# A66 NORTHERN TRANS PENNINE (NTP) PROJECT

# JOINT SUBMISSION OF CUMBRIA COUNTY COUNCIL AND EDEN DISTRICT COUNCIL FOR EXAMINATION DEADLINE 2 (15TH JANUARY 2023)

## Councils' comments on Written Summary of Oral Submissions in National Highways' Compulsory Acquisition Hearing 1 (CAH1) Post Hearing Submission

The Councils' comments are entered in the right hand column added to National Highways' written submission of oral case in Section 2 of this document. The matters commented on are highlighted in yellow.

Infrastructure Planning

Planning Act 2008

**The Infrastructure Planning (Examination Procedure) Rules 2010**

# A66 Northern Trans-Pennine Project Development Consent Order 202x

## 7.4 Compulsory Acquisition Hearing 1 (CAH1) Post Hearing Submissions (including written submissions of oral case)

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## 1. Introduction

1.1 This document summarises the oral submissions made by National Highways (the "**Applicant**") at Compulsory Acquisition Hearing 1 (**"CAH1"**) dealing with issues relating to compulsory acquisition, held on 2 December 2022 in relation to the Applicant's application for development consent for the A66 Northern Trans-Pennine Project (the "**Project**").

1.2 CAH1 was attended by the Examining Authority (the "**ExA**") and the Applicant, together with a number of Interested Parties and Affected Persons.

1.3 Where the ExA requested additional information from the Applicant on particular matters, or the Applicant undertook to provide additional information during CAH1, the Applicant's response is set out in or appended to this document.

1.4 This document does not purport to summarise the oral submissions of parties other than the Applicant, and summaries of submissions made by other parties are only included where necessary in order to give context to the Applicant's submissions in response.

1.5 The structure of this document follows the order of items as set out in the agenda for CAH1 dealing with matters relating to the Project (the "**Agenda**"), published by the ExA on 22 November 2022. Numbered items referred to are references to the numbered items in the Agenda.

1.6 Recordings of CAH1 have been published and are available on the Planning Inspectorate's website.

## 2. WRITTEN SUMMARY OF THE APPLICANT'S ORAL SUBMISSIONS

| **2.0 Statutory Conditions and General Principles** | | |
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| **Agenda Item** | **The Applicant's Response** | **Councils' Comments** |
| ***2.1 The Applicant to confirm that the application includes a request for Compulsory Acquisition (CA) in accordance with s123(2) of the PA2008.*** | **Robbie Owen, for the Applicant** confirmed that the application includes a request for Compulsory Acquisition ("**CA**") in accordance with s123(2) of the Planning Act (PA) 2008. | |
| ***2.2 The Applicant to set out briefly whether and how the purposes for which the CA powers are sought comply with s122(2) of the PA2008.*** | **Heidi Slater, for the Applicant** confirmed that the Applicant is satisfied that the condition in section 122(2) of the PA 2008 is met, on the basis that the land which is proposed to be subject to CA powers is either needed for the development, needed to facilitate the development, incidental to the development, or is replacement land which is to be given in exchange of the Order land under section 131 or 132 of the PA 2008. Ms Slater referred the ExA to the Compulsory Acquisition and Temporary Possession Schedule [Document Reference 5.9, APP-300], where the Applicant sets out the purposes for which CA (and temporary possession ("**TP**")) powers are required in relation to each individual plot of land, with reference to the relevant numbered works shown on the Works Plans and comprising the authorised development as set out in Schedule 1 to the draft DCO.<br><br>Ms Slater explained the Applicant's approach to CA, following concerns expressed by Affected Persons about the extent of pink land (being land which is proposed to be subject to CA powers) shown on the Land Plans. Ms Slater explained that the pink land denotes a worst-case scenario, but land being marked as pink does not necessarily mean that it *will* be acquired. The articles within the draft Development Consent Order (the "**DCO**") [Document Reference 5.1, APP-285] have been drafted to allow the pink land to be "rolled back" to blue (i.e. land which is proposed to be subject only to the compulsory acquisition of new rights) so that the acquisition of rights can take place, as an alternative to the acquisition of | |

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| | land. Furthermore, where land is shown pink or blue on the Land Plans, the power of CA can be downgraded to the power of TP, if the Project can be delivered through the lesser power. CA remains a last resort, where acquisition by agreement is the preference, and with the detailed design work still to be done, the Land Plans inevitably represent the worst-case scenario. This is necessary in order to ensure the deliverability of the Project, should development consent be granted.<br>Similarly, the Order limits represent the full extent of land, but if all of this land is not needed, it will not all be acquired. This approach has been used in other highways DCOs, where consent is sought before the detailed design is taken forward. The approach is necessary because flexibility is needed to accommodate the sequence of developing a preliminary design, applying for consent, and then developing a detailed design.<br>Ultimately the Applicant only seeks to acquire land needed for the Project, which is mirrored within the specific wording of Article 19 of the draft DCO [Document Reference 5.1, APP-285]. The drafting is specific, in that it permits the Applicant to only acquire compulsorily so much of the Order Land as is required for the authorised development. This analysis will be done at a later stage, once the detailed design has been fully developed. | |
| ***2.3 The Applicant to explain briefly whether and how consideration has been given to all reasonable alternatives to CA and Temporary Possession (TP).*** | **Heidi Slater, for the Applicant** confirmed that consideration has been given to all reasonable alternatives to CA and TP. In the widest sense, alternatives have been considered in terms of alternative mode solutions (e.g. rail) and alternative route options for each of the schemes comprising the Project. These were discussed in ISH1 on Wednesday 30 November 2022, so were not restated during CAH1.<br>Ms Slater explained that more specifically, in the context of CA and TP powers, as noted at section 5.5 of the Statement of Reasons [Document Reference 5.8, APP-299], in designing the Project and determining the land subject to CA and TP powers, the Applicant has considered alternatives and modifications to the Project to minimise the potential land take. These alternatives and modifications were consulted upon and the preferred route for each scheme has been chosen based on a thorough | |

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| | consideration of relevant issues. That process is described in detail in Chapter 3 of the Environmental Statement [Document Reference 3.2, APP-046], in Chapter 5 of the Project Development Overview Report [Document Reference 4.1, APP-244] and in Chapter 2 of the Case for the Project [Document Reference 2.2, APP-008].<br><br>The selection process included taking account of various factors such as the views of consultees, environmental impacts, affordability, value for money, the objectives of the Project, and safety and operational considerations. However, none of the alternatives that were considered obviate the need for CA and TP of land. Therefore, to minimise the impacts of CA and TP as far as possible, the Order limits extend no further than the land that, on the basis of the preliminary design, is reasonably required for the construction, operation, mitigation and maintenance of the Project. The Order limits have been drawn as tightly as possible, with detailed consideration of the layout, boundaries and ownership of the land.<br><br>In terms of specific alternatives to CA and TP, as explained at section 5.7 of the Statement of Reasons [Document Reference 5.8, APP-299], the Applicant has sought and continues to seek to acquire land and rights over land for the Project, by agreement, as an alternative to CA. The Applicant agreed to provide an updated version of the Schedule of Negotiations [Document Reference 5.10, APP-301] at Deadlines 2, 5 and 8.<br><br>**Louise Staples, for the National Farmers Union (NFU)** raised concerns about the lack of certainty amongst NFU members in relation to the amount of land marked for CA and TP, questioning whether it is all necessary, and commenting that there had been a lack of engagement between the Applicant and potentially affected persons.<br><br>Ms Slater clarified that the detailed design work is being progressed currently, which will facilitate further engagement with landowners. In the meantime, the Applicant has offered to acquire land through its Acquisition Completion Premium Policy, with an uplift on market value. Landowners | |

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| | therefore have the option of selling their land or waiting until the detailed design stage of the Project is progressed further.<br>**Mr Salvin, for Mortham Estates** sought justification for a large amount of land being identified for permanent acquisition, particularly as the plans show that land is to be acquired which is located some distance from the A66 route. Mr Salvin queried whether the Applicant ought to use conservation covenants as opposed to powers under the Compulsory Purchase Order ("**CPO**") regime.<br>**Robbie Owen, for the Applicant** emphasised that the Project involves more than a single stage process in that it is currently at a preliminary design stage, where contractors are appointed and detailed design is underway, which will not be concluded by the time a decision as to whether to grant consent for the DCO is made. At this stage, the Applicant needs to demonstrate that the extent of land over which CA and TP powers are proposed is necessary, and that there is a compelling case in the public interest, taking into account the stage that the Project has reached.<br>Crucially, the terms of the draft DCO [Document Reference 5.1, APP-285] impose a second stage to the above, in that the power of CA under Articles 19(1) and 22 only apply to so much of the Order land *as is required* for the authorised development. Similarly, in relation to temporary use, the power under Article 29 of the draft DCO can only be used in relation to the *construction of the authorised development*. The Applicant must therefore comply with the second stage before exercising any of the powers that the DCO would grant in respect of land. It must be demonstrated that the land in question is required at the detailed design stage to realise the Project, such that the Applicant is not proposing anything unusual in the context of a complex highways scheme.<br>Ms Slater added that in relation to the extent of pink coloured land and the distance of the land from the highway, the likelihood is that the land is required for environmental or landscape mitigation, which is essential in securing the delivery of the Project. The land marked pink provides a means of protection for the Applicant if agreement cannot be reached in a | |

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| | timely manner, or, in the case of mitigation, if the state of the land is changed and is no longer acceptable to the owner – in this scenario the land could, having been acquired, remain within the Applicant's ownership. Finally, interests in land must be acquired in some areas to accommodate necessary diversions of statutory undertakers' apparatus. This approach does not preclude a solution which is less draconian than the pink land appears to be on the plans, and as noted earlier, the Applicant's preference would be to acquire land by agreement, or for agreements to grant rights over land to be entered into between the relevant parties. The Applicant is currently exploring the possibility of entering into s253 agreements under the Highways Act 1980 to mitigate the effects of the Project on land.<br>Mr Owen added, with regard to Mr Salvin's reference to conservation covenants, that they are an important mechanism but are a relatively novel approach, so it has not yet been established that they are capable of being used in a manner that would ensure the deliverability of the Project in the same way that CA powers can. The Applicant does not therefore deem conservation covenants to be an adequately suitable alternative to justify the same compelling case in the public interest for the DCO as is made via the use of CA powers included in the draft DCO.<br>***Post hearing -*** *The Applicant will provide an updated version of the Schedule of Negotiations [Document Reference 5.10, APP-301] at Deadlines 2, 5 and 8.* | |
| ***2.4 The Applicant to explain briefly whether and how the land and rights proposed to be acquired, including those for TP, are necessary and proportionate.***<br>***Why are areas proposed for site compounds subject to CA and not TP where they are not*** | **Robbie Owen, for the Applicant** confirmed that the Applicant had already (in the course of the discussion referenced above) explained the ways in which the land and rights which are proposed to be acquired are necessary and proportionate. This point was therefore not discussed further within Agenda item 2.4 of CAH1.<br>In relation to paragraph 2 of this Agenda item, **Heidi Slater, for the Applicant** explained that a reason for pink coloured land on the Land Plans is to cover a scenario where a landowner no longer wishes to retain the land in its changed state, post-construction. This is a strategy that has | |

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| ***proposed for subsequent environmental mitigation, such as at Plot 0102-01-35 [AS-013 and APP-041]? Why is CA sought over the seemingly unused parts of Plots: 0102-02-05; 08-03-06; and 09-02-21 [AS-013, APP-309 and APP-304] and all of Plot 03-03-36 [APP-305]?*** | been adopted in relation to compounds in some areas, where there is a risk that the remedial works necessary to reinstate the land to its previous condition may prove more costly than the value of the land itself. In this scenario the Applicant may need to acquire the land to mitigate its exposure to costs.<br>**Stephen Bagnall, Design Manager at Amey, for the Applicant** explained that in relation to Plot 0102-01-35, it was hoped that several of the vacant office buildings could be utilised (during construction) as site offices associated with the adjacent compound.<br>**Michelle Spark, for Cumbria County Council** submitted that in relation to Plot 0102-01-35, negotiations have been taking place between Cumbria County Council and the Applicant for permanent land take, but the offices located on the land in question are used by the Council for childcare and other essential services. This land take therefore ought to be temporary and more meaningful negotiations with the Applicant are sought. The Applicant also agreed to seek to address this issue through further engagement with Cumbria County Council.<br>For Plot 0102-02-05, Mr Bagnall explained that the Applicant proposes to use this plot to construct an outfall from its retention pond to the River Eamont. The intention is to acquire the land permanently and subsequently return it to the landowner following construction of the Project. The ExA clarified that in relation to Plot 05, on sheet 2 of 2, there is a small rectangle of land which is marked white on the Mitigation Map but pink on the Land Plan. The Applicant agreed to provide a further explanation for this specific Plot, alongside those noted on the Agenda item.<br>***Post hearing note:*** *In response to the ExA's question (above) the Applicant can confirm that the majority of white/blank areas shown on Environmental Mitigation Maps [Document Reference 2.8, APP-041] correspond to existing or proposed areas of paving, hardstanding, highway or accesses, or proposed maintenance areas at ponds, or proposed outfalls to adjacent watercourses.* | |

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| | *By way of exception to that general rule, there are some small areas which, whilst shown white/blank on the Environmental Mitigation Maps, are proposed to be acquired (compulsorily). As these areas are required for reasons that do not fall within the broad categories identified above, the Applicant's need for these areas is explained below:*<br>***Plot 0102-01-35 (Skirsgill Depot):***<br>*At the time of the preparation of the DCO application it was unclear whether the current office buildings within this plot were being fully utilised and it was therefore proposed that NH could/would negotiate with Cumbria County Council (CCC) regarding utilising (during construction) several of the office buildings (if vacant) for use as site offices associated with the adjacent compound (subject to agreement with CCC).*<br>*However, there was some uncertainty about the current use of the office building and the potential condition and level of the land following the completion of construction, and therefore the land was proposed to be subject to CA powers in order to accommodate a future scenario in which CCC did not wish to retain the land in the event that its state was changed in consequence of its use for the purposes of the Project.*<br>*National Highways is currently engaging in active discussion with CCC with reference to the Skirsgill depot and the proposed acquisition and use of this land for the purposes of the Project. A range of potential options is currently being explored and the Applicant is confident that an agreed solution will be achieved which accommodates the needs of both CCC and the Applicant.*<br>***Plot 0102-02-05:***<br>*It is proposed that* ***the Applicant would use this plot to construct a drainage outfall running from its proposed retention pond to the River Eamont, and also to provide an area of hardstanding, which is proposed to serve as parking for maintenance vehicles servicing the adjacent retention pond. There is no environmental mitigation*** | CCC in all of its correspondence with the Applicant has been clear that the current office buildings are used for essential services (Childrens and Adult's Services) and that it cannot relocate them. There has been no suggestion that the office buildings could be used as they would not be vacant.<br>CCC has confirmed in a number of meetings with the Applicant that it would potentially be prepared to take the land back at Skirsgill Depot in its changed state.<br>CCC has had limited engagement with the Applicant since CAH1 in relation to the Skirsgill Depot and the Applicant's proposed use and this has been promised in January 2023. Please refer to CCC's full position regarding the compulsory acquisition of its land in paragraph 2.10.2 of its Written Representations [REP1-019.1] |

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| | ***proposed for this area of hardstanding (hence it is shown white/unhatched on the Environmental Mitigation Maps).***<br>***Plot 03-03-36:***<br>*This land has been included in the application to allow for potential diversionary works to an overhead utility pole (Electricity North West) which is* ***located within this small triangular shaped plot, that may be required to deliver the scheme proposals.***<br>*The plot has been proposed to be subject to CA powers so that if Electricity North West requires rights to be granted for its benefit over the land used to accommodate the diverted apparatus, the Applicant would be capable of granting it those rights, havi****ng first acquired a superior interest in the relevant land through the use of its CA powers.***<br>*This approach would only be deployed in the event that any rights required by Electricity North West were not granted directly to* ***Electricity North West by the landowner voluntarily and by agreement.***<br>***Plot 08-03-06***<br>*Powers of compulsory acquisition are being sought over the blank area within this plot to enable a proposed utility diversion – an overhead electricity line is proposed to be relocated underground, with grassland to be reinstated above. This will require a correction to Figure 2.8.6 in the Environmental Mitigation Maps [Document Reference 2.8, APP-041], to show the* ***proposed grassland (which is currently omitted from the Environmental Mitigation Maps).***<br>*National Highways (NH) has acquired this plot and The Old Rectory building, so N****ational Highways now own it and it is being maintained by the Property Management Team.***<br>***Plot 09-02-21***<br>*Powers of compulsory acquisition are being sought over the blank area within this plot for the provision of a new PROW diversion (Reference F) as shown on the Rights of Way and Access Plans for Scheme 09 Stephen Bank to Carkin Moor [Document Reference 5.19, APP-348] (existing public footpath 20.23/8/1) and for proposed environmental mitigation in* | |

