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Case No: CO/4852/2022;
AC-2022-LON-003680

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 17/11/2023

Before :

THE HONOURABLE MRS JUSTICE THORNTON DBE

- -

Between :

THE KING **on the application of** **PEAK DISTRICT AND SOUTH YORKSHIRE BRANCH OF THE CAMPAIGN TO PROTECT RURAL ENGLAND**	**Claimant**
- and -	
SECRETARY OF STATE FOR TRANSPORT	**Defendant**
- and -	
NATIONAL HIGHWAYS LIMITED	**Interested Party**

- -
- -

David Wolfe KC and Toby Fisher (instructed by **Richard Buxton Solicitors**) for the **Claimant**
James Strachan KC and Rose Grogan (instructed by **Government Legal Department**) for the **Defendant**
Jenny Wigley KC (instructed by **Gowling WLG (UK) LLP**) for the **Interested Party**

Hearing dates: 3rd - 4th October 2023

- -

Approved Judgment

This judgment was handed down remotely not before 14:00 on Friday 17th November 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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THE HONOURABLE MRS JUSTICE THORNTON DBE

Mrs Justice Thornton :

Introduction

1. Peak District and South Yorkshire Branch of the Campaign to Protect Rural England ("CPRE") seeks to challenge a decision by the Defendant, the Secretary of State for Transport ("the Secretary of State"), dated 16 November 2022, to grant development consent for the A57 Link Roads Scheme. The Interested Party, National Highways Limited ("National Highways") is the applicant for development consent.

2. The A57 Link Roads Scheme ("the Scheme") has been developed to improve journeys between Manchester and Sheffield and to address one of the most significant and longstanding congested areas of the country. The current A57 around Mottram-in-Longdendale in Tameside suffers from congestion which causes delays and unreliable journey times. The Scheme will create two new link roads at the western end of the A57/A628 Trans-Pennine route:

    - Mottram Moor Link Road – a new dual carriageway from the M67, junction 4 roundabout, to a new junction on the A57(T) at Mottram Moor.
    - A57 Link Road – a new single carriageway link from the A57(T) at Mottram Moor to a new junction on the A57 in Woolley Bridge.

3. The Secretary of State's decision to grant consent followed a public examination before a Panel of two Planning Inspectors ("the Panel") which began on 16 November 2021 and finished on 16 May 2022. The Panel recommended the grant of consent in a report dated 16 August 2022 ("the Report"). CPRE participated fully in the public examination.

4. Twenty-two hectares of the Scheme will be located on Green Belt land. The Panel reached the view that the Scheme will cause harm to the openness of the Green Belt. It will cross the Green Belt, introduce permanent embankments, bunds, and barriers alien to the Green Belt; give prominence to vehicles and introduce new street lighting. The Panel gave the harm significant weight in its decision making but concluded that the need for, and considerable public benefits of, the Scheme clearly outweighed the adverse effects of the Scheme, including its harm to the Green Belt. The public benefits weighing significantly in favour of granting consent were said to include the reduced congestion and improved journey time through Mottram, Hollingworth and Tintwistle, as well as between Manchester and Sheffield, together with the significant economic benefits brought about by the improvements proposed. The Secretary of State agreed with the Panel's conclusion.

5. CPRE seeks to challenge the Secretary of State's decision on two grounds:

> Ground 1: The Secretary of State unlawfully failed to comply with the requirement in Regulation 21(1)(b) of the Infrastructure Planning (Environmental Impact Assessment) Regulations 2017 to provide a reasoned conclusion on the significant effects of the Scheme because he erroneously treated National Highways' Environmental Statement as providing a cumulative assessment of the carbon emissions from the Scheme in

conjunction with other developments when it did not and he failed to assess the significance of those cumulative impacts.

Ground 2: when concluding that the benefits of the Scheme clearly outweighed the harm to the Green Belt such that there were 'Very Special Circumstances' justifying inappropriate development in the Green Belt, the Secretary of State unlawfully failed personally to assess whether credible alternatives proposed might deliver substantially similar benefits with less harm to the Green Belt.

6. By order dated 17 March 2023, Lang J ordered the claim to proceed by way of a rolled up hearing to consider permission, with the substantive hearing to follow on, if permission was granted.

7. At the hearing it was common ground that Ground 1 is materially the same as the challenge advanced by Dr Boswell in Boswell v Secretary of State for Transport [2023] EWHC 1710 which was dismissed by the Court. Dr Boswell has been granted permission to appeal by the Court of Appeal. The parties were in agreement with the Court's suggestion that Ground 1 of the present claim is stayed pending a decision from the Court of Appeal on the appeal. Accordingly, no submissions were made on the substance of Ground 1 at the hearing and the remainder of this judgment focuses on Ground 2 (consideration of alternatives in relation to development proposed on Green Belt land).

Background

Legal and policy background

8. The Scheme is classed as a nationally significant infrastructure project under sections 14 and 22 of the Planning Act 2008. Accordingly, development consent is required under Section 31 of the Act and the decision making process is regulated by the Act. The application is examined in public by a single Planning Inspector or, as in the present case, by a Panel of Inspectors who produce a report to the Secretary of State setting out the findings and conclusions in respect of the application and a recommendation on the decision to be made (Section 74). It is the function of the Secretary of State to decide the application (Section 103). The Secretary of State either makes an order granting development consent or refuses it (Section 114).

9. Where, as here, a National Policy Statement is applicable, Section 104(2) of the Act requires the Secretary of State to have regard to, amongst other matters, the policy statement and to decide the application in accordance with it, save to the extent that exceptions apply (s104(3)). The statutory framework for the designation of national policy statements and for obtaining a Development Consent Order has been summarised in a number of recent cases and need not be repeated here as the analysis was not in dispute ((R (Clientearth) v SSBEIS [2020] PTSR 1709, as approved by the Court of Appeal [2021] PTSR 1400)).

10. The National Policy Statement on National Networks ("the National Policy Statement") was adopted in 2014. Passages of particular relevance to the issues which arise in the present claim are as follows:

'General principles of assessment

4.2 Subject to the detailed policies and protections in this NPS, and the legal constraints set out in the Planning Act, there is a presumption in favour of granting development consent for national networks NSIPs that fall within the need for infrastructure established in this NPS. ….

