



Department for

Infrastructure

An Roinn

Bonneagair

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**From the Permanent Secretary
Katrina Godfrey**

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Chairperson
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Your
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Our reference: PSDFI 74/20
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Dear William

PAC INQUIRY: MAJOR CAPITAL PROJECTS

I am writing in response to two items of recent correspondence which you raised with me and with my thanks for the Committee's understanding in allowing extra time to provide my reply.

Planning-related matters and the A5 and A6

Your letter of 13 March 2020 asked that Angus Kerr, Chief Planner and Director of Regional Planning, might also attend the evidence session planned involving DfI and DfC, when this is rescheduled. This reflected the Committee's wish to be able to direct their questions on planning related matters to the relevant planning official regarding the A5 and A6.

It might be helpful if I explained that the Planning (General Development) Order (NI) 1993 as amended gives permitted development rights for certain road schemes. These permitted development rights apply to trunk road and special road (motorways) schemes for which an Environmental Impact Assessment Report is required. The statutory procedures governing the construction and improvement of trunk roads here are contained in The Roads (Northern Ireland) Order 1993. Major schemes to improve motorways and trunk roads developed in accordance with these procedures will not therefore generally require separate planning approval. Details of the procedures are included at Annex A.

Officials are very happy to brief the Committee on the planning aspects of the A5 and A6, and the most relevant official would be John Irvine, DfI's Director of Major Projects and Procurement, who was already planning to join me at the session. I can, of course, also arrange for Angus to accompany me if that would be helpful to the Committee.

Correspondence from Mr Chris Murphy

Your letter of 23 March 2020 referred to correspondence from Mr Chris Murphy and requested information on the costs arising from a legal challenge that Mr Murphy has pursued against the Department.

By way of background, one of the Department's predecessor departments, the former Department for Regional Development, commenced the development of the A6 Randalstown to Castledawson dualling scheme in 2003. The preferred route was established using a staged assessment and selection process, based on the government's five assessment criteria of Environment, Safety, Economy, Accessibility and Integration. The Stage 1 Report, which set out the corridor options, and Stage 2 Report, which identifies the approved route options were both made public. At each stage, all relevant statutory and non-statutory bodies, and the public, were consulted to help inform the Department's determination of the preferred corridor and then the selection of the preferred route.

The scheme has been subject to all relevant statutory procedures, including the publication of an Environmental Statement and independent examination at a Public Inquiry in 2007. All stakeholders were given ample opportunity to object, support, or make comment on the scheme proposals.

It is worth noting that the route selected by this process, and currently being constructed, is not within the area subject to the international environmental designation, the Lough Neagh & Lough Beg Special Protection Area (SPA). The main selection feature in this SPA is the Whooper Swan, who overwinter in significant numbers in the Toome area. Given the proximity to the designated area and the swans, the Department carried out a Habitats Regulations Assessment (HRA) (then known as an Article 6 Stage 1 - Test of Likely Significance and a Stage 2 - Appropriate Assessment). These were undertaken, and subsequently updated in full consultation with the then EHS - Natural Heritage, now NIEA. The assessment concluded that there would be no significant effect on the integrity of the SPA.

The then Infrastructure Minister, Chris Hazzard, announced that the scheme was to proceed in a press statement in August 2016. The Vesting Orders were made that same day. In September 2016, Mr Murphy submitted pre-action correspondence indicating that he would be taking a Judicial Review (JR), based on his belief that the HRA was not compliant with the law. In response to the JR, the Department postponed the award of the full contract from October 2016 and only advance works were instructed to proceed.

The JR took place and on 28 March 2017, Justice Keegan dismissed the application as there was no breach of Article 6 of the Habitats Directive. Justice Keegan also concluded that the Department's decision was "rational and lawful".

Mr Murphy subsequently appealed the judgment to the Court of Appeal, and again in response, the Department awarded the contract in June 2017, but with significant contractual constraints as works were not to proceed in the "swan area". This was the contested area between Deerpark Road and the existing Toome Bypass which is subject to a winter restriction due to commitments in the Environmental Statement to minimise the potential disruption to the Whooper Swans.

The Appeal was heard in August 2017 and the judgment was issued in September 2017, again in support of the Department's position. Only at this stage was the Department able to remove the contractual constraints to allow access to the swan area, although the winter restriction was imminent and no work could commence until 18 March 2018 in compliance with commitments in the Environmental Statement.

As a direct result of the JR and subsequent appeal the scheme lost a full year of access to the swan area and as a consequence the programmed scheme completion for the whole project was delayed one full year.

Mr Murphy then sought to have the judgment appealed at the Supreme Court but the Supreme Court refused. Mr Murphy also sought to bring a complaint to the European Commission, but it rejected the complaint.

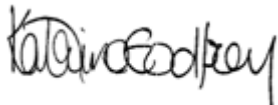
The cost to the scheme as a direct result of the legal proceedings set out above was estimated in 2017 at £10.6m. This figure was provided by the Department to the Northern Ireland Audit Office (NIAO) and is referenced (as £11m) in its report on Major Capital Projects published on 19 December 2019.

