

Summary of oral submissions made  
by the Messing and Inworth Action  
Group Limited – ISH2 DCO Hearing

## Summary of oral submissions made by the Messing and Inworth Action Group Limited – ISH2 DCO Hearing

The following representations were made by Stephen Humphreys (Legal Director at Ashfords LLP) (SH) on behalf of the Messing and Inworth Action Group Limited (MIAG). These comments were made in respect of the draft DCO submitted by National Highways (NH) in support of the application for the A12 DCO.

Following the ExA's question to NH in respect of the issue raised by MIAG as part of its Written Representation (REP2-084) re: that MIAG does not consider NH has properly applied for consent for the whole scheme, NH responded that it did not agree with MIAG.

NH acknowledged that more than one NSIP can be included in a DCO application. NH pointed to the fact that the application includes two NSIPs; one for the highway scheme and one for the gas pipeline. NH acknowledged that whilst part of the scheme involves the construction of a new highway that, on balance, the whole scheme equates to the "alteration" of a highway (under the terms of s.22(1)(b) of the Planning Act 2008). In any event the whole scheme is – in NH's view – covered by the Planning Act 2008 and the NPS NN so why does it matter.

SH noted that MIAG's comments on the dDCO are without prejudice to its case in respect of Junction 24, particularly its support for the Main Alternative which does not form part of the DCO proposal.

On the dDCO, SH responded with the following:

- Section 31 of the Planning Act notes that you need a DCO to the extent that a proposal is a NSIP.
- Section 14 details what a NSIP (singular) is, and this includes highway-related development (Section 14(1)(h)).
- Section 14 is subject to Section 22.
- Section 22 provides that highway related development is a NSIP only if it is the construction of a highway (Section 22(1)(a)), the alteration of a highway (Section 22(1)(b)) or the improvement of a highway (Section 22(1)(c)). S.22(a) and (b) are subject to qualifying criteria under s.22(2) & (4) and s.22(3) & (4) respectively. s.22(b) is also subject to alteration specific requirements under s.22(7) & (8).
- For both S.22(a) and (b) the area to be developed has to over 12.5 hectares. The area for development has a different meaning under both (a) and (b). For the construction of a highway it means "land on which the highway is to be constructed ..." and for the alteration of a highway it means the "land on which the part of the highway to be altered is situated ..." (our emphasis). As such, construction encompasses the development of land which is not existing highway but is to become highway. Whereas the alteration of a highway is the alteration to an existing highway.
- National Highways provides in the application form and in the Explanatory Memorandum that the sub-categories of Section 22(1) are expressly stated to be alternatives and notwithstanding the various elements of the proposal, they are obliged to place the whole

scheme into a single category (here “alteration”). Whilst 22(1)(a), (b) and (c) are alternatives, MIAG considers that this belies the fact that each sub-paragraph is capable of being a separate NSIP (a point that NH said it disputes in ISH2).

- For guidance on this MIAG considers that one can look at other sections of the Planning Act 2008. For example, sections 15 (Generating Stations) and 19 (Gas Reception Facilities) each have subsections of different forms of development that equate to their overarching development type. If, for example, one were proposing an onshore generating station (15(2)) and an offshore generating station (15(3)) together in the same application, MIAG does not consider that you would shoehorn them both into 15(2) or 15(3) and call them a single NSIP because they each have distinct criteria (in the same way that construction and alteration of a highway does).
- The fact is that the distance of new highway between Feering and Marks Tey (approximately five to six kilometres of new highway) is capable of qualifying as the construction of a new highway and as a separate NSIP. There is nothing new in National Highways’ approach to this. As an example, the A585 - Windy Harbour was for the “construction” of a five to six kilometre stretch of new highway. It involves extensive detrunking of the existing A585 route, in the same way that the A12 does. This is clear from the General Arrangement Plans submitted in support of that scheme which are currently on the A585 PINS project website. It is worth noting that NH at ISH2 disputed that this scheme constituted the construction of a new highway.
- MIAG considers that there is a reason why the subsections in Section 22 are separate. This is because the construction of a highway compared to the alteration of a highway is very different – in terms of its environmental impacts and also its perception from the public’s and stakeholders’ point of view. Engagement from stakeholders and the public can, of course, be very different where for an alteration scheme compared to the construction of an entirely new stretch of highway. The alteration of a highway suggests that its existing alignment is retained and deviation from this route is minimal. The construction of a new highway engages the impression of a wholly new scheme distinct from any existing infrastructure.
- Given that a five to six kilometre stretch of new road that is being developed between Feering and Marks Tey and there is to be an extensive length of de-trunking to the existing A12 alignment (which MIAG considers supports the proposition that this aspect of the scheme is by no means an alteration), MIAG considers that this length of the proposal satisfies section 22(1)(a) and is the construction of a new highway. As such, MIAG submits that this aspect of the proposal is a separate NSIP that requires consent for which National Highways has not applied.
- Furthermore, and as noted above in respect of public interaction, all of the consultation that National Highways has done to date has been premised on a wrong presentation of the proposal. This is true also from a compulsory acquisition perspective; individuals whose land will be affected by the proposal should be entitled to know the purpose for which their land is being interfered with.

