

# **Host Authorities' Statement at Deadline 11 on DCO Matters**

## **1. INTRODUCTION**

- 1.1. This document has been prepared on behalf of Central Bedfordshire Council, Dacorum Borough Council, Hertfordshire County Council, Luton Borough Council and North Hertfordshire Council ('the Host Authorities').
- 1.2. It does not seek to summarise all of the outstanding matters or concerns of the Host Authorities nor set out their final position on each aspect of the draft DCO. Instead it seeks to highlight the key points of concern remaining as the examination closes.
- 1.3. Throughout the examination the Host Authorities have been keenly engaged with the evolution of the Applicant's draft DCO. This can be seen from the range of issues raised in their Local Impact Reports on matters pertaining to the draft DCO, their contributions to the Issue Specific Hearings 1 and 10 on the draft DCO ([REP3-108] and ([REP6-095]), their response to the Examining Authority's Proposed Changes to the DCO ([REP8-052]) and written questions in relation to the DCO ([REP4-126] and [REP7-087]) and their responses to DCO matters at Deadlines 9 and 10 ([REP9-063] and [REP10-053]).
- 1.4. In relation to the draft DCO, the Host Authorities have acknowledged that the Applicant's draft DCO includes much that is conventional in terms of precedented DCO drafting. However, the proposed development for which the Applicant seeks development consent is not a conventional DCO seeking as it does powers to expand an existing operational airport in a phased manner over an extended duration. This is a different scenario from the developments that gave rise to those precedents which are predominantly green field conventional infrastructure projects and so it is important that the justification of such provisions is considered carefully in this light.
- 1.5. The Applicant's draft DCO also includes aspects that, in its own case, are novel, chief among them the Green Controlled Growth provisions. Other aspects such as the interaction between the draft DCO and the existing planning permissions for the airport and the related Green Horizons Park planning permission give rise to their own particular issues and concerns.

## **2. DEEMED CONSENTS**

- 2.1. All provisions that require the consent or agreement of a party in the articles of the draft DCO and in its requirements in Schedule 2 (including the Green Controlled Growth provisions) are subject to a form of deemed consent if decisions are not taken within the timeframes stipulated. The timeframes vary depending on the provision in question and the brevity of the relevant timeframes has been a consistent theme of the Host Authorities submissions. While deemed consents are well precedented in development consent orders their inclusion is usually justified on the basis that they are appropriate in the circumstances of urgently needed nationally significant infrastructure.
- 2.2. This should be contrasted with the Applicant's proposal where there is existing "head room" in its recently granted planning permission to allow expansion by a further million passengers per annum and where the Applicant seeks a flexible framework to allow further expansion. As such, the urgency of need that typically justifies the imposition of such provisions is absent in this case. Deemed consent provisions risk important matters not receiving the scrutiny that they merit, or worse, risk administrative oversights having potentially wide-ranging legal effects. The Host Authorities set out in detail their concerns with deemed consents in response to Action Point 14 in their Issue Specific Hearing 10 post hearing submission and written summary of oral submissions ([REP6-095]).

## **3. ARTICLE 45 (APPLICATION OF THE 1990 ACT)**

- 3.1. In principle, the Host Authorities are supportive of a provision that seeks to clarify and reconcile the interaction of the draft Order with the existing planning permissions. The Host Authorities welcome the amendments that the Applicant has made to clarify the scope of an "inconsistency".

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However, as set out in their Response at Deadline 10 on DCO Matters ([REP10-053]) some concerns remain, in particular in relation to the potential for paragraphs (2), (3) and (4) to operate such that a particular aspect of an inconsistent development becomes effectively immune from enforcement under both the Planning Act 2008 and the Town and Country Planning Act 1990. The Host Authorities have suggested that such a lacuna could be addressed by means of a new requirement that would in effect allow the Applicant to indicate in the case of such an inconsistency which parts of a given aspect of a development are relying on which regime, and for that proposal to be submitted for the approval of the relevant planning authority. That approval would have the effect of applying paragraphs (2) to (4) to the relevant aspects of the inconsistent development. The Host Authorities consider that such a requirement would strike an appropriate balance between allowing development to come forward alongside the Order whilst give clarity to all parties as to which regime applies.

