

# **M42 Junction 6 Development Consent Order Scheme Number TR010027**

## **8.39 Written Submission of Applicant's Case at the Second ISH on 2 July 2019**

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Rule 8(1)(k)

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**M42 Junction 6**  
Development Consent Order 202[ ]

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### Appendices:

- A Applicant's Comments on the Written Representation of the Gooch Estate made in respect of the drafting of the dDCO submitted at Deadline 1 and comments on "Written Summary of Oral Submissions" on ISH(1) on the dDCO held on 22 May 2019 and submitted at Deadline 2.
- B Precedents of Use for Provisions in the dDCO.
- C Local Legislation to be disapplied.

## 1. Introduction

- 1.1.1 This document summarises the case put forward by Highways England (the Applicant), at the Issue Specific Hearing (ISH 2) on the draft Development Consent Order (DCO) which took place at the Ramada Hotel, Church Hill Road, Solihull on 2 July 2019.
- 1.1.2 The Examining Authority (ExA) confirmed (in response to original question 1.1) that only the final form of the draft Development Consent Order (dDCO) as the Applicant wished to be made (to be submitted on Tuesday 5 November 2019) had to be accompanied with a SI template validation report.
- 1.1.3 The ExA noted that Gooch Estate had queried the drafting of various articles in the dDCO and had set out these comments in its Written Representation (REP1-023) and its written summary of oral submissions made at ISH(1) on the dDCO (REP2-053). The Applicant was directed by the ExA to respond to these issues in writing by Deadline 3.
- 1.1.4 Please see Appendix A to this document which sets out the Applicant's response to the various points raised by Gooch Estate in the aforementioned documents.

## 2. Representations at ISH 2

### 2.1 Articles of the DCO

- 2.1.1 Nick Evans (NE) on behalf of the Applicant confirmed that the definition of 'Secretary of State' will be removed from article 2 in accordance with Advice Note 15 and that the drafting in Article 21 will be updated to also include 'Homes England', the trading name of the Homes and Communities Agency, to reflect the ExA's preferences.
- 2.1.2 In response to the Canal & River Trust's submission to remove 'canal' from the definition of 'watercourse' in article 2, NE, on behalf of the Applicant, explained that the definition used was standard and well preceded in DCOs and that to remove 'canal' from the definition would simply cause confusion. It was submitted that it was the Applicant's preference for the definition to remain unchanged given it was well preceded and there are no canals affected or impacted by the Scheme.
- 2.1.3 The Applicant considered the need to maintain 'adjacency' in article 3 and submitted that it remained beneficial to the Scheme to maintain it. It was confirmed that, following a review of the relevant local legislation, the list had been narrowed and no further legislation had been identified, but the Applicant could not be certain that all relevant legislation had been identified in the search. Trevor Ivory on behalf of HS2 said that this was a critical issue for HS2 but one that was capable of being resolved through protective provisions. In response, NE for the Applicant confirmed that the parties were working up protective provision which would set out how the two projects would interrelate to satisfy both HS2 and the Applicant.
- 2.1.4 NE for the Applicant noted that although the current timetable does not require the Applicant to submit the next iteration of the dDCO until Deadline 5 (which is after the next scheduled ISH on the dDCO) the Applicant would provide an updated version of the dDCO (for Deadline 3. This would allow Interested Parties to consider it in advance of the next DCO ISH. The ExA confirmed that they welcomed this suggestion.
- 2.1.5 NE confirmed that the next iteration of the dDCO would include amendments to article 6 to reflect the Secretary of State's decision in the A19/A184 Testo's Junction Alteration (Correction) Order 2019 so that the reference would be to 'materially new or materially different environmental effects.' It was also confirmed that appropriate changes would be made to the dDCO wherever this wording was found.
- 2.1.6 Robert Eaton of Birmingham Airport asked whether the test might also be used for changes which may affect aerodrome safety in order to protect the airport's aerodrome safeguarding zone. NE, on behalf of the Applicant, submitted that this would be most appropriately dealt with in the context of a requirement as the reference to 'materially new or materially different' was drafted in the context of Environmental Impact Assessment legislation. NE confirmed that the Applicant would include in the dDCO draft wording for such a requirement submitted Deadline 3. Birmingham Airport confirmed that they were content with this proposal subject to confirmation of the drafting.

- 2.1.7 The ExA asked the Applicant to confirm the precedents (and case law if any) in support of article 11 (Planning Permission). Please see Appendix B.
- 2.1.8 The ExA sought to understand the status of the table of works provided by the Applicant identifying streets within the Order limits where street works could be carried out. NE confirmed that it had been provided for information only. NE reiterated that the Applicant did not believe it necessary to list all the affected streets in a schedule, citing unnecessary duplication, as the Applicant proposes to carry out at least some street works in relation to almost every street in the Order limits. The ExA confirmed that they would consider this point further.
- 2.1.9 NE explained the Applicant's approach to the New Roads and Street Works Act 1991 (the 1991 Act) as set out in the dDCO. Ordinarily, the 1991 Act gives statutory undertakers a general ability to carry out street works at times and locations that suit their undertakings, and gives street authorities the powers to constrain that general ability. On the basis that the dDCO permits the Applicant to carry out specific works and specific locations in a specific time period, the Applicant considers that it is unnecessary for these powers in the 1991 Act also to apply. NE on behalf of HE submitted that this was standard practice in a number of DCOs, and the approach was supported by Warwickshire County Council (WCC), although Solihull Metropolitan Borough Council (SMBC) has indicated (in its response to Rule 6 letter) that its normal 1991 Act powers should remain. The Applicant's position remains that it is appropriate for street works under the DCO to be constrained by the DCO's own obligations, and that the 1991 Act powers set out in article 13(3) are not appropriate. This only applies to the Scheme and clearly SMBC would remain responsible for such works outwith the dDCO.
- 2.1.10 NE noted the ExA's request for further information on precedent of use and case law where applicable in relation to articles 19, 23, and 39 and committed to respond by Deadline 3. Please see Appendix B.
- 2.1.11 NE confirmed that in relation to article 50 (disapplication of local legislation) that extracts of the relevant legislation would be submitted by Deadline 3. Please see Appendix C.

## 2.2 Guillotine and deemed consenting provisions

- 2.2.1 WCC and SMBC confirmed that neither party objected to the Applicant's proposed guillotine provisions. Their respective positions are confirmed in WCC's Local Impact Report (REP2-038) the position statement of WCC submitted at Deadline 2 (REP2-039) and in SMBC's response to the Rule 6 letter (REP2-037).
- 2.2.2 NE noted the ExA's comments that, under article 16, the Applicant may be able to stop up streets temporarily without the consent of the local street authority. NE explained that, other than for the street specified in Schedule 4 (currently only part of Solihull Road) where the Applicant would only have consult the street authority before stopping up the street, the Applicant would be required to obtain the consent of the street authority before temporarily stopping up or restricting the use of any other street within the Order limits (as set out in article 16(5)(b)).
- 2.2.3 NE submitted that the street authority may choose to impose any reasonable condition regarding any such consent and this could be used to address one of the Gooch Estate's concerns that the Applicant should provide replacement

vehicular access. SMBC (the relevant street authority) confirmed that they felt best placed to retain these powers, as set out in its response to the Rule 6 letter but that the Applicant's proposal may be workable if it was limited to one street. The Applicant and SMBC confirmed that they would investigate this issue further.

- 2.2.4 NE addressed the ExA's questions regarding article 21, confirming that the Applicant would continue to be subject to the Environment Agency's permitting regime as the standard controls and conditions in relation to water discharge and drainage would continue to apply.
- 2.2.5 The ExA explored whether, on the face of applications which would be subject to the deemed consenting provisions, the Applicant could make it clearer to the consenting body that the application was subject to such provisions and that they could ask for further information before taking a decision. NE submitted that as SMBC would almost always be the consenting body for any such applications, the Applicant would discuss proposed wording with them before submitting it to the ExA for their consideration.
- 2.2.6 NE also confirmed that the Applicant would review and respond to the Gooch Estate's comments on deemed consent provisions (see Appendix A).
- 2.2.7 NE confirmed that the Applicant would provide an update as to the land provisionally identified as maybe required for surveys (article 23).