Alternatives
4.26 Applicants should comply with all legal requirements and any policy requirements set out in this NPS on the assessment of alternatives. In particular:

- The EIA Directive requires projects with significant environmental effects to include an outline of the main alternatives studied by the applicant and an indication of the main reasons for the applicant's choice, taking into account the environmental effects.
- There may also be other specific legal requirements for the consideration of alternatives, for example, under the Habitats and Water Framework Directives.
- There may also be policy requirements in this NPS, for example the flood risk sequential test and the assessment of alternatives for developments in National Parks, the Broads and Areas of Outstanding Natural Beauty (AONB).

4.27 All projects should be subject to an options appraisal. The appraisal should consider viable modal alternatives and may also consider other options (in light of the paragraphs 3.23 to 3.27 of this NPS). Where projects have been subject to full options appraisal in achieving their status within Road or Rail Investment Strategies or other appropriate policies or investment plans, option testing need not be considered by the examining authority or the decision maker. For national road and rail schemes, proportionate option consideration of alternatives will have been undertaken as part of the investment decision making process. It is not necessary for the Examining Authority and the decision maker to reconsider this process, but they should be satisfied that this assessment has been undertaken.

Green Belt

5.164 …...The fundamental aim of Green Belt policy is to prevent urban sprawl by keeping land permanently open; the essential characteristics of Green Belts are their openness and their permanence.

5.178 When located in the Green Belt national networks infrastructure projects may comprise inappropriate development. Inappropriate development is by definition harmful to the Green Belt and there is a presumption against it except in very special circumstances. The Secretary of State will need to assess whether there are very special circumstances to justify inappropriate development. Very special circumstances will not exist unless the potential harm to the Green Belt by reason of inappropriateness, and any other harm, is clearly outweighed by other considerations. In view of the presumption against inappropriate development, the Secretary of State will attach substantial weight to the harm to the Green Belt, when considering any application for such development.'

11. In R (Samuel Smith Old Brewery (Tadcaster) and others) v North Yorkshire County Council [2020] UKSC 3, Lord Carnwath explained that key features of development control in Green Belts are the concepts of "appropriate" and "inappropriate" development. The construction of new buildings in the Green Belt is 'inappropriate' development and should not be approved except in 'very special circumstances'. The distinction between development that is 'inappropriate' in the Green Belt and development that is not 'inappropriate' (i.e. appropriate) governs the approach a decision-maker must take in determining an application for planning permission.

12. Finally by way of legal background; the Scheme constitutes Environmental Impact Assessment (EIA) development to which the Infrastructure Planning (Environmental Impact Assessment) Regulations 2017 (SI 2017 No. 572) apply. Regulation 4(2) prohibits the granting of a Development Consent Order "unless an EIA has been carried out in respect of that application." Regulation 14 defines what must be contained in an Environmental Statement, including "the likely significant effect of the proposed development on the environment" (Regulation 14(2)(b)). Also required is "a description of the reasonable alternatives studied by the applicant, which are relevant to the proposed development and its specific characteristics, and an indication of the main reasons for the option chosen, taking into account the effects of the development on the environment." (Regulation 14(2)(d)).

Factual background

13. As part of its application for development consent, National Highways produced a statement of its case for the Scheme, which included its case on locating the Scheme in the Green Belt. Its primary case was that the development did not constitute inappropriate development in the Green Belt. In the alternative it explained why any harm would be outweighed by other material considerations, so as to amount to 'very special circumstances' necessary to justify the harm to the Green Belt. In particular, the document states:

> '7.5.23 the need for the Scheme is an important and relevant consideration that should be attributed significant weight. This document sets out the rationale behind the Scheme and identifies the Government's support in increasing capacity, reducing congestion and delays …
>
> …
>
> 7.5.24 The Scheme has been through a rigorous assessment process and was included in the first RIS (published in 2014) and continues to be a committed scheme in RIS2 (published in March 2020). Furthermore, the Scheme was included in the DfT 2014 RIS, as one of the routes in greatest need of improvement.
>
> 7.5.25 It would not be possible for the Scheme to take place without development taking place in the Green Belt. The Scheme has been designed so as to minimise potential effects on the Green Belt, through minimising land take and incorporating a significant landscaping Scheme, designed to follow the contours of the land, to lessen visual impacts and mitigate adverse effects.
>
> ……

> Openness of Green Belt
>
> 7.5.35 Notwithstanding the case for 'very special circumstances' noted above, the Scheme has been designed to minimise any perceived impact to the existing openness of the Green Belt.
>
> 7.5.36 There are no alternative options to deliver the Scheme in a non-Green Belt location. The need for the Scheme and lack of alternatives present very special circumstances strongly in favour of the Scheme. Very special circumstances exist that outweigh any harm caused to the openness of the Green Belt.
> …..
>
> Conclusion on Green Belt
>
> 7.5.43 Based on the above assessment, potential harm to the Green Belt is minimal and is clearly outweighed by the other important and relevant considerations in relation to the need for the Scheme. Based on conclusions reached regarding other NSIP highway projects in the Green Belt the Scheme should not be considered inappropriate development.
>
> 7.5.44 The Scheme is also able to demonstrate compliance with all Green Belt tests of very special circumstances, as detailed above.
>
> 7.5.45 The Scheme is required to link two existing locations, which are surrounded by Green Belt, and therefore the Scheme cannot be completed without works being undertake in the Green Belt.'

14. National Highways also produced an assessment of other options, or alternatives to the Scheme, which had been considered but discounted. The latter is set out in Chapter 3 of its Environmental Statement (produced to comply with the requirements of the Infrastructure Planning (Environmental Impact Assessment) Regulations 2017). The chapter explains that the current scheme has evolved over more than 50 years as different ideas were considered and discarded to address the longstanding connectivity and congestion issues. The earlier historic studies and design were said to have informed the development of the Scheme. The methodology for identifying and selecting the options was explained and details of feasibility studies provided.

15. The Scheme was included in Roads Investment Strategy 1 (RIS1) and Roads Investment Strategy 2 (RIS2). It is, therefore, one of the schemes referred to in the National Policy Statement as a scheme which has been a been subject to full options appraisal as part of the case for its inclusion in those strategies (4.27).

