

Gravesham Borough Council (IP Ref: 20035747)

Response to Secretary of State's letter dated 26 July 2024 in respect of the amendment to section 85 of the Countryside and Rights of Way Act 2000

Introduction

Gravesham Borough Council (Gravesham) notes that the applicant submitted a version 3.0 unilateral undertaking to the examination under [REP10-014](#) to the effect that a payment of £4.24 million would be made to Kent County Council to create an AONB Enhancement Fund (now National Landscape).

Both [Natural England](#) and the [Kent Downs National Landscape Team](#) have responded to the Secretary of State's [letter](#) dated 9 July 2024 effectively stating that they do not consider the package proposed by the applicant to be sufficient, notwithstanding a 'without prejudice' offer by the [applicant](#) to increase the financial package by an additional £3 million to be delivered by amending Table 1 to document 7.21 Stakeholder Actions and Commitments Register ([REP9A-060](#)).

In determining the application, the Secretary of State is bound by the revised statutory duty now set out in section 85 of the Countryside and Rights of Way Act 2000, which states:

85 (A1) In exercising or performing any functions in relation to, or so as to affect, land in an area of outstanding natural beauty in England, a relevant authority other than a devolved Welsh authority must seek to further the purpose of conserving and enhancing the natural beauty of the area of outstanding natural beauty.

In response to the submissions made by the Interested Parties, the Secretary of State has issued a further [letter](#) dated 26 July 2024 which contains the following:

Amendment of section 85 of the Countryside and Rights of Way Act 2000

1. Responses were provided by the Applicant, Natural England and the Kent Downs National Landscape Team in response to the Secretary of State's consultation letter of the 09 July 2024.
2. The proposal to provide funding to deliver enhancement measures to the Kent Downs National Landscape (formerly AONB) is noted, but the appropriate amount of funding or non-financial measures remains a point of disagreement. Without prejudice to any final decision on this matter, it is proposed that the following provision is included within the Schedule 2, Part 1, requirement 3 (detailed design) of the Development Consent Order:
 - (3) Prior to the commencement of the operation of the authorised development, the undertaker and Natural England must agree to a written proposal regarding measures, which may include a financial payment or other non-financial measures, for the benefit of the Kent Downs National

Landscape having regard to the duty of section 85 of the Countryside and Rights of Way Act 2000. Projects to be supported financially or by non-financial measures will be in accordance with the principles of the Kent Downs AONB Management Plan or any superseding document, and will be agreed with the Kent Downs National Landscape team.

(4) Any dispute under sub-paragraph (3) above as to the measure or measures to be agreed, including the quantum of any financial payment if included, shall be referred to an independent expert agreed by all parties in accordance with article 64 (arbitration).

3. All interested parties are invited to provide any comments they may have on the responses provided, as well as the proposed provision.

Article 64 (arbitration) of v. 12.0 of the Draft Development Consent Order (REP10-005) states:

Arbitration

64.—(1) Except where otherwise expressly provided for in this Order and unless otherwise agreed in writing between the parties, any difference under any provision of this Order (other than a difference which falls to be determined by the tribunal) must be referred to and settled by a single arbitrator to be agreed between the parties or, failing agreement, to be appointed on the application of either party (after giving notice in writing to the other) by the President of the Institution of Civil Engineers.

(2) Any matter for which the consent or approval of the Secretary of State is required under any provision of this Order is not subject to arbitration.

Points that Gravesham wishes to raise in relation to the approach set out above.

1. For the avoidance of doubt, Gravesham remains opposed to the proposal in principle as it believes a convincing case has not been made by the applicant that this is the most appropriate solution to the existing problem at the Dartford Crossing. The applicant's own analysis shows that LTC will only provide temporary relief at Dartford, where transport demand is relatively inelastic, and benefits in terms of network resilience have been assumed rather than proven. This means that further interventions are likely to be required in time at Dartford and elsewhere on the network that will be at additional cost to the taxpayer and road users. These inevitable additional costs have not been factored into the scheme's BCR and are separate from the unacceptable environmental impact of the scheme on the local area. The comments provided below on the statutory duty under Section 85 and the draft requirement are therefore 'without prejudice' to this position.

2. Schedule 2, Part 1, requirement 3 of the draft DCO deals with submission of detailed design of the consented works for approval by the Secretary of State and not matters potentially outside the Order limits. If the outstanding issue is to be dealt with by an additional requirement under Schedule 2, Part 1, it should appear as a separate new provision perhaps following requirement 5 on Landscaping and Ecology with the remaining requirements re-numbered.

3. The new provision seeks agreement between the applicant and Natural England on the form any package should take and, in the absence of agreement, arbitration by a third

party in accordance with Article 64. As such, it would not appear in the electronic register of requirements to be discharged by the Secretary of State under Schedule 2, Part 2. In the interests of transparency, details of any agreement or the result of arbitration should appear in the Register as a matter of public record. This would occur automatically should the suggestion under point 3 below be accepted. Gravesham would also suggest that the Kent Downs National Landscape Team be a party with whom agreement needs to be reached as it is they that would be implementing any agreed scheme.