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| | *the form of enhancement of existing woodland. This will require a correction to Figure 2.8.7 in the Environmental Mitigation Maps [Document Reference 2.8, APP-041] to show the proposed woodland enhancement (which is currently omitted from the Environmental Mitigation Maps).*<br>*In addition to those plots listed above, which were referenced in the ExA's Agenda for CAH1, the Applicant has identified blank / white areas within the following plots and has sought to explain the reason for which those plots are proposed to be subject to powers of compulsory acquisition:*<br><br>***Plot 0102-01-34***<br>*Powers of compulsory acquisition are being sought over the blank area within this plot (i.e. the blank area shown on Figure 2.8.1 in the Environmental Mitigation Maps Sheet 1 of 2 [Document Reference 2.8, APP-041] to provide access to facilitate planting of woodland to the south of the plot (shaded brown on the aforementioned Environmental Mitigation Maps).*<br>***Plot 0102-02-19; 0102-02-56***<br>*Powers of compulsory acquisition are being sought over the blank area within these plots (i.e. the blank areas shown on Figure 2.8.1 in the Environmental Mitigation Maps Sheet 2 of 2 [Document Reference 2.8, APP-041]* ***to accommodate the potential diversion of a United Utilities underground sewer.***<br>***Plot 08-01-12***<br>*Powers of compulsory acquisition are proposed to be sought over the blank area within this plot to the south of the proposed attenuation pond, south of the B6277 Moorhouse Lane (the blank area is shown on Figure 2.8.6 Sheet 1 of 3 in the Environmental Mitigation Maps [Document Reference 2.8, APP-041]. This area has been identified as an area to accommodate the proposed. reinstatement of grassland. This will require a correction to Figure 2.8.6 Sheet 1 of 3 in the Environmental Mitigation Maps [Document Reference 2.8, APP-041] to shade this blank area accordingly.* | CCC has set out its position regarding Plot 0102-02-56 in paragraph 2.10.2 of its Written Representations [REP1-019.1] regarding the compulsory purchase of land to accommodate a sewer over the emergency access required for |

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| | ***Plot 08-03-01***<br>*Powers of compulsory acquisition are proposed to be sought over the blank area within this plot to the southeast of Tack Room Cottage (the blank area is shown on Figure 2.8.6 Sheet 3 of 3 in the Environmental Mitigation Maps [Document Reference 2.8, APP-0410, which has been identified as an area for reinstatement of grassland. This will require a correction to Figure 2.8.6 Sheet 3 of 3 in the Environmental Mitigation Maps [Document Reference 2.8, APP-041] to show the proposed reinstatement of grassland (which is currently omitted from the Environmental Mitigation Maps).*<br>***Plot 09-03-05, 09-03-12, 09-03-13, 09-03-14, 09-03-15***<br>*Powers of compulsory acquisition are being sought over the blank areas within these plots, which are located to the west of Foxwell Farm (the blank area is shown on Figure 2.8.7 Sheet 3 of 4 in the Environmental Mitigation Maps [Document Reference 2.8, APP-041]. These areas are required for a proposed utility diversion – an overhead electricity line is proposed to be relocated underground, with grassland to be reinstated above. This will require a correction to Figure 2.8.7 Sheet 3 of 4 in the Environmental Mitigation Maps [Document Reference 2.8, APP-041] to show the proposed grassland reinstatement (which is currently omitted from the Environmental Mitigation Maps).* | the Fire Station and the need for unfettered access. |
| ***2.5 The Applicant to set out briefly whether, having regard to s122(3) of the PA2008, there is a compelling case in the public interest for the land to be acquired compulsorily and the public benefit would outweigh the private loss.*** | **Heidi Slater, for the Applicant** submitted that the wider public benefits of the Project against the impacts on private land interests have been considered. As is explained in section 6.3 of the Statement of Reasons [Document Reference 5.8, APP-299], the Applicant recognises that the Project will have an impact on privately held interests in land and understands that this is very difficult for those persons whose ownership and occupation of land is affected by the Project. However, it would not be possible for the Project to come forward without affecting land which is currently privately owned.<br>The Applicant acknowledges the values of the existing land uses but notes that the loss of these private interests can, and will, be fairly and | |

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| | appropriately compensated through the payment of statutory compensation under the Compensation Code. In contrast, the wider public benefits of the Project can only be delivered if CA powers are authorised.<br>The Applicant considers that on balance, the wider public benefits outlined in the Case for the Project [Document Reference 2.2, APP-008] that would be realised, if the Project was delivered, would outweigh the losses suffered by private individuals, both on an individual basis, and cumulatively across the Project as a whole. | |
| ***2.6 The Applicant to explain briefly whether, in the context of 'the need for infrastructure established in the NNNPS', the Proposed Development would include any 'upgraded technology to address congestion and improve performance and resilience at junctions' and where [Statement of Reasons (SoR), APP-299, para 1.1.9i. and 1.1.10]. Section 2 of the SoR is numbered incorrectly and the correct paragraph numbers should be 2.2.9i and 2.2.10.*** | **Heidi Slater, for the Applicant** explained that traffic signals operating via MOVA technology (Microprocessor Optimised Vehicle Actuation) are currently installed to control all movements at M6 Junction 40, at the Kemplay Bank roundabout and at Scotch Corner.<br>As part of the Project, new traffic signals and MOVA systems will be installed as part of the junction upgrades at the aforementioned junctions on Scheme 0102 and Scheme 11, to help facilitate the traffic movements through these junctions. In addition, 6 no Variable Message Signs (VMS) have been proposed along the route to advise of incidents and journey times to key junctions along the route. These VMSs are to be installed on Schemes 0102, 03, 06, 07 and 08; their proposed locations are identified by means of an 'orange spot' symbol on the General Arrangement Drawings for these Schemes [Document Reference 2.5, APP-011; APP-012; APP-014; APP-015; and APP-016].<br>***Post hearing note:*** *The Applicant will rectify the error in the numbering of section 2.2 of the Statement of Reasons [Document Reference 5.8, APP-299] and will submit and updated version of this document at Deadline 2.* | |
| ***2.7 Other matters relating to statutory conditions and general principles.*** | Agenda item not used at CAH1. | |
| **3.0 Summary of DCO Provisions** | | |

| Agenda Item | The Applicant's Response | Councils' Comments |
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| ***3.1 The Applicant to set out briefly which draft DCO Articles engage CA and TP powers [APP-285].*** | **Robbie Owen, for the Applicant** submitted that the key articles in the draft DCO [Document Reference 5,1 APP-285] which engage powers of compulsory acquisition ('CA') and temporary possession ('TP') are:<br>For CA:<br>• Article 19 which provides for the CA of land. This applies to all pink and blue coloured land on the Land Plans;<br>• Article 22 which provides for the CA of rights and restrictive covenants, applying to all pink and blue land on the Land Plans. In respect of land shaded blue on the Land Plans, and listed (on a plot by plot basis) in Schedule 4, the new rights which may be created and acquired are limited to those specifically listed in the third column of that Schedule; and<br>• Article 27 which provides for the CA of land or new rights in subsoil below, and in airspace above the Order land.<br>For TP:<br>• Article 29 which provides for the temporary use of land for constructing the authorised development. This includes all plots within the Order limits (i.e. those over which the power to compulsorily acquire land and rights over land and impose restrictive covenants) but in relation to the plots shown in green on the land plans and listed in Schedule 6 to the draft DCO [Document Reference 5.1, APP-285] only a power of temporary possession is sought; and<br>• Article 30 which provides for the temporary use of land for maintaining the authorised development for a period of five years. | |
| ***3.2 The Applicant to summarise briefly any other provisions in the draft DCO relating to CA and TP*** | **Robbie Owen, for the Applicant** submitted that other powers relating to CA and TP (which are also included in Part 3 of the draft DCO) are contained in:<br>• Article 20 which relates to the incorporation of the minerals code;<br>• Article 21 which provides for a time limit for the exercise of powers to possess land temporarily or to acquire land compulsorily; | |

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| | • Article 23 which provides for private rights over land affected by compulsory acquisition and temporary possession;<br>• Article 24 which provides for the power to override easements and other rights;<br>• Article 25 modifies, in its application to the DCO, provisions set out in Part 1 of the Compulsory Purchase Act 1965;<br>• Article 26 deals with the application of the Compulsory Purchase (Vesting Declarations) Act 1981;<br>• Article 28 deals with rights over or under streets;<br>• Article 31 relates to statutory undertakers;<br>• Article 32 also deals with statutory undertakers' rights and powers whose apparatus is located under, in, on, along or across a street which is stopped up under the terms of the DCO;<br>• Article 33 relates to statutory undertakers' apparatus and provides for the recovery of costs in securing a new or replacement utility connection;<br>• Article 34 is related to special category land, allowing the provision of replacement land in exchange for special category land which is proposed to be acquired pursuant to the Order.;<br>• Article 35 relates to Crown rights and provides that nothing in the draft DCO authorises the Applicant to take, use, enter upon or in any manner interfere with any Crown land or any rights over land which are held by the Crown, without the written consent of the appropriate Crown authority; and<br>• Article 36 deals with the relocation of Brough Hill Fair.<br>In relation to compensation:<br>• Article 37 relates to the disregard of certain interests and improvements;<br>• Article 38 provides for the set-off for the enhancement in value of retained land; and<br>• Article 39 provides for no double recovery. | |

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| ***3.3 The Book of Reference (BoR) [APP-290 to APP-298] includes many Category 1 and 2 persons, particularly in respect of mines and minerals, identified as being unknown [AS-015 to AS-022]. Parts 3 of the BoR also list persons identified as being unknown. The Applicant to explain generally, in the context of the SoR [APP-299, section 4.7] and s44 of the PA2008, how the types of unknown interests have been identified in the first place and what subsequent attempts have been made to identify these persons. Following the explanation, the Applicant may be requested to provide a schedule to cover this matter.*** | **Heidi Slater, for the Applicant** confirmed that the Applicant appointed a land referencing agent to carry out diligent inquiry. The land referencing methodology used by the land referencing agent is outlined in sections 4.4 to 4.8 of the Statement of Reasons [Document Reference 5.8, APP-299].<br>The process included initial desk-based assessment work (sometimes referred to as 'non-contact referencing') by the land referencing agent on behalf of the Applicant, which was followed up subsequently by the issuing of requisitions for information and land interest questionnaires to all persons and properties identified by the initial referencing work. Where responses were received, they were logged. If returns were not received, the land referencing team followed up with additional correspondence and telephone calls in the quest for information, known as the 'contact referencing' stage. Where the land referencing team encountered difficulty in identifying or contacting persons with an interest in land, site notices were erected at relevant locations, inviting the owners and/or occupiers of the land to come forward.<br>In relation to unknown interests, an analysis indicates that they fall largely into three distinct groups:<br>1. **Unregistered land** – in respect of which there is no registered freehold interest (i.e. the land is unregistered), and it has not been possible, through contact referencing (as outlined above) to identify a named owner;<br>2. **Unknown mines and minerals interests** – where title information at HM Land Registry specifically excludes mines and minerals from the freehold title, but provides no further information about the ownership of those mines and minerals; and it has not been possible to identify their owners through subsequent contact referencing (e.g. requisitions for information); and<br>3. **Unknown persons in Part 3 of the Book of Reference** – where the title information at HM Land Registry includes reference to rights, easements etc., but does not attribute them to any particular party; and | |

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| | subsequent contact referencing (e.g. requisitions for information) has not been successful in identifying such parties.<br><br>The Applicant has prepared a schedule listing all of the 'known unknown' interests which fall into each of these three groups, which will be provided to the ExA.<br><br>***Post hearing note:*** *Please see Appendix 1 to this note, which (as foreshadowed in CAH1) comprises a series of tables listing all of the unknown interests identified in the Book of Reference [AS-015 to AS-022]. The tables are numbered 1 to 3, and their content reflects the three categories of unknown owners listed above.*<br><br>1. ***Table 1 – Unregistered land*** *– This table lists all of the plots in respect of which there is no registered freehold interest (i.e. the land is unregistered), and it has not been possible, through subsequent diligent inquiry, carried out through contact referencing (the methodology for which is outlined above), to identify a named owner.*<br>2. ***Table 2 – Unknown mines and minerals interests*** *– The table lists all of the plots in relation to which title information at HM Land Registry specifically excludes mines and minerals from the freehold title but provides no further information about the ownership of those mines and minerals; and it has not been possible to identify their owners through subsequent diligent inquiry, carried out through contact referencing (e.g. requisitions for information).*<br>3. ***Table 3 – Unknown persons in Part 3 of the Book of Reference*** *– This table lists all of the plots in relation to which the title information at HM Land Registry includes reference to rights, easements etc., but does not attribute them to any particular party; and subsequent diligent inquiry, carried out through contact referencing (e.g. requisitions for information) has not been successful in identifying such parties.*<br><br>***Post hearing note (included with this agenda item 3.3 in accordance with the ExA's suggestion):*** *In connection with agenda item 3.7 (see below), the Applicant was asked to explain in its summary of oral representations why, in some entries in the Book of Reference, mines and* | |

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| | *minerals interests are noted as being subject to a "caution in respect of mines and minerals" whereas other mines and minerals interests are not.*<br>*The Applicant can confirm that this notation is as a result of the means by which HM Land Registry records information about interests in land. In general terms, where land is first registered the prospective owner would be required to demonstrate its legal ownership of the estate in land through the production of documentary evidence. In some cases that evidence will indicate that the rights to mines and minerals are excepted from (i.e. not included within) the title. This may be because at some point in history when the land was sold, the owner reserved to their retained land the mines and minerals interest, or where the mines and minerals were reserved to the lord of the manor under the now largely abolished copyhold estate in land.*<br>*Where this is the case the HM Land Registry notes on the title register that the freehold title has excepted from it the mines and minerals interests; but it will rarely have sufficient information to also record the retained land that has the benefit of the excepted mines and minerals interests. It is titles of this nature that give rise to entries in the Book of Reference where mines and minerals are in unknown ownership and where the Applicant through its diligent inquiries, has not been able to identify the owner of those mines and minerals interests.*<br>*In relation to the mines and minerals interests that are noted as being subject to a caution or notice against the registered title; this refers to the system operated by the Land Registry in relation to which persons can register a caution against a title indicating that someone intends to claim an interest in that title.*<br>*In relation to unregistered land a person who believes they may be entitled to claim the minerals interest may register a cautionary title requiring that person to be given notice of first registration of that interest. In effect, it allows a person who maintains that they have a claim over that interest to be notified so that their interest can be asserted.* | |

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| | *Finally, it is possible for a freehold estate in only the mines and minerals interests (and not the surface land) to be registered.*<br>*The difference in notation of the mines and minerals interests in the Book of Reference reflects the different means by which HM Land Registry records mines and minerals interests, and the differing claims to ownership of mines and minerals interests.* | |
| ***3.4 The Applicant to explain what factors were used in the desk-based assessment of potential Compulsory Purchase Act 1965 section 10 Category 3 persons [SoR, APP-299, para 4.5.3] together with any spatial or distance parameters that were used in the assessment.*** | **Robbie Owen, for the Applicant** submitted that section 10 claims may be made by parties who have an interest in land/property, which is affected by some physical interference with a legal right that they are entitled to use in connection with their land/property. Whilst the interference with the right would need to arise from the *construction* of the Project, the land benefitting from the right could be located at some distance from the Project itself, and could be some distance outside the Order limits.<br>Therefore, in carrying out its desk-based assessment to identify Category 3 persons who would or might be entitled to make a claim under section 10 of the Compulsory Purchase Act 1965 ("potential section 10 claimants"), the Applicant's specialist land referencing agent identified a 'buffer zone', which extended in all directions for a distance of 300 metres from the centre of the engineering boundary (being the boundary of the land which was considered to be needed to accommodate engineering works), along the full length of each of the schemes comprised in the Project.<br>All interests in land within this 300-metre buffer zone were included in the initial desk-top land referencing work and were served with requisitions for information including 'land interest questionnaires' (LIQs), which included questions designed to elicit information which would help the Project team to identify potential section 10 claimants. All those parties who received LIQs were also included in the pre-application consultation.<br>The buffer zone was deliberately extensive, in order to ensure a robust and precautionary approach, given that the design of the Project was | |

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| | continuing to evolve whilst land referencing work and consultation were being progressed. However, the land referencing team did not just rely on the 300m buffer – if for an example an access track off the A66 was within the buffer, then the team would follow it along its route to identify the associated farm or property. As such, the land referencing work will have picked up parties further away than 300m, as part of the precautionary, inclusive approach that was adopted.<br>In preparing to identify potential section 10 claimants, the land referencing agent considered the nature of the Project and determined that areas where access from properties to the public highway might be obstructed during the construction of the Project (being the execution of public works), and where no alternative means of access might be possible or available during that process, could potentially give rise to section 10 claims.<br>Therefore, as the design of the Project continued to evolve, the land referencing team systematically reviewed the emerging draft Order limits to identify properties which looked to be at risk of being 'cut off' during the construction of the Project.<br>All such properties were then considered by a multi-disciplinary team, comprising members of the land referencing team, the engineering design team, and the legal team, who reviewed the areas and properties in question via a GIS platform hosted by the land referencing team. Each area was discussed in detail, with consideration being given to how the design might impact on properties and access to those properties during the construction of the Project. Other factors considered included the potential impacts of construction such as noise, dust, fumes and vibration arising from construction works and related traffic – although it was acknowledged that the prospects of such short-lived temporary effects were less likely to cause depreciation in the value of a property (which is the test under section 10) than other factors, such as interference with rights, for example through severance.<br>In addition to this desk-top referencing, when meeting in person with affected persons, the Project team has endeavoured to establish whether | |

