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Case No: CO/3401/2021
CO/3508/2021
CO/3869/2021

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT
PLANNING COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 21/07/2022

Before:

SIR DUNCAN OUSELEY
Sitting as a High Court Judge

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Between:

BUCKINGHAMSHIRE COUNCIL	**Claimant**
- and -	
SECRETARY OF STATE FOR TRANSPORT **SECRETARY OF STATE FOR LEVELLING UP, HOUSING AND COMMUNITIES**	**Defendants**
-and-	
HIGH SPEED TWO (HS2) LTD	**Interested Party**

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David Matthias QC and Charles Streeten (instructed by **Buckles Solicitors**) for the **Claimant**
Richard Kimblin QC and Matthew Dale-Harris (instructed by **Government Legal Department**) for the **Defendants**
Morag Ellis QC and Alexander Greaves (instructed by **Eversheds Sutherland (International) Ltd**)
for the **Interested Party**
Hearing dates: 8 and 9 June 2022

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Judgment Approved by the court for handing down

Sir Duncan Ouseley:

1. The High Speed Rail (London-West Midlands) Act 2017, the 2017 Act, deems in section 20 that planning permission is granted for the HS2 project, and provides that Schedule 17 imposes conditions on that permission. These require High Speed Two (HS2) Ltd, HS2L, the Interested Party, to make requests to local authorities for approval of arrangements in accordance with which various matters related to the construction of HS2 have to be carried out. Appeals against refusal of approval or non-determination of requests for approval are made to the two Secretaries of States, the Defendants, jointly. Challenges to their appeal decisions are made by judicial review.

2. HS2L made eight requests to Buckinghamshire Council, the Claimant, for approval of the arrangements for eight routes in Buckinghamshire for Large Goods Vehicles, LGVs, to and from construction sites for the HS2 project. The Council did not determine seven of the requests, because it said that information necessary for their determination had not been provided by HS2L. Indeed, that meant that the period allowed for their determination had never begun. HS2L appealed against non-determination to the Secretaries of State, the seven sites generating three appeals. The Secretaries of State, through Inspectors, allowed the appeals. These three linked claims for judicial review challenge those three decisions of the Secretaries of State.

3. These are the third court proceedings involving consideration of a request for approval of the arrangements related to various aspects of the construction of HS2.

4. There are common issues across all three decision letters, and some peculiar to one or two of them. The first common ground of challenge concerns the information which has to be provided to the local authority for the request for approval to be valid, and how a dispute, about the necessity for the information sought, affects appeal rights to the Secretaries of State. This gives rise to a jurisdictional issue, and a consideration of earlier authorities. The second common ground of challenge raises issues as to the true interpretation of paragraph 6 of Schedule 17, and as to what scope it gives to the local authority to seek to modify the routes proposed by conditions. Broadly, the Council says that the decisions on the appeals, properly understood, took an overly narrow view of paragraph 6. The detail of this varies from decision to decision. There is thirdly a particular issue involving two decisions, where it is said that an important aspect of cumulative impact was ignored by each when it should have been covered at least in one decision.

The statutory, policy and agreements framework

5. This was set out in paragraphs 7-28 of my earlier judgment on paragraph 6 of Schedule 17 *in R (London Borough of Hillingdon) v Secretaries of State for Transport and for Housing. Communities and Local Government* [2021] EWHC 871 (Admin); (*Hillingdon 2*). For convenience, I repeat here that which has not been changed since that judgment. The statutory guidance, in paragraphs 13-17, was updated following the decision of the Court of Appeal in *R (London Borough of Hillingdon) v Secretaries of State for Transport and for Housing, Communities and Local Government;* [2020] EWCA Civ 1005, *Hillingdon 1*.

6. Schedule 17 paragraph 1 provides that the requirements in paragraphs 2-12 are "conditions of the planning permission." The enforcement provisions in the Town and Country Planning Act 1990 apply to enable the conditions to be enforced by a local planning authority. Paragraph 6 contains the "Condition relating to road transport":

> "(1) If the relevant planning authority is a qualifying authority, development must, with respect to the matters to which this paragraph applies, be carried out in accordance with arrangements approved by that authority.
>
> (2) The matters to which this paragraph applies are the routes by which anything is to be transported on a highway by a large goods vehicle to –
>
> (a) a working or storage site;…
>
> (4) Sub-paragraph (1) does not require arrangements to be approved in relation to—
>
> (a) transportation on a special road or trunk road, or
>
> (b) transportation to a site where the number of large goods vehicle movements (whether to or from the site) does not on any day exceed 24.
>
> (5) The relevant planning authority may only refuse to approve arrangements for the purposes of this paragraph on the ground that—
>
> (a)... or
>
> (b) the arrangements ought to be modified—
>
> (i) to preserve the local environment or local amenity,
>
> (ii) to prevent or reduce prejudicial effects on road safety or on the free flow of traffic in the local area, or
>
> (iii) to preserve a site of archaeological or historic interest or nature conservation value,
>
> and are reasonably capable of being so modified.
>
> (6) The relevant planning authority may only impose conditions on approval for the purposes of this paragraph— (a) with the agreement of the nominated undertaker, and (b) on the ground referred to in sub-paragraph (5)(b)...."

7. "7. A 'large goods vehicle' is defined by reference to Part 4 of the Road Traffic Act 1988. They are goods vehicles with a maximum permissible operating weight over 7.5 tonnes, and are therefore the larger heavy goods vehicles. [Heavy goods vehicles are those over 3.5 tonnes].

"8. Applying those provisions here, [Buckinghamshire Council] is a relevant planning authority and a qualifying authority within paragraph 6(1) and (3), and became a qualifying authority in circumstances I shall come to. Hence its approval to the routes for large goods vehicles used in the construction of HS2, was required; paragraph 6(2). HS2L is the 'nominated undertaker'….

"9. Paragraph 22 deals with appeals: where HS2L 'is aggrieved by a decision of a planning authority on a request for approval...(including a decision to require additional details), it may appeal to the appropriate Ministers....' The appropriate ministers may allow or dismiss the appeal or vary the decision of the authority, 'but may only make a determination involving- (a) the refusal of approval or (b) the imposition of conditions on approval, on a ground open to that authority.' The parties agreed before me that the requirement for HS2L's consent to the imposition of a condition by a local authority did not apply to the imposition of a condition by the Secretaries of State on an appeal, and that they could impose conditions regardless of HS2L's consent. On an application under paragraph 6, they could not impose a condition on a ground other than those in subparagraph (5)(b). [Paragraph 20 empowers the Secretaries of State to call in any request for approval for their determination].

"10. I need to refer briefly to other provisions of the Schedule. The paragraph at issue in *Hillingdon 1* was paragraph 3, which related to 'other construction works', including earthworks and fences. An approval could only be refused on a limited range of grounds, which, so far as material, were the same as in paragraph 6 (5)(b)(i-iii), that is the preservation of local amenities, preventing prejudice to road safety and traffic flow, and to preserve a site of archaeological or other special interest. Subparagraph (4) of paragraph 3 did not have a counterpart in paragraph 6; it enabled the planning authority, on approving a plan under paragraph 3, to require additional details to be submitted by HS2L for the authority's approval. This provision did however have counterparts in paragraph 2, the condition relating to building works, and paragraph 7, relating to waste, soil disposal and excavation. But these were not relevant in *Hillingdon 1*.

"11. There was also a general paragraph, 16, in the Schedule, providing that a local authority did not need to consider a request for approval unless HS2L had deposited with the authority a document setting out its proposed programme of Schedule 17 requests for approval to the authority, and a document explaining how the subject of the request fitted into the overall scheme of the works authorised by the HS2 Act. Paragraph 16(2) makes it clear that this does not apply to a request for approval of additional details. There is no express general power in the Schedule, or Act, enabling relevant information about the subject matter of the request to be required from HS2L. This was an issue in *Hillingdon 1*.

"12. **Statutory guidance**: Under paragraph 26 of Schedule 17, the Secretary of State may issue guidance to local authorities, which are obliged to have regard to the guidance in the exercise of their functions under this Schedule. So too was the Inspector."

8. The updated guidance issued by the Secretary of State in May 2021, after *Hillingdon 1*, states in [2] that the "purpose of Schedule 17 is to ensure that there is an appropriate level of local planning control over the HS2 Phase One construction works while not unduly delaying or adding costs to the project." Later, it added that the approvals had been "carefully defined to provide that level of local planning control." It acknowledged

that the Guidance is not legislation and that the Act takes precedence, where there appear to be differences between them. It cited paragraph 17 of the judgment in *Hillingdon 1*, concerning the collaborative way in which planning authorities and HS2L should work to prevent the planning process creating an undue hindrance to the delivery of the HS2 project. The main difference between requests for approval made under the conditions in Schedule 17 and applications for approval of reserved matters made under conditions on planning permissions, was that the grounds on which the planning authority could approve further details and apply conditions were more constrained under Schedule 17.

9. It stated further:

> "20. Planning authorities should not through the exercise of the Schedule seek to: revisit matters settled through the Parliamentary process or to modify or replicate controls already in place, either specific to HS2 Phase One such as the Environmental Minimum Requirements, (EMRs), other controls in the Act such as those under Schedule 4 or 33 or existing legislation.
>
> 21. These principles are unaltered by the Judgment. Schedule 17 requests should be determined on the basis of the controls already place in the EMRs.
>
> 22. Planning authorities should not replicate controls in the EMRs through Schedule 17 unless they are relevant to the grounds of approval and necessary to give effect to their duties under the Schedule. Requests for approvals under paragraphs 4,7 and 8 may need to replicate controls in the EMRs, given the matters for approval under those paragraphs."

10. It said this about information for decision-making:

> "25. Planning authorities require sufficient information to make decisions under Schedule 17. The information necessary to make a decision is generally that defined in the Planning Forum Notes, which reflect the collaborative decisions of the Planning Forum. Through pre-application discussions planning authorities should identify to the nominated undertaker any additional information it considers is necessary to make a decision and the forthcoming requests for approval, by reference to the ground for refusal. The nominated undertaker will provide such information as is reasonably required for that purpose or explain why such information is not considered necessary to the determination.
>
> 26. Information requested to support Schedule 17 requests for approval should be: relevant to the matter for approval and the grounds; reasonable and proportionate, and necessary for the decision."

11. Under the heading "Grounds for determination", the Guidance emphasised that Parliament had judged the impact assessed and reported in the Environmental Statement to be acceptable when set against the benefits of the scheme. It was not the purpose of Schedule 17 to eliminate all prejudicial impacts such as on traffic flow and safety. There would be cases when a request had to be approved notwithstanding an identified negative impact unless modifications could reasonably be made. It was not open to planning authorities to refuse in principle works covered by the ES. "Instead, Schedule 17 offers planning authorities an opportunity to seek modifications to the details submitted that they consider reduce the impacts of a submission if such modifications can be justified."

12. At [42-43], the Guidance dealt specifically with paragraph 6 of Schedule 17:

> "The scope of approvals under paragraph 6 is defined in paragraph 6(2) as being '… the routes by which anything is to be transported on a highway by a large goods vehicle…'. The arrangements that are approved by the planning authorities must relate to the routes to be used themselves. For example, details of arrangements for vehicle monitoring and the management of accesses, access designs approved under schedule 4, and the provision of works to be carried out to the route would not fall within the scope of approvals under paragraph 6. Modifications can be made to the submitted routes by the local planning authority by substituting one route for another. Conditions can require that routes are used at certain times or by certain numbers of large goods vehicles where the planning authority can show such a limit to be justified, and if agreed by HS2.
>
> 43. Where a modification to a proposed route is proposed it is likely that the planning authority would need to specify a suitable alternative route using a condition. Any condition that would prevent the number of vehicles reasonably needed for construction accessing work sites at the times at which they are required without the provision of a suitable alternative would not be considered reasonable. Local authorities should consider the effect of any such modifications or conditions on the cost and programme of HS2. The nominated undertaker will provide such information as is reasonably required for that purpose."

13. The onus is on the planning authority to justify the condition by reference to the grounds of refusal. In [47-49], statutory guidance is given on modifications. It repeats the statutory requirement that a modification can only be sought where it relates directly to the statutory grounds for refusal, and where the submitted scheme can reasonably be modified.

14. Paragraphs [50-56] deal with the imposition of conditions. It repeats the statutory requirement that no condition be imposed by a local authority without the consent of HS2L. This is to avoid delay caused by the imposition of inappropriate conditions. If the conditions are not agreed, the authority can refuse approval. [52] states that:

> "When determining any request for approval, conditions should not be imposed which conflict with controls or commitments contained in the EMRs. This is because these controls would have been considered necessary or sufficient by Parliament when it had approved deemed planning permission for the railway...".

15. The new Guidance also emphasises the importance of collaborative working between the planning authorities and the nominated undertaker, "through the HS2 Phase One Planning Forum. Through the Planning Forum common standards for information are set out in Planning Forum Notes…"

> "[58] Planning authorities should make any requests for further information as early as possible in the pre-application process in order not to hinder the HS2 programme. When reasonable further information is requested the nominated undertaker will provide it with a submission or evidence as soon as possible. When requesting information planning authorities should, by reference to the ground for refusal, explain why the information is necessary and relevant."

16. In the light of the decision in *Hillingdon 1*, the Guidance commented on validation in [59-63]: there was no process of validating requests for approval in Schedule 17, akin to that for planning applications; there was no requirement to comply with the planning authority's Planning Application Validation Check Lists. Although an extension of time could be agreed for the provision of further information, it was otherwise clear that the 8 week period, after which a request was deemed to be refused, began with the date on which it was received by the local planning authority. The nominated undertaker should consider agreeing extensions when needed to provide information, but pre-application collaboration should make such requests post-application the exception. In exceptional circumstances, the Secretaries of State had power to call in the decision for their own determination, under paragraph 20 of Schedule 17.

17. I return to what I set out in *Hillingdon 2*.

"17. It is evident that, although an application for approval under the Schedule has some similarities to an application for the approval of reserved matter under a planning permission, the issues for a local authority to determine, and its power to impose conditions were limited; and undertakings had to be given about how they would handle the requests for approval, before it qualified for that task. It also needs to be remembered that there has to be, here, an approval of lorry routes, on which there will be LGVs for the construction period. The approval cannot re-examine the principle of the development, and prevent it on the grounds of construction traffic impact.

"18**. 'Qualifying authorities' and the Planning Memorandum**: [Buckinghamshire Council] became a qualifying authority under the provisions of paragraph 13 of the Schedule. An authority could only qualify if it had given the Secretary of State 'undertakings with respect to the handling of planning issues arising under this Schedule which he or she considered satisfactory, and had not been released from those undertakings.' This was an agreement which clearly was intended to avoid foreseeable problems with local authority approvals, and provision for them, for that purpose, was part of the statutory structure.

“19. Those undertakings are set out in the Planning Memorandum, signed by [Buckinghamshire Council]. Its introduction states that it seeks to ensure that the process of obtaining the considerable number of approvals which have to be sought under Schedule 17 ‘does not unduly hinder construction of HS2.’ It contains the obligations of the authorities who choose to sign up to it, and HS2L. HS2L ‘will work with qualifying authorities to support the determination of requests for approval, which will include early and constructive engagement in accordance with obligations set out in this Memorandum.’ It is binding on the authority, which undertakes to act in accordance with it, and it is to be taken into account by signatory authorities in determining requests for approval.