### 4. GREEN CONTROLLED GROWTH – PART 3 OF SCHEDULE 2

- 4.1. The substance of the Green Controlled Growth Framework is addressed elsewhere in the submissions of the Host Authorities at this deadline.
- 4.2. It remains the Host Authorities view that Dacorum Borough Council ought to be a member of the Environmental Scrutiny Group and should be added to the list in paragraph 20(2) of Schedule 2 to the draft DCO.
- 4.3. The Host Authorities remain seriously concerned that under the Green Controlled Growth Framework the undertaker could continue to operate the authorised development in exceedance of the Limits set by that framework and that, provided the undertaker otherwise complies with the procedures set out in Part 3 of Schedule 2, the continued exceedance of Limits would not breach the terms of the DCO and so no enforcement action could be taken. While the Applicant may not be able to further expand capacity while Limits are being exceeded, this is of no comfort to the communities and businesses suffering the persistent adverse effects.
- 4.4. This issue was discussed at Issue Specific Hearings 9 and 10 ([REP6-094] and [REP6-095]) where the Host Authorities indicated that a further mechanism was required to ensure that the undertaker was disincentivised from operating the airport persistently in exceedance of Limits and to ensure that the affected communities were compensated for the adverse effects. The Host Authorities made further submissions ([REP10-52]) in response to the Applicant's objections to such a mechanism, which set out why the Host Authorities consider that the principle of such a mechanism is necessary, justified and relevant to the authorised development and within the scope of what may be included in a development consent order in accordance with section 120 of the Planning Act 2008. It is clear that a "back stop" provision that seeks to disincentivise a development from operating in exceedance of the Limits established by its own environmental assessment and which seeks to provide compensation when other efforts at mitigation have proven unsuccessful, is relevant to that development, is necessary and is justified.
- 4.5. The Applicant has made clear its objection in principle to the inclusion of such a mechanism and has not provided any without prejudice drafting to explore how such a mechanism could be implemented. To that end the Host Authorities have included in **Appendix 1** to this submission a proposed requirement setting out how such a mechanism could operate.
- 4.6. The proposed provision would give the ESG a discretion to request that the Secretary of State requires the undertaker to make payments to the Community Fund where there is a persistent exceedance of a Limit. This provides two important procedural safeguards to the imposition of such a compensation payment: the ESG has to be satisfied that making such a request is warranted and the Secretary of State must be satisfied that it is appropriate in the circumstances. A persistent exceedance of a Limit would only arise where a (i) Monitoring Report shows that a Limit is being exceeded; (ii) a Mitigation Plan has been approved and implemented; (iii) a Monitoring Report shows that after 2 years the Limit is still being exceeded or the Mitigation Plan programme is not being met; (iv) as a consequence, an updated Mitigation Plan is approved; and (v) after 2 years a Monitoring Report shows that there remains an exceedance or the programme

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in the Mitigation Plan is not being met. As such, it remains very much a “backstop” to provide a disincentive to persistent exceedance of Limits and to compensate the communities affected.