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| | those persons' interests in land are subject to any third-party rights which might present grounds for a potential section 10 claim. Any information ascertained in this way has been included in the land referencing database used to inform the Book of Reference.<br>In relation to all of these methodologies, a precautionary approach was taken to identifying potential section 10 claimants, given the wording in section 44 of the PA 2008, which asks the Applicant to identify persons who "would or might" be entitled to make a claim. Where there was uncertainty about whether a person might be entitled to make a claim, they were included in the Book of Reference as a precaution, to ensure that no parties who the Applicant thought "might" be able to make a claim were inadvertently excluded. | |
| ***3.5 The Applicant to explain whether longer term maintenance, beyond the five-year period in draft DCO Article 30, is solely enabled by the CA of land and rights [SoR, APP-299, para 3.4.6].*** | **Robbie Owen, for the Applicant** explained that as is noted at paragraph 8.30 of the Explanatory Memorandum [Document Reference 5.3, APP-286], Article 30 provides a power to temporarily possess land for the purposes of maintaining the authorised development during the five-year maintenance period specified in Article 30(11). The provision is intended to facilitate the resolution of any 'snagging' issues that arise during the first five years of the Project's operation.<br>Typically, highways projects are designed to have a materials lifespan of between 20 and 40 years before any significant maintenance and upgrading is required. Of course, this will be dependent on material properties, maintenance and usage; and there may be some elements, including structural concrete and steelwork, which have extended design lives of up to 120 years.<br>Consequently, the Applicant is reliant on the acquisition of land, the acquisition of rights over land and any contractual agreements in relation to the use of land, to carry out the maintenance required for the Project in the longer term. The Applicant is seeking to acquire by agreement the land and rights over land that it requires to construct and maintain the Project, as is explained in Section 4.9 of the Statement of Reasons [Document Reference 5.8, APP-299]. However, to safeguard the delivery | |

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| | of this nationally significant infrastructure project the Applicant is seeking the authorisation of CA powers. | |
| ***3.6 The Applicant to explain why each of the additional limits of deviation, beyond those of 3m horizontally and 1m vertically, in draft DCO Article 7 are necessary as shown in the Works plans [APP-318 to APP-325 and AS-012]. Following the explanation, the Applicant may be requested to provide a schedule to cover this matter. The Applicant to explain whether the drafting of draft DCO Article 54 could have any bearing on the stated limits of deviation specified in Article 7.*** | The Applicant agreed to provide a detailed explanation of all departures from the standard limits of deviation specified in article 7 of the DCO in a post-hearing note.<br>In relation to the drafting of Article 54 of the draft DCO, and whether it could have any bearing on the stated Limits of Deviation specified in Article 7, **Robbie Owen, for the Applicant** explained that there is no provision within Article 7 for the limits to be subsequently changed. The intention behind the cross-reference in Article 54 to Article 7 is to preserve the ability to exercise the power to deviate under Article 7, otherwise it could be argued that there is non-compliance with Article 54 in terms of failing to design the Project in detail and subsequently carrying it out in a way that is compatible with Works Plans and the Engineering Section Drawings, where deviation occurs.<br>If a change was approved by the Secretary of State under Article 54(2), this would not automatically allow for a change to the Limits of Deviation as there is no provision within Article 7 permitting this to be the case. The Applicant is of the view that Article 7 operates independently of Article 54, although an interaction between the two Articles exists.<br>***Post hearing note**: As requested during the Hearing, an explanation of all departures from the standard Limits of Deviation is now provided, and can be found in Appendix 2 to this note.* | |
| ***3.7 The Applicant to explain why para 8(3) of Parts II and III of Schedule 2 (minerals) to the Acquisition of Land Act 1981 is not being incorporated into draft DCO Article 20, as this is not explained in the Explanatory Memorandum [APP-286, para 8.3]. Does this*** | **Robbie Owen, for the Applicant** submitted that the general position is that unless otherwise excluded from a transaction to acquire land, the acquisition of the land will include the acquisition of any mines and minerals forming part of the land. Mines and minerals may, however, be expressly excluded from CA by the application of "the mining code" to the instrument authorising the CA (a CPO or a DCO).<br>"The mining code", sometimes also referred to as "the minerals code", is the name given to Parts 2 and 3 of Schedule 2 (minerals) to the | |

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| ***minerals incorporation negate the need for many of the 'unknown' Category 1 persons in the BoR [AS-015 to AS-022]?*** | Acquisition of Land Act 1981. Article 20 of the draft DCO [Document Reference 5.1, APP-285] incorporates Parts 2 and 3 of Schedule 2 (minerals) to the Acquisition of Land Act 1981 into the draft DCO, subject to some modifications.<br><br>The effect of incorporating the minerals code (or the mining code) into the draft DCO is that, if the DCO were made, the undertaker (which in this case would be the Applicant) would not be entitled to acquire any mines or minerals, other than where minerals were necessarily extracted or used in the construction of the authorised development, unless these were expressly proposed to be purchased. Where the minerals code is incorporated into the draft DCO, it is modified to exclude paragraph 8(3).<br><br>Paragraph 8(3) provides that, *"If the owner of the mines refuses to allow a person appointed by the acquiring authority for the purpose to enter the mines or works under this paragraph he shall be liable on summary conviction to a sum not exceeding £50."*<br><br>The effect of excluding paragraph 8(3) is that it would not be possible for the Applicant to bring proceedings against a landowner who refused to allow the Applicant, or its agent, to enter onto the land containing the mines or minerals.<br><br>The inclusion of the minerals code, in a form which excludes paragraph 8(3), follows standard drafting practice derived from the Infrastructure Planning (Model Provisions) (England and Wales) Order 2009 (now revoked). This drafting approach is also widely applied in highways DCOs, such as, for example, the A14 Cambridge to Huntingdon Improvement Scheme DCO 2016; the Silvertown Tunnel Order 2018; the Lake Lothing (Lowestoft) Third Crossing Order 2020; and the Great Yarmouth Third River Crossing DCO 2020. However, we do note that paragraph 8(3) has not been excluded from the application of the minerals code in the recently made A57 Link Roads DCO 2022.<br><br>***Post hearing note:*** *The Applicant has chosen not to incorporate paragraph 8(3) of Schedule 2 to the Acquisition of Land Act 1981 and so it would not be open to the Applicant to seek to impose a £50 fine in circumstances where it is refused access to minerals. It is considered that* | |

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| | *in the circumstances of this project the imposition of a £50 fine is unlikely to result in an effective remedy where other remedies (such as injunctive relief) may be available and more appropriate. The Applicant will update the Explanatory Memorandum [Document Reference 5.3, APP-286] accordingly at its next iteration to be submitted at Deadline 2.*<br>***Post hearing note:*** *the Applicant was asked to explain in its summary of oral submissions whether the incorporation of the minerals code would enable the removal of mines and minerals interests in unknown ownership. Having considered the matter further the Applicant remains of the view that, in the circumstances of this particular project, and in light of the regional and historical particularities as to mines and minerals which give rise to a significant degree of uncertainty as to the identity of persons with interests in mines and minerals (in relation to which see the following post hearing note), it would not be appropriate to remove from the Book of Reference owners of mines and minerals interests. In this regard it should be noted that paragraph 2 of the minerals code (contained in Schedule 2 to the Acquisition of Land Act 1981) merely creates a default position that a conveyance excludes mines and minerals, which "shall be deemed to be excepted out of the conveyance of that land unless expressly named and conveyed". While in general terms the Applicant does not propose to acquire mines and minerals interests, which is why it has incorporated the minerals code and its presumption against such acquisition, it is not precluded from doing so. Therefore, on a precautionary basis, it is appropriate for mines and minerals interest owners to remain listed in the Book of Reference.* | |
| ***3.8 The Applicant to explain why draft DCO Article 22(3) is subject to various sections/schedules of the Compulsory Purchase Act 1965. The Applicant should also add this explanation to the*** | **Robbie Owen, for the Applicant** submitted that Article 22(3) is an important provision, based on a model provision, which makes it clear that where the undertaker acquires a right over land compulsorily, it is not required to acquire a greater interest in the same land.<br>The article is, however, subject to the statutory provisions contained in section 8 of, and Schedule 2A to, of the Compulsory Purchase Act 1965. Subject to a range of qualifying criteria, these provisions enable a person in relation to whom it is proposed to acquire part of their landholding, to | |

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| ***Explanatory Memorandum [APP-286, para 8.9].*** | serve a counter-notice on the acquiring authority requiring it to either cease its CA of part of the landholding, or alternatively, to purchase all of that landholding.<br>However, it is important to recognise that there is a patchwork of compulsory purchase legislation that has arisen since the 1965 Act which is not well suited to the CA of new rights. Strictly speaking, the counter-notice provisions in section 8 of the Compulsory Purchase Act 1965 apply only to the acquisition of land and do not apply to the acquisition of new rights, or to the imposition of new restrictive covenants, over land.<br>To remedy this, paragraph (4) of Article 22 introduces Schedule 5 to the draft DCO which contains the modifications to compensation and compulsory purchase enactments necessary to permit the undertaker to acquire rights compulsorily and for those burdened by the rights acquired compulsorily, to be properly compensated. Paragraph 5(8) of Schedule 5 modifies Schedule 2A to the 1965 Act so that the counter-notice procedure "works" for the CA of rights and restrictive covenants.<br>To reflect this modification, and to ensure that paragraph (4) of Article 22 "works" for the CA of rights, Article 22(3) refers to the modifications that the DCO itself introduces via Schedule 5.<br>***Post hearing note:*** *Appendix 3 to this note provides further background information on the procedures for the implementation of compulsory acquisition powers and how they were modified by the Housing and Planning Act 2016. The Applicant will update the Explanatory Memorandum to reflect the explanation provided at this agenda item in relation to article 22(3). This is due to be submitted at Deadline 2.* | |
| ***3.9 The Applicant to provide a legal explanation why the power sought in draft DCO Article 24 is still required. The Applicant should also add this explanation to the Explanatory*** | Article 24 provides for the overriding of easements and other rights. Existing easements and restrictions on land that could interfere with the delivery of the Project are addressed by article 23 (private rights over land). In summary, Article 23 provides that existing rights are:<br>• extinguished, where the undertaker acquires the land by compulsion or agreement; | |

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| ***Memorandum [APP-286, para 8.14].*** | • extinguished, to the extent that the existing rights are inconsistent with the rights or restrictive covenants acquired or imposed under the Order; and<br>• suspended for the duration of the period of temporary possession, where the undertaker temporarily possesses the land under the provisions of Articles 29 and 30 of the Order.<br><br>However, Article 23 does still have "gaps" in relation to the exercise of the powers conferred by the Order, for example article 14 (protective works to buildings) and article 15 (authority to survey and investigate land) which authorise the entry on to land but which do not necessarily amount to "possession" of the land.<br><br>Article 24 ensures that such activities authorised by the Order can be carried out, unimpeded by existing rights or restrictions, that those who suffer a loss as a result of the right or interest being overridden may claim compensation and, as article 24 is a power to override and not extinguish, once the undertaker's activity has ceased the person with the benefit of the interest may resume their enjoyment of it.<br><br>***Post hearing note:*** *The Applicant will update the Explanatory Memorandum [Document Reference 5.3, APP-286] to clarify the justification for this provision given in the Explanatory Memorandum at its next iteration at Deadline 2. It should be noted that substantially the same question was put to the Applicant in the ISH2 Supplementary Questions, ISH2.DCO.10, a response to which is also provided at Deadline 1 in the Applicant's Responses to the Examining Authority's Issue Specific Hearing 2 Written Questions [Document Reference 7.1].* | |
| ***3.10 The Applicant to explain why the notice periods introduced by the Housing and Planning Act 2016 appear to have not been applied to draft DCO Article 25(4) and (5) [Explanatory Memorandum,*** | For context, **Robbie Owen, for the Applicant** briefly explained some of the main changes of relevance to the CA provisions of the draft DCO that were brought about by the Housing and Planning Act 2016. The counter-notice procedure under section 8 of, and Schedule 2A to, the Compulsory Purchase Act 1965 was modified by Schedule 22 of the Housing and Planning Act 2016 which introduced a new Schedule 2A to the 1965 Act. | |

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| ***APP-286, para 8.16]. The Applicant to further explain the 'broad precedent' resulting from the examples given. The Applicant should also add this explanation to the Explanatory Memorandum.*** | The purpose and effect of paragraph (5)(b) of Article 25 is to insert a new interpretation provision in Schedule 2A to the 1965 Act, which clarifies that the entry onto land, or taking possession of it, pursuant to Articles 14 (protective works to buildings), 15 (authority to survey and investigate land), 29 (temporary use of land for maintaining the authorised development) and 30 (temporary use of land for maintaining the authorised development) (the "relevant provisions" for the purposes of this response), does not engage the counter-notice provisions.<br><br>This is considered to be appropriate, as the relevant provisions contain powers that are of a fundamentally different character than the CA of land or even rights over land.<br><br>In each case the relevant powers would authorise only a temporary interference with existing land interests. To apply the counter-notice provisions to the exercise of the relevant provisions would risk rendering them non-functional, as a person receiving a notice of the undertaker's intention to exercise those powers could simply serve a counter notice requiring the undertaker to either withdraw the notice or acquire the whole of that person's landholding or contest the notice at the Upper Tribunal (Lands Chamber).<br><br>In relation to the "broad precedent" cited at paragraph 8.16 of the Explanatory Memorandum [Document Reference 5.3, APP-286], this is a reference to the vast majority of DCOs made for highways projects since Housing and Planning Act 2016 came into force. The first of the Applicant's DCOs granted after the coming into force of the Housing and Planning Act 2016 was the M20 Junction 10a DCO 2017. Paragraph 51 of the Secretary of State's decision letter records that the Secretary of State made the Order with modifications "to ensure the provisions are aligned with legislative changes that have been made" which is a reference to the Housing and Planning Act 2016. Since then, the Applicant's DCOs have followed the Secretary of State's precedent.<br><br>***Post hearing note:*** *The Applicant will update the Explanatory Memorandum regarding the reference to the Housing and Planning Act* | |

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| | *2016 and related 'broad precedents' in relation to article 25. This is required at Deadline 2. The Applicant has prepared a note contained in Appendix 3 (to this note) which provides more information about the procedures for the implementation of compulsory acquisition powers and the amendments made to those procedures by the Housing and Planning Act 2016, and which provides further explanation of the legislation applied and modified by this article. The Applicant will make appropriate clarifications in its Explanatory Memorandum [Document Reference 5.3, APP-286] in its next iteration at Deadline 2.* | |
| ***3.11 The Applicant to explain why the drafting of draft DCO Article 26 'has been adapted' and how it takes 'account of the Housing and Planning Act 2016' [Explanatory Memorandum, APP-286, para 8.18]. The Applicant should also add this explanation to the Explanatory Memorandum.*** | The Applicant agreed to update the Explanatory Memorandum in respect of this Agenda item, at Deadline 2.<br><br>***Post hearing:*** *The Applicant will update the Explanatory Memorandum regarding the reference to the Housing and Planning Act 2016 in relation to article 26 (including an explanation of how the HPA 2016 has affected the GVD process). This is required at Deadline 2. The Applicant has prepared a note contained in Appendix 3 which provides more information about the procedures for the implementation of compulsory acquisition powers and the amendments made to those systems by the Housing and Planning Act 2016, and which provides further background on the legislation that is applied and modified by this article.* | |
| ***3.12 The Applicant to explain why the intended notice periods in the Neighbourhood Planning Act 2017 are not reflected in draft DCO Article 29(2).*** | **Robbie Owen, for the Applicant** explained that Article 29 governs the temporary use of land, for the purposes of constructing the Project. Article 29(2) provides that not less than 14 days before entering on and taking TP of land, the Applicant must serve notice to affected owners and occupiers.<br><br>The Applicant's position on providing 14 days' notice, as precedented, rather than the 3 months' notice which will come into force with the Neighbourhood Planning Act 2017 is set out at paragraph 8.27 of the Explanatory Memorandum [Document Reference 5.3, APP-286]. The Applicant considers the 3-month period set out in the Neighbourhood Planning Act 2017 to be excessive and inflexible in exercising its TP powers. The Applicant acknowledges that TP, while a lesser imposition | |

