

Highways Commissioning
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11th October 2024

M5 Junction 10 Improvements Scheme

Dear Mr Maund,

Application by Gloucestershire County Council for an order granting Development Consent for the M5 Junction 10 Improvements Scheme

Planning Act 2008 – Section 89 and The Infrastructure Planning (Examination Procedure) Rules 2010 – Rule 8 and 9, 13 and 16

Further to the Applicant's Deadline 5 submission, submitted 01 October 2024, the Applicant became aware yesterday that formatting errors occurred in relation to its Response to Examining Authority Second Written Questions [REP5-027]. As a result of these errors revisions to the final document were lost. To ensure that there is no misunderstanding and that the Examining Authority and interested parties are fully aware of the Applicant's position on each issue, we have set out the relevant revisions to REP5-027 below. The intention is that the revised responses replace those submitted at Deadline 5.

Whilst we identified a number of errors throughout the Applicant's submission, we have limited the changes within this letter to those which are material to the responses.

Whilst the Applicant is aware that previous submissions into Examination cannot be removed it is hoped that this letter, and its contents, can be considered by the Examining Authority and accepted into Examination as the Applicant's true position and one that may be the basis of discussion in next week's hearings.

We apologise for any inconvenience caused but wanted to inform the Examining Authority of the issue as soon as it became apparent.

Q5.0.6

Section 122 Planning Act 2008 states that a DCO may include provision authorising the compulsory acquisition of land only if the Secretary of State is satisfied that the land:

- a. Is required for the development to which the development consent relates
- b. Is required to facilitate or is incidental to that development, or
- c. Is replacement land which is to be given in exchange for the order land under section 131 or 132; and
- d. There is a compelling case in the public interest for the land to acquire compulsorily.

The Applicant has summarised its position relating to the provisions on funding in CA Guidance, but the Applicant would make further reference to paragraph 10 which states the Secretary of State *must ultimately be persuaded that the purposes for which an order authorises the compulsory acquisition of land are legitimate and are sufficient to justify interfering with the human rights of those with an interest in the land affected.*

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The Planning Act 2008 and Guidance are limited to assessing the *purpose* for which the acquisition is sought and weighing that *purpose* against the impact caused. There is no requirement which would force any party to ensure that the purpose comes to fruition.

However, in considering whether acquisition of land is justified based on the *purpose* for which it is acquired, the decision maker may wish to analyse the potentiality of that *purpose*, i.e. the development commencing. The Applicant would submit that paragraphs 17-18 deal with this consideration and as mentioned above, the Applicant has made its position clear in this regard.

The Applicant would further reference the precise terms on which it seeks to be granted the dDCO, being set out in article 21 that the undertaker may acquire compulsorily so much of the Order land as is required to carry out, facilitate or is incidental to the authorised development. This ensures that the operation of compulsory acquisition is in keeping with section 122. What this means in practice is that the Applicant is forced by the terms of the Order to acquire *only so much as is required to carry out the authorised development*. Table A, Statement of Reasons details the purposes for which compulsory acquisition and temporary powers are sought, and separately the dDCO sets out the precise basis on which rights and temporary powers can be exercised (see Schedules 5 and 7).

However, the Scheme is not seeking compulsory acquisition powers for a development that will never commence. The Applicant has demonstrated in accordance with the relevant tests in guidance that it has sufficient funding to satisfy compulsory acquisition and otherwise has provided an indication on how the remaining shortfall of funding will be met. As a basic position, the undertaker as a local authority will not be seeking to purchase land for which it will have to take the liability of purchase and ongoing ownership where it has no anticipation that the relevant development would be built out.

In the event that the development was to be paused pending further funding, or whatever other reason, including due to central government funding changes as has happened in the recent past with a number of projects not least the A303 Stonehenge, or HS2, then the undertaker would have a choice of either retaining the land until funding is secured or selling the land. In the event that the land is sold then this will be subject to the Crichel Down rules which are in place to ensure that the persons affected by the compulsory acquisition have the right of first refusal regarding and sale.

