

# **A12 Chelmsford to A120 widening scheme**

**TR010060**

**Volume 3**

## **3.2 Explanatory Memorandum**

APFP Regulation 5(2)(c)

Planning Act 2008

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

August 2022

## Infrastructure Planning

### Planning Act 2008

# A12 Chelmsford to A120 widening scheme Development Consent Order 202[ ]

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## TR010060/APP/3.2 EXPLANATORY MEMORANDUM

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## 1. SUMMARY

- 1.1 This memorandum explains the purpose and effect of each article of, and the requirements of, the draft A12 Chelmsford to A120 Widening Development Consent Order (**Order**), as required by Regulation 5(2)(c) of the Infrastructure Planning (Applications: Prescribed Forms and Procedure) Regulations 2009.
- 1.2 This document should be read alongside the Order and the other documents submitted in respect of the application for the Order.

## 2. PURPOSE OF THE ORDER

- 2.1 National Highways Limited (**National Highways**) is applying to the Secretary of State for a development consent order to carry out the A12 Chelmsford to A120 Widening scheme (**proposed scheme**).
- 2.2 National Highways is the strategic highway company responsible for operating, maintaining and improving the Strategic Road Network (**SRN**) in England. National Highways became a Government owned company in April 2015, succeeding to the functions of the Highways Agency.
- 2.3 The SRN is made up of the motorway and major A roads network. The A12 is part of the SRN.
- 2.4 The proposed scheme is to address the problems of congestion and poor journey time as a result of high volumes of traffic between Chelmsford and Colchester. The A12 is particularly important as an economic route providing access for HGVs to Felixstowe and Harwich ports and as a commuter route between Chelmsford and Colchester.
- 2.5 The proposed scheme will deliver improvements to the A12 between Junction 19 (Boreham interchange) and junction 25 (Marks Tey interchange), a distance of approximately 24km, or 15 miles. The proposed scheme involves widening the A12 to three lanes throughout (where it is not already three lanes) with new alignments between junctions 22 and 23 and a second section of widening between junctions 24 and 25.
- 2.6 It also includes safety improvements, including closing off existing private and local direct accesses onto the main carriageway, and providing alternative routes for walkers, cyclists and horse riders.
- 2.7 A detailed description of the proposed scheme is included in Chapter 2: the Proposed Scheme of the Environmental Statement (TR010060/APP/6.1).
- 2.8 The overall aims of the proposed scheme are to solve strategic traffic problems and congestion, and associated safety issues, along the strategic road network (SRN) between junctions 19 (Boreham interchange) and 25 (Marks Tey interchange). Scheme-specific objectives have been used to develop the proposed scheme design (see Table 1 below).

**Table 1: Proposed scheme-specific objectives**

How it aligns with strategic aims	Objective
Supporting economic growth	Proposed scheme supports the growth identified in Local Plans by reducing congestion related delay, improving journey time reliability and increasing the overall transport capacity of the A12
A safe and serviceable network	Private accesses to the strategic road network closed off and alternative access to local roads provided by the proposed scheme
	Proposed scheme improves road user safety
	Proposed scheme improves road worker safety during maintenance and operational use
A more free-flowing network	Proposed scheme reduces current and forecast congestion related delays and therefore improves journey time reliability
	Proposed scheme design reflects the impacts of other schemes and recognises other RIS schemes
An improved environment	Reduce the visual, air and noise quality impacts of the proposed scheme on affected communities on the route
A more accessible and integrated network	Proposed scheme reduces the impact of severance of communities along the route
	Proposed scheme improves accessibility for walkers, cyclists, horse riders, and public transport users
Customer satisfaction	Improve customer satisfaction, and reduce customer impact during construction

2.9 The environmental objectives were developed based on the commitments within Highways England's Licence (DfT, 2015) to reduce the environmental impacts of operating, maintaining and improving the SRN; protecting and enhancing the environment to achieve the best practicable environmental outcomes across its activities; and seeking to improve the well-being of road users and communities affected by the SRN.

**Nationally Significant Infrastructure Project — Alteration of a highway**

2.10 The proposed scheme is a nationally significant infrastructure project (**NSIP**) within sections 14(1)(h) and 22(1) of the Planning Act 2008 (**2008 Act**). Under section 22 an NSIP must fall within one of the three categories specified, which are expressly stated to be alternatives. The proposed scheme is the “alteration” of a highway within the meaning of section 22(1)(b).

2.11 The proposed scheme satisfies section 22(3) in that:

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- 2.11.1 the highway is wholly in England;
- 2.11.2 National Highways as strategic highways company will be the highway authority for the highway; and
- 2.11.3 the area of development is greater than the relevant limit set out in subsection (4), which in this case is 12.5 hectares; and speed limits will be in excess of 50mph.
- 2.12 As the proposed scheme is an NSIP, development consent must be obtained from the Secretary of State to authorise it, and an application for a development consent order must be made to the Secretary of State, care of the Planning Inspectorate, under section 37 of the 2008 Act.
- 2.13 Schedule 1 (authorised development) to the Order contains a list of numbered works comprising the proposed scheme. Because of the large number of individual works, often overlapping, the schedule of works has been divided into permanent works, temporary works and utility works together with a list of other associated development which is ancillary to the listed works.
- 2.14 Given the nature of the proposed scheme, being in part new carriageway, and in part alterations to the existing A12, no distinction is made in Schedule 1 between those parts of the proposed scheme that form the nationally significant infrastructure project and those parts that are associated with it. All of the authorised development either comprises part of the NSIP or may be lawfully authorised as part of the DCO on the basis that it meets the definition of "associated development" under the 2008 Act and related Guidance.

### **Nationally Significant Infrastructure Project — diversion of a gas pipeline**

- 2.15 In addition to the principal NSIP for the alteration of the A12, the diversion of a high pressure gas main (Work No U69) owned and operated by Cadent Gas Limited (Cadent) also meets the thresholds for being development to which the 2008 Act applies.
- 2.16 The gas main diversion meets the conditions set out in sub-sections (2), (4), and (5) of Section 20. The gas main diversion would be wholly in England, has a design operating pressure of more than 7 bar gauge (barg - a unit of gauge pressure) and supplies more than 50,000 customers. In addition, in accordance with Section 20(1) of the Planning Act 2008, the gas main is expected to be constructed by Cadent (the current operator of the gas main to be diverted) who is a 'gas transporter' (as it holds a licence under the Gas Act 1986).
- 2.17 The gas main diversion would be approximately 3km in length and have a diameter of 600mm and therefore would not meet the condition in Section 20(3)(a). In order to determine whether the diversion of the gas main will have a significant effect on the environment, and therefore meet the condition in Section 20(3)(b), National Highways has prepared a Screening Assessment of the environmental effects of the construction of the gas main diversion. The results of the Screening Assessment can be found at Appendix 5.2 of the ES [TR010060/APP/6.3].
- 2.18 The Screening Assessment at Appendix 5.2 of the ES [TR010060/APP/6.3]

concludes that the proposed gas main diversion is likely to give rise to significant landscape and visual effects due to the loss of trees and woodlands which would impact the landscape character of the River Blackwater valley and open up views across the Blackwater River Valley towards the A12. Therefore, the gas main diversion is being treated as an NSIP in its own right for the purposes of the application. The gas main diversion is an integral part of, and required only because of, the proposed scheme. It is therefore appropriate that it forms part of the application for development consent for the proposed scheme, with powers promoted by National Highways, and not as a separate application for development consent.

2.19 Regulation 6(4) of the Infrastructure Planning (Applications: Prescribed Forms and Procedure) Regulations 2009 (APFP) requires that for pipeline NSIPs, certain details must be provided:

*"4) If the application is for the construction of a pipeline, it must be accompanied by details of—*

- (a) the name of the proposed pipeline;*
- (b) the owner of the proposed pipeline;*
- (c) the start and end point of the proposed pipeline;*
- (d) the length of the proposed pipeline in kilometres;*
- (e) the external diameter in millimetres of the proposed pipeline;*
- (f) what will be conveyed by the proposed pipeline; and*
- (g) whether the grant of any rights in land or consents to road or river crossing works are required and if so whether they can be obtained by agreement."*

<b>Provision of Regulation 6(4) APFP</b>	<b>Response</b>
the name of the proposed pipeline	The Witham South to Little Braxted Gas Governor High Pressure Gas Main (AIA2)
the owner of the proposed pipeline	Cadent Gas Limited
(c) the start and end point of the proposed pipeline;	The corridor diverts from the existing gas main at approximately national grid reference TL 821 130, west of Maldon Road (B1018), Witham, Essex.  It re-joins the existing gas main at approximately national grid reference TL 830 144, south-west of Little Braxted.
(d) Length of the proposed pipeline in kilometres	Approximately 3km



(e) the external diameter in millimetres of the proposed pipeline	600mm diameter
(f) what will be conveyed by the proposed pipeline	Natural Gas
(g) whether the grant of any rights in land or consents to road or river crossing works are required and if so whether they can be obtained by agreement	<p>The pipeline will cross under the local highways of Maldon Road and Blue Mills Hill, south-east of Witham.</p> <p>It is anticipated the crossings underground will be achieved by installation in trenches which will then be backfilled or will be achieved by directional drilling.</p> <p>The pipeline will also cross under the River Blackwater. It is anticipated this will be achieved by directional drilling.</p> <p>Whilst agreement will be sought with the relevant owners and the local highway authority, powers of compulsory acquisition to secure new rights and restrictive covenants for the crossings are sought in the draft Order.</p>

### Associated development

- 2.20 The Order specifically authorises development which is associated with the NSIP works. The Secretary of State may, under the provisions of section 115 of the 2008 Act, grant consent for development that is associated with the NSIP works (**associated development**).
- 2.21 Guidance on associated development was issued by the Secretary of State for Communities and Local Government - (<https://bit.ly/3ox6esN>). In this guidance associated development is described as being "*typical of development brought forward alongside the relevant type of principal development or of a kind that is usually necessary to support a particular type of project*" (paragraph 6) and "*requires a direct relationship between associated development and the principal development. Associated development should therefore either support the construction or operation of the principal development, or help address its impacts. Associated development should not be an aim in itself but should be subordinate to the principal development*" (paragraph 5).
- 2.22 In some cases there may be some overlap between associated development and works which form part of the NSIP. Given this potential for overlap between the two categories, there is a danger that separating this out in the Order could potentially lead to an error, incorrectly defining it one way or another. For instance, there may be some on-highway, and some off-highway, diversion of the same piece of statutory undertaker equipment.
- 2.23 Noting that there is no requirement for a development consent order to distinguish between these two categories, National Highways has therefore chosen not to



differentiate the NSIP and associated development works in Schedule 1 to the Order. All elements of the proposed scheme either constitute part of the NSIP or are associated development within the meaning of section 115(2) of the 2008 Act, and so can properly be authorised by the Order.

2.24 In order to ensure that the authorised development is constructed efficiently and without impediment, the Order contains the powers to carry out the other associated works listed in paragraphs (a) – (t) of Part 1 of Schedule 1. The use of such measures was explicitly approved in the A19/A1058 Coast Road (Junction Improvement) Order 2016 (**A19/A1058 Order**) and extensive provisions were used in both the A14 Cambridge to Huntingdon Improvement Scheme Development Consent Order 2016 (**A14 Order**) and the Silvertown Tunnel Order 2018. The list has been further extended to include:

- 2.24.1 parking laybys and emergency laybys;
- 2.24.2 refurbishment of existing bridges;
- 2.24.3 gantries;
- 2.24.4 temporary crossings of highways; and
- 2.24.5 removal of redundant carriageways

to reflect the design requirements of the proposed scheme.

### **3. ANCILLARY MATTERS**

3.1 The Order also contains several ancillary matters, i.e. provisions not consisting of development.

3.2 The Order seeks to apply and modify statutory provisions in relation to the compulsory acquisition of land. It is for this reason that under sections 117 and 120(5) of the 2008 Act the Order must be made by way of Statutory Instrument. The Order is therefore in that form.

3.3 Other ancillary matters include the temporary and permanent stopping up of lengths of existing highway and private means of access in the vicinity of the proposed scheme, the classification of highways, the imposition of traffic regulation measures (including the application of speed limits), the creation of new private means of access, and the application and disapplication of primary legislation (including a Private Act relating to the navigable River Chelmer) and local byelaws.

### **4. THE ORDER**

4.1 The purpose and effect of the provisions of the Order are now explained in sequence. Whilst the Infrastructure Planning (Model Provisions) (England and Wales) Order 2009 (S.I. 2009/2265) has been repealed, the Order reflects much of the suggested drafting in the model provisions, as well as other development consent orders that have been made to date.