### 3. Schedule 1 Authorised Development

- 3.1.1 In response to the Warwickshire Gaelic Athletic Association's (WGAA) proposed amendment to the description for Work No. 68, NE for the Applicant submitted that the dDCO includes measures to mitigate the impact of the Scheme on the WGAA and these are confirmed in the proposed reconfiguration of the WGAA facility (**APP 8.21**). It does not include the relocation of the existing club house, but proposes internal reconfiguration and therefore the Applicant sees no need for the drafting amendments suggesting by the WGAA.
- 3.1.2 Philip O'Reilly questioned the Applicant on whether the distance left between the pitches, causing further encroachment on his land, was being provided not because it was necessary for the Scheme but because it would allow the WGAA to carry out further development, relocating their clubhouse elsewhere on the site. The Applicant explained that this was not the case, citing the need to strike a balance between the impacts of the Scheme on all interested parties and to ensure that access was being provided. NE also reiterated that the ISH was focused on the DCO, whilst this issue was more relevant to a Compulsory Acquisition Hearing.
- 3.1.3 In response to the ExA's queries about whether each individual numbered Work in Schedule 1 should also set out the "lettered" ancillary works that could be carried out in connection with it, NE confirmed that the Applicant took the view that the approach taken in the dDCO as currently drafted, with the lettered ancillary works expressed to apply to any of the numbered Works was consistent with a long line of DCOs and Transport and Work Act Orders and achieved a balance between scheme detail and flexibility and the nature of the Scheme. It also prevented unnecessary repetition within the dDCO itself. This view was supported by SMBC. Nevertheless, the Applicant had submitted in Appendix C to its Response to the ExA's Questions on the DCO [**APP 8.7**], a table showing which of the lettered works are anticipated to apply to each numbered Work, and confirmed to the ExA that they would respond to the Gooch Estate's submissions on this matter.
- 3.1.4 The ExA sought further information on when they could expect the management strategy for Work 69 including details on the location of the compound(s) as they had hoped to have further detail in advance of the ASIs. NE for the Applicant, confirmed that a meeting had taken place between the Applicant's Senior Project Manager and Contractor, Skanska, for the Scheme who was working these up. The Applicant committed to see what could be provided for the ASI and to provide the timeline to present the strategy for Deadline 3.
- 3.1.5 Jonathan Horton, Parish Councillor for Bickenhill and Marston Green, sought information on the latest date that the compound location could be moved. NE for the Applicant explained that this would depend on whether a proposed new location would need an additional Environmental Statement or land take and require a material change to the DCO. The Applicant confirmed they would provide further details for Deadline 3. NE confirmed that notwithstanding production of the note it remained the Applicant's position that the position of the main site compound was appropriate and that it was not the Applicant's intention to seek a change to the dDCO seeking to move the site of the compound.



- 3.1.6 The ExA also asked for additional detail about the alternative sites that were considered for the compound, the reasons for the final choice and justification for the proposed location of the site. It was confirmed that such a paper would be prepared but that it was a substantial requirement and not one that could be completed by Deadline 3. It was agreed that the additional information would be submitted by Deadline 4.

## 4. Requirements, Discharging Procedures, Appeals and Disputes

- 4.1.1 The Applicant submitted that in article 47, the President of the Institute of Civil Engineers is an appropriate arbitrator in circumstances where the Secretary of State may be a party to the arbitration, as is the case in this Scheme and in the DCO for M4 Smart Motorway. This is on the basis that they understand how large civil engineering projects work and have experience of appointing arbitrators across all aspects of such work. Both SMBC and WCC confirmed that they were content with the arbitration provision as provided in the dDCO.
- 4.1.2 In Requirement 5 (Landscaping), NE on behalf of the Applicant, confirmed that they would review the wording at paragraph 4 to consider whether "other recognised codes of good practice" could be drafted to be more precise, otherwise they submit that the existing wording should be maintained.
- 4.1.3 The Applicant provided an update on the progress made on the protected species draft licences for bats and Great Crested Newts.
- 4.1.4 The ExA sought details from the Applicant about circumstances in Requirement 7 (protected species) when it would not be possible to avoid the bird nesting season and who would decide if this was the case. NE explained that this was likely to be the case for example where timings of works were constrained by where we they were in the programme; where slots had been allocated for works near the railway; and where the Applicant was moving receptors such that they were unable to avoid the entirety of a long season. This would be set out in the various plans of the Construction Environmental Management Plan (CEMP), but the Applicant agreed to provide further detail for Deadline 3.
- 4.1.5 NE, on behalf of the Applicant, also committed to provide ExA with information in relation to Requirement 9 (Archaeological remains), setting out the circumstances envisaged where a larger buffer would be needed and how it would be decided.

## 5. Protective Provisions Update

- 5.1.1 NE, on behalf of the Applicant, provided an update on the good progress made on protective provisions since Deadline 2. It was explained that an asset protection agreement may be considered more appropriate for Network Rail, and that a side agreement may be used for Esso given that they are not a statutory undertaker. WPD are seeking to agree standard provisions with the Applicant across all their projects and the Applicant awaits the outcome of negotiations on the A30 Chiverton to Carland Cross scheme, which is further advanced and may provide a precedent for the Scheme to follow.
- 5.1.2 NE suggested that HS2 who were in attendance, may want to respond on progress protecting their future assets. Trevor Ivory, on behalf of HS2 confirmed that protective provisions would be required to deal with their concerns about the powers sought under article 3 of the dDCO, but that a combination of options may be used to deal with wider issues. HS2 said that they were keen to see draft provisions as soon as possible.

## 6. Other Issues Arising from Deadline 2 Submissions

- 6.1.1 Mark Sullivan (MS), representing Campaign to Protect Rural England (CPRE) Warwickshire challenged whether the application was legally sound on the basis that the Scheme was not connecting a trunk road to the motorway, the A45 having previously been detrunked. MS was asked by the ExA to provide a written submission for Deadline 3 and the Applicant confirmed that they would provide comments on this response.

## Appendix A: Applicant's Comments on the Written Representation of the Gooch Estate made in respect of the drafting of the dDCO submitted at Deadline 1 and comments on "Written Summary of Oral Submissions" on ISH(1) on the dDCO held on 22 May 2019 and submitted at Deadline 2

Question No./ Party	Question/Response/Comments (and drafting example where relevant)
Q1.4	<b>General: Guillotine Provisions</b>
Extract from response	<p><i>A number of the Articles (such as Articles 16, 20, 21 and 23) provide for deemed consent if a consultee does not respond within a certain period, known as a 'guillotine' provision.</i></p> <p><i>Similarly, paragraph 13(1), Part 2, Schedule 2 (Applications made under requirements) provides that "where an application has been made to the Secretary of State for any consent, agreement or approval required by a requirement... the Secretary of State must give notice to the undertaker of the decision on the application within a period of 8 weeks". Pursuant to paragraph 13(2) of the same Schedule, if the Secretary of State does not determine an application within the period, "the Secretary of State is taken to have granted <b>all parts</b> of the application (<b>without any condition or qualification</b> at the end of that period)" (emphasis added).</i></p> <p><i>The Gooch Estate consider that the very broad powers conferred by these 'guillotine' provisions are not appropriate. The street authority or Secretary of State may not have sufficient time to undertake the necessary consultation to fully understand the impact of the proposals within such limited time periods.</i></p> <p><i>In its written summary of oral submissions made at the ISH(1) [REP2-053]:</i></p> <p><i>"3.4: The Gooch Estate submitted that if the Secretary of State is under considerable pressure an 8 week period may not provide sufficient time to consider and undertake the necessary consultation to fully understand the impact of a proposal or application under paragraph 13, Part 2, Schedule 2. This could result in non-determination with no proper scrutiny. This does not afford any protection to any affected persons."</i></p>

