Date: 15 February 2021

AQUIND Interconnector application for a Development Consent Order for the 'AQUIND Interconnector' between Great Britain and France

(PINS reference: EN020022)

Mr. Geoffrey Carpenter & Mr. Peter Carpenter (ID: 20025030) in relation to Little Denmead Farm

Affected Party's Statement on:

Scope of Planning Act 2008 Statutory Purposes & The Development

Compulsory Acquisition of AP Land

Submitted in relation to Deadline 7c of the Examination Timetable

Blake Morgan LLP
6 New Street Square
London EC4A 3DJ
www.blakemorgan.co.uk

AP STATEMENT ON SCOPE OF STATUTORY PURPOSES & THE DEVELOPMENT

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SECTION A- EXECUTIVE SUMMARY

1. The Applicant seeks development consent for development in the field of energy. The purpose of development that can be permitted for that purpose is, under the Planning Act 2008, closed and cannot admit of any other purpose not itself within the scope of "the field of energy".

2. The Affected Party ("AP") recognises that section 104(3) and (4) applies so as to engender a presumption in favour of the grant of development consent for that particular development.

3. The AP also recognises that a purpose "for commercial telecommunications" cannot fall inside the jurisdictional scope of the PA 2008 without more. In isolation, any envisaged development can only fall outside of the PA 2008 by dint of that isolated purpose different to and unrelated to that authorised under the PA 2008 field of energy. The same consideration of the jurisdictional boundary of the PA 2008 was considered and addressed by the ExA and Secretary of State in the Swansea Bay Tidal Lagoon DCO, another energy project that was advanced with non-energy related development. There, the ExA severed the extra-statutory development from the scope of the PA 2008 purpose so as to enable it to be permitted on application to the local planning authority under the Town and Country Planning Act 1990 ("TCPA 1990").

4. The sole means by which a part of the advanced development "for commercial telecommunications" purposes could be lawfully in-jurisdiction is for the ExA and Secretary of State to impose an encompassing purpose around that development "for monitoring purposes of electricity cables". That occurred in Thorpe Marsh DCO and enabled a cable there to qualify as "associated development". With the addition of that encompassing purpose, the said advanced development cannot in aw qualify as "associated development" nor as "part of" the development nor as "a matter ancillary to" the development in the field of energy. The law remains that simple, notwithstanding numerous attempts to seek to render extra-PA 2008 development as in-jurisdiction development. But it cannot be.

5. The envisaged compulsory acquisition of the AP's land cannot be subject to the guidance presumption in favour of the development in the field of energy, let alone another purpose. Instead, by operation of sections 104(3) and (4) and (6) and (8), 120(3) and (4), and 122(2) and (3), and common law protections against land taking, there remains a presumption against acquisition by the Company here. The evidence shows that it cannot demonstrate satisfaction of the statutory conditions, including as to funding.

6. This is, therefore, an *orthodox* case to which paragraph 16 of his Planning Act 2008: CPO Guidance applies. That is, the ExA can only recommend, and the Secretary of State can only reasonably authorise a DCO for an energy project shorn of *all* proposed draft powers of temporary and permanent land acquisition.

SECTION B: Legal Framework & Scope of Statutory Purposes under Planning Act 2008

7. This Application for development consent is subject to the legal framework of the Planning Act 2008 ("PA 2008") and not to that of the Town and Country Planning Act 1990 ("TCPA 1990"). Guidance formulated for the purposes of the latter is not formulated for the purposes of the former, and vice versa. See e.g the Planning Act 2008: Guidance related to procedures for the compulsory acquisition of land (September 2013), in particular paragraphs 1-3.

8. The statutory framework of the PA 2008 provides for the grant of development consent and also of the authorisation of powers by which to compulsorily acquire the land of third parties against their will. Not every application for development consent will engage the taking of third party land. Therefore, the statutory framework accommodates applications that do not engage compulsory acquisition processes and those that may. This Application is an application that engages those acquisition processes.

9. Where compulsory acquisition processes are engaged, the ExA and Secretary of State will recall that in the *Prest* case the Court of Appeal held: (Emphasis added)

> *In the sphere of compulsory land acquisition, the onus of showing that a CPO has been properly confirmed rests squarely on the acquiring authority and if he seeks to support his own decision, on the Secretary of State. The taking of a person's land against his will is a serious invasion of his proprietary rights. The use of statutory authority for the destruction of those rights requires to be most carefully scrutinised. The courts must be vigilant to see to it that that authority is not abused. It must not be used unless it is clear that the Secretary of State has allowed those rights to be violated by a decision based upon the right legal principles, adequate evidence and proper consideration of the factor which sways his mind into confirmation of the order sought. (The Court of Appeal, in Prest, applied by the Supreme Court in the Sainsbury's case).*

10. The Affected Party ("AP") reminds the ExA and Secretary of State that the "onus" of justifying the use of compulsory purchase powers lies exclusively on Aquind Limited itself and the AP does not have to do anything nor prove anything to protect the taking of its land by Aquind Limited against the will of the AP.

11. The ExA and Secretary of State will recall that the *guidance* presumption in favour of the grant of a development consent for "the development" cannot result to oust or subvert the *statutory* requirements in section 122 of the PA 2008. As in *Sainsbury's*, at paragraph 9: (Emphasis added)

> *Compulsory acquisition by public authorities for public purposes has always been in this country entirely a creature of statute: Rugby Joint Water Board v Shaw-Fox [1973] AC 202 , 214. The courts have been astute to impose a strict construction on statutes expropriating private property, and to ensure that rights of compulsory acquisition granted for a specified purpose may not be used for a different or collateral purpose …*

12. The lawful approach to statutory policy was also set out in *Padfield v Minister for Agriculture* [1968] AC 997 at 1032G to 1033A:

> *… it is the Minister's duty not to act so as to frustrate the policy and objects of the Act, and if it were to appear from all the circumstances of the case that that has been the effect of the Minister's refusal, then it appears to me that the court must be entitled to act…*
>
> *[T]here is ample authority for going behind the words which confer the power to the general scope and objects of the Act in order to find what was intended….*

… [A] discretion so limited that it must not be used to frustrate the object of the Act which conferred it…

13. The scope of the "purposes" for which section 122 may be used for under the PA 2008 is confined by section 14(1) and 35 to specified stated "fields". In particular, an NSIP: (Emphasis added)

> *Means a project which consists of any of the following - …*
> *a) the construction or extension of a generating station …*

14. Section 14(1) is expressly subject (alone) to (2) to (5). The scope of the power by order under (3) to "add a new type of project to subsection (1)" is expressly confined by (5)(a) to "a project of the new type is a project for the carrying out of works in one or more of the fields specified in subsection (6)". Subsection (6) specifies "fields" (a) to (e) where (a) is the field of "energy". Section 14(1) and (6) do not describes the categories of NSIPs not fields as "including". Therefore, it remains self-evident that the categories of project type are confined by statute by the scope of (6), here (a). And the fields themselves are closed categories. Only a project that "consists" of "the construction or extension of a generating station" within the "field" of "energy" can satisfy the *purpose* of the PA 2008 here so as to qualify as an NSIP.

15. Further, the scope of section 35 of the PA 2008 is also *confined* as follows. Its scope proceeds from the phrase under (1) "development for which development consent is required". That latter phrase derives from section 31 that states: "consent under this Act ("development consent") is required for development to the extent that the development *is or forms part of a nationally significant infrastructure project*". The phrase "*nationally significant infrastructure project*" is itself defined by section 14(1). Therefore, the scope of the power of the Secretary of State under section 35(1) is expressly limited also by the scope of section 14(1). It follows, by self-evident recognition of the closed categories of "field" referred to above, that the Secretary of State has no statutory power to make a direction under section 35 other than for "development" within a statutory field of section 14(6), here, (a). See section 35(2)(a)(i) "only if … in the field of energy". The sole saving is section 35(2)(a)(ii) which *expressly* specifies "a business of commercial project … of a prescribed description". The use by Parliament of the express term "commercial" results to mean that there can be no room to *imply* "commercial" as a purpose into a direction under section 35(2)(a)(i). If Parliament had intended a "project" in the field of energy under 35(2)(a)(i) to be "commercial", then it could have said so by inclusion of "commercial" in (i) but it did not and limited the presence of that term to 35(2)(a)(ii). Parliament itself *confined* the scope of "commercial project" to those exclusively within those of a "prescribed description".

16. In *Secretary of State for Education v Tameside* [1977] AC 1014, the House of Lords held at 1065A: (Emphasis added)

> *… in reaching his decision unfavourable to the council he had directed himself properly in law and had in consequence taken into consideration the matters which upon the true construction of the Act he ought to have considered and excluded from his consideration matters that were irrelevant to what he had to consider … d[T]he question for the court is, did the Secretary of State ask himself the right question and take reasonable steps to acquaint himself with the relevant information to enable him to answer it correctly?*

17. In this Application, "development" here "consisting of" envisaged development within the land *of the AP* envisaged to be taken against its will and comprised of:

a) fibre optic material *devoid of function* related to the field of energy (and envisaged as being preferred to be included inside of copper tube within a wider cable also containing adjacent separate fibre optic material but which such separate material *would have* a function exclusively of and 'for monitoring of the electricity cable purposes and intra-convertor station communication purposes' so as to be a function related to the "field of energy");

b) a Telecommunications Building exclusively related to (a) and itself *devoid of function* related to the field of energy;

c) an area of parking and access road related to (b) and itself *devoid of function* related to the field of energy;

d) any engineering land formation and drainage works related to (a) – (c) and itself *devoid of function* related to the field of energy; and

e) any fencing envisaged to relate to (a) to (d) (in particular outside of the footprint of the convertor station building Rochdale Envelope inside of which the building that is within the "field of energy" may be constructed) and itself *devoid of function* related to the field of energy;

can only be "development" <u>for</u> a purpose – "<u>for</u> commercial telecommunications" - <u>outside</u> of the "field <u>of</u> <u>energy</u>". That purpose – "for commercial telecommunications" – is evidently a "different or collateral purpose" to those specified in sections 14(6)(a) and 35(2)(a)(i) ("field of energy"). However, since 2011, it has been trite and expressed law that compulsory acquisition powers cannot be used for "collateral or different purpose". See paragraph 9 of the *Sainsbury's* case, citing the far older *Rugby* case.

18. The Secretary of State's Section 35 Direction in this Application is consistent the foregoing statutory framework and the lawful scope of the section 35 power available to him. It is self-evident that the stated "elements" <u>of</u> the proposed Development in his Direction, as lawfully understood by reference to the Applicant's Request for a Direction statement, properly qualify <u>within</u> the scope of section 35(2)(a)(i) and 14(6) <u>because</u> they relate to the purpose of "the field of energy". By contrast, in the absence of a lawful wider purpose encompassing the particular purpose - "for commercial telecommunications" - in itself, the purpose "for commercial telecommunications" can only fall <u>outside</u> of the scope of section 14(6) and 35(2)(a)(i) and cannot be <u>within</u> the scope of the PA 2008.

19. This analysis is supported by the trite law on compulsory acquisition set out in *Sainsbury's*: (Emphasis added)

> *10. In Prest v Secretary of State for Wales (1982) 81 LGR 193, 198 Lord Denning M[aster of the] R[olls] said:*
>
> > *I regard it as a principle of our constitutional law that <u>no</u> citizen is to be deprived of his land by any public authority against his will, <u>unless</u> it is <u>expressly</u> authorised by Parliament and the public interest decisively so demands …"*

20. Parliament has not "expressly" authorised in the PA 2008 the taking of land other than for development inside of the field of (here) "energy".

21. Without more, it remains the AP's position that the inclusion of a *freestanding* purpose for any part of the Application development "for commercial telecommunications" can only be outside of the scope of the Act. The AP recognises that the ExA understands this simple legal position and that the Secretary of State, in due course, also does.

22. Indeed, recognising as he did the "intention" of the Applicant company to propose "commercial telecommunications", and having regard to the Secretary of State's PA 2008 decision in the Thorpe Marsh gas pipeline DCO, it is consistent with the PA 2008 statutory regime to have left for *evaluation* by his ExA as to whether or not certain intended telecommunications cables may or may not qualify as "associated development". In the Thorpe Marsh DCO, and *consistent* with the foregoing analysis of the AP, the purpose of the cables along the gas pipeline were not "for" the freestanding purpose of "commercial telecommunications" but that purpose "for commercial telecommunications" was expressly wholly encompassed by a wider purpose that did in law relate to the NSIP purpose, being "for monitoring" purposes of the electricity cables. It is also for this reason that the AP has provided its Table of Interconnector Projects that show the consistent use of the term "for" in order to ensure that the *purpose* (the function) of the particular development element remains within the jurisdiction of the relevant field, here, the field of energy. Thus, it is understandable, and sets no different precedent in the Application DCO circumstances, for the Thorpe Marsh DCO to have included a reference to "for commercial telecommunications" because that particular purpose was in that DCO wholly encompassed within an encapsulating wider purpose "for monitoring" of the gas pipeline (i.e. development within the "field of energy"). Rather, the Thorpe Marsh DCO supports the AP's position on the lawful scope of development and its purpose and is against the Applicant's case for is DCO here.

23. Further, and however, the evaluation left by the Secretary of State to his ExA is also subject to law, in particular as expressed in Sainsbury's that: "*The courts have been astute to impose a strict construction on statutes expropriating private property, and to ensure that rights of compulsory acquisition granted for a specified purpose may not be used for a different or collateral purpose*". The ExA evaluation is also subject to the terms of section 120 and 122 of the PA 2008. See below.

Section C- Section 120 of the Planning Act 2008

24. Section 120 of the PA includes:

> *3) An order granting development consent may make provision relating to, or to matters ancillary to, the development for which consent is granted.*

25. By section 120(4), the "provisions" include those in Schedule 5, Part 1, paragraph 1: "The acquisition of land, compulsorily or by agreement". Therefore, the exercise of discretion ("may") in 120(3) includes "provisions" that include "the acquisition of land, compulsorily or by agreement".

26. The exercise of discretion under section 120(3) and (4) ("may"), bears on the envisaged compulsory acquisition of land of the AP (and by logical extension, *all* other land within the Order limits not owned by Aquind Limited and that that limited company aspires to compulsorily acquire for the project in the field of energy), through the operation of "provisions" that expressly include acquisition provisions.

27. As such, the section 120(3) discretion also remains subject to the common law protections referred to in *Sainsbury's*: (Emphasis added)

> *11. … 40. Private property rights, although subject to compulsory acquisition by statute, have long been hedged about by the common law with protections. These protections are not absolute but take the form of interpretative approaches where statutes are said to affect such rights."*
>
> *"42. The attribution by Blackstone, of caution to the legislature in exercising its power over private property, is reflected in what has been called a presumption, in the interpretation of statutes, against an intention to interfere with vested property rights …*
>
> *"43. The terminology of 'presumption' is linked to that of 'legislative intention'. As a practical matter it means that, where a statute is capable of more than one construction, that construction will be chosen which interferes least with private property rights."*

28. In this Application, the result of the exercise of discretions ("may") by the Secretary of State (having regard to the recommendation of the ExA) under sections 120(3) and (4) to include a "provision" in the form of any compulsory purchase powers would be to "affect" "private property rights" of the AP in the freehold of their land. Therefore, the *evaluation* by the ExA (and the Secretary of State) is required to be made subject to the *common law* "presumption … against" interference of the AP's private property rights as a result of the exercise of those discretions. As a practical matter, the construction "will be chosen" (i.e. must be chosen), "which interferes least with private property rights".

29. Thus, the "construction" of sections 14(6), 35(2)(a)(i) and 120(3) and (4) in the acquisition context results to exclude the inclusion in any "provision" relating to the AP's affected land of an isolated purpose "for commercial telecommunications" of any part the development envisaged to be situated on the land of the AP against their will.

30. There are, therefore, two *practical* outcomes by which a lawful exercise of sections 120(3) and (4) discretions can be ensured:

    a) To delete from Article 2(1) of the draft DCO any reference to the *isolated purpose* "for commercial telecommunications" of any development envisaged to be *within* the scope of the draft DCO. If that is not

deleted, the AP's position remains that the *inclusion* of the isolated purpose "for commercial telecommunications" would be *outside of the scope of legal jurisdiction* of the Secretary of State under sections 14(6), 35(2)(a)(i), and 120(3) and (4) of the PA 2008 in circumstances where the limited company applicant seeks to rely on a "different or collateral purpose" to seek to justify compulsory acquisition "provisions" relating to the taking AP's private property through section 122; or

b) To lawfully wholly encapsulate by additional express terms within Article 2(1) any reference to the (currently) freestanding, isolated, and extra-statutory purpose "for commercial telecommunications" of any development envisaged to be within the scope of the draft DCO, to ensure that the result of such encapsulating purpose wholly encompasses "for commercial telecommunications" exclusively within a wider and in-jurisdiction purpose relating to the "field of energy", for example, being a wider stated purpose of such development being "for electricity cable monitoring and intra-electricity converter station purposes". This practical approach would also ensure satisfaction of section 157 of the PA 2008 by which the *purpose* of the fibre optic cable would be that for which it was designed, being a purpose "for monitoring purposes" and not "for commercial telecommunications" purposes.

SECTION D - OfCom Direction & Different or Collateral Purpose under the Communications Act 2003

31. The AP recognises that a basis for the promotion by the Applicant limited company of future use of its choice to include additional (but non-functionally related to the "field of energy") fibre optic material in cables is to ensure future satisfaction of the terms of the section 106 direction by OfCom. See **Appendix H**, hereto. The terms of that direction state:

> ***9.*** *Ofcom hereby directs, in accordance with section 106 of the Act, as follows—*
> *(a) the Code shall apply to the Applicant for the purposes of the provision by the Applicant of part of an electronic communications network, namely, the Applicant's electronic communications network excluding the UK Aquind Interconnector Fibre, as defined in this direction; and (b) that application of the Code shall have effect throughout England. …*
> ***Interpretation***
> ***11.*** *In this Direction—*
> *(a) "**Act**" means the Communications Act 2003;*
> *(b) "**Applicant**" means Aquind Limited, whose registered company number is 06681477;*
> *(c) "**Code**" means the electronic communications code set out in Schedule 3A to the Communications Act 2003;*
> *(d) "**Ofcom**" means the Office of Communications.*
> *(e) "**UK Aquind Interconnector Fibre** " means the part of the Applicant's electronic communications network in England, which is deployed in the Applicant's marine and underground electric power transmission link that runs between the south of England and Normandy in France, and is subject to a Direction issued on 30 July 2018, by the Secretary of State for Business, Energy and Industrial Strategy, pursuant to section 35 of the planning Act 2008.*

32. The consequence of engagement of that OfCom subsisting direction, in future *upon a grant of a DCO* by the Secretary of State for "a project in the field of energy" but that included a "part" of the development not within the field of energy, would be to result in that isolated "part" (of the development not encapsulated within a wider purpose of "for monitoring of electricity cables …" referred to above) in that then future part being able in that future point to then qualify as a "telecommunications network".

33. In direct consequence of that direction then being satisfied, the EC Code would be engaged so as to preclude the availability other than of statutory compensation based on the "no scheme" world, as opposed to the "scheme" world, for the evaluation of required compensation for the logically prior *consideration, testing, and* justification of the inclusion of compulsory purchase "provisions" under sections 120(3) and (4) of the PA 2008. Therefore, the AP's position remains that inclusion of an isolated purpose "for commercial telecommunications" that could apply to any "part" of the development would qualify as a "different or collateral purpose" that the Supreme Court has held to be unlawful where private property rights would be affected (as here). This is because, without encapsulation within a wider purpose relating to the "field of energy" (for example, "for monitoring purposes …" as set out above), the grant of a DCO that includes such an isolated freestanding purpose ("for commercial telecommunications") could result in satisfying the different purpose of the Communications Act 2003 and section 106 thereof (see the OfCom Direction) and the *collateral* purpose in this PA 2008 of deliberate suppression by AQ of, and purported avoidance at this time of, consideration of lawful land acquisition value of the affected land of the AP by reference to the scheme world. That approach by the Applicant limited company is reflected in paragraph 5.6 of its Funding Statement

in support in the PA 2008 sphere of its use of compulsory purchase powers (which excludes any consideration of market value ("scheme world") evaluation in relation to "requisite funds" (SEE PARA 9) for the taking of the AP's affected land.

34. It is difficult to see how the above approach of the limited company can be described otherwise than as a "different" purpose to that of the "field of energy" (being ultimately for a purpose under a different statutory regime relating to telecommunications and not to the field of energy under the PA 2008), nor as not being a "collateral purpose", by it being a purpose of the Applicant purporting to sidestep lawful consideration on the facts available during the statutory Examination Hearing Period by the ExA and the SoS of the question of whether there is a reasonable prospect of "requisite funds" for compulsory acquisition becoming available under the PA 2008 (and during its Examination Hearing period), without regard to the 2003 Communications Act, the ECC and future theoretical engagement of the OfCom Direction (itself subject to a decision to grant a DCO that includes as an isolated purpose a part of some development "for commercial telecommunications". In this respect, the ExA will note the absence from the Funding Statement, Rev 2, paragraph 5.6 (or at all) of any reference at all to market value uplift from use of the land within the Order limits "for commercial telecommunications" purposes logically prior to the subsequent determination by the Secretary of State whether or not to grant development consent to exclude use "for commercial telecommunications" purposes of "part" of the development sought to be consented.

35. The foregoing position of the AP is reinforced by the Supreme Court's setting out of the law in Sainsbury's:

> *11. … 42. The attribution by Blackstone, of caution to the legislature in exercising its power over private property, is reflected in what has been called a presumption, in the interpretation of statutes, against an intention to interfere with vested property rights …*
>
> *43. The terminology of 'presumption' is linked to that of 'legislative intention'. As a practical matter it means that, where a statute is capable of more than one construction, that construction will be chosen which interferes least with private property rights."*

36. In that case, it was common ground that section 226(1)(a) of the TCPA 1990 was satisfied by the envisaged Raglan Street redevelopment and could only be secured through use of that CPO power and that, in turn, another site would be able to be improved, and that there was a planning obligation that related to both sites. But, the Supreme Court held that: (Emphasis added)

> *38. There is no doubt that where a body has a power of compulsory acquisition which is expressed or limited by reference to a particular purpose, then it is not legitimate for the body to seek to use the power for a different or collateral purpose … In Galloway v Mayor and Commonalty of London (1866) LR 1 HL 34 , 43, Lord Carnworth LC said that persons authorised to take the land of others "cannot be allowed to exercise the powers conferred on them for any collateral object; that is, for any purposes except those for which the legislature has invested them with extraordinary powers". In Clunies-Ross v Commonwealth of Australia (1984) 155 CLR 193, 199 the High Court of Australia said that the statutory power to acquire land for a public purpose could not be used to "advance or achieve some more remote public purpose, however laudable".*
> *39. So also the familiar rules on the judicial control of the exercise of legislative powers apply in the CPO context as elsewhere …*
> *40. Nor can it be doubted that off-site benefits may be taken into account in making a CPO…*
> *43. It is necessary to note, at the outset, the relevant legal differences between this case and the cases in which similar questions have previously arisen. The first is that there is a difference between the exercise*

of powers of compulsory acquisition and the exercise of powers to control development and grant planning permission, which is rooted in the deep-seated respect for private property reflected in the decisions cited above. The second is that both compulsory acquisition and planning control are solely creatures of statute, and that while the provisions which are relevant on this appeal are contained in one statute, the 1990 Act, the statutory provisions are different. …
72. What is the connection in the present case? The expression "cross-subsidy" has been much used by Tesco and the council. The expression bears a special meaning in this case… Here all it means is that Tesco says that (a) the council's requirements for the Royal Hospital site have the result that Tesco cannot develop it profitably; and (b) Tesco will undertake its development if it can develop the Raglan Street site. Tesco says that the consequence of (a) and (b) is that the Raglan Street site development will "cross-subsidise" the Royal Hospital site development. But the only connections between the proposed Raglan Street site and Royal Hospital site developments are that (a) Tesco says that it will develop the latter if it can develop the former; (b) it has contractually agreed to perform building works on the Royal Hospital site if it acquires the Raglan Street site. The commercial effect will be that the deficiency on the Royal Hospital site will be made up, or "cross-subsidised", by the Raglan Street site development. ***Nothing in the papers before the court suggests that this will be done by any direct subvention from the income or capital proceeds of the Raglan Street site****, but this would not in any event make a difference….*

73. The crucial question is whether that is a connection which the council is entitled to take into consideration under section 226(1)(a) or section 226(1A) . To take the latter first, Elias J was right to hold that section 226(1A) was not the crucial provision for the purposes of this case. It does not answer the prior question of what matters can be taken into consideration.

74. The power of compulsory acquisition must be capable of being exercised under section 226(1)(a) ***before*** *the limitation in section 226(1A) applies. Once it applies the local authority must think that the development will contribute to the achievement of the well-being benefits. Section 226(1A) does not permit the council to take into account a commitment by the developer of a site part of which was to be the subject of a CPO to secure the development, redevelopment or improvement of another (unconnected) site and so achieve further well-being benefits for the area…. The Raglan Street site development will not, in any legally relevant sense, contribute to the achievement of the well-being benefits flowing from the Royal Hospital site development.*

75. But that matters little since the crucial question is whether the council was entitled to take it into account under section 226(1)(a) . There can be no doubt that, even if there is no express reference in section 226(1)(a) to the local authority taking into account material considerations (by contrast with section 70(2)), only relevant matters may be taken into account…. Sullivan LJ was wrong to conclude that it followed that a cross-subsidy from a CPO site to another site was a material consideration. The fact that a conditional agreement for sale linked the obligation to carry out works on the Royal Hospital site was not a relevant connection…

77. First, as a matter of principle it is impossible to put into separate compartments the exercise by the council of its power of compulsory purchase of Sainsbury's property, and the exercise of the council's power to dispose of Sainsbury's property to Tesco, and then to conclude that the Royal Hospital site development may not be taken into account for the former, but can be taken into account for the latter. It is wrong for the council to deprive Sainsbury's of its property because the council will ***derive*** *from disposal of that property* ***benefits*** *wholly unconnected with the* ***acquisition*** *of the property.*

78. Second, although it is plain that the power of compulsory purchase may be used to assemble a site for a preferred developer, there is nothing in Standard Commercial Property Securities Ltd v Glasgow City Council (No 2) 2007 SC (HL) 33 which supports the proposition that unconnected benefits may be taken into account by a local authority in deciding whether property should be compulsorily acquired for the purpose of disposing of it to a preferred developer.

37. As Lord Walker held:

82. Where a local authority is considering exercising powers of compulsory purchase for planning purposes, planning considerations must be central to the decision-making process. The public purse is to

be protected against improvidence, but the local authority should not be exercising its powers in order to make a commercial profit…

38. Whereas a direction under section 35(2)(b) admits of a "business or commercial" project that entails a commercial profit, a direction under section 35(2)(a) does not so admit. But here, the Applicant limited company would derive two commercial benefits from inclusion of the phrase "for commercial telecommunications":

    a) That phrase could/would result in future to satisfy the ECC and so avoid paying "requisite [market value for] funds" in relation to the taking of the AP's land against its will;

    b) That phrase would in itself result in the entitlement under the dDCO (if authorised) in favour of the Applicant limited company to commercial profits of 5% of profits, being pure profits not supplying any form of cross-subsidy to the project in the field of energy that is the subject of the Application, and notwithstanding that the company asserts the benefits of the leases it may grant would be a "significant" public benefit but without any *means* by which that private benefit could be connected or related to the public in any real sense at all. Indeed, the company has no land interest and so cannot at this time execute a development consent planning obligation by which to apply any of the 5% to any area (or related situation) within or abutting the Order limits;

    c) The scope of the authorised purposes under section 14(6) of the PA 2008 are confined to specified "fields", here, of "energy". The Applicant limited company should not be seeking, the ExA should not be recommending, and the Secretary of State should not be granting a DCO that includes an entitlement to generate "for commercial telecommunications" (purposes) a commercial profit, nor one of 5% over and above the financial equation relating to the provision of an energy project.

39. The AP, therefore, invites the ExA and Secretary of State to align the draft terms of the DCO so as to:

    a) Refuse to grant the dDCO as currently drawn and promoted by the limited company Applicant; or

    b) exclude from the face of the dDCO (and in due course that which may be granted for a "project in the field of energy") any reference to "for commercial telecommunications", and with consequential refining the terms of the dDCO so as to in accord with the helpful cross-references securing that effect previously advanced by the Applicant in Deadline 6;

    c) wholly encompassing the current expression of the isolated purpose ""for commercial telecommunications" within a wider encapsulating purpose, being "for monitoring of the electricity bearing cables …" so as to ensure that the cables and fibre optic material subject to a DCO are within the scope of the jurisdiction of the PA 2008 that exclusively relates to specified closed "fields" expressed in section 14(6) of the PA 2008.

SECTION E – Section 115 of the Planning Act 2008 & the scope of purpose of "Associated development"

40. As a (so-called) "precautionary" approach, the Applicant limited company continues to rely on the statutory phrase "associated development" as a means by which to seek to secure development consent for the function or use of fibre optic material (that it will choose to include alongside other fibre optic strands that would directly connect to the converter station and equipment in it so as to supply a monitoring and intra-station communications function). The analysis above concerning "different or collateral purpose" applies to the consideration of the term "associated" within the phrase "associated development".

41. For completeness, the same analysis applies to the concept of "associated development" in section 115 of the PA 2008. That section provides: (Emphasis added)

> *1) Development consent may be granted for development which is —*
> *a) development for which development consent is required, or*
> *b) associated development …*
> *2) "Associated development" means development which —*
> *a) is associated with the development within subsection (1)(a) (or any part of it), …*
> *b) … and*
> *c) is within subsection (3), (4) or (4A) …*
> *3) Development is within this subsection if it is to be carried out wholly in one or more of the following areas —*
> *a) England …*
> *b) …*
> *c) in the case of development in the field of energy, …*

42. The AP has previously provided the ordinary meaning of "associated" and noted that the meaning of that adjective is "joined in companionship, function, … concomitant; sharing in responsibility or function … but with a secondary or subordinate status". The Applicant's own evidence shows that the choice to include the presence of fibre optic material inside of the copper tube, adjacent to the functioning fibre optic cables (directly actually connected to the converter station through equipment situated in it) and functionally relating to the monitoring of electricity bearing cables and supplying an intra-converter station communications function, would result in additional fibre optic material whose theoretical future function would be wholly unrelated to the field of energy, would not relate to the function of monitoring of the electricity bearing cables nor to intra-converter station communications, and, thereby, the function of the other fibre optic material could not be joined in function with the monitoring cables, not have a shared function with such cables so as to be able to have some kind of "secondary or subordinate status".

43. That is, qualification as "associated" development flows here from shared function and not from presence of material close by to another material. See, in this respect, the Swansea Bay Tidal Lagoon DCO in which that ExA asked whether or not the development in question was "essential" to the *function* of the energy project.

44. Therefore, the AP's position remains that the fibre optic material "for commercial telecommunications" cannot come within the legal scope of "associated development" for want of shared function with other fibre optic cable that *would* have a function related to the "project in the field of energy".

Section F – Jurisdictional Compass of Planning Act 2008 Field of Energy & Swansea Tidal Lagoon DCO

45. For these reasons, the AP has suggested (helpfully) a lawful route by which the ExA might include, as at the Tidal Bay DCO, the presence in the cable of additional fibre optic material – confined to "operational development" devoid of function – that could fall within a wider encapsulating stated Article 2(1) for the purpose of "for monitoring of electricity bearing cables …" so as to enable – in due course, a party to apply for planning permission for change of use of that particular additional "operational development" from an actual non-use to a particular use "for commercial telecommunications" together with planning permission for a related Telecommunications Building (itself *enabling and supplying a function* to the said inherently passive additional cable material) and so forth. No doubt Winchester CC and Portsmouth CC could entertain such an application(s) in future, in line with the situation at Swansea Bay Tidal Lagoon DCO where similar jurisdictional matters arose.

46. If it is suggested that that route may be unavailable, it remains the AP's position that it is the Applicant limited company's choice to include additional fibre optic material not relating to a the "field of energy" within its DCO. It remains its choice to also avoid all of these problems by choosing to not include non-related fibre optic material in its scheme.

47. Contrary to paragraph 7.11 of **[REP7-075]**, the Applicant's evidence (in its Request for Exemption, Section 4 – Project Description) is that the protection for the fibre optic cable derives from being within the "same trench" as the power cables and not from the particular diameter of the overall armoured fibre optic cable *itself*. Thus, as remains accepted by the Applicant in **[REP1-127]** paragraph 5.2 of its "FOC Statement", the company can *choose* to install a cable within the armoured copper tube of *fewer* fibre optic strands per se:

> *Within the required outer diameter for the fibre optic cables, 192 glass fibres may be installed. Each fibre optic cables is required to include a sufficient amount of glass fibres for its use in connection with the primary use of the interconnector and as redundancy for this purpose in the event of individual glass fibre failures. The number of glass fibres required in connection with the primary use of the interconnector and as redundancy for this purpose is less than 192… [I]t would be possible to install a cable with fewer glass fibres (and thus less spare capacity)…*

48. By that choice to include inside of the copper tube within the cable diameter *more* fibre optic material than is related to the "field of energy" for the monitoring of electricity cables and intra-Converter Station communications, the Applicant company has engendered a different or collateral purpose. By its evidenced choice it could also choose to not include such unnecessary fibre optic material in that tube and so avoid all of the foregoing issues as well as this resulting to ensure removal from the dDCO of the phrase "for commercial telecommunications" from its dDCO. Exercise of the choice to not place unnecessary fibre material in the tube, or to wholly encapsulate the material exclusively within a wider electricity provision related purpose (and intra-Converter Station communication purpose) would also result in a legally *in-jurisdiction* project but subject to CPO and funding matters below and elsewhere covered in the AP Statement on Funding.

49. Further, and in apparent contradistinction to **[REP7-075]**, paragraph, in its **Request for Exemption, Project Description,** the Applicant has evidenced that the protection for the cable results from the *shared trench* and *not* from a requirement of the overall cable diameter itself: (Emphasis added)

> 4.3.5 Inclusion of data cable … *Installation in the same trench* as the power cables alongside them, together with separation of the two cables system, *ensures consistent protection against* fishing and anchor damage as well as natural *hazards*…

SECTION G – Convention Rights & Legitimate Aim (purpose)

50. The Human Rights Act results to incorporate the provisions of Article 8 and Article 1 of the First Protocol into domestic law. Taking of the extent of land envisaged by the limited company's proposals will result to destroy the AP's landholding as a farm, their homestead, as well as fundamentally change their ongoing business by reduction in land by reason of significant land take envisaged by the Applicant limited company.

51. The Articles each require the taking of the AP's land to serve a legitimate aim. For the reasons given above, the envisaged taking of land under the PA 2008 "for commercial telecommunications" (and not wholly encapsulated within a wider purpose "for monitoring of electricity cables and intra-converter station communications") notwithstanding that isolated freestanding aim (or purpose) cannot come within the scope of the purpose of the "field of energy" results to preclude the taking of the AP's land for a legitimate purpose. By logical extension, the same reasoning applies to other areas of the Order limits not within the ownership of the Applicant limited company "for commercial telecommunications".

SECTION H – Sections 104 & 122 of the Planning Act 2008

52. The next question is to consider the terms of section 122 of the PA 2008 and their inter-relationship with sections 120 and 104(3) and (4) in light of the *guidance* presumption and the legal protections against land acquisition by third parties.

53. By section 104(2)(a), the SoS must have regard to any NPS that has effect "in relation to the development of the description to which the application relates". For the reasons given above, the NPS cannot have effect in relation to any development relating to the purpose of "for commercial telecommunications" because that purpose falls outside of the PA 2008 and cannot come within it. See above. The NPS does have effect in relation to "the development of the description to which the application relates" – being development of a "project in the field of energy". Section 104(3) requires the SoS to decide the application in accordance with the NPS, except to the extent that subsections (4) to (8) apply. The AP has set out above its reasoning for the different purpose and the engagement of Convention Right considerations and the related Human Rights Act. These engage subsection (6).

54. Section 104(6) precludes the SoS from deciding the application in accordance with the NPS would be unlawful by virtue of any enactment. That provision appears to encompass the PA 2008 itself. Deciding the application to include development "for commercial telecommunications" would breach section 14(6) and (1).

55. Section 104(8) precludes the SoS from deciding the application in accordance with the NPS "if the [SoS] is satisfied that any condition prescribed for deciding the application otherwise … is met". In this respect, section 122 provides for "conditions". See below.

56. The Applicant limited company does not itself own any land within the Order limits and so has included "provisions" in the dDCO relating to both interfering with the land of third parties (including the AP) so as to preclude access by those parties for periods, and the taking of land against the will of third parties, (including the AP), permanently.

57. The envisaged "provisions" for acquisition derive from section 120 that provides: (Emphasis added)

> *3) An order granting development consent may make provision relating to, or to matters ancillary to, the development for which consent is granted.*
>
> *4) The provision that may be made under subsection (3) includes in particular provision for or relating to any of the matters listed in Part 1 of Schedule 5.*

58. Part 1 of Schedule 5 includes provisions relating to compulsory acquisition.

59. Whereas section 120 engenders the "provision" describing acquisition, section 122 provides for the "*Purpose* for which compulsory acquisition may be authorised" provides: (Emphasis added)

> *1) An order granting development consent may include provision authorising the compulsory acquisition of land only if the Secretary of State is satisfied that the conditions in subsections (2) and (3) are met.*
> *2) The condition is that the land —*
> *a) is required for **the** development to which the development consent relates,*
> *b) is required to facilitate … to **that** development,*

3) The condition is that there is a compelling case in the public interest for the land to be acquired compulsorily.

60. Thus, "is required" connotes a purpose as well as a practical outcome. A "desire" is a purpose. A "preference" to change a view is a purpose. Such purposes, however, could not begin to satisfy the condition of section 122(2). In addition, there must also be a demonstrably "compelling" case in the public interest.

61. In such an application as this where compulsory land taking is envisaged, whether temporarily or permanently, the discretions in sections 120(3), (4) and 122(1) are subject to the common law protections referred to above. The AP reminds the ExA and Secretary of State of the *Prest* case:

> *In the sphere of compulsory land acquisition, the onus of showing that a CPO has been properly confirmed rests squarely on the acquiring authority and if he seeks to support his own decision, on the Secretary of State. The taking of a person's land against his will is a serious invasion of his proprietary rights. The use of statutory authority for the destruction of those rights requires to be most carefully scrutinised. The courts must be vigilant to see to it that that authority is not abused. It must not be used unless it is clear that the Secretary of State has allowed those rights to be violated by a decision based upon the right legal principles, adequate evidence and proper consideration of the factor which sways his mind into confirmation of the order sought.*

62. Further, in *Tameside* [1977] AC 1016, the House of Lords held, at page 1065, that in the exercise of a discretion by the Secretary of State under a statute: (Emphasis added)

> *I must now inquire what were the facts upon which the Secretary of State expressed himself as satisfied that the council were acting or proposing to act unreasonably. … [T]he facts on which he acted must be taken from the department's letters at the relevant time…*
>
> *…[P]ut more compendiously, the question for the court is, did the Secretary of State ask himself the right question and take reasonable steps to acquaint himself with the relevant information to enable him to answer it correctly? …*

63. In this respect, section 98 of the PA 2008 requires:

1) The Examining authority is under a duty to complete the Examining authority's examination of the application by the end of the period of 6 months beginning with the day after the start day.

64. Within the 6 month period, section 92(1) and (2) requires cpo hearing to be held. There is no power to hold a further hearing outside of that period, nor to take account of actual facts not able to have been subject to consideration at such a hearing by an affected party.

65. The AP reminds the ExA and Secretary of State of the *Sainbury's* case in relation to the "interpretation" of statutes and of the "presumption":

> *11. … "40. Private property rights, although subject to compulsory acquisition by statute, have long been hedged about by the common law with protections. These protections are not absolute but take the form of interpretative approaches where statutes are said to affect such rights."*
>
> *"42. The attribution by Blackstone, of caution to the legislature in exercising its power over private property, is reflected in what has been called a presumption, in the interpretation of statutes, against an intention to interfere with vested property rights …*
>
> *"43. The terminology of 'presumption' is linked to that of 'legislative intention'. As a practical matter it means that, where a statute is capable of more than one construction, that construction will be chosen which interferes least with private property rights."*

66. As has been referred to above, the *guidance* presumption cannot subvert nor usurp the common law protections that engender a presumption "against" the taking of land of the AP against its will, temporarily or permanently. The inclusion of section 104(8) of the PA 2008 of a statutory provision disengaging the guidance presumption in favour of a prescribed "condition" is consistent with that removal of a presumption under law (not guidance). That is, the Applicant limited company cannot benefit from the *guidance* presumption in relation to the satisfaction of section 122 "conditions". Rather, the common law presumption operates to reverse that presumption against the limited company and the onus remains on that entity to prove its case. The AP need do nothing.

67. Further, as referred to above, a "preference" or "desire" cannot begin to equate to satisfying the statutory test of "is required". Section 122 uses the term "is required" and not "is preferred" or "is a laudable choice" or "is laudably desired".

68. Furthermore, the Application is formulated on the basis of a *Rochdale* envelope approach devoid of detailed particularisation of binding details or particulars. It remains the case at Deadline 7c that the Applicant company has produced no evidence showing that it is not *possible* to secure the result advanced by the AP and as a matter of principle not detail: being restoration of its land after the event of converter station construction and situation of electricity bearing cables below its land to use for agricultural purposes. To this end:

    a) the AP has drawn up a development consent planning obligation that results to ensure period access (not for abnormal loads but) for light maintenance vehicles evidenced by the Design and Access Statement to be desiring to visit the Converter Station 3-4 times each year. The obligation operates to prevent the AP preventing access by the Applicant company as otherwise a trespasser along a defined route around the edge of the AP's land (including land within the Order limits);

    b) the Design and Access Statement and other evidence is that the Converter Station will be self-extinguishing in the event of fire and it cannot be said that fire tenders could not utilise the access referred to in (a) above. If the self-extinguishing system is considered by the Applicant to be inadequate to ensure the appropriate degree of fire safety, then a Requirement could ensure a detailed risk assessment establishes the appropriate degree of fire safety engineering to protect systems;

    c) the Design and Access Statement evidences the use of electrified fencing to preclude trespasser access to the footprint of the Converter Station and it is difficult to see how a trespasser might dig up deeply buried cables under the AP's land once so situated and appropriately protected. If these protections are considered by the Applicant to be inadequate to ensure the appropriate degree of safety from incursion within the Rochdale envelope for the Station, then a Requirement could ensure a detailed risk assessment establishes the correct height and features of an anti-intruder perimeter for that building. See also Vanguard's approach to security at paragraph 64 of its Design and Access Statement (using also the Rochdale Envelope approach in its recent approved DCO at

https://infrastructure.planninginspectorate.gov.uk/wp-content/ipc/uploads/projects/EN010079/EN010079-001928-8.03%20Design%20and%20Access%20Statement.pdf): (Emphasis added)

> *64. There will be no requirement for public access to the onshore project station or National Grid substation extension, and appropriate security measures will be installed to prevent unauthorised access to the onshore electrical transmission works once operational.*

69. The AP addresses below other matters envisaged to be situated on its land.

SECTION I – AP Responses to Applicant Limited Company' Appendix A of [REP7-075]

70. In this Application, the section 122(2) "the development" is the extent of the development qualifying as "development" *per se* and that is within the "field of energy". "Development" is defined by section 32 of the PA 2008 by reference to section 55 of the TCPA 1990. That latter provision expressly excludes under section 55(2)(e) "agricultural use" from the scope of "development". Therefore, the reinstatement of the AP's land for such agricultural use following construction works would need a Requirement or Protective Provision to secure reinstate its prior situation thereafter. It is also not understood that planting of vegetation is development as the AP's land is not in a conservation area. Therefore, the soft landscape proposals appear unable to fall within the scope of section 122(2)(a) or (b) as "development" because they cannot in law qualify as "development", requiring development consent or otherwise.

71. By its **[REP7-075]**, Appendix A, the Applicant company asserts justification for its taking of the AP's land *permanently,* after the event of construction of the Converter Station and below ground situation of the electricity bearing cables and functionally related fibre optic monitoring and intra-Station communications, for – ultimately – a haul road that might or might not be necessary to use over the lifetime of the energy related development, for a differently appearing landscape with some hedges and a few trees, and a fence around the whole.

72. With respect to the Applicant limited company, its asserted justification is no justification and fails to come close to satisfying the terms of section 122. To remind the company, the terms of section 122 state:

    2) The condition is that the land —

    a) is required for the development to which the development consent relates,

    b) is required to facilitate … to that development,

    3) …

73. Subsection (1) provides a discretion that entitles the SoS to include a "provision" in the dDCO "only if" he is satisfied that (2) and (3) are (both) satisfied.

74. Further, the *Sainsbury's* "presumption" operates *against* the Applicant company, and the "onus" exclusively lies on that company. The AP need do nor prove anything to resist the taking of its land against its will.

Additional Fibre Optic Material "for commercial telecommunications" & not "for" electricity generation purposes

75. In respect of the additional fibre optic material, it is the company's *own case in evidence* that additional fibre material over and above that evidenced to relate to the "field of energy" is "desirable" and that it is "possible" to use smaller diameter cable to exclude the presence of such additional fibre optic material. See **[REP1-027]**, paragraph 5.2, FOC Statement referred to above.

76. A "desirable" choice for additional capacity, accepted by the company as "spare" (and so. By its own definition, not necessary), "however laudable", cannot begin to satisfy the term "land is required <u>for</u> the development to which the development consent <u>relates</u>" (section 122(2)(a)), because it cannot relate to the development and cannot be "required" "for" the development *to which the development consent* relates.

77. The outcome of that situation, as previously articulated, also removes a "requirement" Telecommunications Buildings and related parking and fencing that relate "solely" to the provision of additional cables "for commercial telecommunications". See above and **[REP1-027]**, paragraph 5.4: "The Telecommunications Buildings are **<u>required solely</u>** <u>in connection with the commercial use</u>". None of that "development" can on the evidence of the company "relate" to the essential energy development of the Converter Station and electricity bearing cables. No amount of company rhetoric or arm waving can engender evidence of functional relationship and where the company's evidence in fact evidences the absence of any functional relationship (and no funding relationship either).

Access

78. The Applicant company shows by its **[REP7-075]**, Appendix A Responses to the AP's position, that it has either misunderstood the AP's case or seeks to obviscates obdurately the relevant position of the AP in respect of "access" so as to seek to bamboozle the ExA notwithstanding the legal requirement on the ExA and Secretary of State to most carefully scrutinize the situation where CPO is envisaged. See *Sainsbury's*.

79. To reiterate, the AP accepts that, *in order to construct* the Converter Station, there is a requirement for a *temporary* construction compound and a temporary haul road such that, for a limited period, *part* of the AP's land will come to be used *for* construction purposes and that a Converter Station would be *permanently* situated on a part of its land to the North of the farmstead and electricity bearing cables would be situated beneath its land. The AP also understands that the company has chosen a route for construction vehicles, including abnormal loads, that will enable passage by all construction-related vehicles to and from the Rochdale Envelope that would contain the Converter Station (including as to vertical clearance).

80. However, upon completion of the Station construction works, and of the burying of the electricity cables below ground level, there will then be no need at all for a *temporary* construction compound nor for a *temporary* haul road for any kind of construction vehicle. However, a construction compound surface and haul road will then remain to be addressed. It would cost the company money to remove the compound and haul road and restore the land to its agricultural use and it appears cheaper for it to seek to acquire the land 'permanently' to

avoid applying funds to its restoration to agricultural land. But a future commercial advantage (or company impecuniosity) cannot be a legally relevant justification for *permanent* land take from the AP. See *Sainsbury's* case. Article 30(4) also results to preclude reinstatement of the AP's land also from its destruction for agricultural use by temporary construction compound use. The frameworks advanced by the company also include no obligation on it to restore the AP's land to enable its agricultural use. There remains, absent the ExA and Secretary of State imposing the same, no Requirement nor Protective Provision (save as advanced by the AP) by which to reinstate the AP's land after construction operations have concluded. Absent that, the PA has provided PP's that seek to ensure reinstatement of their land following conclusion of construction operations.

81. An example of company obduracy is paragraph 2.4 of **[REP7-075]**. The AP recognises the evidenced proposal of the company for periodic *annual regular* maintenance access to and from the Station by what the Design and Access Statement describes as "light vehicles". In the context of the Rochdale Envelope approach relied on by the Applicant company, there is no evidence to suggest that the AP's own farm-related vehicles and machinery *currently*, nor the company's envisaged "light vehicles", cannot and *could not* use, and continue to use, the existing Eastern perimeter access way at, within, and around the Eastern boundary of the AP's for such vehicles, nor is there any evidence to suggest that vertical clearance along that existing accessway *for* "light vehicles" (and the AP's existing farm vehicles) has any issues at all with vertical clearance below the pylons. Indeed, the Western Extension of the Substation EIA location plan shows in some detail that accessway going beneath the overhead pylon cables and then following their line South Westwards *along* their overhead line. To the extent, theoretically, it is sought by the company's paragraph that the *envisaged* land rise *beyond* that pylon line may create issues for "light vehicles" that have already traversed below the overhead pylon lines seeking to access the Station footprint, then these would reflect the envisaged situation farther west (but for higher vehicles) and a Requirement can ensure that the land profile of a route from the South Eastern corner of the Station to the accessway is appropriately profiled to ensure any (if any which is denied) adequate clearance for "light vehicles".

82. The Applicant company has evidenced in its Design and Access Statement that transformers will be situated within the Rochdale Envelope and that, sensibly, a spare transformer would be available already on site in the event of an emergency. Transformers appear to be quite heavy and are *asserted* by the company to (now) weigh "300 tonnes" each. There is no evidence to show that in order for that spare transformer to be brought into service a vehicle is immediately required to move it from its envisaged location as a spare a few metres further along the line of transformers to a nearby location farther along the same line of operational transformers.

83. However, notwithstanding envisaged operational obligations on the company to maintain supply, the presence of a spare transformer on site adjacent to a row of other transformers, and

84. In the Vanguard DCO, "up to eight" transformers were considered necessary to the "project substation":

46. …. The importing of large Abnormal Indivisible Loads (AILs) may lead to delays on the highway network. The construction of the onshore project substation is likely to require the delivery of up to eight supergrid transformers to the onshore project substation.

See page 22 of https://infrastructure.planninginspectorate.gov.uk/wp-content/ipc/uploads/projects/EN010079/EN010079-001512-Chapter%2024%20Traffic%20and%20Transport%20Norfolk%20Vanguard%20ES.pdf

85. The Vanguard project Design and Access Statement included: (Emphasis added)

38. The onshore project substation converts the HVDC electrical power from the Norfolk Vanguard export cables to HVAC which is the appropriate voltage required for connection to the National Grid system. Filtering, switchgear and associated protection and control equipment is also located at the onshore project substation to comply with the technical requirements of the National Grid and allow safe operation of the Norfolk Vanguard connection…

39. The onshore project substation will consist of up to two converter stations, each having a power transfer capability of between 800MW and 1000MW. As such, the onshore project substation will consist of: • 2x converter buildings - housing DC filter equipment and power electronics to convert HVDC to HVAC power for connection to National Grid; • 2x outdoor HVAC compounds – each compound will contain one or more 400kV transformers, plus HVAC filters, busbars and cable sealing ends; • Control building – housing SCADA and protection equipment; • Access roads – for operation and maintenance access to equipment; and • Associated connections between equipment via overhead busbar and cabling, including buried earthing system.

40. The largest equipment within the onshore project substation will be the converter halls which will not exceed a height of 19m, all other equipment will not exceed a height of 13m. The tallest structure at the onshore project substation site will be the lightning protection masts at a height of 25m. The total land requirement for the onshore project substation to the perimeter fence is 250m x 300m.

41. Permanent palisade fencing will be installed around the onshore project substation compound up to a height of 2.4m.

42. The final appearance of the onshore project substation is subject to detailed design post consent. For the purposes of the DAS, indicative maximum parameters (as set out in Table 5.4 and DCO Requirement 16) have been provided with reference to a Rochdale Envelope approach in terms of realistic worst case design parameters…

43. In addition to the main converter halls, the onshore project substation compound would contain electrical equipment including power transformers, switchgear, harmonic filters, cables, lightning protection masts, control buildings, communications masts, backup generators, access, fencing and other associated equipment, structures or buildings. The onshore project substation would have a compact layout, with the majority of equipment contained in agricultural style buildings…

49. During operation, the onshore project substation would not be manned, however access would be required periodically for routine maintenance activities, estimated at an average of one visit per week …

56. … The existing Necton National Grid substation would require an extension to accommodate the Norfolk Vanguard connection points. The National Grid substation extension would need to accommodate circuit breakers and associated busbar structures which allow connection onto the existing 400kV overhead line for generation to be transmitted onto the wider National Grid system.

86. The Design and Access Statement for the Vanguard convertor station includes no reference at all to a spare transformer, let alone a potential need for a spare or a further spare nor a risk of these being necessary. The reasonable inference from the "design" statement of an experienced energy provider is that there is no real risk of transformer failure during operational lifetime.

87. Unlike Vanguard, the Applicant company has not itself constructed a converter station before and the AP recognises the company has different experience to Vanguard. Had there been a credible risk of transformer failure by Vanguard, then there can be no doubt that, in its experience, Vanguard would have referred to such a risk. Vanguard's EIA on Traffic included no reference to emergency failure either: (Emphasis added)

> ***24.7.8 Potential Impacts during Operation*** *…*
>
> *363. Along the onshore cable route, periodic access to installed link boxes and test pits may be required for inspection, (estimated to be annually). These test pits will be accessible from ground level and will be located close to existing access routes where possible. Access to the cable easement will be required to conduct emergency repairs if necessary.*
>
> *364. The onshore project substation will not be manned; however, access will be required periodically for routine maintenance activities, estimated at an average of one visit per week for each of the onshore project substation and National Grid substation extension.*
>
> *365. Considering the activities listed above, no significant traffic impacts are anticipated during the operational phase.*

88. Further, the EIA Regulations require consideration of major accidents and disasters.

89. The Applicant company addressed this consideration in **[APP-363]**, its Environmental Statement, Volume 3, Appendix 4.1, Screening for Major Accidents and Disasters.

90. *Infrastructure Planning (Environmental Impact Assessment) Regulations 2017* include in Regulation 4(2):

> *2) Where this regulation applies, the Secretary of State or relevant authority (as the case may be) must not (in the case of the Secretary of State) make an order granting development consent or (in the case of the relevant authority) grant subsequent consent unless an EIA has been carried out in respect of that application.*

91. Regulation 3() includes that:

> *"environmental information" means the environmental statement (or in the case of a subsequent application, the updated environmental statement), including any further information and any other information, any representations made by any body required by these Regulations to be invited to make representations and any representations duly made by any other person about the environmental effects of the development[and of any associated development.*

92. Regulation 14 requires that an application for an order granting development consent for EIA development must be accompanied by an environmental statement:

> *2) An environmental statement is a statement which includes at least — …*
>
> *c) a description of any features of the proposed development, or measures envisaged in order to avoid, prevent or reduce and, if possible, offset likely significant adverse effects on the environment; …*
>
> *f) any additional information specified in Schedule 4 relevant to the specific characteristics of the particular development or type of development and to the environmental features likely to be significantly affected.*
>
> *3) The environmental statement referred to in paragraph (1) must — …*
>
> *b) include the information reasonably required for reaching a reasoned conclusion on the significant effects of the development on the environment, taking into account current knowledge and methods of assessment; and*

c) be prepared, taking into account the results of any relevant UK environmental assessment, which is reasonably available to the applicant with a view to avoiding duplication of assessment.

93. Schedule 4 includes, in paragraph 5: (Emphasis added)

A description of the likely significant effects of the development on the environment resulting from, inter alia —

a) the construction and existence of the development…

c) the risks to human health, cultural heritage or the environment (for example due to accidents or disasters); …

g) the technologies and the substances used.

The description of the likely significant effects on the factors specified in regulation 5(2) should cover the direct effects and any indirect, secondary, cumulative, transboundary, short-term, medium-term and long-term, permanent and temporary, positive and negative effects of the development….

94. Paragraph 8 provides: (Emphasis added)

A description of the expected significant adverse effects of the development on the environment deriving from the vulnerability of the development to risks of major accidents and/or disasters which are relevant to the project concerned. Relevant information available and obtained through risk assessments pursuant to retained EU law such as any law that implemented Directive 2012/18/EU of the European Parliament and of the Council or Council Directive 2009/71/Euratom or UK environmental assessments may be used for this purpose provided that the requirements of any law that implemented this Directive are met. Where appropriate, this description should include measures envisaged to prevent or mitigate the significant adverse effects of such events on the environment and details of the preparedness for and proposed response to such emergencies.

95. In particular, paragraph 8 requires a description (not of "likely") but of "*expected*" "significant *adverse effects of the development on the environment deriving from the vulnerability of the development to risks*". This is a lower threshold than other descriptions.

96. The company states in its Major Disaster Chapter: (Emphasis added)

1.1.1.1 This Appendix addresses the potential vulnerability of the Proposed Development to major accidents and/or disasters as required by the Infrastructure Planning (Environmental Impact Assessment) Regulations 2017 (HM Government, 2017).

1.1.1.2 Schedule 4, Paragraph 8 of the ('Environmental Impact Assessment') EIA Regulations requires an Environmental Statement ('ES') to include the following: "A description of the expected significant adverse effects of the development on the environment deriving from the vulnerability of the development to risks of major accidents and/or disasters which are relevant to the project concerned. Relevant information available and obtained through risk assessments pursuant to EU legislation such as Directive 2012/18/EU of the European Parliament and of the Council"…"or Council Directive 2009/71/Euratom"…"or UK environmental assessments may be used for this purpose provided that the requirements of this Directive are met. Where appropriate, this description should include measures envisaged to prevent or mitigate the significant adverse effects of such events on the environment and details of the preparedness for and proposed response to such emergencies."

1.1.1.3 A screening exercise has been undertaken to determine the types of major accidents and/or disasters relevant to the Proposed Development under the Regulations, these include: □ vulnerability of the development to major accidents and disasters, which may then give rise to significant adverse effects on the environment; and □ major accidents and disasters arising from development which may give rise to significant adverse effects on the environment.

1.1.1.4 Where there is potential for significant environmental effects, and the major accident or disaster is screened in, these are assessed in the relevant individual chapters presented in this ES. …

97. Table 1 includes types of "relevant" disasters. These include: "electricity failure". The Applicant company evaluated:

> *Screen out – loss of functionality to proposed development only, no impact on EIA topics/ receptors. Whilst the probability of a region or UK wide electricity failure is low, experts consider that the risk of such a high consequence event needs to be taken very seriously (The Centre for the Study of Existential Risk, Cambridge University and The International Centre for Infrastructure Futures, 2017). Therefore, the Proposed Development should be designed in accordance with current best practice in terms of the risk of electricity failure.*

98. There is no evidence in Table 1 that *transformer failure* "may" or are a "potential" failure risk, or are "vulnerable" or are "relevant" risks that may engender an "expected" (not a "likely") significant effect.

99. Table 1 does not include any evidence of transformer failure as a relevant risk.

100. The envisaged Station layout includes a single transformer. This single provision can be properly said to: "[as] *appropriate, this description … includes measures envisaged to prevent or mitigate the significant adverse effects of such events on the environment and details of the preparedness for and proposed response to such emergencies [by providing a single transformer in the event of a transformer failure".*

101. It is not understood that the Applicant company is *now* asserting at Deadline 7 that its EIA on Major Disasters evaluation of "risk of major accidents" is asserted as to be incomplete with the result that its EIA has been recently appreciated as being not concluded and now contains gaps in the environmental information relating to its project, such that Regulation 4(2) now precludes a grant of development consent for its Converter Station on the AP's land.

102. In light of this evidence, including **[APP-363]**, the AP's position is that the theoretical speculative assertion by the Applicant company of the risk of theoretically needing a spare transformer at all, and the assertion by the company of a need to replace its spare, is, when compared the company's own EIA evaluation (to the legally correct baseline of "risk", and with regard to comparable constructions of stations (e.g. by experienced energy providers such as Vanguard which itself (unlike the company) regularly promotes energy projects that (as here) include a converter station), the assertion by the Applicant of a risk of transformer failure is an incredible (as in, a not credible nor a legally relevant) assertion by that company. If it were otherwise, then the Applicant would be evidencing to the ExA and Secretary of State that it's own EIA has a gap in it resulting from the Major Disasters' consideration being devoid of relevant evaluation of the "risk" of transformer failure with the result that Regulation 4(2) now precludes a grant of development consent.

103. The AP's position remains that the *permanent* provision for a haul road remains not shown by the Applicant to be "required" under section 122(2) of the PA 2008 due to transformer failure. There is no real nor credible risk of the same. Conversely, if (theoretically and contrary to the AP's position and the EA Chapter on Major Disasters), the ExA considers that in light of Aquind's Deadline 7 Submissions, Appendix A, that that Chapter now has a gap in the evidence in that Chapter, then Regulation 4(2) bites.

104. Rather, as paragraph 2.8.1 of **[REP7-075]** confirms, any risk of failure remains accommodated by the "industry norm to have a single transformer available at site for in [sic] the very unlikely event of a failure". To use the language of the EIA Regulations, paragraph 8:

> *[There are no] expected significant adverse effects of the development on the environment deriving from the vulnerability of the development to risks of major accidents and/or disasters [from transformer failure] which are relevant to the project concerned [in relation to the Converter Station].*

105. It follows that there is no legal nor rational basis for *permanent* presence of a haul road after conclusion of the construction works so as to enable transit through the AP's land of a transformer.

106. There is no justification, save for convenience, to remove a failed transformer, particularly because it is convenient to retain a spare on the Station site. Convenience is not a requirement but a choice. Section 122(2) cannot be satisfied in relation to retaining permanently the haul road over the land of the AP against its will.

107. This analysis also removes any requirement for permanent drainage associated with the permanent presence of the haul roadway.

108. See also Appendix G hereto for further AP Haul Road Access addressing the Applicant's generalized fears and concerns about further transformer failure.

Security

109. The AP's position remains as previously set out. The Applicant company's concern at paragraph 3.3 of **[REP7-075]** engenders (if credible) a Requirement that its envisaged security perimeter be evaluated for risk of intrusion and appropriate fencing erected within the (helpful) height of the Rochdale Envelope.

110. The experienced energy provider, Vanguard, also secured a DCO including for a converter station and the ExA and Secretary of State there accepted that adherence to National Grid standards was adequate for perimeter fencing. In particular, there is no evidence that the generalized fear and concern of intrusion by the Applicant in this locality of the AP's land is more than theoretical and illusory. The National Grid measures are accepted by the Applicant as providing a "robust level of security". See paragraph 3.3 of **[REP7-075]**.

111. Because the Converter Station would itself be encompassed by an adequate security fence, there remains no rational requirement for any other fencing encompassing Plot 1-32 at all. Thus, that development (a structure) cannot be said to be required for the development (in the field of energy).

Which Rochdale Envelope?

112. The ExA requested consideration of how to remove the unorthodox choice of no less than two Rochdale Envelopes (plural), in essence, so as to ensure justification for compulsory acquisition was certain, clear, and not ambivalent. It is difficult to see how the choice of "which Option" will be executed will necessarily not be taken at the inception of the process. The AP's position aligns with that of the ExA, being to ensure total

removal of the Option not relied on at the earliest possible point and so as to ensure that it does not subsequently remain as an envelope in which to erected further development at a future date.

113. The AP's position remains, in relation to its land, that if one of the two Options is not deleted at the earliest point legally possible, then the case for acquisition of its land remains as not yet undetermined by the Applicant itself. This means that the evidence does not conclusively show that the Applicant "knows what it wants" (as it were) and such ambivalence undermines (at this time) support for condition 2 of section 122, a compelling case for acquisition on the facts, as well as condition 1: which land is required for the Station?

Rochdale Envelope Parameters

114. The AP recognises that the Applicant has confirmed that all structures (including all lightning masts) will be contained within the Option B Rochdale Envelope parameters of that volume coupled with 4m high "narrow, slender" lightning mast volumes above (but for no other purpose). See section 5 of **[REP7-075]**.

115. Contrary to paragraph 5.12 of **[REP7-075]**, there remains no *objective* justification for permanent acquisition of the AP's land above the Converter Station Rochdale Envelope Volume. Acquisition of air rights above that volume remains unlawful and not shown to be "required", objectively, for any purpose by the Applicant.

Drainage

116. The AP's position remains that, relying on the Rochdale Envelope approach, and with regard to the plans and indicative size of an attenuation pond, it has not been demonstrated that in principle there is no available space along the Western flank of the Options B Envelopes in which to situate a drainage attenuation pond. It is no answer to rely on proposed landscaping to prevent provision of a pond because landscaping too is only illustrative at this stage. The Applicant's proposed flexibility cuts both ways.

Commercial Telecommunications

117. Contrary to section 7 of **[REP7-075]**, the AP has set out its position on this matter above. In summary, the AP responds as follows but does not specifically address every paragraph or point here because they have been addressed above, elsewhere, or herein.

118. Contrary to paragraphs 7.1 and 7.2 of **[REP7-075]**, for the reasons set out by the AP in Deadline 6, and herein above as to "purpose" and the scope of the purpose of the "field of energy" in sections 14(1) and (6)(a) of the PA 2008, the "additional fibres", Telecommunications Buildings, and related parking cannot, in law, qualify as "part" of the development for which development consent is required *because* the isolated and discrete function or purpose "for commercial telecommunications" is outside of the scope of the PA 2008. The AP recognises that a similar issue arose about the jurisdictional line (between the PA 2008 and the TCPA 1990) in Swansea Bay Tidal Lagoon DCO that resulted in the ExA there severing elements that could not qualify as being "for" energy generation purposes within the PA 2008, and instead making some of the elements exclusively "operational development" so that retrofitting could be avoided on a future application for planning permission for the element severed by the ExA from the DCO then in front of them. Therefore, the debates in this DCO about a jurisdictional line is not unorthodox but requires "most careful scrutiny" here in particular because it concerns the taking of the AP's land both temporarily and permanently against its will. Only by imposing a purpose relating to the "field of energy" so as to wholly encapsulate the "additional fibres" could those fibres otherwise be brought within the scope of the jurisdiction of the PA 2008. Otherwise, a function or purpose or use could result on application for planning permission to PCC and WCC for a change of use of the additional fibres from a nil use to a use "for commercial telecommunications". A grant of planning permission remains discretionary.

119. Contrary to paragraph 7.3 of **[REP7-075]**, certain of the fibre optic strands that relate directly to the Convertor Station by reason of a connection to equipment in it so as to provide intra-Converter Station communications, and where a functional connection is supplied by their monitoring of nearby electricity bearing cables, are "integral" to the development in the "field of energy". However, the additional fibres (the "spare" 180 odd fibre material strands chosen to be also included inside of the copper tube inside of the armour cable), cannot be functionally related to the development in the field of energy. Indeed, the Applicant's evidence simply reinforces that the "additional cables" (and in turn the Telecommunications Buildings and related parking also cannot be intra-PA 2008 as they too serve that freestanding isolated purpose).

120. Contrary to paragraph 7.4 of **[REP7-075]**, section 35 of the PA 2008 cannot empower the SoS to write a blank cheque on the scope of "associated development" because his power is confined to specified fields (here, "energy") and his direction related to certain "elements" of the "proposed Development" that did not (and could not) include "commercial telecommunications".

121. Contrary to paragraph 7.6 of **[REP7-075]**, the AP has done what it can on the basis of the Applicant's dispersed, opaque, incomplete and sometimes internally inconsistent information to ascertain the objective justification for the taking of its land against its will by the limited company. The AP was seeking to understand

the objective basis for the outer diameter of a cable that paragraph 5.2 of the FOC Statement at **[REP1-127]** left ambiguous and unclear. The AP *now* understands from the Applicant's Request for Exemption, Section 4, that situating fibre optic cables relating to the electricity cables and the Converter Station within the "same trench" as the "power cables and alongside them" "ensures consistent protection against … natural hazards". See page 12 of the Request for Exemption.

122. The AP notes the helpful confirmation by the Applicant in paragraph 7.9 of **[REP7-075]** that cables will be situated below the plough zone and that, it further follows, this can be secured by a Requirement.

123. Contrary to the obduracy of paragraph 7.10 of **[REP7-075]**, the AP was summarising the provisions of section 122.

124. Contrary to the obduracy of paragraph 7.11 of **[REP7-075]**, the AP was not substituting "desire" as a test under section 122. It is misleading arm waving of the Applicant limited company seeking to acquire the AP's land to assert the same. The terms of section 122(2) are clear. The Applicant's evidence in relation to the Applicant's own attempt to satisfy the test of "required" (using shorthand for section 122(2)) is that the Applicant "desires" to make use of additional (but unnecessary) fibre optic material. See **[REP3-014]** where it's evidence states: (Emphasis added)

> *"The obtainment of [Telecommunications] code powers occurred in 2020. The project and its philosophy has been pursued since circa 2014. The Proposed Development is an Interconnector, and the Applicant is desiring of utilising the Proposed Development to its full design capacity and benefit."*

125. Contrary to paragraph 7.12 of **[REP7-075]**, the fibre optic material and buildings and parking related to that are "solely" required in relation to the envisaged function or purpose "for commercial telecommunications", cannot qualify as "associated development" by reason of their disparate function that cannot be a shared function "for" the field of energy for the reasons given above.

126. For the detailed reasons given above, the fibre optic material and buildings and related parking cannot qualify as "land" "required *for* the development to which *the development consent* relates" because the development to which development consent "relates" (its purpose) is a development in the field of energy (whereas the fibre optic material and its related buildings would have a discrete function that cannot and does not relate to the development to which the development consent relates inside of the PA 2008).

127. Contrary to paragraph 7.13 of **[REP7-075]**, the Applicant set up a *non-sequitor* not advanced by the AP which the Applicant then seeks to counter. The term "ancillary" appears in section 120(3) and it is the Applicant's (various cases) that the additional fibre optic material not functionally related to the electricity bearing cables or to the intra-Converter Station communications somehow qualifies within the scope of "ancillary". The test in section 120(3) is:

> *An order granting development consent may make provision relating to, or to matters ancillary to, the development for which consent is granted.*

128. The ordinary meaning of "ancillary" is: "subservient; subordinate; auxiliary; providing support; especially providing *essential* support or services to a central function". See **Appendix F** hereto.

129. The feature of the term “ancillary” is some kind of relationship between the theoretical candidate “ancillary” matter and “the development for which consent is granted. i.e “*ancillary to, the development for which consent is granted*”. There is, however, no evidence of and evidently no functional or other kind of support or relationship from the “commercial telecommunications” “to” the essential electricity function of “the development for which consent is granted” so as to enable lawful satisfaction of section 120(3) test. The Applicant’s evidence shows there to be no relationship at all between the additional development “for commercial telecommunications” and development related “solely” that isolated purpose” on the one hand and on the other “the development for which consent is granted”. There also can be no such relationship because there is a jurisdictional bar on the same in respect of a use “for commercial telecommunications”. “The development for which consent is granted” proceeds from that which can be granted under the PA 2008. The scope of the PA 2008 and section 120(3) “ancillary…” presupposes the scope of sections 31 and 14(1) and (6) that confine the scope of consent may be granted for to development of closed lists of function that here concern only the field of “energy”. The evidence does not show here, and the scope of the PA 2008 precludes, any ancillary function of “commercial telecommunications” to this (or any) development in the field of energy. The scope of section 14(1) and (6)(a) precludes qualification within the Act of a purpose “for commercial telecommunications”.

130. Therefore, contrary to paragraph 7.13 of **[REP7-075]**, whereas section 120(3) can in law evidently apply to the fibre optic material that is functionally related to the electricity cables of the development (for which consent is envisaged to be granted) by reason of the fibres function for monitoring electricity bearing cables and functionally supplying intra-Converter Station communications capability for development in the “field of energy”, by contrast, in law also, the “additional” fibres optic cables referred to in paragraph 5.2 of **[REP1-127]** cannot qualify within the legal scope of “ancillary” in section 120(3). Such inclusion would be outside of the jurisdictional scope of section 120(3).

131. (Unlike the position at Thorpe Marsh where commercial telecommunications cables were encapsulated by a wholly encompassing support function that itself related to the development for which consent is granted, here) nor is there any evidence either that the latter fibres in any way support the electricity bearing cables or the Converter Station in any way. Only the imposition of an encapsulating purpose ensuring the additional fibres exclusively supported the energy development could result to bring the additional fibres (and Telecommunications Buildings and related parking) within the jurisdiction of section 120(3). No amount of Applicant arm waving and obduracy can change the statutory position.

132. Contrary to paragraph 7.14 of **[REP7-075]**, the AP was summarising the inter-relationship of the additional fibre optic material and the Telecommunications Buildings and related parking. To cite the Applicant limited company’s evidence in **[REP1-127]** and in the context of its “desire” above: (Emphasis added)

[REP3-014]

"The obtainment of [Telecommunications] code powers occurred in 2020. The project and its philosophy has been pursued since circa 2014. The Proposed Development is an Interconnector, and the Applicant is desiring of utilising the Proposed Development to its full design capacity and benefit."

[REP1-127]

5. SPARE CAPACITY

5.1 As there will be spare capacity within the fibre optic cables, so as to realise the full benefit of the Proposed Development and to ensure it operates effectively to its design capacity the intention is for the spare capacity to be used for commercial telecommunications purposes…

5.2 To withstand the various physical impacts which the fibre optic cables are likely to be subject to associated with transportation, installation and operation in the marine and underground environment and protect the glass fibres located within it, the fibre optic cables are required to be of an adequate outer diameter. Within the required outer diameter for the fibre optic cables, 192 glass fibres may be installed. Each fibre optic cables is required to include a sufficient amount of glass fibres for its use in connection with the primary use of the interconnector and as redundancy for this purpose in the event of individual glass fibre failures. The number of glass fibres required in connection with the primary use of the interconnector and as redundancy for this purpose is less than 192, though this is a multiple of fibres that is commonly produced by manufacturers of such cables. Noting that the outer diameter must be of sufficient size to withstand the impacts to which it is likely to be subject, and the use of standard size cable components for this purpose, the size of the cable itself would not change if the number of glass fibres within it was reduced from 192 to a lesser multiple. Therefore, whilst it would be possible to install a cable with fewer glass fibres (and thus less spare capacity), this would not reduce the impacts to any degree. Accordingly, there is no benefit to such an approach being taken, and it is considered this would limit the overall benefits to be provided by the Proposed Development…

5.4 The Telecommunications Buildings are required solely in connection with the commercial use …

133. Contrary to paragraph 7.15 of **[REP7-075]**, a "desire", "however laudable" cannot satisfy the section 122(2) test of "requirement". There is no real connection or relationship between the "desire" and the public interest at all. See Sainsbury's. There is a strong desire to avoid evaluating "requisite funds" for compulsory acquisition by seeking to trigger the OfCom section 106 direction in due course. But that commercial advantage is not relevant to establishing during the Examination Hearing Period the relevant facts upon which the ExA and the SoS must direct themselves in ascertaining whether or not to grant a DCO including with acquisition provisions if during that period the evidence satisfies section 122 conditions.

134. Contrary to paragraph 7.16 of **[REP7-075]**, there is Guidance on "Associated Development" but not on "matters ancillary to". The former is also a defined term. In each case, however, recourse falls to be made to the ordinary meaning of the terms "associated" and "ancillary" so as to enable appreciation of their legal scope. Section 115 concerns "associated development" and not "matters ancillary to".

135. The "common purpose" to which the AP refers is a mere convenient *summary* or *shorthand* of the terms be found in:

a) The ordinary meaning of "associated" previously referred to by the AP in its position submissions:

"joined in … function …; concomitant… Sharing in responsibility, function …etc but with a secondary or subordinate status";

i) "jointed in function" or "shared in function" can be *summarised* as having a "common function" (as a necessary start point);

ii) "associate" presupposes such "sharing in … function" because the "secondary function" (such as "for commercial telecommunications") proceeds from the "but with a secondary function" that itself presupposes a logically prior *shared* function. Here, the fibre optic material strands that can have a function of monitoring the electricity bearing cables and of intra-Converter Station communications are in themselves "part of" the electricity development of which the development consists but the absence of such function from other fibre material results to preclude qualification of other material within the scope of sections 14(1) and (6)(a) ("field of energy");

b) The ordinary meaning of "ancillary" in Appendix A hereto also presupposes a relationship ("matters ancillary to the development …") and the ordinary meaning of "ancillary" includes the "providing essential support or services to a central function". Such essential support also connotes common function or purpose. Here, the central function is "the field of energy". A purpose or function "for commercial telecommunications" cannot, in law, provide "essential support for" the central function of "energy generation" without more. The "more" is supplied by a function attaching to certain fibre optic cables "for monitoring purposes" and "for intra-Converter Station communications". The "more" cannot be supplied here otherwise than by imposition of a wholly encapsulating purpose encompassing the "additional fibres" (and in turn the Telecommunications Buildings "solely required for" the "commercial use") such as a purpose "for monitoring" of the electricity bearing cables. That was how in Thorpe Marsh gas pipeline DCO the SoS was lawfully able to include "commercial telecommunications" cables *because* they were encompassed by a wider encapsulating purpose. The difficulty for the Applicant in this DCO is that encapsulating purpose would simultaneously preclude satisfaction of the section 106 OfCOM direction (and engagement of the value suppressing provisions of the Code).

136. Contrary to paragraph 7.17 of **[REP7-075]**, the AP now understands from that paragraph that the Applicant is not contending to apply its gloss – "primary" – to the phrase section 120(3) "matters ancillary to". Further, the AP's position is that it cannot be, and is not, a 'direct relationship' between the fibres that functionally relate to the electricity bearing cables by reason of monitoring and intra-Converter Station communications on the one hand, and on the other "additional fibres" devoid of any actual function but which are envisaged to be "for commercial telecommunications" (being an extra statutory purpose) and in relation to which the Telecommunications Buildings and related parking are "solely required" (i.e. not otherwise required "for electricity generation" purposes).

Landscaping

137. Section 122(2)(b) of the PA 2008 is relied on by the Applicant for permanent acquisition of land that would then become a construction compound and temporary haul road.

138. Section 122 would supply a purpose for a provision that stems from section 120(3).

139. Section 120(3) and (4) provide for provisions. Part 1 and Schedule 5 include *matters*: paragraph 13: "Cutting down, uprooting, topping or lopping trees or shrubs or cutting back their roots". The specified matters

do not expressly extend to “landscaping” as an express provision for which acquisition can be expressly authorised.

140. Sections 122(2) and (3) state:

> *2) the condition is that the land —*
>
> *a) is required for the development to which the development consent relates,*
>
> *b) is required to facilitate … that development …*
>
> *3) The condition is that there is a compelling case in the public interest for the land to be acquired compulsorily.*

141. The SoS’s Planning Act 2008: Guidance on CPO Powers, includes, at paragraphs 11 and 12: (Emphasis added)

> *11. Section 122 of the Planning Act sets out two conditions which must be met to the satisfaction of the Secretary of State before compulsory acquisition can be authorised. The first of these is related to the purpose for which compulsory acquisition is sought. These three purposes are set out in section 122(2): …*
>
> *(ii) An example might be the acquisition of land for the purposes of landscaping the project. In such a case the Secretary of State will need to be satisfied that the development could only be landscaped to a satisfactory standard if the land in question were to be compulsorily acquired, and that the land to be taken is no more than is reasonably necessary for that purpose, and that is proportionate…*
>
> *16. There may be circumstances where the Secretary of State could reasonably justify granting development consent for a project, but decide against including in an order the provisions authorising the compulsory acquisition of the land. For example, this could arise where the Secretary of State is not persuaded that all of the land which the applicant wishes to acquire compulsorily has been shown to be necessary for the purposes of the scheme. Alternatively, the Secretary of State may consider that the scheme itself should be modified in a way that affects the requirement for land which would otherwise be subject to compulsory acquisition. Such scenarios could lead to a decision to remove all or some of the proposed compulsory acquisition provisions from a development consent order.*

142. It cannot be rationally concluded that “the development could only be landscaped” by acquisition of the AP’s land (other than the footprint of the Converter Station). See paragraph 11(ii). Plot 1-32 could be reinstated by a Requirement (or Protective Provision) to agricultural use and the perimeter made subject to a management plan to ensure ongoing maintenance of the perimeter by the Applicant.

143. Taking land of the AP in order to compulsorily impose on them a difference in vegetative view cannot be regarded as lawfully proportionate. It is not. It would be irrational to authorise compulsory acquisition of their land to compel a change of view of the AP over their land. This seems too obvious to even have to state. However, it is evident that this Application raises a number of novel approaches to a DCO application.

144. The Applicant company relies, in Section 8 of **[REP7-075]**, paragraph 8.3 on the advice of the local authority. The Applicant cites no statutory requirement as the foundation for its preference to landscape the AP’s land following its use for construction purposes. Nor does the Applicant assert or contend that it *could not* restore the AP’s land to use for agricultural purposes.

145. It remains important to note that all of the land envisaged to be landscaped, including Stoneacre Copse, is the private property of the AP, and that the Copse has a real and special meaning for the AP as the actual

last resting place of their father. In addition, Stoneacre Copse is at Deadline 7c not inside of the Order Limits and was expressly rejected from being so included by the Applicant a few years ago. See the evidence of Henry Brice.

146. Whilst laudable, there is no reason why a Requirement to landscape the taken land could not require the Applicant to reinstate the AP's land for agricultural purposes and to restore its soft landscape edges in line with an approved management plan. There remains no need at all for the Applicant to itself have permanent land ownership in order to execute long term management objective around the edges of the AP's (then restored) farmland.

APPENDIX A

Padfield v Minister of Agriculture **[1968] AC 997 at 1032G to 1033A**

Constabulary or to the general public interest. I am therefore of the opinion that they must be made available in this litigation.

Their Lordships accordingly voted that the order of the District Registrar be restored,

> " that the defendant do produce for inspection at his solicitor's office to the plaintiff and his advisers on reasonable notice the five documents. . . ."

Solicitors: *Field, Roscoe & Co. for Berkson & Berkson, Birkenhead; Markbys for Wayman-Hayles, Chester; Treasury Solicitor.*

F. C.

[HOUSE OF LORDS]

PADFIELD AND OTHERS . . . . . APPELLANTS

AND

MINISTER OF AGRICULTURE, FISHERIES AND FOOD AND OTHERS . . RESPONDENTS

Agriculture—Agricultural marketing—Milk marketing scheme—Complaint to Minister—Duty of Minister—Reference to committee of investigation—Agricultural Marketing Act, 1958 (6 & 7 *Eliz.* 2, *c.* 47), *s.* 19 (3).

Crown—Minister, determination by—Whether subject to review by courts—Marketing scheme—Complaint—Reference to committee of investigation—Discretion of Minister—Limitation—Public interest—Agricultural Marketing Act, 1958, *s.* 19.

The Agricultural Marketing Act, 1958, contained (inter alia) provisions relating to the milk marketing scheme. By section 19:

> "(3) A committee of investigation shall— . . . (*b*) be charged with the duty, if the Minister in any case so directs, of considering, and reporting to the Minister on . . . any . . . complaint made to the Minister as to the operation of any scheme which, in the opinion of the Minister, could not be considered by a consumers' committee. . . . (6) If a committee of investigation report to the Minister that any provision of a scheme or any act or omission of a board administering a scheme is contrary to the interests of consumers of the regulated products, or is contrary to the interests of any persons affected by the scheme and is not in the public

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* *Present*: LORD REID, LORD MORRIS OF BORTH-Y-GEST, LORD HODSON, LORD PEARCE AND LORD UPJOHN.

C. A.
1966
Padfield
v.
Minister of Agriculture, Fisheries and Food

interest, the Minister, if he thinks fit to do so after considering the report—(*a*) may by order make such amendments in the scheme as he considers necessary or expedient for the purpose of rectifying the matter; (*b*) may by order revoke the scheme; (*c*) in the event of the matter being one which it is within the power of the board to rectify, may by order direct the board to take such steps to rectify the matter as may be specified in the order. . . ."

Under the scheme, producers had to sell their milk to the Milk Marketing Board, which fixed the different prices paid for it in each of the eleven regions into which England and Wales were divided. The differentials reflected the varying costs of transporting the milk from the producers to the consumers, but they had been fixed several years ago, since when transport costs had altered. The South-Eastern Region producers contended that the differential between it and the Far-Western Region should be altered in a way which would incidentally have affected other regions. Since the constitution of the board, which consisted largely of members elected by the individual regions, made it impossible for the South-Eastern producers to obtain a majority for their proposals, they asked the Minister of Agriculture, Fisheries and Food to appoint a committee of investigation and when he refused applied to the court for an order of mandamus.

Held, (Lord Morris of Borth-y-Gest dissenting) that the order should be made, directing the Minister to consider the complaint according to law.

Parliament conferred a discretion on the Minister so that it could be used to promote the policy and objects of the Act which were to be determined by the construction of the Act; this was a matter of law for the court. Though there might be reasons which would justify the Minister in refusing to refer a complaint, his discretion was not unlimited and, if it appeared that the effect of his refusal to appoint a committee of investigation was to frustrate the policy of the Act, the court was entitled to interfere.

Julius v. *Bishop of Oxford* (1880) 5 App.Cas. 214, H.L.(E.) considered.

Decision of the Court of Appeal, post, p. 1003E; [1968] 2 W.L.R. 924, C.A. reversed.

APPEAL from the Court of Appeal (Diplock and Russell L.JJ., Lord Denning M.R. dissenting).

The Minister of Agriculture, Fisheries and Food and the Milk Marketing Board (the present respondents) appealed from an order of the Divisional Court of the Queen's Bench Division dated February 3, 1966, whereby the court made an order of mandamus ordering the Minister to consider an application to him by George Padfield, Geoffrey Loveys Brock and Henry Steven (the present appellants), to refer a complaint by them to the committee of

investigation under the Agricultural Marketing Act, 1958, "according to law and upon relevant considerations to the exclusion of irrelevant considerations." The Court of Appeal having allowed the appeal,[1] the present appellants appealed to the House of Lords.

Since 1933 the Milk Marketing Scheme (Approval) Order, 1933 (S.R. & O. 1933, No. 789), as amended by the Milk Marketing Scheme (Amendment) Orders, 1936, 1937, 1939, 1950 and 1955, had been in operation in England and Wales. Thereunder producers were bound to sell their milk to the Milk Marketing Board, which periodically fixed the prices to be paid to the producers. England and Wales was divided into eleven regions. All the producers in each region received the same price but the price varied from region to region. One reason for this was that the cost to the board of transporting milk from the producers' farms to the centres of consumption was greater in some regions than in others. The lowest price was paid to producers in the Far-Western Region the highest to those in the South-Eastern Region. In the other nine regions the prices varied between the two. The present differentials were fixed several years ago when transport costs were much lower. For about ten years the South-Eastern producers had been unsuccessfully urging the board to increase the differentials. The differential between the South-East and the Far-West was 1·19d. per gallon. South-Eastern producers contended that it should be 3½d. per gallon. Since the total sum available to the board to pay for milk bought in all regions was fixed each year, giving effect to the contention of the South-Eastern producers would mean that they and perhaps the producers in some other regions would get higher prices, but producers in the Far-West and several other regions would get less.

The board is composed of 12 members from the regions (two from the North-Western Region and one from each of the others), three members elected by all the producers and three appointed by the Minister. The board acts by a majority of its members. The experience of the past 10 years was said to show that the South-Eastern producers could not hope to get a majority on the board for their proposals. With a view to getting the Minister of Agriculture, Fisheries and Food to take action under section 19 of the Agricultural Marketing Act, 1958, the present appellants, who were office bearers of the South-Eastern regional committee, met officials of the Ministry on April 30, 1967.

On May 1, 1964, John Henry Kirk, an Under Secretary at the Ministry, wrote to the appellant Padfield the following letter:

[1] Post, p. 1003E; [1968] 2 W.L.R. 924.

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"My colleague Mr. Jones-Parry and I had the opportunity of discussing with you a day or two ago a matter which you first raised with the Ministry at the end of January, namely, what means the Ministry could suggest for investigating and remedying the grievance felt by your committee concerning the regional price of milk in the south-east.

"2. We explained that, as it seemed to us, the only procedure available would be for a group of producers in the south-east to formulate a complaint within the terms of section 19 of the Agricultural Marketing Act 1958, and request the Minister to refer this to the committee of investigation. We made it clear, however, that the Minister is not bound so to refer any complaint and has discretion to decide whether to do so.

"3. In considering how to exercise his discretion the Minister would, amongst other things, address his mind to the possibility that if a complaint were so referred and the committee were to uphold it, he in turn would be expected to make a statutory order to give effect to the committee's recommendations. It is this consideration, rather than the formal eligibility of the complaint as a subject for investigation, that the Minister would have in mind in determining whether your particular complaint is a suitable one for reference to the committee. We were unable to hold out any prospect that the Minister would be prepared to regard it as suitable.

"4. The reasons which led us to this conclusion were explained to you as follows: (*a*) The guarantee given to milk producers under the Agriculture Acts is a guarantee given to the board on behalf of all producers. The Minister owes no duty to producers in any particular region, and this is a principle that would be seriously called into question by the making of an Order concerned with a regional price; (*b*) Such action would also bring into question the status of the Milk Marketing Scheme as an instrument for the self-government of the industry and such doubt would also, by extension, affect the other Marketing Schemes as well; and (*c*) It is by no means clear that the Minister could make an Order pertaining to the price of milk in the south-east without determining at least one of the major factors governing prices in the other regions, and he would therefore be assuming an inappropriate degree of responsibility for determining the structure of regional prices throughout England and Wales.

"5. I wish to point out that the statement of these reasons is not intended to imply an assessment of the merits of your complaint considered as an issue of equity among regions."

On June 18, 1964, the solicitors of the Milk Marketing Board wrote to the solicitors of the present appellants the following letter:

"While your clients contend that they ought to have a bigger proportion of the available money, there are other producers elsewhere who contend that your clients ought to

have a smaller proportion. The proportions actually determined by the board are the result of collective decisions of the board and do not necessarily represent the view of any one producer or of the producers in any one county or region. . . . The board have the duty of determining prices and they have done so to the best of their ability. They consider that as they have acted within their powers and in good faith, an arbitrator appointed under paragraph 93 of the scheme has no power to substitute his view (if it differs from the board's) of what those prices should be. . . . Your clients cannot receive more unless some others receive less, and what is really involved is the whole determination of prices throughout the country. Paragraph 93 of the scheme is not intended to transfer the board's duty of determining prices to an arbitrator at the instance of a particular group of producers."

A letter dated January 4, 1965, from the solicitors of the present appellants to the Minister of Agriculture, Fisheries and Food said:

"3. The complaint is of certain acts and/or omissions in prescribing (under paragraph 64 of the Scheme) the terms on which and the price at which milk shall be sold to the board, in that the board should, but do not, take fully into account variations as between producers in the costs of bringing their milk to a liquid market whether such costs are incurred or not.

"4. These acts and/or omissions of the board (*a*) are contrary to the proper and reasonable interests of the producers in the South-Eastern region and of other producers near large liquid markets, all of whom are persons affected by the scheme, and (*b*) are not in the public interest.

"5. At present producers' net prices show a range of 1·19d. per gallon between regions while the true marketing costs in 1961/2 had a range of 3·37d. per gallon between regions, the South-Eastern region having the lowest costs. Under the present arrangements the range of net prices is fixed and does not vary from year to year, whereas the trend is for the marketing costs to widen: the complainants calculate that the 1963/4 range was 3·66d. per gallon, the costs of the South-Eastern region still being the lowest. As between individual producers the range of true marketing costs is even greater.

"6. *As to* (*a*) *in paragraph* 4 *above.*

"It is contrary to the reasonable and proper interests of the producers referred to in paragraph 4 above that (in addition to the other contributions they properly make under the Scheme) they should make a contribution to the marketing costs of reaching the liquid markets from the more distant parts of the country which are properly attributable to producers in those more distant parts and which should be borne by such producers.

"7. *As to* (*b*) *in paragraph* 4 *above.*

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"(i) The cross-subsidy set out above has caused or contributed to and will cause or contribute to an unreasonable alteration in the balance of production, reducing growth in the nearer areas and increasing it in the more distant. This has tended and will tend to increase the total marketing costs to the public detriment. (ii) It is not in the public interest to continue a system of pricing which unduly favours one set of producers as against others."

In reply the private secretary to the Minister wrote on March 23, 1965, the following letter:

"The Minister has asked me to reply to your letter of January 4 in which you made a complaint on behalf of Messrs. G. Padfield, G. L. Brock and H. Steven, against the Milk Marketing Board, and requested that the complaint should be referred to the committee of investigation. The Minister's main duty in considering this complaint has been to decide its suitability for investigation by means of a particular procedure. He has come to the conclusion that it would not be suitable. The complaint is of course one that raises wide issues going beyond the immediate concern of your clients, which is presumably the prices they themselves receive. It would also affect the interests of other regions and involve the regional price structure as a whole. In any event the Minister considers that the issue is of a kind which properly falls to be resolved through the arrangements available to producers and the board within the framework of the scheme itself. Accordingly he has instructed me to inform you that he is unable to accede to your clients' request that this complaint be referred to the committee of investigation under section 19 of the Act."

In reply to a further letter the following letter from the Ministry dated May 3, 1965, and signed by A. L. Irving stated:

"I am directed to reply to your letter of April 9 addressed to the Minister's private secretary. You will appreciate that under the Agricultural Marketing Act, 1958, the Minister has unfettered discretion to decide whether or not to refer a particular complaint to the committee of investigation. In reaching his decision he has had in mind the normal democratic machinery of the Milk Marketing Scheme, in which all registered producers participate and which governs the operations of the board."

On June 18, 1965, the present appellants applied by motion for the leave of a Divisional Court of the Queen's Bench Division to apply for an order of mandamus commanding the Minister (1) to refer the complaint to the committee of investigation or (2) to deal effectively with the complaint on relevant considerations only to

the exclusion of irrelevant considerations. In an affirmation dated January 19, 1966, the Minister stated as follows:

> "3. In considering the applicants' application I read among other papers the letter signed by Mr. J. H. Kirk and dated May 1, 1964, . . .
>
> "4. Before reaching my decision not to refer the applicants' complaint to the committee of investigation I considered all the matters put before me on behalf of the applicants in support of their application.
>
> "5. I came to my decision for the reasons indicated in the letters dated March 23, 1965, and May 3, 1965, . . . namely, that I considered that the issue raised by the applicants' complaint was one which in all the circumstances should be dealt with by the board rather than the committee of investigation."

The Minister and the board appealed from the order of the Divisional Court of February 3, 1966.

Sir Dingle Foot, Q.C., S.-G. and *Peter Langdon-Davies* for the Minister of Agriculture, Fisheries and Food.

David Kemp for the Milk Marketing Board.

D. A. Grant Q.C. and *Alistair Dawson* for the applicants, George Padfield, Geoffrey Loweys Brock and Henry Steven.

July 27, 1966. The following judgments were read.

LORD DENNING M.R. We are here concerned with the marketing of milk. It is regulated by the Milk Marketing Scheme and administered by the Milk Marketing Board. The dairy farmers of England and Wales sell their milk to the Milk Marketing Board. The lorries of the board pick up the churns of milk at the farm gate and carry it to depots. The price is fixed by the board for milk delivered at the farm gate. In order to fix the price, England and Wales are divided into eleven regions. The price varies from region to region. But all the farmers in any one region are paid the same price per gallon at the farm gate.

The dairy farmers in the South-Eastern region are paid a higher price for their milk than the dairy farmers in the Far-Western region. The reason is because they are much nearer to the great population of London. If they were free of control, they would be selling their milk to London at a price delivered in London, and would have to bear their own costs of transport. The costs of the Sussex farmers in transporting their milk to the London market would be much less than the costs of the Cornish farmers,

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and their net receipts would be correspondingly higher. The board recognise this by paying a "differential" to the South-Eastern farmers to compensate them.

The South-Eastern farmers, nearly 5,000 of them, complain that the existing "differential" is too low. It was fixed long ago by the Minister during the war under the regulations then in force. It was then fixed at 1·19d. per gallon, and has remained the same ever since. The value of money has altered and costs have increased. The actual difference in costs is 3½d. per gallon. The South-Eastern farmers claim that the differential should be increased to recognise this increase. They pray in aid the report of two committees. First, the Cutforth Committee, which was set up by the Minister, and reported in 1936:

> "It seems to us essential as a governing principle that transport charges should be allocated among producers in such a way as to secure differentials in net returns which are related to actual proximity to liquid milk consuming centres."

Second, the Davis Committee, which was set up by the board itself and reported in 1963: "We recommend that under present conditions the total range of prices at the farm gate should be 2·4d. per gallon as against 1·19d. as at present." The Davis Committee divided the country into five zones, stepping up the differentials in five stages by 0·6d. per gallon. For instance, Cornwall and Devon should get the basic price; Somerset 0·6d. more; Wiltshire and Dorset 1·2d. more; Hampshire and Berkshire 1·8d. more; Kent and Sussex and the Home Counties 2·4d. more per gallon than the basic price.

In view of these favourable reports, the South-Eastern dairy farmers have pressed the Milk Marketing Board to increase the prices payable to them. But the Milk Marketing Board have refused. All the moneys received for milk go into one pool. If the South-Eastern farmers got more, the Far-Western farmers would get less. An increase in differential would benefit the South-Eastern farmers and some of the nearby regions, but would harm the Far-Western and other remote regions. Under the Milk Marketing Scheme, the board consists of 17 or 18 members, 12 being regional members, three being special members elected by all producers, and two or three appointed by the Minister. It looks as if those pressing for an increase in differential can always be out-voted by those who desire no change.

Seeing that they could not persuade the board to make a change in the differential, the South-Eastern farmers complained to the

Minister under section 19 (3) of the Agricultural Marketing Act, 1958. Under that section the Minister has power to direct that a complaint be considered by the committee of investigation. The committee of investigation is a standing statutory committee under a legal chairman, which is set up especially to consider complaints affecting the milk industry. The Minister refused to refer the complaint to the committee. The South-Eastern farmers now come to the court complaining of the conduct of the Minister. They say that in refusing he took extraneous matters into consideration which he ought not to have done.

The key words of section 19 (3) are that

> "A committee of investigation shall . . . be charged with the duty, if the Minister in any case so directs, of considering, and reporting to the Minister on . . . any complaint made to the Minister as to the operation of any scheme."

If the Minister does refer a matter to the committee, its task is shown by section 19 (6). It has to consider whether any provision of the Milk Marketing Scheme, or any act or omission of the Milk Marketing Board, is "contrary to the interests of any persons affected by the scheme and is not in the public interest." The rest of the section and the regulations under it show that once a matter is referred to a committee of investigation, it is to be investigated in a fair and impartial manner. The committee can hear witnesses. It can call for accounts and information from the board. It can hear other witnesses not called by the party. It must hear not only the complaint but also the board. The committee has then to make its report: and its conclusions have to be published. If the committee report that the board ought to take steps to remedy the matters of complaint, the board can themselves take those steps: and if they do not do so, the Minister can order them to rectify the matter.

Applying these provisions to the present case, the South-Eastern dairy farmers are clearly "persons affected by the scheme." They have made a complaint to the Minister "as to the operation of the scheme." The Minister therefore has power to refer it to a committee of investigation. Suppose he did so and that the committee reported that the present price differential is contrary to the interests of the South-Eastern dairy farmers, and is not in the public interest. The report would no doubt be considered by the board. If the board did not take steps to remedy the position, the Minister could step in and order them to rectify it.

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It is plain to me that by these provisions Parliament has provided machinery by which complaints of farmers can be investigated by a committee which is independent of the board and by which those complaints, if justified, can be remedied. No other machinery is provided. This case raises the important question: How far can the Minister reject the complaint out of hand? Is the Minister at liberty in his unfettered discretion to withhold the matter from the committee of investigation and thus refuse the farmers a hearing by the committee? And by refusing a hearing, refuse a remedy? Mr. Kemp, who appeared for the Milk Marketing Board, contended that the Minister need not consider the complaint at all. He could throw it into the waste paper-basket without looking at it. The Solicitor-General did not support this argument. It is clearly untenable. The Minister is under a duty to consider every complaint so as to see whether it should be referred to the committee of investigation. I can well see that he may quite properly reject some of the complaints without more ado. They may be frivolous or wrong-headed: or they may be repetitive of old complaints already disposed of. But there are others which he cannot properly reject. In my opinion every genuine complaint which is worthy of investigation by the committee of investigation should be referred to that committee. The Minister is not at liberty to refuse it on grounds which are arbitrary or capricious. Nor because he has a personal antipathy to the complainant or does not like his political views. Nor on any other irrelevant ground.

It is said that the decision of the Minister is administrative and not judicial. But that does not mean that he can do as he likes, regardless of right or wrong. Nor does it mean that the courts are powerless to correct him. Good administration requires that complaints should be investigated and that grievances should be remedied. When Parliament has set up machinery for that very purpose, it is not for the Minister to brush it on one side. He should not refuse to have a complaint investigated without good reason.

But it is said that the Minister is not bound to give any reason at all. And that, if he gives no reason, his refusal cannot be questioned. So why does it matter if he gives bad reasons? I do not agree. This is the only remedy available to a person aggrieved. Save, of course, for questions in the House which Parliament itself did not consider suitable. Else why did it set up a committee of investigation? If the Minister is to deny the com-

plainant a hearing—and a remedy—he should at least have good reasons for his refusal: and, if asked, he should give them. If he does not do so, the court may infer that he has no good reason. If it appears to the court that the Minister has been, or must have been, influenced by extraneous considerations which ought not to have influenced him—or, conversely, has failed, or must have failed, to take into account considerations which ought to have influenced him—the court has power to interfere. It can issue a mandamus to compel him to consider the complaint properly. That was laid down by two of my predecessors in this place: Lord Esher M.R. in *Reg.* v. *Vestry of St. Pancras*,[1] said of a body who were entrusted with a discretion:

> "... they must fairly consider the application and exercise their discretion on it fairly, and not take into account any reason for their decision which is not a legal one. If people who have to exercise a public duty by exercising their discretion take into account matters which the courts consider not to be proper for the guidance of their discretion, then in the eye of the law they have not exercised their discretion."