### 5. UPDATE ON LOCAL HIGHWAY AUTHORITY PROTECTIVE PROVISIONS – PART 6 OF SCHEDULE 8

- 5.1. The Host Authorities that are local highway authorities have engaged in constructive negotiations with the Applicant in relation to the terms of the Local Highway Authority Protective Provisions and related provisions within the draft DCO. The Host Authorities submitted their preferred form of protective provisions at Deadline 10, some of which were incorporated into the Applicant's revised draft DCO submitted at that deadline, including the amendments to article 12 to make their provisions subject to Parts 5 and 6 of Schedule 8 and the amendments to requirement 6 to remove the linkage between the technical approvals under the protective provisions and the “planning” approval under requirement 6.
- 5.2. The Host Authorities preferred form of protective provisions, updated to reflect discussions with the Applicant, are included as **Appendix 2** to this submission. The Host Authorities understand that there are only three points of disagreement remaining.
- 5.3. First, the Host Authorities consider that the “commence” triggers ought to be replaced with “begin” and cognate terms wherever they appear. This is to ensure that important works of relevance to highway works that are excluded from the Applicant's definition of “commence” in paragraph 1 of Schedule 2, such as the diversion or laying of services (i.e. utilities), cannot take place outside the scope of the local highway authority protective provisions regime. While the Applicant may suggest that such works are unlikely to take place without the prior exercise of the temporary closure power in article 13 (temporary closure and restriction of use of streets) which is subject to the consent of the street authority, that fails to recognise the different functions that article 13 serves. An article 13 determination would be concerned with the appropriateness of the temporary closure and is subject to a 28 day determination period and deemed consent, which makes it an unsuitable vehicle for approving the design of interventions to the highway authorities' assets. The Applicant's preferred form of the Local Highway Authority protective provisions does not expressly apply the definition of “commence” in paragraph 1 of Schedule 2. However there clearly is a risk that such an interpretation would be applied to the term, which is why the Host Authorities consider it is important that “begin” is used to avoid this risk.
- 5.4. Secondly, the Host Authorities do not agree that paragraph 58(6) of Schedule 8 in the Applicant's deadline 10 DCO ([REP10-004]) is acceptable in that form. The Host Authorities hold this view because it is not clear what it is that paragraph 58(6) is intended to achieve or why it is the case that the local highway authority ought to be responsible for reimbursing the undertaker its expenses related to the undoing of works that have been tested and found to be unsatisfactory. It is for the undertaker to ensure that it carries out works to the local highway network to a satisfactory standard.
- 5.5. Thirdly, the Host Authorities consider that a minimum sum insured of £10 million is appropriate and reflects the risks that may arise, particularly in relation to third parties, from works in the highway and that those risks do not directly correlate to the value of the works being carried out. While it is evident that the greater the magnitude of works the greater the magnitude of claims that might arise, any works in the highway carry a minimum baseline risk unrelated to the value of the works. The minimum sum insured reflects this baseline level of risk.
- 5.6. Finally, the Host Authorities consider that it is not appropriate for works covered by a permit issued under a permit scheme to avoid the protective provisions regime. The permit scheme is additional to, and not duplicative of, the protective provisions regime. As such the Host Authorities preferred protective provisions delete the provision in paragraph 55 that would allow a permit to stand in for the protective provisions. It is understood that the Applicant now agrees with this position.

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**APPENDIX 1**

**HOST AUTHORITIES GREEN CONTROLLED GROWTH REQUIREMENT**

**PROPOSED TO BE INSERTED AS PARAGRAPH 25 OF PART 3**

**OF SCHEDULE 2 TO THE DRAFT DCO**

### **Compensation payments into the community fund for persistent breach of Limits**

25.—(1) Where the undertaker operates the airport persistently in excess of a Limit the Secretary of State may, at the request of the ESG and in accordance with the provisions of this paragraph, require the undertaker to make compensation payments into a community fund until such time as the Secretary of State is satisfied that the Limit in question is no longer being exceeded.

(2) For the purposes of this paragraph the undertaker is deemed to be operating the airport persistently in excess of a Limit in the circumstances where it is required by paragraph 24(10) to submit an updated Mitigation Plan for a second or subsequent occasion in relation to an exceedance of the same Limit.

(3) A request to the Secretary of State by the ESG under sub-paragraph (1) must include—

- (a) a summary of the circumstances giving rise to the undertaker operating the airport persistently in excess of a Limit;
- (b) a copy of any approved Mitigation Plan having effect in relation to the Limit in question; and
- (c) a statement setting out the ESG's recommendations, taking into account the relevant factors, in relation to—
  - (i) the reasons why it is appropriate to require the undertaker to make compensation payments into a community fund;
  - (ii) details of the identity of the community fund to receive those payments; and
  - (iii) the quantum, frequency and nature of compensation payments.

(4) The Secretary of State must consult the undertaker and the ESG before determining whether to require the undertaker to make compensation payments into a community fund following receipt of a request by the ESG and must have regard to the relevant factors and any consultation responses received when determining—

- (a) whether to require the undertaker to make compensation payments into a community fund; and
- (b) where the undertaker is required to make compensation payments into a community fund—
  - (i) the quantum, frequency and nature of the compensation payments; and
  - (ii) the identity of the community fund to receive those payments.

(5) The Secretary of State's decision in relation to the ESG's request must be issued to the undertaker and the ESG in writing and include—

- (a) a statement of reasons; and
- (b) where the undertaker is required to make compensation payments—
  - (i) the quantum, frequency and nature of compensation payments; and
  - (ii) the identity of the community fund to receive those payments.

(6) The undertaker must make the payments required by the Secretary of State in accordance with the Secretary of State's decision issued under sub-paragraph (5) until such time as the Secretary of State has certified in writing that the undertaker has demonstrated to the Secretary of State's satisfaction, following consultation with the ESG, that the undertaker is no longer operating the airport in excess of the Limit in question.

