

M3 Junction 9 Improvement

Scheme Number: TR010055

8.25 Applicant Response to the Examining Authority's Proposed changes to the draft Development Consent Order

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Planning Act 2008

**Infrastructure Planning (Applications: Prescribed Forms and
Procedure) Regulations 2009**

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M3 Junction 9 Improvement Development Consent Order 202[x]

8.25 Applicant Response to the Examining Authority's Proposed changes to the draft Development Consent Order

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1.1 Introduction

- 1.1.1 This document sets out the Applicant's response to the Examining Authority's (ExA) proposed changes to the latest version of the Applicant's **draft Development Consent Order (3.1, Rev 4)** submitted at Deadline 5 of the Examination.
- 1.1.2 A revised version of the **draft Development Consent Order (3.1, Rev 5)** has been submitted at Deadline 6.

1.2 Applicant response to ExA's suggested changes

Table 1.1 Applicant response to ExA's suggested changes

Reference	ExA's suggested changes	ExA's comments
General		
Drafting guidance	When the dDCO is finalised, all internal references, statutory citations and references and legal footnotes should be checked and updated as required. Drafting should be reviewed to follow best practice in Planning Inspectorate Advice Notes 13 and 15 and guidance on statutory instrument drafting from the Office of the Parliamentary Counsel (June 2020).	
Applicant response		
Applicant notes this comment.		
Drafting	The Final DCO to be submitted in PDF by the Applicant at Deadline 10 must be accompanied by a MS Word copy in the SI template with the SI template validation report confirming that it is in accordance with the format for the official draft SI template and has passed through the draft SI checker. All outstanding format issues must be addressed before submission and the Applicant must submit the checker reports to show that this has been done by Deadline 10.	
Applicant response		

Reference	ExA's suggested changes	ExA's comments
The Applicant notes this comment and will provide its final Development Consent Order at Deadline 8.		
Use of 'and/or'	Check use of 'and/or': this is not considered to be suitable for statutory instruments.	
Applicant response		
The Applicant notes this comment and will address any such use before Deadline 8. The Applicant notes two instances of this; both found in Requirement 9.		
Preamble	Where special powers under Pt 7 Chapter 1 of the 2008 Act (specifically ss 131 and 132) need to be invoked, their application is required to be endorsed on the face of the Orders in the preamble. Check that no such powers need to be added to the preamble.	
Applicant response		
Sections 131 and 132 would be required where compulsory acquisition is sought over common open space, or fuel or field garden allotment. The Scheme does not seek compulsory acquisition over this land and as such the preamble has not been drafted to reference these sections.		
Explanatory memorandum	A robust justification should be provided in the Explanatory Memorandum for each Article and Requirement in the dDCO, explaining why the inclusion of the power or requirement is necessary, proportionate to the novelty or controversy relating to the provision. Account should be taken of equivalent provisions in made DCOs, recognising that practice has	

Reference	ExA's suggested changes	ExA's comments
	<p>evolved and the model provisions set out in the infrastructure regulations may no longer be relevant.</p>	
<p>Applicant response</p>		
<p>The Applicant will review the Explanatory Memorandum (3.2, APP-020) provided at submission and provide an updated document to reflect any amendments which have been made throughout the examination at Deadline 8.</p>		
<p>Articles</p>		
<p>Article 28</p>	<p>The amendment of Article 28 (2) as follows: 28. (2) Prior to the extinguishment of each of the public rights of way identified in columns (1) to (3) of Parts 1 and 2 of Schedule 4 and shown on the rights of way and access plans, the undertaker must erect a site notice at each end of the rights of way to be extinguished no less than 42 days prior to the extinguishment of that right of way and must ensure a copy of this site notice is provided to the local highway authority for their information at the same time</p>	<p>The ExA considers that it is necessary and reasonable to provide for a 42-day notice period to ensure that there is sufficient time for HCC to administer and prepare any related public notices that are required.</p>
<p>Applicant response</p>		
<p>The Applicant understands that this amendment is proposed as a result of Hampshire County Council's position in which they state that they require a 42 day notice period to ensure that there is sufficient time to administer and prepare the public notices that are required. The County Council has stated that the 28 day notice period is equal to the 28 day statutory notice period and would not allow the County Council to properly administer this process and is concerned that it would lead to issues around the statutory notice period itself and possible complaints from the public.</p>		