Lord Greene M.R., in *Associated Provincial Picture Houses Ltd.* v. *Wednesbury Corporation*[2] said[3]:

> " . . . a person entrusted with a discretion must, so to speak, direct himself properly in law. He must call his own attention to the matters which he is bound to consider. He must exclude from his consideration matters which are irrelevant to what he has to consider."

That passage has been repeatedly cited with approval in the House of Lords: see *Smith* v. *East Elloe Rural District Council*,[4] by Lord Reid[5]; *Fawcett Properties Ltd.* v. *Buckingham County Council*.[6]

Applying these principles to this case, the Lord Chief Justice held that this was a case where the courts should interfere. He said that the complaint by the South-Eastern farmers was

> " a bona fide complaint and one which would be likely in the light of past history to be found to be justified and further that the conduct of the board in this regard would be likely to be held to be one which is not in the public interest."

The Solicitor-General criticised that passage as not being

[1] (1890) 24 Q.B.D. 371, 375–376; 6 T.L.R. 175, C.A.
[2] [1948] 1 K.B. 223; 63 T.L.R. 623; [1947] 2 All E.R. 680, C.A.
[3] [1948] 1 K.B. 223, 229.
[4] [1956] A.C. 736; [1956] 2 W.L.R. 888; [1956] 1 All E.R. 855, H.L.(E.).
[5] [1956] A.C. 736, 762.
[6] [1961] A.C. 636, 660; [1960] 3 W.L.R. 831; [1960] 3 All E.R. 503, H.L.(E.).

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warranted by the evidence. It may be that the Lord Chief Justice put it a little too high in using the word "likely." But the evidence at least discloses this. It shows that this complaint by the South-Eastern farmers was a genuine complaint which was worthy of investigation by the committee of investigation. It has the support of a committee set up by the board itself. And yet the Minister has not referred it to the statutory committee. Why not? The reason was disclosed at a meeting which the South-Eastern farmers had with the officials of the Ministry on April 28, 1964. The officials said that, if a complaint was made, the Minister would refuse to refer it to the committee of investigation. They set out their reasons in a letter of May 1, 1964, which had been carefully prepared in advance:

> "In considering how to exercise his discretion, the Minister would, amongst other things, address his mind to the possibility that if a complaint were so referred, and the committee were to uphold it, he in turn would be expected to make a statutory order to give effect to the committee's recommendations. It is this consideration . . . that the Minister would have in mind in determining whether your particular complaint is a suitable one for reference to the committee. We were unable to hold out any prospect that the Minister would be prepared to regard it as suitable. . . . The statement of these reasons is not intended to imply an assessment of the merits of your complaint considered as an issue of equity among regions."

The one reason disclosed by that letter is that, if the committee were to uphold the complaint, the Minister would be expected to give effect to the committee's recommendations, and that he was unwilling to do. By whom would he be expected? I presume he means by Parliament or, at any rate, by public opinion. See what this comes to! The Minister does not want an inquiry lest Parliament, or the public, would expect him to act on the report. It means this: Even though the complaint was justified on the merits, and even though the committee recommended that it be rectified, the Minister was not prepared to rectify it.

I do not think that was a proper approach to the complaint. The Minister ought not to make up his mind in advance. He could not tell what evidence the committee might have before them, or what reasons might lead to their recommendations. He ought at least to be prepared to consider their report with an open mind. He ought not to shut down an investigation simply because he might be expected to act on the recommendations.

Following on that letter, the South-Eastern farmers on January 4, 1965, made an official complaint to the Minister. On March 23, 1965, the Minister refused to refer it to the committee of investigation. He said:

> "The Minister's main duty in considering this complaint has been to decide its suitability for investigation by means of a particular procedure. He has come to the conclusion that it would not be suitable. The complaint is, of course, one that raises wide issues going beyond the immediate concern of your clients, which is presumably the prices they themselves receive. It would also affect the interests of other regions and involve the regional price structure as a whole. In any event, the Minister considers that the issue is of a kind which properly falls to be resolved through the arrangements available to producers and the board within the framework of the scheme itself."

Following on that reply, the complainants' solicitor pressed the Minister further. In particular, by a letter of November 4, 1965, he asked the Minister if he had excluded from his mind the considerations set out in the 1964 letter. The Minister never gave a direct answer to that question. He never said he had excluded those considerations from his mind. All he did was to make an affidavit on January 19, 1966, in which he said: "I considered that the issue raised by the applicants' complaint was one which in all the circumstances should be dealt with by the board rather than the committee of investigation."

In view of the Minister's failure to reply to the specific question asked by the complainant's solicitor, I am prepared to infer, and do infer, that he was influenced by the considerations set out in the letter of May 1, 1964, as well as those in his later letter and affidavit.

Taking the reasons which the Minister has given for his refusal, I take first the consideration in the letter of May 1, 1964, that if the complaint were upheld, he would be expected to make a statutory order. That was a bad reason which ought not to have influenced him. Second, I take the consideration that the complaint raised wide issues as a ground for refusing an investigation. That was a bad reason. The width of the issue would be a ground for holding an investigation, not for refusing it. The committee could hear the views of the producers in other regions. Third, I take the Minister's statement that it was a matter for the decision of the Milk Marketing Board, and not for him. I think he was thereby mistaking his powers. He has the ultimate word on prices. If the board regulates prices in a way which is contrary

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to the public interest, the Minister can of his own motion intervene and make an order to rectify the position; see section 20 (2). Likewise, when a committee of investigation reports that the board is fixing prices in a way which is contrary to the interests of farmers, and not in the public interest, the Minister has power to make an order to rectify this position: see section 19 (6) (*c*).

In my opinion, therefore, the Minister has been influenced by reasons which ought not to have weighed with him. He has, therefore, not properly exercised his discretion. An order of mandamus should go to direct him to exercise it properly. I agree with the Lord Chief Justice and would dismiss this appeal.

DIPLOCK L.J. (read by Russell L.J.): The Solicitor-General concedes that the words in section 19 (3) of the Act: "if the Minister in any case so directs" impose upon the Minister a duty to consider any complaint made to him as to the operation of any scheme, but contends that it leaves him with complete discretion to decide whether he will refer the complaint to a committee of investigation for consideration and report.

The concession as to the Minister's duty to consider a complaint was, in my view, rightly made. Counsel for the Milk Marketing Board, however, whose locus standi in the matter has not been made clear to me, argues that the Minister is entitled to put any complaint into his wastepaper basket unread for he is under no duty to consider it. Consequently the High Court has no jurisdiction to order him by mandamus to do so. The imposition of a duty by a statute does not require any particular form of words. It is perhaps unusual for a duty to be imposed in respect of an act mentioned in a mere protatic phrase such as that under consideration in the present statute. But even such a phrase can do so if the subject matter with which it deals compels the conclusion that Parliament must have intended to impose a duty in respect of the doing of that act. Here the subject matter is a complaint as to the operation of a scheme for which subsection (3) and the subsequent subsections are intended to provide a remedy. The obtaining of a direction by the Minister is a condition precedent to the complainant's access to that remedy. In my view it is a necessary implication that the Minister is under a duty to make up his mind "in any case" whether the complaint is such that the complainant ought to have access to that remedy and is consequently under a duty to consider the complaint for that purpose.

A But it is important to bear in mind first that the sole purpose of his consideration is to decide whether the complaint is one which he thinks ought to be dealt with by the procedure of a committee of investigation under the section, and secondly that it is to his discretion and not that of anyone else that Parliament has entrusted the decision whether or not any particular complaint B should be so dealt with. His decision is administrative, not judicial, and in reaching it he may lawfully take into consideration its possible effects on general policy and other people. He need not confine himself to the merits of the particular case made by the complainant. Indeed, save in so far as may be necessary to satisfy himself that there is something in the case to be investigated, he C is not at this stage concerned with the merits of the case at all. Those will be for the committee of investigation to consider if he decides to refer the case to them.

The Minister need give no reasons for his refusal to refer a complaint for consideration by a committee of investigation. One would expect him as a matter of courtesy to give some reason for D his decision whenever, as in the present case, a bona fide complaint came from a responsible source. But, since he need give none, he need not give all—a matter to be borne steadfastly in mind if his decision is attacked in the High Court for failing to have regard to some relevant matter. For the High Court would only discourage such courtesy and so would stultify its own function as guardian of the rule of law in the administrative field if it E were to treat the reasons given by the Minister for his decision as if they were the written award of an arbitrator to be meticulously examined for some mistake or omission which might lend colour to a suggestion that he had erred in law. Again, since the decision is administrative, the language used for communicating the F Minister's reason for it is not lawyer's jargon but Civil Servicese. And we must so read it, asking ourselves what would ordinary laymen, in this case dairy farmers, understand to be the reasons why their request had been turned down.

And so it is in this spirit that I turn to the reasons which were G given by the Minister in the present case. The grounds upon which the High Court is justified in interfering by prerogative order or by declaration in an administrative decision are now well settled. I do not find it necessary to refer to any other authority than that of *Associated Provincial Picture Houses Ltd.* v. *Wednesbury Corporation*[7] which has already been cited by the Master of the

[7] [1948] 1 K.B. 223, 228.

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Rolls. I agree too with the Master of the Rolls that, having regard to the terms of the Minister's own affidavit and what had gone before it, the proper inference is that the Minister was influenced by the considerations referred to in Mr. Kirk's earlier letter of May 1, 1964, as well as those stated in the formal letters of March 23 and May 3, 1965. All three letters make it clear that the Minister was directing his mind to the "suitability" of the complaint for being dealt with by the procedure of reference to a committee of investigation under section 19 of the Act. And this was right—for that was all that he had to decide at that stage. Unlike the Board of Education in *Rex* v. *Board of Education*[8] he asked himself the right question.

The reasons which he gave for regarding the complaint as unsuitable for this procedure have been subjected to close analysis both in the Divisional Court and in the argument before us. For reasons I have stated, I do not think that this is the right approach. Having regard to the past history of the dispute between the South-Eastern region and the Marketing Board, all of which was well known to the Ministry as well as to the complainants, the complainants would have understood the letters as saying:

> "Your complaint raises the whole question of what (if any) differential prices should be paid by the Milk Marketing Board to producers in the various regions. This is a question which the Minister considers should be decided by the board which is composed for the most part of representatives elected by the producers in the various regions throughout the country. It is a question in which he thinks he should not interfere. If the complaint were referred to a committee of investigation for consideration and report, it would involve the risk that the committee might uphold the complaint and the Minister would be expected to make a statutory Order overruling the board's decision. This, for a number of reasons indicated in Mr. Kirk's letter of May 1, 1964, he would not be prepared to do. He therefore thinks it better not to refer the complaint to a committee of investigation either."

This seems to me to be a policy decision. Subject to his accountability to Parliament, it is for him and no one else to decide to what extent he should exercise his limited powers of control over the exercise by marketing boards of their powers under marketing schemes; and it is for him and no one else to decide whether he will permit a complainant to set in motion the statutory machinery which may result in a report adverse to the

[8] [1910] 2 K.B. 165, C.A.

board, undermine its authority and put the Minister himself under pressure to exercise control over a matter which he thinks is best left to the board.

In his leading judgment in the Divisional Court, the Lord Chief Justice has dissected the reasons given in the letters into three. In the reverse order to that in which they are dealt with in his judgment, they are: (a) that the question of regional price structure raised by the complaint was one to be dealt with by the marketing board itself; (b) that the complaint raised wide issues going beyond the immediate concern of the complainants, and (c) that the Minister himself would not take action on the report of the committee of investigation if it were adverse to the board.

As regards (a), a stress is laid by the Lord Chief Justice and by Sachs J. on the fact that the South-Eastern region, whom the complainants represent, have only a minority representation on the board. Like any other region, they can be outvoted upon matters where their interests conflict with those of the majority. That is how "normal democratic machinery" works. Whether it is good machinery or not, it is one which Parliament has approved as suitable for the nation as well as for marketing boards, and, with great respect, I cannot accept that the Minister, by referring to the operations of the board as being governed by the normal democratic machinery, was overlooking the fact that the complainants had only a minority representation on the board and minorities can be outvoted.

As regards (b), the Divisional Court have inferred, from the Minister's reference to the complaint as raising wide issues which affect the interests of other regions and the regional price structure as a whole, that he had misconstrued the Act in that he must have thought that the Act prohibited the reference to a committee of investigation of complaints which raised wide issues and affected other persons, and likewise prohibited him from making statutory orders about the regional price structure. Again, and with respect, I can see no good ground for these inferences. It is one thing to think that you have no power to refer a complaint because it raises wide issues and affects other persons; it is another thing to regard that as one reason why it may be impolitic to refer a particular complaint. It is one thing to think that you have no power to make statutory orders about regional prices; it is another to think it impolitic to do so. The former are mistakes of law; the latter are decisions of policy. The letter of May 1, 1964, makes it clear that the Minister, as one would expect, knew quite well

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that he had the necessary powers but that as a matter of policy he did not intend to exercise them in respect of the particular complaint of the South-Eastern region. And policy is for him, not for the court.

It is reason (c) that has given me most pause. The Divisional Court pointed out that where a complaint is made about an act or omission of the board, section 19 confers upon the Minister two discretions, first, a discretion whether or not to refer the complaint to a committee of investigation and, secondly, but only if the committee report that the act or omission is contrary to the interests of any persons affected by the scheme and not in the public interest, a discretion to order the board to take such steps to rectify the matter as may be specified in the order. As the letter of May 1, 1964, shows, the Minister, in deciding how to exercise his first discretion whether to refer the complaint to a committee of investigation, took into account the fact that he would be unwilling to exercise his second discretion by making an order on the board if the occasion for the exercise of that discretion should arise as a result of the committee's report. In so doing the Divisional Court held that he erred in law because: "The exercise of the first discretion . . . is . . . wholly independent of what view the Minister may take if and when he comes to exercise the second discretion." This seems to me to be applying judicial concepts to administrative decisions. Such decisions must take account of consequences remote as well as immediate, of risks as well as certainties. The Minister is certainly entitled and, as I think, ought, to ask himself: "If I refer this complaint to a committee of investigation, what may that lead to?" One possibility is that it will lead to a report upholding the complaint and critical of the board's action in a sphere in which the Minister thinks it should be left to make its own decisions with which he should not interfere. And if he does not intend in any event to interfere, that is, to exercise his second discretion by making an order on the board, this is, in my view, a relevant consideration for him to take into account when deciding whether or not to refer the complaint to a committee of investigation at all.

What has given me most concern is the phrase in the letter of May 1, 1964: "... if a complaint were so referred and the committee were to uphold it, he [the Minister] in turn would be expected to make a statutory order to give effect to the committee's recommendations." If this really meant expected by Parliament, I think

A it would disclose a basic mistake of constitutional law, for it would avow an attempt to elude Parliamentary control of policy. But the phrase does not identify the contemplated holders of the expectations. It may have been intended to refer to the complainants, the opposition in Parliament or the press, and it would not be right to put the worst construction on it.

B It follows that I do not think that any of the reasons which have been advanced would justify this court in ordering the Minister to reconsider the complaint. It has not, in my view, been shown either that he did not exercise his discretion, or that in doing so he misconstrued his powers or duties under the Act, or that he C took into his consideration any irrelevant matters or omitted to consider any relevant matters. It seems to me that the unexpressed major premise of the Divisional Court's judgment is that the Act confers upon persons affected by a marketing scheme a right to have any bona fide complaint as to the operation of the scheme D considered by a committee of investigation. But this the Act does not do. The only right is to have referred to the committee such complaints as the Minister in his discretion thinks should be so referred. He did not think that this one should, and, since it has not been shown that in so thinking he erred in law, there is an end of the matter.

E For my part I would allow this appeal.

RUSSELL L.J. I had prepared in outline a judgment arriving at the same conclusion as that of Diplock L.J. and for the same reasons. Ordinarily, since we differ from the Master of the Rolls F and the Divisional Court, I would deliver a separate judgment; but I do not think I would express my opinions on this case better or more cogently than has Diplock L.J., and therefore content myself with agreeing that the appeal should be allowed.

G *Appeal allowed with costs in the Court of Appeal and in the Divisional Court.*
Leave to appeal.

Solicitors: *Solicitor, Ministry of Agriculture, Fisheries and Food; Ellis & Fairbairn; Biddle, Thorne, Welsford & Barnes.*

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The applicants appealed.

The hearing of the appeal before the Appellate Committee proceeded on July 18, 19 and 20, 1967. On the last day it was adjourned to a date to be fixed to enable the appellants to raise in addition to the questions set out in their printed case the following question for decision in this appeal:

> "Whether on the true construction of section 19 of the Agricultural Marketing Act, 1958, the first respondent [the Minister] was under a duty to refer the appellants' complaint dated January 4, 1965, to the committee of investigation appointed by the Minister under that section."

Supplemental cases were filed on behalf of the appellants and the respondent Minister and the hearing of the appeal proceeded on December 18, 19 and 20, 1967.

T. M. Eastham Q.C. and *Alistair Dawson* for the appellants. Three questions arise here: (1) Was the Minister bound to refer the complaint to the committee of investigation under section 19 (3) of the Agricultural Marketing Act, 1958? (2) Can the court intervene to control the exercise by the Minister of the power conferred on him by the statute? (3) Should the court intervene in the present case?

The appellants say here that the acts or omissions of the board were contrary to the interests of persons affected by the Milk Marketing Scheme within section 19 (6) of the Act.

The words "if the Minister in any case so directs" in section 19 (3) (*b*) in relation to the reference of a complaint to the committee of investigation are admittedly permissive only and, if section 19 is to be construed as imposing a duty on the Minister, that duty must be derived aliunde. In some cases a duty exists to exercise a power, as distinguished from a complete discretion. Here a duty can be spelt out of the Act.

In *Julius* v. *Bishop of Oxford* [1] Lord Selborne said in relation to the words "it shall be lawful" that their meaning is the same whether or not there is a duty to use the power and that they never in themselves confer an obligation. Lord Cairns L.C.[2] laid down the tests to determine whether discretionary words imposed such a duty, so that the enabling words are compulsory: (1) The power has to be deposited with a public officer, (2) to be used for the benefit of persons (3) who are specifically pointed out and

[1] (1880) 5 App.Cas. 214, 235, H.L.(E.). [2] Ibid. 225.

(4) with regard to whom a definition is given of the circumstances in which its exercise can be called for.

In the present case the Minister is a public officer, on whom a duty of supervision has been placed. The power is not conferred for his own benefit. The persons pointed out are the persons affected by the Scheme. The power is to be exercised when a complaint is made which could not be considered by a consumers' committee (see section 19 (3) (*b*)). The present case fulfils all these conditions and a duty is imposed on the Minister to refer such a complaint. See also in the *Julius* case [3] Lord Cairns, Lord Penzance and Lord Selborne. Reliance is placed (1) on the compulsory nature of the Scheme; (2) that section 19 is designed for the redress of grievances and (3) that it is the sole means of obtaining redress: see what Lord Denning M.R. said in the Court of Appeal.[4] It is plain from section 30 that the Minister has considerable responsibilities under the Act. There is a duty on the Minister to refer every genuine and substantial complaint, (i.e., one which is not trivial, frivolous or repetitive). The appellants have a right to have it referred.

In the case of *Julius* [5] only some words of Lord Blackburn create some difficulty, but the cases on which he was relying show that he was using the word "right" in an unusual way, e.g., *Alderman Backwell's Case*.[6] The right in the present case is that of a private individual whose rights are affected.

Rex v. *Steward of Havering Atte Bower* [7] is slightly analogous to the present case. The only two fairly recent cases are *Rex* v. *Mitchell* [8] and *In re Shuter*.[9]

Section 20 of the Act is wholly different from section 19, which envisages a complaint by someone whose rights are being adversely affected by the Scheme. He must go before the committee of investigation to establish that he is so affected and that it is not in the public interest that the Scheme should continue in its present form. The only provision in the Act under which the appellants can have their complaints investigated is section 19. Under section 20 they have no right at all to make the Minister move. In the circumstances the Minister cannot say that he will not consider the merits or allow anyone else to do so. Mandamus should issue.

[3] 5 App.Cas. 214, 222–223, 227, 229–230, 235.
[4] Ante, p. 1006A.
[5] 5 App.Cas. 214, 241, 244.
[6] (1683) 1 Vern. 152.
[7] (1822) 5 B. & Ald. 691.
[8] [1913] 1 K.B. 561, 567–568; 29 T.L.R. 157, D.C.
[9] [1960] 1 K.B. 142; [1959] 3 W.L.R. 652; [1959] 3 All E.R. 481, D.C.

If the House of Lords holds that this is not a case of a discretion coupled with a duty, the question arises in what circumstances can the court intervene to control the exercise of a pure discretion. Reliance is placed on what Lord Denning M.R. said in the Court of Appeal [10]; see also Diplock L.J.[11] The court can intervene if the Minister has been influenced by extraneous considerations or has failed to take into account considerations which should have influenced him. On this question there is no real difference between the parties.

As to the third question, the Minister has misdirected himself as to the true construction of section 19, which must include complaints made by producers. On the documents it is clear that the Minister took into account irrelevant considerations. In the circumstances there is no hope of the complaint being dealt with by the board under the normal democratic procedure, which here produced a situation not only unfair to the appellants but contrary to the public interest.

The Minister failed to exercise his discretion according to law because his refusal to refer the complaint was caused or influenced by his having misdirected himself in law and taken into account erroneous and irrelevant considerations.

Paragraph 3 of the letter of May 1, 1964, sets out irrelevant matters to which, it is said, the Minister would address his mind. In the letter of March 23, 1965, an objection to referring the complaint is said to be that it "raises wide issues." That is not a proper consideration. It is also stated that the issue is of a kind "which properly falls to be resolved through the arrangements . . . within the framework of the Scheme itself." But this approach ignores the Minister's powers under section 19 (6) (*c*) and section 20 (2).

Alistair Dawson following. In references to "the public interest" there is a difference of phrasing between section 19 (6) and section 20 (2). In the latter case what must be considered is whether the matter is harmful to the public interest; in the former case what is being considered is something which is not actively required by the public interest. As to "public benefit," see *In re Coats' Trusts*,[12] affirmed in the House of Lords (*Gilmour* v. *Coats* [13]). The difference indicates that the complainant will succeed if he shows that his interests are detrimentally affected.

[10] Ante, p. 1007A.
[11] Ante, p. 1011G.
[12] [1948] Ch. 340, 344–345; 64 T.L.R. 193; [1948] 1 All E.R. 221, C.A.
[13] [1949] A.C. 426; 65 T.L.R. 234; [1949] 1 All E.R. 848, H.L.(E.).

The Milk Marketing Board are always parties to such proceedings as this. If a general direction were given to them they would be able to work out the proper payments on the new principles.

Section 30 of the Act gives the Minister a general power of supervision. He cannot say that in respect of one class of operations he will not interfere with the board on pricing, no matter how unjust the situation may be. That would deprive producers of the protection which the Act gives them.

Sir Dingle Foot Q.C. and *Peter Langdon-Davies* for the respondents. The first question is whether on the true construction of section 19 the Minister was under a duty to refer this complaint to a committee of investigation.

The submissions for the appellants represent a complete misconception of the Minister's duties in relation to the board.

The statutory regulation of agricultural marketing starts with the Agricultural Marketing Acts, 1931 and 1933. These Acts give a considerable degree of self government to the producers who elect the marketing boards. The boards are given extensive powers to regulate sales and determine prices to farmers and even to impose penalties. The Minister has very limited powers of intervention: see section 1 (1) of the Act of 1958. The first move must come from the producers themselves; see also section 2 (2), (3) and (7), section 4, section 6 and section 8 (1) (*b*), which gives an aggrieved producer the remedy of arbitration.

It is common ground that arbitration would not have been appropriate in the present case. Even under section 20 of the Act, where the Minister is given certain powers of intervention, those powers are limited (see subsection (2)). It is only when one goes back to section 19, where there has been a reference to a committee of investigation, that the Minister himself is the final judge of what is in the public interest. Under section 19 he cannot act to give directions to the board until the committee has reported. Under that section also his powers are very limited; see also section 24. Section 30 does not give the Minister a power of general supervision; he is under no form of parliamentary accountability for the actions of the board; see also sections 34 and 36.

The Milk Marketing Board is an elected body given very wide powers and, among other things, it is clearly intended by Parliament that it should determine the price of milk and how it is to be sold. All decisions must be taken by the board itself. Only residual powers are left to the Minister, who cannot take any action of his own motion. This falls far short of any general

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power of supervision. He is only given certain limited powers of intervention and has no general responsibility to Parliament for the decisions of the board. Decisions as to price differentials and the like should be decisions of the board. The Minister must not try to supersede the board, because he would then be defeating the intentions of Parliament.

There is no duty on the Minister to order a hearing by the committee of investigation. His only duty is to consider a complaint fairly, and with regard to every complaint he has an unfettered discretion whether or not to refer it to the committee. In the *Julius* case [14] there is no contradiction between the speeches of Lord Cairns L.C. and Lord Blackburn.

Here the Minister is given certain functions as the guardian of the public interest. The Act is designed to safeguard consumers, dairymen and distributors, who have no vote on the board and it is to that that the Minister must direct his mind. But no one in the class of persons affected by the Act is given by section 19 (2) any enforceable right under section 19 (3). That is not the effect of section 19 (6), the wording of which is different.

In all the cases cited in the *Julius* case [15] there was something in the nature of a legal right. In the present case one is dealing, not with persons with specific legal rights, but with something much wider. Every member of the public is affected by a marketing scheme and has an interest in its operation, and so have the distributors, but it cannot be maintained that everyone with a grievance is entitled to have it investigated.

The Minister does not occupy a position analogous to that of a judge. His function is entirely different. He is there in the last resort to consider questions of public interest, not the grievances of particular individuals. He has a duty to apply his mind to the complaint which is made and to decide whether or not it should go to the committee of investigation. He could not disregard a complaint and throw it unread into the waste paper basket nor make a decision never to send any cases to the committee on the ground that the investigation of complaints would have a disruptive effect on the Scheme and on balance cause more trouble than it was worth. But, on the other hand, he is not bound to exercise his discretion in favour of a complainant and order an investigation.

The appellants are seeking to read into the Act words which are not there. The legislature has given the Minister a completely unfettered discretion. He must apply his mind to the particular

[14] 5 App.Cas 214, 222, 243–244. [15] 5 App.Cas. 214.

grievance, to which he must have regard at all stages. Admittedly he has a discretion to refuse to refer unsubstantial complaints and he must also have an unfettered discretion to refuse to refer a substantial complaint if the public interest is involved. He can refuse to act on a complaint without giving any reasons and in such a case the complainant would have no remedy and his decision cannot be questioned. Accordingly the reasons which he has given in the present case should not be examined too closely.

The Minister has two decisions to make: (1) whether to refer a complaint to the committee of investigation and (2) if he does so, whether to give effect to its report.

On the first question he may say that he does not think there is a suitable case for investigation because the complaint strikes at the very root of the Scheme. He must consider at all stages what it is in the national interest for him to do.

The *Julius* case [15] was referred to in *In re Baker*,[16] *Rex* v. *Mitchell*,[17] *Sheffield Corporation* v. *Luxford* [18] and *de Keyser* v. *British Railway Traffic & Electric Co. Ltd.*[19] From these it appears that unless the duty is coupled with a legal right its exercise is discretionary. The appellants can derive no help from the *Julius* case,[20] which is entirely in favour of the respondents.

As to the question whether the court can intervene to control the exercise by the Minister of the discretion conferred on him by statute, it is salutary that, when Ministers have misconceived their powers, they should be subject to judicial correction. But it is equally important that the courts should not substitute their own views for those of the Minister or trespass on the field of policy. The authorities show how far the courts have gone in this form of judicial control: see Halsbury's Laws of England, 3rd ed., Vol. 11 (1955), pp. 103–104, para. 192; *Reg.* v. *St. Pancras Vestry* [21]; *Rex* v. *Board of Education* [22]; *Rex* v. *Port of London Authority* [23] and *Associated Provincial Picture Houses Ltd.* v. *Wednesbury Corporation.*[24]

The authorities amount to this: (1) Where there is, as here, an unfettered discretion, the only right of the applicant is to have his application considered. (2) The courts will only intervene if the

[15] 5 App.Cas. 214.
[16] (1890) 44 Ch.D. 262, 273; 6 T.L.R. 273, C.A.
[17] [1913] 1 K.B. 561, 566, 569.
[18] [1929] 2 K.B. 180, 183; 45 T.L.R. 491, D.C.
[19] [1936] 1 K.B. 224, 229; 52 T.L.R. 73, D.C.
[20] 5 App.Cas. 214.
[21] (1890) 24 Q.B.D. 371, 375, 377; 6 T.L.R. 175, C.A.
[22] [1910] 2 K.B. 165, 174, 175, 178, 180; 26 T.L.R. 422, C.A.
[23] [1919] 1 K.B. 176, 183, 184, 186–187; 35 T.L.R. 143, C.A.
[24] [1948] 1 K.B. 223, 228, 229; 63 T.L.R. 623; [1947] 2 All E.R. 680, C.A.

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Minister or the authority is acting unlawfully. (3) The Minister or the authority acts unlawfully if he or it refuses to consider the application. There may be (a) an outright refusal or (b) a misdirection on a point of law, or (c) an irrelevant or extraneous consideration taken into account.

When the courts are considering the exercise of an administrative discretion they will be reluctant to hold that the Minister or the authority has considered something wholly outside the ambit of that discretion.

As to the question whether the court should intervene in the present case, the court cannot proceed on the view that the reasons of the Minister are contained in the letter of May 1, 1964. It is the letters of March 23, 1965, and May 3, 1965, which show his reasons. These express his final refusal to refer the complaint. These are the authoritative documents, and one should not attach too much weight to the earlier letter.

It cannot be maintained that the Minister has exercised his discretion on a wrong view of the law or taken into account any irrelevant or extraneous considerations.

At the end of the day one is entitled to say that this was a case to be dealt with by the board and not by the committee of investigation.

Peter Langdon-Davies following. On the facts it is not true that the other regions were benefiting to the detriment of the South-Eastern region, the producers in which are not an oppressed minority. The interests of the different regions may vary. Though some may have a vested interest in favour of the present prices, others are neutral. It cannot be maintained that every hand is against the South-Eastern region.

The question whether the present case fulfils the test laid down in the *Julius* case [25] is purely one of construction. In some parts of the Act the mandatory word "shall" is used, e.g., in sections 2 (3), 19 (2) and 20 (3), but in section 19 (3) the expression "if the Minister in any case so directs" confers an unfettered discretion. When a power is given by mere empowering words, it would be strange if it was one which there was no obligation to exercise: see *In re Neath & Brecon Railway Co.*[26] In this Act the legislature used the word "shall" when it thought good and proper to do so and there is no reason to think that when it did not do so that was not deliberate too. The Minister's only duty under this

[25] 5 App.Cas. 214.

[26] (1874) 9 Ch.App. 263, 264, C.A.

section is to consider whether the complaint is suitable for investigation by the committee and in that his discretion is unfettered.

The court can only interfere if the Minister acted unlawfully: see the case of *Associated Provincial Picture Houses*.[27] The Minister is subject to two controls, (1) Parliament and (2) the courts, whose function is only to keep him within the law and to see that he goes no further. If he wrongly refused to refer a case, he could be brought to book by Parliament. The court may think he is wrong, stubborn or acting unfairly, but it should not interfere unless he is acting unlawfully. It is not always easy to draw the line. It is agreed that Lord Denning M.R. was right when he said in the court below[28] that the Minister must not brush aside the machinery provided for remedying grievances. He must not refuse without good reason to have a complaint investigated but he is the judge of the question whether or not to refer a complaint and in so deciding he is subject to the control of Parliament. Lord Denning M.R.[28] was introducing a new concept into the law in requiring that the Minister must give a good reason for refusing to exercise his discretionary power, thereby making the court the judge. The Minister is under no duty to explain why he exercises his discretion. This whole passage of Lord Denning's judgment proceeds from a misconception of the relative control functions of the court and of Parliament. The majority judgment[29] sets out the law as it is.

If a court decides to interfere with the exercise of a discretionary power it will have to make an order. When it is so interfering the normal form of order is a direction " to determine the matter according to law " and it is always made clear what the error of law is: see the *St. Pancras* case,[30] *Rex* v. *Board of Education*[31] and *Rex* v. *London County Council*.[32]

The Minister should not be required to disregard the suitability of the complaint for investigation by the committee because that is really a matter for him. The Minister is entitled to have a policy and to make it known and to consider any application to him in the light of that policy (see *Rex* v. *London County Council*[32]) though he would not be allowed to have a policy that in no case would he exercise his power: see also *Rex* v. *Torquay*

[27] [1948] 1 K.B. 223, 234.
[28] Ante, p. 1006F.
[29] Ibid. 1006G.
[30] 24 Q.B.D. 371, 380.
[31] [1910] 2 K.B. 165.
[32] [1918] 1 K.B. 68; 34 T.L.R. 21, D.C.

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Licensing Justices.[33] If licensing justices are entitled to have a policy so, a fortiori, is the Minister.

Eastham Q.C. in reply. By their notice of motion the present appellants asked for a *Julius*[34] order or alternatively for an order in the terms which the court subsequently made. If they are successful in the House of Lords, they are content with an order that the Minister should consider the complaint "according to law."

It is common ground that the cases since *Julius*[34] do not help much in the solution of the first question. On its true analysis that case points to the first question here being answered in the appellants' favour: see Lord Cairns L.C.[35] and Lord Penzance.[36]

If the report of the consumers' committee is against a complainant, section 19 (3) enables the Minister to cut the matter short. But if the report is in favour of the complainant, the subsection gives him the right to go before the investigating committee. In the case of a "busybody" frivolous complaint the Minister has a discretion not to send it to the investigating committee. What is conferred on him is a discretion coupled with a duty. But, even if it be held that subsection (3) confers on him an unfettered discretion so far as consumers are concerned, it does not follow that that is so in the case of persons affected by the Scheme.

The respondents relied on the provision for arbitration in section 8 (1) (*b*) of the Act, but that is not an appropriate remedy or an alternative to a reference to the committee of investigation.

The Minister is a watchdog to ensure that the board shall act in the public interest, whereas here he is trying to pursue a policy of refusing to control the board at all on the ground that it should be self-governing. But that is not a policy which he is entitled to follow in deciding whether or not to refer a complaint to the investigating committee. The board's action in fixing prices as they have is injurious to the South-Eastern farmers, who are persons affected, and is contrary to the public interest.

It is the wrong approach to treat the Act as if it were designed for the protection of dairymen and distributors who have no vote on the board and so does not visualise the settlement of disputes between the board and a body of producers. Although distributors have no vote on the board, they are not without protection: see paragraph 66 of the Milk Marketing Scheme, 1933, as amended.

[33] [1951] 2 K.B. 784; [1951] 2 T.L.R. 652; [1951] 2 All E.R. 656, D.C.

[34] 5 App.Cas. 214.

[35] Ibid. 225.

[36] Ibid. 229–230.

The proper test is that of Lord Blackburn in the *Julius* case [37] and reliance is placed on *Rex* v. *Mitchell*,[38] where the word "may" in the Act under consideration was held to be an enabling word and that the court of summary jurisdiction was bound to give effect to the right of the accused.

Under section 19 (2) (*b*) of the Act consumers have a legal right to have their complaints heard by a consumers' committee. Under section 19 (3) the Minister has power to refer to a committee of investigation any report by a consumers' committee and any complaint as to the operation of any scheme. That is a power clearly within the decision in *Rex* v. *Mitchell*.[38] Unless there is a reference to the committee of investigation the consumers' rights under section 19 (2) (*b*) are wholly ineffectual. There is a duty on the Minister to exercise his power. If that be so in relation to consumers, it is so in relation to persons affected by the Scheme.

As to the question whether the court can intervene to control the exercise by the Minister of the powers conferred on him, it is accepted that the court can only interfere if the Minister acts unlawfully. But the qualifications put on that by the respondents are irrelevant.

As to the third question, in order to see what was in the Minister's mind, the court can look at the letter of May 1, 1964. In paragraph 3 of his affirmation dated January 19, 1966, the Minister referred to that letter as a paper which he had read. The proper inference is that he was influenced by the considerations set out in the letter: see what was said in the Court of Appeal.[39]

Paragraph 3 of the letter is a plain misdirection, saying in effect that, if the Minister referred the complaint, he might be placed in an embarrassing situation. In paragraph 4 reason (a) is erroneous in law in its statement of the Minister's duty; reason (b) wrongfully asserts a policy not to take action under section 19 on the ground that the self-government of the industry is paramount, and reason (c) is erroneous, since the Minister can fix the differential, and under sections 19 and 20 the Minister has a responsibility for the matters which affect the interests of the appellants.

As to the letters of March 23 and May 3, 1965, altering prices is not an overriding of the Scheme but only an adjustment.

If the appellants are successful in this appeal, a special provision as to costs may have to be made in respect of the Supplemental Cases filed in this appeal. Perhaps a day may have been added to the hearing.

[37] 5 App.Cas. 214, 241.
[38] [1913] 1 K.B. 561.
[39] Ante, pp. 1009C–D, 1012A.

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Sir Dingle Foot Q.C. If the appellants succeed on either of the grounds they have relied on, there should be a special order as to costs. It is for the House to decide how much the hearing has been lengthened. In any event, the appellants should pay the costs of the Supplemental Cases. The respondents should be given two-thirds of the costs of the adjourned hearing.

Their Lordships took time for consideration.

Feb. 14, 1968. LORD REID. My Lords, since 1933 there has been in operation a Milk Marketing Scheme for England and Wales made under statutory provisions now contained in the consolidating Agricultural Marketing Act, 1958. Under that scheme producers are bound to sell their milk to the Milk Marketing Board and that board periodically fixes the prices to be paid to the producers. England and Wales is divided into eleven regions. In each region producers receive the same price but there is a different price for each region. One reason for this is that the cost to the board of transporting milk from the producers' farms to centres of consumption is considerably greater for some regions than for others. The lowest price is paid to producers in the Far-Western Region and the highest is paid to producers in the South-Eastern Region: prices paid in the other nine regions vary but fall between these two extremes. The present differentials between the regions were fixed many years ago when costs of transport were much lower. For the last ten years or so South-Eastern producers have been urging the board to increase these differentials but without success. It appears that the present differential between the South-East and the Far-West is 1·19 pence per gallon: South-Eastern producers contend that the figure should be in the region of $3\frac{1}{2}$ pence per gallon. As the total sum available to the board to pay for the milk they buy in all the regions is fixed each year, giving effect to the contention of the South-Eastern producers would mean that they and perhaps the producers in some other regions would get higher prices, but producers in the Far-West and several other regions would get less.

This matter has been considered by two independent committees and their recommendations would, at least to some extent, favour the contention of the South-Eastern producers. I only mention this fact because it shows that their contention cannot be dismissed as wholly unreasonable or inconsistent with the general scheme.

A The Milk Marketing Board is composed of twelve members from the regions, three elected by all producers in the country and three appointed by the Minister. The board, of course, acts by a majority of its members. It is said that members each have in mind, quite properly, the interests of their constituents, that the adoption of the proposals of the South-Eastern producers would B be against the financial interests of the constituents of most of the members, and that the experience of the last ten years shows that the South-Eastern producers cannot hope to get a majority on the board for their proposals.

The Act of 1958 provides two methods by which persons aggrieved by the board's actions can seek a remedy. The first is C arbitration. The South-Eastern producers attempted to invoke that remedy but it is now common ground that arbitration would be inappropriate. To give effect to their contention would require a readjustment of the price structure all over the country and this could not be achieved by arbitration.

The other possible remedy is that provided by section 19 of D the Act of 1958 which is in these terms:

> "(1) The Minister shall appoint two committees (hereafter in this Act referred to as a 'consumers' committee' and a 'committee of investigation') for Great Britain, for England and Wales and for Scotland respectively. (2) A consumers' committee shall—(*a*) consist of a chairman and of not less E than six other members, who shall be such persons as appear to the Minister, after consultation as to one member with the Co-operative Union, to represent the interests of the consumers of all the products the marketing of which is for the time being regulated by schemes approved by the Minister; and (*b*) be charged with the duty of considering and reporting to the Minister on—(i) the effect of any scheme approved by the Minister, which is for the time being in force, on con- F sumers of the regulated product; and (ii) any complaints made to the committee as to the effect of any such scheme on consumers of the regulated product. (3) A committee of investigation shall—(*a*) consist of a chairman and either four or five other members; and (*b*) be charged with the duty, if the Minister in any case so directs, of considering, and reporting to the Minister on, any report made by a con- G sumers' committee and any complaint made to the Minister as to the operation of any scheme which, in the opinion of the Minister, could not be considered by a consumers' committee under the last foregoing subsection. (4) On receiving the report of a committee of investigation under this section the Minister shall forthwith publish the conclusions of the committee in such manner as he thinks fit. (5) For the purpose of enabling any committee appointed under this section to

consider any matter which it is their duty under this section to consider, the board administering the scheme to which the matter relates shall furnish the committee with such accounts and other information relating to the affairs of the board as the committee may reasonably require, and shall be entitled to make representations to the committee with respect to the matter in such manner as may be prescribed by regulations made by the Minister under this Part of this Act with respect to the procedure of the committee. (6) If a committee of investigation report to the Minister that any provision of a scheme or any act or omission of a board administering a scheme is contrary to the interests of consumers of the regulated product, or is contrary to the interests of any persons affected by the scheme and is not in the public interest, the Minister, if he thinks fit so to do after considering the report— (*a*) may by order make such amendments in the scheme as he considers necessary or expedient for the purpose of rectifying the matter; (*b*) may by order revoke the scheme; (*c*) in the event of the matter being one which it is within the power of the board to rectify, may by order direct the board to take such steps to rectify the matter as may be specified in the order, and thereupon it shall be the duty of the board forthwith to comply with the order. Before taking any action under this subsection the Minister shall give the board notice of the action which he proposes to take and shall consider any representations made by the board within fourteen days after the date of the notice. . . . (8) Any order made under paragraph (*a*) of subsection (6) of this section, under paragraph (*c*) of that subsection or under the last foregoing subsection shall be subject to annulment in pursuance of a resolution of either House of Parliament, and any order made under paragraph (*b*) of the said subsection (6) shall not take effect unless it has been approved by a resolution of each House of Parliament."

With a view to getting the Minister to take action under this section the present appellants, who are office bearers of the South-Eastern regional committee of the board, approached the Minister and met officials of the Ministry on April 30, 1964. The outcome of that meeting was unsatisfactory to them and on January 4, 1965, their solicitors wrote to the Minister making a formal complaint and asking that the complaint be referred to the committee of investigation. The nature of the complaint was stated thus:

> "4. These acts and/or omissions of the board (*a*) are contrary to the proper and reasonable interests of producers in the South-Eastern region and of other producers near large liquid markets, all of whom are persons affected by the scheme, and (*b*) are not in the public interest. . . .
>
> "6. *As to* (*a*) *in para.* 4 *above*

A "It is contrary to the reasonable and proper interests of the producers referred to in para. 4 above that (in addition to the other contributions they properly make under the scheme) they should make a contribution to the marketing costs of reaching the liquid markets from the more distant parts of the country which are properly attributable to producers in those more distant parts and which should be borne by such producers.

B "7. *As to (b) in para. 4 above*

"(i) the cross-subsidy set out above has caused or contributed to and will cause or contribute to an unreasonable alteration in the balance of production, reducing growth in the nearer areas and increasing it in the more distant. This has tended and will tend to increase the total marketing costs to the public detriment. (ii) it is not in the public interest to

C continue a system of pricing which unduly favours one set of producers as against others."

To this letter the Minister's private secretary replied on March 23, 1965: [His Lordship read the letter and continued]:

And in reply to a further letter an official of the Minister replied

D on May 3, 1965: [His Lordship read the letter and continued]:

Thereafter the appellants applied to the court for an order of mandamus commanding the Minister to refer this complaint to the committee of investigation.

On February 3, 1966, a Divisional Court (Lord Parker C.J., and Sachs and Nield JJ.) made an order against the Minister but

E on July 27, 1966 this order was set aside by the Court of Appeal by a majority (Diplock and Russell L.JJ., Lord Denning M.R. dissenting).

The question at issue in this appeal is the nature and extent of the Minister's duty under section 19 (3) (*b*) of the Act of 1958 in deciding whether to refer to the committee of investigation

F a complaint as to the operation of any scheme made by persons adversely affected by the scheme. The respondent contends that his only duty is to consider a complaint fairly and that he is given an unfettered discretion with regard to every complaint either to refer it or not to refer it to the committee as he may think fit. The appellants contend that it is his duty to refer every genuine and

G substantial complaint, or alternatively that his discretion is not unfettered and that in this case he failed to exercise his discretion according to law because his refusal was caused or influenced by his having misdirected himself in law or by his having taken into account extraneous or irrelevant considerations.

In my view, the appellants' first contention goes too far. There are a number of reasons which would justify the Minister in

refusing to refer a complaint. For example, he might consider it more suitable for arbitration, or he might consider that in an earlier case the committee of investigation had already rejected a substantially similar complaint, or he might think the complaint to be frivolous or vexatious. So he must have at least some measure of discretion. But is it unfettered?

It is implicit in the argument for the Minister that there are only two possible interpretations of this provision—either he must refer every complaint or he has an unfettered discretion to refuse to refer in any case. I do not think that is right. Parliament must have conferred the discretion with the intention that it should be used to promote the policy and objects of the Act; the policy and objects of the Act must be determined by construing the Act as a whole and construction is always a matter of law for the court. In a matter of this kind it is not possible to draw a hard and fast line, but if the Minister, by reason of his having misconstrued the Act or for any other reason, so uses his discretion as to thwart or run counter to the policy and objects of the Act, then our law would be very defective if persons aggrieved were not entitled to the protection of the court. So it is necessary first to construe the Act.

When these provisions were first enacted in 1931 it was unusual for Parliament to compel people to sell their commodities in a way to which they objected and it was easily foreseeable that any such scheme would cause loss to some producers. Moreover, if the operation of the scheme was put in the hands of the majority of the producers, it was obvious that they might use their power to the detriment of consumers, distributors or a minority of the producers. So it is not surprising that Parliament enacted safeguards.

The approval of Parliament shows that this scheme was thought to be in the public interest, and in so far as it necessarily involved detriment to some persons, it must have been thought to be in the public interest that they should suffer it. But in sections 19 and 20 Parliament drew a line. They provide machinery for investigating and determining whether the scheme is operating or the board is acting in a manner contrary to the public interest.

The effect of these sections is that if, but only if, the Minister and the committee of investigation concur in the view that something is being done contrary to the public interest the Minister can step in. Section 20 enables the Minister to take the initiative. Section 19 deals with complaints by individuals who are aggrieved.

I need not deal with the provisions which apply to consumers. We are concerned with other persons who may be distributors or producers. If the Minister directs that a complaint by any of them shall be referred to the committee of investigation, that committee will make a report which must be published. If they report that any provision of this scheme or any act or omission of the board is contrary to the interests of the complainers *and* is not in the public interest, then the Minister is empowered to take action, but not otherwise. He may disagree with the view of the committee as to public interest, and, if he thinks that there are other public interests which outweigh the public interest that justice should be done to the complainers, he would be not only entitled but bound to refuse to take action. Whether he takes action or not, he may be criticised and held accountable in Parliament but the court cannot interfere.

I must now examine the Minister's reasons for refusing to refer the appellants' complaint to the committee. I have already set out the letters of March 23 and May 3, 1965. I think it is right also to refer to a letter sent from the Ministry on May 1, 1964, because in his affidavit the Minister says he has read this letter and there is no indication that he disagrees with any part of it. It is as follows: [His Lordship read the letter and continued]:

The first reason which the Minister gave in his letter of March 23, 1965, was that this complaint was unsuitable for investigation because it raised wide issues. Here it appears to me that the Minister has clearly misdirected himself. Section 19 (6) contemplates the raising of issues so wide that it may be necessary for the Minister to amend a scheme or even to revoke it. Narrower issues may be suitable for arbitration but section 19 affords the only method of investigating wide issues. In my view it is plainly the intention of the Act that even the widest issues should be investigated if the complaint is genuine and substantial, as this complaint certainly is.

Then it is said that this issue should be "resolved through the arrangements available to producers and the board within the framework of the scheme itself." This re-states in a condensed form the reasons given in paragraph 4 of the letter of May 1, 1964, where it is said "the Minister owes no duty to producers in any particular region," and reference is made to the "status of the Milk Marketing Scheme as an instrument for the self-government of the industry," and to the Minister "assuming an inappropriate degree of responsibility." But, as I have already pointed out, the

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Act imposes on the Minister a responsibility whenever there is a relevant and substantial complaint that the board are acting in a manner inconsistent with the public interest, and that has been relevantly alleged in this case. I can find nothing in the Act to limit this responsibility or to justify the statement that the Minister owes no duty to producers in a particular region. The Minister is, I think, correct in saying that the board is an instrument for the self-government of the industry. So long as it does not act contrary to the public interest the Minister cannot interfere. But if it does act contrary to what both the committee of investigation and the Minister hold to be the public interest the Minister has a duty to act. And if a complaint relevantly alleges that the board has so acted, as this complaint does, then it appears to me that the Act does impose a duty on the Minister to have it investigated. If he does not do that he is rendering nugatory a safeguard provided by the Act and depriving complainers of a remedy which I am satisfied that Parliament intended them to have.

Paragraph 3 of the letter of May 1, 1964, refers to the possibility that, if the complaint were referred and the committee were to uphold it, the Minister "would be expected to make a statutory Order to give effect to the committee's recommendations." If this means that he is entitled to refuse to refer a complaint because, if he did so, he might later find himself in an embarrassing situation, that would plainly be a bad reason. I can see an argument to the effect that if, on receipt of a complaint, the Minister can satisfy himself from information in his possession as to the merits of the complaint, and he then chooses to say that, whatever the committee might recommend, he would hold it to be contrary to the public interest to take any action, it would be a waste of time and money to refer the complaint to the committee. I do not intend to express any opinion about that because that is not this case. In the first place it appears that the Minister has come to no decision as to the merits of the appellants' case and, secondly, the Minister has carefully avoided saying what he would do if the committee were to uphold the complaint.

It was argued that the Minister is not bound to give any reasons for refusing to refer a complaint to the committee, that if he gives no reasons his decision cannot be questioned, and that it would be very unfortunate if giving reasons were to put him in a worse position. But I do not agree that a decision cannot be questioned if no reasons are given. If it is the Minister's duty not

to act so as to frustrate the policy and objects of the Act, and if it were to appear from all the circumstances of the case that that has been the effect of the Minister's refusal, then it appears to me that the court must be entitled to act.

A number of authorities were cited in the course of the argument but none appears to me to be at all close to the present case. I must, however, notice *Julius* v. *Bishop of Oxford*[1] because it was largely relied on. There the statute enacted that with regard to certain charges against any Clerk in Holy Orders it "shall be lawful" for the Bishop of the diocese "on the application of any party complaining thereof" to issue a commission for inquiry. It was held that the words "it shall be lawful" merely conferred a power.

> "But there may be something in the nature of the thing empowered to be done, something in the object for which it is to be done, something in the conditions under which it is to be done, something in the title of the person or persons for whose benefit the power is to be exercised, which may couple the power with a duty, and make it the duty of the person on whom the power is reposed, to exercise that power when called upon to do so" (*per* Lord Cairns L.C.[2]).

Lord Penzance said that the true question was whether regard being had to the person enabled, to the subject-matter, to be general objects of the statute and to the person or class of persons for whose benefit the power was intended to be conferred, the words do or do not create a duty,[3] and Lord Selborne said that the question was whether it could be shown from any particular words in the Act or from the general scope and objects of the statute that there was a duty.[4] So there is ample authority for going behind the words which confer the power to the general scope and objects of the Act in order to find what was intended.

In *Julius'* case[5] no question was raised whether there could be a discretion, but a discretion so limited that it must not be used to frustrate the object of the Act which conferred it; and I have found no authority to support the unreasonable proposition that it must be all or nothing—either no discretion at all or an unfettered discretion. Here the words "if the Minister in any case so directs" are sufficient to show that he has some discretion but they give no guide as to its nature or extent. That must be inferred from a construction of the Act read as a whole, and for

[1] (1880) 5 App.Cas. 214, H.L.(E.).
[2] Ibid. 222–223.
[3] Ibid. 229–230.
[4] Ibid. 235.
[5] 5 App.Cas. 214.

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the reasons I have given I would infer that the discretion is not unlimited, and that it has been used by the Minister in a manner which is not in accord with the intention of the statute which conferred it.

As the Minister's discretion has never been properly exercised according to law, I would allow this appeal. It appears to me that the case should now be remitted to the Queen's Bench Division with a direction to require the Minister to consider the complaint of the appellants according to law. The order for costs in the Divisional Court should stand. The appellants should have their costs in the Court of Appeal but, as extra expense was caused in this House by an adjournment of the hearing at their motion, they should only have two-thirds of their costs in this House.

LORD MORRIS OF BORTH-Y-GEST. My Lords, pursuant to decisions of policy which have been the basis of Agricultural Marketing Acts since 1931 there have been various marketing schemes. The producers of an agricultural product are themselves entitled to submit a scheme to the Minister of Agriculture for the regulation and marketing of a product. There may be a board to administer the scheme. Subject to compliance with certain conditions, the Minister may approve such a scheme. A scheme is to be one for regulating the marketing of a product " by the producers thereof." The present case concerns one such scheme, namely, the Milk Marketing Scheme. There has been a scheme in operation since 1933. It was then approved by the Minister and has since from time to time been amended. It is manifest that a scheme will be more acceptable to some producers of milk than to others. The advantage of having a buyer for all the milk which a producer produces will appeal to those who otherwise would have produced more than they could sell. There will be no such advantage for those so placed that they could have a sure and ready market for all that they could produce. If prices are fixed regionally, and are fixed having regard to the average of transport and marketing costs within the region, there will be some within the region who could assert that their costs if they had been left to themselves would have been less than those of others. If in fixing prices regionally it is not deemed advisable fully to reflect the variations as between regions of transport and marketing costs, then it follows that encouragement to production is being given to certain regions at the expense of others. Within the regions, therefore, as well as

within the industry, the interests of some producers are being advantaged at the expense of other producers. The less fortunate are being helped by the more fortunate.

The latter may not welcome the policy which brings about such a result. They may see no reason why they should not have more and others less. They may object to a system under which they are in substance contributing to a subsidy to others. Yet all this may be one of the results of having a scheme.

The Milk Marketing Scheme is administered by a board. It has twelve regional representatives (one for each of ten regions and two for the eleventh region). Those regional members of the board are elected by the registered producers (paragraph 16 of the scheme). In addition there are three special members elected by all registered producers and not less than two and not more than three persons appointed by the Minister. The scheme provides (by paragraph 24) that questions arising at any meeting of the board are to be decided by a majority of the votes of members present. There are regional committees whose duty it is to report to or to make representations to the board on the operation of the scheme in relation to the producers in the region (paragraph 31). On the coming into force of the scheme, a poll of registered producers had to be taken on the question whether the scheme was to remain in force (paragraph 44). Under the statutory provisions (section 1 (8) of the Act of 1931, now section 2 (7) of the Act of 1958) the scheme had to be laid before Parliament. The board has wide powers to regulate marketing (paragraph 60). If the board requires registered producers to sell any milk only to the board then

> "the board shall from time to time prescribe the terms on which and the price at which such milk shall be sold to the board and may also prescribe the form in which contracts for the sale of such milk to the board shall be made" (paragraph 64).

The board may prescribe different terms, prices and forms of contract for different classes of producers or classes of sale or descriptions of milk.

Two things are apparent. One is that the scheme provides for government of the industry by the industry. The second is that no machinery is provided whereby the work of the board could be over-ruled by some reviewing body in regard to such matters as terms of sale and price fixation.

The appellants are three producers in one region (the South-Eastern Region). They have the support of most, or nearly all, of the other producers in that region. In substance they say that the price being paid to them should be higher. They complain of the operation of the scheme. They asked (by a letter of January 4, 1965) that their complaint should be referred to the committee of investigation which has been appointed under the Act. It is important to note their complaint. It was

> "of certain acts and/or omissions in prescribing (under paragraph 64 of the scheme) the terms on which and the price at which milk shall be sold to the board, in that the board should, but do not, take fully into account variations as between producers in the costs of bringing their milk to a liquid market whether such costs are incurred or not."

They set out figures showing that the range of variation (between regions) of producers' net prices is 1·19 pence per gallon, whereas the range of variation (between regions) of true marketing costs is considerably higher (3·37 pence per gallon in 1961–62 and probably 3·66 pence per gallon in 1963–64). The costs in the South-Eastern Region are the lowest.

The cost of transporting milk is naturally at its lowest in regions where the producers are near to centres of population and the Milk Marketing Board pay a higher price at the farm gate to producers in those regions than to producers in other regions. This is known as a differential. Producers in the South-Eastern Region receive a higher regional differential than do producers in any of the other regions.

The complaint as formulated would imply that there should be varying differentials as between all producers, but the case proceeded on the basis that there should be no variation in the differential as between the producers in a particular region.

It would seem probable that the essential facts and figures relating to the complaint are either well known or are readily ascertainable. It is quite clear that in the fixing of prices it must have been decided by the board that they would not take regional variations of transport costs "fully" into account. That decision, if taken in good faith, must have been a policy decision. It must also be the case that the members of the board who fixed the prices must have been fully aware of the contentions of the appellants. Every member of the board must have heard the competing contentions for and against the board's policy advanced and recited over and over again. They have been canvassed over the

years. It has been for the board to decide as a matter of policy whether regional prices should or should not "take fully into account variations as between producers in the costs of bringing their milk to a liquid market." Wider issues of policy are, in turn, involved. The appellants in their letter to the Minister have suggested that the price fixations of the board will have the result of "reducing growth in the nearer areas and increasing it in the more distant" and they suggest that this will tend to increase the total marketing costs to the public detriment. It may or it may not be a good thing to increase production in the more distant areas. It may or it may not be in the public interest to encourage such production. It is no part of our province to attempt to assess the weight of the competing public interests which are involved or to consider whether the policy decisions of the board will or will not in the long run enure to the public advantage. The board may or may not have reached the wisest decision. It is, however, manifest that the board's decisions have been deliberate. There is no suggestion that the board have not acted in entire good faith. Nor is it said that they have exceeded their powers under the scheme as approved. When in 1964 the appellants made a suggestion to the board that there should be an arbitration the board, through their solicitors in a letter (dated June 18, 1964) to the appellants' solicitors, stated: [His Lordship read the letter and continued:]

The appellants do not now suggest that arbitration would be appropriate but in asking that their complaint should be referred to the committee of investigation appointed under the Act they are in effect asking for an arbitration in another form. They are asking that the determination of prices should be made by the committee. The committee could only recommend that the appellants should receive a higher price on the basis that other producers should receive a lower price. The position of all those others would be affected. The committee would be acting as an appellate body from the decision of the board. It may have to be decided as a matter of policy and judgment whether the committee of investigation (which could be concerned with any one of the marketing schemes coming into existence under the Act and was not appointed to be concerned with any particular scheme such as the Milk Marketing Scheme) would be the appropriate body to perform the function. The committee of investigation is, however, in existence and it certainly would be open to the

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Minister if he deemed it desirable to refer a complaint of the present kind to the committee.

Before your Lordships it was in the first place submitted that the appellants had a right to have their complaint referred to the committee and that accordingly an order of mandamus should be directed to the respondent positively commanding him to refer the complaint. This contention was rejected by the Divisional Court and was not even advanced in the Court of Appeal. I, also, would reject it. In my view, the respondent is endowed with a discretion. It is for him to decide whether to ask the committee to report on any complaint made as to the operation of any scheme made under the Act. A duty will only devolve upon the committee " if the Minister in any case so directs."

These words are in sharp contrast to those which are employed in the Act when a positive duty is imposed upon the Minister. Thus in section 2 (3) are the words " shall direct a public enquiry to be held." In section 19 (4) are the words " the Minister shall forthwith publish." In section 20 (3) are the words " the Minister shall refer." If Parliament had intended to impose a duty on the Minister to refer any and every complaint, or even any and every complaint of a particular nature, it would have been so easy to impose such a duty in plain terms. I cannot read the words in section 19 (3) as imposing a positive duty on the Minister to refer every complaint as to the operation of every scheme. Such was the appellant's contention though they modified it by suggesting that the duty would not exist in the case of trivial or frivolous or repetitive complaints. In support of their revived contention the appellants submitted that in some circumstances a duty exists to exercise a power. So in the present case it was argued that a power was deposited in the Minister, that the power was given for the benefit of particular persons, that in the Act they were specifically designated (for example, persons complaining as to the operation of a scheme) and that in the Act the circumstances in which there is entitlement to the exercise of the power are defined (that is, that there should be a complaint to the Minister as to the operation of the scheme being a complaint which could not be considered by a consumers' committee). Reliance was placed upon a passage in the speech of Lord Cairns L.C. in *Julius* v. *Bishop of Oxford.*[6] Lord Cairns said[7] that the cases decided

[6] 5 App.Cas. 214.

[7] Ibid. 225.

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> " that where a power is deposited with a public officer for the purpose of being used for the benefit of persons who are specifically pointed out, and with regard to whom a definition is supplied by the legislature of the conditions upon which they are entitled to call for its exercise, that power ought to be exercised, and the court will require it to be exercised."

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In my view, this passage does not avail the appellants. I can see no provision in the Act showing that the appellants or others who might make a complaint similar to theirs were " entitled " to call upon the Minister to exercise the power given to him. At most their entitlement was that the Minister should consider and should decide whether or not in the exercise of his discretion he

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would refer a complaint. It would have to be shown that the Act gave the appellants a " right " to have their complaint sent to the committee before the power in the Minister could be held to be one that he was bound to exercise. Thus in his speech in *Julius* v. *Bishop of Oxford*[8] Lord Blackburn said that

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> " if the object for which the power is conferred is for the purpose of enforcing a right, there may be a duty cast on the donee of the power to exercise it for the benefit of those who have that right, when required on their behalf."

So also Lord Blackburn said[9]:

> " The enabling words are construed as compulsory whenever the object of the power is to effectuate a legal right."

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Where some legal right or entitlement is conferred or enjoyed, and for the purpose of effectuating such right or entitlement a power is conferred upon someone, then words which are permissive in character will sometimes be construed as involving a duty to exercise the power. The purpose and the language of any

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particular enactment must be considered. Thus in *Rex* v. *Mitchell*[10] consideration was given to the words of section 9 of the Conspiracy and Protection of Property Act, 1875, namely:

> " Where a person is accused before a court of summary jurisdiction of any offence made punishable by this Act, and for which a penalty amounting to twenty pounds, or imprisonment, is imposed, the accused may, on appearing before the court of summary jurisdiction, declare that he objects to being tried for such offence by a court of summary jurisdiction, and thereupon the court of summary jurisdiction may deal with the case in all respects as if the accused were charged with

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[8] 5 App.Cas. 214, 241.
[9] Ibid. 244.
[10] [1913] 1 K.B. 561; 29 T.L.R. 157, D.C.

an indictable offence and not an offence punishable on summary conviction, and the offence may be prosecuted on indictment accordingly."

A declaration of objection to being tried by a court of summary jurisdiction was duly made by a person accused of an offence made punishable by the Act who was entitled to object. It was held that accordingly he had a right to trial by jury and that the justices were bound to give effect to his claim and had no jurisdiction to try the case.

On the principles laid down in *Julius'* case [11] it becomes necessary to consider the language used in the Agricultural Marketing Act and the purposes of the Act. A consumers' committee under section 19 (2) is charged with the duty of considering and reporting to the Minister on the effect of a scheme on consumers and also on " any complaints made to the committee as to the effect of any such scheme on consumers of the regulated product." The words in section 19 (3) are in marked contrast. A committee of investigation is only charged with the duty of considering and reporting " if the Minister in any case so directs." The Minister may refer to them a report of a consumers' committee. He may refer to them a complaint which has been made to him and which in his view could not have gone to a consumers' committee. The language here is, in my view, purely permissive. The Minister is endowed with discretionary powers. If he did decide to refer a complaint he is endowed with further discretionary powers after receiving a report (see section 19 (6)).

I cannot, therefore, accept the contention of the appellants that they had a right to have their complaint referred to the committee and that the Minister had a positive duty to refer it. The Minister, in my view, had a discretion. It was urged on behalf of the respondent that his discretion was in one sense an unfettered one, though it was not said that he could disregard the complaint. The case proceeded on an acceptance by the respondent that he was bound to consider the complaint and then, in the exercise of his judgment, to decide whether or not to refer it to the committee.

If the respondent proceeded properly to exercise his judgment then, in my view, it is no part of the duty of any court to act as a Court of Appeal from his decision or to express any opinion as to whether it was wise or unwise. The Minister was given an executive discretion. In speaking of a power given by statute to a local authority to grant certain licences Lord Greene M.R. said

[11] 5 App.Cas. 214.

in his judgment in *Associated Provincial Picture Houses Ltd.* v. *Wednesbury Corporation* [12]:

> " When discretion of this kind is granted the law recognises certain principles upon which that discretion must be exercised, but within the four corners of those principles the discretion, in my opinion, is an absolute one and cannot be questioned in any court of law."

I think it follows that an order of mandamus could only be made against the Minister if it is shown that in some way he acted unlawfully. A court could make an order if it were shown (*a*) that the Minister failed or refused to apply his mind to or to consider the question whether to refer a complaint or (*b*) that he misinterpreted the law or proceeded on an erroneous view of the law or (*c*) that he based his decision on some wholly extraneous consideration or (*d*) that he failed to have regard to matters which he should have taken into account. I propose to consider whether any one of these is established. The order that was made by the Divisional Court commanded the respondent

> " to consider the said complaint of the applicants according to law and upon relevant consideration to the exclusion of irrelevant considerations."

As to (*a*) it cannot be asserted that the respondent failed to consider the appellants' complaint. In his affirmation the respondent states that he considered the complaint and all the matters put before him by the appellants. He states that he came to his decision for the reasons indicated in the letters of March 23 and May 3, 1965, namely that he

> " considered that the issue raised by the applicants' complaint was one which in all the circumstances should be dealt with by the board rather than the committee of investigation."

As to (*b*) I do not consider that the respondent is shown to have misinterpreted the law unless it could be said that any of the considerations recorded in the letters from the Ministry were so inadmissible as to involve that the respondent took a wrong view of the law or misdirected himself in law. I turn therefore to consider the letters. They formed the foundation for the submission that on the basis of (*c*) and (*d*) above the order of the Divisional Court was appropriately made.

As the respondent states in his affirmation that he came to his decision for the reasons indicated in the two letters, it is primarily

[12] [1948] 1 K.B. 223, 228; 63 T.L.R. 623; [1947] 2 All E.R. 680, C.A.

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those letters that are to be studied. As, however, he states that in deciding as to the application he had read a letter dated May 1, 1964, written by a Ministry representative and as he has not stated that he excluded from his mind the considerations therein recorded, I think that it is a reasonable inference that they had, or may have had, some influence. It is fair, I think, to regard all three letters as revealing what was in the mind of the respondent. His decision was that the complaint was not one that in his view was suitable for investigation by means of the particular procedure of a reference to the committee of investigation. That decision was essentially a policy decision. It concerned a situation that was known and understood in the industry. The main facts in regard to it were known. The differential, or the range between producers' net prices, stands at 1·19 pence per gallon. It has stood at that figure for some years. It was a figure that was first fixed during the war. That fact was known to all concerned. So also must it have been known to all concerned that if true marketing costs were taken "fully" into account the range would be much higher. The question must therefore have been a perennial one as to whether the differential should be varied. If it were, then producers in some regions would get more and producers in other regions would get less. A constant major policy problem must have been whether it is desirable to encourage production in those regions where, if there were no scheme, producers would not fare very well. So also it must have been widely known that two committees had made suggestions relating to this long-standing problem. One of them (the Cutforth Committee) had reported as far back as 1936. Another (the Davis Committee) had in 1963 suggested that the country should be divided into five price zones each with a different differential and that the total range of the prices at the farm gate should be the figure of 2·4 pence per gallon instead of the figure of 1·19 pence per gallon. But all these facts and considerations must have been well known.

A B C D E F G

I know of no reason to assume or to suggest that the members of the board in the discharge of their duties have acted irresponsibly. Because a policy decision under a national scheme results in a measure of advantage to some and a measure of disadvantage to others it does not follow that the members of the board have been guided, not by considerations of the national interest or of the general interest of their industry, but solely by considerations as to how the pockets of their colleagues would be affected.

At any time during the sequence of the past years it would

have been open to a Minister, had he considered it desirable and politic, to take the initiative under section 20 subsection (2) of the Act and to give directions to the board concerning prices. It was at all time a question of policy for successive Ministers, whether or not they should take such action. For any decision or for any inaction a Minister would be answerable in Parliament.

It was against all this background that the respondent had to consider the appellants' request in the early part of 1965. In agreement with Diplock and Russell L.JJ. I do not consider that it has been shown that he failed to exercise his discretion: nor has it been shown that he was guided by irrelevant considerations or that he failed to consider relevant matters. A study of the letters leads me to the view that the respondent considered it desirable that the milk industry should, in accordance with its own scheme, be self-governing and that it would not be good policy for him to over-rule decisions of the Milk Marketing Board which fixed the price to be paid in a particular region or to particular persons. I do not find in the letters any statement that the respondent considered that he had no power to refer the appellants' complaint to the committee: nor any statement that the respondent considered that he was compelled to leave price fixing to the Milk Marketing Board. Rightly or wrongly he considered it best to do so.

As a result of the meticulous scrutiny to which the three letters have been subjected the appellants contend that irrelevant or inadmissible considerations were taken into account by the respondent.

1. Criticism is made of the passage in the letter of March 23 to the effect that the complaint of the appellants was "one that raises wide issues going beyond the immediate concern of your clients which is presumably the prices they themselves receive." In the following sentence it is pointed out that the complaint would also affect the interests of other regions and involve the regional price structure as a whole. I do not read that passage as involving that the complaint ought not to go to the committee merely because it raised wide issues. What I think was being pointed out was that the appellants' complaint would necessarily involve a complete review of the prices in all the regions as fixed by the board. I see no reason to think that the respondent was unaware of his powers as, for example, under section 20 (2). What I think is revealed is that the respondent as a matter of policy considered it undesirable or inappropriate for him to over-rule the

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board in regard to price fixation. This is shown by the letter of May 1, 1964, where it said:

> "It is by no means clear that the Minister could make an Order pertaining to the price of milk in the south-east without determining at least one of the major factors governing prices in the other regions, and he would therefore be assuming an inappropriate degree of responsibility for determining the structure of regional prices throughout England and Wales."

2. Criticism is made of the passage in which it is said that the Minister considered that the issue was of a kind which properly fell to be resolved within the framework of the scheme. It is said that he was mistaking his powers and was being unmindful of the courses of action open to him either under section 20 (2) or after a report from a committee under section 19 (6) (*c*). I see no reason to deduce that the respondent was oblivious of his powers: nor that he was not appreciating that under the machinery of the scheme a majority vote could result in disadvantages for some districts. If the respondent nevertheless decided that the self-governing machinery should operate, his decision could be attacked as being impolitic, but I do not think it could be attacked as being made on inadmissible considerations.

3. Criticism is further made of the sentence in the letter of May 1, 1964, which reads:

> "In considering how to exercise his discretion the Minister would, amongst other things, address his mind to the possibility that if a complaint were so referred and the committee were to uphold it, he in turn would be expected to make a statutory Order to give effect to the committee's recommendations."

This sentence may be obscure and imprecise but I doubt whether we ought to put the most unfavourable construction upon it. If there was a reference to the committee and if the committee reported that some act of the board was contrary to the interests of consumers or "of any persons affected by the scheme" and was not in the public interest, then the Minister would himself have a discretion as to whether or not to take any course of action designated in section 19 (6).

There may be cases where from a knowledge of the problem and all its aspects and because of his own firm view as to what course the public interest demands, a Minister could see that a reference could lead to no useful result. A Minister might conclude that whatever report a committee might make a reference to them

A would only produce needless confusion and disappointment and would not prompt him to follow a course of action that he considered undesirable. Though the 1964 letter is not very explicit, it is for the appellant to show that the respondent was guided by irrelevant considerations. In agreement with Diplock and Russell L.JJ. I consider that the appellants have failed to show this.

B For the reasons which I have set out I would dismiss the appeal.

LORD HODSON. My Lords, the appellants say in the first place that this is a case which satisfies the test, propounded in *Julius* v. *Bishop of Oxford*,[13] drawing the distinction between a power coupled with a duty and a complete discretion. In the former case C enabling words are said to be compulsory when they are words to effectuate a legal right.

It is argued that the Minister is subject to mandamus here, for he is given a power to be exercised in favour of persons who are defined and accordingly are given a right to have their claim submitted to a committee of investigation under the provisions of D section 19 of the Agricultural Marketing Act, 1958. This argument was abandoned before the Divisional Court, not put forward in the Court of Appeal but was resurrected before your Lordships by way of Supplemental Case. Section 19 (3), so far as material, reads:

> E "A committee of investigation shall— . . . (*b*) be charged with the duty, if the Minister in any case so directs, of considering, and reporting to the Minister on, any report made by a consumer's committee and any complaint made to the Minister as to the operation of any scheme which, in the opinion of the Minister, could not be considered by a consumers' committee under the last foregoing subsection."

F Schemes for regulating the marketing of agricultural products were introduced by the Agricultural Marketing Act, 1931, and are compulsory in their operation upon consumers, who are protected as to price and supply, upon distributors and upon producers, who get the advantage of having no milk left on their hands unsold.

G The discretion must be exercised by the Minister in accordance with the intention of the Act but there is nothing in the language used in the subsection introduced by the words "if the Minister in any case so directs" nor in the context of the Act and earlier legislation to support the view that an absolute right to an

[13] 5 App.Cas. 214.

enquiry is given to an aggrieved person. The argument of the appellants is undermined, in my opinion, by their concession that trivial, frivolous or vexatious complaints can be shut out as, for example, where a complaint has been recently dealt with in a parallel case. True that the scheme is of a compulsory nature and section 19 is designed for the redress of grievances but this is not to exclude the Minister's discretion to reject a complaint if he exercises his discretion according to law. The succeeding section, section 20 of the Act, indicates the position of the Minister as responsible for giving directions to a board as to its acts or omissions as he considers necessary or expedient in the public interest and his directions have to be complied with so far as the board is not required to do anything which it has no power to do.

If the Minister has a complete discretion under the Act, as in my opinion he has, the only question remaining is whether he has exercised it lawfully.

It is upon this issue that much difference of judicial opinion has emerged although there is no divergence of opinion as to the relevant law. As Lord Denning M.R. said, citing Lord Greene M.R. in the case of *Associated Provincial Picture Houses Ltd.* v. *Wednesbury Corporation* [14]:

> ". . . a person entrusted with a discretion must, so to speak, direct himself properly in law. He must call his own attention to the matters which he is bound to consider. He must exclude from his consideration matters which are irrelevant to what he has to consider."

In another part of this judgment [15] Lord Greene drew attention to that which I have mentioned above, namely, the necessity to have regard to matters to which the statute conferring the discretion shows that the authority exercising the discretion ought to have regard. The authority must not, as it has been said, allow itself to be influenced by something extraneous and extrajudicial which ought not to have affected its decision.

I come now to the facts of the present case. In 1933 the Milk Marketing Scheme (amended in 1955) came into operation. The members of the board consist of 12 regional members elected for the several regions by the registered producers and three special members elected by all registered producers and not less than two and not more than three persons appointed by the Minister (see Part II of the scheme, paragraph 9). Questions arising at a

[14] [1948] 1 K.B. 223, 229. [15] Ibid. 228.

meeting of the board are decided by a majority of the votes of the members present (see Part II, paragraph 24). The price of milk is fixed by the board for milk delivered at the farm gate.

The South-Eastern farmers being much nearer to the great population of London are paid what is called a differential to compensate them for the loss of the advantage they would otherwise have over most other districts in consequence of their proximity to a large market. The differential was fixed many years ago at 1·19d. per gallon and the South-Eastern farmers have long complained that it is too low and sought without success to obtain redress of their grievance from the board. They have been outvoted since, in the interests of their own pockets, so it is said, a majority of the other regions opposed them. This decision has been reached notwithstanding the recommendations of two committees set up at different times who have recognised the justice of their claim. On the Davis Committee, set up in 1963, making its report without any benefit to the South-Eastern farmers ensuing, and the board having rejected their claim, the first named appellant approached the Minister at the end of January, 1964, asking what means the Ministry could suggest for investigating and remedying the grievance felt by his committee concerning the regional price of milk in the south-east.

Correspondence ensued to which it will be necessary to refer and the decision of the Minister refusing to refer the complaint to the investigating committee was contained in a letter of March 23, 1965. The letter reads, so far as material:

> "The Minister's main duty in considering this complaint has been to decide its suitability for investigation by means of a particular procedure. He has come to the conclusion that it would not be suitable. The complaint is of course one that raises wide issues going beyond the immediate concern of your clients, which is presumably the prices they themselves receive. It would also affect the interests of other regions and involve the regional price structure as a whole. In any event the Minister considers that the issue is of a kind which properly falls to be resolved through the arrangements available to producers and the board within the framework of the scheme itself. Accordingly he has instructed me to inform you that he is unable to accede to your clients' request that this complaint be referred to the committee of investigation under section 19 of the Act."

In response to a further letter from the appellants' solicitors a letter dated May 3, 1965, was received referring to the Minister's unfettered discretion and adding that in reaching his decision

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he had had in mind the normal democratic machinery of the Milk Marketing Scheme in which all registered producers participated and which governs the operations of the board.

Upon the appellants' solicitors enquiring whether it would be asserted that the letters of 1965 were the only matters present to the Minister's mind at the time of his decision, to the exclusion of the considerations set out in the letters which had passed in the year 1964, the Minister affirmed on November 4, 1965, he having been appointed on October 19, 1964 (after the 1964 letters had passed):

> "3. In considering the applicants' application I read among other papers the letter signed by Mr. J. H. Kirk and dated May 1, 1964. . . .
> "4. Before reaching my decision not to refer the applicants' complaint to the committee of investigation I considered all the matters put before me on behalf of the applicants in support of their application.
> "5. I came to my decision for the reasons indicated in the letters dated March 23, 1965, and May 3, 1965, . . . namely that I considered that the issue raised by the applicants' complaint was one which in all the circumstances should be dealt with by the board rather than the committee of investigation."

If the letter of May 1, 1964, be looked at, and it was not disowned by the Minister in his affirmation or at all, it throws further light on the refusal of the Minister to exercise his discretion by referring the complaint to the investigating committee. This letter contains the following :

> "3. In considering how to exercise his discretion the Minister would, amongst other things, address his mind to the possibility that if a complaint were so referred and the committee were to uphold it, he in turn would be expected to make a Statutory Order to give effect to the committee's recommendations. It is this consideration, rather than the formal eligibility of the complaint as a subject for investigation, that the Minister would have in mind in determining whether your particular complaint is a suitable one for reference to the committee. We were unable to hold out any prospect that the Minister would be prepared to regard it as suitable.
> "4. The reasons which led us to this conclusion were explained to you as follows: (*a*) The guarantee given to milk producers under the Agriculture Acts is a guarantee given to the board on behalf of all producers. The Minister owes no duty to producers in any particular region, and this is a principle that would be seriously called into question by the making of an Order concerned with a regional price; (*b*) Such action would also bring into question the status of the Milk

Marketing Scheme as an instrument for the self-government of the industry and such doubt would also, by extension, affect the other marketing schemes as well; and (*c*) It is by no means clear that the Minister could make an Order pertaining to the price of milk in the south-east without determining at least one of the major factors governing prices in the other regions, and he would therefore be assuming an inappropriate degree of responsibility for determining the structure of regional prices throughout England and Wales. "5. I wish to point out that the statement of these reasons is not intended to imply an assessment of the merits of your complaint considered as an issue of equity among regions."

The reasons disclosed are not, in my opinion, good reasons for refusing to refer the complaint seeing that they leave out of account altogether the merits of the complaint itself. The complaint is, as the Lord Chief Justice pointed out, made by persons affected by the scheme and is not one for the consumer committee as opposed to the committee of investigation and it was eligible for reference to the latter. It has never been suggested that the complaint was not a genuine one. It is no objection to the exercise of the discretion to refer that wide issues will be raised and the interests of other regions and the regional price structure as a whole would be affected. It is likely that the removal of a grievance will, in any event, have a wide effect and the Minister cannot lawfully say in advance that he will not refer the matter to the committee to ascertain the facts because, as he says in effect, although not in so many words, "I would not regard it as right to give effect to the report if it were favourable to the appellants."

It has been suggested that the reasons given by the Minister need not and should not be examined closely for he need give no reason at all in the exercise of his discretion. True it is that the Minister is not bound to give his reasons for refusing to exercise his discretion in a particular manner, but when, as here, the circumstances indicate a genuine complaint for which the appropriate remedy is provided, if the Minister in the case in question so directs, he would not escape from the possibility of control by mandamus through adopting a negative attitude without explanation. As the guardian of the public interest he has a duty to protect the interests of those who claim to have been treated contrary to the public interest.

I would allow the appeal accordingly and remit the matter to the Queen's Bench Division so as to require the Minister to consider the complaint of the appellants according to law. I agree

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with the order for costs proposed by my noble and learned friend, Lord Reid.

LORD PEARCE. My Lords, prima facie the appellants have a complaint of substance. They are "persons affected by the scheme." The "act or omission of the board" in not paying them a higher price differential is "contrary to their interests." And apparently reasonable prima facie arguments have been advanced to show that this "is not in the public interest." The appellants' complaint is therefore prima facie suitable to be considered by the committee of investigation.

The outline of their complaint is simple. They farm in the more populous South-Eastern Region. In a more populous region milk is more valuable. The consumer is near at hand. The cost of transport is less. And milk which is drunk fetches higher prices than that which is used for manufacture. As against this the overheads of production are, generally speaking, somewhat higher than in some more rural regions. For instance, the land in the more populous region is almost inevitably more expensive. It seems to follow that if the producer of milk in a populous region is paid precisely the same price as the producer in a sparsely populated rural region, the former is not being fairly treated. Some acknowledgment of this fact is made in a differential of 1·19 pence per gallon which was, we are told, fixed by the Minister during the war. Of this figure ·71 of a penny related to the cost of transport. With rising prices the present differential cost in respect of transport has risen to over 3d. No acknowledgment of this increase in cost has ever been made in the price paid to the farmers in the South-Eastern Region. Yet, unless the figure fixed by the Minister in the war was too large, which has not been suggested, it would seem that in view of increased costs it must now be too small. Prima facie this would seem unfair. Two committees, one in 1956 and one in 1963, have, on investigation, lent weight to the appellants' contention. But the gain of the South Eastern would mean some loss in some regions elsewhere. The South-Eastern Region is in a minority on the board. They have been unable, in spite of fifteen attempts, to persuade the majority to do anything about it. The appellants contend that the present situation is not only unfair to them but also it is not in the public interest. They argue, for instance, that the present situation discourages the production of milk in the region where it is most valuable. Against this, of course, may be set the benefit of

encouraging milk production in more sparsely populated regions. Any final conclusion on this matter obviously needs close consideration of all its relevant detail. One may sum it up superficially by saying that there is prima facie a complaint of some substance, that it has had support from two committees, and that there seems little likelihood of the majority of the board doing anything to remedy it.

This is not a criticism of the majority. Most of them are elected to represent their own regions. One can hardly expect them to vote in favour of something that will injure their own regions. Nor would it be very conducive to the success of the scheme if a region felt that its representative was pursuing altruistic policies in favour of other regions at the expense of those whom he is elected to represent. If justice to a minority is to be imposed at the expense of a majority, it is probably more convenient that it should be imposed aliunde.

This fact was, in my opinion, recognised by Parliament. It was obvious that the scheme and the Act created a monopoly and imposed severe restrictions on individuals' liberty of action. With the aim of general betterment Parliament was interfering with the individual farmer's method of earning a livelihood and subjecting him to the mercies of the majority rule of the board. But (no doubt with these considerations in mind) Parliament deliberately imposed certain safeguards. Two independent committees must be appointed (section 19). First there is the "consumers' committee" to deal with consumers' complaints. The findings of this committee do not, however, produce any effective result, unless and until they have been considered by the more important committee of investigation. That committee is

> "charged with the duty, if the Minister in any case so directs, of considering, and reporting to the Minister on, any report made by a consumers' committee and any complaint made to the Minister as to the operation of any scheme which, in the opinion of the Minister, could not be considered by a consumers' committee."

The Minister is bound to publish that report.

> "If a committee of investigation report to the Minister that any provision of a scheme or any act or omission of a board administering a scheme is contrary to the interests of consumers of the regulated product, or is contrary to the interests of any persons affected by the scheme and is not in the public interest, the Minister, if he thinks fit so to do after considering the report,"

may either amend the scheme so as to rectify the matter, or revoke the whole scheme, or direct the board to take steps to rectify the matter (after hearing any representations from the board). By section 20 the Minister has a right of his own motion, independently of the investigation committee, to impose his will on the board. But in that case the board can ask to have the matter heard by the committee of investigation, and if the committee's report is in the board's favour the Minister cannot impose his will on them.

Thus the independent committee of investigation was a cornerstone in the structure of the Act. It was a deliberate safeguard against injustices that might arise from the operation of the scheme. There is provision for arbitration between individual producers and the board. But this is clearly not intended to deal with a case such as the present; and the board has rightly refused arbitration on this matter.

The appellants have therefore no avenue for their complaint except through section 19. And that section makes access to the committee of investigation dependent on a direction of the Minister to the committee of investigation. There is no provision as to what are the duties of a Minister in this respect. Has he a duty to further complaints of substance which have no other outlet? Or can he refuse them any outlet at all if he so chooses? Need he have any valid reason for doing so? Or if he refuses without any apparent justification, is he exempt from any interference by the courts provided that he either gives no reasons which are demonstrably bad or gives no reasons at all? No express answer to these questions is given in the Act. The intention of Parliament, therefore, must be implied from its provisions and its structure.

Both sides placed some reliance on the case of *Julius* v. *Bishop of Oxford*.[16] This dealt with a somewhat analogous problem under an Act which said "it shall be lawful" for the bishop to issue a commission. It was held that the words gave the bishop a complete discretion to issue or decline to issue a commission. That decision rested on the construction of the particular Act and it made clear that in the context of an Act is to be found the answer to the question how a power given by it is to be exercised. Lord Cairns L.C. said[17]:

> ". . . the cases to which I have referred appear to decide nothing more than this: that where a power is deposited with a public officer for the purpose of being used for the benefit

[16] 5 App.Cas. 214. [17] Ibid. 225.

of persons who are specifically pointed out, and with regard to whom a definition is supplied by the legislature of the conditions upon which they are entitled to call for its exercise, that power ought to be exercised, and the court will require it to be exercised."

Lord Penzance said [18]:

"The words 'it shall be lawful' are distinctly words of permission only—they are enabling and empowering words. They confer a legislative right and power on the individual named to do a particular thing, and the true question is not whether they mean something different, but whether, regard being had to the person so enabled—to the subject-matter, to the general objects of the statute, and to the person or class of persons for whose benefit the power may be intended to have been conferred—they do, or do not, create a duty in the person on whom it is conferred, to exercise it."

And Lord Selborne said [19]:

"The question whether a judge, or a public officer, to whom a power is given by such words, is bound to use it upon any particular occasion, or in any particular manner, must be solved aliunde, and, in general, it is to be solved from the context, from the particular provisions, or from the general scope and objects, of the enactment conferring the power."

It is quite clear from the Act in question that the Minister is intended to have *some* duty in the matter. It is conceded that he must properly consider the complaint. He cannot throw it unread into the waste paper basket. He cannot simply say (albeit honestly) "I think that in general the investigation of complaints has a disruptive effect on the scheme and leads to more trouble than (on balance) it is worth; I shall therefore never refer anything to the committee of investigation." To allow him to do so would be to give him power to set aside for his period as Minister the obvious intention of Parliament, namely, that an independent committee set up for the purpose should investigate grievances and that their report should be available to Parliament. This was clearly never intended by the Act. Nor was it intended that he could silently thwart its intention by failing to carry out its purposes. I do not regard a Minister's failure or refusal to give any reasons as a sufficient exclusion of the court's surveillance. If all the prima facie reasons seem to point in favour of his taking a certain course to carry out the intentions of Parliament in respect of a power which it has given him in that regard, and he gives no reason whatever for taking a contrary course, the court may infer that he has no

[18] 5 App.Cas. 214, 229–230. [19] Ibid. 235.

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good reason and that he is not using the power given by Parliament to carry out its intentions. In the present case, however, the Minister has given reasons which show that he was not exercising his discretion in accordance with the intentions of the Act.

In the present case it is clear that Parliament attached considerable importance to the independent committee of investigation as a means to ensure that injustices were not caused by the operation of a compulsory scheme. It provided no other means by which an injustice could be ventilated. It was not content to leave the matter wholly in the power of a majority of the board. Nor was it content that the removal of injustice should be left to the power of the Minister. It wished to have the published views of an independent committee of investigation (with wide power to explore the matter fully). It also wished that committee to consider and weigh the public interest—a fact that makes it clear that the question of public interest was not at that stage being left to the Minister. When the report is published then the Minister may and must make up his own mind on the subject. He has power to do what he thinks best and decide whether or not to implement the report. He is then answerable only to Parliament, which will have the advantage of being able to understand the pros and cons of the matter from the published report of an independent committee. Until that is published nobody can effectively criticise his action, since nobody will have a balanced view of the strength of the grievance and its impact on the public interest.

It is clear, however, as a matter of common sense, that Parliament did not intend that frivolous or repetitive or insubstantial complaints or those which were more apt for arbitration should be examined by the committee of investigation. And, no doubt, the Minister was intended to use his discretion not to direct the committee to investigate those. It is argued that, if he has a discretion to *that* extent, he must also have an unfettered discretion to suppress a complaint of substance involving the public interest which has no other outlet. I cannot see why this should be so. Parliament intended that certain substantial complaints (involving the public interest) under the compulsory scheme should be considered by the investigation committee. It was for the Minister to use his discretion to promote Parliament's intention. If the court had doubt as to whether the appellants' complaint was frivolous or repetitive, or not genuine, or not substantial, or unsuitable for investigation or more apt for arbitration, it would

not interfere. But nothing which has been said in this case leads one to doubt that it is a complaint of some substance which should properly be investigated by the independent committee with a view to pronouncing on the weight of the complaint and the public interest involved.

The fact that the complaint raises wide issues and affects other regions was not a good ground for denying it an investigation by the committee. It is a matter which makes it very suitable for the committee of investigation, with its duty to report on the public interest, and its capacity to hear representatives of all the regions.

Moreover the Minister was mistaken in thinking that " normal democratic machinery of the Milk Marketing Scheme " was a ground for refusal to have the complaint investigated. It is alleged that the normal democratic machinery of the board is acting contrary to the public interest. The investigation under section 19 and the Minister's powers under section 20 were intended to correct, where necessary, the normal democratic machinery of the scheme. Parliament had put into the hands of the Minister and those of the committee of investigation the power and duty where necessary to intervene. A general abdication of that power and duty would not be in accord with Parliament's intentions.

I would allow the appeal.

LORD UPJOHN. My Lords, this appeal is of great importance to the milk producing industry and therefore to the country in general, for it is concerned with the refusal of the respondent Minister to order an inquiry into the complaint of the appellants representing the milk producing farmers of the South-Eastern Region.

In 1931 Parliament, in order to produce better conditions within the agricultural industry and more efficient and economical methods of production and distribution, enacted the Agricultural Marketing Act, 1931, which provided for schemes to be prepared for the control of various sections of the industry. In 1933 pursuant to the provisions of the Act, the Milk Marketing Scheme, 1933, for England and Wales was prepared and approved by Parliament and is, subject to many subsequent amendments, still in force; I shall refer to it as " the scheme." Many other schemes relating to the control of other sections of the industry have been prepared and approved and the Act now controlling these schemes is the Agricultural Marketing Act, 1958, an Act consolidating the

Act of 1931 and later amending Acts. For all relevant purposes schemes have statutory force.

As was intended by Parliament, the scheme was prepared by the industry itself, a circumstance much relied upon in argument on behalf of the Minister; but of course that does not mean that it received the unanimous approval of all milk producers; that would be impossible to expect of any scheme. The scheme provided for a board to administer it consisting of members elected by the eleven regions into which the country was for the purposes of the scheme divided, one of them being the South-Eastern Region. It provided for the registration of producers of milk and in those days when compulsory powers were less familiar than today, went so far as to provide that no unregistered producer should sell any milk. Furthermore the scheme empowered the board (a power quickly exercised and still in force) to resolve that registered producers should sell only to the board and then only at the price and upon the terms prescribed by the board. No one doubts that these provisions were greatly to the advantage of the industry as a whole, but a scheme which put the milk industry into such a straight jacket may produce anomalies and individual discontent. In my opinion it was with this (inter alia) in view and in the realisation that such matters should receive review at ministerial level that Parliament enacted the provision now to be found in section 19 of the Act of 1958.

That section provided that the Minister should appoint two committees, a consumers' committee and a committee of investigation. The former committee is bound to consider and report to the Minister upon any approved scheme and any complaints made to them as to the effect of the scheme on consumers, a matter with which this appeal is not concerned.

The committee of investigation is by section 19 (3) (*b*)

> "charged with the duty, if the Minister in any case so directs, of considering, and reporting to the Minister on . . . any complaint made to the Minister as to the operation of any scheme which . . . could not be considered by a consumers' committee . . ."

These committees are by the Act permanent committees and have been set up by the Minister to receive and deal with, from time to time, matters referred to them, another indication that Parliament realised that schemes might require inquiry and review in operation as time went on and circumstances changed.

The South-Eastern region contend that for many years they have received too low a price for their products for the reasons I

A shall not discuss, for they are set out fully in the speech of my noble and learned friend, Lord Reid. Further, it is perfectly clear upon the facts that this question, having been considered by two independent committees (with results on the whole favourable to the South-Eastern Region) and having been raised on no less than fifteen occasions at board meetings by the South-Eastern B regional representative since 1958, cannot be dismissed as frivolous, vexatious or trivial. In fairness to the Minister and his advisers let it be said that this has never been suggested.

At first sight, therefore, I should suppose that this was precisely the type of matter which Parliament had envisaged would be fit for investigation by the committee of investigation and report C to the Minister, but the Minister has declined either to investigate the complaint himself, as of course he was perfectly entitled to do, or to refer it to the committee of investigation.

Section 19 (3) as a matter of language confers a discretion upon the Minister as to whether any complaint made to him should be referred to the committee of investigation, the relevant D words being "if the Minister in any case so directs," plainly words of discretion and not of duty. But it was argued before your Lordships, perhaps more strenuously at the first hearing than at the second after Supplemental Cases had been delivered, that the case was governed by the principle established by the well known case of *Julius* v. *Bishop of Oxford*[20] where it was held E that words of permission such as "it shall be lawful" might in some cases in fact call for its exercise and create a duty upon the donee of the power or permission to exercise it. It was held not to do so in that case where Parliament had conferred upon the bishop a power to issue a commission, but, like so many cases in our law where it was held that the principle did not apply, it is the F leading authority for the proposition that there may be, as it is so often said, "a power coupled with a duty." In other words, as was so succinctly stated by the court in *Rex* v. *Steward of Havering Atte Bower*,[21] "the words of permission . . . are obligatory"; briefly they create a duty, not a power.

But, in my opinion, that principle can have no application to G the present where it is clear that Parliament would have used different words if it had intended that the Minister was under a duty to refer every complaint to the committee of investigation; in fact Parliament would have adopted precisely the same language as in section 19 (2) where consumers are empowered to make their

[20] 5 App.Cas. 214.

[21] (1822) 5 B. & Ald. 691, 692.

complaints direct to the consumers' committee without any intermediate reference to the Minister.

So it is clear that the Minister has a discretion and the real question for this House to consider is how far that discretion is subject to judicial control.

My Lords, upon the basic principles of law to be applied there was no real difference of opinion, the great question being how they should be applied to this case.

The Minister in exercising his powers and duties, conferred upon him by statute, can only be controlled by a prerogative writ which will only issue if he acts unlawfully. Unlawful behaviour by the Minister may be stated with sufficient accuracy for the purposes of the present appeal (and here I adopt the classification of Lord Parker C.J., in the Divisional Court): (*a*) by an outright refusal to consider the relevant matter, or (*b*) by misdirecting himself in point of law, or (*c*) by taking into account some wholly irrelevant or extraneous consideration, or (*d*) by wholly omitting to take into account a relevant consideration.

There is ample authority for these propositions which were not challenged in argument. In practice they merge into one another and ultimately it becomes a question whether for one reason or another the Minister has acted unlawfully in the sense of misdirecting himself in law, that is, not merely in respect of some point of law but by failing to observe the other headings I have mentioned.

In the circumstances of this case, which I have sufficiently detailed for this purpose, it seems to me quite clear that prima facie there seems a case for investigation by the committee of investigation. As I have said already, it seems just the type of situation for which the machinery of section 19 was set up, but that is a matter for the Minister.

He may have good reasons for refusing an investigation, he may have, indeed, good policy reasons for refusing it, though that policy must not be based on political considerations which as Farwell L.J. said in *Rex* v. *Board of Education*[22] are pre-eminently extraneous. So I must examine the reasons given by the Minister, including any policy upon which they may be based, to see whether he has acted unlawfully and thereby overstepped the true limits of his discretion, or, as it is frequently said in the prerogative writ cases, exceeded his jurisdiction. Unless he has done so, the court has no jurisdiction to interfere. It is not a Court

[22] [1910] 2 K.B. 165, 181; 26 T.L.R. 422, C.A.

of Appeal and has no jurisdiction to correct the decision of the Minister acting lawfully within his discretion, however much the court may disagree with its exercise.

In his affidavit filed in opposition to the appellants' application for the order of mandamus the Minister, after referring to the fact that he had read the letter dated May 1, 1964, of Mr. Kirk, an Under Secretary of the Ministry, stated that he reached his decision for refusing a reference to the investigating committee for the reasons given in his private secretary's letters of March 23 and May 3, 1965, all addressed to the respondents or their solicitors. So to these letters I must turn to see whether his reasons are open to challenge on the ground of being unlawful.

The first letter, that of March 23, 1965, in which the Minister gave his reasons was, so far as relevant, in these terms:

> "The Minister's main duty in considering this complaint has been to decide its suitability for investigation by means of a particular procedure. He has come to the conclusion that it would not be suitable. The complaint is of course one that raises wide issues going beyond the immediate concern of your clients, which is presumably the prices they themselves receive. It would also affect the interests of other regions and involve the regional price structure as a whole. In any event the Minister considers that the issue is of a kind which properly falls to be resolved through the arrangements available to producers and the board within the framework of the scheme itself. Accordingly he has instructed me to inform you that he is unable to accede to your clients' request that this complaint be referred to the committee of investigation under section 19 of the Act."

This letter seems to me to show an entirely wrong approach to the complaint. The Minister's main duty is not to consider its suitability for investigation; he is putting the cart before the horse. He might reach that conclusion after weighing all the facts but not until he has done so; but perhaps this is the least of the criticisms (arising out of his letter) to be directed at the Minister. But I have dealt with it as in argument it was seriously pressed upon your Lordships as a conclusive consideration in answer to any challenge to his powers.

His next statement—that it raises wide issues, etc.—shows a complete misapprehension of his duties, for it indicates quite clearly that he has completely misunderstood the scope and object of section 19. It is when wide issues are raised and when the complaint of one region raises matters which may affect other regions and the regional price structure as a whole, that the

Minister should consider it as a most powerful (though not conclusive) element in favour of referring the complaint instead of the reverse. Then, again, in his final paragraph of this letter the Minister reveals the same misconception. It was just because it was realised that the board structure might produce within its framework matters for complaint by those vitally affected that the machinery of section 19 was set up. This letter shows that the Minister was entirely misdirecting himself in law based upon a misunderstanding of the basic reasons for the conferment upon him of the powers of section 19.

I will turn to his second letter, that of May 3, 1965, which so far as relevant was in these terms:

> "You will appreciate that under the Agricultural Marketing Act, 1958, the Minister has unfettered discretion to decide whether or not to refer a particular complaint to the committee of investigation. In reaching his decision he has had in mind the normal democratic machinery of the Milk Marketing Scheme, in which all registered producers participate and which governs the operations of the board."

This introduces the idea, much pressed upon your Lordships in argument, that he had an "unfettered" discretion in this matter; this, it was argued, means that, provided the Minister considered the complaint bona fide, that was an end of the matter. Here let it be said at once, he and his advisers have obviously given a bona fide and painstaking consideration to the complaints addressed to him; the question is whether the consideration given was sufficient in law.

My Lords, I believe that the introduction of the adjective "unfettered" and its reliance thereon as an answer to the appellants' claim is one of the fundamental matters confounding the Minister's attitude, bona fide though it be. First, the adjective nowhere appears in section 19, it is an unauthorised gloss by the Minister. Secondly, even if the section did contain that adjective I doubt if it would make any difference in law to his powers, save to emphasise what he has already, namely that acting lawfully he has a power of decision which cannot be controlled by the courts; it is unfettered. But the use of that adjective, even in an Act of Parliament, can do nothing to unfetter the control which the judiciary have over the executive, namely that in exercising their powers the latter must act lawfully and that is a matter to be determined by looking at the Act and its scope and object in conferring a discretion upon the Minister rather than by the use of adjectives.

The second sentence of this letter again only shows what I have earlier pointed out, that the Minister has failed to understand that it may be his duty to intervene where there is a serious complaint that the "democratic machinery" of the board is producing unfairness among its members.

