

## **WEST MIDLANDS INTERCHANGE – WRITTEN REPRESENTATION FOR DEADLINE 2 SUBMISSION**

As an interested party to the examination of the West Midlands Interchange DCO Highways England make the following Written Representation.

In addition to this Written Representation we have prepared a response to the ExA's questions in the template supplied by PINS.

### **Preamble**

Highways England has been appointed by the Secretary of State for Transport as a strategic highway company under the provisions of the Infrastructure Act 2015 and is the highway authority, traffic authority and street authority for the Strategic Road Network (SRN).

The SRN is a national asset and as such works to ensure that it operates and is managed in the public interest, both in respect of current activities and needs as well as in providing effective stewardship of its long-term operation and integrity. The SRN in close proximity to the site comprises the A5 and A449 trunk roads and the M6 and M54 motorways.

In our Deadline 1 submission and oral evidence at the initial hearing sessions we raised the matters of Deemed Consent and Development Phasing. For clarity, we record that these matters remain of concern to us as set out below.

### **Deemed Consent**

At the DCO issue specific hearing we raised the principle of deemed consent as a fundamental issue for Highways England.

Highways England is a strategic highway company operating under the terms of the Infrastructure Act 2015 including a licence issued by the Secretary of State for Transport.

Section 5(2) of the 2015 Act provides that; “...a strategic highways company must also, in exercising its functions, have regard to the effect of the exercise of those functions on—

- (a) the environment, and
- (b) the safety of users of highways”

Section 4.2 of the License (dated April 2015) indicates that “Without prejudice to the general duties on the Licence holder under section 5 of the Infrastructure Act 2015, the Licence holder must, in exercising its functions and complying with its legal duties and other obligations, act in a manner which it considers best calculated to: .....(e) Protect and improve the safety of the network.....”.

Only Highways England as the licensed highway authority can determine the safety implications of any development proposition that introduces changes to its network. This duty is non-delegable to third parties as only Highways England under section 5(2) of the 2015 Act and its license has the locus to carry out this function. Our statutory duty to have regard to the safety of users of our highways is negated by the very principle of deemed consent.

We set out below our views on the DCO Articles in which the applicant seeks to apply deemed consent which could negate the approval processes that we are bound to operate by statute and the terms of our operating license. In addition, we reference the operation of the Protective Provisions under a deemed consent scenario.

Article 9(2) – this article provides for deemed consent to the works in Works No 5 in so far as it allows variation in the make-up of streets. Importantly for Highways England, Works No 5 includes “....(b) works comprising the interfaces with Works Nos. 4 and 7”, Works No 4 being the trunk road works. The ability of the applicant after a fixed period to vary at will the physical interfaces with the trunk road is unacceptable to Highways England given that this approach could result in a situation where the safety implications of such a variation would not be subject to detailed assessment by Highways England.

Article 13(3) provides for deemed consent to be granted for proposed new accesses. Highways England in addition to its stated position on design approvals for accesses raised in previous correspondence has specific policy obligations imposed by the DfT in respect of new accesses on the trunk road network. DfT Circular 02/2013 contains a general presumption against new trunk road accesses being approved, although a ‘*graduated and less restrictive approach to the formation or intensification of use of access*’ may apply on a case by case basis for a Trunk Road that is not a route of near motorway standard.

The assessment of such proposals must be made on their merits and is a matter for Highways England regarding the core function of the network and safety of such proposals. Any requirement to depart from this policy are not within Highways England’s

gift (being under DfT control) and as such the principle of deemed consent forms a direct challenge to government policy.

Article 17(7) provides for deemed consent for an unlimited ability to make, amend or revoke traffic orders not included in Schedule 9. Traffic Orders have direct implications for road safety which only Highways England can fully assess.

Article 21(9) provides deemed consent for the discharge of water into the systems of statutory water undertakers. Highways England although not a statutory water undertaker does have policy requirements imposed by DfT Circular 02/2013 not to accept water run off that may arise due to any change of use from development land. As such, we contend that the general application of this Article is unacceptable given our specific duties under this policy.