The Applicant would note that as has been raised in other ExQs, there are specific and distinct policy tests set out in Guidance in relation to funding which seek to provide a policy basis for weighing the chances of a scheme progressing. The Applicant would submit that this consideration is relevant to the 5-year period of compulsory acquisition. This is because it is principally in place to balance the impact of blight over affected land. The question to be had over the use of land in the future in the event that the Scheme does not progress is not directly related to this particularly due to the protections in place under the Crichel Down rules.

Q5.0.8

The Applicant understands that this question refers to article 21 of the Manston Airport Development Consent Order 2022 which states that no notice to treat can be served or declaration under section 4 of the 1981 Act executed after the later of:

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- a. A year after the period for legal challenge in section 117 of the 2008 expires;
or
- b. the final determination of any legal challenge under section 118 of the 2008 Act.

Fundamentally, the Applicant does not consider that its position regarding funding is equivalent to that in the Manston Airport example. The Applicant has in its response to ISH3.27 provided a more detailed explanation for the difference in the funding situations between Manston and this Scheme. In short, in Manston there was concern during examination that there was insufficient evidence that the applicant held adequate funds to indicate how an order that contains the authorisation of compulsory acquisition is proposed to be funded. This is not a concern in this Scheme, with clear adequate funding being in place for compulsory acquisition proposed by the Scheme. Therefore, a reduction in the time limit to exercise compulsory acquisition power to one year is not considered proportionate or necessary given the funding that is in place.

However, the Applicant does note that under the current arrangement with Homes England, which the Applicant maintains is, and will always be, subject to the ability to change through negotiation between the parties, the Scheme will be drawing down its funding by late 2027. The Applicant is actively exploring options with Homes England to extend the funding period of the Scheme and is discussing options for extending the period for funding to 2029 as an appropriate period. This will involve discussions with HMT/MHCLG. However, having regard to the Scheme's ability to unlock housing growth in the context of recent government announcements, there is a reasonable prospect of this occurring.

Considering that acquisition of land may well be staggered to align with construction timetables, it would be important to maintain a compulsory acquisition period for as long a period as is reasonable. Clearly, the general position in DCOs is this to be 5 years. Should it be required, the Applicant considers that retaining 5 years is an appropriate period for compulsory acquisition due to the reasonable prospect of the HIF funding availability period being extended with the consent of HMT and MHCLG. There is no reason for the Order to pre-suppose the result of those discussions. A five-year period for compulsory acquisition is well established as a reasonable period to affect land and therefore the Applicant considers that the dDCO should remain as drafted in this instance.

In the event that a lesser period is chosen the Applicant would be concerned by the imposition of a Requirement similar to that at Manston Airport, which only granted 12 months to acquire the necessary land. The response to Q5.0.10 below demonstrates that there is a means by which the funding availability period could be extended. Any such Requirement would unfairly restrict the ability to utilise any extension to the HIF grant or to utilise other forms of funding. A period of 3 years would align with the current funding availability period and period for construction agreed with Homes England.

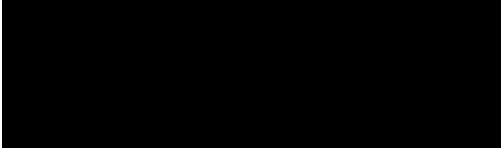
Q5.0.10(iii)

Please note that the response to the above question references March 2024 which should be read as March 2028.

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Should you have any queries regarding the above please do not hesitate to contact me or a member of the project team.