Reference	ExA's suggested changes	ExA's comments
<p>The Applicant's position is that the notice that would be provided to the County Council (as a result of previous amendments to the Development Consent Order) would not be provided with the view that the County Council would go on to prepare the statutory public notices which would be required in cases where applications are being made pursuant to the Highways Act 1980. However, under the Planning Act 2008 and the proposed Development Consent Order the consideration of the appropriateness of the stopping up is considered during the examination process. Therefore, at the time when the undertaker erects the notice this does not trigger a representation period but is the notification that the way will be stopped up at the end of the 28 days period.</p> <p>Consequently, there are no administrative steps for the County Council to take other than to update the definitive map. The Applicant considers that 28 days is ample time for this to be undertaken.</p>		
<p>Requirements</p>		
<p>1.</p>	<p>The amendment of 1. As follows: 1. "outline traffic management plan" means the document certified by the Secretary of State as the outline traffic management plan for the purposes of this Order.</p>	<p>The ExA considers this to be necessary in order to clarify which version of the plan Requirement 11 is referring to.</p>
<p>Applicant response</p>		
<p>The Applicant will update the draft Development Consent Order (3.1, Rev 5) accordingly.</p>		
<p>4. (3)</p>	<p>The amendment of 4. (3) as follows: 4. (3) The undertaker must ensure that any consultation responses are reflected in the details submitted to the Secretary of State for approval under this Schedule, but only where it is appropriate, reasonable and feasible to do so.,</p>	<p>The ExA does not consider that it is necessary to include the words suggested to be deleted or to place any emphasis on those factors and not others.</p>

Reference	ExA's suggested changes	ExA's comments
	<p>taking into account considerations including, but not limited to, cost and engineering practicality.</p>	
<p>Applicant response</p>		
<p>The Applicant notes the intention of the Examining Authority. The Applicant has set out its position in this regard at ExAQ2 9.2.14 of Applicant Response to the Examining Authority's Second Written Questions (ExQ2) (8.17, REP5-026) which explains where this wording has been granted previously, and how it does not consider the wording changes the interpretation rather it adds clarification. The Applicant does not propose to amend the draft Development Consent Order (3.1, Rev 5) to remove this wording.</p>		
5. (3) (g)	<p>The inclusion of a new 5. (3) (g) as follows: 5.3 (g) landscaping works associated with the provision of any fences and walls.</p>	<p>The ExA considers the inclusion of this provision to be necessary given the location of part of the site within the SDNPA.</p>
<p>Applicant response</p>		
<p>The Applicant notes the Examining Authority's comments and will update the draft Development Consent Order (3.1, Rev 5) at Deadline 6 as follows: <i>'5(3)(g) landscaping works associated with the provision of any fences and walls which do not serve a structural or safety purpose for a highway'</i></p>		
6. (3)	<p>The amendment of 6. (3) as follows: 6. (3) Any tree or shrub, or other element planted as part of the landscaping scheme that, within a period of 5 <u>10</u> years</p>	<p>The ExA considers that given the location of part of the site within the SDNP it is necessary for the scope of 6. (3) to include all elements planted as part of the scheme and that the</p>