#### **Part 1 — Preliminary**

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### *Article 1 - Citation and commencement*

- 4.2 Article 1 sets out the name of the Order and the date on which it comes into force.
- 4.3 This article did not appear in the model provisions. However, it is a standard article that is included in all development consent orders.

### *Article 2 - Interpretation*

- 4.4 The purpose of article 2(1) is to define terms used in the remainder of the Order. It is a standard article and was included in the model provisions as article 1.
- 4.5 The following definitions in particular have been included due to the nature of the proposed scheme:
- (a) "the 1984 Act";
  - (b) "bridleway";
  - (c) "carriageway";
  - (d) "cycle track": this term is used interchangeably with "cycle way" in the application documents and both are intended to have the meaning set out in the Order;
  - (e) "footpath" and "footway";
  - (f) "special road";
  - (g) "street";
  - (h) "street authority";
  - (i) "traffic authority"; and
  - (j) "trunk road".
- 4.6 Other definitions to note include:
- (a) "maintain" which includes inspect, repair, adjust, alter, improve, landscape, preserve, remove, reconstruct, refurbish or replace. The wording has been further amended since submission (at Deadline 3) to reflect the wording in the M42 Junction 6 Development Consent Order 2020 (SI 2020 No. 528);
  - (b) "permit scheme" is defined to reflect the existence of schemes made under Part 3 of the Traffic Management Act 2004 applying to highways within the order land;
  - (c) "Order land" which includes the words 'or used permanently or temporarily' as this is the usual term for land involved in the proposed scheme - some of it may only be used temporarily rather than acquired;

- (d) "Order limits" references the 'limits of deviation' as defining the extent of the area within which the authorised development may be carried out.
- (e) "works plans" is defined by reference to permanent works plans, temporary works plans and utility works plans. Each of the three elements of the Works is itself separately defined. This approach to the works plans has been adopted because of the level of detail and complexity of the overall scheme of works for the proposed scheme. It was felt appropriate to divide the works plans to make the details of the individual works more comprehensible for stakeholders and interested parties.
- 4.7 Articles 2(2) and 2(3) expand the definition of rights over land (which was included in the model provisions as article 1(2)) and clarify the purpose of the power within the Order to impose restrictive covenants.
- 4.8 Article 2(4) expands the definition of rights over land to enable new rights to be created and acquired for the benefit of persons other than National Highways, or for the benefit of land adversely affected by the Order. This wording reflects wording set out in the M42 Junction 6 Improvement Development Consent Order 2020 (M42 Junction 6 Order).
- 4.9 Article 2(5) defines measurements as approximate. The purpose of this is to ensure that if, upon construction of the works, it transpires that the distances are marginally different to those listed in the Order, there is no issue over whether the works are permitted by the Order. Thus, this provision allows for a small tolerance with respect to any distances and points, although all works will take place within the limits of deviation. It is common practice to include such provision in legislation authorising linear infrastructure - see, for example, The M20 Junction 10a Development Consent Order 2017 (**M20 Junction 10a Order**) at article 2(3), and the A19/A1058 Order at article 2(3).
- 4.10 Article 2(6) provides that areas given in the Book of Reference (TR010060/APP/4.3) are approximate, since these are not covered by article 2(5). This is intended to clarify the position of the areas in the Book of Reference, and the purpose and effect is the same as set out in the previous paragraph.
- 4.11 Articles 2(7) and (8) tie references to lettered/numbered points and numbered works in the Order to the relevant plans.
- 4.12 Article 2(10) clarifies that references to any statutory body include that body's successors from time to time.

*Article 3 - Disapplication of legislative provisions*

- 4.13 This article provides (in reliance on section 120(5)(a) of the 2008 Act) for the disapplication in relation to the construction of the authorised development of certain requirements which would otherwise apply under general legislation. Section 120(5)(a) provides that an order granting development consent may apply, modify or exclude a statutory provision which relates to any matter for which provision may be made in the order.

- 4.14 Paragraph (1) of Article 3 disapplies provisions of the Neighbourhood Planning Act 2017 (**NPA 2017**). This disapplication makes it clear that the temporary possession provisions in that enactment would not take effect at the expense of the temporary possession provisions contained in the Order. National Highways notes that the provisions relating to temporary possession in the NPA 2017 have not yet come into force and that regulations required to provide more detail on the operation of the regime have not yet been made. Due to the uncertainty in relation to the detail around that regime, National Highways has consulted on the long-standing process available under the 2008 Act. National Highways additionally considers that if Parliament wished to apply the NPA 2017 temporary possession regime to DCO projects, it could have done so by effecting amendments to PART VII of the Planning Act 2008. It has not done so, and in the absence of the clarity this would provide, National Highways proposes to proceed under the existing 2008 Act procedure.
- 4.15 Paragraph (2) of Article 3 modifies Regulation 6 of the Hedgerows Regulations 1997 to include development consent orders to the list of permitted activities in Regulation 6.
- 4.16 Paragraphs (3) and (4) of Article 3 provide for the disapplication of various consents which would otherwise be required from the Environment Agency, internal drainage boards, lead local flood defence authorities or Natural England under the Environmental Permitting (England and Wales) Regulations 2016/1154, the Water Resources Act 1991 or the Land Drainage Act 1991. The dis-applications have been separated in to construction activities (Article 3(3)) and for operation or maintenance of the authorised development (Article 3(4)). Those contained in Article 3(3) are:
- 4.16.1 the requirement for an environmental; permit for a flood risk activity or a water discharge activity under the Environmental Permitting (England and Wales) Regulations 2016;
  - 4.16.2 for approval under byelaws made or deemed to have been made under the Water Resources Act 1991;
  - 4.16.3 the need for Secretary of State consent to vary an award which affects the drainage of land under the Land Drainage Act 1991; and
  - 4.16.4 for approvals required by byelaws made under the Land Drainage Act 1991 regulating the use and obstruction of watercourses.

These are consents for activities which are a necessary part of the proposed scheme.

- 4.17 Paragraph (4) of Article 3 provides for the disapplication of various consents which would otherwise be required under the Environmental Permitting (England and Wales) Regulations 2016/1154, the Water Resources Act 1991 or the Land Drainage Act 1991 for operational and maintenance activities associated with the proposed scheme. The dis-applications are:
- 4.17.1 for an environmental permit for the carrying on of flood risk or water discharge activities;

- 4.17.2 for approval under byelaws made or deemed to have been made under the Water Resources Act 1991;
- 4.17.3 the need for the Secretary of State's consent to vary an award which affects the drainage of land; and
- 4.17.4 for approvals required by byelaws made under the Land Drainage Act 1991 regulating the use and obstruction of watercourses.
- 4.18 As these provisions (other than byelaws made under section 66 of the Land Drainage Act 1991 and section 32 of the Land Drainage Act 1991) are prescribed under section 150 of the 2008 Act, the consent of the Environment Agency and the relevant drainage authorities to the inclusion of these provisions in the Order will be needed and these consents are being sought. There are draft protective provisions for the benefit of the Environment Agency and the relevant drainage authorities and these are being discussed with those bodies.
- 4.19 National Highways has produced a Consents Licences and Agreements Position Statement (application document reference TR010060/APP/3.3) as part of this application. This sets out in greater detail National Highways' proposed approach to obtaining the other consents required for the proposed scheme.

*Article 4 - Maintenance of drainage works*

- 4.20 The purpose of article 4 is to make it clear that any realignment of drainage works or other works to them that are carried out as part of the proposed scheme do not affect the existing allocation of responsibility for maintenance of those drainage works, unless this is otherwise agreed between National Highways and the responsible party. Responsibility for maintenance of drainage works may sit with the Environment Agency, an internal drainage board, a lead local flood authority or a landowner.
- 4.21 This article was not included in the model provisions. However, precedent exists in article 5 of the A19/A184 Testo's Junction Alteration Development Consent Order 2018 (**A19/A184 Order**). National Highways considers that it is a sensible inclusion to clarify who has responsibility for maintenance of drainage works.

**Part 2 — Principal Powers**

*Article 5 - Development consent etc. granted by the Order*

- 4.22 Article 5 provides the principal power to construct and operate the authorised development within the Order limits. Schedule 1 describes the authorised development. As is explained below in relation to Schedule 1, the approach has been taken to separate out the works in to permanent works, temporary works and utility works (together with a list of other associated development) because of the overlapping nature of the component works. If a single set of works plans were to be used, it would be difficult to distinguish the individual works. Separating the works on the works plans, with the consequential drafting required for this, has therefore been resolved upon.
- 4.23 Development consent is subject to the provisions of the Order, including the

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requirements listed in Schedule 2. This is based on article 2 of the model provisions.

- 4.24 Article 5(2) was not included in the model provisions, but has been included in previous orders such as the M20 Junction 10a Order (article 5(2)). It provides that any enactment applying to land within or adjacent to the Order limits has effect subject to the provisions of the Order. As the Order amends and disapplies various enactments that apply to and affect the authorised development, or would otherwise do so, this ensures that the legislative position is consistent.

*Article 6 - Maintenance of authorised development*

- 4.25 This article sets out the scope within which National Highways may maintain the development. The definition of "maintain" is contained in article 2(1) and is similar to that which has been approved by the Secretary of State in the making of previous highway development consent orders, for example the M20 Junction 10a Order (article 6). It is therefore considered to be appropriate and acceptable to adopt the same definition for the proposed scheme. The various elements of the definition ("inspect, repair, adjust, alter, improve, landscape, preserve, remove, reconstruct, refurbish or replace") would bear their common sense meanings and would allow National Highways to undertake all types of works reasonably associated with maintenance, as the definition in the Highways Act 1980 is limited to "repair". The definition of "maintain" also ensures that any works carried out do not give rise to any materially new or materially different environmental effects to those identified in the Environmental Statement (Document reference: TR010060/APP/6.1).

- 4.26 This article was included in the model provisions as article 3.

- 4.27 Powers of maintenance are subject to other provisions in the Order, in particular, Article 14 (Construction and maintenance of new, altered or diverted streets and other structures) which makes provision in relation to maintenance by highway authorities.

*Article 7 - Application of the 1990 Act*

- 4.28 This article applies to specified works which, though temporary in nature, would be in place for a considerable period of time (eg temporary worksites). The article applies section 57(2) of the Town and Country Planning Act 1990 Act (1990 Act) to those works to clarify that planning permission is not required for the resumption, at the end of that period, of the purpose for which that land was normally used before the development consent was granted.

- 4.29 Article 7 was not included in the model provisions, but has been included in the M42 Junction 6 Order (article 9).

*Article 8 - Planning permission*

- 4.30 Article 8 permits certain development authorised by a planning permission granted under the 1990 Act that is within the Order limits to be carried out pursuant to the terms of the planning permission without breaching the Order. This provision is not a model provision, but ensures that National Highways does not breach section 161 of the 2008 Act in carrying out certain development pursuant to a grant of planning



permission, provided that development is not of itself an NSIP or part of one, or required to complete or enable the use or operation of any part of the authorised development. This article is based on article 7 of A30 Chiverton to Carland Cross Development Consent Order 2020 (A30 Chiverton Order).

- 4.31 Article 8 has been added to the Order to ensure that where there is an existing planning permission within the Order Limits the carrying out of the Order will not constitute a breach of that planning permission. This is necessary for the proposed scheme because there is an extant planning permission for quarry works within the Order which contains a condition requiring restoration. Where the Order Limits fall within the land subject to that planning permission the undertaker will not be in breach of that planning permission.

*Article 9 - Existing powers and duties of the undertaker*

- 4.32 This article provides that nothing in the Order is to prejudice the operation of, and the power and duties of National Highways under, the Highways Act 1980 (1980 Act), the New Roads and Street Works Act 1991 (1991 Act) and the Town and Country Planning (General Permitted Development) (England) Order 2015 (2015 Order). This is not a model provision but its inclusion is essential to ensure that National Highways' functions under the 1980 Act, 1991 Act and 2015 Order are unaffected by the Order.
- 4.33 This article reflects the wording of recent National Highways orders such as the M20 Junction 10a Order (article 37).

