rail Freight Interchange and Highway Order 2016 Sch 19 and 20

Para 153 – adds a new para providing for the payment of commuted Sums in respect of new highway assets which will become the responsibility of the LHA

Para 154 – adds a new para providing for payment of costs incurred by the LHA and an indemnity.

Para 155 – adds a new paragraph providing for the provision of warranties from the contractor and designer in favour of the LHA so that there is direct recourse in the event of issues arising.

11. The subject matter of all the new provisions is similar to that which can be found in the PP for the benefit of National Highways to be found in the DCO referred to in footnote 3 to this note and are required by National Highways in respect of any of the highways it becomes responsible for following works being carried out.

Main areas of Dispute

12. Obviously, the extent to which the amendments proposed to the PP in Appendix A are acceptable will not be known until the Applicant responds to those amendments. However, from the responses of the Applicant previously it seems to the LHA that the following are likely to be the main areas of contention:
 - a) The extent of participation of the LHA in certain aspects of the governing of the works.
 - b) Payment of commuted sums for additional maintenance liabilities.
 - c) Potentially some of the new provisions inserted.

END

APPENDIX A

**PROTECTIVE PROVISIONS SUPPLIED BY THE APPLICANT WITH LHA
AMENDMENTS SHOWN TRACKED**

PART 11

FOR THE PROTECTION OF LOCAL HIGHWAY AUTHORITIES

Application

140. The provisions of this Part of this Schedule have effect in relation to relevant works unless otherwise agreed in writing between the undertaker and the relevant local highway authority.

Definitions

141. In this Part of this Schedule—

“as built drawings” means

(a) as constructed drawings in both PDF and AutoCAD DWG formats;

(b) list of suppliers and materials used and CCTV surveys;

(c) product data sheets, technical specifications for all material used;

(d) as constructed information for any utilities discovered installed or moved during the relevant works

(e) method statements for works carried out;

(f) in relation to road lighting, signs and traffic signals any information required by Series 1400 of the Specification for Highway Works;

(g) plan of temporary signage indicating new road layouts;

(h) organisation and methods manuals for all products used in the construction of the relevant works;

(i) as constructed programme;

(j) Health and Safety file;

“business day” means a day other than a Saturday or Sunday, which is not Christmas Day, Good Friday or a bank holiday under section 1 (bank holidays) of the Banking and Financial Dealings Act 1971;

“commuted sum” means the sum to be paid by the undertaker to the local highway authority for the future maintenance of any highway assets not previously forming part of the local highway network which will be transferred to the local highway authority or substantively modified by the works, as calculated in accordance with paragraph 153 of this part;

“detailed design” means drawings and other information comprising the detailed design for ~~local roads comprised in the authorised development~~ the relevant works for the purposes of paragraph 3 of Schedule 2 of the Order;

“detailed information” means drawings, specifications and other information relating to the ~~local highway, as relevant to the works in question, to include but not be limited to comprise~~ the following (insofar as both parties agree (acting reasonably) are relevant and not already provided for in any document that the undertaker is required to produce under Schedule 2 to the Order) ~~and be in accordance with the detailed design~~—

(a) boundary, environmental and mitigation fencing;

(b) road restraint systems (vehicle and pedestrian);

(c) drainage and ducting;

~~(d) earthworks;~~

(d) earthworks including supporting geotechnical assessments required by HD22/08 and any required Strengthened Earthworks Appraisal Form certification (SEAF);

(e) road pavements;

(f) kerbs, footways and paved areas;

(g) long and cross sectional drawings;

(h) traffic signal equipment and associated signal phasing and timing detail

(i) road lighting (including columns and brackets)

~~(h)~~(j) traffic signs and road markings;

~~(i)~~(k) electrical work for road lighting traffic signals and traffic signs;

~~(j)~~(l) highway structures;

~~(k)~~(m) hard and soft landscaping, planting and any boundary features which will form part of the local highway;

~~(l)~~(n) utility, new utilities and diversions of existing utilities insofar as in the existing or proposed local highway;

~~(m)~~(o) a schedule of timings for the works, including dates and durations for any closures of any part of the local highway;

~~(n)~~(p) traffic management proposals including any diversionary routes;

~~(o)~~(q) a schedule of the existing local highway condition prior to commencement of construction related activities;

~~(p)~~(r) a specification of the condition in which it is proposed that the local highway will be returned once the relevant works have been completed;

~~(q)~~(s) any temporary works structures which are to be erected or retained under the Order or otherwise.

(t) pre construction health and safety information;

(u) identification of any land expected to become highway land as a consequence of the relevant works

(v) plans showing any non vehicular highway which is maintainable by the relevant local highway authority or is intended to be at the completion of the relevant works comprising footpaths footways cycleways and bridleways; and

(w) any other information, drawing, or specification that may be required by either party acting reasonably.

“DMRB” means the Design Manual for Roads and Bridges published by the undertaker. or any replacement or modification of that standard for the time being in force;

“final certificate” means the final certificate issued by the local highway authority under paragraph ~~149~~150 of this Part of this Schedule;

“local highway” means any public highway including any public right of way which is maintainable, or is intended at the completion of the works in relation thereto to be maintainable by ~~the~~a local highway authority;

“local operating agreement” means an agreement made pursuant to paragraph 143 of this Part of this Schedule;

“maintenance period” means ~~12 months from the period between~~ the date of the countersigned provisional certificate being ~~served under paragraph 147 of this Part~~ issued and the date of the final certificate being issued unless otherwise agreed in writing between the parties;

“provisional certificate” means the counter signed certificate served under paragraph ~~147~~148 of this Part;

“relevant works” means that part of the authorised works which relate to the local highway for which the relevant highway authority is responsible

“senior representatives” means the regional director on behalf of the undertaker and persons notified to the undertaker by the local highway authority as being their senior representatives; and

“works” means any works authorised by the Order undertaken on, to or under any part of the local highway and any drainage required in connection therewith.