Reference	ExA's suggested changes	ExA's comments
	<p>after planting, is removed, dies or becomes seriously damaged or diseased, must be replaced in the first available planting season with a specimen of the same species and size as that originally planted.</p>	<p>reasonable concerns in relation to establishment of various elements justify the extension of the replacement period to 10 years. We do not consider that the extension of this period would place any unduly onerous burden upon the undertaker.</p>
<p>Applicant response</p>		
<p>The Applicant notes that '<i>chalk grassland</i>' has been changed to '<i>other element</i>'. The Applicant intentionally did not use the suggested wording from South Downs National Park of "other element" as the Applicant does not recognise this as having a commonly understood meaning and as such could cause issues for interpretation. The wording generates significant questions over the extent to which individual elements need to be replaced if following a strict interpretation. The Applicant's proposal of '<i>chalk grassland</i>' therefore was to indicate a habitat-based approach and to try and avoid the issues with the non-determinative nature of '<i>other element</i>.'</p> <p>Regarding the amendment of 5 years of replacement period to 10 years, the Applicant has provided its position in its response to ExAQ2 9.2.16 of Applicant Response to the Examining Authority's Second Written Questions (ExQ2) (8.17, REP5-026). This was that beyond a 5 year period routine maintenance will include thinning and coppicing to ensure the continued successful establishment of the planting. This means that the maintenance routine will result in the removal of trees and shrubs. These are removed without the intention of replacement to ensure that the existing stock is not overburdened with competition.</p> <p>The extension from a 5 year to a 10 year replacement period would then be contrary to the maintenance schedule of the landscaping works. As such, the Applicant does not consider this amendment to be appropriate.</p> <p>Furthermore if there were issues with the establishment of any elements of the landscaping scheme this would be addressed in the ongoing management plans where steps to secure establishment would be set out.</p>		

Reference	ExA's suggested changes	ExA's comments
7.	<p>The amendment of 7. as follows:</p> <p>7. Any permanent and temporary fencing and other means of enclosure for the authorised development must be constructed and installed in accordance with the Manual of Contract Documents for Highway Works except where any departures from that manual <u>are required pursuant to Requirement 5(3) (g) above and</u> are agreed in writing by the Secretary of State in connection with the authorised development</p>	<p>To ensure compatibility with the amendment of 5. (3)</p>
<p>Applicant response</p>		
<p>The Examining Authority's amendments suggest that landscaping considerations should have primacy over safety and regulatory standards. The Applicant has provided an explanation as to the differences between requirement 6 and 7 in its response to ExAQ2 9.2.15(ii) of Applicant Response to the Examining Authority's Second Written Questions (ExQ2) (8.17, REP5-026). The Applicant considers this wording is inappropriate and goes beyond ensuring compatibility with requirement 5(3)(g).</p> <p>Under the current drafting of the draft Development Consent Order (3.1, Rev 5), if a relevant planning authority during consultation on requirement 5(3)(g) makes suggestions that are counter to that of the Manual of Contract Documents for Highway Works the Applicant would be able to demonstrate to the Secretary of State that the suggestions would not be appropriate, reasonable or feasible in that case under requirement 4(3). However, should the Secretary of State disagree with the Applicant in that instance, then the current drafting of Requirement 7 allows for flexibility that the Secretary of State may grant deviance from the Manual of Contract Documents for Highway Works. This means there is already sufficient flexibility in the provisions for the Secretary of State to take an appropriate view on the facts laid before him. The proposed wording, however, would grant automatic primacy to a landscaping scheme which would be inappropriate.</p>		
11. (1)	<p>The amendment of 11. (1) as follows:</p>	<p>The ExA considers that, for the avoidance of doubt, it is reasonable to specifically provide</p>

