

# M60/M62/M66 Simister Island Interchange

**TR010064**

## **3.2 EXPLANATORY MEMORANDUM**

APFP Regulation 5(2)(c)

Planning Act 2008

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

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

**M60/M62/M66 Simister Island Interchange  
Development Consent Order 20[ ]**

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**3.2 Explanatory Memorandum**

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# **National Highways**

The M60/M62/M66 Simister Island Interchange  
Development Consent Order 20[ ]

## **Explanatory Memorandum**

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## 1 Summary

- 1.1 This memorandum explains the purpose and effect of each article of, and relevant Schedules to, the draft Development Consent Order ("the Order"), as required by Regulation 5(2)(c) of the Infrastructure Planning (Applications: Prescribed Forms and Procedure) Regulations 2009<sup>1</sup>.

## 2 Purpose of the Order

### *Nationally Significant Infrastructure Project – alteration of a highway*

- 2.1 The general arrangement of the scheme is shown on the General Arrangement Plans (document reference TR010064/APP/2.2). The M60/M62/M66 Simister Island Interchange ("the Scheme") is described in detail in Chapter 2 of the Environmental Statement (document reference TR010064/APP/6.1). The main components of the Scheme are:

- Construction of a new loop road (the 'Northern Loop') to provide a new link between the M60 eastbound to the M60 southbound. This will allow drivers to continue along the M60 without having to leave the motorway, navigate the roundabout and re-join the M60.
- Widening of the M66 southbound through J18 from two lanes to four lanes.
- Widening of the existing M60 northbound to M60 westbound link road from one lane to two lanes.
- Realignment of the M66 southbound slip road to M60 J18 to accommodate the Northern Loop structure, including a new overbridge where the slip road crosses the Northern Loop and realignment of the left turn lane to the M62 eastbound.
- Conversion of the hard shoulder along the existing four-lane Controlled Motorway between M60 J17 to J18 into a running lane (both sides).
- Construction of a new hard shoulder on the M60 between J17 and J18 in the existing verge (both sides).
- Renewal of signs and signals, including new signs and street lighting at M60 J18 and its approaches, renewed traffic signals at the M60 J18 roundabout, and new gantries on the M66 southbound side and between M60 J17 to J18.
- Construction of associated drainage works including new attenuation ponds to accommodate surface water run-off from the highway and improve water quality.

- 2.2 The Scheme will:

- Improve the journey experience for users of this section of our network by:
  - Reducing congestion at peak times;

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<sup>1</sup> S.I. 2009/2264

- Reducing journey times;
- Delivering more reliable journey times;
- Provide a scheme that is safe for all road users;
- Minimise the impact of our scheme on the surrounding environment including within Noise Important Areas and Air Quality Management Areas; and
- Support future economic growth across the Greater Manchester area by delivering against local aspirations set out in regional and local authorities' transport strategies and local plans.

2.3 The Scheme is a nationally significant infrastructure project (NSIP) within Sections 14(1)(h) and 22(1) of the Planning Act 2008 ("2008 Act"). Under Section 22 an NSIP must fall within one of the three categories specified, which are expressly stated to be alternatives. Whilst the Scheme includes improvement of existing highway and construction of new highway, it is predominantly alteration of existing highway within the meaning of Section 22(1)(b). The Scheme is wholly located in England. National Highways Limited, being a strategic highways company, is the highway authority for the highway affected by the Scheme. The area of development within the Order Limits is 34.4 hectares comprising 23.3 hectares of permanent land take and 11.1 hectares of temporary land take which is greater than the minimum threshold of 15 hectares stipulated in Section 22(4)(a) in relation to the alteration of a motorway. The alterations to the highway are likely to have a significant effect on the environment and the application is accompanied by an Environmental Statement (document reference TR010064/APP/6.1). The Scheme therefore complies with all requirements of Section 22(3) of the 2008 Act.

2.4 As the proposed authorised development is an NSIP, consent under the 2008 Act is required (section 31 of the 2008 Act). Under section 37 of the 2008 Act, an order granting development consent may only be made if an application for it is made (through the Planning Inspectorate) to the Secretary of State.

### **3 Associated development**

3.1 The Order also seeks consent for works which would constitute associated development, and which is included in the "authorised development" listed in Schedule 1 of the Order.

3.2 Guidance<sup>2</sup> on associated development has been issued by the Secretary of State for Housing, Communities and Local Government ("the Guidance"). In the Guidance, associated development is described as being "*typical of development brought forward alongside the relevant type of principal development or of a kind that is usually necessary to support a particular type of project*" (paragraph 6) and "*requires a direct relationship between associated development and the principal development. Associated development should therefore either support the construction or operation of the principal development, or help address its impacts. Associated development should not be an aim in itself but should be subordinate to the principal development*" (paragraph 5).

3.3 Annex B of the Guidance listed the following as examples of associated development for highway NSIPs:

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<sup>2</sup> Guidance on associated development applications for major infrastructure projects

- (a) replacement roadside facilities where this becomes necessary due to the elimination of an existing facility by highway improvement infrastructure associated with cycle/pedestrian access;
- (b) off-site landscaping, habitat creation and other environmental works;
- (c) off-site drainage works;
- (d) alteration/diversion/stopping up of local roads, accesses and other rights of way; and
- (e) off-site diversion of statutory undertakers' equipment.

3.4 However, in some cases it should be recognised that there may be some overlap, or the absence of the clear boundary, between associated development and works which form part of the NSIP. For instance, there may be some on-highway, and some off-highway, diversion of the same piece of statutory undertaker equipment.

3.5 For this reason, and noting that there is no requirement for a development consent order to distinguish between these two categories, National Highways has chosen not to differentiate the NSIP and associated development works in Schedule 1 to the Order. Ultimately, all elements of the authorised development either constitute part of the NSIP or are "associated development" within the meaning of section 115(2) of the 2008 Act, and so can properly be authorised by the Order.

3.6 For the avoidance of doubt, the diversions of statutory undertaker equipment and apparatus required for the Scheme do not constitute an NSIP in their own right.

3.7 In order to ensure that the development and the associated development (once authorised) are constructed efficiently and without impediment, the Order contains the powers to carry out the works listed in Schedule 1. The use of such measures was explicitly approved in the A19/A1058 Coast Road (Junction Improvement) Development Consent Order 2016 (the "A19 Order") and extensive provisions were used in the A14 Cambridge to Huntingdon Improvement Scheme Development Consent Order 2016 (the "A14 Order"), the M4 Motorway (Junctions 3 to 12) (Smart Motorway) Development Consent Order 2016 (the "M4 Order"), the A19/A184 Testo's Junction Alteration Development Consent Order 2018 (the "Testo's Order"), the Silvertown Tunnel Development Consent Order 2018 (the "Silvertown Order"), the A63 (Castle Street Improvement, Hull) Development Consent Order 2020 (the "Castle Street Order"), the Windy Harbour to Skippool Improvement Scheme Development Consent Order 2020, (the "Windy Harbour Order").

