

A303 Sparkford to Ilchester Dualling Scheme TR010036

9.33 Protective Provisions Note

APFP Regulation 5(2)(d) & 7
Planning Act 2008
Infrastructure Planning (Applications: Prescribed
Forms and Procedure) Regulations 2009
May 2019



Infrastructure Planning

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(Applications: Prescribed
Forms and Procedure)
Regulations 2009**

A303 Sparkford to Ilchester Dualling Scheme
Development Consent Order 201[x]

PROTECTIVE PROVISIONS NOTE

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1. Introduction

- 1.1.1. The Applicant has reviewed the draft Protective Provisions submitted by Somerset County Council (“SCC”) at deadline 6. The Applicant notes the Examining Authority’s request in the agenda for the hearing on 15 May 2019 that the Applicant submit a note and its own draft Protective Provisions by 12 noon on Friday 10 May. This note is accordingly submitted in line with that request.
- 1.1.2. The Applicant advises that the draft Protective Provisions as submitted by SCC are not agreed. The Applicant has submitted with this report a draft of the Protective Provisions as prepared by it in line with the matters it has offered to secure in the examination and in discussion with SCC. As requested, the Applicant has also submitted a comparison between its draft Protective Provisions and SCC’s to highlight the areas of agreement and difference.
- 1.1.3. With regards to the areas of difference and using the SCC numbering, the Applicant wishes to make the following comments.

2. Protective Provision Comments

2.1 General

- 2.1.1. The Applicant has avoided the use of “shall” in accordance with section 3.3 of Advice Note fifteen: Drafting Development Consent Orders. The SCC amendments to “shall” are therefore all rejected by the Applicant.

2.2 Paragraph 2

2.2.1 Insertion of definition of Commuted Sum

- 2.2.1. The Applicant has agreed with SCC that a commuted sum will be paid towards the maintenance of any new, non-standard assets which are to be transferred to SCC under the DCO. The Applicant had understood that this was to be included in an agreement between the Parties, not the Protective Provisions, however as SCC have included it in their draft without notifying the Applicant and despite the ongoing meetings between them, the Applicant now assumes SCC are not seeking the separate agreement. The Applicant has accordingly included commuted sum provisions within the draft submitted with this note.
- 2.2.2. The Applicant rejects the reliance proposed in the SCC definition on the SCC technical note and the inclusion of “or any replacement or modification of that document for the time being in force”. Apart from the technicality that guidance cannot be ‘in force’ as it is not legislation, this document is purely a SCC guidance document and any part of it could be

changed unilaterally by SCC at any time; that is not acceptable to the Applicant and leads to uncertainty. The Applicant has therefore included a definition of “Non-standard Highway Assets” which aligns with the approach currently taken by the technical note but is separate to and not reliant on that guidance.

2.2.2 Definition of detailed information

- 2.2.3. The Applicant rejects the changes made by SCC to the definition of “detailed information”. There is no reason that SCC cannot specify what information they require rather than reducing the certainty of this definition to include a vague provision for ‘any information they require’. Provided that the list of “detailed information” is prescribed in the Protective Provisions (and therefore certain), the Applicant is willing to provide it.
- 2.2.4. SCC’s addition to item (o) in the detailed information definition, requiring a schedule of condition of other local highway which SCC consider will be affected by the works, is also rejected. That would by its nature include areas outside the redline boundary of the consent and therefore the DCO. The Applicant is, however, willing to provide a schedule of condition for the affected public highway within the scheme limits, which is thought to be reasonable.
- 2.2.5. SCC’s definition of “Detailed information” item (q) provides “where highway is to be de-trunked under this Order, a specification of the condition of the de-trunked section of highway, the works to be undertaken to ensure the existing road is brought up to an appropriate standard before it is passed to the Local Highway Authority to maintain”. In the Applicant’s view this is unnecessary. The definition of local highway under the Applicant’s drafting includes sections to be de-trunked and for which detailed information is required – the proposed (q) is therefore duplication.
- 2.2.6. Further, the inclusion of “and other such works and traffic management measures as the Local Highway Authority reasonably consider necessary to minimise the risk of unauthorised use and anti-social behaviour” in this item is rejected. The Applicant cannot and will not agree to the inclusion of ‘such other works’ in any of the forms it appears in the SCC draft (please see the response to paragraph 5(1) detailing why this is unacceptable). The Applicant has asked SCC to advise of design measures it would wish to have included to address anti-social behaviour so that these can be considered as part of the development of the detailed design; SCC has not advised of any measures and has advised in its written submissions that it cannot propose any. It is not reasonable to require the Applicant to include works which SCC has already stated it cannot specify.
- 2.2.7. Where any requests to include measures are made before approval of detailed design the Applicant will consider these, such requests cannot however be accommodated post such approval without creating