Design input and commencement

142.—(1) The undertaker ~~will~~must allow and facilitate an appropriately qualified ~~officer~~person or ~~officers of the local highway authority that has been nominated~~persons duly appointed by the relevant local highway authority (each being a “nominated officer”) to participate in the design process for the detailed design ~~for the works and will have reasonable regard to any representations of the nominated officer in finalising its detailed design proposal (and, without limitation, the undertaker is able to refuse implementation of any representation which would cause a breach of this Order, conflict with a permit issued under a permit scheme or would entail materially new or materially different environmental effects from those reported in the environmental statement)~~ of the relevant works

~~(2) Participation under sub-paragraph (1) will be in the form of invitations (given at least 10 business days in advance and sent by email) to attend design meetings relating to relevant works and the provision to the nominated officer of such drawings, cross/long sections, design proposals and other information as is reasonably required to allow the nominated officer to provide an informed response on the detailed design proposals to the undertaker.~~

~~(3) Nominated officer will have no less than 10 business days from the date on which the undertaker supplies information pursuant to sub-paragraph (2) to provide the undertaker with any comments upon any information provided to that officer pursuant to sub-paragraph (2).~~

~~(4) No part of the works may commence until, the undertaker has provided to the local highway authority the detailed information relating to that part of the works (without prejudice to the undertaker providing parts of the detailed information insofar as it relates to the operation of the local highway at a later date provided the provision of that information is subject to this sub-paragraph and sub-paragraphs (5) to (7)).~~

~~(5) The undertaker will give the local highway authority at least 10 business days to comment and provide representations by email on the detailed information provided to it under sub-paragraph (4).~~

~~(2) The undertaker will have reasonable regard to any comments. Prior to the undertaker finalising the detailed design of any of the relevant works the undertaker must~~

- ~~(a) provide the nominated officers with drawings cross/long sections of the relevant works~~
- ~~(b) offer, and if accepted, facilitate a meeting or series of meetings, as necessary for the proper understanding of the detailed design of the relevant works and allowing for iterations of the detailed design in response to such meetings~~
- ~~(c) allow a period of not less than 21 business days from the date of the final version of the detailed information being supplied to the nominated officers for the nominated officer to make representations and recommendations made by the local highway authority under paragraph (5) (and, without limitation, the undertaker is able to refuse implementation of any representation or recommendation which would cause a breach of this Order, conflict with a permit issued under a permit scheme or would entail materially new or materially different environmental effects from on the proposed design~~
- ~~(d) have regard to any representations and recommendations of the nominated officer when finalising the detailed design and provide to the nominated officer a response to those reported in the environmental statement) and will endeavour to provide the local highway authority with representations and recommendations in writing within 10 business days of their receipt setting out reasons for non-acceptance of any representation or recommendation as soon as reasonably practicable upon receipt of representations and recommendations including confirming whether or not and how the detailed design has been changed in response to the representations and recommendations from the nominated officer~~

~~(3) Prior to the undertaker commencing any of the relevant works the undertaker must~~

- ~~(a) submit the detailed information in respect of the relevant works to the nominated officer of the relevant local highway authority~~
- ~~(b) allow a period of not less than 21 business days for the nominated officer to provide representations and recommendations in respect of the detailed design information;~~
- ~~(c) have regard to any representations of the nominated officer in respect of the detailed design and provide to the nominated officer a request from the local highway authority response to those representations in writing within 10 business days of its receipt setting out reasons for non-acceptance of any representations and recommendations including confirming whether or not and how the detailed design has been changed in response to the representations and recommendations from the nominated officers~~
- ~~(d) agree with the relevant local highway authority the commuted sum to be paid for the relevant works under paragraph 153~~
- ~~(e) agree with the relevant local highway authority details of adequate maintenance access and hardstandings for inspections and maintenance on foot or using vehicles (if necessary) for any elements of the relevant works for which the relevant local highway authority will become responsible~~

(f) agree the design of any temporary new access to the relevant works which is not otherwise identified in any of the plans certified in this Order

(g) provide the warranties to the relevant local highway authority pursuant to paragraph 155

(6)(4) Within 10 business days of receiving the undertaker's decision and reason for any non-acceptance, the local highway authority shall be able to challenge the decision and any disputes arising shall be determined in accordance with paragraph 156.

(7)(5) The relevant works must not be carried out except in accordance with the detailed information (but subject to the process in sub-paragraphs (4) and (5)-3) or as otherwise may be agreed between the undertaker and the relevant local highway authority.

(8)(6) This paragraph does not apply to the relevant works to the extent the undertaker and the relevant local highway authority agree (acting reasonably) that a permit issued under a permit scheme applies to the works.

143.—(1) Before commencing the construction of, or the carrying out of any relevant work authorised by this Order which involves works to a local highway the undertaker must use reasonable endeavours to agree with the relevant local highway authority a local operating agreement covering the following as relevant to the works in question—

(a) communications and customer care arrangements for communication with stakeholders and the community generally including who will be

(i) the identity of which party is responsible thereoffor each activity;

(ii) the identity of the contractor responsible for proactive stakeholder engagement and communication;

(iii) defined timescales for contractors response;

(b) definition of the extents offor the works areas, zone of influence, traffic management and diversion requirements and free recovery areas (as appropriate) For the avoidance of doubt the works areas are the areas between the highway boundary, the traffic management lead in tapers, the longitudinal coning and the end of the lead out tapers. The zone of influence is defined as everything outside of the works areas;

(c) asset handover arrangements comprising of a description of the scheme's assets and activities to be undertaken to enable commencement, completion and handover of works, asset inspection, and the identity of which party is responsible for each activity. This is to include a requirement that contractors undertake a pre-works joint handover inspection of existing assets and agreement of condition and repair of any longitudinal joints prior to commencement of works. This is also to include the contractor defining a approach to incremental hand-back of as built asset data as per the Asset Data Management Manual, and for the contractor to undertake rectification of damage or defect where applicable;

(d) arrangements for the submission to the local highway authority of digital copies of all as-built drawings for the relevant work area including ~~adoption limits~~ identification of any new limits of highway maintainable by the relevant local highway authority;

(e) routine maintenance and repair arrangements to apply during the construction period and the maintenance period. Prior to the provisional certificate being issued the contractor will be responsible for all routine maintenance and repair activities throughout the construction phase of the authorised development;

(f) winter maintenance and severe weather arrangements to apply during the construction period and the maintenance period. The contractor is to advise the local highway authority of all programmed works and also of all works that could compromise winter treatments. Contractor is also to identify and resolve conflict between a booked traffic management change and a planned treatment;

(g) occupancy management to include the contractor being required to work within the road space booking requirements of the relevant local highway authority;

(h) continuity of technology arrangements to apply during the construction period and the maintenance period. This is to include the contractor being responsible for a complete pre-construction and post-construction technology asset review (including any remedial work to be

completed), provision of temporary technology during construction scheme to replace that disconnected and rectify any faults with temporary technology;

~~(f)~~(i) arrangements for dealing with and recording incidents during the construction period and the maintenance period. This is to include identification of incidents and provision of recovery vehicles within the free recovery area, responding to incidents within the zone of influence when required by the relevant local highway authority and responding to incidents within the works area; and

(j) traffic management: ~~during relevant~~ information on the key activities to be undertaken with regard to the design, installation, maintenance and removal of traffic management. This is to include the contractor being responsible for the design, installation, maintenance and removal of all traffic management required for the safe construction of the authorised development, including processing all traffic regulation orders required; and

~~(g)~~(k) the method of reporting of any claims made by and against the undertaker in respect of the relevant highway works.

~~(2) Any~~Where agreement cannot be reached on the terms of any local operating agreement the contents will be resolved using the procedure under paragraph 156

~~(2)~~(3) The agreement completed under sub-paragraph (1) must be complied with at all times by the undertaker and its contractors and their sub-contractors and continue in force until such time as a the relevant final certificate has been issued in respect of the relevant works or the removal of the undertaker and its contractors and their sub-contractors from all local highway authority roads, whichever is the earliest.