#### **4 Ancillary Matters**

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

4.2 The main ancillary matter is a power to acquire land or rights over land compulsorily or by agreement, in accordance with section 120(4) of the 2008 Act, required for the authorised development, or to facilitate, or that are incidental to the authorised development under section 122 of the 2008 Act. A justification for these powers is set out in the Statement of Reasons (document reference TR010064/APP/4.1) that accompanies the application.

4.3 Further to providing these powers, the Order seeks to apply and modify statutory provisions that relate to the compulsory acquisition of land. Under sections 117 and 120(5) of the 2008 Act, an order

containing provisions of this nature must be made by Statutory Instrument. The Order is therefore presented in that form.

- 4.4 Other ancillary matters include the stopping up of existing highways and private means of access in the vicinity of the route, and the classification of highways.

## **5 Draft Order**

- 5.1 The purpose and effect of the provisions of the Order are now explained in sequence. While the Infrastructure Planning (Model Provisions) (England and Wales) Order 2009<sup>3</sup> has been repealed, the Order draws on the model provisions (general and highway), as well as precedent set by development consent orders that have been made to date.

### **Part 1 – Preliminary**

#### *Article 1 – Citation and commencement*

- 5.2 Article 1 sets out the name of the Order, establishing how it may be cited in subsequent legislation. It also states the date on which the Order comes into force.

#### *Article 2 – Interpretation*

- 5.3 The purpose of article 2(1) is to define terms used in the remainder of the Order.
- 5.4 The following definitions are used in articles in the remainder of the Order that are typical of highway schemes:
- (a) "the 1984 Act";
  - (b) "carriageway";
  - (c) "cycle track": this term is used interchangeably with "cycle way" in the application documents and both are intended to have the meaning defined in this article. Note that the definition is modified to make it clear that all cycle tracks authorised by the Order provide a right of way on foot;
  - (d) "footway" and "footpath";
  - (e) "street";
  - (f) "street authority"; and
  - (g) "trunk road".
- 5.5 Other definitions to note include:

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<sup>3</sup> S.I. 2009/2265



- (a) "maintain" which includes inspect, repair, adjust, alter, improve, landscape, preserve, remove, reconstruct, refurbish or replace, provided such works do not give rise to any materially new or materially different significant adverse environmental effects to those identified in the environmental statement and any derivative of "maintain" is to be construed accordingly.

The inclusion of "adjust" or "alter" is justifiable on the basis that during maintenance operations changes to existing specifications may be required. Similarly, "remove" is included as it may be necessary to remove something in order to repair, clean or replace it, for example. The proper maintenance of the highway is an essential part of ensuring the safety of road users. It is therefore appropriate to ensure that National Highways can carry out the maintenance activities it needs to in order to ensure continued public safety.

National Highways considers the operations included within the definition of "maintain" is appropriate for the future operation of the Scheme and has precedent in made DCOs to date, such as the M42 Junction 6 Development Consent Order 2020 (the "M42 Order") and the A428 Black Cat to Caxton Gibbet Development Consent Order 2022 ("Black Cat") (both of which have the same operations included in the definition of 'maintain'). It should be kept in mind that the power to maintain in the Order is expressed as relating to the authorised development; in other words, it does not extend to matters beyond the development as authorised. In addition, activities that would give rise to materially new or materially different significant adverse environmental impacts in comparison with those reported in the environmental statement are excluded from the ambit of permissible maintenance activities for the purposes of this definition, which means there are effective limits on the extent of the powers in line with the parameters that have been assessed.

The limitation of the operation of the permitted maintenance activities by reference to materially new or materially different environmental effects is well established and has precedent in the majority of consented highways DCOs including the aforementioned M42 Order and Black Cat DCOs.

Multiple orders permitted by the Secretary of State have gone further and included wording intended to clarify that only changes that are detrimental to those likely significant effects that have been assessed as part of the environmental statement are intended to be restricted. The A14 Order and the M20 Junction 10a Development Consent Order (the "M20 Order") both refer to "materially worse adverse effects" and also the A57 Link Roads Development Consent Order 2022/1206 cited "materially new or materially worse" environmental effects.

National Highways has expanded the "materially new or materially different" test to only apply to "significant adverse" environmental effects. The purpose is to clarify that the Order is not intended to prevent variations which would result in an improved environmental outcome. Without clarification, the "materially new or materially different" test can operate to unintentionally restrict the delivery of beneficial improvements to the assessed environmental outcomes, such as opportunities which are identified during the detailed design process to deliver the Scheme in a way that is less harmful to the environment and result in a materially new or different beneficial environmental effect. Reference to 'significant' is made to align with the fact that only significant environmental effects need to be assessed in the Environmental Statement and only a departure from an assessed outcome that is of significance should be restricted. The use of the term 'adverse' clarifies that only a change which is detrimental is restricted, but one that is beneficial is not.

The test relating to materially new or material different significant adverse environmental effects is applied consistently throughout the Order and in addition to Article 2 (interpretation) it appears at Article 6 (limits of deviation), Schedule 1 (authorised development), Requirement 8 (surface and foul water drainage) and Requirement 12 (application made under requirements). The wording operates to limit the works that can be undertaken under the Order or those which can be approved by the Secretary of State subsequently;

- (b) "the Order land", which comprises all of the land to be acquired or used permanently or temporarily as shown on the land plans;
- (c) "the Order limits", which references the extent of the area within which the authorised development may be carried out.

- 5.6 Article 2(2)-(3) provides that a broad definition of 'rights over land' applies to the Order.
- 5.7 Article 2(4) provides that measurements are approximate. The purpose of this is to ensure that if, upon construction of the authorised development, it transpires that the distances are marginally different to those listed in the Order, there is no issue over whether the authorised development is permitted by the Order. Thus, this provision allows for a small tolerance with respect to any distances and points although works will take place within the limits of deviation. It is commonplace to include such provision in an act or instrument authorising linear infrastructure and the model provisions included similar wording in article 1(3).
- 5.8 Article 2(5) provides that areas given in the book of reference are approximate as these are not covered by article 2(4). This is intended to clarify the position of the areas in the book of reference, the purpose and effect is the same as set out in the previous paragraph.
- 5.9 Article 2(6) provides that references to any statutory body include that body's successor having jurisdiction over the authorised development.
- 5.10 Articles 2(7) and 2(8) tie references to lettered/numbered points and numbered works in the Order to the streets, rights of way and access plans or the classification of roads plans.
- 5.11 Article 2(9) provides that the expression "includes" is to be construed without limitation.

## **Part 2 – Principal Powers**

### *Article 3 - Development consent etc. granted by the Order*

- 5.12 Article 3(1) grants the development consent by giving National Highways the power to construct the authorised development, which is described in Schedule 1. This article makes the consent subject to the requirements that are listed in Schedule 2. This is based on article 2 of the model provisions.
- 5.13 Article 3(2) states that any enactment applying to land within the Order limits has effect subject to the provisions of the Order. This provision ensures that the modifications made in the Order apply to any enactments that may affect the authorised development and further ensures consistency with legislation more generally. There is precedent for such a provision, for example the Secretary of State approved the same wording in the A14 Order (see article 5(2)) and in the Testo's Order (see article 3(2)).