- It is of note that National Highways did not provide during ISH2 (and have not to date) any examples of comparable consented schemes which include such a significant amount of newly constructed highway (and extent of detrunking) where the scheme has been advanced as an “alteration”.
- It is of course up to the Panel and the SoS to satisfy itself that the powers sought by NH in the DCO allow it to develop what NH has applied for. Clearly, there could be significant legal consequences for the scheme if NH does not robustly justify its position in this respect or err on the side of caution and seek to amend the scheme at this stage.

**National Highways noted that a new roundabout plan for the Inworth Roundabout has been prepared by National Highways and shared with both the County Council and MIAG.**

- During ISH1, NH provided that a new Inworth Roundabout plan – setting out a new alignment for the roundabout (in response to issues raised by MIAG) – will not be submitted into the Examination. NH noted that this plan will be submitted as part of the detailed design sign-off under the Requirements.
- MIAG disputes that this is the right approach. If NH knows that it is going to change the scheme alignment and it has shared this approach with ECC and MIAG, the plan should be shared with the Examination so that the ExA and the SoS can take the proposal (and its effects) into account when determining the application.
- The public and third parties should be given an opportunity to consider the extent of the amendments and their impacts during the Examination process; clarity should be provided by NH on how the changes affect the extent to which the assessments (including environmental assessments) have been or could be altered; and there also needs to be certainty on the issue.
- Given the fact that NH keeps referring to the ‘Contractor’ being engaged by NH on this project, it is likely (in MIAG’s view) that the Contractor has already approved the proposed drawings in respect of the Inworth roundabout, especially if they have been shared with ECC. Again, this amendment to the proposal should be detailed now by NH and not kicked down the road so that consultation and/or engagement comes at a much later stage outside of the statutory examination process.

**dDCO**

MIAG is concerned that National Highways has not provided an updated dDCO to date. NH noted in the hearing that it meant to provide an updated DCO at D2 but that this would instead be submitted at D3. However, given comments during the hearing, NH suggested that one would be provided at

D4 instead of D3. MIAG is struggling to understand how and when it is supposed to engage with the updated DCO whilst its submission is being postponed in this way.

SH went through comments made in MIAG's written representation. Given the limited time in ISH2 and the comments from others, MIAG had to highlight these points from its WR:

- MIAG has concern with the definition of Maintain in article 2 and how broad this wording is.
- SH noted concern with Article 5(2) and the wording 'adjacent to'. National Highways provided that they will respond to this point in writing.
- SH noted that ECC will likely want to support its proposed wording for Article 15(6).
- Article 16 is also unclear ('open to traffic' is not defined). National Highways did not explain why this is required. National Highways noted that a response will be provided in writing.
- MIAG has concern with the extent of works that can be undertaken under the term "commence" in Schedule 2, particularly outside the control of the DCO and the extent to which the powers sought adhere to what has been assessed by NH in the ES.
- Requirement 10 – MIAG supports ECC's position in this respect and the need for a link to the design principles submitted by NH. MIAG has proposed changes to Requirement 10 in its WR and encourages NH to adopt this wording for the A12 (especially as the SoS approved it as part of the A428 DCO).
- MIAH supports ECC's position that a fund or other ability to call on remediation from NH should be secured through the DCO to ensure that – in the event impacts are worse than NH predicts – these can be properly mitigated during the construction and operational phases of the development.
- MIAG provided that it has concern with the extent of 'associated development' listed in Schedule 1 of the dDCO. A number of representations have been made by National Highways to MIAG on the extent of the works proposed to Inworth Road, including the width of passing places and footways. SH sought clarity on the extent to which associated development would be used along the Inworth Road. However, NH refused to clarify this, simply stating that the power is in the DCO to give National Highways flexibility. MIAG nevertheless still requests that NH gives it comfort on this point.

**END**