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| | than the acquisition of land or rights over land, remains a significant imposition with the potential for disruption and acknowledges that affected persons would benefit from having the most accurate available information in relation to the Applicant's intentions as to when it will take TP of land, if it is necessary to exercise that power.<br><br>If the Applicant is required to give three months' notice it would reduce the Applicant's flexibility in its exercise of the TP power. An unintended consequence of this is that the Applicant may need to make decisions on when it requires land on a precautionary basis to avoid programme disruption, leading to land being possessed temporarily earlier than would otherwise be the case, which would be to the detriment of affected persons through the unnecessary disruption caused, and to the Applicant through being required to compensate the affected persons for the loss or damage occasioned by the additional disruption.<br><br>It should further be noted that it is in the Applicant's interests to provide affected persons with the best available information in relation to its date of intended possession of land, particularly where that information can be used by affected persons to mitigate their losses, thereby reducing the Applicant's compensation liability.<br><br>**Louise Staples, for NFU** submitted that 14 days' notice does not provide landowners with sufficient flexibility, particularly in light of the Applicant being aware of the land that it needs to temporarily possess longer than 14 days before notice is provided.<br><br>***Post hearing note:*** *Having reflected on the matter, it is not the Applicant's intention to commit to extending the minimum period of notice required before taking temporary possession of land. The Applicant remains of the view that an extension to this period of notice would have a detrimental effect on project delivery, and in turn, cause longer periods of overall disruption to landowners for the reasons stated in the hearing and noted above. However, the Applicant is sympathetic to the underlying concern and considers that duties of the Agricultural Liaison Officer enshrined in the Environmental Management Plan [Document Reference 2.9, APP-019] could be amended to give effect to the Applicant's intention* | |

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| | *to keep affected persons informed as to the expected timing of when land will be required, as that information becomes available. The Applicant considers that such an approach would strike an appropriate balance between giving landowners the best available information so that they can plan accordingly whilst also avoiding the concerns outlined in the summary of oral submissions above. The amendment to the Environmental Management Plan [Document Reference 2.9, APP-019] would be made in its next iteration at Deadline 3.* | |
| ***3.13 The Applicant to explain how vesting after the certification of receipt of a scheme for replacement land in draft DCO Article 34(1) accords with s131 and s132 of the PA2008. Should the scheme be approved before certification?*** | **Robbie Owen, for the Applicant** submitted that the provision in section 131(12) of the PA 2008 defines replacement land as:<br>*"land which is not less in area than the order land and which is no less advantageous to the persons, if any, entitled to rights of common or other rights, and to the public"*<br>Provisions similar to that found in Article 34 take on subtly different forms. The drafting it has employed in Article 34(1) is precedented in two made DCOs; the A303 (Amesbury to Berwick Down) Development Consent Order 2020 and the A63 (Castle Street Improvement, Hull) Development Consent Order 2022. The Applicant agreed to consider further the broader point about a mismatch between Article 34 and section 131 of the PA 2008.<br>***Post hearing note:*** *the Applicant has reviewed article 34 in the light of the test in section 131(4) of the Planning Act 2008 to which it relates. The exception in section 131(4) applies if "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". It is clear that article 34(1), (2) and (4) when read together meet the tests in section 131(4) of the Planning Act 2008 in that paragraph (1) ensures that the special category land does not vest until the scheme and timetable for the replacement land has been received by the Secretary of State and so commits the undertaker to complete the replacement provision in accordance with the scheme and timetable. Only then does paragraph (2) permit the vesting of the special category land in the undertaker. On the* | |

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| | *date that the replacement land is laid out, paragraph (4) ensures that it is subject to the same rights, trusts and incidents as were attached to the special category land. This is consistent with the Secretary of State being satisfied that "replacement land has or <u>will</u> be given in exchange for the order land."*<br><br>*In relation to section 132 of the Planning Act 2008, and the acquisition of rights over special category land, as is explained in section 7.2 of the Statement of Reasons [Document Reference 5.8, APP-299], the Applicant relies on the exception in section 132(3) which states that the exception applies if the order land, when burdened with the rights the undertaker would acquire under the Order, will be no less advantageous to the persons in whom it is vested, other persons, if any, entitled to rights of common or other rights, and, the public. Whether or not the land would be no less advantageous is matter on which the Secretary of State must be satisfied, and the Applicant's reasons in support of that conclusion are explained in section 2.7 of the Statement of Reasons, but it is not a point in relation to which the drafting of article 34 is of particular relevance. All article 34(3) seeks to do is to confirm that the private rights that are inconsistent with the order rights are to be extinguished in accordance with article 23(2) of the draft Order. The private rights that may be extinguished are distinct from the public rights with which section 132(3) is concerned.*<br><br>*However, the Applicant has reflected on the drafting in article 34 and considers that there remains scope for further amendments to provide for an approval function for the Secretary of State in relation to the scheme for the provision of replacement land and its timetable and will make appropriate amendments to article 34 in the next iteration of the DCO to be submitted at Deadline 2.* | |
| ***3.14 The Applicant to comment on whether the plot information in draft DCO Article 34(5) may be better set out in a table, as*** | The Applicant agreed to consider this Agenda item in its post-hearing note.<br><br>***Post hearing note:*** *the Applicant has considered whether the lists in article 34 could be better presented in a tabular format. In carrying out the* | |

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| ***has been done in Article 7, or in a draft DCO schedule.*** | *review the Applicant has identified a drafting error in the definition of "the special category land" which lists all special category land that the Applicant seeks authorisation to acquire compulsorily. It ought to list only those plots of special category land in relation to which it seeks authorisation to acquire compulsorily and in relation to which it proposes to provide replacement land. In relation to other plots of special category land that the Applicant seeks powers to compulsorily acquire, other grounds are relied upon for not providing replacement land as is explained in section 7.2 of the Statement of Reasons [Document Reference 5.8, APP-299]. In revising article 34 the Applicant will consider whether a table will assist with the presentation of the article, in the light of the revisions required.* | |
| ***3.15 Draft DCO Article 35(1) should be updated to reflect the change of monarch.*** | The Applicant agreed to update the draft DCO to reflect the change of monarch.<br>***Post hearing note:*** *the Applicant will make this amendment in the next iteration of the draft Order which is to be submitted at Deadline 2.* | |
| ***3.16 Other matters relating to DCO provisions.*** | Agenda item 4.0 from Issue Specific Hearing 2 in relation to Article 15 of the draft DCO was discussed as part of CAH1. The Agenda item read:<br>*Article 15 (authority to survey land...): The ExA wishes to better understand the powers sought by subparagraph (1)(b) in respect to any land which is adjacent to, but outside the Order limits. In particular:*<br>• *The ExA wishes to better understand specifically which land this would refer to, having regard to the term "adjacent to".*<br>• *Explanatory Memorandum paragraph 7.42 final sentence in relation to this Article states "This is particularly relevant with respect to ecological receptors that are liable to move into and out of the Order limits". The ExA requests the Applicant to explain whether the power in the Article goes much further than the Explanatory Memorandum explanation and should be restricted to areas where there is known ecological sensitivity or linked to an assessment in the ES.* | |

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| | • *The Applicant is required to explain why this article is different to Article 23(1) in the A47 Blofield to North Burlingham DCO in respect of 'land shown within the Order limits or which may be affected by the authorised development'. This should be explained in the context of the Explanatory Memorandum [Document Reference 5.3, APP-286, para 7.42] 'surveys can be conducted to assess the effects of the Project, or on the Project' and 'ecological receptors that are liable to move'.*<br>• *The Applicant will also be invited to comment on the possible use of:*<br>  • '*for the purposes of this Order' in draft DCO Article 15(1); and*<br>  • *where reasonably necessary, any land which is adjacent to, but outside the Order limits which may be affected by or have an effect on the authorised development' in draft DCO Article 15(1)(b).*<br><br>**Robbie Owen, for the Applicant** submitted that as is explained in the Explanatory Memorandum [Document Reference 5.3, APP-286], the purpose of Article 15 is to provide the Applicant with the power to enter on land to carry out surveys.<br><br>It is important to note the power conferred by the Article may be exercised only *"for the purposes of the construction, operation or maintenance of the authorised development"* and it authorises entry onto land *"within the Order limits"* and, *"where reasonably necessary,"* any land which is adjacent to but outside the Order limits.<br><br>The term "adjacent to" is not defined and should be given its ordinary everyday meaning, which is to be next to or near to the subject. It is acknowledged that there is a degree of imprecision in the term but, given that the power may only be exercised in relation to adjacent land "where reasonably necessary" and for the purposes of the construction, operation or maintenance of the authorised development, its exercise is appropriately constrained. For example, if a survey could be undertaken within the Order limits, it would not be reasonably necessary for the undertaker to carry it out on adjacent land.<br><br>Turning to the second bullet point, Mr Owen explained that the Explanatory Memorandum gives ecological surveys as an example | |

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| | through the wording "*particularly relevant for*", in that nothing limits the Article's application to ecological surveys alone. The Applicant does not consider it be appropriate to curtail the power to survey, to specific geographical areas of known ecological sensitivity. The surveys that may be required include, but are not limited to pre-construction ecological surveys for badgers, reptiles and bats which may be required to be undertaken beyond the Order limits to ensure compliance with relevant industry guidance and standards, or surveys related to private and unlicensed water supplies that may be adversely affected by the Project.<br>In relation to the third bullet point, Mr Owen noted that the precedents referred to, insofar as they relate to the power to survey land beyond the Order limits, are broader than the power that has been drafted within this Project's DCO because the former wording is not geographically constrained to "adjacent land", nor is it subject to an express requirement for that power to be exercised only where reasonably necessary.<br>Furthermore, it is possible that land beyond the Order limits needs to be surveyed for ecological reasons, by way of example, to ascertain what species are present. This land is not necessarily affected by the Project but is adjacent to it. Therefore, relating drafting to land 'affected by the authorised development' may ultimately narrow the scope of the Article as it calls into question whether the power exists to enter adjacent land for ecological reasons.<br>**Louise Staples for the NFU** sought more clarity on the definition for '*adjacent to*' (the geographical distance from the Order limits) and queried whether the Applicant could provide notice of its intention to carry out a survey, alongside the nature of and justification for the survey, its duration and the equipment to be taken onsite. The Applicant agreed to provide a response to this within its post-hearing note.<br>***Post hearing note:*** *the Applicant was asked to consider a range of further matters in relation in to article 15. Taking these in turn:*<br>• *Consider the drafting of article 15, particularly the inclusion of wording like 'for the purposes of this Order' and to compare article 15(1)(a) and* | |

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| | *(b) of the draft Order in the light of precedents such as the A47 Blofield to North Burlingham Development Consent Order 2022*<br><br>*Article 23(1) of the A47 Blofield to North Burlingham Development Consent Order 2022 ('A47 DCO') is very similar to the Applicant's drafting of article 15(1) of the Order. The key differences are that:*<br><br>*1. Article 23(1) of the A47 DCO provides that surveys may be carried out "for the purposes of this Order" whereas article 15 of the Applicant's draft Order provides that surveys may be carried out "for the purposes of the construction, operation or maintenance of the authorised development". The Applicant considers there to be very little of material difference, if any, between the two formulations. If there is any difference the "for the purposes of this Order" used in the A47 DCO is perhaps of marginally wider application than the "for the purposes of the construction, operation or maintenance of the authorised development" as this latter formulation relates the purpose to both an activity (construction, operation or maintenance) and a subject (the authorised development, which is a term defined by reference to the description in Schedule 1) rather than just for the purposes of the Order. In reality though, the Applicant considers there to be no appreciable difference in effect and in the circumstances of this Project, the Applicant has a preference for the more precise formulation adopted in article 15 of its draft Order.*<br><br>*2. Article 23(1) of the A47 DCO goes on to authorise entry "on any land shown within the Order limits or which may be affected by the authorised development". This would authorise entry on land which is either within the Order limits, or which is affected by the authorised development. As was stated in oral submissions, this would allow surveys on any land within the Order limits and any land, however remote from the Order limits, provided that the <u>land</u> in question can be said to be affected by the authorised development.*<br><br>*While it is clear that this would cover, for example, surveys beyond the Order limits to assess ground settlement or related matters, it isn't as clear as it could be that it would cover all of the surveys listed in article* | |

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| | *23(1)(a) to (d), for example ecological or archaeological surveys, although that would be a reasonable interpretation of the article's construction.*<br><br>*In the case of ecological surveys, the land itself may be entirely unaffected, if the purpose of the survey is to establish the presence or absence of particular species in the vicinity of the authorised development and it is the species, not the land, that may be affected by the authorised development. While the drafting of article 23 of the A47 DCO ought to be able to overcome such challenges, in the circumstances of this Order the Applicant considers that the alternative and clearer expression of the power in article 15 of the draft Order is appropriate.*<br><br>*Article 15(1) of the draft Order splits into two sub-paragraphs such that the Applicant may enter (a) any land shown within the Order limits; and (b) where reasonably necessary, any land which is adjacent to, but outside the Order limits, and then carry out the surveys described in sub-paragraphs (i) to (iv). This split makes it clear that the Applicant can enter on any land within the Order limits and, enter any land adjacent to the Order limits where it is reasonably necessary to do so. This ensures that the full range of surveys that may be required for the purposes of the construction, operation and maintenance of the authorised development can be carried out on adjacent land, but only where it is reasonably necessary to do so.*<br><br>*For the above reasons, the Applicant is minded to retain its approach in article 15. In that regard it should be noted that this approach to the surveying power was accepted by the Secretary of State in the A303 (Amesbury to Berwick Down) Development Consent Order 2020 (sometimes referred to as the 'Stonehenge Tunnel'), a project that traversed the iconic Avebury and Stonehenge World Heritage Site, and so there is no reason to consider that the approach is unacceptable in policy terms. It also has precedent in other development consent orders, including the Silvertown Tunnel Order 2018.* | |

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| | • *Consider whether certainty could be given on the geographical limit of 'adjacent land'*<br><br>*The Applicant has reflected on whether greater certainty could be given on the geographical extent of what can be considered to be 'adjacent land'. It has concluded that its current approach is appropriate and that the requirement for surveys to be carried out on adjacent land only where reasonably necessary, provides sufficient safeguards.*<br><br>• *Consider whether article 15(3) should be amended to require the notice to include (i) details of the nature and justification for the survey, (ii) the duration of the survey and (iii) the equipment to be taken on site (iv) the identity of the persons that are to enter the land*<br><br>*The Applicant has reflected on the points raised by Ms Staples on behalf of the NFU and has concluded that the drafting in article 15(3) is appropriate.*<br><br>*The requirement to provide information in a legal notice of the nature of the intended survey or investigation will provide a degree of information sufficient to understand in general terms what is proposed. The Applicant is concerned that the inclusion in the article of a requirement to include details of the equipment to be taken on site could prove to be unduly burdensome on both the Applicant and the recipients of the notices. Faced with a requirement to provide details of "equipment" the Applicant is likely to adopt a precautionary approach and list all items of equipment which might be required and in some circumstances (for example, archaeological investigations that could require a variety of different spades, trowels, sifting equipment, or other more technologically advanced equipment) this may prove lengthy, technical and of very little value to the occupiers and owners in understanding what it is proposed.*<br><br>*Similarly, in relation to the duration of surveys, it may prove difficult for the Applicant to specify in advance precisely the duration of a survey. In the majority of cases, it is expected that it would be in a position to give a reasonable indication of the expected duration but it is unlikely that this would be compatible with the degree of precision required in a legal* | |

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| | *notice. A variety of circumstances might arise such that surveys may take longer than expected, for example, unexpected poor weather conditions or unanticipated archaeological finds, may require the duration of surveys to be extended. Faced with a requirement to specify a duration, the Applicant would likely take a precautionary approach and specify a longer duration than is expected and so the value of that information to the landowner/occupier in managing their affairs would be significantly reduced.*<br>*Finally, in relation to the identity of the persons entering the land to carry out surveys and investigations, it is not clear to the Applicant what benefit such a provision would serve, particularly when article 15(4)(a) already requires such persons to produce written evidence of their authority to do so on request.*<br>*Consequently, the Applicant is not minded to make further amendments to article 15(3) and again notes that the approach is widely precedented in a significant number of National Highways' development consent orders, see for example article 23 of the A417 Missing Link Development Consent Order 2022 and article 21 of the A57 Link Roads Development Consent Order 2022 (which does not include a provision equivalent to article 15(3) of the Order which requires the notice to include an indication of the nature of the survey or investigation) and article 23 of the A47 DCO which includes a provision that is the equivalent to article 15(3) of the Order.*<br>*However, the Applicant acknowledges the concern underlying the NFU's requests for changes to the drafting; that owners and occupiers of land that is to be surveyed will wish to know in advance sufficient details of the surveys required so that they can adapt their use of land accordingly. Consequently, the Applicant is considering making amendments to the duties of the Agricultural Liaison Officer as set out in the Environmental Management Plan [Document Reference 2.9, APP-019] to ensure that appropriate information as to the nature of the survey, its anticipated duration and the categories of equipment and plant that are likely to be required will be provided to the occupier.* | |