Article 22(6) allows for deemed consent to access the highway for invasive surveys to be conducted. The implications for road users of such surveys are significant with temporary closures and traffic management measures expected with attendant safety concerns which only a fully approved working regime can manage. The integrity of our asset is key to the discharge of our statutory safety responsibilities. Deemed consent of invasive works compromises the necessary control that our statutory duties require. As such, deemed consent for these works is inappropriate and not in accordance with the statutory requirements placed upon us.

The Protective Provisions have been drafted in such a way to mirror a standard Section 278 agreement and largely reflect the process that Highways England would expect a developer to follow should it wish to carry out work on the SRN. As the highway authority for the SRN and the body that will become responsible for those works on completion, it is considered absolutely vital that Highways England has a role to play in both the design of those works and how they are carried out. Highways England is a competent network operator with a tried and tested asset protection team in place to address these issues and therefore the appropriate body to ensure that these works are designed and carried out safely and correctly.

The Protective Provisions have in general been agreed on the basis that they ensure that no work is either accepted as an appropriate design, or constructed on site, if it would not be compliant with the Design Manual for Roads and Bridges. Deemed consent is not workable with this requirement. These provisions are written to ensure the safety of the travelling public is paramount with only suitable work being taken forward and implemented for use. Should deemed consent apply in terms of design and

specification work then the risk of unsuitable work being constructed on site and the likelihood of adverse safety incidents occurring increases. This is something that Highways England cannot tolerate as highway authority and network operator with statutory obligations to protect the safety of the SRN. Once “approved” works are constructed Highways England must take them back under its control notwithstanding any safety concerns it may have. There is then a potential liability on the public purse to carry any safety risk or spend money to put things right all because a deadline was missed, and the highway authority’s approval processes were bypassed. Anything that can create an ongoing safety risk, and liability for the public purse, should not be subject to deemed consent due to the inherent risks that creates.

Highways England understands that the Applicant’s rationale for seeking deemed consent provisions is to ensure appropriate engagement. It ought to be recognised however that Highways England has statutory responsibilities to support economic growth<sup>1</sup> (i.e. to support developments such as this one) and as a public body must act reasonably. It should not therefore be necessary for Highways England to be made subject to deemed consent provisions to ensure its engagement and a public body should not be forced into a position against its will where safety is potentially compromised. Similar arguments were advanced by National Grid during the examination into the North London Heat and Power Generating Station DCO. The Secretary of State accepted National Grid’s submissions and confirmed that the requirement for an approval not to be unreasonably withheld or delayed would be appropriate to ensure the undertaker received a response in a timely manner. Deemed consent provisions were therefore removed before the order was made. Highways England submit that the same position should be taken with regards this application and would not object to being subject to a similar obligation.

## **Development Phasing**

We noted the comments from South Staffordshire District Council on the phasing of the development authorised by the DCO with particular regards to the timing of the rail terminal being available for use. At the DCO Issue Specific Hearing we recorded that the availability of the rail terminal is an essential element of the basis on which the traffic analysis supporting the DCO application has been conducted.

We note that a stand-alone assessment of the traffic implications of the Phase1 development of 147,000m<sup>2</sup> has been conducted and accepted by Highways England.

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<sup>1</sup> See paragraphs 4.2 and 4.3 of Highways England’s Licence

This assumes no rail traffic being present and the A449 to A5 link road not opened until the 147,000m<sup>2</sup> cap is exceeded.

Beyond the development quantum set for Phase 1, the rail terminal forms an integral element of the transport equation for the assessment of the traffic impacts of the development in accordance with the requirements of DfT Circular 02/2013 “The strategic road network and the delivery of sustainable development”. Rail transport at the comparator sites selected by the applicant and agreed with Highways England was active at the time of their assessment. The trip generation and distribution analysis at the WMI site therefore reflects the data collected from the comparator sites including an active rail link and terminal.

The traffic mitigation package submitted by the applicant is directly related to the assessments made which include an active rail terminal.