The case on alternatives put by objectors to the Scheme

16. CPRE advanced a case before the Examining Authority that there were credible alternative measures, which would not harm the Green Belt and would address the traffic congestion whilst avoiding invasive road building. It was said that these alternatives had not been rigorously assessed and had instead been dismissed inappropriately by National Highways. In particular, CPRE put forward a package of measures, which it described as a 'Low Carbon travel package', which aimed to avoid

road building by making use of the existing roads and stimulating greater use of public transport, walking and cycling. The proposed measures included controls on HGV vehicles passing through the Peak District National Park. Another objector to the Scheme, Mr Bagshaw, put forward a proposal for a one-way traffic flow system around Mottram.

The Report by the Panel

17. Chapter 2 of the Report sets out the lengthy planning history of the Scheme. Proposals to address congestion and improve connectivity date as far back as 1967 to discussions to extend the M67 motorway across the Peak District National Park. In 2000, the Highways Agency assessed the impacts of various congestion strategies including an HGV lorry ban, public transport improvements and a bypass option. At that time, the assessment concluded that there were no realistic alternatives to a bypass of the villages. In September 2015, the Department for Transport assessed twenty-three potential solutions leading to a long list of nine options with two options taken forward to public consultation in 2016/2017. Between 2017 and 2021, ongoing environmental surveys, consultation and geotechnical surveys were conducted. Several elements were removed from the scope of the proposed scheme and the Scheme emerged as the preferred and final option.

18. The proposal for an HGV control scheme which was part of CPRE's "low carbon" alternative was referred to:

> 'The decision was also taken to reconsider the HGV Control Schemes as part of a package. The reason it did not progress was because of it being potentially difficult to deliver. However, the HGV Control Scheme option was supported by several groups, so the Applicant decided that it merited further consideration. (2.4.34)
> …….
> At this point the Applicant considered that the key issue regarding deliverability of the HGV Control Scheme, including complementary measures, remained unchanged. As the evaluation criteria clearly stipulated that an option (or sub-option within a package) must be deliverable. Any package of options which included the HGV Control Scheme was deemed undeliverable and not progressed further.' [6/810] (2.4.36)

19. Chapter 4 of the Report considers alternatives. Having introduced the policy context (paragraphs 4.26 and 4.27 of the National Policy Statement), the Report continues as follows:

> '4.5.24 The Proposed Development is included in RIS1 and RIS2 and the Applicant confirmed that the Proposed Development was appraised using the DfT's TAG which follows Treasury Green Book guidance. Some IPs suggested that the Applicant's appraisal was out-of-date due to changes in circumstances, legislation, and policy, citing the judgement concerning The Queen (on the application of) Save Stonehenge World Heritage Site Ltd, v Secretary of State for Transport [2021] EWHC 2161 (Admin) (the Stonehenge Case).
>
> 4.5.25 As explained in Section 2.4, there was considerable work carried out prior to the Preferred Route Announcement for the Proposed Development in 2017

involving the identification and selection of options, both before, and after, the publication of RIS1 in 2015. The consideration of alternatives continued after the Preferred Route announcement as evidenced by the subsequent incorporation of key changes to the Preferred Route since 2017.

4.5.26 We are satisfied that the Proposed Development was subject to an iterative design process and responded to consultative feedback from the public and other stakeholders.

……

4.5.29 The Applicant [REP9-027, item 9.79.35] explained the process of review of the Proposed Development in line with Treasury Green Book guidance. At each stage, that process either confirmed that previous findings remained valid or identified where new information was likely to result in changes to those findings. ……

4.5.30 The Stonehenge judgement establishes that there is a need to consider all reasonable alternatives in designing NSIPs. With respect to the Proposed Development, we are content that the Applicant has undertaken an appropriate assessment of reasonable alternatives, that we have noted.

4.5.31 We find that the Applicant [REP2-036] has demonstrated the main alternatives and provided a brief explanation of the reasons for the choice of the preferred option taking into account the environmental effects in accordance with paragraph 4.26 of the NPSNN and satisfied that alternatives have been considered in accordance with the NPSNN.

4.5.32 CPRE PDSY [REP2-070, REP2-071, REP4-016, REP12-032], promoted an package of measures to provide a low carbon travel alternative, an aspiration also supported by other IPs, such as the High Peak Green Party [REP2-076]. Other IPs [REP1-052, REP2-049, REP2-073, REP2-075, REP2-085] supported elements of this package, such as controls on HGVs crossing PDNP, improvement of the Woolley Bridge mini-roundabout, and support to public transport, cyclists and pedestrians.

4.5.33 Elements of CPRE PDSY's proposals are included in the Proposed Development, such as improvements to Junction 4, traffic calming and the provision of pedestrian and cycling facilities. However, such standalone measures, or combinations of such improvements were considered during the development and optimisation of the Proposed Development, but not taken forward for the reasons outlined in ES Chapter 3 [REP2-036] and amplified by the Applicant [REP1-042, REP4-009]. We are mindful of NPSNN's advice that relying solely on alternatives such as demand management and modal shift is not viable or desirable to manage need. We are conscious of the part that such proposals must play in tackling the transport and climate challenges of the future and further consideration of such proposals is included in Section 5.2. We are therefore satisfied that the appraisal of alternatives to a road-based scheme has been undertaken and is sufficient to meet the requirements of the NPSNN.

….

> 4.5.35 Stephen Bagshaw [REP2-088] and Peter Simon [REP2-082] suggested a gyratory using Hyde Road and other parts of the existing network, together with a new link from Junction 4 to Roe Cross Lane through the fields to the north of Hyde Road, as an alternative to the Proposed Development. A similar scheme was considered during the development and optimisation of the Proposed Development, but not taken forward for the reasons outlined in ES Chapter 3 [REP2-036]. We are therefore content that a gyratory scheme was considered sufficiently and that there was no deficiency in this regard in the Applicant's consideration of alternatives.
>
> Conclusion on the consideration of alternatives
>
> 4.5.36 In accordance with paragraph 4.26 of the NPSNN the Applicant included within the ES an outline of the main alternatives studied and provided an indication of the main reasons for choice of the preferred route, considering the environmental effects.
>
> 4.5.37 In accordance with paragraph 4.27 of the NPSNN, we are satisfied that the Proposed Development has been subject to a full options appraisal in achieving its status within the RIS, and that a proportionate consideration of alternatives was undertaken.
>
> 4.5.38 Taking all these matters into account, we are satisfied that the consideration of alternatives does not count against the DCO being made.'

