

Comments by Somerset County Council on Highways England's Submission "9.33 Protective Provisions Note"

HE Comment	SCC Response
<p>Definition of Commuted Sum</p> <p>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.</p> <p>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.</p>	<p>SCC agrees with the form of wording proposed by the Applicant to define "Commuted Sum" and "Non-standard Highway Assets" and within paragraph 15 of its Proposed Protective Provisions save that the reference to "new" in the definition of "Non-standard Highway Assets" should be deleted on the basis that some of these assets, whilst "new" to the local highway authority, may have been in place for some time.</p>

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<p>Definition of detailed information</p> <p>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.</p> <p>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.</p> <p>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</p>	<p>Whilst it is not possible be sure about the scope of the detailed information required given the absence of a detailed design, SCC would consider its list of detailed information (set out in its version of the Protective Provisions at 2(a) to (q)) to be adequate, and in the interests of progressing an agreement would therefore be content to remove reference to ‘any other information which it might reasonably require’ in its version of the Protective Provisions .</p> <p>Local highways may be affected by the movement of construction traffic outside the scheme limits, emphasised by the absence of detail in relation to the Construction Traffic Management Plan. It would be in the interests of both parties for a schedule of condition to be agreed of those local highways which might be affected by the works. Any damage caused by construction traffic would need to be remedied by the undertaker.</p> <p>Item (q) will also ensure the provision of a specification of the condition of a de-trunked section of highway that may not be subject to any works.</p>

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<p>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.</p> <p>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.</p> <p>2.2.7. Where any requests to include measures are made before approval of detailed design the Applicant will consider these, such requests cannot</p>	<p>It is essential that the detailed design process takes into account the need to design out as far as possible the risks associated with unauthorised use and anti-social behaviour, and the wording proposed by the Local Highway Authority seeks to ensure that these specific matters are actively considered in relation to de-trunked roads. The Applicant has highlighted itself that the detailed design process will need to flow after the close of the Examination. SCC believes that it will not be possible to design out these risks in their entirety, but it will be for the Applicant to develop and propose such detailed designs, not the LHA. SCC wishes to be actively engaged in the design process and can assist the undertaker based on its extensive experience of dealing with unauthorised use or anti-social behaviour on the local highway network.</p> <p>There is currently a lack of detailed information about both the design of the scheme and the</p>

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<p>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.</p>	<p>associated traffic management plan. The Applicant's proposed wording for Requirements 11 and 12 rely on a consultation process regarding the traffic management plan and detailed designs in accordance with Requirement 4. But Requirement 4 provides for in effect only a notification process rather than a process of meaningful consultation where the Local Highway Authority would be fully engaged during development of the scheme and is able to inform and influence detailed matters. That is both unacceptable and unreasonable. SCC proposes a model which enables it to engage actively and iteratively in development of the detailed designs and the traffic management plan that would both protect the interests of the Local Highway Authority, and minimise the potential long term risks of delays to the project.</p> <p>Irrespective of whether SCC is the approving body pursuant to Requirement 12, SCC would expect this detailed information to be provided prior to Requirement 12 approval in order that it may give proper consideration to the proposed works in its consultation response. The definition of "Detailed Information" proposed by the Applicant indicates that this information will not be provided until</p>

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	after Requirement 12 approval. If the detailed information is provided prior to Requirement 12 approval SCC can ensure any design measures it recommends are raised in a timely manner.
<p>Definition of local highway</p> <p>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.</p>	<p>The Protective Provisions should apply equally to all highways (including public rights of way) on the basis that maintenance responsibility of the majority of these routes will pass to the local highway authority pursuant to article 13.</p>
<p>Definition of maintenance period</p> <p>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.</p>	<p>It is unreasonable for the Applicant to suggest that SCC should be responsible for maintenance of the local highways during the 52 week defect period. The nature of the contract between the Applicant and its main contractor is not a material consideration. The purpose of the maintenance period is to expose the new highway infrastructure to a reasonable period of public use to ensure that it is fit for purpose once any initial defects and works arising from the safety audit have been addressed. A maintenance period of 12 months is the norm, but this may be extended depending on the scale of any defects or safety works and the speed with which they are addressed. During this maintenance period the liability for maintaining the road remains with the</p>