#### *Article 4 - Maintenance of authorised development*

- 5.14 This article empowers National Highways to maintain the authorised development. "Maintain" is defined in article 2(1) as including "inspect, repair, adjust, alter, improve, landscape, preserve, remove, reconstruct, refurbish or replace", with these terms bearing their common-sense meanings. This definition is broader than the equivalent in section 329 of the Highways Act 1980, which simply states that maintenance "includes repair" – there is no explicit mention of inspect, adjust, alter, improve, landscape, preserve, remove, reconstruct, refurbish or replace. Article 4 therefore supplements the maintenance powers under the Highways Act 1980 and ensures that National Highways has the necessary powers to maintain the Scheme. It is considered necessary and appropriate to adopt the broader definition.
- 5.15 It should be noted that powers of maintenance are subject to other provisions in the Order, in particular article 10, which makes provision in relation to maintenance by highway authorities.

#### *Article 5 - Maintenance of drainage works*

- 5.16 The purpose of this article is to make it clear that any realignment of drains or other works to them that are carried out as part of the Scheme do not affect the existing allocation of responsibility for maintenance of those drains, unless this is agreed between National Highways and the responsible party. The provision is well precedented (see, for example, article 4 of the A14 Order and article 5 of the Testo's Order) and is considered a sensible inclusion to clarify who has responsibility for the maintenance of drainage works.

#### *Article 6 - Limits of deviation*

- 5.17 Since the authorised development involves linear works, article 6 provides for limits of deviation to allow for a lateral deviation from the lines and situations of the authorised development within the limits of deviation shown on the works plans, and vertical deviation of the linear works subject to certain maximums.
- 5.18 The limits can be exceeded where it is demonstrated to the Secretary of State's satisfaction (and the Secretary of State has certified accordingly following consultation with the relevant planning authority) that such deviation would not give rise to any materially new or materially different significant adverse environmental effects from those reported in the Environmental Statement.
- 5.19 The purpose of this provision is to provide National Highways with a proportionate degree of flexibility when constructing the Scheme, reducing the risk that the Scheme as approved cannot later be implemented for unforeseen reasons but at the same time ensuring that any flexibility will not give rise to any materially new or materially different significant adverse environmental effects from those reported in the environmental statement.

#### *Article 7 - Benefit of Order*

- 5.20 Article 7 overrides section 156(1) of the 2008 Act (as permitted by section 156(2)) to give the benefit of the Order to National Highways rather than anyone with an interest in the land. It would be impracticable for a variety of landowners to implement parts of the Order in an uncoordinated manner, which might be the case if section 156(1) were to remain.

- 5.21 The purpose of article 7(2) is to clarify the exceptions where the Order will self-evidently benefit others, e.g. rights for statutory undertakers. Absent this provision, there would be a contradiction since strictly speaking only National Highways could benefit from these works. The same wording was accepted and approved by the Secretary of State in the A14 Order (see article 8(2)), the M4 Order (see article 7(2)) and in the Testo's Order (see article 7(2)).

*Article 8 - Consent to transfer benefit of Order*

- 5.22 This article allows powers under the Order to be transferred to others by National Highways. The consent of the Secretary of State is required for a transfer or grant, except where it is made to specified companies in relation to certain utility diversion works.

*Article 9 – Planning permission*

- 5.23 This article provides that, if planning permission is granted pursuant to the Town and Country Planning Act 1990 in respect of any part of the land within the Order limits following the Order coming into force and that development is not an NSIP but is required to complete, construct, use or operate the authorised development, then the carrying out of the development pursuant to that planning permission will not breach the terms of the Order or section 161 of the Act. The Article also clarifies that where an overlapping planning permission is approved and implemented that will not prevent the remainder of the authorised development from being implemented pursuant to the Order.

**Part 3 – Streets**

*Article 10 – Street works*

- 5.24 Article 10 allows the undertaker to interfere with and execute works in or under the streets within the Order limits which are not trunk roads for the purposes of the authorised development. The authority given by this article is a statutory right for the purposes of sections 48(3) and 51(1) of the New Roads and Street Works Act 1991 (the "1991 Act"). Certain provisions in the 1991 Act apply to works carried out under this article, such as the need to give advance notice (section 54 1991 Act) and notice of the start date for works (section 55 1991 Act). Other provisions of the 1991 Act are however disapplied by article 11(3) (application of the 1991 Act) and further justification for this approach is provided under Article 11 below.

*Article 11 - Application of the 1991 Act*

- 5.25 Article 11 modifies the application of the 1991 Act to works carried out under the powers of the Order.
- 5.26 Article 11(1) provides that works carried out under the powers of the Order which match the description of "major highway works" in the 1991 Act will be treated as major highways works for the purposes of the 1991 Act. The effect of this is to clarify that the provisions for sharing the burden of dealing with apparatus in the street (under sections 84 and 85 of the 1991 Act), which would normally apply only to major works carried out by the highway authority, will apply in respect of the works authorised by the Order irrespective of who in fact carries them out.
- 5.27 "Major Highways Works" are defined at section 86 of the 1991 Act. The definition includes, at sub-sections 86(3)(b) and (f), works undertaken under powers conferred by sections 64 and 184 of the Highways Act 1980. As that would not be relevant in this context (where the works will be undertaken

under the powers of the Order), these sub-sections are omitted from article 9(1)(a). Works equivalent to works undertaken under those sections of the Highways Act 1980, but carried out under powers conferred by the Order, are included through article 9(1)(b). The effect is that any works which would be "major highway works" under the 1991 Act if carried out by a highway authority in relation to one of its streets are also "major highway works" if carried out under the powers of the Order regardless of who carries them out.

- 5.28 Article 11(3) provides that certain provisions of the 1991 Act listed in that paragraph will not apply. The disapplication of these provisions (which are designed primarily to regulate the carrying out of street works by utility companies in respect of their apparatus) is appropriate given the scale of works proposed under the Order, the specific authorisation given for those works by the Order (particularly article 3 and Schedule 1), and the provisions in the Order (including the requirements) which would regulate the carrying out of the Order works.
- 5.29 Articles 11(4) to 11(6) apply certain provisions of the 1991 Act (listed in article 11(5)) to any streets which are temporarily stopped up under the Order. This is for two reasons: first, it prevents any confusion as to whether works in respect of a temporarily stopped up street are "street works" for the purposes of the 1991 Act and, secondly, it simplifies the implementation of the works by providing for a single process in respect of streets which are stopped up and those which are not.
- 5.30 Article 11(7)(a) provides that nothing in article 12 shall affect the ability of the local highway authority (under s.87 of the 1991 Act) to declare a street in its area a maintainable highway, which would make maintenance of the street (once completed) the responsibility of the local highway authority, and would mean that the 1991 Act would apply to street works carried out in that street. Further, it provides that National Highways will not be under the duties that apply to a "street authority" for the purposes of the 1991 Act by virtue of being responsible for the maintenance of a street under article 12.
- 5.31 Article 11(7)(b) makes it clear that the maintenance obligations imposed by article 11 do not override the provisions of the 1991 Act that govern procedures for street works, i.e. works in streets involving the placing of or alteration to apparatus in the street. After the implementation of the Order it is appropriate that the 1991 Act should govern such works as it is specifically designed to ensure a fair and efficient procedure for the various parties affected by such works.
- 5.32 These modifications generally reflect those made in other highway development consent orders, for example the M4 Order, the A19/A1058 Coast Road (Junction Improvement) Development Consent Order 2016 (the "A19 Order") and the Testo's Order.