“20. Section 7 of the Planning Memorandum deals with the need for expeditious handling of requests for approval. Authorities should not seek to impose unreasonably stringent requirements on the requests for approval, which might frustrate or delay the project, or unreasonably add to its costs. They should give ‘due weight’ to the conclusions of the Select Committee where relevant. They would use reasonable endeavours to deal with requests within 8 weeks. HS2L would ‘respond quickly to requests for information or clarification to assist the planning authority in the timely processing of requests.’ HS2L agreed to engage in ‘proportionate forward discussions’ about forthcoming requests. Repeated failure to comply with the requirements of the Memorandum could lead to an authority being disqualified. The reasons for refusing a request should be specific as to the grounds in the Schedule relied on, full, clear and precise. In section 7.7.3, …, the Memorandum said:

‘Where the authority’s decision in relation to the determination of construction arrangements has been reached on the grounds that the arrangements ought to be modified and are reasonably capable of being modified, the authority shall include an explanation of why and how it considers modifications should be made.’

“21. In section 9, the authorities agreed that in determining requests for approval, it would take into account ‘the assessments in the Environmental Statement, the arrangements in the CoCP [Code of Construction Practice] and the Environmental Memorandum, and any relevant undertakings and assurances in the Register of Undertakings and Assurances, to the Act.’

“22. Signatory authorities to the Planning Memorandum are part of the Planning Forum, which meets regularly to assist with the effective implementation of the planning provisions in the Act. They have to take its conclusions into account. The Planning Forum produces Planning Forum Notes, PFN, setting out ‘standards and practices to be followed by those implementing’ Schedule 17. This includes [Buckinghamshire Council]. PFN6 defined the information required to be submitted with the requests for approval of lorry routes.

“23. The Environmental Minimum Requirements, EMRs, 2017: These are referred to in the statutory guidance. They set out controls on HS2L, as the nominated undertaker, to which it is bound under the Development Agreement. They are relevant to the controls available which, applying the guidance, conditions should not modify or replicate…. The background to the EMR is explained in the Introduction to the document setting them out. The intention of the Secretary of State is to carry out the project ‘so that its impact is as assessed in the ES’, the Environmental Statement, supplemented by additional volumes as changes arose. The EMR General Principles

state that the controls in the EMR, the Act and in the Undertakings given by the Secretary of State 'will ensure that impacts which have been assessed in the ES will not be exceeded,' except in circumstances which do not apply here, such as a change in circumstances which was not likely at the time of the ES or are unlikely to be environmentally significant. HS2L 'will be contractually bound to comply with the controls set out in the EMRs' and will in any event 'use reasonable endeavours to adopt mitigation measures that will further reduce any adverse environmental impacts...insofar as these mitigation measures do not add unreasonable costs to the project or unreasonable delays to the construction programme.' In addition, HS2L will have to comply with the Planning and Environmental Memoranda and the CoCP.

"24. The EMR themselves include the following at [3.1.2 and 3.1.3]: '3.1.2 The nominated undertaker shall comply with and, where required to do so by the Secretary of State, shall...execute and deliver memoranda and agreements on planning heritage and related matters in the form reasonably required by the Secretary of State, including but not limited to the planning and heritage memoranda ....3.1.3 The nominated undertaker shall comply with all undertakings and assurances [specified in the HS2 Register of Undertakings and Assurances published by the Department for Transport...] and those undertakings or assurances shall take priority over the remainder of the EMRs to the extent of any inconsistency.'

"25. The CoCP, a component of the EMRs, is intended to provide for consistency in the management of construction activities across local authority boundaries and with a wide range of 'key stakeholders.' It is relevant to the Secretary of State's and HS2L's submissions about the extent of controls which should not be duplicated by conditions on an approval of a request. The CoCP sets out what are described as a series of measures and standards of work which HS2L has to apply to 'provide effective planning, management and control during construction to control potential impacts upon people, businesses and the natural and historic environment....' Class measures to be approved by the Secretary of State include road mud prevention measures, but road transport is for the planning authority. As part of its Environmental Management System, lead contractors are required to plan their works in advance to ensure that, as far as reasonably practicable, measures to reduce environmental effects are incorporated into the construction methods and that commitments from the ES and the Act are complied with. The CoCP is implemented by being imposed on the lead contractors by HS2L, incorporating both general and site-specific requirements. The lead contractors will be obliged to undertake the necessary monitoring work of the impact of construction works.

"26. Traffic management is the specific topic in Chapter 14 of the CoCP. [14.1.1] obliges HS2L to require that ''the impact from construction traffic on the local community (including ...users of the surrounding transport network) be minimised by the contractors where reasonably practicable.' [14.1.2] requires public access to be maintained where reasonably practicable and that appropriate measures are implemented to ensure that the local transport networks can continue to operate effectively. 'The impact of road based construction traffic will be reduced by implementing and monitoring clear controls on vehicle types, hours of site operation, parking and routes for large goods vehicles.' It is not specific about controls on large goods vehicle numbers during the day. 'Route-wide, local area and site-specific traffic management measures will be implemented during the construction of the project ….'

Generic route wide measures should be discussed in advance with the local highway authorities, and HS2L would ensure that a Route-wide Traffic Management Plan (RTMP) would be produced in consultation with highway and traffic authorities. This would cover a wide variety of matters such as the maintenance of the road, road safety measures for vulnerable road users, the site-specific traffic management measures, road closures, and monitoring deviation from authorised routes.

"27. HS2L would also require the production of Local Traffic Management Plans, LTMPs, in consultation with highway authorities, among other bodies. The topics to be included were access routes and site accesses, and 'a list of roads which may be used by construction traffic in the vicinity of the site, including any restrictions to construction traffic on these routes, such as the avoidance of large goods vehicles operating adjacent to schools during drop-off and pick-up periods and any commitments set out in the HS2 Register of Undertakings and Assurances.' In relation to lorry management, the LTMPs would include details where appropriate of the 'timing of site operations and timing of traffic movements' and of the 'local routes to be used by lorries generated by construction activity.' Site-specific traffic management measures which could be covered included 'measures to minimise impact on highway users' among many which were rather more specific.

"28. The Development Agreement: HS2L was bound into these arrangements under the HS2 Development Agreement of 2014, amended in 2017, with the Secretary of State for Transport. Both parties agreed, cl.9, to act reasonably and to co-operate with each other and with local authorities, and various other bodies. HS2L's obligations in cl.10.1(N) were to manage, develop and deliver the project and to discharge its obligations under the Agreement at all times 'so as to comply with and discharge the Undertakings, Assurances and Requirements ....' These were defined as including cl.1.1, the EMRs, the Register of Undertakings and Assurances, and any other undertakings or assurances given by the Secretary of State to any third party in connection with the proceedings before a Select Committee in respect of the HS2 Bill. The Secretary of State had also given an undertaking to Parliament."

The decision in *Hillingdon 1*

18. I set it out now because of its crucial influence on the approach adopted by Buckinghamshire Council to the requests it received, and to the appellate jurisdiction. The judgment of the Court by Lindblom, Haddon-Cave and Green LJJ was handed down on 31 July 2020. In that case, the request for approval under paragraph 3 of Schedule 17 related to earthworks for ecological mitigation within an archaeological protection zone. No evidence or information was provided by HS2L to the London Borough of Hillingdon, LBH, as part of its formal request for approval, so as to enable LBH to undertake its statutory duties to evaluate the plans and specifications for their impact upon potential archaeological remains. The Court of Appeal described HS2L's stance, at paragraph 7, as being that it was under no obligation to furnish such information and evidence. This was because it would itself in due course conduct relevant investigations into the potential impact of the development upon any archaeological remains, and take all necessary mitigation and modification steps, under a guidance document forming part of its contract with the Secretary of State for Transport, which set out its obligations as the nominated undertaker.

19. In [10], it summarised its reasons for allowing the appeal from Lang J who had upheld the decision of the Secretaries of State allowing HS2L's appeal:

> "The key to this case lies in a careful reading of Schedule 17 and the powers and obligations it imposes upon local authorities and upon HS2 Ltd. In our judgment, the duty to perform and assessment of impact, and possible mitigation and modification measures under Schedule 17, has been imposed by Parliament squarely and exclusively upon the local authority. It cannot be circumvented by the contractor taking it upon itself to conduct some non-statutory investigation into impact. We also conclude that the authority is under no duty to process a request for approval from HS2 Ltd unless it is accompanied by evidence and information adequate and sufficient to enable the authority to perform its statutory duty."

20. In [23], having set out the provisions dealing with extensions of the 8 week period for the determination of a request, and the right of appeal against a deemed refusal of the request where, at the expiry of the 8 week period, or as extended, the Court of Appeal said this:

> "As we explain below (see paragraph [77]), it was accepted (correctly in our judgment) in argument by Counsel for the Secretaries of State that it was implicit in the duty on the nominated undertaker under this paragraph to deposit information, that such documentation must be "*adequate*", i.e. by reference to the task the authority had to perform under Schedule 17."

21. LBH refused the request for approval in language which would have been appropriate if an examination of the merits had been carried out, when it had not been. It had no information, and no obvious means of finding out, whether there was any archaeological potential, and if so where, and facing what risks of harm, if the request were approved. At [51], the Court of Appeal commented:

> "As we explain below, it was, technically, wrong of the Council to formulate its refusal decision in this way because to have been in a position to form the conclusions expressed, the Council would have had to form judgments about the planning issues arising and, of course, the essential complaint of the Council was that HS2 Ltd had failed to enable it to do this. It should simply have refused to rule upon the merits of the request for approval until such time as the relevant information had been supplied."

22. The appeal was heard by an Inspector who made recommendations to the Secretaries of State. It was not suggested, either to him or to the Court of Appeal, that he had no jurisdiction to hear the appeal. He found that the information available in relation to archaeology was not adequate, although it satisfied the form of the relevant Planning Forum Notes, PFN. However, they did not specify the depth of material required, and scope existed for the supply of information which was reasonably necessary for an informed decision. The design of the works ought to be and could reasonably be

modified to preserve a site of archaeological interest, if that were found necessary once adequate information became available. The development at issue could be carried out elsewhere within the development's permitted limits. He concluded that it was unreasonable to expect LBH, on the basis of inadequate information, either to approve an application or to show that the works ought to be and could reasonably be modified.

23. The Secretaries of State disagreed, and allowed the appeal, holding not merely that the information required by the PFNs had been supplied, but that the scope of the matters for approval had to be read in the light of the bespoke HS2 regime, including the EMR processes, seen as the means of ensuring that adequate archaeological protection was in place. Effectively this regime would provide the necessary protection.

24. The Court of Appeal concluded that this rather gutted the Schedule 17 powers of any practical effect, and instead substituted the non-statutory regime for the statutory one, with the result that LBH could not perform its statutory functions for want of the necessary information. It was not suggested in the DL that LBH had enough material to perform the statutory evaluation itself; rather it was that the LBH did not need the material because the statutory evaluation would eventually be carried out by others under the bespoke HS2 regime. The decision was quashed, [93], the Court of Appeal adding "and we remit the matter to [the Secretaries of State] for reconsideration in the light of this judgment."

25. At [68-70], it said that the statutory scheme reflected "a deliberate decision by Parliament in the apportionment of democratic reasonability and accountability so that decisions on matters of local concern are determined by local planning authorities who are accountable to their council taxpayers." Of course, that is not saying that Schedule 17 can be read without understanding the limitations on those powers, limitations more restrictive than those applicable to local planning authorities in their normal functions, or understanding the reasoning behind the undertaking they had to sign in the Planning Memorandum in order to exercise the limited powers they were given, or the statutory obligation to have regard to statutory guidance, and if not following it, the public law duty to give good reasons as to why not.

26. At [70], the Court of Appeal said:

> "It follows from the statutory scheme that, if HS2 Ltd fails to furnish an authority with information and evidence sufficient to enable the authority to perform its duty, then the authority is under no obligation to determine the request. It is also evident from the statutory scheme… that, since HS2 Ltd cannot proceed to carry out works without approval, it has a concomitant duty to furnish an authority with such evidence and information as is necessary and adequate to enable the authority to perform its allotted statutory task. If, for some reason, HS2 Ltd does not do this then the correct approach is not to refuse the request for approval (as occurred in this case) but instead to decline to process the request until such time as adequate evidence and information has been furnished. The eight-week period for consulting and then deciding upon the request will not start to run until adequate information has been provided."

27. At [77-8], the Court of Appeal developed its reasoning on the duty to furnish adequate information. The system devised in Schedule 17 of the Act could not work without an implied duty to provide information "commensurate with the task the authority must perform." That was the information necessary for the evaluative assessment implicit in the power to refuse approval, or to propose modifications by conditions, albeit that the permissible grounds for approval were limited. It was common ground in that case that HS2L had not provided such information or evidence. The statutory scheme contemplated that a request for approval would only be submitted when it contained adequate information. It recognised that:

> "There may always be some leeway and room for debate as to what is adequate and under the co-operative procedure which has been instituted there will often be scope for discussion between HS2Ltd and the authority as to what is required, but that does not alter the underlying point which is that the request "*as deposited*" should be "*adequate*" to meet the statutory task which is to be performed by the authority."

28. I commented obiter on what was said in [70] in my judgment in *Hillingdon 2* at [208-209]. I expressed the view that what was said by the Court of Appeal in *Hillingdon 1* at [70], to the effect that a local authority could refuse to entertain a request for approval until it had the information it required, and so prevent the start of the eight-week period which would have to elapse before an appeal on the grounds of non-determination could be made, was itself obiter. My reservations referred (i) to the common practice of local authorities seeking more information as they entertained an application before them, as issues were clarified, and then more being provided on appeal in further response, none of which was treated as preventing time running, and (ii) to the problem which postponing the running of time would have if the only remedy for a dispute over the relevance, necessity and proportionality of the further information sought, was by way of judicial review of the reasonableness in law of the request, and not by way of an appeal which could deal with the merits of the request.

29. The Court of Appeal, [2021] EWCA Civ 1501, (Sir Keith Lindblom, with whom Baker and Lewis LJJ, agreed), refusing permission to appeal my judgment in *Hillingdon 2*, said at [57] with reference to my comments:

> "…I should come back to what the judge said about the suggestion made by this court in the previous case that there could be circumstances where on authority might properly decline to entertain a Schedule 17 request if it is wholly lacking in relevant content, and if the request is truly a nonentity the time for determination might not even run until it is given some substance. I can see some force in the judge's observations. But as the point was not decisive on the last occasion and nor is it here, I think the right thing to do is to leave it to be fully argued should it ever arise for the court to resolve."

30. The point has now arisen for resolution.

The Planning Forum Notes

31. There are two Planning Forum Notes, PFNs, to which I must now refer. They matter in this context because of the Guidance they contain about information HS2L should provide to local planning authorities when requesting approvals under Schedule 17. They were relevant to the decisions on validity, and to the adequacy of the information supplied by HS2L, whether going to validity or not. The Planning Forum, which produces them, includes representatives of Buckinghamshire Council. First, PFN 6, includes advice on the contents of lorry route requests for approval: the route proposed, with list of roads and plan, a definition of the works to which the approval relates, a description of the sites, works there, a summary of information from the Local Traffic Management Plan, LTMP, including predicted LGVs numbers and timings, and a Route Management, Improvement and Safety Plan, ROMIS, which would include a summary of any physical changes necessary to facilitate the use of the route by LGVs, and a summary of measures required to ensure the safety and free flow of traffic near the worksite access points. These requirements were met in relation to each of the requests.