(7) The undertaker cannot be required under the provisions of this paragraph to make compensation payments to a community fund that exceed in a calendar year the sum of [ ] (index-linked) but for the purposes of determining whether this annual cap is exceeded any payments into a community fund required by a development consent obligation are to be disregarded.

(8) In this paragraph—

“community fund” means a fund established pursuant to a development consent obligation, or such other fund that has as its object the funding of community projects in the vicinity of the authorised development that the Secretary of State may approve under this paragraph;

“development consent obligation” means a development consent obligation under section 106 of the 1990 Act related to the authorised development;

“index-linked” means that the sum in question is to be increased annually on the month that is the anniversary of the month when this Order came into force (“the anniversary month”), by an amount equal to the percentage increase in the All Items Index of Retail Prices (“RPI Index”) issued by the Office for National Statistics (or, if the RPI Index ceases to exist, such other index as is specified by the ESG) from the month when this Order came into force to the month immediately before the anniversary month;

“quantum, frequency and nature of compensation payments” means the amount the undertaker is to pay into a community fund in any calendar year and the frequency it is due to be paid within a calendar year; and

“the relevant factors” are the following—

- (a) the measures that have been taken by the undertaker with a view to ensuring that the operation of the airport no longer exceeds a Limit;
- (b) the nature and magnitude of the exceedance of a Limit;
- (c) the impacts on local communities arising from the exceedance of a Limit;
- (d) the current annual passenger throughput of the airport;
- (e) the frequency of monitoring results relevant to the Limit becoming available; and
- (f) any other matters that the Secretary of State considers to be relevant.

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**APPENDIX 2**

**HOST AUTHORITIES' PREFERRED FORM  
OF LOCAL HIGHWAY AUTHORITY PROTECTIVE PROVISIONS TO  
BE INSERTED AS PART 6 OF SCHEDULE 8 TO THE DRAFT DCO**

**PART 6**  
**FOR THE PROTECTION OF LOCAL HIGHWAY AUTHORITIES**

*Application, etc.*

**53.**—(1) The provisions of this Part of this Schedule apply for the protection of local highway authorities unless otherwise agreed in writing between the undertaker and a relevant highway authority.

(2) An agreement for the purpose of sub-paragraph (1) includes, but is not limited to, an agreement made under article 17 of this Order, or under the 1980 Act.

(3) Any approval or consent of a local highway authority required under this Part of this Schedule—

- (a) must not be unreasonably withheld or delayed;
- (b) must be given in writing;
- (c) in the case of a refusal must be accompanied by a statement of grounds for refusal; and
- (d) may be subject to any conditions as the local highway authority reasonably considers necessary.

**54.**—(1) In this Part of this Schedule—

“bond sum” means the sum equal to 150% of the costs of carrying out the specified works (to include all the costs plus the commuted sum) or such other sum agreed between the undertaker and the relevant highway authority;

“the cash surety” means the sum agreed between the undertaker and the relevant highway authority, acting reasonably;

“commuted sum” means such reasonable sum calculated as provided for in paragraph 67 of this Part of this Schedule to be used to fund the future cost of maintaining the specified works;

“detailed design information” means such drawings, specifications and other information, as are relevant to and reasonably required in respect of any specified works, to comprise the following—

- (a) site clearance details;
- (b) boundary, environmental and mitigation fencing;
- (c) road restraint systems (vehicle and pedestrian);
- (d) drainage and ducting as required by DMRB CD 535 Drainage asset data and risk management and DMRB CS551 Drainage surveys – standards for Highways;
- (e) earthworks as required by DMRB CD 535 Drainage asset data and risk management and DMRB CS551 Drainage surveys – standards for Highways;
- (f) highway pavements, pavement foundations, kerbs, footways and paved areas;
- (g) traffic signs and road markings;
- (h) traffic signal equipment and associated signal phasing and timing detail;
- (i) road lighting (including columns and brackets);
- (j) electrical work for highway lighting and traffic signs;
- (k) highway structures;
- (l) landscaping, planting and any boundary features which will form part of the local highway;
- (m) utility diversions insofar as in the existing or proposed local highway;
- (n) a schedule of timings for the works, including dates and durations for any closures of any part of the local highway;