*Article 12 - Construction and maintenance of new, altered or diverted streets and other structures*

- 5.33 The standard position in respect of maintenance of streets is that National Highways is responsible for maintaining trunk roads. Other streets are to be maintained by the local highway authority in respect of highways maintainable at the public expense, or whichever body is responsible for the maintenance of the street in respect of streets which are not maintainable at the public expense. This is reflected in articles 12(1) and (2). These provisions are subject to any agreement to the contrary between National Highways and the relevant street or highway authority.
- 5.34 The effect of articles 12(3) and 12(4) are that in any action for damages against National Highways alleging failure to maintain a street, National Highways will have the defence that it had taken such care as was reasonably required in the circumstances to secure that the street was not dangerous for traffic.

This extends the provision in section 58 of the Highways Act 1980 to National Highways and draws on the approach taken in article 21 of the A556 (Knutsford to Bowdon Improvement) Development Consent Order 2014 (the "A556 Order") and repeated in article 9 of the A19 Order and article 12 of the M4 Order.

- 5.35 While National Highways would benefit from the equivalent defence in the Highways Act 1980 in respect of trunk roads, for which it is the highway authority, the proposed development includes roads which are not trunk roads and so this article is needed to ensure National Highways is covered by this defence in respect of all the roads that comprise the authorised development.

*Article 13 - Classification of roads etc.*

- 5.36 The designation of highways and the specification of the classes of traffic authorised to use a highway, are ancillary matters which may be included in a development consent order. These matters are addressed by this article, which is integral to the implementation of the Scheme, and therefore are considered appropriate to be included in the Order as an ancillary matter under section 120(3) of the 2008 Act.

- 5.37 In particular:

- Paragraph (1) of article 13 provides for the roads described in Part 1 of Schedule 3 to become special roads. Under paragraph (1) they will be classified as special roads for the purpose of any enactment or instrument which refers to highways classified as special roads, and will be provided for the use of traffic of Classes I and II as set out in the Highways Act 1980.
- Paragraph (2) provides for the roads in Part 1 of Schedule 3 to be classified as trunk roads from the date that the authorised development is open to traffic.
- Paragraph (3) confirms that the public rights of way in Part 3 of Schedule 3 will be provided, and open for use from the date on which the authorised development is open for traffic or as soon as reasonably practicable following completion of the public right of way by agreement with the relevant highway authority.
- Paragraph (4) confirms that the private means of access in column 2 of Part 4 of Schedule 3 will be provided and to be open no later than the date on which the authorised development is open to traffic.

- 5.38 The purpose of paragraph (6) is to confirm that the matters covered in paragraphs (1) to (5) could be varied or revoked in the future pursuant to an appropriate statutory authority without the need to apply under the 2008 Act for an amendment to the Order.

*Article 14 - Temporary closure and restriction of use of streets*

- 5.39 This article allows for the temporary closure, alteration, diversion or restriction of streets for the purposes of the Scheme.
- 5.40 Access for pedestrians must be provided, and where National Highways is not the street authority, consent to any such stopping up or restriction must be sought from the street authority (article 14(3) and (4)).

- 5.41 Article 14(2) confers a power on National Highways where the use of a street has been temporarily closed under this article to use it as a temporary working site.
- 5.42 Article 14(6) states that where a street authority fails to notify National Highways of its decision in respect of an application for consent within 28 days of the application being made it is deemed to have given its consent. It is considered necessary to remove the possibility for delay and provide certainty that the authorised development can be delivered by National Highways in a timely fashion. The article is a standard provision in highways development consent orders (see for example, article 11 of the A19 Order and article 12 of the Testo's Order). Article 14(7) requires the street authority to be notified of the deemed consent provisions within Article 14(6).

*Article 15 - Permanent stopping up, restriction of use of streets and public rights of way*

- 5.43 This article allows streets and public rights of way named in Parts 1 and 2 of Schedule 4 to be stopped up (i.e. the legal right of way along them to be extinguished). In the case of Part 1, no substitute is to be provided. In the case of Part 2 a substitute is to be provided and is described. For Part 2, the street or public right of way may not be stopped up unless one of the conditions referred to in paragraph (2) is met.
- 5.44 Since the definition of a "street" in section 48 of the 1991 Act includes highways and footways the stopping up and diversion of footpaths and footways are also dealt with in this article and Schedule 4. The wording is based on numerous highways development consent orders (see for example article 12 of the A19 Order and article 13 of the Testo's Order).

*Article 16 - Access to works*

- 5.45 This article allows accesses to public highways to be created or improved. It provides National Highways with a general power to form and lay out means of access, or improve existing means of access rather than listing accesses in a schedule, to provide an appropriate degree of flexibility in case the need for an access or an improvement to an existing access only becomes apparent at a later stage in the implementation of the proposed development. These powers are equivalent to those available to National Highways when implementing schemes under the Highways Act 1980 (the "1980 Act"). The 1980 Act allows a highway authority to provide "a new means of access to any premises" where it considers it "necessary or expedient in connection with the construction, improvement or alteration of a highway". The statutory power is subject to securing the consent of the authority which is, or which will become, the highway authority for that highway. The drafting of Article 16 is considered to be appropriate as it will help to ensure that the authorised development can be carried out expeditiously by allowing the undertaker to create new temporary accesses as and where required, particularly in response to requests from landowners, occupiers and other affected parties.

*Article 17 - Traffic regulation*

- 5.46 The purpose of this article is to provide National Highways with powers to make traffic regulation orders in relation to roads for which it is not the highway authority, so that it can implement traffic management measures (e.g. restrictions on the use of roads) necessary to construct the authorised development. This provision is not included in the Model Provisions but has been consistently approved in development consent orders granted under the 2008 Act. This draws on the approach taken in article 37 of the A556 Order and article 43 of the M4 Order and article 16 of the Testo's Order.

- 5.47 This article would, at any time prior to 12 months following the opening of the authorised development for public use, allow National Highways, in so far as it is necessary or expedient for the purposes of the construction, maintenance or operation of the authorised development, to:
- (a) revoke, amend or suspend in whole or in part any order made under the 1984 Act;
  - (b) permit, prohibit or restrict the stopping, waiting, loading or unloading of vehicles on any road;
  - (c) authorise the use as a parking place of any road;
  - (d) make provision as to the direction or priority of vehicular traffic; and
  - (e) permit or prohibit vehicular access to any road.
- 5.48 Implementation of any of the measures is subject to the prior approval of the traffic authority in whose area the roads are situated. Provision is also made for the chief officer of police and the relevant traffic authority to be notified in advance. This complies with the consultation and publicity requirements for traffic regulation orders under the Secretary of State's Traffic Orders (Procedure) (England and Wales) Regulations 1990/1656.
- 5.49 Article 17(11) states that where a traffic authority fails to notify National Highways of its decision in respect of an application for consent within 28 days of the application being made it is deemed to have given its consent. It is considered necessary to remove the possibility for delay and provide certainty that the authorised development can be delivered by National Highways in a timely fashion. The article is a standard provision in highways development consent orders (see for example, article 11 of the A19 Order and article 12 of the Testo's Order). Article 17(12) requires the traffic authority to be notified of the deemed consent provisions within Article 17(11).