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	<p>undertaker, save for winter maintenance where responsibilities will need to be defined within the Detailed Local Operating Agreement that has yet to be drafted or agreed, but which both parties have suggested is included within the Protective Provisions.</p> <p>SCC considers that a minimum 52 week maintenance period is appropriate but this should only commence after the Works have been carried out to the reasonable satisfaction of the Local Highway Authority including any defects and works resulting from the Stage 3 Road Safety Audit.</p> <p>The issue of the Final Certificate would signify the completion of the Stage 4 road safety audit and the completion of all necessary works following the end of the Maintenance Period, and the transfer of the maintenance responsibility would at that point transfer to SCC from the undertaker.</p> <p>It would be an untenable and confused legal position if highway became maintainable by the local highway authority when responsibility for defects or safety issues remained with the undertaker. For instance, if a repair were required</p>

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	to a section of new highway, then it may not be apparent whether the repair was required as a result of a defect in the construction or design, or as a result of extraordinary use, or a mixture of both, and therefore whether the highway authority or undertaker is responsible. It is SCC's proposal that the undertaker is only responsible for that section of highway on which it has worked until the issue of the Final Certificate.
<p>Definition of works</p> <p>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.</p>	<p>It would be in the interests of all the parties to ensure that the definition of 'works' in the Protective Provisions that limits it to local highways. The term "works" is used in a variety of different contexts in the DCO and therefore by giving the term a specific meaning for the purposes of the Protective provisions provides clarity.</p>
<p>Paragraphs 4(1) and (2)</p> <p>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</p>	<p>It is not SCC's intention to introduce an additional approvals process. There may be the opportunity to streamline the Protective Provisions but this will depend on the wording of Requirement 12. SCC proposed protective provisions provide for the submission of detailed information for the</p>

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<p>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.</p> <p>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.</p>	<p>Council's approval prior to construction of the works, and will enable the Council to approve the detailed designs pursuant to Requirement 12. This is, in effect, one approval process.</p> <p>SCC would however be pleased to amend its paragraph 4 within its version of the Protective Provisions to remove any concern around a double approvals process in the event that SCC were the discharging authority for the local highway element within Schedule 2 Requirement 12 of the Order.</p> <p>The ability to grant conditional approval enables SCC to approve the detailed design where some amendments are required. If this were not the case, it would leave SCC with only two options: to approve the design as submitted or to reject it.</p>
<p>Paragraph 5(1)</p> <p>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</p>	<p>It is hoped that the Applicant would not unreasonably delay the completion of the works and the wording should therefore not give cause</p>

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<p>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.</p> <p>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.</p> <p>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, uncosted 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.</p> <p>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</p>	<p>for concern. However, SCC would be content to amend the wording 5(1) to remove reference to completing the works 'without unreasonable delay' to address the Applicant's objection but would highlight the need for SCC to approve the Traffic Management Plan.</p> <p>The reference to permitted development was in error. However, it is anticipated that there is a possibility that once the detailed design is prepared and consultations proceed with SCC, there may be other works identified which may be required in addition to the authorised works. SCC does not accept that these additional works should not be carried out simply because they are not specified as authorised works within the terms of the order, particularly where those works are identified as part of the safety audit process.</p>

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<p>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.</p> <p>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</p>	<p>The Applicant appears to accept that there may be works necessary as a result of RSA 3 and RSA 4 (which will need to be determined by the Project Sponsor – not the Designer), and that these may require a separate consent if they give rise to any new or materially different effects from those identified in the Environmental Statement. SCC would highlight that it would be an untenable</p>