Survey Reinstatement

144. The undertaker must reinstate to the reasonable satisfaction of the relevant local highway authority any part of the local highway which has been temporarily used for survey or investigation purposes by the undertaker to the condition and level it was in on the date on which the survey or investigation began or such other condition as may be agreed in writing by the relevant local highway authority.

Inspections and testing of materials

~~144.145.~~—(1) The undertaker must allow and facilitate ~~nominated officers~~any person duly appointed by the local highway authority to access and inspect at all reasonable times any part of the relevant works during their construction and before a final certificate has been issued in respect of the relevant works as is reasonably necessary to ensure that the works have been or are being carried out in accordance with the detailed design and to the appropriate standard.

(2) The undertaker must allow any person duly appointed by the local highway authority to enter upon and inspect any part of the works which are in, over, under, or adjacent to any local highway or may affect any highway or any property of the local highway authority, during the carrying out of the works, and the undertaker must give to such officer all facilities for such inspection.

~~(2)~~(3) Any testing reasonably requested by the relevant local highway authority of materials used in any works must be carried out at the undertaker's expense and in accordance with the latest version of the Manual of Contract Documents for Highway Works (or any other testing specification agreed by both ~~Parties~~parties acting reasonably).

~~(3)~~(4) The relevant local highway authority (or its agent) may test all or any materials used or proposed to be used in any works and the undertaker must provide such information access and materials as is reasonably necessary to facilitate such testing.

~~(4)~~(5) The undertaker must, as soon as is reasonably practicable and in any event within 7 business days of a request, provide the local highway authority with a copy of all test certificates and results relevant to the relevant works that the relevant local highway authority has requested in writing.

~~(5)~~(6) The relevant local highway authority must as soon as is reasonably practicable and in any event within 7 business days of a request provide the undertaker with a copy of all test results and certificates relevant to the relevant works that the undertaker has requested in writing.

~~(6) In circumstances where a work carried out by the undertaker is tested by the local highway authority pursuant to the provisions of this part of the Schedule and that test resulted in works being undone at the undertaker's expense (acting reasonably) and found to be satisfactory then that expense must forthwith be~~

reimbursed by the local highway authority provided that the local highway authority was given a reasonable opportunity by the undertaker to inspect the works at a time when the works could have been inspected without the need to incur the expense.

Road Safety Audits

~~145.146.~~—(1) The undertaker must procure that an appropriately qualified RSA team (as defined in DMRB standard GG 119) undertakes road safety audit in accordance with DMRB Volume 5 Section 2 Part 2 (GG 119) or any replacement or modification of that standard GG 119 and ~~will~~must provide copies of the reports of such audits to the relevant local highway authority within 7 business days of their receipt by the undertaker.

~~(2) The local highway authority must be invited to participate in the road safety audit conducted under sub-paragraph (1).~~

~~(2) The undertaker must provide details of the safety auditors the undertaker proposes to appoint to carry out road safety audits in respect of the relevant works to the relevant local highway authority and provide the relevant local highway authority with a reasonable opportunity to raise any concerns in respect of such appointment prior to the appointment being made.~~

~~(3) An appropriately qualified person on behalf of the relevant local highway authority must be invited to participate in the road safety audits of the relevant works conducted under sub-paragraph (1). Participation under this sub-paragraph (2) will be in the form of invitations (given at least one calendar month in advance and sent by email) to attend the road safety audit and the provision to the appropriately qualified person on behalf of the relevant local highway authority of such reports and other information as is reasonably required to allow that person to engage in informed participation in the road safety audit. The undertaker must consult with the relevant local highway authority with respect to any additional requirements the relevant local highway authority considers should be addressed in those audits.~~

~~(3)(4) Where the report of the stage 3 and 4 road safety audit identifies any recommended measures in respect of the ~~local highway~~relevant works, the undertaker must carry out, at its own expense and to the reasonable satisfaction of the local highway authority, ~~these~~the measures or works identified as part of the stage 3 and 4 audit ~~which the undertaker considers necessary (acting reasonably)~~unless otherwise agreed with the relevant local highway authority and ~~which provided the measures or works~~ do not give rise to any new or materially different environmental effects in comparison with those identified in the environmental statement.~~

~~(5) Any recommended measures or works which are to be carried out to a relevant local highway authority road in accordance with the report of the stage 3 or stage 4 road safety audit must be undertaken by the undertaker.~~

~~(6) The undertaker must use reasonable endeavours to agree with the relevant local highway authority a programme for works to be carried out under sub-paragraph (4), which programme must include but is not limited to timing of any closures of any part of the highway, traffic management arrangements, signage and diversion routes where appropriate.~~

~~(7) The carrying out of recommended measures or works under this paragraph 146 are to be taken to be works carried out under this Order.~~

~~(8) Where agreement cannot be reached under this paragraph, the terms of an agreement will be resolved in accordance with paragraph 156.~~

Defects in local highways constructed by the undertaker

~~146.147.~~—(1) Until such time as a final certificate has been issued in respect of any relevant works, the undertaker must make good any defects in the relevant works constructed by the undertaker or any person acting on behalf or under the instruction of the undertaker to the reasonable satisfaction of the relevant local highway authority.

~~(2) The~~Where the undertaker carries out any relevant works it must ~~submit~~make good any latent defects in those works notified to it by the local highway authority ~~such details and information relating~~within the period of 12 years from the date of the issue of the final certificate to the reasonable satisfaction of the local highway authority.

~~(3) The carrying out of any making good any defects under sub-paragraph (1) and remedial works required under sub-paragraph (2) must be preceded by the submission of such details and information to the local highway authority as the ~~local highway authority and the undertaker~~ agree isdeems to be reasonable in the~~

circumstances but always including a description of the works to be carried out, a schedule of timings for the works, including dates and durations for any closures of any part of the local highway and traffic management proposals.

(4) The undertaker must use reasonable endeavours to complete the works pursuant to sub-paragraph (2) on such date or dates that will be notified by the undertaker to the local highway authority in writing or as may be agreed between the parties acting reasonably.

(2)(5) Prior to the completion of the works pursuant to sub-paragraph (2) the undertaker must invite the local highway authority to participate in the inspection of such works to identify any defects or incomplete works.

