

## Response of the Local Highway Authorities to Section 2 of the Applicant's Responses to IP's comments on the Draft DCO (dDCO), submitted by National Highways (NH) at D9 (Doc 9.213)

### 1. Introduction

1.1 This document responds directly to the response of the Applicant to the compromise amendments to the Protective Provisions (PP) put forward by the Local Highway Authorities (LHA) at D8 (REP8-150). The response of the Applicant is set out in Section 2 of the Applicant's Responses to Interested Parties comments on the dDCO at D8 (Doc 9.123).

1.2 This response is submitted on behalf of all five LHA.

1.3 With regards to the two general submissions made in paras. 2.1.2 and 2.1.3 of Doc 9.213:

1.3.1 In paragraph 2.1.2 the Applicant once again argues it is a special case and that, as a highway authority, it should not be subject to the same limitations and requirements as a private sector developer. That misses the point. It is not the identity of the promoter that is important, it is the nature of the important assets that need to be safeguarded. In any event, it does not stand up to scrutiny because:

- PP for highway authorities are not limited to DCO promoted by the private sector. As acknowledged by the Applicant, they have been included in DCO promoted by the Applicant and the Applicant has acknowledged that it is appropriate to include them here.
- the closest parallel situation is where, under section 6 of the Highways Act 1980, NH can delegate to a local highway authority some of its functions in order that the local highway authority can carry out works on the strategic road network<sup>1</sup>. In that situation a s.6 Agreement is entered into, and NH routinely retain control over matters such as design, carrying out of the works, programme, compliance with RSA, maintenance obligations and provision of information. It also requires the payment of commuted sums, reimbursement of all its expenses and indemnifying. It does not simply rely on the fact that the local highway authority is a public sector body which already has duties, functions and responsibilities under the Highways Act 1980, as the LHA are being asked to do here.

1.3.2 In para. 2.1.3 the Applicant erroneously states the LHA have acknowledged that many of the amendments sought by them were "inappropriate", hence the compromise put forward by the LHA in REP8-150. That is not the case. As explained in REP8-150 (para. 1.4), the compromise position was "*in order to try and reduce the number of issues upon which the ExA and Secretary of State are required to adjudicate*".

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<sup>1</sup> For example, tying in works necessitated by a larger LHA scheme

1.4 The remainder of this document focusses solely on those amendments sought by the LHA to the PP in REP8-150 not accepted by NH<sup>2</sup>. The numbered paragraphs referred to are those in the PP used in the dDCO submitted by the Applicant at D9.

## 2. Amendments Sought

### Para. 148 – Definition of “as built drawings”

#### Amendment sought

Para. (a) should read “*as constructed drawings of the local highway in both PDF and Autocad DWG formats or in formats reasonably agreed with the relevant local highway authority*”.

#### Justification

Amendments to (a) should not be controversial. The list is much reduced from that required to be provided to the Applicant when carrying out works on the national network. The amendment to (a) is in line with the Applicant’s requirements in other DCOs and simply sets out the expectation in respect of the format of the as built information to be provided.

### Para. 148 new definition and new paragraph – Commuted Sums

#### Amendments sought

Definition of Commuted Sum to be added as follows:

*“commuted sum” means the sum to be paid by the undertaker to the relevant local highway authority for the future maintenance of any highway asset not previously forming part of the local highway network or substantially modified by the works as determined in accordance with paragraph [ ]”*

and new paragraph to be added (suggested to be after paragraph 159 Land Interests):

[ ]

*(1) [Where this paragraph applies in accordance with sub- paragraph 7] 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.*

*(2) Where the schedule prepared under sub-paragraph (1) cannot be agreed, the matters of dispute shall be determined in accordance with paragraph [ ].*

*(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-*

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<sup>2</sup> See Appendix 1 REP8-150

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 relevant 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 [ ].

(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 as evidenced by the issue of the provisional certificate in respect of those works; or

(b) the date of agreement of the value of the commuted sum under sub-paragraph (3) or determination under sub-paragraph (5).

