

Action Point ISH7- SCC to submit final version of protective provisions on the basis that the local highway authority is to approve the detailed design and alternatively that the Secretary of State is to approve the detailed design

Explanatory Note to Protective Provisions

1. Alternative Protective Provisions

The two sets of protective provisions appended to this note reflect the two alternative approval processes for the detailed design of the works to the local road network. The first reflects the County Council's position, that is, that the detailed design of the works to the local road network should be submitted to the local highway authority for approval. The second set of protective provisions reflects the alternative provision, as sought by the Applicant, that the Secretary of State should approve the detailed design of all parts of the scheme, including the works to the local road network, following consultation with the County Council.

Both sets of protective provisions are based on those submitted and considered at ISH7, and are largely the same as the majority of the provisions relate to the process following approval of the detailed design. The protective provisions based on the local highway authority (LHA) approving the works are drafted on the basis that the LHA will have sight of the detailed design information prior to its formal submission for approval pursuant to requirement 12.

The protective provisions based on the Secretary of State approving the works are drafted on the basis that the LHA will be invited to attend design meetings before the LHA is formally consulted pursuant to requirement 12, incorporating a shortened version of the draft wording proposed by the Applicant in its 22nd May submission.

2. Inter-relationship with the DCO

The Protective Provisions inter-relate with Articles 13, 14 and requirement 12 of Schedule 2.

In the event that the LHA is the approving authority under requirement 12 for the detailed design relating to the local highway network, the following amendments would be required to the draft DCO (new text in blue):

Requirement 12 of Schedule 2

No part of the authorised development is to commence until the detailed design of that part has been approved in writing by the Secretary of State following consultation with the relevant planning authority and local highway authority on matters related to their functions, and in respect of any part of the authorised development which relates to changes to the local highway network, no such part is to commence until the detailed design of that part has been approved in writing by the local highway authority

In addition, it would necessary to alter the amendments sought to articles 13 and 14 in the County Council's deadline 6 response to reflect the amended protective provisions as follows:

Article 13

13(10) For the purposes of paragraphs (1), (2), (4), (5) and (6) of this Article "completion" shall mean the later of the date of the Final Certificate issued pursuant to Part [] of Schedule 8 or the date of completion of the authorised development.

Article 14

14(10) For the purposes of paragraphs (3) and (4) of this Article "completion" shall mean the later of the date of the Final Certificate issued pursuant to Part [] of Schedule 8 or the date of completion of the authorised development.

The other amendments to articles 13 and 14 set out in the County Council's deadline 6 submission will continue to be required.

In the event that the detailed design of all works is submitted to the Secretary of State for approval, then there would be no changes proposed to requirement 12. In relation to Articles 13 and 14, the above amendments would still be required. It is absolutely essential that the point of completion and the transfer of maintenance to the LHA is clearly defined in both cases and accords with the terms of the protective provisions. The above amendments seek to secure this.

3. Summary of Amendments to the County Council's proposed Protective Provisions

The summary below is based primarily using the subject headings referred to in the Applicant's response to Action point 37, as contained in the document titled "9.35 Responses to Action Points for Midday 22 May 2019", with the inclusion of an additional heading for commuted sums.

3.1 Commuted Sum

As confirmed in ISH7, the County Council accepts that the proposed provisions in relation to the commuted sum to be paid by the undertaker to the County Council for the maintenance of Non-Standard Highway Assets is workable. As agreed with the Applicant, the reference to this only applying to "new" assets has been deleted on the basis that it was ambiguous. The agreed position is that the commuted sum will be paid for all such assets which were not previously maintainable by the County Council but will become so maintainable pursuant to the provisions of the DCO.

3.2 Detailed Design and Other Detailed Information

Both sets of protective provisions are drafted on the basis that the detailed design information is that which will be supplied by the undertaker for approval pursuant to requirement 12. Requirement 12 does not set out what information is to be supplied as part of the detailed design, and the documents listed in the detailed design could

be moved from the protective provisions and included within the list of documents in requirement 12(2). For the present purposes, the County Council has left the drafting in the protective provisions.