Question No./ Party	Question/Response/Comments (and drafting example where relevant)
	<i>3.6: HE confirmed at the hearing that they will put forward a detailed process and/or explanation in relation to Secretary of State approval and guillotine provisions.</i>
Applicant's Comment	<p>Please see the Applicant's response to questions 1.4 and 1.5 of the ExA's first round of written questions [<b>REP2-008/Document 8.7</b>].</p> <p>The response to Q1.4 deals, in particular with comments raised by the Gooch Estate in relation to the general use of 'Guillotine Provisions' whilst the response to Q 1.5 considers general determinations and discharge of requirements and the role of the Secretary of State (SoS).</p> <p>In addition, the response confirms the process followed by the SoS in discharging requirements.</p>
Extract from response	<p><u>Written Representation</u> [<b>REP1-023</b>]</p> <p><i>6.5: It is not standard practice for all development consent orders to confer 'guillotine' provisions in respect of temporary stopping up powers. For example, the Morpeth Northern Bypass DCO provides no such provision at corresponding Article 12 (Temporary prohibition or restriction of use of streets). The requirement is for consent from the street authority, with a provision that such consent is not to be unreasonably withheld.</i></p>
Applicant's Comment	<p>The Applicant does not agree with the assertion made by Gooch Estate that it is not standard practice for all 'DCOs' to include deemed consenting provisions in respect of temporary stopping up powers. Gooch Estate cites an individual example.</p> <p>The deemed consent provisions adopted by the Applicant in the dDCO have been adopted from precedents contained and endorsed by the SoS in many other DCO schemes (both highway and non-highway) and the Applicant is satisfied that the inclusion of such provisions is justified and proportionate:</p> <p>Not including any of the Applicant's DCOs examples include:</p> <ul style="list-style-type: none"> <li>Article 13 (Temporary Prohibition or restriction of use of streets) <b>The Cornwall Council (A30 Temple to Higher</b></li> </ul>

Question No./ Party	Question/Response/Comments (and drafting example where relevant)
	<p><b>Carblake Improvement) Order 2015</b>, promoted by Cornwall County Council;</p> <ul style="list-style-type: none"> <li>Article 69 (Consents, agreements and approvals) <b>The Silvertown Tunnel Order 2018</b>, promoted by Transport for London ('TfL') which states <p>“(2) If a relevant authority which has received an application fails to notify TfL of its decision before the end of the period of 28 days beginning with the date on which the application was received, the relevant authority is deemed to have given its consent, agreement or approval, as the case may be.”</p> </li> <li>Article 57 (Consents, agreements, certification and approvals) <b>The Port of Tilbury Order 2019</b> promoted by Port of Tilbury London Limited, which replicates the provision of the Silvertown Tunnel Order set out above.</li> <li>Article 13 (Temporary stopping up of streets and public rights of way) <b>The National Grid (Richborough Connection Project) Development Consent Order 2017</b></li> </ul> <p>The Applicant would also point out to the ExA that the Morpeth North Bypass was promoted by Northumberland County Council, which was itself the local highway authority, and that Article 13 (Power to alter layout of streets) of the same DCO – which presumably affects streets that are not the responsibility of the County Council – does include a deemed consent provision of 28 days.</p> <p>Please see also the Applicant's response to question 1.4 of the ExA's first round of written questions [(REP2-008/Document 8.7)] with its general comments on the justification for deemed consent.</p>



Question No./ Party	Question/Response/Comments (and drafting example where relevant)
Extract from response	<p><u>Written Representation</u> [REP1-023]</p> <p>6.6: Similarly with the Morpeth Northern Bypass, 'guillotine' provisions were originally proposed with respect to the discharge of requirements. However, these were removed and replaced by provisions at paragraph 2 of Schedule 2 (Approvals of submitted schemes) which provide no time limits for approval of details submitted to discharge requirements but do state that:</p> <p>"(3) Where any requirement specifies "unless otherwise approved by the relevant planning authority" such approval must not be given except in relation to minor or Immaterial changes where the subject-matter of the approval sought (either by itself or in combination with other changes or proposed changes) is unlikely to give rise to any materially new or materially different environmental effects from those assessed in the environmental statement and such an approval must not be given in respect of any land outside the Order limits."</p> <p>6.7: The Gooch Estate wishes to see provisions such as those used in the Morpeth Northern Bypass DCO utilised in this DCO. As an alternative to the 'guillotine' provisions', the Gooch Estate would be satisfied with an appeal procedure as set out in Appendix 1 to Advice note fifteen: Drafting Development Consent Orders (Appendix 2) or the ability for the arbitration provisions under Article 47 to be utilised in the event of non-determination</p>
Applicant's Comment	<p>The Applicant has visited the Planning Inspectorate's website to review the Morpeth Northern Bypass DCO. The dDCO submitted for application did not appear to contain any procedure for the discharge of requirements and no 'guillotine' provisions could be seen. That said, it is acknowledged that the DCO as made does include Requirement 2 (Approvals of submitted schemes) which does not include a 'guillotine' provision.</p> <p>The requirements in the Morpeth Northern Bypass are discharged by the relevant planning authority, which was Northumberland County Council itself, rather than the SoS. Again, therefore, applications for discharge of requirements would have been an internal matter within the County Council, and so are not directly relevant to this DCO.</p> <p>The Applicant notes that the Silvertown Tunnel Order 2018 and the Port of Tilbury Order 2019 referred to above both contain provisions for the discharge of requirements (by the local authority) and which include deemed consent</p>

Question No./ Party	Question/Response/Comments (and drafting example where relevant)
	<p>provisions (8 weeks) which drafted in similar terms to those contained in the Applicant's dDCO</p> <p>For the reasons set out fully in response to Q1.5 of the ExA's First Written Questions [REP2-008/Document 8.7] the Applicant is satisfied that the drafting of Schedule 2 and the discharge of requirements is appropriate and there is no requirement for the drafting to be changed.</p>
Extract from Response	<p><i>The Gooch Estate wishes to see provisions such as those used in the Morpeth Northern Bypass DCO utilised in this DCO. As an alternative to the 'guillotine' provisions', the Gooch Estate would be satisfied with an appeal procedure as set out in Appendix 1 to Advice note fifteen: Drafting Development Consent Orders (Appendix 2) or the ability for the arbitration provisions under Article 47 to be utilised in the event of non-determination tract of answer to be added</i></p>
Applicant's Comment	<p>For the reasons set out fully in response to Q1.5 of the ExA's First Written Questions [REP2-008/Document 8.7] the Applicant is satisfied that the drafting of Schedule 2 and the discharge of requirements is appropriate and there is no requirement for the drafting to be changed.</p>
Question 4	<p><b>Limits of Deviation – Article 6</b></p>
Extract from response	<p><u>Written Summary of Oral Submissions</u> [REP2-053]:</p> <p>4.1: Article 6(1) enables the undertaker to deviate, to certain maximum limitations, laterally and vertically from the works plans and engineering drawings and sections "except that these maximum limits of deviation do not apply where it is demonstrated by the undertaker to the Secretary of State's satisfaction and the Secretary of State, following consultation with the relevant planning authority, certifies accordingly that a deviation in excess of these limits would not give rise to any materially new or materially worse adverse environmental effects from the reported in the environmental statement".</p> <p>4.2: The Applicant was asked to justify this level of flexibility in the context of this DCO.</p>