Those are the reasons relied upon by the Minister for refusing a reference. Summing up the matter shortly, in my opinion every reason given shows that the Minister has failed to understand the object and scope of section 19 and of his functions and duties thereunder which he has misinterpreted and so misdirected himself in law.

The matter, however, does not end there, for in his affidavit the Minister referred, as I have already mentioned, to Mr. Kirk's letter of May 1, 1964, without disapproval. That letter contained this paragraph:

> "3. In considering how to exercise his discretion the Minister would, amongst other things, address his mind to the possibility that if a complaint were so referred and the committee were to uphold it, he in turn would be expected to make a statutory order to give effect to the committee's recommendations. It is this consideration, rather than the formal eligibility of the complaint as a subject for investigation, that the Minister would have in mind in determining whether your particular complaint is a suitable one for reference to the committee. We were unable to hold out any prospect that the Minister would be prepared to regard it as suitable."

This fear of parliamentary trouble (for, in my opinion, this must be the scarcely veiled meaning of this letter) if an inquiry were ordered and its possible results is alone sufficient to vitiate the Minister's decision which, as I have stated earlier, can never validly turn on purely political considerations; he must be prepared to face the music in Parliament if a statute has cast upon him an obligation in the proper exercise of a discretion conferred upon him to order a reference to the committee of investigation.

My Lords, I would only add this: that without throwing any doubt upon what are well known as the club expulsion cases, where the absence of reasons has not proved fatal to the decision of expulsion by a club committee, a decision of the Minister stands on quite a different basis; he is a public officer charged by Parliament with the discharge of a public discretion affecting Her Majesty's subjects; if he does not give any reason for his decision it may be, if circumstances warrant it, that a court may be at liberty to come to the conclusion that he had no good reason for

H. L. (E.) 1968

Padfield v. Minister of Agriculture, Fisheries and Food

LORD UPJOHN

reaching that conclusion and order a prerogative writ to issue accordingly.

The Minister in my opinion has not given a single valid reason for refusing to order an inquiry into the legitimate complaint (be it well founded or not) of the South-Eastern Region; all his disclosed reasons for refusing to do so are bad in law. I would allow this appeal in the terms proposed by my noble and learned friend, Lord Reid.

Appeal allowed.

The House of Lords ordered that the cause be remitted to the Divisional Court of the Queen's Bench Division to require the respondent, the Minister of Agriculture, Fisheries and Food, to consider the complaint of the appellants according to law. It further ordered that the respondents do pay to the appellants the costs incurred by them in the courts below and also two-thirds of the costs incurred by them in respect of the appeal to the House of Lords.

Solicitors: *Biddle & Co.; The Solicitor, Ministry of Agriculture, Fisheries and Food.*

F. C.

[PRIVY COUNCIL]

P. C.*

1967 *Nov.* 27, 28; 1968 *Jan.* 22

KULAMMA *v.* MANADAN

Fiji—Native land—Unlawful "dealing" with—Share farming agreement—Agreement of purely contractual and personal character—Whether agreement an "alienation" of the farmer's interest—Whether a "dealing with the land"—Native Land Trust Ordinance, Cap. 104 (*Laws of Fiji,* 1955 *Rev.*), *s.* 12.

A share farming agreement made between the appellant's late husband, S., and his brother, the respondent, M., relating to native land, provided:

"1. The owner S. will employ the farmer M. to farm and the farmer will farm the said land to the best of his skill and ability. 2. This agreement shall enure until all moneys owing by the owner to M.H.S. are fully paid. 3. The farmer will at all times . . . cultivate and farm . . . according to

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* *Present*: LORD GUEST, LORD WILBERFORCE and LORD PEARSON.

APPENDIX B

Secretary of State for Education v Tameside MBC **[1977] AC 1014 at 1067**

[HOUSE OF LORDS]

SECRETARY OF STATE FOR EDUCATION AND SCIENCE . . . . . APPELLANT

AND

TAMESIDE METROPOLITAN BOROUGH COUNCIL . . . . . RESPONDENTS

1976 July 22, 23, 26 — Lord Denning M.R., Scarman and Geoffrey Lane L.JJ.

1976 July 29, 30, 31; Aug. 2; Oct. 21 — Lord Wilberforce, Viscount Dilhorne, Lord Diplock, Lord Salmon and Lord Russell of Killowen

Education—School—Secretary of State, powers of—Local education authority proposing to introduce comprehensive system of education—Scheme approved by Secretary of State—Control of authority passing to political opponents committed to retention of grammar schools—Authority proposing selective entry to grammar schools—Direction by Secretary of State to implement scheme of comprehensive education—Whether lawful—Whether authority "proposing to act unreasonably"—Whether sufficient time for authority to put proposals into effect—Duty of teachers to cooperate—Education Act 1944 (7 & 8 *Geo.* 6, *c.* 31), *ss.* 1 (1), 8 (1), 13 (1) (4), 68 [1] (*as amended by Education Act* 1968 (*c.* 17), *s.* 1 (2)

A local education authority proposed to bring all the schools in their area under the comprehensive principle. Their scheme was approved by the Secretary of State for Education and Science in November 1975, and implementation of the scheme was envisaged by the beginning of the school year in September 1976. In May 1976 local government elections were held, and in the authority's area the survival of the grammar schools was a strongly fought issue on which the opposition party took a stand. The opposition party gained control of the authority, and considered that they had a mandate to reconsider their predecessors' education policy. The new authority proposed to continue and complete three new comprehensive schools which were in the course of construction, to continue 16 secondary modern schools and to postpone plans for conversion of three grammar schools into comprehensive schools or sixth form colleges. In a letter to the Secretary of State on June 7, they said that the schools in their area were not ready for the changed roles proposed by their predecessors and that implementation of those proposals in September would have caused grave disruption to the children's education. They summarised their present plans as being "the maintenance of

[1] Education Act 1944, as amended, ss. 1 (1), 8 (1): see post, p. 1053B, C–E.
S. 13: "(1) . . . where a local education authority intend to make any significant change in the character, . . . of a county school, they shall submit proposals for that purpose to the Secretary of State. . . . (4) Any proposals submitted to the Secretary of State under this section may be approved by him after making such modifications therein, if any, as appear to him to be desirable: . . ."
S. 68: see post, p. 1046E–F.

the status quo with the least disturbance and disruption to the children's education pending any longer term, well thought out proposals." All allocations of pupils for the forthcoming year made by their predecessors—some 3,000—would be honoured subject to parents' agreement. Two of the grammar schools would remain grammar schools open to 11-year-old entry, making 240 selective places available. All parents of 11-year-olds were to be given the right to apply for reallocation. If, as was likely, the number of applicants exceeded the number of places available, those pupils most suitable and most likely to benefit from that type of education would be selected by a combination of reports, records and interviews. There would be no formal 11-plus examination. (In the event, there were 783 applications by parents of 11-year-olds for the 240 places in response to letters sent out to 3,200 parents.)

On June 11 the Secretary of State, acting under section 68 of the Education Act 1944, directed the authority to give effect to the proposals approved by him in November 1975 and to implement the arrangements previously made for the allocation of pupils to secondary schools for the coming year on a non-selective basis. His letter of direction stated "A change of plan at this stage of the year, designed to come into effect less than three months later, must . . . give rise to considerable difficulties . . ."

On June 18, 1976, the Secretary of State applied for an order of mandamus ordering the authority to comply with his direction. The Divisional Court held that the Secretary of State was justified in saying that in the circumstances there was no time to carry out the proposed selection procedure by September and that accordingly there had been material on which he had been entitled to express himself as satisfied that the authority were going to act unreasonably. They made the order of mandamus.

The Court of Appeal received evidence to the effect that the selection procedure proposed by the authority (on the basis of reports, records and interviews) was well known and tried and workable and that sufficient teachers were available to form a selection panel. They allowed the authority's appeal and quashed the order of mandamus.

On appeal by the Secretary of State:—

Held, dismissing the appeal, that under the Act of 1944 a local education authority were entitled to have a policy, and section 68 did not entitle the Secretary of State to require them to abandon it because he disagreed with it; that he could give a direction only if they were acting unreasonably in doing what they were entitled to do; that his objection that their policy was creating a dilemma for parents was insupportable in view of the fact that the electorate, including many parents, had voted for a selective basis of secondary education and the authority were providing it; that the critical question was whether on June 11, 1976, the Secretary of State had had a sufficient factual basis for believing that the change proposed by the authority would lead to educational chaos or undue disruption, bearing in mind that the electorate must have accepted that there would be some disruption; that the question which the Secretary of State should have considered was whether a reasonable authority would have attempted to carry out the selection procedure proposed in the time available or at all; that he did not appear to have directed his mind properly or at all to that question; that although the authority's letter stating that selection would be by a combination of

reports, records and interviews was lacking in specification it must have conveyed sufficient to the experts at the Department of Education and Science to have enabled them to understand what was meant, and such defects as there were in the proposed procedure did not enable it to be said that no reasonable authority would have attempted to carry it out; that the teachers were public servants with responsibility for their pupils and a duty to produce reports and it could not have been unreasonable for the authority to have taken the view that if the Secretary of State did not intervene the teachers would cooperate; and that, accordingly, there had been no ground on which the Secretary of State, properly directed, could have found that the authority were acting or proposing to act unreasonably (post, pp. 1046H—1047C, 1048B–C, 1050H—1051A, E–G, 1052A, E–G, 1054C, 1058H—1059A, 1061D, F–G, 1062E–G, 1064B, E, G—1065B, 1066B–C, E–F, G—1067A, 1070B–D, F–G, 1071B–C, H, 1072B–C, 1073B–C, 1074D–E, 1075F, G–H, 1076C–D).

Per Lord Russell of Killowen. "Unreasonably" is a very strong word indeed (post, p. 1075C). Facts subsequently brought forward as existing on June 11 could not properly be relied on as showing that the authority's proposals were not unreasonable unless they were of such a character that they could be taken to have been within the knowledge of the Secretary of State (post, p. 1076E).

Decision of the Court of Appeal, post, pp. 1020H et seq., affirmed.

The following cases are referred to in their Lordships' opinions:

Associated Provincial Picture Houses Ltd. v. *Wednesbury Corporation* [1948] 1 K.B. 223; [1947] 2 All E.R. 680, C.A.

Secretary of State for Employment v. *ASLEF (No. 2)* [1972] 2 Q.B. 455; [1972] 2 W.L.R. 1370; [1972] 2 All E.R. 949, C.A.

W. (An Infant), In re [1971] A.C. 682; [1971] 2 W.L.R. 1011; [1971] 2 All E.R. 49, H.L.(E.).

The following additional cases were cited in argument in the House of Lords:

Cumings v. *Birkenhead Corporation* [1972] Ch. 12; [1971] 2 W.L.R. 1458; [1971] 2 All E.R. 881, C.A.

McEldowney v. *Forde* [1971] A.C. 632; [1969] 3 W.L.R. 179; [1969] 2 All E.R. 1039, H.L.(N.I.).

Padfield v. *Minister of Agriculture, Fisheries and Food* [1968] A.C. 997; [1968] 2 W.L.R. 924; [1968] 1 All E.R. 694, H.L.(E.).

Reg. v. *Minister of Housing and Local Government, Ex parte Chichester Rural District Council* [1960] 1 W.L.R. 587; [1960] 2 All E.R. 407, D.C.

Rex v. *Bishop of Sarum* [1916] 1 K.B. 466.

Sadler v. *Sheffield Corporation* [1924] 1 Ch. 483.

The following cases are referred to in the judgments of the Court of Appeal:

Associated Provincial Picture Houses Ltd. v. *Wednesbury Corporation* [1948] 1 K.B. 223; [1947] 2 All E.R. 680, C.A.

City of Plymouth (City Centre) Declaratory Order 1946, In re; Robinson v. *Minister of Town and Country Planning* [1947] K.B. 702; [1947] 1 All E.R. 851, C.A.

Liversidge v. *Anderson* [1942] A.C. 206; [1941] 3 All E.R. 338, H.L.(E.).
Nakkuda Ali v. *Jayaratne* [1951] A.C. 66, P.C.
Padfield v. *Minister of Agriculture, Fisheries and Food* [1968] A.C. 997; [1968] 2 W.L.R. 924; [1968] 1 All E.R. 694, C.A. and H.L.(E.).
Ridge v. *Baldwin* [1964] A.C. 40; [1963] 2 W.L.R. 935; [1963] 2 All E.R. 66, H.L.(E.).
Secretary of State for Employment v. *ASLEF* (*No.* 2) [1972] 2 Q.B. 455; [1972] 2 W.L.R. 1370; [1972] 2 All E.R. 949, C.A.
W. (*An Infant*), *In re* [1971] A.C. 682; [1971] 2 W.L.R. 1011; [1971] 2 All E.R. 49, H.L.(E.).

The following additional cases were cited in argument in the Court of Appeal:

Bradbury v. *Enfield London Borough Council* [1967] 1 W.L.R. 1311; [1967] 3 All E.R. 434, C.A.
British Oxygen Co. Ltd. v. *Board of Trade* [1969] 1 Ch. 57; [1968] 3 W.L.R. 1; [1968] 2 All E.R. 177.
Cumings v. *Birkenhead Corporation* [1972] Ch. 12; [1971] 2 W.L.R 1458; [1971] 2 All E.R. 881, C.A.
Hanks v. *Minister of Housing and Local Government* [1963] 1 Q.B. 999; [1962] 3 W.L.R. 1482; [1963] 1 All E.R. 47.
Mountview Court Properties Ltd. v. *Devlin* (1970) 21 P. & C.R. 689, D.C.
Sadler v. *Sheffield Corporation* [1924] 1 Ch. 483.
Watt v. *Kesteven County Council* [1955] 1 Q.B. 408; [1955] 2 W.L.R. 499; [1955] 1 All E.R. 473, C.A.

APPEAL from the Divisional Court of the Queen's Bench Division.

On June 11, 1976, the Secretary of State for Education and Science, in the exercise of the powers conferred by section 68 of the Education Act 1944 and vested in him by the Secretary of State for Education and Science Order 1964, directed the Tameside local education authority, the Tameside Metropolitan Borough Council, to give effect to proposals which he had approved on November 11, 1975, and accordingly to implement the arrangements previously made for the allocation of pupils to secondary schools for the coming school year on a non-selective basis and to make such other provision relating to the staffing of the schools, alterations to school premises and other matters as were required to give effect to the proposals. His letter of direction read:

"I am directed by the Secretary of State for Education and Science to refer to correspondence between the department and the authority beginning with Mr. J. I. Langtry's letter of May 11 which asked whether the authority intended to implement the secondary reorganisation proposals approved by the Secretary of State on November 11, 1975, and, in the event of the authority deciding not to implement those in September, for full details of the arrangements proposed for the transfer of pupils to county secondary schools in September. On May 19 the education services committee recommended that the authority should not implement the approved proposals but made no statement of any alternative arrangements for the transfer of pupils for the coming school year. On May 20 the authority were invited to discuss the situation with the Secretary of State in the week beginning May 24, but were unable to do so. The department accordingly wrote to the authority again on May 26 asking for a precise and detailed

statement of the plans which the authority hoped to put into effect in September. As a result of that letter, a meeting took place on Wednesday, June 9, between the Secretary of State and representatives of the authority including Councillor Grantham, leader of the council, and Councillor Thorpe, chairman of the education services committee.

"The background to the meeting is that on March 19, 1975, the authority submitted to the Secretary of State proposals under section 13 of the Education Act 1944. These proposals provided for changes in the character of all their county secondary grammar and modern schools in September 1976 in such a way as to end selection by ability and aptitude and to establish a comprehensive system of secondary education. The Secretary of State approved the proposals on November 11, 1975. Since that date extensive preparations have been made to put the proposals into effect. Much progress has been made in the staffing of the proposed comprehensive schools; teachers have been planning courses for them; building work directly related to changes in the character of some schools has been put in hand; and over 3,000 children due to transfer from primary schools this year have been allocated to secondary schools without reference to ability or aptitude, the former selective processes being no longer appropriate, and largely by reference to parental choice.

"At the meeting on June 9 the authority's representatives informed the Secretary of State that the council had on June 8 resolved to continue the 21 schools which were the subject of the proposals approved under section 13, the five grammar schools as '11 to 18 academic high schools' and the remainder as '11 to 16 secondary schools,' and accordingly to modify the arrangements already made for the allocation of pupils to secondary schools for the coming year. Their reasons for these proposals were set out in a letter from the chairman of the education services committee dated June 7 and the proposals themselves were explained in detail by the authority's representatives at the meeting.

"The Secretary of State has given the most careful consideration to the representations made to him. He is satisfied that the authority are proposing to act unreasonably with respect to the exercise of the powers conferred, and the performance of the duties imposed, by and under the Education Acts 1944 to 1976* regarding the provision of secondary education for their area and in particular with respect to their powers and duties (express and implied) under sections 8 and 17 of the Education Act 1944 regarding the admission of pupils to secondary schools on transfer from primary schools at the beginning of the coming school year, i.e., on September 1, 1976. A change of plan at this stage of the year, designed to come into effect less than three months later, must in his opinion give rise to considerable difficulties. The authority's revised proposals confront the parents of children due to transfer in September with the dilemma of either adhering to secondary school allocations for their children which they may no longer regard as appropriate, or else submitting to an improvised selection procedure (the precise form of which, the Secretary of State understands, has even now not been settled) carried out in circumstances and under a timetable which raise substantial doubts about its educational

* *Reporter's note.* "1976" refers to the Education Bill.

validity. Furthermore it is clear from the terms of paragraph 10 of the resolution adopted at the special council meeting of June 8, which were elaborated in the course of the meeting of June 9 by the authority's representatives, that an abnormally high proportion of pupils might need to be reallocated to different secondary schools during, or at the end of, the educational year beginning in September 1976. This would impose a further measure of disturbance on top of the present uncertainty. In addition the change of plan at this time in the educational year threatens to give rise to practical difficulties in relation to the appointments of staff already made and the construction of buildings for the new comprehensive schools and to create a degree of confusion and uncertainty which could impair the efficient working of the schools.

" In the exercise of the powers conferred by section 68 of the Education Act 1944, and vested in him by the Secretary of State for Education and Science Order 1964, the Secretary of State hereby directs the authority to give effect to the proposals which he approved on November 11, 1975, and accordingly to implement the arrangements previously made for the allocation of pupils to secondary schools for the coming school year on a non-selective basis and to make such other provision relating to the staffing of the schools, alterations to school premises and other matters as is required to give effect to the proposals."

By notice of motion dated June 18, 1976, the Secretary of State applied pursuant to leave granted by the Divisional Court on that date for an order of mandamus directed to the council requiring them to exercise the powers conferred and duties imposed on them by and under the Education Acts 1944 to 1976 [sic] in accordance with his directions dated June 11, 1976, on the grounds that he, having been satisfied that the council were proposing to act unreasonably with respect to the exercise of the powers conferred, and the performance of the duties imposed, by and under the the Acts of 1944 to 1976 [sic] regarding the provision of secondary education for their area, as he had been entitled to do by section 68 of the Act of 1944, as amended, had given directions to the council dated June 11, 1976; that it had been then and thereafter the duty of the council to comply with that direction and that they did not intend to do so unless required to do so by the court.

On July 12, 1976, the Divisional Court granted the order. In his judgment, Lord Widgery C.J. said:

> " In the end Mr. Woolf's argument, as it seems to me, was this. He said there are lots of things which are going to cause trouble if we get a sudden change of plan at the last minute like this. There are all sorts of difficulties arising and all sorts of wasted building work will occur, but absolutely crucial in this case is the fact that there are 240 grammar school places to fill. They are available to be filled in September. The children have been warned suitably in advance. Yet, says Mr. Woolf, there is nothing in the proposals of the Tameside authority as to how this selection is to be carried out either in the time available or at all.
>
> " We can only set aside the Secretary of State's directions if we are satisfied that he has gone outside his jurisdiction and has made this order when there is no ground upon which it can lawfully be made.

Although I have not found this an easy case, and although, I confess, my opinion of the conclusion has wavered from time to time from one side to the other, I think in the end Mr. Woolf has satisfied us that there was here before the Secretary of State material upon which he could express himself as satisfied that the local authority were going to act unreasonably.

"This is not in any sense a victory for comprehensive education or selective education. It is simply a conclusion that, when the Secretary of State says there is no time to get this done by September, I think he is right on that one point. I am not required to go into any other grounds. On the question of whether there was time to get this done by September he says he thought not. In my view there was material upon which, if he thought fit, he could reach that conclusion."

Cusack J. agreed. May J., also agreeing, said:

"Having heard the argument on both sides, I have ultimately come to the conclusion that there was relevant material upon which the Secretary of State was entitled to come to the conclusion to which he did come. Shortness of time coupled with the lack of cooperation from some of the teachers in the area I think provided him with sufficient evidence to entitle him to decide as he did. On the affidavits and exhibits before us, I am not impressed with the other grounds referred to by the Secretary of State—the fresh contracts which it is contended have been entered into with teachers within the new comprehensive system; the building work which it is alleged has been put in hand; still less the planning of the new courses which it is said has been done. Further, had the local authority had the cooperation of the teachers concerned, it would I think have been difficult for the Secretary of State to have contended that there was then any relevant material before him upon which he could have reached the necessary conclusion under section 68 of the Act of 1944. Without that cooperation, however, it is certainly arguable that it is difficult to see how all the children under the aegis of this local authority could fairly have been allocated to appropriate secondary schools in time for the new term in September next, and in the end I have come to the conclusion that this was sufficient material upon which a Secretary of State could decide as the Secretary of State in fact did."

The council appealed.

Anthony Lloyd Q.C., *Leon Brittan* and *Andrew Caldecott* for the council.

David McNeill Q.C. and *J. J. Hodgson* for six parents.

T. H. Bingham Q.C. and *Harry Woolf* for the Secretary of State.

LORD DENNING M.R. There is a controversy on this question: should the grammar schools be turned into comprehensive schools? Most educationalists and parents know what the controversy is all about, but for others who do not know the background perhaps I may say a word. The difference lies in the way the children are selected on and after the age of 11.

In order to go to a grammar school, a boy or girl of age 11 has to show some marked ability or aptitude. When he gets there, he or she will mingle with other bright youngsters and be taught there right through until the age of 18. But a comprehensive school takes any boy or girl of age 11 without reference to his or her ability or aptitude. The bright and the dull start together in classes, but they are divided into different streams as they develop in ability or aptitude. They remain at the comprehensive school until they are 16. Most of them then leave to go to work. But those who wish can go on for two more years at a sixth form college where they are given more advanced teaching. That is from 16 to 18.

Each system has its advocates. Those who support the grammar schools point to their long and distinguished record going back before the Reformation. They were, says Trevelyan, " the typical unit of Elizabethan education . . . where the cleverest boys of all classes were brought up together ": see *Trevelyan, English Social History* (1944), p. 162 [Illustrated English Social History (1949–1952), vol. 2, p. 23]. Those who seek to retain them claim that they retain the inherited virtues of sound learning and hard work leading to fine achievement: and many parents, they say, wish still to send their children to a grammar school, if it is available, rather than to a comprehensive. In contrast the comprehensive schools are of recent origin. Those who support them claim that they give equally good education for the able children as the grammar schools; and, what is more, they provide better education for the many others. So much support is now given to comprehensive schools that a bill before Parliament seeks to declare that " the comprehensive principle " is to be applied throughout our educational system. It says that pupils are *not* to be selected " by reference to ability or aptitude."

We, of course, in this court support neither side in this controversy: but we have to take notice that the political parties are concerned in it. This is shown by the dispute which is now before the court. It is about education in the Tameside metropolitan area (which was formed in 1974 as a part of Lancashire and Cheshire). Before May 1976 the council was controlled by the Labour party. But on May 6, 1976, there were local elections which brought the Conservatives to power. Whilst the Labour councillors were in the majority, they had made plans to change over to the " comprehensive principle " as soon as it could be done. On March 19, 1975, they made detailed proposals to the minister whereby they were going (1) to put into use three new purpose-built comprehensive schools; (2) to bring 16 secondary modern schools into the comprehensive principle; and (3)—this is the particular proposal now in question—to shut down five grammar schools and to turn three of them into three comprehensive schools and the other two into two sixth form colleges. The buildings for this changeover were not to be purpose-built. The staff and pupils were still to be in the old grammar school buildings. On November 11, 1975, these proposals of the old council were approved by the Secretary of State. But they were opposed by the Conservative party in the council as being premature. At the local elections in 1975 and 1976 the Conservative councillors made it one of their planks in their election campaign. Their leaflets put it in this way:

" Education.
" Present comprehensive plan will not be implemented.
" A review of complete education system will be undertaken to improve opportunities for all children together with freedom of parental choice."

On May 6, 1976, the Conservative party gained control. They approved and adopted much that their predecessors had done towards the comprehensive principle. For instance, three new comprehensive schools had been built—purpose-built—as comprehensive schools. The Conservative party considered these as a valuable nucleus for the future. They also approved the proposal that the 16 existing secondary modern schools should be brought into line with the comprehensive principle. But here is the point: they proposed to postpone the plans for the five grammar schools because they thought that the changes would themselves cause much disruption and disturbance to the children's education and it would be better to continue the five grammar schools as they were for a time so that the position could be reviewed. Their policy was, they said, to maintain " the status quo with the least disturbance and disruption to the children's education pending any longer term, well thought out proposals."

When the Secretary of State heard of the postponement by the new council he was much concerned. He thought that the plans of the previous council had gone too far to be put into reverse in this way. He thought that the new council were acting, or proposing to act, unreasonably in postponing the changeover. On June 11, 1976, he directed the new council that they were to implement the old council's proposals and a week later, on June 18, 1976, he followed this up by applying to the Divisional Court for an order of mandamus commanding the new council to implement the old council's proposal. On July 12, 1976, the Divisional Court granted the mandamus. The new council appeal to this court and are supported by some of the parents of the children affected.

Before I go into what the minister has done and his reasons, I will consider the facts by summarising the arguments put on either side on this proposed postponement. The new council—that is, the local authority—rely on the result of the May election. They say that the issue was put plainly before the electorate. The new council consider that they have a mandate for postponing the old council's proposals and that they are morally bound to honour that mandate if they can legitimately do so. That is their first argument.

The new council also say that the old council were proceeding with too much haste to implement the changeover. They say that if the proposals of the old council were implemented immediately—without a pause for review—it would lead to disruption of the studies of many pupils, especially those already in the sixth form (where they spend two years) and those due to go up into it. Those pupils who had been there for one year already would have to stay in the old grammar schools for their last year, taught, they expect, by junior teachers. Those going up into the sixth form at age 16 would have to go to the new sixth form colleges for their last two years in new surroundings and with new teachers and with building work not started or not completed and this, they say, would be at a crucial

time when they were to take their examinations (such as the " A " levels) on which their future careers depend. Those are not all, but only some, of the arguments which were being adduced by the new council.

On the other hand, there are arguments on the other side. The Secretary of State has strong arguments against any postponement. He says that many preparations have been made for the changeover to take place on September 1, 1976, and it would cause unwarranted disruption if these were now to be put into reverse. These preparations were summarised by the department in these words in the letter of June 11:

> " Much progress has been made in the staffing of the proposed comprehensive schools; teachers have been planning courses for them; building work . . . has been put in hand; and over 3,000 children " (of 11) ". . . have been allocated [places] without reference to ability or aptitude."

Those are the principal arguments being put forward by the Secretary of State.

But to these arguments the new council make their answer. They admit that if the proposals were to be postponed there would be some disruption, but they assert that there would be not nearly so much disruption as the department fears. Staffing, they suggest, will present few problems because 95 per cent. of the teachers will remain in the same schools anyway, and their new contracts will be honoured. The new courses, they say, have not been planned in detail and can readily be revised before the new term starts. Little building work has been put in hand, and a great deal will not be completed in time for the new term. As to the 3,000 new 11-year-olds who are coming up, they say that the great majority of parents are content with the places allocated to them. They have written to all those parents with youngsters who are coming up to 11, and have had replies from all. Only 783 wish their children to go to a grammar school, if available. The new council admit that, if the grammar schools are to be retained for a year pending review, there will be only 240 places available. (These will arise because of the change back from the proposed sixth form colleges, Ashton and Hyde.) So the new council will have 240 places available for those 783. It will be necessary to find some way of selecting the 240 children to fill them; and furthermore to make the selection in time for the new term starting in September 1976. Eventually, as the argument proceeded, it seemed that this selection became the main crux of the difference between the parties before us.

Now it is most important to remember that we have to view the matter —as the parties had to view the matter—as at June 11, 1976, when the Secretary of State made his decision. What were the materials then before the new council? They were hopeful that those 240 could have been selected well and fairly before the end of the summer term. It would not end until July 23. So they had six weeks, and they say that it could have been done if the teachers and staff had been willing to cooperate with the new council in making the selection. They would go through the records and recommendations from the primary schools. They would have standardised reasoning tests and then the selection could be well and truly made if only the teachers and staff were willing to cooperate. But unfortunately it

appears that some of the trade unions, speaking through the teachers consultative committee, said that they were unwilling to cooperate in this changeover. Faced with the unwillingness of some at least of the teachers to cooperate, the new council had then in their minds—and have since formulated in affidavits before us—a plan to overcome this difficulty. They say that they will be able to get the records of the 783 pupils from the primary schools and that they can get a "selection panel" of 20 teachers who are willing to serve on a selection board. The chairman is to be the headmaster of a junior school of much experience. He says in his affidavit:

> "If I had a selection panel of 20 teachers (10 couples) I am of the opinion that a fair, feasible and practicable selection of 240 places from 783 applications can comfortably be made within one week."

If this view of the new council is accepted, then it does appear that, although it would be far from perfect, a selection can be made out of the 783 children whereby 240 of the best and brightest of these youngsters can be allocated places at the grammar schools. It can be done even now with only five weeks to go before the new term. All the more so could it have been done on June 11, 1976, when the matter has to be tested. They had good reason then to believe that a fair selection could be made.

Now we have to come to the point: Was the Secretary of State warranted in the course which he took on June 11, 1976? He said he was satisfied that the new council was acting or proposing to act unreasonably. He relied on his powers under section 68 of the Education Act 1944. The question for the court today is whether he was lawfully exercising his powers under that section or not. So I must read it, because the whole case turns upon it. It says, as amended:

> "If the Secretary of State is satisfied, either on complaint by any person or otherwise, that any local education authority . . . [has] acted or [is] proposing to act unreasonably with respect to the exercise of any power conferred or the performance of any duty imposed by or under this Act, he may . . . give such directions as to the exercise of the power or the performance of the duty as appear to him to be expedient."

The governing words which we have to consider here are, first, "If the Secretary of State is satisfied," and, secondly, "that any local education authority . . . [has] acted or [is] proposing to act unreasonably." So much depends on the interpretation of those words that I must say something upon them.

So far as "satisfied" is concerned, it is suggested—and was suggested by the chief officers of the local authority on June 21, 1976—that once the Secretary of State said that he was "satisfied" his decision could not be challenged in the courts unless it was shown to have been made in bad faith. We were referred by Mr. Bingham to *Liversidge* v. *Anderson* [1942] A.C. 206, where Lord Atkin drew attention to cases where the Defence Regulations required the Secretary of State to be "satisfied" of something or other. Lord Atkin said, at p. 233: "In all these cases it is plain that unlimited discretion is given to the Secretary of State, assuming as everyone does that he acts in good

faith," to which I would add a similar passage by Somervell L.J. in *In re City of Plymouth (City Centre) Declaratory Order 1946: Robinson* v. *Minister of Town and Country Planning* [1947] K.B. 702, 721. Those statements were made, however, in relation to regulations in war time or immediately after the war when the decisions of the executive had to be implemented speedily and without question. That was pointed out by Lord Radcliffe in *Nakkuda Ali* v. *Jayaratne* [1951] A.C. 66, 77 and by Lord Reid in *Ridge* v. *Baldwin* [1964] A.C. 40, 73. Those statements do not apply today. Much depends on the matter about which the Secretary of State has to be satisfied. If he is to be satisfied on a matter of opinion, that is one thing. But if he has to be satisfied that someone has been guilty of some discreditable or unworthy or unreasonable conduct, that is another. To my mind, if a statute gives a minister power to take drastic action if he is "satisfied" that a local authority has acted or is proposing to act improperly or unreasonably, then the minister should obey all the elementary rules of fairness before he finds that the local authority is guilty or before he takes drastic action overruling them. He should give the party affected notice of the charge of impropriety or unreasonableness and a fair opportunity of dealing with it. I am glad to see that the Secretary of State did so in this case. He had before him the written proposals of the new council and he met their leaders. In addition, however, the minister must direct himself properly in law. He must call his own attention to the matters he is bound to consider. He must exclude from his consideration matters which are irrelevant to that which he has to consider and the decision to which he comes must be one which is reasonable in this sense: that it is, or can be, supported with good reasons or at any rate is a decision which a reasonable person might reasonably reach. Such is, I think, plain from *Padfield* v. *Minister of Agriculture, Fisheries and Food* [1968] A.C. 997 which is a landmark in our administrative law and which we had in mind in *Secretary of State for Employment* v. *ASLEF (No. 2)* [1972] 2 Q.B. 455, 493, 510. So much for the requirements if the minister is to be "satisfied."

Now I turn to the other important words in this section: that he is satisfied that the local education authority have acted or are proposing to act "unreasonably." The question often arises whether someone has acted, is acting or is proposing to act "unreasonably." To decide this question, it must be remembered, as Lord Hailsham of St. Marylebone L.C. said in *In re W. (An Infant)* [1971] A.C. 682, 700:

> "Two reasonable parents can perfectly reasonably come to opposite conclusions on the same set of facts without forfeiting their title to be regarded as reasonable."

It is one thing to say to a person: "I think you are wrong. I do not agree with you." It is quite another thing to say to him: "You are being quite unreasonable about it." I know it is often done. It is commonplace to say to your adversary: "You are being very unreasonable" when all you mean is: "I think you are wrong." Such hyperbole is excusable in ordinary mortals but not in those who have to consider and apply Acts of Parliament. No one can properly be labelled as being unreasonable unless

he is not only wrong but unreasonably wrong, so wrong that no reasonable person could sensibly take that view. A

All the more so when a man—be he a judge or a minister— is entrusted by Parliament with the task of deciding whether another person has acted, is acting or is proposing to act unreasonably. Especially when the one who has to decide has himself his own views—and perhaps his own strong views—as to what should or should not be done. He must be very careful then not to fall into the error—a very common error—of B thinking that anyone with whom he disagrees is being unreasonable. He may himself think the solution so obvious that the opposite view cannot be reasonably held by anyone. But he must pause before doing so. He must ask himself: "Is this person so very wrong? May he not quite reasonably take a different view?" It is only when the answer is: "He is completely wrong. No reasonable person would take that view" C that he should condemn him as being unreasonable. During the argument I was interested in the question which Scarman L.J. put to Mr. Bingham, and which he accepted: In order for the new local authority to be unreasonable, it must be apparent to them that in all probability the solution which they are suggesting will not work. Put in another way, it seems to me that if, on June 11, 1976, the new council reasonably took the view that their solution would work, and in particular that a D fair selection of the 240 could be made in time for the new term, it could not be said that they were acting unreasonably.

It is on this point—on the interpretation of unreasonableness—that I think the minister must have misdirected himself. In his decision letter of June 11, 1976, he has set out the reasons why he thinks the new council are acting wrongly in postponing the changeover. He says: "A change of plan at this stage . . . must . . . give rise to considerable diffi- E culties," that the parents will be confronted with a "dilemma," and that the "improvised selection procedure" is such as to "raise substantial doubts about its educational validity." All these are reasons why the minister thinks that the new council are acting, or proposing to act, *erroneously.* But none of them in my view are reasons for saying that the new council are acting, or proposing to act, *unreasonably.* It seems to me that in con- F sidering whether they are acting unreasonably or not there are many considerations to be borne in mind besides those expressly mentioned by the minister. There is the mandate itself which the council believe they have obtained from the electorate. There is the disruption which they feel will result from the premature implementation of the old council's proposals. They admit that the selection tests in the circumstances of the case are not perfect, but they believe they will work. All these are G considerations showing they were acting reasonably: and there is no trace that the minister had regard to them. All things considered, I do not find any evidence on which the minister could declare himself satisfied that they had acted or were proposing to act unreasonably.

In the circumstances, it seems to me that the minister's directions were not validly made in accordance with the Act of Parliament. Being invalid, H it is not a case for any issue of an order of mandamus to the new council.

One word more on a technical point. It was said that mandamus did not lie directly for a failure to obey directions under section 68, and

that, before applying for mandamus, the minister ought to have gone through the extra procedure of a declaration of default under section 99. If I am right in thinking the directions under section 68 were invalid that point does not arise for decision in this case, and therefore I will say nothing on it.

But on the principal point in the case it seems to me that the minister was not justified in asserting that he was satisfied that the new council were acting or proposing to act unreasonably. It is therefore no case for a mandamus. I would allow the appeal accordingly.

SCARMAN L.J. This appeal raises two questions. One is of technical law, the meaning of the adverb "unreasonably" in section 68 of the Education Act 1944. The other is a question of legal principle in the field of administrative law—the scope of judicial review where what has to be resolved is a dispute as to their powers between two elected authorities, one being the central government and the other a local authority.

I need not rehearse the facts. The dispute is between the Secretary of State for Education and Science and a local education authority, the metropolitan borough council of Tameside. The Secretary of State has directed that proposals previously made by the authority and approved by him for the introduction into the area of universal comprehensive education be implemented. The council, whose political control has changed hands in a recent election, has changed its policy and no longer wishes to implement the proposals. The Secretary of State says that he is satisfied that the council is, or is proposing, to act unreasonably in the exercise of its powers or in the performance of its duty under the Act and has issued his direction under section 68. The council having made plain that they do not consider themselves bound to comply with the direction, he asks the court for an order of mandamus requiring them to do so.

It is sufficient, for the purposes of my judgment, to bear in mind (1) that on November 11, 1975, the Secretary of State gave his approval under section 13 of the Education Act 1944 to proposals (which I shall call the section 13 proposals) put forward by the local education authority for introducing universal comprehensive education into the area, beginning on September 1, 1976; (2) that his approval of those proposals imposed no duty upon the local education authority to implement them; (3) that in the election of May 6 of this year control of the authority passed from the Labour party, who supported the section 13 proposals, to the Conservatives who did not, and do not; (4) that the local education authority, now under Conservative control, informed the minister in May that they intended not to implement the section 13 proposals but to retain the existing mixed pattern of education, which includes three comprehensive schools, 16 secondary modern schools and five grammar schools, until such time as a new, well thought out system of education might be devised for the area; (5) that, after receiving the written representations of the local education authority, and after according their representatives a meeting to discuss, in particular, the detailed proposals for the change of plan, the Secretary of State invoked section 68 of the Act of 1944 and

issued by letter dated June 11 his direction to the local education authority to implement the section 13 proposals.

The authority challenges the lawfulness of his direction. It is, as I have said, a dispute between two public authorities. Judicial review can resolve it: but the review has to embrace not only the lawfulness, or otherwise, of the Secretary of State's direction but also the validity of the local education authority's decision not to implement the section 13 proposals.

Ultimately there is, I think, only one issue: whether the direction of the Secretary of State was lawful. For, if it was, there can be no doubt, in my judgment, but that mandamus must go. I reject the submission that, even if the direction be lawful, the court in the discretion which it undoubtedly possesses should refuse the order sought. But the submission as to discretion, though it must be rejected, has drawn attention to an aspect of the case of considerable importance, namely, that the local education authority is entitled to have its decision treated with the same respect and approached in the same way as the minister's. The case is no more an appeal against the decision of the local education authority not to implement the section 13 proposals than it is an appeal against the Secretary of State's direction to the authority to implement it. In respect of each decision the court's role is strictly limited to judicial review.

As I have said, the Secretary of State acted under section 68 of the Education Act 1944. Being satisfied that the Tameside local education authority—that is to say, the metropolitan borough council of Tameside—was proposing to act unreasonably, he issued his direction by letter of June 11, 1976. He expressed his satisfaction in these terms:

> "He"—that is, the Secretary of State—"is satisfied that the authority are proposing to act unreasonably with respect to the exercise of the powers conferred, and the performance of the duties imposed, by and under the Education Acts . . . regarding the provision of secondary education for their area and in particular with respect to their powers and duties (express and implied) under sections 8 and 17 of the Education Act 1944 regarding the admission of pupils to secondary schools on transfer from primary schools at the beginning of the coming school year, i.e., on September 1, 1976."

His direction in the same letter was put in these terms:

> "In the exercise of the powers conferred by section 68 of the Education Act 1944, and vested in him by the Secretary of State for Education and Science Order 1964, the Secretary of State hereby directs the authority to give effect to the proposals which he approved on November 11, 1975, and accordingly to implement the arrangements previously made for the allocation of pupils to secondary schools for the coming school year on a non-selective basis and to make such other provision relating to the staffing of the schools, alterations to school premises and other matters as is required to give effect to the proposals."

I accept the submission of Mr. Bingham, for the Secretary of State, that

we must look primarily to the letter for the reasons for his satisfaction, though the Secretary of State is not to be precluded from relying on other reasons if they existed when he gave his direction. The primary reason given in the letter was put as follows:

> "The authority's revised proposals confront the parents of children due to transfer in September with the dilemma of either adhering to secondary school allocations for their children which they may no longer regard as appropriate, or else submitting to an improvised selection procedure (the precise form of which, the Secretary of State understands, has even now not been settled) carried out in circumstances and under a timetable which raise substiantal doubts about its educational validity."

The letter does refer to additional difficulties arising from the change of plan by the local education authority. But undoubtedly the real reason for the Secretary of State's direction was his concern over the difficulties of selection and reallocation arising from the change of plan. The other difficulties loom large—surprisingly large, I venture to think—in the evidence by which the Secretary of State seeks to persuade the court to grant him the order he seeks. But I agree with Lord Widgery C.J. when he said, in giving judgment in the Divisional Court, that the allocation problem was the "situation . . . very largely relied upon in the end by the Secretary of State. . . ." Lord Widgery C.J. examined the other matters relied on by the Secretary of State and thought little of them. He based his judgment "on that one point," that is to say, that the selection of children to fill the 240 places made available by the change of plan at the two grammar schools (which under the section 13 proposals were to become sixth form colleges) could not be carried out "in the time available or at all." Cusack J. agreed with him: and so did May J. in a judgment which revealed his profound scepticism as to the validity of the other reasons advanced.

As always with judicial review, it is vital to determine, and then strictly to follow, the correct judicial approach to the problem placed before the court. Mr. Bingham put it correctly when he submitted that the letter of June 11 was crucial to the Secretary of State's case, and that it must be read fairly, not legalistically, and must be studied in its contemporary context, that is to say, as things were on June 11. Mr. Bingham was also right to remind the court that it is not suggested (a) that in the letter any reliance was placed on extraneous or irrelevant matters; (b) that the Secretary of State had omitted or failed to take into consideration any relevant matters (unless being misinformed is such a failure); (c) that the Secretary of State in using his power of direction under section 68 had any intention other than to secure compliance with the policy and intendment of the statute; (d) that there was bad faith on his part. He submitted—rightly, in my opinion—that *Padfield* v. *Minister of Agriculture, Fisheries and Food* [1968] A.C. 997 is not directly in point, since in that case the minister's reasons for refusing to appoint a committee of investigation were held to be outside the policy and intendment of the statute. When, however, Mr. Bingham came to summarise the law, he put it, I think, a little too narrowly. He submitted—and, if I may, I will

put his submissions in my own words and not necessarily his—that (1) section 68 confers on the Secretary of State a "subjective" discretion; (2) while judicial review of the exercise of the discretion is not excluded by the section, the court can declare the Secretary of State's direction unlawful only if there be proved to exist one or other of the following situations: bad faith on the part of the Secretary of State, misdirection in law, taking account of irrelevant matters or omitting to consider relevant matters, and finally a situation where the Secretary of State has taken a view which on the material and the information available to him no reasonable man could have taken; (3) the court must assume the discretion to have been lawfully exercised, until the contrary be shown; (4) the court must always bear in mind that the discretion is the minister's, not the court's. He relied on a well known line of cases, of which the familiar landmarks are *Liversidge* v. *Anderson* [1942] A.C. 206 (particularly the dissenting speech of Lord Atkin, at pp. 232, 235 and 245) and *Associated Provincial Picture Houses Ltd.* v. *Wednesbury Corporation* [1948] 1 K.B. 223. I agree with the great majority of Mr. Bingham's submissions. But, first, I think that the epithet "subjective" is of no assistance in this context. The point of principle is simply that it is not a judicial but a ministerial discretion in an administrative matter which is under review. Of course, the unusual feature of the present case is that we have under review two administrative decisions, each by a different authority: the Secretary of State's decision to use his section 68 power of direction, and the local education authority's earlier decision not to implement the section 13 proposals, the decision which in fact led the Secretary of State to act under section 68.

Secondly, I do not accept that the scope of judicial review is limited quite to the extent suggested by Mr. Bingham. I would add a further situation to those specified by him: misunderstanding or ignorance of an established and relevant fact. Let me give two examples. The fact may be either physical, something which existed or occurred or did not, or it may be mental, an opinion. Suppose that, contrary to the minister's belief, it was the fact that there was in the area of the local education authority adequate school accommodation for the pupils to be educated, and the minister acted under the section believing that there was not. If it were plainly established that the minister was mistaken, I do not think that he could substantiate the lawfulness of his direction under this section. Now, more closely to the facts of this case, take a matter of expert professional opinion. Suppose that, contrary to the understanding of the minister, there does in fact exist a respectable body of professional or expert opinion to the effect that the selection procedures for school entry proposed are adequate and acceptable. If that body of opinion be proved to exist, and if that body of opinion proves to be available both to the local education authority and to the minister, then again I would have thought it quite impossible for the minister to invoke his powers under section 68.

Lord Denning M.R. has briefly referred to some of the case law on the matter; and in the short time available I have looked to see if there is authority which would belie what I believe to be the law, and there is none. I think that the law which I believe to exist follows from the

cases to which Lord Denning M.R. has referred, and is really to be deduced from a well-known passage in *S.A. de Smith, Judicial Review of Administrative Action*, 3rd ed. (1973), p. 320, where he says:

> "Secondly, a court may hold that it can interfere if the competent authority has misdirected itself by applying a wrong legal test to the question before it, or by misunderstanding the nature of the matter in respect of which it has to be satisfied. Such criteria are sufficiently elastic to justify either a broad or a narrow test of validity; and they seem to have become increasingly popular. Thirdly, a court may state its readiness to interfere if there are no grounds on which a reasonable authority could have been satisfied as to the existence of the conditions precedent. This test can be combined with the first and the second."

I would add by way of parenthesis and somewhat out of place that in the present case the evidence now before the court does show that the Secretary of State either misunderstood or was not informed as to the nature and effect of the professional educational advice available to the local education authority.

I have already put in my own words the situation which I think, in addition to those more commonly described, enables the court to exercise its power of review. I would now try to put that situation into a formula; and my formula would be as follows: that the Secretary of State cannot lawfully be satisfied that the local education authority is proposing to act unreasonably unless upon the information that was or ought to have been available to him the local education authority, acting reasonably, could not have acted, or proposed to act, as it in fact did. In other words, while it is not for the court to substitute its view for the minister's, it is also the law that the minister cannot substitute his view for that of the local education authority, provided always that an authority, acting reasonably, could have made the decision that in fact it made.

Turning to the facts, I think that it is likely that the Secretary of State was not as fully informed as he might have been upon the possibilities of setting up a viable and acceptable method of selecting pupils for the two grammar schools. The weight of advice available to him was that it was not possible to make an acceptable selection between June 11, the date of his direction, and September 1, the beginning of the new school year. But we know, and the minister ought to have been apprised of the fact, that the local education authority could rely on perfectly respectable professional advice that it was possible. Unless this advice can be shown to be unsound, I do not see how it was possible for the Secretary of State to be satisfied that the local education authority was proposing to act unreasonably. We have admitted, without objection, evidence which was not before the Divisional Court, evidence from which it is abundantly clear that, though there might be difficulties, there was no insuperable problem in setting up and carrying through selection tests after June 11 and in time for the new school year beginning on September 1. I would refer to paragraph 6 in the affidavit of Mr. Thomas, one of Her Majesty's chief inspectors of schools. It is to be remembered that on June 11 there

were still almost six weeks of term left in which to have whatever discussions or interviews were needed with teachers or pupils.

There was no suggestion that this period of term time was not enough. The real point was that the teachers' associations, being strongly opposed to the local education authority's change of plan, would not cooperate to get the work done. The point is hypothetical: for no one knows what the teachers would have done had the Secretary of State accepted the decision of the local education authority. But from the mere possibility that the unions might in any event have urged their members not to cooperate with the local education authority one is not, in my judgment, to infer that the local education authority was proposing to act unreasonably. Moreover, as we now know from the evidence adduced in this court and as could have been discovered by the Secretary of State prior to June 11, there was, and is, a sufficient number of teachers willing to cooperate in the selection tests and, as I have already mentioned, a respectable body of professional opinion that the job of selection not only could have been, if started in June, which is the critical moment of time, but can even now be acceptably accomplished by September 1.

Thus, while there are differences of opinion as to the acceptability of the tests proposed, there is none, as I understand the evidence, as to the time factor. There was time enough in June. How can, then, the Secretary of State have been satisfied that the course of action proposed by the local education authority was unreasonable? It may have been unwelcome, attended by some risk and one that called for effort and drive. But none of these factors could, in isolation or accumulatively, constitute unreasonableness. And, when the local education authority had to balance the difficulties associated with "going comprehensive" by September 1, which, as the evidence shows, were genuine difficulties, against those associated with a decision to revert to the existing mixed pattern of comprehensive, secondary modern and grammar school education, I find it impossible to say that there existed grounds on which the Secretary of State could have been satisfied that the local education authority was proposing to act unreasonably. "Unreasonably" must mean in the context of section 68 not "unreasonably policy-wise" but "unreasonably" in the administrative sense: for the Secretary of State very properly concedes that section 68 is not an appropriate vehicle for imposing an unwelcome educational policy upon a local education authority. Moreover, the word "unreasonably" means not "mistakenly" nor even "wrongly" but refers only to a situation in which the authority is acting or proposing to act in a way in which, in the circumstances prevailing and on the expert advice available, no reasonable authority could have acted. The local education authority, being a public authority, is entitled to have its acts assessed by the Secretary of State on that basis.

Finally, there is and can be no suggestion that the Secretary of State has allowed political considerations to influence his decision in this case. The truth is that the Secretary of State was not fully informed as to the practicability of what the local education authority had in mind to do. His advisers may have jumped to the conclusion that the local education authority's proposals were unworkable and unacceptable. But we now know that they were practicable and that their acceptability is recognised

by respectable professional opinion. The local education authority, like the Secretary of State, is a democratically elected authority entitled to have its opinion of administrative problems within the area of its responsibility respected. If grounds cannot be shown to exist for treating their decision as unreasonable, it should not be too difficult to show that the Secretary of State had no grounds for being satisfied that they were proposing to act unreasonably. I think that they have shown that he had none: and I would allow the appeal, declaring that no order of mandamus should go.

Mr. Lloyd, for the local education authority, did raise a further point upon section 99 of the Education Act 1944. He submitted that the machinery for taking action in the event of default by a local education authority under that section was exclusive of the right of the Secretary of State to bring mandamus proceedings in any case in which that statutory machinery had not been invoked. Like Lord Denning M.R., I reserve my opinion on the point, but I will say that I would be very surprised if Mr. Lloyd was right.

GEOFFREY LANE L.J. On June 11 of this year the Secretary of State for Education and Science gave a directive to the metropolitan borough of Tameside under section 68 of the Education Act 1944. That directive was that the borough should implement proposals approved by the Secretary of State in November 1975 under section 13 of that Act.

That directive the borough has declined to obey for all practical purposes. Thereupon the Secretary of State on July 12 moved the Divisional Court for and succeeded in obtaining an order of mandamus requiring the borough to comply with his directive. From that order the borough appeals.

The principal if not the only question to be decided is whether the directive from the Secretary of State was a lawful and valid order which under the terms of the Act the borough was obliged to obey.

The details of the unhappy differences between the Secretary of State and the new councillors for Tameside have already been given, and it is unnecessary for me to repeat them. The two sides of the dispute can perhaps be conveniently summarised as follows. The Secretary of State is saying that there is already in process of being implemented a scheme approved by him for replacing the selection of pupils by merit with the so-called comprehensive system of education. The proposal, he says, of the borough to revert to the old merit system and to retain the grammar schools in their old capacity is an unworkable proposal and is therefore unreasonable. Therefore, he says, "I, the Secretary of State, direct you the borough to discontinue your plan and to implement the comprehensive system which I have already approved."

On their side the borough reply by saying that they appreciate that there are difficulties in the path of their proposals. But, they say, there are difficulties of at least comparable size in the path of the comprehensive system proposed by the minister. Their own difficulties, they say, can all be overcome.

At the root of the dispute, and there is no advantage in closing one's eyes to the fact, are the two opposing views as to the better form of secon-

dary education. Unfortunately the argument has become politically aligned, with the result that the true issues may sometimes become lost in the dust of political battle.

One thing is, however, clear in the present case and that is that both sides are fervently and genuinely convinced that their own view is the correct one—not only that their own scheme is the best for the pupils, but that their own scheme is practicable.

The situation is somewhat unusual. We are concerned to decide not the question whether the Secretary of State is in breach of a duty cast upon him by law, but whether the directive from the Secretary of State requiring the borough to act was a lawful order. There are thus two stages rather than the more usual one single stage. What is being judged is the Secretary of State's judgment of the actions of the borough. It is of course not for the court to substitute its own views for those of the Secretary of State. The task of the court, in the present circumstances, is to decide whether there was any foundation of fact upon which the Secretary of State could properly come to the conclusion on June 11, 1976, that the borough had acted as no reasonable local authority could have acted in refusing to implement the comprehensive scheme. If there was such a foundation, then he was entitled to issue the directive even though the court may differ from his view.

What then were the grounds upon which the Secretary of State reached his conclusion? In the affidavit sworn on his behalf by Mr. Jenkins the reasons for his decision are not expressly set out. Reference is made to the letter of June 11, and one is left to extract such reasons as one can from that and also from the statements in the affidavit. Mr. Lloyd, on behalf of the borough, submits that there are five such reasons. Four, he says, are plainly wrong and the fifth (which he suggests was an afterthought) is on closer examination no better. Mr. Bingham, for the Secretary of State, submits that the first four so-called reasons were not reasons at all, but only part of the historical background, and that Mr. Lloyd's fifth reason was a more than adequate basis for the Secretary of State's directive. I, myself, have no doubt at all that the four items were being put forward as reasons by the Secretary of State, and not merely as part of the history. There was no reason, otherwise, for selecting them as part of the historical background rather than a hundred other facts. Those four reasons are set out in the affidavit of Mr. Jenkins, that affidavit being dated June 17, and there is no need for me to read them in full here. It is clear in short, to my mind, that none of those four grounds has any substance and indeed I have to say that Mr. Jenkins' affidavit is something less than frank on one of them—that is, the second—which suggests on first reading that a large number of transfers of staff had been made to implement the original scheme; when, however, one comes to examine the figures in detail it seems that only 35 transfers have been made and the rest were promotions and other appointments. It is the fifth ground which is really the nub of the case, and that is the suggestion that in the time available it is not possible to operate a sufficiently accurate merit selection system which is the foundation of the borough's whole scheme. The objection is that it is impossible to carry out the selection procedure in time for the beginning of the new term on September 1. This has been complicated,

it seems, by the attitude of some of the teachers' unions who have encouraged their members not to cooperate with the borough's proposals. Affidavits from Mr. Beard, who has accepted an invitation to act as chairman of the selection panel, and from Mr. Potts, who is a very experienced educationalist, which are before this court make it clear that even in the short time of five weeks available from today it will be possible to carry out a reasonably accurate selection for the 780-odd children who are involved in the difficulty. The one matter which could frustrate that objective would be if the heads of the junior schools refused to release the records of pupils. These records belong to the borough, and I find it hard to believe that any of the heads involved would take such a step as to withhold those documents from the people who are entitled to have them. I think we should assume that they will not withhold them. There will, it is true, be insufficient time for a standardised verbal reasoning test to be carried out. Such a test is desirable in order to cater for the differing standards amongst the junior schools, but its lack is not fatal to a selection procedure, as Mr. Thomas, one of Her Majesty's chief inspectors of schools, in an affidavit made clear. The furthest that he goes is to say in the final paragraph of his affidavit:

> "I conclude that the arrangements for the selection of pupils for grammar schools in Tameside this year which are referred to in Mr. Beard's affidavit would not, with reasonable certainty, allow a fair selection between border-line candidates."

That, it seems to me, is a tentative statement, and it was a statement made on July 21 of this year. We are now at the end of July. Had the Secretary of State allowed the borough's plans to go forward on June 11 instead of placing an embargo upon them, then these difficulties would, practically speaking, have no doubt disappeared. I do not believe that the teachers would have taken the attitude which they have taken if that directive had not been given by the Secretary of State. I believe that the heads would have cooperated. Thus the minister's action is itself partly responsible for the existing situation.

I find it quite impossible to say that there were any valid grounds for the Secretary of State's decision when it was given that no reasonable local authority could have acted as the borough did here. No doubt the Secretary of State is convinced that the borough's decision is wrong and even deplorable. No doubt the borough think the same of the Secretary of State's attitude. But that is not to say that either is acting unreasonably or that anyone can legitimately come to the conclusion that either is being unreasonable. I would allow the appeal on this ground, and I agree that that decision makes it unnecessary to consider Mr. Lloyd's further point and ancillary argument based on his interpretation of section 99. I would allow the appeal.

Appeal allowed with costs.
Leave to appeal refused.

Solicitors: *Oswald Hickson, Collier & Co.; Vaudrey, Osborne & Mellor, Manchester; Treasury Solicitor.*

A. H. B.

On July 29, 1976, the Secretary of State petitioned the House of Lords for leave to appeal. A

T. H. Bingham Q.C. and *Harry Woolf* for the Secretary of State. It is accepted that you are not entitled to say that a person is unreasonable because he disagrees with you. The question is whether, viewed objectively, the decision is unreasonable or not. The fact that discretion is entrusted to a minister by Parliament does not mean that his exercise of it is not open B to review by the courts. It can be challenged if it can be shown that he has misdirected himself in law. But neither the council here, while saying that the Secretary of State's letter of June 11 is a misdirection, nor the Divisional Court, have been able to show that it contains a misdirection in law. It is not suggested that the matters in paragraph 2 of the letter are matters to which the Secretary of State should not have paid attention. C The moment the court says that what the Secretary of State was being told about the selective system was wrong, it is entering into the discretion which has been entrusted to the Minister. The principle enunciated by Scarman L.J. regarding new evidence, ante, p. 1030E, is not only new but wrong. It is a vastly important extension of the field of judicial review, and potentially very extensive. If the Secretary of State took the view that the council's selection system could not be put into operation fairly, then that D entitled him to take the view that the council were being unreasonable. He did not take into account things which he ought not to have taken into account, etc., and in so far as the Court of Appeal took new evidence into account that was a new principle and ought to be gone into. The Court of Appeal were wrong in not confining their decisions to saying that there was material on which the Secretary of State could say that the council were acting unreasonably. They strayed into being conditioned, E at least, by material which had not been available to the Secretary of State. The new evidence to the effect that the council's procedure would be satisfactory is not accepted.

While the court should be astute to restrain a minister from acting in excess of his powers—that is recognised as a function of the rule of law—the converse applies too: the minister should be free to exercise his execu- F tive authority within its field. The Court of Appeal here has nullified a decision which the Secretary of State was perfectly entitled to make. They relied on grounds which were not legitimate for doing what they did.

Anthony Lloyd Q.C., Leon Brittan and *Andrew Caldecott* for the council. The council make the following points. 1. Three judges in the Court of Appeal have all come to the conclusion on the facts that there was no G ground here on which the Secretary of State could lawfully be satisfied that the council were acting or proposing to act unreasonably: see, e.g., *per* Lord Denning M.R., ante, p. 1026D. He drew the inference, at p. 1026G, that the Secretary of State must have misdirected himself as to the question which he should ask: not, did he agree with the council, but, was the council acting unreasonably? The section 76 point is a difficult one. It H is easier to carry out one's policy if the electorate is with you. Geoffrey Lane L.J., ante, p. 1035F, allowed the appeal on the basis that there were no valid grounds on which the Secretary of State could have come to his

conclusion. Much the same view was in fact taken by Lord Widgery C.J. in the Divisional Court, ante, pp. 1019G—1020C, and by May J., ante, p. 1020C–F.

The teachers' consultative committee have met, and invited the head teachers to hand in the reports. Seven have, and there is no reason to suppose that the others will not. This does not bear on the rightness of the Secretary of State's decision, but had it been before the Divisional Court they would not have taken the view that the Secretary of State had established grounds for making his direction because of the opposition to the council's scheme. At that stage the teachers were in dispute. If it had been apparent to the council that they would not be able to put their scheme into operation, they would not have attempted to do so. The three judges in the Divisional Court would have come to the same conclusion as the Court of Appeal if they had had this evidence. So the council's case is a strong one on the facts.

2. There is no great question of law here. It is fundamentally a question of fact whether there were grounds for the Secretary of State's decision. If there is a great question of constitutional law here, it is not seemly to deal with so important a question at too great a pace.

3. It may be that the importance of the case has been, or could be, exaggerated in other respects, besides that of the law. If here the future of 3,000 children were at stake, it would be a very serious matter, but that is not the case. The council are proposing simply to maintain the status quo for a year, not to rush into anything in September. The effect of preserving the status quo in relation to the two grammar schools is that 240 places will be available for boys and girls. The council could have left the 240 places empty without affecting the character of the schools. By not turning them into sixth form colleges they simply have 240 places available. Against that background, it is almost absurd to talk of jeopardising the whole educational position of this age group. There will be no imbalance between boys and girls. There have been only 198 applications by girls out of the total of 783 applications. That is the same proportion—a quarter— as the places available for girls (60).

Although Scarman L.J.'s judgment is important, it is not of such importance that your Lordships should give the Secretary of State leave to appeal. In his petition for leave, the Secretary of State seems to be saying that, assuming that the Court of Appeal were right on the evidence before them, they should have shut their eyes to that evidence and decided the appeal solely on the material which had been placed before the Secretary of State. That, if correct, is a remarkable proposition. The Court of Appeal rightly asked themselves: could the Secretary of State have been satisfied on the evidence? The Secretary of State's reasons for his decision should be considered together: one cannot subtract the bad reasons and ask whether the rest were all right. It is not right to say that the Court of Appeal equated the role of the Secretary of State in relation to the council to that of the court reviewing a decision of the Secretary of State, but none the less there are distinct similarities (see *per* Lord Upjohn in *Padfield* v. *Minister of Agriculture, Fisheries and Food* [1968] A.C. 997).

David McNeill Q.C. and *J. J. Hodgson* for the six parents adopted the submissions for the council.

Bingham Q.C. in reply. Lord Widgery C.J. correctly directed himself as to the question of law which he had to answer, and correctly answered it. A

The Appeal Committee (Lord Wilberforce, Viscount Dilhorne, Lord Diplock, Lord Salmon and Lord Russell of Killowen) granted the Secretary of State leave to appeal. The hearing of the appeal took place on July 30 and 31.

B

T. H. Bingham Q.C. and *Harry Woolf* for the Secretary of State. It was a question in the Court of Appeal whether section 8 of the Education Act 1944, beginning "It shall be the duty . . .," imposed any duty with regard to allocation to schools. There was a decision in 1972 that it did, and it is not really contested. *Cumings* v. *Birkenhead Corporation* [1972] Ch. 12 shows that it is an administrative discretion which has to be exercised fairly and reasonably. If the authority are acting unreasonably, C they are acting in breach of the power in section 8. The Secretary of State's approval under section 13 is only a starting point: it gives leave; it does not impose an obligation. The authority do not have to go ahead if they do not want to. The two criteria in section 13 (10) of the Act of 1944, added by section 1 (2) of the Education Act 1968 are satisfied here: alterations in age, and alterations in admission arrangements by reference to ability D and aptitude. The relevance of section 17 is that it is in some sense the counterpart of section 8: a particular choice at particular schools. Under section 37 there is a right of parental choice unless good reason is given. The Secretary of State cannot hold examinations, but he can satisfy himself that the selection procedure is satisfactory. Here, a system is proposed which is not satisfactory. 500 parents are likely to complain. The Secretary of State will find himself in a position E in which he cannot satisfy himself that the selection procedure is satisfactory. These are not mere difficulties, but are very substantial obstacles to the proper performance of his duty to resolve disputes when they arise. [Reference was made to section 68 and 99 of the Act of 1944.] A week before June 11, the teachers were stating their view. The crux may be whether they were going to cooperate, and here is material on which the F Secretary of State was clearly entitled to take the view that they were not. *Provided* that the council had had the cooperation of all concerned, perhaps they would have been entitled to act as they did, but, on the material before the Secretary of State, they did not have that cooperation. Strictly, one has to judge their reasonableness as at that moment, though the same state of affairs persisted thereafter.

Just because the Secretary of State has given reasons for his decision, G he cannot be shut out from saying that his mind was affected by other things, even if he does not refer to them specifically. The collective disputes procedure in operation between three of the teachers' unions and the council is not so far outside what he had referred to that it ought to be shut out. It is clearly capable of being regarded as evidence of unreasonableness on the part of the council when someone says that they H are going ahead despite those factors. On the other side, see the report of the chief executive, the director of education and the director of administration to the council on June 21, 1976. There was evidence on which the

A Secretary of State could take the view that what the council were proposing to do was (having regard to the time scale) unreasonable and their objections to the implementation of the approved comprehensive scheme were trivial compared with the objections the other way.

As regards the giving of reasons, the Secretary of State relies on what Scarman L.J. said, ante, pp. 1028H—1029A. Where reasons are given in fairly general terms, the court should not exclude material falling within B the ambit of those reasons if it appears likely that it will have affected the mind of the person giving them.

The principles governing the approach of the Court of Appeal to ministerial discretion in this case are as follows. 1. Its function is to see that the Secretary of State does not exceed his power. 2. The scope of review is determined by the language of the grant of power. "Satisfied" leads C to a different review from "has reason to believe" (*Liversidge* v. *Anderson* [1942] A.C. 206) or "if it appears to the Minister." The Secretary of State does not know of any other section with language comparable to that of section 68. 3. The Secretary of State's decision can be impugned if it can be shown that he misdirected himself in law, on the familiar grounds. 4. The Secretary of State's duty is to take such steps as are reasonably necessary to satisfy himself. 5. His decision may, depending D on the circumstances, be open to challenge if he is shown to have misdirected himself in fact on the material before him. The authority for this proposition is extremely slender (see *Secretary of State for Employment* v. *ASLEF (No. 2)* [1972] 2 Q.B. 455. It would be contrary to principle for the Secretary of State's decision to be impugned on the basis of material which comes into existence after it has been made. [Reference was made to *S.A. de Smith, Judicial Review of Administrative Action*, 3rd ed. E (1973), p. 320; *Reg.* v. *Minister of Housing and Local Government, Ex parte Chichester Rural District Council* [1960] 1 W.L.R. 587.]

There is no reason to suppose that the Secretary of State was not fully alive to the meaning of "reasonable" and gave it proper consideration. [Reference was made to *McEldowney* v. *Forde* [1971] A.C. 632, *per* Lord Diplock, at p. 659.] There is no substantial support for some of F the passages in *de Smith* quoted by Scarman L.J. in the Court of Appeal.

Lastly, reasonableness is a matter of fact and degree, so long as there is some evidence of it: see *per* Lord Hailsham of St. Marylebone L.C. in *In re W. (An Infant)* [1971] A.C. 682, 699. The teachers' non-cooperation is at the heart of this matter.

Anthony Lloyd Q.C., *Leon Brittan* and *Andrew Caldecott* for the council. The council's propositions are as follows. 1. The question which G the Secretary of State should ask himself under the Act is: "Am I satisfied that the council are proposing to act in a way in which no reasonable council would act in the particular circumstances?" It would not be enough for him merely to disagree with them or think them wrong. "Unreasonably" must be interpreted in its full sense (this is now probably common ground): see *per* Lord Hailsham of St. Marylebone L.C. in H *In re W. (An Infant)* [1971] A.C. 682, 699–700. "Reasonably" should not be whittled down. It is used in the context of the Act where there is an elaborate balance of powers and duties. The Act did not intend a collision unless the local authority were acting unreasonably.

2. The Court of Appeal is entitled, indeed bound, to look at the reasons given by the Secretary of State for saying that he is satisfied. If the Court of Appeal takes the view that no reasonable person could be satisfied on those reasons, there is no doubt that it can set the Secretary of State's decision aside. The field of review is already set very narrowly. Because that is so, while being fair to the Secretary of State, one should perhaps not give him the benefit of the doubt.

If the council had been neglecting the view that there might be non-cooperation by the teachers, that would make their view unreasonable.

Assuming that the Secretary of State is a reasonable man, he must have misdirected himself on some question of law or fact. So approached, the case is well within *Padfield* v. *Minister of Agriculture, Fisheries and Food* [1968] A.C. 997: see *per* Lord Denning M.R., at p. 1006; the council also rely on *Secretary of State for Employment* v. *ASLEF* (*No.* 2) [1972] 2 Q.B. 455. A misdirection in fact means a misdirection on the facts as they really were at the time, not just on the facts which were before the Secretary of State.

3. Having regard to the reasons given in the Secretary of State's letter of direction, and particularly in his letter of May 26, 1976, and in Mr. Jenkins's affidavit, the Secretary of State is not just saying (if he is saying it at all) that it is too late now to carry out a proper selection test. What he is saying is that the progress towards comprehensive reorganisation has now gone so far that it would be unreasonable for the council to turn back.

There is no distinction between a reason which is intrinsically irrelevant and a reason which is potentially relevant but which has no substance in fact. The reasons regarding staff and buildings, which were originally put forward by the Secretary of State with vigour (less so in the Court of Appeal), have now virtually gone. Really the only reasons which are put forward are those in the Secretary of State's letter of May 26, 1976. The Secretary of State ignored responsible and professional opinion as to the feasibility of selection tests; the council adopt what the Court of Appeal said on this.

It is not right as a matter of law to say that the court is confined to looking at the material which the Secretary of State himself had, or ought to have had, unless by that one means all the relevant material. Suppose that he genuinely thought that on the material which he had the selection process could not be completed by September; the highest at which the matter could then be put in his favour would be: "how can he be said to have acted unreasonably when on the material which he had a reasonable person could have taken the view which he has in fact taken?" That illustrates the fallacy in the Secretary of State's argument regarding confining the matter to the material which was before him. The question is not whether the Secretary of State himself subjectively was acting reasonably or unreasonably. The question is objective: on the reasons which he has given, do those reasons objectively support the view his view on the material which was available at the time, not just the material which he in fact had? Suppose that the Secretary of State decided to close down a school on the ground that there were too many schools in the area, and without his knowledge another school had burned down. That sort of argument would get nowhere. The question, on a judicial review,

A whenever one is dealing with a misdirection in fact, as in law, does not depend on the material actually before the Secretary of State, or on what he ought to know (unless one assumes that he ought to know all the material facts). One assumes that he is going to know all the relevant facts, not just that he is going to do his best. He must inform himself of all the relevant facts.

The question which the Secretary of State asks in relation to the B authority is, is it acting reasonably or unreasonably? The court does not ask, is the Secretary of State acting reasonably (subjectively). If he has not all the relevant facts, his decision, objectively, goes. If his function is, as it is, to have regard to the true facts, evidence was admissible in the Divisional Court to establish what those facts were. As to what Scarman L.J. said, the test is not what he knew or ought to have known. Scarman C L.J., rather than going too far, does not go far enough. His judgment is a valuable reformulation of the law rather than an extension of judicial review. The question is not whether there was a body of opinion available to the Secretary of State, but whether it existed. The Secretary of State has a duty to inform himself of all relevant facts, not just to take all reasonable steps to do so.

To summarise the council's argument on the selection point: 1. It is D an obvious point that parents did not have to apply on behalf of their children for the 240 places. There was no pressure on them to reply; they were merely invited to do so. To talk of a "dilemma" is extravagant, just as it is to talk of the educational provision for the whole age group being put in jeopardy. 2. In the very broadest sense (only), it was not unreasonable for the council to attempt to put into practice the policy E which they had indicated to the electorate in two elections. 3. It was not unreasonable—again in the broadest sense—for the council to *attempt* to fill the 240 places which would have been left empty by not going ahead with the sixth form colleges. If the worst came to the worst, they could have left the places empty. 4. The council have not attempted at any stage to "override" the views of the teachers; they have attempted to F carry the teachers (or their unions) with them. 5. When they were asked to explain their plans, they did so in considerable detail in their letter of June 7, 1976. It was a very reasonable letter to write, both in content and in manner. 6. It was not unreasonable for them to hope that the teachers would cooperate, although it was true that they had declared a dispute, at least to the extent that they would hand over the reports and records. If the worst came to the worst, the council could have compelled G them to do so. If necessary, they would have taken that course.

In this connection, the council now apply to put before the House an affidavit bringing this matter up to date. It shows, first, what may have been true of the attitude of the teachers on June 11: that they are now prepared to hand over the records. Secondly, on the question of discretion: if the House feels that it is now too late for the council to go ahead H with their plans, it should be aware that the records are now being handed over. It is evidence of a state of mind.

Bingham Q.C. The affidavit should not be let in without an opportunity being given to the Secretary of State of answering it.

[LORD WILBERFORCE. The House will not admit the affidavit at this stage.]

Lloyd Q.C. continuing. There was no material on which the Secretary of State could properly come to the conclusion that it was unreasonable for the council to try to put their plan into operation. He should at least have allowed them to try a bit longer.

The disturbance to the pupils if the approved plans had been carried out would have been much greater than if the council's selection system were operated. It would clearly have been sensible to wait for a year until the buildings were completed before putting the approved plan into operation. The council had to choose between two courses, each involving some disruption. How can it be said that in choosing one difficulty rather than the other they were acting in a way in which no reasonable council would have acted? It comes down to one point: all that the Secretary of State is putting forward is grounds on which one might disagree with what the council are doing, but there is no ground sufficient in law to say that they were unreasonable in what they were doing.

The Act does not say on what basis the Secretary of State decides. The question is not between comprehensive and selective education, but between one comprehensive scheme and another.

There are the following additional points. When the court is looking at the reasons for a decision, it infers two things: (1) that the reasons given are the best reasons; (2) that all the reasons played some part in the decision-making process. It follows from (1) that the Secretary of State cannot add to his reasons: there is neat authority for this in *Reg.* v. *Minister of Housing and Local Government, Ex parte Chichester Rural District Council* [1960] 1 W.L.R. 587. What is added will be second best. The reason is one of policy as much as anything. Equally, the Secretary of State cannot subtract from his reasons, because all are presumed to have played some part in the decision-making process. [Reference was made to *Sadler* v. *Sheffield Corporation* [1924] 1 Ch. 483.] This point is another way of saying that if the Secretary of State takes into account irrelevant considerations then his decision must fall.

Discretion only arises if the council are wrong in their argument so far. The Secretary of State arrived at a correct decision, but on what is now known it had no substance in fact, and, assuming that the court had no power to declare his decision invalid—the council says that it had—no court in the circumstances would enforce it by mandamus.

On section 68, the only people who have the right to choose a school are the parents or the Secretary of State, not the local authority. One would think that it would be provided that the local authority should allocate the children between schools, but that provision simply is not there: there is no such power or duty.

On section 99, a procedural point, the council would accept that once a direction is given under section 68 there is a duty on the local authority to comply with the direction, provided, of course, that it is valid. Until the direction is given, however, there is no duty to implement the section 13 proposal, even though it has been approved by the Secretary of State. The duty arises for the first time under section 68. The question then is how it is to be enforced: normally by mandamus. Most statutes, however

(see, e.g., the Housing Finance Act 1972, section 95), especially those regulating procedure between local and central government, have a procedure by way of default orders. Turning to the default section in the Act of 1944, section 99 (1), this lays down how the Secretary of State is to enforce the duty in case of a default. Here, the Secretary of State has jumped a step, eliding the step which he should have gone through in section 99. In every case where action is being brought by central government against the local authority under this Act which provides for a default order, this default order is an important step which must be complied with.

Bingham Q.C. in reply. It would be odd to find the Secretary of State in his decision letter saying: "I have given 'unreasonable' the following meaning. . . ." Nor should the court say "It is 50/50 what he meant." It should approach his decision on the basis that he is likely to have directed himself correctly regarding an expression common in statutes. It is not desirable that he should be cross-examined as to what he meant.

Regarding the correspondence leading up to the Secretary of State's direction, it is unlikely that the department would have specified express concern about selection if it had known what was proposed about selection. Everything which the Secretary of State relies on is covered by the wording which he uses. It is not tied to a particular intake of pupils, or to a particular aspect of the matter. He cannot be said to have thought of things ex post facto. He should certainly have asked himself: "If I do not intervene, will the teachers do their duty?" The construction of section 68 for which the council contend would make it virtually a dead letter: the Secretary of State could never discover all the facts. He is dealing with a local authority which ex hypothesi is proposing to act unreasonably. He is entitled to rely on the educated knowledge and experience within his department.

In *Reg.* v. *Minister of Housing and Local Government, Ex parte Chichester Rural District Council* [1960] 1 W.L.R. 587 the minister was obliged to give reasons. His decision could not be upheld on the basis of reasons which he had not given. The case is distinguishable.

As to discretion, where there is a public duty to perform, mandamus will lie. Discretion has a very small part to play. [Reference was made to *Rex* v. *Bishop of Sarum* [1916] 1 K.B. 466, 470.]

Section 8 creates a power *and* a duty. Lord Denning M.R. so treated it in *Cumings* v. *Birkenhead Corporation* [1972] Ch. 12, 35–36.

There are four distinctions between section 99 and section 68. (1) Section 99 has been in the Education Acts in one form or another for a long time, first in section 16 of the Act of 1902 (public inquiry held first), then in section 150 of the Act of 1921. Section 68 was first included in 1944. (2) Section 68 is both prospective and retrospective, section 99 retrospective only. (3) Section 68 refers to powers and duties, section 99 to duties alone. (4) Section 99 makes express reference to mandamus; section 68 does not. There are two explanations for these distinctions. First, historical: in 1902 it was sought to make it clear that mandamus would lie. Secondly, to make it clear that mandamus was available at the suit of the Secretary of State and not of anybody else.

The real objection to the council's argument is the practical one. On that argument, if the Secretary of State were satisfied that a local authority

were proposing to act unreasonably, he would take the following course: (i) give a direction; (ii) wait to see what course the local authority would follow; (iii) make a default order under section 99; again, a pause, then (iv) apply for mandamus. One would need very strong arguments on construction to conclude that the legislature intended anything so unwieldy: see, again, *Cumings* v. *Birkenhead Corporation* [1972] Ch. 12. A real remedy is provided, not just a press-button for section 99.

The six parents did not appear and were not represented at the hearing of the appeal.

August 2. Their Lordships announced that they were of the opinion, for reasons to be announced, that the appeal failed.

Their Lordships took time for consideration.

October 21. LORD WILBERFORCE. My Lords, this appeal is concerned with secondary education in the metropolitan borough of Tameside. Tameside is a new unit of local government created under the Local Government Act 1972; it includes areas formerly in Cheshire and Lancashire. Its resources in secondary education included 16 secondary modern and five grammar schools and three purpose-built comprehensive schools under construction. Soon after its creation the council, as local education authority, put forward a scheme for bringing all the schools in the area under the comprehensive principle—"comprehensive" in this context not bearing its normal meaning in English, or the meaning it bore in the Education Act 1944, but its meaning in modern political jargon of a system which, in theory, lets everyone in to any school without selection by aptitude or ability. Grammar schools, by contrast, allocate places by selection. This scheme was brought in and, as the law required, was laid before the Secretary of State for Education and Science on March 10, 1975; it was very detailed and would clearly take some time to implement. Briefly, it provided (1) for setting up three new purpose-built comprehensive schools (those mentioned above) (2) for bringing the 16 secondary modern schools into the comprehensive principle (3) for abolition of the five grammar schools by turning three of them into comprehensives and two into sixth form colleges. These proposals in due course, on November 11, 1975, received the Secretary of State's approval, and the council then became entitled to put them into effect: but—and this is important—the Secretary of State's approval imposed no duty on the council to implement them. In fact, the council did take some steps towards their initial implementation by the beginning of the school year in September 1976. These steps were of a rather hurried nature, and, the respondents now contend, premature, and made not without an eye upon the local government elections to be held in May 1976. It is certainly fair to say that it was and is clear that necessary buildings for the changeover could not be completed, or in some cases more than just begun, by September 1976, and that if the new proposals were to start at that date there would be a good deal of improvisation and temporary disruption. There was some impressive evidence of this from a number of experienced teachers.

Local elections were held on May 6, 1976. The issues no doubt were numerous and of varying importance, but the survival of the grammar schools as selective entry schools was one issue strongly fought, and on which the opposition party took its stand. A large number of parents had signed a petition against the 1975 proposals and no doubt supported the opposition. The opposition gained control of the council, and they considered themselves to have been given a mandate to reconsider their predecessors' education policy. They formulated their own proposals as not involving a total reversal of that policy. They set them out in a carefully thought out and moderate letter addressed to the Secretary of State on June 7, 1976. They proposed to adopt what had already been done in the direction of comprehensive education—the three new comprehensives would be continued and completed as "a valuable nucleus of any future scheme." The 16 secondary moderns would be continued. But they did not propose to implement at once the plans for conversion of the grammar schools. They proposed to postpone these plans and to continue the schools for a time so that the position could be reviewed, in the light, amongst other things, of the new Education Bill then before Parliament. Their policy was

> "... the maintenance of the status quo with the least disturbance and disruption to the children's education pending any longer term, well thought out proposals."

The Secretary of State, and his department, were greatly concerned with the difficulties likely to be brought about by a change in control of the local education authority. Undoubtedly such changes are an administrator's nightmare. The department had approved the "comprehensive" plan, and they knew and approved that the authority had planned to start introducing it in September 1976. A change of course only three months before the new school year was to start very naturally worried the officials. There was correspondence between the department and the authority in May and June in which the authority was asked to explain its plans, particularly with regard to the selection of pupils; there was a meeting on June 9, which does not seem to have been amicable or conclusive. The Secretary of State remained of the opinion that it was too late to reverse the previous council's plans and that the new council were acting unreasonably in doing so. So on June 11, 1976, he gave a direction to the council to implement their predecessors' proposals, and on June 18, 1976, he asked for an order of mandamus that they should do so. This order was granted by the Divisional Court but on July 26, 1976, on appeal by the authority, it was discharged by the Court of Appeal, leave to appeal being refused. By an emergency procedure which started with an application for leave to appeal on July 29 and which phased into a full hearing of the appeal, your Lordships heard full, and I must say admirable, arguments on a complete documentary record on July 29 to 31. I would like to acknowledge the efforts and cooperation of those advising each side which enabled this exceptionally quick procedure to be carried out. The argument was concluded on July 31, and on August 2 it was announced that their Lordships were of opinion, for reasons to be announced and now set forth, that the appeal failed.

I must now set the legal scene. The direction of June 11, 1976, was given under section 68 of the Education Act 1944. Education is still governed by this notable statute, as amended, and it is necessary to understand its structure. Under the Act responsibility for secondary education rests upon a fourfold foundation: the Minister (as he was then called); local authorities; parental wishes; and school managers and governors. All have their part to play. The primary responsibility rests on the Minister. He has to promote the education of the people of England and

> ". . . to secure the effective execution by local authorities, under his control and direction, of the national policy for providing a varied and comprehensive" (old meaning) "educational service in every area." (section 1.)

But local education authorities, which are elected, have their place defined. It is they who are responsible for "providing secondary education" in schools

> ". . . sufficient in number, character, and equipment to afford for all pupils opportunities for education offering such variety of instruction and training as may be desirable in view of their different ages, abilities, and aptitudes, . . ." (section 8.)

Section 13 is an important section—it is that which was acted on in 1975. It enables local education authorities to make "significant changes" in the character of any school but requires them to make proposals to that effect to the Secretary of State. So the initiative is theirs: ultimate control is with the Secretary of State: there is no obligation, before or after his approval, on the authority to carry its proposals out. Section 68 must be quoted in full:

> "If the Secretary of State is satisfied, either on complaint by any person or otherwise, that any local education authority or the managers or governors of any county or voluntary school have acted or are proposing to act unreasonably with respect to the exercise of any power conferred or the performance of any duty imposed by or under this Act, he may, notwithstanding any enactment rendering the exercise of the power or the performance of the duty contingent upon the opinion of the authority or of the managers or governors, give such directions as to the exercise of the power or the performance of the duty as appear to him to be expedient . . ."

This section does not say what the consequences of the giving of directions are to be, but I accept, for the purposes of the appeal, that the consequences are to impose on the authority a statutory duty to comply with them which can be enforced by an order of mandamus.

Analysis of the section brings out three cardinal points.

(1) The matters with which the section is concerned are primarily matters of educational administration. The action which the Secretary of State is entitled to stop is unreasonable action with respect to the exercise of a power or the performance of a duty—the power and the duty of the authority are presupposed and cannot be interfered with. Local education authorities are entitled under the Act to have a policy, and this section

does not enable the Secretary of State to require them to abandon or reverse a policy just because the Secretary of State disagrees with it. Specifically, the Secretary of State cannot use power under this section to impose a general policy of comprehensive education upon a local education authority which does not agree with the policy. He cannot direct them to bring in a scheme for total comprehensive education in their area, and if they have done so he cannot direct them to implement it. If he tries to use a direction under section 68 for this purpose, his direction would be clearly invalid. A direction under section 68 must be justified on the ground of unreasonable action in doing what under the Act the local authority is entitled to do, and under the Act it has a freedom of choice. I do not think that there is any controversy upon these propositions.

The critical question in this case, and it is not an easy one, is whether, on a matter which appears to be one of educational administration, namely whether the change of course proposed by the council in May 1976 would lead to educational chaos or undue disruption, the Secretary of State's judgment can be challenged.

(2) The section is framed in a "subjective" form—if the Secretary of State "is satisfied." This form of section is quite well known, and at first sight might seem to exclude judicial review. Sections in this form may, no doubt, exclude judicial review on what is or has become a matter of pure judgment. But I do not think that they go further than that. If a judgment requires, before it can be made, the existence of some facts, then, although the evaluation of those facts is for the Secretary of State alone, the court must inquire whether those facts exist, and have been taken into account, whether the judgment has been made upon a proper self-direction as to those facts, whether the judgment has not been made upon other facts which ought not to have been taken into account. If these requirements are not met, then the exercise of judgment, however bona fide it may be, becomes capable of challenge: see *Secretary of State for Employment* v. *ASLEF (No. 2)* [1972] 2 Q.B. 455, *per* Lord Denning M.R., at p. 493.

(3) The section has to be considered within the structure of the Act. In many statutes a minister or other authority is given a discretionary power and in these cases the court's power to review any exercise of the discretion, though still real, is limited. In these cases it is said that the courts cannot substitute their opinion for that of the minister: they can interfere on such grounds as that the minister has acted right outside his powers or outside the purpose of the Act, or unfairly, or upon an incorrect basis of fact. But there is no universal rule as to the principles on which the exercise of a discretion may be reviewed: each statute or type of statute must be individually looked at. This Act, of 1944, is quite different from those which simply create a ministerial discretion. The Secretary of State, under section 68, is not merely exercising a discretion: he is reviewing the action of another public body which itself has discretionary powers and duties. He, by contrast with the courts in the normal case, may substitute his opinion for that of the authority: this is what the section allows, but he must take account of what the authority, under the statute, is entitled to do. The authority—this is vital—is itself elected, and is given specific powers as to the kind of schools it wants in its area. Therefore two

situations may arise. One is that there may be a difference of policy between the Secretary of State (under Parliament) and the local authority: the section gives no power to the Secretary of State to make his policy prevail. The other is that, owing to the democratic process involving periodic elections, abrupt reversals of policy may take place, particularly where there are only two parties and the winner takes all. Any reversal of policy if at all substantial must cause some administrative disruption—this was as true of the 1975 proposals as of those of the respondents. So the mere possibility, or probability, of disruption cannot be a ground for issuing a direction to abandon the policy. What the Secretary of State is entitled, by a direction if necessary, to ensure is that such disruptions are not "unreasonable," i.e., greater than a body, elected to carry out a new programme, with which the Secretary of State may disagree, ought to impose upon those for whom it is responsible. After all, those who voted for the new programme, involving a change of course, must also be taken to have accepted some degree of disruption in implementing it.

The ultimate question in this case, in my opinion, is whether the Secretary of State has given sufficient, or any, weight to this particular factor in the exercise of his judgment.

I must now inquire what were the facts upon which the Secretary of State expressed himself as satisfied that the council were acting or proposing to act unreasonably. The Secretary of State did not give oral evidence in the courts, and the facts on which he acted must be taken from the department's letters at the relevant time—i.e., on or about June 11, 1976—and from affidavits sworn by its officers. These documents are to be read fairly and in bonam partem. If reasons are given in general terms, the court should not exclude reasons which fairly fall within them: allowance must be fairly made for difficulties in expression. The Secretary of State must be given credit for having the background to this actual situation well in mind, and must be taken to be properly and professionally informed as to educational practices used in the area, and as to resources available to the local education authority. His opinion, based, as it must be, upon that of a strong and expert department, is not to be lightly overriden.

The first letter from the department to the local education authority was dated May 26, 1976. This refers to "a great deal of educational and administrative planning" which had taken place since approval of the "comprehensive" plan in November 1975. Particular matters mentioned without details were (i) allocation of children to schools; (ii) progress in staffing arrangements including the offer and acceptance of contracts; (iii) planning of curricula and courses; (iv) some building work. Reference is also made to the "continuing absence of any precise alternative plans." Tameside answered this on June 7, 1976, in a long letter. I must summarise it at some length because argument has tended to become concentrated on one or two narrow points rather than upon a balanced overall view of the council's plans. I have already commented on the general character and tone of this letter, which is moderate and appreciative of the difficulties, and which shows at least an intention and purpose to reduce them to the minimum.

The letter begins with a narrative section stating that no comprehensive

reorganisation in Tameside had yet taken place. The schools were not ready for their changed roles; building works were not completed, and not in most cases begun. Implementation (sc. of the 1975 proposals) in September 1976 would have caused grave disruption to the children's education. A particular case of this would be disruption of the education of 16-year-old pupils, who under the 1975 proposals would have been turned out of the sixth forms of three grammar schools and transferred to two non-selective sixth form colleges. I do not think that any of this is disputed. The authority's own plans were set out under 10 points, which involved continuation of the five grammar schools, continuation and completion of the three new purpose-built comprehensives and continuation of the remaining secondary schools. Their policy as regards allocation to schools is spelt out in five paragraphs. All allocations of pupils for the forthcoming year—about 3,000 in all—made by the old council would be honoured subject to agreement by the parents concerned. Ashton and Hyde grammar schools—by the old council destined to become sixth form colleges—would remain grammar schools and would be open to 11-year-old entry, thus making 240 selective places available. All parents of 11-year-olds were to be given the right to apply for reallocation of their children, but if they were satisfied with the existing allocations those allocations would stand. Then it is said (paragraph 7):

> "If the number of applicants to the grammar schools exceeds the number of places available, as is likely, then those pupils most suitable and most likely to benefit from that type of education will be selected by a combination of reports, records and interviews. There will be no formal 11-plus examination."

Finally, it was said that there would be a review of the first year entries, and a very flexible transfer system would be operated at the end of the first year, or earlier if required. I do not think that we need to consider this proposal since there is plenty of time for it to be reconsidered.

The letter also stated that, apart from these immediate plans, longer term proposals would have to be worked out and would need to comply with whatever terms might be contained in the pending Education Bill as and when enacted.

The proposals in this letter were explained, it is said, at a meeting held at the House of Commons on June 9.

On June 11, the direction under section 68 was given in a letter of that date. The letter stated that the Secretary of State was satisfied that the authority was proposing to act unreasonably according to the formula used in section 68 of the Act. A change of plan designed to come into effect in less than three months must, in the opinion of the Secretary of State, give rise to "considerable difficulties." It pointed out that over 3,000 pupils transferring from primary schools had already been allocated and allotted places. Then followed this paragraph (which I shall call "paragraph A").

> "The authority's revised proposals *confront* the parents of children due to transfer in September *with the dilemma* of either adhering to secondary school allocations for their children which they may no longer regard as appropriate, or else *submitting* to an improvised

selection procedure (the precise form of which, the Secretary of State understands, has even now not been settled) carried out in circumstances and under a timetable which raise substantial doubts about its educational validity." (My emphasis.)

A further objection was taken to the proposed possible reallocation during or after the first year—I have commented on this above. The change of plan at this time in the educational year threatened to give rise to practical difficulties in relation to the appointments of staff already made and the construction of buildings for the new comprehensive schools and to create a degree of confusion and uncertainty which could impair the efficient working of the schools.

These arguments were restated and expanded in the affidavit sworn on behalf of the Secretary of State in support of the application for mandamus. The affidavit stated three points.

Point (i): that 653 of the 802 transfers, promotions and other appointments (of teachers) required to implement the reorganisation had been made.

Point (ii): that contracts had been entered into for building work directly related to the change in character of two of the schools and work had started under the contracts. In the case of a third school, the authority had entered into commitments for such building work.

Point (iii): that preparations had been made for courses on the basis that the proposals communicated to the Secretary of State would be put into effect.

These points (i), (ii) and (iii) were dealt with fully by the authority and I need say no more about them than that they were completely exploded. They were held to have no substance in them by five of the six learned judges who have considered this matter: the sixth indicated general agreement without specific discussion and indeed point (ii) was criticised with some severity by one of the learned Lords Justices in the Court of Appeal.

Some attempt was made to rehabilitate these points in this House, but learned counsel decided, no doubt wisely, to concentrate on the allocation issue. But these three points cannot just be discarded as if they had never been made. They form part of a composite set of facts relied upon as showing unreasonable conduct, and I am not at all sure that the disappearance of so many planks does not fatally weaken the stability of the platform. At the least—and I will give the department the benefit of this assumption—the remaining factual basis would need to be strong and clear if it alone were to be the basis for the Secretary of State's "satisfaction" as to unreasonable conduct.

So I come to the question of allocation, which was at the centre of the case as argued, and it can best be approached via "paragraph A" above, a paragraph which I regard as revealing. It shows a very strange attitude toward the decision taken by the authority. After the electorate, including no doubt a large number of parents, had voted the new council into office on the platform that some selective basis would be preserved, to say that this created "a dilemma" for the parents, with the undertone that this was something unreasonable, appears to me curious and para-

doxical. Parents desired to have a chance of selective places. The new council was giving it to them. If they did not want selective places, they had no need and no obligation to apply for them. Unless the creation of freedom of choice, where no such freedom existed previously, is intrinsically an evil, it seems hard to understand how this so-called dilemma could be something unreasonably created. The impression which it gives of upsetting 3,000 places is entirely a false one since over 90 per cent. of these would remain unaltered. Then, to refer to "submitting to an improvised selection procedure" hardly does justice to the authority's plan. Some selection procedure was inherent in what the electorate had voted for, a choice which, if it meant anything, must involve some change in allocations for the forthcoming school year and, unless exactly 240 parents applied for the 240 places, some selection. It would seem likely that in voting for this change in May 1976 the electors must have accepted, if not favoured, some degree of improvisation. The whole paragraph forces the conclusion that the Secretary of State was operating under a misconception as to what would be reasonable for a newly elected council to do, and that he failed to take into account that it was entitled—indeed in a sense bound—to carry out the policy on which it was elected, and failed to give weight to the fact that the limited degree of selection (for 240 places out of some 3,000) which was involved, though less than perfect, was something which a reasonable authority might accept and which the parents concerned clearly did accept.

What the Secretary of State was entitled to do, under his residual powers, was to say something to the effect: "the election has taken place; the new authority may be entitled to postpone the comprehensive scheme: this may involve some degree of selection and apparently the parents desire it. Nevertheless from an educational point of view, whatever some parents may think, I am satisfied that in the time available this, or some part of it, cannot be carried out, and that no reasonable authority would attempt to carry it out." Let us judge him by this test—though I do not think that this was the test he himself applied. Was the procedure to be followed for choosing which of the applicants were to be allotted the 240 selective places such that no reasonable authority could adopt it? The authority's letter of June 7 said that selection would be by "a combination of reports, records and interviews." They had about three months in which to carry it out. The plan was lacking in specification, but it must have conveyed sufficient to the experts at the department to enable them to understand what was proposed. Selection by 11-plus examination was not the only selection procedure available. Lancashire, part of which was taken over by Tameside, had evolved and operated a method of selection by head teacher recommendation, ranking of pupils, reports and records and standardised verbal reasoning tests. The Tameside authority had set up in May a panel of selection to operate a procedure of this kind, the chairman of which was experienced in the Lancashire method. He, as he deposed in an affidavit before the Court of Appeal, was of opinion that even though a verbal reasoning test might not be practicable in the time there would be no difficulty in selecting the number of pupils required. There were other opinions, expressed

with varying degrees of confidence by experts, and no doubt the procedure could not be said to be perfect, but I do not think that such defects as there were could possibly, in the circumstances, having regard to the comparatively small number of places involved, enable it to be said that the whole of the authority's programme of which this was a part was such that no reasonable authority would carry it out.

But there is a further complication. The authority's selection plans were opposed by a number of the teachers' unions, and there was the likelihood of non-cooperation by some of the head teachers in the primary schools in production of records and reports. The department letters and affidavits do not rely upon this matter, for understandable reasons, but they must be assumed to have had it in mind. Is this a fact upon which the Secretary of State might legitimately form the judgment that the authority was acting unreasonably?

To rephrase the question: on June 11, 1976 (this is the date of the direction, and we are not entitled to see what happened thereafter), could it be said that the authority was acting unreasonably in proceeding with a selection procedure which was otherwise workable in face of the possibility of persistent opposition by teachers' unions and individual teachers, or would *the only* (not " the more ") reasonable course have been for the authority to abandon its plans? This is, I think, the ultimate factual question in the case. And I think that it must be answered in the negative—i.e., that it could not be unreasonable, in June 1976, and assuming that the Secretary of State did not interfere, for the authority to put forward a plan to act on its approved procedure. The teachers, after all, are public servants, with responsibility for their pupils. They were under a duty to produce reports. These reports and the records in the primary schools are public property. I do not think that it could be unreasonable (not " was unreasonable ") for the authority to take the view that if the Secretary of State did not intervene under his statutory powers the teachers would cooperate in working the authority's procedure—a procedure which had, in similar form, been operated in part of this very area.

On the whole case, I come to the conclusion that the Secretary of State, real though his difficulties were, fundamentally misconceived and misdirected himself as to the proper manner in which to regard the proposed action of the Tameside authority after the local election of May 1976: that if he had exercised his judgment on the basis of the factual situation in which this newly elected authority was placed—with a policy approved by its electorate, and massively supported by the parents—there was no ground—however much he might disagree with the new policy, and regret such administrative dislocation as was brought about by the change—upon which he could find that the authority was acting or proposing to act unreasonably. In my opinion the judgments in the Court of Appeal were right and the appeal must be dismissed.

VISCOUNT DILHORNE. My Lords, in this appeal the comparative merits of comprehensive education and the system it replaces have no relevance to the issues to be determined. All we have to decide is whether the

Secretary of State had power to direct the Tameside Metropolitan Borough Council on June 11, 1976, to implement the proposals which that council, when it had a Labour majority, had submitted to him on March 19, 1975, and which he had approved on November 11, 1975, for the reorganisation of secondary education in their area.

Section 1 (1) of the Education Act 1944 imposes on the Secretary of State the duty

> ". . . to promote the education of the people of England and Wales and the progressive development of institutions devoted to that purpose, and to secure the effective execution by local authorities, under his control and direction, of the national policy for providing a varied and comprehensive educational service in every area."

Section 6 (1) of that Act provides that the local education authority for each county borough shall be the council of the county borough, and section 8 (1) imposes on every local education authority the duty, inter alia, to secure that there shall be available for their area sufficient schools

> ". . . (*b*) for providing secondary education, that is to say, full-time education suitable to the requirements of senior pupils, other than such full-time education as may be provided for senior pupils in pursuance of a scheme made under the provisions of this Act relating to further education . . . ; and the schools available for an area shall not be deemed to be sufficient unless they are sufficient in number, character and equipment to afford for all pupils opportunities for education offering such variety of instruction and training as may be desirable in view of their different ages, abilities, and aptitudes, and of the different periods for which they may be expected to remain at school, including practical instruction and training appropriate to their respective needs."

In the discharge of this duty local education authorities are subject to the general supervision of the Secretary of State. Their relationship is not that of master and servant. He has to secure the effective execution of the national policy. They have to carry it out in their areas and they enjoy a considerable degree of autonomy. The Secretary of State is given power by section 68 of the Act to secure that they do so. That section reads as follows:

> "If the Secretary of State is satisfied, either on complaint by any person or otherwise, that any local education authority or the managers or governors of any county or voluntary school have acted or are proposing to act unreasonably with respect to the exercise of any power conferred or the performance of any duty imposed by or under this Act, he may, . . . give such directions as to the exercise of the power or the performance of the duty as appear to him to be expedient . . ."

Until the Secretary of State had approved the proposals submitted to him in March 1975, the council had no power to give effect to them, but the giving of that approval, while it gave them power, did not, the Secretary of State recognises, impose on them any duty to do so. Nevertheless, it is his contention that in deciding not to implement them fully but to

modify them the council had acted unreasonably and so he had power to direct them

> ". . . to give effect to the proposals which he approved on November 11, 1975, and accordingly to implement the arrangements previously made for the allocation of pupils to secondary schools for the coming school year on a non-selective basis and to make such other provision relating to the staffing of the schools, alteration to school premises and other matters as is required to give effect to the proposals."