*Article 10 - Limits of deviation*

- 4.34 This article, in paragraph (1), makes it clear that the authorised development must be carried out within the Order limits shown on the works plans and the streets, rights of way and access plans.
- 4.35 Since the authorised development includes linear works (which are defined in article 10(10) as being those for which a centreline is shown on the permanent works plans), article 10(2) provides for limits of deviation to allow for a lateral deviation of the authorised development within the limits of deviation shown on the permanent works plans. This flexibility is required to allow for any necessary design refinements during the detailed design stage. The overall limits of deviation for permanent works are narrowly drawn, reflecting the current level of design for the proposed scheme.
- 4.36 Article 10(3) is to reflect the extents of the proposed borrow pits (Works Nos. 17, 26, 48 and 59) and flood mitigation works, where specific limits of deviation for the works are shown to illustrate the proposed extent of those permanent works.
- 4.37 Article 10(4) is to reflect the fact that there is a need for limits of deviation for public rights of way and cycle tracks, which is shown by reference to the limits of deviation shown on the streets, rights of way and access plans.
- 4.38 For the linear works on the permanent works plans, vertical deviation is set in paragraph (5) by reference to the section and is subject to a maximum deviation of 1.0 metre upwards or 1.0 metre downwards, with the exception of Works Nos. 45(b)



and 74(a) (permanent works at the proposed junction 24) where additional upwards deviation, to any extent not exceeding 1.5 metres, is sought. This additional vertical variation is sought as it may be possible to reduce the depth of the cut for the works at this location, whilst maintaining adequate headroom under bridge structures, at this junction.

- 4.39 The vertical limits of deviation shown on the engineering drawings and sections drawings have been taken into account in the preparation of the Environmental Statement (TR010060/APP/6.1) and the potential impacts of a deviation within the permitted limits have been assessed. The effect of article 10(6) is that National Highways is permitted to exceed the limits specified in article 10(5) if it can demonstrate to the Secretary of State's satisfaction that no materially new or different adverse environmental effects from those reported in the Environmental Statement would arise.
- 4.40 The wording in paragraphs (6) was not included in the model provisions, but has become common wording in development consent orders, for example in the M20 Junction 10a Order (article 8) and the M42 Junction 6 Order (article 6). The ability to deviate within the prescribed limits of deviation is important to ensure that, if the precise 'as built' alignments or elevations are slightly different to those indicatively shown on the application plans, no question arises as to whether the works are permitted by the Order. The detailed design of the proposed scheme will follow the grant of the Order (see Requirement 10 (detailed design)) and the limits of deviation ensure that National Highways and its contractor have sufficient flexibility to design and construct the authorised development post consent.
- 4.41 Paragraphs (8) and (9) set the limits of deviation for temporary works and utilities works respectively, by reference to the limits of deviation for temporary works and utilities works that are shown on the temporary works plans and utilities works plans respectively.
- 4.42 Overall, whilst the framework for this article is drawn from the model provisions, it has included additional wording that has become common wording in development consent orders, for example in The Silvertown Tunnel Order 2018 (article 5), the M20 Junction 10a Order (article 8), The M4 Motorway (Junctions 3 to 12) (Smart Motorway) Order 2016 (**M4 Order**) (article 6). Further adaption has been required to separate out the different limits of deviation and approaches to delineation of works on the temporary works plans and utilities works plans. It has been amended at Deadline 4 to make it clear that limits of deviation apply to public rights of way and cycle tracks.

*Article 11 - Benefit of Order*

- 4.43 This article overrides section 156(1) of the 2008 Act (as permitted by section 156(2)) to give the benefit of the Order to National Highways rather than anyone with an interest in the land. It would be impracticable for a variety of landowners to implement parts of the Order in an uncoordinated manner, which might be the case if section 156(1) were to apply.
- 4.44 The purpose of paragraph (2) is to clarify the exceptions where the Order will self-

evidently benefit others, eg rights for statutory undertakers to undertake works to their own apparatus, and mitigation works outlined in the Schedule 1 description of the works. Without this provision there would be a contradiction, since, strictly speaking, only National Highways could benefit from these works. It follows article 8 of the M25 Junction 28 Development Consent Order 2022.

*Article 12 - Consent to transfer benefit of Order*

- 4.45 This article allows the benefit of the Order to be transferred or granted to others by National Highways. Such provisions are widely accepted practice in development consent orders and the principle of this provision is broadly modelled on that contained in other Orders such as the A30 Chiverton Order; the A63 (Castle Street Improvement, Hull) Development Consent Order 2020; the A585 Windy Harbour to Skippool Highway Development Consent Order 2020 (**A585 Windy Harbour Order**); the M42 Junction 6 Order; and the A19/A184 Order. However, the equivalent provision in this article is drafted more widely because of the size and scale of the proposed scheme and the number of statutory undertakers and private means of access to land which are affected by it. Furthermore, it is unnecessary for each utility diversion and each private means of access to be identified individually within this article in so far as it relates to the transfer of the compulsory acquisition powers – all the rights which are proposed to be acquired by and for the benefit of such third parties are identified in Schedule 5 to the Order.
- 4.46 Paragraphs (2) and (3) together ensure that the person benefitting from any such transfer or grant would be subject to the same obligations as National Highways would be. An exception is made in relation to liability for the payment of compensation due in connection with the compulsory acquisition of land (including the compulsory acquisition of rights over land). Where new rights are to be acquired by and for the benefit of third parties, the liability for the payment of compensation to the owners of the land which will be burdened by those new rights, once acquired, will remain with National Highways. The transfer of the benefit of the Order would require the consent of the Secretary of State except in the circumstances specified in paragraph (4), which are necessary to ensure that statutory undertakers whose apparatus is to be relocated, and persons whose private means of access are to be stopped up and re-provided, may enjoy the benefit of the rights sought for their benefit under the Order, and paragraph (5), which are necessary to allow the statutory undertakers to undertake the specific works listed in that paragraph.
- 4.47 The process for the acquisition of such rights would therefore be as follows:
- 4.47.1 Paragraph (4) would obviate the need for National Highways to seek the Secretary of State's consent to the transfer of the benefit of the Order, where such benefit was required to be transferred to statutory undertakers or to landowners to enable them to acquire (and enjoy the benefit of) rights over land, where it was necessary for them to do so in consequence of the diversion, relocation or replacement of their apparatus or their private means of access to land or premises, as the case may be (and as referenced in Schedules 5 and 4 to the Order respectively).
- 4.47.2 In place of the Secretary of State's consent to the transfer of the benefit of

the Order, National Highways would have authority to, and would need to, by paragraph (2) of article 30, give its prior consent in writing to the transfer of the benefit of the Order in each case.

From this point onwards, the process would be the same irrespective of whether there is a transfer of the benefit of the Order under article 12 or 30.

- 4.47.3 National Highways would enter into an agreement with the person(s) to whom the benefit of the provisions of the Order were to be transferred under article 12 or 30; and, in consequence of the transfer of the benefit of the Order, the acquiring authority in respect of the relevant right over land would be the statutory undertaker whose apparatus was being relocated, or the land owner whose private means of access was being stopped up and re-provided.
- 4.47.4 Notwithstanding the above, National Highways would retain liability for the payment of compensation to the owner (and, if separate, the occupier) of the land burdened with the right so acquired.
- 4.47.5 Paragraph (5) provides for a transfer of benefit for those works listed in the paragraph to the statutory undertaker for whom the work is being provided. This is found in a number of other National Highways Orders.

### Part 3 — Streets

#### *Article 13 - Application of 1991 Act*

- 4.48 This article provides for the application of the New Roads and Street Works Act 1991. Although not included in the model provisions, there is precedent for these provisions in respect of the development consent orders granted for other major highways schemes, for example the M25 Junction 28 Development Consent Order 2022 (article 10(2)) and the A47 Blofield to North Burlingham Development Consent Order 2022 (article 11(2)).
- 4.49 Paragraphs (1) and (2) provide that certain works carried out under the authority of the Order are to be "major highway works" for the purposes of the 1991 Act. The effect of this is to clarify that the cost-sharing provisions relevant to the diversion of utility apparatus (which would apply to such works under the 1991 Act if carried out by the highway authority) will apply in respect of the works authorised by the Order, irrespective of who carries them out.
- 4.50 Paragraph (3) provides that certain provisions of the 1991 Act listed in that paragraph will not apply. The disapplication of these provisions (which are designed primarily to regulate the carrying out of street works by utility companies in respect of their apparatus) is appropriate given the scale of works proposed under the Order, the specific authorisation given for those works by the Order, and the specific provisions in the Order which regulate the carrying out of the Order works.
- 4.51 Paragraphs (4) to (6) apply certain provisions of the 1991 Act (listed in paragraph (5)) to streets which are to be temporarily restricted for use, altered or diverted under the Order. This is for two reasons: first, it prevents any confusion as to whether works in

respect of a temporarily affected street are 'street works' for the purposes of the 1991 Act; and secondly, it simplifies the implementation of the works by providing for a single process in respect of streets which are stopped up and those which are not.

- 4.52 Paragraph (7) and 7(a) provide that nothing in article 14 of the Order (which provides that any highway other than a special road or a trunk road that is constructed, altered or diverted under the Order must be maintained by the local highway authority) affects the operation of section 87 of the 1991 Act, which allows a local highway authority to declare that a street in its area is likely to become a maintainable highway and consequently that Part 3 of the 1991 Act applies to that street. National Highways will not be under the duties that apply to a street authority under the 1991 Act by virtue of being responsible for the maintenance of a street under article 14.
- 4.53 Paragraph (7)(b) clarifies that the provisions relating to responsibility for maintenance of streets in article 14 do not affect the application of Part 3 of the 1991 Act to maintenance works which are street works for the purposes of the 1991 Act. 'Street works' is defined in section 48(3) of the 1991 Act as including works for the maintenance of apparatus (but excluding works for road purposes) that are executed in pursuance of a statutory right or a street works licence.
- 4.54 Paragraphs (8) to (11) deal with the application of a permit scheme made under Part 3 of the Traffic Management Act 2004 to certain works carried out under the Order. These sub-paragraphs are based on the wording of the M25 Junction 28 Development Consent Order 2022.

*Article 14 - Construction and maintenance of new, altered or diverted streets and other structures*

- 4.55 The purposes and effect of the article are as follows:
- (a) Under the Highways Act 1980 and the Appointment of a Strategic Highways Company Order 2015, National Highways is the highway authority for, and therefore is responsible for maintaining trunk roads, including those to be provided as part of the proposed scheme. For any other highways and streets, this article determines the body that will be liable for maintenance. Liability for maintenance would transfer to the local highway authority or to the street authority as appropriate on completion of the works. Paragraphs (1) to (4) allow National Highways to make agreements with the local highway authority concerned.
  - (b) Paragraph (5) makes specific maintenance provision in relation to new bridges carrying highways over the trunk road, with the responsibility for such bridges being with National Highways.
  - (c) The effect of paragraphs (6) and (7) is that in any action for damages against National Highways alleging failure to maintain a street, National Highways will have the defence that it had taken such care as was reasonably required in the circumstances to secure that the street was not dangerous for traffic. This ensures that the provision in section 58 of the Highways Act 1980 applies to National Highways not only in respect of trunk roads for which it is the highway

authority but also other roads and is consistent with the approach taken in previous development consent orders. It has been revised at Deadline 4 to remove reference to streets which are not intended to be highways.

- 4.56 This article was not included in the model provisions, but similar provision has been included in all National Highways orders made to date, including recently the M25 Junction 28 Development Consent Order 2022 Junction 10a Order and the A47 Blofield to North Burlingham Development Consent Order 2022.

*Article 15 - Classification of roads, etc.*

- 4.57 The designation of highways is an ancillary matter which may be included in a development consent order. These and other related matters are addressed by this article. This matter is integral to the implementation of the proposed scheme and it is therefore appropriate to include it in the Order as ancillary matters.
- 4.58 Paragraph (1) provides for the roads described in Part 1 of Schedule 3 to become trunk roads from the date that they are complete and open to traffic.
- 4.59 Paragraph (2) provides for the roads described in Parts 2 to 4 of Schedule 3 to become classified roads from the date that they are complete and open to traffic.
- 4.60 Paragraph (3) provides for the roads described in Part 5 of Schedule 3 to become unclassified roads from the date that they are complete and open to traffic.
- 4.61 Paragraph (4) provides that the orders specified in Part 12 of Schedule 3 (revocations and variations of existing traffic regulation orders) are to be varied or revoked as specified in that Part on such day as National Highways may determine.
- 4.62 Paragraph (5) confirms that the footpaths, cycle tracks, footways and bridleways in Part 13 of Schedule 3 will be provided unless otherwise agreed with the relevant planning authority.
- 4.63 Paragraph (6) provides for the trunk roads described in Part 14 of Schedule 3 to cease to be trunk roads on such day as National Highways may determine. In practice this will be a date that has been agreed with or notified to the local highway authority.
- 4.64 The purpose of paragraph (7) is to confirm that the matters covered paragraphs (1) to (7) could be varied or revoked in the future without the need to apply under the 2008 Act for an amendment to the Order.
- 4.65 This article was not included in the model provisions, but has frequently been included in National Highways orders made to date.