#### **Part 4 – Supplemental powers**

##### *Article 18 - Discharge of water*

- 5.50 This article establishes statutory authority for National Highways to discharge water into a sewer, watercourse or drain in connection with the carrying out or maintenance of the authorised development.
- 5.51 This statutory authority is subject to National Highways obtaining the consent of the owner of the sewer, watercourse or drain, but that consent cannot be withheld unreasonably. National Highways is required to identify the 28 day deemed consent period when seeking such consent.

##### *Article 19 - Protective work to buildings*

- 5.52 The purpose of this article is to allow National Highways to undertake protective works to buildings affected by the authorised development, such as underpinning, and to set out the procedure that will apply in these circumstances. The power to carry out protective works and or enter onto land is exercisable after 14 days' notice. National Highways considers 14 days to be reasonable on the basis that, where protective works are required to buildings, then both the Applicant and owners/occupiers have a mutual interest to ensure works are undertaken proactively as soon as possible to ensure that damage or further damage is not caused to the buildings. The period of 14 days is consistent with other time periods specified in the draft Order (for example, taking temporary possession of land). The wording



has broad precedent (see article 16 of the A19 Order and article 18 of the A14 Order and in the Testo's Order see article 18).

*Article 20 - Authority to survey and investigate the land*

- 5.53 This article gives National Highways the power to enter any land shown within the Order limits for the purpose of surveying and investigating. The article provides that National Highways must give 14 days' notice before exercising the powers of entry, which is consistent with section 53 of the Planning Act 2008, and that compensation is payable for any loss or damage. The consent of the local highway authority or street authority is required where intrusive investigations are required in a highway or street and National Highways is required to identify the 28 day deemed consent period when seeking such consent.
- 5.54 The drafting in paragraph (1) authorises surveys on any land shown within the Order limits or affected by the authorised development. This potential extension beyond the Order limits has precedent in the Silvertown Order. Powers to make excavations and boreholes, to investigate groundwater and discharge water onto land are also included, to ensure that National Highways is able to undertake all necessary activities in connection with surveying the land. The ability to survey land affected by the authorised development which may be adjacent to the Order limits is required so that National Highways can be confident that the surveys can be conducted to assess the effects of the Scheme, or on the Scheme, from outside its limits. It imposes a lesser burden than seeking compulsory acquisition of such land. This, again, is a standard provision with broad precedent (see article 20 of the M20 Junction 10a Development Consent Order 2017 (the "M20 Order") and article 19 of the Testo's Order).

**Part 5 – Powers of acquisition and possession**

*Article 21 - Compulsory acquisition of land*

- 5.55 This article authorises the acquisition of land by compulsory purchase. It grants the power to acquire so much of the Order land as is required for the project. The power of acquisition over the Order land is qualified and restricted by sub-article (2) which confirms mineral deposits are excluded in accordance with article 22, the maximum time limit of 5 years applies to the powers of acquisition (article 23), certain parcels of land are restricted to the acquisition of rights and imposition of restrictive covenants (article 24), notwithstanding that certain land can only be acquired temporarily the undertaker is permitted to acquire new rights, subsoil or airspace (article 30(9)), subject to the protective provisions in Schedule 9 the undertaker may acquire land and rights belonging to statutory undertakers (article 32) and nothing in the Order permits the undertaker to enter upon Crown Land or interfere with land or rights held by or on behalf of the Crown (article 34).

*Article 22 - Compulsory acquisition of land - incorporation of the mineral code*

- 5.56 This article incorporates Part 2 of Schedule 2 of the Acquisition of Land Act 1981. This means that where National Highways acquires land under the powers of the Order, it will not acquire any mineral deposits present in the land (other than those necessarily extracted or used in constructing the authorised development) unless they are expressly included in the conveyance. This approach is consistent with article 19 of the model provisions.

*Article 23 - Time limit for exercise of authority to acquire land compulsorily*

- 5.57 This article gives National Highways five years to issue 'notices to treat' or to execute a 'general vesting declaration' to acquire the land that is subject to the power of compulsory purchase. These are the two main procedural methods by which the process of compulsorily acquiring land may be undertaken should the Order be made.
- 5.58 The article also sets a 5 year time limit on the power of National Highways to take temporary possession of land, although it does not prevent National Highways from remaining in possession of land after that time if it took possession within the 5 year limit. This article was included in the model provisions as article 20 and has consistently been approved by the Secretary of State (see for example article 22 of the A14 Order and article 22 of the Testo's Order).

*Article 24 - Compulsory acquisition of rights and imposition of restrictive covenants*

- 5.59 This article allows for rights in land to be acquired as well as the land itself, and also for new rights to be created and the imposition of restrictive covenants over land.
- 5.60 This article provides for such rights as may be required to be acquired by National Highways over land which it is authorised to acquire under article 21. Rights can be acquired for the benefit of National Highways, statutory undertakers and other persons who may require a replacement right for one lost as a result of the development of the Scheme, such as a right of access or a right to connect into services. The public benefit of this power is that it allows National Highways, where possible, to reduce the area of permanent land acquisition and rely on rights instead. A provision of this kind is usual in Transport and Works Act orders and Hybrid Bills, and has been followed in a number of development consent orders (for example article 23 of the A14 Order and article 23 of the Testo's Order).
- 5.61 Article 24(2) provides that for the land described in Schedule 5, National Highways' powers of compulsory acquisition are limited to the acquisition of such rights as may be required for the purposes set out in the Schedule.
- 5.62 Article 24(3) provides that where National Highways needs only to acquire rights over land, it shall not be obliged to acquire any greater interest in that land.
- 5.63 Article 24(4) and Schedule 6 impose modifications to the compulsory purchase and compensation provisions under general legislation. They do not affect the entitlement to compensation, but generally ensure that the compensation procedure applies to the additional categories of acquisition covered by the Order - the creation of new rights and the imposition of restrictive covenants in particular. This is a consequence of the extension of land acquisition powers to these categories (done to allow lesser land interests to be acquired). For the purpose of section 126(2) of the 2008 Act, the relevant compensation provisions are modified only to the extent necessary to ensure that they apply properly to the acquisition of rights, and not to affect the amount of compensation to which landowners would be entitled. Furthermore, the provisions have been amended so that the time limits are consistent with the Order (five years as opposed to three years) and the appropriate references to the 2008 Act.
- 5.64 Pursuant to the power in this article, Article 24(5) expressly permits the undertaker to vest rights acquired for a statutory undertaker or other body, directly in that entity. This is consistent with the overarching aim of the power, namely to reduce the land the undertaker might otherwise have to acquire in order to grant a right for the benefit of a statutory undertaker or other body.