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<p>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.</p> <p>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.</p>	<p>and confused legal position if highway became maintainable by the local highway authority when safety issues remained unresolved.</p> <p>The wording in paragraph 5(1)(b) is taken from the Section 6 agreement between the Applicant and SCC in which SCC is carrying out work in part to the strategic road network and simply emphasises the approach that would be expected of a competent highway authority. The Council is not aware that it is expressed as clearly anywhere else within the DCO.</p>
<p>Paragraph 5(2)</p> <p>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.</p>	<p>SCC would be content to delete 5(2), but would highlight the need for the County Council to approve the Traffic Management Plan.</p>
<p>Paragraph 6(1)</p> <p>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</p>	<p>As with any development, SCC’s expectation is that it will afforded full access to the site and that its representative will be inducted into the site health and safety procedures. SCC is unclear why</p>

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<p>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.</p> <p>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.</p>	<p>the principal contractor would have to stop any works in order to facilitate inspection by the Local Highway Authority representative.</p> <p>SCC remains the local highway authority in relation to these sections of highway. The DCO does not expressly seek to disapply the LHA's powers under the Highways Act 1980 and it is right that it should not do so. Although public access may be restricted whilst the undertaker is carrying out works there may still be infrastructure within the highway which serves the wider road network, such as drainage culverts, to which the LHA may require access for inspection and maintenance.</p> <p>The Applicant is not proposing to accept the LHA's responsibilities for the sections of road over which it temporarily has possession (see its comments in 2.2.34), and therefore a form of wording which would seek to restrict the powers of the LHA in such circumstances is inappropriate.</p>
<p>Paragraph 6(2)</p> <p>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</p>	<p>It is noted that the Applicant has deleted SCC's proposed wording for the testing of materials to be undertaken in accordance with the Manual of</p>

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<p>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.</p>	<p>Contract Documents for Highway Works which the industry standard so it is unclear why this is not agreed.</p> <p>The local highway works are to be undertaken to the reasonable satisfaction of the local highway authority (Article 13). A component of this will relate to the testing of materials. SCC seeks the ability to undertake additional testing not adequately covered by the specification document for the scheme in cases where SCC has concerns about the quality of the material and/ or workmanship. In these circumstances, the cost of the testing should be met by the Applicant. SCC does not wish to undertake secondary testing (i.e. additional testing to confirm/validate the outcomes of any test. The Protective Provisions could be clarified on this point.</p>
<p>Paragraph 7</p> <p>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</p>	<p>Upon conclusion of the Examination, SCC would wish to engage in the detailed design process of the scheme with the Applicant. The matter of fees is an area of disagreement, but it would be appropriate for the RSA 2 to be included within the Protective Provisions irrespective of whether agreement can be achieved on this matter.</p>

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<p>that this means SCC will not, in practice, participate at that stage so there is no utility including it.</p>	
<p>Paragraph 7(3)</p> <p>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.</p> <p>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</p>	<p>The Applicant appears to accept that there may be works necessary as a result of RSA 3 and RSA 4 and that these may require a separate consent if they give rise to any new or materially different effects from those identified in the Environmental Statement.</p> <p>SCC recognises that the decision about the recommendations resulting from the Audit will rest with the Project Sponsor, and that there may be circumstances where it is reasonable to implement alternative works as a result of the safety audit findings. However, as any works must be completed to the reasonable satisfaction of the LHA and responsibility will pass to the LHA upon completion, it is reasonable that the Project Sponsor should seek to agree the scope of the works with the LHA , so that it may be satisfied that the recommendations of the safety audit report have been properly considered and observed. It is therefore proposed that paragraph 7(3) could be amended as follows to address the Applicant's concerns:</p>

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<p>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.</p>	<p>"Where the report of the stage 3 and stage 4 road safety audit identify any recommended works to the highway, the undertaker must use reasonable endeavours to agree with the local highway authority which works or alternative proposals require to be implemented and must carry out at its own expense such works to the reasonable satisfaction of the Local Highway Authority and prior to any local highway being transferred or returned to the control of the Local Highway Authority".</p>
<p>Paragraph 14</p> <p>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.</p>	<p>SCC considers that a minimum 52 week maintenance period is appropriate but this should only commence after the Works have been completed to the reasonable satisfaction of the Local Highway Authority (including any defects), and the completion of any works resulting from the Stage 3 Road Safety Audit. The nature of the contract between the Applicant and its main contractor is not a material consideration.</p> <p>The issue of certificates at the start and end of the maintenance period is standard practice, and creates a record of the duration of the maintenance period for any specific section of highway. This is important to ensure</p>