£8.6m of the £10.6m is the estimated cost for delaying the project by approximately one year. At the time of the JR, the Department was in contract with the Graham Farrans Joint Venture, which was already engaged in the design and preparation for construction. This figure includes £4.6m inflationary costs due to delay and £4m in contract costs related to: programme implications; work sequencing; nugatory work; the loss of opportunity to bulk buy; hiring equipment for a short period rather than buying; and mobilising and de-mobilising of the construction operation in the swan area.

The Department has incurred additional costs for consultants, both during the JR process, and to manage the project for a further year, in the region of £1.8m. The Department also had costs for legal advice and court representation (£0.2m). These items account for the remaining £2m of the £10.6m additional costs.

I hope you find this information helpful. John Irvine and I would be happy to provide any further clarification on these matters when we attend the rearranged evidence session.

Yours sincerely



KATRINA GODFREY

ANNEX A

DfI – Strategic Road Improvement Scheme Procedures

Planning – Permitted Development Rights

When Crown Immunity was removed in 2006, the Planning (General Development) Order (NI) 1993 was amended to give permitted development rights for certain road schemes. These permitted development rights apply to trunk road and special road (motorways) schemes for which an Environmental Impact Assessment Report is required. The legal approval for a scheme to proceed is by way of the procedures for making a Direction Order (Trunk Roads) or a Designation Order (Special Roads) under Article 14 or 15 of the Roads (NI) Order 1993. In a similar fashion to the planning process, these procedures provide the opportunity for public consultation and a public inquiry if necessary. It was decided by Planning Service at that time, in order to avoid the duplication of processes, Strategic Road Improvement Schemes would not need to go through the planning application process.

Statutory Procedures

The statutory procedures governing the construction, improvement and acquisition of land for trunk roads and special roads in Northern Ireland are contained in The Roads (Northern Ireland) Order 1993 (1993 Order).

The 1993 Order was amended in 2004 to enable the three strands of the statutory procedures - Environmental, Direction Order/Designation Order and Vesting Order - to be taken forward concurrently i.e. to be published into the public domain at the same time and for one inquiry to consider all representations made against or in support of the scheme. This allows objectors or supporters to present a single case, incorporating all of their comments and objections, on one occasion.

Direction Order

Article 14 of The Roads (Northern Ireland) Order 1993 provides that where the Department considers it expedient for the purpose of extending, improving or reorganising the trunk road system that any road should be designated as a trunk road; the Department may direct that (a) any existing Road (b) any road in the course

of construction or (c) any road proposed to be constructed shall become a trunk road and the trunk road system should be modified accordingly.

The statutory procedure requires the publication of a draft order and illustrative map describing the new trunk road.

Environmental Statement / Environmental Impact Assessment Report (EIAR)

Part V of The Roads (Northern Ireland) Order 1993 sets out the environmental impact assessment process that must be followed for strategic road improvement schemes.

Where an environmental impact assessment is necessary, the statutory procedure requires publication of a notice confirming that the scheme is a relevant project and that an Environmental Statement is prepared (since May 2017 called an Environmental Impact Assessment Report (EIAR)). The transitional provisions of the May 2017 legislation to update Part V of The Roads (Northern Ireland) Order 1993 allowed the A5 and A6 schemes to be progressed under the Environmental Statements already published prior to May 2017.

An Environmental Statement / EIAR is a detailed report on the findings of an Environmental Impact Assessment carried out on the proposed scheme. In particular, it describes, assesses and gives weight to the predicted environmental effects (adverse and beneficial) the scheme would have and details any mitigation measures proposed to reduce or eliminate those effects.

Rather than separate documents, EIARs now incorporate a section covering the Habitats Regulations Assessment (HRA) for the subject scheme.

Vesting Order

Article 113 of The Roads (Northern Ireland) Order 1993 provides that where the Department desires to acquire any land otherwise than by agreement, the Department may make an order vesting the land for the Department.

The statutory procedure requires the publication of a draft order, schedule and map describing the land to be compulsorily acquired for construction of the new road.

Publication of draft orders and environmental statement / EIAR

A composite notice is published in the Belfast Gazette and the local press informing the public that draft orders and an Environmental Statement / EIAR have been prepared. The notices specify the time within which representations may be made and inform where the draft orders and Environmental Statement / EIAR may be inspected.

Public Inquiry

Depending on the weight and content of representations received, the Department may convene a public inquiry to examine the case for and against the road proposal and to give affected landowners and the general public the chance to voice their views. The purpose of a public inquiry is to enable objectors and supporters to present their evidence before an independent Inspector. After the close of the inquiry, the Inspector will produce a report clearly setting out his or her recommendations and conclusions.

Decision to Proceed with Scheme

It is the responsibility of the Minister, as the "Decision Maker", to give approval for a Strategic Road Improvement scheme to proceed.