Provisional Certificate

147.148.—(1) Subject to sub-paragraph (2), when the undertaker considers that the relevant works have reached completion so that they are available for use by the public it must serve a provisional certificate on the relevant local highway authority and must allow the relevant local highway authority the opportunity to inspect the works to identify any defects or incomplete works ~~(and the undertaker must give proper consideration to any representations and recommendations made by the local highway authority and make good such any defects pursuant or incomplete works identified.~~

(2) The undertaker must not serve a provisional certificate on the relevant local highway authority under sub-paragraph (1) until either—

- (a) a stage 3 road safety audit has been carried out in respect of the relevant works in question in accordance with GG19GG119 of DMRB and ~~unless otherwise agreed with the opinion of the undertaker~~ relevant local highway authority any recommended measures identified in the audit and which ~~the undertaker considers to be necessary~~, have been completed; agreed under paragraph 146 should be carried out and where a further stage 3 road safety audit has been carried out in accordance with this sub-paragraph (a) to confirm that recommended measures identified in the audit have been appropriately addressed to the satisfaction of the appropriately qualified RSA team (as defined in DMRB standard GG 119); or
- (b) ~~the~~ the relevant works were not subject to a stage 3 safety audit and the relevant local highway authority has been provided an opportunity to inspect the works and the undertaker has, ~~in its opinion~~, completed any further works or measures required to address any safety deficiencies or defects identified as a result of the inspection;

~~The and any defects or incomplete works have been made good~~

(3) Subject to sub-paragraph (2) the relevant local highway authority must issue to the undertaker, on request from the undertaker a counter-signed provisional certificate in relation to any part of the relevant works, after completion of that part of the relevant works ~~once a stage 3 safety audit has been carried out in accordance with sub-paragraph (2).~~

Maintenance

148.149.—(1) Subject to paragraph (2), the undertaker must maintain the works throughout the maintenance period to the standard appropriate to their use by the public as specified in the DMRB including remedying any defects.

(2) Nothing in paragraph (1) makes the undertaker responsible for the maintenance of any street works or maintenance works undertaken by any person other than the undertaker or which does not form part of the authorised development during the maintenance period.

(3) The undertaker must use reasonable endeavours to complete maintenance works pursuant to paragraph 149(1) on such date or dates notified to the relevant local highway authority in writing by the undertaker or as may be agreed by the undertaker and the relevant local highway authority acting reasonably.

Final Certificate

149.150.—(1) The local highway authority must ~~promptly~~ as soon as reasonably practicable issue a final certificate in respect of the works where—

- (a) ~~the maintenance period has passed;~~

- ~~(b)~~(a) all incomplete works, identified defects and failure to maintain requiring remediation ~~under sub-paragraph 8(1)~~ have been remedied to the relevant local highway authority's reasonable satisfaction; ~~and~~
- ~~(e)~~(b) the undertaker has given the local highway authority a reasonable opportunity to inspect the relevant works in readiness for the issue of a final certificate and has given due consideration and acted accordingly in respect of any representations and recommendations made by the local highway authority in respect of the works;
- ~~(d)~~(c) the undertaker has provided the local highway authority with a health and safety file in respect of the relevant works to the local highway authority's reasonable satisfaction;
- ~~(e)~~(d) the undertaker has provided the relevant local highway authority with the as built drawings and such detailed details and information as relating to any such works as the local highway authority deems to be reasonable in the circumstances including, for the avoidance of doubt, such Detailed Information as the relevant local highway authority has requested (acting reasonably) in relation to the relevant works as built; ~~and~~
- ~~(f)~~(e) any sewers which the local drainage authority consider should be constructed to dispose of soil and surface water drainage in connection with the relevant Worksworks and in order to make them appropriate for public use have been constructed.
- ~~(f)~~ The issue a stage 4 safety audit in accordance with GG119 of a final certificate by the DMRB has been completed and any works arising therefrom have been completed unless otherwise agreed with the relevant local highway authority ~~amounts~~
- ~~(g)~~ the relevant works are not subject to an acknowledgment by the any ongoing traffic management measures or routeing of construction traffic related to the authorised development
- ~~(h)~~ the undertaker has paid to the relevant local highway authority any commuted sum payable under paragraph 153 in respect of the relevant works
- ~~(i)~~ the undertaker has paid to the relevant local highway authority all costs and expenses due under paragraph 154 at that point
- ~~(j)~~ any transfer of land requested by the relevant local highway authority has been completed under paragraph 152; and
- ~~(g)~~(k) the relevant local highway authority considers that the construction, alteration or diversion (as the case may be) of a highway has been completed to its reasonable satisfaction for the purposes of articles 10(1) and 10(2) of the Order.

Emergency Work

~~150.151.~~ Nothing in this Part of this Schedule prevents the local highway authority from carrying out any work or taking such action as deemed appropriate forthwith without prior notice to the undertaker in the event of an emergency or danger to the public.

Land interests

~~151.152.~~ Following~~Prior to~~ the issuing of the final certificate under paragraph ~~149~~150 in respect of any part of the ~~local highway~~relevant works, the undertaker must, if requested by the relevant local highway authority, in respect of a local highway which is to be maintainable by the relevant local highway authority following, and as a result of, the completion of those works either—

- (a) execute and complete a transfer to the relevant local highway authority at nil consideration of any land and rights which have been compulsorily acquired under this Order and which are necessary for the maintenance and operation of a local highway; or
- (b) exercise article 20 (compulsory acquisition of land) and article 28 (compulsory acquisition of rights and imposition of restrictive covenants) as applied by article 31 (application of the 1981 Act) and 32 (modification of the 2017 Regulations) of this Order to directly vest in the relevant local highway authority land or interest which ~~are~~may be necessary for the maintenance and operation of a local highway,
- (c) unless otherwise agreed between the undertaker and the relevant local highway authority.

Commuted Sums

153.

(1) The undertaker must use reasonable endeavours to agree with the relevant local highway authority a schedule of new highway assets which are proposed to become the maintenance responsibility of the relevant local highway authority as a result of the authorised development under article 10 (construction and maintenance of new, altered, or diverted streets and other structures) and article 15 (classification of the roads, etc.) of the Order.

(2) Where the schedule prepared under paragraph (1) cannot be agreed, the matters of dispute shall be determined in accordance with paragraph 156.

(3) Following agreement of the schedule under sub-paragraph (1) or determination under sub-paragraph (2), the relevant local highway authority must prepare a calculation of the Commuted Sum based on maintenance the local highway authority considers to be required for the schedule of highway assets agreed under sub-paragraph (1) or determined under sub-paragraph (2) and must use reasonable endeavours to agree it with the undertaker.

(4) The undertaker must be provided with a complete breakdown of the calculation of the Commuted Sum by the local highway authority under sub-paragraph (3) including any assumptions used.

(5) Where the calculation prepared under sub-paragraph (3) cannot be agreed, the matters of dispute shall be determined in accordance with paragraph 156.

(6) The undertaker must pay the Commuted Sum to the relevant local highway authority in one instalment within 10 business days of the later of:

- (a) the date of completion of the relevant works to which the Commuted Sum applies; or
- (b) the date of agreement of the value of the Commuted Sum under sub-paragraph (3) or determination under sub-paragraph (5).