32. After the requests had been made, but before the appeals were considered, PFN 17 was produced in response to the judgment of the Court of Appeal in Hillingdon 1, to be read with the new statutory Guidance of May 2021. The information to be supplied by HS2L should only be that which was "necessary" for the local authority to evaluate the impact of the proposals against the relevant grounds for refusal. Annex 1 provided guidance on the "additional information that could be considered appropriate to Schedule 17 decisions," of various types, "beyond that specified in Planning Forum Notes."

33. For requests under paragraph 6 of Schedule 17:

> "…further information may be requested by the qualifying authority only where relevant to understanding the impact of the use of the route and whether a modification is reasonably necessary. the requirement for this information should be demonstrated and the scope of information should be agreed through pre-application engagement….Information should relate to the grounds in paragraph 6(5). For example, details of how Large Goods Vehicles are monitored is not relevant do an understanding of the suitability of a route. Road widths are relevant to the consideration of the suitability of a route."

34. In addition to what is set out in PFN 6:

> "further information which may be necessary to allow the qualifying authority to consider a request for approval...(but are not arrangements subject to approval under paragraph 6)(my brackets) where not already available within the ES or there is a substantial change in HS2's proposals: Traffic assessments [but only to baseline data in the ES, and not updated to current conditions]; Modelling of traffic flows at individual junctions along a route that has been subject to previous assessment and where it is reasonable to expect that the changes to HS2's proposals would result in substantially higher congestion then

previously asserted; and Cumulative Large Goods Vehicle flows from all HS2 works."

35. What was not relevant, for example, to understanding the suitability of a route were details of vehicle monitoring, or of the existing highway condition and provision of any works to be carried out to the route. Nor was it reasonable to require the modelling of alternative routes.

The process of the requests and appeals

36. The Brackley Road Compound request was submitted on 12 June 2020, the Wendover Green Tunnel request on 3 March 2021, and the seven sites at issue within the A413 worksites request were submitted on two dates (reflecting the fact that the seven involved two different contractors), 2 June 2020 and 17 July 2020.

37. There were discussions between HS2L and the Council, and the provision of information, before the requests were submitted and afterwards too. There were rather inconclusive discussions about extensions of time, partly because, the Council maintained its position that, until it was satisfied that a valid request had been made, no question of an extension of time for its consideration of the request could arise. In each case, save one for which it granted approval, Buckinghamshire Council took the view that it did not have sufficient information to determine any request, or to treat it as valid, at any stage, and notwithstanding the further material supplied by HS2L. This was its position when the requests were made and at all subsequent times. In adopting that stance, from August 2020, it relied on what the Court of Appeal had said at [70] in *Hillingdon 1*. Its view was that so long as it considered that information was necessary and had not been supplied, time had not begun to run. Save for one of those in the first set of A413 worksite submissions, no determination was therefore ever made on any of the requests.

38. Appeals against non-determination were lodged on 19 March 2021, (Brackley Road Compound), 9 June 2021 (Wendover Green Tunnel), 15 March 2021 (A413 worksites). No one sought to argue over whether time had been extended in fact from the date of the making of the request, or whether the appeals were out of time, if the Secretaries of State had jurisdiction to entertain them.

39. Buckinghamshire Council contended that the Secretaries of State had no jurisdiction to entertain any of the appeals, because the eight-week period from the making of a request, which had to elapse before an appeal on the grounds of non-determination could be brought, had never begun to run. It maintained that position notwithstanding that Mr Matthias QC for Buckinghamshire Council, accepted that the Secretaries of State could reasonably disagree with that view and could reasonably take the view that sufficient information had been provided for lawful decisions to be made on the requests, although on the merits they ought not to have done so. The Council had rationally come to different conclusions on each request, and it was its view which determined whether the 8-week period had begun to run. However, if the Secretaries of State did have jurisdiction on the appeals, he could not describe the decisions of the Inspectors as irrational or unlawful by reference simply to the fact that information sought by the Council had not been provided. There was by contrast argument before the Inspectors that the information sought was not relevant, necessary or proportionate to the decisions which the Council could take within its limited remit.

40. In no case, however, either when it considered the requests or on appeal, did the Council suggest that there were any more appropriate routes in whole or part, or that the further information which it sought might reveal the possibility that there was one. That has never been part of its case on any of the requests. In no case either did the Council suggest, let alone propose, any modification which should be made, or even the type which should be considered, to deal with the concerns it identified. Its stance was that it did not have the information it thought necessary to propose any modifications to be made by conditions. The Secretaries of State, it conceded before me, could reasonably reach a different conclusion. But the essence of its case in all appeals was simply that, as it had not had the information which it thought was necessary to determine the requests, the Secretaries of State had no jurisdiction to entertain the appeals.

41. **The Brackley Road Compound request** sought approval for the route from the A43 trunk road network to the Brackley Road construction worksite along the A433. The A43/A422 junction is a roundabout, at grade and not signalised. The Council's concern, as clarified by Mr Matthias, was that whilst the numbers of LGVs forecast in the request were within those assessed in the Environmental Statement and so approved by Parliament as acceptable, the numbers of HS2-related non-LGVs were now predicted to be much higher than in the ES. The Council's concern was that queues at the junction could lead to non-LGV traffic rat-running along a route off the A43 to the north which joined the A422 to the east of the roundabout, bypassing the potential queues, but running through the village of Turweston to do so. The appeal was decided by an Inspector, Mr Felgate.

42. **The Wendover Green Tunnel request** sought approval for the LGV route from Junction 2 of the M40, on the strategic road network, via the A355, an inter-urban two lane dual carriageway, to the 3-arm high capacity Pyebush roundabout. Thence the route passed along the A40, a two lane single carriageway rural A-class road, to a roundabout on the edge of Beaconsfield where it would rejoin the A355, by then a single carriageway A-class road, initially with some development on one side. On the edge of Amersham, a roundabout would lead to the A413 Amersham By-pass, initially a dual carriageway, and then a single carriageway rural A-class road, passing largely through undeveloped countryside. Finally, as the Wendover By-Pass, the A413 becomes a high standard single carriageway. All the main settlements, from Amersham, westward, were by-passed.

43. The Council's principal concern was the cumulative effect of LGVs using the A413 to access the Wendover Green Tunnel construction site, which would pass to the west of the other sites along the A413 and would therefore be using, for much of its length, the same routes as those for which approval was sought under the A413 worksites request. There had been no assessment, it said, of the combined effects of the LGV movements accessing all of those worksites along the parts of the route common to them. Nor had there been an assessment of the effects, cumulative with the LGVs of non-LGV construction traffic to those sites. The appeal was decided by Mr Felgate, on 3 September 2021, after a site visit on 23 August 2021.

44. **The A413 worksites requests** at issue covered four routes and seven worksites. There was a very considerable overlap between the Wendover Green Tunnel route and the A413 worksites route, along generally shorter parts of the same route. The concerns were the same in essence as for the Wendover Green Tunnel route: the absence of cumulative impact assessment. The LGV and other traffic flow figures for the A413

worksites themselves were within those assessed in the ES. The Council had urged the Secretaries of State that the same Inspector should decide these appeals and the Wendover Green Tunnel appeal, because of the overlap in the routes for which approval was requested. But that did not happen. The A413 worksites decision was dated 29 September 2021, and taken by Mr Dignan.

45. Although his decision came out some three weeks after the Wendover Green Tunnel decision, the decision appears to assume that that decision had not yet been made, and certainly makes no reference to the actual decision. There is no evidence that either relevant Government department or the Planning Inspectorate drew his attention to it or was asked by him about it; Buckinghamshire Council did not draw that decision to his attention either, or make enquiries as to whether either relevant Government department or the Planning Inspectorate had done so either. It provided inadmissible and argumentative evidence debating the merits of the decisions; it did not say why those simple steps had eluded it. No party offered any evidence about this gap in information.

The appeal decisions

46. **The Brackley Road Compound appeal decision, 23 August 2021**. This dealt with the validity of the appeal as a preliminary matter. It recorded the Council's contention that the appeal was invalid as the prescribed period for determination had never commenced. There was no statutory provision permitting an appeal to be treated as invalid. The information required by PFN 6 had all been supplied; PFN 17 post-dated the application by 9 months. *Hillingdon 1*, at paragraph 70, held, he said, that the material provided should be sufficient to enable the determining authority to perform its duty, and that the 8 week period did not start until then. He continued: "But this ruling still leaves the question as to what type and amount of information are needed in any particular case to be considered on the facts and circumstances of that case. In the event of an appeal, that question is one that clearly must fall within the scope of the decision maker who is to determine the appeal." Although the Council listed items which it said should have been supplied, none were on the checklist in PFN 6: "Therefore, HS2L's failure to supply that information at the outset did not make the submission invalid." The emergence of PFN 17 at an advanced stage of the process could not invalidate the application retrospectively, and so did not affect the validity of the appeal. He would however consider the adequacy of the information provided in the context of the substantive issues to which he then turned.

47. The Council contended, on the merits, that approval should be refused because of "the significant adverse impact on road safety or on the free flow of traffic in the local area, contrary to paragraph 6(5)(b)(ii) of Sch.17." The Inspector considered the main issue to be whether the proposed lorry route or related arrangements ought to be modified, and were reasonably capable of being modified, having regard to road safety and the free flow of traffic.

48. The Inspector summarised the relevant statutory Guidance. He noted, DL19, that the Guidance:

> "makes clear that the arrangements that are approved must relate only to the routes themselves. Modifications may be made by substituting one route for another. Conditions limiting times or

> numbers of vehicles must be justified, and should have regard to the effects on the HS2 project's costs and programming. "

49. He described the route in some detail, before concluding that "it seems beyond doubt that the route proposed… is not only the best available, but to all intents and purposes the only logical route for the purposes of serving the Brackley Road Compound."

50. The Council's principal concern related to congestion at the A422/A43 roundabout. The Inspector agreed that the construction of HS2 would generate a significant amount of extra traffic, including cars, vans, and smaller HGVs, "none of which were subject to control through Schedule 17", as well as the LGVs which were the subject of the application, with the likely result of worsening traffic conditions in the area during the four year construction period.

51. However, the likelihood of some increase in congestion and delays at that junction must have been taken into account in the Parliamentary process, which would also have anticipated some change in the numbers over time. In any event, the number of LGVs was within the range assumed and assessed in the ES and Transport Assessment, TA.

52. The Council advanced its case to the Inspector for further information by pointing out that, although the forecast LGV flows were within those assessed in the ES, and therefore had to be taken as acceptable, the flows for other vehicles were much higher than assessed. LGVs in the ES were within the range of 850-1430 peak daily movements, and other HS2 related vehicles were 30-50, a total less than 1500. Now, the total was estimated at 2500 of which LGVs were estimated to be 1180, and 1320 other vehicles mainly cars, light goods vehicles and some 50-60 HGVs. This led it to say that HS2L had not carried out an adequate assessment of these new numbers, which the Council contended could affect the operation of the A422/A43 junction, potentially causing delays, queueing and rat-running.

53. This was considered in DL 29-32, and is central to the challenge to the lawfulness of the substantive decision:

> "29. I note that the forecast number of smaller, non-LGV vehicles is now higher than previously expected. But the present application is only concerned with LGVs, and it is therefore only those vehicles that are relevant. I also note that the Council's concerns now appear to relate to the A43 as well as the A422. But the A43 does not form part of the route applied for, and LGV and other traffic movements on it, whether generated by HS2 or not, outside the scope of Schedule 17."

54. There was no suggestion that the relevant section of the A42 had any significant accident record, and he could see no reason why its use by LGVs should give rise to any undue danger; DL30.

55. The Inspector then referred to the risk of rat-running through Turweston by traffic seeking to avoid HS2 related congestion at the A42/A43 roundabout, whether from LGVs or non-LGV construction traffic. He said at DL31:

> "I note that concerns have been raised regarding the potential risk of vehicles diverting, during times of congestion, away from the A422 and through nearby villages including Turweston. I agree this would be undesirable, but Turweston is not on the proposed route. In any event, given Turweston's proximity to the Brackley Road Compound, it seems to me that the possibility of rat-running through the village is not directly related to the choice of LGV route. Moreover, if measures are needed to control such rat-running, other means are available under the EMRs, including through the on-going local procedures relating to the Local Traffic Management Pan (LTMP), the ROMIS, and the Traffic Liaison Group (the LTG)."

56. Hence, he concluded in DL32, that there was no evidence that the approval of the LGV route would have any adverse effect on road safety or the free flow of traffic.

57. The next section of the decision is headed "Adequacy of the information provided." In DL 33, he listed the further material which the Council sought. It is worth setting it out. It included:

> "… forecasts of the total trip generation, broken down between types of vehicle, peak and non-peak hours, and peak/non-peak operating phases. And alongside this, the Council would have wished to see a comprehensive methodology statement; comprehensive summaries of the relevant information from the previous ES figures, and of the differences between this and the updated forecasts; a comparison with junction modelling outputs and explanation of the methodology used; and a summary of the residual significant effects, with further analysis of the differences from the ES."

58. The Council wished to have this information:

> "34…so that it could consider whether any conditions or limits should be imposed in relation to numbers of vehicles or times of use. However, for the reasons already explained, I have found that the route proposed by HS2L, is suitable for LGV traffic, and is the best route available to serve the Brackley Road site. I have also found that the impact of the route has already been taken into account in the granting of deemed planning permission for the HS2 development. These considerations clearly weigh in favour of approval, and it seems highly unlikely that the provision of any additional information could change that conclusion.
>
> 35…In the present case… the decision is whether the proposed lorry route is acceptable in the form now proposed, or should be modified. There is nothing else in the application that can be approved or modified, except the route itself. Nor is there any requirement in paragraph 6 of the Schedule for anything else to be considered, apart from the route. Paragraph 6 does allow for

> consideration of conditions, but only where needed for the purpose of modification. In this case, the Council's request for additional information is indeed directed at possible conditions, but with no apparent intent or prospect that such conditions would involve any modification to the route. In the circumstances, I can see no reason why a lawful decision cannot be made without further information.
>
> 36. …PFN 17 makes it clear that further information [including traffic assessments, modelling and cumulative information] should not be expected in all cases, and indeed states that further information may only be requested where relevant to whether modification is necessary, having regard to the grounds specified in Schedule 17 paragraph 6. It seems clear from this that where any information additional to the standard requirements set out in PFN 6 is to be sought, this will need clear justification on a case-by-case basis. In the present case, the Council's requests for further information have not been so justified. In the circumstances, having regard also to paragraph 26 of the Statutory Guidance, the information requested appears to me to be neither relevant, reasonable, proportionate, nor necessary."

59. The submitted documents were clear as to the proposed route and included all the relevant mandatory information. The Inspector was satisfied that he had sufficient information to make his decision; DL37.

60. I note that the Council did not carry out any work itself to assist the judgment as to what the effect would be, whether by modelling or a manual assessment. In his witness statement, largely inadmissible or irrelevant, Mr Black, Highways Approval Team Leader of the Council's HS2 Team, said that the Council was currently undertaking junction modelling of that junction. So, it had the information and means to do that work earlier, but had wanted HS2L instead to do it. The results, of course, could not have been before the Inspector, and would have been inadmissible before me, although misguidedly promised.