After considering the Inspector's Report, the Department prepares a draft Departmental Statement for the Minister to consider. The Departmental Statement sets out the case for the scheme, the representations received against and in support of the scheme, the Department's responses to the Inspector's recommendations, and the assessment of the impact of the scheme on the environment and any mitigation measures required.

Upon considering all information provided the Minister shall decide if the scheme should proceed and give instruction to officials for the necessary statutory orders to be made. The Minister's decision to proceed with a scheme is announced by way of a Written or Oral Statement to the Assembly.

Statutory Legal Challenges to Decision to Proceed

Decision to Proceed/Environmental Statement

If a person is aggrieved by a Decision to proceed with the construction of a scheme which was subject to an Environmental Statement/EIAR, on the grounds that it is not within the powers of the Department or that the procedures of Part V of the 1993 Roads Order were not followed, they may within 6 weeks from the date the Decision is first published, lodge an application to the High Court for an interim order to suspend the Decision until proceedings are heard and if successful with their challenge, get the Decision quashed.

Vesting Order

A vesting order is an “administrative order” and is not subject to the Assembly process. At the expiration of one month from the date of publication of the notice of making, the vesting order becomes operative. During this one month period any person aggrieved by a vesting order and desires to question its validity on the grounds that it is not within the Department’s powers or the proper procedures were not followed, may make an application to the High Court for an interim order to suspend the vesting order until proceedings are heard and if successful with their challenge get the order quashed.

Direction / Trunk Road Order

A Direction Order (DO) is the legal authority to construct a scheme. It is subject to Ministerial approval and the Assembly process. The process is that the Minister announces a scheme proceeding and gives approval for the making of the DO. An explanatory note is then sent to the DfI Committee for approval. The DO is then made and laid in the Assembly and comes into force on the appointed date unless annulled by the Assembly within the Statutory Period

Major Projects Lifecycle

All major roads projects are progressed through the phases shown below in Figure 1.

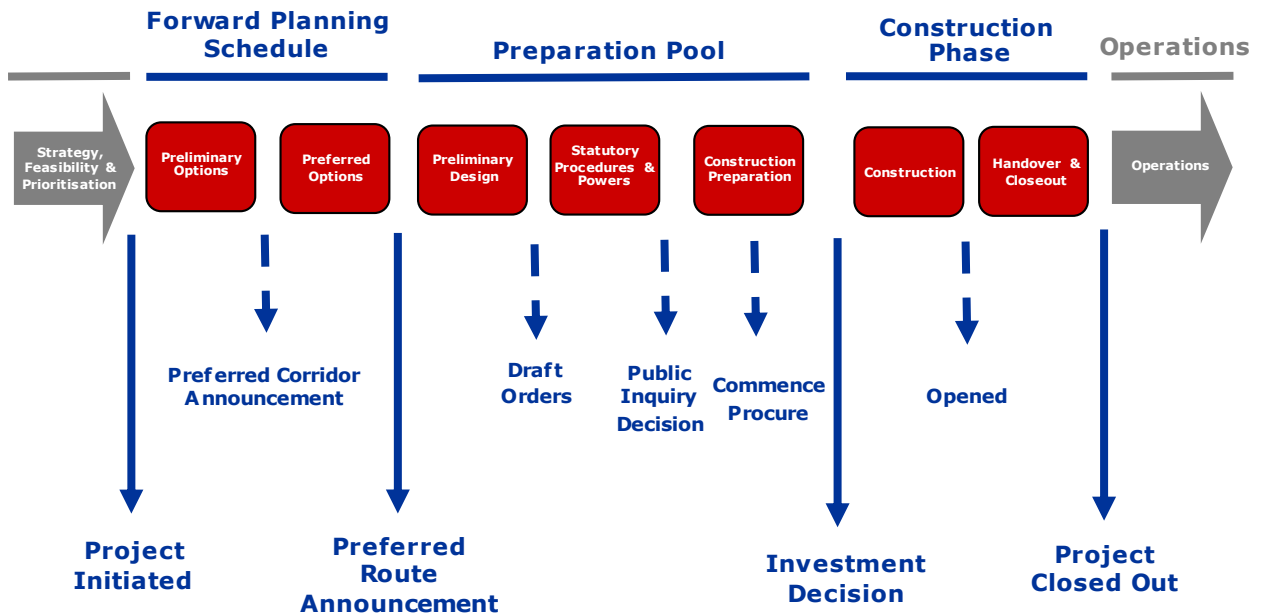


Figure 1

A **Preliminary Options Report** will identify the best performing options to be taken forward. The **Preferred Options Report** will identify the preferred route.

The Project Sponsor will develop a **preliminary design** and complete a Proposed Scheme Report to progress the scheme through the **statutory procedures**.

If, following a Public Inquiry, the Minister decides to proceed with the scheme; a procurement competition will be launched, subject to the approval of the final business case and the availability of funding. The successful award of contract will lead to construction.