Costs and Indemnities

154. (1) The undertaker must pay to the relevant local highway authority in respect of the works a sum equal to the whole of any costs and expenses reasonably incurred by that relevant local highway authority in respect of:

- (a) participating in the design of any part of the authorised development, the examination or approval of design or construction information required for the works including for the protection of the local highway network, and reaching agreement on the schedule of highways assets pursuant to paragraphs 142 and 143
- (b) carrying out any inspections reasonably required in connection with any of the provisions of this Part of this Schedule, including the inspection of the construction and completion of the works including any remediation works pursuant to paragraph 145
- (c) carrying out any surveys and testing which are reasonably required in connection with the construction of the works pursuant to paragraph 145
- (d) including the schedule of highways assets agreed pursuant to paragraph 143 within the road maintenance contracts of the relevant highway authority;
- (e) negotiating, completing, implementing and monitoring compliance with the relevant local operating agreement pursuant to paragraph 143
- (f) participation in road safety audits relating to the works pursuant to paragraph 146
- (g) issuing any approvals/certificates pursuant to paragraphs 148 and 150
- (h) agreeing any commuted sum pursuant to paragraph 153
- (i) the transfer or vesting in the relevant local highway authority of any land and rights acquired by the undertaker pursuant to paragraph 152
- (j) providing details of and agreeing all costs payable pursuant to this paragraph

(2) The undertaker must pay the costs and expenses referred to in sub-paragraph (1) to the relevant local highway authority within 28 business days of the relevant local highway authority advising the undertaker

that they have been incurred and no final certificate will be issued under paragraph 150 if any payment due to be paid at that point has not been paid.

(3) The undertaker will indemnify and keep indemnified the relevant local highway authority against any liability, loss, costs, claim arising out of or incidental to the relevant works other than any caused by any negligent act, default or omission of the relevant local highway authority.

Warranties

155. (1) The undertaker must procure warranties in favour of the relevant local highway authority from the contractor and designer of the relevant works to the effect that all reasonable skill care and due diligence has been and will be exercised in designing and constructing the relevant works including the selection of the materials, goods, equipment and plant such warranties to be provide to the relevant local highway authority before the relevant work commences.

Disputes

152,156.—(1) In the event of any disagreement between the Parties arising out of or in connection with this agreement (other than in difference as to the meaning or construction of this Part of this Schedule) which requires the agreement of the Parties jointly or the approval of the local highway authority and which cannot be resolved within 10 business days of the disagreement arising, either party may request a review of the issue in disagreement by the parties giving notice in writing to ~~the~~the Parties' senior representatives.

(2) The senior representatives will consider any such request and use all reasonable endeavours in good faith to reach agreement to resolve any disagreement.

(3) Where agreement is not reached by the senior representatives within 10 business days of a request being made under sub-paragraph (2), the disagreement ~~may be the subject of an appeal to the Secretary of State under article 65 (appeals to the Secretary of State) of this Order.~~is to be determined by arbitration as provided for in article 64 (arbitration).

APPENDIX B

PROTECTIVE PROVISIONS INCORPORATING LHA AMENDMENTS

PART 11

FOR THE PROTECTION OF LOCAL HIGHWAY AUTHORITIES

Application

140. The provisions of this Part of this Schedule have effect in relation to relevant works unless otherwise agreed in writing between the undertaker and the relevant local highway authority.

Definitions

141. In this Part of this Schedule—

“as built drawings” means

- (a) as constructed drawings in both PDF and AutoCAD DWG formats;
- (b) list of suppliers and materials used and CCTV surveys;
- (c) product data sheets, technical specifications for all material used;
- (d) as constructed information for any utilities discovered installed or moved during the relevant works
- (e) method statements for works carried out;
- (f) in relation to road lighting, signs and traffic signals any information required by Series 1400 of the Specification for Highway Works;
- (g) plan of temporary signage indicating new road layouts;
- (h) organisation and methods manuals for all products used in the construction of the relevant works;
- (i) as constructed programme;
- (j) Health and Safety file;

“business day” means a day other than a Saturday or Sunday, which is not Christmas Day, Good Friday or a bank holiday under section 1 (bank holidays) of the Banking and Financial Dealings Act 1971;

“commuted sum” means the sum to be paid by the undertaker to the local highway authority for the future maintenance of any highway assets not previously forming part of the local highway network which will be transferred to the local highway authority or substantively modified by the works, as calculated in accordance with paragraph 153 of this part;

“detailed design” means drawings and other information comprising the detailed design for the relevant works for the purposes of paragraph 3 of Schedule 2 of the Order;

“detailed information” means drawings, specifications and other information relating to the relevant works, to include but not be limited to the following (insofar as both parties agree (acting reasonably) are relevant and not already provided for in any document that the undertaker is required to produce under Schedule 2 to the Order)—

- (k) boundary, environmental and mitigation fencing;
- (l) road restraint systems (vehicle and pedestrian);
- (m) drainage and ducting;
- (n) earthworks including supporting geotechnical assessments required by HD22/08 and any required Strengthened Earthworks Appraisal Form certification (SEAF);
- (o) road pavements;
- (p) kerbs, footways and paved areas;
- (q) long and cross sectional drawings;
- (r) traffic signal equipment and associated signal phasing and timing detail
- (s) road lighting (including columns and brackets)
- (t) traffic signs and road markings;
- (u) electrical work for road lighting traffic signals and traffic signs;
- (v) highway structures;

- (w) hard and soft landscaping, planting and any boundary features which will form part of the local highway;
- (x) new utilities and diversions of existing utilities insofar as in the existing or proposed local highway;
- (y) a schedule of timings for the works, including dates and durations for any closures of any part of the local highway;
- (z) traffic management proposals including any diversionary routes;
- (aa) a schedule of the existing local highway condition prior to commencement of construction related activities;
- (bb) a specification of the condition in which it is proposed that the local highway will be returned once the relevant works have been completed;
- (cc) any temporary works structures which are to be erected or retained under the Order or otherwise.
- (dd) pre construction health and safety information;
- (ee) identification of any land expected to become highway land as a consequence of the relevant works
- (ff) plans showing any non vehicular highway which is maintainable by the relevant local highway authority or is intended to be at the completion of the relevant works comprising footpaths footways cycleways and bridleways; and
- (gg) any other information, drawing, or specification that may be required by either party acting reasonably.

“DMRB” means the Design Manual for Roads and Bridges published by the undertaker. or any replacement or modification of that standard for the time being in force;

“final certificate” means the final certificate issued by the local highway authority under paragraph 150 of this Part of this Schedule;

“local highway” means any public highway including any public right of way which is maintainable, or is intended at the completion of the works in relation thereto to be maintainable by a local highway authority;

“local operating agreement” means an agreement made pursuant to paragraph 143 of this Part of this Schedule;

“maintenance period” means the period between the date of the countersigned provisional certificate being issued and the date of the final certificate being issued unless otherwise agreed in writing between the parties;

“provisional certificate” means the counter signed certificate served under paragraph 148 of this Part;

"relevant works" means that part of the authorised works which relate to the local highway for which the relevant highway authority is responsible

“senior representatives” means the regional director on behalf of the undertaker and persons notified to the undertaker by the local highway authority as being their senior representatives; and

“works” means any works authorised by the Order undertaken on, to or under any part of the local highway and any drainage required in connection therewith.