*Article 25 - Private rights over land*

- 5.65 In order for it to be possible to implement the authorised development, provision is needed for the extinguishment of private rights in the Order land that would otherwise be incompatible. Article 25 supplies that provision.
- 5.66 Article 25(1) provides for the extinguishment of private rights over the Order land subject to compulsory acquisition under the Order, from the moment of acquisition or occupation of that land.
- 5.67 Article 25(2) provides for the extinguishment of existing private rights over land that is subject to the compulsory acquisition of new rights (but where the underlying land is not subject to powers of compulsory acquisition), if the exercise of those existing rights is inconsistent with the implementation of the Scheme, from the date of acquisition of the right or occupation of the underlying land.
- 5.68 Article 25(3) provides that rights over Order land that is already owned by National Highways are also extinguished, at the point that any activity authorised by the Order interferes with or breaches those rights.
- 5.69 Article 25(4) provides for the temporary suspension of private rights over Order land that is not acquired but is occupied temporarily by National Highways in order to construct the proposed development. The suspension is for the duration of the occupation.
- 5.70 Articles 25(5) to 25(8) make provision for compensation and for circumstances where rights are preserved.
- 5.71 Article 25(9) sets out a list of matters deemed to be private rights to provide certainty as to the scope of the article. The list of deemed private rights is broad in order to ensure that any right which could potentially interfere with the implementation of the proposed development can be extinguished. A similar list appears in the equivalent article in the A14 Order (see article 25) and the A19 Order (see article 24) and in the Testo's Order (see article 24).

*Article 26 - Modification of Part 1 of the Compulsory Purchase Act 1965*

- 5.70 The purpose of this article is to ensure consistency between the standard terms of highways development consent orders and the Compulsory Purchase Act 1965 (as amended by the Housing and Planning Act 2016) as applied by section 125 of the 2008 Act. These modifications have broad precedent in Schedule 14 to the High Speed Rail (London - West Midlands) Act 2017.

*Article 27 - Application of the 1981 Act (the Compulsory Purchase (Vesting Declarations) Act 1981)*

- 5.72 This article applies (with minor modifications to make the provisions appropriate to the context of acquisition under powers in a development consent order) the provisions of the 1981 Act to compulsory acquisition under the Order. The effect of Article 27 is that subject to the powers of compulsory acquisition, National Highways has the option of acquiring Order land, or a right within the Order land for itself or for the benefit of another party consistent with Article 24 (compulsory acquisition of rights and imposition of restrictive covenants), by vesting declaration.
- 5.73 Vesting declarations are one of two ways of acquiring land that is subject to compulsory purchase. The other method involves serving a notice to treat on the landowner to commence the process of establishing the acquisition price, after which title in the land is transferred. The date on which title will transfer is uncertain under the notice to treat method.

- 5.74 A vesting declaration, in contrast, sets the date on which title in the land is transferred to the acquiring authority. Compensation is negotiated or determined and paid later. Vesting declarations, therefore, allow title in the land to pass to the acquirer more quickly than using the notice to treat method, and also allow several parcels to be acquired at once. Their use is subject to serving notices and observing time limits as required by the 1981 Act (as amended by the Housing and Planning Act 2016).
- 5.75 The modifications ensure consistency with the standard five year period sought under the Order for acquisition rights. It further ensures that the appropriate references are made to the Act. The modifications are based in large part on previous highways NSIPs, and following amendments to the 1981 Act in the Housing and Planning Act 2016 and the High Speed Rail (London - West Midlands) Act 2017.

*Article 28 - Acquisition of subsoil or airspace only*

- 5.76 This article allows National Highways to acquire land below the surface or above the surface, rather than having to acquire all of the land.
- 5.77 The purpose of this article is to give National Highways the flexibility to minimise so far as is possible the extent of interests to be acquired, with consequently less impact on affected landowners, and lower payments of compensation which is in the public interest. This too is a standard provision used in many highways development consent orders (see for example article 27 of the A14 Order and article 27 of the Testo's Order).

*Article 29 - Rights under or over streets*

- 5.78 The purpose of this article is to allow National Highways to appropriate and use land above or below streets within the Order limits, without having to acquire the street or any right or easement in it. The exercise of this power, without full acquisition, is prohibited in the circumstances set out in article 28(3). Compensation is payable for any loss or damage caused to an owner or occupier of land affected by the power of appropriation where no acquisition has taken place. It is necessary to enable National Highways to use temporary structures to divert non-motorised user routes for walkers, cyclists and horse riders during the construction of the Scheme.

*Article 30 - Temporary use of land for carrying out the authorised development*

- 5.79 The purpose of this article is to allow the land set out in Schedule 7 to be occupied temporarily while the works are carried out. This is land which is required during construction of the Scheme but is not required permanently. This article also allows for the temporary occupation of any of the land for permanent acquisition that has not yet been taken possession of. In particular:
- (a) Article 30(1)(a)(i) allows the land set out in Schedule 7 to be occupied temporarily while the works are carried out. This is land which is required during construction of the Scheme but which is not required outright permanently, and includes land which will be occupied temporarily and then subject to permanent rights (e.g. diversion of utilities apparatus). Article 30(9) prevents this land from being acquired permanently, although confirms that acquisition of rights over this land, or of subsoil /airspace only, is not prevented and is required in respect of certain parcels. Likewise, some land taken temporarily will have permanent works undertaken to it, e.g. accommodation works (see further sub article (4)(b), and Schedule 7).

- (b) Article 30(1)(a)(ii) allows for the temporary occupation of any of the land that is subject to the powers of permanent acquisition, but in respect of which no process for acquisition has yet been commenced. The rationale for this is that it reduces the amount of land that is required to be subject to outright acquisition. Thus article 21 with article 30(1)(a)(ii) makes it possible for National Highways to occupy land temporarily initially and only proceed to acquire permanently that part which is necessary for the Scheme as constructed. The benefits of this are lesser impacts on landowners and lower costs to National Highways, which is in the public interest. In line with this, article 30(1)(d) confirms that the authorised development as listed in Schedule 1 can be undertaken on land that has been temporarily occupied.
- (c) Article 30(4) provides that, prior to giving up possession of land taken temporarily, National Highways will remove all temporary works and restore the land to the original surveyed condition at the time of entry (unless otherwise agreed with the owner of the land) so as to provide certainty as to the extent and standard of restoration required. The same approach has been adopted in article 31(5) where possession of land has been taken temporarily for maintaining the authorised development.
- (d) Article 30(12) clarifies that temporary possession of land set out in Schedule 7 may be taken more than once. This power allows for the return of land to a landowner where land is taken at an early stage to enable initial works to be undertaken but the main works for which temporary possession is permitted are delivered until later in the construction programme. Where temporary possession can only be exercised once, an undertaker would be unable to acquiesce to a request to return land to a landowner early and a landowner may be deprived of their land for a greater period than is otherwise necessary.

*Article 31 – Temporary use of land for maintaining the authorised development*

- 5.80 This article provides that National Highways may take temporary possession of land within the Order limits required for the purpose of maintaining the authorised development and to construct such temporary works as may be reasonably necessary for that purpose for a period of five years from the date on which that part of the authorised development is first used. Provision is made for notice and compensation. This power does not apply with respect to houses, gardens or any other buildings for the time being occupied. This article was included in the model provisions as article 29 and the A19 Order (see article 28) and the M4 Order (see article 29) and the Testo's Order (see article 30) reflect the wording used in this article.