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| | • *ii.* The Applicant was asked to investigate why a single entry for Sleastonhow Farm exists within the Book of Reference, whilst the ExA has received relevant representations from a number of persons (i.e. members of the Nicholson family and others) who claim an association with Sleastonhow Farm. The ExA referred the Applicant to Emma Nicholson's commentary during the Open Floor Hearing held on 29 November 2022 and Relevant Representations.<br>*The Applicant confirms that it has reviewed the information held on its land referencing database in the light of the ExA's comments and is of the view that the Book of Reference [AS-017] should be updated to include the following as occupiers in respect of any plots relating to Sleastonhow Farm:*<br>• *Tim Nicholson (trading as RK & GF Nicholson)*<br>• *Emma Nicholson (trading as RK & GF Nicholson)*<br>*The Applicant also considers that where Felicity Nicholson is referenced as an 'occupier' of land identified in the Book of Reference, each such entry should be updated to include the words, "(trading as RK & GF Nicholson)".*<br>*An updated version of the Book of Reference [Document Reference 5.7, AS-017] will be provided at Deadline 8 (16 May 2022).* | |
| **4.0 Funding** | | |
| **Agenda Item** | **The Applicant's Response** | **Councils' Comments** |
| ***4.1 The Applicant to advise of any updates to the Funding Statement [APP-289].*** | **Monica Corso Griffiths, Head of DCO and Design, for the Applicant** submitted that there is no update to the cost estimate that informed the Funding Statement submitted as part of the DCO application [Document Reference 5.6, APP-289]; it is the same information used for securing approvals for the Project from the Applicant, Department for Transport and the Treasury between May and August 2022.<br>When the Funding Statement was submitted, the Applicant had acquired 4 properties under blight, with blight claims pending payment in relation to a further 4 properties. By way of an update on that position, the Applicant has now acquired a total of 5 properties under blight (with the most recent acquisition relating to property on Scheme 09 (Monk's Rest Farm)), whilst | |

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| | 3 blight claim notices, which have been accepted as valid, are currently in negotiation as to quantum.<br>A further formal revised cost estimate for the Project is planned for after the end of the Examination process (to align with development of the Project's detailed design). | |
| ***4.2 Other matters relating to funding.*** | Agenda item not used at CAH1. | |
| **5.0 Special Category Land** | | |
| **Agenda Item** | **The Applicant's Response** | **Councils' Comments** |
| ***5.1 The Applicant to explain the application of s131 and s132 of the PA2008 to the draft DCO, particularly in relation to s131(4) and s132(3).*** | **Heidi Slater, for the Applicant** explained that section 131(4) is one of the exceptions from the rule in section 131 that a DCO that authorises the CA of "special category land", i.e. land forming part of a common, or open space, or a fuel or field garden allotment, is to be subject special parliamentary procedure.<br>The exception in section 131(4) applies if 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 (i.e., the special category land being acquired compulsorily).<br>The draft DCO makes provision for the CA of common land and open space land; and, with two exceptions, all such special category land will be replaced through the provisions of paragraphs (1), (2) and (4) of Article 34.<br>The first exception (where no replacement land is proposed) relates to plot 0405-02-82 which is part of Kirkby Thore Primary School playing field. As is explained in paragraphs 7.2.16 to 7.2.22 of the Statement of Reasons [Document Reference 5.8, APP-299], the need for this land arises in connection with works required to relocate an existing wooden utility pole that supports an overhead power cable which currently passes above Kirkby Thore Primary School playing field. | |

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| | The Applicant proposes to relocate the wooden pole within the highway verge, thereby raising the level of the existing overhead electricity line to accommodate changes in ground levels caused by earthworks forming part of Scheme 0405.<br>Once this scheme is in place, and works have been completed, there will be no change to the current position, insofar as the land will still be able to be used as a school playing field and the overhead line will continue to pass above the playing field. Accordingly, it is the Applicant's view that replacement land is not required.<br>The land is shown as being subject to compulsory acquisition as a safeguard, to enable the Applicant to grant rights to the utility undertaker to retain and maintain the apparatus as raised. Alternatively, if the owner of the playing field (Cumbria County Council) agrees to grant the necessary rights directly to the utility undertaker (Electricity North West), then the Applicant would have no need to acquire any interest in the land comprising the school playing field.<br>In relation to section 132(3) of the Planning Act 2008, this provides an exception from the requirement for the Order to be subject to special parliamentary procedure as a result of the acquisition of new rights over special category land where the Secretary of State is satisfied that the special category land, when burdened by the Order rights, will be no less advantageous than it was before, to the person in whom it is vested, or to other persons, if any, who are entitled to rights of common or other rights, and to the public.<br>The Applicant relies on section 132(3) in relation to the proposed acquisition of rights over special category land on Scheme 0102. This is explained in the Statement of Reasons [Document Reference 5.8, APP-299] at paragraphs 7.2.14 to 7.2.15 and in the accompanying table that shows plots 0102-02-54 0102-02-57, 0102-02-58, 0102-02-68, 0102-02-70, 0102-02-72, 0102-02-73 (noting that the first of these plots, 0102-02-54 was omitted from the Statement of Reasons as originally submitted, but included in the Applicant's Errata Report [AS-009]).<br>These plots are proposed to be subject to the acquisition of rights, but no replacement land is proposed to be provided. This is because (as is | |

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| | explained in paragraphs 7.2.14 to 7.2.15 of the Statement of Reasons), the acquisition of rights over special category land at Thacka Beck is required for the purposes of planting, and thereafter maintaining, woodland habitat to mitigate the environmental impacts of the Scheme.<br>However, no replacement land is proposed because the land will still be capable of beneficial use for the purposes of public recreation once the woodland planting is in place and therefore the exception in section 132(3) applies: the order land, when burdened with the order right will be no less advantageous than it was before to the persons in whom it is vested, to other persons, if any, entitled to rights of common or other rights, and to the public.<br>***Post hearing note:*** *In terms of the application of the exceptions in sections 131 and 132 of the Planning Act 2008 to the special category land comprising the Kirkby Thore Primary School playing field, the Applicant notes that neither the Statement of Reasons nor article 34 clearly identify how any of the exceptions in section 131 (or section 132) apply to Kirkby Thore School playing field and the acquisition strategy outlined above. The Applicant intends to update the drafting in article 34 to rectify this omission and will do so in time for the submission of the next iteration of the draft DCO at Deadline 2.*<br>*In the meantime, by way of explanation, the Applicant's position is that:*<br>• *In the first instance (i.e. acquisition engaging section 131), the exception in section 131(4B) applies. This is because:*<br>*(a) the school playing field is open space ((4B)(a)) and does not comprise any other type of special category land listed in subsection (1) of section 131 ((4B)(b)); and*<br>*(b) it is proposed to be acquired for a temporary (although possibly long-lived) purpose (i.e. to grant rights for the benefit of the utility undertaker) ((4B)(c)). Once those rights had been granted to the statutory undertaker, the Applicant could offer the land to its original owner (the County Council) (as surplus land pursuant to the Crichel* | |

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| | *Down Rules). The land would then be permanently subject to the new rights granted by the Applicant to the statutory undertaker.*<br>• *In that scenario, if section 132 was then engaged in respect of the granting of those new rights for the benefit of a third party, the Applicant considers that the exception in subsection 132(3) would apply, in that when burdened by such rights the land would be no less advantageous (to its owners and occupiers) than it was before. The overhead electricity cable would still pass above the playing field, but if there were any change to the status quo, it would only be insofar as the electricity line would be located at a greater height above the ground than it is currently.*<br>• *In addition, the Applicant has also committed to minimising the disruption to the use of the school playing field through measure D-GEN-12 contained in the Environmental Management Plan [Document Reference 2.9, APP-019] which requires all works to be undertaken within the grounds of Kirkby Thore School (specifically associated with the diversion of overhead power lines) to be undertaken outside of school opening hours, and requires to the contractor to liaise closely with the school regarding any required works.*<br>*Returning to the point about the need to revise the drafting in article 34, the Applicant has noted that there is an error in article 34(5), in that the definition of special category land currently covers all of the special category land affected by the Project, irrespective of whether or not that special category land is proposed to be replaced, pursuant to the exception in section 131(4). This is problematic, because – as explained above – the exception in section 131(4) (replacement land) is not applicable to all of the special category land.*<br>*Therefore, as noted above, the Applicant will undertake to clarify the drafting of article 34 in the next iteration of the draft DCO to be submitted to the Examining Authority.* | |
| ***5.2 The Applicant to explain, including in the context of*** | **Robbie Owen, for the Applicant** submitted that the Applicant's proposals include replacement land for the Ministry of Defence (MoD) playing field, | |

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| ***s135(3) of the PA2008, why the 'playing field which is owned and used by the MoD' and said to be open space special category land does not attract the PA2008 requirement for replacement land [SoR, APP-299, para 7.2.26]. In addition:***<br>• ***Why are the words 'made available to the public for recreational purposes' used [SoR, APP-299, para 7.2.26] instead of 'used for the purposes of public recreation' as in s19(4) of the Acquisition of Land Act 1981?***<br>• ***Is this area gated and locked?***<br>• ***Is this area used for recreation on an unrestricted basis or by prior arrangement?*** | as shown on Sheet 4 of 6 of the General Arrangement Drawings for Scheme 06 [Document Reference 2.5, APP-014], Sheet 4 of 6 of the General Scheme Outline Plans for Scheme 06 [PDL-006] and included in non-linear Work No. 06-9, where it is shown on Sheet 4 of 6 of the Works Plans for Scheme 06 [Document Reference 5.16, APP-321], lying to the south of Station Road.<br>It is the Applicant's understanding that the MoD intend for the arrangements applying to the current site, to continue at the replacement site, when this site is not in use by the MoD. The Applicant does not consider that the statutory provisions of the PA 2008 relating to the requirement to provide exchange land are engaged. The starting point is that given that the land in question is Crown land, in light of Article 35 of the draft DCO [Document Reference 5.1, APP-285], nothing in the Order prejudicially affects any estate, right, power, privilege, authority or exemption of the Crown.<br>Therefore, the powers of CA of land cannot be used against the Crown. The DCO seeks the power of CA over the current playing field, given the possibility of other interests in relation to it. Section 135(1) of the PA 2008 provides that a DCO may include provision authorising the CA of *an interest* in Crown land as long as it is a non-Crown interest and the Crown consents.<br>The circumstances where exchange land is required to be provided are twofold: section 131 requires replacement land to be provided to avoid Special Parliamentary Procedure, where a DCO authorises the CA *of land*. Section 132 has the same requirement for exchange land in respect of an Order authorising the CA of a *right over land*.<br>The Applicant is not proposing either of these, in that it is proposing (with consent of the Crown), CA of an *interest in land*. Therefore, the formal requirements of sections 131 and 132 are not engaged, but the Applicant proposes to provide a replacement playing field in any event.<br>The Applicant does not deem section 135(3) of the PA 2008 to be relevant as it relates to section 135(2), which is engaged by the Order but not in relation to the land provisions. Section 135(2) provides that a DCO may | |

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| | include any other provision, other than in relation to CA, in relation to Crown Land with consent of Crown authority.<br>Mr Owen submitted that the MoD has confirmed that the land is kept gated and locked. It is not used on an unrestricted basis, but has been used by agreement based on prior arrangement, by a local primary school on an annual basis for example.<br>The Applicant agreed to cover this Agenda item in more detail within its post-hearing note.<br>***Post hearing note**: Having considered the further information about the use of the MoD playing field that has come to light since the submission of the DCO application, the Applicant is of the view that the MoD playing field does not come within the definition of "open space" in section 19 of the Acquisition of Land Act 1981, as applied to the dDCO by section 131(12) of the Planning Act 2008.*<br>*The Applicant understands that the playing field is not made available or used "for the purposes of public recreation". This is because the MoD has confirmed that the playing field is kept gated and locked when not in use and is only made available for use by non-MoD parties by prior arrangement and with the agreement of the MoD. Accordingly, neither section 131 nor section 132 of the Planning Act 2008 are engaged and nor is the requirement to provide replacement land engaged.*<br>*The Applicant has received written correspondence from the MoD which supports the position outlined above. In particular, regarding the arrangements for the non-military use of the playing field , Barry Law, representative of the MoD, has confirmed to the Applicant by email (dated 24 November 2022) that the MoD only makes the land available for non-military use on the following basis:*<br>• *"Warcop Primary School – there is an arrangement in place allowing the school to use the MoD playing field annually for its Rusk Bearing festival https://en.wikipedia.org/wiki/Rushbearingand sports day; and* | |

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| | • *Appleby Junior Football Club – an arrangement was in place for a period of 8-9 months following Storm Desmond (in 2015) and the flooding of the club's normal training/playing fields."*<br><br>*With regard to the transfer of these arrangements from the existing playing field to the proposed new facility, Barry Law, representative of the MoD, has confirmed to the Applicant by email (dated 1 December 2022) that "The designs for the replacement sports facility are being developed and the MoD intends to continue with the previous local access arrangements when the facility is not in use by the MoD"*<br><br>*The Applicant therefore proposes to update the Statement of Reasons [Document Reference 5.8, APP-299] accordingly and to submit a revised version of it at Deadline 2, together with updated Special Category Land Plans for Scheme 06 [Document Reference 5.15, APP-316].* | |
| ***5.3 The Applicant to explain if there are any material differences, in terms of the mechanisms, between draft DCO Article 34 (special category land) and Article 38 of the M25 Junction 10/A3 Wisley Interchange DCO, as they appear to be similar. In addition:***<br><br>• ***If there are no material differences, why has the wording of Article 38 in the M25 Junction 10/A3 Wisley Interchange DCO not been referred to as a precedent [Explanatory Memorandum, APP-286, para 8.40]?*** | The Applicant agreed to submit a written response addressing this Agenda item, as part of its post-hearing note.<br><br>**Mr Owen, for the Applicant** addressed bullet point 2, explaining that in line with many other similar projects, this Project is not currently at a stage of design wherein it is practicable to provide the details of a scheme for such re-provision.<br><br>This approach is consistent with all of the Applicant's DCOs that include provision for replacement land. Typically, in these DCOs, the special category land article (Article 34 in this DCO) provides for the certification of such a scheme by the Secretary of State after the DCO has been made.<br><br>***Post hearing note:*** *The Applicant to explain if there are any material differences, in terms of the mechanisms, between draft DCO Article 34 (special category land) and Article 38 of the M25 Junction 10/A3 Wisley Interchange DCO, as they appear to be similar.*<br><br>• *There are clearly similarities between the drafting of article 34 of the draft DCO and article 38 of the M25 Junction 10/A3 Wisley* | |

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| • ***What has prevented a special category replacement land scheme being incorporated within the draft DCO?*** | *Interchange Development Consent Order 2022 (**"M25 J10 DCO"** / **"Wisley Interchange DCO"**).*<br>• *The main similarity is that both articles seek to address – and to distinguish between – the compulsory acquisition of special category land, and the compulsory acquisition of rights over special category land. Both also deal with the issue of replacement land.*<br>• *There are also bound to be some similarities arising from the fact that those drafting both instruments are likely to have had regard to the relatively small number of precedent articles that have come before them.*<br>*If there are no material differences, why has the wording of Article 38 in the M25 Junction 10/A3 Wisley Interchange DCO not been referred to as a precedent [Explanatory Memorandum, Document Reference 5.3, APP-286, para 8.40]*<br>• *There are some material differences in the drafting between the two, which is why the Wisley Interchange DCO was not cited as a precedent in the Explanatory Memorandum for the A66 dDCO.*<br>• *In reviewing article 34, the Applicant will give further careful consideration to the drafting of article 38 of the Wisley Interchange DCO.*<br>• *However, the Applicant notes that the Wisley Interchange DCO is unusual in that special category land, in particular the justification for the compulsory acquisition of replacement land, was an issue of particular controversy in relation to that project. It is very unusual, for example, for a Secretary of State's decision letter to devote 11 pages (44 paragraphs) to issues arising in connection with the provision of replacement land; and it would appear that the drafting of article 38 of the Wisley Interchange DCO reflects the particular issues which arose from the circumstances of that project (e.g. dispute about the appropriate amount of replacement land (in terms of the ratio of special category land to replacement land); and discussion about other key factors such as the quality and location of replacement land.* | |

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| | *What has prevented a special category replacement land scheme being incorporated within the draft DCO?*<br>• *A scheme for the provision of replacement special category land has not been incorporated in the draft DCO because the Project is not at a stage of design where it is currently practicable to provide the details of a scheme*<br>• *By way of precedent, we would point to the following made DCOs:*<br>  • *The A417 Missing Link Development Consent Order 2022 (made 16 November and coming into force on 7 December 2022);*<br>  • *The A30 Chiverton to Carland Cross Development Consent Order 2020; and*<br>  • *The Cornwall Council (A30 Temple to Higher Carblake Improvement) Order 2015.* | |
| ***5.4 Other matters relating to special category land.*** | Agenda item not used at CAH1. | |
| **6.0 Crown Land and Interests** | | |
| **Agenda Item** | **The Applicant's Response** | **Councils' Comments** |
| ***6.1 The Applicant to provide an update (including the positions of the parties, latest contact, envisaged actions and Examination timescales) on discussions with the Ministry of Defence (MoD) and the Public Trustee. In relation to agreement with the MoD and the duration of the Examination, what is meant by 'in the near future' [SoR, APP-299, para 7.1.6]?*** | **Monica Corso Griffiths, Head of DCO and Design, for the Applicant** confirmed that the Applicant has been involved in discussions with the Defence Infrastructure Organisation (DIO) on behalf of the MoD over the past few months, and they are currently working towards a Statement of Common Ground, to be agreed in January. They are currently in agreement as to the land required for the Project. One of the proposed changes that the Applicant seeks to introduce will relate to MoD land and will seek to adjust the environmental mitigation that the Applicant requires, in order to avoid impacts on the MoD's operations.<br>The Applicant currently has a draft Crown land consent letter which was submitted to the MoD. This is currently under consideration, as the Statement of Common Ground is currently a priority for January. The consent letter will follow. | |