Question No./ Party	Question/Response/Comments (and drafting example where relevant)
Applicant's Comment	<p>Please see the response to ExA's question 4 [<b>REP2-008/Document 8.7</b>] where the Applicant was asked by the ExA to justify the level of flexibility provided by Article 6 of the dDCO.</p> <p>Please see also the Applicant's response to question 1.1.3 in the ExA's first round of questions [<b>REP2-007/Document 8.6</b>].</p>
Extract from response	<p><u>Written Summary of Oral Submissions</u> [<b>REP2-053</b>]:</p> <p><i>4.4: The Gooch Estate raised the concern that the 'guillotine' provisions at paragraph 13, Part 2 of Schedule 2 would also apply to any request made to the Secretary of State to disapply the maximum limits of deviation. The effect is that the Secretary of State may be deemed to approve exceedances of the limits of deviation without any assessment of the environmental or operational impacts of doing so.</i></p> <p><i>4.5: Paragraph 13(1)(c) creates a deemed refusal following non-determination of an application by the Secretary of State but only if HE is of the view that it would likely give rise to materially new or materially worse environmental effects. However, Article 6(1) requires the undertaker to satisfy the Secretary of State that the proposed deviation would not give rise to any materially new or materially worse environmental effects from those reported in the environmental statement. The Gooch Estate submitted that that the 'guillotine' provision at Schedule 2 may circumvent the Secretary of State's ability to satisfy himself regarding the environmental effects of the proposal.</i></p> <p><i>The <u>Written Summary of Oral Submissions</u> complimented the points made by Gooch Estates in its <u>Written Representation</u> [<b>REP1-023</b>]</i></p>
Applicant's Comment	<p>This issue is considered in the Applicant's response to question 1.5 of the ExA's first round of written questions on the dDCO [<b>REP2-008/Document 8.7</b>].</p>

Question No./ Party	Question/Response/Comments (and drafting example where relevant)
Question 9	<b>Street works – Article 12</b>
Extract from response	<p><u>Written Representation</u> [REP1-023]</p> <p><i>6.11 The Gooch Estate does not consider this wide power reasonable or necessary and believes the power should be limited to identified streets, as it is in article 8 of the Model Provisions. Where proposed works are likely to affect access to the Gooch Estate's Land, provision should be made for alternative access.</i></p> <p><u>Written Summary of Oral Submissions</u> [REP2-053]:</p> <p><i>5.1: Article 12(1) permits the undertaker to “enter on so much of any of the streets as are within the Order limits” to undertake works. The Gooch Estate reiterated its concern about the impact this wide power could have on its ability to access its Land. There are streets outside of the Works Plans but inside the Order limits which provide essential access to farmland owned and farmed by the Gooch Estate.</i></p> <p><i>5.2 The Gooch Estate do not consider this wide power to be reasonable or necessary. They requested a list setting out where the works are likely to be required and are necessary. Where proposed works are likely to affect access to the Gooch Estate's Land, provision should be made for alternative access and this should be secured through the DCO.</i></p>
Applicant's Comment	<p>The article extends to all streets in the Order Limits as it is a highway scheme and the Applicant proposes to carry out at least some works in relation to almost every street within the Order limits. It would be an unnecessary duplication to list in a schedule all streets within the Order Limits where street works may be required. The Applicant does not believe it is necessary, therefore, for the streets to be identified.</p> <p>At the ISH (2) on Tuesday 2 July on the dDCO, Mr Evans, on behalf of the Applicant, reaffirmed the Applicant's position in this regard. Mr Evans also confirmed that the table identifying the relevant streets (including those constructed as part of the Scheme) to which this article applies (submitted at Deadline 2) was for information purposes only and that it was unnecessary duplication to refer to these streets in a new schedule to the dDCO.</p>

Question No./ Party	Question/Response/Comments (and drafting example where relevant)
Question 12	<b>Temporary stopping up and restriction of use of streets – Article 16</b>
Extract from response	<p><u>Written Representation</u> [REP1-023]</p> <p><i>6.12: Gooch Estate's concern with respect to this Article is the impact it will have on the ability for the Gooch Estate to access its Land. While provision is made at Article 16(3) for the undertaker to provide reasonable alternative access for pedestrians going to and from premises abutting an affected street, no such provision is made for vehicular access. The Gooch Estate will need the right to have an alternative vehicular access provided where an existing access is blocked due to the temporary stopping up or restriction on use of streets.</i></p> <p><u>Written Summary of Oral Submissions</u> [REP2-053]:</p> <p>6.1: The Gooch Estate expressed the same concern with this Article and the need for vehicular access to be afforded by provision of alternative vehicular access. This should be secured through the DCO</p>
Applicant's Comment	<p>Please see the Applicant's response to question 13 in the ExA's questions [REP2-008/Document 8.7].</p> <p>There is no statutory requirement for the Applicant to provide temporary vehicular access to premises abutting an affected street, during a period of temporary stopping up for works. Nevertheless, the Applicant will seek to agree with Gooch Estate a mechanism to ensure that alternative vehicular access is available to their land where an access is prevented by a temporary stopping up.</p>

Question No./ Party	Question/Response/Comments (and drafting example where relevant)
Question 17	<b>Authority to Survey and Investigate the land</b>
Extract from response	<p><u>Written Representation</u> [REP1-023]</p> <p><i>6.14: The Gooch Estate considers that the powers to undertake surveys and investigations outside of the Order limits are onerous and unjustified such that they should be removed. Alternatively with regard to land outside of the Order Limits, the Gooch Estate requests a stipulation that justification is provided for surveys/investigations. If the Gooch Estate is not satisfied that justification exists for the proposed works there should be an ability to refer the matter for arbitration.</i></p> <p><u>Written Summary of Oral Submissions</u> [REP2-053]:</p> <p><i>7.13: The Gooch Estate owns a significant amount of land "adjacent" to the Order limits and considers that the powers to undertake surveys and investigations outside of the Order limits are onerous and unjustified such that they should be removed. Alternatively with regard to land outside of the Order Limits, the Gooch Estate requests a stipulation that justification is provided for surveys/investigations as they cannot understand what surveys are necessary.</i></p> <p><i>7.4: Although the Gooch Estate considers these broad powers unnecessary if they were found to be necessary it would request that they are modified to be time limited. It is unjust to have these powers hanging over a third party landowner.</i></p>
Applicant's Comment	<p>Please see the Applicant's response to question 13 in the ExA's questions [REP2-008/Document 8.7].</p> <p>The Applicant is unable to exhaustively identify all land adjacent to, but outside, the Order limits where surveys or investigations may be required under this article.</p> <p>Power to survey on land adjacent to the Order limits may only be carried out where it is "reasonably necessary". The article is time limited in that it relates to surveys in relation to the authorised development, predominately construction of the Scheme with only minor maintenance implications.</p> <p>It would be necessary to complete a survey outside the Order Limits when a precautionary approach is not reasonable</p>



Question No./ Party	Question/Response/Comments (and drafting example where relevant)
	<p>or sufficient, and the survey data it is required to maintain legal compliance of the Scheme. This is likely to be when there is an unavoidable risk of harm to a protected species and the survey is required to inform either a protected species derogation licence or non-licensed mitigation measures. The following are examples of when this would be reasonably necessary:</p> <ul style="list-style-type: none"> <li>• During construction badgers establish a new sett immediately adjacent the Order Limits, and both the nature of construction activities and the close proximity of the sett to the Scheme means it is not possible to avoid impacts. Direct survey is required to evaluate the sett and to inform the need for and requirements of a badger derogation licence.</li> <li>• Construction delays mean that existing baseline survey data is out of date and not considered sufficient by Natural England for a proposed Great Crested Newt European Protected Species licence application. Access to off-site ponds (potentially up to 500m from the Order Limits) is therefore required to update the baseline survey data and inform the derogation licence.</li> <li>• During construction a bird species listed under Schedule 1 to the Wildlife &amp; Countryside Act 1981, and therefore specially protected from disturbance, is observed immediately adjacent to the Order Limits. Delays to construction based on a precautionary approach, such as assuming the bird is nesting and maintaining a disturbance-free stand-off, may be considered unreasonable. Therefore, access to land outside the Order Limits would be required to monitor the bird and evaluate its breeding status for the purpose of informing avoidance measures.</li> </ul> <p>In terms of proportionality, the power could only be exercised, whether within or without the Order limits, on 14 days' notice to the owner and occupier of the land. The Applicant is obliged to compensate the owners and occupiers for any loss suffered. There is, therefore, an incentive for the Applicant to ensure that the survey works are carried out as quickly as possible.</p>
Not Applicable	<b>Compulsory acquisition of rights and restrictive covenants</b>
Extract from	<u>Written Representation</u> [REP1-023]