- (o) stage 1 and stage 2 road safety audits prepared in accordance with paragraph 57;
- (p) traffic management proposals including any diversionary routes;
- (q) a schedule of the existing local highway condition prior to of construction related activities beginning;
- (r) a specification of the condition in which it is proposed that the local highway will be returned once the specified works have been completed;
- (s) tracking plans, including a version of such plans in AutoCAD format or such other software format as the relevant highway authority may reasonably request;
- (t) highway alignment drawings;
- (u) drainage contour plans and drainage calculations;
- (v) visibility splay plans; and
- (w) any temporary works structures which are to be erected or retained under the Order or otherwise;

“DMRB” means the Design Manual for Roads and Bridges or any replacement or modification of that standard for the time being in force;

“final certificate” means the final certificate issued by a relevant highway authority under paragraph 63 of this Part of this Schedule;

“maintenance period” means the period from the date of the provisional certificate being issued to the date of the final certificate being issued, unless otherwise agreed in writing between the undertaker and the relevant highway authority;

“provisional certificate” means the certificate issued under paragraph 62 of this Part of this Schedule;

“specification for highways works” means the specification for highways works published from time to time by the relevant highway authority setting out the requirements and approvals procedures for work, goods or materials used in the construction, alteration, improvement or maintenance of the local highway network; and

“specified works” means any part of the authorised development that involves the construction, alteration or improvement of a local highway.

(2) For the purposes of its obligations to procure a bond under this Part of this Schedule, the undertaker may procure a bond in relation to the specified works, and a separate bond in relation to the commuted sums, and in those circumstances references in this Part to “bond” and “bond sum” means both bonds together.

*Detailed design information and beginning relevant works*

**55.** Before beginning any specified works, the undertaker must—

- (a) provide to the relevant highway authority the detailed design information relating to those specified works and obtain the relevant highway authority’s written approval for those works; and
- (b) secure road space booking from the relevant highway authority, such road space booking approval not to be unreasonably withheld or delayed.

*Security*

**56.** The specified works must not begin until—

- (a) the undertaker procures that the specified works are secured by a bond from a bondsman first approved by the relevant highway authority, in a form agreed between the undertaker and the relevant highway authority, to indemnify the relevant highway authority against all losses, damages, costs or expenses arising from any breach of any one or more of the obligations of the undertaker in respect of the exercise of the powers under this Order and the specified works under the provisions of this Part of this Schedule provided that the maximum liability of the bond must not exceed the bond sum; and

- (b) the undertaker has provided the cash surety which may be utilised by the relevant highway authority in the event of the undertaker failing to make payments under paragraph 61 or to carry out works the need for which arises from a breach of one or more of the obligations of the undertaker under the provisions of this Part of this Schedule.

*Road safety audits*

**57.**—(1) Road safety audits required to be carried out by the undertaker under the provisions of this Part of this Schedule must be carried out in accordance with the Design Manual for Roads and Bridges standard GG119 or any replacement or modification of it.

(2) No stage of any road safety audit that is required to be carried out by the undertaker under this Part of this Schedule in relation to any specified works is to begin until the relevant highway authority has approved in writing for that stage of road safety audit of those specified works—

- (a) the curriculum vitae of the persons carrying out the road safety audit; and
- (b) the road safety audit brief.

(3) The specified works must not begin until a stage 1 and stage 2 road safety audit has been carried out and all recommendations raised in the audit or any exceptions are approved by the relevant highway authority.

(4) Where the report of the stage 3 and 4 road safety audit identifies any recommended measures in respect of a local highway, the undertaker must carry out, at its own expense and to the reasonable satisfaction of the relevant highway authority, those measures identified as part of the stage 3 and 4 road safety audit provided that—

- (a) the undertaker has the powers to deliver the measures under this Order; and
- (b) the measures do not give rise to any new or materially different environmental effects in comparison with those identified in the environmental statement.

(5) If by the operation of sub-paragraphs (4)(a) or (4)(b) the undertaker is not required to carry out the recommendations of a stage 3 or stage 4 road safety audit the relevant highway authority may instead carry out those recommendations and recover the reasonable costs of so doing from the undertaker.