20. The impacts of the proposed development on the Green Belt are considered in Chapter 5 on the need for the Scheme. The Panel concluded as follows:

> '5.6.152 In Chapter 4 we concluded that an appraisal of alternatives was undertaken and sufficient to meet the requirements of the NPSNN. We are satisfied that the route is safeguarded in local policy and that the location in the Green Belt is unavoidable as it relates to the need to mitigate severe congestion on existing road routes, which are surrounded by Green Belt. On that basis we conclude that there is a requirement for a Green Belt location.'

21. On the harm to the Green Belt from the Scheme, the Panel concluded that:

> '5.6.154 We note the submissions made about openness by the Applicant and by other parties, including TMBC, DCC and CPRE PDSY. The Proposed Development would cross the Green Belt. Even with the secured mitigation, we find that the Proposed Development would introduce permanent embankments, bunds, and barriers into the River Etherow Valley of a form, height, extent and with characteristics that would be alien to the Green Belt and that would have the effect of raising other uncharacteristic elements and vehicles to several metres above existing ground level, giving them prominence. New street lighting of the carriageway would be prominent. In a number of locations, and particularly in the River Etherow Valley, the Proposed Development would create a substantial visual barrier between the remaining areas of Green Belt. Some footpaths to the north of the main carriageway in the River Etherow Valley would have significantly reduced near and middle-distance visibility to the Green Belt on the other side of the main carriageway and would experience the introduction of

> uncharacteristic features including new street lighting, barriers, structures and vehicles. Having carefully considered these matters we conclude that the Proposed Development would not preserve the openness of the Green Belt.
>
> 5.6.155 Based on the above, and in consideration of paragraph 150 of the NPPF, we conclude that as the Proposed Development would not preserve openness it would be inappropriate development in the Green Belt.
> 5.6.156 In accordance with paragraphs 5.170 and 5.178 of the NPSNN it follows that the Proposed Development should not be approved except in 'very special circumstances' and that those will not exist unless the potential harm to the Green Belt by reason of inappropriateness, and any other harm, is clearly outweighed by other considerations. We address whether there are 'very special circumstances' alongside the planning balance in Chapter 7.
>
> 5.6.157 Paragraph 5.178 of the NPSNN says that "In view of the presumption against inappropriate development, the Secretary of State will attach substantial weight to the harm to the Green Belt, when considering any application for such development."
>
> 5.6.158 Based on the above, we conclude that there would be harm to the Green Belt and give this substantial weight against the DCO being made.'

22. Chapter 7 contains the Panel's conclusion on the case for making a Development Consent Order. Section 7.3 addresses the need case and consideration of alternatives, repeating the earlier conclusions that the need for the Scheme had been established and that the appraisal of alternatives was sufficient to meet the requirements of the National Policy Statement. Impacts on the Green Belt were considered at 7.4.56 with the conclusion at 7.4.63 that there would be harm to the Green Belt which was to be given substantial weight against consent being given.

23. In a section headed *Planning Balance and conclusions* (7.5.4), the Report commented on the matters counting significantly in favour of making the Development Consent Order, which included, amongst others, the need for the Scheme; the policy presumption in favour of development consent (7.5.8); reduced congestion and improvements to the reliability of people's journeys through Mottram, Hollingworth and Tintwistle, as well as also between the Manchester and Sheffield city regions. These matters were given substantial weight. Benefits to business trips and positive, wider economic impacts were also given substantial weight. Matters counting significantly against the Development Consent Order being made included harm to the Green Belt which was given substantial weight; and increases in traffic through the Peak District National Park, also given substantial weight (7.5.9).

24. Turning to address the planning balance, the Panel concluded:

> '7.5.12 The 'critical need' to improve the SRN to deliver a national network that meets the country's long-term needs and supports a prosperous and competitive economy, reduced congestion and improvements to journey time reliability, and benefits to businesses during the operational phase are powerful factors that bring substantial weight in favour of the DCO being made….

> 7.5.13 On the other side of the balance are harm to the Green Belt and to PDNP, which both attract substantial weight.
>
> 7.5.14 Taking all the above into account, we find that the matters in favour of the DCO being made, including the national need, clearly outweigh those against. Other matters bring both benefits and adverse effects, but none of those, either individually or cumulatively, lead us to a different conclusion in terms of the overall balance of benefits and adverse impacts.
>
> 7.5.15 We consider that the potential harm to the Green Belt by reason of inappropriateness, and any other harm, is clearly outweighed by other considerations and therefore 'very special circumstances' exist for the Proposed Development to be approved in accordance with paragraphs 5.170 and 5.178 of the NPSNN.'

25. Chapter 10 sets out the Panel's conclusions. The Chapter also sets out the recommendation to the Secretary of State to grant development consent, including that the potential harm to the Green Belt by reason of inappropriateness, and any other harm, is clearly outweighed by other considerations and therefore 'very special circumstances' exist for the Proposed Development to be approved in accordance with paragraphs 5.170 and 5.178 of the National Policy Statement (10.2.11).

The Secretary of State's Decision letter

26. His decision letter states that the Secretary of State has decided under section 114 of the Planning Act 2008 to make an order granting development consent for the proposals in this application. The letter addresses the need for the development and the consideration of alternatives as follows:

> 'Consideration of Alternatives
>
> 21. Noting the considerable history to the identification and development of the preferred route of the Proposed Development as outlined in section 2.4 of the Report, the Secretary of State agrees with the ExA that the Proposed Development was subject to an iterative design process and responded to consultative feedback [ER 4.5.26], and that there has been an appropriate assessment of reasonable alternatives [ER 4.5.30]. He is satisfied that the Applicant has considered reasonable alternatives, demonstrated the main alternatives and provided a brief explanation of the reasons for choosing the preferred route taking into account the environmental effects in accordance with paragraph 4.26 of the NPSNN [ER 4.5.31 and ER 4.5.36]….
>
> 22. Several IPs promoted a package of measures to provide low carbon travel alternatives [ER 4.5.32] including CPRE who submitted additional information for consideration in its representation dated 26 September 2022 including a report on Low Carbon Travel in Longdendale and Glossopdale. The Secretary of State notes that the ExA highlighted that several elements of CPRE's low carbon proposals have been incorporated into the Proposed Development, for example, improvements to Junction 4, traffic calming and the provision of pedestrian and cycling facilities. Although the Secretary of State notes that other measures were considered during development and optimisation of the Proposed Development,

like the ExA, he is mindful of the NPSNN which sets out that relying solely on alternatives such as demand management and modal shift (or a combination of those alternatives) is not viable or desirable as a means of managing need [ER 4.5.33].