It is not for the courts to usurp the functions of the Secretary of State. If the council had acted or were proposing to act unreasonably, he was entitled to give them these directions or any other directions he thought necessary in discharge of his duty under section 1 of the Act.

In this House it was common ground that the question whether a local authority was acting or was proposing to act unreasonably had to be viewed objectively. It did not suffice that in his opinion the conduct of the authority was unreasonable. For him to have power to give directions, the conduct had to be such that no reasonable authority would engage in it.

The proposals submitted on March 19, 1975, and approved by the Secretary of State were as follows.

Three of the five grammar schools in the area were to be made comprehensive and in the school year beginning on September 1, 1976, 11-year-old children from the primary schools would be admitted to them without being subjected to any test of their ability. So that year and for the next four years the pupils at these schools would consist of selected and non-selected children and it was only after that that these schools would be fully comprehensive.

The remaining two grammar schools were to be converted into sixth form colleges to which pupils would be admitted on September 1, 1976. Those under 16 at this date would be transferred to comprehensive schools.

There was at this time one comprehensive school in existence and two others were being constructed.

The proposals submitted by the Tameside council to the department at the department's request on June 7, 1976, were to continue the five grammar schools as "11 to 18 academic high schools," to continue and complete the three comprehensive schools which, they said, formed "a valuable nucleus of any future scheme" and to continue the remaining 11 to 16 secondary schools.

They proposed that all allocations to schools for 11-year-olds made by their predecessors immediately before the local elections should be honoured and maintained subject to the continued agreement and acceptance by the parents concerned but that parents of 11-year-olds could apply for reallocation if they were dissatisfied with their present allocation.

As the two grammar schools which were to become sixth form colleges were to remain grammar schools and no allocations of 11-year-olds had been made to them under the approved proposals, there would be 240 school places in these schools to be filled; and if the number of applicants for these places exceeded the number of places available they proposed that the pupils most suitable and most likely to benefit from that type of

education should be selected in the light of "reports, records and interviews."

So the new Tameside council only proposed to disturb the allocation on a non-selective basis to secondary schools of the 3,200 or so 11-year-old children leaving primary schools to the extent of selecting 240 from those who applied for admission to the two grammar schools which were not to be made into sixth form colleges.

It was not disputed before us that whether the approved proposals should be implemented was a major issue at the local government elections in 1976. Having gained control of the council on May 6, 1976, the Conservatives could claim to have obtained a mandate not to implement them in the same way as a party which has won a general election can claim to have a mandate to carry out the proposals in its manifesto.

Shortly before polling day, May 6, and presumably because the question was a live issue, the Tameside Teachers Consultative Committee which consisted of representatives of the National Union of Teachers, the National Association of Head Teachers, the National Association of Schoolmasters/Union of Women Teachers and the "Joint Four," which I understand is the name given to four small unions or associations consisting mainly of grammar school teachers, published the following statement:

> "It" (the committee) "wishes it to be clearly known that in its wholly professional opinion, one which is devoid of any political bias, it considers the process of secondary reorganisation too far advanced for any postponement or modification of the present plans."

In a letter dated June 4, 1976, to the department, this committee stated that immediately after this announcement the "Joint Four" had "declared its intention of supporting whatever new proposals might be made, as, indeed, did individual members within the other associations."

Five days after polling day, on May 11, a member of the department wrote to the Tameside council saying that he was directed by the Secretary of State to ask whether it was the intention of the council to implement the approved proposals by September 1, 1976, and, if not, to ask that

> "... full details of the arrangements made or proposed for the transfer of pupils to county secondary schools next September be forwarded ... as a matter of urgency."

On May 12 solicitors acting for the National Association of Head Teachers and the Tameside Head Teachers Association wrote to the council referring to a resolution passed by those bodies in which it had been said that if their members were instructed to implement selection procedures they would invoke "collective disputes procedures" of which it was said that one of the cardinal features was that no action should be taken to implement decisions relating to the dispute until those procedures had been fully implemented.

On May 19 the National Association of Head Teachers, the National Association of Schoolmasters/Union of Women Teachers and the National Union of Teachers (hereinafter referred to as "the unions") declared the dispute to be official.

On May 26, Mr. Jenkins of the department wrote to the council saying:

> "The Secretary of State is aware that since he approved the proposals in November a great deal of educational and administrative planning has taken place with the intention of putting them into effect in September 1976. Children have been allocated to schools, considerable progress has been made in staffing arrangements including, in many cases, the offer and acceptance of contracts and teachers have been planning curricula and courses for the new comprehensive schools. Some building work has also been put in hand.
>
> "The Secretary of State is extremely concerned that the sudden cessation of this planned and orderly development and the continuing absence of any precise alternative plans is causing such uncertainty that the education service as a whole, and the educational provision for the age group about to transfer to secondary schools in particular, are being put in jeopardy. He has asked me, therefore, to request that the authority should provide him with a precise and detailed statement of the plans which it hopes to put into effect in September. This statement should reach him not later than Friday, June 4.
>
> "I am to add that if in the Secretary of State's judgment the authority's revised proposals would involve unwarrantable disruption, he would have to consider whether he should use his powers under section 68 of the Education Act 1944 to direct the authority to implement the original proposals."

By letter dated June 4 the unions informed Mr. Jenkins of their attitude and commented on the council's new proposals which had been communicated to them. In the course of that letter it was said:

> "The corner-stone of our dispute would still be that in the time available it is impossible to do justice to even a straightforward process of assessment let alone one as complicated as this. Head teachers in particular would feel the burden of responsibility intolerable in what is now such an emotive issue."

On June 7 the council wrote telling Mr. Jenkins what they proposed. They first drew attention to a number of matters which they felt had not received the consideration they deserved. They can be summarised as follows. 1. There was no question of a comprehensive reorganisation having taken place and being reversed. It had not yet taken place. 2. Even if the approved proposals met the wishes of the parents and the needs of the children, the schools were not yet ready for their proposed roles, building works had not been completed and in most cases not even begun and thus " . . . implementation in September 1976 would have caused great disruption to the children's education." 3. The planning that had gone on had been totally inadequate in the time available and had the marks of being a rushed job for political reasons. 4. While they regretted the precipitate action of their predecessors in attempting to appoint teachers and make contracts with them before the schools were ready, they would honour the obligations entered into. 5. The approved

proposals were not popular with the people of Tameside and not considered to be in the best interests of the children.

> ". . . we must go back to the drawing board and try again with a more considered, well thought out scheme. At all costs the disruption in children's education which would have been caused by the implementation of the present proposals must be avoided in any future plan."

6. Insufficient attention had been paid to the plight of the 16-year-olds. They would have been turned out of the sixth forms of three grammar schools and have been forced to move to one of the two non-selective sixth form colleges with dislocation of their work and have to work ". . . in the far less academic atmosphere of an open entry sixth form college . . ."

The council then said that their present plans might be summarised as being

> ". . . the maintenance of the status quo with the least disturbance and disruption of the children's education pending any longer term, well thought out proposals."

In addition to the proposals to which I have already referred, the council proposed that 16-year-olds from both the five grammar schools and all other secondary schools who applied and were accepted for "A" level courses might pursue them within the sixth forms of the five grammar schools and at the Tameside College of Technology and they anticipated that wherever possible pupils would wish to stay at their own school where it had a sixth form, but final choice would depend on the particular course chosen. They also proposed that there should be a review of the first year entries and that there would be a very flexible transfer system at the end of the first year (or earlier if required in certain circumstances) to assist pupils, following consultation and agreement with the parents and teachers concerned, to transfer to other schools within Tameside where the child's ability and aptitude during the course of the year had shown that the child would be happier and better suited to a school or course elsewhere. They did not however anticipate that widespread transfers would be necessary or requested.

On June 9 there was a meeting at the House of Commons between the Secretary of State and his officials and Mr. Grantham, the leader of the council, and Mr. Thorpe, the chairman of the education services committee of the council. In affidavits Mr. Grantham and Mr. Thorpe said that at the meeting the Secretary of State appeared already to have made up his mind. Mr. Jenkins in an affidavit sworn on July 2 denied this and said that at the meeting the Tameside representatives were

> ". . . apparently unable to offer any satisfactory detailed explanation of how they proposed to assess, in a sound way from an educational point of view and in the very limited time then remaining to them, the large number of children whose parents had by then requested reallocation for the school term beginning in September 1976."

The large number was 783 applications by parents of 11-year-olds for

the 240 grammar school places in response to letters sent out to 3,200 parents. There were also 190 applications by fifth form pupils in secondary modern schools for grammar school places. Of these 178 had been provided by June 30 and Mr. Thorpe was confident that the remaining 12 applications could be granted.

On June 11 Mr. Jenkins by letter conveyed to the council the Secretary of State's decision to direct them to implement the proposals he had approved. He said, repeating what had been said in the letter of May 26, that since the proposals had been approved on November 11, 1975,

> ". . . extensive preparations have been made to put the proposals into effect. Much progress has been made in the staffing of the proposed comprehensive schools; teachers have been planning courses for them; building work directly related to changes in the character of some schools has been put in hand; and over 3,000 children due to transfer from primary schools this year have been allocated to secondary schools . . ."

The only interference with this allocation that the council proposed was the filling of 240 grammar school places.

In the penultimate paragraph of the letter, Mr. Jenkins stated the reasons for the Secretary of State's decision. That paragraph began with the sentence: "The Secretary of State has given the most careful consideration to the representations made to him." There was no other reference to the matters mentioned at the beginning of the council's letter of June 7 to which reference has been made. The council were given no indication of the result of the most careful consideration of those matters.

The paragraph went on to say that the Secretary of State was satisfied that the authority were proposing to act unreasonably with respect to their statutory powers and duties

> ". . . regarding the provision of secondary education for their area and in particular . . . regarding the admission of pupils to secondary schools . . . at the beginning of the coming school year, i.e., on September 1, 1976."

This echoed what had been said in the letter of May 26 though then the Secretary of State did not know, as he did by June 11, that the only change the council proposed to make in the allocations already made was the selection of 240 11-year-old children for grammar school places.

The paragraph went on to say that a change of plan at that time of year must in his opinion give rise to very considerable difficulties, and that the authority's revised proposals

> ". . . confront the parents of children due to transfer in September with the dilemma of either adhering to secondary school allocations for their children which they may no longer regard as appropriate, or else submitting to an improvised selection procedure . . . carried out in circumstances and under a timetable which raise substantial doubts as to its educational validity."

This is an interesting and curious paragraph. Giving parents the choice of either adhering to the allocation already made or of applying for admission to a grammar school is called confronting them with a dilemma.

Implementation of the approved proposals in full meant that they would have no such choice—and a choice which the result of the election might indicate a large number of parents wished to have.

It was not said that in the time available a selection of 11-year-olds to fill the 240 places could not be made, only that the selection procedure would be of doubtful educational validity. It may strike some as curious that the Secretary of State should be so concerned about the validity of the selection procedure adopted to fill 240 places when under the proposals he had approved there was to be no selection procedure at all.

The paragraph then went on to say that

> ". . . an abnormally high proportion of pupils might need to be reallocated to different secondary schools during, or at the end of, the educational year beginning in September 1976."

No reasons were given for this opinion nor was it explained why this might result from the filling of 240 grammar school places when the other allocations of 11-year-olds were not affected.

Reference was then made to practical difficulties in relation to the appointments of staff already made, and the construction of buildings for the new comprehensive schools.

In their letter of June 7 the council did not refer to the attitude of the unions and no direct reference was made to that in the letters of May 11 and 26 and June 11 written by the department though in argument in this House it was contended on behalf of the Secretary of State that the reference to the circumstances in which the selection was to be made was a veiled reference to the attitude of the unions. What is clear beyond doubt is that the Secretary of State did not in the letter of June 11 base his decision to give directions on the ground that the policy of non-cooperation by the unions meant that selection of the 240 could not be achieved. Indeed it was only in his second affidavit sworn on July 2 in reply to one sworn by Mr. Thorpe in which he referred to the unions that Mr. Jenkins mentioned them, exhibiting the letter of June 4 which they had sent to the department and saying that a formal dispute had been declared. He did not then assert that the unions' attitude meant that selection could not be made.

As the council were not prepared to comply with the directions, the Secretary of State applied for an order of mandamus. The Divisional Court (Lord Widgery C.J., Cusack and May JJ.) granted his application giving judgment on July 12.

Lord Widgery C.J. did not base his conclusion on anything other than the allocation of the 240 grammar school places. The council's proposals with regard to the two grammar schools which were not to be converted into sixth form colleges were, he thought, ". . . of the utmost importance because they really seem to me to be the core of the case against the local authority." After referring to the contention that the council had not put forward any proper plan for the selection of pupils for these places, Lord Widgery said:

> "To make matters worse—indeed really to clinch matters on this point—there is a difference of opinion of a substantial character between the new Tameside authority and the official organisation of the

teachers, and amongst the other results from that unhappy situation is the fact that the teachers are not prepared to help in devising some kind of selective entry test to take the place of the 11-plus examination which never materialised and the provision of which, in the view of anyone who accepts that the entry should be selective, is absolutely essential."

He said that his opinion had wavered from time to time but that his was

"... simply a conclusion that when the Secretary of State says there is no time to get this" (the selection) "done by September, I think he is right on that one point."

Cusack J. agreed entirely with Lord Widgery and May J. was of the opinion that shortness of time for the selection coupled with the lack of cooperation from some of the teachers entitled the Secretary of State to decide as he did. He went on to say:

"... had the local authority had the cooperation of the teachers concerned, it would I think have been difficult for the Secretary of State to have contended that there was any relevant material before him upon which he could have reached the necessary conclusion under section 68 of the Act of 1944."

So the Divisional Court's decision was based solely on the unions' non-cooperation making it not possible to select 240 pupils for the grammar school places by September 1—and that was not stated in the letter of June 11 to be a reason for the Secretary of State's decision.

Before the hearing in the Court of Appeal further affidavits were filed. In his second affidavit Mr. Thorpe said that when the unions made it clear that they were not prepared to cooperate the council decided to appoint a panel of experienced teachers to carry out a selection procedure which he said was well known, based on head teachers' assessments, pupils' reports and records. By the end of May, 20 senior grammar school teachers and one primary school teacher had said that they were willing to help in this process and 20 teachers were appointed to a selection panel. Mr. Beard, who had served on the selection panel for Lancashire Division 24 since the early 1960s, described this selection procedure in detail and said that it had been followed in that division since that time. In his opinion a fair, feasible and practical selection might be made by a panel of 20 teachers of children to fill the 240 places in one week. Mr. Potts, who had many years' experience of selection procedures, said that in the London Borough of Barnet eight panels of three heads would complete the selection of 850 pupils from approximately 3,000 in 10 working days. He entirely agreed with Mr. Beard and so did Mr. Gilyatt. They all disagreed with Mr. Milroy who had been chief education officer of Gloucester whose view was that such a selection procedure could only operate in term time and would take 12 weeks to operate and that even if the teachers had been prepared to cooperate there would have been insufficient time before September 1 to complete any proper selection and allocation process.

This selection procedure, Mr. Thorpe said, had been that of which they had told the Secretary of State at their meeting on June 9. It is inconceivable

that, operated as it had been for many years in different parts of the country, it was unknown to the department.

It may be that views as to the efficacy of this procedure differ and that it is thought by some to be of doubtful "educational validity," but can it be said that the council in seeking before June 11—for that is the vital date—were acting in a way no reasonable council would in deciding to operate this long established procedure? Were it not for the attitude of the unions, I do not think that that possibly could be said.

So the question to be determined comes down to this: should the council have abandoned the policy for which they had a mandate within just over a month from the election because of the unions' attitude? Were they, the elected body responsible for the education in their area, acting in a way no reasonable council would in not submitting before June 11 to the pressure applied to them? In the course of his excellent argument for the Secretary of State Mr. Bingham conceded that there would have been time to carry out proper tests if the teachers had been prepared to cooperate but it was his contention that before June 11 the council knew or ought to have known that on account of the unions' attitude the procedure they proposed would not work.

I see no grounds for saying that by June 11 the council knew or ought to have known that the selection procedures they proposed would not work. They may have thought it possible that they could persuade the unions to change their attitude and as not beyond the bounds of possibility that sufficient responsible teachers, recognising that the children might otherwise suffer, might cooperate. The unions admitted that some of their members did not agree with their policy. Once the Secretary of State had given his directions, there was no possibility of the unions reviewing their policy, but we have to consider the position not after those directions were given but before.

Further, in the letter of June 11 it was not said that the selection could not be made, only that it was of doubtful "educational validity." If the department was not then prepared to say that it would not work, what warrant was there for condemning the council as acting unreasonably in not recognising that it would not work and for seeking to carry out their policy?

In my opinion there is no ground for holding that because of the difficulties in selecting pupils to fill 240 grammar school places the council acted or were proposing to act prior to June 11 in a way no reasonable council would in deciding not to implement the approved proposals and to maintain the status quo for the time being.

I am inclined to think that too much importance has been attached to this question of selection and insufficient to the disturbance and dislocation that would be caused by implementing the approved proposals by September 1.

The major difference between those proposals and the council's was that the two grammar schools would not be converted into sixth form colleges. The availability of the 240 places was a consequence of that.

One of the matters to which the council drew attention in their letter of June 7 was the plight of the 16-year-olds who would, they said, have been turned out of the sixth forms of three grammar schools and have had

to move to these colleges. Miss Mullenger, a school mistress for 20 years, deposed—and her affidavit sworn on June 30 was supported by many other teachers—that at one of the colleges only the footings for the necessary extension had been put in hand and at the other the necessary extensions and alterations had been delayed. She said it was within her knowledge

> ". . . that if the approved proposals take effect in September, pupils attending the two sixth form colleges would only receive education on a ' part-time ' basis, that is to say that they would be able to attend at the school premises only when they had lessons. For private study, there would be no room to work in classrooms and they would have to work at home or in public libraries or wherever they could find room to do so."

Miss Gabbat, a teacher at the Ashton Grammar School which was to be converted into a sixth form college, in her affidavit sworn on July 20 said that the foundations of the extension proposed there had been laid but that the building could not be completed by September 1976. The original library had been demolished and many of the books would have to be stored in cardboard boxes. Adequate library facilities would not be available until the gymnasium had been converted into a library and work on that had not been started.

In the light of this evidence there were valid grounds for the council thinking that implementation of the approved proposals by September 1 would cause grave disruption of the children's education and they were entitled not unreasonably to conclude that as the sixth form colleges would not be ready for use by September 1 they should seek to maintain the status quo for the time being.

In all the circumstances it does not appear to me that on June 11 there were any valid grounds for concluding that the council were acting or were proposing to act in a way no reasonable council would. Like Lord Denning M.R. I do not find any evidence on which, applying the right test, the Secretary of State could properly have decided that the council proposed to act unreasonably. Either in deciding that he was entitled to give directions he applied the wrong test—and the letter of June 11 and those that preceded it show no indication that he applied the right one and the language of that of June 11 is consistent with the application of the wrong one—or, if he applied the right test, he must have misdirected himself and there is no indication that he attached any weight to the sixth form colleges not being ready for use as such by September 1.

In my opinion the Court of Appeal came to the right conclusion and for the reasons I have stated this appeal should be dismissed.

LORD DIPLOCK. My Lords, the principal Act of Parliament which confers upon the Secretary of State and the Tameside council respectively the cognate powers which each was claiming to exercise in the period between the local government elections on May 6 and the direction given by the Secretary of State on June 11, 1976, is the Education Act 1944. It had been promoted by a coalition government in which all political parties were then represented and at a time when, as I recollect, the social purpose which the system of public education was designed to serve was not, as it

has since become, a matter of acute political controversy upon party lines. The minor amendments that have been made since 1944 do not affect the scheme of the Act.

The responsibility for carrying out the national policy for education is distributed by the Act between the Minister of Education (now the Secretary of State) and local education authorities, acting in partnership, as Lord Widgery C.J. aptly put it, and also governors and managers of the individual schools, with whose function this appeal is not concerned. To these three kinds of public authority concerned with education I would add, and not as junior partners only, the parents of children of school age upon whom by section 36 is placed the primary duty of causing their children to receive efficient full-time education suitable to their ages, abilities and aptitudes. Parental wishes as to the school to be attended by the child (see section 37) and what he is to be taught there are to prevail so far as is compatible with the provision of efficient instruction and training and the avoidance of unreasonable public expenditure (see section 76).

Under the Act the actual provision of public education services in each local government area is exclusively the function of the local education authority, i.e., the county or borough council representative of and elected by the inhabitants of the area served by the schools to be provided by the authority. The functions of the Secretary of State, apart from contributing to the cost of the provision of educational services (see section 100), are supervisory only. The execution by the local authorities of the national policy for education is described in section 1 as being under his control and direction; but the extent to which the Secretary of State is empowered to fetter a local authority's choice as to the method of implementing the national policy which it considers to be best suited to its own area is limited by the provisions of the Act. The only question for your Lordships in the instant appeal is whether in giving his direction of June 11, 1976, the Secretary of State trespassed beyond the statutory limits to his powers.

The Act does not leave the national policy for education to be determined from time to time by successive Secretaries of State. The Act itself says what the policy is. In section 1 its purpose is described as being for "providing a varied and comprehensive educational service in every area." In this context "comprehensive" bears its dictionary meaning and not the narrower connotation it has since acquired in the controversy between the rival educational and social merits of secondary schools to which entry is by selection according to ability and those to which it is not. What is to be provided by way of secondary education in accordance with the national policy is expanded in section 8. The number, *character* and equipment of the secondary schools provided by a local authority in its area must be such as

> ". . . to afford for all pupils opportunities for education offering such variety of instruction and training as may be desirable in view of their different ages, abilities, and aptitudes, . . . including practical instruction and training appropriate to their respective needs."

I pause here to draw attention to the underlying assumptions, as disclosed by the Act read as a whole, and in particular by sections 1, 7, 8 and 36, (a) that the contribution to be made by education towards ". . . the

spiritual, moral, mental, and physical development of the community . . ." (see section 7) is by developing the particular abilities and aptitudes of the individual pupil; (b) that individual pupils differ from one another in ability and aptitude; and (c) that these differences will call for different methods of teaching for pupils of differing ability or aptitude if the statutory policy for education is to be carried out.

The Act leaves to local education authorities a broad discretion to choose what in their judgment are the means best suited to their areas for providing the variety of instruction called for by those provisions which I have mentioned. It is not necessary to discuss here what were the respective responsibilities of the minister and local education authorities in the formulation of the original development plans for primary and secondary education in each area under section 11 of the Act. In Tameside, as elsewhere, this was all in the distant past. It is now common ground that in the spring of 1976, as a result of the approval by the Secretary of State of the proposals of the Tameside council when controlled by a Labour majority, there were two courses lawfully open to the newly elected council. One was to carry out their predecessor's proposals for making entry to all the secondary schools non-selective; the other was to leave the character of all the secondary schools in the area the same as in the previous year, i.e., with selective entry to the five grammar schools according to the pupil's aptitude for academic learning and with non-selective entry to the remaining schools. As between these two courses the right to choose was prima facie that of the council alone. The Secretary of State's power to overrule their choice by giving them a direction under section 68 to act in some other way that he himself preferred and they did not was exercisable only if he had satisfied himself that the council were proposing to act " unreasonably."

My Lords, in public law " unreasonable " as descriptive of the way in which a public authority has purported to exercise a discretion vested in it by statute has become a term of legal art. To fall within this expression it must be conduct which no sensible authority acting with due appreciation of its responsibilities would have decided to adopt.

The very concept of administrative discretion involves a right to choose between more than one possible course of action upon which there is room for reasonable people to hold differing opinions as to which is to be preferred. It has from beginning to end of these proceedings been properly conceded by counsel for the Secretary of State that his own strong preference and that of the government of which he is a member for non-selective entry to all secondary schools is not of itself a ground upon which he could be satisfied that the Tameside council would be acting unreasonably if they gave effect to their contrary preference for the retention of selective entry to the five grammar schools in their area. What he had to consider was whether the way in which they proposed to give effect to that preference would, in the light of the circumstances as they existed on June 11, 1976, involve such interference with the provision of efficient instruction and training in secondary schools in their area that no sensible authority acting with due appreciation of its responsibilities under the Act could have decided to adopt the course which the Tameside council were then proposing.

It was for the Secretary of State to decide that. It is not for any court of

law to substitute its own opinion for his; but it is for a court of law to determine whether it has been established that in reaching his decision unfavourable to the council he had directed himself properly in law and had in consequence taken into consideration the matters which upon the true construction of the Act he ought to have considered and excluded from his consideration matters that were irrelevant to what he had to consider: see *Associated Provincial Picture Houses Ltd.* v. *Wednesbury Corporation* [1948] 1 K.B. 223, *per* Lord Greene M.R., at p. 229. Or, put more compendiously, the question for the court is, did the Secretary of State ask himself the right question and take reasonable steps to acquaint himself with the relevant information to enable him to answer it correctly?

There has never been the least suggestion in this case that the Secretary of State acted otherwise than in good faith. So one can take the reasons contained in his letter of June 11 as indicating with candour those matters which had influenced his mind in reaching his conclusion that the council proposed to act unreasonably. The material parts of that letter have been cited and the events to which it relates have been analysed in so many judgments in the courts below and speeches in this House that it would be tedious for me to repeat them here. The references in the letter to staffing arrangements, planning of curricula and courses and building work have not been relied upon in the proceedings for mandamus as capable of justifying the Secretary of State's decision. It seems likely that he had been inadequately informed of the facts. What is left then are his criticisms of the way in which the council proposed to allocate to grammar schools the pupils who would be leaving the primary schools in July 1976, at the end of the summer term. There were two aspects of this. First, there were pupils whose abilities and aptitudes suited them for a grammar school education, but who had been allocated to schools which were now to remain secondary modern schools. Secondly, there were pupils who had already been allocated to three of the five grammar schools, but whose abilities and aptitudes made them more suitable for the less academic training provided in secondary modern schools. This second category has not bulked large in the arguments before the courts below or in this House. The evidence discloses that in any system involving selective entry at the age of 11 plus some misfits manifest themselves as the educational year progresses and are transferred to more suitable schools. The council proposed that misfits resulting from the non-selective allocation of unsuitable pupils to grammar schools should be dealt with in this, the usual, way, though there would no doubt be more of them than if the original allocation had been selective.

The argument has largely turned upon the council's proposals for allocating pupils to the 240 places which would be available for entry to the lower forms at Ashton and Hyde grammar schools. What was proposed by the council for these places was selection by a combination of reports, records and interviews. Selection based on reports and records obtained from the pupils' primary schools, together with the use of one of several alternative aids for evaluating possible differences in the standards of assessment adopted in reports from different primary schools, is a well tried system of selection which had been in use in areas as far apart as Lancashire and Barnet and had been adopted in Tameside itself as the selection process in the preceding year. A proposal to adopt it for the school year starting

in September 1976 in circumstances in which it could be carried out effectively could not be " unreasonable " in the sense required by section 13.

It has not been seriously contended before your Lordships that the time available between June 11 and September 1, when the new term at secondary schools began, was insufficient to enable this method to be carried out effectively, if reasonable cooperation were obtainable from head teachers at the primary schools. However, three of the teachers' trade unions, including those to which the majority of head teachers of primary schools belonged, had threatened to withhold the cooperation of their members. So the question that the Secretary of State had to ask himself was: in face of the trade unions' threat that their members would refuse to cooperate was the council on June 11 acting unreasonably in not having abandoned by that date all plans for reintroducing selective entry to grammar schools in their area?

The letter of June 11 contains no indication that the Secretary of State directed his mind to this question, let alone that he realised that it lay at the heart of what he had to decide. In the passage dealing with selection, on which my noble and learned friend, Lord Wilberforce, has already commented, the Secretary of State, despite the weight which the Act itself requires him to attach to parental choice, refers to the opportunity to be afforded to parents of having some choice in the kind of secondary school their children were to attend as confronting the parents with a dilemma.

The only passage capable of referring, even eliptically, to the unions' threat is the reference to the selection procedure being " . . . carried out in circumstances and under a timetable which raise substantial doubts about its educational validity."

A relevant question to which the Secretary of State should have directed his mind was the extent to which head teachers would be likely to persist in a policy of non-cooperation if he himself was known to have declined to stop the council from proceeding with their plan. There is no suggestion in the letter, nor in either of the affidavits sworn on his behalf by Mr. Jenkins, that the Secretary of State ever directed his mind to this particular question or formed any view about it. Indeed, it is not until the second affidavit that it is disclosed that the teachers' trade unions had been writing directly to the department on the matter at all. It is not for a court of law to speculate as to how the Secretary of State would have answered that question had he directed his mind to it, though like others of your Lordships and members of the Court of Appeal I find it difficult to believe that responsible head teachers, regardful of the interests of their pupils, would have persisted in a refusal to do their best to make the selection procedure work fairly and effectively if the Secretary of State had made it clear to them by his decision that he was not prepared himself to interfere with the council's proceeding with its plans. Assuming, however, that he had formed the view that cooperation by head teachers was likely to be only partial so that the selection process would be liable to greater possibility of error than where full cooperation could be obtained, the Secretary of State would have to consider whether the existence of such a degree of imperfection in the selection system as he thought would be involved was so great as to make it unreasonable conduct for the council to attempt to fulfil the mandate which they had so recently received from the electors. Again, there is no

indication that the Secretary of State weighed these two considerations against one another.

Like all your Lordships, I would dismiss this appeal, although I prefer to put it on the ground that, in my view, the respondents have succeeded in establishing in these proceedings that the Secretary of State did not direct his mind to the right question; and so, since his good faith is not in question, he cannot have directed himself properly in law.

LORD SALMON. My Lords, in 1975 Tameside had five grammar schools, 16 secondary modern schools, one completed comprehensive school and two others in the course of construction. In March 1975 the local education authority, the metropolitan borough council of Tameside (then under the control of the Labour party), put forward proposals to the Secretary of State for Education and Science under section 13 of the Education Act 1944 for introducing an entirely comprehensive system of education and abolishing all the grammar schools on September 1, 1976. The Secretary of State approved these proposals on November 11, 1975. This approval imposed no obligation on the authority to implement the proposals. They were free to change their mind without obtaining the Secretary of State's permission. It was however unlikely that they would have done so but for the result of the election held on May 6, 1976, when the control of the local authority passed from the Labour party to the Conservative party. One of the chief issues before the electorate of Tameside had been whether or not their grammar schools should be abolished. It is perhaps unfortunate that such an important educational question had become a party political issue, about which feelings ran high and a great deal of heat had been engendered. Broadly, the Labour party is for abolishing grammar schools and the Conservative party for preserving them. There are many impressive reasons which can be advanced by each side in favour of its own point of view. Certainly it is completely outside the province of the courts or this House in its judicial capacity to express any opinion upon the rights and wrongs of this dispute: moreover, it has nothing whatever to do with the determination of this appeal.

The Conservative party having won the election in Tameside on May 6 the authority rightly considered that they had a mandate from the electors to preserve the Tameside grammar schools—the question as to whether or not the grammar schools were to be preserved having been one of the chief issues in the election. The Secretary of State not unnaturally foresaw that the local authority were likely to carry out their mandate and decide not to implement the proposals approved by him in the previous November. On May 11, 1976 (five days after the result of the election had been announced), he caused a letter to be written to the authority asking that

> "... full details of the arrangements made or proposed for the transfer of pupils to county secondary schools next September be forwarded to the Department [of Education] as a matter of urgency."

On May 26, 1976, the Secretary of State caused another letter to be written to the authority expressing his extreme concern that the proposals which he had approved were not being carried out and requesting the

authority to provide him with a "precise and detailed statement of the plans which [the authority] hopes to put into effect in September." The letter ends with a warning or threat that if the authority's plans would, in the Secretary of State's view, involve "unwarrantable disruption" the Secretary of State would have to consider whether he should use his powers under section 68 of the Education Act 1944 to direct the authority to implement the original proposals.

In the meantime some of the trade unions concerned had advised their members (comprising most of the teachers and staff in the primary and secondary schools) not to cooperate with the authority in putting into effect any plans inconsistent with the 1975 proposals. If, as seems to me not improbable, the teachers were apprised of the contents of the letter of May 26 to which I have referred, this certainly would not have discouraged them from complying with the advice which they had received from the trade unions. It must have appeared likely to them that when the Secretary of State came to make his decision he would decide (as he in fact did) to give the authority directions to implement the original proposals and that any time or effort which, in the meantime, might have been spent on furthering the authority's plan would have been wasted.

On June 7, 1976, the authority wrote what I regard as a most courteous, sensible, full, fair and well reasoned reply to the letter of May 26 in which they explained with precision their plans for the future. This is an important letter and I am afraid that I must quote from it at some length:

> "In detail these immediate plans are as follows: 1. Continuation of the five grammar schools in Tameside as 11 to 18 academic high schools. 2. Continuation and completion of the three comprehensive schools as already agreed and for which money has already been spent. We believe that these *purpose-built* comprehensive schools form a valuable nucleus of any future scheme. 3. Continuation of the remaining 11 to 16 secondary schools. 4. All allocations to schools for 11-year-olds made by our predecessors immediately before the local elections to be honoured and maintained subject to the continued agreement and acceptance by the parents concerned. 5. Ashton and Hyde grammar schools now to be open for an 11-year-old entry. Since no 11-year-old allocations to these two schools had been made by our predecessors, this creates approximately 240 selective school places in addition to those already allocated. 6. All parents of 11-year-olds transferring to secondary schools have been invited to reapply for reallocation if they are dissatisfied with their present allocation. If they are satisfied, then of course they need not apply and no reallocation will be made. 7. If the number of applicants to the grammar schools exceeds the number of places available, as is likely, then those pupils most suitable and most likely to benefit from that type of education will be selected by a combination of reports, records and interviews. There will be no formal 11-plus examination. 8. Those not applying for grammar school places, or those unsuccessful in obtaining a grammar school place, will still be offered a reallocation to one of the other secondary schools in Tameside if the parent requests and provided the places are available. It is not intended to follow any neighbourhood

zoning. 9. 16-year-olds from both the five grammar schools, and all other secondary schools, who apply, and are accepted for, "A" level courses may pursue these within the sixth forms of the five grammar schools, or at Tameside College of Technology. It is anticipated that wherever possible pupils will wish to stay at their own school where it has a sixth form, but final choice will of course depend upon the particular courses chosen. 10. A review of the first year entries will be made and there will be a very flexible transfer system at the end of the first year (or earlier if required in certain circumstances) to assist pupils, following consultation and agreement with the parents and teachers concerned, to transfer to other schools within Tameside where the child's ability and aptitude during the course of the year has shown that the child would be happier and better suited to a school or a course elsewhere. It is not anticipated that widespread transfers will be necessary or requested, but the facility to do so will be there.

"I apologise for the length of this letter but I think it important that the Secretary of State should be fully informed of the present position and of our concern for the welfare of Tameside children. For his information I also enclose a copy of a letter which has been sent to all parents in Tameside setting out the position and inviting those who wish to to reapply for secondary school allocation. Whilst we have been advised that we might take action over the unreasonable behaviour of our predecessors in their precipitous action taken only days before the elections, we do not propose to pursue such a course. We believe that it would be in the best interests of Tameside, and of the children, to concentrate on matters of education and to work for the continuing, gentle, considered evolution of our schools to meet parental demands and pupils' needs."

On June 11, 1976, the Secretary of State made his decision and communicated it to the authority by letter of that date. The letter stated that:

"[The Secretary of State] is satisfied that the authority are proposing to act unreasonably with respect to the exercise of the powers conferred, and the performance of the duties imposed, by . . . the Education Acts 1944–1976 [sic] . . . with respect to their . . . duties . . . under sections 8 and 17 of the Education Act 1944 regarding the admission of pupils to secondary schools from primary schools at the beginning of the coming school year, i.e., on September 1, 1976."

It then sets out the grounds on which the Secretary of State is so satisfied (to which I shall refer later) and concludes:

"In the exercise of the powers conferred by section 68 of the Education Act 1944, and vested in him . . . , the Secretary of State hereby directs the authority to give effect to the proposals which he approved on November 11, 1975, and accordingly to implement the arrangements previously made for the allocation of pupils to secondary schools for the coming school year on a non-selective basis and to make such other provision relating to the staffing of the schools, alterations to

school premises and other matters as is required to give effect to the proposals." A

The question that arises in this appeal is one of considerable constitutional importance—was the Secretary of State acting lawfully or unlawfully when on June 11, 1976, he gave the authority the directions which I have recited? Under the Education Act 1944 the local education authorities have the duty imposed on them of securing the provision of primary and secondary schools in their respective areas, and they are invested with the powers necessary to carry out these duties—see sections 8 and 9. They cannot however establish a new county school or close an established one without putting their proposals for doing so before the minister and obtaining his consent—see section 13. Hence the reason for the Tameside authority in 1975 putting the proposals for closing their grammar schools before the Secretary of State. His acceptance of these proposals as I have already observed did not however of itself cast any obligation on the authority to carry them out. B C

As the law stands at present, neither the Secretary of State nor any other member of the executive has any power, in ordinary circumstances, to order local authorities to close down their grammar schools or convert them into comprehensive schools. Accordingly the Secretary of State's directions given on June 11 are unlawful unless they can be brought within the powers conferred upon the Secretary of State by section 68 of the Act of 1944 which reads as follows: D

> "If the Secretary of State is satisfied . . . that any local education authority . . . have acted or are proposing to act unreasonably with respect to the exercise of any power conferred or the performance of any duty imposed by . . . this Act, he may, notwithstanding any enactment rendering the exercise of the power or the performance of the duty contingent upon the opinion of the authority . . . give such directions as to the exercise of the power or the performance of the duty as appear to him to be expedient." E

In my opinion, section 68, on its true construction, means that before the Secretary of State can lawfully issue directions under it he must satisfy himself not only that he does not agree with the way in which the authority have acted or are proposing to act nor even that the authority is mistaken or wrong. The question he must ask himself is: "Could any reasonable local authority act in the way in which this authority has acted or is proposing to act?" If, but only if, he is satisfied on any material capable of satisfying a reasonable man that the answer to the crucial question is "No," he may lawfully issue directions under section 68. I would adopt what Lord Hailsham of St. Marylebone L.C. said in *In re W. (An Infant)* [1971] A.C. 682, 700: F G

> "Two reasonable [persons] can perfectly reasonably come to opposite conclusions on the same set of facts without forfeiting their title to be regarded as reasonable . . . Not every reasonable exercise of judgment is right, and not every mistaken exercise of judgment is unreasonable." H

There is certainly no evidence as to how the Secretary of State construed section 68 nor as to the questions he asked himself before deciding to issue his directions set out in the letter of June 11. Neither of the affidavits sworn by Mr. Jenkins, an assistant secretary in the schools branch of the Department of Education and Science, throw any light upon this matter. It may be that the Secretary of State misconstrued section 68, asked himself the wrong question (e.g. " do I agree with the action proposed by the authority? ") and therefore misdirected himself in law. On that assumption, the Secretary of State's directions to the authority on June 11, 1976, would have to be overruled on the grounds of their illegality. Assuming however that he asked himself the right questions and decided that no reasonable authority would act as this authority now proposed to act, I cannot discern any valid ground upon which such a decision could be justified. The grounds upon which the Secretary of State purported to act under section 68 are set out in the letter of June 11; there were five of them. Four of these, which I need not itemise, appeared to the Divisional Court and to the Court of Appeal to have no substance in them. They were not pressed in this House and I do not consider that they lend any support to the Secretary of State's case. Nor am I any more impressed by the fifth ground upon which the Secretary of State succeeded in the Divisional Court and upon which he chiefly relied thereafter. It was only hinted at in the letter of June 11. This was that no reasonable authority in the position of the Tameside authority could have concluded that it had time between June 11 and September 1, 1976, to make a fair and efficient selection on merit of 240 pupils out of the 783 applicants for the 240 places which would be available in the grammar schools on September 1, 1976. The Divisional Court with considerable hesitation decided this question in favour of the Secretary of State only, I think, because of an uncontradicted affidavit by a former chief education officer of Gloucestershire filed at a late stage on July 2 stating that the whole process of selection normally takes a full term of 12 weeks to complete and therefore there was no chance of the test being completed before September 1.

The authority's letter of June 7 had pointed out (paragraph 7) that pupils most suitable and likely to benefit from the type of education would be selected by a combination of reports, records and interviews instead of by an 11-plus examination. The evidence of a number of distinguished educationalists, produced without objection before the Court of Appeal, showed that this alternative method of selection had been widely used since the 1960s in areas as far separated as Lancashire Division 24, close to Tameside, and the London Borough of Barnet and that it had proved entirely satisfactory. With a selection panel of 20 teachers (10 couples) the whole operation of making a fair and accurate selection of 240 from 783 applications could have been comfortably carried out in Tameside within one week. In the London Borough of Barnet for the period 1965 to 1970 eight panels—each consisting of three teachers—yearly completed a fair selection of 850 pupils from about 3,000 in 10 working days.

It seems incredible to me that these facts were unknown to the Department of Education and not available to the Secretary of State on June 11, 1976. It follows that if the Secretary of State before making his decision had asked himself the right question—" could any reasonable authority in

the position of Tameside have reasonably come to the conclusion that a fair selection could have been made to fill the 240 vacancies before September 1, 1976? "—the answer could only have been "yes." It may be that some authorities might have preferred the views of the expert witness upon whose evidence the Secretary of State relied in the Divisional Court to the views of the witnesses upon whose evidence the Tameside authority relied in the Court of Appeal. I find it impossible however to accept that any reasonable man could have been satisfied that no reasonable authority on the evidence could take the view that a satisfactory selection of candidates for the 240 places in the grammar schools could have been made between June 11 and September 1, 1976. Therefore either the Secretary of State must have erred in law by misconstruing section 68 and failing to ask himself the right question or he asked himself that question and answered it "no" without any valid ground for doing so.

It has been argued that before June 11, 1976, the majority of the teachers had refused to cooperate with the authority and that without their cooperation no selection would have been possible. No doubt they were hoping and expecting that the Secretary of State would give directions to the authority to carry out the 1975 proposals—a hope and expectation which must have been fortified by the warning or threat at the end of the letter of May 26 which the Secretary of State caused to be sent to the authority. Even so, 20 of them were prepared to form a panel to carry out the selection under the chairmanship of Mr. Beard, the very experienced former headmaster of a junior county school who had served on the selection panel for Lancashire Division 24 since this type of selection began in the early 1960s.

The facts deposed to in the affidavits of Mr. Beard and Mr. Potts (also a most experienced educationalist) make it plain that in their view the panel of 20 would have plenty of time even between August 2 (the date when your Lordships' decision was announced) and September 1 to make a reasonably accurate selection from amongst the 783 applicants to fill the 240 vacancies in the grammar schools for the beginning of the next term. On June 11 they would have had ample time to make the most meticulous selection well before September 1.

Towards the end of May 1976 the 49 head teachers of the primary schools were asked by the authority to make their records, reports and written personal assessments of the 783 candidates for the 240 vacancies in the grammar schools available to the selection panel appointed by the authority. Only three agreed to do so. The remainder refused on the ground that their trade unions had advised them not to comply with the authority's request. As I have already said, it is, in my view, a fair inference that the trade unions and many of the teachers were hoping and expecting that the Secretary of State would soon be giving the directions threatened in the letter of May 26 and which he in fact gave on June 11. On the other hand, any reasonable authority could reasonably expect, for the reasons stated in their letter of July 7, that the Secretary of State would decide not to give the directions which he did in fact give on June 11 or that, if he gave them, they would be held by the courts to be unlawful either on the ground that the Secretary of State in giving such directions had

misdirected himself in law or that there was no legal ground to support them.

If on June 11 the Secretary of State had, as in my view he should have done, decided, and announced his decision, against giving any directions under section 68 and had allowed the authority's plan for the grammar schools to go forward, I believe that the teachers would have changed the attitude which they had taken up when they were expecting a ministerial embargo. Like Geoffrey Lane L.J. (ante p. 1035E–F), I cannot believe that once they knew that there was to be no ministerial embargo they would have continued to be non-cooperative in an attempt to thwart the authority in carrying out the policy of preserving the grammar schools in Tameside in accordance with the mandate which the authority had been given by the inhabitants of Tameside in the recent democratically held election. I believe that the vast majority of the teachers including all the head teachers in the primary schools would have done their duty and loyally cooperated with the authority which employed them.

The teachers no more than the executive (as I am sure they both recognise) can lawfully impose a policy relating to grammar schools, namely, that of abolishing them, merely because they do not approve of the policy of preserving them which the authority has lawfully adopted.

I am convinced that there are no valid grounds for holding that the authority acted or were proposing to act unreasonably within the meaning of section 68. The directions given by the Secretary of State on June 11, 1976, were in my view unlawful. Accordingly, there is no necessity for me to express any opinion on the point taken by Mr. Anthony Lloyd under section 99 of the Education Act 1944.

My Lords, I would dismiss the appeal.

LORD RUSSELL OF KILLOWEN. My Lords, I would remark upon some matters introductory to consideration of this appeal.

1. In my judicial capacity I must have no preference for a particular system of state supported education, whether mixed or comprehensive. In my personal capacity I have in fact no preference for any particular system, and this fact, while it may disable me from arriving at a conclusion that a particular view is wrong, may assist me in arriving at a correct conclusion as to whether a proposed course of action, motivated in whole or part by a particular view, is "unreasonable." In this latter respect I may indeed, because of my very neutrality, or if you please indifference, be in a position of relative advantage in concluding what may be considered unreasonable, while at the same time (though not paradoxically) being at a disadvantage in concluding which system is the better.

2. There was no obligation whatever in law on the local authority to implement its 1975 proposals, albeit they had been approved by the Secretary of State. Prima facie the local authority was within its rights and duties to change its mind and continue the existing mixed system.

3. In concluding whether the local authority was truly proposing to act unreasonably, the Secretary of State was in a position of considerable disadvantage. His duty in approaching the question was to adopt a

posture of complete neutrality between the educational merits of the comprehensive and the mixed systems: but he was committed in view to the former—I speak here not at all of party politics—and his departmental advisers had deliberated and worked for many months before approving the detailed 1975 proposals which the local authority now proposed at least to defer. It is in that context that I have ventured to refer to a possible advantage, in reaching a true conclusion on the crucial question, of my own neutrality or indifference.

I leave those general considerations to address myself to the particular question in the case: whether there were grounds upon which the Secretary of State on June 11 could properly be satisfied that the local authority was then proposing to act unreasonably. It is, my Lords, no doubt a most serious matter for the judiciary to overset a conclusion of a minister with overall responsibility in a field of such importance to the national welfare as education, when it is not suggested either that the conclusion was motivated by partly political considerations or that it involved bad faith. On the other hand it is not my understanding that the mere expression by the Secretary of State of his satisfaction that particular proposals are unreasonable deprives the court of the ability to decide that there were no sufficient grounds for that satisfaction and that consequently the Secretary of State must in some respect have misdirected himself in applying his mind to the problem. Further I would observe that it is equally a most serious matter for the organisation of education in an area, which is, under the statute (with exceptions), the province of the local authority, to be taken out of its hands by the central government on the ground that the former is proposing to act "unreasonably"—which I take to mean that the course that is proposed is one that in the circumstances no reasonable local authority, with the interests at heart of the education of the young in its area, would take.

The details of the documents leading up to the letter written for the Secretary of State on June 11, 1976, have been set out by my noble and learned friends, and I do not repeat them; nor do I rehearse in any detail the facts of the case, for that would involve tedious repetition. The letter from the newly constituted local authority, whose new constitution was based at least in part upon acceptance by the electorate of proposals to defer implementation of the 1975 scheme, cannot be said to bear the stamp of irrationality or unreasonableness. It stated in sober fashion the objections to implementation of the 1975 proposals in September 1976. It recognised the problems involved in applying the brake to those proposals which of course had acquired a degree of momentum. It arrived at a considered view on balance of disadvantages. From a neutral standpoint on systems of state education I find it quite impossible to conclude that this attitude was one of an unreasonable education authority. I have no doubt that the Secretary of State was satisfied that the local authority was *wrong* to put the brake on the 1975 proposals. Equally I have no doubt that the reconstituted local authority was satisfied that the previously constituted local authority and the Secretary of State were *wrong* to propose and approve the 1975 proposals for initial implementation in September 1976. But to my mind it is quite unacceptable in either case to

proceed from "wrong" to "unreasonable." If by statute comprehensive education is introduced throughout there will no doubt be many who will consider that it is wrong so to do: but it could not be objectively unreasonable, whatever the disruptions resulting from introduction into selected entry schools of non-selected entry primary school children, or the move of 16-year-old children to a different school, or any other change. Equally I apprehend that if in an area a fully comprehensive system of education is established it would not be right to describe a proposed reversion to a mixed system as "unreasonable" as opposed to a view that it would be "wrong." History is replete with genuine accusations of unreasonableness when all that is involved is disagreement, perhaps passionate, between reasonable people. In summary, my Lords, "unreasonably" is a very strong word indeed, the strength of which may easily fail to be recognised and which in my opinion has not been recognised in the instant case by the Secretary of State.

I have, my Lords, referred to the reasonable letter from the local authority. I now refer in slightly more detail to the letter of decision of June 11, 1976. As indicating grounds of unreasonableness on the part of the local authority it appears to me to be unsatisfactory. It does not grapple with the arguments or contentions of the local authority supporting its attitude: it refers only in general terms to consideration of points made. It states that a change of plan at this stage (June 11) ". . . must . . . give rise to considerable difficulties." It refers (as such difficulties) to a number of features, none of them very dogmatically stated, as follows.

(i) Parents of children are presented with a dilemma: this must refer to parents whose child has been allotted (under the 1975 proposals) to a comprehensive based school but who (under the new proposal) would like the child to be considered for one of the 240 places available under the 1976 proposals at the two now retained grammar schools which were to become sixth form schools: the dilemma is either to retain the allocation at a comprehensive or secondary modern or to try for one of the newly available grammar school places. The dilemma suggested is that the parent (who ex hypothesi would prefer a grammar school placing if possible) would in pursuit of that aim risk an unthorough vetting for the vacancies. I do not find it easy to understand this so-called dilemma. Half a loaf is better than no bread for one who seeks bread.

(ii) The system of selection for the 240 grammar school places is to be "improvised" (the precise form of which has not been settled), "carried out in circumstances and under a timetable which raise substantial *doubts* about its educational validity." Assuming that this is a delicate reference ("circumstances") to the fact that at that date a substantial number of teachers for various reasons were refusing to cooperate in tests for the 240 grammar school places, I find it hard to believe that if the Secretary of State had held his hand on June 11 (when there was ample time for a full vetting for the 240 grammar school places) the relevant teachers, who are after all professionals dedicated to the interests of child education, would have refused to do their best for the children under them. The Secretary of State certainly says nothing to the contrary.

(iii) The letter of June 11 referred next to paragraph 10 of the local authority's representations. That paragraph (ante, p. 1069B–C) has

recognised that adherence to the non-selective allocations of the 3,000-odd primary school leavers, already made under the 1975 proposals on the assumption that all the secondary schools were ultimately to become fully comprehensive, might result in some square pegs in round holes under the revised system: for example, a child unsuited to a grammar school might find itself at one of the three. But the paragraph showed that in the view of the local authority a flexible system of interchange in such cases could be operated after or during the first term and that "widespread transfers" would be unnecessary. The department's letter of June 11 stressed that this "might" involve ". . . an abnormally high proportion of pupils [needing] to be reallocated to different secondary schools . . ." What is meant by "abnormally high" except more than usual? This was recognised by the local authority in its letter. And, supposing it to be so, how high is abnormal and what is its contribution to "unreasonably"?

In the end in argument the whole matter of "unreasonableness" came down to the question of the reliability of selection procedures for 240 grammar school places in the time available out of some 800 parental applications. This had to be considered on June 11 by the Secretary of State. Could it then have been described (as it was *not* by the letter of June 11) as unreasonable on the part of the local authority to suppose that the teachers would do their best for the children in this regard? I cannot think so.

Accordingly, my Lords, I am of opinion that the Secretary of State in his letter of June 11 exceeded his powers and this appeal fails.

I would add this. The question whether the Secretary of State was justified in his conclusion that the proposals of the local authority were unreasonable falls to be decided at the date of his conclusion, June 11: that is common ground. I would not however subscribe to the view that facts subsequently brought forward as then existing can properly be relied upon as showing that the proposals were not unreasonable unless those facts are of such a character that they can be taken to have been within the knowledge of the department.

Appeal dismissed with costs.

Solicitors: *Treasury Solicitor; Oswald Hickson, Collier & Co.*

M. G.

END OF VOLUME AND OF APPEAL CASES FOR 1977.

APPENDIX C

Prest v Secretary of State for Wales **[1983] 1 WLUK**

James Stanley Prest and Michael Ian Bowstead Straker (Trustees of the Felin Isaf Trust and Miskin Village Trust) and Sir Brandon Meredith RHYS Williams and Brinley Edmunds v The Secretary of State for Wales v The Welsh Water Authority

Positive/Neutral Judicial Consideration

Court
Court of Appeal (Civil Division)

Judgment Date
1 January 1983

In the Supreme Court of Judicature

Court of Appeal

On Appeal from the High Court of Justice

Queen’s Bench Division

1983 WL 215478

The Master of the Rolls (Lord Denning) Lord Justice Watkins Lord Justice Fox

Friday, 24th September, 1982

Representation

LORD HOOSON Q.C. and MR. J. HOWELL (instructed by Messrs. Roche Hardcastle) appeared on behalf of the Appellants.
MR. SIMON BROWN (instructed by The Treasury Solicitor) appeared on behalf of the Secretary of State.
MR. M. T. PILL Q.C. and KISS A. J. BOOTH (instructed by the Area Solicitor, Welsh Water Authority) appeared on behalf of the Welsh Water Authority.

JUDGMENT

THE MASTER OF THE ROLLS:

Sir Brandon Rhys Williams is a doughty fighter. He is under attack in his own homeland. It is in the Vale of Glamorgan. You pass by it if you go by the main line from Cardiff to Bridgend. Also if you go by car along the new M4 motorway near the Miskin interchange. He and his forebears have been in those parts for over 300 years. They have a considerable estate there which they let out to tenant farmers. Yet now they are under threat. The Welsh Water Authority are about to seize 30 or so acres of their land. It is agricultural land on a site next the railway line. The Welsh Water Authority have made a compulsory purchase order on it: and it has been confirmed by the Minister. It is now under appeal to this court.

The reason for this imminent seizure is to make a new sewage works for the neighbouring towns and villages. It is urgent. The existing sewage works are grossly over-loaded. It is anticipated – and hoped – that the district may be developed for industrial use. So that more facilities are needed for the disposal of sewage.

Sir Brandon and his children's trustees all recognise the need for a *new* sewage works and the urgency of it. They are just as keen as the Welsh Water Authority. But they do not agree to the site seized •0 or about to be seized by that Authority. They offer an alternative site: or rather one of two alternative sites. Each of them is about 30 or 40 acres. Each of them is close by in the same area. One is 60 yards away from the railway line. The other is 160 yards away. Each is very convenient for the new sewage works.

The contest in the case is this: Which of the sites should be used for the new sewage works? Should it be the site proposed by the Authority? or one of the two alternative sites offered by Sir Brandon?

In November and December 1977 there was a long public inquiry as to the comparative merits of the sites. It took twelve days. The long and short of it is that there is nothing to choose *between* the sites – save as to cost. Everything was considered at the inquiry. Such as the means of access, the *interference* with agriculture, the effect on the amenities, the impact of floodtag, and so forth. In no material respect was any one site to be preferred to the others – save as to cost.

Now the cost was the rub. At the inquiry there was much evidence as to the cost of constructing the plant for treating the sewage. The total cost, as at 1976 prices, would be £7,616,900 on the site proposed by the Authority. But as to the alternative sites, *Nos. 1* and 2, offered by Sir Brandon

> "the construction of similar treatment works would cost some £230,000 more on Site 1, and some £320,000 more on Site 2."

Those were of course, only estimates at that time. Like all estimates they are often falsified in execution. They are certainly out of date by this time. Even so, the saving of £230,000 or even £300,000 would seem to be marginal in relation to a figure of nearly £8,000,000.

Yet that saving seems to have *been* the determining factor with the Inspector. *He made his report* on 20th April 1978. It *covered* sixty-four closely-typed pages. He said in it:

> "The cost of development is not normally a factor which enters into the determination of a planning application. But in my opinion this case is peculiar … the applications (by Sir Brandon for sites Nos. 1 and 2) should be refused on the grounds that they represent unnecessary and wasteful expenditure of public funds."

In recent letters the Welsh Water Authority have made it clear that the determining factor has been one of cost. On 23rd April 1982 they said that the proposals of Sir Brandon "impose an unacceptable cost-penalty on its proposed sewage disposal scheme" : and on 14th May 1982 that the alternative site "has been considered and rejected because of the additional cost involved" .

The offer by Sir Brandon

Now I come to the crucial point in the appeal. Both at the inquiry and ever since, Sir Brandon and his children's trustees have offered to convey either of the alternative sites offered by them at "existing use value" . That is, at its value as agricultural land. But if the Welsh Water Authority insist on the site proposed by the Authority itself, then Sir Brandon and his children's trustees will require the Authority to pay its full compensation allowed by law. That is its value, not as agricultural land, but as land with a potential for development for industrial purposes. This will be much higher than the agricultural value. It would far more than outweigh the saving of £230,000 to £300,000 on construction costs.

The point that was omitted

Here is the strangething. The Inspector did not take any account of that offer. He recorded it among his findings in paragraph 264(9), but he did not take it into account in assessing the cost of the whole project. He only took into account the cost of constructing the sewage treatment works. He did not take into account the cost of acquiring the land itself. That is a most significant omission. Both sides agree that it was omitted. Neither side adduced any evidence before the Inspector about it. So *he did* not take it into account.

The letter of 20th October 1978

Whilst the Inspector's report was with the Minister – and before he gave his decision – the trustees and Sir Brandon wrote a letter of 20th October 1978. They asked for the inquiry to be re-opened. They pointed out that the site proposed by the Authority had much potential for industrial purposes: so the cost of acquiring it would be much greater than that of the site offered by Sir Brandon which was being offered at agricultural value. This was clear enough in the somewhat clumsy language of the letter:

> "This obvious potential of the CPO site (the site proposed by the Authority) for industrial purposes if the sewage works were not required to be built on it introduces material questions of relative land costs into the choice of sewage works sites. These issues cannot be resolved until the nature of the industrial development of the area has been decided but are likely to be a material factor which ought to be taken into consideration before the Compulsory Purchase Order is confirmed. This matter was not considered at all during the inquiry."

The planning applications

Whilst all these things were going on, the trustees and Sir Brandon were making planning applications for the development of much of their land in the area for industrial purposes. These were called in by the Minister so that he could determine them himself. They had not been determined at the date of the decision letter in November 1978. A local inquiry was held into them by a different Inspector. He recommended that the applications should be allowed. But, on 7th August, 1980, the Minister turned them down at that stage. He said:

> "While not disputing the Inspector's view that there is a need for industrial land in the general area, the Secretary of State notes that other industrial sites are available and he is not convinced that the industrial need would justify a major intrusion into this attractive part of the Vale of Glamorgan."

Nevertheless, the trustees and Sir Brandon made another application. It was called in by the Minister again for his determination. Another Inspector, Miss Ellis, held another local inquiry. It is believed that she reported in favour of industrial development. In a letter of 12th March 1982 the Minister indicated his willingness to permit industrial development, subject to certain conditions.

It is quite clear, therefore, that by this time it is very probable that (if it were not acquired

compulsorily) the site proposed by the Authority would be developed for industrial purposes and would command a very high price. The cost of the whole project would be far greater than it would be if the Authority accepted the alternative site offered by Sir Brandon.

These findings give rise to several points of law.

The use of compulsory powers

The first is fundamental. To what extent is the Secretary of State entitled to *use* compulsory powers to acquire the land of a private individual? It is clear that no Minister or public authority can acquire any land compulsorily except the power to do so be given by Parliament: and Parliament only grants it, or should only grant it, when it is necessary in the public interest. In any case, there. fore, where the scales are evenly balanced — for or against compulsory acquisition w the decision — by whomsoever it is made — should come down against compulsory acquisition. I regard it as a principle of our constitutional law that no citizen is to be deprived of his land by any public authority against his will, unless it is expressly authorised by Parliament and the public interest decisively so demands: and then only on the condition that proper compensation is paid, see *Attorney-General v. De Keyser's Royal Hotel Ltd. (1920) A.C. 508* . If there is any reasonable doubt on the matter, the balance must be resolved in favour of the citizen. This principle was well applied by Mr. Justice Forbes in Brown v. Secretary of State for the Environment (1978) P. & C.R. 285 , where there were alternative sites available to the local authority, including one owned by them. He said (at page 291):

> "It seems to me that there is a very long and respectable tradition for the view that an authority that *seeks* to dispossess a citizen of his land must do so by showing that it is necessary … If, in fact, the acquiring authority is itself in possession of other suitable land other land that is wholly suitable for that purpose – then it seems to me that no reasonable Secretary of State faced with that fact could come to the conclusion that it was necessary for the authority to acquire other land compulsorily for precisely the same purpose."

The facts to be considered

The second point is this: When a case reaches the courts, is it to be decided on the facts as they appeared to the Minister at the date of his decision? or, can the courts look at subsequent facts? In this very case the Inspector took the view that, at the time of his inquiry, it was a matter for "speculation" whether or not there would be an industrial use of the site proposed by the Authority. But, by the time that the case reached the courts, or at any rate reached this court, it was no longer speculative. It was highly probable that the landowner would get permission for development for industrial purposes. If these had been proceedings in a court of law, this

subsequent evidence would have been regarded as so material that it would have been admitted in the Court of Appeal, *see* Murphy v. Stone-Wallwork (1969) 1 W.L.R. 1025 ; *Mulholland v. Mitchell (1971) A.C. 666* . So here it seems to me that, when the decision of the Minister was under challenge in the courts, it was not final. It was sub judice. So far as I am aware, the acquiring authority does not act on it until the court proceedings are finally disposed of. Rarely indeed would fresh facts be admitted to counteract the decision: but I think that in a proper case they should be. Take this very case. The Welsh Water Authority are not bound to take up the compulsory purchase order. If they exercise it, the price will not *be assessed* at the date of the order. It will *be assessed* at the time when they actually take the land, see *West Midland Baptist (Trust) Association (Inc) v. Birmingham Corporation (1970) A.C. 874* . That would be much higher than at the date of the Inspector's inquiry. If the Authority can wait till after the Court of Appeal order – to see what prices are, it is only fair that the landowner should be able to have his case – against compulsory purchase – also determined at that date.

Test it this way: Take a case where the Minister has confirmed the compulsory purchase order. But after the confirmation the acquiring authority alters its proposals radically, or abandons them, or decides to use the land far a different purpose from that which it originally intended. In that case the cm. pulsory purchase order would no longer be available to it. The court would restrain the acquiring authority from going on with the purchase. That *is* shown by Grice & anr. v. Dudley Corporation (1958) 1 Ch. 329 , where Mr. Justice Upjohn said (at page 344);

> "… what are the corporation doing? They seem to me to be endeavouring to acquire the plaintiffs' property for some purpose other than that for which they were authorised to exercise compulsory powers by the compulsory purchase order … they are going entirely outside the order and, if that be so, then they must be restrained from doing so."

If that can be done by the court – after the order has been confirmed – surely it can be done where there is an application to the court to set aside the order under the statutory powers available. I am aware that this would need fresh evidence over and above that which was before the Inspector and the Minister. But there is power to receive it. Not usually. Only rarely. As I said in *Ashbridge Investments Ltd. v. Minister of Housing & Local Government (1965) 1 W.L.R. 1320* at page 1327:

> "Fresh evidence should not be admitted save in exceptional circumstances."

Those exceptional circumstances need not be closely defined. I would suggest that fresh evidence can and should be admitted on similar grounds to that in the courts of law – in those cases where it has arisen since and would in all probability have an important influence on the

result.

The matters to be taken into account

The third principle asks this question: What matters is the Secretary of State to take into account? Is he limited to those canvassed before the Inspector? or should he go beyond them and consider other matters, if they are relevant?

This was one of the principal points made by the Minister and by the Water Authority. They said that the trustees and Sir Brandon never raised the point about the cost of acquisition of the land, nor did they give any evidence upon it. So they should be shut out from canvassing it now.

To my mind this is a mistake. It treats a public inquiry – and the Minister's decision – as if it were a lis inter partes . That it certainly is not. It is a public inquiry at which the acquiring authority and the objectors are present and put forward their cases – but there is an unseen party who is vitally interested and is not represented. It is the public at large. It is the duty of the Minister to have regard to the public interest. For instance, in order to acquire the land the acquiring authority has to use the taxpayers' money or the ratepayers' money. The Minister ought to see that they are not made to pay too much for the land – especially where there is an alternative site which can be acquired at a much less price. So also with the planning and development of this land. It is the public at large who are concerned. If planning considerations point to the alternative site rather than to the site proposed by the Authority, the Minister should take them into account, cf. *Hanks & ors. v. Minister of Housing & Local Government (1963) 1 Q.B. 999* . The principle was implicit in the decision of the House of Lords in *Board of Education v. Rice (1911) A.C. 179* . It was expressed by Lord Greene, M.R., in a single sentence in *Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation (1948) 1 K.B. 223* at page 229:

> "He must call his own attention to the matters which he is bound to consider."

This was put a little more fully by Lord Diplock in *Education Secretary v. Tameside (1977) A.C. 1014* at page 1065:

> "Or, put more compendiously, the question for the court is, did the Secretary of State ask himself the right question and take reasonable steps to acquaint himself with the relevant information to enable him to answer it correctly?"

The power of the court

The fourth principle is the power of the court to intervene. Often we are referred to the classic judgment of Lord *Greene*, M.R., in the Wednesbury case (1948) 1 K.B. 223, but I ventured to restate it in my own words in *Ashbridge Investments v. Minister of Housing (1965) 1 W.L.R. 1320* at page 1326, which has been repeatedly applied. This was in relation to the very statutory words applicable here:

> "Seeing that that decision is entrusted to the Minister, we have to consider the power of the court to interfere with his decision. It is given in Schedule 4, para. 2 (of the Housing Act 1957). The court can only interfere on the ground that the Minister has gone outside the powers of the Act or that any requirement of the Act has not been complied with. Under this section it seems to me that the court can interfere with the Minister's decision if he has acted on no evidence; or if he has come to a conclusion to which on the evidence he could not reasonably come; or if he has given a wrong interpretation to the words of the statute; or if he has taken into consideration matters which he ought not to have taken into account, or vice versa; or has otherwise gone wrong in law."

I went on to say that in some cases fresh evidence might be admitted:

> "We have to apply this to the *modern* procedure whereby the inspector makes his report and the Minister gives his letter of decision, and they are made available to the parties. It seems to me that the court should look at the material which the Inspector and the Minister had before them, just as it looks at the material before an inferior court, and see whether on that material the Minister has gone wrong in law … Fresh evidence should not be admitted save in exceptional circumstances."

Conclusion

It remains to apply these principles.

In the first place, we have fresh evidence which shows that the present proposals of the acquiring authority are radically different from those which were considered by the Inspector at the inquiry. The main differences are these:

(i) Modern methods of treating sewage have reduced the whole scale of the project so that the area required for the actual works has been halved in size.

(ii) It is very probable that planning permission be given for the development of the order land for industrial purposes (that is the CPO site): so that it would command a very

considerable "hope" value far in excess of agricultural land, cf. *Camrose (Viscount) & anr. v. Basingstoke Corporation (1966) 1 W.L.R. 1100* .
(iii) The trustees and Sir Brandon have made it clear that they will make the alternative site available at existing use value, that is, its agricultural value.

In view of the fresh evidence it would be quite unreasonable for the acquiring authority to proceed with the compulsory purchase order. Yet on 18th May 1981, they gave notice to treat and have only held their hand pending these proceedings.

In the second place, even if the fresh evidence be disregarded, when the Minister wrote the decision letter confirming the compulsory purchase order, he failed to take into account the cost of acquiring the site proposed by the Authority (the CPO site) as against the cost of acquiring the alternative site offered by Sir Brandon. This was a most relevant consideration. It would probably have made a crucial difference because, even at that date in 1978, there was a potential of development for industrial use which would have given a considerable "hope" value to the order land (the CPO site). The Minister ought to have had regard to this point – in the public interest ≤ even though it was not canvassed by the parties at the inquiry. In any event he ought to have considered it – after receiving the letter of 20th October 1978 – and asked for evidence of values before coming to his decisions. If he had considered its the only reasonable conclusion would be that the compulsory purchase order would not have been confirmed.

I would, therefore, allow the appeal and set aside the compulsory purchase order. Everyone must regret the long delay in making the new sewage works. But I think that the responsibility must rest primarily with the Welsh Water Authority. All could have *been* avoided if they had not insisted on their own site, but had accepted the offer made by Sir Brandon and his children's trustees long ago. If they had done so, the sewage works could have been completed by this time – at much less cost than they will be now. It is, I understand, still open to them to accept the offer. They should do so and get on with the work at once. I would allow the appeal accordingly.

LORD JUSTICE WATKINS:

The attempted acquisition of land by compulsory purchase is when strongly resisted by the owners of it, likely to give rise to a protracted and sometimes bitter contest fought in the forum of public inquiry and thereafter in the courts. Seldom, however, can there have been such a long drawn out struggle to preserve for himself and his family a part of their land at Miskin in the heart of Glamorgan as that waged by Sir Brandon Rhys Williams and the Trustees of the family Trusts.

Sir Brandon's family have lived in Miskin Manor for a century. They have been associated with the lands thereabouts for three centuries or more. He has set ideas of his own as to how his land should be developed in the interests of good and profitable estate management. He has not for

many years been averse to selling some part of his land, at agricultural value, initially to the Local Authority and later on to the Welsh Water Authority when this was created in 1944 so that a sewage disposal plant could be constructed upon it and a suitable access road provided to that.

But he insists upon making available for this purpose a site which in extent and in every other way is, in his estimation, suitable for this purpose and he will not, in any circumstance, treat with the Welsh Water Authority in respect of another part of his land, which is their considered choice for the construction of a plant which is to be provided for the benefit of the inhabitants of Miskin, Llantrisant and other villages nearby.

But the construction of this is, after a decade of strife concerning its location, still not imminent. Indeed, local inhabitants could be excused for thinking that it never will be, seeing that the Welsh Water Authority is, it could be said, inexcusably obdurate in pursuing its objective and Sir Brandon is at least equally determined and resourceful in thwarting them.

There have been from time to time substantial changes in the schemes or proposals put before the Secretary of State for Wales by both sides. The Welsh Water Authority has made fundamental changes in its conception of the kind of plant designed to be constructed, which has meant, among other things, that the amount of land sought to be acquired has diminished in size and Sir Brandon has changed the location of the alternative site he is willing voluntarily to sell at agricultural value to accommodate the plant.

A sensible and reasonably expeditious resolution to this dispute has also been affected by other factors outside the control of both the Welsh Water Authority and Sir Brandon. Notable among these has been the planning and construction of the M4 motorway, which passes through the Miskin Estate, and various proposals, some of which have been the subject of planning applications, for industrial development of this part of Glamorgan which lies immediately to the south of the Rhondda Valley, wherein coal mining has been for years a declining industry – just as in other valleys in Glamorgan and Gwent has the manufacture of steel. These two heavy industries were the economic bedrock of South Wales.

For many years now, since the end of the second world war especially, the local industrial scene has gradually moved from the valleys to the agricultural coastal plain where lie the ports and through which run the railway line and now the motorway. New industries hitherto alien to this part of Wales have been placed near or not very far away from these essential facilities for transporting people and material.

Some of the land around Llantrisant has already been used for this purpose. During the last 15 years a much more extensive industrial development there has been envisaged by planners, including Professor Buchanan, in a specially commissioned report. These proposals have included, among other things, the creation of a new town. Today the approach to development there is much less grandiose, but the determination to bring some new industry to the area

appears to be in some quarters as firm as ever.

Accordingly, it can with justification, so it is argued, be said that the area has a potential for industrial use. The Welsh Land Authority, which is answerable to the Secretary of State, has been and seemingly remains very conscious of this. Various provisions of the Community Land Act 1975 remain available to this Authority. Armed with these it seeks to acquire land for industrial use near Llantrisant, including a part of the Miskin Estate. It has not yet succeeded in obtaining the requisite consents with which to implement its proposals for land acquisition, but there is no sign that its resolve to acquire a reserve of land in this neighbourhood is weakening.

Furthermore, the Local and County Authorities, which themselves have under. gone convulsive changes in recent times, have advanced proposals for development so as to bring in new industry.

So the long endured pressures imposed upon the Secretary of State for Wales and his predecessors to grant planning permissions and approve the purchase of land by compulsory acquisition have been many and various.

It would not be in the least surprising, therefore, if the Secretary of State and those who advise him, in a mood of desperation if not exasperation, resolved to put an end to the battle over the siting of the sewage plant by as he has done, giving the Welsh Water Authority the powers of land acquisition it seeks accompanied by planning permission to construct the plant which he stipulated was to begin by 30th November 1983.

In the decisive decision letter of 14th November 1978, after describing out. standing applications for planning permission for industrial use by Sir Brandon and the Welsh Land Authority, it was stated:

> "Whilst it would not be for the Secretary of State to prejudge the issue regarding the siting of industry south east of the Miskin Interchange, he is satisfied on the evidence that the construction of a sewage disposal works on the site proposed by the Authority or on either of the two sites advanced by Sir Brandon Rhys Williams would not jeopardise the development of an industrial estate in the area. Accordingly, he considers he would not be justified in with.≥ holding his decisions in relation to the sewage disposal works".

It was contended on behalf of the appellants that in this passage the Secretary of State revealed that he had reached a decision in advance of detailed appraisals of the planning applications which, if successful, would inevitably have seriously affected the cost of compulsory acquisition of the Welsh Water Authority site. The decision to confirm the order was swayed against Sir Brandon solely by the costs factor, a full and proper appreciation of which could not be gained

without regard to the user present or prospective of adjoining parts of his lands.

As subsequent events have shown, so it is argued, this cost factor viewed in that way will involve the Welsh Water Authority in a sum for the acquisition of the site which is the subject of the compulsory purchase order, which will not be based on agricultural value but upon a valuation which takes account of at least the hope of planning permission being granted for use for industrial purposes of the site and of adjoining lands as a composite whole or for adjoining lands excluding the site. In this context, it is of interest to learn of the Secretary of State's recent indication that he is quite likely to regard favourably a recommendation made by an inspector in 1981 that conditional planning permission be granted to Sir Brandon and the trustees upon their applications therefor for the use for industrial purposes of a very considerable area of land which includes the compulsory purchase order site.

In her report following the enquiry into the applications, the inspector somewhat significantly concluded, upon the need for land for industrial use, that, if it was necessary urgently to attract large prestige firms with exacting require.+ ments which can serve the Rhondda, then Miskin was the only site she was shown which meets the criteria of accessibility, availability and attractiveness.

In March 1982 the Secretary of State informed Sir Brandon and the Trustees that the existence of an acceptable agreement with the local planning authority under the provisions of section 52 of the Town and Country Planning Act 1971 – apparently such an agreement is in being – would be an important factor in his con.. sideration of the applications. And he enquired whether, in view of the areas of land covered by the agreement, account could be taken of any possible requirements which might arise for alternative sites for a sewage disposal works.

What is one to make of all that, save, it seems inevitable, that a large part of the Miskin lands, the CPO site included, will soon be the subject of plan. ning permission for industrial *use.* And the cost of acquisition of the CPO site, if the order is to remain confirmed, will not be based on agricultural land value but upon the much higher value attributed to land used for industrial purposes.

This is obviously in the public interest a very important consideration, especially when it is borne *in* mind that, in the present case, land can still be acquired by the Welsh Water Authority without the use of compulsory powers at agricultural value which is, so it is submitted by Lord Hooson, as suitable as the compulsory purchase order site for the construction of a sewage plant.

Looking at the whole situation as it appears now, that is, I think, a valid and powerful argument. Despite attempts made on behalf of the Secretary of State and the Welsh Water Authority to demonstrate that his decision to confirm the compulsory purchase order was not exclusively founded on the difference between the cost of construction of the CPO site and the alternative site, I am persuaded, for reasons which I shall later explain and which arise out of the contents

of the several reports and decision letters which are summarised in the decision letter of 14th November 1978, that this was the sole factor which caused the Secretary of State to prefer the CPO site.

Accordingly, seeing nothing has happened to change the character of either of the two sites during the last three-and-a-half years, if it were permissible to regard the situation as it appears now for the purpose of fairly disposing of the appeal, I would unhesitatingly allow the appeal. The cost factor is altogether different now. Land values are a powerful, if not overwhelming, ingredient of it, whereas it *was* absent from the Secretary of State's consideration in the autumn of 1978.

But is it lawful and otherwise proper to look at the Secretary of State's decision taking account of subsequent events so as with hindsight, to adjudge it right or wrong? It is very tempting to do so, especially when what is at stake is the right of a man to retain his land or to dispose of it when and how and to whom he chooses. There are instances in recent times when this court has, notably in claims for personal injury, looked at an event or events subsequent to judgment in order to decide whether a plaintiff or a defendant has been justly treated, but I regard them as an exception to the general rule, which is that a decision appealed against can only be regarded within the circumstances from which it was derived. Generally to conduct the appellate process otherwise would *be* to introduce into it an undesirable combination of re-hearing and fresh evidence which would put at peril the imperative need for judgments or orders or decisions to be final unless they are wrong in law or because, for example, the principles explained in the well-known Wednesbury case have not been followed.

I did not understand Lord Hooson to invite us to resolve this appeal other-wise than in the conventional way. This I propose to do, firmly believing it to be wrong to proceed differently. The most he asks of us with regard to the post decision history is to pay regard to it as an unfolding of events, the main effect of which the Secretary of State could reasonably have anticipated as likely to occur sometime soon in the future when he made his decision in November 1978. In other words, it demonstrates what it was the Secretary of State might have anticipated if he had given thought to it, namely that there was hope value in the CPO site and adjoining lands which inevitably would markedly affect the cost of acquisition under the CPO and, therefore, the cost factor which he acted upon.

So regarded, reception of evidence of that kind is, I think, unobjectionable but otherwise it must be ignored. Even when acted upon in that context it may prove to be of little or no value. This is especially so in long drawn out planning disputes during which time all manner of conditions and needs may change so as radically to alter a pre-existing situation.

In the present appeal I do not find the subsequent events helpful, having regard to the vast bulk of the past history, every detail of which must have been known to the Welsh office and, therefore, to the Secretary of State if he had wished to acquaint himself of it. His role in making

planning decisions and confirming or otherwise compulsory purchase orders is, if not inquisitorial, which Mr. Simon Brown submits that it is not, surely investigatory, especially when he is given notice of a relevant matter which might affect his decision by a person likely to be affected by it. He must acquaint himself,from the formidable amount of assistance available to him in his department and from public inquiry, with all the information which is indispensable to the making of a just and equitable decision in the making of which he *is* entrusted with a broad discretionary power. The proper use of a discretionary power is in peril if less than the information essential for its exercise is available to him. If proper use involves him *in* "routing around" – *see* *Rhodes v. Minister of Housing and Local Government (1963) 1 W.L.R. 208* at 213 – relied upon by Mr. Pill – he must either cause that to be done or resolve the issue in favour of the land owner.

So long as all those persons who are going to be affected by his decision are aware of the information he expects to take account of, so that they are given full opportunity to make representations to him about it at public inquiry or through correspondence either before or after public inquiry, he is not restricted in his sources of gathering relevant information. A public inquiry is the best known, most used and most useful means at his disposal to ensure that he is fully equipped to decide the matter in hand.

There are times, however, when a vital point, as it *seems* to him later has either been insufficiently ventilated or not touched upon at all at an inquiry. In either of these circumstances, if he is going to allow the point to affect him, he must cause enquiries to be made into it even to the extent of re-opening the public inquiry. Lord Greene M.R. in *Associated Provincial Picture Houses Limited v. Wednesbury Corporation (1948) 1 K.B. 223* at page 229 said:

> "He must call his own attention to the matters which he is bound to consider."

What he may not do is to proceed to exercise his discretion and allow it to be swayed by a factor which is inadequately presented to him. It matters not, so it seems to me, that he could reasonably have expected an objector or a supporter of his ultimate decision to have fully exposed for him that factor in all its facets at public inquiry or in some other way. He conducts a process of administrative decision which is quite unlike that conducted by courts and some, if not all, tribunals. Nevertheless, it is a process which is governed by disciplines vital to the public interest.

In *Secretary of State for Education and Science v. Tameside Metropolitan Borough Council (1977) A.C. 1014* at page 1065 Lord Diplock said:

> "Or, put more compendiously, the question for the court is, did the Secretary of State ask himself the right question and take reasonable steps to acquaint himself with the relevant

information to enable him to answer it correctly?"

It could be said that the Secretary of State did ask himself the right question, although Lord Hooson submits to the contrary in the circumstances, namely whether the financial implications alone could allow him to confirm the compulsory purchase order. But whether, as on any view he should have done, he acquainted himself with all the relevant information or, I would add, all the relevant considerations indispensable to correctly *answer* the question, has not to my mind been established by anything we have read or heard in this court.

In this regard he cannot, contrary to a submission made to us, in my opinion, invoke, nor can anyone else who seeks to support his decision here invoke, the doctrine of estoppel against an appellant who challenges that decision, no matter that that person could have a thought of doing so, ventilated at public inquiry what may turn out to be a crucial facet of the factor upon which the decision is hinged. To allow a legal principle or doctrine of that kind to intrude into an administrative process such as this would, in my opinion, be both inappropriate and unjust. Moreover, in the circumstances under review here, even if the issue of estoppel was validly to be raised, it should not, in my opinion, be determined in favour of either the Secretary of State or the *Welsh* Water Authority. It is clear, I think, that he gave his consent to the compulsory acquisition of Sir Brandon's land solely because of the financial implications arising out of the use of that land. If, as in my view he did, he considered those implications, leaving out of account a fact vital to a proper appraisal of them, Sir Brandon cannot possibly be estopped from inviting this court to examine the effect of that omission.

The inspector whose conclusions and recommendations he accepted made it abundantly plain, as I read his report, that he was in favour of recommending the CPO site upon a financial implication only having, so it would seem, recognised that, upon all other relevant considerations, there was nothing of consequence to cause him to prefer the CPO site to Sir Brandon's alternative. In other words, there was nothing to choose between them. In order to substantiate this appreciation of his views, it is necessary, I regret in the interests of brevity, to record in detail the contents of the following paragraphs of his report:

> "(xix) Sir Brandon is right again to insist that costs are not the whole story, and that other factors are also important and need to be placed in the balance. The question which therefore arises is whether those other factors, either individually or collectively, weigh so heavily against the CPO site that the considerable additional expenditure likely to prove necessary at Sites 1 or 2 should be accepted in the wider public interest. Having carefully considered the origins of the dispute, the FFB Report, and the evidence of the inquiries relating to all those matters, I am convinced that they do not. I therefore propose to make a favourable recommendation in respect of a modified CPO site.

> "(xx) As to Sir Brandon's applications, nothing in the evidence concerning appearance, agriculture, flooding, the Nant Coslech or possible future industry suggests to me that planning permissions for Sites 1 and 2 need be withheld. The evidence concerning the Ancient Monument and the Site of Special Scientific Interest shows that Sites 1 and 2 have 'negative' advantages (in the sense that damage elsewhere would be avoided or reduced), although in my view these are marginal and are far outweighed by the prospect of heavy operational traffic being thrown on to the local road network.
>
> "(xxi) The cost of development is not normally a factor which enters into the determination of a planning application. But in my opinion this case is peculiar, in the *sense* that the sole object of Sir Brandon submitting his applications has been to force thorough and proper consideration of the alternative sites. There is no question of Sir Brandon ever implementing a permission(s) for the con.struction of a sewage treatment works, and there can be no doubt that the WNWDA (i.e. the public) would foot the bill.
>
> "(xxii) The machinery of physical planning control does not, and should not, operate in a financial vacuum, divorced from the harsh realities of everyday economics. Rather, I believe that wisely used it should seek to channel public investment into the right places at the right time. Thus, having concluded that the development of Sites 1 and 2 is likely to incur substantial and unnecessary penalties in the shape of scarce public resources, it would be wholly illogical for me to recommend that permission be granted in respect of those sites, unless it had been demonstrated that they possess other overriding advantages compared with the Authority's preferred scheme. I am convinced that they possess no such advantages, and conclude that the applications should be refused on the grounds that they represent unnecessary and wasteful expenditure of public funds."

If the inspector had thought there were other grounds including, for example, agricultural, environmental, access and highway considerations, he would have undoubtedly, in my view, expressly so stated. Thus, although these considerations are mentioned in paragraph (v) of the decision letter, it cannot be supposed, having regard to the inspector's detailed assessment of them, that they influenced the Secretary of State into confirming the CPO.

Paragraph (v) reads as follows: "Apart from the specific issues referred to in paragraphs 11(i) – (iv) above the Secretary of State has also carefully con.. sidered and accepts his inspector's general conclusions in relation to the agricultural, environmental, access and highway implications. He also accepts the inspector's assessment of the financial implications, contained in the conclusions to the report of the second re-opened inquiry, concerning the Water Authority's proposed redevelopment and the cost comparisons with the sites advanced by Sir Brandon Rhys Williams" .

In the following paragraph – (vi) – the Secretary of State said he had also considered written representations submitted to him by Sir Brandon. These were contained in his solicitor's letter of 20th October 1978 wherein this paragraph appears:

> "This obvious potential of the CPO site for industrial purposes if the sewage works were not required to be built on it introduces material questions of relative land costs into the choice of sewage works sites. These issues cannot be resolved until the nature of the industrial development of the area has been decided but are likely to be a material factor which ought to be taken into consideration before the Compulsory Purchase Order is confirmed. This matter was not considered at all during the enquiry".

Regardless of the main purpose of the letter this paragraph clearly alerted, or should have done I think, the Secretary of State to the likelihood that a decision based upon financial implications without consideration of relative land costs would be ill founded and, therefore, unjust to Sir Brandon. The raising of the matter of land costs is nowhere, as I understand the decision letter, answered by it directly or, by implication, within it. The assumption must be, therefore, that the Secretary of State, in refusing to re-open the inquiry or to delay his decision, regarded the financial implication from the standpoint of construction costs and no other.

It was submitted to us that the foregoing paragraph of the solicitor's letter could not possibly have indicated to the Secretary of State that Sir Brandon was suggesting that hope value inter alia was being referred to by the words "material questions of relative land costs" . As already indicated, I do not agree. The Secretary of State has the benefit of advice from senior civil servants well versed in such matters as compulsory purchase and planning. I am not persuaded that they,knowing, of course, that there were material unresolved planning applications before them, did not appreciate that it was being suggested that hope value should be taken account of.

In any event, I do not think it required this paragraph to introduce this financial factor into the mind of the Secretary of State. He was so concerned about the financial implications as to found his decision upon them. That being so, how could he neglect to consider something so fundamental as the cost of the acquisition of land upon which the sewage plant was to be constructed? If this kind of decision were being taken in the commercial world I venture to think that the cost of land would have been very high on the agenda. If the Secretary of State did have it on his agenda – he has failed to prove that – he may have come to the same decision as that which is being challenged, but there is no evidence whatsoever that he gave it so much as a passing thought.

Paragraph (vii) of the decision letter is noteworthy in this connection. He therein contended that all submissions made to him after the close of the enquiries was sufficiently covered by evidence already before him. The plain fact undoubtedly is that no evidence of comparative land

costs was before him. This I take to be a clear indication of his neglect to take account of them.

Does the Secretary of State's failure to enquire into and to consider the full implications of the cost of land acquisition invalidate his decision, bearing in mind the planning and all other relevant considerations? Lord Hooson submits his failure to do so is fatal to the decision – cost of land acquisition was overwhelmingly the main factor to be considered if financial considerations governed the decision. He goes further, and asserts that it was wrong in principle in the exclusive context of finance to prefer the CPO site unless there were overwhelming reasons for this, e.g., a gross disparity in costs which the difference involved in the construction of the plant could not properly be said to amount to.

For the Secretary of State and the Welsh Water Authority it is submitted that he was not called upon to enquire into the cost of the acquisition of land, and that it was reasonable for him and therefore a proper exercise of his discretion to determine the matter as he did.

Mr. Simon Brown conceded, however, that,if there was a glaring lacuna in the evidence and the considerations required to properly found a decision which is capable of being clarified without delaying the decision, the Secretary of State may be "Wednesbury" unreasonable if he does not make enquiries. In other words, he must be shown to have acted perversely.

In the sphere of compulsory land acquisition, the onus of showing that a CPO has been properly confirmed rests squarely on the acquiring authority ands if he seeks to support his own decision, on the Secretary of State. The taking of a person's land against his will is a serious invasion of his proprietary rights. The use of statutory authority for the destruction of those rights requires to be most carefully scrutinised. The courts must be vigilant to see to it that that authority is not abused. It must not be used unless it is clear that the Secretary of State has allowed those rights to be violated by a decision based upon the right legal principles, adequate evidence and proper consideration of the factor which sways his mind into confirmation of the order sought.

I have come to the conclusion that his decision should not be upheld. A vital consideration was not enquired into, in my view. It was, therefore, left out of account in the exercise of the Secretary of State's discretion. The hope value of parts of the Miskin lands should not have been disregarded as it was, especially seeing that there was evidence of its possible existence. An enquiry into it would not, it seems to me, have delayed the decision by much time, if any. To fail to make that enquiry was a glaring omission going to a fundamental consideration.

For these reasons I, too, would allow this appeal.

LORD JUSTICE FOX:

I approach this case on the basis that the propriety of the Secretary of State's decision must be

determined by reference to the facts as they existed at the date when he gave the decision. No argument to the contrary was addressed to us. Indeed, Lord Hooson, as I understood him, accepted that basis as correct. That concession was, in my view, rightly made. I see no ground upon which the propriety of the Secretary of State's decision in November 1978 can be determined by reference to an event occurring over three years later (i.e., the Secretary of State's letter of 12th March 1982 indicating that he was prepared to permit industrial development subject to conditions).

The principal matter raised by the appeal is what attitude the Secretary of State should have taken to the question of comparative acquisition costs. The matter was not considered at all at the public inquiry where the investigation of comparative costs was directed to the costs of construction. The Inspector records, however, in paragraph 263(a) of his Report: "All these lands are in the ownership of Sir Brandon or his children's Trustees. Gwern-y-Gedrych is no longer being actively farmed and such land as the Authority might require is "on offer" at existing use value." Gwern-y-Gedrych is the alternative site offered by Sir Brandon. Are the appellants now estopped from raising the point? At the date when the Secretary of State gave his decision there had already been three public inquiries. The opponents of the Order were not lacking in professional advice or, I think, in determination in their resistance to the confirmation of the Order. They had every opportunity and incentive to raise the matter. In my view, how. ever, there is no question of estoppel here. The Secretary of State's duty was to review the position in the light of all relevant considerations. He had a duty to direct his mind to the material questions and to take reasonable steps to inform himself. If the Secretary of State fails to discharge that duty I do not think that the landowner is precluded from complaining merely because he failed to see the point at an earlier stage. The Inquiry is not litigation, it is merely an aid to the ascertainment of the material facts and issues. It may well be that, in determining whether the Secretary of State has directed his mind to the right questions and has taken reasonable steps to inform himself, the court should have regard to what was, at the time the Secretary of State made his decision, common ground or unquestioned between the parties. Thus, where if at the Inquiry (a) the question of cost was in issue, (b) Gwern-y-Gedrych was on offer at existing use value, (c) it was then speculative whether the possibility of industrial development would materially increase land values and (d) the cm,. plainants put forward no case that the land values were materially increased by that possibility, it might be said that the Secretary of State could reasonably refer, without further inquiry, that the mere possibility of industrial development being permitted consequent upon the planning applications had no material effect upon land values. But, if that proposition is correct (and, as I mention later, I feel doubt as to what the impact of the applications on value might be), it is not, in fact, the situation which faced the Secretary of State when he made his decision. By that time he had received the letter from Sir Brandon's solicitors dated 20th October 1978. There are a number of passages in that letter to which I should refer. Thus, the letter in its opening paragraph states:

> "We understand that the report of the Inspector following the public inquiry which closed in December 1977 has been submitted to you and the purpose of this letter is to request that

> this inquiry be re-opened before a decision is taken to enable certain matters which arose since the inquiry closed or were not placed before the inquiry to be fully and openly investigated". The matters thus referred to are set out in ten numbered paragraphs.
>
> In paragraph 1, after a reference to the applications for planning permission for industrial development, it is stated: "Your decision on the CPO should not, therefore, we submit with respect, be made until these two applications have been considered."

Paragraph 4 is in the following terms: "This obvious potential of the CPO site for industrial purposes if the sewage works were not required to be built on it introduced material questions of the relative land costs into the choice of sewage works sites. These issues cannot be resolved until the nature of the industrial development of the area has been decided but are likely to be a material factor which ought to be taken into consideration before the Compulsory Purchase Order is confirmed. This matter was not considered at all during the inquiry."

Finally, in paragraph 10, the letter states: "Our client considers that for these and other reasons the conclusions of the Secretary of State following the public hearing into the applications to develop the red and the green land should be available before the crucially relevant question of the choice of site for the sewage works can be determined. … It would, we submit be contrary to natural justice to announce a precipitate decision in favour of the CPO site before the industrial site hearings have taken their proper course and decisions have been taken."

There is no doubt that the main object of this letter was to ask that the Secretary of State re-open the inquiry or defer a decision upon the Compulsory Purchase Order until the planning applications had been determined. The Secretary of State considered that request and he rejected it. He was perfectly entitled to do so.

Whilst I think that the main object of the letter was as I have indicated, the provisions of paragraph 4 are, I think, of wider effect and are important. The paragraph asserts that the potential of the CPO site for industrial purposes introduced material questions of comparative land costs which had not previously been considered. It is true that the paragraph also states that "these issues cannot be resolved until the nature of the industrial development of the area has been decided" , but it also states that those issues "are likely to be a material factor which ought to be taken into consideration before the Compulsory Purchase Order is confirmed" . In my view, paragraph 4 must be read as bringing to the attention of the Secretary of State the contention that the possibility of industrial use now introduced material factors of comparative land costs which should be taken into consideration before the Order was confirmed. That condition replaced the attitude adopted by Sir Brandon at the Inquiry.

The Secretary of State, in confirming the Order, accepted, in general, the conclusions and

recommendations of the Inspector. In paragraph 11(v), the Secretary of State says:

> "Apart from the specific issues referred to in paragraphs 11 (i)–(iv) above the Secretary of State has also carefully considered and accepts his Inspector's general conclusions in relation to the agricultural, environmental, access and highway implications. He also accepts the Inspector's assessment of the financial implications contained in the conclusions to the Report of the second reopened Inquiry concerning the Water Authority's proposed development and the cost comparison with the sites advanced by Sir Brandon Rhys Williams."

The Inspector had reported (see paragraph (xviii) of the Decision Letter:

> "(xviii) Mr. Shiell's assessment of the engineering *evidence* accompanies this report and is wholly accepted by me. It is to be expected that however hard promoters of different schemes may attempt to take a disinterested view they will tend s perhaps subconsciously, to maximise the difficulties of the rival site and minimise the problems of the one they favour. The truth often lies somewhere between. The manner in which Mr. Shiell has picked a scrupulous path through the various elements of the alternative schemes strikes me as being fair, rational and comprehensive. The result of that impartial *analysis* suggests that, compared with the CPO site, the construction of similar treatment works would cost some £230,000 more on Site 1, and some £320,000 more on Site 2.
>
> "(xix) Sir Brandon is right again to insist that costs are not the whole story, and that other factors are also important and need to be placed in the balance. The question which therefore arises is whether those other factors, either individually or collectively, weigh so heavily against the CPO site that the considerable additional expenditure likely to prove necessary at Sites 1 or 2 should be accepted in the wider public interest. Having carefully considered the origins of the dispute, the FFB Report, and the evidence of the inquiries relating to all those matters, I am convinced that they do not. I therefore propose to make a favourable recommendation in respect of a modified CPO site."

It appears, therefore, that the Inspector regarded construction cost as the determining factor and that the Secretary of State accepted that. But, if the increased cost of construction on the alternative site was a determining factor on the figures available to the Inspector, that was a circumstance which could be altered if in fact the cost of acquisition of the alternative site was much lower by reason of the beneficial offer made by Sir Brandon to sell the alternative site at existing use value coupled with the possibility of a large increase in value of the Compulsory Purchase Order site consequent upon the likelihood of industrial development.

So the position is this. The Secretary of State decided in favour of the Compulsory Purchase Order on the basis of the increased construction costs if the alternative site were used. The letter of 20th October 1978, however, asserted that a new factor was introduced into the equation, namely comparative acquisition costs. The Secretary of State was bound to consider that. In paragraph 11(viii) of the Decision letter he states:

> "All representations received after the close of the Inquiries have been carefully considered. It has been concluded, however, that there is nothing contained therein which is not sufficiently covered by evidence already before the Secretary of State."

That statement does not *answer* the present problem. We have no reason to suppose that the Secretary of State ever had any evidence of comparative land costs in front of him. He does not appear to have received any at the Inquiries and there is nothing to suggest that he obtained any from any other source. I do not think it is sufficient to say that nobody suggested at the Inquiry that the difference in value was significant and that the making of the planning application in 1978 left the position as to industrial user as speculative as it was before the planning applications were made. So far as the Inquiry is concerned, the portance of the letter of 20th October 1978 is that it raised a new contention which, as the letter itself stated, was not considered at all during the Inquiry. That being so, I do not think that the fact that no point was taken at the Inquiry can be a reliable guide to the question of value at the time of the Inquiry. If it was not, then the fact that the planning position remained uncertain still does not give a reliable guide to value. I am not, in any event, satisfied on any evidence before us whether the making of the applications might not have affected value. Dealers in land might be influenced by applications made by major local landowners and the Land Authority for Wales.

I can only conclude that, in a case where the Secretary of State decided to confirm the Compulsory Purchase Order primarily on considerations of cost, and where shortly before his decision he was asked to take account of land acquisition costs, he confirmed the Order without material as to what the latter costs were. Accordingly, I do not think that he can have given the proper degree of consideration to the overall question of cost. The onus of establishing that a Compulsory Purchase Order has been properly made must be on the acquiring authority. The question of cost was a material issue. One of the elements in the total cost was land acquisition cost. I am not satisfied that the Secretary of State had adequate material to judge the latter cost when he made his decision. I would allow the appeal.

THE MASTER OF THE ROLLS:

The judgment is the appeal is allowed; the order is quashed accordingly.

MR. HOWELL: May I respectfully invite your Lordships to allow the respondents their costs here and below and that the costs of Mr. Prest and Mr. Straker be taxed on a trustee basis?

THE MASTER OF THE ROLLS: You are asking for the costs against both the Welsh Water Authority and the Secretary of State?

MR. HOWELL: My Lord, yes.

LORD JUSTICE FOX:

Should they get their costs on a trustee basis? No doubt they can get any costs they do not recover out of the fund, but I think, so far as any other costs are concerned, it is just ordinary litigation.

THE MASTER OF THE ROLLS:

It is just ordinary litigation; it should not be anything special. When a case is ordinary litigation they get ordinary costs, do they not?

LORD JUSTICE FOX:

They can only indemnify themselves out of the fund

MR. HOWELL: It is certainly not a case about administration of the trust.

LORD JUSTICE FOX: As trustees, if they engage in proper activities to preserve the trust property, any expenses in respect of that can be recovered from the trust fund.

MR. HOWELL: My Lord, certainly.

THE MASTER OF THE ROLLS:

Let us hope you will get all your costs without bothering the fund about it. If they are properly taxed it seems to me that all the expenditure which you have incurred, if it is proper and reasonable – therefore, you ought to get your costs from the other side. Mr. Brown, is there any question about that?

MR. BROWN: My Lord, none at all, provided, of course, the court does not make any special order as to costs to reflect the status as trustees of certain of the applicants. I gather the court is not minded to make such special order, so as to that I say nothing.

THE MASTER OF THE ROLLS: Have you anything to say about that, Miss Booth?

MISS BOOTH: My Lord, no. We chose to be separately represented on the last occasion and I cannot resist that application.

MR. BROWN: My Lord, I am instructed to make application to your Lordships to grant leave to appeal to the House of Lords.

THE MASTER OF THE ROLLS: More and more delay: it is about time these sewage works were constructed.

MR. BROWN: My Lord, certainly. It is obviously an important decision in many respects and, indeed, no doubt the Secretary of State for Wales and other depart. ments of the Crown wish to consider certain matters. I am particularly concerned with some aspects of the judgments of this court which are of a wider and more general application than merely to the instant appeal. My Lords, the two particular matters are the nature and extent of the Secretary of State's investigatory function – I use, I hope, the language of my Lord, Lord Justice Watkins – and, secondly, the correct approach to the question whether or not to confirm a compulsory purchase order, to what extent the balance must fall down decisively in favour of acquisition. There is the other question as to fresh evidence but, as I understand the judgments of this court, your Lordship is in a minority on that and perhaps, even in your Lordship's judgment, it is an obiter dictum expression of view. That is the application I am instructed to make.

THE MASTER OF THE ROLLS: What do you say about it, Mr. Howell?

MR. HOWELL: My Lord, obviously the question of the duty of the Secretary of State to make investigations is a point of general application. All that I would say is that all three of your Lordships' judgments

THE MASTER OF THE ROLLS: What seems to me at the moment is the urgency of the work being got on with. If this case goes to the House of Lords, goodness knows how long it will take. Nothing will be done and there it is.

MR. HOWELL: My Lord, it certainly will not be in the public interest that the construction of the sewage works be further delayed.

THE MASTER OF THE ROLLS: We refuse leave. So the appeal will be allowed with costs here and below.