(7) [This paragraph only applies to Transport for London and the London Borough of Havering].

#### Justification

See paragraph 5 of REP8-150 and REP3-186, REP4-318, pages 5 and 6; REP1-304 paras. 4.9 – 4.15, REP4-359 paras. 6.7 -6.15, REP5-114 paras. 5.1 – 5.5 and REP7-229, section 3.

### **Para. 148 – Definition of “detailed design “**

#### Amendments sought

**Para. 148 (d)** should read “*earthworks including supporting geotechnical assessments required by DMRB and any required strengthened earthworks appraisal form certification*”.

**Para. 148 (i)** additional paragraph should read “*traffic signal equipment and associated signal phasing and timing detail*”.

#### Justification

These additions are not aimed at requiring compliance, but simply seek to ensure that the LHA who will be responsible for the assets when the work is complete have the information relevant to their assets. The LHA are surprised they are controversial. The response by the Applicant suggests that the information may be available elsewhere but that is not at all clear and no specific requirement to provide the information is referred to, only general references to other documents. It is not clear what the relevance is of the reference to the Traffic Management Forum, however, if the Applicant believes that there are no such forums in connection with private sector DCO it is mistaken.

## Para. 148 – Definition of “works”

### Amendment Sought

The definition should refer to works “on, to, over or under” any part of the local highway network. The word “over” is missing from the Applicant’s version.

### Justification

The Applicant in Table 2.2 of its Responses to IP’s comments on the dDCO submitted by NH at D9 (Doc 9.213) appears to agree with the amendments sought but has not carried it through to the PP in the dDCO submitted at D9.

## Para. 149 (6) - Design Input

### Amendments Sought

The sub paragraph should be amended as follows:

*(6) The undertaker will have reasonable regard to any comments, representations and recommendations made by the relevant 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 those reported in the environmental statement) and will ~~endeavour to~~ provide the relevant local highway authority with reasons for non-acceptance of any representation or recommendation ~~as soon as reasonably practicable upon following~~ receipt of a request from the relevant local highway authority in writing within 10 business days of ~~such request.~~its decision.*

### Justification

There is no reason why the Applicant cannot accept a commitment to respond to a request from the relevant local highway authority and no reason why the LHA should have to request such a response within 10 days of a decision that they will not necessarily know has been made.

## Para. 150 (1) – local operating agreement

### Amendment Sought

“Reasonable endeavours” should be replaced by “*best endeavours*” in line 2/3.

### Justification

The entering into of local operating agreements is vital and the Applicant should be required to make every effort to enter into them - only frustrated by reasons outside of its control. If the Applicant is doing all it can to enter into a local operating agreement, then it will be satisfying the requirement to use best endeavours. This is not an “unbalanced” request given that other parties who have PP in the dDCO have the benefit of best endeavours obligations from the Applicant in relation to matters no more important than the need to protect the local highway network. Accordingly, a “best endeavours” obligation is appropriate.<sup>3</sup>

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<sup>3</sup> See for example Sch 14 Part 1 para 7 (3) and para 12; Part 5 para 60, para 76 and para 92; Part 10 para 137

## Para. 150 (1) (e), (i) and (j) – contents of local operating agreement

### Amendments Sought

The above sub paragraphs should be amended as follows:

- (e) routine maintenance and repair arrangements in relation to local highways directly affected by the construction of the authorised development;
- (f) continuity of technology arrangements to apply during the construction period and the maintenance period;
- (g) arrangements for dealing with and recording incidents during the construction period and the maintenance period including appropriate provision of recovery vehicles; and
- (h) traffic management: during therelevant works;
- (i) asset handover arrangements; and
- (j) the method of reporting any claims made by and against the undertaker in respect of the works.

### Justification

There is no reason why the above additions should be controversial – it is not agreed that these are effectively covered in other paragraphs. The point of the local operating agreement is that a further level of detail is included which is not found in the PP. The reluctance of the Applicant to accept straightforward, sensible amendments such as these simply adds to the concerns of the LHA with regards to the effective liaison and co-operation that will be forthcoming from the Applicant absent requirements in these PP.