23. The Secretary of State notes that various IPs proposed alternative options to the Proposed Development including a long bypass encompassing Hollingsworth and Tintwistle [ER 4.5.34] and a gyratory using Hyde Road and other parts of the existing network together with a new link from Junction 4 to Roe Cross Lane to the north of Hyde Road [ER 4.5.35]. The ExA concluded that these alternatives were considered sufficiently during the development and optimisation of the Proposed Development, that there was no deficiency in the Applicant's consideration of alternatives and that the appraisal of alternatives was compliant with the NPSNN [ER 4.5.35]. The Secretary of State has no reason to disagree with this.

24. Overall, the Secretary of State agrees with the ExA that: in accordance with paragraph 4.26 of the NPSNN, the Applicant included within the Environmental Statement ('ES') an outline of the main alternatives studied and provided an indication of the main reasons for the choice of the preferred route, considering the environmental effects [ER 4.5.36]; the Proposed Development has been subject to a full options appraisal in achieving its status within the RIS in accordance with paragraph 4.27 of the NPSNN [ER 4.5.37]; and that the consideration of alternatives does not count against the DCO being made [ER 4.5.38].'

27. Turning to Green Belt:

'117. It is noted that the 22.28ha of the Proposed Development would be located within the Tameside Unitary Development Plan Green Belt designation [ER 5.6.120].

……

119. The appraisal of alternatives has been dealt with earlier in this letter (paragraphs 21 to 24) where it was concluded that this was sufficient to meet the requirements of the NPSNN. The Secretary of State agrees with the ExA that there is a requirement for a Green Belt location because the route of the Proposed Development is safeguarded in local policy and that the location in the Green Belt is unavoidable because it relates to the need to mitigate severe congestion of existing routes which are surrounded by Green Belt [ER 5.6.152].

120….Consequently, the Secretary of State concurs with the ExA that the Proposed Development would not preserve the openness of the Green Belt [ER 5.6.154] and therefore would be inappropriate development within the Green Belt, taking into account paragraph 150(c) of the NPPF [ER 5.6.155].

121. The Secretary of State notes that in accordance with paragraphs 5.170 and 5.178 of the NPSNN, the Proposed Development should only be approved in 'very special circumstances' which will not exist unless the potential harm to the Green Belt by reason of inappropriateness and any other harm is clearly

> outweighed by other considerations, a matter which he addresses in the section headed 'Conclusions on the Case for Making a DCO' in this letter [ER 5.6.156 – ER 15.5.157]. In conclusion, he agrees with the ExA that there would be harm to the Green Belt and accords this substantial weight against the DCO being made [ER 5.6.158].'

28. Drawing together the conclusions on the Case for Making a development consent order, the Secretary of State agreed with the Panel that the need case for the Scheme had been made out (§197). The Secretary of State agreed with the Panel's conclusion that matters that count significantly in favour of the Development Consent Order being made are reduced congestion and improved journey time reliability through Mottram, Hollingworth and Tintwistle as well as between Manchester and Sheffield and noted that the Panel gave this substantial weight due to the scale of benefits to tackling specific congestion without constrained traffic growth (§198). The Secretary of State agreed with the Panel's conclusions regarding matters that count significantly against the Proposed Development which include harm to the Green Belt (§199). The Secretary of State agreed with the Panel that the matters in favour of the Development Consent Order being made outweighed the matters weighing against the Development Consent order being made (either in isolation or combination) [ER 7.5.14] §200).

Discussion

CPRE's primary case – the Secretary of State treated alternatives as a material consideration

29. CPRE's primary case is that the Secretary of State treated alternatives as a material consideration. This is said to be unsurprising as National Highways had relied on the absence of alternatives to justify development in the Green Belt. Meanwhile, objectors had specifically identified credible alternatives that they claimed would deliver the same or similar benefits within the same site with no or substantially less harm to the Green Belt. Having recognised them as material, the Secretary of State needed to assess the alternatives for himself. Instead, his consideration of alternatives was limited to the Panel's conclusion that i) National Highways had provided a satisfactory outline of the main alternatives studied and an indication of the main reasons for choice of the preferred route, considering the environmental effects; and ii) the Scheme had been subject to a full options appraisal in achieving its status within the RIS.

30. I do not accept the underlying factual basis of CPRE's primary case.

31. It is apparent from a review of its statement of case that National Highways did not seek to justify the Scheme on the basis there were no alternatives or that its Scheme was the best, or better than other options. It relied on the need for the Scheme, the rigorous assessment it had undergone and on the absence of any alternative to development in the Green Belt. Its statement of case explains that the Scheme is required to link two existing locations, which are surrounded by Green Belt, and cannot therefore be completed without works being undertaken in the Green Belt (7.4.45 of the Panel's Report).

32. In its submissions to the contrary, CPRE pointed to the reference by National Highways to "The need for the Scheme and lack of alternatives present very special

circumstances strongly in favour of the Scheme" (7.5.37) (underlining reflects CPRE's emphasis). However, read fairly, the reference to the 'lack of alternatives' is a reference back to the preceding sentence, "There are no alternative options to deliver the Scheme in a non-Green Belt location" (underlining is the Court's emphasis). The same point is repeated in paragraph 7.5.25 of the statement of case. CPRE also pointed to "The Scheme has been through a rigorous assessment process" (7.5.24). Again, read fairly, this is no more than a statement of the assessment process for the Scheme itself. It does not amount to a statement of comparison between the Scheme and alternatives. In my view, CPRE's forensic focus on particular sentences and phrases in the statement of case engages in the 'over-legalisation' of the planning process which Lord Carnwath warned against in R (Samuel Smith Old Brewery (Tadcaster) and others) v North Yorkshire County Council [2020] UKSC 3 at §21. See also Lindblom LJ in St Modwen Developments Ltd v Communities and Local Government Secretary 2018 PTSR 746 at §7 referring to there being no place in planning challenges for the kind of hypercritical scrutiny that this Court has rejected.

33. CPRE pointed to the express reference to the appraisal of alternatives in paragraph 119 of the Secretary of State's decision letter to support its contention that the Secretary of State had treated alternatives as material considerations. I disagree. Read fairly the Secretary of State is agreeing with the Panel's assessment at 5.6.152 of its Report that a Green Belt location was unavoidable "because it relates to the need to mitigate severe congestion of existing routes which are surrounded by Green Belt".