*Construction of the specified works*

**58.** The specified works must be carried out by the undertaker to the reasonable satisfaction of the relevant highway authority in accordance with—

- (a) the relevant detailed design information approved by the relevant highway authority under paragraph 55 or as subsequently varied by agreement between the undertaker and the relevant highway authority;
- (b) the DMRB, the specification for highway works, together with all other relevant standards as required by the relevant highway authority to include, inter alia, all relevant interim advice notes, the Traffic Signs Manual and the Traffic Signs Regulations and General Directions 2016(a) save to the extent that exceptions from those standards apply which have been approved by the relevant highway authority; and
- (c) all aspects of the Construction (Design and Management) Regulations 2015(b) or any statutory amendment or variation of the same and in particular the undertaker, as client, must ensure that all client duties (as defined in the said regulations) are undertaken to the reasonable satisfaction of the relevant highway authority.

*Inspections and testing of materials*

**59.**—(1) The undertaker must allow and facilitate an appropriately qualified officer or officers of a relevant highway authority that have been nominated by that relevant highway authority (each being a “nominated officer”) to access and inspect at all reasonable times any part of the specified

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(a) S.I. 2016/362.  
(b) S.I. 2015.51.

works during their construction and before a final certificate has been issued in respect of the specified works as is reasonably necessary to ensure that the works have been or are being carried out to the appropriate standard.

(2) Any testing reasonably requested by the relevant highway authority of materials used in any specified works must be carried out at the undertaker's expense and in accordance with the DMRB (or any other testing specification agreed by the undertaker and the relevant highway authority acting reasonably).

(3) A relevant highway authority (or its agent) may test all or any materials used or proposed to be used in any specified works and the undertaker must provide such information, access and materials as is reasonably required to facilitate such testing.

(4) The undertaker must, as soon as is reasonably practicable, provide the relevant highway authority with a copy of all test certificates and results relevant to the specified works that the relevant highway authority has requested in writing.

(5) The relevant highway authority must as soon as is reasonably practicable provide the undertaker with a copy of all test results and certificates relevant to the works that the undertaker has requested in writing.

(6) If any part of the specified works is constructed—

- (a) other than in accordance with the requirements of this Part of this Schedule; or
- (b) in a way that causes damage to the highway, highway structure or asset or any other land of the relevant highway authority,

the relevant highway authority may by notice in writing require the undertaker, at the undertaker's own expense, to comply promptly with the requirements of this Part of this Schedule or remedy any damage notified to the undertaker under this Part of this Schedule, to the reasonable satisfaction of the relevant highway authority.

(7) If during the carrying out of the authorised development the undertaker or its appointed contractors or agents causes damage to the local highway then the relevant highway authority may by notice in writing require the undertaker, at its own expense, to remedy the damage.

(8) If within 28 days on which a notice under sub-paragraph (6) or sub-paragraph (7) is served on the undertaker (or in the event of there being, in the opinion of the relevant highway authority, a danger to highway users, within such lesser period as the relevant highway authority may stipulate), the undertaker has failed to take the steps required by that notice, the relevant highway authority may carry out the steps required of the undertaker and may recover any expenditure incurred by the relevant highway authority in so doing, such sum to be payable within 30 days of demand.

#### *Defects in local highways constructed by the undertaker*

**60.**—(1) Until such time as a final certificate has been issued in respect of any specified works, the undertaker must make good any defects in the specified works constructed by the undertaker to the reasonable satisfaction of the relevant highway authority.

(2) The undertaker must submit to the relevant highway authority such details and information relating to making good any defects under sub-paragraph (1) as the relevant highway authority and the undertaker agree is reasonable in the circumstances.

#### *Payments*

**61.**—(1) The undertaker must pay to the relevant highway authority a sum equal to the whole of any costs and expenses which the relevant highway authority reasonably incurs (including costs and expenses for using internal or external staff and costs relating to any work which becomes abortive) in relation to the specified works and in relation to any approvals sought under this Order, or otherwise incurred under this Part of this Schedule, including—

- (a) the checking and approval of the information and any advice given to the undertaker relating to the design, specification and programme of the specified works generally;

- (b) the supervision of the specified works;
- (c) the checking and approval of the information required to determine approvals under this Order;
- (d) all reasonable legal, technical and administrative costs and disbursements incurred by the relevant highway authority in connection with sub-paragraphs (a)-(c); and
- (e) any value added tax which is payable by the relevant highway authority in respect of such costs and expenses and for which it cannot obtain reinstatement from HM Revenue and Customs,

together comprising “the costs”.