unacceptable risk to the project programme. It is not reasonable for SCC to have the ability to refuse to allow works to start under an approved detailed design because design or traffic management measures they have not previously specified have not been included in the design.

2.2.3 Definition of local highway

- 2.2.8. The extension of the definition of local highway to include public rights of way is rejected. These Protective Provisions were proposed to provide SCC with protection on discrete points related to vehicular highways, not all rights of way.

2.2.4 Definition of maintenance period

- 2.2.9. The Applicant does not agree with the inclusion of SCC's proposed definition of "maintenance period". The local highway authority is statutorily charged and funded to maintain its highways and it is inappropriate for it to be trying to pass that responsibility to third parties. The Applicant has already agreed that it will be liable for a 52 week defect remediation period for its works from completion of those local highway works (this is secured through paragraph 13(1) of the draft Protective Provisions). The Applicant will not agree to be liable for the normal, day to day maintenance of local highways following completion of the works and it is not reasonable to expect it to do so. Given that the Applicant will not take on the routine maintenance of SCC highways the definition of "winter maintenance" is also unnecessary as there is no need to distinguish that.

2.2.5 Definition of works

- 2.2.10. The SCC definition of "works" is rejected. No special definition is needed for this schedule. Further, the inclusion of "any associated works or consequential works reasonably required by the Local Highway Authority" is completely rejected – please see the reasoning set out for the rejection of similar wording in paragraph 5(1) which applies equally to this wording.

2.3 Paragraphs 4(1) and (2)

- 2.2.11. This paragraph requires the approval of SCC for all of the detailed information, which duplicates most of the detailed design matters for works relating to the local highway. This replicates the **approval** also sought by SCC as discharging authority under requirement 12 (which the Applicant does not accept). In practice the drafting suggested by SCC for these provisions and requirement 12 would, when taken together, mean that 3 approvals are required; from the Secretary of State as discharging authority, from SCC as discharging authority and from SCC under the Protective Provisions. The Applicant strongly objects to this approach which is contrary to the intention of the Planning Act to streamline consenting for NSIPs. The Applicant maintains its position that the

discharging authority should be the Secretary of State alone and objects to any approval equivalent to that discharge by SCC being required through Protective Provisions.

- 2.2.12. With reference to the specific drafting of the SCC draft provisions, the Applicant objects to SCC requiring a separate approval under Protective Provisions for matters which have already been approved under a detailed design. This is unnecessary duplication which creates delay and is not necessary given that all of the detailed design already requires to be approved under requirement 12. While not accepting that any approval should be required at all, the Applicant also objects to the SCC provision allowing approval to be conditional and thereby allow SCC to impose controls outside the DCO which have not been subject to any consideration in the examination.