## Para. 153 (3), Para. 155 (2) (a) and Para. 157 (1) (g) – Road Safety Audits

### Amendments Sought

**Para. 153 (3)** should be amended as follows:

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

**Para. 155 (2) (a)** should be amended as follows:

- (a) a stage 3 road safety audit has been carried out in respect of the works in question in accordance with GG119 of DMRB and ~~in the opinion of the undertaker~~ any recommended measures identified in the audit which do not give rise to any new or materially different environmental effects in comparison with those identified in the environmental statement ( and which the undertaker considers to be necessary, have been completed unless otherwise agreed with the relevant local highway authority; or

**Para 157(1)**, a paragraph (g) should be added:

- (g) a stage 4 safety audit in accordance with GG119 of the DMRB has been completed and any recommended measures identified in the audit which do not give rise to any new or materially different environmental effects in comparison with those identified in the environmental statement have been completed unless otherwise agreed with the relevant local highway authority.

Justification

It is considered entirely reasonable for the LHA to be involved in any decision taken by the Applicant not to accept any recommendations of an independent road safety auditor where they apply to the local road network. It is the LHA who will have responsibility for dealing with any safety failures when it takes over responsibility of the asset. It is noted that in s.6 agreements (where LHA are doing works on the national network) the Applicant requires local highway authorities to carry out the recommendations of the road safety auditor unless it agrees otherwise.

**Para. 155 (1) – provisional certificate**

Amendments Sought

The last line of sub paragraph (1) should say “**and complete incomplete works**” not “**or complete incomplete works**”.

Justification

To ensure both defects and incomplete works are included.

**Para. 157 – Final Certificate**

Amendments Sought

Para. 157(1), a paragraph ((h)) should be added as follows:

- (h) the relevant works are not subject to any ongoing traffic management measures or prescribed routing of construction traffic related to the authorised development.

Justification

It is entirely appropriate that the LHA do not assume responsibility for the assets and their maintenance if they are still subject to traffic management measures and are part of a prescribed route for construction traffic.

**New paragraph – before 160 – Costs and Indemnity**

Amendments Sought

A new paragraph to be added as follows:

*Costs and Indemnity*

- [ ] (1) Subject to paragraph (2) 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:

- (h) participating in the design of any part of the authorised development;
- (i) carrying out any inspections reasonably required in connection with any of the provisions of this Part of this Schedule;
- (j) negotiating, completing, implementing and monitoring compliance with the relevant local operating agreement pursuant to paragraph 150;
- (k) participation in road safety audits relating to the works pursuant to paragraph 153, 155 and 157;
- (l) issuing any approvals/certificates pursuant to paragraphs 155 and 157;
- (m) agreeing any commuted sum pursuant to paragraph [ ]; and
- (n) the transfer or vesting in the relevant local highway authority of any land and rights acquired by the undertaker pursuant to paragraph 159.

(2) No costs shall be payable under paragraph (1) if they are the subject of an obligation to pay costs to a relevant local highway authority under the provisions of an agreement entered into between that relevant local highway authority as local planning authority and the undertaker under section 106 of the 1990 Act.

(3) 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 157 if any payment due to be paid at that point has not been paid.

(4) 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.

### Justification

Paragraphs 5.5 – 5.8 of REP8-150 remain applicable. The Applicant once again believes it is different and that because it is a highway authority it should not pay the costs of the local highway authorities notwithstanding that:

- All other PP include payment of the other parties full costs.
- The local highway authority have no means of meeting these costs.
- The Applicant has accepted responsibility for the costs in the S106 Agreements – this provision simply seeks to ensure that if the S106 monies are not sufficient to cover all the costs (since they were based not on the LHA estimates of full costs being recovered but based on what the Applicant was prepared to offer) then they are still recoverable.
- the Applicant always requires its costs to be reimbursed even though it has licence obligations funded by central government. That is not only in connection with works carried out by the private sector but also in connection with works carried out by local highway authorities on its own network.

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