(2) The undertaker must pay to the relevant highway authority upon demand and prior to such costs being incurred the total costs that the relevant highway authority reasonably believe will be properly and necessarily incurred by the relevant highway authority in undertaking any statutory procedure or preparing and bringing into force any traffic regulation order or orders necessary to carry out or for effectively implementing the authorised development.

(3) The relevant highway authority must provide the undertaker with a fully itemised schedule showing its estimate of the relevant highway authority costs prior to beginning the specified works and the undertaker must pay to the relevant highway authority the estimate of the costs attributable to the specified works prior to commencing the specified works and in any event prior to the relevant highway authority incurring any cost.

(4) If at any time after the payment referred to in sub-paragraph (3) has become payable, the relevant highway authority reasonably believes that the costs will exceed the estimated costs it may give notice to the undertaker of the amount that it believes the costs will exceed the estimate (“the excess”) and the undertaker must pay to the relevant highway authority within 28 days of the date of the notice a sum equal to the excess.

(5) The relevant highway authority must give the undertaker a final account of the costs referred to in sub-paragraph (1) to (4) above within 30 days of the issue of the provisional certificate issued pursuant to paragraph 62.

(6) Within 28 days of the issue of the final account—

- (a) if the final account shows a further sum as due to the relevant highway authority the undertaker must pay to the relevant highway authority the sum shown due to it; and
- (b) if the account shows that the payment or payments previously made by the undertaker have exceeded the costs incurred by the relevant highway authority, the relevant highway authority must refund the difference to the undertaker.

(7) If any payment due under any of the provisions of this Part of this Schedule is not made on or before the date on which it falls due the party from whom it was due must at the same time as making the payment pay to the other party interest at 1% above the Bank of England base lending rate from time to time being in force for the period starting on the date upon which the payment fell due and ending with the date of payment of the sum on which interest is payable together with that interest.

*Provisional certificate*

**62.**—(1) Subject to sub-paragraph (2), when the undertaker considers that the specified works have reached completion so that they are available for use by the public it must apply to the relevant highway authority for a provisional certificate and must allow the relevant highway authority the opportunity to inspect the specified works to identify any defects or incomplete works (and the undertaker must make good such defects pursuant to paragraph 60).

(2) Following an application for a provisional certificate, the relevant highway authority must as soon as reasonably practicable—

- (a) inspect the specified works; and
- (b) provide the undertaker with a written list of any works that are required for the provisional certificate to be issued or confirmation that no further works are required for this purpose.

(3) When—

- (a) a stage 3 road safety audit has been carried out in respect of the works in question and any recommended measures identified in the audit have been completed and approved by the relevant highway authority;
- (b) the relevant highway authority has been provided an opportunity to inspect the specified works and the undertaker has completed any further works or measures required to address any safety deficiencies or defects identified as a result of the inspection, to the reasonable satisfaction of the relevant highway authority; and
- (c) the undertaker has paid the commuted sum to the relevant highway authority,

the relevant highway authority must promptly issue the provisional certificate to the undertaker.

(4) The undertaker must submit a stage 4 road safety audit as required by and in line with the timescales stipulated in the road safety audit standard.

(5) The undertaker must comply with the findings of the stage 4 road safety standard and must pay all reasonable costs of and incidental to such and provide updated as-built information to the relevant highway authority.

#### *Maintenance*

**63.**—(1) Notwithstanding article 12 (construction and maintenance of new, altered or diverted streets) of this Order, but subject to sub-paragraph (2), the undertaker must maintain the specified works throughout the maintenance period to a standard appropriate to their use by the public until the final certificate is issued in accordance with paragraph 64.

(2) Nothing in sub-paragraph (1) makes the undertaker responsible during the maintenance period for the maintenance of any highway, street works or maintenance works—

- (a) undertaken by any person other than the undertaker; or
- (b) which do not form part of the specified works.

#### *Final certificate*

**64.**—(1) No sooner than 12 months from the date of issue of the provisional certificate the undertaker must apply in writing to the relevant highway authority for a final certificate in respect of the specified works.

(2) Following receipt of the application for a final certificate, the relevant highway authority must as soon as is reasonably practicable—

- (a) inspect the specified works; and
- (b) provide the undertaker with a written list of any further works required to remedy or make good any defect or damage in the local highway network, or confirmation that no such works are required for this purpose.