2.4 Paragraph 5(1)

- 2.2.13. The Applicant objects to the insertion of a requirement under 5(1)(a) to complete the works “without unreasonable delay in accordance with the approved Detailed Information and to the reasonable satisfaction of the Local Highway Authority”. The Applicant is already obliged by the DCO to complete works to the local highway to the reasonable satisfaction of the local highway authority and so there is no need or utility to repeat that.
- 2.2.14. The detailed information to be submitted includes a programme of works and a requirement to carry out works in accordance with the detailed information (and therefore in accordance with the programme of works). It is therefore unclear what utility SCC consider is served by insertion of ‘without unreasonable delay’. Further, it is not clear how SCC would determine that any delay was unreasonable or what they would propose to do if they did consider a delay to be unreasonable.
- 2.2.15. The Applicant objects and has advised SCC it objects to the inclusion of the words “*together with any other works local highway authority might reasonably require*”. Wording to this effect appears several times in the SCC draft, in the definitions of detailed information and works and in this section. All of these insertions are rejected in principle. Not only is it unreasonable to seek to bind the Applicant to carry out undefined, unprogrammed, uncoded works simply on demand by SCC, but the DCO may not necessarily consent such works; the Applicant cannot be bound in the Protective Provisions to carry out unconsented works.
- 2.2.16. It has been repeatedly explained to SCC that, contrary to their explanatory note submission, permitted development rights do not apply to EIA projects. The DCO is clearly an EIA project. Permitted development rights are set out in the Town and Country Planning (General Permitted Development) (England) Order 2015 Article 3 (10) of that Order provides that schedule 1 or schedule 2 development within the meaning of the Town And Country Planning (Environmental Impact Assessment) Regulations 2017 is not permitted by this order. Those EIA

regulations provide in Schedule 1 that works to various strategic roads will be Schedule 1 development and in Schedule 2 that Schedule 2 development will include construction of roads (unless already included in schedule 1) where the works exceed 1 hectare. The DCO scheme is considerably in excess of 1 hectare. The scheme is therefore clearly an EIA project under those regulations. Permitted development rights are therefore **not** available. The DCO can therefore only require works which are within the scope of the consent. Any other works would require separate planning permission to be obtained, and, where necessary, having regard to the nature of the works and the relationship to the DCO scheme, those works would be subject to further environmental assessment for those consents. The SCC suggested explanation in paragraph 5.2 of its explanatory note is therefore, in the Applicant's view, wrong in law.

- 2.2.17. Highways England as a responsible highway authority will undertake works which are required to comply with road safety audits. Road safety audits identify works which may be required to address identified concerns, however, it is acceptable for the designer to propose alternatives or not implement specific works. As the designer of the scheme with the full understanding of it, it is Highways England's responsibility to determine which of the works identified in the road safety audit should be implemented. In any case SCC has not limited this provision to any other works which are identified in road safety audits but has provided for any other works it requires. This is unacceptable to the Applicant. Not only does this introduce an obligation into the DCO to undertake works which are not specified in the DCO or shown on the plans and which are not costed or programmed, but it is not limited to works which fall within the scope of this consent.
- 2.2.18. The Applicant objects to the insertion of 5(1)(b) *that "the undertaker must:... (b) take such precautions for the protection of public and private interests as would be incumbent on the undertaker if it were the local highway authority"*. The protection of public and private interests in relation to works under the DCO is already secured in the DCO – this insertion is unnecessary and attempts to apply a legal regime to the scheme which does not apply because these matters have been dealt with separately.

2.5 Paragraph 5(2)

- 2.2.19. The Applicant has already provided that SCC must be given a programme of works under the detailed information and notified of completion under the Applicant's paragraph 14(3) within 5 working days of such completion. The Applicant therefore considers SCC's paragraph 5(2) to be unnecessary.

2.6 Paragraph 6(1)

- 2.2.20. The Applicant notes that SCC is asking for the right to inspect works on demand. The Applicant has already advised SCC that it is happy to facilitate the inspection of works but it requires 2 working days' notice. That 2 days' notice can be of more than one planned inspection and notification of a proposed programme is entirely acceptable. The 2 days' notice is required to ensure that the sections of the site SCC wishes to inspect are safe and access can be provided acceptably. It also allows the Applicant to ensure that any person inspecting the site can be appropriately briefed, that the health and safety management of the site can be properly undertaken, and that the relevant personnel can be available on site to assist the SCC officers and answer any questions they may have.
- 2.2.21. It is not reasonable that SCC can demand access to any part of a large, active construction site at any time without notice being given and where the principal contractor may then have to stop works in order to facilitate that. It is entirely reasonable that SCC can put forward a schedule of proposed inspections which the Applicant would facilitate, having received notice. The Applicant has proposed an alternative right to inspect in its draft Protective Provisions.