Yours sincerely,



Chris Beattie
Highways and Infrastructure
Gloucestershire County Council

<p>Q5.0.6</p>	<p>Funding</p> <p>(i) The ExA note the response provided to ExQ 5.0.8, do you consider that the test under s122 would be met if the land were to be acquired within the 5-year period referenced within the answer, but the development did not commence?</p> <p>(ii) Taken as a whole does the guidance, and the terms of the Act not only require there to a reasonable prospect of the requisite funding being available for acquisition, but for the development to be undertaken?</p>	<p>Section 122 Planning Act 2008 states that a DCO may include provision authorising the compulsory acquisition of land only if the Secretary of State is satisfied that the land:</p> <ol style="list-style-type: none"> Is required for the development to which the development consent relates Is required to facilitate or is incidental to that development, or Is replacement land which is to be given in exchange for the order land under section 131 or 132; and There is a compelling case in the public interest for the land to acquire compulsorily. <p>The Applicant has summarised its position relating to the provisions on funding in CA Guidance, but the Applicant would make further reference to paragraph 10 which states the Secretary of State <i>must ultimately be persuaded that the purposes for which an order authorises the compulsory acquisition of land are legitimate and are sufficient to justify interfering with the human rights of those with an interest in the land affected.</i></p> <p>The ExA through seeking to obtain certainty that the land will be used for the development is going beyond the tests set out in the Planning Act and Guidance. The Planning Act 2008 and Guidance are clearly limited to assessing the <i>purpose</i> for which the acquisition is sought and weighing that purpose against the impact caused. There is no requirement which would force any party to ensure that the purpose comes to fruition.</p> <p>However, the Applicant would acknowledge that in considering whether acquisition of land is justified based on the <i>purpose</i> for which it is acquired, the decision maker may wish to analyse the potentiality of that <i>purpose</i>, i.e the development commencing. The Applicant would submit that paragraphs 17-18 deal with this consideration and as mentioned above, the Applicant has made its position clear in this regard.</p> <p>The Applicant would further reference the precise terms on which it seeks to be granted the dDCO, being set out in article 21 that the undertaker may acquire compulsorily so much of the Order land as is required to carry out, facilitate or is incidental to the authorised development. This ensures that the operation of compulsory acquisition is in keeping with section 122. What this means in practice is that the Applicant is forced by the terms of the Order to acquire <i>only so much as is required to carry out the authorised development</i>. Table A, Statement of Reasons details the purposes for which compulsory acquisition and temporary powers are sought, and separately the dDCO sets out the precise basis on which rights and temporary powers can be exercised (see Schedules 5 and 7).</p> <p>Were the development not ever to be commenced (i.e not commenced within the 5 year period as required by requirement 2), then the Applicant submits that the undertaker may be at risk of breaching the</p>
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		<p>terms of the order, as they would have acquired land compulsorily that was not required or otherwise potentially not in accordance with the purposes set out in the Order. Not only would there be potential offences under the Planning Act 2008 but potentially recourse due to the impacts on human rights.</p> <p>However, the Scheme is not seeking compulsory acquisition powers for a development that will never commence. The Applicant has demonstrated to the satisfaction of <u>in accordance with</u> the relevant tests in guidance that it has sufficient funding to satisfy compulsory acquisition and otherwise has provided an indication on how the remaining shortfall of funding will be met. As a basic position, the undertaker as a local authority will not be seeking to purchase land for which it will have to take the liability of purchase, and ongoing ownership for where it has no anticipation that the relevant development would be built out.</p> <p>In the event that the development were to be paused pending further funding, or whatever other reason, including due to central government funding changes as has happened in the recent past with a number of projects not least the A303 Stonehenge, or HS2, then the undertaker would have a choice of either retaining the land until funding is secured or selling the land. In the event that the land is sold then this will be subject to the Crichel Down rules which are in place to ensure that the persons affected by the compulsory acquisition have the right of first refusal regarding and sale. The Applicant would submit that retaining the land pending further funding would not cause the undertaker to be in an automatic breach of the order as the land is still acquired for the purpose of the authorised development.</p> <p>It appears to the Applicant that the Panel are wrestling with a perceived uncertainty regarding the grant of compulsory acquisition powers and how to weigh this uncertainty against the public benefit of the Scheme. The Applicant would submit that Guidance has set out the tests required to consider relevant to this uncertainty in paragraphs 17 and 18 and has provided its position in relation to these paragraphs. The Applicant would note that as has been raised in other ExQs, there are specific and distinct policy tests set out in Guidance in relation to funding which seek to provide a policy basis for weighing the chances of a scheme progressing. The Applicant would submit that this consideration is relevant to the 5-year period of compulsory acquisition. This is because it is principally in place to balance the impact of blight over affected land. The question to be had over the use of land in the future in the event that the Scheme does not progress is not directly related to this particularly due to the protections in place under the Crichel Down rules.</p>
<p>Q5.0.8</p>	<p>Funding</p> <p>In the Funding Technical Note at paragraph 4.1.8 the Applicant advises that CA would have a</p>	<p>The Applicant understands that this question refers to article 21 of the Manston Airport Development Consent Order 2022 which states that no notice to treat can be served or declaration under section 4 of the 1981 Act executed after the later of:</p> <ul style="list-style-type: none"> a. A year after the period for legal challenge in section 117 of the 2008 expires; or