(3) The undertaker must carry out such works notified to it pursuant to sub-paragraph (2).

(4) The relevant highway authority must promptly issue the final certificate to the undertaker once the relevant highway authority is reasonably satisfied in relation to the specified works that—

- (a) any defects or damage arising from defects during the maintenance period and any defects notified to the undertaker pursuant to sub-paragraph (2) and any remedial works required as a result of the stage 4 road safety audit have been made good to the reasonable satisfaction of the relevant highway authority;
- (b) the costs have been paid to the relevant highway authority in full;
- (c) the undertaker has provided the relevant highway authority with a health and safety file in respect of the specified works to the relevant highway authority's reasonable satisfaction; and

(d) the undertaker has provided the relevant highway authority with such detailed design information as the relevant highway authority has requested (acting reasonably) in relation to the specified works as built.

(5) The issue of a final certificate by a relevant highway authority amounts to an acknowledgment by the relevant highway authority that the construction alteration or diversion (as the case may be) of a highway has been completed to its reasonable satisfaction for the purposes of article 12 of this Order.

(6) On the issue of the final certificate to the undertaker the bond is to be released in full.

#### *Emergency work*

**65.** Nothing in this Part of this Schedule prevents a relevant highway authority from carrying out any work or taking such action as deemed appropriate forthwith without prior notice to the undertaker in the event of an emergency or danger to the public.

#### *Land interests*

**66.** Following the issuing of the final certificate under paragraph 63 in respect of any part of a local highway, the undertaker must, if requested by the relevant highway authority, in respect of a local highway which is to be maintainable by the relevant highway authority following, and as a result of, the completion of those works either—

- (a) execute and complete a transfer to the relevant highway authority at nil consideration of any land and rights which have been compulsorily acquired under this Order and which are necessary for the maintenance and operation of a local highway; or
- (b) exercise article 24 (compulsory acquisition of land) and article 27 (compulsory acquisition of rights and imposition of restrictive covenants) of this Order to directly vest in the relevant highway authority land or s which are necessary for the maintenance and operation of a local highway,

unless otherwise agreed between the undertaker and the relevant highway authority.

#### *Commuted sums*

**67.—**(1) The relevant highway authority must provide to the undertaker an estimate of the commuted sum, calculated in accordance with the relevant highway authority's published guidance or any successor guidance, prior to beginning the specified works.

(2) The undertaker must pay to the relevant highway authority the commuted sum prior to the issue of the provisional certificate.

#### *Insurance*

**68.** Prior to beginning the specified works the undertaker must ensure that such public liability insurance in the minimum sum of £10,000,000 as the local highway authority may reasonably require for the specified works in question is in place with an insurer against any legal liability for damage loss or injury to any property or any person as a direct result of the execution of specified works.

#### *Indemnity*

**69.—**(1) Subject to sub-paragraphs (2) and (3) the undertaker fully indemnifies the relevant highway authority from and against all costs, claims, expenses, damages, losses and liabilities suffered by the relevant highway authority arising from the construction, maintenance or use of the specified works or exercise of or failure to exercise any power under this Order within 14 days of demand.

(2) Sub-paragraph (1) does not apply to costs, claims, expenses, damages, losses and liabilities which were caused by or arose out of the negligence or default of the relevant highway authority or its officers, servants, agents or contractors or any person or body for whom it is responsible.

(3) If any person makes a claim or notifies an intention to make a claim against the relevant highway authority which may reasonably be considered likely to give rise to a liability under this paragraph then the relevant highway authority must—

- (a) as soon as reasonably practicable give the undertaker reasonable notice of any such third party claim or demand, specifying the nature of the indemnity liability in reasonable detail; and
- (b) not make any admission of liability, agreement or compromise in relation to the indemnity liability without first consulting the undertaker and considering their representations.

(4) The relevant highway authority must use its reasonable endeavours to mitigate in whole or in part and to minimise any costs, expenses, loss, demands and penalties to which the indemnity under this paragraph applies where it is within the relevant highway authority's reasonable gift and control to do so and which expressly excludes any obligation to mitigate liability arising from third parties which is outside of the relevant highway authority's control. The relevant highway authority must provide an explanation of how any claim has been mitigated or minimised or where mitigation or minimisation is not possible an explanation as to why, if reasonably requested to do so by the undertaker and only in relation to costs that are incurred which are within the relevant highway authority's direct control.