*Article 16 – Speed Limits*

- 4.66 The speed limit applicable to traffic using the highways is an ancillary matter which may be included in a development consent order and is integral to the implementation of the Proposed Scheme and it is therefore appropriate to include it in the Order as an ancillary matter.



- 4.67 Paragraph (14) imposes speed limits on certain sections of the proposed scheme as described in Part 46 of Schedule 3.
- 4.68 Paragraph (2) makes it clear that the national speed limit is the default speed limit which will apply to certain lengths of road described in Parts 6 and 7 of Schedule 3.
- 4.69 Paragraphs (3) to (5) provide make provision for a variable speed limit to apply (instead of the national speed limit) to the roads in Part 7 of Schedule 3 where a lower speed limit is displayed on a variable speed limit sign.
- 4.70 Paragraph (6) makes similar provision to the Road Traffic Exemptions (Special Forces) (Variation and Amendment) Regulations 2011.
- 4.71 Paragraphs (1) and (8) were not included in the model provisions, but has frequently been included in National Highways orders made to date. Paragraphs (2) to (5) and (7) are bespoke drafting to impose a variable speed limit.

*Article 17 - Power to alter layout etc. of streets*

- 4.72 This Article allows National Highways to alter the layout of existing streets within the Order limits for the purpose of constructing and maintaining the authorised development. This is subject to the consent of the street authority who must be given the specified period of notice in advance of exercising the powers. This consent is deemed given if the street authority does not respond to National Highways consent request within 28 days.
- 4.73 Paragraph (2) requires National Highways to restore any street that has been temporarily altered to the reasonable satisfaction of the street authority.
- 4.74 Paragraph (5) provides that paragraphs (2), (3) and (4) do not apply where National Highways is the street authority for the street in which the works are being carried out.
- 4.75 It is considered appropriate to provide a power for National Highways as a Strategic Highways Company to enter and carry out works to side roads that would otherwise be within the purview of the local highway authorities. It is unnecessary to list the affected roads, since their location and extent is self-evident from the works, land and streets, rights of way and access plans.
- 4.76 This Article is necessary under section 120(5)(c) of the 2008 Act to give full effect to Articles 5 (Development consent etc. granted by the Order) and 6 (Maintenance of authorised development).

This article is not included in the model provisions but is based on article 10 of the M4 Order amongst others.

*Article 18 - Street Works*

- 4.77 This article allows National Highways to break up or open, tunnel or bore under, remove or use earth and materials in or under and place and maintain apparatus in or under the streets, demolish, remove, replace and relocate any street furniture,

execute any works to provide or improve sight lines, execute and maintain landscaping works, carry out re-lining and placement of road marking and remove and install temporary and permanent road signage in the Order Limits for the purposes of the authorised development. The authority given by this article is a statutory right for the purposes of sections 48(3) (streets, street works and undertakers) and 51(1) (prohibition of unauthorised street works) of the 1991 Act.

- 4.78 The article is based on article 8 of the model provisions, article 11 of the M4 Order and article 12 of the M42 Junction 6 Order.

*Article 19 - Temporary alteration, diversion, prohibition and restriction of the use of streets*

- 4.79 This article allows for the temporary alteration, diversion or restriction of streets for the purposes of the proposed scheme, whilst ensuring that essential pedestrian access to and from premises along that street is maintained if necessary (paragraph (3)).

- 4.80 Paragraph (2) confers a power on National Highways where a street has been temporarily restricted for use under this article to use it as a temporary working site.

- 4.81 Under paragraph (4) the consent of the street authority is required where National Highways is not the street authority. The street authority may attach reasonable conditions to any consent, but must not unreasonably withhold or delay consent. Under paragraph (6), this consent is deemed given if the street authority does not respond to National Highways' consent request within 28 days.

- 4.82 Paragraph (5) provides a right to compensation for any person suffering loss due to the suspension of a private right of way under this article.

- 4.83 Paragraph (6) states that a street authority which fails to notify National Highways of its decision in respect of an application for consent within 28 days of the application being made is deemed to have given its consent. This time limit is considered necessary to remove the possibility for delay and provide certainty that the authorised development can be delivered by National Highways in a timely fashion. As a nationally significant infrastructure project the proposed scheme should not be at risk of being held up due to a failure to respond to an application for consent.

- 4.84 This article has been included in previous development consent orders for highway schemes, for example on the M20 Junction 10a Order (article 14(6)). The drafting has been amended so that it is clear that the highway status of the land will remain during the temporary interference of use and any subsoil rights will not be impacted during the carrying out of the works.

*Article 20 - Permanent stopping up and restriction of use of streets and private means of access*

- 4.85 This article allows the streets and private means of access identified in Schedule 4 to be stopped up (ie the legal right of way along them to be extinguished). Since the definition of a 'street' in section 48 of the New Roads and Street Works Act 1991 includes highways, footways and footpaths, such ways can be stopped up under this



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Article as well as vehicular accesses.

- 4.86 Paragraph (2) relates to the highways and private means of access to be stopped up as specified in Parts 2 and 4 of Schedule 4 for which a substitute is to be provided. It requires the substitute to be completed and open for use, or a temporary alternative route to be available, before the highway or private means of access in question is stopped up.
- 4.87 For the streets and private means of access to be stopped up as specified in Parts 1 and 6 of Schedule 4, no substitute street or private means of access is to be provided. Such a street or private means of access may not be stopped up unless the conditions referred to in paragraph (4) of article 20 are met.
- 4.88 Paragraph (7) relates to private means of access to be altered as specified in Part 5 of Schedule 4. The change to the private means of access is shown on the streets, rights of way and access plans.
- 4.89 Paragraph (8) provides a right to compensation for any person suffering loss due to the suspension or extinguishment of a private right of way under this article.
- 4.90 The principal parts of this article were included in the model provisions as article 9. Paragraphs ((5) and (6) have been added for additional clarification for the public and are based on article 10 of the model provisions.

*Article 21 - Access to works*

- 4.91 This article allows works accesses to be created within the Order limits. This article departs from the model provisions (article 12) to provide National Highways with a general power to provide means of access, the intention being to provide similar powers to those available under the Highways Act 1980. The wording can be found in Article 14 of The A19 Downhill Lane Junction Development Consent Order 2020.

*Article 22 - Clearways, prohibitions and restrictions*

- 4.92 This article is necessary to ensure safe and proper operation of the authorised development, and to ensure that the proposed scheme delivers its intended benefits. It is therefore appropriate to include it in the Order as an ancillary matter under section 120(3) of the 2008 Act.
- 4.93 Paragraph (1) prohibits stopping on any part of a road specified as a clearway or a lay-by to which no stopping restrictions otherwise apply in Part 8 of Schedule 3 except upon the direction of or with a permission of a uniformed constable or traffic officer.
- 4.94 Paragraph (2) prohibits use of roads in Part 9 of Schedule 3 for vehicles exceeding a specified width except upon the direction of or with a permission of a uniformed constable or traffic officer.
- 4.95 Paragraph (3) prohibits use of roads in Part 9 of Schedule 3 for pedestrians and other slow moving vehicles of the type specified in that Part, except upon the direction of or with a permission of a uniformed constable or traffic officer.

- 4.96 Paragraph (4) prohibits entry by vehicles from and to roads which are specified in Part 10 of Schedule 3 except upon the direction of or with a permission of a uniformed constable or traffic officer.
- 4.97 Paragraph (5) prohibits waiting on any part of a road specified in Part 11 of Schedule 3 during the days and hours specified in that Part, except upon the direction of, or with a permission of a uniformed constable or civil enforcement officer.
- 4.98 Paragraph (6) sets out a list of circumstances in which it would be lawful for a vehicle to stop which would not contravene paragraph (1). Paragraphs (6) and (7) set out the circumstances in which it would be lawful for a vehicle to wait, which would not contravene paragraph (5).
- 4.99 Paragraph (9) imposes a prohibition on waiting on any part of the highway to be constructed for the purposes of selling or dispensing goods from a vehicle. This provision is intended to prevent unauthorised trading on the highway, particularly in the laybys which are not designed to accommodate such a use.
- 4.100 Paragraphs (10) to (14) recognises that the enforcement of waiting restrictions will be by Essex County Council's civil enforcement officers. The drafting is bespoke, but is based on the Essex County Council (Colchester Borough) (Prohibition of Waiting, Loading and Stopping) and (On-Street Parking Places) (Civil Enforcement Area) Consolidation Order 2019.
- 4.101 Paragraphs (15) sets out a list of circumstances in which it would be lawful for a vehicle to contravene paragraph (2) or (3). Paragraph (16) set out the circumstances in which it would be lawful for a vehicle to wait, which would not contravene paragraph (4).
- 4.102 Paragraph (17) confirms that the provisions of this article have effect as if made under the Road Traffic Regulation Act 1984, and can be varied or revoked in the future without the need to apply under the 2008 Act for an amendment to the Order.
- 4.103 This article was not included in the model provisions but similar provisions in respect of clearways and prohibitions have been included in all National Highways orders made to date except the M4 Motorway (Junctions 3 to 12) (Smart Motorway) Developer Consent Order 2016.
- 4.104 The purpose of this article is to ensure that the lengths of road in question are subject to restrictions on stopping and waiting and other restrictions which will allow the safe and efficient operation of the authorised development.

#### *Article 23 – Traffic Regulation*

- 4.105 This article would, at any time up to 12 months from the opening of the authorised development for public use, allow National Highways, in so far as it is necessary or expedient for the purposes of the construction, maintenance or operation of the authorised development, to:
- (a) revoke, amend or suspend in whole or in part any order made under the Road Traffic Regulation Act 1984;

- (b) permit, prohibit or restrict the stopping, waiting, loading or unloading of vehicles on any road;
- (c) authorise the use as a parking place of any road;
- (d) make provision as to the direction or priority of vehicular traffic; and
- (e) permit or prohibit vehicular access to any road.
- 4.106 Under paragraph (3) any restriction etc. made before the end of the 12 month period may continue to have effect after that period has expired.
- 4.107 Implementation of any of the measures is subject to the prior approval of the traffic authority in whose area the roads are situated. Requirement is made in paragraphs (4) and (5) for the chief officer of police and the relevant traffic authority to be consulted and notified in advance. The notification period varies depending on what is being proposed.
- 4.108 Any restrictions etc. may be suspended, varied or revoked by National Highways within a period of 24 months from the opening of the authorised development (paragraph (7)).
- 4.109 This article was not included in the model provisions but has been included in all previous National Highways orders (for example article 47 of the M20 Junction 10a Order, article 43 of the M4 Order). It is anticipated that this article will be used inter alia to allow National Highways to amend the speed limits on sections of the public highways adjacent to and connecting to the Order land for which the County Council is the Highway Authority and traffic authority. These amendments are required to align the existing speed limits with those to be imposed on the altered stretches of highway within the proposed scheme to which they connect.

#### **Part 4 — Supplemental powers**

##### *Article 24 - Discharge of water*

- 4.110 This article sets out the circumstances in which National Highways is entitled to discharge water into a sewer, watercourse or drain, and its purpose is to establish statutory authority for doing so.
- 4.111 The effect of paragraph (3) is that this can only be done with the consent of the owner. Consent can be given subject to reasonable terms and conditions, but cannot be unreasonably withheld.
- 4.112 Paragraph (5) requires National Highways to take reasonably practicable steps to ensure that any water that is discharged is as free as may be practicable from gravel, soil or other solid substance, oil or matter in suspension.
- 4.113 Paragraph (7) states that a person who fails to notify National Highways of their decision in respect of an application for consent/approval within 28 days of the application being made is deemed to have granted consent/approval. This time limit is considered necessary to remove the possibility for delay and provide certainty that

the authorised development can be delivered by National Highways in a timely fashion. As a nationally significant infrastructure project the proposed scheme should not be at risk of being held up due to a failure to respond to an application for consent/approval.

- 4.114 This provision has been included in previous National Highways orders, for example the M20 Junction 10a Order (article 18(7)).