2.7 Paragraph 6(2)

- 2.2.22. The Applicant does not accept that there is any need for secondary testing to be carried out by SCC where it is already entitled to receive the results of the testing which will be carried out on behalf of a highway authority in accordance with DMRB. If SCC wishes to carry out such secondary testing, it is not reasonable that the Applicant should have to pay for that, having already carried out and shared the results of the primary testing. The Applicant therefore objects to the SCC drafting creating financial liability on the Applicant for unnecessary secondary testing.

2.8 Paragraph 7

- 2.2.23. The Applicant has not included RSA 2 in its drafting (although it will be carried out because it is mandatory) because this audit is undertaken at detailed design stage and SCC has declined to continue participation in the technical working groups which would lead up to that. The Applicant would be content to allow SCC to participate in RSA2 but will not agree to pay SCC any fee to do so. The Applicant understands that this means SCC will not, in practice, participate at that stage so there is no utility including it.

2.9 Paragraph 7(3)

- 2.2.24. The Applicant disagrees with the SCC wording of this paragraph. Road Safety Audits identify recommended works. The road will be approved as being safe to use by RSA3 before it is opened. No highway authority or other developer is obligated to carry out all of the works identified in any road safety audit; it is for the appropriately qualified design team to consider the outcomes of the road safety audit and which of its recommended works should be undertaken and whether any alternatives would be preferable. The wording proposed by SCC would require any work identified to be carried out. That is unreasonable, does not accord with DMRB and should not be included within the Protective Provisions.
- 2.2.25.** In addition, while the Applicant, as a highway authority, has a duty under the Road Traffic Act to ensure the highways it constructs are safe, it is up to the Applicant as to how it complies with that duty. The safety of the road in accordance with road safety audits will be assured by RSA3 prior to any road opening to traffic. RSA4 addresses any concerns which have arisen following the opening of the road. RSA4 is not always required if there are no incidents in the 12 months following opening. The Applicant has agreed to carry out RSA4 regardless in this case so that SCC has the certainty of knowing that, even where there are no incidents, a final check is carried out at RSA4. That does not mean that the Applicant should be obliged to implement any recommendation, regardless of what that would mean in practice, of any road safety audit. The DCO cannot require the Applicant to undertake works which are out with the scope of the DCO. Where the Applicant, as the responsible RSA body under DMRB, agrees such works are required outside the scope of the DCO ES, further consent for those works will have to be sought.

2.10 Paragraph 14

- 2.2.26. All of SCC's amendments to paragraph 14 are rejected. The Applicant has already agreed that it will be liable for a 52 week defect remediation period from completion of local highway works. The defect remediation will be carried out under the Applicant's contract with its main contractor and any concerns raised by SCC will be directed to the Applicant. The Applicant does not agree that this period should be tied to the issue of various certificates by SCC. Highways England is entirely content that SCC can identify or flag to it any defects or any other issues that they are unhappy with, however, the defects liability period must be limited to 52 weeks. It cannot be indefinite unless and until SCC issues certificates. That is not reasonable in the context of the Applicant being a highways authority using public funds.

2.11 Paragraph 15

- 2.2.27. The Applicant does not agree that the additions made by SCC to paragraph 15(1) add anything of substance or are necessary.