34. Permission to apply for judicial review on CPRE's primary case is refused.

CPRE's alternative case – alternatives were a mandatory material consideration

35. CPRE's alternative case is that, in the circumstances of this case, the existence or absence of alternatives that might deliver the same or similar benefits, with no or substantially less harm to the Green Belt, was a mandatory material consideration which the Secretary of State unlawfully failed to take into account. The following reasons were advanced for this assessment. First, the Scheme will involve large scale civil engineering works that will be permanent and irreversible. Second, the Scheme was considered to be inappropriate development and the harm caused to the openness of the Green Belt by the Scheme was given "substantial weight" by the Secretary of State. Third, National Highways had expressly relied on its options appraisal, and "the lack of alternatives" to demonstrate very special circumstances justifying inappropriate development. Fourth, interested parties had specifically identified credible alternatives in the course of the Examination that they claimed would deliver the same or similar benefits with no or substantially less harm to the Green Belt. Fifth, the alternatives proposed were concrete and capable of genuine assessment. They had scored well in early options appraisals, and their promoters were present and engaged in the Examination. Those credible alternatives had received considerable attention in the Examination. Sixth, this was not an "alternative sites" case. Rather, as in Langley Park School for Girls v Bromley London Borough Council ([2010] 1 P & CR 10) and R (Save Stonehenge World Heritage Site Ltd) v Secretary of State for Transport ([2021] EWHC 2161 (Admin)) it was an "alternative schemes" case where the alternative schemes advanced by interested parties fell within the red line boundary of the application site. Seventh, the initial options appraisal was more than seven years old and did not reflect substantial changes in policy and technology since then and

had not assessed alternatives with regard to their impacts on Green Belt purposes and openness, as in Langley Park.

36. The widely applied analytical approach to the question of whether a particular consideration may be classed as a 'mandatory material consideration', such that a decision maker will act unlawfully in not taking it into account is explained in R (Friends of the Earth) v Secretary of State for Transport) [(2021] PTSR 190 at §116-121. The question is whether the consideration in question was expressly or impliedly identified in legislation (or policy), as a consideration required to be taken into account by the decision maker "as a matter of legal obligation", or alternatively whether, on the facts of the case, it was "so obviously material" to the decision on the particular project as to require direct consideration. A consideration that is so 'obviously material' such that a failure to take it into account would be irrational would not accord with the intention of the legislation (or planning policy).

37. In writing before the hearing, it was suggested on behalf of CPRE that Green Belt policy in the National Policy Statement on National Networks requires an assessment of alternatives. This submission was not pursued with any vigour during the hearing and I reject it. Paragraphs 5.164 and 5.178 of the statement set out Green Belt Policy. They do not make any mention of an assessment of alternatives. Green Belt Policy requires special regard to be paid to its protection, in particular by requiring very special circumstances to justify inappropriate development. However, it falls short of imposing a positive obligation to consider alternatives which might not have the same adverse impacts as the national network development under consideration. This is in contrast with requirements relating to flood risk and development in an area of outstanding natural beauty.

38. General principles on alternative sites are set down in the Policy Statement at paragraphs 4.26 and 4.27. Paragraph 4.26 requires an applicant to comply with "all legal requirements" and "any policy requirements set out in this NPS" on the assessment of alternatives. The specific legal requirement of relevance in the present case is the requirement to provide an outline of the main alternatives considered by the applicant for development consent and an indication of the main reasons for the choice of scheme, as required by the Environmental Impact Assessment regime. In addition, before the Court there was no dispute that the "legal requirements" in paragraph 4.26 also includes any requirements arising from judicial principles set out in case law, a topic I turn to below (R (Save Stonehenge World Heritage Site at §259).

39. Paragraph 4.27 of the Policy Statement provides that where a project has been subject to full options testing for the purposes of inclusion in a Road Investment Strategy it is not necessary for the decision-maker to reconsider this process; instead, they should be satisfied that the assessment has been carried out. Accordingly, the Secretary of State is not required to conduct his own assessment of alternatives but satisfy himself that the appraisal of options by the applicant has been undertaken appropriately. Where paragraph 4.27 is satisfied, by full options testing for the purposes of a Road Investment Strategy, the applicant still needs to meet any requirements arising from paragraph 4.26. Paragraph 4.27 does not override paragraph 4.26 (R (Save Stonehenge World Heritage Site) at (§260)).

Common law principles on alternatives

40. The common law principles about alternative sites are well established and were summarised recently by Holgate J in R (Save Stonehenge World Heritage Site Ltd) at (§268f.). I draw on the following principles from his analysis as particularly relevant to the issues that arise in the present case.

41. The first principle of relevance is that where there are clear planning objections to development upon a particular site then "it may well be relevant and indeed necessary" to consider whether there is a more appropriate site elsewhere. This is particularly so where the development is bound to have significant adverse effects and where the major argument advanced in support of the application is that the need for the development outweighs the planning disadvantages inherent in it. Examples of this second situation may include infrastructure projects of national importance (Trusthouse Forte Hotels Ltd v Secretary of State for the Environment (1987) 53 P & CR 293 at §299 and R (Save Stonehenge World Heritage Site Ltd) at §269).

42. Second; whilst it is, generally speaking, exceptional for proposals on alternative sites to be relevant, the principle set out above must apply with equal, if not greater force where the alternative suggested relates to different siting within the same application site rather than a different site altogether (R v Langley Park School for Girls v Bromley LBC [2010] 1 P & CR 10 at §46). In such case, no "exceptional circumstances" are required to justify taking an alternative proposal into consideration (§40).

43. Third; a distinction must be drawn between two categories of legal error: first, where it is said that the decision-maker erred by taking alternatives into account and second, where it is said that he had erred by failing to take them into account. In the second category an error of law cannot arise unless alternatives amount to a mandatory material consideration, the test for which is set out at §36 above.

44. Fourth; there is 'no one size fits all'. Whether there is a need to consider the possibility of avoiding or reducing the planning harm caused by a particular proposal by considering alternative schemes is a matter of planning judgement for the decision maker (Langley Park at §52-53)). The court will not interfere with matters of planning judgement other than on legitimate public law grounds (R (Friends of the Earth) v Transport Secretary) [2021] PTSR 190 at §119).