Design input and commencement

142.—(1) The undertaker must allow and facilitate an appropriately qualified person or persons duly appointed by the relevant local highway authority (each being a “nominated officer”) to participate in the design process for the detailed design of the relevant works

- (2) Prior to the undertaker finalising the detailed design of any of the relevant works the undertaker must
 - (a) provide the nominated officers with drawings cross/long sections of the relevant works
 - (b) offer, and if accepted, facilitate a meeting or series of meetings, as necessary for the proper understanding of the detailed design of the relevant works and allowing for iterations of the detailed design in response to such meetings
 - (c) allow a period of not less than 21 business days from the date of the final version of the detailed information being supplied to the nominated officers for the nominated officer to make representations and recommendations on the proposed design

- (d) have regard to any representations and recommendations of the nominated officer when finalising the detailed design and provide to the nominated officer a response to those representations and recommendations in writing within 10 business days of their receipt setting out reasons for non acceptance of any representations and recommendations including confirming whether or not and how the detailed design has been changed in response to the representations and recommendations from the nominated officer

(3) Prior to the undertaker commencing any of the relevant works the undertaker must

- (a) submit the detailed information in respect of the relevant works to the nominated officer of the relevant local highway authority
- (b) allow a period of not less than 21 business days for the nominated officer to provide representations and recommendations in respect of the detailed design information;
- (c) have regard to any representations of the nominated officer in respect of the detailed design and provide to the nominated officer a response to those representations in writing within 10 business days of their receipt setting out reasons for non acceptance of any representations and recommendations including confirming whether or not and how the detailed design has been changed in response to the representations and recommendations from the nominated officers
- (d) agree with the relevant local highway authority the commuted sum to be paid for the relevant works under paragraph 153
- (e) agree with the relevant local highway authority details of adequate maintenance access and hardstandings for inspections and maintenance on foot or using vehicles (if necessary) for any elements of the relevant works for which the relevant local highway authority will become responsible
- (f) agree the design of any temporary new access to the relevant works which is not otherwise identified in any of the plans certified in this Order
- (g) provide the warranties to the relevant local highway authority pursuant to paragraph 155

(4) Within 10 business days of receiving the undertaker's decision and reason for any non-acceptance, the local highway authority shall be able to challenge the decision and any disputes arising shall be determined in accordance with paragraph 156.

(5) The relevant works must not be carried out except in accordance with the detailed information (but subject to the process in sub-paragraphs (3) or as otherwise may be agreed between the undertaker and the relevant local highway authority.

(6) This paragraph does not apply to the relevant works to the extent the undertaker and the relevant local highway authority agree (acting reasonably) that a permit issued under a permit scheme applies to the works.

143.—(1) Before commencing the construction of, or the carrying out of any relevant work the undertaker must agree with the relevant local highway authority a local operating agreement covering the following—

- (a) communications and customer care arrangements for communication with stakeholders and the community generally including
 - (i) the identity of which party is responsible for each activity;
 - (ii) the identity of the contractor responsible for proactive stakeholder engagement and communication
 - (iii) defined timescales for contractors response
- (b) definition of the extents of the works areas, zone of influence, traffic management and diversion requirements and free recovery areas (as appropriate) For the avoidance of doubt the works areas are the areas between the highway boundary, the traffic management lead in tapers, the longitudinal coning and the end of the lead out tapers. The zone of influence is defined as everything outside of the works areas;
- (c) asset handover arrangements comprising of a description of the scheme's assets and activities to be undertaken to enable commencement, completion and handover of works, asset inspection, and the identity of which party is responsible for each activity. This is to include a requirement that contractors undertake a pre-works joint handover inspection of existing assets and agreement of condition and repair of any longitudinal joints prior to commencement of works. This is also to

include the contractor defining a approach to incremental hand-back of as built asset data as per the Asset Data Management Manual, and for the contractor to undertake rectification of damage or defect where applicable;

- (d) arrangements for the submission to the local highway authority of digital copies of all as-built drawings for the relevant work area including identification of any new limits of highway maintainable by the relevant local highway authority;
- (e) routine maintenance and repair arrangements to apply during the construction period and the maintenance period. Prior to the provisional certificate being issued the contractor will be responsible for all routine maintenance and repair activities throughout the construction phase of the authorised development;
- (f) winter maintenance and severe weather arrangements to apply during the construction period and the maintenance period. The contractor is to advise the local highway authority of all programmed works and also of all works that could compromise winter treatments. Contractor is also to identify and resolve conflict between a booked traffic management change and a planned treatment;
- (g) occupancy management to include the contractor being required to work within the road space booking requirements of the relevant local highway authority;
- (h) continuity of technology arrangements to apply during the construction period and the maintenance period. This is to include the contractor being responsible for a complete pre-construction and post-construction technology asset review (including any remedial work to be completed), provision of temporary technology during construction scheme to replace that disconnected and rectify any faults with temporary technology;
- (i) arrangements for dealing with and recording incidents during the construction period and the maintenance period. This is to include identification of incidents and provision of recovery vehicles within the free recovery area, responding to incidents within the zone of influence when required by the relevant local highway authority and responding to incidents within the works area;
- (j) traffic management information on the key activities to be undertaken with regard to the design, installation, maintenance and removal of traffic management. This is to include the contractor being responsible for the design, installation, maintenance and removal of all traffic management required for the safe construction of the authorised development, including processing all traffic regulation orders required; and
- (k) the method of reporting of any claims made by and against the undertaker in respect of the relevant highway works.

(2) Where agreement cannot be reached on the terms of any local operating agreement the contents will be resolved using the procedure under paragraph 156

(3) The agreement completed under sub-paragraph (1) must be complied with at all times by the undertaker and its contractors and their sub-contractors and continue in force until such time as the relevant final certificate has been issued in respect of the relevant works or the removal of the undertaker and its contractors and their sub-contractors from all local highway authority roads, whichever is the earliest.

Survey Reinstatement

144. The undertaker must reinstate to the reasonable satisfaction of the relevant local highway authority any part of the local highway which has been temporarily used for survey or investigation purposes by the undertaker to the condition and level it was in on the date on which the survey or investigation began or such other condition as may be agreed in writing by the relevant local highway authority.

Inspections and testing of materials

145.—(1) The undertaker must allow and facilitate any person duly appointed by the local highway authority to access and inspect at all reasonable times any part of the relevant works during their construction and before a final certificate has been issued in respect of the relevant works as is reasonably necessary to ensure that the works have been or are being carried out in accordance with the detailed design and to the appropriate standard.