Reference	ExA's suggested changes	ExA's comments
	<p>11. (1) No part of the authorised development is to commence until a traffic management plan for the construction of that part of the authorised development, substantially in accordance with the outline traffic management plan has been submitted to and approved in writing by the Secretary of State following consultation with <u>the South Downs National Park Authority, the Winchester City Council, and</u> the local highway authority.</p>	<p>for consultation on the Traffic Management Plan with the SDNPA and the WCC as well as the local highway authority given the location of the site. As indicated above, the ExA considers that the outline traffic management plan should be defined as the plan certified as such by the SoS.</p>
<p>Applicant response</p>		
<p>The Applicant's response to ExAQ2 9.2.18 in Applicant Response to the Examining Authority's Second Written Questions (ExQ2) (8.17, REP5-026) set out that it would separate the Construction Workers Travel Plan, called a Green Travel Plan, out of the Traffic Management Plan and insert that into the first iteration Environmental Management Plan (fiEMP) (7.3, Rev 6) and require this to be developed in consultation with the relevant planning authorities. This was added to entry C15 of the REAC table at Deadline 5. The Applicant therefore considers that the elements of the traffic management plan which would be appropriate to comment on for a planning authority on matters related to its functions has been moved out of the traffic management plan. Therefore, there is not a need for relevant planning authorities to be consulted on the traffic management plan.</p> <p>However, if the Examining Authority does not agree with the Applicant, the Applicant submits that the wording should be amended to the below to align with the approach taken with other requirements to ensure that a relevant planning authority is not consulted on matters outside its jurisdictional boundary.</p> <p>(1) No part of the authorised development is to commence until a traffic management plan for the construction of that part of the authorised development, substantially in accordance with the outline traffic management plan has been submitted to and approved in writing by the Secretary of State following consultation the local highway authority <u>and the relevant planning authority on matters related to its functions.</u></p>		

Reference	ExA's suggested changes	ExA's comments
13. (1)	<p>The amendment of 13. (1) as follows:</p> <p>1. No part of the authorised development is to commence until written details of the surface water drainage system for that part, <u>in accordance with the flood risk assessment and drainage strategy</u>, reflecting the mitigation measures in chapter 13 of the environmental statement and including means of pollution control, have been submitted to and approved in writing by the Secretary of State following consultation with the relevant planning authority on matters related to their functions, the lead local flood authority, the Environment Agency, and the local highway authority where that the surface water drainage system interacts with a highway maintainable at the expense of that local highway authority.</p>	<p>The ExA considers that the inclusion of the requirement to reference the flood risk assessment and drainage strategy is reasonable to secure those assessments adequately within the DCO.</p>
Applicant response		
<p>The Applicant accepts the inclusion of the Flood Risk Assessment (7.4, APP-157) and Appendix 13.1 (Drainage Strategy Report) of the ES (6.3, APP-142 – APP-143) within Requirement 13.</p>		
14. (1)	<p>The amendment of 14. (1) as follows:</p> <p>14. (1) No part of the authorised development is to commence until written details of proposed noise mitigation in respect of the use and operation of that part of the authorised development, including low noise surfacing, have been submitted to and approved in writing by the Secretary of State, following consultation with <u>Winchester City Council and South</u></p>	<p>The ExA considers that it is reasonable, for the avoidance of doubt, to specifically provide for consultation on the noise mitigation measures with both the SDNPA and the WCC given the location of the site and with HCC in relation to the low noise surfacing given its function.</p>

Reference	ExA's suggested changes	ExA's comments
	<p><u>Downs National Park Authority on matters relating to their function and Hampshire County Council as the local highway authority in respect of low noise surfacing.</u></p>	
<p>Applicant response</p>		
<p>The Applicant accepts that low noise road surfacing is a matter which Hampshire County Council will wish to have regard to given its function. However, this requirement is specifically to manage the environmental health impacts of noise including low noise surfacing for sign off by an environmental health officer of a relevant planning authority.</p> <p>The location and design of low noise road surfacing will be a matter of consultation as part of detailed design through which the local highway authority will be consulted on. The inclusion therefore of the local highway authority is not necessary.</p> <p>However, if the Examining Authority does not agree with the Applicant; the Applicant proposes the following amendments to ensure alignment in the drafting of other requirements. This is to remove specific reference to Winchester City Council and South Downs National Park Authority and refer to '<i>relevant planning authority</i>' to ensure both are treated equally and only consulted to the extent relevant to their functions, and to reference Hampshire County Council only by reference to a relevant highway authority in accordance with other requirements:</p> <p>(1) No part of the authorised development is to commence until written details of proposed noise mitigation in respect of the use and operation of that part of the authorised development, including low noise surfacing, have been submitted to and approved in writing by the Secretary of State, following consultation with the <u>relevant planning authority on matters related to their functions and the local highway authority in respect of low noise surfacing to the extent related to its functions.</u></p>		