I can only conclude that, in a case where the Secretary of State decided to confirm the Compulsory Purchase Order primarily on considerations of cost, and where shortly before his decision he was asked to take account of land acquisition costs, he confirmed the Order without material as to what the latter costs were. Accordingly, I do not think that he can have given the proper degree of consideration to the overall question of cost. The onus of establishing that a Compulsory Purchase Order has been properly made must be on the acquiring authority. The question of cost was a material issue. One of the elements in the total cost was land acquisition cost. I am not satisfied that the Secretary of State had adequate material to judge the latter cost when he made his decision. I would allow the appeal.

Order: Appeal allowed with costs here and below. Leave to appeal to the House of Lords refused.

APPENDIX D

Warrington v Garvey **[1988] JPL 752**

Prosecution for non-compliance with enforcement notices

Case Comment

Journal of Planning & Environment Law

J.P.L. 1988, Nov, 752-762

Subject
Planning

Keywords
Enforcement notices; Offences; Planning permission

Cases cited

Warrington BC v Garvey [1988] J.P.L. 752; [1988] 1 WLUK 863 (Crown Ct (Mold))

J.P.L. 752 Following an application for planning permission dated March 8, 1980, the applicant wrote a letter dated May 20, 1980 in which he set out further particulars of how he prepared to carry out the works of infilling. He set out in the course of five paragraphs certain matters: paragraph 1: "the existing depth of the land still to be filled in approximately 2 feet"; paragraph 2: "the type of materials to be used are inert subsoil and 1 foot of topsoil"; paragraph 3: "the method of working I have used (or to be used) is four wagons or less depending on the amount of fill available. Access has been from Reddish Land. The origin of material is wherever I can get it. Suitable inert subsoil. Whenever I get a new source if required I will inform Planning Department and they can inspect the material."

Then in paragraph 4 he indicated that he expected the work to be finished in approximately two years and concluded his letter in this way: "The proposed after-use is an extension to my garden. The land that has already been filled has been topsoiled and will continue to be so as to leave an area that can be utilised while waiting for more fill."

That letter was received by the local planning authority and the local planning authority granted

its consent to the proposal in a consent dated June 25, 1980 and that consent was expressed to be subject to a number of conditions and one of the conditions--condition 4--was: "This permission shall relate solely to the submitted plan dated May 22, 1980 and the details contained in the accompanying letter dated May 20, 1980." Thus, on its face the letter of May 20, 1980 was incorporated in its entirety into paragraph 4 and with the submitted plan became condition 4 upon which planning consent was given.

Subsequently two enforcement notices were served on the applicant and a criminal prosecution was brought in the Crown Court under section 89(1) of the Town and Country Planning Act 1971 for non-compliance with these notices.

JUDGE WOOLLEY said (in directing the jury) that, at the conclusion of the case for the prosecution, counsel for the defendant had made extensive submissions as to the ***J.P.L. 753*** enforcement notices referred to respectively as enforcement notice A and enforcement notice B. With the consent of the defence--and indeed at the request of the defence--the jury had remained throughout the submissions made to him by the respective counsel. He (Judge Woolley) made the observation, initially, that he was not sitting here as a Judge of the High Court hearing an appeal from the Secretary of State or construing an Act of Parliament or statutory instrument within the ambit of civil proceedings; neither was he sitting as a Divisional Court of the Queen's Bench Division. He was sitting here presiding over a criminal trial and he was justified in looking at each of the essential ingredients of the alleged offences; to consider those essential ingredients in the light of the submissions made to him on the part of the defendant. If he was justified in regarding any essential ingredient of the alleged offences as being dubious then he should not resile from saying so in the clearest possible terms. If the matter in question were to be left to the jury he would be bound to give clear and unambiguous directions which of necessity would be bound to reflect his view of each essential ingredient in the alleged offences. He ventured to suggest that if that course were adopted then it would be extremely unlikely that the jury would convict and indeed with that in mind it might be unsafe to leave that matter to the jury.

Essentially, the submissions that have been made to him were submissions in law and he had to consider them, as he had said, in the light of his capacity as Judge conducting with the assistance of the jury a criminal trial. Certain cases had been referred to his attention which had involved the courts in the construction of statutes and regulations and enforcement notices and conditions and planning consents and it has been observed by more than one Judge in the course of the hearing of those cases that the anxiety of the courts in civil matters should be to give effect, if it be possible to do so, to planning legislation and to the whole scheme and ambit of Town and Country Planning schemes. One can understand that and when it comes to uncertainty, as Lord Denning observed in the *Fawcett* case, it was the duty of a Judge to attempt to resolve that uncertainty and give effect to the legislation.

It has been said in other cases that the courts dealing with planning legislation and planning

cases generally should only give effect to the general law and construe provisions benevolently. Benevolently in that context must necessarily mean the construction of provisions in such a way as to give efficacy to the planning law. Again, one can readily understand that that was a duty of courts when considering these matters in a civil capacity.

But he (Judge Woolley) did not see it as any part of his role in a criminal case to construe anything benevolently in favour of the local planning authority or in the context of a criminal case in favour of the prosecution. If there was uncertainty, if there was doubt, if one or more of the essential ingredients of an offence were considered to be dubious, it was not his duty and indeed it would be contrary to his duty, presiding as he did in a criminal trial, to attempt to give efficacy to those provisions and in such a way to construe them in favour of the Prosecution and against the Defendant because that would have the effect of applying the numerous cases drawn to his attention relating to the construction of legislation and other documents in a benevolent fashion.

[After referring to *R.* v. *Smith* (1984) 48 P. & C.R. 392 and *Miller-Mead* v. *Minister of Housing and Local Government* [1963] 2 Q.B. 196, Judge Woolley continued.]

J.P.L. 754 He was also invited to consider the decision in *Scarborough Borough Council* v. *Adams* (1983) 47 P. & C.R. 133 and he was in particular invited to that part of the judgment of Watkins L.J. at p.138 of the report. He observed that of the cases drawn to his attention in the course of these submissions this was the only case which was dealt with by the courts within the ambit of criminal proceedings and what he had already said was respectively a reflection upon what Watkins L.J. had to say in that case because clearly reading his judgment Watkins L.J. was somewhat disturbed to be told that in the course of a course matter the Adam brothers were not entitled to take any point which in a criminal case would be regarded as being open to them to take. The learned Lord Justice had this to say, at p.138:

”Secondly, he (he was referring to counsel) contents that, by the time a person proceeded against under that section reaches the Magistrates’ Court, it is too late for him to challenge the validity of the enforcement notice on any of the grounds contained in section 88(2) of the Act. I do not agree. It is far too sweeping an assertion to make. It may be--and I say nothing more positive about it than that for the purposes of this case--that it is not open to someone in the position of the two Adams, denied as they were the right of an appeal to the Secretary of State, to argue before the justice the invalidity of any of the grounds set out in section 88, but to assert that they were dis-entitled from otherwise attacking the enforcement notice is, in my judgment, going unjustifiably too far. It must, it seems to me, be open to a person or persons in that position to argue that an enforcement notice is a nullity or invalid for the reason, for example, that the issuing authority had no jurisdiction to issue the notice--no jurisdiction possibly because the persons named in the notice as issued had no interest in the land and were neither owners nor occupiers of it. Therefore, it seems to me that Mr. Sullivan has not succeeded in demonstrating that the two Adams were without any kind of right to challenge the validity of the enforcement

notice. It is quite clear from the contents of the notes in the *Encyclopaedia of Planning Law and Practice Volume 2,* to sections 87, 88 and 89, that the questions of nullity and invalidity are of very considerable concern to the courts, where there is always an anxiety to ensure that a person who comes before the court is not denied a proper right, in appropriate circumstances, to challenge a notice that is the foundation of the offences as charged."

Well, Watkins L.J. was there, it seemed to him, leaving it entirely open for courts concerned with criminal prosecutions to give to a defendant a full and unfettered liberty which the learned Lord Justice regarded as the right of a defendant to attack an enforcement notice on grounds of nullity and invalidity other than those statutory grounds of appeal under Part V of the Act; and, the learned Lord Justice was expressing caution and, it seems to him, anxiety that criminal courts were not to be deflected from doing what was just in all the circumstances to ensure justice to be done to a defendant by considering the vast body of civil cases which appear (as he had already sought to explain) to give some limit to the construction which he courts should adopt in relation to planning consents, planning conditions and indeed in relation to enforcement notices as well.

[Judge Woolley then quoted extensively from Lord Fraser's speech in *Davey* v. *Spelthorne* [1984] A.C. 262 and then continued.]

Enforcement notice A was issued on July 4, 1984 and it was served on July 5, 1984. The breach referred to in paragraph 2 of the recitals to enforcement notice A was in these ***J.P.L. 755*** terms: "The breach of planning control which appears to have taken place consists in failure to comply with the conditions specified in Schedule 2 below subject to which permission for development of the land was granted on the 25th day of June 1980."

Pausing there for a moment. Upon reading recitals one would expect to find in Schedule 2 the condition upon which planning consent had been granted which had not been complied with, but when one looked at Schedule 2 that was not what was included in Schedule 2 and it was not that which Recital 2 specified as being included in Schedule 2. The words one found in Schedule 2 which should describe accurately or with reasonable certainty, the condition in question was couched in these words: "This permission shall relate solely to the submitted plan dated May 22, 1980 and the details contained in the accompanying letter dated May 20, 1980 and in particular the following paragraphs of that letter:--The type of materials to be used are inert subsoil and 1 foot of topsoil." Then there are a few dots which appear to indicate *prima facie* that the words which then follow consist of a quotation and then one reads the following words: "… the site to be finished in approximately two years."

So again, looking back to recital 2 it stated that: "The breach of planning control which appears to have taken place consists in failure to comply with the conditions specified in Schedule 2." So he asked himself forensically: Did Schedule 2, in fact, specify the condition or conditions which it was said by the enforcement notice have not been applied with? Well, he had read what was

said in Schedule 2 and he had come to the conclusion that Schedule 2 did not specify the conditions which were referred to in the planning consent. Schedule 2 was not the condition which was specified in condition of the planning consent; it was something entirely different. Part of what was specified was to be found in the letter of May 20, 1980, but in particular that part of it which was apparently a quotation was not what was in condition 4 of the consent. What was in condition 4 of the consent was not what was said in Schedule 2 it was something more; and it contained paragraph 4 as it contained the other paragraphs of the letter of May 20, 1980. What had happened was that the local planning authority, having taken the view that the conditions upon which the planning consent was granted had been breached, were bound in the enforcement notice to specify with reasonable certainty the condition or conditions which had not been complied with. And the condition, so far as was material to the present submission which it was said in Schedule 2 had not been complied with, was that "the site to be finished in approximately two years"; that was never a condition of the planning consent.

It was said by counsel appearing for the defendant that the letter and plan had been formed on the basis for a varied planning condition at condition 4, and, that condition 4 was a manifestly unlawful condition. Well, of course, the local authority could attach conditions to planning consents, but if it does so it should particularly in the context of an enforcement notice, specify the condition or conditions which it was alleging had been broken, and, the condition here alleged to have been broken, so far as was material, was a condition which was never a condition of the planning consent. The edited form of the condition, which was a condition of the planning consent, did such violence to the condition, as it was incorporated into the planning consent with Schedule 2, that the enforcement notice becomes quite unmeaningful and artificial.

Referring in this context to the *Encyclopaedia of Planning Law and Practice* at 2·0524 under the heading: "conditions bad for uncertainty"--"A planning condition may be so ***J.P.L. 756*** uncertain as to be invalid, but only in extreme cases of unintelligibility should it be struck down under this head." And the reliance for that observation was based upon the decision of *Fawcett Properties* in which case Lord Denning was at pains to indicate that within the ambit of civil proceedings a condition should, if possible, be given validity and should be construed if at all possible in a way which rendered it to be certain. That test did not appear to be a test which could be adopted by a criminal court considering one of the essential planks, namely an enforcement notice in the alleged offence against this defendant.

Furthermore, reliance was based upon the decision of the *London Borough of Hounslow* v. *Secretary of State for the Environment* [1981] J.P.L. 510. Lord Ackner gave the decision of the Divisional Court and said that there were propositions which could be derived from the legislation and from the authorities on that legislation:

"(1) The wording of an Enforcement Notice need not strictly adhere to formality. (2) The notice must tell the recipient clearly what he had done wrong and what he must do to remedy it. (3) If, on the true construction of the notice, it was hopelessly ambiguous and uncertain, so that the

owner or occupier could not, for example, tell with reasonable certainty what steps he had to take to remedy the alleged breaches, the notice was a nullity being a nullity was not capable of correction. The authority for the above proposition was to be found in the well known case of *Miller-Mead* v. *Minister of Housing and Local Environment.*"

Ackner L.J. went on: "(4) If an error could be corrected without injustice it was not a material error. (5) The Secretary of State had a duty to try and put an Enforcement Notice in order. (6) The power and duty to correct an Enforcement Notice was not limited to correction in favour of the developer." What Ackner L.J. there had to say was subject to the caviat raised in the light of Watkins L.J. observations in the case of *Scarborough Borough Council* v. *Adams,* (1983) 47 P. & C.R. 133

Counsel for the prosecution in this respect submitted that the defendant could have appealed under section 88(2); he could have asked the Secretary of State to have discharged the condition. The Statute did give the right to apply to the Secretary of State to discharge a condition of the planning consent, but the defendant was not concerned at that stage to discharge the condition. The condition was in the terms of condition 4 attached to the consent of June 25, 1980. What went wrong was that the enforcement notice, while purporting to state that there had been a breach of that condition, merely stated that there had been a breach of some other condition, a condition which was not a condition imported into the planning consent of June 25, 1980. There was no condition of that planning consent which required the defendant to finish the site of approximately two years. That was not the condition imported into the planning consent at all. It was something entirely different.

It might be argued, of course, that to import such condition as that into the planning consent of June 25, 1980 was to import a condition which could not be imported in the light of the precise terms of the letter. But looking at the matter from the point of view of the enforcement notice, the enforcement notice clearly appeared to be directing itself to a breach of a condition contained in the consent and the condition which it was said that the defendant was in breach of, was not the condition which one found in the planning consent of June 25, 1980.

J.P.L. 757 Thus, he had come to the conclusion that enforcement notice A was not an enforcement notice which could be relied upon by the prosecution as an essential ingredient in count 1 of the indictment. Count 1 relied upon that enforcement notice. The prosecution had to demonstrate and prove that it was regular in every respect and that it did properly give rise to the commission of the offence which was alleged in count 1 of the indictment. Thus, he proposed to direct the jury to return a verdict of not guilty on count 1 of the indictment.

Passing to consideration of enforcement notice B, counsel for the defendant had three submissions to make. He submitted, first of all, that notice B was not an enforcement notice at all because it did not require any steps to be taken to remedy the breach, and, he invited attention to the provisions of section 87 and in particular to the words in (1) of that section which

specified that the notice to be issued was a notice requiring the breach to be remedied. He also invited attention to the subsequent provisions of section 87, namely (6), (7) and (10), and invited attention once again to the *Encyclopaedia of Planning Law and Practice* at 2·0658 under the subject heading: "breach of planning control": "Breach of planning control is defined so as to include unauthorised development and failure to comply with any conditions or limitation subject to which planning permission was granted. It remains the law that the notice must correctly identify which breach has occurred." And, reference was made to Lord Denning's judgment in the *Miller-Mead* case.

The problem about this part of the submissions made by counsel for the defendant was that the learned author of the *Encyclopaedia* himself expressed considerable doubt and appeared to give and express alternate views in a small compass of the work which he had edited and the difficulty was exposed in the case of *Iddenden* [1972] 1 W.L.R. 1433. That was an interesting case where the applicants had bought land upon which there were a number of buildings, including nissen huts and a lean-to structure. They used the structures for manufacturing purposes and then applied to the planning authority for permission to demolish the existing buildings and erect new buildings. In March of 1968 permission was refused, but despite that refusal the applicants proceeded to demolish the nissen huts and the lean-to structure and erected a large prefabricated building on a concrete base and continued to use the land for the manufacturing processes of metal components. The planning authority served an Enforcement Notice requiring the applicants to demolish the unauthorised building and discontinue the unauthorised use, and, the applicants appealed to the Secretary of State and thence to the Queen's Bench Divisional Court contending that the enforcement notice was invalid having regard to the mandatory terms of the Act of 1968. In effect, they contended that because the enforcement notice did not require the applicants to restore the land with its own buildings to its state immediately before the demolition and breach of planning permission then it was not a good enforcement notice.

In that case Bridge J. had said in the terms of his judgment, referring to the provision in question: "That provision in that form makes it perfectly obvious, to my mind, that there is no objection to the enforcement notice if it stops short of requiring, as it might require, full restoration of the land to its condition before the offending development."

He (Judge Woolley), in relation to this particular submission made by counsel for the defendant, was in complete agreement with the counter submissions made by counsel for the prosecution.

J.P.L. 758 But counsel had made two other submissions in relation to notice B and thought that in relation to these two further submissions he was on rather stronger ground. He submitted, secondly, that enforcement notice B was invalid because it failed to identify the land and he rightly pointed out that that was not a ground for appeal to the Secretary of State under section 88. He invited attention to the statutory instrument made under the Act, indeed made under the provisions of the Town and Country Planning Act 1971, and invited in particular to paragraph

(3) of the statutory instrument and paragraph (3) was headed: "Matters to be specified in Enforcement Notice." Those words appear to be mandatory and it provided that:

"Local planning authorities are directed to specify in any enforcement notice which they issue under section 87 of the 1971 Act--(a) the reasons they consider it expedient to issue the notice; and (b) the precise boundaries of the land to which the notice relates, whether by reference to a plan or otherwise."

The words were "the precise boundaries," and the word "precise" had necessarily to mean what it said and had to have its normal and grammatical effect. Precise boundaries meant precise boundaries; nothing less; nothing more. Where land specified and referred to in an enforcement notice as being the subject matter of the enforcement notice could be described by existing boundaries which were finite and existing at the time, and could clearly be described, then, of course the precise boundaries of the land in question could be described by words in sufficient particularity, but where there were no physical boundaries or indeterminate physical boundaries the land could not be described and it certainly could not be described with precision except by reference to a plan.

The plan referred to was a plan on a small scale and it was a plan, or purported to be a plan, of an irregular shaped piece of land. The fact that it was irregular necessarily gave rise to difficulty in satisfactorily delineating the precise boundaries, and indeed, it necessarily created difficulty in ascertaining the precise boundaries and area of the land in question.

The two enforcement officers, who were experienced enforcement officers, themselves experienced difficulty in identifying the land the subject matter of Notice B. When they came to the land for the purpose of ascertaining whether or not there had been any breach of planning control the two officers experienced trouble. They experienced trouble because the plan in question appeared to indicate a physical boundary, namely the brook which was or appeared to be at the time when the plan was prepared extant. The two officers found that not to be the position and thus they could not conclude at that stage whether or not there had been compliance with the enforcement notice, and indeed, one of the officers in the course of his evidence went so far as to say that he was uncertain and the officers went back to the drawing board and there conducted what they described as a paper investigation. It appeared, actually, that they had made two paper investigations and both officers, in the course of their evidence, described the investigations that they had made following the paper investigations and how they came back to the site and made what could be described only as a survey by triangulation. It was difficult, at first, to follow what both officers were saying and it might very well be that the jury shared their difficulty. Indeed, the officers were working off a plan which was defective in the sense that it was not a good copy and moreover they were ****J.P.L. 759*** considering, at that time, the plan which had been attached to the enforcement notice and which by common consent on the inquiry before the Inspector was accepted to be incorrect. The officers, although they were aware of the fact that the Inspector had modified the plan by deleting one wedge of land from it,

they appeared not to have been aware of the fact that the Inspector had also deleted a second wedge from the plan attached to the enforcement notice. So with the rather sophisticated survey which the officers were obliged to conduct they were able to translate--they did not purport to do anything else--on the site the land which was the subject matter of the enforcement notice.

The burden did not rest upon any person upon whom an enforcement notice had been served to conduct a survey in order to inform himself precisely what land was indicated in the enforcement notice. The enforcement notice as a statutory instrument specified, so quite clearly had to indicate the precise boundaries either by the notice itself or either by the notice together with a plan or otherwise. It thus should be possible, if an enforcement notice complied with the statutory provisions, for a person upon whom it was served to look at that notice and satisfy himself with certainty as to the land and every bit of land that was comprised in the enforcement notice. He had to be in a position to ascertain, without difficulty, precisely what land was referred to; and, in the context of this particular notice, the defendant should have been in a position to know what precise land he had to cover and what precise land he had to see.

The answer had to be the enforcement notice did not give him that precision to which he was entitled and thus, looking at notice B once again as a necessary plank and ingredient in the prosecution case, was it an ingredient that could be relied upon or whether it was so uncertain, so unprecise, a nullity, or could be attacked in any way open to the defendant in a criminal court to contend that the necessary ingredient, namely the notice B was dubious and could not be relied upon by the prosecution to allege that an offence had been committed.

Thus, he (Judge Woolley) found himself supporting the submissions made in this respect by counsel for the defendant, who said in his final submission in relation to enforcement notice B that notice B was uncertain and ambiguous and was a nullity and he relied on the *Hounslow* case.

Perhaps a more interesting and meaningful case for present purposes was that of *Ivory* v. *Secretary of State for the Environment* [1985] J.P.L. 796. Again, this was a decision of the High Court and was a decision of Kennedy J., who referred to Lord Denning's words in the case of the *Fawcett Properties* (to which I have already referred) and he said quoting from Lord Denning:

"I am of opinion that a planning condition is only void for uncertainty if it can be given no meaning or no sensible or ascertaining meaning, and not merely because it is ambiguous or leads to absurd results. It is the daily task of the courts to resolve ambiguities of language and to choose between them and to construe words so as to avoid absurdities or to put up with them; and this applied to conditions in planning permissions as well as to other documents."

Well, this was a case involving a condition and was a case within the civil ambit of proceedings and clearly what Lord Denning had said from the general principle to be ****J.P.L. 760*** applied in

the construction of planning conditions, that there should be some anxiety on the part of the courts to ascribe efficacy and meaning to planning conditions and an ambiguity which could be resolved should be resolved so as to avoid absurdities which might otherwise apply. But that was not the test he had to apply and it appeared in the course of his judgment that Kennedy J. was (like Watkins L.J. in the *Scarborough* case) fully aware of the difficulties that the criminal courts might from time to time encounter in applying Lord Denning's test.

Kennedy J. referred to this at p.797 of the report:

"The *Fawcett* case was, of course, a planning condition case and it had been rightfully emphasised before Kennedy J. that a planning condition case was, in certain material respects, different from a case concerned with an enforcement notice. In particular, where an enforcement notice had to be considered there was in the background the immediate possibility of penal sanctions, which although present for a planning condition case was a good deal more remote."

So there, the learned Judge appeared to be watering down the principle enunciated by Lord Denning and saying that different considerations would apply even in a civil context to the construction of an enforcement notice case because of the possibility of penal sanctions.

When the learned Judge referred to possibility of penal sanctions, he was inclined, with the deepest respect, to differ from him because an enforcement notice by its very nature was a penal notice and that notice did have sanctions which included the penal sanction of the criminal law; so that the recipient of a penal notice did not broach the possibility of a penal sanction, he had a penal sanction in the notice itself which was served upon him and if it was not complied with then he knew or should know that in the ultimate the penal sanction of the criminal law could be invoked, as was the case here. Of course, he was dealing with this matter in the course of a criminal trial.

Thus, while Kennedy J. was considering the matter within the ambit of a civil construction case and was dealing with it on the principles, as he understood, he did raise this warning, a warning which had been raised by Watkins J. in the Scarborough case, and at p.798 he had this to say:

"Turning now to the facts of this case Mr. Neild submitted that the words of this enforcement notice did not tell the recipient with reasonable clarity what he had done wrong and what he must do to remedy it. They were, he submitted hopelessly ambiguous and uncertain so that the appellant could not tell, with reasonable certainty, what steps he had to take to remedy the alleged breaches."

And then further down p.798 in the second paragraph: "The words, should not be construed like a statute but as with by-laws should be benevolently interpreted," then he added these words: "at least until they had to be construed within the context of a criminal prosecution."

The necessary inference seemed to be from that, that the benevolent construction which Lord Denning and others had referred to for the purpose of giving efficacy to the planning law within the ambit of civil proceedings had to bear a different construction when the courts came to consider whether or not an offence had been committed. ***J.P.L. 761*** There, benevolence ended. And, it was not part of his duty in a criminal case to make any construction on a benevolent or other basis which favoured the prosecution at the expense of the defence.

Having to construe the documents as being essential planks in the prosecution case and since counts 1 and 2, under present submission, relied upon enforcement notices A and B he had to consider enforcement notices in that context and in that context alone. The learned editor of the report of the case of *Ivory* raised this very point and he adopted what the learned editor had to say. He said this:

"Although Kennedy J. rightfully emphasised that in the end it all comes down to a question of fact and degree (to be determined here by the Court), the tenor of the decision does suggest that the Courts are not going to hold enforcement notices invalid simply because they are vague or ambiguous and that to use Ackner L.J.'s words they must be "hopelessly ambiguous and uncertain.' Kennedy J. accepted that in the case of an enforcement notice the risk of penal sanction is more direct and immediate, if perhaps more theoretical than real. If a case of an ambiguous condition should come before the magistrates' court, presumably the presumption of a narrow construction in the case of criminal sanctions would ensure that any harshness can be avoided."

He regarded enforcement notice B as also invalid and would direct the jury to return a verdict of not guilty.

Comment. Although this is a decision of the Crown Court it was considered important enough to report in this *journal* because of the distinction it draws between the approach to be taken to the construction and intepretation of enforcement notices in the criminal courts as opposed to the civil courts.

An initial question to be settled is the exact jurisdiction of the criminal courts with regard to enforcement notices. Apart from being excluded by section 243(1)(*a*) from questioning the validity of enforcement notices on certain grounds, it can be argued that the criminal courts are not the appropriate place to go into the arcane mysteries of administrative law.

Certainly this was the approach taken by Webster J. in *Quietlynn* v. *Plymouth City Council* [1987] 3 W.L.R. 189 with regard to the control of sex-shops but since then the decision in *R.* v. *Reading Crown Court, ex p. Hutchinson* [1987] 3 W.L.R. 1062 suggests that the validity of administrative orders can be raised indirectly on criminal prosecutions. In the last case it was pointed out that if the point is important it can be quickly settled at a higher level by way of case stated from the magistrates court.

None of these cases concerned enforcement notices but as Judge Woolley points out in his ruling, Watkins L.J.'s judgment in *Scarborough Borough Council* v. *Adams* is strong authority that the courts in criminal proceedings can go into the question of the validity of an enforcement notice. Of course in such a case, the criminal courts have no formal authority to quash the enforcement notice as they are solely seized with the questions of whether the criminal charge has been proved. However, even if the defence that an enforcement notice is invalid can be raised in the criminal courts, thus does not automatically means that the law applied should be different. In this regard, reference can be made to two High Court decisions where it was argued by way of case stated that notices were nullities. In *Coventry Scaffolding Company (London) Ltd.* v. *Parker* [1978] J.P.L. 127, the magistrates' court rejected the defence that the notice had failed to precisely identify the land. On an appeal by way of case stated, the High Court rejected the argument that the notice was a nullity. Similarly in *Epping Forest District Council* v. *Matthews* [1987] J.P.L. 132, where the magistrates court had accepted the defence that the notice was a nullity, the High Court on appeal found it to be valid. In neither case, did the court give any indication that the approach in the ****J.P.L. 762*** case of a criminal prosecution was different from that in a civil case. Indeed in each case the court approved the approach taken in civil cases. This must be right and it is submitted that it would be wrong for there to be different standards of validity depending upon whether the argument is raised in a prosecution or in an appeal under section 246.

Nevertheless the different contexts will create differences. As Judge Woolley pointed out, this writer in the comment on the *Ivory* case, suggested that "If a case of an ambiguous condition should come before the magistrates' court, presumably the presumption of a narrow construction in the case of criminal sanctions would ensure that any harshness can be avoided." This was not intended to suggest that there should be two standards of validity but rather that on the factual questions of whether the condition had been broken, the magistrates court should construe an open-textured but yet *valid* condition narrowly.

Turning to the substantive issues, it is difficult to authoritively ascertain the facts from Judge Woolley's ruling but it seems within regard to enforcement notice A that it was alleging a breach of a condition that the site be finished in approximately two years. In fact no such condition was attached to the permission but rather the relevant condition incorporated the letter of May 20, 1980 which in turn contained a statement that the works were expected to take approximately two years. So, apart from the fact that the actual condition was so vague as to be meaningless--expectations cannot be enforced--the purported description of the condition in the notice was very inaccurate and misleading. So this was not really a case of the enforcement notice being vague or ambiguous--on its face it was relatively clear. It was simply inaccurate in that it set out the alleged breach of a condition, which was in fact not the condition contained in the permission. The defect therefore fell with ground (b) of section 88(2) that "the matters alleged in the notice did not constitute a breach of planning control" and as such the criminal courts are excluded by section 243 from holding the notice to be invalid. In this respect, the case

is on all fours with the Divisional Court decision in *Epping District Council* v. *Scott* [1986] J.P.L. 603, where the enforcement notice similarly misdescribed the condition which was alleged to be broken. Stephen Brown L.J. stated that

”Once the notice had been upheld by the Minister or if it had not been the subject of an appeal, the time for compliance had elapsed, then that notice had to be considered and construed as a valid notice and its validity and enforcement included the requirement specified in the notice for compliance.”

As notice B, it seems that having made the allegation of the breach of planning control, it did not require any steps to be taken to remedy that said breach. It is therefore not really a case of under enforcement but of non enforcement! However it may be that the local planning authority in this notice went on to utilise the provisions introduced by the Local Government and Planning (Amendment) Act 1981, which authorised steps to be taken which do not directly relate to the breach; but it is impossible to comment further because Judge Woolley does not fully describe the form the notice took.

There is then the question of the failure to identify the land subject to the notice. In the *Coventry Scaffolding* case the Divisional Court held that a misdescription of the land did not make the notice a nullity because the appellants were fully aware of the land to which it related. Kerr L.J. laid down that the overriding principle was:

”… whether in the light of the surrounding circumstances, the recipient of the notice was sufficiently and clearly appraised of the effect of the notice and of what he had to do pursuant to it to render it just or unjust to hold him to it.”

However in that case regulation 3 of the Town and Country Planning General Development (Enforcement Notices and Appeals) Regulations 1981 did not apply and it may be that the requirement that the precise boundaries be set out, has strengthened the need for accuracy. In any case it does seem that in the present case it was very difficult for the recipient of the notice to know the extent of the land to which the notice related and that therefore it was sufficiently ambiguous to be a nullity.

APPENDIX E

***R (Sainsburys Supermarket Limited) v Wolverhampton CC* [2011] 1 AC 437**

A

Supreme Court

Regina (Sainsbury's Supermarkets Ltd) *v* Wolverhampton City Council

[2010] UKSC 20

B

2010 Feb 1, 2; May 12

Lord Phillips of Worth Matravers PSC, Lord Hope of Craighead DPSC, Lord Walker of Gestingthorpe, Baroness Hale of Richmond, Lord Brown of Eaton under Heywood, Lord Mance, Lord Collins of Mapesbury JJSC

Compulsory purchase Development Competing proposals Planning authority determining how to exercise compulsory purchase powers Whether entitled when considering benefits of rival schemes to have regard to benefits accruing to site not within proposed development area Town and Country Planning Act 1990 (c 8) (as amended by Planning and Compulsory Purchase Act 2004 (c 5), s 99, Sch 9), ss 226(1)(a)(1A), 233

C

The claimant supermarket company owned or controlled 86% of site A and another supermarket company, T Ltd, owned or controlled most of the remainder of the site. Both companies wished to develop site A but, unless the defendant local authority used its compulsory purchase powers in respect of that site, neither of the proposed developments could take place. T Ltd also owned site B, about 850 metres away, which contained a number of listed buildings which were in poor condition. For many years it had been an objective of the local authority to secure the regeneration of site B. T Ltd, who considered that it was not financially viable to develop site B on its own, offered to link its scheme for site A with the redevelopment of site B on the basis that that would amount to a subsidy at least equal to the loss it would sustain in carrying out the development of site B. The local authority approved in principle the making of a compulsory purchase order under section 226(1)(a) of the Town and Country Planning Act 1990[1] in respect of the claimant's land at site A to facilitate a development of the site by T Ltd. In resolving to make that order, the local authority took into account T Ltd's commitment to develop site B. The claimant sought judicial review of the local authority's decision on the ground that it was illegitimate for the local authority, in resolving to make the compulsory purchase order, to have regard to the regeneration of site B. The judge dismissed the claim. On the claimant's appeal, the Court of Appeal held that section 226(1)(a) required the local authority to be satisfied that the compulsory purchase order would facilitate the redevelopment of site A but that section 226(1A) required it to consider whether and to what extent the redevelopment of site A would bring well being benefits to a wider area and that, if a redevelopment was likely to act as a catalyst for the redevelopment of some other site, such catalytic effects were capable of falling within the scope of section 226(1A) and it dismissed the appeal.

D E F G

On the claimant's appeal

Held, (1) that the principles which applied to the determination of planning applications could apply, by analogy, to compulsory acquisition for development purposes, provided that (per Lord Walker of Gestingthorpe, Baroness Hale of Richmond, Lord Mance and Lord Collins of Mapesbury JJSC) because of the serious invasion of proprietary rights involved in compulsory acquisition, a strict approach to the application of those principles was adopted; that, therefore, a local authority

H

[1] Town and Country Planning Act 1990, as amended, ss 226(1)(a)(1A), 233: see post, para 108.

could take into account off site benefits of a proposed development provided that such benefits were related to or connected with the development for which the compulsory acquisition was made; and that (per Lord Phillips of Worth Matravers PSC, Lord Walker of Gestingthorpe, Baroness Hale of Richmond, Lord Mance and Lord Collins of Mapesbury JJSC) such a connection had to be a real rather than a fanciful or remote one and (Lord Brown of Eaton under Heywood JSC dissenting) in the absence of any other connection a cross subsidy from the acquisition site to another site would not suffice (post, paras 70, 71 72, 80, 82, 83, 84, 89, 90, 97, 98, 120, 127 128, 134 135, 137 138, 151, 168, 173, 181).

(2) That (per Lord Walker of Gestingthorpe, Baroness Hale of Richmond, Lord Mance and Lord Collins of Mapesbury JJSC) the power of compulsory acquisition had to be capable of being exercised under section 226(1)(a) of the 1990 Act before the limitation in section 226(1A) applied; that (Lord Brown of Eaton under Heywood JSC dissenting) the claimed financial connection between the two developments did not amount to a relevant matter for the purposes of section 226(1)(a); and that (Lord Phillips of Worth Matravers PSC and Lord Hope of Craighead DPSC dissenting) no different result was required by the fact that T Ltd and the claimant co owned and were in competition for site A and the council was proposing to dispose of the land to T Ltd under section 233 (post, paras 74, 75, 76, 80, 83, 90, 91, 96, 97, 100, 106, 151).

(3) Allowing the appeal (Lord Phillips of Worth Matravers PSC, Lord Hope of Craighead DPSC and Lord Brown of Eaton under Heywood JSC dissenting), that, accordingly, there should be a declaration that the opportunity for redevelopment of site B was not a lawful consideration in deciding whether to make a compulsory purchase order in relation to site A (post, paras 79, 80, 89, 90, 97, 106).

R v Westminster City Council, Ex p Monahan [1990] 1 QB 87, CA, *R v Plymouth City Council, Ex p Plymouth and South Devon Co operative Society Ltd* (1993) 67 P & CR 78, CA, *Tesco Stores Ltd v Secretary of State for the Environment* [1995] 1 WLR 759, HL(E) and *Standard Commercial Property Securities Ltd v Glasgow City Council (No 2)* 2007 SC (HL) 33, HL(Sc) considered.

Decision of the Court of Appeal [2009] EWCA Civ 835; [2009] 3 EGLR 94 reversed.

The following cases are referred to in the judgments:

Associated Provincial Picture Houses Ltd v Wednesbury Corpn [1948] 1 KB 223; [1947] 2 All ER 680, CA

Bradford (City of) Metropolitan Council v Secretary of State for the Environment (1986) 53 P & CR 55, CA

Brighton Borough Council v Secretary of State for the Environment (1978) 39 P & CR 46

Chesterfield Properties plc v Secretary of State for the Environment (1997) 76 P & CR 117

Clunies Ross v Commonwealth of Australia (1984) 155 CLR 193

Galloway v Mayor and Commonalty of London (1866) LR 1 HL 34, HL(E)

Grampian Regional Council v Secretary of State for Scotland 1984 SC (HL) 58, HL(Sc)

Hall & Co Ltd v Shoreham by Sea Urban District Council [1964] 1 WLR 240; [1964] 1 All ER 1, CA

Hanks v Minister of Housing and Local Government [1963] 1 QB 999; [1962] 3 WLR 1482; [1963] 1 All ER 47

Kelo v City of New London, Connecticut (2005) 554 US 469

Municipal Council of Sydney v Campbell [1925] AC 338, PC

Newbury District Council v Secretary of State for the Environment [1981] AC 578; [1980] 2 WLR 379; [1980] 1 All ER 731, HL(E)

Prest v Secretary of State for Wales (1982) 81 LGR 193, CA

Pyx Granite Co Ltd v Ministry of Housing and Local Government [1958] 1 QB 554; [1958] 2 WLR 371; [1958] 1 All ER 625, CA

R v Plymouth City Council, Ex p Plymouth and South Devon Co operative Society Ltd (1993) 67 P & CR 78; [1993] JPL 538, CA

R v Secretary of State for Transport, Ex p de Rothschild [1989] 1 All ER 933; 87 LGR 511; sub nom *de Rothschild v Secretary of State for Transport* 57 P & CR 330, CA

R v Westminster City Council, Ex p Monahan [1990] 1 QB 87; [1989] 3 WLR 408; [1989] 2 All ER 74, CA

R & R Fazzolari Pty Ltd v Parramatta City Council [2009] HCA 12; 237 CLR 603

Rugby Joint Water Board v Shaw Fox [1973] AC 202; [1972] 2 WLR 757; [1972] 1 All ER 1057, HL(E)

Simpsons Motor Sales (London) Ltd v Hendon Corpn [1964] AC 1088; [1963] 2 WLR 1187; [1963] 2 All ER 484, HL(E)

Sosmo Trust Ltd v Secretary of State for the Environment [1983] JPL 806

Sovmots Investments Ltd v Secretary of State for the Environment [1977] QB 411; [1976] 2 WLR 73; [1976] 1 All ER 178; [1977] QB 411; [1976] 3 WLR 597; [1976] 3 All ER 720, CA; [1979] AC 144; [1977] 2 WLR 951; [1977] 2 All ER 385, HL(E)

Standard Commercial Property Securities Ltd v Glasgow City Council (No 2) 2005 SLT 144; [2006] UKHL 50; 2007 SC (HL) 33, HL(Sc)

Tesco Stores Ltd v Secretary of State for the Environment [1995] 1 WLR 759; [1995] 2 All ER 636, HL(E)

Waters v Welsh Development Agency [2004] UKHL 19; [2004] 1 WLR 1304; [2004] 2 All ER 915, HL(E)

Westminster Renslade Ltd v Secretary of State for the Environment (1983) 48 P & CR 255

The following additional case was cited in argument:

Belfields Ltd v Secretary of State for Communities and Local Government [2007] EWHC 3040 (Admin); [2008] JPL 954

APPEAL from the Court of Appeal

The claimant, Sainsbury's Supermarkets Ltd, appealed, with permission of the Supreme Court (Lord Walker of Gestingthorpe, Lord Mance and Lord Collins of Mapesbury JJSC) granted on 5 November 2009, from a decision of the Court of Appeal (Ward, Mummery, Sullivan LJJ) [2009] 3 EGLR 94 given on 31 July 2009, dismissing its appeal against a decision of Elias J [2009] EWHC 134 (Admin) given on 3 February 2009 whereby he had dismissed its claim for judicial review of the decision of the defendant local authority, Wolverhampton City Council, given on 30 January 2008 to give approval in principle to the making of a compulsory purchase order under section 226(1)(a) of the Town and Country Planning Act 1990 in respect of land owned by the claimant. Tesco Stores Ltd was an interested party

The facts are stated in the judgment of Lord Collins of Mapesbury JSC.

Christopher Lockhart-Mummery QC, *Eian Caws* and *Charles Banner* (instructed by *CMS Cameron McKenna LLP*) for the claimant.

Compulsory purchase powers should only be exercised as a last resort, where the interference with property rights is necessary to achieve the relevant objectives. The court must carefully scrutinise the exercise of compulsory purchase powers to ensure that the statutory authority has been properly exercised: see *Prest v Secretary of State for Wales* (1982) 81 LGR 193, 198, 211. In deciding whether, and how, to exercise

compulsory purchase powers in relation to a site under section 226 of the Town and Country Planning Act 1990, as amended, a local authority may only lawfully take into account those factors relevant to the achievement of the statutory purpose. A proposal to cross-subsidise development elsewhere is entirely unrelated to the achievement of the statutory purpose and, in making its decision by reference to that factor, the local authority was pursuing a purpose outside the statutory scheme and/or was taking into account an immaterial consideration.

The Court of Appeal's construction of section 226(1A) was fundamentally flawed because it treated the terms of subsection (1A) as an enlargement, rather than as a restriction, of the powers under subsection (1)(a). The power under subsection (1)(a) may be exercised by a local authority if it thinks that the acquisition will facilitate, inter alia, the carrying out of redevelopment on the land to be acquired. However, by virtue of subsection (1A), it may only proceed to exercise that power if it thinks that the redevelopment is likely to contribute to one of the specified well-being objects. Subsection (1A) does not, therefore, confer any power on the local authority to acquire a site under subsection (1)(a) *because* such acquisition is likely to contribute to the well-being objects, but it prevents such acquisition if those benefits are not considered likely to arise as a result of the acquisition: see *Belfields Ltd v Secretary of State for Communities and Local Government* [2008] JPL 954. The exercise of the power of acquisition is rooted in subsection (1)(a) and requires the authority to decide that the acquisition will facilitate the redevelopment of the land that it proposes to acquire rather than some other unrelated land in a wholly different location. The Court of Appeal wrongly treated the limitation on the exercise of the power provided by subsection (1A) as providing a new class of material considerations which may be taken into account by a local authority in deciding whether to exercise its power compulsorily to acquire land under section 226. The ministerial advice in ODPM Circular 06/2004, *Compulsory Purchase and the Crichel Down Rules*, gives no support to the Court of Appeal's approach to the construction of subsection (1A). The claimant's approach to section 226 reflects the approach adopted by Parliament in section 3 of the Local Government Act 2000, under which the power to promote well-being in section 2 of that Act is curtailed by any prohibition, restriction or limitation imposed by another statute. In the field of compulsory purchase, subsections (1)(a) and (1A) of section 226 of the 1990 Act set such constraints on a local authority's powers of acquisition.

Irrespective of the provisions of section 226(1A), an acquiring authority, when making a compulsory purchase order of a site under section 226(1)(a), and the Secretary of State when authorising that order, may not have regard to a commitment to secure through cross-subsidy the development of an unrelated site, thereby seeking to achieve well-being benefits from such development. The lawfulness of the exercise of a statutory discretion is to be determined by looking at the relevant legislation and its scope and object in order to assess whether irrelevant considerations have motivated or influenced the decision. It is also fundamental to the exercise of discretionary powers that decision-makers must not pursue collateral purposes or ends which are outside the objects and purposes of the statute. Where compulsory purchase is concerned, the courts have consistently confined the exercise of such powers strictly to the stated statutory purpose:

see *Galloway v Mayor and Commonalty of London* (1866) LR 1 HL 34, 43. Where a plurality of purposes is pursued, but one purpose is unauthorised by the statute, the power will have been invalidly exercised. Subsection (1)(a) does not authorise the acquisition of land in order to facilitate the development of some other, unrelated land: see *Chesterfield Properties plc v Secretary of State for the Environment* (1997) 76 P & CR 117, 125. The contentions of the local authority and the interested party are contrary to the intention of Parliament as expressed in the clear language of section 226. Parliament has provided that the power of subsection (1)(a) is not to be exercised unless the authority thinks that well-being will result from the carrying out of development on the site to be acquired. If Parliament had contemplated that the achievement of the wider well-being of the local authority's area was to be a relevant factor in the overall discretion arising under section 226(1)(a), it would have expressed subsection (1A) differently. A local authority cannot use its powers for an ulterior object, however desirable that object may seem to it to be in the public interest: see *Pyx Granite Co Ltd v Ministry of Housing and Local Government* [1958] 1 QB 554, 572 and *Tesco Stores Ltd v Secretary of State for the Environment* [1995] 1 WLR 759, 772.

In the context of planning permission, an offered planning obligation which has nothing to do with the proposed development, apart from the fact that it is offered by the developer, is not a material consideration and is regarded as an attempt to buy planning permission: see the *Tesco Stores* case, at p 770. Benefits which are embellishments of the development itself or by way of appropriate mitigation to offset the impacts arising from the development can lawfully be taken into account: see *R v Plymouth City Council, Ex p Plymouth and South Devon Co-operative Society Ltd* [1993] JPL 538. The possibility of one development cross-subsidising another highly desirable development is capable of being a material consideration under section 70(2) of the 1990 Act if the two developments form part of one composite development project: see *R v Westminster City Council, Ex p Monahan* [1990] 1 QB 87. Whilst there is not an exact parallel between the scope of the material considerations under section 70(2) and those under section 226, there is no proper basis for distinguishing the approach taken in the planning cases from that involving the exercise of compulsory powers of acquisition. The Court of Appeal's suggestion that, unlike section 70(2), section 226(1A) imposes an express obligation to have regard to off-site benefits, is incorrect. The effect of section 226(1A) is to require consideration of the well-being benefits resulting from the physical development of the site to be acquired, which may in some cases also be experienced off-site, but not to have regard to benefits that might flow from the development of another unrelated site, purely because the prospective developer of the acquired site has chosen to create a financial link between the two developments. The Court of Appeal also erred in attaching weight to the fact that the financial viability of an application for planning permission is unlikely to be a material consideration for the purposes of determining an application under section 70(2) but that it was a highly material factor in the consideration by the Secretary of State of the merits of authorising compulsory acquisition. A distinction has to be made between the viability of the development for which the compulsory purchase order is being acquired and the viability of the development of some other unrelated

land. The former is a material consideration but that does not support the proposition that the latter is also material. The Court of Appeal also wrongly attached significance to the distinction between the scrutiny given to a compulsory purchase order compared with that given to a grant of planning permission. The scope of the power under section 226 cannot be affected by the fact that its purported exercise may be subject to subsequent scrutiny. The courts have defined the legitimacy of off-site benefits by reference to their direct relationship to the development in question in order to avoid a regime whereby planning permission can be granted to the highest bidder. There is an equal need to draw the same dividing line in the case of compulsory purchase, if not a greater need in view of its consequences. A comparison of the statutory language supports that position. The courts have carved out of the phrase "material considerations" in section 70(2) the principle of benefits related to the development. The far more specific language of subsections (1)(a) and (1A) of section 226 compels the same conclusion. There is no discernible justification or logic for treating as material in the context of a compulsory acquisition brought under the 1990 Act a consideration to which it would be unlawful for a planning authority to have regard when deciding whether to grant planning permission for the development which the compulsory purchase order is to facilitate. *Standard Commercial Property Securities Ltd v Glasgow City Council (No 2)* 2005 SLT 144; 2007 SC (HL) 33 concerns a different statutory provision and can be distinguished.

Neil King QC and *Guy Williams* (instructed by *Wragge & Co LLP, Birmingham*) for the local authority.

In order lawfully to exercise its powers of compulsory acquisition under section 226(1)(a) of the 1990 Act a local authority must think that (i) the acquisition will facilitate the carrying out of development, redevelopment or improvement on or in relation to the land; and (ii) the development is likely to contribute to the achievement of the promotion or improvement of the economic, social and/or environmental well-being of their area. Thus, subsection (1)(a) is concerned with the purpose for which land may be compulsorily acquired and subsection (1A) is concerned with the consequences, in terms of achieving specific objects, which may flow from the acquisition; but the requirements of both provisions must be met before a compulsory purchase order can be made. The purpose of the acquisition of the claimant's land falls squarely within section 226(1)(a). The development which will be facilitated by the acquisition will then, via a cross-subsidy to the related development, also result in well-being benefits within section 226(1A). ODPM Circular 06/2004 correctly advises that the statutory concept of well-being extends to the whole of the relevant local authority area: see Appendix A, para 6.

The words of section 226(1A) should be given their ordinary meaning. If Parliament had wished to confine consideration to the economic, social and environmental well-being of only the land being acquired, it would have done so, although that would have made little sense. Section 226(1A) requires an acquiring authority to satisfy itself that the proposed acquisition will have beneficial consequences in terms of the well-being of its area. The nature of those consequences will vary widely depending on the circumstances; but there is no reason why bringing forward the beneficial

A development of other land in its area is incapable, as a matter of law, of constituting such a consequence. The claimant's argument ignores the requirements of subsection (1A), by virtue of which the authority must think that the proposed development "is likely to contribute to the achievement of" the well-being objects of its area, and it is inconsistent with Government policy as set out in ODPM Circular 06/2004 that the benefit to be derived from exercising the power is not restricted to the area subject to the order, as the concept is applied to the well-being of the whole, or any part, of the acquiring authority's area. The words "contribute to" are wide. As a matter of ordinary language the proposed development will contribute to well-being objectives through the economic, social and environmental benefits which will result from the development of both sites. There is no difference in principle, in terms of the requirements of section 226(1A), between the benefits resulting from the proposed development itself and the benefits resulting from the related development. Section 226 is drafted in broad terms to encompass wide ranging well-being benefits. The necessary connection between the well-being benefit in question and the development of the compulsory purchase order land is clearly set out within subsection (1A). There is no reason to restrict the ordinary meaning of those words. Without the cross-subsidy which the related development will provide, the development of the compulsory purchase order site is unlikely to happen. Thus the development of the compulsory purchase order site is likely to contribute to the objects set out in section 226(1A) through both the development of that site and the consequential development of the other site. Accordingly, the benefits of the related development may lawfully be taken into account by the local authority by reference to section 226(1A) in exercising its powers under section 226(1)(a).

It is not appropriate to carry across dicta in cases which are concerned with the lawfulness of planning conditions and section 106 agreements directly and without any modification to the power to make compulsory purchase orders under section 226. The reasoning of the Court of Appeal, in drawing a distinction between the considerations material to the grant of planning permission under section 70(2) and the approach to the compulsory acquisition of land under section 226, is endorsed. The relevance of the well-being benefits which will be secured through the cross-subsidy which one development will provide for the other is not a matter of law but of weight for the decision-maker. The lawfulness of the considerations taken into account by the local authority should be resolved by reference to the plain wording of section 226 without more.

However, if it is appropriate to apply, in some way, the principles established in relation to section 70(2), it must be done in such a way as properly to reflect the different context and statutory purpose of compulsory acquisition, namely to facilitate development and to promote the well-being of the authority's area. *Tesco Stores Ltd v Secretary of State for the Environment* [1995] 1 WLR 759 does not address, nor does it therefore seek to prescribe, what matters may, or may not, be taken into account by a local authority when deciding whether to exercise its powers of compulsory acquisition in order to facilitate the carrying out of one or other of two, or more, rival schemes of development on a site. In deciding whether to make a compulsory purchase order in such circumstances, there can be no reason in principle why the local authority should be precluded as a matter of law

from taking into account all the benefits to its area which will result from the making of the order: see *Standard Commercial Property Securities Ltd v Glasgow City Council (No 2)* 2007 SC (HL) 33, paras 39, 70. The authority is deciding whether to use its powers of compulsory acquisition in order to facilitate development which would not take place without intervention and so bring about well-being benefits to its area as a whole. Regard must be had to the statutory obligation to take wider well-being benefits into account, and the significance of viability and well-being. [Reference was also made to *R v Plymouth City Council, Ex p Plymouth and South Devon Co-operative Society Ltd* [1993] JPL 538.]

The weight to be attributed to the cross-subsidy is a matter for the authority, subject to a challenge for unreasonableness: see *Associated Provincial Picture Houses Ltd v Wednesbury Corpn* [1948] 1 KB 223. The potential materiality of cross-subsidy and financial considerations in the planning permission context is established by *R v Westminster City Council, Ex p Monahan* [1990] 1 QB 87: see also *Brighton Borough Council v Secretary of State for the Environment* (1978) 39 P & CR 46; *Sosmo Trust Ltd v Secretary of State for the Environment* [1983] JPL 806 and *Sovmots Investments Ltd v Secretary of State for the Environment* [1977] QB 411.

Even if the well-being benefits which would result from the related development could not lawfully be taken into consideration under section 226(1A), in choosing between the two development proposals in the context of deciding which one, if either, to facilitate through the exercise of its powers of compulsory acquisition, the authority was entitled to take account of the overall benefits to its area which each scheme would provide. Such an approach does not enable a developer to buy the exercise of compulsory purchase powers, rather it means that the authority may take all material considerations into account in determining whether, and in whose favour, to exercise powers of compulsory acquisition.

Christopher Katkowski QC and *Scott Lyness* (instructed by *Ashurst LLP*) for the interested party.

The arguments of the local authority are adopted.

Under section 226(1A) the question is not whether the development is *likely to contribute* to the achievement of any one or more of the specified objects but whether the local authority *think that* it is likely to so contribute. The decision-maker is the local authority and it is then for the Secretary of State, if objection is made, to decide whether the development is likely to contribute to the achievement of one or more of the specified objects. A discretion is therefore given to the decision-maker and there are no clear grounds for interfering with it in this case.

In any event, the statutory purpose is not to be determined from subsection (1)(a) exclusively but from subsections (1)(a) and (1A) together. Even if the benefits of the related development do not fall within subsection (1A), where there is a competition between two rival contenders there is no public law reason not to allow additional benefits put forward by one contender to be taken into account.

Lockhart-Mummery QC replied.

The court took time for consideration.

12 May 2010. The following judgments were handed down.

LORD COLLINS OF MAPESBURY JSC

Introduction

1 This appeal is about compulsory acquisition of private property by local authorities under the Town and Country Planning Act 1990 in connection with the development or redevelopment of land. It raises for the first time, in the context of compulsory acquisition, a number of controversial issues which have arisen in the context of planning permission, including these: how far a local authority may go in finding a solution to problems caused by the deterioration of listed buildings; to what extent a local authority may take into account off-site benefits offered by a developer; and what offers (if any) made by a developer infringe the principle or policy that planning permissions may not be bought or sold.

2 The Raglan Street site is a semi-derelict site situated immediately to the west of, and just outside, the Wolverhampton Ring Road, which encircles the Wolverhampton city centre retail, business and leisure core. Sainsbury's Supermarkets Ltd ("Sainsbury's") owns or controls 86% of the site and Tesco Stores Ltd ("Tesco") controls most of the remainder. Sainsbury's and Tesco each wish to develop the Raglan Street site. Outline planning permission has been granted to Tesco, and the local authority has resolved to grant outline planning permission to Sainsbury's.

3 Tesco controls a site in the Wolverhampton city centre known as the Royal Hospital site, which is about 850 metres away from the Raglan Street site on the other side of the city centre. The Royal Hospital site is a large site with a number of listed buildings which are in poor condition. It has been an objective of Wolverhampton City Council ("the council") over several years to secure the regeneration of the Royal Hospital site. Tesco's position has been that it was not financially viable to develop the Royal Hospital site in accordance with the council's planning requirements and its space requirements on the site for the primary care trust. It offered to link its scheme for the Raglan Street site with the redevelopment of the Royal Hospital site and said that this would amount to a subsidy at least equal to the loss it would sustain in carrying out the Royal Hospital site development.

4 The council accepted that the Royal Hospital site would not be attractive to developers if it were restricted to the council's scheme. Even on optimistic assumptions, there did not appear to be a level of profit available which would make the site an attractive proposition when weighed against the risks. Development was unlikely to take place for the foreseeable future unless Tesco's proposals were brought forward through a cross-subsidy from the Raglan Street site.

5 In January 2008 the council approved in principle the making of a compulsory purchase order ("CPO") under section 226(1)(a) of the 1990 Act in respect of the land owned by Sainsbury's at the Raglan Street site to facilitate a development of the site by Tesco. In resolving to make the CPO, the council took into account Tesco's commitment to develop the Royal Hospital site (and indeed passed a resolution which indicated that one of the purposes of the CPO was to facilitate the carrying out of the Royal Hospital site development).

6 Sainsbury's wishes to develop the Raglan Street site and claims that it is illegitimate for the council, in resolving to make a CPO of the Sainsbury's land on the Raglan Street site, to have regard to the regeneration of the Royal Hospital site to which Tesco will be committed if it is able to develop the Raglan Street site. Elias J dismissed the claim by Sainsbury's for judicial review of the council's decision, and the Court of Appeal [2009] 3 EGLR 94 dismissed an appeal in a judgment of Sullivan LJ, with whom Ward and Mummery LJJ agreed.

Compulsory purchase

7 Section 226 of the 1990 Act, as amended by section 99 of and Schedule 9 to the Planning and Compulsory Purchase Act 2004, provides:

> "(1) A local authority to whom this section applies shall, on being authorised to do so by the Secretary of State, have power to acquire compulsorily any land in their area— (a) if the authority think that the acquisition will facilitate the carrying out of development, redevelopment or improvement on or in relation to the land, or (b) which is required for a purpose which it is necessary to achieve in the interests of the proper planning of an area in which the land is situated.
>
> "(1A) But a local authority must not exercise the power under paragraph (a) of subsection (1) unless they think that the development, redevelopment or improvement is likely to contribute to the achievement of any one or more of the following objects— (a) the promotion or improvement of the economic well-being of their area; (b) the promotion or improvement of the social well-being of their area; (c) the promotion or improvement of the environmental well-being of their area."

8 CPOs made by a local authority under section 226 must be confirmed by the Secretary of State. If the owner of the land which is the subject of a CPO objects to the order, the Secretary of State will appoint an independent inspector to conduct a public inquiry. The inspector's report and recommendation will be considered by the Secretary of State when a decision whether or not to confirm the CPO is taken. Where land has been acquired by a local authority for planning purposes, the authority may dispose of the land to secure the best use of that or other land, or to secure the construction of buildings needed for the proper planning of the area: section 233(1).

9 Compulsory acquisition by public authorities for public purposes has always been in this country entirely a creature of statute: *Rugby Joint Water Board v Shaw-Fox* [1973] AC 202, 214. The courts have been astute to impose a strict construction on statutes expropriating private property, and to ensure that rights of compulsory acquisition granted for a specified purpose may not be used for a different or collateral purpose: see Taggart, "Expropriation, Public Purpose and the Constitution", in *The Golden Metwand and the Crooked Cord: Essays on Public Law in Honour of Sir William Wade*, (1998) ed Forsyth & Hare, p 91.

10 In *Prest v Secretary of State for Wales* (1982) 81 LGR 193, 198 Lord Denning MR said:

> "I regard it as a principle of our constitutional law that no citizen is to be deprived of his land by any public authority against his will, unless it is

A expressly authorised by Parliament and the public interest decisively so demands . . ."

and Watkins LJ said, at pp 211–212:

"The taking of a person's land against his will is a serious invasion of his proprietary rights. The use of statutory authority for the destruction of those rights requires to be most carefully scrutinised. The courts must B be vigilant to see to it that that authority is not abused. It must not be used unless it is clear that the Secretary of State has allowed those rights to be violated by a decision based upon the right legal principles, adequate evidence and proper consideration of the factor which sways his mind into confirmation of the order sought."

C **11** Recently, in the High Court of Australia, French CJ said in *R & R Fazzolari Pty Ltd v Parramatta City Council* [2009] HCA 12, paras 40, 42, 43:

"40. Private property rights, although subject to compulsory acquisition by statute, have long been hedged about by the common law with protections. These protections are not absolute but take the form of interpretative approaches where statutes are said to affect such rights."

D "42. The attribution by Blackstone, of caution to the legislature in exercising its power over private property, is reflected in what has been called a presumption, in the interpretation of statutes, against an intention to interfere with vested property rights . . .

"43. The terminology of 'presumption' is linked to that of 'legislative intention'. As a practical matter it means that, where a statute is capable E of more than one construction, that construction will be chosen which interferes least with private property rights."

The facts

12 It was originally envisaged by Tesco that the Royal Hospital site would be a suitable location for a scheme which made provision for a F superstore whilst retaining and restoring much of the fabric of the former Royal Hospital buildings.

13 In January 2001, Sainsbury's applied for outline planning permission to redevelop the Raglan Street site for a mixed use development comprising retail uses, residential, leisure, parking and associated highway and access works. The application was called in by the Secretary of State and, following a public inquiry, planning permission was granted on G 12 November 2002.

14 In early 2005 Sainsbury's informed the council that it no longer intended to develop the Raglan Street site, because it had agreed to sell its interests in the Raglan Street site to Tesco, which was developing a revised scheme. Sale documentation was agreed and engrossments circulated for execution. In addition, Tesco acquired interests in the Raglan Street site owned by third parties.

H **15** On 28 June 2005 the council's cabinet (resources) panel reported on the proposed Tesco scheme, and said that the grant of permission would be linked to obligations relating to the Royal Hospital site. The panel approved in principle the use of compulsory purchase powers to assemble the Raglan Street site should the need arise. This was on the then understanding that the

interests of Sainsbury's would be transferred to Tesco by agreement and that any CPO would be required only to acquire minor interests within the site.

16 On 3 November 2005 Tesco entered into a conditional sale agreement with the council, which provided for the sale of the council's interest in the Raglan Street site to Tesco and for the council to use its compulsory purchase powers, if necessary, to facilitate the acquisition of outstanding interests in the site. The agreement also imposed an obligation on Tesco to carry out and complete works of demolition and repairs at the Royal Hospital site before the commencement of works at the Raglan Street site. This agreement was replaced in July 2009 by a conditional agreement for lease.

17 Following exchange of the agreement with the council and its acquisition of third party interests in the Raglan Street site, Tesco sought an exchange of its agreement with Sainsbury's. This did not happen because Sainsbury's decided that it did in fact wish to redevelop the Raglan Street site, and to submit a fresh planning application for redevelopment of the site.

18 In accordance with its obligations in the agreement with the council, Tesco submitted planning applications to the council for the development of both the Royal Hospital site (in April 2006) and the Raglan Street site (in July 2006). In October 2006, Sainsbury's submitted a planning application for a new scheme for redevelopment of the Raglan Street site. Both applications for the redevelopment of the Raglan Street site proposed a supermarket with parking and a petrol filling station, private flats, sheltered housing and small commercial units. The main differences between the schemes were that the Tesco supermarket was more than 50% larger than Sainsbury's, and the Sainsbury's scheme proposed retail warehouses and a leisure centre. Outline planning permission was recommended for both schemes.

19 On 6 December 2006 the council's cabinet noted that Tesco and Sainsbury's were unable to agree on how the site should be developed and resolved to approve in principle the use of CPO powers in relation to the Raglan Street site if necessary, subject to a further report to cabinet setting out all relevant factors including the criteria for selecting the preferred redevelopment scheme.

20 Each of the applications by Sainsbury's and Tesco for development of the Raglan Street site came before the council's planning committee on 13 March 2007 when it was resolved to grant both applications subject to various requirements. In the report to committee concerning the application by Tesco, the case officer said:

> "Initially Tesco indicated that they wished the development of the Royal Hospital site to be linked to the grant of permission for the development of Raglan Street. However, when their agents were asked how such a linkage could legitimately be made, they were unable to make a suggestion. There is therefore no such linkage for committee to consider."

21 Tesco's application for planning permission for development of the Raglan Street site was therefore considered without reference to the benefits of redevelopment of the Royal Hospital site. Planning permission for the Tesco proposal at the Raglan Street site was granted on 22 July 2009, which was also the date of a new conditional agreement for lease between the council and Tesco replacing the conditional agreement for sale of

A 3 November 2005. The agreement gives the council an option to purchase Tesco's interest in the Royal Hospital building. One of the terms is that, once certain works have been carried out by Tesco, then Tesco will make a balancing payment to the council which is to be used solely in connection with the completion of the Royal Hospital building works: schedule 1.

22 On 27 June 2007, in order to decide whose land to acquire compulsorily to facilitate the development of the Raglan Street site, the B council's cabinet resolved to invite both Sainsbury's and Tesco to demonstrate the extent to which their respective development proposals met the council's objectives for the Raglan Street area. It also resolved that Sainsbury's and Tesco be advised that the council's preferred outcome remained that the parties would negotiate with each other to resolve the impasse.

C **23** On 30 January 2008 a report was presented to the council's cabinet which, having set out the statutory background and relevant advice in ODPM Circular 06/2004, *Compulsory Purchase and the Crichel Down Rules*, stated:

> "The remaining sections of this report consider the two schemes against the legal and policy tests set out in the Act and the circular and D compare them with each other. There is no doubt that both the Tesco and Sainsbury's schemes would fulfil the statutory purpose of 'facilitating the carrying out of development, redevelopment or improvement on or in relation to the land'."

24 The report noted that both schemes for the Raglan Street site were acceptable in planning terms. The report went on to describe the E circumstances relating to the development of the Royal Hospital site by Tesco. Tesco was no longer seeking planning permission for a retail store on the site. The council had promoted a proposal by Tesco for a mixed use development comprising housing, offices, primary care centre and administrative offices, retail, financial services and professional offices and food and drink uses, together with associated parking. It would provide F accommodation for a primary care centre and offices for the primary care trust.

25 The report said that Tesco's position was that a Royal Hospital site development in accordance with the council's aspirations was not viable and that the return to a developer in a scheme according with the council's aspirations (including 20% affordable housing content) would involve a substantial loss, which would mainly be caused by the refurbishment of the G listed building element for the primary care trust. The scheme would be viable only through a cross-subsidy from the development of the Raglan Street site.

26 The report went on to say that whilst there was disagreement between Tesco and Sainsbury's about the viability of the Royal Hospital site development, it was clear that Tesco was unlikely to carry out its scheme H unless it was selected as the operator of the store at Raglan Street and were thus able to cross-subsidise the Royal Hospital site development.

27 The report concluded:

> "both schemes would bring appreciable planning benefits and would promote and improve the economic, social and environmental well-being

of the city. However, the Tesco scheme enjoys a decisive advantage in that it will enable the development of the RHS to be brought forward in a manner that is consistent with the council's planning objectives for that site. Making a CPO for the Tesco scheme will therefore result in a significantly greater contribution to the economic, social and environmental well-being of the council's area than would making a CPO for the Sainsbury's scheme. On this basis, and subject to the satisfactory resolution of the matters identified in the recommendations set out at the beginning of this report, there is a compelling case in the public interest to make a CPO to enable the Tesco scheme to proceed."

28 In accordance with the recommendation made in the report, the council's cabinet resolved to approve the principle of the making of a CPO of land owned by Sainsbury's to facilitate the carrying out of (i) Tesco's development proposals for the Raglan Street site and (ii) a mixed use retail, office and residential development of the Royal Hospital site, subject to, amongst other matters, Tesco producing satisfactory evidence of a commitment to the carrying out of the development of the Royal Hospital site before consideration be given to a resolution to authorise the making of the CPO. The cabinet decision of 30 January 2008 was referred to the council's scrutiny board and on 19 February 2008 the board resolved that the report be received and noted.

The issues

29 In the absence of agreement between Sainsbury's and Tesco, the only way in which the Raglan Street site can come forward for redevelopment is through the exercise of compulsory purchase powers. Section 226(1)(a) provides that the local authority has power to acquire compulsorily any land in its area if it thinks "that the acquisition will facilitate the carrying out of development, redevelopment or improvement on or in relation to the land". A local authority may use its powers of compulsory purchase to assemble a site for development by a preferred developer: *Standard Commercial Property Securities Ltd v Glasgow City Council (No 2)* 2007 SC (HL) 33, para 6. It is common ground that the compulsory acquisition of the outstanding interests in the Raglan Street site would facilitate the carrying out of development, redevelopment or improvement on the land under either the Tesco scheme or the Sainsbury's scheme such that the test in section 226(1)(a) is met.

30 So also it is common ground that both schemes of redevelopment on the Raglan Street site would promote and improve the economic, social and environmental well-being of the city and therefore satisfy the requirement in section 226(1A) that a local authority must not exercise the power unless it thinks that "the development, redevelopment or improvement is likely to contribute to the achievement" of the well-being objects set out in the subsection. It is also agreed that the redevelopment of the Royal Hospital site as proposed would bring well-being benefits to the council's area, but Sainsbury's says that, contrary to the approach of the Court of Appeal, those well-being objects are not within section 226(1A), because they do not flow from the proposed redevelopment of the Raglan Street site.

31 The issues on this appeal are these. (1) Whether, on a proper construction of section 226(1A), the council was entitled to take into

account, in discharging its duty under that subsection, a commitment by the developer of a site part of which was to be the subject of a CPO to secure (by way of cross-subsidy) the development, redevelopment or improvement of another (unconnected) site and so achieve further well-being benefits for the area. (2) Whether the council was entitled, in deciding whether and how to exercise its powers under section 226(1)(a), to take into account such a commitment by a developer.

32 On the first issue, relating to the interpretation and application of section 226(1A), the Court of Appeal, differing from Elias J, found in favour of the council and Tesco. On the second issue, relating to section 226(1)(a), Elias J found in favour of the council and Tesco, but the Court of Appeal did not find it necessary to decide the point because of its conclusion on section 226(1A).

The judgments of Elias J and the Court of Appeal

Section 226(1A)

33 Elias J decided that, contrary to the argument of the council and Tesco, on a proper construction of section 226(1A), the Royal Hospital site benefits did not fall within its ambit. They would have been well-being benefits in relation to a CPO of that site, but in order to fall within section 226(1A) in relation to the development of the Raglan Street site, the benefits must flow from the development of the Raglan Street site alone, since that was the site covered by the CPO. The fact that a link between the two developments could be achieved by an agreement under section 106 of the 1990 Act did not entitle the council to treat what were in reality well-being benefits resulting from development of the Royal Hospital site as if they were generated by development of the Raglan Street site.

34 The Court of Appeal held that the council was entitled to take the Royal Hospital site benefits into account because they fell within section 226(1A). Whilst section 226(1)(a) focused the local authority's attention on what was proposed to take place on the CPO site itself and required the authority to be satisfied that the CPO would facilitate the redevelopment of the CPO site, section 226(1A) required it to look beyond the benefits that would accrue on the CPO site and to consider whether and to what extent the redevelopment of the CPO site would bring well-being benefits to a wider area. If the carrying out of the redevelopment of a CPO site was likely to act as a catalyst for the development or redevelopment of some other site or sites, then such catalytic effects were capable of falling within the scope of section 226(1A).

35 The financial viability of a proposed redevelopment scheme would be a highly material factor, and the proposed redevelopment of a CPO site might have to be cross-subsidised. It would be surprising if the potential financial implications of redeveloping the CPO site, including the possibility of cross-subsidy as a result of facilitating its redevelopment, were immaterial for the purposes of any consideration of the extent to which the carrying out of the redevelopment would be likely to contribute to wider "well-being" benefits.

36 The possibility of one development cross-subsidising another highly desirable development was capable of being a material consideration in the determination of a planning application under section 70(2) of the 1990 Act:

R v Westminster City Council, Ex p Monahan [1990] 1 QB 87. The proposed cross-subsidy was a material consideration in the light of the council's obligation under section 226(1A) to take wider, off-site "well-being" benefits into account and in the light of the significance of financial viability and economic well-being in the CPO context.

Section 226(1)(a)

37 Elias J held that for the purposes of section 226(1)(a), when choosing between two developments either of which would in principle be facilitated by a CPO, the council was entitled to have regard to all the benefits which would flow from the development when determining in whose favour the CPO should be exercised, including any off-site benefits achieved by means of an agreement linking the development of the Raglan Street site to development of the Royal Hospital site. The Court of Appeal decided that it was not necessary to rule on the alternative submission by the council and Tesco that the Royal Hospital site benefits were material considerations under section 226(1)(a) in any event.

The CPO context

38 There is no doubt that where a body has a power of compulsory acquisition which is expressed or limited by reference to a particular purpose, then it is not legitimate for the body to seek to use the power for a different or collateral purpose: *Simpsons Motor Sales (London) Ltd v Hendon Corpn* [1964] AC 1088, 1118, per Lord Evershed. In *Galloway v Mayor and Commonalty of London* (1866) LR 1 HL 34, 43, Lord Cranworth LC said that persons authorised to take the land of others "cannot be allowed to exercise the powers conferred on them for any collateral object; that is, for any purposes except those for which the legislature has invested them with extraordinary powers". In *Clunies-Ross v Commonwealth of Australia* (1984) 155 CLR 193, 199 the High Court of Australia said that the statutory power to acquire land for a public purpose could not be used to "advance or achieve some more remote public purpose, however laudable". See also *Municipal Council of Sydney v Campbell* [1925] AC 338, 343.

39 So also the familiar rules on the judicial control of the exercise of legislative powers apply in the CPO context as elsewhere: see e g, among many others, *Hanks v Minister of Housing and Local Government* [1963] 1 QB 999 (Megaw J); *Prest v Secretary of State for Wales* (1982) 81 LGR 193 (as explained in *de Rothschild v Secretary of State for Transport* (1988) 57 P & CR 330; *Chesterfield Properties plc v Secretary of State for the Environment* (1997) 76 P & CR 117 (Laws J)).

40 Nor can it be doubted that off-site benefits may be taken into account in making a CPO. *Standard Commercial Property Securities Ltd v Glasgow City Council (No 2)* 2007 SC (HL) 33 was a decision on the Scottish compulsory purchase provisions in the Town and Country Planning (Scotland) Act 1997, which are similar to, but not identical with, the equivalent provisions in the 1990 Act. Section 191 provided in substance that where land is acquired or appropriated by a planning authority for planning purposes, the authority might dispose of such land to any person to secure the best use of the land, and that the land could not be disposed of

A otherwise than at the best price or on the best terms that could reasonably be obtained. The property in question was in a run down part of Bath Street and Buchanan Street, Glasgow. Proposals for redevelopment of the site by the developer contained a strong element of planning gain. The issue was whether the planning authority, exercising its compulsory purchase powers to redevelop a site, had acted ultra vires by entering into a back-to-back agreement with the developer in which the council had agreed to transfer the B land to the developer in return for the developer indemnifying the council for the money expended in assembling the site and making it available. In effect the developer was to be put in the same position as if it had itself exercised the power of compulsory acquisition: para 14. It was held that the words "best terms" permitted disposal for a consideration which was not the "best price", and so terms that would produce planning benefits and gains of C value to the authority could be taken into account as well as terms resulting in cash benefits. It was accepted that the local authority could use its powers to assemble the site for development by a preferred developer: para 6. Lord Hope of Craighead (at para 39) and Lord Brown of Eaton-under-Heywood (at para 70) also accepted that account could be taken by a planning authority of the wider, off-site planning gains which would result from the exercise of its compulsory purchase powers. But these were benefits directly D related to the site, and directly flowing from the development, and the decision does not help in the solution of the present appeal.

Other contexts

41 All parties, especially Sainsbury's, relied on authorities relating to planning applications, and in particular on those relating to the extent to E which conditions attached to a planning permission must relate to the development; and the extent to which off-site benefits (whether under a section 106 agreement or not) are "other material considerations" to which the authority must have regard under section 70(2) of the 1990 Act in deciding whether to grant or refuse planning permission (or to impose conditions). In the Court of Appeal Sullivan LJ did not think that a "read-F across" from the limitations on the exercise of the section 70(2) power was appropriate in the context of section 226.

42 In summary, Sainsbury's position was (a) the cases on the legitimate scope of planning conditions were relevant, from which it followed that the only off-site benefits which could be taken into account were those which fairly and reasonably related to the development in relation to which the CPO power was being exercised, that is the Raglan Street development; G (b) the cases on section 70(2) also proceeded on the basis that there had to be a connection between the benefits and the permitted development; (c) a potential cross-subsidy was relevant only where there was a composite development. The position of the council and Tesco was that the Court of Appeal was right to say that there should not be a read-across from the planning permission cases to CPO cases, but in any event the authorities showed that financial considerations, including off-site benefits through H cross-subsidies, were relevant, and were essentially a matter for evaluation by the planning authority.

43 It is necessary to note, at the outset, the relevant legal differences between this case and the cases in which similar questions have previously arisen. The first is that there is a difference between the exercise of powers of

compulsory acquisition and the exercise of powers to control development and grant planning permission, which is rooted in the deep-seated respect for private property reflected in the decisions cited above. The second is that both compulsory acquisition and planning control are solely creatures of statute, and that while the provisions which are relevant on this appeal are contained in one statute, the 1990 Act, the statutory provisions are different. The relevant provisions of section 226 have been set out above, and it is only necessary to repeat that section 226(1)(a) gives the local authority power to acquire compulsorily if "the authority think that the acquisition will facilitate the carrying out of development, redevelopment or improvement on or in relation to the land" and does not contain, by contrast with section 70(2) on planning applications, any express reference to the authority having regard to "any other material considerations". Nevertheless the policies underlying planning permission and acquisition for development purposes are similar, and considerable assistance can be obtained from the learning in the case law on planning permissions.

"Fairly and reasonably relate" and "material considerations"

44 In *Pyx Granite Co Ltd v Ministry of Housing and Local Government* [1958] 1 QB 554 (reversed on other grounds [1960] AC 260) Lord Denning said (at p 572) in relation to what is now section 70(1)(a) of the 1990 Act:

> "Although the planning authorities are given very wide powers to impose 'such conditions as they think fit,' nevertheless the law says that those conditions, to be valid, must fairly and reasonably relate to the permitted development."

Pyx Granite had the right to quarry in two areas of the Malvern Hills. The company required permission to break fresh surface on one of the sites. Conditions attached to the planning permission relating to such matters as the times when machinery for crushing the stone could be used and the control of dust emissions were held valid. The facts do not appear fully in the judgments, but it seems that the equipment was on the part of the land under the control of the company which was not the land in respect of which the application for permission related, but they could properly be regarded (for the purposes of the Town and Country Planning Act 1947, section 14) as "expedient . . . in connection with" the permitted development. Lord Denning said, at p 574: "It would be very different if the Minister sought to impose like conditions about plant or machinery a mile or so away."

45 Lord Denning's formula that "the conditions must [be] fairly and reasonably [related] to the development" was approved in *Newbury District Council v Secretary of State for the Environment* [1981] AC 578, 599 (Viscount Dilhorne), 607 (Lord Fraser of Tullybelton), 618 (Lord Scarman), 627 (Lord Lane). Viscount Dilhorne said, at p 599:

> "It follows that the conditions imposed must be for a planning purpose and not for any ulterior one, and that they must fairly and reasonably relate to the development permitted. Also they must not be so unreasonable that no reasonable planning authority could have imposed them . . ."

As Lord Hoffmann said in *Tesco Stores Ltd v Secretary of State for the Environment* [1995] 1 WLR 759, 772, as a general statement this formulation has never been challenged. See eg *Grampian Regional Council v Secretary of State for Scotland* 1984 SC (HL) 58, 66. In the *Newbury* case itself it was held that the Secretary of State was entitled to come to the conclusion that a condition imposed by a local authority requiring the removal of existing substantial buildings was not sufficiently related to a temporary change of use for which permission was granted.

46 The effect of the adoption of the *Pyx Granite/Newbury* formula was to put severe limits on the powers of planning authorities: *Tesco Stores Ltd v Secretary of State for the Environment* [1995] 1 WLR 759, 772–723. Conditions requiring off-site roadway benefits were held to be unreasonable in, for example, *Hall & Co Ltd v Shoreham-by-Sea Urban District Council* [1964] 1 WLR 240 (ancillary road condition held to be *Wednesbury* unreasonable (*Associated Provincial Picture Houses Ltd v Wednesbury Corpn* [1948] 1 KB 223)); *City of Bradford Metropolitan Council v Secretary of State for the Environment* (1986) 53 P & CR 55 (where it was suggested that it would make no difference if they were included in a section 106 agreement); cf *Westminster Renslade Ltd v Secretary of State for the Environment* (1983) 48 P & CR 255 (not legitimate to refuse a planning application because it did not contain provisions for the increase of the proportion of car parking space subject to public control: the absence of a benefit not a reason for refusing planning permission where the benefit could not have been lawfully secured by means of a condition).

47 Section 70(2) of the 1990 Act provides that in dealing with an application for planning permission, the local planning authority "shall have regard to the provisions of the development plan, so far as material to the application, and to any other material considerations".

48 There are two decisions of the Court of Appeal, and a decision of the House of Lords, which have a bearing on the questions on this appeal: *R v Westminster City Council, Ex p Monahan* [1990] 1 QB 87; *R v Plymouth City Council, Ex p Plymouth and South Devon Co-operative Society Ltd* (1993) 67 P & CR 78; *Tesco Stores Ltd v Secretary of State for the Environment* [1995] 1 WLR 759. They deal with one or more of the following questions: the extent to which financial considerations are "material considerations" in planning decisions; what connection (if any) is required between the development site and off-site benefits for the purpose of material considerations; and the respective roles of the planning authorities and the courts in determining what considerations are relevant and what connection with off-site benefits is necessary.

49 *R v Westminster City Council, Ex p Monahan* and *R v Plymouth City Council, Ex p Plymouth and South Devon Co-operative Society Ltd* are both cases in which Lord Denning's "fairly and reasonably relate" formula in relation to conditions was extended to, or discussed in connection with, the issue of material considerations under section 70(2). In that context the decisions have been superseded by the decision in the *Tesco* case, but they contain valuable discussion by some distinguished members of the Court of Appeal on questions of some relevance to the determination of this appeal.

50 In *Ex p Monahan* Lord Denning's formula was discussed in a case involving enabling development, i e development which is contrary to established planning policy, but which is occasionally permitted because it

brings public benefits which have been demonstrated clearly to outweigh the harm that would be caused. The decision also discusses the question of the extent to which the provision of off-site benefits by the developer may be material. In the *Plymouth* case one of the issues was the extent to which off-site planning benefits promised by a section 106 agreement were material considerations.

R v Westminster City Council, Ex p Monahan

51 In *R v Westminster City Council, Ex p Monahan* [1990] 1 QB 87 the Royal Opera House, Covent Garden Ltd, applied for planning permission and listed building consents to carry out a redevelopment, the central objective of which was to extend and improve the opera house by reconstruction and modernisation to bring it up to international standards, and to develop the surrounding area consistently with that project. Parts of the site were proposed to be used for the erection of office accommodation, which would be a departure from the development plan. The planning authority granted permission for the whole proposed development on the basis that the desirable improvements to the opera house could not be financed unless the offices were permitted. The applicants sought judicial review of that decision on the ground, inter alia, that the fact that a desirable part of a proposed development would not be financially viable unless permission were given for the other part was not capable of being a "material consideration" for the purposes of what is now section 70(2) of the 1990 Act in granting planning permission for the development as a whole.

52 It was held that financial considerations which fairly and reasonably related to the development were capable of being material considerations which could be taken into account in reaching that determination; and that the local planning authority had been entitled, in deciding to grant planning permission for the erection of the offices, to balance the fact that the improvements to the opera house would not be financially viable if the permission for the offices were not granted against the fact that the office development was contrary to the development plan.

53 On this appeal Sainsbury's accepts that in the context of section 70(2) the possibility of one development cross-subsidising another desirable development is capable, in limited circumstances, of being a material consideration, and that *Ex p Monahan* is such a case, where both developments formed part of one composite development. The council and Tesco say that *Ex p Monahan* supports their position because the Court of Appeal held the consequence of the financial viability of the proposed opera house development to be a relevant factor in the planning authority's determination.

54 Kerr LJ's reasoning was essentially this: (1) in composite or related developments (related in the sense that they can and should properly be considered in combination) the realisation of the main objective may depend on the financial implications or consequences of others; (2) provided that the ultimate determination is based on planning grounds and not on some ulterior motive, and that it is not irrational, there would be no basis for holding it to be invalid in law solely on the ground that it has taken account of, and adjusted itself to, the financial realities of the overall situation; (3) financial considerations may be treated as material in appropriate cases: *Brighton Borough Council v Secretary of State for Environment*

(1978) 39 P & CR 46; *Sosmo Trust Ltd v Secretary of State for the Environment* [1983] JPL 806. He concluded, at p 117, by agreeing with Webster J's conclusion at first instance. Webster J had said:

> "It seems to me to be quite beyond doubt [but] that the fact that the finances made available from the commercial development would enable the improvements to be carried out was capable of being a material consideration, that is to say, that it was a consideration which related to the use or development of the land, that it related to a planning purpose and to the character of the use of the land, namely the improvements to the Royal Opera House which I have already described, particularly as the proposed commercial development was on the same site as the Royal Opera House and as the commercial development and the proposed improvements to the Royal Opera House all formed part of one proposal."

55 The "fairly and reasonably related to the development" formula was applied by Kerr LJ (at pp 111–112), and Staughton LJ (at p 122) (who also agreed that there was a composite or related development).

56 There was some discussion in the *Ex p Monahan* decision of the limits of what could be taken into consideration, by reference to two hypothetical examples. The first example (which Kerr LJ said was an extreme example) was the case of the development of an undesirable office block in Victoria which was said to be necessary to generate the finance for a desirable development in Covent Garden. Kerr LJ said that a combination of this nature would be unlikely to be properly entertained as a single planning application or as an application for one composite development, and that such a case would involve considerations of fact and degree rather than of principle: at p 117. Nicholls LJ dealt with this point by saying, at p 121:

> "I am not persuaded by this reductio ad absurdum argument. Circumstances vary so widely that it may be unsatisfactory and unwise to attempt to state a formula which is intended to provide a definitive answer in all types of case. All that need be said to decide this appeal is that the sites of the commercial development approved in principle are sufficiently close to the opera house for it to have been proper for the local planning authority to treat the proposed development of the office sites, in Russell Street and elsewhere, and the proposed improvements to the opera house as forming part of one composite development project. As such it was open to the planning authority to balance the pros and cons of the various features of the scheme. It was open to the authority to treat the consequence, for the opera house works, of granting or withholding permission for offices as a material consideration in considering the part of the application which related to offices."

57 The second hypothetical example, the swimming pool at the other end of the city, was dealt with by Staughton LJ, at p 122:

> "The other extreme arises from the axiom of Lloyd LJ in *City of Bradford Metropolitan Council v Secretary of State for the Environment* [1986] 1 EGLR 199, 202G that planning permission cannot be bought and sold. Suppose that a developer wished to erect an office building at one end of the town A, and offered to build a swimming-pool at the other

end B. It would in my view be wrong for the planning authority to regard the swimming-pool as a material consideration, or to impose a condition that it should be built. That case seems to me little different from the developer who offers the planning authority a cheque so that it can build the swimming-pool for itself—provided he has permission for his office development . . . Where then is the line to be drawn between those extremes? In my judgment the answer lies in the speech of Viscount Dilhorne in *Newbury District Council v Secretary of State for the Environment* [1981] AC 578, 599, which Kerr LJ has quoted. Conditions imposed must 'fairly and reasonably relate to the development permitted', if they are to be valid. So must considerations, if they are to be material."

58 The ratio of the decision in *Ex p Monahan* is that where there are composite or related developments (related in the sense that they can and should properly be considered in combination), the local authority may balance the desirable financial consequences for one part of the scheme against the undesirable aspects of another part. In *R v Plymouth City Council, Ex p Plymouth and South Devon Co-operative Society Ltd* 67 P & CR 78, 88, Hoffmann LJ observed that the *Ex p Monahan* decision concerned what was treated as a single composite development, and held that there was a sufficient nexus between the office development and the opera house improvements to entitle the planning authority to say that the desirability of the latter fairly and reasonably related to the former, because of (1) the financial dependency of the one part of the development on the other and (2) their physical proximity.

59 The *Ex p Monahan* decision demonstrates, if demonstration were necessary, that financial considerations may be relevant in planning decisions. In *Sosmo Trust Ltd v Secretary of State for the Environment* [1983] JPL 806 (cited on this point with approval by Kerr LJ in *Ex p Monahan*, at p 116) Woolf J accepted that the consequences of the financial viability or lack of financial viability of a development were a potentially relevant factor: the true question was not whether a development would be viable but what the planning consequences would be if it were not viable: see at p 807. See also *Sovmots Investments Ltd v Secretary of State for the Environment* [1977] QB 411, 425, per Forbes J (for further proceedings see [1977] QB 411; [1979] AC 144).

R v Plymouth City Council, Ex p Plymouth and South Devon Co-operative Society Ltd

60 The restrictive approach of the courts to conditions was one of the factors which led planning authorities to rely on planning obligations in attempting to secure planning gain. This led directly to the question whether planning authorities were entitled to treat benefits secured by way of a planning obligation as a material consideration in deciding whether to grant planning permission.

61 In *R v Plymouth City Council, Ex p Plymouth and South Devon Co-operative Society Ltd* 67 P & CR 78 it was held that the planning authority could (against the opposition of the Co-op) take into account offers by Tesco and Sainsbury's to enter into section 106 agreements providing for substantial off-site benefits. The off-site benefits included an offer by

A Sainsbury's of a payment of £1m for infrastructure which would enable a separate site to be made available for industrial use, and an offer by Tesco of a park and ride facility on another site. The Co-op's position was that a consideration was only material to the question of whether to grant planning permission, if it was necessary to the grant of permission, i e, overcame some to the proposed development which would otherwise mean that permission could not be granted. It was held that although the benefits had to be
B planning benefits and fairly and reasonably relate to the development, they did not have to be necessary.

62 This is a decision in which there was a connection between the development and the off-site benefits. All members of the court (Russell, Evans and Hoffmann LJJ) accepted (at pp 82, 84, 87–88) that the off-site benefits related to the superstore development applications. The offer of
C £1m by Sainsbury's for infrastructure would help to compensate for the reduction in the pool of resources for employment land. The park and ride facility offered by Tesco would counteract the increase in traffic caused by the superstore development: at pp 82–83; 90–91.

Tesco Stores Ltd v Secretary of State for the Environment

D **63** But, although it has not been expressly overruled and the result would be the same today, the reasoning of the *Plymouth* decision can no longer stand, based as it was on the "fairly and reasonably related to the development" test: see at pp 81–82, 87, 89–90. In *Tesco Stores Ltd v Secretary of State for the Environment* [1995] 1 WLR 759 there were rival plans for the development of superstores on different sites in Witney, Oxfordshire, by Tesco and Sainsbury's (in conjunction with Tarmac). At an
E inquiry into proposals to alter the Witney local plan by building a new link road to relieve traffic congestion and a food superstore in the town centre, the inspector approved the proposal for a link road and rejected that for a town centre superstore. Tesco offered to provide full funding for the link road. The Secretary of State allowed the Sainsbury's/Tarmac appeal, and dismissed Tesco's application: the funding offer was not fairly and
F reasonably related in scale to the development; although there was a tenuous relationship between the funding of the link road and the proposed foodstore because of a slight worsening of traffic conditions (a 10% increase) the link was not needed. But if it were to be taken into account, then because of the tenuous nature of the connection, the partial contribution was too limited to affect the ultimate decision.

64 The House of Lords confirmed that the Secretary of State had
G fulfilled his duty by taking the offer into account but according it very little weight. It was held that a planning obligation offered under section 106 of the 1990 Act by a developer was a material consideration for the purposes of section 70(2) of the Act if it was relevant to the development; and that the weight to be given to such an obligation was a matter entirely within the discretion of the decision-maker. Tesco's offer to fund the link road was
H sufficiently related to the proposed development to constitute a material consideration under section 70(2). For the purposes of this appeal, the importance of this decision is the light it throws on the nature of the necessary link between the development and the off-site benefit.

65 The House of Lords held that the *Pyx Granite/Newbury* test for planning conditions was not applicable in the context of the question

whether section 106 obligations were material considerations under section 70(2). Lord Keith of Kinkel said, at pp 764, 770:

> "Sir Thomas Bingham MR in the course of his judgment in this case said that 'material' in [section 70(2)] meant 'relevant,' and in my opinion he was correct in this. It is for the courts, if the matter is brought before them, to decide what is a relevant consideration. If the decision-maker wrongly takes the view that some consideration is not relevant, and therefore has no regard to it, his decision cannot stand and he must be required to think again. But it is entirely for the decision-maker to attribute to the relevant considerations such weight as he thinks fit, and the courts will not interfere unless he has acted unreasonably in the *Wednesbury* sense . . . An offered planning obligation which has nothing to do with the proposed development, apart from the fact that it is offered by the developer, will plainly not be a material consideration and could be regarded only as an attempt to buy planning permission. If it has some connection with the proposed development which is not de minimis, then regard must be had to it. But the extent, if any, to which it should affect the decision is a matter entirely within the discretion of the decision-maker and in exercising that discretion he is entitled to have regard to his established policy."

66 All members of the appellate committee agreed with Lord Keith's opinion, and the ratio of the decision is that for the purposes of section 70(2) any benefit whose connection with the development is more than de minimis will be a material consideration, but that the weight to be given to any particular material consideration is entirely a matter for the decision-maker.

67 It has often been said that planning permissions should not be bought or sold: see *City of Bradford Metropolitan Council v Secretary of State for the Environment* 53 P & CR 55, 64, per Lloyd LJ (on which see the *Plymouth* case, at p 84, per Evans LJ; *Ex p Monahan*, at p 122, per Staughton LJ; the *Tesco* case, at p 765, per Lord Keith, and p 782, per Lord Hoffmann); and accepted as a matter of policy in ODPM Circular 05/2005, *Planning Obligations*, para B6 (reflecting its predecessors):

> "The use of planning obligations must be governed by the fundamental principle that planning permission may not be bought or sold. It is therefore not legitimate for unacceptable development to be permitted because of benefits or inducements offered by a developer which are not necessary to make the development acceptable in planning terms . . ."

68 Responding to the point that the approach in the *Plymouth* decision leads to the prospect of the sale and purchase of planning permissions, Lord Hoffmann contrasted cases in which there was a "sufficient connection" between the development and a planning obligations and those in which they were "quite unconnected". He said [1995] 1 WLR 759, 782:

> "This reluctance of the English courts to enter into questions of planning judgment means that they cannot intervene in cases in which there is sufficient connection between the development and a planning obligation to make it a material consideration but the obligation appears disproportionate to the external costs of the development. *R v Plymouth City Council, Ex p Plymouth and South Devon Co-operative Society Ltd*

A 67 P & CR 78, was such a case, leading to concern among academic writers and Steyn LJ in the present case that the court was condoning the sale of planning permissions to the highest bidder. My Lords, to describe a planning decision as a bargain and sale is a vivid metaphor. But I venture to suggest that such a metaphor (and I could myself have used the more emotive term 'auction' rather than 'competition' to describe the process of decision-making process in the *Plymouth* case) is an uncertain guide to the legality of a grant or refusal of planning permission. It is easy enough to apply in a clear case in which the planning authority has demanded or taken account of benefits which are quite unconnected with the proposed development. But in such a case the phrase merely adds colour to the statutory duty to have regard only to material considerations. In cases in which there is a sufficient connection, the application of the metaphor or its relevance to the legality of the planning decision may be highly debatable. I have already explained how in a case of competition such as the *Plymouth* case, in which it is contemplated that the grant of permission to one developer will be a reason for refusing it to another, it may be perfectly rational to choose the proposal which offers the greatest public benefit in terms of both the development itself and related external benefits . . ."

Conclusions

69 There is no doubt that in the light of the report of 30 January 2008, the council had purportedly resolved in principle to make the CPO for the purpose of facilitating both the development of the Raglan Street site and that of the Royal Hospital site. That would be sufficient to vitiate the resolution. But Elias J and the Court Appeal accepted that there would be no point in quashing the resolution on that ground alone, since a more felicitously worded resolution could be passed if the benefits to be derived from the development of the Royal Hospital site were relevant under section 226(1)(a) or section 226(1A).

70 What can be derived from the decisions in the planning context, and in particular the *Tesco* case, can be stated shortly. First, the question of what is a material (or relevant) consideration is a question of law, but the weight to be given to it is a matter for the decision-maker. Second, financial viability may be material if it relates to the development. Third, financial dependency of part of a composite development on another part may be a relevant consideration, in the sense that the fact that the proposed development will finance other relevant planning benefits may be material. Fourth, off-site benefits which are related to or are connected with the development will be material. These principles provide the answer to the questions raised in *Ex p Monahan* [1990] 1 QB 87 about the development in Victoria or the swimming pool on the other side of the city. They do not, as Kerr LJ thought, raise questions of fact and degree. There must be a real connection between the benefits and the development.

71 Given the similar context, there is no reason why similar principles should not apply to compulsory acquisition for development purposes provided that it is recognised that, because of the serious invasion of proprietary rights involved in compulsory acquisition, a strict approach to the application of these principles is required. There must be a real, rather

than a fanciful or remote, connection between the off-site benefits and the development for which the compulsory acquisition is made.

72 What is the connection in the present case? The expression "cross-subsidy" has been much used by Tesco and the council. The expression bears a special meaning in this case. Its most common use is in the competition field, where it usually connotes improper allocation of costs in different product or geographic markets, which may result in predatory pricing or other anti-competitive activity. Here all it means is that Tesco says that (a) the council's requirements for the Royal Hospital site have the result that Tesco cannot develop it profitably; and (b) Tesco will undertake its development if it can develop the Raglan Street site. Tesco says that the consequence of (a) and (b) is that the Raglan Street site development will "cross-subsidise" the Royal Hospital site development. But the only connections between the proposed Raglan Street site and Royal Hospital site developments are that (a) Tesco says that it will develop the latter if it can develop the former; (b) it has contractually agreed to perform building works on the Royal Hospital site if it acquires the Raglan Street site. The commercial effect will be that the deficiency on the Royal Hospital site will be made up, or "cross-subsidised", by the Raglan Street site development. Nothing in the papers before the court suggests that this will be done by any direct subvention from the income or capital proceeds of the Raglan Street site, but this would not in any event make a difference. It is entirely a matter for Tesco how it funds any loss from, or presents any lower return from, the Royal Hospital site. This is only a connection in the sense that either (a) the council is being tempted to facilitate one development because it wants another development; or (b) Tesco is being tempted to undertake one uncommercial development in order to obtain the development it wants.

73 The crucial question is whether that is a connection which the council is entitled to take into consideration under section 226(1)(a) or section 226(1A). To take the latter first, Elias J was right to hold that section 226(1A) was not the crucial provision for the purposes of this case. It does not answer the prior question of what matters can be taken into consideration.

74 The power of compulsory acquisition must be capable of being exercised under section 226(1)(a) before the limitation in section 226(1A) applies. Once it applies the local authority must think that the development will contribute to the achievement of the well-being benefits. Section 226(1A) does not permit the council to take into account a commitment by the developer of a site part of which was to be the subject of a CPO to secure the development, redevelopment or improvement of another (unconnected) site and so achieve further well-being benefits for the area. The council was entitled to come to the view for the purposes of section 226(1A) that the Raglan Street site development would contribute to well-being in its area, but not on the basis of the benefits which would derive from the Royal Hospital site development. The Raglan Street site development will not, in any legally relevant sense, contribute to the achievement of the well-being benefits flowing from the Royal Hospital site development.

75 But that matters little since the crucial question is whether the council was entitled to take it into account under section 226(1)(a). There can be no doubt that, even if there is no express reference in section 226(1)(a)

A to the local authority taking into account material considerations (by contrast with section 70(2)), only relevant matters may be taken into account. For the reasons given above, the claimed financial connection between the two sites was not such as to amount to a relevant matter. It is true, as Sullivan LJ said (at para 34), that the financial viability of a proposed redevelopment scheme would be a highly material factor, and that a proposed redevelopment of a CPO site might have to be cross-subsidised. B But Sullivan LJ was wrong to conclude that it followed that a cross-subsidy *from* a CPO site to another site was a material consideration. The fact that a conditional agreement for sale linked the obligation to carry out works on the Royal Hospital site was not a relevant connection.

76 Nor do I consider, despite the views of Lord Phillips of Worth Matravers PSC and Lord Hope of Craighead DPSC to the contrary, that a C different result on this appeal is required by the fact that Sainsbury's and Tesco were in competition for the site, and that the council is proposing to dispose of the land to Tesco under section 233. They accept that the council was not entitled to take the benefits from the Royal Hospital site development into account in making the CPO, but consider that the opportunity for redevelopment of the Royal Hospital site would be a relevant matter to be taken into account by the council in exercising the D power of disposal to Tesco under section 233.

77 First, as a matter of principle it is impossible to put into separate compartments the exercise by the council of its power of compulsory purchase of Sainsbury's property, and the exercise of the council's power to dispose of Sainsbury's property to Tesco, and then to conclude that the Royal Hospital site development may not be taken into account for the E former, but can be taken into account for the latter. It is wrong for the council to deprive Sainsbury's of its property because the council will derive from disposal of that property benefits wholly unconnected with the acquisition of the property.

78 Second, although it is plain that the power of compulsory purchase may be used to assemble a site for a preferred developer, there is nothing in *Standard Commercial Property Securities Ltd v Glasgow City Council* F *(No 2)* 2007 SC (HL) 33 which supports the proposition that unconnected benefits may be taken into account by a local authority in deciding whether property should be compulsorily acquired for the purpose of disposing of it to a preferred developer. The background to the appeal was a competition between developers for the right to develop a run down part of Buchanan Street, Glasgow. Two developers in particular were keen to develop the G site, Atlas Investments and Standard Commercial, each of which owned part of the site. The council, when inviting all the owners and occupiers of the land on the site to submit proposals for redevelopment, said that successful submissions should seek a mix of activities and functions which would bring added activity to the area outside normal retailing hours, and encouraged applicants to allocate a budget to the cost of integrating public art into the development and include improvements to the relevant areas of H adjoining streets, and so contribute to the transformation of Glasgow city centre. Those were the wider planning gain benefits to which Lord Hope referred in his opinion: para 39. Similarly Lord Brown of Eaton-under-Heywood (at para 70) referred to the council's desire to obtain economic and social benefits for Glasgow. But it is clear from Lord Hope's opinion

in that decision, as he accepts in his judgment on this appeal, that the benefits which the developers were invited to confer were related to the site, and the immediately adjoining area. There is nothing in the decision to support the conclusion that in this case the promise to develop the Royal Hospital site would have been a material consideration in a disposal under section 233.