(2) The undertaker must allow any person duly appointed by the local highway authority to enter upon and inspect any part of the works which are in, over, under, or adjacent to any local highway or may affect any

highway or any property of the local highway authority, during the carrying out of the works, and the undertaker must give to such officer all facilities for such inspection.

(3) Any testing reasonably requested by the relevant local highway authority of materials used in any works must be carried out at the undertaker's expense and in accordance with the latest version of the Manual of Contract Documents for Highway Works (or any other testing specification agreed by both parties acting reasonably).

(4) The relevant local highway authority (or its agent) may test all or any materials used or proposed to be used in any works and the undertaker must provide such information access and materials as is reasonably necessary to facilitate such testing.

(5) The undertaker must, as soon as is reasonably practicable and in any event within 7 business days of a request, provide the local highway authority with a copy of all test certificates and results relevant to the relevant works that the relevant local highway authority has requested in writing.

(6) The relevant local highway authority must as soon as is reasonably practicable and in any event within 7 business days of a request provide the undertaker with a copy of all test results and certificates relevant to the relevant works that the undertaker has requested in writing.

Road Safety Audits

146.—(1) The undertaker must procure that an appropriately qualified RSA team (as defined in DMRB standard GG 119) undertakes road safety audit in accordance with DMRB Volume 5 Section 2 Part 2 (GG 119) or any replacement or modification of that standard and must provide copies of the reports of such audits to the relevant local highway authority within 7 business days of their receipt by the undertaker.

(2) The undertaker must provide details of the safety auditors the undertaker proposes to appoint to carry out road safety audits in respect of the relevant works to the relevant local highway authority and provide the relevant local highway authority with a reasonable opportunity to raise any concerns in respect of such appointment prior to the appointment being made.

(3) An appropriately qualified person on behalf of the relevant local highway authority must be invited to participate in the road safety audits of the relevant works conducted under sub-paragraph (1). Participation under this sub-paragraph (2) will be in the form of invitations (given at least one calendar month in advance and sent by email) to attend the road safety audit and the provision to the appropriately qualified person on behalf of the relevant local highway authority of such reports and other information as is reasonably required to allow that person to engage in informed participation in the road safety audit. The undertaker must consult with the relevant local highway authority with respect to any additional requirements the relevant local highway authority considers should be addressed in those audits.

(4) Where the report of the stage 3 and 4 road safety audit identifies any recommended measures in respect of the relevant works, the undertaker must carry out, at its own expense and to the reasonable satisfaction of the local highway authority, the measures or works identified as part of the stage 3 and 4 audit unless otherwise agreed with the relevant local highway authority and provided the measures or works do not give rise to any new or materially different environmental effects in comparison with those identified in the environmental statement.

(5) Any recommended measures or works which are to be carried out to a relevant local highway authority road in accordance with the report of the stage 3 or stage 4 road safety audit must be undertaken by the undertaker.

(6) The undertaker must use reasonable endeavours to agree with the relevant local highway authority a programme for works to be carried out under sub-paragraph (4), which programme must include but is not limited to timing of any closures of any part of the highway, traffic management arrangements, signage and diversion routes where appropriate.

(7) The carrying out of recommended measures or works under this paragraph 146 are to be taken to be works carried out under this Order.

(8) Where agreement cannot be reached under this paragraph, the terms of an agreement will be resolved in accordance with paragraph 156.

Defects in local highways constructed by the undertaker

147.—(1) Until such time as a final certificate has been issued in respect of any relevant works, the undertaker must make good any defects in the relevant works constructed by the undertaker or any person

acting on behalf or under the instruction of the undertaker to the reasonable satisfaction of the relevant local highway authority.

(2) Where the undertaker carries out any relevant works it must make good any latent defects in those works notified to it by the local highway authority within the period of 12 years from the date of the issue of the final certificate to the reasonable satisfaction of the local highway authority.

(3) The carrying out of any making good defects under sub-paragraph (1) and remedial works required under sub-paragraph (2) must be preceded by the submission of such details and information to the local highway authority as the undertaker deems to be reasonable in the circumstances but always including a description of the works to be carried out, a schedule of timings for the works, including dates and durations for any closures of any part of the local highway and traffic management proposals.

(4) The undertaker must use reasonable endeavours to complete the works pursuant to sub-paragraph (2) on such date or dates that will be notified by the undertaker to the local highway authority in writing or as may be agreed between the parties acting reasonably.

(5) Prior to the completion of the works pursuant to sub-paragraph (2) the undertaker must invite the local highway authority to participate in the inspection of such works to identify any defects or incomplete works.

Provisional Certificate

148.—(1) Subject to sub-paragraph (2), when the undertaker considers that the relevant works have reached completion so that they are available for use by the public it must serve a provisional certificate on the relevant local highway authority and must allow the relevant local highway authority the opportunity to inspect the works to identify any defects or incomplete works and the undertaker must give proper consideration to any representations and recommendations made by the local highway authority and make good any defects or incomplete works identified.

(2) The undertaker must not serve a provisional certificate on the relevant local highway authority under sub-paragraph (1) until either—

- (a) a stage 3 road safety audit has been carried out in respect of the relevant works in question in accordance with GG119 of DMRB and unless otherwise agreed with the relevant local highway authority any recommended measures identified in the audit and which have been agreed under paragraph 146 should be carried out and where a further stage 3 road safety audit has been carried out in accordance with this sub-paragraph (a) to confirm that recommended measures identified in the audit have been appropriately addressed to the satisfaction of the appropriately qualified RSA team (as defined in DMRB standard GG 119); or
- (b) the relevant works were not subject to a stage 3 safety audit and the relevant local highway authority has been provided an opportunity to inspect the works and the undertaker has completed any further works or measures required to address any safety deficiencies or defects identified as a result of the inspection;

and any defects or incomplete works have been made good

(3) Subject to sub-paragraph (2) the relevant local highway authority must issue to the undertaker, on request from the undertaker a counter-signed provisional certificate in relation to any part of the relevant works, after completion of that part of the relevant works.

Maintenance

149.—(1) Subject to paragraph (2), the undertaker must maintain the works throughout the maintenance period to the standard appropriate to their use by the public as specified in the DMRB including remedying any defects.

(2) Nothing in paragraph (1) makes the undertaker responsible for the maintenance of any street works or maintenance works undertaken by any person other than the undertaker or which does not form part of the authorised development during the maintenance period.

(3) The undertaker must use reasonable endeavours to complete maintenance works pursuant to paragraph 149(1) on such date or dates notified to the relevant local highway authority in writing by the undertaker or as may be agreed by the undertaker and the relevant local highway authority acting reasonably.