Application of the principles to the facts of the present case

45. Having set out a detailed account of the planning history of the Scheme, including the assessment by National Highways of alternatives to the Scheme (2.4.17 and following of the Panel's Report), the Panel addressed the question of alternatives to the Scheme in Chapter 4. It directed itself to paragraphs 4.26 and 4.27 of the National Policy Statement. The Panel concluded that the applicant had complied with paragraph 4.26 of the National Policy Statement by producing an assessment of alternatives within the Environmental Statement for the Scheme. The Panel was satisfied that, in accordance with paragraph 4.27, the Scheme had been subject to a full options appraisal in achieving its status within the Roads Investment Scheme and that a proportionate consideration of alternatives had been undertaken (4.5.37). The Secretary of State agreed (§21).

46. During the course of the examination, the Panel asked National Highways in writing whether Mr Bagshaw's alternative scheme had been considered previously. If it had, what conclusions had been drawn and did National Highways consider that the proposal provided an alternative solution which would satisfy the same aims of the Scheme, provide the same or improved benefits and was deliverable. In March 2022, National Highways responded to the effect that Mr Bagshaw's scheme had not previously been considered, going on to say that "Large one way gyratories such as that proposed by Mr Bagshaw are not considered appropriate solutions to traffic congestion and are frequently being retrospectively removed from the road network." The reasons given for the retrospective removal were the potential for high traffic speeds; disadvantages to bus users and pedestrians and the potential for local access to become convoluted.

47. It appears that National Highways reconsidered whether Mr Bagshaw's scheme had been assessed or not. The Panel subsequently repeated its question to which National Highways responded by explaining that: "The option submitted by Mr Bagshaw was presented as an alternative scheme at the public inquiry of 2007. A scheme looking at a gyratory system in the area of Mottram was assessed in 2015 as part of the EAST study; these were forwarded on to the DfT for consideration but were not included in RIS1."

48. National Highways was also asked for its position on CPRE's alternative proposal, to which the answer given was:

> 'a) Alternatives to the proposed Scheme that have previously been considered and rejected are presented in Chapter 3 of the Environmental Statement (REP2-005). Sustainable transport measures were considered as one of the alternative options and rejected.
>
> b) The reasoning for rejection was that this alternative did not address the identified problems or the route objectives. Moreover, although considered feasible with challenge, current congestion and capacity issues experienced on the route results in a significant challenge in terms of delivering sustainable transport improvements, particularly for improvements relating to bus services. It was also decided introduction of larger scale interventions would enable the provision of complementary public transport measures.'

49. The Panel understood sufficiently the nature of CPRE's alternative package of measures to observe that elements of its proposals had been included in the Scheme, including improvements to junction 4, traffic calming and the provision of pedestrian and cycling facilities. The Panel went on to conclude that the measures identified as a standalone measure or combinations of the improvements proposed had been considered during the options appraisal process but had not been taken forward by the applicant for reasons explained. Further, the Panel reminded itself that the National Policy Statement on National Networks advises that relying solely on alternatives such as demand management and modal shift is not viable or desirable to manage need (4.5.33). Turning to Mr Bagshaw's proposal, the Panel said that a similar proposal had been considered during the development of the Scheme but had not been taken forward for reasons explained in the Environmental Statement. The Panel was therefore content that a gyratory scheme was considered sufficiently and that there

was no deficiency in this regard in the consideration of alternatives by National Highways (4.5.35).

50. It is apparent that the Panel approached the alternatives proposed as a matter of planning judgement, giving them brief consideration but focussing its consideration on whether a proportionate options appraisal had been carried out by the applicant for development consent, in accordance with paragraph 4.27 of the Policy Statement on National Networks. The Secretary of State agreed (§21- 23).

51. Both the Panel and the Secretary of State accepted that the Scheme constitutes Inappropriate Development in the Green Belt by reason of the harm that will be caused to the openness of the Green Belt and gave this "substantial weight" in the assessment of whether very special circumstances existed so as to permit inappropriate development in the Green Belt.

52. The Panel did not return to the question of alternatives in its assessment of very special circumstances. Instead, the Panel proceeded on the basis that there was no alternative to development in the Green Belt, given the Scheme was needed to link two roads, both of which are located in the Green Belt. It proceeded to balance the benefits of the development against the harm to the openness of the Green Belt. It concluded that the benefits of the Scheme outweighed the disadvantages including the harm to the Green Belt. The Secretary of State agreed. In this context it is to be observed that there was no legal requirement for the Secretary of State to personally read all the decision-making materials when making the decision to grant development consent. It is sufficient for him to be provided with a briefing (in this case the Panel's Report) which provides a precis of material he is bound to have regard to (by analogy with an officer's report prepared for local planning authority decisions) (R (Save Stonehenge World Heritage Site) at §60-65).

53. I accept the principle that "it may well be relevant and indeed necessary" to consider whether there is a more appropriate site elsewhere is of potential application given the circumstances of the present case (§41 above). CPRE and Mr Bagshaw had advanced objections to the Scheme. The Scheme will harm the openness of the Green Belt and the major argument advanced in support of the application is that the need for the Scheme outweighs the planning disadvantages inherent in it. The Scheme is an infrastructure project of national importance.

54. The category of legal error relied on in the present case is said to be that the Secretary of State erred by failing to take account of the alternatives advanced by CPRE and Mr Bagshaw. An error of law cannot arise in this regard unless, on the facts, the alternatives advanced by CPRE and Mr Bagshaw were so obviously material, that it was irrational for the Secretary of State to fail to consider them (see §36 above).

55. CPRE advanced seven reasons why, on the facts of the case, the alternatives advanced were mandatory material considerations when deciding whether the benefits of the Scheme outweighed the harm to the Green Belt. The reasons are listed at §35 above. CPRE emphasised that the reasons should be considered as a whole and not separately.