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| | **Heidi Slater, for the Applicant** confirmed that the Applicant has also been engaging with the Public Trustee in respect of the Crown land on Scheme 07. The Applicant has had a number of meetings with the Public Trustee's appointed agent, Will Bashall, with regard to the acquisition of the Ministry of Justice Crown land.<br><br>Following a meeting held on 15 August 2022 provisional agreement between the parties was reached for the acquisition of this land, subject to the Public Trustee's confirmation, which was subsequently provided in writing and reported to the Applicant on 25 October 2022. Heads of terms (HoTs) have been agreed – and were signed on 25 November 2022 – for the Applicant's acquisition by agreement of the Ministry of Justice Crown land required for the Project.<br><br>There are procedures associated with this which will take time. Now that the HoTs have been signed, the Public Trustee's solicitor is in a position to canvas the stint holders (i.e. those with grazing rights over the land in question) to request their consent to the agreed terms and the associated transfer of land. The Public Trustee's solicitor can subsequently (subject to that consent) make an application to the Courts for an order permitting the Public Trustee to agree to the transaction (for the acquisition of the land by the Applicant) and to agree to the granting by the Public Trustee of the Crown authority consent on behalf of the Secretary of State for Justice.<br><br>Whilst the Applicant does not have certainty in respect of the timescales associated with applying for and obtaining a Court Order, the Public Trustee has confirmed that in the meantime (whilst the Court order is sought in order to facilitate the granting of Crown authority consent), it would be happy to provide the Applicant with a simple letter of comfort to say that the Parties are engaging amicably, acquisition has been agreed and the transaction is being progressed. This is because the powers of the Public Trustee may not be exercised without leave of the Court – this is a matter of compliance with the statutory rules governing the exercise of the Public Trustee's powers as trustee. | |

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| | ***Post hearing note:*** *The Applicant will provide an update at Deadline 2 on progress towards the securing of the Public Trustee Crown authority consent. The update will aim to include a timeline for securing Crown authority consent and to set out what still needs to happen before the Public Trustee will be in a position to grant the Crown authority consent.* | |
| ***6.2 The Applicant to provide an update on any discussions or contact with the Crown Estate Commissioners.*** | **Robbie Owen, for the Applicant** confirmed that the Applicant is not engaging in any discussions or having any contact with the Crown Estate Commissioners in respect of the Project. | |
| ***6.3 Other matters relating to Crown land and interests.*** | **Robbie Owen, for the Applicant** submitted that the mechanism to transfer the bundle of rights from the current Brough Hill Fair site to the replacement site, currently owned by the MoD is Article 36 of the draft DCO [Document Reference 5.1, APP-285]. The rights are mentioned within the 1947 conveyance, which conveyed the land to the current owners, subject to said rights relating to Brough Hill Fair.<br>The Applicant does not believe that these are proprietary rights, but the transfer will be effected by operation of law, due to the DCO so providing. The formulation used in the draft Article 36 is similar to the wording used within the 1947 conveyance. Whilst it is not entirely clear what the rights are, the most appropriate formulation is provided for by Article 36 of the draft DCO. The Applicant notes that precedents exist, whereby transfers similar to the Brough Hill Fair rights in question, are effected. The Applicant agreed to seek to locate an example as part of its post-hearing note (please refer to section 5.0 of the Applicant's Issue Specific Hearing 2 (ISH2) Post Hearing Submissions (including written submissions of oral case) [Document Reference 7.3].<br>Discussions with the MoD in relation to Brough Hill Fair have progressed well. The MoD is content that it agrees to the proposals for the replacement site. A separate Crown consent could potentially be produced for this piece of land. | |
| **7.0 Statutory Undertakers** | | |

| Agenda Item | The Applicant's Response | Councils' Comments |
|---|---|---|
| ***7.1 The Applicant to explain the current position in relation to negotiations with Statutory Undertakers, particularly in relation to Protective Provisions.*** | **Heidi Slater, for the Applicant** confirmed that article 48 of, and Parts 1 to 4 of Schedule 9 to, the draft DCO [Document Reference 5.1, APP-285] contain general Protective Provisions for the protection of the following parties:<br>• Part 1 – electricity, gas, water and sewerage undertakers<br>• Part 2 – operators of electronic communications code networks<br>• Part 3 – National Grid<br>• Part 4 – the Environment Agency.<br>Network Rail's Protective Provisions will be included within the next iteration of the draft DCO.<br>Whilst the Applicant considers that the Protective Provisions included in the draft DCO are adequate to protect each statutory undertaker's undertaking and to ensure that it suffers no serious detriment, as set out paragraph 7.5.5 of the Statement of Reasons [Document Reference 5.8, APP-299], the Applicant has sent draft Protective Provisions to all of the statutory undertakers and other utilities having land or apparatus with the potential to be affected by the Project (as identified in Tables 7-1 and 7-2 in the Statement of Reasons [Document Reference 5.8, APP-299].<br>In terms of parties with whom Protective Provisions are proposed to be used, and where PPs will be used on a bespoke basis within the DCO or side agreements, the Applicant agreed to provide a list of the 16 statutory undertakers as part of its post-hearing note.<br>In respect of indemnities with Network Rail, engagement is at an early stage. The Applicant and Network Rail have agreed that an overarching framework agreement will be entered into, and indemnities are to be discussed. The Applicant is therefore content that the parties will reach agreement before the end of the Examination.<br>***Post hearing note:*** *The Applicant will submit an update on the status of negotiations with statutory undertakers in relation to protective provisions alongside its updated Statement of Reasons [Document Reference 5.8,* | |

| | | |
|---|---|---|
| | *APP-299]. The update on the status of negotiations is required at Deadlines 2, 5 and 8.* | |
| ***7.2 The Applicant to set out any representations which it considers have triggered s127 of the PA2008.*** | **Heidi Slater, for the Applicant** submitted that the Applicant does not anticipate having any section 127 representations submitted but not withdrawn, by the end of the Examination in respect of Tables 7-1 and 7-1 of the Statement of Reasons [Document Reference 5.8, APP-299]. | |
| ***7.3 The Applicant to set out, in the event that agreement is not reached with all Statutory Undertakers, how the relevant tests for the exercise of powers pursuant to s127 and s138 of the PA2008 could be met.*** | **Heidi Slater, for the Applicant** explained that the Applicant considers that the Protective Provisions included in the draft DCO [Document Reference 5.1, APP-285] for the benefit of statutory undertakers ensure that there will be no serious detriment to the carrying on of the statutory undertakers' undertaking. These provisions impose an obligation on the Applicant to submit plans prior to carrying out works, carry out any requested protective works for the benefit of the undertakers' apparatus and not to acquire any apparatus without consent. The provisions also include the payment of costs and compensation for any loss or damage.<br>Therefore, notwithstanding the absence of any bespoke provisions, there would be adequate protection in place to satisfy the Secretary of State that the statutory test was met, in that no serious detriment would be caused by the Project to the carrying on of the statutory undertakers' statutory undertakings.<br><br>In respect of Network Rail's indemnities, they fit into the above to the extent that the Applicant would be obliged to cover payment of costs and compensation. | |
| ***7.4 The Applicant to advise whether it considers the North Cumbria Integrated Care NHS Foundation Trust to be a Statutory Undertaker [SoR, APP-299, table 7.1]. If so, how is this the case?*** | **Heidi Slater, for the Applicant** submitted that the draft DCO defines "statutory undertaker" as meaning any statutory undertaker for the purposes of section 127(8) of the PA 2008.<br>Section 127(8) of the PA 2008 defines "statutory undertakers" as having the meaning given by section 8 of the Acquisition of Land Act 1981 and also includes the undertakers—<br>a) which are deemed to be statutory undertakers for the purposes of that Act, by virtue of another enactment; | |

| | | |
|---|---|---|
| | b) which are statutory undertakers for the purposes of section 16(1) and (2) of that Act (see section 16(3) of that Act).<br><br>Section 16(3) provides that for the purposes of sections 16(1) and 16(2) (which contains provisions equivalent to those in section 127 of the PA 2008), "statutory undertakers" include (inter alia), in section 16(3)(ba) "an *NHS foundation trust*".<br>Section 16(3)(ba) was added to section 16 by paragraph 48 of Schedule 4 to the Health and Social Care (Community Health and Standards) Act 2003, which came into force on 1 April 2004 and currently remains in force.<br>The Applicant has therefore considered the North Cumbria Integrated Care NHS Foundation Trust to come within the definition of a statutory undertaker for the purposes of the draft DCO. | |
| ***7.5 Other matters relating to statutory undertakers.*** | Agenda item not used at CAH1.<br>Although Emma Nicholson sought to comment, wifi connectivity issues meant that her comments could not be adequately understood, so the ExA requested that she submit her comments by means of a Written Representation at Deadline 1 instead. | |

# APPENDIX 1 – SCHEDULE OF UNKNOWN OWNERS

## **APPENDIX 2** – DEPARTURES FROM STANDARD LIMITS OF DEVIATION

The standard limits of deviation ('LoDs') are provided for in article 7 of the dDCO [Document Reference 5.1, APP-285] and are also set out in Chapter 2 of the Environmental Statement [Document Reference 3.2, APP-045] in Table 2-2, as shown below:

*Table **Error! No text of specified style in document.**-1 Standard Limits of Deviation across the Project*

| Upwards vertical LoD | Downwards vertical LoD | Lateral LoD for linear works | Linear work commencement / termination points |
|---|---|---|---|
| Levels may deviate by up to 1 metre | Levels may deviate by up to 1 metre | Centreline of linear work (as shown on the works plans) may deviate by up to 3 metres in either direction | Points of commencement / termination (as shown on the works plans) may deviate by up to 3 metres in either direction |
| (from the levels shown on the engineering section drawings) | | | |

However, there are some exceptions to the standard LoDs on all schemes except S0102 and S11. Those exceptions, and the reasons why non-standard LoDs are required, are set out below, in relation to Schemes 03, 0405, 06, 07, 08 and 09. Tables and extracts from the relevant tables, as set out in Chapter 2 of the Environmental Statement [Document Reference 3.2, APP-045], are shown below:

### Scheme 03

*Table **Error! No text of specified style in document.**-2 Exceptions to standard LoDs on Penrith to Temple Sowerby*

| Work No. | Downwards vertical LoD | Reason |
|---|---|---|
| 03-1A | 0m | To protect potential archaeology associated with Brougham Roman Camp (as agreed with Historic England); and<br>to minimise risk of damage to Shell ethylene pipeline that crosses under the A66 |
| 03-8A | 0m | |

**Work Nos 03-1A and 03-8A (Erratum, this should be referenced as Work No 03-7A (not 8A))** – these sections traverse and run adjacent to an existing Scheduled Monument Site (Brougham). In addition, there is a high-pressure Shell Oil North West Ethylene Pipeline (NWEP) which traverses the A66 adjacent to the access to the Sewage Treatment Works – which is below both Work Nos 03-1A and 03-8A. This pipeline is classed as a "major accident hazard" by HSE. **Non-standard vertical LoDs of 0m downwards are required to** help to minimise any risk of interference/disruption to the pipeline and minimise risk to damage of Brougham Scheduled Monument Site.

### Scheme 0405

*Table **Error! No text of specified style in document.**-3 Exceptions to standard LoDs Temple Sowerby to Appleby (Extract)*

| Work No. | Upwards vertical LoD | Downwards vertical LoD | Lateral/ horizontal LoDs | Reason |
|---|---|---|---|---|
| 0405-1A | 3m | 3m | Standard | To minimise environmental impact and cross-fall on bridge whilst enabling cut and fill balance to be achieved. |
| 0405-2A | 3m | 3m | Standard | |

**Work Nos. 0405-1A & 0405-2A** – These works comprise part of the A66 mainline dual carriageway on Scheme 0405. Non-standard vertical LoDs of 3m upwards and 3m downwards are required because the Beck Structure requires a 1% fall on the bridge deck to comp**ly with the Design Manual for Roads and Bridges ("DMRB") requirements. While 1% crossfall can be achieved with the current design it would require pipework to be suspended below the structure which is sub-optimal for the aesthetics of the structure and for maintenance of the sub-surface drainage system. An alternative solution is to create a 1% longfall on the structure (currently 0.65%), to do this, the vertical alignment over the structure and for a relatively short distance either side of the structure would need to be adjusted. The non-standard LoD allows for this potential improvement while ensuring the requirements of the accommodation track, footway, structure aesthetics and earthwork balance are not adversely affected.**

*Table **Error! No text of specified style in document.**-4 Exceptions to standard LoDs Temple Sowerby to Appleby (Extract)*

| Work No. | Upwards vertical LoD | Downwards vertical LoD | Lateral/ horizontal LoDs | Reason |
|---|---|---|---|---|
| 0405-4B | Standard | Standard | Order limits | To ensure that new cycle track is delivered on the alignment of and within the boundaries of the de-trunked A66. |
| 0405-19 | Standard | Standard | Order limits | To ensure that new cycle track is delivered on the alignment of and within the boundaries of the de-trunked A66. |

**Work Nos. 0405-4B & 0405-19** – These numbered works form part of the existing A66 to which there is proposed to be added a combined footway / cycleway to link Temple Sowerby to Appleby. Based on the LiDAR survey information and site observation, there is insufficient verge/carriageway width available to install this facility within the existing highway corridor for the whole length, hence some sections have been designed offline. However, there may be an opportunity for the off-line sections to be moved on-line should more detailed surveys show that

sufficient space is available to accommodate the proposed facility. A non-standard LoD **laterally to the Order Limits** allows for flexibility in the positioning of the combined footway / cycleway in **the vicinity of the existing highway corridor.**

*Table **Error! No text of specified style in document.**-5 Exceptions to standard LoDs Temple Sowerby to Appleby (Extract)*

| Work No. | Upwards vertical LoD | Downwards vertical LoD | Lateral/ horizontal LoDs | Reason |
|---|---|---|---|---|
| 0405-5 | Standard | 2m | Standard | To increase / ensure sufficiency of headroom in underpass. |

**Work No.0405-5 – The proposed underpass has been designed with 4.65m of headroom. There is no prescribed headroom requirement for accommodation structures within the DMRB so the provision must be agreed with the affected landowners. Should ongoing negotiations conclude that additional headroom is required, non-standard vertical LoDs of 2m vertically downwards allows for this underpass and associated tracks to be lowered.**

*Table **Error! No text of specified style in document.**-6 Exceptions to standard LoDs Temple Sowerby to Appleby (Extract)*

| Work No. | Upwards vertical LoD | Downwards vertical LoD | Lateral/ horizontal LoDs | Reason |
|---|---|---|---|---|
| 0405-18 | Standard | 0m | Order limits | To protect potential archaeology associated with Roman Camp Scheduled Monument (as agreed with Historic England) |

**Work No. 0405-18** – This numbered work forms part of the existing A66 to which there is proposed to be added a combined footway / cycleway. While the preliminary design is within the existing highway boundary it also crosses the Roman Camp Scheduled Monument (as agreed with Historic England). A non-standard lateral LoD to the Order Limits allows for the alignment to be adjusted horizontally within the existing highway corridor to reduce the risk of impacting any archaeology. In addition, non-standard LoDs of **0m vertically downwards removes the downward flexibility of the alignment to reduce the risk of disturbing deeper archaeology.**

**Scheme 06**

*Table **Error! No text of specified style in document.**-7 Exceptions to standard LoD for Appleby to Brough (Extract)*

| Work No. | Upwards vertical LoD | Downwards vertical LoD | Lateral/ horizontal LoDs | Reason |
|---|---|---|---|---|
| 06-1B | Standard | 0m | Standard | To protect potential archaeology associated with Roman Camp Scheduled Monument (as |

| | | | | |
|---|---|---|---|---|
| | | | | agreed with Historic England) |

**Work No. 06-1B** – This numbered work forms part of the new A66 mainline dual carriageway to the east of Sandford and west of Warcop. Non-standard LoDs of 0m vertically downwards removes the downward flexibility of the alignment to reduce the risk of disturbing deeper archaeology associated with the Warcop Roman Cam Scheduled Monument

*Table **Error! No text of specified style in document.**-8 Exceptions to standard LoD for Appleby to Brough (Extract)*

| Work No. | Upwards vertical LoD | Downwards vertical LoD | Lateral/ horizontal LoDs | Reason |
|---|---|---|---|---|
| 06-1C | 0m | No downwards LoD (i.e. 'to any extent downwards as may be necessary') | Standard | To enable the provision of appropriate mitigation for authorised development within flood plain. |

**Work No. 06-1C** – This numbered work forms part of the new A66 mainline dual carriageway to the west of Warcop and east of Warcop. Non-standard LoDs of 0m vertically upwards removes the upward flexibility of the alignment as it is considered that the realistic worst case design has been accounted for. Whereas non-standard LoDs with no downward limit provide the opportunity, subject to detailed flood modelling and detailed design work, to lower the vertical alignment of the A66 mainline dual carriageway over the key structures at Cringle Beck and Moor Beck closer to existing ground levels.