*Article 25 - Protective work to buildings*

- 4.115 The purpose of this article is to allow National Highways to undertake protective works to buildings affected by the authorised development. It is adapted from article 15 of the model provisions and has precedent, for example article 16 of the A19/A1058 Order.

- 4.116 Paragraph (10) applies section 13 of the Compulsory Purchase Act 1965, thereby providing an enforcement mechanism (by way of a warrant) where entry onto, or possession of, land under the article is refused.

*Article 26 - Authority to survey and investigate the land*

- 4.117 This article gives National Highways the power to enter certain land for the purpose of surveying and investigating. It provides that National Highways must give 14 days' notice before exercising the powers of entry. Compensation is payable for any loss or damage caused.
- 4.118 Paragraphs (1) to (5) were included in the model provisions as article 16 and in the majority of made DCOs to date. However, the drafting in paragraph (1) departs from the model provisions by authorising surveys, where reasonably necessary, on land outside but adjacent to the Order limits. This extension beyond the Order Limits has precedent in the Silvertown Tunnel Order 2018 and the M42 Junction 6 Order. Powers to make excavations and boreholes, to investigate groundwater and discharge water onto land are also included, to ensure that National Highways is able to undertake all necessary activities in connection with surveying the land.
- 4.119 The ability to survey land adjacent to the Order limits where reasonably necessary is required so that National Highways can be confident that the surveys can be conducted to assess the effects of the proposed scheme, or on the proposed scheme, from outside its limits. It imposes a lesser burden than seeking compulsory acquisition of such land.
- 4.120 Paragraph (6) requires National Highways to state the purpose of the survey.
- 4.121 Paragraph (7) applies section 13 of the Compulsory Purchase Act 1965, thereby providing an enforcement mechanism (by way of a warrant) where entry onto, or possession of, land under the article is refused and was also contained in the M42 Junction 6 Order.
- 4.122 Paragraph (8) provides for deemed consent if a highway or street authority does not provide a decision on whether it consents to trial holes being made under paragraph (4).

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## Part 5 — Powers of Acquisition

### *Article 27 - Compulsory acquisition of land*

- 4.123 This article authorises the acquisition of land by compulsory purchase. It grants the power to acquire the land that is required for the proposed scheme. This is subject to articles 30 (compulsory acquisition of rights and imposition of restrictive covenants) and article 40 (temporary use of land for carrying out the authorised development) and article 53 (crown rights), which are explained below.
- 4.124 This article is based on article 18 of the model provisions.

### *Article 28 - Compulsory acquisition of land - incorporation of the mineral code*

- 4.125 This article incorporates Parts 2 and 3 of Schedule 2 to the Acquisition of Land Act 1981, exempting existing rights in minerals from the scope of compulsory acquisition unless they are expressly named and conveyed. It also makes provision for a situation where the owner of mines or minerals wishes to work such mines and minerals. This means that where National Highways acquires land under the powers of the Order, it will not acquire any mineral deposits present in the land (other than those necessarily extracted or used in constructing the authorised development) unless they are expressly included in the conveyance.
- 4.126 This article was included in the model provisions as article 19. Its inclusion is justified as there are mineral workings in close proximity to the Order land.

### *Article 29 - Time limit for exercise of authority to acquire land compulsorily*

- 4.127 This article gives National Highways five years to issue notices to treat or to execute a general vesting declaration to acquire the land that may be compulsorily acquired under the Order. These are the two main procedural methods by which the process of compulsorily acquiring land may be undertaken should the Order be made.
- 4.128 The article also sets a 5 year time limit on the power of National Highways to take temporary possession of land under article 40 (temporary use of land for carrying out the authorised development), although it does not prevent National Highways from remaining in possession of land after than time if it took possession within the 5 year limit (this has consistently been approved by the Secretary of State in made Orders).
- 4.129 This article was included in the model provisions as article 20.

### *Article 30 - Compulsory acquisition of rights and imposition of restrictive covenants*

- 4.130 This article allows for rights over land to be acquired as well as the land itself, and also for new rights to be created over land for the benefit of National Highways and for the benefit of third parties, such as statutory undertakers whose apparatus is required to be diverted or relocated, and the owner and occupiers of land whose private means of access are required to be stopped up and re-provided in consequence of the proposed scheme. It requires the written consent of National Highways for these powers to be relied upon by a third party. This article also includes the power to impose restrictive covenants.



- 4.131 It provides for such rights as may be required to be acquired by National Highways over land which it is authorised to acquire under article 27 (compulsory acquisition of land). The public benefit of this is that it would allow National Highways, if possible, to reduce the area of outright acquisition and rely on rights instead.
- 4.132 The power to impose restrictive covenants will allow for the possibility of reducing the area of outright acquisition and thus enable a more proportionate exercise of compulsory powers. It is therefore in the public interest and has precedent in other highway development consent orders. It is required specifically to protect the diverted apparatus of statutory utilities.
- 4.133 Paragraphs (2), (3) and (5) provide for the exercise of the power by statutory undertakers and by the owners and occupiers of land (for the reasons noted above), with National Highways' prior written consent, to ensure that those persons are able to benefit from the rights acquired for their benefit. Related drafting in article 12 (consent to transfer benefit of Order) provides that the transfer to such persons of the power to acquire rights may be authorised in writing by the undertaker, without the need for the consent of the Secretary of State. This is necessary to facilitate the delivery of the proposed scheme and the supporting land acquisition strategy. The Scheme involves numerous utility diversions and also requires a significant number of private means of access to be stopped up and re-provided, with the replacement private means of access in some cases crossing land which is owned by third parties and which, in the interests of minimising the impacts of the proposed scheme on affected land owners, National Highways has not sought powers to acquire outright.
- 4.134 In this scenario, the new rights (all of which are identified in Schedule 5 to the Order) need to be acquired by the relevant statutory undertakers or land owners, to enable them to enjoy the benefit of those rights. Where rights are acquired under the Order for the benefit of such parties, liability for the payment of compensation to the owners of the land which will be burdened by the new rights will remain with National Highways.
- 4.135 Paragraph (4) provides that, for the land described in Schedule 5, National Highways' powers of compulsory acquisition are limited to the acquisition of such rights, and the imposition of such restrictive covenants, as may be required for the purposes of the authorised development as outlined in Schedule 5.
- 4.136 Paragraph (6) provides that where National Highways only needs to acquire rights over land, it is not obliged to acquire any greater interest in that land.
- 4.137 Paragraph (7) applies Schedule 6, which imposes modifications to the compulsory purchase and compensation provisions under general legislation. They do not affect the entitlement to compensation, but generally ensure that the compensation code applies to the additional categories of acquisition covered by the Order and the creation of new rights and the imposition of restrictive covenants in particular. This is a consequence of the extension of land acquisition powers to these categories (done to allow lesser land interests to be acquired).
- 4.138 For the purpose of section 126(2) of the 2008 Act, the relevant compensation provisions are modified only to the extent necessary to ensure that they apply

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properly to the acquisition of rights, and not to affect the amount of compensation to which landowners would be entitled.

- 4.139 This article is based on article 21 of the model provisions and broadly follows the M20 Junction 10a Order (article 24) and the M4 Order (article 22).

*Article 31 - Private rights over land*

- 4.140 This article provides for the extinguishment of private rights over land that is subject to compulsory acquisition under the Order. In so far as National Highways acquires land or creates new rights over land under the Order, where the continuance of private rights over that land would be inconsistent with the exercise of the right being acquired or created, then the private rights in question will be extinguished.
- 4.141 Paragraph (3) provides that rights over Order land that is already owned by National Highways are extinguished on commencement of any activity authorised by the Order which interferes with or breaches those rights.
- 4.142 Paragraph (4) provides that all private rights over land which National Highways takes temporary possession of under the Order will be suspended and unenforceable for as long as National Highways remains in lawful possession of the land.
- 4.143 Paragraphs (5) to (8) make provision for compensation and for circumstances where rights are preserved. Paragraph (5) provides that any right holders who suffer loss caused by the extinguishment or suspension of rights will be entitled to compensation.
- 4.144 Paragraph (9) sets out a list of matters deemed to be private rights.
- 4.145 Paragraph (10) provides that the owners and occupiers of the land to be accessed over new private means of access which require taking access along the tracks to be formed on the Order land are granted private rights to use these tracks. This provides certainty to the owners and occupiers of the affected landholdings as to how their access will be secured.

*Article 32 - Power to override easements and other rights*

- 4.146 This article provides a power to override easements and other rights and reflects the terms of section 120(3) and (4), and paragraphs 2 and 3 of Part 1 of Schedule 5 to the 2008 Act. This article has precedent in, for example, article 32 of the Thames Water Utilities Limited (Thames Tideway Tunnel) Order 2014 (**Thames Tideway Order**). It provides statutory authority for carrying out any authorised activity that interferes with any of the interests listed in paragraph (2) including restrictions on user of land arising by the virtue of a contract. Paragraph (3) provides for compensation to be payable where the interests listed in paragraph (2) are overridden.
- 4.147 Notwithstanding the coming into force of section 203 of the Housing and Planning Act 2016, the power to override easements remains an appropriate power to be exercised in certain circumstances, for instance where National Highways has not acquired the relevant land. It may also apply where National Highways already holds



an interest in the Order land but an existing easement or other right would be incompatible with the proposed scheme and must be overridden.

- 4.148 The payment of compensation is provided for in paragraph (3).

*Article 33 - Disregard of certain interests and improvements*

- 4.149 This article provides for the Lands Chamber of the Upper Tribunal (Lands Tribunal) to disregard certain interests in and enhancements to the value of land for the purposes of assessing compensation with respect to its compulsory acquisition where the creation of the interest or the making of the enhancement was designed with a view to obtaining compensation or increased compensation.

- 4.150 The article has precedent in the M25 Junction 28 Development Consent Order 2022 (**M25 Junction 28 Order**), article 50.

- 4.151 The wording of this article mirrors section 4 (assessment of compensation) of the Acquisition of Land Act 1981 (in this paragraph "the 1981 Act"). It is necessary to specifically apply the effect of section 4 of the 1981 Act in the Order. This is because the 1981 Act only applies to a compulsory purchase to which any other statutory instrument has applied its provisions and the 2008 Act (nor standard Order provisions) does not apply these. Sections 120(3) and 120(5)(a) and Schedule 5 (by virtue of section 120(3)) of the Act allow the application in a DCO of statutory provisions which relate to the payment of compensation. It complies with section 126 of the 2008 Act as it does not have the effect of modifying or excluding the application of an existing provision relating to compulsory purchase compensation.

*Article 34 - Set-off for enhancement in value of retained land*

- 4.152 This article provides that in assessing the compensation payable to any person in respect of the acquisition of any land, the Lands Tribunal shall set off against the value of the land any increase in value of any contiguous or adjacent land belonging to that person arising out of construction of the authorised development.

- 4.153 The principle in this article is established in section 7 of the Land Compensation Act 1961 (effect of certain actual or prospective development of adjacent land in same ownership), which needs to be applied. Sections 120(3) and 120(5)(a) of and Schedule 5 (by virtue of section 120(3)) to the 2008 Act allow the application in a DCO of statutory provisions which relate to the payment of compensation.

- 4.154 This article complies with section 126(2) of the 2008 Act as it does not have the effect of modifying the application of an existing provision relating to compulsory purchase compensation. The article has precedent in the M25 Junction 28 Order, article 51.

*Article 35 – No double recovery*

- 4.155 This article provides that compensation is not payable both under this Order and other compensation regimes for the same loss or damage. In addition, the article provides that there is not to be double recovery under two or more different provisions of this Order.