- 2.2.28. The last part of paragraph 15(1) beginning “AND FURTHER to indemnify the Local Highway Authority in respect of any claims costs or proceedings whatsoever arising under Part I and Part II of the Land Compensation Act 1973...” is simply not necessary as SCC has no liability under that Act. This is appropriately covered by the 1973 Act itself and does not need to be addressed separately in the DCO. The reasoning for this is set out below.
- 2.2.29. The 1973 Act at Section 1 (Right to Compensation) provides:
- “(1) Where the value of an interest in land is depreciated by physical factors caused by the use of public works, then, if—
- (a) the interest qualifies for compensation under this Part of this Act; and
- (b) the person entitled to the interest makes a claim after the time provided by and otherwise in accordance with this Part of this Act,
- compensation for that depreciation shall, subject to the provisions of this Part of this Act, be payable by the responsible authority to the person making the claim...
- (4) The responsible authority mentioned in subsection (1) above is, in relation to a highway, the appropriate highway authority and, in relation to other public works, the person managing those works.”
- 2.2.30. Section 19 provides who the appropriate highway authority is:
- “(1) In this Part of this Act—
- “the appropriate highway authority” means—
- (a) except where paragraph (b) below applies, **the highway authority who constructed the highway to which the claim relates** or any other authority to which the functions of that authority in relation to that highway are transferred by virtue of the Local Government Act 1985 or the Local Government (Wales) Act 1994;
- (b) if and so far as the claim relates to depreciation that would not have been caused but for alterations to the carriageway of a highway, **the highway authority who carried out the alterations** or any other authority to which the functions of that authority in relation to that highway are transferred by virtue of either of those Acts”
- 2.2.31. Highways England is a highway authority by virtue of the Highways Act 1980 section 1A and the Appointment of a Strategic Highways Company Order 2015 (SI 2015/376).
- 2.2.32. Therefore, it is clear that the Applicant (Highways England) would be the highway authority who constructed the highway for any new areas of local highway and altered the highway for any other works. Accordingly any

claims under the 1973 Act could only be made against the Applicant and not SCC.

2.12 Paragraph 17

- 2.2.33. The Applicant rejects all of SCC's paragraph 17. The Applicant entirely rejects the SCC proposed process of stage three and final certificates which have to be issued by SCC. These are not required under the DCO, which provides when highways occupied or altered as part of the works transfer to SCC, and should not be superseded by Protective Provisions.
- 2.2.34. Although SCC is calling it a maintenance period, the period of 52 weeks from completion of the works, which the Applicant has agreed to, is a defects liability period only. The Applicant will not be responsible for normal highways maintenance as it is not the highway authority for the road. The Applicant is entirely content to maintain liability for any defects in the works carried out. It will not, however, be responsible for maintenance required as the result of, for example, normal traffic incidents damaging the surface of the highway. It is not reasonable for SCC to attempt to make the Applicant responsible for the normal day to day maintenance of local highways (for which SCC will be responsible).
- 2.2.35. The Applicant does also not consider it acceptable as proposed under 17(4) that it should indemnify the local highway authority for claims arising out of the maintenance of the works. The Applicant will accept liability for any defects due to its construction however it will not, as it is not the relevant highway authority, accept any other liability for any other maintenance. Maintenance for local highway authorities is by statute a matter for the local highway authority and it receives funding from central government to undertake it. It should not attempt to pass this to a third party.

2.13 Paragraph 18

- 2.2.36. The timing set out by SCC in paragraph 18 does not work. RSA4 cannot be carried out until the road has been open to traffic for 12 months. The Applicant has already advised it will provide a 52 week defect liability period. The timing proposed by SCC would in effect extend the defect liability period and the various liabilities for maintenance and indemnification which SCC is attempting to foist onto the Applicant to an unknown date in the future. The Applicant's liability would only end when SCC chose to issue the final certificate. That is entirely unacceptable to the Applicant.
- 2.2.37. The Applicant also objects to 18(e) that all costs, charges, and expenses payable to the local highway authority have to have been paid before a final certificate can be issued. As has been repeatedly submitted by the Applicant it is not intended to pay SCC to carry out its statutory role. The Applicant does not require SCC's inspection, it does not require SCC's supervision and it will not pay SCC to respond to consultation.

2.14 Paragraph 19

- 2.2.38. As noted for paragraph 18(e) above, the Applicant rejects the principle of paying SCC the costs sought in paragraph 19.