*Table **Error! No text of specified style in document.**-9 Exceptions to standard LoD for Appleby to Brough (Extract)*

| Work No. | Upwards vertical LoD | Downwards vertical LoD | Lateral/ horizontal LoDs | Reason |
|---|---|---|---|---|
| 06-2A | 2m | 2m | Standard | To accommodate detailed design of the junction in a way that will minimise impacts on adjacent fen landscape. |
| 06-2B | 2m | 2m | Lateral LoD shown by fine green dashed line on Works Plans (Sheet 2 of 6). | |

**Work No. 06-2A and Work No. 06-2B** – These numbered works form part of the underpass at Sandford Junction. The non-standard lateral LoDs applying to Work No. 06-2B are required to enable the loop of the junction (on the northern side of the new A66 mainline dual carriageway) to mirrored westwards (within a lateral LoD denoted by a fine dashed green line on Sheet 2 of 6 of the Works Plans for Scheme 06 Appleby to Brough [Document Reference 5.16, APP-321] thereby providing greater flexibility in the design of the junction in order to minimise the impact of the junction on fen landscape to the north and east of Sandford Junction. The non-standard upwards and downwards vertical LoDs applying to both Work No. 06-2A and Work No. 06-2B are required to ensure that there is adequate flexibility in the geometry of the road to tie-in to the Work No. 06-

1A as a consequence of the implementation of the non-standard lateral LoDs associated with Work No. 06-2B

*Table **Error! No text of specified style in document.**-10 Exceptions to standard LoD for Appleby to Brough (Extract)*

| Work No. | Upwards vertical LoD | Downwards vertical LoD | Lateral/ horizontal LoDs | Reason |
|---|---|---|---|---|
| 06-7A | Standard | Standard | Centreline of linear work (shown on sheet 5 of the works plans) may deviate by up to 40 metres northwards, and by 3 metres (standard LoD) southwards | To allow development of detailed design of proposed junction and associated attenuation pond in a way which minimises impacts on environmental features (including fen landscape) in the vicinity of Flitholme/Langrigg |
| 06-7B | Standard | Standard | Westwards lateral LoD shown by fine green dashed line on Works Plans (Sheet 5 of 6).<br>Centreline of linear work (shown on sheet 5 of the works plans) may deviate by up to 40m northwards, and by 3 metres (standard LoD) southwards | To allow development of detailed design of proposed junction and associated attenuation pond in a way which minimises impacts on properties local to Langrigg and on environmental features (including fen landscape) in the vicinity of Flitholme/Langrigg |
| 06-7C | Standard | Standard | The commencement point of Work No. 06-7C may deviate laterally westwards and northwards to any extent necessary to | To allow development of detailed design of proposed junction and associated attenuation pond in a way which minimises |

| Work No. | Upwards vertical LoD | Downwards vertical LoD | Lateral/ horizontal LoDs | Reason |
|---|---|---|---|---|
| | | | accommodate the location of Work No. 06-7B within the westward lateral limits of deviation for Work No. 06-7B | impacts on properties local to Langrigg and on environmental features (including fen landscape) in the vicinity of.<br>To accommodate a movement northwards of the link leading to the attenuation pond avoiding the fen local to Flitholme/Langrigg |

**Work No. 06-7A, Work No. 06-7B and Work No. 06-7C** – These numbered works are associated with the means to realign the westbound off and on slip further westwards so as to enable the connection to Langrigg Lane to be moved further northwards away from residential property and avoid impacts on the fen west of Langrigg Lane.

The Applicant would note that the removal of Langrigg Westbound Junction, revision to Langrigg Road link and earlier tie-in of Flitholme Road (Scheme 6) is a change that is planned to be submitted at Deadline 3. This involves the removal of the current westbound junction proposals at Langrigg meaning that traffic would no longer be able to leave and join the new A66 mainline at this location. As a result of the removal of the westbound junction on the A66 Mainline the Langrigg Road link would move northwards, principally adjacent to the A66 mainline dual carriageway. The Langrigg Road link would extend westwards, staying in close proximity to the A66 Mainline to connect to Flitholme Road at the earliest opportunity to retain as much of the existing Flitholme Road as possible. The connection from the Langrigg Road Link to Langrigg Road would be through a simple T-junction. Associated infrastructure, such as the balancing ponds, could be reduced in size and could be moved north away from the fen land and houses.

### Scheme 07

*Table **Error! No text of specified style in document.**-11 Exceptions to standard LoDs for Bowes Bypass*

| Work No. | Upwards vertical LoD | Downwards vertical LoD | Lateral/ horizontal LoDs | Reason |
|---|---|---|---|---|
| 07-1B | Standard | 1.5m | Standard | To allow for:<br>potential widening of accommodation bridge structure to enable mitigation of impacts on bat foraging habitat; and |
| 07-2B | Standard | 1.5m | Standard | |

| | | | | |
|---|---|---|---|---|
| | | | | management of consequential effects on the alignment of the mainline A66 beneath widened accommodation bridge. |

**Work No. 07-1B** – This non-standard vertical LoD of 1.5m downwards allows the eastbound mainline carriageway to be lowered at the location of the East Bowes Accommodation bridge to allow for any widening of the overbridge structure for a potential green corridor for bat migration. Should there be a need to increase the clearance of the overbridge, there is flexibility to provide this additional clearance by lowering the mainline instead of lifting the overbridge alignment and increasing ramp lengths either side to get back to ground level.

**Work No. 07-2B** – This non-standard vertical LoD of 1.5m downwards is required for the same reason as is explained above in relation to Work No. 07-1B, and applies to the westbound carriageway at the location of the East Bowes Accommodation bridge. Separate centrelines and works numbers were applied to the eastbound and westbound carriageways of this length of the A66 mainline to accommodate level changes in both carriageways at the A67 Bowes Junction Overbridges.

### Scheme 08

*Table **Error! No text of specified style in document.**-12 Exception to standard LoDs for Cross Lanes to Rokeby (Extact)*

| Work No. | Upwards vertical LoD | Downwards vertical LoD | Lateral/ horizontal LoDs | Reason |
|---|---|---|---|---|
| 08-1B | Standard | 2m | Standard | To allow for: potential widening of accommodation bridge structure to enable mitigation of impacts on bat foraging habitat; and management of consequential effects on the alignment of the mainline A66 beneath widened accommodation bridge (Work Nos 08-4A and 08-4B: see below). |

**Work No.** 08-1B – This non-standard vertical LoD of 2m downwards allows the eastbound mainline carriageway to be lowered at the location of the Clint Lane Overbridge to allow for any widening of the overbridge structure for a potential green corridor for bat migration. Should there be a need to increase the clearance of the overbridge, this non-standard vertical LoD allows

flexibility to provide this additional clearance by lowering the mainline instead of lifting the overbridge alignment and increasing embankment heights next to Cross Lanes Farm Shop and Café and Cross Lanes Farmhouse.

*Table **Error! No text of specified style in document.**-13 Exception to standard LoDs for Cross Lanes to Rokeby (Extract)*

| Work No. | Upwards vertical LoD | Downwards vertical LoD | Lateral/ horizontal LoDs | Reason |
|---|---|---|---|---|
| 08-4A | Standard | 2m | Standard | To accommodate related non-standard LoD applying to the A66 mainline (Work No. 08-1B) to enable provision of mitigation for impacts on bat habitat (e.g. bat bridge). |

**Work No. 08-4A** – This non-standard vertical LoD of 2m downwards is included so that if the LoD for Work No. 08-1B (see above) is applied then the eastbound diverge slip road and the eastbound merge slip road associated with the Cross Lanes junction can be altered to tie in with any potential lowering of the mainline.

*Table **Error! No text of specified style in document.**-14 Exception to standard LoDs for Cross Lanes to Rokeby (Extract)*

| Work No. | Upwards vertical LoD | Downwards vertical LoD | Lateral/ horizontal LoDs | Reason |
|---|---|---|---|---|
| 08-4B | Standard | 2m | Standard | To accommodate related non-standard LoD applying to the A66 mainline (Work No. 08-1B) to enable provision of mitigation for impacts on bat habitat (e.g. bat bridge). |

**Work No. 08-4B** – This non-standard vertical LoD of 2m downwards is included so that if the LoD for Work No. 08-1B (see above) is applied then the westbound diverge slip road and the westbound merge slip road associated with the Cross Lanes junction can be altered to tie in with any potential lowering of the mainline**.**

**Scheme 09**

*Table **Error! No text of specified style in document.**-15 Exceptions to standard LoDs for Stephen Bank to Carkin Moor (Extract)*

| Work No. | Upwards vertical LoD | Downwards vertical LoD | Lateral/ horizontal LoDs – north of centreline | Lateral/ horizontal LoDs – south of centreline | Reason |
|---|---|---|---|---|---|
| 09-1B | Standard | 3m | 5m | 5m | To allow flexibility to facilitate potential realignment of A66 mainline to accommodate potential adjustments to alignment of new local access road Work No. 09-3B (alongside new and improved A66 mainline, Work No. 09-1B). |

**Work No. 09-1B** – This downwards vertical LoD of 3m, and horizonal LoD of 5m to either side of the centreline, provides flexibility for the A66 mainline, in the vicinity of Collier Lane Overbridge, to be lowered or move horizontally in conjunction with steepening earthworks batters and/ or integrating a retention solution. This would work in conjunction with the lateral LoDs shown on Sheet 2 of 4 of the Works Plans for Scheme 09 [APP-324] for Work No. 09-3B (moving the realigned A66 back onto to its original line) and Work No. 09-05 (lowering the vertical alignment of Collier Lane Overbridge back to its current levels to allow a tie into the Work No. 09-3B).

*Table **Error! No text of specified style in document.**-16 Exceptions to standard LoDs for Stephen Bank to Carkin Moor (Extract)*

| Work No. | Upwards vertical LoD | Downwards vertical LoD | Lateral/ horizontal LoDs – north of centreline | Lateral/ horizontal LoDs – south of centreline | Reason |
|---|---|---|---|---|---|
| 09-3B | Standard | No downwards LoD (i.e. 'to any extent downwards | Lateral LoD shown by fine green dashed line on Works Plans (Sheet 2 of 6). | Order limits | To allow flexibility to facilitate potential realignment of new local |

| Work No. | Upwards vertical LoD | Downwards vertical LoD | Lateral/ horizontal LoDs – north of centreline | Lateral/ horizontal LoDs – south of centreline | Reason |
|---|---|---|---|---|---|
| | | as may be necessary') | | | access road, Work No. 09-3B, to include re-use of existing A66 mainline carriageway post de-trunking |

**Work No. 09-3B** – The non-standard LoDs applying to this numbered work are required to provide flexibility for the re-aligned section of the de-trunked A66 to be retained on its current line (within a lateral LoD denoted by a fine dashed green line on Sheet 2 of 4 of the Works Plans for Scheme 09 Stephen Bank to Carkin Moor Sheet 2 of 4 **[**Document Reference 5.16, APP-324**]** on the north side of the existing A66, thereby potentially reducing landtake. It would be grouped with Work Nos. 09-1B and 09-05. It is the intention of the Applicant to make amend a drafting error in the LoDs for Work No. 09-3B at Deadline 3.

*Table **Error! No text of specified style in document.**-17 Exceptions to standard LoDs for Stephen Bank to Carkin Moor (Extract)*

| Work No. | Upwards vertical LoD | Downwards vertical LoD | Lateral/ horizontal LoDs – north of centreline | Lateral/ horizontal LoDs – south of centreline | Reason |
|---|---|---|---|---|---|
| 09-1D | Standard | 4m | Order Limits | Standard | To facilitate appropriate vertical alignment through setting of Scheduled Monument (objective of flexibility is to retain height of monument relative to road). |

**Work No. 09-1D** – The proposed alignment passes through the existing cutting of the scheduled monument at a level approx. 3-4m above the existing road level. This is to make use of the existing cutting, whilst minimising retaining wall height. The flexibility of a downwards vertical LoD of 4m is sought to allow the vertical alignment of the A66 mainline to be lowered in the vicinity of the scheduled monument with the introduction of higher retaining walls. This would allow a reduction in earthworks either side of the scheduled monument and allow the new alignment to follow that of the existing road more closely, aiding buildability.

*Table **Error! No text of specified style in document.**-18 Exceptions to standard LoDs for Stephen Bank to Carkin Moor (Extract)*

| Work No. | Upwards vertical LoD | Downwards vertical LoD | Lateral/ horizontal LoDs – north of centreline | Lateral/ horizontal LoDs – south of centreline | Reason |
|---|---|---|---|---|---|
| 09-2D | Standard | Standard | 0m | 5m | To avoid impacts on / incursion into setting of Scheduled Monument. |

**Work No. 09-2D** (Errata – should be renamed as Work No. 09-3E) – This non-standard horizontal LoD of 5m south of the centreline allows the section of the realigned Warrener Lane that passes adjacent to the scheduled monument to be moved further south should the works impact on any archaeological findings associated with the site of the Roman camp.

*Table **Error! No text of specified style in document.**-19 Exceptions to standard LoDs for Stephen Bank to Carkin Moor (Extract)*

| Work No. | Upwards vertical LoD | Downwards vertical LoD | Lateral/ horizontal LoDs – north of centreline | Lateral/ horizontal LoDs – south of centreline | Reason |
|---|---|---|---|---|---|
| 09-5 | Standard | 3m | Standard | Standard | Linked to LoDs for Work Nos. 09-1B and 09-3B – i.e. to allow flexibility for potential realignment of new local access road (on route of de-trunked A66) and new/improved A66. |

**Work No. 09-5** – This non-standard vertical LoD of 3m downwards provides flexibility to lower the level of Collier Lane Overbridge back to its current levels, should the lowering of the A66 mainline occur under the LoDs for Work No. 09-1B above. This would also allow Work No. 09-3B to be lowered back to existing ground levels and enable more of the existing A66 to be retained, potentially reducing landtake.

# APPPENDIX 3 - Summary of the relevant amendments made by the Housing and Planning Act 2016 to the processes for implementing **compulsory acquisition powers and their application and modification by articles 25 and 26 of the draft Order**

## Introduction

1. The Examining Authority's Agenda for the Compulsory Acquisition Hearing held on 2 December 2022 together with its Issue Specific Hearing 2 Supplementary Agenda Additional Questions contain a number of items and questions that touch upon the effect changes to the legal procedures that are required to be followed to implement compulsory acquisition powers brought about by the Housing and Planning Act 2016, and how articles 25 and 26 of the Applicant's draft Order take those changes into account.

2. The agenda items and supplementary questions addressed in this appendix are:

   a. **CAH agenda item 3.10** and **ISH2.DCO.11** which query the approach of the Applicant to the provisions of the Housing and Planning Act 2016 in article 25 (modification of Part 1 of the 1965 Act) of the draft Order which relates to the implementation of compulsory acqusition powers through the notice to treat and notice to enter procedure; and

   b. **CAH agenda item 3.11** and **ISH2.DCO.12** which query the approach of the Applicant to the provisions of the Housing and Planning Act 2016 in article 26 (application of the 1981 Act) of the draft Order which relates to the implementation of compulsory acquisition powers through the general vesting declaration procedure.

3. This note is also of relevance to **CAH agenda item 3.8** which relates to article 22(3) (compulsory acquisition of rights and restrictive covenants) of the Order, the discussion on which touches upon the counter-notice provisions contained in Schedule 2A to the Compulsory Purchase Act 1965.

4. This note summarises:

   a. How the two procedures operated prior to the coming into force of the Housing and Planning Act 2016;

   b. How the two procedures now operate after the coming into force of the Housing and Planning Act 2016;

   c. Explains how the provisions of articles 25 and 26 of the Order apply and modify the provisions of the Compulsory Purchase Act 1965 and the Compulsory Purchase (Vesting Declarations) Act 1981, as amended by the Housing and Planning Act 2016, to enable the implementation of the compulsory acquistion powers sought in the Order in a way that is legally sound (i.e. it "works") and is consistent with the changes to those procedures brought about by the Housing and Planning Act 2016.

## Procedures for implementation of compulsory acquisition powers

5. It is important to acknowledge at the outset, in the opening words of the Law Commission in its 2004 report *Towards a Compulsory Purchase Code*, *"The current law of compulsory purchase is a patchwork of diverse rules, derived from a variety of statutes and cases over more than 100 years, which are neither accessible to those affected, nor readily capable of interpretation save by specialists."*. While that report was focussed on the provisions that relate to compensation for compulsory purchase, the general observations as to the legislative landscape remains true and in the intervening years successive governments have sought to tackle the issue in a piecemeal fashion. The Housing and Planning Act 2016 did seek to harmonise the practical application of certain procedures, but it did so by way of re-stitching parts of the patchwork, rather than by consolidating the legislation.