	<p>five-year window. While this would meet the usual timeframe within a DCO and the CA Regulations, the HIF funding on which the Applicant relies would appear to expire in 2027.</p> <p>(i) In these circumstances would it not be more appropriate to have a Requirement similar to that at Manston Airport not less?</p>	<p>b. the final determination of any legal challenge under section 118 of the 2008 Act.</p> <p>Fundamentally, the Applicant does not consider that its position regarding funding is equivalent to that in the Manston Airport example. The Applicant has in its response to ISH3.27 provided a more detailed explanation for the difference in the funding situations between Manston and this Scheme. In short, in Manston there was concern during examination that there was insufficient evidence that the applicant held adequate funds to indicate how an order that contains the authorisation of compulsory acquisition is proposed to be funded. This is not a concern in this Scheme, with clear adequate funding being in place for compulsory acquisition proposed by the Scheme. Therefore, a reduction in the time limit to exercise compulsory acquisition power to one year is not considered proportionate or necessary given the funding that is in place.</p> <p>However, the Applicant does note that under the current arrangement with Homes England, which the Applicant maintains is, and will always be, subject to the ability to change through negotiation between the parties, the Scheme cannot draw<u>will be drawing</u> down on additional<u>its</u> funding from the end of<u>by late</u> 2027. The Applicant is actively exploring options with Homes England to extend the funding period of the Scheme and will be arguing that is discussing options for extending the period for funding to 2029 is an appropriate period. The Applicant is not able to give further details regarding this discussion with Homes England and acknowledges that extension of funding period is within Homes England gift and not something that is within the control of the Applicant. However, the Applicant would, in trying to demonstrate the reasonableness of the assumption that such a timeframe could be extended, point to the fact thatThis will involve discussions with HMT/MHCLG. However, having regard to the Scheme's ability to unlock significant housing growth in the context of recent government announcements, that highlight the primacy of the need for housing across the United Kingdom, would suggest that such an extension cannot be considered unlikely<u>there is a reasonable prospect of this occurring</u>.</p> <p>Considering that acquisition of land may well be staggered to align with construction timetables, it would be important to maintain a compulsory acquisition period for as long a period as is reasonable. Clearly, the general position in DCOs is this to be 5 years. The Applicant would accept that in this case, with a mind to the period of HIF funding that a reduction of the timeline to exercise compulsory acquisition could be reduced to 3 years, to reflect more closely the factual funding situation. This change is not, to repeat, as a result of an inadequacy of funding as was the case in Manston Airport. By reducing the period for acquisition to 3 years.<u>Should it be required, the Applicant considers that retaining 5 years is an appropriate period for compulsory acquisition due to the reasonable prospect of the HIF funding availability period being extended with the consent of HMT and MHCLG. There is no reason for the Order to pre-suppose the result of those discussions. A five year period for compulsory acquisition is</u></p>
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