61. The Inspector went on to point out that no specific modifications of any kind had been proposed or identified by any party. Given his earlier findings as to the suitability of the proposed route and the lack of alternatives, he could see no reason why any modification to the proposed arrangements ought to be made. The Council's arguments for conditions were presented in general terms, without explaining what modifications would be given effect through such conditions, or how they would fall within the scope of paragraph 6 of Schedule 17. Unconditional approval should be granted in the absence of a clear reason why the proposal was unacceptable on the specified grounds, and it was not necessary in the circumstances he had described to consider whether any modification was reasonably capable of being made; DL 38-41.

62. Moreover, I note, the Council made no suggestions as to what modifications would have been within the scope of paragraph 6, or with what effect on the construction programme. It did not suggest that rat-running could be reduced by signage, or prohibition of turning movements, off or on route, or that the capacity of the roundabout arms with the larger queueing problems should be increased by temporary works, or

any other type of solution to the problem it foresaw but wanted quantified. Its promised but inadmissible modelling appears to have been directed to that. The one suggestion it did not make, and indeed disavowed, was that there should be a different route, in whole or part.

63. **The Wendover Green Tunnel appeal decision, 3 September 2021**. The same Inspector dealt with this appeal as dealt with the Brackley Road Compound appeal. Much of what he concluded in that appeal about the scope of paragraph 6 of Schedule 17, statutory Guidance, and the PFNs, is in materially similar terms to what he said in this appeal, and it does not need to be repeated here.

64. The Council's case to the Inspector was very similar to its case for the A413 worksites appeal, because of the very considerable overlap between the routes used. Its case made clear that it sought a cumulative assessment of traffic in two respects: (i) all HS2 LGV traffic along the A413 routes, covering the A413 worksites and Wendover Green Tunnel, and (ii) an assessment covering all HS2 construction traffic on those routes and not just its LGVs. It had asked for the same Inspector to deal with all those appeals even if they were not to be joined in the same appeal, as second and third best to their being combined in a single application. It knew however that the A413 worksites appeal was being dealt with by a different Inspector, because the HS2L case said so. The A413 worksites appeal was dealt with first by the parties, although decided second of the two A413 route appeals, and therefore the Wendover Green Tunnel written submissions deployed much of the A413 appeal material. This is further dealt with in the A413 DL and submissions.

65. The Council's case involved a dispute with HS2L over whether it had provided the cumulative impact figures for all seven sites (disaggregated by cars, small goods vehicles and LGVs) by direction in the AM peak hour, the PM peak hour and on daily flows for a peak day). The Council was critical of the numerous histograms, which only covered HGV and LGV construction traffic, and critical of the comprehensive nature of other material, which it said only covered total changes in traffic flow at key junctions. It identified elsewhere what it thought were discrepant figures. It criticised the lack of information about the derivation of the figures. All of these criticisms meant that the request was invalid. It did have enough to say however, that it was reasonable to conclude that the "significantly higher traffic forecasts" would result in "additional significant adverse effects on the A413."

66. HS2L's case pointed out that in response to the concerns raised by the Council in relation to the impact on specific junctions and existing road conditions, that it had submitted a Summary Assessment Note, SAN, covering the A413 work sites as well as Wendover Green Tunnel, for which additional assessments had been carried out on the proposed lorry route to that work site where flow was forecast to be above that assessed in the ES. In the light of the exceedance of the ES flows, the contractors had to agree to ensuring that the ES average forecast flows would be maintained in the peak hour, a commitment to be secured through the LTMP and the Vehicle Management Booking System. HS2L explained to the Council how it planned to keep peak flow numbers within the EMRs, confirmed by a supplementary note. With modifications to vehicle movement planning, the ES PM peak hour numbers could be adhered to and further junction improvements would not be required. A further addendum provided a breakdown of vehicle and peak vehicle numbers on the lorry routes. The two contractors would hold regular meetings to ensure vehicle flows were managed in the

peak hours, and that mitigation measures in the PM peak hour were adhered to. The latest draft of the LTMP was provided.

67. HS2L had done this work because the construction traffic for Wendover Green Tunnel would now be using the A413 routes whereas in the ES it was assumed to be a different route, so the assessments had to be updated from the ES for the purpose of the requests.

68. The Council again accepted that the Inspector could reasonably conclude that he had enough material to determine the appeal. This acceptance was not stated to the Inspector, but was Mr Matthias' response to a question from me early on in the hearing, as with all the appeals. The Council again had no alternative route to suggest and did not suggest that further information could have led to one being identified. Again, despite the very considerable material which had been provided, and notwithstanding the criticisms it made, it had not identified any modifications to the route arrangements which should and could be made. Its criticism of the Inspector before me concerned how the cumulative effect of this site with the A413 worksites had been considered.

69. In his conclusion about the validity of the appeal, taken as a preliminary matter, at DL12, he rejected the Council's contention that this lorry route approval request should not have been submitted as a separate application, but only as part of an application with the routes proposed in four other applications relating to worksites in the A413 corridor. He said:

> "In this context, I also note that these other four applications are now the subject of further appeals. But there is nothing in the Act itself, or in the Statutory Guidance or PFNs, that prevents lorry route applications being made in relation to individual worksites, and indeed the wording of paragraph 6(2) of Schedule 17 seems to me to envisage applications being made on just such a basis. To my mind, this cannot give rise to a finding of invalidity."

70. The Inspector added, DL13, that neither *Hillingdon 1* nor *Hillingdon 2*, first instance, suggested that information could be required which was neither necessary or relevant. Those judgments made clear that:

> "…the question of what type and amount of information is necessary in a particular case, to enable a lawful decision to be made, will still be a matter of planning judgment, dependant on the facts and circumstances of that case."

71. The Inspector, having rejected the contention that the appeal was invalid, defined the main substantive issue in the terms he used in the Brackley Road Compound DL; [47] above. The Council had put in no grounds for dismissing the appeal were it found valid, but its statement had raised concerns about the numbers of vehicles on the route.

72. The Inspector set out the statutory Guidance in much the same terms as in the Brackley Road Compound decision. He considered the characteristics of the proposed route, identifying those which weighed in favour of the route, and the absence of the sort of limitations or weaknesses which would make it unsuitable for LGVs. The route appeared to be the same as that assumed in the ES and TA assessments for the Bill, and so Parliament had taken it into account in passing the Act. He concluded that the

proposed route was suitable and "acceptable in principle"; DL 30. He also considered possible alternatives, before concluding at DL36, that there was no preferable alternative.

73. Indeed, none had been suggested. Nor, I add, was it suggested that further information could have led to a different route being preferred. This was accepted as the best route.

74. The Inspector then considered the free flow of traffic. He considered the existing flows, quite high in the peaks and around key junctions. He had the data and forecasts from the ES, TA and APs. With the existing flows, and background growth, "the additional LGVs generated by the Wendover worksite would have the potential to add to existing congestion problems where they already occur, or to cause new problems in other parts of the route. I appreciate the concern of the Council and others at that prospect." [DL38]. Various highway works had been identified in the Local Traffic Management Plan, LTMP, which would help traffic flows, and help mitigate the effects of LGV traffic on congestion; DL39. The undertakings and assurances in the ROMIS made further provision for the upgrading of a section of a roundabout, and there was a general provision enabling further works to increase junction capacities, and various other obligations on HS2L to take mitigation measures, ranging from control of vehicle types, workforce travel plans, monitoring and site operating hours, to more general obligations to mitigate impacts on local communities as far as reasonably practicable; DL40.

75. The Inspector said, DL41, that he appreciated that:

> "…the degree of control available to the Council in relation to the undertakings and assurances was not the same as could be applied through conditions or obligations entered into under Planning legislation. But nevertheless, it is right to assume that the undertakings and assurances will be honoured, and also that they are capable of being enforced if necessary."

76. None of these measures were guaranteed to succeed in preventing an increase in congestion. But, DL41, they:

> "…are likely to have some beneficial effect in mitigating the effects of HS2 construction traffic on the free flow of traffic in Buckinghamshire, including on the LGV route now proposed."

77. The likelihood of some adverse effects from HS2 construction traffic was taken into account by Parliament. That decision was not to be revisited or undermined by introducing new conditions or restrictions not provided for by the Act. The updated traffic generation and junction modelling figures were higher than those produced previously, but that was only to be expected over time; DL43:

> "Where such changes are significant, or could result in new adverse effects, the way that the HS2 regime allows for additional mitigation is through the EMRs, including the on-going processes of updating the LTMP and the ROMIS, and through the operation of the undertakings and assurances that I have identified. Given the existence of these other mechanisms, it seems to me that in dealing with the present lorry route

> application, giving further detailed consideration to any new traffic figures or forecasts would be unnecessary and duplicatory. There is no suggestion that the updated figures mean that the route now proposed is no longer the most suitable. in these circumstances, I can see nothing in either the Act itself or the Statutory Guidance that makes it necessary to consider any new traffic figures, or indeed any matters other than the route itself and its planning merits."

78. The Inspector adopted much the same approach in relation to highway safety: the increase in LGVs would increase the risk to safety but that was accepted as inherent in the passing of the Act. There was no better route on that ground. No part of the route had a notable accident record. Specific safety measures were proposed at some roundabouts and sections, which the Inspector listed. He also referred to the "undertakings and assurances listed in the ROMIS [which contained] various other wide-ranging general provisions relevant to safety." There would be no undue risks to safety and there was no preferable route on that account.

79. Next, the Inspector considered the adequacy of the information provided. The information still sought by the Council, DL50, was the same as listed in the Brackley Road Compound decision, [56] above. He commented, DL51, that this information did not form part of the information required by PFNs 1, 3 or 6. PFN 17 and the statutory Guidance said that that type of information could only be requested where relevant and necessary to the question of whether a route modification was necessary, having regard to the grounds upon which such a modification could be made. He could appreciate the Council's reasons for wishing to have this information in its desire to discharge "what it sees as its responsibilities in respect of planning and highway matters." He continued:

> "However, under the HS2 Act, the Council's powers in matters relating to the HS2 project are significantly more limited than they would be in most other developments." [The proposed lorry route was the best available.] "There is no suggestion that the provision of the additional information requested by the council could realistically lead to any reconsideration of that conclusion, or that it might lead to any modification of the proposed route. In the absence of such a possibility, the additional information is not necessary for the purposes of determining the application. Nor is the request either reasonable or proportionate in these circumstances."

80. He was satisfied that, as the decision before him was whether the proposed lorry route was acceptable in the form proposed, or should be modified, he was satisfied that he already had sufficient information for that purpose.

81. Moreover, as he pointed out in DL55-8:

> "55. No modifications of any kind to the proposed route have been proposed or identified by any party… there is no apparent reason why any modification to the route ought to be made.

> 56. Nor have any modifications of any other kind being suggested. But in any event, nothing else is proposed for approval other than the route itself. Given that nothing in paragraph 6 of Schedule 17 requires consideration to be given to anything other than the route, there seems no reason why any such other modification should be considered.
>
> 57. [Nothing prevented unconditional approval, which was the default position] except where there is a clear reason why the submitted proposal is unacceptable on one of the grounds specified.
>
> 58. In view of the above, it is not necessary for me to consider whether any modification is reasonably capable of being made."

82. He allowed the appeal.

83. **The A413 worksites appeal decision**, **29 September 2021**. This dealt with four appeals, one involving three sites. The sites were all reached from the M40 at Junction 2, following the A355 to the A40, then back to the A355, before accessing the A413 to lead directly, or via a short stretch of other roads, to the A413 worksites. There was an almost total overlap between all the routes proposed in this group of four appeals. The Wendover Green Tunnel route followed this same common route but continued beyond the A413 worksites route to the west on the A413.

84. The Inspector explained how the question of the validity of the appeals arose: the Council contended that it had not received sufficient information for the determination of the requests, and contended that time had not started running for their determination, and so no appeal could be made on the grounds that they had not been determined. He saw the main issues as being (i) whether the appeals were validly made, which depended on whether the information submitted with the requests was adequate and sufficient for the determination of the requests, and (ii) whether there was sufficient justification to withhold approval on the basis that the arrangements should be modified on the permitted grounds and were reasonably capable of being so modified.

85. On the first issue, the Inspector referred to the statutory Guidance. This recognised that local authorities required sufficient information to make decisions, and had advised them that the information necessary for that purpose was "generally that defined in the Planning Forum Notes, which reflect the collaborative decisions of the Planning Forum." This Forum "facilitates liaison between stakeholders, including local authorities, and those which become Qualifying Authorities, [which includes Buckinghamshire Council] have undertaken to follow the outputs of the forum. Its consensus-based outputs include guidance and outline documentation on the exercise of powers." He then referred to PFNs 6 and 17, and the need for information requested to be relevant to the limited specified grounds of refusal available. He referred to the significance of the impacts assessed in the ES for the evaluation of impacts in determining LGV approval requests. Even if there were adverse effects falling within the specified grounds, a request would have to be approved unless modifications could reasonably be made. PFN 17 Annex 1 recognised that further information could be required and HS2L was expected to provide it or explain why it was not thought

necessary; however, it still had to be relevant to the specified grounds, reasonable and proportionate.

86. The Inspector elaborated on that in DL 12-14. The arrangements to be approved under paragraph 6 "must relate to the routes to be used themselves, and details of arrangements for vehicle monitoring and the management of accesses, access designs approved under Schedule 4, and the provision of works to be carried out to the route would not fall within the scope of approvals under paragraph 6." PFN 6 required the provision of LGV numbers, timing and the identification of the route and site accesses. PFN 17 said that information might be necessary for consideration of a request, though not itself subject to approval, such as "traffic assessments, modelling of traffic flows at individual junctions and cumulative flows from all HS2 works."

87. Here, the Inspector found that all the information required by PFN 6 had been provided, the rationale for the route choice, and alternatives considered had also been provided. He also said, DL19, that the information provided covered that which was provided for by Annex 1 to PFN 17. A ROMIS Plan had been provided. This included:

> "a summary of any physical changes necessary to facilitate the use of the route by LGVs; and a summary of measures required to ensure the safety and free flow of traffic in the proximity of the worksite access points. In respect of [the Little Missenden etc] request, further information on vehicle numbers with forecast monthly average daily and AM and PM peak daily movements was provided in October 2020. In respect of the other 3 appeals, an assessment note in October 2020 sought to address the councils concerns about impact on specific junctions, but only where the vehicle flow movement succeeded the ES forecast flow movements."