Question No./ Party	Question/Response/Comments (and drafting example where relevant)
response	<p><i>6.16 A substantial area of the Gooch Estate's land could be affected by the ability to impose restrictive covenants conferred by Article 27. The Gooch Estate echo the Examiners' concerns and the Secretary of State's decision at paragraph 62 of the M4 Motorway (Junctions 3 to 12) (Smart Motorway) DCO:</i></p> <p><i>"to remove the power to impose restrictive covenants and related provisions as he does not consider that it is appropriate to give such a general power over any of the Order land as defined in article 2(1) in the absence of a specific and clear justification for conferring such a wide-ranging power in the circumstances of the proposed development and without an indication of how the power would be used"</i></p> <p><i>6.17 In the Morpeth Northern Bypass DCO the Secretary of State considered that the power to impose restrictive covenants over land within the Order limits should be limited to a specified list of plots detailed in columns (1) and (2) of Schedule 10 to the Order (paragraph 44).</i></p> <p><i>6.18 Likewise, in the recently approved A19 / A184 Testos Junction Improvement DCO and the M20 Junction 10a DCO the power to impose restrictive covenants was limited by reference to certain plots specified in column (1) of Schedule 5 (see Article 23(3) Testos and Article 24(3) M20).</i></p> <p><i>6.19 The Gooch Estate does not consider such broad powers to be justified and would request that they are removed from the DCO or alternatively they be limited to a list of specific plots, with justification provided for their inclusion in the Order.</i></p>

Question No./ Party	Question/Response/Comments (and drafting example where relevant)
Applicant's Comment	<p>Please see the Applicant's response to question 19 in the ExA's questions [REP2-008/Document 8.7].</p> <p>The Applicant's justification for acquisition of land is set out in the Statement of Reasons [APP-018/Volume 4.1].</p> <p>The Applicant considers that the general power is justified as the flexibility to achieve its aim through the exercise of a lesser power to acquire rights or impose restrictive covenants, rather than acquiring the whole of the land outright, would allow the Applicant to take a proportionate approach should the opportunity arise. Without the inclusion of this article, the Applicant would have no alternative but to acquire the land outright if an alternative agreement could not be reached by private treaty.</p> <p>Detailed consideration of, and justification for, the inclusion of acquisition of land will properly be considered in detail at the Compulsory Acquisition Hearing (CAH).</p> <p>Ahead of the CAH the Applicant notes that the Gooch Estate quotes previous DCOs where the power to impose restrictive covenants is limited to identified plots.</p> <p>The Applicant has, in fact, adopted the same approach here. Article 27 (Compulsory Acquisition of Rights) must be read in conjunction with Schedule 7.</p> <p>Article 27(2) confirms that in relation to plots of land specified in column (1) of Schedule 7, the imposition of restrictive covenants is limited to those, as may be required for the purpose specified in column (2).</p>
Question 28	<b>Authorised Development – further development within the Order Limits</b>
Extract from response	<p><u>Written Representation</u> [REP1-023]</p> <p><i>6.20: Works 1 - 76 in this Schedule provide details of extensive works and operations that will be undertaken. The Gooch Estate echo the Examiners' comments that the additional works listed at paragraphs (a) to (o) are extensive and require justification. Such works could impact on the Gooch Estate's operations and no consultation would be undertaken prior to the works commencing.</i></p>

Question No./ Party	Question/Response/Comments (and drafting example where relevant)
	<p><u>Written Summary of Oral Submissions</u> [REP2-053]:</p> <p>8.1: ... The Gooch Estate submitted that these provisions are extremely broad, allowing anything to be carried out within the Order limits. Such works could impact on the Gooch Estate's operations and no consultation would be undertaken prior to the works commencing. There would be no protection for the Gooch Estate to prevent interference with their land</p>
Applicant's Comment	Please see the Applicant's response to question 28 in the ExA's questions [REP2-008/Document 8.7].
Not Applicable	<b>Schedule 11 – Certification of plans</b>
Extract from response	<p><u>Written Representation</u> [REP1-023]</p> <p>6.21: ..., the Gooch Estate is concerned about the potential impacts of construction on its use and access to the Land. This concern is exacerbated by the absence of a certified Construction Environmental Management Plan ("CEMP") in the draft DCO. The Gooch Estate notes that other DCOs promoted by HE do provide for the certification of outline CEMPs (see, for example, Article 44 of the M20 Junction 10a DCO 2017 and Schedule 10 of the A19/A184 Testo's Junction Alteration DCO 2018) and requests that provision is made for the certification of an outline CEMP in this DCO.</p>
Applicant's Comment	<p>The dDCO includes an Outline Environment Management Plan (OEMP) [APP-172/Volume 6.11] which is to be certified by the SoS (it is included in Schedule 11 of the dDCO list of documents to be so certified).</p> <p>Requirement 4 of the dDCO [APP-105/Document 3.1] requires the Applicant to prepare a CEMP in accordance with the OEMP (Requirement 4(2)).</p> <p>Requirement 4(4) provides:</p> <p><i>"No part of the authorised development is to commence until a CEMP, substantially in accordance with the OEMP,</i></p>

Question No./ Party	Question/Response/Comments (and drafting example where relevant)
	<p><i>has been submitted to and approved in writing by the Secretary of State...</i></p> <p>The OEMP states:</p> <p><i>"As set out in Figure 1, this OEMP will be developed into a more detailed Construction Environmental Management Plan (CEMP) by the Principal Contractor (PC)1 once the detailed design has been finalised"</i></p> <p>It should be noted that the OEMP is just that – an 'outline' – and will be developed further, not least during the examination.</p> <p>Nevertheless - It includes a number of Outline Management Plans (<b>OMPs</b>) for key environmental disciplines to be developed into the final Management Plans, by the principal contractor, prior to construction as considered below.</p> <p>Each final Management Plan must be based on the relevant OMP and must incorporate and reflect the requirements of the sections of the OEMP and CEMP.</p> <p>While the DCOs cited by Gooch Estate do refer to outline CEMPs – all of which are certified by the SoS and then become the CEMP – other DCOs promoted by the Applicant adopt the approach taken on the M42 and refer to OEMPs (also certified by SoS) which inform the production of the CEMP. Examples include:</p> <ol style="list-style-type: none"> <li>1. A303 Stonehenge</li> <li>2. A303 Sparkford to Ilchester</li> <li>3. A63 Castle Street (Hull)</li> </ol> <p>The principle adopted is therefore the same: a CEMP must be produced which complies with a document that has been submitted as part of the application and certified by the SoS. This is the case irrespective of whether the initial plan (to be certified) is referred to as an outline CEMP or an OEMP.</p> <p>There is, therefore, no need to amend the drafting</p>

## Appendix B: Precedents of Use for Provisions in the dDCO

Article	Precedents for the provision in the dDCO
11 (Planning Permission)	<p>The M20 Junction 10a Development Consent Order 2017 (article 7)</p> <p>The M4 Motorway (Junctions 3 to 12) (Smart Motorway) Development Consent Order 2016 (article 5)</p> <p>The Daventry International Rail Freight Interchange Alteration Order 2014 (article 5) contains a similar exemption, though differently worded.</p>
39 (Felling or Lopping of Trees and Removal of Hedgerows)	<p>The Port of Tilbury (Expansion) Order 2019 (article 21)</p> <p>The A19/A184 Testo's Junction Alteration Development Consent Order 2018 (article 34)</p> <p>The M20 Junction 10a Development Consent Order 2017</p> <p>The A14 Cambridge to Huntingdon Improvement Scheme Development Consent Order 2016 (article 36)</p> <p>The Brechfa Forest West Wind Farm Order 2013 (article 15)</p> <p>The Keuper Underground Gas Storage Facility Order 2017 (article 36) achieves the same end by a different method.</p>
48 (Removal of Human Remains)	<p>The provision of the dDCO is partly drawn from paragraph 17 of the Infrastructure Provisions (Model Provisions) (England and Wales) Order 2009</p> <p>Other precedents for this provision, albeit with some differences in drafting, are:</p> <p>The Eggborough Gas Fired Generating Station Order 2018 (article 16)</p> <p>The Glyn Rhonwy Pumped Storage Generating Station Order 2017 (article 28)</p> <p>The Thorpe Marsh Gas Pipeline Order 2016 (article 19)</p> <p>River Humber Gas Pipeline Replacement Order 2016 (article 20).</p> <p>The Triton Knoll Electrical System Order 2016 (article 14)</p> <p>The Knottingley Power Plant Order 2015 (article 17)</p> <p>The Ferrybridge Multifuel 2 Power Station Order 2015 (article 20)</p>