56. The first reason given by CPRE for why alternatives are mandatory considerations is that the Scheme will involve large scale civil engineering works that will be

permanent and irreversible. This language borrows from the decision of Holgate J in R (Save Stonehenge World Heritage Site). In that case the claimant successfully challenged the grant of development consent for a cutting and tunnel through the site on which Stonehenge stands on the basis that the relative merits of alternative tunnel options were an obviously material consideration which the Secretary of State had been required to assess and it was irrational for them not to have been taken into account. In setting out why he had reached this conclusion, Holgate J referred to the work as involving "large scale civil engineering works…The harm described by the Panel would be permanent and irreversible" (§280). A central underlying thrust of CPRE's submissions before the Court was that the present case is analogous with R (Save Stonehenge World Heritage Site). Even accepting as I do, CPRE's submission that the factors in R (Save Stonehenge World Heritage Site) meant that case was wholly exceptional, I am not persuaded that the present case is analogous. Stonehenge is a World Heritage Site, described by the World Heritage Committee as one of the most impressive prehistoric megalith monuments in the world. There is said to be an exceptional survival of prehistoric monuments, which together with their setting form landscapes without parallel (§6). Having set out the general common law principles on whether alternatives sites are an obviously material consideration, Holgate J concluded that "the relevant circumstances of the present case are wholly exceptional" (§277). He set out a number of reasons for his conclusion which taken together were overwhelming. The reason why the "permanent and irreversible" changes to the landscape were relevant was not because they were permanent and irreversible, per se, but because those changes were being made within a World Heritage Site. The proposed development was described by the Panel as the greatest physical change to the Stonehenge landscape in 6000 years and a change which would be "permanent and irreversible" (§258).

57. CPRE's second reason is that the Scheme was considered to be inappropriate development and the harm caused to the openness of the Green Belt by the Scheme was given "substantial weight" by the Secretary of State. This may make alternative proposals a relevant consideration but it is not in my judgment sufficient to elevate alternatives into the category of mandatory material considerations. If it was, then alternatives would be relevant in every Green Belt case where there was inappropriate development and there is no such policy requirement to this effect in the National Policy Statement (as explained at §36 above). There is no general principle of law that in any case where a proposed development would cause adverse effects, but these are held to be outweighed by its beneficial effects, the existence of alternative sites inevitably becomes a mandatory material consideration (Lang J in R (Substation Action Save East Suffolk Ltd) v Secretary of State for Business, Energy and Industrial Strategy [2022] PTSR 74 at §211).

58. CPRE's third reason was that National Highways relied on "the lack of alternatives" to demonstrate Very Special Circumstances justifying inappropriate development. For the reasons explained above in the discussion of CPRE's primary case, I do not accept CPRE's characterisation of the case put by National Highways. The case put by National Highways, and understood to be as such by the Panel and Secretary of State, was that there was no alternative to development in the Green Belt. The Panel (with whom the Secretary of State agreed) identified the considerations it considered counted significantly in favour of development consent and an absence of alternatives was not included in the list (7.5.8 of the Panel's Report).

59. CPRE's fourth and fifth reasons were, in summary, that others had advanced credible alternatives. However, the credibility of these alternatives was disputed by the applicant for development consent. National Highways had concluded that the alternative schemes could not deliver the objectives of the Scheme and were also otherwise challenging to implement. That information was before the Panel who referred to the fact that National Highways had chosen not to take them forwards.

60. CPRE's sixth reason was that the present case is not an "alternative sites" case but an "alternative schemes" case and therefore analogous with R (Save Stonehenge World Heritage Site) and also with Langley Park. In the latter case, Sullivan LJ said it was not an 'alternative sites' case because objectors were proposing an alternative layout on the same site. However, the factual basis for CPRE's submission in this regard was contentious. Before the Court, National Highways disputed that Mr Bagshaw's proposal falls within the red line boundary of the site. It produced a plan, which was not challenged, demonstrating that aspects of Mr Bagshaw's gyratory scheme extend beyond the red line boundary in parts. Similarly, in my view, the modal shift proposed by CPRE must inevitably have implications beyond the red line boundary, as will its proposal for weight controls on HGV lorries (e.g. a lorry cannot simply shed part of its load on arrival at the boundary of the site).

61. As for legal comparisons, I have already explained my reasons for rejecting the submission that the present case is analogous with R (Save Stonehenge World Heritage Site). In my judgment, the present case is also distinguishable from Langley Park, which was not a case where the Court of Appeal concluded that the alternative proposed was necessarily a mandatory material consideration. Rather, it was a case where the decision-maker had wrongly considered itself precluded from considering an alternative (§47 and §48 of the judgment).

62. CPRE's final reason is that the initial options appraisal was more than seven years old and did not reflect substantial changes in policy and technology since then. No detail was provided as to why the appraisal was said to be out of date and amounts to a repeat of a criticism advanced before the Panel and addressed in its Report (see above at §19 ("4.5.24 …Some IPs suggested that the Applicant's appraisal was out-of-date …."). The Secretary of State agreed with the Panel's analysis in this regard (§21 of the decision letter).

63. Accordingly, the reasons advanced by CPRE do not justify a conclusion that the alternatives proposed were mandatory material consideration. The same conclusion is reached whether the reasons are considered individually or cumulatively.

Conclusion

64. In conclusion; I do not accept the underlying factual basis of CPRE's primary case that the Secretary of State treated alternatives as a material consideration but failed to assess them for himself. Permission to apply for judicial review on CPRE's primary case is refused.

65. Nor am I persuaded that the alternatives advanced by CPRE and Mr Bagshaw were mandatory material considerations such that it was unlawful for the Secretary of State to rely on their assessment by National Highways in its options appraisal of the Scheme. The present case is not analogous with the wholly exceptional set of

circumstances in R (Save Stonehenge World Heritage Site) v Secretary of State for Transport [2021] EWHC 2161 (Admin). There is no general principle of law that the existence of alternative sites inevitably becomes a mandatory material consideration in any case where a proposed development would cause adverse effects but these are held to be outweighed by its beneficial effects (Lang J in R (Substation Action Save East Suffolk Ltd) v Secretary of State for Business, Energy and Industrial Strategy [2022] PTSR 74 at §211). Neither the applicant for development consent or the decision maker relied on the absence of alternatives to justify the Scheme. The credibility of the alternatives advanced was in dispute. The present case is distinguishable from Langley Park School for Girls v Bromley London Borough Council [2010] 1P & CR 10). The criticism advanced about the age of the options appraisal by National Highways was addressed by the Panel in its Report.

66. The Panel approached the alternatives proposed as a matter of planning judgement, giving them brief consideration but focussing its consideration on whether a proportionate options appraisal had been carried out by the applicant for development consent, in accordance with paragraph 4.27 of the Policy Statement on National Networks. The Secretary of State agreed with the Panel's approach and conclusion. In my judgment the approach taken demonstrates no error of law.

67. Permission is granted on CPRE's alternative case, but the claim fails.