88. The Inspector then referred to the Wendover Green Tunnel site in these terms in DL15-18:

> "So far as the appeal routes are concerned, forecast excess traffic was due to a site further along the A413, the Wendover Green Tunnel North Portal…, for which a request for route approval had yet to be made, though it is proposed to use the appeal routes. None of the sites the subject of these appeals were forecast to be above the ES forecast, but adding in the Wendover Green traffic, which originally was to use a different route, indicated that there would be forecast flows in excess of the ES flows at peak hours and substantive changes in forecasts flows through 2 junctions, one of which would require flow management by the undertakers to ensure that ES vehicle flows were not exceeded in the PM peak. This would be managed through the Local Traffic Management Plan (LTMP) and a Vehicle Management Booking System, as explained in a Vehicle Management Supplementary Note provided by the Council in November 2020.
>
> 16. The assessment notes of October 2020 were updated with additional information in December 2020 providing updated

> HGV numbers (albeit about 95% are expected to be LGV) expected to travel to and from the worksites along with monthly total and summary peak daily movements. This update included a commitment from the undertaker of the [Little Missenden etc] sites to cooperate with the undertaker of the other sites and the Wendover Green Tunnel site to manage traffic flows through the junction requiring flow management to avoid exceeding ES peak flows.
>
> 17. Further correspondence between the parties up to March 2021 included identifying where details of HS2 construction traffic in Buckinghamshire were to be found in the HS2 Ltd hybrid bill documentation, and the methodology used for assessment of increased flows.
>
> 18. By this point there appeared to be no issues between the Council and the undertakers regarding the impact of HS2 traffic generated by the specific worksites the subject of the appeals on the routes specified. There appears to be no dispute that the LGV traffic flows were not forecast to exceed the ES forecasts, nor that there was likely to be impacts on road safety or the free flow of local traffic over and above that considered acceptable by the passage of the Act that might be attributable to the use of the appeal routes by LGV traffic from these specific sites. Ultimately it seems clear that most of the justification for additional information concerned the Wendover Green Tunnel traffic."

89. Notwithstanding that information, which as the Inspector found, satisfied the terms of PFNs 6 and 17, the Council considered, DL20, that further detailed information was required "in order to understand the cumulative impacts of the construction activities and vehicle trips on different sections of the A355 route in particular and how that compared with the relevant forecast in the ES: "Specific shortcomings identified by the Council relate to understanding the details of the methodology used to derive forecast traffic flows on different sections of the routes, details of the cumulative impact of LGVs, cars and light goods vehicles, and how cumulative impact of all vehicles relates to those in the ES."

90. The Inspector discussed this in DL21-22:

> "The appellant has given assurances that the methodology used is that set out in the ES Scope and Methodology Report and it considers that it is appropriate to base the cumulative assessments (all vehicles) on the assumptions used in the ES until travel surveys can be undertaken. Since the ES and supporting documents, including updates, are public documents I find it difficult to accept the Council's assertion that it has been unable to undertake a meaningful comparison of projected traffic flows provided for the purposes of the approval requests with the ES flows. Nonetheless I can understand the Council's concerns about the overall effect of HS2 construction activity on the

> combined route, particularly as there is already considerable congestion in some of the common sections of highway, as I saw on my site visit. However, the ES, considered during the passage of the legislation, did envisage significant adverse effects as a result of the overall development, and the significant change from ES assumptions is due to traffic from the Wendover Green Tunnel North Portal site, which was to use another route."

91. The Council sought a single request for approval covering all the sites which would use the A413/A355/A40 route, that is one which included the Wendover Green Tunnel site. This, it said, was fundamental to the performance of its duty. The Inspector rejected the contention that a single request was required in law. It was for HS2L to decide what it sought approval for and when, furnishing the Council with adequate information. Each request had to be decided on its own merits "though other approvals will be material considerations insofar as they may affect traffic flows." Here, the Inspector concluded that the Council, by October 2020 at the latest, had been supplied with enough information to determine the four requests to which the appeals before him related. The debate about extensions of time is not now material.

92. The Inspector then turned to the substantive merits of the appeal. He pointed out the limited grounds available to refuse or to modify a route. The Council had not said what it would have decided had it considered that it had sufficient information to determine the requests. Routes identified and assessed in the ES, and which remained within the parameters of the ES should require little scrutiny, "given the very limited grounds for refusal." He continued in DL28:

> "While I appreciate that the addition of traffic to the network of the proposed changed routing for the Wendover Green Tunnel North Portal would need detailed scrutiny as a departure from the ES, approval of the appeal routes would not undermine that process."

93. He was plainly unaware that the Wendover Green Tunnel decision had already been made on appeal.

94. He found, DL29, that on the appeal routes before him, there was no basis for modifying the routes or to show that they were reasonably capable of modification. The Council had suggested no conditions:

> "but in view of the extensive systems for control and response to highways matters contained within the EMR and associated documents, the obligations placed upon the nominated undertaker to comply with undertakings and assurances, the route management improvement and safety plan, and the role of the LTMP as a living document through which unforeseen issues can be appropriately addressed, I consider that no conditions need be attached to these approvals."

95. He allowed the appeals.

Ground 1: Jurisdiction in all three appeal decisions

96. Mr Matthias' first contention was that what the Court of Appeal in *Hillingdon 1* said, at paragraphs 51 and 70, was not obiter, and that I was wrong to treat it as such in *Hillingdon 2*. It was part of the ratio or so closely bound up with and logically the inevitable consequence of what it held, that I should treat it as ratio, or at the very least as weighty, and weightier than my own obiter comments. He pointed out that paragraph 70, which elaborated paragraph 51, in which the Court said that the correct approach for a local authority, where HS2L had failed to provide sufficient evidence and information for the authority to perform its duty, was to decline to process the request and to refuse it, was introduced by the words that this "follows from the statutory scheme, " which the Court had spent some time analysing. It was no by-the-by comment; it was the logical consequence of its analysis of the statutory framework which was the basis of its decision.

97. I disagree with that analysis of the ratio. The Court of Appeal had before it an appeal based on a refusal of a request. It entertained a challenge to the appeal decision, not saying at any stage that the Secretaries of State lacked jurisdiction to entertain the appeal, even after it had found that the decision-makers at each level had lacked the necessary information for the determination of the request. It quashed the decision, and, perhaps unnecessarily but clearly, remitted the case to the Secretaries of State. It did not say that the decision would have to go back to the local authority so that the 8 week period could begin to run when the necessary information had been supplied.

98. The ratio was that where HS2L had supplied no information upon which a rational decision-maker could discharge its, albeit restricted, statutory functions under the Act, the decision-maker still had jurisdiction to make a decision, time would run still for an appeal, and an appeal could be made on the merits, and fail on grounds relating to the legal sufficiency of the information for a valid decision. If the logic of the statutory structure was as described in paragraph 70, it would have had to find that the Secretaries of State had no jurisdiction at all, and that no decision could be remitted to them. It would have had to find the same were Mr Matthias right that the local authority was the sole arbiter of what was necessary, and hence retained exclusive control of the running of time for an appeal on the grounds of non-determination, subject only to judicial review of the rationality of its requirements. The Court of Appeal did not have before it the actual problem of a local authority refusing to entertain a request. What it said in paragraphs 52 and 70 was plainly obiter.

99. That is what the Court of Appeal in *Hillingdon 2* left for decision when it arose. It did not suggest that the problem had in fact been disposed of in *Hillingdon 1*. At paragraph 57, it referred to the "suggestion" of the Court in *Hillingdon 1*, and then characterised what *Hillingdon 1* had said in more precise and limited terms than in fact it used, but grasping the sense of what it had meant. The Court of Appeal in *Hillingdon 2* expected the issue, which is not without its difficulties, to be approached afresh when it arises, as it now has.

100. There are two aspects to the problem: (i) what is the nature and level of information which the local authority can require before it has jurisdiction to determine the request? (ii) What jurisdiction is there to entertain an appeal, where there is a contest over the sufficiency, relevance or necessity for the further information sought to be provided?

101. There are no statutory provisions which set out what is required by way of information to give the local authority jurisdiction to embark on the determination process. There is

no express validatory process or requirement. There is no provision which states, or even implies, that an application is valid only when the local authority in its reasonable opinion has enough to embark on considering its decision. The Court of Appeal held in *Hillingdon 1* that the Act contains, by a necessary implication, a duty on HS2L to provide the information or evidence necessary or sufficient for the qualifying local authority to carry out the functions which have been laid upon it in the Act, albeit that those functions are limited in scope. What is necessarily implied is that sufficient information must be supplied for the authority to reach a lawful determination on the issues. It does not mean that every possible material consideration has to be covered; it means that the information sought or supplied has to be that without which no reasonable authority could proceed to a determination of the request pursuant to its functions. This encompasses the test of relevance, necessity and proportionality. It applies to the implied duty, the approach of *Secretary of State for Education and Science v Tameside MBC* [1977] AC 1014, [1976] UKHL 6. I see the language of Lindblom LJ in *Hillingdon 2*, at [57] as capturing the essence of the point. That would be an objective and not subjective test. There can be no necessary implication that the local authority is the ultimate judge of what is required, subject to judicial review, where there is an appeal process cast in very general terms.

102. Statutory Guidance however now provides further flesh on the bones; it may require more than may satisfy the implied duty. If HS2L wishes to supply less, it would need to explain why it was seeking to depart from that Guidance, just as a local authority, provided with information to satisfy the implied statutory duty, would have to explain why it sought more, where the Guidance says that explanation is required.

103. This also introduces the second point: how does the failure, or refusal to supply, what the local authority seeks fit within the appellate process?

104. It is worth considering here how validity has been addressed in other planning legislation, where there has been an increasingly detailed express duty to provide information. Section 62 of the Town and Country Planning Act 1990, TCPA, permits Development Orders to provide for the form and manner of applications for planning permission, the content of applications and the documents and other materials which are to accompany them. The local authority may require, s62(3), particulars or evidence in support as it thinks necessary, so long as that is consistent with the Development Order, is reasonable having regard to the nature and scale of the proposed development, and is reasonably thought to be a material consideration in the determination of the application. Its list of requirements must be published and kept up to date. There are also a number of documents which s62 requires the Development Order to require to be provided with the application.

105. Section 78 of the TCPA 1990 deals with appeal rights. An applicant for planning permission may appeal against non-determination of the application, where the application has not been determined within the period prescribed by the Development Order, or as extended by agreement. The Order can specify what information must accompany the notice of appeal.

106. The Development Orders have gone through an evolution. The 1988 Town and Country Planning (Applications) Regulations 1988/1812 required little more than the description and plans of what was sought. The Town and Country Planning (General Development Procedure) Order 1995/419, GPDO, as in force until 2008, made express

provision for the local planning authority to consider whether an application was invalid because of a failure to comply with the statutory requirements for an application for planning permission or approval of reserved matters. They would notify the applicant that the application was invalid. It also provided that the extendable 8 week period for decision-making did not run until "a valid application" had been received. Article 20 defined what constituted a valid application. Article 5 extended the documentation which had to accompany certain applications for planning permission, but the material required for a valid application as defined in Article 20, at least in its 2008 version, until 2015, defined it so as to include the particulars or evidence required by the local authority under s62(3).

107. The Town and Country (Development Management Procedure) (England) Order 2015/595 made specific provision for validation disputes. Although Article 12 enables the authority to require particulars or evidence to be included in an application, it is only where the authority has published a list of its requirements on its website, that those particulars can be required for the application to be valid. Where the applicant considers that the requirements do not meet the tests in Article 34(6)(c), as not being reasonable having regard in particular to the nature and scale of the proposed development, or not being reasonably thought to be a material consideration in the determination of the application, it can raise the issue with the local authority, which either abandons the point, leading to the application being validated, or to its being maintained which leads to a non-validation notice. A short period is given for this process. If the application is validated, the various time scales for determination begin to run. If no decision has been made within those timescales, the application is referred to the Secretary of State. If the application is not validated, it also has to be referred to the Secretary of State within specified time frames. The content of a valid application is defined and specified.

108. This evolved legislation of 2015 stands in stark contrast to the very general provisions of Schedule 17 to the 2017 Act. Whilst a duty to provide information has to be implied into its various paragraphs, in order for the statutory framework to work as must have been intended, the contrast between what is specified in the ordinary planning regime and what is to be implied into the 2017 Act, shows that the level of information for a request to be valid, has to be carefully assessed so as not to exceed that which is necessary for the decision-making process to meet public law duties. It is clearly not a subjective test, but one which follows the lines of the *Tameside* duty. The nature and depth of the information required under the planning regime cannot be implied as necessary for the lawful decision-making under the 2017 Act.

109. The structure of the general planning legislation also suggests that if time is not to run, so that there can be no appeal from the local authority decision that a request has yet to be validly made, and that what is styled a request is not a request at all in the context of Schedule 17, a nonentity as Lindblom LJ described it, the material to be provided for validity has to be that without which no reasonable authority could reach a lawful decision, and without which either the local authority or the Secretaries of State, if an appeal were before them, would be bound in law to hold that no decision could be made. It is difficult to see that a process of determining validity by evaluation of reasonableness, relevance and proportionality, availability of other sources or even some analysis which could be undertaken by the local planning authority itself, can be a necessary statutory implication.

110. Turning to the second question, the scope of appeal, it is yet more difficult to see how it can be necessarily implied that the issue goes to validity so as to preclude any appeal, leaving it as the exclusive unappealable realm of the local planning authority, with judicial review as the only remedy. The question there would be whether the local authority had reached a rational judgment under whatever test of necessity or sufficiency was to be applied; in this context those words are the same in scope. That would preclude a substantive dispute as to the need for material being resolved in favour of HS2L, so long as the local authority passed the threshold of rationality in an area of planning judgment, and in many ways of technical understanding, remote from the general experience or expertise of the Courts. The difficulties in such an approach are made manifest in these appeals and indeed in *Hillingdon 2*.

111. I do not regard Mr Matthias' submission as remotely consistent with the specific statutory framework in which the authority has to qualify for participation by giving undertakings as to the process to be followed, the limited functions given, and the terms of the statutory Guidance, together with the emphasis on not delaying the construction programme or frustrating the project. Such a regime, as I come to, was only found to exist in a first instance decision on particular statutory wording, which was followed by a change to the legislation.

112. It is not possible either to reconcile Mr Matthias' submissions with the ability to extend time for decision- making. All the information, which the local authority would want, would be discussed in a non-statutory framework, operating before time began to run. It would run counter, without a word of express legislative support, to the commonplace of time being extended for the provision of further information, and indeed of further information being provided on appeal. It would do so against a background designed to speed up the determination of details, and to eliminate unnecessary delays and blockages.

113. It would not be consistent with the general authorities on appeals under planning legislation where rights of appeal on issues of validity of an application have been held to be implicit in them, on purposive interpretations.

114. In *Geall v Secretary of State for the Environment* (1998) 78 P&CR 264, Court of Appeal (Schiemann LJ, with whom Simon Brown and Otton LJJ agreed), a local authority had challenged the validity of an appeal made to the Secretary of State against an enforcement notice. It said that the appeal, on the ground that planning permission should be granted, was invalid, as the required fee for such a ground of appeal had not been paid. The appellant's case was that he had paid the fee but in connection with an earlier planning application for the same development; the local authority still retained this fee. He lost before the Inspector at first instance and appealed, only to lose again. The judgment is a reasoned consideration of the problem of appeals in respect of validity in planning and enforcement appeals, which the particular ground of appeal at issue raised. Schiemann LJ said, in relation to planning appeals, that s78 TCPA 1990 was the only source of jurisdiction to appeal. Where the authority refused to process an application, declaring it invalid, there could be no appeal if the Secretary of State took the view that no application for planning permission had been made. If the Secretary of State took the view that the application was valid, then he was duty bound to entertain the appeal. Article 26 (2) (c) of the 1995 General Development Procedure Order gave the Secretary of State jurisdiction to determine an appeal where the local authority contended that further information was required before it could determine the appeal.

But that did not mean that in other cases, where the local authority was of the same view as to the completeness of the information needed for determining the application, the Secretary of State had no jurisdiction to determine for himself whether there had been an application, validly made but not determined. That is the critical point for this case. In the enforcement notice case, it was for the Secretary of State, on appeal, to determine whether an application had been made. If not, then he could not consider the appeal.