Article	Precedents for the provision in the dDCO
	<p>The Dogger Bank Creyke Beck Offshore Wind Farm Order 2015 (article 20)</p> <p>The Dogger Bank Teesside A and B Offshore Wind Farm Order 2015 (article 21)</p> <p>The Progress Power (Gas Fired Power Station) Order 2015 (article 17)</p> <p>The Clocaenog Forest Wind Farm Order 2014 (article 32)</p> <p>The Thames Water Utilities Limited (Thames Tideway Tunnel) Order 2014 (article 23)</p> <p>The Walney Extension Offshore Wind Farm Order 2014 (article 18)</p> <p>The Brechfa Forest West Wind Farm Order 2013 (article 16).</p>

## Appendix C: Local Legislation to be Disapplied

### Birmingham and Oxford Junction Railway Act 1846 (c. cccxxxvii)

**XXIV.** And be it enacted, That it shall be lawful for the said Company in the Construction of the Railways by this Act authorized to carry the same across and on the Level of the several Roads numbered on the Plans deposited as herein-before mentioned as follows; (that is to say,)

A Road in the Parish of Church Bickenhill numbered 13:

Roads in the Parish of Solihull numbered 58, 79, 87, 156:

A Road in the Parish of the Lapworth, numbered 63:

A Road in the Parish of Bishops Itchington, numbered 37 a;

A Road in the Parish of Wootton Wawen, numbered 7.

**XXV.** And be it enacted, That for the greater Convenience and Security of the Public the said Company shall erect and permanently maintain a Station or Lodge at the Points where the said Railways shall cross on the Level any of the before-mentioned Roads.

### London and North Western Railway (Additional Powers) Act 1879 (c. cxlii)

...

**9.** They may make in the parish of Aston-juxta-Birmingham, in the county of Warwick, a new footpath, in substitution for a portion of the existing footpath which crosses on the level their Aston and Stechford Junction Railway, now in course of construction, near to and westward of the crossing of that railway by the public carriage road from Alum Rock to Castle Bromwich, which new footpath will be situate on the south side of and adjoining the said railway, and will extend from the said existing footpath to the said public road ;

And when they have made the new footpath they may stop up and discontinue as a public highway so much of the said existing footpath as lies between the junction therewith of the said new footpath and the said public road:

...

**14.** Subject to the provisions of this Act, and in addition to the other lands, houses, and buildings which the Company are by this Act authorised to acquire, the Company may from time to time enter upon, take, use, and appropriate to the purposes of extending the station, siding, warehouse, wharf, dépôt, mineral, goods, and other accommodation of the Company, and for other purposes connected with their undertaking, the lands, houses,



and buildings herein-after described or referred to, and may in connexion with such use and appropriation execute the works and exercise the powers herein-after mentioned; (that is to say,)

...

#### IN THE COUNTY OF WARWICK

...

Certain lands in the parish of Bickenhill lying on the north-east side of and adjoining their London and Birmingham Railway at and near the Marston Green Station;

And they may divert and stop up so much of the footpath which now crosses that railway on the level, one hundred and fifty yards or thereabouts south-east of the said station, as extends in an easterly direction for a distance of one hundred yards or thereabouts from the south-western side of the said railway, and may carry the same over the said railway by means of a bridge.

...

**32.** The Company or any other company exercising any of the powers of this Act, either alone or jointly with the Company, may, in constructing the new roads, streets, and footpaths, and alterations of roads, streets, and footpaths, by this Act authorised to be constructed by them respectively, deviate the same to the extent of the limits of deviation marked on the deposited plans relating thereto, and may deviate from the levels shown on the deposited sections relating thereto to any extent not exceeding five feet, but not so as to increase the rate of inclination as shown on those sections.

**35.** The site and soil of the several roads, streets, footpaths, courts, passages, thoroughfares, or highways, or portions thereof, by this Act authorised to be stopped up and discontinued, and the fee simple and inheritance thereof, shall (except where by this Act otherwise provided), if any company or companies exercising the powers of this Act relative thereto are, or if and when under the powers of this Act or of any other Act relating to such company or companies already passed they become, the owners of the lands on both sides thereof, be from the time of the stopping up thereof respectively wholly and absolutely vested in such company or companies.

#### **London and North Western Railway Act 1880 (c. cxlv)**

**18.** Subject to the provisions of this Act, the Company may, in the lines shown on the deposited plans and according to the levels shown on the deposited sections, make the new roads and deviations or alterations of roads, and may, in the lines shown on the deposited plans, make the new footpaths and alterations of footpaths, and may execute

the other works, herein-after described, with all proper works and conveniences connected therewith respectively, and may exercise the other powers herein-after mentioned, and may enter upon, take, and use such of the lands delineated on the deposited plans and described in the deposited books of reference as may be required for those and other purposes; (that is to say,)

(1.) They may stop up and discontinue as a public highway so much as lies within the boundaries of their property of the footpath in the parish of Bickenhill, in the county of Warwick, which now crosses on the level the London and Birmingham Railway of the Company one hundred and fifty yards or thereabouts south-east of the Marston Green Station; and so much of section 14 of the London and North-western Railway (Additional Powers) Act, 1879, as provides for carrying the said footpath over the said railway by means of a bridge is hereby repealed;

...

#### **London and North Western Railway Act 1893 (c. clxvi)**

25. Subject to the provisions of this Act and in addition to the other lands which the Company are by this Act authorised to acquire the Company may from time to time enter upon take use and appropriate for the purpose of extending the stations sidings warehouses coal wharves depôts and other accommodation of the Company for mineral goods and cattle traffic and for other purposes connected with their undertaking the lands herein-after described or referred to delineated on the deposited plans and described in the deposited books of reference relating thereto and may execute the works and exercise the powers herein-after mentioned and so far as such works are shown upon the deposited plans and sections in accordance with those plans and sections (that is to say):—

...

In the county of Warwick—

Certain lands in the parish of Hampton-in-Arden lying on the south-west side of and adjoining the Company's London and Birmingham Railway at or near Hampton-in-Arden Station:

...

#### **West Midlands County Council Act 1980 (c. xi)**

6 (1) A district council may by notice prohibit, either entirely or at such times or on such days as may be specified in the notice, any of the following things:—

(a) entering land to which this section applies;

- (b) allowing horses or cattle to enter such land;
- (c) driving or riding a vehicle on such land;
- (d) playing a ball game on such land;
- (e) playing any other game on such land;
- (f) using any equipment provided on such land:

Provided that in the case of such prohibitions as are mentioned in paragraph (a), (d), (e) or (f) above the district council may exempt a child under such age as may be specified in the notice in respect of any or all of those paragraphs and may similarly exempt any other person who is in charge of such a child while the child is on the land.