Final Certificate

150.—(1) The local highway authority must as soon as reasonably practicable issue a final certificate in respect of the works where—

- (a) all incomplete works, identified defects and failure to maintain requiring remediation have been remedied to the relevant local highway authority's reasonable satisfaction
- (b) the undertaker has given the local highway authority a reasonable opportunity to inspect the relevant works in readiness for the issue of a final certificate and has given due consideration and acted accordingly in respect of any representations and recommendations made by the local highway authority in respect of the works
- (c) the undertaker has provided the local highway authority with a health and safety file in respect of the relevant works to the local highway authority's reasonable satisfaction
- (d) the undertaker has provided the relevant local highway authority with the as built drawings and such details and information relating to any such works as the local highway authority deems to be reasonable in the circumstances including, for the avoidance of doubt, such Detailed Information as the relevant local highway authority has requested (acting reasonably) in relation to the relevant works as built.
- (e) any sewers which the local drainage authority consider should be constructed to dispose of soil and surface water drainage in connection with the relevant works and in order to make them appropriate for public use have been constructed
- (f) a stage 4 safety audit in accordance with GG119 of DMRB has been completed and any works arising therefrom have been completed unless otherwise agreed with the relevant local highway authority
- (g) the relevant works are not subject to any ongoing traffic management measures or routeing of construction traffic related to the authorised development
- (h) the undertaker has paid to the relevant local highway authority any commuted sum payable under paragraph 153 in respect of the relevant works
- (i) the undertaker has paid to the relevant local highway authority all costs and expenses due under paragraph 154 at that point
- (j) any transfer of land requested by the relevant local highway authority has been completed under paragraph 152; and
- (k) the relevant local highway authority considers that the construction, alteration or diversion (as the case may be) of a highway has been completed to its reasonable satisfaction for the purposes of articles 10(1) and 10(2) of the Order.

Emergency Work

151. Nothing in this Part of this Schedule prevents the local highway authority from carrying out any work or taking such action as deemed appropriate forthwith without prior notice to the undertaker in the event of an emergency or danger to the public.

Land interests

152. Prior to the issuing of the final certificate under paragraph 150 in respect of any part of the relevant works, the undertaker must, if requested by the relevant local highway authority, in respect of a local highway which is to be maintainable by the relevant local highway authority following, and as a result of, the completion of those works either—

- (a) execute and complete a transfer to the relevant local highway authority at nil consideration of any land and rights which have been compulsorily acquired under this Order and which are necessary for the maintenance and operation of a local highway; or
- (b) exercise article 20 (compulsory acquisition of land) and article 28 (compulsory acquisition of rights and imposition of restrictive covenants) as applied by article 31 (application of the 1981 Act) and 32 (modification of the 2017 Regulations) of this Order to directly vest in the relevant local highway authority land or interest which may be necessary for the maintenance and operation of a local highway,

unless otherwise agreed between the undertaker and the relevant local highway authority.

Commuted Sums

153.

(1) The undertaker must use reasonable endeavours to agree with the relevant local highway authority a schedule of new highway assets which are proposed to become the maintenance responsibility of the relevant local highway authority as a result of the authorised development under article 10 (construction and maintenance of new, altered, or diverted streets and other structures) and article 15 (classification of the roads, etc.) of the Order.

(2) Where the schedule prepared under paragraph (1) cannot be agreed, the matters of dispute shall be determined in accordance with paragraph 156.

(3) Following agreement of the schedule under sub-paragraph (1) or determination under sub-paragraph (2), the relevant local highway authority must prepare a calculation of the Commuted Sum based on maintenance the local highway authority considers to be required for the schedule of highway assets agreed under sub-paragraph (1) or determined under sub-paragraph (2) and must use reasonable endeavours to agree it with the undertaker.

(4) The undertaker must be provided with a complete breakdown of the calculation of the Commuted Sum by the local highway authority under sub-paragraph (3) including any assumptions used.

(5) Where the calculation prepared under sub-paragraph (3) cannot be agreed, the matters of dispute shall be determined in accordance with paragraph 156.

(6) The undertaker must pay the Commuted Sum to the relevant local highway authority in one instalment within 10 business days of the later of:

- (a) the date of completion of the relevant works to which the Commuted Sum applies; or
- (b) the date of agreement of the value of the Commuted Sum under sub-paragraph (3) or determination under sub-paragraph (5).

Costs and Indemnities

154. (1) The undertaker must pay to the relevant local highway authority in respect of the works a sum equal to the whole of any costs and expenses reasonably incurred by that relevant local highway authority in respect of:

- (a) participating in the design of any part of the authorised development, the examination or approval of design or construction information required for the works including for the protection of the local highway network, and reaching agreement on the schedule of highways assets pursuant to paragraphs 142 and 143
- (b) carrying out any inspections reasonably required in connection with any of the provisions of this Part of this Schedule, including the inspection of the construction and completion of the works including any remediation works pursuant to paragraph 145
- (c) carrying out any surveys and testing which are reasonably required in connection with the construction of the works pursuant to paragraph 145
- (d) including the schedule of highways assets agreed pursuant to paragraph 143 within the road maintenance contracts of the relevant highway authority;
- (e) negotiating, completing, implementing and monitoring compliance with the relevant local operating agreement pursuant to paragraph 143
- (f) participation in road safety audits relating to the works pursuant to paragraph 146
- (g) issuing any approvals/certificates pursuant to paragraphs 148 and 150
- (h) agreeing any commuted sum pursuant to paragraph 153

- (i) the transfer or vesting in the relevant local highway authority of any land and rights acquired by the undertaker pursuant to paragraph 152
- (j) providing details of and agreeing all costs payable pursuant to this paragraph

(2) The undertaker must pay the costs and expenses referred to in sub-paragraph (1) to the relevant local highway authority within 28 business days of the relevant local highway authority advising the undertaker that they have been incurred and no final certificate will be issued under paragraph 150 if any payment due to be paid at that point has not been paid.

(3) The undertaker will indemnify and keep indemnified the relevant local highway authority against any liability, loss, costs, claim arising out of or incidental to the relevant works other than any caused by any negligent act, default or omission of the relevant local highway authority.

Warranties

155. (1) The undertaker must procure warranties in favour of the relevant local highway authority from the contractor and designer of the relevant works to the effect that all reasonable skill care and due diligence has been and will be exercised in designing and constructing the relevant works including the selection of the materials, goods, equipment and plant such warranties to be provide to the relevant local highway authority before the relevant work commences.

Disputes

156.—(1) In the event of any disagreement between the Parties arising out of or in connection with this agreement (other than in difference as to the meaning or construction of this Part of this Schedule) which requires the agreement of the Parties jointly or the approval of the local highway authority and which cannot be resolved within 10 business days of the disagreement arising, either party may request a review of the issue in disagreement by the parties giving notice in writing to the Parties' senior representatives.

(2) The senior representatives will consider any such request and use all reasonable endeavours in good faith to reach agreement to resolve any disagreement.

(3) Where agreement is not reached by the senior representatives within 10 business days of a request being made under sub-paragraph (2), the disagreement is to be determined by arbitration as provided for in article 64 (arbitration).