115. This decision was cited with approval by the Court of Appeal in *R v Secretary of State for the Environment, Transport and the Regions ex parte Bath and North East Somerset District Council* [1999] 1WLR 1759. The local planning authority refused to register applications for planning permission and listed building consent, because it thought that insufficient details had been provided, which the applicant refused to supply. The applicant appealed to the Secretary of State under s78 TCPA 1990, on the grounds of non-determination. A public inquiry was ordered for the hearing of the appeals. The local authority challenged that decision by judicial review on the grounds that there was no jurisdiction to hear the appeal since no valid application had been lodged. The Court of Appeal held that the 1990 Act, and the Planning (Listed Buildings and Conservation Areas Act, and the relevant Regulations and Orders:

> "…did not confer upon a local planning authority exclusive jurisdiction to determine the validity of a planning application, and on a purposive construction of those statutes and considering the legislative scheme as a whole, an applicant for planning permission or listed building consent was entitled to have the opinion of the secretary of State on the question of validity; that an "application" for the purposes of section 78…included an application which the local authority considered invalid; and that accordingly, the Secretary of State had jurisdiction to consider the company's appeal and to order the inquiry, notwithstanding the view of the local planning authority that the application was invalid."

116. I quote the headnote, which is a sufficient summary of the judgment of Pill LJ, with whom Otton and Roch LJJ agreed.

117. The Secretary of State, if faced with an issue of invalidity, has to grapple with it, and if resolved against the applicant, cannot then deal with the appeal on its planning merits. It is also clear that on the legislation at that time, the appeal on validity permitted the Secretary of State to determine all the issues, including the justification for the further information required by the authority. These decisions did not refer to the provisions of s79 TCPA, the powers of the Secretary of State on an appeal to deal with an application as if made to him in the first place, although supportive of the views expressed about the statutory framework. S79 of course assumes that the application is valid, but that assumption does not help on the scope of the Secretary of State's jurisdiction where the validity issue depends on a disputed evaluation of the need for the provision of material required by the local planning authority.

118. I should mention briefly two first instance decisions, in that context. First, *Newcastle Upon Tyne City Council v Secretary of State for Communities and Local Government* [2009] EWHC (Admin) 369, Langstaff J. He held that changes in 2008, to the 1995

GPDO, in Article 20(3A), prevented the Secretary of State, on an appeal relating to a validity issue, taking a different view from the local authority on the need for the further information sought. It was his interpretation of that particular statutory change, and I can see the force of his interpretation, which caused him to differ from the earlier Court of Appeal cases, rightly or wrongly. That was however, in its turn, affected by the 2015 statutory provisions for validating and appealing refusals to validate applications, which I have already set out.

119. The decision of Dove J in *Maximus Networks Ltd v Secretary of State for Communities and Local Government and others* [2018] EWHC 1933 (Admin) applied an earlier decision of Keith Lindblom QC, as then he was, sitting as a Deputy Judge, in *Parker v Secretary of State for Communities and Local Government and others* [2009] EWHC 2330 (Admin), but not cited to Langstaff J. Mr Lindblom had upheld the decision of an Inspector hearing an appeal where the outline application was invalid for want of sufficient details in the Design and Access Statement, but where on appeal the Inspector had heard five days of evidence and submissions thoroughly scrutinising all the design and access arrangements. Dove J concluded at [31]:

> " In the light of the material set out above I am entirely satisfied that in the context of an appeal both section 79(1) and section 79(6) of the 1990 Act provide the defendant with a discretion to conclude at the outset of an appeal whether or not the application upon which it is founded is valid and also to decline to determine the appeal if it emerges that, for instance, provisions of the GPDO in respect of requirements for a valid application have not been complied with. By the same token, since this is a discretion, it is open to the defendant to conclude that it is appropriate to continue to process the appeal and accept it as valid notwithstanding breaches of the requirement if it is appropriate to do so."

120. He also dealt with s327A of the 1990 Act, in force in full in 2007, which expressly prevents a local planning authority from entertaining an application which did not meet the statutory requirements. That did not prevent the Secretary of State from exercising an appellate jurisdiction, but would be powerful in the exercise of his discretion as to whether or not to do so. In so saying he accepted the arguments of the Secretary of State, although that position was not contested by the claimant who sought to rely on the existence of a discretion.

121. The powers of the Secretary of State on appeal under Schedule 17, paragraph 20-22, to the HS2 Act are very general. Where there is an express power on a local authority to require the provision of additional details, as there is under a few paragraphs of Schedule 17, but not paragraph 6, that requirement too is an appealable decision.

122. The short conclusion which I draw from this analysis is that, unless the statutory appeal provisions expressly exclude an appeal on validity, an appeal on validity can be entertained by the Secretaries of State. There is no such express exclusionary provision in the 2017 Act. The general purposive approach to the interpretation of appeal rights in planning legislation is that an appeal is available on issues relating to validity, including evaluative and factual matters, as part of the generally expressed appeal rights. Even where, in the general planning legislation, there is an express provision

which prevents an authority having jurisdiction, the balance of authority favours the conclusion that there is a discretionary jurisdiction to hear the appeal. *Parker* is a good illustration of the good sense of such an approach. There is nothing in the context or structure of the 2017 Act to show that some such exclusionary provision in relation to appeals should be inferred, putting this Act at odds with the general approach in planning appeals, quite contrary to its specific purpose and structure. The more general approach is clearly intended by Parliament. Once there is jurisdiction to entertain the appeal, the merits fall for determination as well.

123. Mr Matthias saw the very difficulty for a Court, carrying out an assessment of the rationality of the local authority's request by way of judicial review, as a reason why there would be fewer proceedings by way of judicial review than appeals if that route were available. He may be right that the sheer difficulty of persuading a court, at least without a lengthy examination of the points, that a request was irrational would deter the challenge. But to make the local authority's view of the reasonableness of a technical request so difficult to challenge, does not fit with the role of the authority, nor with the particular statutory scheme, nor the general planning regime. It makes excessive detail, time- consuming and costly work to very little point, virtually unchallengeable, and puts the HS2 regime as an outlier on the opposite side of the range from where it is plainly intended to be. The appeals provide good examples of the problems which his submissions would create, if correct.

124. Accordingly, the Inspectors each had jurisdiction to hear the appeals. Each was entitled to consider the need for the information sought, and each was entitled to reach the conclusion they did, that the information supplied was sufficient, and then to reach a conclusion about that on its planning merits. In no case did the Council suggest that the Inspectors lacked sufficient material for a lawful decision; it accepted that reasonable Inspectors could reach those decisions. It was agreed therefore to be very different from the factual situation addressed by the Court of Appeal in *Hillingdon 1*. The Council had thus nailed its colours to the mast of validity. It did not suggest that the information it sought could have affected the choice of route; it could only therefore have gone to some unspecified sort of modification about the way in which the route was used. It did not suggest any conditions which should and could reasonably be imposed to deal with the situations which concerned it. Once its colours had been struck, the Council could not and did not suggest that the Inspectors should have considered the possibility of, let alone devised, conditions, which it had not suggested or drafted.

125. I reject the challenge to the appellate jurisdiction of the Secretaries of State.

Ground 2: The approach to the PFNs

126. Mr Matthias contended that, in the Brackley Road Compound and Wendover Green Tunnel appeals, the same Inspector had treated compliance with PFNs 1, 3 and 6 as determinative of the adequacy of the material supplied, and had treated PFN 17 as irrelevant to jurisdiction, as it post-dated the applications, albeit that it was relevant to the substance of the appeal. These were errors of law, as the Inspectors had power to consider the need for documents or information outside the scope of the PFNs.

127. I accept, contrary to the submissions of Mr Kimblin QC for the Secretaries of State and of Ms Ellis QC for HS2L, that in Brackley Road Compound, DL12, the Inspector treats

compliance with PFNs 1, 3 and 6 as sufficient for validity; compliance with them satisfied the requirement for sufficient information in DL10 applying *Hillingdon 1*. I also accept that compliance with the PFNs does not of itself and necessarily mean that the application is valid; *Hillingdon 1* is an example of that. However, the significance of what can be read as an error of law has to be understood against the true test for validity. That is not whether the Council made a not unreasonable request for further information. Compliance with PFNs 1, 3 and 6 leaves the Council in the position of having to explain why the further material is necessary for a lawful decision to be made, which is not satisfied by it simply saying that it reasonably wanted this information, as in the stance it took before me.

128. The only judgment required on jurisdiction by the Inspector was whether he had sufficient information for a lawful decision. This meant that the Council had to submit to the Inspector that he had not received sufficient information for a lawful decision; the fact that the Council may want more information, and treats that as going to jurisdiction, does not require the Inspector to do more than himself be satisfied that he has sufficient for his decision. Mr Matthias explicitly accepted, in response to a question from me, that the Inspector had sufficient material for a lawful decision, as the Inspector himself concluded; DL 36-37. He reached a conclusion on the sufficiency of information, and it is plain therefore that he would have so said in relation to jurisdiction if he had thought that that was where it ought to have been mentioned. He is not reaching a judgment as to the reasonableness of the Council's stance; he has no need to. He is not considering whether the Council had enough information for it to pursue the case it wished to mount or justify any conditions which it might wish to propose. It was whether the Inspector had enough for a lawful decision. If there was an error of law, it had no significance for the outcome. The material which was sought beyond PFN 6 was lawfully found not to be necessary.

129. I can see no error in the Inspector's approach to PFN 17. If the material was not required for validity when the application was made, and the application was validly made, it could not be rendered invalid by some later statutory Guidance. Nonetheless, such Guidance was in force at the time of the decision, and so had to be considered for what relevance it had for the merits of the decision. It would have been open to the Inspector to conclude that, although the application was valid, he could not decide the appeal without that further material. In fact, he thought it unnecessary for the decision, and the request unjustified by the Council, contrary to what PFN 17 required of it.

130. In the Wendover Green Tunnel decision, the language is to a degree different in DL11. The word "therefore", upon which Mr Matthias put much weight in the Brackley Road Compound DL, is not in the Wendover Green Tunnel DL. However, I am prepared to accept that the Inspector was making the same point in each, and that Mr Matthias is right as to what he thought. Moreover, in each DL, he treated adequacy of information as a separate topic, and whatever criticisms can be made of that approach, he reached the same conclusions as to the adequacy of the information for him to reach a decision, as to PFN 17, and about the absence of reasoned justification from the Council adequate to show why the further information was necessary. His approach to the effect of the timing of PFN 17 and its effect on validity was the same, and correct. The same analysis applies as to the Brackley Road Compound DL.

131. The same criticisms are not made of the A413 worksites DL; and those which are made about jurisdiction are better considered in relation to Ground 3, and the interpretation of paragraph 6 of Schedule 17 and material considerations.

Ground 3(i): Brackley Road Compound DL:

132. Mr Matthias submitted that in DL 29, the Inspector concluded that, although the forecast number of non-LGV vehicles was higher than in the ES, it was only LGVs which were relevant. The Inspector had also concluded that concerns about the A43 were irrelevant, as it was not part of the lorry route proposed, and movements on it, LGV or not, HS2 related or not, were outside the scope of Schedule 17. Paragraph 6(5)(b)(ii) of Schedule 17, however, which sets out the grounds upon which approvals of arrangements can be refused or modifications ought to be made, included "to prevent or reduce the prejudicial effects on road safety or on the free flow of traffic in the local area."

133. I shall deal first with the A43, and then with the arguments relating to the other roads, not on the route itself, but within the "local area".

134. Mr Kimblin submitted that the Inspector had not treated the impact on the A43 as irrelevant, but rather that the Council was raising generalised concerns in its Statement of Case, which were outside the scope of Schedule 17, albeit that the Inspector recognised that there was likely to be a worsening of traffic conditions in the local area. Ms Ellis submitted that the Inspector had considered impacts on roads in the local area. More specifically she submitted that the A43 was part of the strategic road network, and lorry routes for approval commenced where the strategic road network ended; paragraph 6 (4)(a) of Schedule 17. The A43 therefore fell outside the scope of approvals under paragraph 6.

135. I am satisfied that the Inspector was right to ignore the effect on the A43 itself of the proposed lorry route. The "matters" to which paragraph 6 applies are the routes by which anything is to be transported on a highway to a construction site. They must be carried out in accordance with "arrangements" to be approved by the local qualifying authority. Those "arrangements" to be approved do not include the use of trunk roads. No modifications could be proposed in relation to the trunk road either. The effect of construction traffic on the A43 flows, HS2 related or not, was not for consideration. That is the first point which the Inspector is making. No one addressed the Inspector on where the A43 trunk road ended and the A422 began where there was a roundabout junction between the two. But it was obviously not Parliament's intention that a County Council or unitary authority, could require a modification to arrangements by way of changes to the strategic road network, or to flows on it, when that is a central Government/ Highways England responsibility. I do not think that Parliament meant "local area" to include the strategic road network passing through it, or to give the local planning authority power to concern itself with that network of itself. Indeed, no modifications to the A43 were in fact proposed by the Council. That, of course, is not to conclude that the effect on the local road network of congestion caused by HS2-related LGV construction traffic on the strategic road network, is outside the scope of the local planning authority's role. There was no error, I conclude, in relation to the A43.

136. I now turn to other traffic than LGVs and other roads in the local area than the route itself. Mr Matthias criticised (i) DL27 and DL29 for saying that HS2 related vehicles which were not LGVs were not subject to control through Schedule 17, (ii) DL 31 for implying that problems on roads which did not form part of the route were irrelevant, and (iii) DL 35 for suggesting that only the route proposed for approval could be modified. It was not at issue but that conditions could only be applied for the purposes of a modification.

137. I take those three points without at present dealing with what significance they may have had for the actual decision in the appeal.

138. (i) **HS2 related non-LGV movements**: the prejudicial effects on road safety and free flow of traffic in the local area are intended to include the prejudicial effects of the usage by HS2 LGVs of the proposed route on its background, non-HS2, traffic. These prejudicial effects include effects on the route itself and on other roads in the local area; that covers rat-running. It would be illogical, in my judgment, then to ignore HS2 related non-LGV flows, where it was again the use of the proposed route by HS2 LGVs which would cause problems in the local area, as non-LGV HS2 related flows also used other roads to avoid HS2 LGV traffic delays. That issue could be relevant to the choice of route. It could be relevant to modifications relating to numbers of LGVs and their timing along the route. To the extent that they could lead to a modification, they are relevant. However, problems caused by HS2 non-LGV traffic, such as by construction workers, which are not related to the use by HS2 LGVs of the route proposed, are not relevant to the approval process.

139. (ii) **Problems on roads which are not part of the route**: problems on roads in the local area are relevant to the consideration of alternative routes, or to modifications, provided always that the modifications proposed in consequence do themselves fall within the scope of Schedule 17. There is a difference between the problems, which may be material to the consideration of alternatives or other conditions, and the scope of Schedule 17 in relation to the modifications which can be proposed along the proposed route, particularly once the route itself is decided upon.

140. (iii) **Can modifications be made other than to the use or configuration of the route?** The development, with respect to the routes which are to be used for construction LGVs, (the matters to which paragraph 6 applies), must be carried out in accordance with the approved "arrangements." The effect sof LGVs on other roads, not part of the direct effects of LGVs on the route, are relevant to the suitability of the route in the first place. The "arrangements" which can be modified are first the route itself, so that a different route is used in whole or part. Obviously until that point, modification to the arrangements can include the subsection of a different route in whole or part. The Schedule is not clear as to the scope of "arrangements" but is not confined to the selection of the route itself.