6. With this background in mind, there are two procedures that a body that has been authorised to compulsorily acquire land (generally referred to as an "Aquiring Authority" has available to them to implement those powers and acquire the land. They are (i) the notice to treat and notice of entry procedure set out in Part 1 of the Compulsory Purchase Act 1965 and (ii) the general vesting declaration procedure contained in the Compulsory Purchase (Vesting Declarations) Act 1981.

**Notice to treat and notice of entry – Part 1 of the Compulsory Purchase Act 1965**

7. In very general terms, the notice to treat and notice of entry procedure enables an acquiring authority to serve the requisite notices in relation to specific interests in land and, on their expiry is, entitled to enter the land. The Compulsory Purchase Act 1965 assumes that the Acquiring Authority and the relevant landowners will agree compensation, or in cases of dispute, compensation will be determined by the Upper Tribunal (Lands Chamber). Once compensation is determined the land will be conveyed to the Acquiring Authority through the normal conveyancing process[1].

8. Prior to the coming into force of the relevant provisions of the Housing and Planning Act 2016, assuming the Acquiring Authority wished to implement its powers as soon as possible, the procedure was as follows:

    a. On the confirmation of the compulsory purchase order ('CPO') by the relevant department or Secretary of State, the Acquiring Authority is required to serve notice and publicise its confirmation in accordance with section 15 of the Acquisition of Land Act 1981. An Acquiring Authority would typically await the expiry of the 6 week period within which those aggrieved by the confirmation can seek to take legal action to challenge the confirmation of the CPO.

    b. The Acquring Authority would then serve notice to treat and notice of entry, giving not less than **14 days notice** after which the Acquiring Authority is entitled to enter on and take possession of the land, in accordance with section 11 of the Compulsory Purchase Act 1965.

    c. A notice of entry must be served before the expiry of the period of 3 years beginning with the date that the CPO becomes operative, in accordance with section 4 of the Compulsory Purchase Act 1965.

    d. If a recipient of a notice to treat wishes to object to a notice to treat that seeks to acquire part, but not the whole, of that person's landholding and considers that the taking of part will cause a material detriment to the remainder in accordance with section 8 of the Compulsory Purchase Act 1965; the procedure for serving a counter-notice was governed under case law.

9. The Housing and Planning Act 2016 changed the notice to treat and notice of entry procedure so that now:

    a. The first step remains largely the same, the Acquiring Authority is required to serve notice of and publicise the confirmation of the Order and would await the expiry of the challenge period.

    b. The Acquiring Authority would then serve notice to treat and notice of entry, giving not less than **3 months notice** after which the Acquiring Authority is entitled to enter on and take possession of the land, in accordance with section 11 of the Compulsory Purchase Act 1965.

[1] There are procedures for the execution of a legal document called a deed poll and the payment into court of the compensation due, in cases where a landowner refuses to convey the land or where the landowner cannot be identified.

c. The Housing and Planning Act 2016 introduced a new section 11A that includes a procedure to address the situation where an Acquiring Authority serves notice of entry on all persons who are known to be entitled to receive it, but a newly identified person arises who has not received a notice to treat.

d. A notice of entry must be served before the expiry of the period of 3 years beginning with the date that the CPO becomes operative, but the Housing and Planning Act 2016 substituted section 4 of the Compulsory Purchase Act 1965 with a new section 4 that includes language that clarifies that it is the notice of entry that must be served, and not the expiry of that notice, within the 3 year period.

e. The Housing and Planning Act 2016 also introduced a new section 4A to the Compulsory Purchase Act 1965 that provides for an extension to the 3-year time limit if the CPO is subject to a legal challenge.

f. The Housing and Planning Act 2016 amended section 8 of the Compulsory Purchase Act 1965 in relation to the provisions that apply to divided land and material detriment, and introduced a new Schedule 2A to make provision for the procedure for the service of counter notice, seeking to harmonise it with equivalent provisions that applied to a general vesting declaration.

**Article 25 (modification of the Part 1 of the 1965 Act) of the draft Order**

10. It should be noted that Part 1 of the Compulsory Purchase Act 1965 contemplates that the authorisation of compulsory purchase will be through the means of a compulsory purchase order and not a development consent order. The purpose of article 25 is to make the provisions that apply to the implementation of the compulsory acquisition of land operate in a manner that is consistent with the terms of the Order.

11. Article 25 seeks to “modify” rather than “apply” Part 1 of the Compulsory Purchase Act 1965, because section 125(2) of the Planning Act 2008 already applies its provisions to an order granting development consent which authorises the compulsory acquisition of land. This is acknowledged in paragraph (1) of the article.

12. Parargraph (2) modifies the provisions in section 4A of the Compulsory Purchase Act 1965 (which was introduced by the Housing and Planning Act 2016) that extend the time limit for service of a notice of entry where the CPO is subject to a legal challenge. This paragraph makes two modifications. The first is to replace the reference in section 4A of the Compulsory Purchase Act 1965 to challenges to the CPO being made under section 23 of the Acquisition of Land 1981, with a reference instead to challenges to a DCO being made under section 118 of the Planning Act 2008. The second is to change the reference to a 3-year time limit for the service of notice to treat in section 4 of the Compulsory Purchase Act 1965, with a reference to the 5-year time limit in article 21 of the Order.

13. Paragraph (3) makes minor changes to the procedure (introduced by the Housing and Plannning Act 2016) for serving notices to treat and enter on ‘newly identified persons’ which recognise that the undertaker may already be in possession of the land as a result of the exercise of other powers in the Order, such as article 29 (temporary use of land for constructing the authorised development).

14. Paragraph (4) changes the reference in section 22 (interests omitted from purchase) of the Compulsory Purchase Act 1965 to the 3 year time limit in section 4 of that Act, to a reference to the five year time limit in article 21 of the Order.

15. Paragraph (5) makes two modifications. The first is to substitute the references to section 2A of the Acquisition of Land Act 1981 (a provision introduced by the Housing and Planning Act 2016), in paragraph 1(2) and 14(2) of Schedule 2A to the Compulsory Purchase Act 1965

(which was also introduced by the Housing and Planning Act 2016), with references to article 27(4) (acquisition of subsoil, etc., only) of the Order. Section 2A of the Acquistion of Land Act 1981 allows a CPO to modify the application of the counter-notice procedure under Schedule 2A to the Compulsory Purchase Act 1965 in relation to certain below ground interests and article 27(4) of the Order makes a similar provision. The second modification is to insert a new interpretation provision in Schedule 2A to the Compulsory Purchase Act 1965. This is to address the fact that the language in Schedule 2A uses the term "possession" in a sense that means the Acquiring Authority has served the requisite notices to treat and notices to enter and has then taken possession of the land. The drafting of Schedule 2A to the Compulsory Purchase Act 1965 does not contemplate the Acquiring Authority having the power to take possession of the land temporarily under articles 29 and 30 of the Order, or to enter land under articles 14 (protective works to buildings) and 15 (authority to survey and investigate land). Therefore, article 25(5)(b) inserts a new provision into Schedule 2A that clarifies that posession of land under those provisions does not constitute “possession” for the purposes of the counter-notice procedures in Schedule 2A.

16. The modifications to the application of Part 1 of the 1965 Act have therefore been drafted in a way so as to be consistent with the patchwork of changes that the Housing and Planning Act 2016 has made, and does not seek to disapply the 3-month notice period for a notice of entry.

17. The first National Highways development consent order granted after the coming into force of the Housing and Planning Act 2016 was the M20 Junction 10a Development Consent Order 2017. Paragraph 51 of the Secretary of State’s decision letter records that the Secretary of State made the Order with modifications “to ensure the provisions are aligned with legislative changes that have been made” which is a reference to the Housing and Planning Act 2016. For more recent precedents see the A57 Link Roads Development Consent Order 2022 and the A30 Chiverton to Carland Cross Development Consent Order 2020, although numerous other recent examples exist.

**General vesting declarations made under the Compulsory Purchase (Vesting Declarations) Act 1981**

18. In very general terms a vesting declaration is an instrument that an Acquiring Authority may execute in relation to land it has been authorised to compulsorily acquire and, after completion of the prescribed procedures, all of the land included within that vesting delcaration will vest in (i.e. be transferred to) the Acquiring Authority without the need for a conveyance.

19. Prior to the coming into force of the Housing and Planning Act 2016, assuming the Acquiring Authority wished to implement its compulsory acquisition powers as soon as possible, the procedure was as follows:

    a. On the confirmation of the compulsory purchase order by the Secretary of State, the Acquiring Authority is required to serve notice and publicise its confirmation in accordance with section 15 of the Acquisition of Land Act 1981. At the same time the Acquiring Authority would serve preliminary notices under section 3 of the Compulsory Purchase (Vesting Declarations) Act 1981 (the ‘1981 Act’), of its intention to execute a vesting declaration.

    b. The Acquiring Authority would then have to wait until the expiry of two months from the date of publication of the section 3 preliminary notice before it could execute a vesting declaration.

    c. Having executed a vesting declaration, the Acquiring Authority is then required to serve notice in accordance with section 6 of the 1981 Act.

    d. If a recipient of a section 6 notice wishes to object to a proposal to acquire part, but not the whole, of that person’s landholding and considers that the taking of part will cause a material

detriment to the remainder, the counter notice provisions in Schedule 1 to the 1981 Act apply.

Not less than **28 days** after the completion of service of the section 6 notices, the land would vest in the Acquiring Authority.

20. The Housing and Planning Act 2016 changed the procedure so that now:

    a. The requirement to serve a preliminary notice under section 3 of the 1981 was repealed by the Housing and Planning Act 2016. Instead a prescribed statement providing the information that would previously have been included in a section 3 notice is required to be included in the notice of confirmation of the CPO required to be served under section 15 of the Acquisition of Land Act 1981.

    b. The Acquiring Authority would typically await the expiry of the 6 week period in which legal challenges can be made before executing a general vesting declaration but would no longer be required to await the expiry of the two month period from service of the preliminary notice under section 3 of the 1981, as that section is repealed.

    c. The Housing and Planning Act 2016 introduced a new section 5A giving a 3 year period, beginning with the date the CPO becomes operative, after which no general vesting declaration may be executed. This was introduced to remove the uncertainty in case law as to how the 3 year period was to be calculated.

    d. The Housing and Planning Act 2016 introduced a new section 5B to allow for an extension to the 3 year time limit for executing a vesting declaration where the CPO is the subject of a legal challenge.

    e. Having executed a vesting delaration, the Acquiring Authority is then required to serve notice in accordance with section 6 of the 1981 Act.

    f. Not less than **3 months** after the completion of service of the section 6 notices, the land would vest in the Acquiring Authority (the Housing and Planning Act 2016 increased the minimum period between the completion of sevice of section 6 notices and the vesting date from 28 days to 3 months).

    g. If a recipient of a section 6 notice wishes to object to a proposal to acquire part, but not the whole, of that person's landholding and considers that the taking of part will cause a material detriment to the remainder, the counter notice provisions in Schedule A1 to the 1981 Act apply (these replaced the provisions previously contained in Schedule 1 to the 1981 Act). Schedule A1 sought to harmonise its provisions with the equivalent provisions that apply where a person objects in similar circumstances to a notice to treat (under Schedule 2A to the Compulsory Purchase Act 1965)

**Article 26 (application of the 1981 Act) of the draft Order**

21. It should be noted that the 1981 Act contemplates that the authorisation of compulsory purchase will be through the means of a compulsory purchase order and not a development consent order. The purpose of article 25 is to make the provisions that apply to the implementation of the compulsory acquisition of land by way of a vesting declaration operate in a manner that is consistent with the terms of the Order. Unlike the notice to treat and notice of entry procedure under the Compulsory Purchase Act 1965, the Planning Act 2008 does not apply the provisions of the 1981 Act (there is no equivalent of section 125(2) of the Planning Act 2008 for vesting declarations under the 1981 Act), therefore article 26(1) applies the provisions of the 1981 Act to the Order as though the DCO is a CPO.

22. Paragraph (3) modifies section 1 (application of the Act) so that the provision in the 1981 Act that sets its scope is not inconsistent with the provisions of the 1981 Act being applied by the

draft Order. In this case the undertaker would be “any other body or person authorised to acquire land by means of a compulsory purchase order.”, taking into account that article 26(10) of the Order (discussed below) requires the 1981 Act to be read as though references to a CPO were references to a DCO.

23. Paragraph (4) omits reference to provisions in section 5(2) of the 1981 Act that are no longer required once you read “compulsory purchase order” as “development consent order” as required by paragraph (10).

24. Paragraph (5) omits the 3-year time limit for the execution of a general vesting declaration contained in section 3A of the 1981 Act, which was introduced by the Housing and Planning Act 2016. This section was added to clarify previously inconsistent case law as to how the 3-year period after which a vesting declaration may not be executed, is to be calculated. The three year time limit is omitted by article 26(5) because article 21 (time limits) of the draft Order provides for a 5 year time limit.

25. Paragraph (6) relates to section 5B of the 1981 Act which was introduced by the Housing and Planning Act 2016, which makes provision to extend the 3-year time limit in cases were the compulsory purchase order is the subject of a legal challenge. Paragraph (6) substitutes a mention of the 3 year time limit for implementing the CPO in section 23 (grounds for application to High Court) of the Acquisition of Land Act 1981, with wording that applies section 118 (legal challenges relating to applications for orders granting development consent) of the Planning Act 2008, taking into account the 5year time limit specified in article 21 of the draft Order. The effect is, where the Order is subject to a legal challenge the time limit for making a general vesting declaration is extended in the same way as a CPO, save that the 5 year time limit in article 21 applies, rather than the 3 year time limit in section 5A of the 1981 Act (which is omitted by paragraph (4) above).

26. Paragraph (7) modifies the provisions in section 6 of the 1981 Act which refer to a notice of confirmation of a CPO required under section 15 of the Acquisition of Land Act 1981, to instead refer to the notice required to be served under section 134 (notice of authorisation of compulsory acquisition) of the Planning Act 2008.

27. Paragraph (8) omits wording in the 1981 Act that acknowledges the modifications made to the constructive notice to treat that arises from a general vesting declaration under section 4 of the Acquisition of Land Act 1981. The Applicant is aware that DCOs granted since this provision of the Order was first drafted no longer include this article. The Applicant intends to delete it in the next iteration of the DCO to be submitted at Deadline 2, for consistency with those more recent development consent orders.

28. Paragraph (9) amends the counter notice provisions contained in Schedule A1 to the 1981 Act (the Housing and Planning Act 2016 replaced Schedule 1 with Schedule A1) to replace the reference in paragraph 1(2) of Schedule A1 to section 2A of the Acquisition of Land Act 1981, with a reference to article 27(4) (acquisition of subsoil etc., only) of the Order. Section 2A of the Acquisition of Land Act 1981 makes provision for a CPO to modify the application of the counter-notice procedure under Schedule A1 to the 1981 Act in relation to certain below ground interests; article 27(4) of the Order makes a similar provision. This is the same issue that prompts a similar modification as that in article 25 of the Order in relation to notices to treat and notices to enter under the Compulsory Purchase Act 1965 (see paragaph 13 above). However, the vesting of the land under a general vesting declaration occurs automatically on the vesting date, and unlike the equivalent counter-notice provisions that apply to notices to treat under Schedule 2A to the Compulsory Purchase Act 1965, the counter-notice provisions in Schedule A1 to the 1981 Act are not reliant on the concept of “possession”. This means that there is no need to add an additional interpretation provision as is done in article 25(5)(b) of the Order.

29. Paragraph (10) requires references in the 1981 Act to be read as references to the Compulsory Purchase Act 1965, as applied by section 125 of the Planning Act 2008 and as modified by Schedule 5 to the Order. In effect, this requires all references to a compulsory purchase order in the 1981 Act to be read as though they were references to a development consent order that authorises compulsory acquistion, as modified by Schedule 5 to the Order which facilitates the acquisition of rights over land or the imposition of restrictive covenants.

30. The provisions in article 26 of the Order that applies and modifies the provisions of the 1981 Act have therefore been drafted in a way so as to be consistent with the patchwork of changes that the Housing and Planning Act 2016 has made. The three month minimum period between the completion of service of section 6 notices under the 1981 Act, and the vesting date, are unaffected by article 26.

31. The first National Highways development consent order granted after the coming into force of the Housing and Planning Act 2016 was the M20 Junction 10a Development Consent Order 2017. Paragraph 51 of the Secretary of State's decision letter records that the Secretary of State made the Order with modifications "to ensure the provisions are aligned with legislative changes that have been made" which is a reference to the Housing and Planning Act 2016. For more recent precedents see the A57 Link Roads Development Consent Order 2022 and the A30 Chiverton to Carland Cross Development Consent Order 2020, although numerous other recent examples exist.