*Article 32 - Statutory undertakers*

- 5.81 This article provides National Highways with clear statutory authority to acquire rights over land owned by statutory undertakers (i.e. utilities such as electricity and gas companies).
- 5.82 It also allows National Highways to extinguish rights that statutory undertakers have over the Order land, and to remove and reposition their apparatus. Reference is made to the Order land so that this power is not restricted to apparatus which has been specifically shown on the land plans and described in the book of reference. In practice it is impracticable to show and describe all such apparatus and so a general power for the extinguishment of rights and removal or relocation of apparatus belonging to statutory undertakers over or within any Order land is required.

- 5.83 All land over which this power may be exercised is shown on the Land Plans (document reference TR010064/APP/2.3), and the beneficiaries of such rights are described in the Book of Reference (document reference TR010064/APP/4.3), the requirements of Regulations 5(2)(i)(iii) and 7(1)(c) of the Infrastructure Planning (Applications: Prescribed Forms and Procedure) Regulations 2009 are satisfied.
- 5.84 Article 32(2) restricts National Highways' power to extinguish rights or move apparatus by excluding apparatus in streets. It applies alternative provisions more appropriate to balancing the interests of the various affected parties where the apparatus in question is in a street.
- 5.85 This article is subject to Schedule 9 which contains provisions for the protection of certain statutory undertakers to ensure their continued ability to carry out their functions despite the interference with their rights/apparatus required to facilitate the proposed development.
- 5.86 This is an article with broad precedent (see: the A14 Order (see article 32), the A19 Order (see article 29) and the M4 Order (see article 30) and the Testo's Order (see article 31)).

*Article 33 - Apparatus and rights of statutory undertakers in stopped up streets*

- 5.87 This article governs what happens to statutory undertakers' apparatus under streets that are stopped up by the Order. Without the article, the statutory undertaker will not have access to the apparatus, since there will no longer be a right of way along the street. The statutory undertaker may remove, relocate or replace any affected apparatus of its own volition, or must do so if it is reasonably requested by the Secretary of State.
- 5.88 The statutory undertaker will receive compensation from National Highways for any relocation works and associated costs. Sub articles (4)-(5) discount from this compensation the cost associated with a higher specification in the replacement apparatus. Article 33(6) discounts from this compensation the increase in value to the statutory undertaker for having new rather than old (i.e. older than 7<sup>1</sup>/<sub>2</sub> years) apparatus.
- 5.89 Article 33(7) provides that where statutory undertakers are affected by a stopping up in relation to those parts of the project that constitute "major bridge works", "major transport works" or "major highways works", as defined in the New Roads and Street Works Act 1991, the cost sharing provisions under that Act will apply instead of the compensation provision in this article.
- 5.90 Article 33 was included in the model provisions as article 32. This article is also standard for highways development consent orders (see, for example, article 30 of the A19 Order and article 34 of the M20 Order and article 32 of the Testo's Order).

*Article 34 – Crown rights*

- 5.91 This article does not feature in the model provisions but is included in order to protect the Crown's position in relation to its own estates, rights, powers, privileges, authorities or exemptions and to ensure that the Crown's written consent is required where any land, hereditaments or rights are to be taken, used, entered or interfered with under the powers conferred by the Order. This reflects the statutory position set out in section 135 of the 2008 Act and has been included in substantially the same form in a number of Orders, including The A19 Order 2016 (article 37).

*Article 35 - Recovery of costs of new connections*

- 5.92 This article follows article 33 of the model provisions and provides that if any statutory undertaker's apparatus is removed and this cuts a service to anyone, then the reasonable cost of establishing a new service can be claimed from National Highways.

## **Part 6 – Operations**

### *Article 36 – Felling or lopping of trees and removal or management of hedgerows*

- 5.93 Article 36(1) allows any tree or shrub that is within or overhanging land within the Order limits to be felled or lopped, or have its roots cut back, if it is considered to obstruct the construction, operation or maintenance of the project or endanger anyone using it. Compensation is payable for any loss or damage caused.
- 5.94 Article 36(2) allows any hedgerow within the Order limits and listed in Schedule 8 of the Order to be removed or managed. Compensation is payable for any loss or damage caused. This is a model provision which has been used in numerous orders (see for example article 36 of the M4 Motorway (Junctions 3 to 12) (Smart Motorway) Development Consent Order 2016 and article 36 of the M20 Junction 10a Development Consent Order 2017).

## **Part 7 – Miscellaneous and General**

### *Article 37 - Application of landlord and tenant law*

- 5.95 This article governs the leasing of land by National Highways to any other person. Essentially it allows the terms of the lease to override any statutory provisions relating to landlord and tenant law. This article was included in the model provisions as article 35.

### *Article 38 - Operational land for the purposes of the 1990 Act*

- 5.96 This article means that the land within the Order limits in which National Highways holds an interest shall be treated as “operational land of a statutory undertaker” for the purposes of the Town and Country Planning Act 1990.
- 5.97 The effect of that Order land being treated as operational land is that the person responsible for operating and maintaining the proposed development (National Highways or any transferee of its powers) will benefit from certain permitted development rights on that land in connection with the operation of the road. This article was included in the model provisions as article 36.

### *Article 39 - Defence to proceedings in respect of statutory nuisance*

- 5.98 Section 158 of the 2008 Act confers statutory authority for the purposes of a defence in statutory nuisance generally, subject to any contrary provision made by a particular order. This article is such a contrary provision, amending the terms of the defence in the case of noise nuisance (other types of nuisance continue to have the general defence afforded by s158). It is necessary to clarify the scope of the defence of statutory authority arising from the grant of the Order.
- 5.99 The defence is available if the noise relates to:

- (a) the construction or maintenance of the project, and is in accordance with any controls imposed by the local authority under the Control of Pollution Act 1974, or cannot reasonably be avoided; or
- (b) the use of the project and cannot reasonably be avoided.

5.100 This article is based on article 7 of the Model Provisions which has precedent in recent highway orders made, for example article 38 of the M4 Order and article 42 of the M20 Order and in the Testo's Order (see article 38).

*Article 40 - Protection of interests*

5.101 This article simply gives effect to Schedule 9, which contains provisions protecting the interests of third parties. This schedule contains protective provisions for the benefit of electricity, gas, water and sewerage undertakers as well as electronic communications code network operators. These provisions are based on the standard protective provisions approved by the Secretary of State in the A14 Order and the M4 Order and more recently in the M54 to M6 Link Road Order 2022 (the "M54 Order").

5.102 National Highways has sought the views of the undertakers who have interests affected by the authorised development and continues to negotiate with the undertakers to ensure any concerns are dealt with appropriately. National Highways will provide a full update of the status of the negotiations throughout the examination.

*Article 41 - Certification of plans and documents, etc.*

5.103 This article provides for various plans and other documents (including those listed in Schedule 10) to be certified by the Secretary of State. This was included in the model provisions as article 41.