141. In my judgment, once the route has been approved, "arrangements" have to be controls on the roads forming the route, in the way in which they are physically prepared, repaired or altered, signed or used. It is not in issue but that "arrangements" can cover the timing and numbers of LGVs on the route itself. I do not consider that "arrangements" can cover alterations or controls to roads not forming part of the route. Paragraph 6 approvals and modifications do not apply to them, albeit that when considering what modifications can or should be made to the route, the indirect effect

on those other roads of LGV traffic on the chosen route is relevant. The approval process is not the creation of an all purpose traffic management scheme. Other processes, under the EMRs, deal with those issues which the approval process does not cover. Schedule 4 to the 2017 Act provides also for access and access designs to construction sites. The local highway authority has power to do works to or impose controls on non-trunk roads, affecting all traffic, including, for example in the case of rat-running, deterrent chicanes or turning prohibitions for general traffic, save for where those powers are altered by the provisions of the 2017 Act. These are not problems to be worked around by the use of a *Grampian*-style condition, preventing reliance upon the approval until off-route works had been done. That would conflict with the limited basis upon which approval requests can be modified.

142. With those points in mind, I consider the more concrete application of those points. Mr Matthias submitted that the Inspector erred in DL 30 and 31. The Inspector ought not have confined his assessment of safety to the A422; DL30. Mr Matthias, of course, cannot take issue with the conclusion that there was no safety issue on the A422. I was not shown any evidence that the Council had provided evidence as to a safety issue on other roads as a result of LGVs on the A422, other than perhaps in the sort of general terms that rat-running through Turweston would add to risk there, as would generally be the case with any increase in traffic on local roads. There was nothing more for the Inspector to consider specifically under that head. No other roads were specifically raised for consideration at all. This submission simply makes a theoretical point, about language used to deal with the substantive issues, rather than dealing with theoretical ones which were not raised.

143. However, even if there had been a case on safety made out in relation to Turweston, which required a remedy on the road through Turweston, that would have been outside the scope of paragraph 6 modification, once it did not lead to a modification of the route itself. I do not need to consider the scope for signage on the A422 barring turning movements from it or on to it from the road through Turweston; the suggestion was never made.

144. The error which Mr Matthias submitted had occurred in DL31 was that rat-running through Turweston had been recognised to be undesirable to the extent that it occurred, but had been treated as legally irrelevant because Turweston was not on the proposed route. I accept that, so far as that goes, that is an error of law. In principle, that sort of effect is within the scope of the effect on safety and free flow in the local area. It could, in principle, be such that it might lead to a different route being preferable and reasonable, albeit that that was not the Council's case here.

145. It is possible to refuse the arrangements for the actual route by reference to safety and free flow impacts in the local area. That does not include free flow and safety on the trunk road network, because that is excluded. But it would permit refusal of approval of a route where the indirect consequential effect of LGV traffic on the trunk road network, here the A413 and perhaps the roundabout junction with the A422, causes significant problems on the local roads, for example, by causing other traffic to rat-run on them to avoid delays they would otherwise experience entering or leaving the A413 roundabout. That other traffic of concern would include non-LGV HS2 related construction traffic. If the concern were made out, the Council could show that the arrangements so far as the route itself was concerned should be modified to the extent of altering the route itself in whole or part. It would need to identify another route to

which the arrangement proposed could reasonably be capable of being modified. That was never in prospect here whatever the effect on traffic flow and safety on the local area. It would always have been worse elsewhere.

146. It follows that all that the Council could have suggested was a condition modifying the arrangements. It did not suggest any modifications along the route in consequence of its concerns about rat-running, let alone demonstrate their efficacy or that the arrangements could reasonably be modified to accommodate them. It did not even suggest what sort of modifications could be required so as to relate them to the information it said it needed. It had the numbers of LGV and additional non-LGV traffic passing on to the A422 from the A43; it had the forecast queue lengths from 2013; it had its own experience and skills, including modelling skills, which belatedly it proposed to use. It did not fill in gaps with what it could argue to be reasonable calculations, challenging HS2L to refute them. It is not disputed that the Inspector had enough material to determine the appeal. The extensive, detailed and disaggregated material sought was not necessary. Even without the error of law, the Inspector would have been unable rationally to reach a different conclusion on the evidence and submissions presented to him.

147. Besides, the Inspector did not leave his consideration of the issue at the end of the second sentence in DL31. He said that the possibility of rat-running through Turweston to the Brackley Road Compound was not directly related to the choice of LGV route. By this he meant that the non-LGV construction site traffic was not directly related to the choice of LGV route; it was related to the choice of construction site, which was not up for decision. He accepted, as I read it, that some non-LGV construction traffic could run through Turweston to the site. That was a matter of judgment for him, and has not been said to be irrational.

148. He then said, in a passage which covers HS2 related cars, light vehicles and HGVs, that other means were available to control "such traffic", (and therefore not non-HS2 related rat-running), again a judgment not said to be irrational. It is clear from that that the Inspector did not commit the error attributed to him of ignoring the effect of HS2 LGV movements on HS2 non-LGV movements on the local area. DL 27 and 35 have to be read with those specific further judgments in mind.

149. I appreciate that none of that deals with the prospect of non-HS2 related traffic heading to or from the A43/A422 roundabout past the construction compound, deciding to rat-run through Turweston because of the LGV traffic on the A43/A422 route. But the purported error identified that the point which troubled the Council was the additional HS2 related non-LGV traffic. It is far from clear how information about the effect on non-HS2 related traffic could be obtained from the further material requested by the Council and none was suggested. Further measures were to be taken under the EMRs. The Inspector was well aware that there could be adverse impacts on the local area, which could not be prevented; DL 27, and that further measures could be taken under the EMRs, including workplace travel plans, or even by the Council as highway authority.

150. This ground is dismissed.

Ground 3(ii): Wendover Green Tunnel site DL:

151. Mr Matthias repeated first the submissions which I have dealt with above, submitting that the same Inspector had repeated the same mistakes. The Inspector, DL43, to set the passage relied on by Mr Matthias in its context, said: "There is no suggestion that the updated figures mean that the route now proposed is no longer the most suitable. In these circumstances, I can see nothing in either the Act or Statutory Guidance that *makes it necessary to consider any new traffic figures, or indeed any matters other than the route itself* and its planning merits." I have italicised the passage as cited in Mr Matthias' submissions.

152. For the reasons I have given, that is not a misdirection of law. Mr Matthias is not understanding it correctly. The Inspector is saying that it is the route which matters now, as there is no suitable alternative, without saying that modifications to the route itself because of off-route effects are irrelevant. Even if he were, the Council provided no basis for saying that a modification on, or indeed off route if permissible, was required.

153. In DL 45-48, the Inspector dealt at some length with safety on the route, leading to his conclusion that there was no particular safety problem with the proposed route and there was no better route from a road safety point of view. He did not deal with safety on other roads in the local area, as a result of the proposed route being accepted as best. I was not taken to any material which suggested that the Council had identified safety concerns on or off the route as a result of the use of the A413 for Wendover Green Tunnel site traffic, alone or in conjunction with the other A413 worksites. In any event, it had proposed no modification in relation to that, whether within or without the scope of paragraph 6 of Schedule 17, as either the Inspector or the Council may have considered it to be. This was a submission made to me without exposing any foundation in evidence or arguments made to the Inspector. He should have rejected it anyway in so far as it related to works off the route.

154. Mr Matthias then criticised DL 38 and 45. The Inspector accepted that the LGVs would have the potential to add to existing congestion problems or to cause new problems in other parts of the route; he appreciated the concerns of the Council and others at that prospect. Likewise, an increase in LGVs would tend to increase the risks faced by other road users, which would be the case in relation to any LGV route. Mr Matthias' criticism was that the Inspector failed to consider the possible need to secure improvements to the route by conditions, wrongly regarding such conditions as falling outside the scope the Act. The Inspector had instead relied on undertakings and assurances in the EMRs, and had ignored the strictures of the Court of Appeal about the limitations of the role of such documents in *Hillingdon 1*, in paragraphs 73,76 and 80-84.

155. This is all misconceived. The *Hillingdon 1* judgment did not and could not treat the documents referred to by the Inspector in this decision at DL 39-40, and 46-47, as irrelevant. They are material considerations, and to the extent that statutory Guidance requires consideration to be given to them, any decision to act otherwise than in accordance with the Guidance requires good reason to be given. The fallacy of the sort of argument Mr Matthias urged as the proper understanding of *Hillingdon 1* was explained and disposed of in my judgment in *Hillingdon 2*, at [160] for example, and by the judgment of the Court of Appeal in *Hillingdon 2*. It is important to remember that the Inspector on appeal is entitled to exercise his own judgment as to the weight to be given to those various documents in the exercise of his planning judgments, in

judging what he regards as the appropriate decision on what he considers the issues to be, and how they can be resolved. These are judgments with which the Court should not interfere unless there is legal error in them. The Inspector was entitled to come to the conclusions he did. Again, no modifications were proposed by the Council to deal with whatever point this criticism was directed to. The criticism seems to be just a criticism devoid of any underlying significance for any substantive issue in the appeal.

156. Even if the Inspector had taken too narrow a view of the scope of paragraph 6, I cannot see what the Council supposed the Inspector could do, once he found that he had sufficient information to determine the appeal, as he lawfully did, and no modifications either specific or more general were proposed by the Council to the only realistic lorry route. It was not for the Inspector to ferret around for something. I do not see that the legal debate about the scope of paragraph 6 can advance the Council's case, even if correct.

157. The claims fail on the various grounds taken as Ground 3.

Ground 4: cumulative effects

158. The cumulative effects issue applies to both the Wendover Green Tunnel DL and to the A413 worksites DL. Aside from the jurisdiction issue, it is the only point which arises in the latter case. It was put forward primarily as a substantive issue relating to material considerations.

159. As I have said, the routes for these two groups of sites overlap to a very significant extent, and so would be used by the LGVs going to the A413 worksites and to the Wendover Green Tunnel site, the furthest west along the route. The Council had sought a single request for all those sites, and then that the same Inspector should deal with both appeals so that the cumulative impact of the LGVs, and other traffic, could the more readily be considered.

160. The Council's Statement of Case in the Wendover Green Tunnel appeal was materially very similar to that previously lodged in the A413 appeals. It set out what a single request for approval should cover in relation to cumulative impact in its view, so that the cumulative impact of LGVs and all construction vehicles for all the sites could be assessed. A methodology statement was required, for which the ES Scope and Methodology Report was insufficient as, it said, there were clear discrepancies in the vehicle numbers provided now by HS2L. The changes in the numbers since the LTMP, and the removal of the earlier route assessed for Wendover Green Tunnel site traffic needed to be explained, as the "cumulative impact of the lorry movements from all sites was fundamental to the Council's concerns" about impact. It wanted a comprehensive summary of the cumulative assessments in the ES Transport Assessments, TA, disaggregated by vehicle type, peak hour and daily flows on different sections of the route. It disagreed with HS2L's contention that a cumulative assessment had been provided. The Council next wanted a comprehensive summary, likewise disaggregated, of the differences between the flows now forecast on the A413/A355 compared to that earlier assessment. A detailed summary was required of the methodology used to test cumulative impacts, as the one provided contained discrepancies in vehicle numbers, and did not appear to be comprehensive. Finally, a clear summary of the significant residual effects generated by the assessment of the proposed route and of how that differed from the effects reported in the ES, was needed. HS2L had only provided

information in relation to the PM peak hour, contrary to HS2L's claim to have shared the requested information with the Council. Its Statement of Case elaborated on the deficiencies the Council found in the data supplied by HS2L, suggesting that they involved a considerable under-estimate for various reasons, and suggesting by what margin they could need to be increased.

161. The Council said that HS2L's cumulative assessment covered only HGVs (which meant either LGVs or LGVs plus HGVs, of which 95% would have been LGVs), and not all construction vehicles, notably cars and light vehicles. It contended that HS2L's Summary Assessment Note, SAN, did relate to total changes in traffic flow at key junctions, but had not captured the full cumulative impact of all construction traffic. It had figures for non-LGV construction traffic for each site, peak average daily two-way trips, but no assessment of the routes which they would take or when in relation to peak LGV flows.

162. The Council criticised the report from HS2L, which said that desktop studies had shown no new significant effects from those identified in the ES, and that the junction modelling undertaken with subsequent mitigation measures would mitigate any impact on the entirety of the A35/A413 route. The Council contended that this report included very little information on the traffic flows used or how the cumulative impact of all vehicles had been captured. The Council could not do its own comparison of ES flows and those now forecast because it had never had a satisfactory definition of those ES flows; this problem was exacerbated by the removal of the previously suggested lorry route to the Wendover Green Tunnel site. It contrasted the restrictions proposed by HS2L on LGVs on the route in the PM Peak, with the absence of such restrictions in the AM Peak, when the LGV flows were higher.

163. It is noteworthy again that these arguments did not lead the Council to contend that an assessment of cumulative flows of all vehicles, disaggregated as it required, with all the Council's asserted discrepancies ironed out or explained, could show that an alternative route to any of the A413 worksites or to Wendover Green Tunnel site could emerge as preferable. The previously assessed route to the Wendover Green Tunnel site was not suggested as a potential candidate for resurrection. The information which it did have did not lead it to put forward any modification to the route, or to suggest what sort of modification along the route could emerge, if only it had had the sort of cumulative assessment which would have satisfied it.

164. HS2L's Statement of Case, dated 5 July 2021, for the Wendover Green Tunnel site appeal, noted that the Inspector appointed to deal with this appeal was not the Inspector appointed to deal with the A413 worksites appeal. It repeated, so far as relevant, material already submitted in its earlier Statement of Case for the A413 worksites appeal. It corrected how the Council had characterised the agreed relevance of cumulative impact: HS2L agreed that it had to undertake and continued to undertake a cumulative assessment of all construction traffic to ensure compliance with the EMRs. This was not what paragraph 6 required, which was the submission of details of the routes by which LGVs would access the worksites.

165. It answered the technical points raised by the Council, in relation to the histograms, the overlapping peak construction months and the response if there were a new significant impact. The SAN had concluded that it was only the part of the route over which the Wendover Green Tunnel site traffic went that would exceed the ES forecasts; that had

led to the entire route being reviewed; this review showed that there were unlikely to be new significant effects on links. Additional modelling had been undertaken on four junctions, of which two were not significantly worse than in the ES forecasts, a third required no additional mitigation measures and, although a potentially significant effect was identified for the fourth leading to the possible need for improvement works, that need was obviated by other mitigation measures. These involved restricting numbers during the PM peak, through the VMBS, and co-ordination between the two contractors. The impact of the removal of the other lorry route had therefore been assessed.

166. Although the appeal concerned LGV routes and not routes for all construction traffic, the SAN had undertaken a cumulative assessment to assist the Council; worker trips were based on the ES assumptions, as there were no surveys yet of worker trips and routes. All construction traffic had been taken into account in assessing compliance with the EMRs although HS2L did not have power to require non LGVs to use certain routes. The calculation of traffic generation was explained by reference to the peak month, and over the whole construction period. The assessment had been confined to PM Peak hours because modelling of the AM Peak showed no new significant effect. The source of the Methodology Statement was given as that in the ES, which further explained the sources. The summary of residuals had been addressed at a recent meeting. The cumulative methodology explained the difference between the functions of the two contractors. The histograms for the Wendover Green tunnel site in the A413 route material were still relevant. The Council had overstated the worst case, and misunderstood that daily numbers were for one movement in each direction.