4. Most of the requirements set out in Schedule 2, Part 1 are subject to formal submission to and discharge by the Secretary of State. This is not the case with the proposed new requirement relating to the Kent Downs National Landscape. This begs the question as to whether the Secretary of State would be complying with the statutory duty under section 85 because responsibility for agreeing or arbitrating upon the outcome would be delegated and the Secretary of State would have no control over this. As the responsibility to comply with the duty lies with the Secretary of State and not third parties, it is suggested that irrespective of whether the package is agreed by the parties or subject to binding arbitration, that final 'sign off' should be a matter for the Secretary of State.

5. The proposed requirement states that agreement must be reached on a package 'prior to the commencement of the operation of the authorized development'. However, impacts on the National Landscape will begin to occur during the construction phase and in seeking to further the purpose of conserving and enhancing the natural beauty of the National Landscape, this is a material consideration. As many of the works of enhancement of the National Landscape will be outside the project red line boundary, there is no reason why these cannot be front loaded to commence in parallel or in advance of the LTC scheme. It is suggested therefore that a Grampian style trigger for reaching agreement should be at some earlier point to be set out in the requirement related to any works that impact on the National Landscape.

6. It is unclear from the wording of the proposed requirement as to whether the 'written proposal regarding measures' supersedes the unilateral undertaking under REP10-014 committing the applicant to an initial £4.24m package. Clarification is required on this and whether the intent is that the starting point for negotiations on the package should be £7.24m, to include the additional £3m that the applicant has put forward on a 'without prejudice' basis. Given the Secretary of State has suggested the new requirement knowing that the applicant has made the further offer of £3m, it is assumed that this is considered insufficient and that an enhanced package of measures is required.

7. Gravesham notes that the applicant considers the £38 million asked for by the Kent Downs National Landscape Team to be 'disproportionate'. It is understood that this figure has been derived from a consideration of the applicant's own monetized assessment of residual landscape harm contained in section 10.6 of document [APP-526](#) 7.7 Combined Modelling and Appraisal Report - Appendix D - Economic Appraisal Package: Economic Appraisal Report, which provides an estimate of - £93.35m for the whole project.

8. Whilst it is accepted that the WebTAG methodology is not intended to provide a precise figure for the monetized value of residual landscape harm, the DfT's [Value for Money Supplementary Guidance on Landscape](#) (2021) states that it can provide a useful indicative view of the scale of the monetary impact where the level of harm is considered to be large or moderate.

9. On this basis, the applicant's offer of a compensatory package does not appear generous, particularly when it is considered that £7.24m represents less than 0.1% of an

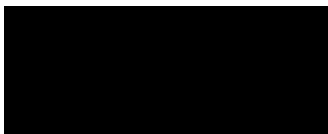
£8.5bn estimated project cost. Gravesham would argue that if Lower Thames Crossing is to be a transformative project in terms of transport and the economy then it should be transformative for nature too. Given Government announced on the 1 August 2024 that it was undertaking a [rapid review](#) of environmental targets to speed nature recovery, wouldn't this be a good place to start and a firm indication of political intent?

10. Should either the parties agree on a package post determination, or the outcome be subject to some form of binding arbitration in accordance with due process (which Article 64 does not define) what would be the legal mechanism for bringing it into effect? The applicant has suggested an amendment to document 7.21 Stakeholder Actions and Commitments Register ([REP9A-060](#)) to deal with this in terms of the additional £3m. However, how would this work in terms of an improved package post determination and how would the Secretary of State tie such a package to any DCO?

11. In terms of the wording of the proposed additional requirement, and having regard to the points raised above, it is suggested that the wording is amended to reflect the earlier agreement on and implementation of the package of measures. Gravesham also has concerns in respect of the draft wording of the requirement saying that the package of measures should *have regard* to the duty of section 85 of the Countryside and Rights of Way Act 2000. This does not appear to reflect the full force of the revised duty, a point made by Natural England in its letter dated 23 July 2024 at pages 1 – 2. It may also be useful if the required enhancement measures are clearly defined within any requirement based on anticipated outcomes.

12. Finally, Gravesham notes that agreeing any final package of measures with Natural England and the Kent Downs National Landscape Team is likely to require resources and that there is a considerable imbalance between those available to the applicant and the other parties – particularly the Kent Downs National Landscape Team. This would be particularly the case was the matter to proceed to independent arbitration. In terms of arriving at a fair and equitable outcome in the public interest, Gravesham would suggest that the Secretary of State should consider how this might be addressed through any requirement and that the reasonable costs of the third parties be met by the applicant.

Yours Sincerely,



Geoff Baker
Senior Planning Officer (Planning Policy)