*Article 42 - Service of notices*

5.104 This article governs how any notices that may be served under the Order shall be deemed to have been served properly. In particular, it allows service by email with the consent of the recipient, and deals with the situation of service on an unknown landowner.

5.105 It is common to have such an article in an order authorising development such as this. The article has precedent in a number of orders including the A14 Order (see article 42) and the M20 Order (see article 45).

5.106 The provision is useful because it provides clarity on the issue. It is noted that the service of notice provisions under sections 229 and 230 of the 2008 Act apply to notices served under that Act rather than notices served under a development consent order made under that Act.

*Article 43 – No double recovery*

5.107 This article makes it clear that compensation is not payable both under this Order and any other enactment, contract or other rule of law. It follows the well-established principle of equivalence that a claimant is compensated for no more and no less than their loss. It has been included in numerous made Orders, including article 38 of the Silvertown Order.



#### *Article 44 - Arbitration*

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

#### *Article 45 – Disapplication and modification of legislative provisions*

- 5.109 This article provides (in reliance on section 120(5)(a) of the 2008 Act) (what may be included in an order granting development consent)) for the disapplication of certain requirements which would otherwise apply under public general legislation. Section 120(5)(a) provides that an order granting development consent may apply, modify or exclude a statutory provision which relates to any matter for which provision may be made in the order.
- 5.110 National Highways considers that, in the context of the Scheme being of national significance, the Order should be the predominant authorising instrument for the works. The purpose of the regime created by the 2008 Act is to ensure that Development Consent Orders provide a unified consent for nationally significant infrastructure projects and the undertaker considers that disapplying and modifying certain legislative provisions, as set out in the Order, is proportionate in this context.
- 5.111 A disapplication is sought in respect of the temporary possession provisions of the Neighbourhood Planning Act 2017. This is required as the relevant sections of the Neighbourhood Planning Act 2017 have not been brought into force and subsidiary regulations to that Act have not yet been made, and there is therefore no certainty as to the requirements of the new temporary possession regime. As such, this enables the temporary possession regime created by the Order to be applied. This approach has been expressly approved by the Secretary of State in the Silvertown Order.
- 5.112 Article 45(2) modifies the Community Infrastructure Levy Regulations 2010 to clarify that any building, which is defined broadly in Article 2 (interpretation) of the Order to encompass any structure or erection such as a gantry or utility structure, is exempt from CIL liability.
- 5.113 Article 45(3) modifies the Hedgerows Regulations 1997 to extend the exemption for the removal of hedgerows authorised by a planning permission to include authorisation by the Order consistent with the power to remove hedgerows in Article 36 (felling or lopping of trees and removal of hedgerows) and as specified in Schedule 8 (hedgerows to be removed or managed) of the Order.

## **6 Schedule 2 - Requirements**

- 6.1 The requirements in Schedule 2 are the equivalent of planning conditions. They reflect the processes and procedures usually employed by National Highways when implementing a scheme such as this. Approvals are to be sought from the Secretary of State for Transport, following consultation with the local planning authority and/or other relevant third party. Again, this is consistent with the processes and procedures employed by National Highways when implementing a scheme such as this.
- 6.2 The requirements in Schedule 2 provide that the various schemes, details and plans to be approved must reflect the mitigation measures set out in the Record of Environmental Actions and Commitments (“REAC”) which contains all of the mitigation commitments made in the Environmental Statement. This is the mechanism to ensure that environmental mitigation is secured by the Order, and the approach here is consistent with other orders which have been made. Further, the requirements provide that the

approved schemes, details and plans must be implemented as approved, unless the Secretary of State approves further amendments to them.

### 6.3 Turning to the purpose and effect of requirements 1 to 15:

- (a) Requirement 1 (interpretation) contains a number of definitions used in Schedule 2.
- (b) Requirement 2 (time limits) provides that the authorised development must not commence later than 5 years from the date of the Order coming into force.
- (c) Requirement 3 (detailed design) states that the authorised development must be carried out in accordance with the Scheme design shown on the engineering drawings and sections unless otherwise agreed in writing by the Secretary of State.
- (d) Requirement 4 (environmental management plan) requires the preparation of a second and third revision respectively of the First Iteration Environmental Management Plan (Document Reference TR010064/APP/6.5) in consultation with the relevant planning authority and for its approval by the Secretary of State. The Second Iteration EMP will be based substantially on the First Iteration Environmental Management Plan prepared as part of the Scheme application. The Second Iteration EMP will fulfil the construction-related objectives and measures as outlined in the REAC and must be in accordance with IS014001. Further details of what must be included in the Second Iteration EMP are set out at sub-paragraph (3). The Third Iteration EMP will fulfil the management and operation related objectives identified in the first iteration EMP.
- (e) Requirement 5 (landscaping) prevents any part of the authorised development commencing until a landscaping scheme, which may be submitted in parts, covering all hard and soft landscaping works has been approved by the Secretary of State in consultation with the relevant planning authority. The proposed landscaping scheme must reflect the relevant mitigation measures in the REAC and must be based on the illustrative Environmental Masterplan annexed to the Environmental Statement (Document Reference TR010064/APP/6.1).
- (f) Requirement 6 (previously unidentified contaminated land and groundwater) makes provision for dealing with any contaminated land and groundwater discovered during construction of the works, in consultation with the relevant planning authority and the Environment Agency.
- (g) Requirement 7 (protected species) where a likely significant effect on a protected species which was not previously identified in the environmental statement is identified during construction of the Scheme, the relevant parts of the relevant works must cease and not recommence until a scheme of protection and mitigation measures has been submitted to and approved in writing by the Secretary of State. Consultation with Natural England is required.
- (h) Requirement 8 (surface and foul water drainage) provides that no part of the authorised development can commence until written details of a surface and foul water drainage system, reflecting the mitigation measures in the REAC and including means of pollution control, have been prepared in consultation with the relevant planning authority and has been approved in writing by the Secretary of State.
- (i) Requirement 9 (archaeological remains) states no part of the authorised development is to commence until for that part of the authorised development a written scheme for the investigation

of areas of archaeological interest, reflecting the mitigation measures included in the REAC, has been submitted to and approved in writing by the Secretary of State following consultation with the relevant planning authority.

- (j) Requirement 10 (traffic management) provides that no part of the authorised development can commence until a traffic management plan for that part has been prepared in consultation with the local highway authority and approved in writing by the Secretary of State. The authorised development must be carried out in accordance with the approved scheme to ensure efficient delivery and integration with highways managed by the local highway authority.
- (k) Requirement 11 (amendments to approved details) clarifies that any requirement stipulating adherence to the approved details includes such amendments as may be subsequently approved by the Secretary of State in Writing.

6.4 Part 2 of Schedule 2 (Requirements 12 – 17) provides a clear procedure for the discharge of requirements by the Secretary of State. It sets out clear time limits for decisions to be made and makes provision for circumstances where the Secretary of State requires further information to be provided in relation to an application for the discharge of a requirement. Any steps National Highways takes to comply with the requirements before the Order is made will be treated as effective in complying with the requirements once the Order is made, thereby avoiding the need to repeat such steps. Part 2 reflects the discharge of requirements provisions approved in the A14 Order and in the Testo's Order.