On this basis, the concerns of South Staffordshire Council over the certainty that an active rail terminal will be in place are, in our view, well founded due to the unforeseen and unassessed consequences on the Strategic Road Network should a rail terminal not materialise. It is therefore a concern for Highways England that the rail elements of the proposal are brought forward in a timely manner as the standalone implications of further phases of the non-rail connected development have not been assessed. Our license duty to provide effective stewardship of the long-term operation and integrity of the SRN is placed in significant doubt if unforeseen traffic consequences occur due to the lack of an active rail terminal.

### **Traffic Issues raised at the Open Table and DCO Issue Specific hearings**

We noted in our Deadline 1 Representation that we would make further detailed representations on traffic related matters.

To aid clarity for Interested Parties we have set these representations out in response to the ExA’s questions which cover the issues raised in both the written and oral representations.

### **Statement of Common Ground**

We have reviewed a further draft SoCG provided by the applicant and provided comment to the applicant on 1<sup>st</sup> April 2019.

## **Progress on outstanding matters between the applicant and ourselves**

As noted in our previous correspondence a small number of further matters remain outstanding between ourselves and the applicant.

We provide a commentary below to ensure the ExA is informed of the latest position.

### **1. Road Safety Audit.**

We are continuing to progress the completion of the RSA stage 1 with the applicant.

In terms of the SRN RSA Stage 1 we are working with the applicant to conclude to our satisfaction the assessment, the necessary designer's response and approval of any exceptions that may be necessary.

At this stage we raise particular concern with the findings of the RSA 1 in respect of M6 junction 12. Although capacity assessment of the roundabout in scenarios with development traffic is satisfactory, the RSA 1 has identified safety concerns that may escalate with development traffic. Potential options for addressing this concern may involve works at the junction but outside the DCO boundary which the applicant will not have the power to undertake. We note that the applicant is reviewing our observations and we expect further information being supplied in due course.

We envisage completion within the Examination timescales. Whilst the subsequent submission of the RSA reports and approvals to the Examination are a matter for the applicant we envisage this occurring in due course.

### **2. Drainage Strategy**

Our concern in respect of the applicant's drainage strategy is due to the need to protect the SRN against the adverse implications of the change in land use and associated changes in the catchment and run off rates produced by the WMI development.

In policy terms, the site drainage and highway drainage should not be interlinked in order to ensure the integrity of the SRN drainage system. DfT Circular 02/2013 "Strategic road network and the delivery of sustainable development" paragraph 50 refers. The submitted plans propose use of an outfall incorporating use of a culvert under the A449 road which is believed to form part of the highway drainage system and therefore a Highways England asset. To date, the applicant has offered no evidence to confirm that this asset is *not* part of the highway drainage system and therefore not within the ambit of paragraph 50.

The trunk works further propose a Canal and Rivers Trust conduit for water flowing from the reservoir to the Staffordshire & Worcestershire Canal coming within the highway boundary of the A5. The applicant offers no proposal as to the ownership of this conduit, nor sets out proposals for its future maintenance. Highways England will not as a matter of course adopt this connection and therefore we require the applicant to confirm the future status and stewardship of the asset. Our preferred solution is that the conduit is relocated within the site boundary and removed from highway land.

We have recently received a further submission of design information from the applicant seeking to address the outstanding issues. We are reviewing this information and will advise the applicant and the ExA of the outcome of the review.

### **3. HGV Management Plan**

We have reviewed the latest draft of this document (Revision C) and have indicated to the applicant a small number of matters to be addressed. We await the applicant's confirmation of these through issue of a further revision.

### **4. Bond and Surety Matters**

We have engaged with applicant's legal advisors and stated our position. We now await the further draft DCO to be issued by the applicant at Deadline 3 with regard to the proposed bond and surety levels before we respond further.

### **Closing Observations**

We look forward to continuing to work with the applicant to resolve the remaining outstanding matters. As part of this work we are intending to make further submissions to ExA as the examination progresses including a commentary on the Deadline 3 submission of a further draft of the DCO.