(2) The land to which this section applies is—

- (a) land provided by the district council laid out as a public garden or used for the purpose of public recreation, or a disused burial ground provided by the council and maintained as a public garden or for those purposes or as a disused burial ground, as the case may be;
- (b) other land provided by the district council and mown or otherwise maintained in an ornamental condition;
- (c) land provided by a person other than the district council and laid out, used, mown or maintained as aforesaid;
- (d) derelict land appearing to the council to be intended for development on which vehicles are, or are likely to be, parked without authority:

Provided that—

- (i) notice shall not be given in respect of land such as is mentioned in paragraph (c) above, except with the consent of the person concerned or his representatives;
- (ii) in respect of land such as is mentioned in paragraph (d) above, the notice shall not prohibit anything but the driving or riding of a vehicle on the land;
- (iii) this section shall not apply to land such as is mentioned in paragraph (d) above, except with the consent of its owner;
- (iv) any prohibition extending to such land as is mentioned in paragraph (d) above shall cease to have effect after six months, or such longer period as the council may by resolution prescribe, after the date when the notice referred to in subsection (1) above was first displayed.

(3) A prohibition under subsection (1) (a), (b) or (c) above shall not extend to going on foot or on horseback or on or in a vehicle to or from premises fronting or abutting on land referred to in subsection (2) (d) above.

(4) A prohibition under subsection (1) (a) or (c) above shall not extend to going on foot or on or in a vehicle—

- (a) in the course of building operations; or
- (b) by statutory undertakers where reasonably necessary for the exercise of their statutory powers:

Provided that the exemption afforded by paragraph (a) above shall be conditional upon means being taken to the satisfaction of the district council to minimise injury to the land and to protect persons on the land.

(5) For the purposes of this section notice shall be given by displaying it in a conspicuous position on or near the land to which it relates.

(6) Notice of a prohibition contained in subsection (1) (c) above if it relates to a grass verge forming part of or adjoining a highway used by motor vehicles (as defined in section 99 of the Act of 1967) shall be indicated by such traffic sign as shall be prescribed in regulations made by the Minister of Transport under the powers contained in sections 54 and 55 of the Act of 1967 or be specially authorised on behalf of the Minister of Transport.

(7) A person who without reasonable excuse contravenes the notice shall be guilty of an offence and liable on summary conviction to a fine not exceeding £50.

(8) Where land to which a prohibition contained in subsection (1) (a), (b) or (c) above applies forms part of a highway, the rights of the public over the highway, except rights of grazing cattle and horses, shall be subject to the prohibition; but, subject as aforesaid, nothing in this section shall—

- (a) limit any right of way, public or private, over land;
- (b) restrict the exercise by any person of any statutory right to enter upon land;
- (c) derogate from or diminish the obligation of any person under section 4 of the Chronically Sick and Disabled Persons Act 1970 (access to, and facilities at, premises open to the public);
- (d) restrict the entry by horses or cattle on any grass or other margin provided by a highway authority in pursuance of section 70 of the Act of 1959 (provision of margins for horses and livestock).

**11** (1) if it appears to the highway authority that floodlighting provided on any premises to illuminate the exterior of any building in the county constitutes a danger to the traffic on any street in the county the highway authority may by notice require the owner or occupier of the premises within 21 days of the service of the notice to comply with such terms, conditions or restrictions in relation to the apparatus used for the provision of the floodlighting as may be specified in the notice or, if he so elects, to cease using the apparatus for floodlighting the building.

(2) The provisions of section 290 of the Act of 1936 shall apply to notices given under this section as they apply to notices mentioned in subsection (1) of that section and that section as so applied shall have effect as if references to the local authority were references to the highway authority.

(3) In this section " building" includes any structure or erection and any part of a building as so defined.

**12** (1) The highway authority may recover from any person carrying on building operations, whether on his own account or as a contractor> the cost of making good damage caused in the course of those operations to the grass verge or footway of a highway maintainable at the public expense by vehicles being taken across, or machinery being on, or the loading or unloading or stacking of materials on, the grass verge or footway.

(2) In this section "building operations" includes rebuilding operations, demolition, excavations, structural alterations of, or additions to, buildings and other operations normally undertaken by a person carrying on business as a builder or contractor.

### **Midland Metro Act 1992 (c. vii)**

#### **3 Incorporation or application of enactments**

The following provisions of the Act of 1989 which incorporate or apply enactments for the purposes of that Act shall have effect as if the references in those provisions to that Act included this Act: —

section 3 (Incorporation and application of enactments relating to railways);

section 4 (Application of Tramways Act 1870);

section 5 (Application of provisions of Public Utilities Street Works Act 1950 and Road Traffic Regulation Act 1984);

section 6 (Application of Part I of Compulsory Purchase Act 1965).

#### **4 Power to make works**

1. Subject to the provisions of this Act, the Executive may, in the lines or situations shown on the deposited plans and according to the levels shown on the deposited sections, make and maintain —
  - a. the works in the Metropolitan Boroughs of Dudley, Sandwell, Walsall and Wolverhampton specified in Part I of Schedule 1 to this Act, with all necessary works and conveniences connected therewith; and
  - b. the works in the City of Birmingham and the Metropolitan Borough of Solihull and in the Borough of North Warwickshire in the County of Warwickshire

- specified in Part I of Schedule 2 to this Act, with all necessary works and conveniences connected therewith.
2. Notwithstanding anything in this Act or shown on the deposited plans or the deposited sections, the Executive may, subject to the approval of the Secretary of State and with the consent of the owners, lessees and occupiers of the lands affected —
    - a. construct the whole or part of Work No. 29 within the limits of deviation for that work in lines or situations and in accordance with levels, dimensions and descriptions other than the lines or situations, levels, dimensions and descriptions shown on the deposited plans and the deposited sections or specified in Part I of Schedule 2 to this Act; and
    - b. construct or extend any part of Work No. 31 within the boundary of Birmingham International Airport in such lines or situations and in accordance with such levels, dimensions and descriptions as may be agreed between the Executive and Birmingham International Airport Plc.
  3. The Executive shall construct a good and sufficient fence on each side of any road bridge which is constructed or widened as part of the authorised works.

## 5 Further works and powers

1. Subject to the provisions of this Act (and, in so far as the same are shown on the deposited plans and sections, in the lines or situations and according to the levels so shown), the Executive may —
  - a. exercise the powers, and carry out the further works, described in Part II of Schedule 1 to this Act, in the Metropolitan Boroughs of Dudley, Sandwell, Walsall and Wolverhampton, with all necessary works and conveniences connected with those works; and
  - b. exercise the powers, and carry out the further works, described in Part II of Schedule 2 of this Act in the City of Birmingham and the Metropolitan Borough of Solihull and in the Borough of North Warwickshire in the County of Warwickshire, with all necessary works and conveniences connected with those works.
2. Without prejudice to the specific powers conferred by subsection (1) above, for the purposes of constructing or maintaining the authorised railways in or adjoining any street, the Executive may, with the consent of the highway authority —
  - a. increase the width of the carriageway of the street by reducing the width of any footway, cycle track or verge or other land within the boundary of the street;
  - b. alter or interfere with the level of any kerb, footway, cycle track, verge or other land within the boundary of the street; or
  - c. at any stopping place on a tramway reduce the width of the carriageway of the street by forming a reserved area in the street or by setting forward the kerbline



of the street and providing access for vehicles to adjoining premises and a footway on the side of that kerbline nearest to those premises.

3. No footway shall, under subsection (2) above, be reduced to a less width than 1.80 metres (5 feet 11 inches) without the consent of the highway authority.
4. Where the carriageway, or part of the carriageway, of any street in which a tramway is laid is of sufficient width to provide not less than 3 metres of width for vehicular traffic clear of the tramway path (as determined in accordance with the clearance required by the Secretary of State), the Executive may, with the consent of the highway authority, carry out such works as may be required to deter, but not prevent, the passage of vehicular traffic along the tramway, whether by raising or lowering the level of the part of the carriageway occupied by the tramway path above or below the level of the adjoining carriageway or by placing a kerb or other obstruction along the edge of that adjoining carriageway.
5. Notwithstanding section 25 of the Tramways Act 1870 as applied by this Act, in the case of any part of a tramway which is situated clear of the carriageway of any street, the Executive may, with the consent of the highway authority, lay and maintain the tramway in such manner that the uppermost surface of the rails is not on a level with the surface of the ground in which it is laid.
6. Subject to the provisions of this Act, the Executive may—
  - a. lay down double lines in lieu of single lines or single lines in lieu of double lines or interlacing lines in lieu of double or single lines on any of the tramways, either when constructing it or at any time thereafter, and construct or take up and reconstruct any such tramway or associated work in such position in the street or land in which it is authorised to be constructed as they think fit; and
  - b. make, maintain, alter and remove such crossings, passing places, sidings, junctions and other works, in addition to those specified in and authorised by this Act, as they find necessary or convenient for the efficient working of the Metro, for the purposes of the control of traffic or for providing access to any premises.
7. The powers of subsection (6) above shall not be exercised in any street which is a highway without the consent of the highway authority.