167. The EMRs required HS2L to use reasonable endeavours to mitigate any significant effects. The criteria for significance were discussed. Techniques could include management of flow, traffic controls, work programme changes, and physical works. The LTMP could consider a workforce travel plan such as park and ride, overnight accommodation and shuttle services. Not all controls had to be via the lorry route approvals. These were essentially the same arguments as already put forward in the A413 worksites appeal.

168. Mr Matthias submitted on the Wendover Green Tunnel site appeal that cumulative impact had been the focus of the further information sought, and was undoubtedly the principal controversial issue, and an obviously material consideration to address. The Inspector did not address it.

169. In my judgment, the Inspector clearly treats the question of a single request for all the lorry routes using the A413 as irrelevant to the validity of the request. That is not itself challenged. He treats the ES assessment of the A413 routes as resolving the acceptability in principle of the route, the last western part of which leading to the site itself was not in the ES. That is not the source of any complaint of error of law. He concluded that there was no better route, and examined free flow and safety along the whole route from the M40.

170. The figures he used in DL38 are those from the Wendover Green Tunnel site on its own. I accept that the Inspector does not address in express terms the question of cumulative impact. But he does in fact consider the route and the statutory issues in the light of the effect of the Wendover Green Tunnel site traffic, along the whole route and with the A413 worksites traffic as part of that.

171. The analysis in DL39-40 is taken from the LTMP and ROMIS which apply to the LGV and other HS2L usage of the A413 for all sites, and hence allows for the cumulative effects of this site and the A413 works sites. The source of those passages can be found in HS2L's Statement of Case, similar to its Statement of Case in the A413 appeal. They relate to cumulative LGV impact on any view, and to other traffic as well to the extent I have set out. The Council may have criticised the work in those documents and the Inspector's reliance on the ROMIS, but in considering them, with his further comments in DL43, and in finding the route acceptable with the improvements referred to, undertakings and assurances, the Inspector was inevitably considering and finding acceptable the cumulative effects of this site with the A413 worksites. He had to consider the whole of the route to the Wendover Green Tunnel site, and not just the part which only the LGVs to the Wendover Green Tunnel site would use. The information he had, and accepted, was based on the cumulative worksites' flows along the route as a whole.

172. Mr Matthias put some weight, and did so in the context of his submissions about the materiality of this appeal decision for the A413 sites decision, on what the Inspector said in DL 43, focussing on the latter part of the third from last sentence: "… giving further detailed consideration to any new traffic figures or forecasts would be unnecessary and duplicatory." Mr Matthias suggested that this related to the additional traffic as a result of the proposed changed routeing for the Wendover Green Tunnel site, and that this view that further detailed consideration was unnecessary, contrasted with the view of the A413 Inspector that it was that traffic which required detailed scrutiny. However, the full sentence needs to be read, and in its context. The Inspector, first, is not referring there just to additional traffic attributable to the new routeing for Wendover Green Tunnel site traffic. He is referring to some of the updated traffic generation and junction modelling figures which, as was only to be expected, had changed from the previous figures, and were higher, because of the additional traffic from the changed route to the Wendover Green Tunnel site; the total traffic included the flows previously assessed in the ES for the A413 worksites. Second, the Inspector says that those figures require no further detailed consideration because of the mechanisms within the HS2 regime which provide for sufficient additional mitigation. That conclusion derives from acceptance of HS2L's analysis of the new figures in its Statement of Case, which he judges do not require further detailed analysis. That further detailed analysis is exactly what the Council was saying was required, and he is rejecting that, as HS2L submitted to him he should. He is accepting the contentions of HS2L that no further junction works were required, (and that is for the whole route for all LGV traffic), because of the way in which the contractors would co-ordinate their programmes to ensure that the PM Peak figures, the only ones which mattered here, were not significantly different from those assessed in the ES. Third, if this Inspector has not made an error in DL43, any comment from the Inspector in the A413 worksites DL about what he expects in another as yet unseen decision, cannot create an error in it; and if there is no error, the necessary consideration has been given to the traffic which Mr Matthias treats the A413 worksites Inspector as referring to. Finally, I emphasise what I said in paragraph 160 of *Hillingdon 2*. It is for the Inspector to decide what weight to give to these documents, such as EMRs and LTMPs in deciding for himself whether the case for modifications has been made out.

173. Although the conclusion in relation to road safety is expressed in DL 48 by reference to HS2 LGVs accessing the Wendover Green Tunnel site, it would be a misreading of

the DL in DL46-47, to say that he ignored the LGVs going to the A413 worksites. As with free flow, the assessment and ROMIS, relied on in those paragraphs, are not so confined, and in being satisfied with the route for Wendover Green Tunnel site LGVs on the basis of those documents, the Inspector is expressing satisfaction on the basis that it is safe with all LGV traffic on it.

174. This is confirmed by the language the Inspector used in DL 50-52, when he considers the Council's request for further information, which is all about cumulative effects. He rejected it as not necessary in the light of what he did have, see DL52, and not because the cumulative effect of LGVs on the A413 routes was immaterial to him as he was only concerned about Wendover Green Tunnel site traffic on its own. What he did have covered cumulative impact, in his judgment, adequately. The information he had was not confined to LGVs, but that does not mean that modifications are available generally in respect of all HS2 construction-related traffic, or on any roads.

175. I also point out that the Inspector did not consider that further cumulative assessments could affect the choice of route, as is accepted. There was no concrete proposal or even suggestion as to what modifications by way of junction improvements, link works, or anything else, could be required as a result of that more detailed cumulative material.

176. Accordingly, I do not consider that a material consideration in relation to cumulative effects has been ignored in the Wendover Green Tunnel site DL.

177. **The A413 sites**: here Mr Matthias submitted, conversely, that this Inspector had ignored the Wendover Green Tunnel LGV traffic in considering free flow and road safety for the A413 worksite routes. In effect, he submitted that neither had looked at the whole HS2 LGV traffic. The A413 Inspector clearly thought that the Wendover Green Tunnel site traffic would require detailed scrutiny, DL 28, "as a departure from the ES", but that approval of the sites before him would not prejudice that process. This, submitted Mr Matthias, should be taken to mean that the Inspector ignored that traffic himself. It also meant that he was not aware that the appeal decision in Wendover Green Tunnel site had been issued over 3 weeks earlier. The cumulative impact was a material consideration, raised by the Council in its Statement of Case to him. The Wendover Green Tunnel site DL was also itself a material consideration. The conclusion that the A413 decision would not undermine the process for dealing with lorry route approval to the Wendover Green Tunnel site was irrational. Both decisions could not be right, without cumulative impact falling between two stools.

178. Mr Matthias referred me to *Baroness Cumberlege of Newick v Secretary of State for Communities and Local Government* [2018] EWCA Civ 1305, [2018] PTSR 2063, on the relevance of appeal decision in other cases. In *Cumberlege*, Lindblom LJ with whom Moylan and Peter Jackson LJJ agreed, the Secretary of State allowed an appeal on the basis that the relevant local plan policy was out of date; it was his decision on an Inspector's report. Nine weeks later, in relation to a nearby site in the area of the same authority, the Secretary of State concluded on appeal that this same policy was up to date. The later decision made no reference to the earlier decision, nor was the Inspector, who reported to him in the later case, referred to it. The two sets of circumstances were not materially distinguishable. Lindblom LJ stated three general propositions in [34]: there would be cases where it would be unreasonable for the Secretary of State not to have regard to an earlier decision; courts should not be prescriptive as to those circumstances; the circumstances in which it would be unreasonable for a Secretary of

State to fail to take into account a previous appeal decision, which had not been drawn to his attention, would vary. The court would consider where he was actually aware of the decision, or ought to have been aware of it, and how significant it was for the appeal in question. The appellate process, with its adversarial element, did not mean that he was necessarily and always absolved from making inquiries about other decisions. Such searches were not routine. In that case, the earlier decision was obviously material, and departure from it would have to be explained. Lindblom LJ concluded, [46], that it would not have been difficult for the Secretary of State to find out whether a recent decision on that point in that local area had been made, and that his duty of consistency or clear explanation for inconsistency, meant that the onus lay on him to inform himself of such decisions.

179. Mr Matthias submitted that the same applied here, although the circumstances were different. It did not matter that Buckinghamshire Council, who complained about the failure to have regard to this material consideration, had been in a position to send it to the Secretary of State for the benefit of the Inspector in the A413 worksites appeal.

180. In my judgment, the Inspector cannot simply be treated as ignoring cumulative impact by reference to the passage in DL28, upon which Mr Matthias relied. This is because, as with the Wendover Green Tunnel site appeal decision, the submission which he received for the appeal included the material submitted for the Wendover Green Tunnel sites appeal. This, as I have explained, did consider cumulative LGV impact. The Inspector in DL15-16 referred to the LTMP and VMBS, and the related Supplementary Note, which cover cumulative impact. This was in the section dealing with the adequacy of the information provided. He noted that most of the justification for the further information, set out in DL20, arose from the Wendover Green Tunnel site traffic, which was assumed in the ES to be using a different route from that now proposed. He said in DL 23 that each request had to be considered on its merits, "though other approvals will be material considerations insofar as they may affect traffic flows." He thought that he had sufficient to determine the appeals before him. No conditions were suggested to him.

181. However, although the Inspector had cumulative material before him, he was clearly expecting the task of considering the cumulative effect, for all the sites in the two appeals, to be carried out in the course of the Wendover Green Tunnel site appeal. The latter was the new factor; the A413 worksites would not have been controversial on their own, as they would have fallen within the ES assessment. In those circumstances, although he had cumulative impact material before him, this Inspector cannot be taken to have considered it in the way or for the purposes he thought should and would be done.

182. The cumulative impact was material to each of the two A413 related decisions, but it would have been sufficient for one Inspector to consider it, and for the other to rely upon the decision of the first one to have done so. There was no need for it to be considered twice, so long as the first one had considered the material in reaching his decision. That is how the A413 Inspector explicitly and lawfully approached it, mistakenly anticipating that his was the first decision.

183. I cannot see that it mattered which appeal decision was the first to consider it, although the Wendover Green Tunnel appeal was the obvious occasion. For both, the impact of the A413 worksites traffic was within the range already assessed by the ES, and it was

the impact on the whole route of the newly assigned Wendover Green Tunnel site traffic which was new, and had to be assessed for acceptability with the traffic already acceptably assigned to the A413. If the LGV route for the Wendover Green Tunnel site traffic was approved with the A413 worksites traffic in mind, I cannot see that it matters that the A413 worksites traffic was approved without it in mind. One decision-maker, with the relevant power, would have approved the cumulative effects. It was not suggested that the purpose of taking the first decision into account was so that the second decision-maker could consider whether he agreed with it, or could then come to a decision inconsistent with the first. Nor was that a remotely likely outcome. The Wendover Green Tunnel site traffic would have been considered with the A413 worksites traffic in mind, just as the second Inspector envisaged.

184. In those circumstances, although I accept that the earlier DL would have been a material consideration in the later DL, I do not regard it as falling within the category of a consideration so obviously material that it was a mandatory consideration; see the analysis in *Cotswold District Council v Secretary of State for Communities and Local Government* [2013] EWHC 3719 (Admin), Lewis J at [55-67], and especially at [63], the general duty on the Secretary of State only to consider previous decisions drawn to his attention, but [67] not where it was so obviously material that he was obliged to consider it and for that purpose to find out about it. If not obtained in those circumstances, the decision would be unlawful, subject to the discretionary powers to refuse relief. This is in line with what the Supreme Court held in *R (Friends of the Earth Ltd) v Secretary of State for Transport* [2020] UKSC 52, [2021] PTSR 190, at [116-121] approving *Cumberlege* at [119], though not itself a case on the failure to consider earlier decisions. It equated the "so obviously material" test with what it would be irrational to ignore.

185. *Cumberlege* does not hold either that an earlier decision which is not drawn to the decision-maker's attention by the parties, or by the decision-maker's own researches or systems, because one or more failed in an obvious opportunity or duty of communication or inquiry, cannot be material. Responsibility for the omission may go to the question of whether the omission was a breach of the public law duty to have regard to material considerations; it may go to whether the earlier decision should be regarded as material.

186. In these circumstances, I regard responsibility as resting primarily with Buckinghamshire Council. It knew of the earlier decision as soon as it was received. It knew of the significance of the earlier decision for the case it sought to mount on each appeal. It could have forwarded it to the Secretaries of State or to the Planning Inspectorate. It did neither. I have seen no explanation for its failure to do so. It may have concluded that it had to win its jurisdiction argument to which this earlier DL was irrelevant, and that it could not succeed on a substantive cumulative impact argument on the second appeal in the light of the first decision. It had not raised cumulative impact as a substantive argument addressed to an identified modification anyway. Indeed, this seems to me independently to undermine the asserted materiality of the earlier decision.

187. I accept that the Secretaries of State or the Planning Inspectorate could have kept an eye out for these decisions, and informed the second Inspector of the arrival of the earlier decision. But I see no reason for them to be more alert to the interests of Buckinghamshire Council than the Council was for its own interests. After all, it knew

of what it might want to make of the earlier decision for the purpose of the second. That would not necessarily have been so clear to the Inspectorate, which could reasonably have thought that the Council could look after itself.

188. Applying *Cumberlege*, the earlier decision would have been relevant to the second decision, but only to the extent of the second Inspector noting that the consideration of the material point had in fact been undertaken and could be relied on. As I read the earlier decision, the Inspector did in fact consider the cumulative effect of all the LGV traffic, from all these worksites, on the entire route covered by them. It could not have made a difference to the second decision; rather the second Inspector would have regarded the cumulative impact assessment as having been carried out. This appears to go to materiality in *Cumberlege* [34], rather than to discretion. On that basis, I do not consider that there was a failure to have regard to a material consideration in the second DL; it would only have been material had it been sent to him.

189. However, if that is more properly characterised as an error of law, I would exercise my discretion, on this A413 worksites application for judicial review, against granting relief. First, I am satisfied that the outcome would not have been different, and certainly highly unlikely to have been different. This is not a case where I consider that I risk over-stepping the mark and second-guessing what the decision-maker would say. This is a case where the second Inspector thought that the Wendover Green Tunnel site decision would cover the problem arising out of the newly assessed Wendover Green Tunnel site traffic. As I read it, the Wendover Green Tunnel site DL did in fact cover it. The second Inspector had not suggested that he needed the other decision for the purpose of his own decision, let alone so as to review it and come to an inconsistent decision, nor is that what *Cumberlege* is concerned to enable. Second, I do not consider that Buckinghamshire Council should do nothing and stand by, letting the error it asserts arise, and then challenge the decision on the grounds of that error which it could have prevented, and claims an interest in preventing. It would be relying on its own failures to cause prejudicial delay and cost to the construction of an important project, whatever its controversial nature and purpose. These are not two inconsistent Secretary of State decisions: the problem is said to be an omission from each, much clearer to the Council than to the Secretaries of State.

190. The cumulative effects ground is dismissed.

Overall conclusions

191. Accordingly, these applications for judicial review fail, and are dismissed.