- 4.156 The principle of equivalence, namely that a claimant in a compulsory purchase matter shall be compensated for no more than and no less than his loss, is long established and no part of the compensation code conflicts with this principle.
- 4.157 This article has precedent in the M25 Junction 28 Order, article 49.
- Article 36 - Modification of Part 1 of the 1965 Act*
- 4.158 The purpose of this article is to ensure consistency between the terms of the Order and the Compulsory Purchase Act 1965 (as amended by the Housing and Planning Act 2016) as applied by section 125 of the 2008 Act. It has precedent in article 30 of the M25 Junction 28 Order.
- Article 37 - Application of the 1981 Act*
- 4.159 This article applies (with minor modifications to make the provisions appropriate to the context of acquisition under powers in a development consent order) the provisions of the Compulsory Purchase (Vesting Declarations) Act 1981 to compulsory acquisition under the Order so that National Highways has the option to acquire land via the vesting declarations procedure.
- 4.160 Vesting declarations are one of two ways of acquiring land that is subject to compulsory purchase. The other method involves serving a notice to treat on the landowner to commence the process of establishing the acquisition price, after which title in the land is transferred. The date on which title will transfer is uncertain under the notice to treat method.
- 4.161 A vesting declaration, in contrast, sets the date on which title in the land is transferred to the acquiring authority. Compensation is negotiated or determined and paid later. Vesting declarations, therefore, allow title in the land to pass to the acquirer more quickly than using the notice to treat method, and also allow several parcels to be acquired at once. Their use is subject to serving notices and observing time limits as required by the 1981 Act (as amended by the Housing and Planning Act 2016).
- 4.162 The modifications ensure consistency with the standard five year period sought under the Order for acquisition rights. It further ensures that the appropriate references are made to the Act. The article is based on article 23 of the model provisions, and previous National Highways orders such as the M25 Junction 28 Order, article 31.
- Article 38 - Acquisition of subsoil or airspace only*
- 4.163 This article allows National Highways to acquire or create rights in, land below the surface or above the surface, rather than having to acquire all of the land.
- 4.164 The purpose of this article is to give National Highways the flexibility to minimise so far as is possible the extent of interests to be acquired, with consequently less impact on affected landowners and lower payments of compensation, both of which are in the public interest. Any subsoil or airspace acquired under this provision can only be used for the same purposes for which National Highways could have acquired all of

the land. This provision allows acquisition of the minimum interest needed to deliver the proposed scheme.

- 4.165 This article is based on article 24 of the model provisions, which related to subsoil only, and previous National Highways orders such as the M20 Junction 10a Order (article 29) and the M4 Order (article 25).

*Article 39 - Rights under or over streets*

- 4.166 The purpose of this article is to allow National Highways to appropriate and use land above or below streets within the Order limits, without having to acquire the street or any right or easement in it. The exercise of this power, without full acquisition, is prohibited in the circumstances set out in paragraph (3). Compensation is payable for any loss or damage caused to an owner or occupier of land affected by the power of appropriation where no acquisition has taken place.

- 4.167 The article was included in the model provisions as article 27.

*Article 40 - Temporary use of land for carrying out the authorised development*

- 4.168 The purpose of this article is to allow the land set out in Schedule 7 to be occupied temporarily while the works are carried out. The land included in Schedule 7 is required during construction of the proposed scheme but the freehold of which is not required permanently. The authorisation of temporary possession means that National Highways does not have to permanently acquire freehold of land which is required to construct the proposed scheme but which is not needed permanently; or over which, post construction, only new rights over land are required. The power therefore assists in reducing the interference with landowners' rights.

- 4.169 This Article allows for the temporary occupation of any of the Land intended for permanent acquisition that has not yet been acquired. The combination of article 40(1)(a)(ii) and article 40(9) will permit subsequent vesting or service of notice to treat and notice of entry over land scheduled for freehold acquisition in the book of reference, after temporary possession has been sought for those plots.

- 4.170 The article is based on article 28 of the model provisions, with a number of changes:
- (a) Paragraph (1) has been modified to reflect the provisions of recent made Orders including the M25 Junction 28 Order and the M25 Junction 10/A3 Wisley Interchange Development Consent Order 2022 (**M25 Junction 10 Order**).
  - (b) The ability to occupy land temporarily that is subject to powers of permanent acquisition but that has not yet been acquired (paragraph (1)(a)(ii)) has been added. This allows National Highways to occupy land without having to acquire it immediately. There is a consequential amendment to paragraphs (3) and (9) to cater for the two types of land.
  - (c) Secondly, paragraph (1)(d) has been added so that permanent works specified in column (3) of Schedule 7, and any other permanent mitigation works in connection with the authorised development, may be left on land that has been temporarily occupied, rather than having to acquire such land for this purpose. The rationale

for this is that it reduces the amount of land that is required to be subject to outright acquisition. The intended scope of 'mitigation works' is any permanent works necessary and appropriate to mitigate the impacts of the proposed scheme (such as landscaping or ecological mitigation works).

- (d) There has been a minor amendment to paragraph (2) to require the notice of intended entry to specify the purpose for which entry is to be taken where land is being entered under paragraph (1)(a)(ii). The Article has been further amended at Deadline 3 to extend the notice period from 14 to 28 days.
- (e) There are amendments to the requirements for restoring the land before returning it to reflect the changes in respect of permanent works, which have been added as paragraph (4)(b). In addition paragraph (4)(f) has been added to allow for tie-in works such as to accesses from residential properties, to be effected under temporary powers, to avoid the need for freehold acquisition of frontage strips for residential properties for those accommodation works to be carried out.
- (f) There is a minor amendment to paragraph (5) where 'any power conferred by' has been omitted, since the provisions are of the article, not of the powers.
- (g) Paragraph (4)(d) is also added in respect of protective works for statutory undertaker apparatus.
- (h) Finally, paragraph (12) has been added to ensure clarity about the extent of the land National Highways may take temporary possession of.

*Article 41 - Temporary use of land for maintaining the authorised development*

- 4.171 This article provides that National Highways may take temporary possession of land within the Order limits, as required for the purpose of maintaining the authorised development, at any time within a period of five years from the date on which that part of the authorised development is first opened for traffic.
- 4.172 Paragraph (1)(c) authorises the construction of such temporary works and buildings on the land as may be reasonably necessary for that purpose. Under paragraph (6) all temporary works must be removed before National Highways gives up possession under this article and the land must be restored to the reasonable satisfaction of the owners.
- 4.173 This power does not apply in relation to houses, gardens or any other buildings for the time being occupied (paragraph (2)).
- 4.174 Paragraph (3) requires at least 28 days' notice of intended entry to be served on the owners and occupiers of the land in question.
- 4.175 Paragraph (4) provides for a procedure in an emergency. This paragraph is included in the M25 Junction 28 Order (Article 35(4)).
- 4.176 Paragraphs (8) to (10) provide for compensation to be paid to owners and occupiers of land of which temporary possession is taken under this article.

- 4.177 This article is substantially based on the wording used in the A19/A1058 Order (see article 28), the M4 Order (see article 29), the A19/A184 Order (see article 30) and the M42 Junction 6 Order (article 34). It is also based on article 29 of the model provisions and article 35 of the M25 Junction 28 Order.
- 4.178 This article is required to enable National Highways to carry out maintenance during the maintenance period and is considered appropriate as it would impose a lesser burden than permanently acquiring rights to achieve the same purpose.

*Article 42 - Statutory undertakers*

- 4.179 This article allows National Highways to extinguish rights of statutory undertakers and remove and reposition their apparatus. Reference is made to the Order land so that this power is not restricted to apparatus which has been specifically shown on the Land Plans and described in the Book of Reference. In practice it is impractical to show and describe all such apparatus and so a general power for the extinguishment of rights and the removal or relocation of apparatus belonging to statutory undertakers over or within any of the Order land is required.
- 4.180 As the land over which this power may be exercised is shown on the Land Plans, and the beneficiaries of such rights are described in the Book of Reference, the requirements of Regulations 5(2)(i)(iii) and 7(1)(c) of the Infrastructure Planning (Applications: Prescribed Forms and Procedure) Regulations 2009 are satisfied.
- 4.181 Paragraph (2) restricts National Highways' power to extinguish rights or remove or reposition apparatus by excluding apparatus in streets. If the streets in question are to be stopped up as part of the authorised development then the provisions of article 20 (permanent stopping up and restriction of use of streets and private means of access) will apply.
- 4.182 This article is based on article 31 of the model provisions and previous National Highways orders such as the M20 Junction 10a Order (article 33) and the M4 Order (article 30).

*Article 43 - Apparatus and rights of statutory undertakers in stopped up streets*

- 4.183 This article governs what happens to statutory undertakers' apparatus (pipes, cables etc.) under streets that are stopped up by the Order. Without the article, the statutory undertaker would not have access to the apparatus, since there would no longer be a right of way along the street.
- 4.184 Under paragraph (2), National Highways may require a statutory undertaker to remove and relocate the apparatus (or apparatus provided in substitution) elsewhere. Paragraph (3) requires National Highways to compensate the statutory undertaker for the reasonable costs it incurs in doing so.
- 4.185 Paragraph (4) provides for a reduction to the amount payable to the statutory undertaker in certain circumstances, including where replacement apparatus is provided that is of a better type, of greater capacity or of greater dimensions and those improvements or increases are not necessary. Paragraph (5) clarifies that the placing of apparatus of a greater length does not count for the purposes of paragraph



(4), since it is likely that for most diversions apparatus of greater length will need to be installed. Similarly, joints in apparatus may be necessary and if so that will not lead to a reduction of the amount payable.

4.186 Paragraph (6) discounts from the amount payable to the statutory undertaker in compensation any financial benefit to the statutory undertaker that arises as a result of having new rather than old (ie older than 7.5 years) apparatus due to the deferment of the timetable for renewal of the apparatus.

4.187 Paragraph (7) provides that for those parts of the proposed scheme that involve major highways works, major bridge works or major transport works (which are defined in Part 3 of the New Roads and Street Works Act 1991 and do not include the construction of a new highway), the compensation provisions under that Act will apply instead.

4.188 This article was included in the model provisions as article 32.

*Article 44 - Recovery of costs of new connections*

4.189 This article provides that if any statutory undertaker's apparatus is removed and this interrupts the supply from that apparatus to owners or occupiers of premises such that they have to seek a connection to other apparatus, then their reasonable costs in obtaining a new supply can be claimed from National Highways.

4.190 This article was included in the model provisions as article 33.

*Article 45 - Special category land*

4.191 Under section 131 of the 2008 Act an order granting development consent is subject to special parliamentary procedure when it authorises the compulsory acquisition of land to which section 131 applies (i.e. a common, open space or fuel or field garden allotment). The exception is if the Secretary of State is satisfied that certain tests under section 131(3) are met, including if the Secretary of State is satisfied that replacement land has been or will be given in exchange for the order land, and the replacement land has been or will be vested in the prospective seller and subject to the same rights, trusts and incidents as attach to the order land. National Highways submits that this is the case, for the reasons set out in the Statement of Reasons.

4.192 This article deals with the replacement of open space special category land that is required for the authorised development. The article makes provision for the special category land and the rights to be acquired in the special category (rights) land to vest in National Highways once the Secretary of State (in consultation with the relevant planning authority) has certified that a scheme for the provision of the replacement land as open space, and a timetable for the implementation of that scheme, has been received from National Highways.

4.193 On the date on which the replacement land is laid out and provided in accordance with the scheme, the replacement land will vest in the person in whom the special category land was previously vested and will be subject to the same rights, trusts and incidents as attached to the special category land.



- 4.194 The article is based on article 38 of the M25 Junction 10 Order but simplified to reflect the different nature of the open space being acquired.

## **Part 6 - Operations**

### *Article 46 - Felling or lopping of trees and removal of hedgerows*

- 4.195 This article allows any tree or shrub that is near the project to be felled or lopped, or have its roots cut back, if it is considered to obstruct the construction, operation or maintenance of the Scheme or endanger anyone using it. In carrying out such works, National Highways must do no unnecessary damage to any tree or shrub and compensation is payable for any loss or damage caused.
- 4.196 Further, this article also authorises the removal of any hedgerow as defined in the Hedgerow Regulations 1997. The proposed scheme includes the removal of identified hedgerows (as set out in Parts 1, 2 and 3 of Schedule 9 (Removal of Important Hedgerows and Removal of Other Hedgerows and Removal of Potentially Important Hedgerows) of the Order) but it does not limit the application of this article to those hedgerows only. This wider application reflects the powers that National Highways would otherwise be able to exercise under the Hedgerow Regulations 1997 to remove any hedgerows when carrying out its functions. This article is based on article 39 of the model provisions and article 39 of the M25 Junction 10 Order. It has been revised at Deadline 3 to include provision for consultation with the relevant planning authority prior to removal of hedgerows not identified in Schedule 9. It has been revised at Deadline 4 to include reference to a new Part of Schedule 9 authorising works to potentially important hedgerows.

### *Article 47 - Trees subject to tree preservation orders, etc.*

- 4.197 This Article enables National Highways to fell or lop, or cut back the roots of any tree which is subject to a tree preservation order to prevent it obstructing or interfering with the construction, maintenance or operation of the authorised development. In carrying out such works, National Highways must do no unnecessary damage to any tree or shrub and compensation is payable if loss or damage is caused.
- 4.198 The article is based on a model provision (article 40) and also reflects article 35 of the M54 to M6 Link Road Development Consent Order 2022.
- 4.199 Paragraphs (4) to (9) extend the powers in this article to trees in conservation areas designated under section 69 of the Planning (Listed Buildings and Conservation Areas) Act 1990. This power is required as the parts of the Order land lie within the boundaries of the Chelmer and Blackwater Navigation, Boreham Roman Road/Plantation Road and Kelvedon conservation areas. There is potential for some trees having to be removed or lopped within these conservation areas which may qualify for protection under the provisions of Section 69 of the Planning (Listed Buildings and Conservation Areas) Act 1990.