## **6 Subsidiary works**

1. Subject to the provisions of this Act the Executive may, for the purposes of the Metro and associated traffic control—
  - a. within the limits of deviation make, lay down, place, erect, repair, alter, renew, maintain, operate and use rails, rail fixings, plates, sleepers, channels, conduits, tubes, stations, platforms, islands, gates, junctions, points, turntables, turnouts, crossings, temporary or permanent cross-overs, passing places, pillars, posts, poles, brackets, wires, subways, manholes, shafts,



- pumps, engines, dynamos, substations, transformers, switchgear, cabling, signalling, monitoring and communications equipment, together with subsidiary and incidental machinery, apparatus, works and appliances; and
- b. in, or under any street in which it may be necessary or convenient, or in other land over which the Executive have or obtain sufficient right, lay, place, form, erect, maintain, renew and repair drains, ditches and culverts and electric wires, conductors, cables, brackets, posts, radio masts, tubes, substations, boxes and other electrical apparatus for connecting the authorised railways and associated works with any electricity generating station or substations or for the purposes of signalling, monitoring and communication in connection with the Metro.
2. The provisions of Part VI of Schedule 3 to the Water Act 1945 (breaking open streets), as having effect in accordance with section 12 of the Control of Pollution Act 1974, shall apply to apparatus and works referred to in subsection (1) above as they apply to pipes and associated works.

## **7 Power to deviate**

In the execution of the authorised works the Executive may, except as may be otherwise provided by this Act, deviate from the lines or situations thereof shown on the deposited plans to the extent of the limits of deviation and deviate vertically from the levels shown on the deposited sections to any extent not exceeding 3 metres upwards and to such extent downwards as may be found necessary or convenient.

## **8 Level crossings**

1. The Executive may carry the authorised railways with a double line across and on the level of the highways and access roads specified in Schedule 3 to this Act.
2. In the exercise of the powers of subsection (1) above, the Executive may alter or interfere with the level of any highway or access road upon which any railway or associated work is to be laid.
3. Any barriers or other protective equipment specified in an order under the [1983 c. 16.] Level Crossings Act 1983 for the safety or convenience of persons using any crossing authorised by subsection (1) above (in this subsection referred to as “the specified apparatus”) shall, in any case where the specified apparatus is to be provided in, on or under any street or controlled land within the meaning of the Act of 1950, be deemed to be transport works for the purposes of Part II of, and Schedule 4 to, that Act, and accordingly the code in the said Part II shall have effect as if the construction or placing of any of the specified apparatus were specified in section 21 (1) (c) of that Act.

## 9 Railway works in streets

1. Subject to the provisions of this Act, the Executive may, for the purpose of providing access to underground railways, make and maintain permanent openings in so much as is within the limits of deviation for those works of the streets specified in Part I of Schedule 4 to this Act.
2.
  - a. Subject to the provisions of this Act, the Executive may, for the purpose of constructing works for the purposes of, or in connection with, underground railways, enter upon, open, break up and interfere with so much as is within the limits of land to be acquired of the streets specified in Parts I and II of Schedule 4 to this Act and so much of any other highway as is within those limits.
  - b. Not less than 28 days before entering upon, opening, breaking up or interfering with the surface of any street referred to in paragraph (a) above, the Executive shall post notices stating their intention in conspicuous positions at each end of the part to the street so affected.

### **Midland Metro (No 2) Act 1993 (c. vi)**

3. - (1) The following provisions of the Act of 1989 (which incorporate or apply enactments for the purposes of that Act) shall, so far as they have effect at the commencement of this Act, have effect as if the references in those provisions to that Act included this Act:-

section 3 (Incorporation and application of enactments relating to railways);

section 4 (Application of the Tramways Act 1870);

section 5 (Application of provisions of the Public Utilities Street Works Act 1950 and Road Traffic Regulation Act 1984); and

section 6 (Application of Part I of the Compulsory Purchase Act 1965);

(2) In accordance with section 20 (2) of the Interpretation Act 1978, the reference in subsection (1) above to section 5 of the Act of 1989 is to that section as amended by section 14 (Amendment of Act of 1989 consequential on New Roads and Street Works Act 1991) of the No. 1 Act of 1993.

6 (1) Subject to the provisions of this Act the Executive may-

- a. in the lines or situations shown on the deposited plans and according to the levels shown on the deposited sections, make and maintain the works in the Metropolitan Borough of Solihull specified in Part I of Schedule 3 to this Act, with all necessary works and conveniences connected therewith; and

- b. in so far as the same are shown on the deposited plans and sections, in the lines or situations and according to the levels so shown, carry out the further works, with all necessary works and conveniences connected therewith, and exercise the further powers, in the Metropolitan Borough of Solihull described in Part II of the said Schedule 3.

(2) The Executive shall cease to have the powers to make and maintain the works, or to exercise the further powers, in the Metropolitan Borough of Solihull specified in Part III of the said Schedule 3.

12 - (1) The following provisions of the Act of 1989 and the No. 1 Act of 1992 relating to works shall, subject to the modifications specified in subsection (2) below and any other necessary modifications, apply to the works authorised by this Act as they apply to works authorised by those Acts:-

in the Act of 1989-

- section 9 (Requirements applicable to tramways);
- section 12 (Provision of accommodation for apparatus);
- section 15 (Gauge of railways and restrictions on working);
- section 17 (Transport consultative committee);
- section 18 (Temporary stoppage of highways);
- section 20 (Stopping up streets and footpaths in case of diversion or substitution);
- section 21 (Provisions as to repair of streets, footpaths, etc.);
- section 22 (Underpinning of houses near works);
- section 23 (Use of sewers, etc., for removing water);
- section 24 (Attachment of brackets, etc., to buildings for purposes of works); and
- section 25 (Provisions as to use of electrical energy):

in the No. 1 Act of 1992-

- subsection (3) of section 4 (Power to make works);
- subsections (2) to (7) of section 5 (Further works and powers);
- section 6 (Subsidiary works);
- subsection (3) of section 8 (Level crossings);
- and section 12 (Agreements with British Railways Board).

(2) For the purposes of this section-

- a. in the said section 9 of the Act of 1989, for the reference in subsection (3) (a) (ii) to section 8 (4) of that Act, there shall be substituted reference to section 5 (4) of the No. 1 Act of 1992 as applied in this Act;
- b. in the said section 12 of the Act of 1989, for the reference to section 11 of that Act, there shall be substituted reference to section 6 of the No. 1 Act of 1992 as applied in this Act;
- c. in the said section 18 of the Act of 1989-
  - i. for the reference to streets within the meaning of that Act, there shall be substituted reference to streets within the meaning of this Act; and
  - ii. for the reference to the limits of deviation and the deposited plans within the meaning of that Act, there shall be substituted reference to the limits of deviation and the deposited plans within the meaning of this Act;
- d. in subsection (1) of the said section 23 of the Act of 1989, for the reference to the limits of deviation within the meaning of that Act, there shall be substituted reference to the limits of deviation within the meaning of this Act;
- e. in the said section 6 of the No. 1 Act of 1992, for the reference to the limits of deviation within the meaning of that Act, there shall be substituted reference to the limits of deviation within the meaning of this Act; and
- f. in subsection (3) of the said section 8 of the No. 1 Act of 1992, for the reference to subsection (1) of that section, there shall be substituted reference to subsection (1) of section 9 of this Act.