79 I would therefore allow the appeal, and make an order declaring that the opportunity for redevelopment of the Royal Hospital site is not a lawful consideration in deciding whether to make a CPO in relation to the Raglan Street site.

LORD WALKER OF GESTINGTHORPE JSC

80 In agreement with Baroness Hale of Richmond, Lord Mance and Lord Collins of Mapesbury JJSC, I would allow this appeal. I agree with the reasons set out in the full judgment of Lord Collins JSC, supported by the shorter judgments of Baroness Hale and Lord Mance JJSC. But in view of the difference of opinion within the court I will try to summarise my reasons in my own words.

81 This appeal is concerned with compulsory acquisition of land *for planning purposes* (that being the general ambit of both paragraphs (a) and (b) in section 226(1) of the Town and Country Planning Act 1990). The land is to end up, not in public ownership and used for public purposes, but in private ownership and used for a variety of purposes, mainly retail and residential. Economic regeneration brought about by urban redevelopment is no doubt a public good, but "private to private" acquisitions by compulsory purchase may also produce large profits for powerful business interests, and courts rightly regard them as particularly sensitive. To the authorities mentioned by Lord Collins JSC in paras 9–11 of his judgment might be added the famous split of the United States Supreme Court in *Kelo v City of New London, Connecticut* (2005) 545 US 469, discussed in *Gray & Gray, Elements of Land Law*, 5th ed (2009), paras 11.2.6 and 11.2.7. *R & R Fazzolari Pty Ltd v Parramatta City Council* [2009] HCA 12 mentioned by Lord Collins JSC was also in substance largely a "private to private" acquisition, although the local authority used a declaration of trust to give the acquisition a better appearance.

82 Where a local authority is considering exercising powers of compulsory purchase for planning purposes, planning considerations must be central to the decision-making process. The public purse is to be protected against improvidence, but the local authority should not be exercising its powers in order to make a commercial profit. In *Standard Commercial Property Securities Ltd v Glasgow City Council (No 2)* 2007 SC (HL) 33, Lord Brown of Eaton-under-Heywood, at para 75, described that proposition as "deeply unattractive". Section 233 of the 1990 Act differs from its Scottish counterpart in that subsection (3) expressly contemplates a disposal "for a consideration less than the best that can reasonably be obtained", though only with the consent of the Secretary of State. But both in Scotland and in England a "back-to-back" arrangement (under which the local authority makes neither a commercial loss nor a commercial gain from its participation, using section 226 powers, in a scheme of comprehensive urban redevelopment) is standard practice. The dominant aim is betterment in planning terms.

A **83** That to my mind is why the issue of what would be material considerations for the purposes of deciding an application for planning permission is also relevant to a decision to exercise powers of compulsory acquisition under section 226. The quality of the proposed redevelopment of the site is of crucial importance. Its larger impact on the authority's area is also an essential element in the decision-making process, because of section 226(1A). In common with all the members of the court I consider B that section 226(1A) has the effect of imposing an extra requirement which is a necessary but not a sufficient condition for the exercise of powers under 226(1). Section 226(1A) does not qualify, still less act as a substitute for, the requirements of the preceding subsection.

84 But the exercise of powers of compulsory acquisition, especially in a "private to private" acquisition, amounts to a serious invasion of the current C owner's proprietary rights. The local authority has a direct financial interest in the matter, and not merely a general interest (as local planning authority) in the betterment and well-being of its area. A stricter approach is therefore called for. As Lord Collins JSC says in his conclusions at para 71 of his judgment, a real (rather than a fanciful or remote) connection must be shown between any off-site benefits and the proposed redevelopment for D which a compulsory purchase order is proposed.

85 Lord Brown JSC has posed a rhetorical question in para 182 of his judgment. After referring to the *Standard Commercial* case he has commented:

> "it is surely implicit in that decision—and, indeed, in the respective legislative requirements in both England and Scotland in effect to get E what I called there (para 68) 'the best overall deal available'—that, by the same token as a cash bidding match would have been possible, so too would have been an offer of other benefits, however extraneous. Why ever not?"

With great respect to Lord Brown JSC I think that he has answered his own question in the passage of his speech in the *Standard Commercial* case, at F para 75:

> "I find deeply unattractive the proposition that, almost inevitably at the expense of some beneficial aspect of the development scheme, the authority should be seeking to make a profit out of the exercise of its statutory powers of acquisition."

G **86** A cash bidding match, or the exaction of extraneous benefits, has superficial attractions as a tie-breaker, especially if there are two contenders, both with very deep pockets, like Tesco and Sainsbury. The merits of their respective schemes are closely matched, as appears from the summary in para 11 of the officers' recommendation document dated 30 January 2008. It is true that the Tesco scheme is said in the summary to offer more jobs, but the Sainsbury scheme might create an unspecified number of extra jobs H through re-use or development of its St George's Parade site: para 6.6. The Tesco scheme would be delivered "by a well resourced operator" but the detailed consideration of delivery (para 7) ranked the two contenders as equally capable. Tesco's only apparently decisive advantage was (para 11.3) the offer of cross-funding for the RHS development.

87 Since their proposals are such that there is little, if anything, to choose between them in planning terms, why should not the local authority look to some substantial extraneous benefit which one contender offers, rather than having to make the difficult choice of a winner between contenders whose proposals are equally satisfactory on planning grounds? The answer is simply that it is not the right way for a local authority to make a decision as to the exercise of its powers of compulsory purchase, any more than it could choose a new chief executive, from a short list of apparently equally well qualified candidates, by holding a closed auction for the office. As Lord Keith of Kinkel said in *Tesco Stores Ltd v Secretary of State for the Environment* [1995] 1 WLR 759, 770:

> "An offered planning obligation which has nothing to do with the proposed development, apart from the fact that it is offered by the developer, will plainly not be a material consideration and could be regarded only as an attempt to buy planning permission."

88 The fact that an exercise of powers of compulsory acquisition and a "back to back" disposal to a developer are prearranged is unable: see Lord Rodger of Earlsferry in the *Standard Commercial* case, at para 53. But that does not mean that the proper consideration of the exercise of powers of compulsory acquisition under section 226 of the 1990 Act can be telescoped into the exercise of powers of disposal under section 233. On this point I am in full agreement with the judgment of Baroness Hale JSC.

89 For these reasons I would allow this appeal and make the declaration proposed by Lord Collins JSC.

BARONESS HALE OF RICHMOND JSC

90 I agree that this appeal should be allowed, for the reasons given by Lord Collins of Mapesbury JSC, together with the further reasons given by Lord Walker of Gestingthorpe and Lord Mance JJSC. Lord Phillips of Worth Matravers PSC and Lord Hope of Craighead DPSC also agree with the reasoning of Lord Collins JSC, on the points upon which he differs from Lord Brown of Eaton-under-Heywood JSC, but they disagree in the result. As I understand it, they consider that the extraneous benefit offered by Tesco, although it would not normally be a relevant consideration in the compulsory purchase decision, would be a relevant consideration when the council came to dispose of the land under section 233(1) of the Town and Country Planning Act 1990. Accordingly, as in practice the decisions may be taken simultaneously, that consideration can be read back into the decision compulsorily to purchase the Sainsbury land under section 226(1).

91 For the reasons given by Lord Mance JSC, I find it difficult to accept that proposition. It puts the cart before the horse. The council have nothing to dispose of unless they have acquired the land, whether voluntarily or compulsorily. They can only acquire the land compulsorily under section 226(1)(a) "if the authority think that the acquisition will facilitate the carrying out of development, redevelopment or improvement on or in relation to the land". The matters to be taken into account in making that decision have to be relevant to that purpose.

92 I agree, as Lord Mance JSC puts it at para 98 of his judgment, that the considerations admissible in relation to compulsory purchase are "no wider" than those admissible in relation to the grant of planning permission.

Although the grant of planning permission is a "useful analogy", it is a different exercise. The considerations material to that exercise are also material, but in a rather different way, to the compulsory purchase decision. Thus, under the former version of section 226(1) (quoted by Lord Phillips PSC at para 121 of his judgment), the considerations which would be material to the grant of planning permission for development on the land were also material to whether the land was "suitable for development". That was a sine qua non for compulsory purchase to "secure" development. This seems obvious. It cannot be proper to deprive a person compulsorily of his land in order to secure something which will not be allowed to take place. Under the new version of section 226(1), the permissibility of *some* development (together with a reasonable prospect of its actually taking place) should be a sine qua non for compulsory acquisition in order to "facilitate" it. The question does not arise in this case, because we are agreed that the extraneous benefit to the Royal Hospital site would not be relevant to the grant of planning permission for this site, any more than it is relevant to the compulsory purchase decision.

93 Acquiring the whole of the Raglan Street site *would* facilitate the development of *that* site (although it is worth noting that Sainsbury have so much of the site that they could carry out a development, albeit a less satisfactory one, without further compulsory acquisition). Persuading Tesco to carry out a wholly unrelated development upon another site elsewhere in the city, desirable though that may be for the city and people of Wolverhampton, does nothing to facilitate the development of the Raglan Street site. Rather, it is the other way round.

94 It is difficult to understand why the fact that Sainsbury also wish to develop the Raglan Street site should make any difference. If it would not be permissible to take into account the extraneous benefit when deciding compulsorily to purchase land from an unwilling owner who did *not* himself wish to develop it, it seems even less permissible to take it into account as against an unwilling owner who *does*. In the former situation, a development which would not otherwise take place would be facilitated; in the latter, it would not be facilitated because the development would take place in any event. (I might comment that Sainsbury would probably never have found themselves in this mess if they had not twice changed their mind about whether to develop this site.)

95 The case of *Standard Commercial Property Securities Ltd v Glasgow City Council (No 2)* 2007 SC (HL) 33 is entirely consistent with this view. A council can agree to assemble a site for development, using their compulsory purchase powers if necessary, and to sell it to their chosen developer. It makes sense, but it is not essential, to conduct the two exercises in tandem. But the considerations relevant to the selection of the developer in that case were all relevant to the development of that site. The selection criteria adopted (and carefully graded) by the council were all directly related to the quality of the development of the site and the feasibility of the would-be developers' carrying it out: see Lord Hope of Craighead, at para 22. There were no subsidiary planning obligations involved, still less any wholly extraneous benefits offered. In any event, the battle was not about the selection criteria, but about whether the proposed terms of disposal were the best obtainable and there was no evidence that they were not. Even if it were permissible to take a wholly extraneous benefit into

account when deciding to whom to sell the land, it does not follow that it is permissible to take that benefit into account when deciding compulsorily to deprive a person of their land.

96 Finally, I agree that section 226(1A) operates as a limitation on the power defined by section 226(1)(a). It is therefore necessary first to consider whether the acquisition will facilitate the development of the land; and only if it will do that, to consider whether the development itself will contribute to the promotion or improvement of the economic, social or environmental well-being of the area.

LORD MANCE JSC

97 I consider that this appeal should be allowed. I agree with the reasons given by Lord Collins of Mapesbury JSC, supplemented by those given by Lord Walker of Gestingthorpe and Baroness Hale of Richmond JJSC, and wish to add only a few comments on one aspect, relating to the basis upon which Lord Phillips of Worth Matravers PSC and Lord Hope of Craighead DPSC (and Lord Brown of Eaton-under-Heywood JSC in an alternative) come in their judgments to an opposite result.

98 Like Lord Phillips PSC (paras 134–135), I agree with Lord Collins JSC's conclusion that a planning authority, when considering a planning application, is only entitled to take into account a planning obligation which the applicant offers if that obligation has some connection with the relevant development, apart from the fact of its offer. I also consider that there is a useful analogy between the grant of planning permission and the exercise of a power of compulsory purchase under section 226(1)(a) of the Town and Country Planning Act 1990, and that the considerations admissible in relation to the latter power are, in the respect mentioned in the previous sentence, no wider than those admissible in relation to the former.

99 In this case, the (decisive) attraction of Tesco's proposal in respect of the Raglan Street site consisted of Tesco's offer to use the profits to subsidise the wholly unconnected development by it of the Royal Hospital site, elsewhere in Wolverhampton, which the city council wished to see take place. Lord Phillips PSC accepts in para 138, for reasons which I have summarised in the previous paragraph, that, had Sainsbury been here "simply an owner who was unwilling to sell his land", it would not have been legitimate for Wolverhampton City Council to take this attraction into account in deciding to exercise its powers of compulsory purchase to facilitate Tesco's scheme in respect of the Raglan Street site. Likewise, he accepts (para 140) that, if Sainsbury and Tesco had been seeking in competition with each other to develop a site in the ownership of a third party, then, too, it would not been admissible for the city council to decide compulsorily to purchase the third party site because of the attraction of Tesco's offer to develop a wholly unconnected site.

100 However, Lord Phillips PSC and Lord Hope DPSC consider that it makes all the difference that, in this case, Sainsbury and Tesco were in competition for the same site (in fact owned or controlled as to 86% by the former and 14% by the latter). I cannot accept that distinction. On its logic, it should make no difference if Sainsbury owned and wanted itself to develop the whole Raglan Street site: Tesco, if it wanted to develop that site, could, by offering to devote part of the profits to the Royal Hospital project, still legitimately induce the city council compulsorily to purchase Sainsbury's

property in order to sell it to Tesco for the Raglan Street development. Lord Phillips DPSC's reference (para 147) to "the fact that the compulsory purchase of land owned by one or the other is involved" as "really peripheral" in a case where there are rival developers goes far towards accepting this conclusion. Alternatively, if some way of avoiding this conclusion exists, the logic must still be that Tesco, by acquiring only one house on the proposed Raglan Street site, could alter fundamentally the considerations admissible in relation to a decision whether compulsorily to purchase Sainsbury's property, rather than Tesco's, in order to facilitate the development of the Raglan Street site. In either case, I do not think it right to describe as "motivated by commercial rivalry" (para 147) the wish of a landowner in Sainsbury's position to develop its own land—or its wish to have any decision to compulsorily purchase its land for the benefit of some other developer made by reference to factors having at least some connection with its land.

101 The error in my view lies in divorcing the exercise of the power of compulsory purchase from the property to which it relates. Two different exercises of that power are here in issue relating to two different pieces of land. When a planning authority exercises compulsory purchase powers to promote a particular development, it does this in relation to specific property and only so far as necessary. In the present case, if Sainsbury's scheme is preferred on its admissible planning merits, then only Tesco's property will be compulsorily purchased, and vice versa. The council's first decision is therefore which development it prefers, and that will determine whose property is compulsorily purchased. The council's decision which development it prefers must be taken having regard to considerations which are admissible in the context of the development for which property is to be compulsorily purchased. Thus, when deciding whether compulsorily to purchase Sainsbury's property, it was not admissible to have regard to Tesco's offer relating to the unconnected development of the Royal Hospital site. If the Raglan Street site had already been in council ownership, and there were two interested developers, the council could of course take into account under section 233 any inducement offered by either—whether in terms of price or some unconnected benefit (such as an undertaking to develop the Royal Hospital site)—as Lord Hope DSPC says in para 155. But that is for the very reason that the only relevant decision would then relate to the disposal of the council's own property. Where the council is deciding whether compulsorily to purchase third party property under section 226(1)(a), the interests of the third party mean that the council must have regard only to considerations which are admissible in the context of the development for which such property is required.

102 *Standard Commercial Property Securities Ltd v Glasgow City Council (No 2)* 2007 SC (HL) 33, to which Lord Phillips PSC and Lord Hope DPSC refer, does not in my view support the conclusion which they reach. It was a case where the Glasgow City Council took its decision which development to prefer on grounds which related scrupulously to the merits of the proposed development, without reference to unconnected factors: see e g paras 21–23, per Lord Hope, para 50, per Lord Rodger of Earlsferry and para 73, per Lord Brown. There was, as Lord Hope DSPC notes in para 155 in his present judgment, a strong element of planning gain involved in the potential development. But it was planning gain related to the development,

not to some entirely unconnected development, so that the case has no analogy with the present. A

103 The issue before the House arose because all potential developers were required to provide an indemnity for Glasgow City Council's costs in effecting the compulsory purchase: paras 22, 50 and 73; and it was this feature which the losing developer criticised. There was some discussion of the possibility that the rival developers might have been invited to enter a bidding match in terms of the price to be paid: para 41, per Lord Hope, para 62, per Lord Rodger and paras 72–73, per Lord Brown. In paras 41 and 72, Lord Hope and Lord Brown both expressed their difficulty in understanding how such a bidding match would work. B

104 At most, one might read into the discussion in the *Standard Commercial Property* case a tacit assumption that such a bidding match might have been permissible if possible, but that does not make the case authority on a point which was evidently not argued in that case, any more than it was in fact argued on the present appeal. The focus in the *Standard Commercial Property* case was on whether the terms on which the Glasgow City Council was proposing to dispose of the property, once compulsorily acquired, met the requirements of section 191(3) of the Town and Country Planning (Scotland) Act 1997. Section 191(1) provided that any land acquired and held for planning purposes could be disposed of to such person, in such manner and subject to such conditions as might appear expedient to secure purposes mentioned in section 191(2), viz the best use of that or other land, etc. Section 191(3) provided that any land so disposed of should only be disposed of "at the best price or on the best terms that can reasonably be obtained". The requirements of section 191(1) and (2) on the one hand and of section 191(3) on the other were, as Lord Hope said, at para 34, "separate and distinct". The issue before the House was, as Lord Hope made clear throughout paras 31–42, simply whether the proposed terms of disposal fell within section 191(3). C D E

105 It is material to think about the consequences if the *Standard Commercial Property* case were to be treated as any sort of authority that a planning authority may, when deciding whether compulsorily to acquire property belonging to one landowner ("A"), have regard to the price offered for the land by potential developer ("B"). There would seem to be no logical reason to limit these consequences to situations where A and B are in competition, or to situations where the potential development extends beyond A's property and includes some property already owned by B. If, in any situation, B were to offer to repurchase A's property from the planning authority on terms giving the planning authority a profit, once the planning authority acquired it by compulsory purchase from A, why would that be illegitimate? Yet A would have little or no means of countering such an inducement. A could not offer any corresponding profit in respect of land which it already owned. And it could not be legitimate for A to offer the local authority a share in the profit it hoped to make from developing its own land, in order to induce the local authority to refrain from compulsorily purchasing its land for the benefit of B. That would amount to buying a local authority's exercise of its discretion. It might be suggested that if, as here, B owned some land which it was desired to include in an overall development, then A might counter B's offer in respect of A's land, by offering the planning authority a profit on the resale of B's land, if it were F G H

compulsorily to acquire that land rather than A's. Apart from the evident inappropriateness of any such bidding war, B's relevant land holding might (as here) be much smaller in area, and, unless it is supposed that A could legitimately offer a ludicrously high price for B's land, the financial attraction for the planning authority of A's offer could not match that of B's. So far, I have spoken only in terms of a bidding match relating to the price to be paid by the developer for the property to be compulsorily purchased. That was the only situation to which any discussion at all was addressed in the *Standard Commercial Property* case. The present case concerns the further question whether a proposed developer could influence the exercise by a planning authority of a discretion (viz whose property compulsorily to purchase and for the benefit of which of two potential developers) by offering some benefit wholly unconnected with any property the subject of the proposed development. In this context, it seems to me even clearer that the *Standard Commercial Property* case cannot lend support to Tesco's case on this appeal.

106 For these reasons, I do not regard the *Standard Commercial Property* case as justifying a conclusion that, as soon as rival developers are competing to develop a single site, part owned by each, considerations become material which would be immaterial if the whole site had been owned by one of them or by a third party. If the discussion in the judgments in that case lends any support to Tesco's case, the point did not arise for decision and was not argued there, any more than it was on the appeal in the present case. As a matter of principle, in my opinion, there is no basis on which the fact that Sainsbury and Tesco were, in a broad sense, rival developers in respect of the same overall site, can or should alter fundamentally the considerations admissible when the city council came to consider which development it should prefer, and which property it should, therefore, compulsorily acquire to facilitate such development. Any such decision fell to be made by reference, and only by reference, to considerations having some connection with the proposed development, and not by reference to any entirely unconnected inducement which might be held out by one of the rival developers. Like Lord Collins, Lord Walker and Baroness Hale JJSC, I would therefore allow Sainsbury's appeal.

LORD PHILLIPS OF WORTH MATRAVERS PSC

Introduction

107 The facts of this appeal are set out in detail in the judgment of Lord Collins of Mapesbury JSC. In essence they are simple. The issue that they raise is not. As every shopper knows Sainsbury and Tesco are rivals. Each owns a chain of supermarkets. Each is anxious to open a supermarket on a site at Wolverhampton ("the site"). To this end Sainsbury has acquired 86% of the site and Tesco has acquired 14%. These figures ignore, as shall I for it has no materiality, the fact that Wolverhampton City Council ("the council") owns a very small part of the site. Sainsbury and Tesco have each prepared a development plan for the site. The plans are very similar. Tesco has obtained planning permission for its plan and Sainsbury is in a position to do the same. The council is anxious that one or other development plan should be implemented, for it will be likely to contribute to the well-being of the

area. The problem is that neither of the rivals is prepared to give way, and in so doing to sell its portion of the site to the other. A

108 To resolve this impasse the council is prepared to use its powers of compulsory purchase to buy the land of one of the rivals and sell it to the other. Those powers are conferred by the following sections of the Town and Country Planning Act 1990, as amended:

"226 *Compulsory acquisition of land for development and other planning purposes* B

"(1) A local authority to whom this section applies shall, on being authorised to do so by the Secretary of State, have power to acquire compulsorily any land in their area— (a) if the authority think that the acquisition will facilitate the carrying out of development, redevelopment or improvement on or in relation to the land or; (b) which is required for a purpose which it is necessary to achieve in the interests of the proper planning of an area in which the land is situated. C

"(1A) But a local authority must not exercise the power under paragraph (a) of subsection (1) unless they think that the development, redevelopment or improvement is likely to contribute to the achievement of any one or more of the following objects— (a) the promotion or improvement of the economic well-being of their area; (b) the promotion or improvement of the social well-being of their area; (c) the promotion or improvement of the environmental well-being of their area." D

"233 *Disposal by local authorities of land held for planning purposes*

"(1) Where any land has been acquired or appropriated by a local authority for planning purposes and is for the time being held by them for the purposes for which it was so acquired or appropriated, the authority may dispose of the land to such person, in such manner and subject to such conditions as appear to them to be expedient in order— (a) to secure the best use of that or other land and any buildings or works which have been, or are to be, erected, constructed or carried out on it (whether by themselves or by any other person), or (b) to secure the erection, construction or carrying out on it of any buildings or works appearing to them to be needed for the proper planning of the area of the authority . . . E F

"(3) The consent of the Secretary of State is . . . required where the disposal is to be for a consideration less than the best that can reasonably be obtained . . ."

109 It is common ground, and rightly so, that the statutory requirements of section 226 are satisfied, so that the council has statutory power compulsorily to purchase the land owned by either of the rivals. There is little, if anything, to choose between the rival development plans. The council has, however, decided to prefer Tesco. Its intention is compulsorily to purchase Sainsbury's land and to sell this to Tesco. Its reason for this decision is as follows. Tesco own another site in Wolverhampton, the Royal Hospital site ("RHS"). This is run down and crying out for regeneration. The council wishes Tesco to redevelop this in a way which Tesco contends is uneconomic. Tesco has, however, agreed to enter into an obligation to redevelop the RHS in accordance with the council's wishes provided only that the council prefers Tesco in the competition for the development of the site. This obligation has been described as involving a "cross-subsidy" of the RHS redevelopment from the G H

A site development. The council has regarded this obligation as decisive in preferring Tesco to Sainsbury in the competition for the development of the site.

110 The issue raised by this appeal is whether Tesco's undertaking to develop the RHS in accordance with the council's wishes is a matter to which the council can properly have regard when deciding upon a scheme for developing the site that involves the compulsory purchase of Sainsbury's land.

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RHS redevelopment

111 The RHS is about half a mile away from the site, on the other side of the city centre. When Tesco applied for planning permission for the development of the site, it sought initially to link this with the redevelopment of the RHS. It was, however, unable to demonstrate any connection between the two, and ultimately accepted that there was no linkage for the planning committee to consider. The reality is that there is no connection between the development of the site and the RHS development other than Tesco's agreement to proceed with the latter if granted the former.

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The "cross-subsidy"

112 I am puzzled by the nature of the so-called "cross-subsidy". Under what is commonly described as a "back-to-back agreement" Tesco has agreed to indemnify the council in relation to the cost to the council of compulsorily purchasing Sainsbury's 86% of the site. Tesco has further agreed to redevelop the RHS at what Tesco contends will be a commercial loss. Tesco states that it will be able to afford this because of the cross-subsidy that will be available if it is permitted to develop the site. It is thus implicit that Tesco anticipates that development of the site will result in an economic benefit that will enable it to entertain a loss-making venture. That economic benefit should, however, be reflected in the price that Tesco, as a willing buyer, would be prepared to pay to Sainsbury, as a willing seller, if Sainsbury's land were to be sold directly to Tesco in an open market transaction. That, as I understand the position, is precisely the amount to which Sainsbury will be entitled from the council as compensation for the compulsory acquisition of their land: see *Waters v Welsh Development Agency* [2004] 1 WLR 1304, paras 17 and 18. If Tesco has to pay the council this amount under the back-to-back agreement it is not easy to see how there will remain to Tesco any surplus economic benefit to fund a loss-making venture at the RHS. Be this as it may, that is precisely what Tesco has agreed to do. Accordingly I approach this appeal on the basis that the compulsory purchase of Sainsbury's land will procure for the council the benefit, not merely of the development of the site, but of the redevelopment of the RHS under the obligation that Tesco has agreed to assume. I shall describe this, by way of shorthand, as "the RHS benefit".

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An analysis of the issues

113 The basic issue raised by this appeal is whether the RHS benefit is a legitimate, or material, consideration to which the council can have regard when deciding whether to acquire Sainsbury's land by compulsory purchase

in the particular context of the competition that exists between Sainsbury and Tesco for this development. This basic issue subdivides into two separate questions: (i) Would the RHS benefit be a material consideration in deciding whether compulsorily to purchase Sainsbury's land if Sainsbury was not competing for the development? (ii) Is the RHS benefit a material consideration in deciding whether to award the development to Sainsbury or Tesco? If the first question is answered in the affirmative, the second question must necessarily also be answered in the affirmative. A negative answer to the first question will not, however, necessarily require a negative answer to the second.

Would the RHS benefit be a material consideration in deciding whether compulsorily to purchase Sainsbury's land if Sainsbury were not competing for the development?

114 The statutory power of compulsory purchase can only lawfully be used for the purpose for which the power has been conferred. In *Galloway v Mayor and Commonalty of London* (1866) LR 1 HL 34, 43 Lord Cranworth LC said:

> "The principle is this, that when persons embarking in great undertakings, for the accomplishment of which those engaged in them have received authority from the legislature to take compulsorily the lands of others, making to the latter proper compensation, the persons so authorised cannot be allowed to exercise the powers conferred on them for any collateral object; that is, for any purposes except those for which the legislature has invested them with extraordinary powers."

115 Section 226(1)(a) and 226(1A) confers the power compulsorily to purchase land, but to justify the exercise of that power the council must be able to show that this is clearly in the public interest: "I regard it as a principle of our constitutional law that no citizen is to be deprived of his land by any public authority against his will, unless it is expressly authorised by Parliament *and the public interest decisively so demands*" (my emphasis), per Lord Denning MR in *Prest v Secretary of State for Wales* (1982) 81 LGR 193, 198. In this case it is common ground that the requirements of section 226 are satisfied and that if (i) there was no competing scheme and (ii) Tesco was not prepared to provide the RHS benefit, the public interest would none the less justify the compulsory purchase of Sainsbury's land in order to enable Tesco to carry out the development. If, however, this were not the case, would the offer by Tesco of the RHS benefit be a material consideration to which the council could have regard when deciding whether the exercise of their power of compulsory purchase was justified?

The ambit of section 226(1A)

116 Section 226(1A) of the Act sets out preconditions to the exercise of the power of compulsory purchase. The development facilitated by the compulsory purchase must be likely to contribute to the improvement of the economic, social or environmental well-being of the area. The Court of Appeal held that because the compulsory purchase of Sainsbury's land would result in the RHS benefit which, in its turn, would contribute to the economic, social or well-being of the area, this, of itself, satisfied section 226(1A).

It necessarily followed that the RHS benefit was a material consideration to which the council could have regard when considering the compulsory purchase of Sainsbury's land.

117 This finding differed from that of Elias J at first instance. I consider that Elias J was correct and the Court of Appeal wrong. The reasoning of the Court of Appeal appears from the following passages of the only reasoned judgment, which was delivered by Sullivan LJ [2009] 3 EGLR 94, paras 26–29:

> "26. Though convoluted, subsection 226(1A) is expressed in deliberately broad terms: 'likely to contribute to the achievement of . . . [the well-being] . . . objects'. It is not prescriptive as to the manner in which the carrying out of redevelopment upon a CPO site might make a contribution to such wider benefits. Mr Lockhart-Mummery accepted that one of the more obvious ways in which the carrying out of redevelopment on a CPO site might, at least in principle, be capable of bringing economic/social/environmental benefits to a wider area would be if the redevelopment was likely to act as the catalyst for the development or redevelopment of some other site or sites within the authority's area.
>
> "27. Such a catalytic effect might be direct, e g because redeveloping the CPO site would be likely to enable the occupier of another, run down site in the authority's area to relocate onto the CPO site, thus enabling the run down site to be redeveloped. Or it might be indirect, e g because the increased attractiveness after redevelopment of a hitherto run down CPO site was likely to make other sites in the area more attractive for development or redevelopment. It was common ground that such catalytic effects were capable of falling within the scope of section 226(1A).
>
> "28. In the present case the report makes it plain that the defendant was satisfied that facilitating the carrying out of the interested party's scheme for the redevelopment of the Raglan Street site would, by reason of the proposed cross-subsidy, act as the catalyst for the redevelopment of the RHS site in a manner which would contribute to the economic social and environmental well-being of its area . . .
>
> "29. In my judgment subsection 226(1A) is concerned with all of the consequences that are likely to flow from the process of the carrying out of redevelopment on the CPO site, and these are not confined to what might be described as the impact of there being new 'bricks and mortar' on the redeveloped site. Thus, disturbance during the redevelopment process and the need to relocate existing occupiers on the one hand, and the job opportunities that would be created during the carrying out of the redevelopment on the other, would both be capable of being relevant (the one negative, the other positive) for the purposes of section 226(1A)."

118 In these passages Sullivan LJ equates "the development" in section 226 (1A) with "the process of the carrying out of redevelopment". I think that this is questionable. He describes the site development as acting "as a catalyst" for the RHS redevelopment, by reason of the cross-subsidy. This is a misuse of language. Section 226(1A) focuses primarily, if not exclusively, on whether the development will be likely to enhance the economic, social or environmental well-being of the area once it is completed. The subsection cannot be satisfied by an agreement by a

developer to fund a second development that has no physical, geographical or other connection with the development that the compulsory purchase is designed to facilitate.

119 This conclusion gives effect to the natural meaning of the language of section 226(1A). In the Court of Appeal Mr Lockhart-Mummery QC for Sainsbury submitted that the same conclusion should be reached by applying, by analogy, decisions on what constitute "material considerations" in the context of planning applications. Sullivan LJ held that these decisions could not be so applied, at least directly, and Mr King QC for the council and Mr Katkowski QC for Tesco have supported his approach. Both Lord Brown of Eaton-under-Heywood and Lord Collins of Mapesbury JJSC have relied on decisions in relation to planning applications in reaching their conclusions, albeit that they have differed as to their effect. Is the analogy between compulsory purchase and planning permission in the present context a fair one?

The analogy between compulsory purchase and planning permission

120 I agree with Lord Brown and Lord Collins JJSC that it is appropriate in this case to draw an analogy, when considering whether the RHS benefit is a material consideration, with certain decisions relating to the grant of planning permission. The issue in this case is whether it is legitimate, when considering the benefits that will flow from a development that is the object of compulsory purchase, to have regard to a particular benefit offered by the developer. The relevant planning cases deal with the question of when it is legitimate, when considering a planning application, to have regard to benefits offered by the developer. Each case raises the question of what can legitimately be considered when assessing how the public interest is affected by the development of land. The analogy is obvious. There is a further point.

121 Section 226 of the Act was amended by section 99 of and Schedule 9 to the Planning and Compulsory Purchase Act 2004, which inserted subsection (1A). In its previous form it included, by section 226(2)(c), a requirement that a local authority, when considering whether land was suitable for development, redevelopment or improvement, should have regard to "any other considerations which would be material for the purpose of determining an application for planning permission for development on the land". While this provision was deleted by the 2004 Act it none the less illustrates the fact that the test of materiality in relation to planning permission can also be relevant in the context of compulsory purchase.

122 The planning obligation offered by Tesco in the present case is the RHS benefit. Could that have constituted a material consideration on Tesco's application for planning permission, notwithstanding that it had no other connection with the proposed development of the site?

Considerations that are material to the grant of planning permission

123 The history of planning permission shows an ambivalence on the part of the legislature, the executive and the judiciary in respect of the extent to which it is legitimate for a local authority to exact planning gain from a developer as a condition of the grant of planning permission. Lord Hoffmann traced this history in some detail at pp 771–777 of his speech in

Tesco Stores Ltd v Secretary of State for the Environment [1995] 1 WLR 759. I shall attempt a rather shorter summary, at least in relation to the earlier part of the history.

124 At the beginning of the 20th century, apart from some public health legislation, there were no planning controls over the use that an individual could make of his own land. A comprehensive system of planning control over the use of land was first introduced by the Town and Country Planning Act 1947. Since then there have been a series of legislative changes seeking, inter alia, to balance the private rights of owners of land against the public interest in the control of the environment, culminating with the Planning Act 2008, which allows for a new Community Infrastructure Levy. A particular problem has been the extent to which it is legitimate to require developers to take responsibility for the "off-site" consequences of their developments.

125 For present purposes, the most significant provision in force is section 70 of the Town and Country Planning Act 1990. This provides:

> "*Determination of applications: general considerations*
>
> "(1) Where an application is made to a local planning authority for planning permission— (a) subject to sections 91 and 92, they may grant planning permission, either unconditionally or subject to such conditions as they think fit; or (b) they may refuse planning permission.
>
> "(2) In dealing with such an application the authority shall have regard to the provisions of the development plan, so far as material to the application, and to any other material considerations."

126 Some of the relevant authorities deal with the criteria of the "material considerations" to which subsection (2) requires the local authority to have regard. Others relate to the scope of the power to impose conditions. In relation to each of these, the following observations of Lord Denning in *Pyx Granite Co Ltd v Ministry of Housing and Local Government* [1958] 1 QB 554, 572 are relevant:

> "The principles to be applied are not, I think, in doubt. Although the planning authorities are given very wide powers to impose 'such conditions as they think fit,' nevertheless the law says that those conditions, to be valid, must fairly and reasonably relate to the permitted development. The planning authority are not at liberty to use their powers for an ulterior object, however desirable that object may seem to them to be in the public interest."

As Lord Hoffmann observed in the *Tesco* case, at p 772, "As a general statement, this formulation has never been challenged".

127 A decision that is particularly relevant in relation to "material considerations" is *R v Westminster City Council, Ex p Monahan* [1990] 1 QB 87. The facts of that case have been set out and analysed by Lord Collins JSC at paras 51–59 of his judgment. In short the Court of Appeal held that it was a material consideration, when considering a composite development, that one part of it, which was undesirable having regard to relevant planning considerations, would provide a necessary cross-subsidy for the development of the other part, which was highly desirable. Lord Collins JSC in his analysis at para 58, identifies the fact that the case concerned "composite or related developments" as a relevant part of the

Court of Appeal's reasoning. At para 70 he identifies the need for such a connection or relationship as being a requirement of law. Lord Brown JSC, in para 176 of his judgment, disagrees. He comments that it was expressly recognised that no discernable legal principle would have supported the need for such a connection.

128 I align myself with Lord Collins JSC's analysis. The passage from the judgment of Nicholls LJ, quoted by Lord Brown and Lord Collins JJSC at paras 169 and 56 of their respective judgments, and the passage from the judgment of Staughton LJ quoted by Lord Collins JSC at para 57, demonstrate that each of those judges saw the need for a relationship between the undesirable and the desirable developments other than the simple fact that the one would subsidise the other. The suggestion by Kerr LJ, at p 117, that the significance of the distance between developments involved "considerations of fact and degree rather than of principle" does not withstand analysis. If the distance matters, then the reason why it matters must be a matter of principle. The relevant principle appears to me to be that a cross-subsidy between two developments cannot be considered unless there is some independent reason for considering the two developments together.

129 Whether that is a rational principle is another matter. If it is acceptable that an undesirable development should be permitted in order to subsidise a desirable development it is not easy to see why there should be an inflexible requirement that one should be in proximity to, or have some other nexus with, the other.

130 A close nexus between the subject matter of a planning condition and the development in relation to which it is imposed has been required by the courts. Lord Hoffmann in the *Tesco* case [1995] 1 WLR 759, 772 referred to the triple requirement for a valid planning condition laid down by the House of Lords in *Newbury District Council v Secretary of State for the Environment* [1981] AC 578: (i) it must be for a planning purpose and not for any ulterior one; (ii) it must fairly and reasonably relate to the permitted development; (iii) it must not be *Wednesbury* unreasonable: [1948] 1 KB 233. Lord Hoffmann went on to refer to *Hall & Co Ltd v Shoreham-by-Sea Urban District Council* [1964] 1 WLR 240 as illustrating the very strict way that the courts gave effect to these requirements, so that conditions requiring contribution to the "external costs" generated by a development were not permitted. As Lord Hoffmann explained, this gave rise to the introduction of "planning agreements", which were replaced in their turn by "planning obligations".

131 Section 106 of the Act, as substituted by section 12(1) of the Planning and Compensation Act 1991, provides:

> "*Planning obligations*
>
> "(1) Any person interested in land in the area of a local planning authority may, by agreement or otherwise, enter into an obligation (referred to in this section and sections 106A and 106B as 'a planning obligation'), enforceable to the extent mentioned in subsection (3)—
> (a) restricting the development or use of the land in any specified way; (b) requiring specified operations or activities to be carried out in, on, under or over the land; (c) requiring the land to be used in any specified way; or (d) requiring a sum or sums to be paid to the authority . . ."

A This section is in very general terms and, in particular, no express restriction or qualification is placed on the undertaking to pay money to the authority. In these circumstances two separate questions arise. The first is whether, and if so what, implicit restrictions exist as to the nature of planning obligations that can lawfully be incurred. The second is the extent to which planning obligations that have been undertaken are material considerations
B to which the authority must have regard under section 70 of the Act. There are two relevant decisions that relate to the latter question.

132 The first is *R v Plymouth City Council, Ex p Plymouth and South Devon Co-operative Society Ltd* (1993) 67 P & CR 78. Lord Brown JSC has set out the facts of this case at para 170 of his judgment. The issue was whether generous planning obligations ("benefits") offered by Tesco and Sainsbury, there as here rival applicants for a development, were material
C considerations to which the planning authority could have regard, notwithstanding that they went well beyond anything that the authority would have been able properly to require by way of planning conditions as being "necessary". The Court of Appeal applied the *Newbury* triple requirement, but held that there was no requirement that the benefits should be necessary, albeit that they had, fairly and reasonably, to relate to the
D development. As to that requirement, this was satisfied in the case of financial contributions to works off-site designed to accommodate demands generated by the development.

133 In that case Lord Hoffmann remarked, at p 90:

> "Materiality is an entirely different matter, because there is a public interest in not allowing planning permissions to be sold in exchange for
E benefits which are not planning considerations or do not relate to the proposed development."

He was subsequently in the *Tesco* case [1995] 1 WLR 759, 778 to say that the parallel between the *Newbury* triple requirement and the materiality of planning obligations was "by no means exact".

134 This brings me to the *Tesco* case, which is the most important
F decision in the context of this appeal. Once again the material facts have been summarised by Lord Brown and Lord Collins JJSC at paras 173 and 63–66 of their respective judgments. What the *Tesco* case established was that the second test in the *Newbury* case does not apply to planning obligations. These, to constitute material considerations, do not have "fairly and reasonably" to relate to the relevant development. It is enough if
G they have a connection to it that is not de minimis. The requirement for such a connection none the less remains. Lord Brown JSC has concluded, at para 174 of his judgment, that this connection is satisfied by an offer to cross-subsidise another development that is otherwise unconnected with the development for which planning permission is sought. He comments that such an offer could not sensibly be regarded as "an attempt to buy planning permission", a phrase he takes from the judgment of Lord Keith of Kinkel,
H at p 770. Lord Brown JSC differs from Lord Collins JSC, who concludes at para 70 that the authorities, and the *Tesco* case in particular, establish that there "must be a real connection" between benefits undertaken by a planning obligation and the development to which the planning application relates.

135 Here I align myself once again with Lord Collins JSC. Lord Brown JSC's conclusions are at odds with the passage in Lord Keith's judgment from which he has borrowed a phrase. The full passage reads:

> "An offered planning obligation which has nothing to do with the proposed development, *apart from the fact that it is offered by the developer*, will plainly not be a material consideration and could be regarded only as an attempt to buy planning permission." (Emphasis mine.)

All members of the committee agreed with the judgment of Lord Keith.

136 Lord Brown JSC has quoted a passage from the judgment of Lord Hoffmann, at p 779C–D, in which he says that section 106 does not require that the planning obligation should relate to any particular development, and Lord Keith made a similar observation, at p 769B. These observations related, however, to the legality, not the materiality, of planning obligations.

137 My conclusion in relation to the effect of the authorities is as follows. When considering the merits of an application for planning permission for a development it is material for the planning authority to consider the impact on the community and the environment of every aspect of the development and of any benefits that have some relevance to that impact that is not de minimis that the developer is prepared to provide. An offer of benefits that have no relation to or connection with the development is not material, for it is no more than an attempt to buy planning permission, which is able in principle. Tesco was right, on its application for planning permission, to drop any attempt to link the development of the site with the RHS development.

138 These principles can properly be applied, by analogy, to a simple case where a local authority is considering whether the public interest justifies the compulsory purchase of land for the purpose of facilitating a development. The development itself must be justified in the public interest and it would be wrong in principle for the local authority to be influenced by the offer by the chosen developer to provide some collateral benefit that has no connection of any kind with the development in question. Thus if, in this case, Sainsbury was not a rival seeking to develop the site but simply an owner who was unwilling to sell his land, it would not be right to treat Tesco's offer of the RHS benefit as a consideration that was material to the decision of whether or not to purchase Sainsbury's land.

Is the RHS benefit a material consideration in deciding whether to award the development to Sainsbury or Tesco?

139 The principle that permits a planning authority to have regard to planning gain that has some connection with a proposed development, but not to planning gain that has no such connection, is not entirely rational. It becomes less rational in a situation where two developers are competing for the grant of planning permission in circumstances where the grant to one or the other is justifiable, but not to both. That was believed to be the position in the *Plymouth* case 67 P & CR 78, although ultimately planning permission was granted to both the rivals, being once again Sainsbury and Tesco. In the *Plymouth* case each of the rivals was anxious to be permitted to build a supermarket. In competing for planning permission each offered to embellish its development with an array of expensive "add-ons",

described by Lord Brown JSC at para 170 of his judgment. These no doubt enhanced the attraction of each of the rival schemes from the viewpoint of the public and the local authority. But the possibility must exist that the cost of these embellishments might have been spent to better advantage in providing alternative planning gain in the local authority's area that had no connection with the proposed development. The reality is that the rivals were, to use a description adopted by Lord Hoffmann in the *Tesco* case [1995] 1 WLR 759, 782, competing for the development as in an auction. If an auction is to be permissible there might be something to be said for permitting the local authority to identify, for consideration by the rival bidders, its most urgent planning needs, whether or not connected with the development. I make this observation only by way of a stepping stone to considering the more complicated issue raised by the facts of this case.

140 The council's decision involves the exercise of two statutory powers. The first is the power of compulsory purchase conferred by section 226 of the Act. The second is the power to sell the land compulsorily purchased, which is conferred by section 233. The purposes of the sale of the land described in section 233 differ from the purposes of the purchase described in section 226. Had the site been in the ownership of a third party who was unwilling to sell it, and had Tesco and Sainsbury been competing to develop it, the council would have had two separate decisions to make. First whether compulsorily to purchase the land. Secondly to which of the two rivals to sell it for the purpose of the development. The law that I have analysed suggests that, when making the first decision under section 226, the council would have been bound to disregard benefits that might be obtainable from either of the developers that were unconnected to the development. But in choosing to which of the two rivals to sell the land for development under section 233 the council would have been entitled, and perhaps bound, to negotiate the best deal available. The terms of section 233 would seem wide enough to have permitted the council to treat as material Tesco's offer to throw into the bargain the RHS benefit.

141 These conclusions receive some support from *Standard Commercial Property Securities Ltd v Glasgow City Council (No 2)* 2007 SC (HL) 33. Lord Collins JSC has set out some of the complicated facts of this case at para 40 of his judgment. That case had these features in common with the present. Glasgow City Council wished to develop a run down area of the city, parts of which were owned by rival developers. The council had decided compulsorily to purchase the entire site and to sell it on back-to-back terms to one of the rival developers. The other developer challenged the deal on the basis that back-to-back terms did not represent the best deal. This the council were bound to achieve under section 191 of the Scottish Act, which closely resembles section 233 of the Act. Lord Collins JSC rightly remarks that there was in that case no offer of benefits unconnected to the development, but I do not think that this robs it of all relevance. Of significance is that in that case, as in this, the council first decided in principle that the facts justified the use of its powers of compulsory purchase, before turning to choose between the rival developers. It is also significant that the House of Lords held that, at the stage of choosing the developer, the council was not simply concerned with achieving the object of the compulsory purchase, but was also entitled to have regard to purely commercial considerations. Lord Hope of Craighead described the position as follows, at para 34:

"section 191 seeks to do two things. On the one hand it seeks to regulate those aspects of the transaction which are intended to secure the purposes set out in subsection (2). These purposes are to secure the best use of the land and the proper planning of the area. On the other it seeks in addition to protect the public purse in the manner indicated by subsection (3). These are separate and distinct requirements, although they must both be read in the light of what section 191 seeks to achieve. The prohibition in subsection (3) directs attention to one issue, and to one issue only. This is the commercial implications of the transaction for the planning authority. It is to the best commercial terms for the disposal of the land, not to what is best designed to achieve the overall planning purpose, that the authority must direct its attention at this stage. But the words 'best terms' permit disposal for a consideration which is not the 'best price'. So terms that will produce planning benefits and gains of value to the authority can be taken into account as well as terms resulting in cash benefits."

142 I can summarise the position as follows. (1) In deciding whether to exercise its powers of compulsory purchase for the purpose of development the council is not permitted to have regard to unconnected benefit that it may derive from the carrying out of the development, but (2) in deciding who shall carry out the development and, thus, to whom the land will be sold for that purpose, the council is entitled, and perhaps bound, to have regard to unconnected benefit offered by the developer. The problem is how to have regard to these principles in a case such as the present where the rival developers each owns part of the site needed for the development.

143 I have concluded that the proper approach should be as follows. The council should first decide, in the case of each of the rivals, whether compulsory purchase of his land would be approved to enable the development to proceed, disregarding any unconnected benefit that might accrue and on the premise that he was simply an unwilling seller rather than a rival developer. In the result of an affirmative answer being given in each case, the council should then decide which developer to prefer having regard to all considerations material to that choice, including the amount of the site already owned by each developer and any benefits offered by either developer, whether or not connected to the development. The fact that this may, in effect, involve an auction between the two developers for the benefit of the community does not seem to me to be inherently able.

144 In the present case this is what the council did. The council was not influenced by the RHS benefit when deciding in principle to use its power of compulsory purchase. In deciding to purchase whatever land was necessary for the development of the site the council had regard only to the proper objects of compulsory purchase. The choice of developers necessarily also determined which land would be compulsorily purchased, but the decision had already been taken to purchase whatever land would be necessary having regard to the choice of developer.

145 To summarise, the RHS benefit was not a consideration that was material to the decision to use the power of compulsory purchase, but it was very material to the decision which developer to select, and this in its turn determined whose land was to be compulsorily purchased. In these circumstances I have reached the conclusion that the RHS benefit was a

A consideration that was material to the decision that determined simultaneously the developer and the land to be purchased. It cannot be said that the decision compulsorily to purchase Sainsbury's land was influenced by a consideration that was not material.

146 The decision that I have reached at laborious length was felicitously stated by Elias J in a single paragraph (para 38) and I propose to conclude my judgment by quoting this:

B

> "In my judgment when deciding which development should receive their support, the council could have regard to all the benefits accruing from the proposed development, including any off-site benefits achieved by way of a section 106 agreement. It seems to me that there are really two stages in the process. First, can a CPO lawfully be made in favour of
> C a particular development? That must be determined by focusing solely on the benefits flowing from the development itself and the RHS benefits could not be taken into account at that stage. Second, if the power can lawfully be exercised, but there is more than one potential party in whose favour it could be exercised, to which development should the council lend its support? At that stage I can see no reason why the council should not have regard to its wider interests. It has established that there is in
> D principle a proper basis in law for interfering with the rights of either of two (or more) owners of land on the site by compulsorily purchasing their interests; I see no reason why it should not select which landowner should be so affected by considering the overall benefits to the council which the respective developments would provide."

E **147** The reality in this case is that the real issue is which developer should be preferred by the council, which is in the position of being able to choose between the two. The fact that the compulsory purchase of land owned by one or the other is involved is really peripheral. Each purchased its land in the hope of being able to use it for the purpose of the development. Each shares the intention that its land should be used for the development. In resisting the compulsory purchase of its land each is motivated by
F commercial rivalry, not by any to the land being used for the proposed development. It would be unfortunate if the rigid application by analogy or principles of planning law were to rob the local community of the additional benefit of the redevelopment of the RHS. I have not found it necessary to reach such a result.

148 For these reasons I would dismiss this appeal.

G

LORD HOPE OF CRAIGHEAD DPSC

149 Reduced to its essentials, this case is about two decisions that the council took to facilitate the development at Raglan Street. The first was whether they should exercise their powers of compulsory acquisition to enable the development. The second was as to the choice of developer. The first decision was taken in the exercise of the powers conferred on the
H council by section 226 of the Town and Country Planning Act 1990, as amended. The second, as Lord Phillips of Worth Matravers PSC has said (see para 140, above), was about the exercise of two statutory powers. I put it in this way, as I think Lord Phillips PSC does too, simply to indicate the context in which each of these powers was being exercised. The cart and the

horse—if I may adopt Baroness Hale of Richmond JSC's analogy (see para 91)—go together, like a horse and carriage, at this stage of the exercise. A

150 The site was not in the sole ownership, or under the sole control, of either developer. They were in competition with each other for its development, so the exercise of compulsory powers to acquire the interest in the land vested in one or other of them was inevitable. Just as inevitable is the fact that the purpose of the exercise of those powers was to enable the council to dispose of the interest that was to be acquired to the preferred developer. Section 226 is concerned with the acquisition of the interest in the land, not its disposal. The power to dispose of land that has been acquired or appropriated is set out in section 233 of the 1990 Act. B

151 The compulsory acquisition of land can only be permitted if it is within the powers of the statute. Great care must be taken to see that those powers are not resorted to unless the statute permits this and that the acquisition is necessary for the purpose that the statute contemplates. The issue on this part of the case is whether the council were entitled to take into account, in discharging their duty under section 226(1A) to consider the well-being benefits for the area, Tesco's commitment to secure by way of cross-subsidy the development of the Royal Hospital site. For the reasons that Lord Phillips PSC and Lord Collins JSC give, I would hold that they were not entitled to do so. Section 226(1)(a) provides that the authority have power to acquire land compulsorily if they think that it will facilitate the carrying out of development, redevelopment or improvement on or in relation to the land. The reference to "the land" in this paragraph is to the land which is to be the subject of the compulsory purchase order. Section 226(1A) places a limitation on the exercise of the power under section 226(1)(a). These two provisions must be read together. The contribution by the development, redevelopment or improvement that section 226(1A) refers to must be on the land that the authority is proposing to acquire compulsorily. C D E

152 The situation in this case is that there was no physical connection of any kind between the two sites. Development of the Royal Hospital site could not contribute anything to the carrying out of development on the Raglan Street site in any real sense at all. They were not part of the same land. There is no doubt that the development of the Royal Hospital site would bring well-being benefits to the council's area of the kind that section 226(1A) refers to. But to fall within that subsection they had to be benefits that flowed from the Raglan Street development, not anywhere else. It follows that the council were not entitled to conclude that the work which Tesco were willing to undertake on the Royal Hospital site would contribute to the well-being of the area resulting from its development of the site at Raglan Street for the purposes of section 226(1A). F G

153 At first sight that might seem to be the end of the case. The report which was presented to the council's cabinet on 30 January 2008 stated that the Tesco and Sainsbury's schemes for the Raglan Street site would both fulfil the purpose referred to in section 226(1)(a). Addressing itself to the choice that had to be made between the two schemes, it went on to describe the circumstances relating to the development of the Royal Hospital site by Tesco and to refer to the decisive advantage which Tesco enjoyed over Sainsbury's if the development of that site was taken into account. It concluded by recommending that there was a compelling case in the public interest to make a compulsory purchase order to enable the Tesco scheme to go ahead. H

As regards the exercise of the power to acquire the land compulsorily, if looked at in isolation, this was to stray into forbidden territory.

154 In my opinion however it would be unrealistic to stop there. The legality of the use of compulsory powers to enable the Raglan Street development to proceed has not been called into question. As the report said, both schemes satisfied the requirements of section 226(1)(a), and it has never been doubted that the carrying out of either of them on that site would contribute to the achievement of the well-being of the area. If the land had been in the ownership of a third party, there would have been no need to say more. The reason why the report went further was the council had to make a choice between the two developers. Although the report did not say so in terms, it is plain that the assumption on which it was proceeding was that, having acquired the land, the council would dispose of it to the preferred developer. The surrounding circumstances show that it was never the council's intention to develop the land themselves or to retain it in their ownership. This part of the report was as much concerned with the exercise of the power to dispose of the land as with the exercise of the power to acquire it.

155 The power of disposal under section 233 confers a wide discretion on the local authority. They may dispose of the land to such person, in such manner and subject to such conditions as appear to them to be expedient to secure the best use of that or other land or the proper planning of their area. Like section 191 of the Town and Country Planning (Scotland) Act 1997 which is in very similar terms, that is its primary objective: see *Standard Commercial Property Securities Ltd v Glasgow City Council (No 2)* 2007 SC (HL) 33, para 32. It was held in that case that the council, when considering whether to use compulsory powers in conjunction with a sale of the land under a back-to-back agreement to the preferred developer, were entitled to have regard to the wider benefits that were expected to flow from the contribution that the preferred developer would make to the redevelopment, the proposals for which were to contain a strong element of planning gain. There was to be a requirement to include improvements to other areas of the urban block within which the site to be acquired compulsorily was situated: see paras 38, 39. The value of the planning gain was something that the council was entitled to take into account in its assessment of whether the disposal was achieved on the best commercial terms.

156 The focus in that case was on the terms on which the council proposed to make the assembled site available to the preferred developer. Its facts differ from those in the present case, so I am not to be taken as suggesting that it provides direct authority for the view which I take here. But it does illustrate the extent of the power of disposal that is conferred by this section on the local authority, and it shows how the authority may legitimately have regard to the way the land will be disposed of before it decides to acquire it compulsorily: taking them both together, like the horse and carriage to which I referred earlier. The council decided to use its compulsory powers to purchase the site with a view to its disposal by means of a back-to-back agreement to achieve the development. The site was part of an urban block within which properties owned by the first petitioners and the second respondents were situated. Each had their own interests and their own agendas which were in competition with each other and, as in this case,

their proposals had to be evaluated. The preferred developer was expected to achieve a scheme that would enhance the wider area within which the site itself was situated. Regard was to be had to benefits which it would provide that were extraneous to the site itself, and extraneous too to each of the properties that were to be acquired compulsorily. Among other things, it was to commit itself to supporting an order for regulating traffic on adjacent streets and to provide details of a financial commitment to the area's environmental enhancement. The whole thing was seen as a single package. The acquisition of the properties and their disposal to a developer who would achieve these benefits were each part of the same exercise: for a more complete account of the facts, see 2005 SLT 144, paras 1–16.

157 I would take from that case the proposition that it is legitimate for the acquiring and disposing authority which has to choose between competing proposals for development to have regard to planning benefits that lie outside the perimeter of the site itself. It has not been suggested that it would have been an improper use of the section 233 power for the council to take account of Tesco's commitment to develop the Royal Hospital site in the assessment as to whether a disposal of the land to Tesco was preferable to disposing of it to Sainsbury's. I can see no reason why that should be so if the land was already in the council's ownership and they were faced with a competition between two or more developers who had no interest in the land at all.

158 It was not possible in this case for the council to take these two decisions separately, each without reference to the other. The choice as to whose land to acquire was inevitably linked to the choice of the developer to whom the land was to be disposed of when it was acquired. Section 226 does not concern itself with choices of that kind. To say that it prohibits them would be to read a limitation into the section which is not there. It would unduly inhibit the exercise of the power of compulsory acquisition in a case such as this, where a site that is in need of development is in divided ownership, the owners are in competition with each other for its development and there are sound planning reasons beyond those that section 226(1A) refers to for regarding the proposal of one developer as preferable to that of the other. I would not regard the opportunity that this particular situation gives for achieving planning gain in the wider public interest as transgressing the rule that the power of compulsory purchase can only be used for the purpose for which the power has been conferred. The contrary view risks making it impossible for projects for urban renewal which can only be achieved by using compulsory powers to assemble the site for redevelopment to include measures for improvements in the public interest which lie outside the site's perimeter. As Lord Phillips PSC says (see para 147), it would be unfortunate if a rigid application of the compulsory purchase principles to proposals of that kind were to rob the community of such benefits.

159 For these reasons, and those of Lord Phillips PSC with which I agree and in respectful agreement too with what Elias J said at first instance [2009] EWHC 134 at [38], I would dismiss the appeal.

LORD BROWN OF EATON-UNDER-HEYWOOD JSC

160 Are a local planning authority, when deciding how to exercise their compulsory purchase powers, precluded in all circumstances, as a matter of

law, from taking into account public planning benefits (however substantial and obvious) which would result, not directly from the development to be facilitated by the proposed land acquisition, but rather from a contractual obligation attaching to that development? That, crucially, is the issue arising on this appeal.

161 Take the facts of this very case, already fully recounted in the judgment of Lord Collins of Mapesbury JSC, but which may conveniently and sufficiently be summarised as follows. Two rival supermarket chains, Sainsbury's and Tesco, each own part of a site which is ripe for development ("the site"). Each wishes to develop the site as a supermarket and each has (or is about to obtain) planning permission for such development. There is really nothing to choose between their respective proposals. Neither is willing to sell its share of the site to the other. In these circumstances it is agreed by all that the local planning authority ("Wolverhampton") must inevitably exercise their compulsory purchase powers under section 226 of the Town and Country Planning Act 1990 (as amended). The question then becomes: who should be chosen to carry out the development of the site and whose land, therefore, should be compulsorily acquired for the purpose? Should Sainsbury's land be acquired so that Tesco may develop the site or vice versa? The issue more particularly arising is whether, in deciding to choose Tesco as the developer, Wolverhampton acted unlawfully in taking into account Tesco's commitment, if chosen, to redevelop the Royal Hospital site, another site in Wolverhampton's area some half a mile away ("the RHS"), redevelopment which Wolverhampton are anxious to promote but which Tesco would not be prepared to undertake save by way of cross-subsidy?

162 It so happens that one of the two rival chains (Sainsbury's) owns 86% of the site, the other (Tesco) 14%. But it is not suggested that this disparity between their respective interests affects the question of law at issue. The same question would arise even if each owned exactly half the site. Plainly the disparity is itself a material consideration and one, indeed, which ultimately could prove decisive in Sainsbury's favour. For present purposes, however, as Mr Lockhart-Mummery QC for Sainsbury's expressly acknowledged, it can be ignored.

163 Section 226 of the 1990 Act provides so far as material:

> "(1) A local authority to whom this section applies shall, on being authorised to do so by the Secretary of State, have power to acquire compulsorily any land in their area— (a) if the authority think that the acquisition will facilitate the carrying out of development, redevelopment or improvement on or in relation to the land . . .
>
> "(1A) But a local authority must not exercise the power under paragraph (a) of subsection (1) unless they think that the development, redevelopment or improvement is likely to contribute to the achievement of any one or more of the following objects— (a) the promotion or improvement of the economic well-being of their area; (b) the promotion or improvement of the social well-being of their area; (c) the promotion or improvement of the environmental well-being of their area."

164 For present purposes the effect of those provisions in combination can be summarised quite simply as follows: A local authority can (subject to confirmation by the Secretary of State) compulsorily acquire land if they

think, first, that this will facilitate its development (section 226(1)(a)) and, secondly, that this development is likely to contribute to the economic and/or social and/or environmental well-being of their area (section 226(1A)). A

165 In the present case it seems to me self-evident that both of these pre-conditions are fully satisfied in respect of each proposed development scheme so that Wolverhampton have a discretion to make whichever CPO they regard to be appropriate, whether of Sainsbury's land or of Tesco's land. The question, I repeat, is whether, in choosing whose land to acquire, Wolverhampton can take into account the additional benefit to their area which would result from Tesco's commitment, if they are enabled to develop the site, also to develop the RHS. B

166 It was the Court of Appeal's conclusion below that Wolverhampton were indeed legally entitled to take account of the proposed cross-subsidy which would enable (and commit) Tesco to redevelop the RHS and that this entitlement arose directly under section 226(1A). This subsection, the Court of Appeal held [2009] 3 EGLR 94, para 33, imposes on local planning authorities an express obligation to have regard to such "off-site, or 'external' benefits". Elias J at first instance had held to the contrary [2009] EWHC 134 (Admin) at [35] that, to fall within section 226(1A), well-being benefits had to be generated by the development of the site itself, not by some contractually linked external development. In the only reasoned judgment in the Court of Appeal, Sullivan LJ (at paras 42 and 44) agreed with Elias J that, C D

> "to fall within section 226(1A) the benefits in question must flow from the redevelopment of [the site]. However . . . [t]he likelihood of the redevelopment of a CPO site leading, whether because of cross-subsidy or for any other reason, to the development or redevelopment of other sites in the authority's area is precisely the kind of wider benefit that subsection (1A) requires the authority to consider." E
>
> "[Section 226(1A)] ensures that wider 'well-being' benefits are not ignored, but are always treated as material considerations . . ."

167 I have to say that on this particular issue, in common with the majority of this court, I prefer Elias J's view to that of the Court of Appeal. That, however, does not seem to me the real issue in the case. Section 226(1A), I repeat, does no more than specify a precondition (additional to that in section 226(1)(a)) which has to be satisfied before any power of compulsory acquisition can be exercised. No one doubts that it was satisfied here. Wolverhampton accordingly had a discretion under the section. The critical question then arising is whether the further public benefit which Tesco was offering was or was not a material consideration which Wolverhampton could take into account when deciding how to exercise that discretion. Elias J held that it was. The Court of Appeal, having concluded (wrongly as I believe) that this further benefit had to be regarded as material by virtue of section 226(1A), chose not to deal with the question whether the benefit would in any event have been a material consideration, section 226(1A) apart. As to this Sullivan LJ merely observed, at para 44, that section 226(1A) "does not purport to cut down the considerations that are capable of being material under subsection 226(1)(a)". And that at least must be right: to stipulate, as section 226(1A) does, that the authority must F G H

not exercise their compulsory purchase powers unless they think that the development itself is likely to contribute to the well-being of their area (whether because it will act as a catalyst for other development or provide employment or stimulate other beneficial activity in the area or whatever else) is by no means to stipulate that, the condition being satisfied, this exhausts all the considerations to which the authority can have regard and they must shut their mind to all other possible external benefits which the exercise of their compulsory purchase powers would bring.

168 In addressing the question whether such external benefits are capable of being material considerations in the exercise of compulsory purchase powers under section 226(1)(a), it seems to me helpful to begin by examining what the position would be in the broadly analogous situation of a planning authority considering rival applications for planning permission. Suppose that the competition between the rival supermarket chains was not, as here, as to which should be preferred as developers of a single site by reference to the exercise of the authority's powers of compulsory purchase, but rather as to which should be granted planning permission assuming that each owned a suitable site but there was room in the area only for one supermarket—the very situation which arose in *Tesco Stores Ltd v Secretary of State for the Environment* [1995] 1 WLR 759 (between, as it happens, the same competing developers as here). Would an offer such as that made here by Tesco to develop the RHS (probably by way of a planning obligation under section 106 of the 1990 Act) be a "material consideration" within the meaning of section 70(2) of the 1990 Act? If it would, then it is difficult to see why it should not be material also for section 226(1)(a) purposes. If, on the other hand, it would not, then the court would need to be persuaded that wider financial benefits are to be regarded as material considerations when exercising compulsory purchase powers than when determining planning applications.

169 Before going to the House of Lords decision in the *Tesco* case itself it is instructive to take note of two earlier Court of Appeal authorities—*R v Westminster City Council, Ex p Monahan* [1990] 1 QB 87 and *R v Plymouth City Council, Ex p Plymouth and South Devon Co-operative Society Ltd* (1993) 67 P & CR 78—the essential backdrop to the speeches in the *Tesco* case. Lord Collins JSC having dealt with these at some length, I content myself with the briefest summary of each. *Ex p Monahan* was the Royal Opera House case in which the planning authority were held entitled to have granted permission for an office development notwithstanding that it involved a major departure from the development plan because that would cross-subsidise the refurbishment of the listed opera house. Nicholls LJ recorded (p 121) that counsel for the planning authority (Mr Sullivan QC)

> "frankly accepted that he could discern no legal principle which distinguished between (a) what happens within one building, (b) what happens on two adjoining sites and (c) what happens on two sites which are miles away from each other"

but continued:

> "All that need be said to decide this appeal is that the sites of the commercial development approved in principle are sufficiently close to

> the opera house for it to have been proper for the local planning authority to treat the proposed development of the office sites . . . and the proposed improvements to the opera house as forming part of one composite development project. As such it was open to the planning authority to balance the pros and cons of the various features of the scheme."

As to what the position would have been had the proposed office block been in Victoria, Kerr LJ similarly suggested, at p 117, that "all such cases would . . . involve considerations of fact and degree rather than of principle".

170 The *Plymouth* case (like the *Tesco* case which followed it) involved competitive planning applications by Sainsbury's and Tesco, the council's original intention having been to allow one store only to be built. Each company was therefore invited to say why it should be preferred and both were told that the council would take into account any community benefits offered (provided they were "justifiable in land use planning terms"—the council's published policy). Sainsbury's offer included the construction of a tourist information centre on the site, an art gallery display facility, a work of art in the car park, a bird-watching hide overlooking the river, an £800,000 contribution to the establishment of a park and ride facility in the neighbourhood, and up to £1m for infrastructure works to make a different site suitable for industrial use. Tesco offered financial contribution to a crèche, a wildlife habitat, a water sculpture, and in addition it offered to sell the council a site for a park and ride facility. Both offers were by way of section 106 agreements. In the event, both applications were granted, doubtless to the satisfaction of Sainsbury's and Tesco but not that of the Co-operative Society who promptly challenged both planning permissions on the ground that the council had taken into account immaterial considerations.

171 The Co-operative Society argued that not merely must a community benefit offered under a section 106 agreement satisfy the three tests laid down by the House of Lords in *Newbury District Council v Secretary of State for the Environment* [1981] AC 578 (following *Pyx Granite Co Ltd v Ministry of Housing and Local Government* [1958] 1 QB 554) by which the legality of a section 70 condition is to be judged—namely (i) that it has a planning purpose, (ii) that it fairly and reasonably relates to the permitted development and (iii) that it is not *Wednesbury* unreasonable—but it must also be necessary in the sense of overcoming what would otherwise have been a planning to the development. In the leading judgment rejecting this argument and stating that "the only question is whether [the section 106 agreement] fairly and reasonably related to the development", Hoffmann LJ said (p 90) that the only benefits which gave pause for thought were the two substantial sums offered by Sainsbury's as a contribution to work to be done away from the site. The park and ride facility, however, would tend to reduce both traffic heading for the store and use of Sainsbury's own car park by people not actually shopping there. As for the £1m offer, this "was not simply to pay the council £1 million. It was to contribute up to £1m to the actual cost of infrastructure works undertaken by the council within a period of two years at a specific site": p 91.

172 As we shall shortly see, the supposed requirement that section 106 offers, like imposed section 70 conditions, have to "fairly and reasonably

relate to the permitted development" (a requirement held satisfied in the *Plymouth* case) did not survive the decision of the House of Lords in the *Tesco* case [1995] 1 WLR 759 to which I now come.

173 The *Tesco* case (like the *Plymouth* case at the initial stage) concerned rival applications by Sainsbury's and Tesco to develop their respective sites (Sainsbury's in conjunction with Tarmac), there being room in Witney for one store only. Notwithstanding that Tesco's application included an offer of £6·6m to fund in its entirety a new link road, the Secretary of State (who had to decide which of the two proposals to allow) chose to grant Sainsbury's application. Tesco appealed on the ground that the Secretary of State had failed to take account of a material consideration, namely their £6·6m offer. Albeit the appeal failed, it did so not on the basis that the offer was an immaterial consideration but rather because, although material, the Secretary of State had been entitled to give it little or no weight and to prefer Sainsbury's proposal because the Secretary of State thought its site "marginally more suitable": Lord Hoffmann, p 783. The following features of the *Tesco* case seem to me of particular importance: (1) The £6·6m offer was held to be a material consideration notwithstanding that the Secretary of State shared his inspector's view that the relationship between the proposed new development and the funding of the link road was "tenuous" (the development being likely to result only in "slight worsening of traffic conditions"). (2) The only reasoned speeches were given by Lord Keith of Kinkel (with whom the other members of the committee agreed) and Lord Hoffmann. Both of them recognised that, contrary to the Court of Appeal's assumption in the *Plymouth* case, the second *Newbury* test has no application to section 106 agreements. As Lord Hoffmann observed, at p 779:

> "section 70(2) does not apply to planning obligations. The vires of planning obligations depends entirely upon the terms of section 106. This does not require that the planning obligation should relate to any particular development. As the Court of Appeal held in *Good v Epping Forest District Council* [1994] 1 WLR 376, the only tests for the validity of a planning obligation outside the express terms of section 106 are that it must be for a planning purpose and not *Wednesbury* unreasonable."

Nevertheless, for a planning obligation to be a material consideration which can legitimately be taken into account in granting planning permission, it has to have "some connection with the proposed development which is not de minimis" (Lord Keith, p 770B); it cannot be "quite unconnected with the proposed development": Lord Hoffmann, p 782D. (3) Were it otherwise, said Lord Keith (p 770A), it "could be regarded only as an attempt to buy planning permission". Lord Hoffmann put it rather differently: p 782C–E. The metaphor of "bargain and sale", he suggested, although "vivid":

> "is an uncertain guide to the legality of a grant or refusal of planning permission. It is easy enough to apply in a clear case in which the planning authority has demanded or taken account of benefits which are quite unconnected with the proposed development. But in such a case the phrase merely adds colour to the statutory duty to have regard only to material considerations. In cases in which there is a sufficient connection, the application of the metaphor or its relevance to the legality of the

planning decision may be highly debatable. I have already explained how in a case of competition such as the *Plymouth* case, in which it is contemplated that the grant of permission to one developer will be a reason for refusing it to another, it may be perfectly rational to choose the proposal which offers the greatest public benefit in terms of both the development itself and related external benefits."

(4) In the *Tesco* case itself, Lord Hoffmann then observed, (p 782G–H), the Secretary of State had in substance accepted the argument that Tesco's "offer to pay for the whole road was wholly disproportionate and it would be quite unfair if [Sainsbury's] was disadvantaged because it was unwilling to match this offer". That, said Lord Hoffmann, "is obviously defensible on the ground that although it may not maximise the benefit for Witney, it does produce fairness between developers". However, Lord Hoffmann continued (p 783), so too was Tesco's argument (that only if they offered the whole cost of the link road would it be constructed) a perfectly respectable one. Importantly, he then said:

"the choice between a policy which emphasises the presumption in favour of development and fairness between developers, such as guided the Secretary of State in this case, and a policy of attempting to obtain the maximum legitimate public benefit, which was pursued by the local planning authority in the *Plymouth* case, lies within the area of discretion which Parliament has entrusted to planning authorities. It is not a choice which should be imposed upon them by the courts."

(5) Lord Hoffmann had earlier (p 780) emphasised the distinction to be made between materiality and weight:

"The law has always made a clear distinction between the question of whether something is a material consideration and the weight which it should be given. The former is a question of law and the latter is a question of planning judgment, which is entirely a matter for the planning authority. Provided that the planning authority has regard to all material considerations, it is at liberty (provided that it does not lapse into *Wednesbury* irrationality) to give them whatever weight the planning authority thinks fit or no weight at all. The fact that the law regards something as a material consideration therefore involves no view about the part, if any, which it should play in the decision-making process."

174 Let me in the light of those authorities return to the question I posed at para 168: would an offer such as Tesco made to Wolverhampton, had it been made in a planning context have been, as a matter of law, a material consideration? To my mind the correct answer to that question should be yes, although plainly the weight (if any) to be given to it would be entirely for the planning authority. And the reason the answer should be yes is quite simply because such an offer could not sensibly have been regarded as "an attempt to buy planning permission" (Lord Keith, at p 770A); on the contrary, it would in my view have had "a sufficient connection" with the proposed development (Lord Hoffmann, at p 782D), "not de minimis": Lord Keith, at p 770A.

175 The proposition that planning consent cannot be bought or sold, although stated nearly a quarter of a century ago to be "axiomatic"

(by Lloyd LJ in *City of Bradford Metropolitan Council v Secretary of State for the Environment* (1986) 53 P & CR 55, 64), needs to be understood for what it is, essentially a prohibition against the grant of a planning permission for what would otherwise be unacceptable development induced by the offer of some entirely unrelated benefit. What it is *not* is a prohibition against, for example, the grant of permission for a development which is contrary to local planning policy on the basis that it needs to be economically viable to ensure that the site does not remain derelict—see *Sosmo Trust Ltd v Secretary of State for the Environment* [1983] JPL 806, where, indeed, Woolf J held that no Secretary of State could reasonably have regarded the economic factor in that case as irrelevant. Nor, of course, did the principle prevent office development being permitted in *Ex p Monahan* [1990] 1 QB 87 essentially because the proposed refurbishment of the opera house was financially dependant upon it.

176 *Ex p Monahan*, it must be noted, is *not* authority for the proposition that, but for the development there "forming part of one composite development project" (p 121), the office building would not have been permitted. As was expressly recognised, no discernible legal principle would have supported such a view. In any event *Ex p Monahan* is not binding on this court. That aside, the *Tesco* case [1995] 1 WLR 759 later established that offers such as that in *Ex p Monahan* to refurbish the opera house do not have to "fairly and reasonably relate to the permitted development" (as at the time of *Ex p Monahan* would have been supposed). Had Tesco in the present case offered (uneconomically) to redevelop the RHS to the benefit of the public in consideration of some planning advantage elsewhere in Wolverhampton's area, it is difficult to see why Wolverhampton would have been legally obliged to refuse.

177 Still less does the principle prevent rival developers, in competitive situations such as arose in the *Plymouth* and *Tesco* cases, seeking to outbid each other as to the external benefits their proposals would bring with them—as both those cases amply demonstrate. It is surely one thing to say that you cannot buy a planning permission (itself, as I have sought to show, only in a narrow sense an absolute principle); quite another to say that in deciding as between two competing developers, each of whose proposals is entirely acceptable on planning grounds, you must completely ignore other planning benefits on offer in your area.

178 Let it be assumed, however, contrary to my view but as I understand every other member of this court to have concluded, that, had the present issue arisen in the context of rival applications for planning permission, Tesco's offered redevelopment of the RHS would have had to be characterised as a wholly unconnected planning benefit and so not a material consideration under section 70. That majority view, as Lord Phillips of Worth Matravers PSC himself points out, at para 139, is "not entirely rational" even in a non-competitive planning context; "less rational" still "where two developers are competing for the grant of planning permission in circumstances where the grant to one or the other is justifiable, but not to both".

179 Is that approach none the less to apply equally in the present context or, as I contemplated at para 168, is the position that "wider financial benefits are to be regarded as material considerations when exercising compulsory purchase powers than when determining planning applications"?

180 The Court of Appeal thought that the case for regarding Tesco's RHS offer as a material consideration was stronger in the CPO context than had it been made in a planning context. They thought this, first, because of the wide (to my mind over-wide) construction they put upon section 226(1A) itself (para 33); secondly, because they regarded financial viability as yet more important in the CPO context than in the planning context (paras 34–40); and, thirdly, because, whereas planning authorities (subject only to the Secretary of State's call-in powers) are free to grant any planning permissions they wish, CPOs must be confirmed by the Secretary of State (who can therefore prevent any misuse of the local authority's compulsory acquisition powers): para 41. Whilst I have difficulty with that reasoning, I nevertheless agree with Lord Phillips PSC and Lord Hope of Craighead DPSC that, even assuming that Tesco's RHS offer would not have been a material consideration had Wolverhampton been determining a planning application, it was none the less material in the context of the decisions the council were in fact required to take here. These were, first, whether Wolverhampton should compulsorily acquire land to facilitate the development of the site (for which both rival developers had the requisite planning permission) and, if so, second, whose land should be acquired—should it be Tesco's land to enable Sainsburys to develop the site or vice versa (i e who should be the preferred developer)?

181 I understand all of us to agree that Wolverhampton were amply entitled to exercise their section 226 power of compulsory acquisition here: as I noted at paras 164 and 165 above, self-evidently both the section 226(1)(a) and the section 226(1A) conditions were satisfied and the development of the site was only going to take place if Wolverhampton did indeed exercise this power. As Lord Hope DPSC observes, however, this power could not be exercised until Wolverhampton had also decided the second question before them: which of the two developers to choose. There seems to me no basis in authority or reason for holding that in reaching this second decision Wolverhampton were required to ignore the off-site benefit (unconnected though I am now assuming it to be) on offer from Tesco. I would on the contrary hold it to be a material consideration for the purposes of deciding which of the rival developers to prefer and whose land, therefore, should be the subject of compulsory purchase under section 226. That is precisely what was held at first instance here and I can but echo Lord Phillips PSC's plaudits for the passage in Elias J's judgment which he quotes in full at para 146.

182 It is essentially on this basis, rather than by reference to Wolverhampton's power of disposal of acquired land under section 233, that for my part I would hold Tesco's offer to have been a material consideration (even assuming that it would not have been so in the planning context). I think it difficult for Tesco to invoke section 233 here. True, section 233 would to my mind plainly entitle a planning authority to have regard to an off-site benefit such as Tesco offered here in deciding how to exercise their section 233 power. (Although, as Baroness Hale of Richmond and Lord Mance JJSC point out, no wholly extraneous benefits were offered or considered in *Standard Commercial Property Securities Ltd v Glasgow City Council (No 2)* 2007 SC (HL) 33, it is surely implicit in that decision—and, indeed, in the respective legislative requirements in both England and Scotland in effect to get what I called there (para 68) "the best overall deal available"—that, by the same token as a cash bidding match would have been

A possible, so too would have been an offer of other benefits, however extraneous. Why ever not? I do not regard this as inconsistent with what I said at para 75 of my judgment in the *Standard Commercial* case—quoted by Lord Walker of Gestingthorpe JSC at para 85: my quarrel there was with the disappointed developer's submission that the planning authority should itself have initiated a bidding war. It is quite another thing to say that they are precluded by law from accepting offers of money or other extraneous benefits when they come to dispose of a compulsorily acquired development site.)

B

183 My difficulty with section 233, however, is, as Baroness Hale JSC points out, that it puts the cart before the horse. Unless and until the Secretary of State confirms a section 226 compulsory purchase order, the local authority has no land to dispose of. I do not see the council here, therefore, as entitled to have regard to their section 233 powers when exercising their section 226 powers. I would be concerned also that on this approach the council might be statutorily *obliged* to accept Tesco's offer in order to obtain "the best overall deal available"—instead of merely being required to regard it as a material consideration, it being a matter for the council (and, in subsequent confirmation proceedings, the Secretary of State) to give it such weight, if any, as they thought right. (Indeed, as I observed earlier (at para 162), it might be that the Secretary of State, unlike Wolverhampton, will regard Sainsbury's substantial larger interest in the site as the determining factor here—rather as the Secretary of State in the *Tesco* case [1995] 1 WLR 759, thought it only fair to Sainsbury's to give no weight to Tesco's "wholly disproportionate" £6·6m offer to fund the link road: see para 173(4) above. That, however, in this case as in that, would be entirely a matter for the planning authorities, not for this court.)

C

D

E **184** All that said, I do not regard section 233 as central to either Lord Phillips PSC's or Lord Hope DPSC's reasoning in this case. Still less did it colour Elias J's approach; indeed, section 233 finds no mention whatever in his judgment.

185 Really what it all comes to is this. It is irrational and unsatisfactory that (in the view of the majority) Tesco's offer here would have had to be ignored in a competitive planning context. It is quite unnecessary and (as Lord Phillips PSC and Lord Hope DPSC observe) would be unfortunate if this irrationality were carried over into the compulsory purchase context within which the present issue arises.

F

186 In the result I would answer the question I posed in para 160: no, not even if the benefits are wholly unconnected with the proposed development, and dismiss this appeal. As indicated, I would do so essentially for the reasons given by Elias J at first instance rather than those given by the Court of Appeal.

G

Appeal allowed.
Declaration accordingly.

JILL SUTHERLAND, Barrister

H

APPENDIX F

Extract from Shorter Oxford English Dictionary, 6th Edition: "ancillary" & "auxillary"

Shorter Oxford English Dictionary

ON HISTORICAL PRINCIPLES

Sixth edition

VOLUME 1 · A–M

OXFORD
UNIVERSITY PRESS

ancestrula /an'sɛstrʊlə/ *noun*. Pl. **-lae** /-liː/, **-las**. E20.
[ORIGIN mod. Latin, irreg. from French ANCESTRAL + Latin *-ula* fem. dim. suffix.]
ZOOLOGY. The original zooecium in a bryozoan colony.

ancestry /'ansɛstri/ *noun*. ME.
[ORIGIN Alt. of Old French *ancesserie* after ANCESTOR: see -Y³, -RY.]
1 Ancestral lineage or descent; *spec.* noble, aristocratic, or ancient descent. Also *fig.*, origin, background. ME.

ADDISON Title and ancestry render a good man more illustrious. W. S. GILBERT I can trace my ancestry back to a protoplasmal primordial atomic globule. M. C. SELF Somewhere in the ancestry of Janus there must have been a happy 'nick' which gave him the peculiar characteristics of the Quarter horse. J. K. GALBRAITH The explanation of consumer behaviour has its ancestry in a much older problem.

2 *collect.* One's ancestors. *arch.* ME.

W. COWPER Our ancestry, a gallant Christian race.

■ **an'cestral** *adjective* (*rare*) = ANCESTRAL M17.

ancho /'antʃəʊ/ *noun*. Orig. and chiefly *US*. Pl. **-os**. E20.
[ORIGIN from Mexican Spanish (*chile*) *ancho*, lit. 'wide (chilli)', in allusion to its shape.]
A large aromatic variety of chilli, used (usu. dried) in Mexican cuisine; the plant bearing this. Also more fully *ancho chilli*, *chile ancho*.

anchor /'aŋkə/ *noun*¹.
[ORIGIN Old English *ancor*, *-cer*, *-cra* (= Old Frisian, Middle & mod. Low German, Middle Dutch *anker*, late Old High German *anchar* (German *Anker*), Old Norse *akkeri*) from Latin *ancora* from Greek *agkura*. In Middle English reinforced by Old French & mod. French *ancre*. The present spelling follows the errón. Latin *anchora*.]
1 An appliance for holding a ship etc. fixed in a particular place by mooring it to the bottom of the sea or river, or for similarly holding a balloon etc. by mooring it to the ground; a heavy metal structure traditionally composed of a long shank with a ring at one end for the cable and at the other end two arms or flukes, tending upwards, with barbs on each side. OE.
kedge anchor, ***mushroom anchor***, etc.
2 *fig.* A ground or source of confidence or security. LME.
3 Any contrivance or instrument that fulfils a purpose similar to that of an anchor. M16. ▸**b** In *pl.* The brakes of a vehicle. *colloq.* M20.
4 Something resembling an anchor in shape, as an architectural moulding. M17.
5 In full ***anchorman***, ***anchorperson***, ***anchorwoman***. A person playing a vital part, as the end member of a tug-of-war team, the last runner in a relay race, the compère of a broadcast programme, etc. E20.
– PHRASES: **at anchor** moored by an anchor. **bring to anchor** moor with an anchor. **cast anchor**, **come to anchor** let down the anchor(s). ***crown and anchor***: see CROWN *noun*. **drop anchor** = ***cast anchor*** above. ***foul anchor***: see FOUL *adjective*. ***fouled anchor***: see FOUL *verb*. **SHEET ANCHOR**. **weigh anchor** take up the anchor(s).
– COMB.: **anchor-hold** *noun*¹ the hold or grip that an anchor takes; a place for anchoring; *fig.* a firm hold, a point clung to, a ground of confidence, security, etc.; ***anchorman***, ***anchorperson***: see sense 5 above; **anchor plate** a heavy piece of timber or metal serving as a support, e.g. for the cables of a suspension bridge; **anchor ring** (*a*) the ring through which the cable is attached to an anchor; (*b*) GEOMETRY a torus of circular cross-section; ***anchorwoman***: see sense 5 above.
■ **anchorless** *adjective* without an anchor; *fig.* without a firm hold, drifting. M19.

anchor /'aŋkə/ *noun*². Long *arch.* or *hist.*
[ORIGIN Old English *ancra*, *ancor*, *-cer* perh. through Old Irish *anchara*, *angcire* from ecclesiastical Latin *anchoreta* ANCHORITE.]
An anchorite; an anchoress.
– COMB.: **anchor-hold** *noun*² the cell or retreat of an anchorite.

anchor /'aŋkə/ *verb*. ME.
[ORIGIN Old French & mod. French *ancrer* = medieval Latin *anc(h)orare*: see ANCHOR *noun*¹.]
1 *verb trans.* Secure (a ship etc.) by means of an anchor; place at or bring to anchor. ME.

SOUTHEY It was not possible to anchor the fleet. SCOTT FITZGERALD An enormous couch on which two young women were buoyed up as though upon an anchored balloon.

2 *verb trans. transf.* & *fig.* Fix as with an anchor, fix firmly. ME.

SHAKES. *Rich. III* Till that my nails were anchor'd in thine eyes. E. O'NEILL Green seaweed anchored to a rock. J. B. PRIESTLEY I didn't feel quite right in my mind. I wasn't firmly anchored to reality.

3 *verb intrans.* Cast anchor; come to anchor; be moored by means of an anchor. L16.

MILTON Seafaring men . . whose Bark by chance Or Pinnace anchors in a craggy Bay. *fig.*: SHAKES. *Mids. for M.* Heaven hath my empty words; Whilst my invention . . Anchors on Isabel.

4 *verb trans.* & *intrans.* Act as anchorperson of (a broadcast programme). M20.

anchorage /'aŋk(ə)rɪdʒ/ *noun*¹. ME.
[ORIGIN from ANCHOR *noun*¹ + -AGE. Cf. French *ancrage*.]
1 A toll or charge for anchoring. *arch.* ME.
2 **a** Conditions admitting of anchoring; a place at which to anchor. L16. ▸**b** *transf.* & *fig.* A point of support or rest; a hold; something on which to depend or repose. L17.

b J. A. FROUDE The Church anchorage no longer tenable in the change of wind; and the new anchorage in the Bible as yet partially discovered and imperfectly sounded. J. TYNDALL I crossed the fissure, obtained the anchorage at the other side, and helped the others over.

3 A set of anchors. *rare*. L16.

SHAKES. *Tit. A.* The bark . . Returns with precious lading to the bay From whence at first she weigh'd her anchorage.

4 The action or process of anchoring; the condition of lying at anchor. E17.

anchorage /'aŋk(ə)rɪdʒ/ *noun*². Now *arch.* or *hist.* L16.
[ORIGIN from ANCHOR *noun*² + -AGE. Cf. *hermitage*, *parsonage*.]
The cell or retreat of an anchorite.

anchoress /'aŋkərɛs/ *noun*. Also (*arch.*) **ancress** /'aŋkrɛs/. LME.
[ORIGIN from ANCHOR *noun*² + -ESS¹.]
A female anchorite; a nun.

anchorite /'aŋkərʌɪt/ *noun*. Also **anchoret** /'aŋkərɪt/, (esp. in sense 2) **anachoret** /ə'nakərɪt/. LME.
[ORIGIN medieval Latin *anc(h)orita*, *ecclesiastical* Latin *anchoreta* from ecclesiastical Greek *anakhōrētēs*, from *anakhōrein* retire, retreat, formed as ANA- + *khōrein* withdraw, from *khōra*, *khōros* place. Superseding ANCHOR *noun*².]
1 A person who has withdrawn from the world, usu. for religious reasons; a hermit, a recluse. LME.
2 *ECCLESIASTICAL HISTORY.* A recluse of the early Eastern Church. L16.
3 *gen.* A person of solitary or secluded habits. E17.
■ **ancho'retic** *adjective* M17. **anchoritic** /-'rɪt-/ *adjective* M19. **anchoritical** /-'rɪt-/ *adjective* M17.

anchoveta /antʃə'vɛtə/ *noun*. M20.
[ORIGIN Spanish, dim. of *anchova*: see ANCHOVY.]
A Pacific anchovy, *Cetengraulis mysticetus*, used as bait or to make fishmeal.

anchovy /'antʃəvi, an'tʃəʊvi/ *noun*. L16.
[ORIGIN Spanish & Portuguese *ancho(v)a*, of unknown origin.]
A small, mainly Mediterranean fish of the herring family, *Engraulis encrasicholus*, which has a rich flavour and is usu. eaten pickled or in pastes, sauces, etc. Also, any of numerous related fishes.
– COMB.: **anchovy pear** (the edible fruit of) the W. Indian tree *Grias cauliflora*.

anchusa /ən'kuːsə, -'tʃaː-/ *noun*. M16.
[ORIGIN Latin (Pliny) from Greek *agkhousa*, *egkh-*.]
Any plant of the genus *Anchusa*, of the borage family; *esp.* the plant *A. azurea*, grown for its deep blue flowers.

anchylose *verb*, **anchylosis** *noun* vars. of ANKYLOSE, ANKYLOSIS.

†anciency *noun*. M16–L19.
[ORIGIN Alt. of ANCIENTY as if ANCIENT *adjective* were of ppl origin, after *decent*, *decency*, etc.]
Ancientness; antiquity.

ancien régime /ɑ̃sjɛ̃ reʒim/ *noun phr.* Pl. **-s -s** (pronounced same). L18.
[ORIGIN French = former regime.]
The system of government in France before the Revolution of 1789. Also *transf.*, the old system or style of things.

ancient /'eɪnʃ(ə)nt/ *noun*¹. In senses 2, 6 also **A-**. LME.
[ORIGIN from the adjective.]
1 An old man (or animal); a patriarch. *arch.* LME.
2 A person who lived in times long past; a Greek or Roman of classical antiquity, esp. an author. Freq. in ***the ancients***. L15.
†3 A senior, one's superior in age. M16–M17.
†4 An ancestor. *rare*. M16–E19.
5 A person holding a senior position, an elder, a dignitary. *arch.* M16.
6 ***the Ancient of Days***, God. M16.

ancient /'eɪnʃ(ə)nt/ *noun*². *arch.* M16.
[ORIGIN Alt. of ENSIGN *noun* by assoc. with early forms of ANCIENT *noun*¹.]
1 A standard or flag; in *pl.*, insignia, colours. M16.
2 A standard-bearer. L16.

ancient /'eɪnʃ(ə)nt/ *adjective*. LME.
[ORIGIN Anglo-Norman *auncien*, Old French & mod. French *ancien*, ult. from Latin ANTE- + *-anus* -AN.]
1 **a** Belonging to times long past. LME. ▸**b** Former, earlier, bygone, (not necessarily referring to long ago). *arch.* L15. ▸**c** *spec.* (Also **A-**.) Belonging or pertaining to the period before the fall of the Western Roman Empire in AD 476. E17.

a D. H. LAWRENCE The grand, pagan twilight of the valleys, . . with a sense of ancient gods. **b** BUNYAN Thy antient kindness. POPE They mourn'd their ancient leader lost. **c** ADDISON Statuary and Architecture both Ancient and Modern.

a ancient Briton: see BRITON *noun* 2. ***ancient Greek***: see GREEK *noun* & *adjective*. **c ancient history** *fig.* something already long familiar.

2 Having lived long; old, aged; having the experience or wisdom of age; venerable. LME.

SHAKES. *Rom. & Jul.* Farewell, ancient lady. S. JOHNSON The precepts of ancient experience. J. GROSS Salmsbury . . looked the more ancient of the two, with his black skull-cap and his patriarchal beard.

3 That has been many years in some rank, position, or capacity; veteran. *arch.* LME.

K. DIGBY Seuerall of our ancientest seamen . . were sea sicke.

4 Of early origin or formation; going far back in history; long-established; time-worn. L15.

ARNOLD BENNETT The fine and ancient borough. M. PEAKE These dwellings, by ancient law, were granted this chill intimacy. M. DRABBLE They were very upper, but not a bit like an ancient family.

ancient demesne: see DEMESNE *noun*. **ancient lights** *ENGLISH LAW* the right of access to light of a property, established by custom and used to prevent the construction of adjacent buildings which would obstruct such access. **ancient monument** an old building etc. protected by Act of Parliament from damage or destruction.
■ **anciently** *adverb* (*a*) in ancient times, long ago; (*b*) from ancient times, for a long time: L15. **ancientness** *noun* M16.

ancientry /'eɪnʃ(ə)ntri/ *noun*. *arch.* M16.
[ORIGIN from ANCIENT *noun*¹, *adjective* + -RY.]
†1 *collect.* Older people, elders. M16–E17.
2 The quality or condition of being ancient. L16.
3 Time long past, antiquity. M18.

†ancienty *noun*. LME.
[ORIGIN Anglo-Norman *auncienté*, Old French & mod. French *ancienneté*: see ANCIENT *adjective*, -TY¹.]
1 The quality of having lived or existed for a long time. LME–M17.
2 The time long past; antiquity. Long *rare*. LME–E19.
3 Distance in past time. L15–L16.
4 Seniority, priority. L15–L18.

ancile /an'sʌili/ *noun*. Pl. **-lia** /-liə/. L16.
[ORIGIN Latin.]
The sacred tutelary shield of ancient Rome, said to have fallen from heaven.

ancilla /an'sɪlə/ *noun*. *rare*. Pl. **-llae** /-liː/, **-llas**. L19.
[ORIGIN Latin, fem. dim. of *ancilus* servant.]
A maidservant, a handmaid (*lit.* & *fig.*).

ancillary /an'sɪlari/ *adjective* & *noun*. M17.
[ORIGIN Latin *ancillaris*, formed as ANCILLA: see -ARY².]
▸ **A** *adjective*. **1** Subservient, subordinate; auxiliary, providing support; now *esp.* providing essential support or services to a central function or industry, esp. to hospital medical staff. (Foll. by *to*.) M17.

R. FRY It is an adjectival and ancillary beauty scarcely worthy of our prolonged contemplation. H. WILSON A period of great anxiety in the medical profession and occupations ancillary to medicine. *Financial Times* Its latest offer of 7.5 per cent for nurses and 6 per cent for ancillary staff and other grades.

2 Of or pertaining to maidservants. *rare*. M19.

THACKERAY The ancillary beauty was the one whom the Prince had selected.

▸ **B** *noun*. An auxiliary, an accessory; an ancillary worker. M19.

†ancle *noun* var. of ANKLE.

†ancome *noun*. L16–L19.
[ORIGIN Prob. var. of ONCOME *noun*. Cf. INCOME *noun*², UNCOME *noun*.]
A boil forming unexpectedly. Also, a whitlow.

ancon /'aŋkɒn, -k(ə)n/ *noun*. Pl. **ancones** /aŋ'kəʊniːz/, **ancons**. E18.
[ORIGIN Latin from Greek *agkōn* nook, bend, elbow.]
ARCHITECTURE. **†1** The corner or quoin of a wall, cross-beam, or rafter. Only in E18.
2 A console, usu. of two volutes, apparently supporting a cornice. M18.

Ancona /an'kəʊnə/ *noun*¹. M19.
[ORIGIN A town in Italy.]
(A bird of) a breed of poultry having black and white mottled plumage.

ancona /an'kəʊnə, an'kɒnə/ *noun*². Pl. **-ne** /-ne, -ni/. L19.
[ORIGIN Italian = medieval Latin, of uncertain origin: perh. alt. of Greek *eikona* accus. of *eikōn* ICON.]
An altarpiece, esp. one consisting of a group of paintings connected by architectural structure.

ancone *noun* pl. of ANCONA *noun*².

ancones *noun pl.* see ANCON.

ancress *noun* see ANCHORESS.

-ancy /-(ə)nsi/ *suffix*.
[ORIGIN from or after Latin *-antia* -ANCE. Cf. -ENCY.]
Forming nouns of quality, as ***relevancy***, or state, as ***expectancy***, but not of action (cf. **-ANCE**). Many words orig. in *-ance* have been refash., as ***constancy***.

ancylostomiasis /ˌaŋkɪləʊstə'mʌɪəsɪs, ˌansɪ-/ *noun*. Pl. **-ases** /-əsiːz/. Also **ank-** /ˌaŋk-/. L19.
[ORIGIN from mod. Latin *Ancylostoma* (see below) from Greek *agkulos* crooked + *stoma* mouth, + -IASIS.]
MEDICINE. Hookworm infection of the small intestine, esp. by *Ancylostoma duodenale* or *Necator americanus*, often leading to anaemia. Also called ***uncinariasis***.

automobile /ˈɔːtəməbiːl/ *adjective, noun, & verb.* Chiefly *N. Amer.* L19.
[ORIGIN French, formed as AUTO-¹ + MOBILE *adjective*.]
▸ **A** *adjective.* **1** Esp. of a vehicle: self-propelling (as opp. to horse-drawn). *arch.* L19.
2 [The noun used attrib.] Of or pertaining to motor vehicles. L19.
▸ **B** *noun.* A motor vehicle; a car. L19.
▸ **C** *verb intrans.* Drive or travel in a motor vehicle. L19.
■ **auto'mobilism** *noun* (*arch.*) the use of motor vehicles L19. **auto'mobilist** *noun* (*arch.*) a motorist L19. **automo'bility** *noun* the use of motor vehicles; mobility based on this: E20.

automorphism /ɔːtəʊˈmɔːfɪz(ə)m/ *noun.* M19.
[ORIGIN from AUTO-¹ + Greek *morphē* form + -ISM.]
1 *MATH.* Any of various kinds of transformation or correspondence which relate a function etc. to itself or to another of the same kind; *spec.* an isomorphism of a structure with itself. M19.
2 The ascription of one's own characteristics to another. Now *rare* or *obsolete.* L19.
■ **automorphic** *adjective* pertaining to, characterized by, or invariant under automorphism M19.

automotive /ɔːtəˈməʊtɪv/ *noun & adjective.* M19.
[ORIGIN from AUTO-¹ + MOTIVE *adjective*.]
▸ †**A** *noun.* A self-propelled vehicle. Only in M19.
▸ **B** *adjective.* Of or pertaining to an automobile or automobiles. L19.

autonomic /ɔːtəˈnɒmɪk/ *adjective.* M19.
[ORIGIN from AUTONOMY + -IC.]
1 Self-governing, independent. M19.
2 *PHYSIOLOGY.* Functioning independently of the will; *esp.* denoting the parts of the nervous system serving organs which control the normally involuntary functions of the body. L19.
■ **autonomical** *adjective* (*rare*) = AUTONOMIC M17. **autonomically** *adverb* M19.

autonomous /ɔːˈtɒnəməs/ *adjective.* E19.
[ORIGIN from Greek *autonomos* (see AUTONOMY) + -OUS.]
Of, pertaining to, or characterized by autonomy; self-governing, independent; free of external influence or control.

J. REED At Helsingfors the Finnish Senate . . declared Finland autonomous, and demanded the withdrawal of Russian troops. R. G. COLLINGWOOD Consciousness is absolutely autonomous: its decision alone determines whether a given sensum or emotion shall be attended to or not. J. C. RANSOM English might almost as well announce that it does not regard itself as entirely autonomous, but as a branch of the department of history.

■ **autonomously** *adverb* L19.

autonomy /ɔːˈtɒnəmi/ *noun.* E17.
[ORIGIN Greek *autonomia*, from *autonomos* having its own laws, from AUTO-¹ + *nomos* law: see -NOMY.]
1 The right or condition of self-government (freq. only in specified matters) of a state, community, institution, etc. E17.

C. G. SELIGMAN The village is the administrative unit, to which the most complete autonomy is allowed. *Encycl. Brit.* The national autonomous regions [of China] reflect the CCP policy of seeking to . . accord cultural autonomy—but not political independence—to areas in which national minority peoples predominate.

2 Freedom of the will. L18.
3 *gen.* Independence, freedom from external control or influence; personal liberty. E19.

A. STORR The therapist should not give advice or do anything else which might interfere with the patient's autonomy. U. LE GUIN They preserved autonomy of conscience even at the cost of becoming eccentric.