## **Part 7 - Miscellaneous and General**

### *Article 48 - Application of landlord and tenant law*

- 4.200 This article governs the leasing of land by National Highways to any other person. Essentially it allows the terms of the lease to override any statutory provisions relating to landlord and tenant law.
- 4.201 This was included in the model provisions as article 35.
- Article 49 - Operational land for purposes of the 1990 Act*
- 4.202 The effect of this article is that the land within the Order limits is to be treated as the operational land of a statutory undertaker for the purposes of the Town and Country Planning Act 1990.
- 4.203 This article was included in the model provisions as article 36.
- Article 50 - Defence to proceedings in respect of statutory nuisance*
- 4.204 Section 158 of the 2008 Act confers statutory authority for the purposes of a defence in civil or criminal proceedings for nuisance. This article provides a defence to proceedings brought in a magistrates' court under s.82(1) of the Environmental Protection Act 1990 in relation to certain nuisances set out in paragraph 79(1) of that Act.
- 4.205 The defence is available if the noise relates to:
- (a) the use of premises by National Highways for the purposes of or in connection with the construction or maintenance of the authorised development and is attributable to the carrying out of the authorised development in accordance with a notice served, or consent given, under the Control of Pollution Act 1974; or
  - (b) the construction, maintenance or use of the proposed scheme and cannot reasonably be avoided.
- 4.206 This article provides a defence to those nuisances which may be of relevance to the authorised development, as set out in the Statutory Nuisances Statement (TR010060/APP/6.9) accompanying the application.
- 4.207 This article is based on article 7 of the model provisions and recent National Highways orders such as the M20 Junction 10a Order (article 42) and the M4 Order (article 38).
- Article 51 - Appeals relating to the Control of Pollution Act 1974*
- 4.208 This article establishes an appeal process in circumstances where a local authority issues a notice under section 60, or does not grant consent or grants conditional consent under section 61, of the Control of Pollution Act 1974. Its aim is to streamline the appeal process, thereby minimising the potential for unnecessary delay to the proposed scheme.
- 4.209 This was not included in the model provisions but has been included in a number of non-highways orders, as well as the M25 Junction 28 Order, article 52.

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*Article 52 – Removal of human remains*

- 4.210 The purpose and effect of this article is to disapply section 25 of the Burial Act 1857 and replace it with an alternative procedure for managing the removal of any human remains disturbed during the course of carrying out the authorised development. This article is based on a model provision and is required to ensure that the appropriate treatment of such remains does not delay the implementation of the authorised development.
- 4.211 This article departs from the model provision in that paragraph (12) excludes the requirement to give notice before the removal of remains which the undertaker is satisfied were interred more than 100 years ago and that no relative or personal representative of the deceased is likely to object to their removal. This approach has precedent in the Crossrail Act 2008 and the M42 Junction 6 Order. Paragraph (13) requires that the undertaker seeks and complies with direction from the Secretary of State under paragraph (14) regarding the treatment of such remains following their removal.
- 4.212 The effect of this article is to replace the existing and disparate regimes for regulating the removal of human remains and consolidate the applicable provisions in a single article in the Order. It is required by National Highways to ensure that archaeological remains are recovered appropriately without causing unacceptable delay to the implementation of this nationally significant infrastructure project.

*Article 53 - Crown rights*

- 4.213 This article prevents National Highways from acquiring any Crown land, or from otherwise interfering with it, without the written consent of the relevant Crown authority. The Crown's consent may be given unconditionally or subject to terms and conditions.
- 4.214 This article reflects the provisions of section 135 of the 2008 Act. It was not included in the model provisions but was included in the A19/A1058 Order as article 37.

*Article 54 – Use of private roads for construction*

- 4.215 This article authorises the temporary passage by National Highways (or other persons who are transferred this statutory right pursuant to article 11 (benefit of Order)) – in common with other permitted users – of private roads within the Order Limits by persons or vehicles, for the purposes of, or in connection with, the construction of the authorised development, without the need for National Highways to take temporary possession of the land under article 40 (temporary use of land for carrying out the authorised development) of the Order.
- 4.216 This article therefore creates a power to “use” a private road for a temporary period that is proportionate to the limited nature of the use, rather than extinguishing, suspending or permanently interfering with the private rights of a landowner (through the acquisition of a permanent right). This is akin to the powers for temporary use under article 40 (temporary use of land for carrying out the authorised development) of the Order; however, it is distinguished because National Highways does not

require the exclusive use and possession of the private roads while exercising this power. The article is necessary because National Highways may need to use private roads inside the Order limits.

- 4.217 Paragraph (2) provides that National Highways will be liable to compensate any person who has suffered loss or damage as a result of the exercise of this power.
- 4.218 Paragraph (3) is included to clarify that any dispute as to a person's entitlement to compensation, or as to the amount of such compensation, is to be determined under Part 1 of the Land Compensation Act 1961.
- 4.219 There is precedent for this article, for example in the Port of Tilbury (Expansion) Order 2019 (article 16) and the Lake Lothing (Lowestoft) Third Crossing Order 2020 (article 14).

*Article 55 – Disapplication of local legislation*

- 4.220 Minor drainage works Work No. 2(a)) are proposed within the towpath and banks of the River Chelmer (which is a navigable waterway, and to which the Chelmer and Blackwater Navigation Act 1793 applies). This article makes it clear that the 1793 Act's provisions are overridden by the provisions of this Order.

*Article 56 - Disapplication and modification of local byelaws*

- 4.221 Byelaws made by Essex County Council under Section 41 of the Countryside Act 1968, with respect to country parks applies to plots 8/3a, 8/6b, 8/6d, 8/6h, 8/6i, 8/6j, 8/25a and 8/25c of the Order land, which form part of the Blackwater Rail Trail Country Park at Witham. National Highways seeks to disapply those parts of the byelaws which might be contravened by the proposed construction and related activities whilst the proposed scheme is being implemented.
- 4.222 Plots 1/11g and 1/14a comprise parts of the land that is subject to the Chelmer and Blackwater Navigation Byelaws 1994. National Highways seeks to disapply those parts of the byelaws which might be contravened by the proposed construction and related activities whilst the proposed scheme is being implemented.
- 4.223 Schedule 10 of the Order details the individual byelaws that National Highways proposes to disapply.

*Article 57 – Use of land between Bury Lane and Station Road, Hatfield Peverel*

- 4.224 This article provides for use of estate roads and intervening land for temporary local traffic diversions between Bury Lane and Station Road, Hatfield Peverel. This is required to enable the demolition and replacement of the existing bridges carrying the highways of Bury Lane and Station Road over the existing A12. The replacement bridges will be constructed on the current alignments of Station Road and Bury Lane, as there is no space to provide parallel bridges for the two highways without demolishing residential properties.
- 4.225 The geographic constraints of the existing A12, the local highway network and the Great Eastern Main Line railway mean that, when one of the bridges is unavailable to

local traffic alternative access would be required. This cannot be accommodated on the highway network. Between Station Road and Bury Lane, the opportunity exists for use of estate roads on two housing developments, together with the use of an emergency access between the two development sites. National Highways therefore is seeking temporary powers (over plot 5/20a of the Order land) to use the relevant parts of the estate roads and intervening link to facilitate access for the local traffic.

- 4.226 As the use of plot 5/20a for the diverted traffic requires to be managed by National Highways, including the imposition of controls over use of the plot and traffic restrictions such as preventing parking from obstructing the route, National Highways is also seeking powers in this article to permit the use of plot 5/20a by persons authorised by National Highways in common with those persons already entitled to use the streets that form part of the route. It also operates to allow National Highways to impose traffic regulation measures required for the diversion route to operate over the streets subject to this article. The article also makes provision for the payment of compensation for the repair of the land.

*Article 58 - Use of Consecrated land*

- 4.227 This article is required because part of the land within the Order limits, at Inworth Church, forms consecrated land. The article applies sections 238 and 239 of the 1990 Act to land, and rights over land, acquired under the Order and permits the use of such land notwithstanding any obligation or restriction imposed under ecclesiastical law or law relating to burial grounds, save as provided for in the remainder of the article.
- 4.228 Paragraph (2) excludes the application of Town and Country Planning (Churches, Places of Religious Worship and Burial Grounds) Regulations 1950.
- 4.229 The drafting in paragraphs (1) and (2) has precedent in the River Humber Gas Pipeline Replacement Order 2016, article 20, paragraphs (15) and (16), but amended to reflect that in this Order provisions regarding disposal of human remains are dealt separately, within article 52.

*Article 59 - Protective provisions*

- 4.230 This article gives effect to Schedule 11, which contains provisions protecting the interests of third parties. It was not included in the model provisions, but is a standard article in development consent orders that include protective provisions.
- 4.231 National Highways has sought the views of the statutory undertakers who have interests affected by the authorised development and continues to negotiate with the statutory undertakers to ensure any concerns are dealt with appropriately.
- 4.232 National Highways will provide a full update of the status of the negotiations during the examination. National Highways has engaged with the statutory undertakers who have interests affected by the authorised development and continues to negotiate with the statutory undertakers to ensure any concerns are dealt with appropriately. National Highways has sought to include bespoke protective provisions where considered appropriate.



- 4.233 However, National Highways is still negotiating bespoke protective provisions with a number of utilities. Until such time as those protective provisions have progressed, the affected utilities will benefit from the generic protective provisions included in the Order for the benefit of electricity, gas, water and sewerage undertakers.

*Article 60 - Certification of documents, etc.*

- 4.234 This article provides for various application plans and other documents to be certified by the Secretary of State as true copies of those documents referred to in the Order. This was included in the model provisions as article 41.

*Article 61 - Service of notices*

- 4.235 This article governs the proper service of notices required to be given under the Order. In particular it allows service by email with the consent of the recipient, and deals with the situation of service on an unknown landowner.

- 4.236 This article was not included in the model provisions but has been included in previous orders, such as article 45 of the M20 Junction 10a Order, article 41 of the M4 Order.

*Article 62 - Arbitration*

- 4.237 This article governs what happens when two or more parties disagree in the implementation of any provision of the Order. The matter is to be settled by arbitration and if the parties cannot agree on who the arbitrator should be, this is decided by the President of the Institution of Civil Engineers.

## **5. SCHEDULE 1 – ARTICLES 2, 5 AND 6 - AUTHORISED DEVELOPMENT**

- 5.1 Schedule 1 describes the individual works and other associated development that collectively comprise the proposed scheme.
- 5.2 Given the complexity and close proximity of many of the works, the approach has been taken to separate out the works comprising the authorised development in to permanent works, temporary works and utilities works (together with a list of other associated development) because of the overlapping nature of the component works, and to illustrate them in separate parts of the works plans – the permanent works plans, temporary works plans and utilities works plans. If a single set of works plans were to be used, it would be difficult to distinguish the individual works. Separating the works on the works plans, with the consequential drafting required for this, has therefore been resolved upon.

## **6. REQUIREMENTS – Article 5 - Schedule 2**

- 6.1 The requirements in Part 1 of Schedule 2 are the equivalent of planning conditions. They apply to the carrying out and operation of the authorised development and reflect the processes and procedures usually employed by National Highways when implementing a scheme such as this.



- 6.2 Approvals will be sought from the Secretary of State for Transport. In practice this would involve certain internal approvals being obtained from independent teams within National Highways before the details are formally submitted by the project team within National Highways to the Secretary of State for Transport for approval.
- 6.3 National Highways understands that decision-making by the Secretary of State would follow similar internal processes to those employed in taking other quasi-judicial decisions (for example, in deciding whether to make a DCO or a Transport and Works Act Order), meaning a separation within the Department for Transport's Strategic Roads Division of those involved in discharging requirements from those involved in delivery of the proposed scheme through their relationships with National Highways.
- 6.4 The requirements provide that the various schemes, details and plans to be approved must, where appropriate, reflect the mitigation measures identified in the Environmental Statement (TR010060/APP/6.2) and as specified to be secured by the requirements described below including the process for the environmental management plans under requirements 3 and 4. This is the mechanism to ensure that environmental mitigation is secured by the Order, and the approach here is consistent with other DCOs which have been made. The requirements provide that the approved schemes, details and plans must be implemented as approved, unless further amendments to them are approved. A general provision to this effect is provided at requirement 12.
- 6.5 The purpose and effect of the requirements is as follows:
- (a) *Requirement 1* contains a number of definitions used in Part 1 of Schedule 2. This was included in the model provisions as requirement 1, however, the definitions reflect the latest guidance as explained further below.