The Council considers that the documents identified in the definition of detailed design are the minimum which should be submitted for approval of the detailed design pursuant to requirement 12. The suggestion by the Applicant that these documents will not be available until after the submission of the detailed design would suggest that the Council will not be properly consulted or able to give a properly considered consultation response in the event it is only a consultee in the approval process, as the essential information it would need to consider will not be provided.

The Council has removed from the definition of Detailed Design that information which it considers would not form part of the detailed design, such as the programme of works. This has been moved to a new definition of "Other Detailed Information" which the Council would need to approve for the proper management of the local road network irrespective of whether it or the Secretary of State is the approving body for the detailed design.

3.3 Local Highway and Public Rights of Way

The Council considers that the protective provisions should apply to all parts of the local highway network for which it is responsible or for which it will inherit responsibility following the authorised development. To distinguish between public highways in the protective provisions simply on the basis of the type of traffic they carry is unjustified.

The Applicant has sought to exclude public rights of way from the protective provisions on the basis that there will be less detailed design information required and the road safety audits will not apply. Requirement 12 does not seek to distinguish between the amount of detail to be submitted for the approval of detailed design for different parts of the highway network, and in reality a common sense approach will apply.

With regard to the road safety audits, parts of the rights of way network which interface with the carriageways will be included, whereas stretches inbetween will not. The Council has amended the protective provisions to reflect this.

3.4 Maintenance

There appears from the Applicant's comments to be some confusion as to what its maintenance responsibility should be for the local highway following the completion of the works. The Council has sought to simplify this, as suggested in ISH7, by amending the protective provisions so that the undertaker is responsible for all parts of the local highway within the Order limits from the moment it commences the authorised development until its completion (or the issue of a Final Certificate if later). The Applicant agreed to consider in ISH7 whether a single date for the completion of the authorised development was identifiable.

In this way the Applicant's responsibilities are clearly defined by location within the Order limits whilst it is either in occupation of these roads or using them to carry out the authorised development. In reality, there are only very short sections of local highway within the Order limits, and most of these are identified as being in the temporary occupation of the undertaker, and maintenance by the County Council could be difficult to implement.

3.5 Approvals

As previously drafted the Applicant was concerned that the Council was seeking to introduce a further approval process on top of that secured by requirement 12. The Council has sought to address this by removing any requirement to seek the Council's approval of the detailed design in the protective provisions, and simply making reference to requirement 12.

The reference to conditional approval, which was intended to facilitate approval of the detailed design in circumstances where some aspects required further information, was objected to by the Applicant and has been deleted by the County Council in this latest version of the protective provisions.

3.6 Reference to the Traffic Management Plan

The Council set out in its deadline 6 submission in relation to requirement 11 its traffic management duties and the need to ensure that the works are carried out in such a way as to minimise disruption.

3.7 Other Works

The Council's position remains that if works are identified as a result of the safety audit, then the Applicant should undertake them even if this requires changes to the Environmental Statement or a separate planning permission or agreement.

3.8 Access

The Council's position remains that it should be able to inspect works to its local highway network, and two day's advance notice of its inspection is unreasonable and could be simply overcome by serving a notice every day of the need to inspect. The Council is a competent highway authority and is accustomed to observing the health and safety rules in place where works are being carried out on its network.

3.9 Defect Liability Period

The Council notes the Applicant's desire to align its maintenance responsibilities with the contractual provisions it has in place in relation to a defect liability period. The Council has clarified the maintenance responsibilities as explained above to simplify the position so that the maintenance responsibility of the undertaker is clearly defined in terms of time and geographical extent, and not governed by private contractual arrangements to which the Council is not party.

3.10 Indemnities

The indemnity provisions remain unchanged. The Applicant has not given any reason why it objects in principle to providing an indemnity.

In relation to claims under the Land Compensation Act 1973, the definition of responsible authority under section 19 could apply to the County Council if it completed the works either due to the undertaker failing to complete them to its satisfaction or simply for practical reasons. Furthermore, the definition of responsible authority in relation to Part 2 is extended to include an authority with power to make traffic regulation orders, and not simply the authority which undertook the works.