■ **autonomism** *noun* = AUTONOMY L19. **autonomist** *noun* an advocate of autonomy M19.

autonym /ˈɔːtənɪm/ *noun.* M19.
[ORIGIN from AUTO-¹ + -NYM.]
(A work published under) an author's own name. Opp. PSEUDONYM.

autopista /ɔːtəˈpɪstə, *foreign* autoˈpista/ *noun.* M20.
[ORIGIN Spanish, from *auto* automobile + *pista* track, PISTE.]
A motorway in Spain and Spanish-speaking countries.

autopsy /ˈɔːtɒpsi, ɔːˈtɒpsi/ *noun & verb.* As noun also in Latin form †**-opsia.** M17.
[ORIGIN French *autopsie* or mod. Latin *autopsia* from Greek, from *autoptēs* eyewitness: see AUTO-², OPTIC, -Y³.]
▸ **A** *noun.* **1** Seeing with one's own eyes; personal observation. *rare.* M17.
2 Dissection of a dead body so as to determine the cause of death or the extent of disease; a post-mortem examination; *fig.* a critical dissection. M19.
▸ **B** *verb trans.* Perform an autopsy on (a body). E20.
■ **autopsic** *adjective* of or pertaining to an autopsy L19.

autoptical /ɔːˈtɒptɪk(ə)l/ *adjective.* M17.
[ORIGIN from Greek *autoptikos*, from *autoptēs* (see AUTOPSY), + -AL¹.]
1 Of, pertaining to, or of the nature of an eyewitness; based on personal observation. M17.
2 = AUTOPSIC. L20.
■ **autoptic** *adjective* (*a*) *rare* = AUTOPTICAL 1; (*b*) = AUTOPSIC. M19. **autoptically** *adverb* M17.

autoradiograph /ɔːtəʊˈreɪdɪəgrɑːf/ *noun & verb.* E20.
[ORIGIN from AUTO-¹ + RADIOGRAPH.]
▸ **A** *noun.* A photograph of an object obtained using radiation from radioactive material in the object. E20.
▸ **B** *verb trans.* Make an autoradiograph of. M20.
■ **autoradiogram** *noun* = AUTORADIOGRAPH *noun* M20. **autoradio'graphic**, **autoradio'graphical** *adjectives* of or pertaining to autoradiography or an autoradiograph M20. **autoradio'graphically** *adverb* M20. **autoradi'ography** *noun* the production and interpretation of autoradiographs M20.

autorotation /ɔːtə(ʊ)rə(ʊ)ˈteɪʃ(ə)n/ *noun.* E20.
[ORIGIN from AUTO-¹ + ROTATION.]
1 *AERONAUTICS.* Rotation (esp. of rotor blades) not caused by engine power. E20.
2 Rotation resulting from the shape or structure of an object (e.g. a winged seed). L20.
■ **autorotate** *verb intrans.* undergo autorotation E20.

autoroute /ˈɔːtərʊt, *foreign* otoʀut (*pl. same*)/ *noun.* M20.
[ORIGIN French, from *auto* automobile + *route* ROUTE *noun*.]
A French motorway.

autoschediastic /ɔːtəʊskɪdɪˈastɪk/ *adjective.* E19.
[ORIGIN Greek *autoskhediastikos*, from *autoskhediazein* act or speak extempore, from *autoskhedios* personally near, offhand: see -IC.]
Done on the spur of the moment, improvised.

autoscopy /ɔːˈtɒskəpi/ *noun.* L19.
[ORIGIN from AUTO-¹ + -SCOPY.]
Viewing or examination of oneself; a hallucination of viewing one's own body.
■ **'autoscope** *noun* an instrument for self-observation; *esp.* any device which reveals subliminal actions (e.g. a dowsing rod): L19. **auto'scopic** *adjective* E20.

autos-da-fé *noun pl.* see AUTO-DA-FÉ.

autosome /ˈɔːtəsəʊm/ *noun.* E20.
[ORIGIN from AUTO-¹ + -SOME³.]
BIOLOGY. A chromosome other than a sex chromosome.
■ **auto'somal** *adjective* M20.

autostrada /ɔːtəˈstrɑːdə, *foreign* autoˈstraːda/ *noun.* Pl. **-stradas**, **-strade** /-ˈstrɑːdeɪ, -deɪ/. E20.
[ORIGIN Italian, from *auto* automobile + *strada* road from Latin STRATUM.]
An Italian motorway.

auto-suggestion /ˌɔːtə(ʊ)səˈdʒɛstʃ(ə)n/ *noun.* L19.
[ORIGIN from AUTO-¹ + SUGGESTION.]
PSYCHOLOGY. Suggestion to oneself; the hypnotic or subconscious adoption of an idea originating within oneself.
■ **auto-su'ggest** *verb* (*a*) *verb trans.* produce, remove, influence (ideas, feelings), by auto-suggestion; (*b*) *verb intrans.* undergo auto-suggestion: E20. **auto-su'ggestible** *adjective* able to be influenced by auto-suggestion E20. **auto-su'ggestive** *adjective* of the nature of or pertaining to auto-suggestion E20.

autotheism /ɔːtəʊˈθiːɪz(ə)m/ *noun.* L16.
[ORIGIN from eccl. Greek *autotheos* very god, from AUTO-¹ + *theos* god, + -ISM.]
1 *THEOLOGY.* The doctrine of the self-subsistence of God or (esp.) Christ. L16.
2 Self-deification. E17.
■ **autotheist** *noun* M18. **autothe'istic** *adjective* M19.

autotomy /ɔːˈtɒtəmi/ *noun.* L19.
[ORIGIN from AUTO-¹ + -TOMY.]
ZOOLOGY. The casting off of a part of the body by some animals (e.g. lizards, crabs) as a means of escape.
■ **autotomize** *verb trans.* lose by autotomy E20.

autotoxin /ɔːtə(ʊ)ˈtɒksɪn/ *noun.* L19.
[ORIGIN from AUTO-¹ + TOXIN.]
A product of an organism's metabolism which is poisonous to the organism itself.
■ **autoto'xaemia** *noun* toxaemia due to an autotoxin L19. **autotoxic** *adjective* E20.

autotrophic /ɔːtə(ʊ)ˈtrəʊfɪk, -ˈtrɒfɪk/ *adjective.* L19.
[ORIGIN from AUTO-¹ + -TROPHIC.]
BIOLOGY. Of an organism: requiring only simple inorganic compounds for nutrition.
■ **'autotroph(e)** *noun* an autotrophic organism M20. **autotrophically** *adverb* M20. **au'totrophism** *noun* E20.

autotype /ˈɔːtə(ʊ)tʌɪp/ *noun.* M19.
[ORIGIN from AUTO-¹ + -TYPE.]
1 A reproduction in facsimile; a true representation of an original. M19.
2 (A facsimile produced by) a photographic printing process for monochrome reproduction. M19.

autoxidation /ˌɔːtɒksɪˈdeɪʃ(ə)n/ *noun.* L19.
[ORIGIN from AUTO-¹ + OXIDATION.]
CHEMISTRY. Spontaneous oxidation by molecular oxygen.
■ **au'toxidize** *verb intrans.* undergo autoxidation E20. **autoxi'dizable** *adjective* susceptible to autoxidation L19.

autumn /ˈɔːtəm/ *noun.* LME.
[ORIGIN Old French *autompne* (mod. *automne*), later directly from Latin *autumnus*.]
1 The third season of the year, between summer and winter; in the northern hemisphere freq. regarded as comprising September, October, and November, or (*ASTRONOMY*) reckoned from the autumnal equinox to the winter solstice; in the southern hemisphere corresponding in time to the northern spring. LME. ▸**b** The fruits of autumn; harvest. *poet.* E17.

b MILTON On her ample square, from side to side, All Autumn pil'd.

2 *fig.* A season of maturity or incipient decay. L16.

J. LANGHORNE The very autumn of a form once fine Retains its beauties.

– COMB.: *autumn crocus*: see CROCUS *noun*¹; **autumn equinox** = *AUTUMNAL equinox*; **autumn gentian** felwort, *Gentianella amarella*; **autumn tints** the brown and gold colours of dying leaves.
■ **autumnity** /ɔːˈtʌmnɪti/ *noun* (*rare*) autumnal quality or conditions L16. **autumny** /ˈɔːtəmi/ *adjective* suggestive or characteristic of autumn E20.

autumn /ˈɔːtəm/ *verb trans. & intrans.* Now *rare.* M17.
[ORIGIN Latin *autumnare* bring on autumn, (medieval Latin) ripen, from *autumnus* AUTUMN *noun*.]
Bring or come to maturity; ripen.

autumnal /ɔːˈtʌmn(ə)l/ *adjective.* L16.
[ORIGIN Latin *autumnalis*, from *autumnus* AUTUMN *noun*: see -AL¹.]
1 Of or pertaining to autumn; characteristic of or appropriate to autumn; maturing or blooming in autumn. L16.

MILTON Thick as Autumnal Leaves that strew the Brooks In Vallombrosa. LD MACAULAY The autumnal rains of Ireland are usually heavy. M. DRABBLE The autumnal colours were deeper . . in the sinking light.

autumnal equinox the point in time at which the sun crosses the celestial equator in a southerly direction (approx. 22 September), or, in the southern hemisphere, in a northerly direction (approx. 21 March).
2 *fig.* Past the prime of life; in decline. E17.

DONNE No Spring, nor Summer Beauty hath such grace, As I have seen in one Autumnall face. *absol.*: DICKENS Melissa might have seen five and thirty summers or thereabouts, and verged on the autumnal.

■ **autumnally** *adverb* M19.

autunite /ˈɔːtənʌɪt/ *noun.* M19.
[ORIGIN from *Autun*, a town in eastern France + -ITE¹.]
MINERALOGY. A tetragonal hydrated phosphate of uranium and calcium, occurring usu. as yellow crystal aggregates or encrustations.

Auvergnat /ɔvɛʀɲa/ *noun.* Pl. pronounced same. M19.
[ORIGIN French, from *Auvergne*: see -AT¹.]
A native or inhabitant of the Auvergne, a region of central France; the dialect spoken in the Auvergne.

auxanography /ɔːksəˈnɒgrəfi/ *noun.* E20.
[ORIGIN formed as AUXANOMETER + -OGRAPHY.]
BIOLOGY. A technique for determining the substances required by a micro-organism for growth, in which different nutrients are distributed on a culture of the micro-organism.
■ **au'xanogram** *noun* a plate culture used in this L19. **ˌauxano'graphic** *adjective* E20.

auxanometer /ɔːksəˈnɒmɪtə/ *noun.* L19.
[ORIGIN from Greek *auxanein* to increase + -OMETER.]
BOTANY. An instrument for measuring growth in plants.

auxesis /ɔːkˈsiːsɪs/ *noun.* L16.
[ORIGIN Late Latin from Greek *auxēsis* increase, amplification.]
1 *RHETORIC.* Increase in intensity of meaning; hyperbole; amplification. L16.
2 *BIOLOGY.* Increase, growth; *esp.* increase in size by expansion of cell size or number of cells. M19.
■ **auxetic** /-ˈsɛtɪk/ *adjective* M18.

auxiliary /ɔːgˈzɪlɪəri, ɒg-/ *adjective & noun.* LME.
[ORIGIN Latin *auxiliarius*, from *auxilium* help: see -ARY¹.]
▸ **A** *adjective.* **1** Helpful; giving support or succour; orig., (of foreign troops etc.) assisting an army at war. LME.
2 Subsidiary, additional, ancillary; (freq. in names of military or other service bodies). L17.
3 *GRAMMAR.* Used in forming words, constructions, etc. Now *spec.* (of a verb) used in forming tenses, moods, aspects, or voices, of other verbs. L17.
▸ **B** *noun.* **1** (A member of) a body of foreign or allied troops etc. in the service of a belligerent nation. E17.
2 A person who or thing which assists, supports, or is subsidiary or ancillary. M17.
3 *GRAMMAR.* An auxiliary verb. L17.
■ †**auxiliar** *adjective & noun* = AUXILIARY L16–M19.

auxin /ˈɔːksɪn/ *noun.* M20.
[ORIGIN from Greek *auxein* to increase + -IN¹.]
BIOCHEMISTRY. Any of a class of compounds that cause the elongation of plant cells in shoots and (with cytokinins) control plant growth and development.

auxo- /ˈɔːksəʊ/ *combining form* of Greek *auxein* to increase: see -O-.
■ **auxochrome** *noun* (*CHEMISTRY*) a polar group which when introduced into a chromogen produces a dyestuff L19; **auxo'chromic** *adjective* (*CHEMISTRY*) of or pertaining to an auxochrome L19. **auxospore** *noun* (*BOTANY*) a vegetative cell formed by diatoms, usu. sexually L19.

APPENDIX G

AP HAUL ROAD ACCESS NOTE

Date: 15 February 2021

Application by Aquind Limited for a Development Consent Order for the 'Aquind Interconnector' electricity line between Great Britain and France (PINS reference: EN020022)

APPENDIX G – AP HAUL ROAD ACCESS NOTE

On behalf of

Mr. Geoffrey Carpenter & Mr. Peter Carpenter

Registration Identification Number: 20025030

Submitted in relation to Deadline 7c of the Examination Timetable

BLAKE MORGAN

Blake Morgan LLP
6 New Street Square
London EC4A 3DJ
www.blakemorgan.co.uk
Ref: 584927-6

1. INTRODUCTION

1.1. Mr Geoffrey Carpenter and Mr Peter Carpenter (the "**Owners**") own the freehold interest to Little Denmead Farm, which covers plots 1-32, 1-32a, 1-38, 1-51, 1-57, 1-69, 1-70, 1-71, and 1-72, and they also benefit from a right of way granted by deed of easement over plots 1-60, 1-63, and 1-65, such plot numbers as shown on the latest revised Land Plans (document reference **[REP6-007]**) (the "**Owners' Property**").

1.2. The Applicant is seeking compulsory acquisition powers over the Owners' Property.

1.3. The Applicant is in particular seeking to permanently compulsorily acquire the freehold interest to plot 1-32 because it proposes to construct a permanent access road (amongst other things) on and through plot 1-32.

1.4. The Owners have submitted throughout the Examination, and most recently at Deadline 7, its detailed reasons as to why there is no need for the Applicant to seek permanent compulsory acquisition powers due to this proposed permanent access road.

1.5. The Owners have submitted evidence showing there is no need for such permanent access after construction of the proposed application works.

1.6. There are alternative accesses that can be used by the Applicant during the operation of the proposed application development. Those alternatives were submitted to the ExA in document references.

1.7. The Owners cannot accept the maintenance of a temporary construction road on their land is justification for the grant of compulsory acquisition powers to the Applicant under section 122 Planning Act 2008 and pursuant to the relevant tests in guidance issued by the Ministry of Housing, Communities, and Local Government entitled 'Planning Act 2008 – Guidance related to procedures for the compulsory acquisition of land' (September 2013) ("**Planning Act CPO Guidance**").

1.8. Without repeating the Owners' detailed positon in relation to this issue, we refer the Examining Authority (ExA) to the following submissions by the Owners in relation to the need for a permanent access road to the proposed converter station over the Owners' Property and the alternative accesses and related protective provisions submitted by the Owner for the ExA to consider:

1.8.1. Written submission in relation to the Issue Specific Hearing 1 (document reference **[REP5-107]**);

1.8.2. Owners' transcript of oral submissions to be made at Compulsory Acquisition Hearing 2 relating to access (document reference [**REP5-108]**);

1.8.3. Owners' draft protective provisions and draft heads of terms for a proposed DCO Obligation relating to access (document reference **[REP5-109]**);

1.8.4. Owners' post hearing note on Scope of Proposed Authorised Development (document reference **[REP6-135]**), Section K; and

1.8.5. Owners' submission at Deadline 7 of the Examination entitled 'Statement in relation to the Carpenters' Proposal for Alternative Accesses and Protective Provisions in relation to Little Denmead Farm' (document reference **[REP7-119]**).

1.9. It is recognised that the Applicant submitted their response at **[REP7-075]** contemporaneously to the Owner's submissions at **[REP7-119]**. However, in order to aid the ExA further the Owner would like to clarify the remaining points of contention in regards to access over the Owner's Property after review of the Applicant's submissions in document reference **[REP7-075]** ('Appendix A of the 'Applicant's Responses to Deadline 6 Submissions – Hearings – Appendices').

2. KEY BACKGROUND

2.1. The premise upon which the Owner and the Applicant continue to disagree is whether a permanent access road is required on plot 1-32 to install and replace transformers, with the Owner contending that the permanent access road is not required and the alternative perimeter access suggested at **[REP7-119]** being suitable for the remaining light vehicle traffic which would require access.

2.2. The reasoning for the Owners position was laid out at paragraphs 4.1-4.11 of the Owners' 'Statement in relation to the Carpenters' Proposal for Alternative Accesses and Protective Provisions in relation to Little Denmead Farm (document reference **[REP7-119]**) . In summary the Owners' reasons are that:

2.2.1. The EIA Regulations required evaluation of the risk of transformer failure in the Converter Station if it were a qualifying risk. The Application EIA includes no evidence of the risk of such a failure. Therefore, the risk asserted by the Applicant limited company, in building its first Converter Station, appears no more than a generalised fear and concern and cannot be credible as a risk. If it is a credible risk, it follows that the Application EIA has a gap in its evidence and Regulation 4(2) precludes a grant of development consent in this Application. On the risk evaluation process undertaken by qualified experts on behalf of the Applicant, there can be no credible risk of transformer failure expected;

2.2.2. In line with industry norm, a spare transformer is already envisaged to be located within the converter station, and so on the facts there can be no credible requirement nor need for a permanent access road to provide or replace a transformer in case of failure, as the Applicant desire, at most, to remove a failed transformer and replace it with a further spare;

2.2.3. Rather than a single spare transformer, so far as the Applicant continues to exhibit generalised fears and concerns about transformer failure, the Applicant could store up to four spare transformers within the existing parameter volume of the Converter Station, this would rationally absolve fears of the Applicant of yet further spare transformers (or transformer parts) being asserted by it as being required, as evidenced by the Spare Parts building, contained within the parameter volume;

2.2.4. As recorded by the Applicant in its Deadline 6 post hearing note entitled ' Applicant's Response to action points raised at ISH1, 2 and 3, and CAH 1 and 2' (document reference **[REP6-063]**), the Applicant's agent, Mr O'Sullivan, whilst stating it was not "standard" practice to store more than one spare transformer on the converter station site, did not dissent from the rational basis that multiple spares could be stored on site. This means

that storing more than one transformer on site is not impossible if it may be helpful to overcome the Applicant's generalised fears as it embarks on its novel project.

2.2.5. As recorded also by the Applicant in document reference **[REP6-063]**, the Applicant's agent did not reject the principle that the alternative access proposed by the Owners along the eastern fringe of Little Denmead Farm **could not** serve "light vehicle" access for ongoing maintenance and inspection purposes (which is what the Owners are proposing. The Owners are not proposing, contrary to the Applicant's agent's assertion, that heavy maintenance vehicles use the alternative access route proposed by the Owners along the eastern fringe of their land). Therefore the Applicant accepts that this alternative route proposed along the eastern fringe of Little Denmead Farm can be used by light maintenance vehicles.

2.2.6. It cannot be rationally said that a failed transformer could not (in some way) be unwired and the wires be re-wired to a close by spare (operational) transformer whilst leaving the then redundant transformer in situ. That would also be a practical and proportionate solution to the Applicant's irrational and unfounded fears of transformer failure(s) already excluded as a relevant "risk" from the EIA evaluation.

2.2.7. It cannot be rationally said that the parameter volume of the proposed converter station contains no space where a crane, in whole or unassembled parts, could not be stored.

2.2.8. As the Converter Station is self-extinguishing there is no need for immediate emergency access by heavy vehicles, and as such light emergency vehicles, including fire tenders, could and would be able to use the proposed perimeter access along the eastern fringe of Little Denmead Farm.

2.3. The Owners' proposed at **[REP7-119]** revised draft protective provisions and a draft DCO obligation that would enable the Applicant to retain access the Owner's Property and lay a temporary access road during the construction period over the same in order to construct the converter station. However, after construction, the temporary access road could – and more readily if appropriately constructed - should be physically removed, the relevant land restored, and the Applicant instead could use an alternative access, granted by the draft DCO obligations, that runs along the eastern edge of the Owners' Property for the purposes of its periodic accessing the converter station for maintenance and inspection by light vehicle. A drawing showing the Owners' proposed alternative access route to be used after the construction of the converter station by light maintenance vehicles is attached at **Appendix 1 to this Statement.**

2.4. There is no objective reasonable requirement for abnormal vehicles, nor heavy maintenance nor emergency vehicles to have a permanent access route over plot 1-32 as the converter station is self-extinguishing (in the event of a fire) and the Owners maintain that whilst it may not be "standard" to store more than one spare transformer on the site, that does not mean it will be impossible. By the Applicant's own admission, the design of the converter station compound will be *bespoke*, not "standard". That design choice cuts both ways, including against the Applicant limited company.

3. SUMMARY OF APPLICANT'S RESPONSES AT DEADLINE 7 RELATING TO ACCESS

3.1. The substantive points of the Applicant's submissions in relation to the proposed permanent access road can be found at paragraphs 2.8.1 – 2.8.4, and 8.5.4 of Appendix A to the 'Applicant's Responses to Deadline 6 Submissions - Hearings - Appendices' (document reference **[REP7-075])**.

3.2. In Summary, the Applicant states at Appendix A of **[REP7-075]** that:

3.2.1. **Location -** The permanent access road is required to be in its currently proposed location on plot 1-32, to enable sufficient clearance from the overhead power cables, and ancient woodland of Stoneacre Copse, plot 1-32a, for the vehicles transporting the 300 tonne transformers.

3.2.2. **Need -** There is "*no need*" for four spare transformers to be located within the converter station compound, due to the transformers being designed and delivered to ensure the highest level of reliability and robustness. Due to the lead time to replace a transformer of this type, typically nine months, it is the industry norm to have a single spare transformer available at site for in the "very unlikely event of failure";

3.2.3.**Removal of faulty transformer** - Exchanging a failed transformer is not a matter of re-wiring and leaving in situ a faulty transformer, but rather requires a specialised contractor who will bring in all necessary tools, and equipment required to carry out an exchange;

3.2.4. **Additional spare transformers** - It would be extremely difficult to near impossible to find the space of four spare transformers of this type with mind to the required safety distances and circulation space for the safe operation of the transformers. The compound area would need to be increased; and

3.2.5. Regardless of the number of spare transformers, or any disassembled crane on site, the faulty transformer would have to be removed and transported off site.

4. OWNER'S RESPONSE TO APPLICANT'S SUBMISSIONS AT DEADLINE 7 ON ACCESS

The Owner's responses are divided into the following 5 sections:

- Section A – general points
- Section B – Location of access road due to clearance heights from overhead cables and Stoneacre Copse
- Section C – The need for spare transformers
- Section D – Removal of faulty transformers
- Section E - Replacement of Spare transformers

SECTION A - General points

4.1. The sole reason advanced for the proposed access road to remain permanently on and across the Owners' Property is for generalised fear and concern by the Applicant that a transformer may fail during the design life of the Converter Station and a replacement fall to be borne into that Station to replace the failed transformer chosen to be removed instead of simply remaining in situ.

4.2. The proposed converter station only needs to be accessed a maximum of 3 to 4 times a year for the purposes of general maintenance and inspection.

4.3. Applicant has not disagreed that the Owners' proposed alternative access route along the eastern fringe of the Owners' Property for maintenance access and that it would be suitable for light maintenance vehicles. Provision of such access is accepted thereby as a reasonable alternative for periodic annual maintenance access to the otherwise unmanned Station.

4.4. As such the Owners maintains their position put forward in **[REP7-119]**, that regular, non-exceptional, access by light vehicles for the purposes of general maintenance and inspection can be granted along the Owners' proposed alternative access route along the eastern fringe of the Owners' Property.

4.5. This alternative access route for light vehicles can be secured through the Owners' proposed protective provisions and the Owners' proposed DCO obligation.

OWNER'S RESPONSE TO APPLICANT'S SUBMISSIONS AT DEADLINE 7 ON ACCESS

SECTION B - Location of access road due to clearance heights from overhead cables and Stoneacre Copse

4.6. The Applicant explains that the transformers will be transported to the converter station during the construction period, using the temporary access road to be laid over plot 1-32.

4.7. On the Applicant's own evidence in paragraph 2.8.2 of Appendix A to **[REP7-075]**, and as described in more detail above, the Applicant confirms that the need to replace a transformer is a "*very unlikely event*" and that "*The transformers are designed and delivered to ensure the highest level of reliability, robustness and to industry standard*". (Emphasis added)

4.8. The Applicant does not assess the failure of a transformer as a credible "risk" in its Environmental Statement evaluation. The Applicant's assertion that the location of a permanent access road is needed in that particular location is therefore not credible. The Applicant has not assessed the transportation of a spare transformer as a "need", and therefore the consideration of cable height clearances etc is a moot point.

4.9. Should there be an unlikely transformer failure, the Owners submit that there are credible options open to the Applicant to lay a temporary access track for heavy vehicles across plot 1-32 after the construction of the converter station. These alternative options are set out at **Appendix 4 to this Statement**. The Applicant would have ample time to lay such a temporary access should a spare transformer be needed during the operation of the converter station, as the Applicant confirms in paragraph 2.8.1 of Appendix A to REP7-075 that "…the lead time to replace a transformer of this type, typically nine months,". Nine months would be more than enough time to lay one of the options for a temporary access during operation that are set out in Appendix 4 to this Statement.

4.10. Finally, the Applicant has not said it would be "impossible" to store spare transformers on te site, only that it would be difficult.

4.11. As the Applicant itself is not asserting its generalised fear and concern of needing a spare transformer as likely. Its assertion that a permanent access road needs to be situated across plot 1-32 due to cable height clearances and the location of Stoneacre Copse is a moot point.

4.12. The Owners have submitted credible options for a temporary access during operation of the converter station over plot 1-32 in Appendix 4 to this Statement. The Owners remain willing to amend their draft DCO obligation and protective provisions submitted at Deadline 7 (see the 'Statement in relation to the Carpenters' Proposal for Alternative Accesses and Protective

Provisions in relation to Little Denmead Farm' (document reference **[REP7-119]**) to accommodate one of these options should the ExA direct to do so.

OWNER'S RESPONSE TO APPLICANT'S SUBMISSIONS AT DEADLINE 7 ON ACCESS

SECTION C - Asserted "Need" – the statutory test – "required for"

4.13. The Planning Act 2008 ("Act") and guidance from the Department of Communities and Local Government 'Planning Act 2008 – Guidance related to procedures for the compulsory acquisition of land – September 2013' ("Guidance") require that compulsory acquisition powers in development consent orders should be used only when "all reasonable alternatives" have been explored, that is, as a last resort.

4.14. Sections 122(1), (2), and (3) of the Planning Act 2008 ("Act") provide that a development consent order may authorise the compulsory acquisition of land only if the Secretary of State is satisfied that the following conditions are met; that the land is:

- required for the development to which the development consent relates;
- is required to facilitate or is incidental to that development; or
- is replacement land which is to be given in exchange for commons, open spaces etc.; and
- there is a compelling case in the public interest for the land to be acquired compulsorily.

4.15. Paragraph 8 of the Planning Act CPO Guidance requires, importantly, that one of the considerations the Secretary of State should have regard to is that the "*applicant should be able to demonstrate to the satisfaction of the Secretary of State that* ***all reasonable alternatives*** *to compulsory acquisition (including modifications to the scheme) have been explored*" (Our emphasis added).

4.16. This is in contrast to the consideration that a confirming authority must take when using their compulsory purchase powers under the Town and Country Planning Act 1990 ("TCPA") which is where the acquiring authority is expected to 'demonstrate that they have taken reasonable steps to acquire all of the land and rights included in the Order by agreement' as laid out in government guidance ("TCPA Guidance").

4.17. This evidences that in the Planning Act CPO Guidance there is an additional requirement for **all reasonable steps** to be demonstrated, which is a higher and more onerous test than the one expected by the TCPA Guidance.

4.18. Despite this, the TCPA Guidance still contends that *'compulsory purchase is intended as a last resort*.' So it can be inferred that the Planning Act CPO Guidance extends an equal if not more strict requirement under the Act through the addition of 'all' that CPO powers only be included as a **matter of last resort.**

4.19. The Applicant generalised fear and concern is helpfully moderated where it states in paragraph 2.8.1 of Appendix A to **[REP-075]** that: (Emphasis added)

"*There is not a need for four spare transformers to be located at a converter station for an interconnector*".

4.20. The Applicant may recall that the land within plot 1-32 is asserted by it as required to be permanently compulsorily acquired *because* the permanent access road is required to transport spare *transformers.* The Applicant must therefore rationally demonstrate its requirement for the transformer(s) to be transported as opposed to being stored on site. The Planning Act CPO Guidance requires the Applicant to take "all reasonable steps" to avoid compulsory acquisition, therefore there is a need for the Applicant to properly consider whether it can store more spare transformers on site – **there IS a need for more spare transformers to be located on site in order to avoid compulsory acquisition**. The AP need do nothing. See *Prest's* case.

4.21. By inexplicably rejecting the Owners' helpful suggestion that more spare transformers are stored on site, the Applicant is not meeting the requirements set out in paragraph 8 of the Planning Act CPO Guidance and failing to take "all reasonable steps" to avoid cpo.

4.22. Separately, the Applicant contends that a spare transformer is *not* required anyway due to such transformers being designed and delivered to ensure the *highest level of reliability* and robustness, and that because there is a "very unlikely event of failure". If that is the case then the Applicant has no case that a permanent access road is required in order to transport spare transformers if the Applicant itself does not think a spare is needed in the first place. There is no justification for permanently acquiring all the land on plot 1-32 premised on irrational generalised fears and concerns, and there is in fact no justification for a *permanent* access road.

4.23. The Applicant has failed to demonstrate any need to locate more spare transformers within the converter station, and admits that it would not be impossible to do so ("near impossible" is not impossible and so it could be done). There can be no justification of authorising compulsory acquisition powers on this basis.

OWNER'S RESPONSE TO APPLICANT'S SUBMISSIONS AT DEADLINE 7 ON ACCESS

SECTION D - Removal of a Faulty Transformer

4.24. The Applicant posits in paragraph 2.8.1 of Appendix A of **[REP7-075]** that it is "a very unlikely event" that a transformer could fail.

4.25. We note that the Applicant does not classify the failure of a transformer as a possible major disaster or risk in its environmental statement.

4.26. The failure of a transformer is, as we have found by reviewing other similar projects, not considered to be a major or any risk by other (experienced) DCO applicants as an issue that needs to be considered.

4.27. For example, no mention was made in chapter 24 (the transport section) of the environmental statement for the Norfolk Vanguard DCO – a copy of which is attached at **Appendix 2 to this Statement** - (which also involved constructing a converter station attached to a wind farm) of the risk of transformer failure and the need to transport spare transformers. The Norfolk Vanguard Design and Access Statement (a copy of which is attached at **Appendix 3 to this Statement**) also did not contain details of the need to transport spare converters after its converter station was constructed.

4.28. The Applicant's assertion therefore that a permanent access road is needed in order to remove a faulty transformer is not credible.

4.29. The Applicant has not evaluated transformer failure as a risk in its environmental statement, which means that it cannot satisfy the requirements in section 122 Planning Act 2008 that there is a need for the compulsory acquisition of land for the purposes of a permanent access road.

4.30. There is no justification for the grant of compulsory acquisition powers on the basis that a permanent access road is required to remove faulty transformers.

4.31. If the Owners are incorrect in their position it follows that the App on EIA on major disasters is fundamentally flawed if this could be a major disaster. Regulation 4(2) would preclude a grant of a DCO if the Applicant were to be believed in relation to a risk of transformer failure requiring an additional transformer to that spare already envisaged on the Converter Station footprint.

SECTION E - Replacement of a Spare Transformer

4.32. The Applicant has stated that due to the *reliability and robustness* of the transformers, and the *highly unlikely event* of their failing, only one transformer would be required and that the storage of four spare transformers would not be suitable, due to the clearance requirements for each transformer within the parameter volume. One spare transformer is already envisaged to be kept on the Station site. That itself meets any requirement for a spare and a risk of requiring a further spare cannot be a credible requirement, including because of the risk evaluation of the EIA submitted in support of the Application.

4.33. The Applicant, however, has failed to consider whether even just two spare transformers would be suitable, and would remove any substantive risk that additional spares would have to be brought to the Converter Station.

4.34. If the Converter Station is designed to have a life of 40 years, and we are to assume that the transformers are designed to function for that entire period "to the highest level" of reliability, then over time the Applicant's generalised fear and concern about a speculative need for two spare transformers on site would diminish, that whilst at the beginning of the period two transformers might be prudent to have on site, as the age of the site progresses *towards* 40 year end, the risk of multiple transformers failing would *reduce* over time, and as such the fear and concern of a need for multiple replacements beyond the single spare would reduce also.

4.35. The Owner considers that to further address the Applicant's generalised fears and concerns, notwithstanding the absence of a credible risk (evidenced by the lawful evaluation of risks in the EIA supporting the Application), that there are then four theoretical scenarios, which might describe the relationship between the theoretical requirement for a permanent access road, and the transport of transformers to and from the Converter Station:

A. Removal of faulty transformers mandatory & replacement of a Spare Transformer imperative due storage of only one spare at the Converter Station	B. Removal of faulty transformers, optional & replacement of a spare transformer optional, or at the least not imperative, due to the storage on site of multiple spare transformers
C. Removal of faulty transformers mandatory & replacement of a spare transformer optional, or at the least not imperative, due to the storage on site of multiple spare transformers	D. Removal of faulty transformers, optional & replacement of a spare transformer imperative due storage of only one spare at the Converter Station

4.36. The Applicant has not presented any reasonable evidence to determine which of the four above (A-D) theoretical scenarios apply in this case.

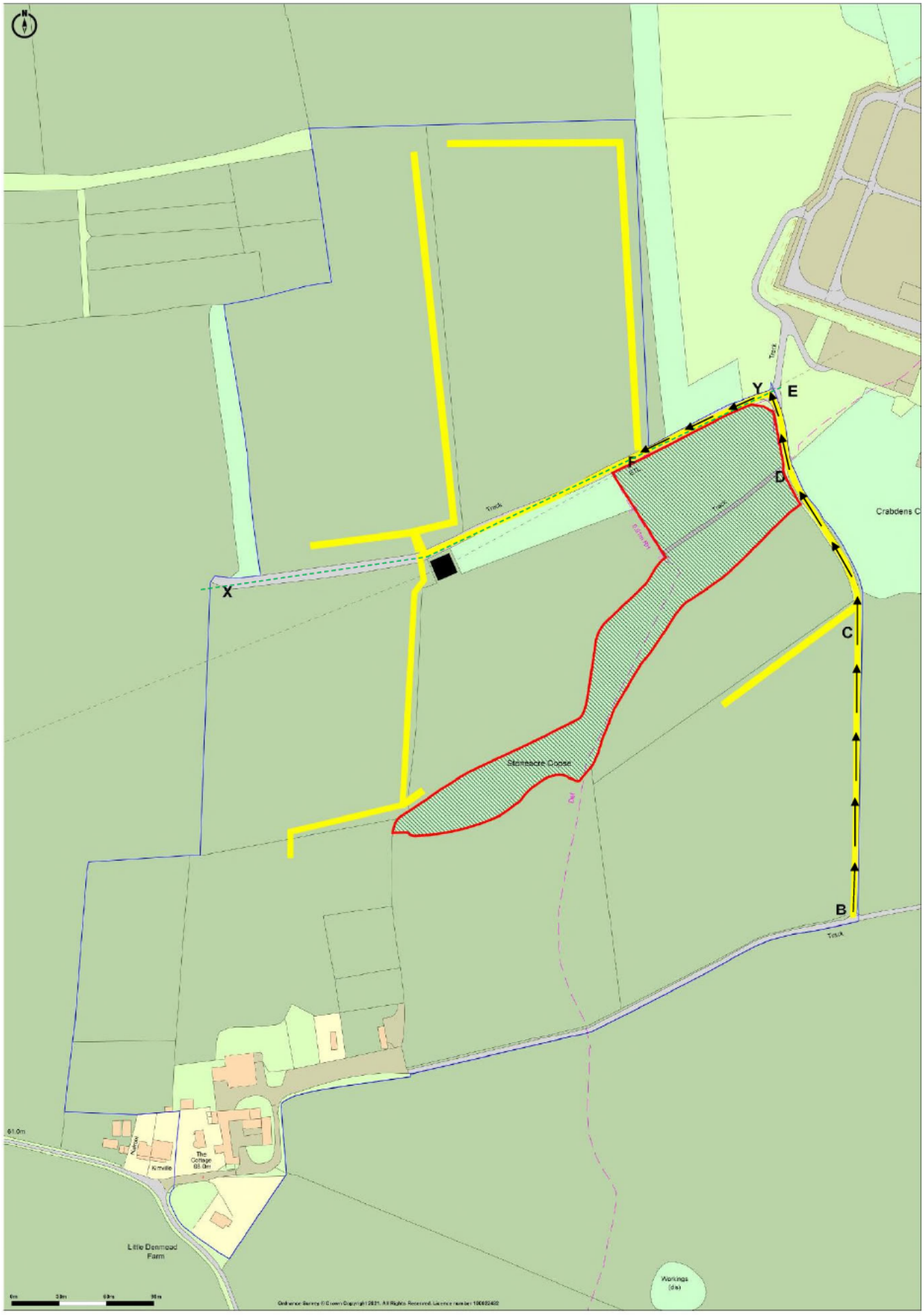
4.37. The Owner accepts that in the case of theoretical option A and C above, where the removal of a faulty transformer is mandatory, there might be the requirement to transport them off site. However, the Owners equally maintain that there is no justification or need for a permanent access road in order to do this. There are credible alternative options to create a temporary access road during the operation of the converter station to facilitate the removal of faulty transformers and those options are set out at **Appendix 4 to this Statement**.

4.38. However, in the case of theoretical options B and D, where the removal of the faulty transformers is optional, the only remaining reason for a continuing need for an access road, is the failure to store on site the requisite *equipment* to enable the site to function as intended for the full total of its design life. Again, either a temporary access can be created as per one of the options set out in **Appendix 4 to this Statement**, or equipment can be transported by light vehicles along the alternative access route shown at **Appendix 1 to this Statement**.

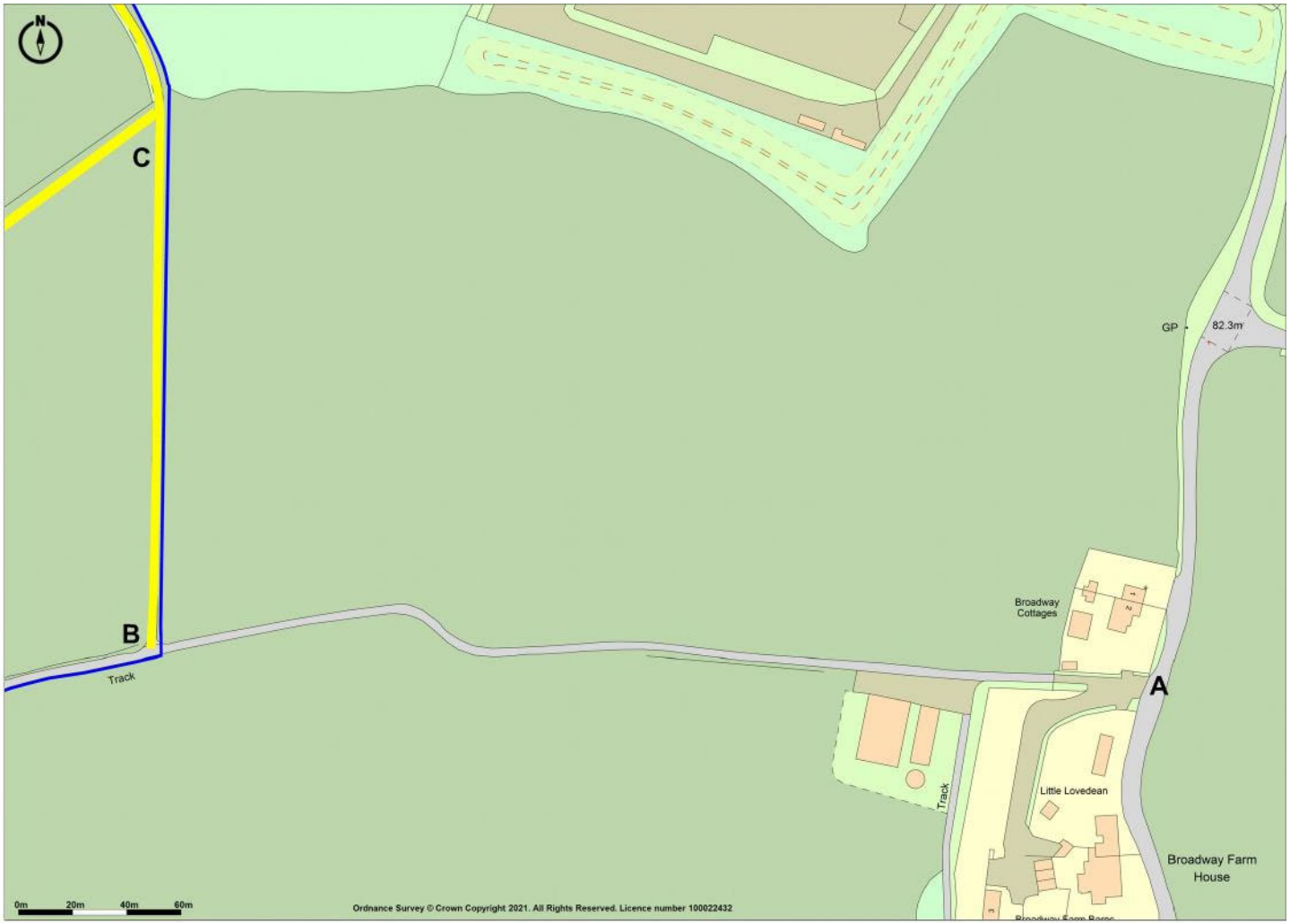
4.39. The Applicant cannot also require flexibility through Rochdale Envelope principles but at the same time assert that, as a matter of detail, there is no space for additional spare transformers. The matter of space for spare transformers as is a matter of detailed design that can be resolved by the Applicant in due course. Rochdale cuts both ways.

APPENDIX 1

OWNERS' PROPOSED ALTERNATIVE ACCESS ROUTE FOR USE AFTER THE CONSTRUCTION OF THE CONVERTER STATION BY LIGHT MAINTENANCE VEHICLES



Accessway Plan – Plan 1 of 2



Accessway Plan – Plan 2 of 2

APPENDIX 2

NORFOLK VANGUARD DCO – CHAPTER 24 OF ENVIRONMENTAL STATEMENT

Norfolk Vanguard Offshore Wind Farm

Chapter 24

Traffic and Transport

Environmental Statement

Volume 1

Applicant: Norfolk Vanguard Limited
Document Reference: 6.1.24
RHDHV Reference: PB4476-005-024
Pursuant to: APFP Regulation 5(2)(a)

Date: June 2018
Revision: Version 1
Author: Royal HaskoningDHV

Photo: Kentish Flats Offshore Wind Farm

Environmental Impact Assessment
Environmental Statement

Document Reference: PB4476-005-024

June 2018

For and on behalf of Norfolk Vanguard Limited

Approved by: Ruari Lean, Rebecca Sherwood

Signed: [redacted]

Date: 8th June 2018

For and on behalf of Royal HaskoningDHV

Drafted by: Ryan Eldon, Andrew Ross

Approved by: Jon Allen

Signed: [redacted]

Date: 1st June 2018

Date	Issue No.	Remarks / Reason for Issue	Author	Checked	Approved
08/04/18	01D	First draft for Norfolk Vanguard Limited Review	RE/AR	ST/RH	AH
01/05/18	02D	Second draft for Norfolk Vanguard Limited Review	RE/AR	CC/ST	JA
01/06/18	01F	Final for ES submission	RE/AR	ST	JA

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Glossary

AADF	Annual Average Daily Flows
AADT	Annual Average Daily Traffic
AILs	Abnormal Indivisible Loads
AMP	Access Management Plan
ATC	Automated Traffic Counts
CBS	Cement Bound Sand
CIA	Cumulative Impact Assessment
CRS	Cable Relay Station
CTMP	Construction Traffic Management Plan
DCO	Development Consent Order
DfT	Department for Transport
DoS	Degree of Saturation
DMRB	Design Manual for Roads and Bridges
ECR	Export Cable Route
EIA	Environment Impact Assessment
EPP	Evidence Plan Process
ES	Environmental Statement
ETG	Expert Topic Group
GEART	Guidelines for the Environmental Assessment of Road Traffic
GTA	Guidance on Transport Assessments
HDD	Horizontal Directional Drilling
HGV	Heavy Goods Vehicle
LTP	Local Transport Plan
MA	Mobilisation Area
MCTC	Manual Classified Turning Count
MMQ	Mean Max Queue
NCC	Norfolk County Council
NNDR	Norwich Northern Distributor Road
NPS	National Policy Statement
NSIP	Nationally Significant Infrastructure Projects
NV	Norfolk Vanguard
PCU	Passenger Car Units
PDS	Project Design Statement
PEIR	Preliminary Environmental Information Report
PIC	Personal Injury Collision
PPG	Planning Policy Guidance
PRC	Practical Reserve Capacity
RFC	Ratio to Flow Capacity
RIS	Road Investment strategy
SRN	Strategic Road Network
TEMPro	Trip End Model Presentation Programme
TMA	Traffic Management Act
TMP	Traffic Management Plan
TP	Travel Plan

WCS	Worst Case Scenario

Terminology

Cable Relay Station	Primarily comprised of an outdoor compound containing reactors (also called inductors, or coils) and switchgear to increase the power transfer capability of the cables under the HVAC technology scenario as considered in the PEIR. This is no longer required for the project as the HVDC technology has been selected.
Control Point	A location that provides the checks and controls for the movement of HGVs and employees.
Delivery	A delivery is the process of transporting goods from a source location to a predefined destination. A delivery will generate two vehicle movements (an arrival and departure)
Jointing pit	Underground structures constructed at regular intervals along the cable route to join sections of cable and facilitate installation of the cables into the buried ducts.
Landfall	Where the offshore cables come ashore at Happisburgh South
Landfall compound	Compound at landfall within which HDD drilling would take place
Link boxes	Underground chambers or above ground cabinets next to the cable trench housing low voltage electrical earthing links.
Mobilisation area	Areas approximately 100 x 100m used as access points to the running track for duct installation. Required to store equipment and provide welfare facilities. Located adjacent to the onshore cable route, accessible from local highways network and suitable for the delivery of heavy and oversized materials and equipment.
National Grid new / replacement overhead line tower	New overhead line towers to be installed at the Necton National Grid substation.
National Grid overhead line modifications	The works to be undertaken to complete the necessary modification to the existing 400kV overhead lines
National Grid substation extension	The permanent footprint of the National Grid substation extension
National Grid temporary works area	Land adjacent to the Necton National Grid substation which would be temporarily required during construction of the National Grid substation extension.
Necton National Grid substation	The existing 400kV substation at Necton, which will be the grid connection location for Norfolk Vanguard
Onshore 400kV cable route	Buried high-voltage cables linking the onshore project substation to the Necton National Grid substation
Onshore cable route	The 45m easement which will contain the buried export cables as well as the temporary running track, topsoil storage and excavated material during construction.
Onshore cables	The cables which take the electricity from landfall to the onshore project substation.
Onshore infrastructure	The combined name for all onshore infrastructure associated with the project from landfall to grid connection.

Onshore project area	All onshore electrical infrastructure (landfall; onshore cable route, accesses, trenchless crossing technique (e.g. Horizontal Directional Drilling (HDD)) zones and mobilisation areas; onshore project substation and extension to the Necton National Grid substation and overhead line modification)
Onshore project substation	A compound containing electrical equipment to enable connection to the National Grid. The substation will convert the exported power from HVDC to HVAC, to 400kV (grid voltage). This also contains equipment to help maintain stable grid voltage.
Running track	The track along the onshore cable route which the construction traffic would use to access workfronts.
The Applicant	Norfolk Vanguard Limited
The project	Norfolk Vanguard Offshore Wind Farm, including the onshore and offshore infrastructure.
Transition pit	Underground structures that house the joints between the offshore export cables and the onshore cables.
Trenchless crossing zone (e.g. HDD)	Temporary areas required for trenchless crossing works.
Vehicle movement	A single trip (i.e. either an arrival to, or departure from site) for the transfer of employees or goods.
Workfront	The 150m length of onshore cable route within which duct installation would occur

24 TRAFFIC AND TRANSPORT

24.1 Introduction

1. This chapter of the Environment Statement (ES) considers the potential traffic and transport impacts of the Norfolk Vanguard project (hereafter 'the project') in relation to the onshore project area.

2. This chapter provides an overview of the existing conditions and environment with regard to traffic and transport matters and assesses potential impacts and associated mitigation on sensitive receptors during the construction, operation and decommissioning phases of the project. The proposed methodology adhered to for the Environmental Impact Assessment (EIA) and Cumulative Impact Assessment (CIA) is discussed in section 24.4.

3. In accordance with the Overarching National Policy Statement (NPS) for Energy EN-1, this chapter contains a 'Transport Assessment' to determine the significance of the project in the context of its traffic and transport effects.

4. Figures which accompany the text in this chapter are provided in Volume 2 Figures.

5. It should be noted that the project's traffic and transport effects have the potential to impact on environmental receptors discussed in other chapters within the ES. The relevant chapters to consider are:

   - Chapter 25 Noise and Vibration;
   - Chapter 26 Air Quality;
   - Chapter 27 Human Health; and
   - Chapter 31 Socio-economics.

24.2 Legislation, Guidance and Policy

24.2.1 Legislation and Policy

6. There are a number of pieces of legislation, policy and guidance applicable to traffic and transport. The following sections provide detail on key pieces of international and UK legislation, policy and guidance which are relevant to this chapter.

24.2.2 National Policy Statements

7. The assessment of potential traffic and transport impacts has been made with specific reference to the NPSs. NPS set out policies or circumstances that the UK Government consider should be taken into account when making decisions on Nationally Significant Infrastructure Projects (NSIP). All six energy NPS received designation by the Secretary of State (SoS) for Energy and Climate Change on 19 July

2011. Those relevant to the project are:

- Overarching NPS for Energy (EN-1) (DECC, 2011a);
- NPS for Renewable Energy Infrastructure (EN-3) (DECC, 2011b); and
- NPS for Electricity Networks Infrastructure (EN-5) (DECC, 2011c).

8. For the specific assessment requirements for traffic and transport, only EN-1 is applicable. This is summarised in Table 24.1, together with an indication of where each stipulation is addressed.

Table 24.1 NPS assessment requirements

NPS requirement	NPS reference	ES Response
EN-1 Overarching NPS for Energy		
If a project is likely to have significant transport implications, the applicant's ES should include a Transport Assessment, using the NATA/ WebTAG methodology stipulated in Department for Transport (DfT) guidance, or any successor to such methodology.	Section 5.13.3	The chapter has been produced in accordance with current transport guidance (referenced later within sections 24.2.4 to 24.2.7) and this is evidenced throughout this document.
Where appropriate, the applicant should prepare a Travel Plan including demand management measures to mitigate transport impacts. The applicant should also provide details of proposed measures to improve access by public transport, walking and cycling, to reduce the need for car parking associated with the proposal and to mitigate transport impacts.	Section 5.13.4	Section 24.7.4 outlines the mitigation measures for construction, such as car-share and Heavy Goods Vehicle (HGV) controls. These parameters have also been captured in an Outline Travel Plan (OTP) (document reference 8.9) and an Outline Traffic Management Plan (OTMP) (document reference 8.8) which is submitted as part of the DCO application.

24.2.3 Local Planning Policy

9. EN-1 states that the Planning Inspectorate will also consider Development Plan Documents or other documents in the Local Development Framework relevant to its decision making.

10. The traffic and transport study area falls under the jurisdiction of Norfolk County Council and Suffolk County Council and would potentially include the following local planning authorities:

- North Norfolk District Council;
- South Norfolk District Council;
- Breckland Council;
- Broadlands District Council;

- Waveney District Council; and
- Norwich City Council.

11. North Norfolk District Council have produced a Local Plan which includes the Core Strategy and Site Allocation Plans setting out detailed, site specific policies (North Norfolk District Council, 2008) providing the context for development across North Norfolk. North Norfolk District Council is currently working on an Emerging Local Plan 2016-2036.

12. South Norfolk District Council, Broadland District Council and Norwich City Council each use an individual adopted Local Plan, which includes the Joint Core Strategy (a partnership between Broadland, Norwich and South Norfolk Councils) (Greater Norwich Development Partnership, 2014). All three authorities supplement the Local Plan via individual Development Management Policies Documents.

13. Breckland Council are currently updating an Emerging Single Local Plan 2011-2036 (Breckland Council, 2017). This plan sets out strategic planning policies within Breckland which will replace the Core Strategy and suite of documents that make up the adopted Local Plan (Breckland Council, 2009).

14. Waveney District Council falls within the county of Suffolk and provides a Core Strategy Development Plan Document (Waveney District Council, 2009) and a number of policies within the adopted Development Management Policies Documents (Waveney Disctrict Council, 2011).

15. Table 24.2 provides details of the local planning policy documents and the policies contained within these which are relevant to traffic and transport.

Table 24.2 Relevant local planning policies

Document	Policy/guidance	Policy/guidance purpose
Norfolk County Council		
Local Transport Plan 3 adopted April 2011.	Policy 4: Protecting the Environment	Transport decisions should take account of the character of the historic environment, landscape and local biodiversity. In particular: • Negative impacts should be mitigated; • Reasonable opportunities for creating habitats taken; • Due regard should be given to ecological networks and European designated sites; • Impact assessments should be undertaken where necessary.
North Norfolk District Council		
Local Development Framework – Core Strategy adopted September 2008.	Policy SS 2: Development in the Countryside	In areas designated as Countryside development will be limited to that which requires a rural location and can include the following: • Renewable energy projects • Transport
	CT5: The Transport	Development will be designed to reduce the need to travel and to maximise the use of sustainable forms of transport appropriate to its

Document	Policy/guidance	Policy/guidance purpose
	Impact of New Development	particular location. Development proposals will be considered against the following criteria; • The proposal provides for safe and convenient access on foot, cycle, public and private transport addressing the needs of all, including those with a disability; • The proposal is capable of being served by safe access to the highway network without detriment to the amenity or character of the locality; • Outside designated settlement boundaries the proposal does not involve direct access on to a principal route, unless the type of development requires a principal route location. • The expected nature and volume of traffic generated by the proposal could be accommodated by the existing road network without detriment to the amenity or character of the surrounding area or highway safety; and • If the proposal would have significant transport implications, it is accompanied by a transport assessment, the coverage and detail of which reflects the scale of development and the extent of the transport implications, and also, for non-residential schemes, a travel plan.
South Norfolk District Council		
Development Management Policies Document. **(South Norfolk District Council, 2015)**	Policy DM 3.11 Road Safety and the Free Flow of Traffic	On all sites development will not be permitted that endangers highway safety or the satisfactory functioning of the highway network. Planning permission will be granted for development involving the formation or intensified use of a direct access onto a Corridor of Movement providing it would not: • Prejudice the safe and free flow of traffic or planned proposals for sustainable transport initiatives along the Corridor of Movement; • Be practical to gain access from the site to the Corridor of Movement via a secondary road; and • Facilitate the use of the Corridor of Movement for short local journeys.
Joint Core Strategy (Broadland, Norwich and South Norfolk) adopted January 2014.	Policy 6: Access and Transportation.	The Transportation system will be enhanced to develop the role of Norwich as a Regional Transport Node. This will be achieved by a number of factors including; • Implementation of the Norwich Area Transportation Strategy (NATS) including construction of the Northern Distributor road; • Promoting improvements to the A11 and A47; and • Continuing to recognise that in the most rural areas the private car will remain an important means of travel.
Breckland Council		
Breckland Local Plan - Core Strategy and Development Control Policies Document adopted	Policy CP13: Accessibility	Travel Plans should be submitted for major schemes or those schemes where there are significant transport implications, such as those where a Transport Assessment is required.
	Policy DC 15: Renewable energy	Proposals for renewable energy development will be supported in principle. Permission will be granted for these developments unless it, or any related infrastructure such as power lines or access roads etc, has a significant detrimental impact or a cumulative detrimental

Document	Policy/guidance	Policy/guidance purpose
December 2009		impact upon: • Sites of international, national or local nature and heritage conservation importance; • The surrounding landscape and townscape; • Local amenity as a result of noise, fumes, electronic interference or outlook through unacceptable visual intrusion; and • Highway safety. Where development is permitted, mitigation measures will be required as appropriate to minimise any environmental impacts, such measures will be secured via condition or legal agreement. All development proposals for a renewable energy generation scheme should, as far as is practicable, provide for the site to be reinstated to its former condition should the development cease to be operational.
Emerging Single Local Plan Pre-Submission Publication August 2017	Policy TR01: Sustainable Transport Network	Major development proposals should include an assessment of the impacts of new development on the existing transport network. Where potential transport impacts are identified, developers will be expected to produce Transport Assessments to assess the impacts and identify appropriate mitigation, together with Travel Plans where appropriate.
	Policy TR02: Transport Requirements	Development proposals that are likely to generate a significant number of heavy goods vehicle movements will be required to demonstrate by way of a Routing Management Plan that no severe impacts will be caused to the efficient and safe operation of the road network and no material harm caused to the living conditions of residents.
Broadland District Council		
Joint Core Strategy (Broadland, Norwich and South Norfolk) adopted January 2014.	Policy 6: Access and Transportation.	The Transportation system will be enhanced to develop the role of Norwich as a Regional Transport Node. This will be achieved by a number of factors including; • Implementation of the Norwich Area Transportation Strategy (NATS) including construction of the Northern Distributor road; • Promoting improvements to the A11 and A47; and • Continuing to recognise that in the most rural areas the private car will remain an important means of travel.
Development Management Policies Document. **(Broadland District Council, 2015)**	Policy GC5: Renewable Energy	Proposals for renewable energy technology, associated infrastructure and integration of renewable energy technology will be encouraged where its impacts are (or can be made) acceptable.
	Policy TS2 – Travel Plans and Transport Assessments	In the case of major development, or where a particular need is identified, a Transport Assessment and/or Travel Plan will be required. Developers will need to include proposals to deal with any consequences of their development in terms of maximising access by foot, cycle and public transport and the means by which this will be secured in perpetuity.
	Policy TS3: Highway Safety	Development will not be permitted where it would result in any significant adverse impact upon the satisfactory functioning or safety of the highway network.
Waveney District Council		
Waveney Local Plan - Core	Policy CS15: Sustainable	Development that could generate significant traffic, including goods vehicles, will only be acceptable in the most accessible locations

Document	Policy/guidance	Policy/guidance purpose
Strategy Development Plan Document adopted January 2009	Transport	where there are opportunities to reduce the need to travel. Development proposals that will have significant transport implications will need to be accompanied by a transport assessment and travel plan showing how car based travel to the site can be minimised.
Development Management Policies Document.	Policy DM02 – Design Principles	Ensure access to the site that does not compromise highway safety and the traffic generated by the development is capable of being accommodated on the surrounding transport network.
Norwich City Council		
Joint Core Strategy (Broadland, Norwich and South Norfolk) adopted January 2014.	Policy 6: Access and Transportation.	The Transportation system will be enhanced to develop the role of Norwich as a Regional Transport Node. This will be achieved by a number of factors including; • Implementation of the Norwich Area Transportation Strategy (NATS) including construction of the Northern Distributor road; • Promoting improvements to the A11 and A47; and • Continuing to recognise that in the most rural areas the private car will remain an important means of travel.
Development Management Policies Document. adopted January 2011.	Policy DM30: Access and Highway Safety	Development must seek opportunities to remove unnecessary access points onto the principal or main distributor routes (as defined in the NATS route hierarchy). New vehicular accesses onto these routes will only be permitted where there is no practical alternative from a more minor route and (where adjacent to an existing or proposed bus rapid transit corridor) they would not prevent or restrict the implementation of necessary highway or junction improvement works associated with the transit corridor. Any new access point must allow for access and egress in a forward gear.

24.2.4 Traffic Management Act

16. The Traffic Management Act (TMA) was introduced in 2004 to deal with congestion and disruption on the road network. The TMA places a duty on local traffic authorities to ensure the expeditious movement of traffic on their road network and those networks of surrounding authorities.

17. The TMA directs effective communication between highway authorities and parties interested in carrying out street work. The TMA encourages a disciplined approach and advance communication to plan the street works.

24.2.5 The Strategic Road Network and the Delivery of Sustainable Development Guidance

18. The Department for Transport (DfT) Circular 02/2013 entitled 'The Strategic Road Network and the Delivery of Sustainable Development' sets out the ways in which the Highways Agency [now Highways England] will engage with communities and developers to deliver sustainable development and thus economic growth, whilst

safeguarding the primary function and purpose of the Strategic Road Network.

19. Under the heading of 'Environmental Impact' Circular 02/2013 notes that:

- "…developers must ensure all environmental implications associated with their proposals, are adequately assessed and reported so as to ensure that the mitigation of any impact is compliant with prevailing policies and standards. This requirement applies in respect of the environmental impacts arising from the temporary construction works and the permanent transport solution associated with the development, as well as the environmental impact of the existing trunk road upon the development itself".

20. The Circular 02/2013 details access requirements specifically for wind turbines and states that:

- "The promoter of a wind farm should prepare a report covering the construction, operation and de-commissioning stages of the development. From this, the acceptability of the proposal should be determined and any mitigating measures should be identified"
- Access to the site for construction, maintenance and de-commissioning should be obtained via the local road network and, normally, there should be no direct connection to the strategic road network"
- Swept path analyses should be provided by the developer for the abnormal load deliveries to the site."

21. Under the heading of '*Access, The Strategic Road Network'* Circular 02/2013 notes that:

- "The creation of new accesses to the strategic road network can impact on its ability to fulfil the function of facilitating the safe and effective movement of goods and people in support of economic growth by compromising traffic movement and flow"
- "The Highways Agency will adopt a graduated and less restrictive approach to the formation or intensification of use of access [to the presumption against for motorway access] to the remainder of the strategic road network. However, the preference will always be that new development should make use of existing junctions. Where a new junction or direct means of access is agreed, the promoter will be expected to secure all necessary consents, and to fund all related design and construction works"

24.2.6 Guidelines for the Environmental Assessment of Road Traffic

22. The Guidelines for the Environmental Assessment of Road Traffic (GEART) (Institute

of Environmental Assessment, 1993) relate to the assessment of the environmental impacts of road traffic associated with new developments, irrespective of whether the developments are to be subject to formal Environmental Impact Assessments (EIAs).

23. The purpose of the guidelines is to provide the basis for systematic, consistent and comprehensive coverage for the appraisal of traffic impacts arising from development projects. Impacts that may arise include: pedestrian severance and amenity, driver delay, accidents and safety and noise, vibration and air quality. Further details on the assessment methodology undertaken for the project in relation to traffic and transport can be found in section 24.4.

24.2.7 DfT Transport Assessment Guidance and Successors

24. The DfT Transport Assessment guidance referred to in NPS EN-1, was withdrawn in October 2014 and was replaced with DCLG Planning Practice Guidance (PPG). For the purpose of assessing the project's impact the relevant PPG is 'Travel Plans, Transport Assessment and Statements' (henceforth referred to as the Transport PPG).

25. The Transport PPG sets out the key principles to be adopted when developing a Transport Assessment as follows:

- Proportionate to the size and scope of the proposed development to which they relate and build on existing information wherever possible;
- Established at the earliest practicable possible stage of a development proposal;
- Be tailored to particular local circumstances (other locally-determined factors and information beyond those which are set out in this guidance may need to be considered in these studies provided there is robust evidence for doing so locally);
- Be brought forward through collaborative ongoing working between the local planning authority/transport authority, transport operators, rail network operators, Highways Agency (now Highways England) where there may be implications for the strategic road network and other relevant bodies.

26. The Transport PPG key principles have shaped the development of the ES and can be seen throughout the document.

24.3 Consultation

27. Consultation is a key driver of the EIA and ES, and is an ongoing process throughout the lifecycle of the project, from the initial stages through to consent and post-consent. To date, consultation regarding traffic and transport has been conducted

through transport Expert Topic Group (ETG) meetings in January 2016, July 2017 and January 2018 to review and agree methodologies for the assessments, the Scoping Report (Royal HaskoningDHV, 2016) and the Preliminary Environmental Information Report (PEIR) (Norfolk Vanguard Limited, 2017). The ETG included transportation professionals from Norfolk County Council, Highways England and Norfolk Vanguard Limited. Whilst not a member of the Group, Suffolk County Council were kept informed of developments, noting that the south east tip of the traffic and transport study area encompassed two roads within their administration area.

28. Further details of the project consultation process are presented within Chapter 7 Technical Consultation.

29. A summary of the consultation that has been undertaken to date and has driven forward the development of this traffic and transport assessment is provided in Table 24.3.

Table 24.3 Consultation responses

Consultee	Document / date received	Comment	Response / where addressed in the ES
Norfolk County Council	25th January 2017 First Expert Topic Group Meeting	Requirement for an Access Management Plan (AMP) and Traffic Management Plan (TMP) was identified.	An outline AMP (OAMP) (document reference 8.10) and outline TMP (OTMP) (document reference 8.8) have been provided as part of the DCO application.
		Trenchless methods (e.g. HDD) to cross the A47, A140, A149. Open cut to be considered for other routes on a site by site basis and agreed with NCC.	Commitment has been made to cross the A47, A140 and A149 via trenchless methods through the Outline Code of Construction Practice (Document ref.8.1)
		NCC advised that extended morning peaks (7:30am – 9am) may require traffic management restrictions.	This has been identified and considered in detailed peak hour capacity assessments as detailed in section 24.7.7.4.

Consultee	Document / date received	Comment	Response / where addressed in the ES
		NCC advised of their preference of routes not via local village centres.	Figure 24.9 details HGV routes within the traffic and transport study area. The strategy has taken account of local village centres and has routed construction traffic away from these locations where practical.
Highways England	27th February 2017 ETG meeting.	Traffic Distribution – a realistic worst case assessment that assumes that all onshore cable route sections will be active at the same time was outlined.	Stakeholders requested more detail on traffic derivation which informed the second meeting of the ETG. This information formed the basis of agreement of the derivation of project traffic demand by all highway stakeholders.
		Study Area – The study area was presented with an expected reduction in size once delivery routes had been agreed and traffic significance screening was finalised.	Updated traffic and transport study area contained within Figure 24.1.
		Access – Proposed existing access to the substation via Necton was presented. It was agreed that a review of the accident record would be undertaken if this facility was to be relied upon. Highways England explained that current policy does not prevent a new access from the A47 from being created, however, preference was for an existing access point to be utilised.	Following consultation with highway stakeholders, a technical note was produced which identified preferred access options based on an evaluation of road safety and environmental impact. The note was circulated to stakeholders and is presented in Appendix 24.21.
		Highways England noted that if the base port for [onshore] construction is to be Gt. Yarmouth, then assessments need to take account of Road Investment Strategy (RIS) schemes.	A sensitivity test of RIS schemes was subsequently agreed with Highways England as set out in section 24.7.7.4.
		Highways England stated that they do not accept Guidelines for the Environmental Assessment of Road Traffic (GEART) significance thresholds for assessing road safety and capacity.	GEART thresholds have not been applied to the effects of road safety and capacity.

Consultee	Document / date received	Comment	Response / where addressed in the ES
Highways England	7th March 2017 EIA Traffic & Transport Method Statement Response (Ref: 60506522 / DN052.002 BN01)	Impact on A47 at Necton issue raised requiring detailed analysis of traffic generation and a review of historic collisions.	Following consultation with highway stakeholders, a technical note was produced which identified preferred access options based on an evaluation of road safety and environmental impact. The note was circulated to stakeholders and is presented in Appendix 24.21.
		Impacts of HGVs on wider network (origin and destination) including a number of sensitive junction locations to be assessed.	Section 24.6.6 provides full HGV derivation, including demand, distribution and assignment. Table 24.35 details sensitive junctions that have been subject to a detailed capacity assessment.
		Highway authorities to seek a formal commitment to use Horizontal Directional Drilling (HDD) method under the A47 and a review required for HGV access to the HDD site off the A47	An OAMP (document reference 8.10) has been submitted with the DCO application which provides details of the proposed access arrangements.
Highways England and Norfolk County Council	17th July 2017 ETG Meeting	NCC / HE provided details of the sensitive junctions that would require further consideration of Driver Delay impacts.	Table 24.35 details sensitive junctions that have been subject to a detailed capacity assessment.
		NCC / HE raised concerns over potential cumulative effects resultant from Norfolk Vanguard construction traffic and proposed A47 Corridor Improvement Programme schemes.	The scope of the cumulative assessment has been agreed with Highways England and NCC and is set out in section 24.8.
		HE raised concern that HGVs originate from Kings Lynn and Lowestoft. However, the flows would be assigned slightly differently if Great Yarmouth was selected as a	Section 24.6.6 provides updated HGV derivation data, including that relating to Great Yarmouth assessed as an additional potential

Consultee	Document / date received	Comment	Response / where addressed in the ES
		source port.	source port.
		HE requested further clarity on employee distribution for PEIR, specifically for distribution from the south of the study area.	Figures 24.10, 24.11 and 24.12 clarify distribution south of the traffic and transport study area with further points of access.
		NCC suggested indicating 'red routes' that would ban HGVs from utilising the route.	The assessment identifies routes that would be unsuitable for project related HGV traffic.
		NCC / HE provided details of sensitive junctions that would require further consideration of Driver Delay impacts.	Table 24.35 details sensitive junctions which have been subject to a capacity assessment.
		Queries raised relating to the existing National Grid substation extension site access and potential for a new access north of the site.	Following consultation with highway stakeholders, a technical note was produced which identified preferred access options based on an evaluation of road safety and environmental impact. The note was circulated to stakeholders and is presented in Appendix 24.21.
		Concerns raised for access off the A47 at the trenchless crossing location.	An OAMP (document reference 8.10) has been submitted with the DCO application which provides details of the proposed access arrangements.
Highways England	4th December 2017 PEIR Response	Link Sensitivity – concerns raised for the sensitivity of Links 64 and 65 in which it is proposed that they are to be taken forward for further assessment.	Links 64 and 65 have now been assessed as 'medium' sensitivity in Table 24.9. Both links taken forward for further assessment in section 24.7.
		Trip Estimation - HE suggested the adoption of the latest version of TEMPro in the estimation of the background flows.	TEMpro (version 7.2) utilised to derive growth factors.
		Road Safety - HE recommended a contingency for mitigation at collision cluster site 12 should be	Section 24.7.7.3.3 discusses mitigation proposals for cluster 12 in the event that

Consultee	Document / date received	Comment	Response / where addressed in the ES
		considered in the event of the A47 Blofield to North Burlingham RIS scheme being delayed.	the proposed Road Investment Strategy (RIS) scheme is delayed.
		Junction Capacity – It is advised that junction capacity assessments may be considered for Junctions 1 (Gapton) and 2 (Vauxhall) in the event of the RIS construction programme being delayed.	Section 24.7.7.4.1 and 24.7.7.4.2 details a proportional approach to assessing capacity on Junction 1 and 2 in the event that the RIS schemes are delayed.
		Concerns raised relating to the substation access and cable crossing on the A47.	An OAMP (document reference 8.10) has been submitted with the DCO application which provides details of the proposed access arrangements.
Highways England and Norfolk County Council	25th January 2018 Traffic and Transport Expert Topic Group Meeting	NCC requested clarification in regard to the DCO transport documents.	An OAMP (document reference 8.10) and OTMP (document reference 8.8) have been provided in support of the DCO application.
		NCC identified concerns regarding the A47 highway access.	Following consultation with highway stakeholders, a technical note was produced which identified preferred access options based on an evaluation of road safety and environmental impact. The note was circulated to stakeholders and is presented in Appendix 24.21.
		HE requested that junction sensitivity tests be undertaken if RIS scheme is not put forward or delayed.	Section 24.7.7.4.1 and 24.7.7.4.2 detail a proportional approach to assessing capacity for impacted junctions in the event that the RIS schemes are delayed.
Norfolk County Council	November 2017 PEIR Response	The formal planning application, when submitted, must be accompanied by a Transport Assessment (TA). The TA will assess the effects of the anticipated traffic upon driver delay; severance; pedestrian delay; pedestrian	The Transport Assessment is contained within the ES. An OAMP (document reference 8.10) and OTMP (document reference 8.8) have been provided in support of the

Consultee	Document / date received	Comment	Response / where addressed in the ES
		amenity; accidents; road safety; and impact from abnormal loads. Development Consent Order (DCO) requirements will also have commitments to agree a Traffic Management Plan (TMP), which will initially be submitted in outline, then completed and agreed when the contractor is appointed.	DCO application.
		An onshore substation will be required. The intention is to extend the Necton substation in an east west direction with vehicular access provided from the A47(T). Traffic assessments for the A47(T) are issues for Highways England to comment upon and not the County Council. Nevertheless, the County Council has expressed concern with regard to the proposed access arrangements and has suggested that as a minimum, a full right turn lane be provided from the A47(T). An alternative access strategy from the A47(T) has also been proposed by the applicant, however the County Council has again raised safety concerns. Ultimately, access to the A47(T) for the proposed new substation is a matter for Highways England to assess and the County Council can only inform them of our concerns.	Following consultation with highway stakeholders, a technical note was produced which identified preferred access options based on an evaluation of road safety and environmental impact. The note was circulated to stakeholders and is presented in Appendix 24.21.
		Vattenfall should work closely with Highways England and Norfolk County Council (Highway Authority) to ensure the proposed cable route does not fetter any future plans for the dualling of the A47(T)	Norfolk Vanguard Limited will work with HE and NCC Highways to ensure that the proposed cable works include suitable provision for existing or approved road developments.
		Vattenfall should ensure that the proposed underground cable route does not fetter any future highway improvement schemes in Norfolk and that where any reinforcement or diversion is needed to the cable route as a result of such highway	Norfolk Vanguard Limited will work with HE and NCC Highways to ensure that the proposed cable works include suitable provision for existing or approved road developments.

Consultee	Document / date received	Comment	Response / where addressed in the ES
		works, that Vattenfall will be responsible for any upgrades or diversion of the cables and will fully meet the costs of these works.	
Breckland Council	November 2017 PEIR Response	The prolonged period of construction will have the biggest impact in terms of the local road network. This will be created by the movements of vehicles transporting materials and removing spoil for the trenches. A fully detailed Transport Assessment and a Construction Traffic Management Plan must clarify the precise implications of the development and propose an appropriate package of management and mitigation measures together with improvements to be made to the local road network at the Applicant's expense.	The Transport Assessment is contained within the ES including proposals for any required mitigations. An OAMP (document reference 8.10) and OTMP (document reference 8.8) have been provided in support of the DCO application.
		Breckland Council fully supports the highway views set out by Norfolk County Council in the response to this consultation. The request for a full right turn lane to be provided from the A47(T) into the area of the extended Necton substation is hereby reiterated. The District Council also shares the view that all major road scheme possibilities, including dualling of the A47, should remain unfettered. Highways England must be fully consulted and have no objections to the development.	Following consultation with highway stakeholders, a technical note was produced which identified preferred access options based on an evaluation of road safety and environmental impact. The note was circulated to stakeholders and is presented in Appendix 24.21.
North Norfolk District Council	November 2017 PEIR Response	The District Council recognises that the majority of traffic movements associated with the proposal will occur during the construction phase and would expect Vattenfall to work with the District Council, the Highway Authority and local communities affected to seek to minimise any adverse impacts through appropriate mitigation strategies.	Traffic derivation is discussed in section 24.6.6 including any proposed mitigation strategies.

Consultee	Document / date received	Comment	Response / where addressed in the ES
Necton Parish Council	November 2017 PEIR Response	Whilst the PEIR identifies entrances to the proposed sites further east of the Necton junction, the consequential impact of increased traffic, wide-load maneuverers and traffic-flow restrictions for proposed new right-hand filter lanes will cause long-term disruption for residents and local businesses.	Following consultation with highway stakeholders, a technical note was produced which identified preferred access options based on an evaluation of road safety and environmental impact. The note was circulated to stakeholders and is presented in Appendix 24.21.
		There is insufficient analysis of the potential impact of traffic to inform our view on this proposal at present. A Transport Assessment and a Construction Traffic Management Plan will form part of the application. The PINS Scoping Opinion (para 3.169) has highlighted our comments with regard to a TMP. Given the impact poor traffic management along the A47 would have on residents of Necton, we would expect to be invited by Vattenfall to form part of a consultation group focusing on this subject.	The Transport Assessment is contained within the ES including proposals for any required mitigations. An OAMP (document reference 8.10) and OTMP (document reference 8.8) have been provided in association with the DCO application. Norfolk Vanguard Limited will work with Necton Parish Council post-consent, to set up a suitably constituted 'advisory group' or similar. This group will enable the views, concerns and ideas of local residents to be fed into Norfolk Vanguard Limited ongoing planning activities, and into effective management processes during the construction phase. A Communications Plan will be produced and included within the Code of Construction Practice (DCO requirement 19)
		With regard to the strategic development plan for the A47 Necton area, this Council has commenced discussions with Highways England on safety improvement measures. Highways England has commissioned a survey that is expected to be complete by summer 2018. Vattenfall accepted an invitation to engage in these discussions, which commenced in	See above response.

Consultee	Document / date received	Comment	Response / where addressed in the ES
		September 2017 and we would expect they would continue to contribute to this process.	
Suffield Parish Council	November 2017 PEIR Response	Assurance required that site vehicles would adhere to proposed trackway.	The OTMP (document reference 8.8) that supports the DCO application contains a commitment to monitoring and enforcing HGV movements
		The proposed mobilisation zone on land between Rectory Road and Felmingham Road. In all literature from Vattenfall it is stated that their aim is the least possible environmental impact from their scheme. Putting a mobilisation zone in Suffield would be totally against this stated aim. The area of Suffield is a deeply rural one with a narrow single track road with blind bends, no street lights and very little traffic.... There are two zones earmarked, one on the A140 and one in North Walsham both of which are in 'blighted' areas with traffic, lighting etc. It is therefore quite unnecessary to inflict such a heavy toll on such a rural area.	Revised project proposals do not include the requirement for a mobilisation area in the vicinity of Suffield.
Colby and Banningham Parish Council	November 2017 PEIR Response	The Primary Mobilisation Area proposed for Rectory Road, Suffield. It is noted that this will be a congregation area for HGV's, contractor vehicles and personal vehicles, with 240 people working there each day. With no restrictions on hours of operation, and peak hours from 7a.m. to 7p.m. 7 days a week, there will not only be significant adverse implications on our residents in respect of noise and air quality, but the area of major concern is the traffic movements. There is not precise data included in the PEIR as to what this will mean for Colby and Banningham, but according to the proposals in the	Revised project proposals do not include the requirement for a mobilisation area in the vicinity of Suffield.

Consultee	Document / date received	Comment	Response / where addressed in the ES
		documents 80% of construction movements will be along unclassified roads and 20% along specially constructed new routes. In our villages with narrow roads, no footpaths and a great deal of – necessary –agricultural vehicle movements, this will be totally unacceptable bearing in mind the nature of the plant, equipment and materials that will need to be transported. The access routes via Highbury Farm and Banningham Hall will create additional pressures for Colby Road and Church Road, the former especially narrow and on a bend at this point. Bridge Road and Colby Corner should be avoided altogether due to its insufficient width for heavy vehicles – it is already signed as "unsuitable for HGV's" and the proximity of Colby Primary School and the traffic generated at the start and end of the school day.	
		Similar comments apply to the Primary Mobilisation Area, at the junction of the A140/B1145. However, the parish council's main comment on this area is that the site is totally unsuited to this use. The junction has been a cause of concern to both our council and Aylsham Town Council for a number of years, it has a bad accident record and the approach off the A140 is narrow and dangerous. The B1134 at this point is not technically wide enough for white lines along the middle of the road, although these do exist. Heavy vehicles turning off the A140 have to use the whole width of the road –if there is approaching traffic, the vehicles are forced to wait, sometimes with the rear sticking out on to the A140.	An OAMP (document reference 8.10) and OTMP (document reference 8.8) have been provided in support of the DCO application. These documents contain a commitment to assessing the manoeuvrability of the types of vehicle that would utilise the A140/B1145 junction and to mitigate this as appropriate.

Consultee	Document / date received	Comment	Response / where addressed in the ES
Oulton Parish Council	November 2017 PEIR Response	Consideration should be made regarding whether access to the site [MA7] is suitable, as it would require HGV's to negotiate narrow country lanes with informal passing places. Possible conflict with year round use by agricultural vehicles, residents and other vehicles plus the possibility of cumulative impact from HGV's from Dong/Ørsted Hornsea 3 project also accessing another potential compound on the old airfield at Oulton Street.	All routes proposed have been subject to a detailed desktop assessment augmented by site visits to validate OS data. An OAMP (document reference 8.10) and OTMP (document reference 8.8) have been provided in support of the DCO application which contains more detail of the measures proposed to manage access via narrow routes. Norfolk Vanguard Limited is in dialogue with Ørsted with regard to coordinating traffic demand.
East Ruston Parish Council	November 2017 PEIR Response	The proposed development site at 6a is over 600metres away from any usable road (B1159) extending to 700 metres to reach the temporary compound (and eventually the Boreas site) and beyond to follow the cable route. Development at this site will therefore necessitate additional road building, creating noise and disruption –as well as further permanent loss of valued countryside. At present the location of this new road is unclear and we do not feel in a position to fully understand the likely impact or comment thereon.	Norfolk Vanguard Limited has reviewed consultation received and revised proposals to now commit and deploy High Voltage Direct Current (HVDC) cable technology to the UK's National Grid and this removes the need for a Cable Relay Station (CRS) (all options including at site 6a) from the project.
		Presence would increase local traffic in the area to unacceptable levels which would subsequently impact surrounding villages and towns and cause diversion into quiet lanes which are not suitable for heavy or high volume traffic.	
Public Health	November 2017 PEIR Response	We note that the submitted reports do not identify any significant risks to public health. However, traffic movements associated with the onshore activities (construction) of the development may generate localised dust emissions leading to	An OTMP (document reference 8.8) has been provided in support of the DCO application. This document contains the measures for the day to day management of the project's

Consultee	Document / date received	Comment	Response / where addressed in the ES
		potential complaints. Any issues raised by local communities need efficient management during the development phase.	HGV traffic including dust suppression. Public health is considered within Chapter 27 Human Health. Dust emissions are considered within Chapter 26 Air Quality.
Royal Mail	November 2017 PEIR Response	Royal Mail requests that the ES to be submitted with Vattenfall's DCO application includes information on the needs of major road users (such as Royal Mail) and acknowledges the requirement to ensure that major road users are not disrupted though full consultation at the appropriate time in the DCO and development process.	An OTMP (document reference 8.8) has been provided in support of the DCO application. This document contains the measures for the day to day management of the project's HGV traffic to minimise the impact on all highway users.
Aylsham Town Council	November 2017 PEIR Response	The areas that concern the Town Council most are where it crosses the A140 and Blickling Road. These are very important and busy roads for Aylsham, especially the A140. Any mitigation of road disturbance would be welcomed.	An OTMP (document reference 8.8) has been provided in support of the DCO application. This document contains the measures for the day to day management of the project's HGV traffic to minimise the impact on all highway users
No to Relay Stations (N2RS)	November 2017 PEIR Response	Massive increase in road traffic, disrupting daily life and forcing traffic into single track lanes.	Norfolk Vanguard Limited has reviewed consultation received and revised proposals to now commit and deploy High Voltage Direct Current (HVDC) cable technology to the UK's National Grid and this removes the need for a Cable Relay Station from the project, thus significantly reducing traffic movement in this locality.
		Access issues	

24.4 Assessment Methodology

30. This section describes the methodology and impact assessment criteria used in the traffic and transport assessment, as consulted on and agreed via Expert Topic Group meetings, the Scoping Report, (Royal HaskoningDHV, 2016) the Method Statement (Royal HaskoningDHV, 2017) and the Preliminary Environmental Report (PEIR) (Norfolk Vanguard Limited, 2017).

31. The traffic and transport assessment methodology follows the principles set out in Chapter 6 (EIA Methodology) and adopts the 'project wide' significance evaluation. However, these principles have been augmented by traffic and transport specific methodologies (as prescribed in GEART) to inform a significance evaluation.

24.4.1 Scale of Assessment

32. Having identified the traffic and transport study area, GEART suggests application of the following rules to define the extent and scale of the assessment required:

    a. Rule 1: Include highway links where traffic flows are predicted to increase by more than 30% (or where the number of Heavy Goods Vehicles (HGVs) is predicted to increase by more than 30%); and

    b. Rule 2: Include any other specifically sensitive areas where traffic flows (or HGV component) are predicted to increase by 10% or more.

33. In justifying these rules GEART examines the science of traffic forecasting and states:

    - "It is generally accepted that accuracies greater than 10% are not achievable. It should also be noted that the day to day variation of traffic on a road is frequently at least some + or -10%. At a basic level, it should therefore be assumed that projected changes in traffic of less than 10% create no discernible environmental impact.
    - …a 30% change in traffic flow represents a reasonable threshold for including a highway link within the assessment."

34. Changes in traffic flows below the GEART rules (thresholds) are assumed to result in no discernible or negligible environmental effects and have therefore not been assessed further as part of this study.

35. The exception to the GEART Rule 1 and 2 is the consideration of the effects of driver delay and road safety. These effects can be potentially significant when high baseline traffic flows are evident, and a lower change in traffic flow can be potentially significant. Full details of the methodology adopted for these effects are set out in section 24.6.

36. GEART sets out consideration and, in some cases, thresholds in respect of changes in the volume and composition of traffic to facilitate a subjective judgement of traffic impact and significance.

37. The following environmental effects have been identified as being susceptible to changes in traffic flow and are appropriate to the local area.

24.4.1.1 Severance

38. Severance is the perceived division that can occur within a community when it becomes separated by a major traffic artery. The term is used to describe a complex series of factors that separate people from both places and other people. Severance may result from the difficulty of crossing a heavily trafficked road or a physical barrier created by the road itself. It can also relate to relatively minor traffic flows if they impede pedestrian access to essential facilities. Severance effects could equally be applied to residents, motorists, cyclists or pedestrians.

39. GEART suggests that changes in total traffic flow of 30%, 60% and 90% are considered to be 'slight', 'moderate' and 'substantial' respectively.

24.4.1.2 Pedestrian amenity

40. Pedestrian amenity is broadly defined as the relative pleasantness of a journey and is considered to be affected by traffic flow, traffic composition and pavement width and separation from traffic. The definition of amenity also takes into consideration pedestrian fear and intimidation, consideration of the exposure to noise and air pollution, and the overall relationship between pedestrians and traffic.

41. GEART suggests that a threshold of a doubling of total traffic flow or the HGV component may lead to a negative impact upon pedestrian amenity.

24.4.1.3 Road safety

42. The salient GEART guidance on road safety is as follows:

- "Where a development is expected to produce a change in the character of traffic (e.g. HGV movements on rural roads), then data on existing accidents levels may not be sufficient. Professional judgement will be needed to assess the implications of local circumstances, or factors which may elevate or lessen the risk of accidents, e.g. junction conflicts."

24.4.1.4 Driver delay

43. GEART recommends the use of proprietary software packages to model junction delay and hence increased vehicle delays. However, it is noted that vehicle delays are only likely to be significant when the surrounding highway network is at, or close to, capacity.

44. The ETG has identified sensitive junctions that require an assessment of potential delays for drivers during peak hours.

45. The assessment therefore seeks to disaggregate the peak hour traffic movements on to these junctions to facilitate a judgement of the potential significance of the driver delay effects.

24.4.1.5 Abnormal indivisible loads

46. The importing of large Abnormal Indivisible Loads (AILs) may lead to delays on the highway network. The construction of the onshore project substation is likely to require the delivery of up to eight supergrid transformers to the onshore project substation. A Route Access Study has been undertaken by Collet and Sons Ltd to inform the management measures required to deliver AILs to the onshore project substation which will be accessed off the A47. Appendix 2 of the OTMP (document reference 8.8) contains the Route Access Study and the details of the management measures to be employed to minimise the disruption to baseline traffic.

24.4.1.6 Other impacts

47. Traffic-borne noise and vibration effects and air quality effects will be informed by the traffic data outlined in this chapter. These impacts are assessed in Chapter 25 Noise and Vibration and Chapter 26 Air Quality, respectively.

24.4.2 Magnitude

48. Table 24.4 details the assessment framework for magnitude thresholds adapted from GEART. These thresholds are guidance only and provide a starting point by which transport data will inform a local analysis of the impact magnitude.

Table 24.4 Traffic and transport assessment framework

Effect	Magnitude of effect			
	Very low	**Low**	**Medium**	**High**
Severance	Changes in total traffic flows of less than 30%	Changes in total traffic flows of 30 to 60%	Changes in total traffic flows of 60 to 90%	Changes in total traffic flows of over 90%
Pedestrian amenity	Change in traffic flows (or HGV component) less than 100%	Greater than 100% increase in traffic (or HGV component) and a review based upon the quantum of vehicles, vehicle speed and pedestrian footfall		
Highway safety	Informed by a review of existing collisions patterns and trends based upon the existing personal injury collision records and the forecast increase in traffic			
Driver delay	Informed by projected traffic increases through sensitive junctions within the traffic and transport study area			

24.4.3 Highway Traffic Sensitive Receptors

49. The sensitivity of a road (link) can be defined by the type of user groups who may use it. A sensitive area may for example be a village environment or where pedestrian or cyclist activity may be high, for example in the vicinity of a school. Table 24.5 provides broad definitions of the different sensitivity levels which have been applied to the assessment.

Table 24.5 Example definitions of the different sensitivity levels for a highway link

Sensitivity	Definition
Low	Few sensitive receptors and / or highway environment can accommodate changes in volumes of traffic
Medium	A low concentration of sensitive receptors (e.g. residential dwellings, pedestrian desire lines, etc.) and limited separation from traffic provided by the highway environment
High *	High concentrations of sensitive receptors (e.g. hospitals, schools, areas with high tourist footfall etc.) and limited separation provided by the highway environment
Negligible	Routes of no importance to the assessment not included in the traffic and transport study area.

*High sensitivity links are considered to be 'specifically sensitive areas' for the purposes of GEART Rule 2

24.4.4 Other Receptors

50. To consider the effects on road safety and driver delay, areas with evidenced road safety patterns and congested junctions have been assigned an appropriate level of sensitivity informed by a detailed review of the baseline characteristics.

51. With respect to driver delay, the ETG has identified four junctions within the traffic and transport study area which are considered to be highly sensitive to changes in traffic.

- A12 Gapton Hall Roundabout;
- A47 Vauxhall Roundabout;
- A149 Fuller's Hill Roundabout; and
- Junction of the A47 and the A1064.

52. The location of these junctions is shown in Figure 24.2 and the assessment discussed further in paragraph 24.7.7.3.9.

24.4.5 Impact Significance

53. Table 24.6 sets out the significance matrix which combines the initial impact assessment derived from the assessment framework presented in Table 24.4 with the sensitive receptor value for the purpose of determining the 'magnitude of impact'.

Table 24.6 Impact significance matrix*

		Negative magnitude				Beneficial magnitude			
		High	Medium	Low	Very low	Very low	Low	Medium	High
Sensitivity	High	*Major*	*Major*	*Moderate*	*Minor*	*Minor*	*Moderate*	*Major*	*Major*
	Medium	*Major*	*Moderate*	*Minor*	*Minor*	*Minor*	*Minor*	*Moderate*	*Major*
	Low	*Moderate*	*Minor*	*Minor*	*Negligible*	*Negligible*	*Minor*	*Minor*	*Moderate*
	Negligible	*Minor*	*Negligible*	*Negligible*	*Negligible*	*Negligible*	*Negligible*	*Negligible*	*Minor*

*Beneficial magnitude matrix has been included for completeness, although it is not anticipated for traffic and transport impacts.

54. Note that for the purposes of this ES, major and moderate impacts are deemed to be 'significant'. In addition, whilst minor impacts are not significant in their own right, it is important to distinguish these from other non-significant impacts as they may contribute to significant impacts cumulatively or through interactions.

55. Embedded mitigation and existing commitments to good practice are included in the initial assessment of impact and is detailed in section 24.7.5. If the impact does not require mitigation (or none is possible) the residual impact will remain the same. If additional mitigation is required there will be an assessment of the post-mitigation residual impact.

24.4.6 Cumulative Impact Assessment

56. Chapter 6 EIA Methodology provides a general methodology with regards to the Cumulative Impact Assessment (CIA).

57. The potential for cumulative effects has been considered for the construction, operation and decommissioning of the project cumulatively with other relevant projects.

58. Cumulative impacts are discussed where the onshore project area has the potential to overlap with similar impacts arising from:

- Recent development, either built or under construction (which is not considered as part of the baseline);
- Approved development, awaiting implementation; and
- Proposals awaiting determination within the planning process with design information in the public domain.

59. The CIA involves consideration of whether impacts on a receptor can occur on a cumulative basis between the project and other activities, projects and plans for which sufficient information regarding location and scale exist.

60. For further details of the methods used for the CIA for traffic and transport, see section 24.8.

24.4.7 Transboundary Impact Assessment

61. There are no transboundary impacts with regard to traffic and transport as the onshore project area is entirely within the UK and would not be sited in proximity to any international boundaries. Transboundary impacts are therefore scoped out of the assessment and are not considered further.

24.5 Scope

24.5.1 Study Area

62. The onshore project study area includes the following elements:

- Landfall;
- Onshore cable route, accesses, trenchless crossing (e.g. Horizontal Directional Drilling (HDD)) zones and mobilisation areas;
- Onshore project substation; and
- Extension to the Necton National Grid substation and overhead line modification.

63. The traffic and transport study area has been informed by determining the most probable routes for traffic, for both the movement of materials and employees, and during construction, operational and decommissioning phases of the project. The study area has been determined with reference to the Norfolk Road Hierarchy and assigns trip origins on the A class road network and trip ends at the components of the onshore project area which serve the onshore cable route.

64. Routes that extend outside of the onshore traffic and transport study area are routes where construction traffic has dissipated and/ or include roads with negligible sensitive receptors. These parameters combine and do not represent significant impacts on the highway network.

65. The traffic and transport study area is illustrated in Figure 24.1 and covers the majority of north and east Norfolk, extending to both Kings Lynn to the west and Great Yarmouth to the east. The traffic and transport study area is divided into 86 separate highway sections known as links, which can be defined as sections of road with similar characteristics and traffic flows.

24.5.2 Data Sources

66. Existing traffic flow data for all the key links within the traffic and transport study area have been captured from a number of primary and secondary sources. The datasets used in the assessment are summarised in Table 24.7 and are presented in Figure 24.3.

Table 24.7 Data sources

Data	Year	Link coverage	Confidence	Notes
Classified Annual Average Daily Traffic (AADT) counts	2015	1a, 1b, 2-4, 6-12, 13a, 13b, 14, 18, 19, 24, 26, 27, 29, 30, 40a, 40b, 44a, 44b, 45, 50, 53-57, 64 and 65.	High	Data sourced from the DfT which provides classified AADT traffic count data.
Classified Automatic Traffic Counts (ATC)	2017	15-17, 20-23, 25, 32-37, 41-43, 46-49, 52 and 61.	High	Traffic counts commissioned by Norfolk Vanguard Limited which provide classified hourly and daily traffic count data.
AADT Traffic Flows	2012, 2017 and 2032	5, 28, 31, 38, 39, 51, 58-60, 62 and 63.	High	Data sourced and interpolated from the Norfolk County Council (Norwich Northern Distributor Road (A1067 to A47(T))) DCO Application*
Estimated Traffic Flow	2017	66-79	Medium	For links with limited project traffic demand flows have been estimated based on data sources for similar links within the traffic and transport study area.

* Document 5.6 NNDR Traffic Forecasting Report: Volume 3 – Appendices H to K

67. A DCO application for the Norwich Northern Distributor Road (NNDR) was submitted on 7th January 2014. The SoS granted development consent on 2nd June 2015.

68. The NNDR completed construction and fully opened to traffic in May 2018. As such, the NNDR (recently renamed to the A1270 - Broadland Northway) has been included as part of the Norfolk Vanguard traffic and transport study area.

69. As part of the NNDR DCO application, Document 5.6 - Traffic Forecasting Report was

produced. The report describes the changes in traffic and network performance that are expected to occur with the implementation of the NNDR and the proposed transport interventions in the area.

70. Table 24.7 demonstrates that baseline traffic flow data for 65 links within the study area have been captured. The remaining 14 links are based on estimated data as detailed within paragraph 76.

71. In addition to the data sources listed in Table 24.7, a desktop assessment was undertaken which included consideration of Personal Injury Collision (PIC) data utilising street view and mapping data.

72. High level open source PIC data for the most recent five year period (01.01.2012 to 31.12.2016) was obtained for the study area from the website Crashmap (Crashmap, 2017).

73. Full PIC data has been obtained from Norfolk County Council and Suffolk County Council for collision clusters identified by the high level Crashmap search.

24.5.3 Assumptions and Limitations

74. The traffic data has been collected from a combination of sources which include the DfT Traffic counts. However, DfT's traffic counts for individual road links are estimates, as they are not always based on up-to-date counts made at these locations. Where other more up-to-date sources of traffic data have been available, such as the commissioned classified ATCs, these have been used instead.

75. The DfT data utilised for the baseflows were taken from the 2015 counts which at the time of project inception was the latest available data. The traffic counts have been through a series of consultations, review and extensively agreed through the ETG. It is considered impractical to periodically update to the latest data and repeat the consultations and reviews.

76. The baseflows for 14 links have been estimated based on their location, characteristics and compared with adjacent link base flows which are of similar nature. There are a number of limitations when using estimated data such as over/under estimating the baseflows. Notwithstanding, it should be noted that all new links are of a minor status and thus have been predicted with low baseflows.

77. The Crashmap website utilises data approved by the National Statistics Authority and reported on by the DfT each year. Incidents are plotted to within 10 metres of their location and as such, can sometimes appear to be off the carriageway when interrogated in detail.

24.6 Existing Environment

78. Characterisation of the existing environment has been informed through a number of sources, including:

- Traffic count data from the DfT;
- Desktop studies and site visits;
- Personal injury collision data sourced utilising open source data;
- Traffic surveys commissioned by Norfolk Vanguard Limited; and
- Traffic count data from the Norfolk County Council, NNDR DCO application.

24.6.1 Highway Network

79. The road network in the vicinity of the onshore project study area is illustrated on Figure 24.4. Within the onshore study area, the principal highway network (managed by Norfolk County Council Highways) includes the A149, A140, and the A1067 whilst the A47 and A12 form part of the Strategic Road (Trunk Road) Network managed by Highways England. Management and maintenance of the road network within Norwich is undertaken by Norwich City Council.

80. A route hierarchy for the whole of Norfolk has been developed by Norfolk County Council (Norfolk County Council, 2017) to encourage drivers to use the most appropriate route according to their destination and vehicle type. These routes have been classified by the following categories and are shown in Appendix 24.1.

- Trunk Roads;
- Principal routes;
- Main Distributor routes;
- HGV routes;
- Local Access routes;
- Special routes; and
- Tourist routes.

24.6.1.1 A-roads (Trunk Roads and Principal Routes)

81. The A47 trunk route is identified in the Norfolk County Council Local Transport Plan (Norfolk County Council, 2011) as one of Norfolk's key strategic connections, forming part of the Trans-European Transport Network. The A47 provides the main east-west road connection and routes from Great Yarmouth to the Midlands and the north of England. Local to the study area, the A47 provides a key link between King's Lynn, Norwich and Lowestoft. The A47 is predominately a single carriageway road, widening to dual carriageway around the major urban areas (Norwich, Dereham, Swaffham and King's Lynn).

82. Six improvement schemes are proposed along the A47 corridor with an expected start date of 2019/2020. These improvements comprise of:

- A47 Wansford to Sutton dualling;
- A47/A141 Guyhirn junction improvement;
- A47 North Tuddenham to Easton dualling;
- A47 Blofield to North Burlingham dualling;
- A47/A11 Thickthorn junction improvement; and
- A47 Great Yarmouth junction improvements including reconstruction of the Vauxhall Roundabout.

83. The A146 is a principal rural single carriageway road that connects the A47 south of Norwich, with the A1145 at Lowestoft. This link joins to Lowestoft and onwards to Great Yarmouth, with both towns containing an operational port.

84. Diverging off the A146 is the A1145, a single carriageway road that leads into Lowestoft and terminates at its junction with the A12.

85. The A12 trunk road operates between Lowestoft and areas to the south including Ipswich. The route connects to other Principal A class roads including the A146, A143 and A1145, as well as the A47 trunk road which allows travel to the north and to Great Yarmouth.

86. Leading north out of Great Yarmouth is the principal road A149, a single carriageway road that widens to dual carriageway along the Caister-on-Sea by-pass. This road continues to Stalham, connecting to the A1151 and B1159.

87. The A1151 is a major road within the site study area, providing links between Norwich, Hoveton and Stalham, as well as the A149.

88. The A1067 provides direct links with Norwich and Fakenham. The rural single carriageway road also offers connecting links to the B1145 and other minor roads.

89. The A1065 is a single carriageway road which connects the A47 at Swaffham to the A148 at Fakenham to the north.

90. Bounding the northern extent of the study area is the A148, a rural single carriageway that extends from Fakenham, through Holt and connects to Cromer. Links to the A1065, A1067, B1149 and A140 are all present along this route.

91. Heading north out of Norwich is the A140, a single carriageway A class road that by-passes Aylsham and connects to Roughton. Links to the A148 and A149 are present along this route allowing connection to the wider study area.

24.6.1.2 B-roads

92. A number of strategically important B class roads are located within, or offer access to, the wider study area. These main roads offer access to minor roads and lanes located along the onshore cable route.