The definitions include a definition of "Commence" which makes clear that a number of activities that would constitute a 'material operation' under the Town and Country Planning Act 1990 do not mean that the authorised development has been 'commenced'. This enables National Highways to undertake certain preparatory works prior to the submission of relevant details for approval under the requirements, which National Highways considers reasonable and proportionate. The works that are excluded from the definition of commence have minimal potential for adverse impacts. They may, in some cases, need to be carried out in order to comply with pre-commencement requirements (for example, to inform assessments and proposals to be submitted for approval).

Also defined is the " First Iteration EMP" – the First Iteration Environmental Management Plan submitted as part of the application (TR010060/APP.6.5). This document contains the Register of Environmental Actions and Commitments (REAC) listing the mitigation measures that will be secured through requirements 3 and 4 in the subsequent environmental management plans that will be produced by National Highways.

The First Iteration EMP also provides outline plans for a number of other documents that will inform subsequent iterations of the EMP, including the Landscape and Ecology Masterplan (LEMP).

- (b) *Requirement 2* provides that the authorised development must not begin later than 5 years from the date of the Order comes into force. This was based on the model provisions as requirement 2. The wording has been amended (at Deadline 3) to replace "begin" with "commence" to reflect recent caselaw (*Tidal Lagoon (Swansea Bay) PLC -v- Secretary of State for Business Energy and Industrial Strategy and others*, [2022] EWCA Civ 1579).
- (c) *Requirement 3* requires a Second Iteration Environmental Management Plan (**Second Iteration EMP**) to be submitted to and approved by the Secretary of State, prior to commencement of the authorised development. The Second Iteration EMP can be submitted in parts which relate to the relevant part of the proposed scheme to be constructed. It will be based substantially on the First Iteration Environmental Management Plan (First Iteration EMP) submitted as part of the application (TR010060/APP.6.5). The outline plans submitted as part of the First Iteration EMP will become more refined and detailed for the purposes of the Second Iteration EMP. The Second Iteration EMP may also contain additional detailed plans as required by National Highways. It must be submitted to and approved by the Secretary of State, following consultation with the relevant planning authority and the Environment Agency on matters related to its functions.
- (d) *Requirement 4* provides that on completion of the authorised development the Third Iteration Environmental Management Plan (**Third Iteration EMP**), must be submitted to and approved by the Secretary of State, following consultation with the relevant planning authority and the Environment Agency on matters related to its functions. The Third Iteration EMP will govern maintenance of the proposed scheme during its operation.

Requirements 3 and 4 reflect the terminology set out in LA 120 - Environmental Management Plans, which was introduced in November 2019 (Revision 0) (LA 120) and subsequently updated in March 2020 (Revision 1). LA 120 forms part of the Design Manual for Roads and Bridges (**DMRB**), which contains information about current standards relating to design, assessment and operation of motorway and all-purpose trunk roads in the United Kingdom.

Terminology relating to the environmental management plans presented in recent National Highways Orders such as the M42 Junction 6 Order typically reflect the conventions set out within Interim Advice Note 183/14 Environmental Management Plans (IAN 183/14), which was withdrawn upon publication of LA 120.

IAN 183/14 adopted the following conventions: Outline Environmental Management Plan (now First Iteration EMP); the Construction Environmental Management Plan (now Second Iteration EMP); and the Handover Environmental Management Plan (now Third Iteration EMP).

- (e) *Requirement 5* requires the preparation of a landscaping scheme for approval by the Secretary of State. The relevant planning authority must be consulted on the scheme, which must reflect the landscaping mitigation measures set out in the First Iteration EMP and must be based on the landscaping elements of the environmental masterplan (TR010060/APP/6.2).

Requirement 5 is based on requirement 7 of the model provisions and recent National Highways orders such as requirement 5 of the M42 Junction 6.

Requirement 5 also provides for the implementation and maintenance of landscaping in accordance with the scheme prepared under this Requirement. Sub-paragraph (6) provides for the replacement of trees and shrubs which become diseased or damaged within a period of 5 years after planting.

Requirement 5 was included in the model provisions as requirement 8.

- (f) *Requirement 6* makes provision for dealing with any contaminated land and groundwater discovered during construction of the works. This requirement specifies requirements that will apply if any unexpected contamination is encountered during construction.

The Environment Agency is included as a consultee under this requirement.

This requirement is based on requirement 15 of the model provisions and recent National Highways orders such as requirement 6 of the M42 Junction 6 Order.

- (g) *Requirement 7* states that the authorised development must be carried out, operated and maintained in accordance with the archaeological mitigation strategy.

The archaeological mitigation strategy (Appendix 7.10 of the Environmental Statement – TR010060/APP/6.3) sets out the requirements for the overarching written scheme of investigation, site specific written schemes of investigation and archaeological method statements with which the undertaker must comply.

- (h) *Requirement 8* provides that where any previously unidentified protected species are found during construction, construction works near their location are to cease and National Highways must immediately report it to the Ecological Clerk of Works. National Highways must then prepare a written protection and mitigation scheme.

Under sub-paragraph (2) National Highways must implement the written scheme immediately and construction in the area specified in the written scheme must not recommence until any necessary licences are obtained to enable mitigation measures to be implemented.

This requirement is based on requirement 34 of the model provisions and recent National Highways orders such as requirement 7 of the A585 Windy Harbour Order and requirement 10 of the M20 Junction 10a Order.

- (i) *Requirement 9* provides that no part of the authorised development can

commence until a traffic management plan for the construction of the authorised development has been prepared and approved by the Secretary of State following consultation with the relevant highway authority. The traffic management plan can be prepared in parts to accord with the construction programme, and is to be prepared substantially in accordance with the Outline Construction Traffic Management Plan (TR010060/APP/7.7) submitted with the application. This requirement consolidates various requirements of the model provisions (such as 22 and 33) and is based on National Highways orders such as requirement 11 of the M20 Junction 10a Order and requirement 18 of the M4 Order.

- (j) *Requirement 10* provides that the authorised development must be designed in detail and carried out so that it is compatible with the preliminary scheme design shown on the Works Plans (TR010060/APP/2.2) and the Engineering Drawings and Sections (TR010060/APP/2.13) and the principles set out in the environmental masterplan (TR010060/APP/6.2, Figure 2.1 of the Environmental Statement) unless otherwise agreed in writing by the Secretary of State following consultation with the relevant planning authority and local highway authority, where appropriate. This means that any variations to the design (which must be within the limits of deviation) are subject to approval.

The Secretary of State must be satisfied that any amendments to the preliminary design would not give rise to any materially new or materially different environmental effects compared to those reported in the Environmental Statement.

This requirement is based on requirements 4 to 6 of the model provisions and recent National Highways orders such as requirement 12 of the M20 Junction 10a Order.

- (k) *Requirement 11* provides that no part of the authorised development can commence until written details of the surface and foul water drainage system, reflecting the content of Chapter 14 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 local authority and the Environment Agency on matters relating to their functions.

This requirement is based on requirement 14 of the model provisions.

- (l) *Requirement 12* requires that (i) the proposed scheme must be carried out in accordance with the flood risk assessment (TR010060/APP/6.3) (including the mitigation measures detailed within it); or (ii) where National Highways seeks to otherwise carry out the authorised development, it must demonstrate to the Environment Agency that either there is no material exceedance to the flood levels in the flood risk assessment or that the affected landowners have accepted the change in flood levels from those shown reported in the flood risk assessment. The flood risk assessment will be a certified document.

- (m) *Requirement 13* deals with noise barriers and bunds. Details of the proposed mitigation, according with the locations the environmental masterplan and reflecting the relevant chapter of the Environmental Statement, must be

approved by the Secretary of State. The measures must then be provided and retained and maintained.

- (n) *Requirement 14* confirms that details approved pursuant to the requirements include any amendments that may subsequently be approved by the Secretary of State. This is based on requirement 37 of the model provisions.

Part 2 of Schedule 2 sets out the process for discharging requirements. This is standard wording, found in a number of made orders.

## **7. SCHEDULE 3: ARTICLES 15, 16 AND 22 - CLASSIFICATIONS OF ROADS, ETC.**

- 7.1 This schedule sets out which roads will be trunk roads and classified roads and which roads will not be classified following completion of the works, and which roads are to be de-trunked. It also sets out speed limits, traffic regulation (including stopping and waiting restrictions), existing traffic regulations orders to be revoked or modified and public rights of way which are to be created under the Order.

## **8. SCHEDULE 4: ARTICLE 20 - PERMANENT STOPPING UP OF HIGHWAYS AND PRIVATE MEANS OF ACCESS AND PROVISION OF NEW HIGHWAYS AND PRIVATE MEANS OF ACCESS**

- 8.1 This schedule sets out those streets that are to be permanently stopped up pursuant to Article 20 (Permanent stopping up and restriction of use of streets and private means of access).

## **9. SCHEDULE 5: ARTICLE 30 - LAND IN WHICH NEW RIGHTS ETC. MAY BE ACQUIRED**

- 9.1 This schedule sets out land in which new rights may be required pursuant to Article 30 (Compulsory acquisition of rights and imposition of restrictive covenants).

## **10. SCHEDULE 6: ARTICLE 30 - MODIFICATION OF COMPENSATION AND COMPULSORY PURCHASE ENACTMENTS FOR CREATION OF NEW RIGHTS AND IMPOSITION OF RESTRICTIVE COVENANTS**

- 10.1 This schedule sets out the modification of legislation on compensation and compulsory purchase for the purpose of creating new rights and imposing restrictive covenants.

## **11. SCHEDULE 7: ARTICLE 40 - LAND OF WHICH TEMPORARY POSSESSION MAY BE TAKEN**

- 11.1 This schedule sets out the land of which temporary possession may be taken pursuant to Article 40 (Temporary possession of land for carrying out the authorised development).

## **12. SCHEDULE 8: ARTICLE 45 - SPECIAL CATEGORY LAND**



- 12.1 This schedule sets out the plots in the Order land that comprise open space, over which freehold acquisition or the securing of new rights is proposed. Part 1 lists the open space for which freehold acquisition is proposed. Part 2 lists the land over which new rights are proposed but for which no replacement land is sought.
- 12.2 Part 3 lists the open space land for which replacement land is sought. Part 4 details the proposed replacement land.

### **13. SCHEDULE 9: ARTICLE 46 - HEDGEROWS AND TREES**

- 13.1 Parts 1, 2 and 3 of this schedule set out those hedgerows to be removed and indicate which are important hedgerows or potentially important hedgerows. Part 4 records those trees that are the subject of Tree Preservation Orders that may be subject to works as part of the proposed scheme.

### **14. SCHEDULE 10: ARTICLE 56 - DISAPPLICATION AND MODIFICATION OF BYELAWS**

- 14.1 This schedule records the proposed disapplication or modification of:
- 14.1.1 Byelaws made by Essex County Council under Section 41 of the Countryside Act 1968, with respect to country parks, required for the proposed works at the "Blackwater Rail Trail", Witham over which the existing A12 is carried by the existing Benton Bridge; and
- 14.1.2 The Chelmer and Blackwater Navigation Byelaws 1994, relating to the works to install a new drainage outfall on the bank of the River Chelmer near Boreham.

### **15. SCHEDULE 11: ARTICLES 42 AND 59 - PROTECTIVE PROVISIONS**

- 15.1 This schedule sets out any protective provisions for the benefit of Electricity, Gas, Water and Sewerage Undertakers; and the Operators of Electronic Communications Code Networks. It also includes bespoke protecting provisions for Anglian Water Services Limited, National Grid Electricity Transmission Plc, Cadent Gas Limited, Network Rail Infrastructure Limited and the Environment Agency.
- 15.2 None of the protective provisions are yet agreed with the benefiting undertakers, but discussions have commenced with the relevant undertakers.

### **16. SCHEDULE 12: ARTICLES 2 AND 60 – DOCUMENTS TO BE CERTIFIED**

- 16.1 This schedule sets out the list of documents to be certified by the Secretary of State under the terms of Article 60 (Certification of documents, etc.).