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	<p>transparency and clarity with regard to where at any particular point in time for a specific section of the highway network the maintenance responsibility rests.</p> <p>SCC refers to its comments above in relation to the definition of the maintenance period which apply here.</p>
<p>Paragraph 15</p> <p>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.</p> <p>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.</p> <p>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,</p>	<p>These provisions are provided for added clarity.</p> <p>The definition in section 19 applies only to Part 1 of the Act, and would negate the need for the indemnity in relation to Part 1 claims if the works are completed in their entirety by the Applicant. However, it is possible that SCC may complete the works, such as the surface layer, if it needs to carry out other works to the highway at the same time as the Applicant, to minimise inconvenience to road users for instance. In such cases it might be possible for an injured party to claim that SCC is liable to meet the Part 1 claim, and therefore an indemnity is required to provide for this eventuality.</p> <p>The definition of responsible authority does not apply to Part 2, under which an affected party</p>

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<p>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...</p> <p>(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."</p> <p>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"</p> <p>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).</p> <p>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</p>	<p>may seek soundproofing from the LHA. The indemnity proposed is required to deal with this.</p>

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<p>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.</p>	
<p>Paragraph 17</p> <p>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.</p> <p>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).</p> <p>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</p>	<p>It is standard practice for the highway to be open to the public for a minimum period of 12 months to ensure that there are no defects in construction which might only become evident upon use. During this maintenance period the liability for maintaining the road remains with the undertaker inclusive of all associated liabilities. The Applicant appears to refute this point. The nature of the contract between the Applicant and its main contractor is not a material consideration.</p> <p>SCC refers to its comments above in relation to the definition of the maintenance period (in response to para 2.2.9) which apply here. As with the maintenance of the highway it would lead to a confused and untenable legal position if liability were to be determined by reference to whether the claim arose out of the defect in the construction, the maintenance of that defective construction or maintenance of the road in which the defective works were constructed. The Applicant should be primarily liable for any claims arising from the works it has carried out and the maintenance of those works until the expiry of the</p>

HE Comment	SCC Response
<p>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.</p>	<p>maintenance period, and should indemnify the LHA accordingly.</p>
<p>Paragraph 18</p> <p>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.</p> <p>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.</p>	<p>The issue of the Final Certificate signifies the completion of the Stage 4 road safety audit and the completion of all recommended works, and the transfer of maintenance responsibility to SCC from the undertaker. The nature of the contract between the Applicant and its main contractor is not a material consideration. It would be an untenable and confused legal position if highway became maintainable by the local highway authority when responsibility for defects or safety issues remained with the undertaker. The DCO is clear that the maintenance of the local roads transfers to SCC upon completion to its reasonable satisfaction, and SCC has proposed amendments to Articles 13 and 14 to clarify that completion is in accordance with the provisions for completion in the Protective Provisions. To suggest that SCC could unreasonably withhold the issue of the Final Certificate to sidestep its usual maintenance responsibility would be contrary to the terms of the DCO.</p>

HE Comment	SCC Response
	In relation to 18(e), the drafting reflects that provided in Part 3 of the Protective Provisions whereby the Applicant agrees to meet the costs of the drainage authority in approving plans, inspection of works and carrying out surveys and tests. This is also the standard position in relation to works carried out by developers under section 278 or section 106 agreements, and was agreed by the Applicant on other occasions as previously submitted by SCC at deadline 5.
<p>Paragraph 19</p> <p>2.2.38. As noted for paragraph 18(e) above, the Applicant rejects the principle of paying SCC the costs sought in paragraph 19.</p>	Noted. As explained above, SCC has a different view.