93. The B1145 is a single carriageway road that provides a link from Kings Lynn to Mundesley on the Norfolk coast. The B1145 crosses a number of A roads (A140, A149, A1065 and A1067) and runs through a number of small towns such as Reepham, Cawston, Aylsham and North Walsham.

94. Within the study area, the B1149 provides a direct link between Norwich and Holt. This single carriageway leads out of the City's outskirts through Horsford, providing a link with the town of Cawston.

95. The B1354 connects with the B1149 and routes southeast towards Aylsham. It is a single carriageway road and passes by the Blickling Estate.

96. Deviating off the A149 into Broomholm is the B1159, a single carriageway B class road located within the study area.

97. The B1147, accessible off the A47, is a single carriageway road located to the east of Dereham that offers connection to Dereham Road.

98. The B1436 is a single carriage way that offers a link to Roughton via the A140 and A149.

99. The B1147 is a single carriageway that links the A1067 through Swanton Morley and onwards to Dereham.

24.6.1.3 Other roads

100. Cromer Road, located off the A140 is a rural single carriageway that passes through Ingworth, a town north of Aylsham.

101. Located adjacent to the B1159 is Mill Common Road, a minor rural road located within the study area.

102. There are a total of 15 unclassified links which serve the final part of the journey to the onshore cable route (Local Access routes). These links typically have narrow carriageways and are subject to very low baseline traffic flows.

24.6.2 Traffic Flow Data

103. The baseline traffic flow data are summarised in Table 24.8 which includes the date and type of survey from which the data has been derived. The sources that have provided the data are as discussed in section 24.5.2.

Table 24.8 Existing daily traffic flows and associated data sources

Link ID	Link description	Total vehicles (24Hr AADT*)	Total HGVs (24Hr AADT*)	Data source, type and date
1a	A47	15,380	1,546	2015 DfT AADF
1b	A47	15,380	1,546	2015 DfT AADF
2	A47	20,675	2,038	2015 DfT AADF
3	A47	36,940	2,751	2015 DfT AADF
4	A47	42,551	2,916	2015 DfT AADF
5	A47	40,800	2,050	NDR Data
6	A47	18,349	1,108	2015 DfT AADF
7	A47	13,339	1,222	2015 DfT AADF
8	A146	11,947	645	2015 DfT AADF
9	A47	33,788	1,029	2015 DfT AADF
10	A47	23,061	596	2015 DfT AADF
11	A1065	6,754	536	2015 DfT AADF
12	A1065	4,866	463	2015 DfT AADF
13a	A148	12,886	733	2015 DfT AADF
13b	A148	9,297	549	2015 DfT AADF
14	A148	10,873	502	2015 DfT AADF
15	B1145 - Litcham	1,725	35	April 2017 ATC
16	B1110/B1146 - Holt Road	7,344	83	April 2017 ATC
17	B1145 - Billingford Road	2,803	46	April 2017 ATC
18	A1067	7,698	551	2015 DfT AADF
19	A148	11,404	978	2015 DfT AADF
20	Mill Common Road	271	6	April 2017 ATC
21	B1147 - Etling Green	1,391	15	April 2017 ATC
22	B1147 - Dereham Road	2,137	20	April 2017 ATC
23	Northgate - from junction with B1146	1,725	35	Aug 2017 ATC
24	A1067	9,140	461	2015 DfT AADF
25	Elsing Lane	495	5	April 2017 ATC
26	A1074	21,564	1,026	2015 DfT AADF
27	A140	29,064	1,949	2015 DfT AADF
28	A140	23,060	1,370	NDR Data
29	A1067	11,562	782	2015 DfT AADF

Link ID	Link description	Total vehicles (24Hr AADT*)	Total HGVs (24Hr AADT*)	Data source, type and date
30	A1067	10,130	640	2015 DfT AADF
31	A1067	19,080	609	NDR Data
32	B1149 - Norwich road	4,043	75	April 2017 ATC
33	B1149 - Holt Road	5,274	162	April 2017 ATC
34	B1145 - west of Cawston	2,648	26	April 2017 ATC
35a	B1159	3,236	29	April 2017 ATC
35b	B1159	3,236	29	April 2017 ATC
36	B1149 - Holt Road	7,553	145	April 2017 ATC
37	B1145 - Cawston road	3,816	49	April 2017 ATC
38	A140 - Cromer Road	21,280	832	NDR Data
39	A140 - Hevingham	12,420	413	NDR Data
40a	A140 - Roughton	8,754	183	2015 DfT AADF
40b	A140 - Aylsham	11,725	526	2015 DfT AADF
41	B1436 - Felbrigg	6,372	144	April 2017 ATC
42	B1145 - Reepham Road	2,265	18	April 2017 ATC
43	Cromer Road - Ingworth	983	3	April 2017 ATC
44a	A149 - Thorpe Market	8,190	424	2015 DfT AADF
44b	A149 - North Walsham	8,190	424	2015 DfT AADF
45	A149	6,276	326	2015 DfT AADF
46	B1145 - Lyngate Road	5,530	90	April 2017 ATC
47a	Bacton Road - North Walsham	1,949	16	April 2017 ATC
47b	North Walsham Road - Edingthorpe Green	1,949	16	April 2017 ATC
47c	Bloodslat Lane - Broomholm	1,949	16	April 2017 ATC
48	B1159 - Bacton Road	2,394	45	April 2017 ATC
49	B1159 – Coast Road	3,469	64	April 2017 ATC
50	A1151	9,148	339	2015 DfT AADF
51	A1151	12,100	515	NDR Data
52	A149 - Wayford Road	12,850	175	April 2017 ATC
53	A149	34,323	1,326	2015 DfT AADF
54	A149	26,345	765	2015 DfT AADF
55	A149	21,454	467	2015 DfT AADF
56	A149	8,125	329	2015 DfT AADF

Link ID	Link description	Total vehicles (24Hr AADT*)	Total HGVs (24Hr AADT*)	Data source, type and date
57	A149	8,256	456	2015 DfT AADF
58	NDR - Link a	n/a	n/a	NDR Data
59	NDR - Link b	n/a	n/a	NDR Data
60	NDR - Link c	n/a	n/a	NDR Data
61	B1436 - Roughton Road	4,451	103	April 2017 ATC
62	A1042	27,073	1,099	NDR Data
63	A1151	15,140	633	NDR Data
64	A12	9,413	548	2015 DfT AADF
65	A47	14,909	504	2015 DfT AADF
66	Wendling – Dereham Road	1,300	50	Estimated
67	North Walsham Road / Happisburgh Road	1,000	40	Estimated
68	The Street / Heydon Road	1,000	40	Estimated
69	Little London Road	500	20	Estimated
70	Plantation Road	1,000	40	Estimated
71	Vicarage Road / Whimpwell Street	2,000	70	Estimated
72	Dereham Road / Longham Road - Dillington	1,000	40	Estimated
73	Hoe Road South	800	30	Estimated
74	Mill Street, Elsing Road – Swanton Morley	800	30	Estimated
75	B1354 - Blickling	2,000	70	Estimated
76	High Noon Road / Church Road	500	20	Estimated
77	Hall Lane – North Walsham	500	20	Estimated
78	Bylaugh	500	20	Estimated
79	B1145 / Suffield Road	2,000	70	Estimated

* Annual Average Daily Traffic

24.6.3 Link Based Sensitive Receptors

104. All 86 highway links within the traffic and transport study area have been assessed and assigned sensitivity. Table 24.9 summarises the links and the rationale for the applied link sensitivity whilst Appendix 24.2 provides a full detailed breakdown per link. Figure 24.5 illustrates these routes graphically.

Table 24.9 Link based sensitive receptors

Link sensitivity	Link ID	Rational
Low	1a, 1b, 2-7, 8-a, 8-c, 9, 10-a, 10-c, 11, 12-b, 12-d, 12-f, 13a, 13b-a, 13b-c, 14-b, 14-d, 15-a, 15-c, 15-e, 15-g, 16, 18-a, 18-c, 18-e, 20-25, 29-a, 30, 32-a, 32-c, 33, 35a, 35b, 36-a, 37, 39-a, 39-c, 40a, 40b, 41, 44a-a, 44a-c, 45-a, 46, 47b, 49-b, 51-b, 52, 55, 56-a, 56-c, 56-e, 57-60, 67, 68, 70, 73, 76, 77 and 78.	An A-road, B-road or minor road that can accommodate a high volume of traffic and / or has limited sensitive receptors. There is minimal, including sporadic, frontage development and footways are wide and / or buffered.
Medium	8-b, 10-b, 12-a, 12-c, 12-e, 13b-b, 14-a,14-c, 17, 18-d, 19, 26-28, 29-b, 32-b, 34, 38, 39-b, 42, 43, 44a-b, 44b, 45-b, 50, 51-a, 53, 56-b, 56-d, 61-66, 72, 74, 75 and 79.	A-roads, B-roads or minor roads that can accommodate high volumes of traffic. Direct frontage development will be present along these links with increases in sensitive receptors including schools, hospitals, churches, pubs and local shops.
High	13b-d, 15-b, 15-d, 15-f, 18-b, 31, 36-b, 47a, 47c, 48, 49-a, 54, 69 and 71.	A mixture of A-roads, B-roads and minor roads that will pass through built up areas. These areas will have significant frontage development and multiple sensitive receptors throughout, and/or pedestrianised areas.

24.6.4 Road Safety

105. To assess whether the project will have an adverse road safety impact it is necessary to establish a baseline and identify any inherent road safety issues within the traffic and transport study area.

106. Recognising the sizeable extent of the traffic and transport study area, a proportional approach has been adopted in defining the road safety baseline involving the following stages:

- Stage 1: A high-level search of the traffic and transport study area utilising open source data[1] covering the most recent three year period of 2014 – 2016 to identify collision clusters. The collision cluster criteria has been based on Norfolk County Council's definition of *"five personal injury collisions occurring within a three year period in a 50 metre radius for built up areas and a 100 metre radius in non-built up areas."*[2]
- Stage 2: Further detailed STATS19[3] data have been obtained from Norfolk County Council for the five year period, 01.05.12 to 30.04.17 and Suffolk County Council for the five year period, 01.04.12 to 01.04.17. These datasets provide

[1] http://www.crashmap.co.uk/
[2] Community and Environmental Services, Norfolk County Council
[3] Accidents on the public highway that are reported to the police and which involve injury or death are recorded by the police on a STATS19 form. The form collects a wide variety of information about the accident (such as time, date, location, road conditions).

further information relevant to the collisions including information relating to the highway environment allowing more detailed assessment to be undertaken.

107. Table 24.10 provides a summary of all identified collision clusters within the traffic and transport study area; these are also shown graphically in Figure 24.6. These cluster sites are considered potentially sensitive to changes in traffic flow and are therefore assessed further in section 24.6.6.

Table 24.10 Crashmap collision cluster information

Link	Collision ref no.	Description	No. of collisions			
			Total	Fatal	Serious	Slight
2	1	A47 at the junction of Woodlane and Berrys Lane	**5**	0	0	5
3	14	A146 (Loddon Road) junction with slip road off A47	**6**	0	0	6
5	12	A47 Junction with the B1140 (Acle Road)	**5**	0	2	3
8	13	A146 (Loddon Road) junction with slip road onto A47	**5**	0	0	5
8	15	A146 (Beccles Road) at the junction of B1136 (Yarmouth Road)	**6**	0	0	6
8	16	A146 (Beccles Road)	**5**	0	1	4
12	17	A1065 junction with Gogg's Mill Road	**5**	0	1	4
26	2	Dereham Road (A1074) within the vicinity of the Norwich Road junction	**10**	0	0	10
26	4	Dereham Road (A1074) at the junction of Larkman Lane and Marl Pit Lane	**7**	0	0	7
26/27	3	A140, A1074 and Dereham Road (A1074) roundabout	**12**	0	0	12
27	5	A140 at the junction of Hellesdon Hall Road	**5**	0	1	4
28	6	A140 (Sweet Briar Road) at the junction of Drayton high Road, Drayton Road and Boundary Road	**9**	0	1	8
28/38/62	7	A1402 (Boundary Road and Mile Cross Lane) at the junction of A140, Cromer Road and Aylsham Road	**7**	0	2	5
38/38/39	18	A140 (Holt Road) roundabout with B1149	**5**	0	1	4
55	11	A149 (Norwich Road) roundabout with the Caister-on-Sea bypass	**6**	0	0	6
55/56	10	A149 (Norwich Road roundabout with the A1064 (Main Road) and Castle Lane	**5**	0	0	5
62	8	A1042 (Mile Cross Lane) at the junction of Vulcan Road and Weston Road	**8**	0	2	6
62/63	9	A1052 (Chartwell Road) Roundabout with the A1151 (Wroxham Road and Sprowston Road) and Mousehold Lane	**10**	0	1	9
65	19	A47 roundabout, Horn Hill with Belvere Road	**5**	0	0	5

24.6.5 Sensitive Junctions

108. During extensive consultation with Norfolk County Council and Highways England as part of the ETG meetings, the junctions that are potentially sensitive to the changes in traffic have been identified as those junctions presented within Table 24.11 and as detailed on Figure 24.2.

Table 24.11 Junctions identified as sensitive to changes in traffic

Junction notation	Location	Junction description	Junction type
Junction 1	Great Yarmouth	Junction of the A47 and Gapton Hall 'Gapton Roundabout'	Four arm roundabout with partial signal control
Junction 2	Great Yarmouth	Junction of the A47 and the A149 'Vauxhall Roundabout'	Four arm roundabout
Junction 3	Great Yarmouth	Junction of the B1141 and the A149 'Fuller's Hill Roundabout'	Four arm roundabout
Junction 4	Acle	Junction of the A47 and A1064	Four arm roundabout

109. Junctions 1, 2, and 4 form part of the Strategic Road Network (SRN) along the A47 and A12 and are maintained by Highways England. Junction 3 falls under Norfolk County Council jurisdiction.

110. Junctions 1 and 2 are currently included within the A47 corridor improvement programme as part of the Road Improvement Schemes (RIS) announced in 2014. Further discussion on the RIS schemes is contained in section 24.7.7.4.

111. The A47 corridor improvement programme is classed as a Nationally Significant Infrastructure Project and would be required to make a DCO application. Current timescales estimate that the DCO for this scheme will be submitted in summer 2018, with construction commencing in spring 2020.

24.6.6 Anticipated Trends in Baseline Conditions - Future Year Traffic Flows

112. To take account of sub-regional growth in housing and employment, vehicle flows have been factored to the future year baseline traffic demand using the DfTTrip End Model Presentation Programme (TEMPro) Version 7.2 with data set 7.0 for Norfolk geographical areas. Background traffic flows for 2022 are presented in Appendix 24.3.

24.7 Potential Impacts

113. The assessment for traffic and transport identifies the period when the maximum traffic will be generated, i.e. the Worst Case Scenario (WCS).

114. During the operational phase, traffic movements would be limited to those generated by the daily operation and periodic maintenance at the onshore project substation and at link boxes/test pits along the onshore cable route. No significant traffic impacts are anticipated during the operational phase therefore an operational traffic and transport assessment is screened out.

115. The WCS traffic demand scenarios have been developed by examining:

- The likely minimum construction programme;
- The earliest commencement date;
- Demand for materials and personnel;
- Likely shift patterns;
- Likely delivery windows; and
- The distribution of traffic.

116. The following sections sets out the parameters and assumptions that together form the WCS.

24.7.1 Construction Programme

117. Table 24.12 details the onshore project construction programme. It can be noted that a sequential approach has been adopted for construction stages with the duct installation/ primary works period representing the maximum construction intensity period in terms of traffic and therefore informing the WCS.

Table 24.12 Indicative project construction programme (HVDC Two Phase)

Activity	Year					
	2020	2021	2022	2023	2024	2025
Landfall						
Duct Installation						
Cable Pull, Joint and Commission						
Phase 1						
Phase 2						
Onshore cable route						
Preconstruction works						
Duct installation works						
Cable pull, joint and commission						
Phase 1						
Phase 2						

Activity	Year					
	2020	2021	2022	2023	2024	2025
Onshore project substation						
Preconstruction works						
Primary works						
Electrical plant installation and commission						
Phase 1						
Phase 2						

118. The duct installation works are programmed for a two year period (2022-2023). The construction traffic derivation for the duct installation includes a three month break where traffic movements are significantly reduced during the winter period. The reduction in traffic movements informs the WCS by condensing traffic movements into a shorter construction time period and thereby increasing daily movements. In real terms, a three month break is unlikely, however, the traffic derivation serves to simulate the accelerated working required to ensure construction keeps to the two year programme in the event of prolonged inclement weather.

119. It is considered that the earliest date that the duct installation/ primary works period could commence would be 2022; as such a baseline year for background traffic of 2022 has been derived for the purpose of the assessment.

120. The nature of construction works typically requires that employees work longer hours in the summer and shorter hours in the winter to take advantage of the available daylight. There is a possibility that a proportion of employee arrival/ departures may overlap with the network peaks.

121. Therefore, to inform the WCS it is assumed that all employee trips would overlap with the network peak hour.

122. The delivery of materials and plant to the mobilisation areas could occur between a typical 7am to 7pm delivery window. To account for breaks in deliveries such as lunch breaks and rest breaks, the HGV construction traffic would be profiled over a 10 hour period resulting in a worst case higher hourly HGV flows.

123. To further inform the WCS, it is proposed that a five day working week would be employed with the potential to extend to a seven day working week during specific periods of the installation. Seven day working would occur for example, following periods of poor weather, but will be reserved for where programme acceleration is required.

24.7.2 Worst Case Scenario

124. Norfolk Vanguard Limited has committed to using an HVDC solution to reduce the footprint of the onshore infrastructure. Thus, the ES traffic assessment is based on the HVDC scheme and its specific requirements.

125. Chapter 5 Project Description sets out the strategy for Norfolk Vanguard to install cable ducts along the onshore cable route for Norfolk Boreas (the sister project to Norfolk Vanguard). It is anticipated that these will be constructed and installed simultaneously for both projects within a single onshore cable route. Therefore, this scenario is considered within this ES as associated development as part of the DCO application.

126. The Norfolk Boreas onshore cable installation and construction of the onshore project substation are considered within Norfolk Vanguard's CIA which is detailed in section 24.8.

127. In summary, the maximum traffic generation would result from the construction of the following project onshore infrastructure components.

1. Norfolk Vanguard HVDC landfall HDD drilling;
2. Norfolk Vanguard and Norfolk Boreas HVDC onshore cable route duct installation;
3. Norfolk Vanguard HVDC onshore project substation; and
4. National Grid substation extension and overhead line modification.

128. The onshore duct installation /primary works are serviced by 14 mobilisation areas. The main function of the mobilisation areas is to provide a control point for HGVs delivering to the onshore cable route, as well as providing welfare facilities, parking for staff and storage areas for materials, plant and equipment.

129. The onshore cable route has been separated into 20 cable route sections (detailed in Figure 24.7) to inform the likely distribution of HGVs and employees on the highway network. The HGV routes are graphically depicted on Figure 24.9.

24.7.2.1 Onshore infrastructure parameters – cable pull, joint and commission

130. The cable pull stage for the project represents a lower construction intensity than that of the duct installation/primary works stages and therefore does not form part of the assessment worst case traffic scenario. The derivation of cable pull traffic demand is as follows:

131. It is assumed that all cable pull and jointing activities would be concentrated within a single year (2024). A total of sixteen work gangs will construct 96 joint pits evenly

spaced approximately 800m apart over 16 equidistant (3.8km) onshore cable route sections. An additional 20% contingency has been added to bolster the worst case scenario. Each work gang would complete 6 joint pits in series with each jointing pit constructed within an indicative five week construction window with the worst case traffic demand occurring in week one.

132. It is calculated that 80% of the onshore cable route will be accessed via unclassified roads/farm tracks (minor links) for the cable pulling and jointing process. The remaining 20% of the onshore cable route will require the worst case installation of a stone running track to gain access to the jointing pits which will generate additional traffic demand.

133. During week one of the five-week construction window, typical daily forecast HGV movements for the minor links that serve the onshore cable route are 24 for accessible joint pit locations (no running track) and 68 for an inaccessible location requiring a running track.

134. To contextualise the difference between the (cable pull and primary works) stages in terms of HGV quantum, a route section comparison of total HGV demand is presented in Table 24.13 and Table 24.14.

Table 24.13 Duct installation and primary works

Cable section: Mobilisation Area	Total vehicles
Section 0: MA1a-W	23,762
Section 1: MA1a-E (or MA1b-W)	13,660
Section 2: MA2-E	9,393
Section 3: MA3-W	5,018
Section 4: MA3-E	3,055
Section 5: MA4-W	5,503
Section 6: MA4-E	8,018
Section 7: MA5a-W	7,472
Section 8 & 8a: MA5b-E	14,223
Section 9 & 9a: MA6-W	7,472
Section 10: MA6-E	5,948
Section 11: MA7-W	5,402
Section 12: MA7-E	9,855
Section 13: MA8-E	8,853
Section 14: MA9-W	10,250
Section 15: MA10-W	5,018
Section 16 & 16a: MA10-E	6,590
Section 17a: MA10a-W	6,415
Section 17: MA11-W	8,936
Section 19: MA11-E	10,355

Cable section: Mobilisation Area	Total vehicles
Duct Installation Totals	**175,198**

Table 24.14: Cable pull, joint and commission

Cable section	Total vehicles
Section 1	3,114
Section 2	3,126
Section 3	3,126
Section 4	1,810
Section 5	2,002
Section 6	2,922
Section 7	4,526
Section 8	2,506
Section 9	1,714
Section 10	3,658
Section 11	2,938
Section 12	2,378
Section 13	3,778
Section 14	2,114
Section 15	2,818
Section 16	2,306
Cable Pull Totals	**44,830**

135. It is forecast that the traffic demand for the cable pull stage is not significant relative to the worst case scenario presented for the duct installation/primary works stage. It is therefore intrinsic that the assessment of the potential traffic impacts of the cable pull stage will be subsumed in the assessment of the duct installation/primary works stage for the 86 highway links identified in the traffic and transport study area.

136. The cable pull stage introduces low traffic demand on minor links to gain access to cable route sections. Details of the proposed cable pull minor access routes and associated traffic derivation are contained in Appendix 24.4.

137. Given the low volumes of project/baseline traffic, the potential traffic impact on the minor routes is unlikely to be significant and would be limited to access constraints (i.e. ensuring that HGVs can deliver without obstructing or damaging the highway). Details of the mitigation measures and detailed route assessments are contained in the Outline Traffic Management Plan (OTMP) submitted in support of the DCO application (DCO Ref. 8.8).

24.7.2.2 HGV traffic demand

138. Details of materials, plant, and timescales for the project have been informed by work undertaken by the engineering consultants. Appendix 24.5 details the forecasts associated with the expected quantity of materials, plant and total HGV deliveries for each of the components of the onshore project area associated with the WCS.

139. Appendix 24.6 details the indicative maximum traffic generation forecasts for each component of the onshore project area.

24.7.2.2.1 Peak HGV construction demand

140. Appendix 24.7 shows the disaggregation of components of the onshore project area traffic demand (contained within Appendix 24.5 and 24.6) by activity over time. This exercise allows derivation of total deliveries and HGV movements per day.

141. To meet the two year duct installation/ primary works period, 15 onshore cable route sections of a total of 20 would be close to or at peak activity at any one time for the duration of the project.

142. To ensure the assessment considers the maximum impacts in the traffic and transport study area, it is necessary to assign the traffic demand for a total of 20 onshore cable route sections to the network. This method has the advantage of ensuring the peak impact on all minor links is assessed and is therefore appropriate for screening traffic and transport effects.

143. There is a drawback in application of peak impact on all links, in that potential in-combination traffic flows on the Strategic/ Principal road network are over estimated by assigning traffic flows for all 20 onshore cable route sections (noting 15 onshore cable route sections would be active at any one time).

144. To address this overestimate, it has been agreed by the ETG that a 'primary route reduction factor' of 0.75 (a multiple of 15/20) can be applied to the project traffic flows assigned to the Strategic/ Principal road network. This reduction factor is not applied to the local road network as traffic would be assigned to discrete onshore cable route sections and is less influenced by multiple onshore cable route section activity.

145. If the assessment predicts significant impacts, the level of overestimation on the minor roads can be re-evaluated on a link and junction basis.

146. The trenchless crossing (TC) zones[4] traffic demand departs from the above

[4] Trenchless crossing zones (e.g. HDD) are areas within the onshore cable route which will house trenchless crossing entry or exit points. The 17 TC zones do not include the landfall.

methodology. The 17 TC zones will be split into three groups based on their geographic location and then assigned a TC work gang as detailed:

- Gang 1 will construct TC1, TC2, TC3a, TC3b, TC4 and TC5;
- Gang 2 will construct TC6, TC7, TC8, TC9, TC10 and TC11; and
- Gang 3 will construct TC12, TC13, TC14, TC15 & TC16.

147. Each work gang will construct TCs consecutively within their TC geographic location. This constrains traffic demand to a level that would be generated by three trenchless crossing zones active at any point within the construction programme (a traffic demand 'cap').

148. The total traffic demand for each crossing can be split up to 75% drive side and 25% at the reception side. As a worst case scenario, each side of a TC has had 75% of the total traffic demand assigned to allow flexibility in construction.

24.7.2.2.2 Contingencies

149. An appropriate level of contingency has been applied to the following onshore infrastructure HGV flows:

- 10% for landfall and trenchless crossing zones (e.g. HDD); and
- 20% for duct installation, cable pull and jointing, onshore project substation and National Grid substation extension.

24.7.2.3 Employee traffic demand

150. It is estimated that a workforce of 300 employees will be required during construction peaks, serving 15 onshore cable route sections as set out in Appendix 24.7.

151. Applying the same approach to construction workforce intensity as that adopted for HGV construction demand (i.e. assigning traffic to all 20 onshore cable route sections consecutively), a total of 400 employees over 20 onshore cable route sections has been assigned.

152. However, in contrast to the HGV derivation, no reduction factor has been applied to the workforce (recognising the total workforce number as finite).

153. Table 24.15 summarises the total onshore infrastructure component's employee demand to be assessed.

Table 24.15 Employee summary

Infrastructure component	Realistic programme	ES assessed employees	Notes
Duct	300	400	

Infrastructure component	Realistic programme	ES assessed employees	Notes
installation			
Landfall	10	20	
Trenchless crossings	30	30	3 gangs of 10 employees each.
Onshore project substation	50	50	
NG Substation Extension	50	50	
Totals	440	550	

154. In recognition of the large geographical area and rural nature of the traffic and transport study area it has been assumed, as a worst case, that all construction employees travel by car. No allowance has been made for the opportunities for employees to car share, walk and cycle or use public transport.

24.7.2.4 Summary of worst case scenario assumptions

155. The key assumptions that have informed the construction traffic demand WCS are summarised in Table 24.16.

Table 24.16 WCS traffic demand assumptions

Construction parameters
The duct installation activity (programmed for 2022-2023) would generate the highest construction intensity with the maximum project demand for delivery of materials and transportation of personnel anticipated during this period.
The duct installation activity would be subject to a three-month winter break, thereby condensing project traffic movements into a shorter period.
Earliest start of construction 2022.
7am to 7pm working day with a reduced 10 hour delivery window.
Five day working week (Monday – Friday).
Maximum demand for mobilisation areas, landfall, onshore project substation and National Grid substation extension occurs concurrently.
Three trenchless crossings out of a total of 17 planned trenchless crossings would be under construction at any one time.
An appropriate level of contingency (20%) reflecting the uncertainties in the design has been applied to all duct installation, cable pull and jointing and substation material quantities.
An appropriate level of contingency (10%) reflecting the uncertainties in the design has been applied to all trenchless crossing material quantities.

Construction parameters
Traffic derivation
A 'Primary Route' reduction factor (0.75) to be applied to the project HGV traffic flows along the Strategic/ Principal road network to reflect a maximum realistic cumulative project traffic demand from 15 cable sections.
A maximum of 70% of the project traffic demand would be generated from a single port location to reflect the 'distance deterrent' for supply to the extreme east of the onshore cable route from a western supply chain origin and vice versa.
HGV traffic demand for each TC can be split up to 75% drive side and 25% at the reception side. Each side of a TC has had 75% of the total traffic demand assigned to allow flexibility in construction methodology.
No reduction to project traffic applied for construction workers to allow for travel by non-car modes (e.g. bus, rail, walking and cycling) or travel. Sustainable Travel mode share will be determined by the Project Travel Plan.
The nature of construction works typically requires that employees work longer hours in the summer and shorter hours in the winter to take advantage of the available daylight. To assess the worst case highway capacity impacts, workers are assumed to arrive /depart during the network peak hours.

24.7.2.5 Traffic distribution

156. At present, the supply chain for materials cannot be described as this will depend on the contractor employed. Therefore, the following sections describe the assumptions that have been adopted to inform the distribution of HGV and construction employee traffic.

24.7.2.5.1 HGV distribution

157. Trips associated with bulk materials such as aggregate and Cement Bound Sand (CBS) would make up the majority of the total HGV movements for the project.

158. The economics of transporting large quantities of bulk materials from outside of the local area are likely to be prohibitive. A review of the potential supply chain within the traffic and transport study area indicates that while there are a number of local suppliers that may meet some of Norfolk Vanguard's demand, they are unlikely to meet the substantive material demands required of the project.

159. A viable alternative would be to import materials from the ports local to the project. Kings Lynn Port to the west and Lowestoft/ Great Yarmouth Ports to the east are considered to be the most likely source for all materials and, as such, it is assumed that all HGV movements would have an origin and destination in these regions (noting that in practice that some of the demand could be met by local supply chain). The relevant port locations are presented graphically in relation to all onshore infrastructure locations in Figure 24.7.

160. A single port could have the capacity to provide all required materials for the project, however, it is unlikely that HGVs would travel long distances to service the furthest

onshore infrastructure site from a single port as the economics would be a 'distance deterrent'. Rather, it is considered reasonable to assume that two ports (one from the east, and one from the west) would be utilised for importing materials. Each port would generate the maximum traffic demand on the highway links which serve the closest onshore infrastructure locations.

24.7.2.5.2 Delivery locations

161. Figure 24.7 details the onshore project area. The site delivery strategy is as follows:

- Landfall: deliveries would be made directly to the landfall south of Happisburgh with construction traffic using the B1159 to access the local routes leading to the landfall compound at the landfall.
- Onshore cable route: Delivery of plant and materials would be direct to each of the 14 mobilisation areas. The mobilisation areas serve discrete lengths of the onshore cable route and are positioned to maximise construction productivity. They are sited at suitable locations close to public highways and are required to store equipment and provide welfare facilities.
- The 14 mobilisation areas serve a total of 20 cable route sections which typically head east and west from each mobilisation area.
- Trenchless crossing zones: Materials and plant are assumed to be delivered directly to the 17 TC locations.
- Onshore project substation: Deliveries would occur directly to the onshore project substation mobilisation area.
- National Grid substation extension and overhead line modification: Deliveries would occur directly to the National Grid overhead line temporary works area.

24.7.2.5.3 Employee distribution

162. The availability of local labour and rented accommodation has been reviewed as part of the socio economics study (as detailed in Chapter 31 Socio-economics) to inform the potential construction employee distribution.

163. The types of specialist skills required for the project mean that construction personnel will have to be drawn from across the UK since contractors will be unable to rely solely on local labour sources. Socio economic data has informed a worse case forecasts that 30% of the workforce would be drawn from the local area (resident) and 70% would be beyond a daily commute (in-migrant).

164. In-migrant personnel i.e. who reside beyond a reasonable daily commute (defined as up to a 45 minute drive to the onshore infrastructure sites) are likely to base themselves within local rented accommodation. To inform the distribution of labour from outside Norfolk, the availability of local rented accommodation within commuting distances of the project has been captured.

165. In acknowledgement of the large geographical study area, three destination locations have been proposed for specific components of the onshore project area and are listed below:

- Origin Data Set A – based on a 45 minute and 90 minute drive time to the onshore project substation location in the vicinity of Necton.
- Origin Data Set B – based on a 45 minute and 90 minute drive time to a central point along the onshore cable route in the vicinity of Cawston.
- Origin Data Set C – based on a 45 minute and 90 minute drive time to the landfall in the vicinity of Happisburgh.

166. The distribution of local rented accommodation per postcode cluster is outlined within Appendix 24.8. The distribution of bed spaces per postcode cluster has been factored using a gravity model approach, whereby the number of bed spaces is divided by the journey time (taken from a route planner) from the centre of the postcode cluster to either Origin Data Set A, B or C.

167. Appendix 24.8 also assigns each postcode cluster a point of entry on to the highway network to inform the distribution of employees from outside Norfolk.

168. In informing the distribution of the employees who potentially could be drawn from the local area (resident workers), the socio economics study has examined the distribution of residents within the local area (defined as a 90 minute drive to the onshore infrastructure sites) with the relevant skill sets.

169. The distribution of local employees per postcode cluster is outlined within Appendix 24.9. This has been factored using a gravity model approach, whereby the number of employees is divided by the journey time (taken from a route planner) from the centre of the postcode cluster to either Origin Data Set A, B or C.

170. Appendix 24.9 also assigns each postcode cluster a point of entry on to the highway network to inform the distribution of local employees.

171. Appendix 24.10 provides a summary of the traffic and transport study area point of entry links and their corresponding percentage distribution for resident and employees from outside Norfolk.

172. Figures 24.10, 24.11 and 24.12 graphically depict the percentage distribution for resident and non-local employees point of entry onto the highway network for Destinations A, B and C respectively.

24.7.2.6 Construction traffic assignment

24.7.2.6.1 HGV traffic assignment

173. The assignment of traffic flows for a large linear project is very complex in nature. A proportionate approach has been agreed by the ETG which seeks to minimise the number of data sets by consolidating traffic demand data for cable route sections and port locations, ensuring that flows are not over-estimated cumulatively on the Strategic/ Principal Road highway network.

174. To meet the proportional approach objectives a two stage process has been developed to consolidate traffic assignments.

- Stage 1 (Classify): Classifying all links within the traffic and transport study area according to their project function.
- Stage 2 (categorise): Identify and categorise links based on distance between the port origin and final onshore infrastructure destination, applying a 'distance deterrent' factor to traffic flows.

Stage 1 (Classify)

175. As discussed in paragraphs 142 to 144, a Primary Route reduction factor is applied to the Strategic/ Principal highway network to address the over estimation of cumulative project traffic flows from maximum cable route intensity.

176. All links within the traffic and transport study area have been classified according to their interaction with the project traffic demand. Table 24.17 details the link classifications and road function of the links. The reduction factor has been applied to links identified as 'Primary Collector Routes'.

Table 24.17 Primary Route Classifications

Link Classification	Road function/ characteristics	Links
Primary Collector Route	Trunk and principal roads. Connecting primary destinations such as major urban areas.	1a, 1b, 2-12, 13a, 13b, 14, 19, 53-57, 64 and 65
Secondary Collector Route	Major urban road networks and inter-primary links between the primary collector routes and the minor local routes.	18, 24, 26-33, 36, 38, 39, 40a, 40b, 44a, 44b, 45, 46, 50-52, 58, 60, 62 and 63
Minor Local Routes	Distributor roads and local access routes usually Classified B and C class roads including some unclassified roads.	15-17, 20-23, 25, 3435a, 35b37, 41-43, 47a, 47b, 47c, 48, 49, 61 and 66-79

177. The classification of links is presented graphically in Figure 24.8.

Stage 2 (Categorise)

178. Utilising two port locations (Kings Lynn to the west and either Lowestoft or Great Yarmouth to the east), Stage 2 categorises the links using distance deterrent to forecast the maximum traffic assignment on each link.

- Category 1 Links – A discrete port location would serve the demand for all onshore infrastructure locations with distance deterrent applied. Rather than apply a notional 50/50 east /west origin split, it has been assumed up to a maximum of 70% of traffic could be generated from either port location.
- Category 2 Links – Regardless of origin, traffic converges on links local to the respective onshore infrastructure locations to complete the 'last leg' of the journey. These links are not subject to distance deterrent and have 100% of the required traffic demand assigned.

179. The maximum traffic demand per week for each onshore infrastructure site location is contained within Appendix 24.7. The following steps detailed in Table 24.18 summarise the traffic assignment methodology.

Table 24.18 HGV assignment methodology

Steps	Description	Reference	Appendix Tables
Step 1	Assigns the peak construction HGV traffic deliveries travelling to each individual onshore infrastructure site location according to their assumed origin	Appendix 24.11 (Kings Lynn) Appendix 24.12 (Lowestoft) Appendix 24.13 (Great Yarmouth)	Tables 1, 4, 5 & 6
Step 2	Primary route reduction factor (0.75) applied to Total Daily HGV Deliveries (gross) for all identified Primary Collector Roads as classified in Table 24.16.	Appendix 24.11 (Kings Lynn) Appendix 24.12 (Lowestoft) Appendix 24.13 (Great Yarmouth)	Table 2
Step 3	TC deliveries for both drive and reception sides assigned to links.	Appendix 24.11 (Kings Lynn) Appendix 24.12 (Lowestoft) Appendix 24.13 (Great Yarmouth)	Table 3
Step 4	The sum HGV deliveries per link for each port location.	Appendix 24.11 (Kings Lynn) Appendix 24.12 (Lowestoft) Appendix 24.13 (Great Yarmouth)	Table 7
Step 5	Presenting 100% assignment and then applying a 70% distance deterrent. Summarises and colour codes each port assignment link flows.	Appendix 24.14 (HGV Assignment)	Kings Lynn (green) Table 1a (100% assignment) Table 1b (70% assignment). Lowestoft (blue) Table 2a (100% assignment) Table 2b (70% assignment). Great Yarmouth (purple) Table 3a (100% assignment) Table 3b (70% assignment).

Steps	Description	Reference	Appendix Tables
Step 7	Table 5 represents the final consolidated HGV traffic deliveries and movements associated with each link within the traffic and transport study area made up of the following composition. • Green – Kings Lynn origin – Category 1 link • Blue – Lowestoft origin – Category 1 link • Purple – Great Yarmouth origin – Category 1 link • Orange – All three port origins – Category 2 link	Appendix 24.14 (HGV Assignment)	Table 5 (Final assignment)

180. Table 24.19 below summarises the links that have had 70% or 100% HGV traffic flows assigned according to link category. The information is shown graphically in Figure 24.13.

Table 24.19 Link summary

Link category	Links affected
Category 1 Links with 70% flow assignments applied	2, 3, 4-10, 13a, 13b, 14, 18, 19, 29, 30, 32, 33, 36, 39, 40a, 41, 44a, 44b, 45, 52-60, 64 and 65.
Category 2 Links with 100% flow assignments applied.	1a, 1b, 16, 17, 21, 22, 24, 25, 34, 35a, 35b, 37, 40b, 42, 46, 47b, 47c, 49 and 66-79.

24.7.2.6.2 Employee traffic assignment

181. It is assumed all employees working on each of the onshore infrastructure sites would travel directly to each respective site.

182. Utilising the maximum employee numbers per week for each of the onshore infrastructure sites as contained within Appendix 24.7, the following six steps outlined in Table 24.20 assign traffic to the highway network:

Table 24.20 Employee assignment methodology

Steps	Description	Reference	Appendix Tables
Step 1	Assigns the peak employee traffic to the onshore project substation and National Grid substation extension utilising 'Origin Data Set A' and according to their assumed origin link	Appendix 24.15 (onshore project substations and National Grid substation extension)	Table 1 and 2
Step 2	Assigns the peak employee traffic to the 14 mobilisation areas utilising 'Origin Data Set B' and according to their assumed origin link	Appendix 24.16 (mobilisation areas)	Tables 1 to 13
Step 3	Assigns the peak employee traffic to the 17 trenchless crossing zones utilising 'Origin Data Set B'	Appendix 24.16 (TCs)	Tables 1 to 13
Step 4	The sum employee one-way trips per link applying a maximum 'cap' at three TCs per link.	Appendix 24.16 (TCs)	Table 14
Step 5	Assigns the peak employee traffic to the landfall zone utilising 'Origin Data Set C' and according to their assumed origin link	Appendix 24.16	Table 1
Step 6	Provides a cumulative summation of the movement to all employee traffic movements	Appendix 24.18 (Employee assignment summary)	Table 1

24.7.3 Traffic Impact Screening

183. With reference to the GEART (Rule 1 and Rule 2)[5], a screening process has been undertaken for the traffic and transport study area to identify routes that are likely to have an increase in traffic flows that would require further impact assessment.

184. Table 24.21 summarises the total daily peak vehicle movements (i.e. arrivals and departures) of all materials, personnel and plant. The table also provides a comparison of the peak daily construction flows with the forecast background daily traffic flows in 2022 (assumed worst case realistic start of construction). Cells highlighted blue indicate GEART Rule 1 or Rule 2 screening thresholds have been met. Appendix 24.19 graphically depicts this demand on the highway network.

Table 24.21 Existing and proposed daily traffic flows

Link	Description	Link sensitivity	Background 2022 flows (24hr AADT*)		2022 construction vehicle movements		Percentage increase	
			All vehicles	HGVs	All vehicles	HGVs	All vehicles	HGVs
1a	A47	Low	17,379	1,747	571	445	3.3%	25.5%
1b	A47	Low	17,379	1,747	737	377	4.2%	21.6%
2	A47	Low	23,363	2,303	693	312	3.0%	13.5%
3	A47	Low	41,742	3,109	527	312	1.3%	10.0%
4	A47	Low	48,083	3,295	394	312	0.8%	9.5%
5	A47	Low	45,233	2,273	704	639	1.6%	28.1%
6	A47	Low	20,734	1,252	679	639	3.3%	51.0%
7	A47	Low	15,073	1,381	373	312	2.5%	22.6%
8	A146	Medium	13,500	729	340	312	2.5%	42.7%
9	A47	Low	38,180	1,163	732	721	1.9%	62.0%
10	A47	Medium	26,059	673	725	721	2.8%	107.1%
11	A1065	Low	7,632	606	69	0	0.9%	0.0%
12	A1065	Medium	5,499	523	38	0	0.7%	0.0%
13a	A148	Low	14,561	828	747	671	5.1%	81.0%
13b	A148	High	10,506	620	569	520	5.4%	83.9%
14	A148	Medium	12,286	567	491	420	4.0%	74.0%
15	B1145 - Litcham	High	1,893	38	13	0	0.7%	0.0%
16	B1110/B1146 - Holt Road	Low	8,058	91	361	240	4.5%	263.0%
17	B1145 - Billingford Road	Medium	3,075	50	326	240	10.6%	474.5%
18	A1067	High	8,699	623	401	335	4.6%	53.9%
19	A148	Medium	12,887	1,105	756	721	5.9%	65.3%

[5] Rule 1: Include highway links where traffic flows are predicted to increase by more than 30% (or where the number of HGVs is predicted to increase by more than 30%); and Rule 2: Include any other specifically sensitive areas where traffic flows (or HGV component) are predicted to increase by 10% or more.

Link	Description	Link sensitivity	Background 2022 flows (24hr AADT*)		2022 construction vehicle movements		Percentage increase	
			All vehicles	HGVs	All vehicles	HGVs	All vehicles	HGVs
20	Mill Common Road	Low	297	7	0	0	0.0%	0.0%
21	B1147 - Etling Green	Low	1,526	16	304	240	19.9%	1455.3%
22	B1147 - Dereham Road	Low	2,345	22	328	240	14.0%	1091.4%
23	Northgate - from junction with B1146	Low	1,893	38	4	0	0.2%	0.0%
24	A1067	Low	10,328	521	579	431	5.6%	82.8%
25	Elsing Lane	Low	543	5	92	72	16.9%	1309.6%
26	A1074	Medium	24,367	1,159	117	0	0.5%	0.0%
27	A140	Medium	32,842	2,202	121	0	0.4%	0.0%
28	A140	Medium	22,300	1,325	138	0	0.6%	0.0%
29	A1067	Medium	13,065	884	450	335	3.4%	37.9%
30	A1067	Low	11,447	723	447	335	3.9%	46.4%
31	A1067	High	18,200	581	110	0	0.6%	0.0%
32	B1149 - Edgefield	Medium	4,436	82	275	235	6.2%	285.2%
33	B1149 - Holly road	Low	5,787	178	390	235	6.7%	132.1%
34	B1145 - west of Cawston	Medium	2,905	29	394	240	13.5%	839.6%
35a	B1159	Low	3,551	32	494	348	13.9%	1093.4%
35b	B1159	Low	3,551	32	350	287	9.9%	903.3%
36	B1149 - Horsford	High	8,287	159	347	235	4.2%	147.5%
37	B1145 - Cawston road	Low	4,187	54	180	96	4.3%	178.2%
38	A140 - Cromer Road	Medium	20,150	788	237	0	1.2%	0.0%
39	A140 - Hevingham	Medium	14,967	498	364	134	2.4%	26.9%
40a	A140 - Roughton	Low	9,892	207	356	344	3.6%	166.4%
40b	A140 - Roughton	Low	13,249	594	374	192	2.8%	32.2%
41	B1436 - Felbrigg	Low	6,991	158	542	478	7.7%	302.7%
42	B1145 - Reepham Road	Medium	2,485	20	306	192	12.3%	970.1%
43	Cromer Road - Ingworth	Medium	1,079	3	25	0	2.3%	0.0%
44a	A149	Medium	9,255	479	438	344	4.7%	71.8%
44b	A149	Medium	9,255	479	468	311	5.1%	64.8%
45	A149	Medium	7,092	368	358	244	5.0%	66.1%
46	B1145	Low	6,068	99	485	240	8.0%	242.5%
47a	North Walsham Road - Edingthorpe Green	High	2,138	18	151	0	7.1%	0.0%

Link	Description	Link sensitivity	Background 2022 flows (24hr AADT*)		2022 construction vehicle movements		Percentage increase	
			All vehicles	HGVs	All vehicles	HGVs	All vehicles	HGVs
47b	North Walsham Road - Edingthorpe Green	Low	2,138	18	209	72	9.8%	409.2%
47c	North Walsham Road - Edingthorpe Green	High	2,138	18	220	192	10.3%	1091.4%
48	B1159 - Bacton Road	High	2,627	49	0	0	0.0%	0.0%
49	B1159	High	3,806	70	232	192	6.1%	272.8%
50	A1151	Medium	10,337	383	186	0	1.8%	0.0%
51	A1151	Medium	20,467	872	114	0	0.6%	0.0%
52	A149 - Wayford Road	Low	14,099	192	363	244	2.6%	126.8%
53	A149	Medium	38,785	1,498	938	932	2.4%	62.2%
54	A149	High	29,770	864	300	294	1.0%	34.0%
55	A149	Low	24,243	528	300	294	1.2%	55.7%
56	A149	Medium	9,181	372	338	294	3.7%	79.0%
57	A149	Low	9,329	515	340	294	3.6%	57.0%
58	NDR - Link a	Low	37,050	1,570	536	503	1.4%	32.0%
59	NDR - Link b	Low	25,656	1,087	521	503	2.0%	46.3%
60	NDR - Link c	Low	19,142	811	402	335	2.1%	41.3%
61	B1436 - Thorpe Market Road	Medium	4,884	113	71	0	1.5%	0.0%
62	A1042	Medium	24,378	990	145	0	0.6%	0.0%
63	A1151	Medium	13,933	583	81	0	0.6%	0.0%
64	A12	Medium	10,637	619	319	312	3.0%	50.3%
65	A47	Medium	16,847	570	723	721	4.3%	126.7%
66	Wendling – Dereham Road	Medium	1426	55	136	96	9.5%	174.7%
67	North Walsham Road / Happisburgh Road	Low	1097	44	175	96	15.9%	218.3%
68	The Street / Heydon Road	Low	1097	44	176	96	16.0%	218.3%
69	Little London Road	High	549	22	260	**240	47.3%	1092.3%
70	Plantation Road	Low	1097	44	292	192	26.6%	436.6%
71	Vicarage Road / Whimpwell Street	High	2194	77	144	61	6.6%	78.8%
72	Dereham Road / Longham Road - Dillington	Medium	1097	44	184	144	16.7%	327.4%
73	Hoe Road South	Low	878	33	158	144	18.0%	436.5%

Link	Description	Link sensitivity	Background 2022 flows (24hr AADT*)		2022 construction vehicle movements		Percentage increase	
			All vehicles	HGVs	All vehicles	HGVs	All vehicles	HGVs
74	Mill Street, Elsing Road – Swanton Morley	Medium	878	33	103	72	11.7%	218.3%
75	B1354 - Blickling	Medium	2194	77	72	72	3.3%	93.5%
76	High Noon Road / Church Road	Low	549	22	92	72	16.7%	327.4%
77	Hall Lane – North Walsham	Low	549	22	92	72	16.7%	327.4%
78	Bylaugh	Low	549	22	92	72	16.7%	327.4%
79	B1145 / Suffield Road	Medium	2194	77	92	72	4.2%	93.5%
*	AADT – Annual Average Daily Traffic							
**	Links with traffic deliveries utilising smaller vehicles							
%	Exceeds GEART screening thresholds							

185. In accordance with GEART, only those sensitive links that show greater than 10% increase in total traffic flows (or HGV component) or, for all other links, a greater than 30% increase in total traffic or the HGV component are considered when assessing the traffic effect of severance and pedestrian amenity upon receptors.

186. It is noted from Table 24.21 that 60 of the 86 links are above the GEART screening thresholds. Table 24.22 provides a summary of those links that will be taken forward for further assessment and those that are screened out.

Table 24.22 Link screening summary

	Further assessment	No further assessment
Link	6, 8, 9, 10, 13a, 13b, 14, 16, 17, 18, 19, 21, 22, 24, 25, 29, 30, 32, 33, 34, 35a, 35b, 36, 37, 40a, 40b, 41, 42, 44a, 44b, 45, 46, 47b, 47c, 49, 52, 53, 54, 55, 56, 57, 58, 59, 60, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79.	1a, 1b, 2, 3, 4, 5, 7, 11, 12, 15, 20, 23, 26, 27, 28, 31, 38, 39, 43, 47a, 48, 50, 51, 61, 62, 63.

24.7.4 Assessment Scenarios

187. Chapter 5 Project Description outlines the scenarios to be assessed in relation to the phasing of the works. The phasing of the construction works is as follows:

- The offshore project may be constructed as one or two phases and elements of the onshore construction would also be phased to reflect this;
- Pre-construction works (e.g. hedgerow clearance) for the onshore cable route to be conducted over a two year period, prior to duct installation;
- Cable ducts would be installed in one operation over two years, regardless of the

offshore strategy;

- Cable pull through would be done in either one or two phases;
- The onshore project substation ground preparation and enabling works would be done in one phase, anticipated to take two years for pre-construction works and two years for primary works;
- The required electrical infrastructure and plant within the onshore project substation would then be installed as required for each phase if the one or two phase options were adopted for offshore construction; and
- Total construction window for the one phase scenario is anticipated to be five years, and six years for the two phase scenario.

24.7.5 Embedded mitigation

188. Norfolk Vanguard Limited has committed to a number of techniques and engineering designs/modifications inherent as part of the project, during the pre-application phase, in order to avoid a number of impacts or reduce impacts as far as possible. Embedding mitigation into the project design is a type of primary mitigation and is an inherent aspect of the EIA process.

189. A range of different information sources has been considered as part of embedding mitigation into the design of the project; for further details see Chapter 5 Project Description, Chapter 4 Site Selection and Assessment of Alternatives and the Consultation Report (Document reference 5.1) including engineering requirements, feedback from communities and landowners, ongoing discussions with stakeholders and regulators, commercial considerations and environmental best practice.

190. The following sections outline the key embedded mitigation measures relevant for this assessment.

191. With specific regard to traffic and transport, the final assessment has been a culmination of an interactive process with the project engineering consultants. This involved developing construction methodologies, undertaking a preliminary impact assessment and revising as necessary to minimise the potential impacts. This has led to a comprehensive suite of 'designed in' mitigation measures to addresses potential significant traffic and transport impact before it can manifest.

192. Table 24.23 sets out the designed in (embedded) mitigation measures that have been applied to the traffic forecasts contained in this chapter.

193. Where embedded mitigation measures have been developed into the design of the project with specific regard to traffic and transport, these are described in Table 24.24.

Table 24.23 Embedded mitigation

Parameter	Mitigation measures embedded into the project design	Notes
Strategic approach to delivering Norfolk Vanguard and Norfolk Boreas	Subject to both Norfolk Vanguard and Norfolk Boreas receiving development consent and progressing to construction, onshore ducts will be installed for both projects at the same time, as part of the Norfolk Vanguard construction works. This would allow the main civil works for the cable route to be completed in one construction period and in advance of cable delivery, preventing the requirement to reopen the land in order to minimise disruption. Onshore cables would then be pulled through the pre-installed ducts in a phased approach at later stages. In accordance with the Horlock Rules, the co-location of Norfolk Vanguard and Norfolk Boreas onshore project substations will keep these developments contained within a localised area and, in so doing, will contain the extent of potential impacts.	The strategic approach to delivering Norfolk Vanguard and Norfolk Boreas has been a consideration from the outset.
Commitment to HVDC technology	Commitment to HVDC technology minimises environmental impacts through the following design considerations; • HVDC requires fewer cables than the HVAC solution. During the duct installation phase this reduces the cable route working width (for Norfolk Vanguard and Norfolk Boreas combined) to 45m from the previously identified worst case of 100m. As a result, the overall footprint of the onshore cable route required for the duct installation phase is reduced from approx. 600ha to 270ha; • The width of permanent cable easement is also reduced from 54m to 20m; • Removes the requirement for a CRS; • Reduces the maximum duration of the cable pull phase from three years down to two years; • Reduces the total number of jointing bays for Norfolk Vanguard from 450 to 150; and • Reduces the number of drills needed at trenchless crossings (including landfall).	Norfolk Vanguard Limited has reviewed consultation received and in light of the feedback, has made a number of decisions in relation to the project design. One of these decisions is to deploy HVDC technology as the export system.
Site Selection	The project has undergone an extensive site selection process which has involved incorporating environmental considerations in collaboration with the engineering design requirements. Considerations include (but are not limited to) adhering to the Horlock Rules for onshore project substations and National Grid infrastructure, a preference for the shortest route length (where practical) and developing construction methodologies to minimise potential impacts. Key design principles from the outset were followed	Constraints mapping and sensitive site selection to avoid a number of impacts, or to reduce impacts as far as possible, is a type of primary mitigation and is an inherent aspect of the EIA process. Norfolk Vanguard Limited has reviewed consultation received to

Parameter	Mitigation measures embedded into the project design	Notes
	(wherever practical) and further refined during the EIA process, including; • Avoiding proximity to residential dwellings; • Avoiding proximity to historic buildings; • Avoiding designated sites; • Minimising impacts to local residents in relation to access to services and road usage, including footpath closures; • Utilising open agricultural land, therefore reducing road carriageway works; • Minimising requirement for complex crossing arrangements, e.g. road, river and rail crossings; • Avoiding areas of important habitat, trees, ponds and agricultural ditches; • Installing cables in flat terrain maintaining a straight route where possible for ease of pulling cables through ducts; • Avoiding other services (e.g. gas pipelines) but aiming to cross at close to right angles where crossings are required; • Minimising the number of hedgerow crossings, utilising existing gaps in field boundaries; • Avoiding rendering parcels of agricultural land inaccessible; and • Utilising and upgrading existing accesses where possible to avoid impacting undisturbed ground.	inform the site selection process (including local communities, landowners and regulators) and in response to feedback, has made a number of decisions in relation to the siting of project infrastructure. The site selection process is set out in Chapter 4 Site Selection and Assessment of Alternatives.
Duct Installation Strategy	The onshore cable duct installation strategy is proposed to be conducted in a sectionalised approach in order to minimise impacts. Construction teams would work on a short length (approximately 150m section) and once the cable ducts have been installed, the section would be back filled and the top soil replaced before moving onto the next section. This would minimise the amount of land being worked on at any one time and would also minimise the duration of works on any given section of the route.	This has been a project commitment from the outset in response to lessons learnt on other similar NSIPs. Chapter 5 Project Description provides a detailed description of the process.
Long HDD at landfall	Use of long HDD at landfall to avoid restrictions or closures to Happisburgh beach and retain open access to the beach during construction. Norfolk Vanguard Limited have also agreed to not use the beach car park at Happisburgh South.	Norfolk Vanguard Limited has reviewed consultation received and in response to feedback, has made a number of decisions in relation to the project design. One of those decisions is to use long HDD at landfall.

Parameter	Mitigation measures embedded into the project design	Notes
Trenchless Crossings	Commitment to trenchless crossing techniques to minimise impacts to the following specific features; • Wendling Carr County Wildlife Site; • Little Wood County Wildlife Site; • Land South of Dillington Carr County Wildlife Site; • Kerdiston proposed County Wildlife Site; • Marriott's Way County Wildlife Site / Public Right of Way (PRoW); • Paston Way and Knapton Cutting County Wildlife Site; • Norfolk Coast Path; • Witton Hall Plantation along Old Hall Road; • King's Beck; • River Wensum; • River Bure; • Wendling Beck; • Wendling Carr; • North Walsham and Dilham Canal; • Network Rail line at North Walsham that runs from Norwich to Cromer; • Mid-Norfolk Railway line at Dereham that runs from Wymondham to North Elmham; and • Trunk Roads including A47, A140, A149.	A commitment to a number of trenchless crossings at certain sensitive locations was identified at the outset. However, Norfolk Vanguard Limited has committed to certain additional trenchless crossings as a direct response to stakeholder requests.

Table 24.24 Embedded mitigation for traffic and transport

Parameter	Embedded mitigation for traffic and transport	Notes
Mobilisation Areas	Mobilisation areas would be located close to main A-roads minimising impacts upon local communities and utilising the most suitable roads. Mobilisation areas located away from population centres where practical to reduce impact on local communities and population centres.	
Duct Installation	Suitable access points and identification of optimum routes for construction traffic to use. This minimises impacts on sensitive receptors.	Details contained in the OAMP (document reference 8.10)
Cable Pull and Jointing Stage access	Suitable side accesses and road crossing locations reviewed from initial schedule of 200+ access points to 70+ realistic potential access points to minimise local route impacts.	Details contained in the OAMP (document reference 8.10)
Vehicle Movement	Construction of an (up to) 6m wide running track with an approximate length of 60km. This would reduce the number of access points required and HGV movements on the local road network. Consolidating HGVs at mobilisation areas to reduce vehicle movements along more sensitive local routes.	Details contained in the OTMP (document reference 8.8)

Parameter	Embedded mitigation for traffic and transport	Notes
	Carefully selected delivery routes acknowledging the sensitive receptors within the traffic and transport study area Management measures to control timing of deliveries	
Onshore Cable Route Site Selection	Consolidating onshore cable route section construction employee movements at mobilisation areas. Onward travel along the running track to place of work reducing vehicle movements along local routes.	Details contained in the OTP (document reference 8.9)

24.7.6 Monitoring

194. An OTMP (document reference 8.8) and OTP (document reference 8.9) are submitted in support of the DCO application for the project.

195. The OTMP (document reference 8.8) sets out the standards and procedures for managing the impact of HGV traffic during the construction period, including localised road improvements necessary to facilitate the safe use of the existing road network.

196. The OTP (document reference 8.9)sets out how construction employee traffic would be managed and controlled.

197. Both documents contain a commitment to monitoring and enforcement measures to ensure the project's HGV and employee traffic is within the bounds of the worst case impacts assessed.

198. Final plans which accord with these outline documents must be submitted to and approved by the relevant local planning authority (in consultation with the relevant highway authority) prior to commencement of relevant works, as per Requirement 25 of the DCO.

24.7.7 Potential Impacts during Construction

24.7.7.1 Impact 1: Severance

199. With reference to Table 24.21 it is noted the forecast peak daily change in total traffic flow for link 69 is greater than the 30% change in total traffic threshold whereby GEART suggests negative impacts may be experienced.

200. The remaining links all experience traffic flows significantly below the 30% thresholds and the magnitude of effect on low to high sensitivity links is assessed as very low, giving impact significance on all links of **negligible** to **minor adverse**.

201. Link 69 (shown on Figure 24.1) is Little London Road from the B1145 Lyngate Road junction to an access point approximately 210m east.

202. Link 69 is a narrow lane lined with no footway. The lane is lined with established hedgerows, walls and a number of private residential accesses. The route is assessed as unsuitable for conventional (20t payload) tipper trucks and therefore in order to safely traverse along the narrow lane, mitigation is proposed in the form of splitting HGV payload into smaller 10t vehicles at mobilisation area (MA)10.

203. By halving the size of vehicles, this in effect doubles the daily number of HGVs (from 120 to 240 movements) therefore giving rise to severance traffic effects

204. The increase of 240 HGV movements on link 69; represents a high magnitude of effect on a high value receptor; resulting in the prediction of a **major adverse** impact.

205. The 240 HGV movements represents the worst case scenario, where construction of all infrastructure components are undertaken concurrently and assigned to link 69. Table 24.25 breaks down the worst case scenario into the separate infrastructure components and their programmed date of works, as detailed within Appendix 24.7.

Table 24.25 Link 69 Traffic Derivation

Infrastructure component	Programmed date of infrastructure component	**Work Gang**	Peak construction vehicle deliveries	Peak construction vehicle movements	Indicative peak construction duration
Section 16a: MA10	24.03.2023 – 10.07.2023	Duct Installation Gang	48	96	9 weeks
TC 14 – Paston Way CWS (East)	27.06.2022 – 15.08.2022	TC Gang 3*	72	144	2 weeks
TC 15 – North Walsham and Dilham Canal (West)	22.08.2022 – 10.10.2022	TC Gang 3*	72	144	2 weeks
*	TC gang 3 would only work on one TC at any one time during the construction programme.				

206. It can be noted from Table 24.25 that the construction programme presented is sufficient to also allow sequential construction of the three components.

207. Notwithstanding, a sequential peak of 144 daily movements would still represent an increase of 76% for all vehicles and 654% for HGVs; therefore mitigation is considered.

208. As detailed in the construction programme (Appendix 24.7), section 16a of the duct installation is predicted to last a total of 12 weeks during year 2 (2023). The greatest opportunity to reduce the effects of severance upon Link 69 would be to focus on elongating the currently defined construction programme.

209. For example, an increase in total construction programme from 12 weeks to 24 weeks would see a reduction from 96 peak daily movements to 48.

210. Furthermore, the locations of the drive and reception side of the TC zone have not been selected at this time. Therefore 75% of the traffic (required at the drive) has been assigned to each side.

211. There is therefore an opportunity to further reduce the TC traffic demand by placing both TC 14 and TC 15 reception sides to the area which link 69 serves. This would reduce the 144 daily movements to 48 (25%).

212. In summary, mitigation for link 69 would be agreed as part of the TMP and may comprise one or more of the following mitigation measures:

1. Extend construction programme for section 16a of the duct installation;
2. Locate the reception sides of TC 14 and TC 15 to the area which link 69 serves; and
3. Sequential planning of construction activities to reduce peak HGV demand.

213. Table 24.26 contains forecast daily traffic demand with the implementation of mitigation measures.

Table 24.26 Resultant link 69 traffic demand

Infrastructure component	Work Gang	Peak daily construction vehicle deliveries	Peak daily construction vehicle movements	Peak construction duration
Section 16a:MA10	Duct Installation Gang	24	48	24 weeks
TC 14 – Paston Way CWS (East)	TC Gang 3	24	48	2 weeks
TC 15 – North Walsham and Dilham Canal (West)	TC Gang 3	24	48	2 weeks

214. 48 daily HGV movements is assessed as an achievable peak. With this much reduced demand the effect is considered to be of low magnitude. However, noting the high sensitivity of the receptor it is expected that the residual impact significance

would be marginally **moderate adverse**.

215. The assessed impact is very localised (impacting on a small number of dwellings) and is for a relative short duration of time. It is considered community engagement to establish clear lines of communication to the appointed contractor would serve to identify periods that are particular sensitive to HGV movements and that could further mitigate this impact.

216. The OTMP (document reference 8.8) contains a specific commitment to managing the HGV movements on link 69 and notes the need for community engagement.

24.7.7.2 Impact 2: Pedestrian amenity

217. It can be noted from Table 24.21 that the peak daily change in total flows or HGV component for links 10, 16, 17, 21, 22, 25, 32, 33, 34, 35a, 35b, 36, 37, 40a, 41, 42, 46, 47b, 47c, 49, 52, 65-70, 72, 73, 74,77 and 78 are greater than the 100% GEART impact threshold whereby GEART suggests negative impacts may be experienced (Paragraph 40).

218. In addition, links 75, 76 and 79 experience increases close to the 100% threshold. These links are also considered further noting that a small change in demand could result in potentially significant impacts.

219. The remaining links all experience traffic flows significantly below the 100% thresholds and the magnitude of effect is assessed as very low on low to high sensitivity links giving impact significance on all links of **negligible** to **minor adverse**.

220. Table 24.27 presents the impact assessment for each identified link. To establish the context for the impact assessment reference is made to Norfolk County Council's route hierarchy plan (Appendix 24.1).

Table 24.27 Pedestrian amenity assessment

Link	Link description	NCC route hierarchy	2022 HGV base flows	2022 HGV const' flows	HGV flow increase	Assessment	Magnitude of effect	Link sensitivity	Impact significance
10	A47	Strategic Road Network	673	1,395	107.1%	Part of Highways England A47 Strategic Road Network; designed for high vehicle capacity and has adequate separation from pedestrian activity.	Low	Medium	**Minor Adverse**
16	B1110/B1146 - Holt Road	Main Distributor Others – 3A2	91	331	263.0%	Receptors currently experience 1 HGV every 6 minutes 40 seconds. This would increase to 1 HGV every 1 minute 48 seconds during construction. Sporadic settlements with no footways provided, indicating minimal requirement to walk along the link.	Medium	Low	**Minor Adverse**
17	B1145 - Billingford Road	Main Distributor Others – 3A2	50	290	474.5%	Receptors currently experience 1 HGV every 12 minutes during peak hour. This would increase to 1 HGV every 2 minutes 4 seconds during construction. The majority of the route has no footways indicating minimal pedestrian movement. Where the link passes through the villages of Billingford a footway is provided and a 30mph speed limit is in force.	Medium	Medium	**Moderate Adverse**
21	B1147 - Etling Green	Local Access – 3B2	16	256	1455.3%	Classified as a 'Local Access' route within NCC Route Hierarchy plan. The link serves a Mobilisation area and one side of a TC zone resulting in a large increase in HGV flows over baseline flows. No footways provided along entire link indicating minimal pedestrian footfall predicted.	High	Low	**Moderate Adverse**

Link	Link description	NCC route hierarchy	2022 HGV base flows	2022 HGV const' flows	HGV flow increase	Assessment	Magnitude of effect	Link sensitivity	Impact significance
22	B1147 - Dereham Road	Local Access – 3B2	22	261	1091.4%	Classified as 'Local Access' route within NCC Route Hierarchy plan. The link serves a mobilisation area and 1 TC zone resulting in a large increase in HGV flows over baseline flows.	High	Low	**Moderate Adverse**
25	Elsing Lane	Local Access – 3B2	5	77	1309.6%	Classified as 'Local Access' route within NCC Route Hierarchy plan. The link serves a single TC zone. Minimal HGV base flows increasing to one HGV every 7 minutes 48 seconds during construction period.	Medium	Low	**Minor Adverse**
32	B1149 - Edgefield	Main Distributor Others – 3A2	82	317	285.2%	Classified as 'Main Distributor Others' route within NCC Route Hierarchy plan. The link serves access to 2 mobilisation areas and 3 TC zones. A low increase in HGV relative to baseline HGV movements. Majority of route has no footways, indicating minimal pedestrian movement. Link 32 routes through the villages of Holt and Edgefield where at least one footway is provided adjacent to the road. A speed limit of 30mph is in force in throughout the village extents.	Low	Medium	**Minor Adverse**
33	B1149 -Holt Road	Main Distributor Others – 3A2	178	412	132.1%	Classified as 'Main Distributor Others' route within NCC Route Hierarchy plan. The link serves access to 2 mobilisation areas and 2 TC zones. Receptors currently experience 1 HGV every 3 minutes 22 seconds during peak hour. Likely to increase to 1 HGV every 1 minute 27 seconds during construction.	Medium	Low	**Minor Adverse**

Link	Link description	NCC route hierarchy	2022 HGV base flows	2022 HGV const' flows	HGV flow increase	Assessment	Magnitude of effect	Link sensitivity	Impact significance
						Majority of route has no footways, indicating minimal pedestrian movement.			
34	B1145 – west of Cawston	Main Distributor Others – 3A2	29	268	839.6%	Receptors currently experience 1 HGV every 20 minutes. This would increase to 1 HGV every 2 minute 14 seconds during construction. However, evidence of existing industrial park and HGV movements routing through Cawston identified indicating the Highway has been adapted to accommodate HGV demand.	Medium	Medium	**Moderate Adverse**
35a	B1159	Main Distributor Others – 3A2	32	380	1093.4%	Classified as 'Main Distributor Others' route within NCC Route Hierarchy plan. The link serves access to the landfall site, 2 mobilisation areas and 2 TC zones resulting in a large increase in HGV flows over baseline flows.	High	Low	**Moderate Adverse**
35b	B1159	Main Distributor Others – 3A2	32	319	903.3%	Classified as 'Main Distributor Others' route within NCC Route Hierarchy plan. The link provides access to the landfall site, 2 mobilisation areas and 2 TC zones resulting in a large increase in HGV flows over baseline flows.	High	Low	**Moderate Adverse**
36	B1149 – Holt Road	Main Distributor Others – 3A2	159	384	147.5%	Classified as 'Main Distributor Others' route within NCC Route Hierarchy plan. The link provides access to 2 mobilisation areas and 2 TC zones. Receptors currently experience 1 HGV every 3 minutes 46 seconds. This would increase to 1 HGV every 1 minute 33 seconds during construction. Majority of route has no footways indicating minimal	Low	High	**Moderate Adverse**

Link	Link description	NCC route hierarchy	2022 HGV base flows	2022 HGV const' flows	HGV flow increase	Assessment	Magnitude of effect	Link sensitivity	Impact significance
						pedestrian movement. Link 36 routes through the village of Horsford where a footway is provided. A 30mph speed limit is in force which would reduce the speed of HGVs.			
37	B1145 – Cawston Road	Main Distributor Others – 3A2	54	150	178.2%	Classified as 'Main Distributor Others' route within NCC Route Hierarchy plan. Receptors currently experience 1 HGV every 11 minutes 6 seconds. This would increase to 1 HGV every 4 minutes during construction. No footways provided along entire link indicating minimal pedestrian footfall predicted.	Low	Low	**Minor Adverse**
40a	A140 - Roughton	Primary Route – 2B	207	551	166.4%	Receptors currently experience 1 HGV every 2 minutes and 53 seconds. This would increase to 1 HGV every 1 minute 5 seconds during construction.	Medium	Low	**Minor Adverse**
41	B1436 - Felbrigg	Main Distributor Others – 3A2	158	636	302.7%	Receptors currently experience 1 HGV every 3 minutes and 48 seconds. This would increase to 1 HGV every 57 seconds during construction.	High	Low	**Moderate Adverse**
42	B1145 – Reepham Road	Main Distributor Others – 3A2	20	211	970.1%	Classified as 'Main Distributor Others' route within NCC Route Hierarchy plan. The link serves two TC zones resulting in a large increase in HGV flows over baseline flows.	High	Medium	**Major Adverse**
46	B1145	Main Distributor	99	338	242.5%	The link serves access to a mobilisation area and 2 TC zones which result in a large increase in HGV flows over baseflows	Low	Low	**Minor Adverse**

Link	Link description	NCC route hierarchy	2022 HGV base flows	2022 HGV const' flows	HGV flow increase	Assessment	Magnitude of effect	Link sensitivity	Impact significance
		Others – 3A2				during the construction period. However, the road is classified as a 'Main Distributor Others' route which serves existing industrial estates and commercial properties. The B1145 does not provide for pedestrian access along its length and a designated walking route on an adjacent side road and an underpass is provided to the residential areas to the east.			
47b	North Walsham Road - Edingthorpe Green	Special Access – 3B3	18	89	409.2%	Classified as a 'Special Access' route within the NCC Route hierarchy plan. The link provides access to 1 TC zone. During the construction period the link would experience 1 HGV every six minutes and 44 seconds.	Medium	Low	**Minor Adverse**
47c	North Walsham Road - Edingthorpe Green	Special Access – 3B3	18	209	1091.4%	Classified as a 'Special Access' route within the NCC Route hierarchy plan. The link provides access to 1 mobilisation area and 2 TC zones. A number of route constraints exist for a large increase in HGV flows including poor geometry and surface level footpaths with on street parking. During the construction period the link would experience 1 HGV every 2 minutes and 52 seconds.	High	High	**Major Adverse**
49	B1159	Main Distributor Others – 3A2	70	262	272.8%	Classified as a 'Main Distributor Other' route within the NCC Route hierarchy plan. The link routes through the villages of Walcott, Keswick and Broomholm. The link provides access to one mobilisation area and two TC zones. Evidence of direct residential frontage and on street parking exist on the route. Bacton primary school exists adjacent to the B1159.	Medium	High	**Major Adverse**

Link	Link description	NCC route hierarchy	2022 HGV base flows	2022 HGV const' flows	HGV flow increase	Assessment	Magnitude of effect	Link sensitivity	Impact significance
						However, this is set against a relatively low HGV baseline and Bacton Gas Terminal HGV route. During the construction period the link would experience 1 HGV every 2 minutes and 17 seconds.			
65	A47	Strategic Lorry route*	570	1,291	126.7%	Classified as a Strategic Lorry Route as defined by Suffolk County Council and is designed for high vehicle capacity and has adequate separation from pedestrian activity.	Low	Medium	**Minor Adverse**
66	Wendling – Dereham Road	Minor local - 4A	55	151	174.7%	Classified as a 'Minor Local 4a' route within the NCC Route hierarchy plan. The link provides access to one mobilisation area. A low increase in HGV relative to baseline HGV movements. A single footway is provided sporadically along the northern verge linking bus stops to local residential dwellings indicating minimal pedestrian movement.	Low	Medium	**Minor Adverse**
67	North Walsham Road / Happisburgh Road	Minor local - 4A	44	140	218.3%	Classified as a 'Minor Local 4a' route within the NCC Route hierarchy plan. The link serves 1 mobilisation area located approximately 800m from the junction with the B1159. No sensitive receptors are identified along the route, indicating minimal pedestrian movement.	Low	Low	**Minor Adverse**
68	The Street / Heydon Road	Local Access – 3B2	44	140	218.3%	A low increase in HGVs relative to baseline movements. The link provides access to 1 mobilisation area. The road is classified as a 'Local Access' route which serves existing agricultural estates and an airfield. The route does not provide for pedestrian access along its length.	Medium	Low	**Minor Adverse**

Link	Link description	NCC route hierarchy	2022 HGV base flows	2022 HGV const' flows	HGV flow increase	Assessment	Magnitude of effect	Link sensitivity	Impact significance
69	Little London Road	Minor local - 4A	22	262	1092.3%	Classified as a 'Minor Local 4a' route within the NCC Route hierarchy plan. From the B1145 Lyngate Road Junction to an access point approximately 210m east. The link would serve cable section 16a and 2 TC zones. The link is a narrow lane lined with no footway. The lane is lined with established hedgerows, walls and a number of private residential accesses.	High	High	**Major Adverse**
70	Plantation Road	Main Distributor Others – 3A2	44	235	436.6%	The link provides access to a mobilisation area and a TC zone which result in a large increase in HGV flows over baseflows during the construction period. The B1145 does not provide for pedestrian access along its length and there are a handful of agricultural properties accessed off the link.	Medium	Low	**Minor Adverse**
71	Vicarage Road / Whimpwell Street	Minor local - 4A	77	137	78.8%	Classified as a 'Minor Local 4a' route within the NCC Route hierarchy plan. The link serves the landfall and routes through Happisburgh Common which comprises of a number of sensitive receptors that front the road.	Low	High	**Moderate Adverse**
72	Dereham Road / Longham Road - Dillington	Minor local - 4A	44	188	327.4%	Classified as a 'Minor Local 4a' route within the NCC Route hierarchy plan. The link serves 2 TC zones and comprises of a rural narrow lane with sporadic frontage development. No footways are provided along the route indicating minimal pedestrian activity.	Medium	Medium	**Moderate Adverse**

Link	Link description	NCC route hierarchy	2022 HGV base flows	2022 HGV const' flows	HGV flow increase	Assessment	Magnitude of effect	Link sensitivity	Impact significance
73	Hoe Road South	Minor local - 4A	33	177	436.5%	Classified as a 'Minor Local 4a' route within the NCC Route hierarchy plan The link provides access to 1 TC zone and comprises of a rural narrow lane. Minimal frontage access is located at its junction with the B1147. No footways are provided along the route indicating minimal pedestrian activity.	Medium	Low	**Minor Adverse**
74	Mill Street, Elsing Road – Swanton Morley	Local Access – 3B2	33	105	218.3%	The road is classified as a 'Local Access' route which routes through the village of Swanton Morley. Frontage development and footway provision is evident within Swanton Morley. A low increase in HGV relative to baseline HGV movements. The link serves 1 side of a TC zone. During the construction period the link would experience 1 HGV every 5 minutes and 42 seconds.	Low	Medium	**Minor Adverse**
75	B1354	Tourist Access - 3B4	77	149	93.5%	Part classified as a 'Tourist Access' route within the NCC Route hierarchy plan east of New Road as this routes past the Blickling Estate (National Trust) site. No footways are provided along the route indicating minimal pedestrian activity. The link serves 1 side of a TC zone and during the construction period the link would experience 1 HGV every 4 minutes.	Low	Medium	**Minor Adverse**
76	Hall Lane – North	Local Access –	22	94	327.4%	A low increase in HGVs relative to baseline HGV movements. The link provides access to 1 side of a TC zone.	Low	Low	**Minor Adverse**

Link	Link description	NCC route hierarchy	2022 HGV base flows	2022 HGV const' flows	HGV flow increase	Assessment	Magnitude of effect	Link sensitivity	Impact significance
	Walsham	3B2				The road is classified as a 'Minor Local 4a' route and is signed as a designated route for HGVs to an existing agricultural property. No footways are provided along the route indicating minimal pedestrian activity.			
77	Bylaugh	Minor local - 4A	22	94	327.4%	A low increase in HGV relative to baseline HGV movements. The link provides access to 1 side of a TC zone. The road is classified as a 'Minor Local 4a' route and extends approximately 260m from its junction with North Walsham Road to the side access proposed. No footways are provided along the route indicating minimal pedestrian activity.	Medium	Low	**Minor Adverse**
78	B1145 / Suffield Road	Minor local - 4A	22	94	327.4%	A low increase in HGV relative to baseline HGV movements. The link provides access to 1 side of a TC zone. The road is classified as a 'Minor Local 4a' route and extends approximately 450m from its junction with North Walsham Road to the side access proposed. No footways are provided along the route indicating minimal pedestrian activity.	Medium	Low	**Minor Adverse**
79	High Noon Road / Church Road	Main Distributor Others – 3A2	77	149	93.5%	Classified as 'Main Distributor Others' route within NCC Route Hierarchy plan from its junction with the A140 and Suffield Road Receptors currently experience 1 HGV every 7 minutes 47 seconds during peak hour. Likely to increase to 1 HGV every 4 minutes and one seconds during construction.	Low	Medium	**Minor Adverse**

Link	Link description	NCC route hierarchy	2022 HGV base flows	2022 HGV const' flows	HGV flow increase	Assessment	Magnitude of effect	Link sensitivity	Impact significance
						No footways provided along entire link indicating minimal pedestrian footfall predicted.			

* Taken from Suffolk's Lorry Route Network Plan

221. With reference to Table 24.27, the links initially assessed as having potentially significant adverse pedestrian amenity impacts (**moderate** and **major adverse**) are considered in more detail.

24.7.7.2.1 Moderate adverse impacts

222. It is proposed to provide a series of 'enhanced' mitigation measures to be contained within the finalised TMP as outlined in Table 24.28. These measures detailed are additional to those contained in a 'typical' TMP and are included to minimise impacts and enable construction vehicle drivers to understand the policies, procedures and regulations proposed for the safe and efficient movement of plant, materials and employees.

Table 24.28 Enhanced TMP measures

Enhanced TMP Measures
Driver training and toolbox talks
Driver information packs to include: • Delivery timing constraints (e.g. school arrival/departure times); • HGV delivery routes; • Diversion routes; and • Identify safe areas to pull over to reduce the effect of slow moving platoons of vehicles
Safety Awareness – Educate drivers to report 'near misses'
Engagement structure – to provide clear governance and reporting (stakeholders) structure
Monitoring and Reporting – To monitor traffic flows at mobilisation areas and the onshore project substation
Contact information at all roadwork sites and robust complaint response standards (7 days)

223. The measures are designed to familiarise drivers with the identified sensitivities within the traffic and transport study area delivery routes. The 'enhanced' measures will help to mitigate the effects of pedestrian severance and amenity (and associated fear and intimidation factors) and are expected to reduce the potential for road safety impacts associated with the increase of HGV movements within the area.

224. It can be noted from Table 24.27 that links 17, 21, 22, 34, 35a, 35b, 36, 41, 71 and 72 would experience potentially **moderate adverse** impacts.

225. The adoption of the proposed mitigation measures of an enhanced TMP would serve to address the underlining issues that manifest in adverse pedestrian amenity effects (reducing the magnitude of this potential effect), and therefore, the residual impacts on links 17, 21, 22, 34, 35a, 35b, 36, 41, 71 and 72 are expected to be no greater than **minor adverse**.

24.7.7.2.2 Major adverse impacts

226. Table 24.27 demonstrates that links 42, 47c, 49 and 69 all experience **major adverse** impacts. The following section provides a more comprehensive description of these impacts and details specific mitigation measures in addition to the enhanced TMP

discussed at paragraph 222.

24.7.7.2.3 Link 42

227. Link 42 is the B1145 road linking the village of Bawdeswell from the A1067 and on to the village of Reepham. This link is used to access two TC zones (TC 6 and TC 7). The link is considered a medium sensitive route containing direct frontage development and an entrance to a garden centre.

228. The worst case traffic demand has been developed assuming construction of all infrastructure components being undertaken concurrently. With respect to link 42 this approach results in 192 construction vehicle movements on the link. Table 24.29 breaks down the worst case scenario for link 42 into the separate infrastructure components and their programmed date of works as detailed within Appendix 24.7.

Table 24.29 Link 42 Traffic Derivation

Activity	Programmed date of infrastructure component	Work Gang	Peak daily construction vehicle deliveries	Peak daily construction vehicle movements	Peak construction duration
Section 8a: MA5b	27.02.2023 – 12.06.2023	Duct Installation Gang	24	48	16 weeks
TC 6 – Marriott's Way (north and south side)	27.06.2022 – 15.08.2022	TC Gang 2*	72	144	2 weeks
TC 7 – Marriott's Way North and Kerdiston CWS (south side)	22.08.2022 – 10.10.2022	TC Gang 2*	36	72	2 weeks

* TC gang 2 would only work on one TC at any one time during the construction programme.

229. As can be seen from Table 24.29 and Table 24.25, (which are based on the construction programme presented), all three infrastructure components would not occur at the same time.

230. Notwithstanding, a peak of 144 daily movements would still represent an increase of 12.3% for all vehicles and 720% for HGVs

231. An alternative strategy would be to extend weeks 1 and 8 of the construction programme. Week 1 of the construction programme includes the mobilisation and delivery of stone for the construction of the TC compound, week 8 then demobilises

and removes the stone. Increasing each peak period to two weeks would ultimately reduce the traffic movements by 50%.

232. The proposed mitigation and breakdown of the infrastructure components programme would result in the following reduced construction traffic demand as presented in Table 24.30.

Table 24.30 Resultant link 42 traffic demand

Activity	Work Gang	Peak daily construction vehicle deliveries	Peak daily construction vehicle movements	Peak construction duration
Section 8a: MA5b	Duct Installation Gang	24	48	16 weeks
TC 6 – Marriott's Way (north and south side)	TC Gang 2*	36	72	4 weeks
TC 7 – Marriott's Way North and Kerdiston CWS (south side)	TC Gang 2*	36	72	2 weeks

*TC gang 2 would only work on one TC at any one time during the construction programme.

233. The implementation of the proposed programme changes would substantially reduce the number of HGV traffic movements to 72 per day.

234. Therefore, the magnitude of effect is predicted to reduce to low on a medium value sensitive receptor; resulting in a **minor adverse** residual impact.

235. The OTMP (document reference 8.8) contains a specific commitment to managing the HGV movements for link 42.

24.7.7.2.4 Link 47c and Link 49

236. Link 47c is the road from the B1145 through a residential area of North Walsham and on to the villages of Bacton and Broomholm. The link is used to access MA10a and two TC zones (TC15 and TC16). The link is considered a high sensitivity route and contains several constraints including poor geometry, surface level footpaths and on street parking. This link would not be suitable for the forecast increase in construction traffic.

237. Link 49 comprises the B1159 road from its junction with North Walsham Road (west of Happisburgh) north to its junction with Coast Road. The link passes through the villages of Walcott, Bacton and Broomholm.

238. The link is used to access MA-10a and two TC zones (TC15 and TC16). The cable route is considered a high sensitivity route and contains several constraints including

poor geometry, on street parking and a primary school immediately adjacent to the B1159.

239. It is worth noting that link 49 follows the agreed HGV routes associated with the nearby Bacton Gas Terminals, where HGV traffic is directed north on the B1159 (links 35 and 49), continuing north onto the B1159 – Coast Road.

240. The worst case scenario assumes construction of all infrastructure components being undertaken concurrently. This methodology assigns 192 construction vehicle movements onto links 47c and 49. Table 24.31 breaks down the worst case scenario for links 47c and 49 into the separate infrastructure components and their programmed date of works as detailed within Appendix 24.7.

Table 24.31 Links 47c and 49 traffic derivation

Activity	Programmed date of infrastructure component	**Work Gang**	Peak daily construction vehicle deliveries	Peak daily construction vehicle movements	Peak construction duration
Section 17a: MA10a	24.04.2023 – 31.07.2023	Duct Installation Gang	24	48	15 weeks
TC 15 – North Walsham and Dilham Canal (East side)	22.08.2022 – 10.10.2022	TC Gang 3*	36	72	2 weeks
TC 16 – Bacton Woodland (West and East side)	22.08.2022 – 10.10.2022	TC Gang 3*	72	144	2 weeks

*TC gang 3 would only work on one TC at any one time during the construction programme.

241. As can be seen from Table 24.31 (based on the construction programme presented) all three infrastructure components would not occur at the same time.

242. Notwithstanding, a sequential peak of 144 daily movements would still represent an increase of 800% for HGVs on link 47c and 205% on link 49.

243. An alternative strategy would be to extend weeks 1 and 8 of the construction programme for TC 16. Week 1 includes the mobilisation and delivery of stone activities for the construction of the TC compound, week 8 then demobilises and removes the stone. Increasing each peak period to two weeks would ultimately reduce the traffic movements by 50%.

244. It is further proposed that deliveries along links 47c and 49 are restricted so that no

HGV movements occur within the village during school drop off (8am to 9am) and pick up times (3pm to 4pm).

245. The breakdown of infrastructure component programme would result in the following forecast reduced construction traffic demand as presented in Table 24.32.

Table 24.32 Resultant link 47c and 49 traffic demand

Activity	Work Gang	Peak daily construction vehicle deliveries	Peak daily construction vehicle movements	Peak construction duration
Section 17a: MA10a	Duct Installation Gang	24	48	18 weeks
TC 15 – North Walsham and Dilham Canal (East side)	TC Gang 3	36	72	2 weeks
TC 16 – Bacton Woodland (West and East side)	TC Gang 3	36	72	4 weeks

246. With the introduction of the programme changes the peak number of vehicle movements is forecast to reduce to 72 per day.

247. Therefore, the magnitude of effect is predicted to reduce to very low on a high value sensitive receptor; resulting in a **minor adverse** residual impact.

248. The OTMP (document reference 8.8) contains a specific commitment to managing the HGV movements on link 47c and 49.

24.7.7.2.5 Link 69

249. Link 69 has been considered for mitigation during Impact 1: Severance assessment. The mitigation proposals discussed in section 24.7.7.1 would equally apply to Impact 2: Amenity and would reduce the forecast traffic demand to 48 daily HGV movements.

250. With this much reduced demand the effect is considered to be of low magnitude. However, noting the high sensitivity of the receptor it is expected that the residual impact significance would be marginally **moderate adverse**.

251. The assessed impact is very localised (impacting on a small number of dwellings) and is for a relative short duration of time. It is considered community engagement to establish clear lines of communication to the appointed contractor would serve to identify periods that are particularly sensitive to HGV movements and that could further mitigate this impact.

252. The OTMP (document reference 8.8) contains a specific commitment to managing the HGV movements on link 69 and notes the need for community engagement.

24.7.7.2.6 Summary

253. Table 24.33 provides a summary of the potential pedestrian amenity impacts and the expected resultant residual impacts following application of the proposed mitigation.

Table 24.33 Pedestrian amenity summary

Link	Link description	Initial impact assessment	Residual impact assessment	Mitigation measures (additional to Outline TMP)
10	A47	Minor adverse	n/a	n/a
16	B1110/B1146 – Holt Road	Minor adverse	n/a	n/a
17	B1145 - Billingford Road	Moderate adverse	Minor adverse	• Enhanced TMP measures.
21	B1147 – Etling Green	Moderate adverse	Minor adverse	• Enhanced TMP measures.
22	B1147 – Dereham Road	Moderate adverse	Minor adverse	• Enhanced TMP measures.
25	Elsing Lane	Minor adverse	n/a	n/a
32	B1149 - Edgefield	Minor adverse	n/a	n/a
33	B1149 -Holt Road	Minor adverse	n/a	n/a
34	B1145 – west of Cawston	Moderate adverse	Minor adverse	• Enhanced TMP measures.
35a	B1159	Moderate adverse	Minor adverse	• Enhanced TMP measures.
35b	B1159	Moderate adverse	Minor adverse	• Enhanced TMP measures.
36	B1149 – Holt Road	Moderate adverse	Minor adverse	• Enhanced TMP measures.
37	B1145 - Cawston Road	Minor adverse	n/a	• n/a
40a	A140 - Roughton	Minor adverse	n/a	• n/a
41	B1436 - Felbrigg	Moderate adverse	Minor adverse	• Enhanced TMP measures.
42	B1145 – Reepham Road	Major adverse	Minor adverse	• Enhanced TMP measures. • No concurrent Infrastructure components construction. • Extend TC 6 peak construction period.
46	B1145	Minor adverse	n/a	n/a
47b	North Walsham Road - Edingthorpe Green	Minor adverse	n/a	n/a
47c	North Walsham Road - Edingthorpe Green	Major adverse	Minor adverse	• Enhanced TMP measures. • No concurrent Infrastructure component construction. • Extend TC 16 Peak construction period. • Restrict delivery window to outside of school pick up and drop off times.

Link	Link description	Initial impact assessment	Residual impact assessment	Mitigation measures (additional to Outline TMP)
49	B1159	Major adverse	Minor adverse	• Enhanced TMP measures; • No concurrent Infrastructure component construction. • Extend TC 16 Peak construction period. • Restrict delivery window to outside of school pick up and drop off times.
65	A47	Minor adverse	n/a	n/a
66	Wendling – Dereham Road	Minor adverse	n/a	n/a
67	North Walsham Road / Happisburgh Road	Minor adverse	n/a	n/a
68	The Street / Heydon Road	Minor adverse	n/a	n/a
69	Little London Road	Major adverse	Moderate adverse	• Enhanced TMP measures; • No concurrent Infrastructure component construction. • Increase construction programme for section 16a of duct installation. • Locate reception sides of TCs to area served by link 69. • Consolidate TC Employees at MA10 to transfer via multi-occupancy vehicles.
70	Plantation Road	Minor adverse	n/a	n/a
71	Vicarage Road / Whimpwell Street	Moderate adverse	Minor adverse	Enhanced TMP measures.
72	Dereham Road / Longham Road - Dillington	Moderate adverse	Minor adverse	Enhanced TMP measures.
73	Hoe Road South	Minor adverse	n/a	n/a
74	Mill Street, Elsing Road – Swanton Morley	Minor adverse	n/a	n/a
75	B1354	Minor adverse	n/a	n/a
76	Hall Lane – North Walsham	Minor adverse	n/a	n/a
77	Bylaugh	Minor adverse	n/a	n/a
78	B1145 / Suffield Road	Minor adverse	n/a	n/a
79	High Noon Road / Church Road	Minor adverse	n/a	n/a

24.7.7.3 Impact 3: Road safety

254. During stakeholder engagement, Highways England stated that they *'do not recognise GEART significance thresholds for assessing road safety (and capacity)'.* Therefore, as a 'first pass' only those links that exhibit a 'negligible' increase in total

traffic or HGV component have been screened out.

255. Table 24.34 provides a summary of the collision clusters identified in Table 24.10 and includes details of the peak increase in daily construction flows in comparison to the forecast background daily traffic flows in 2022.

Table 24.34 Crashmap collision cluster information

Link	Cluster Ref No.	Description	% increase		Summary
			All vehicles	HGVs	
2	1	A47 at the junction of Woodlane and Berrys Lane	3.3%	25.5%	It is considered that a peak change in total traffic of 3% and HGV traffic of 25.5% represents a very low magnitude of effect on a potentially high sensitive receptor. Therefore, the impact is assessed as **minor adverse**.
3	14	A146 (Loddon Road) junction with slip road off A47	1.3%	10.0%	It is considered that a peak change in total traffic of 1.3% and HGV traffic of 10% represents a very low magnitude of effect on a potentially high sensitive receptor. Therefore, the impact is assessed as **minor adverse**.
5	12	A47 Junction with the B1140 (Acle Road)	1.6%	28.1%	It is considered that the change in HGV traffic could lead to potentially significant impacts.
8	13	A146 (Loddon Road) junction with slip road onto A47	2.5%	42.7%	
8	15	A146 (Beccles Road) at the junction of B1136 (Yarmouth Road)			
8	16	A146 (Beccles Road)			
12	17	A1065 junction with Gogg's Mill Road	0.7%	0.0%	It is considered that a peak change in total traffic of 0.7% represents a very low magnitude of effect on a potentially high sensitive receptor. Therefore, the significance impact is assessed as **minor adverse**.
26	2	Dereham Road (A1074) within the vicinity of the Norwich Road junction	0.5%	0.0%	It is considered that a peak change in total traffic of 0.5% represents a very low magnitude of effect on a potentially high sensitive receptor. Therefore, the magnitude of impact is assessed as **minor adverse**.
26	4	Dereham Road (A1074) at the junction of Larkman Lane and Marl Pit Lane			
26/27	3	A140, A1074 and Dereham Road (A1074) roundabout	0.4%	0.0%	It is considered that a peak change in total traffic of 0.4% represents a very low magnitude of change on a potentially high sensitive receptor. Therefore, the magnitude of impact is assessed as **minor adverse**.
27	5	A140 at the junction of Hellesdon Hall Road	0.4%	0.0%	

Link	Cluster Ref No.	Description	% increase		Summary
			All vehicles	HGVs	
28	6	A140 (Sweet Briar Road) at the junction of Drayton high Road, Drayton Road and Boundary Road	0.6%	0.0%	It is considered that a peak change in total traffic of 0.6% represents a very low magnitude of effect on a potentially high sensitive receptor. Therefore, the magnitude of impact is assessed as **minor adverse**.
28/38/62	7	A1402 (Boundary Road and Mile Cross Lane) at the junction of A140, Cromer Road and Aylsham Road	0.6% - 1.2%	0.0%	It is considered that a peak change in total traffic of up to 1.2% represents a very low magnitude of effect on a potentially high sensitive receptor. Therefore, the magnitude of impact is assessed as **minor adverse**.
36/38/39	18	A140 (Holt Road) roundabout with B1149	1.2% - 4.2%	0.0% - 147.5%	It is considered that the change in HGV traffic could lead to potentially significant impacts.
55	11	A149 (Norwich Road) roundabout with the Caister By Pass	1.2%	55.7%	
55/56	10	A149 (Norwich Road roundabout with the A1064 (Main Road) and Castle Lane	1.2% - 3.7%	55.7% - 79.0%	
62	8	A1042 (Mile Cross Lane) at the junction of Vulcan Road and Weston Road	0.6%	0.0%	It is considered that a peak change in total traffic of 0.6% represents a very low magnitude of effect on a potentially high sensitive receptor. Therefore, the magnitude of impact is assessed as **minor adverse**.
62/63	9	A1052 (Chartwell Road) Roundabout with the A1151 (Wroxham Road and Sprowston Road) and Mousehold Lane	0.6% - 0.6%	0.0%	
64	19	A47 roundabout, Horn Hill with Belvere Road	3.0%	50.3%	It is considered that the change in HGV traffic could lead to potentially significant impacts.

256. Table 24.34 identifies that of the 19 collision clusters within the traffic and transport study area, 10 would experience very low magnitude of effect resulting in a **minor adverse** impact. The remaining six sites would experience increases in HGV traffic which could potentially result in significant impacts and are therefore considered further.

257. To inform the further review of the above identified junctions, detailed collision data (known as STATS19[6]) has been obtained from Norfolk County Council and Suffolk

[6] Accidents on the public highway that are reported to the police and which involve injury or death are recorded by the police on a STATS19 form. The form collects a wide variety of information about the accident (such as time, date, location, road conditions).

County Council for the most recently available five year period (01.05.12 to 30.04.17 and 01.04.12 to 01.04.17 respectively).

258. The STATS19 collision data has been examined to identify any emerging patterns or factors that could be exacerbated by the project's traffic generation. The review is summarised below with full details included as Appendix 24.20.

24.7.7.3.1 Cluster site 10

259. Cluster site 10 is situated at a four arm roundabout to the west of Caister-on-Sea. The A149 approaches from the east as a dual carriageway and north as a single carriageway road. The A1064 heads west of the roundabout with Castle Lane leading south, both of which are single carriageway roads.

260. The junction has experienced nine collisions within the last five years. A review of the collisions at site 10 has indicated that four were single vehicle loss of control collisions; three were rear end shunts and two were collisions between vehicles and pedal cycles. However, there is no pattern to the location of the collisions with the collisions spread around the junction.

261. A review of the baseline highway environment at and on the approach to the roundabout has identified that the junction is of a modern standard and accommodates road safety measures, including advanced warning and direction signing on the A149 and A1064 approaches. The junction is also lit.

262. It is noted that whilst there is a pattern of collision types, the collisions are of a type that would be typical for this form of junction and are not concentrated at any particular location. Therefore, the junction is considered a low sensitivity receptor.

263. Cluster 10 is located at the intersection of links 55 and 56 which are projected to experience an increase of HGV traffic of up to 79%. This is considered to represent a medium magnitude of effect on a low sensitivity receptor resulting in a **minor adverse** impact.

24.7.7.3.2 Cluster site 11

264. Cluster site 11 is situated approximately 1.2km south west of Cluster 10 at a four arm roundabout to the west of Caister-on-Sea. The dual carriageway A149 approaches from the west and south. The Caister By-Pass approach from the north and Norwich Road from the east are both single carriageway roads.

265. The junction has experienced nine collisions within the last five years. A review of the collisions at site 11 has indicated that four were rear end shunts and four were single vehicle loss of control collisions. However, there is no pattern to the location of the collisions with rear end shunts occurring on three out of four junction arms

and loss of control incidents occurring away from the roundabout on the exit and approach arms.

266. A review of the baseline highway environment at and on the approaches to the roundabout has identified that the junction is of a modern standard and incorporates road safety measures, including advanced warning and direction signing on the A149 approaches. Street lighting is also present.

267. It is noted that whilst there is a pattern of collision types at cluster site 11, the collisions are of a type that would be typical for this form of junction and are not concentrated at any particular arm. In addition, the junction is of a modern standard and benefits from existing targeted road safety measures. Therefore, the junction is considered a low sensitivity receptor.

268. Cluster 11 is located on link 55 that is projected to experience an increase of HGV traffic of up to 55.7%. This is considered to represent a medium magnitude of effect on a low sensitivity receptor resulting in a **minor adverse** impact.

24.7.7.3.3 Cluster site 12

269. Cluster site 12 is located on the A47, between the priority junction with Lingwood Lane and the staggered priority junction with the B1140 north and south.

270. Cluster 12 is located along a section of the A47 which would form part of Highways England's Blofield to North Burlingham A47 corridor improvement RIS scheme.

271. Highway England identify that the corridor acts as a bottleneck creating congestion and as a result, a poor safety record. A preferred route announcement (option 4) has been made by Highways England which would involve dualling a new section of the A47 south of the existing Lingwood Lane junctions and constructing a new junction at the B1140.

272. The construction of the proposed improvements is projected to start in spring 2020 and should be complete by the start of the project construction programme in 2022.

273. It is considered that the proposed corridor improvement programme would be appropriate to mitigate the traffic impact of the project and therefore both discrete cluster locations are considered as a low sensitivity receptor.

274. This is considered to represent a low magnitude of effect on a low sensitivity receptor resulting in a **minor adverse** residual impact.

275. Notwithstanding, during consultation, Highways England requested that a contingency mitigation plan for cluster 12 was considered in the event that the corridor improvement programme is delayed.

276. In response, an investigation into collision patterns at cluster 12 has been undertaken. This review has established that cluster site 12 has experienced 25 collisions within the last five years. In total, of these 25 collisions, 8 are located at the eastbound start of the dualling and junction within Lingwood Lane and 16 at the staggered crossing with the B1140. These two discrete patterns are considered further.

277. The first pattern is comprised of eight collisions of which four were rear end shunts associated with vehicles turning right at the junction of Lingwood Lane and four involved rear end shunts where the A47 transitions between single and dual carriageway.

278. A review of the baseline highway environment at, and on the approaches to the B1140 staggered junction has identified that the junctions are of a modern standard and incorporate road safety measures, including advanced warning and direction signing on the A47 approaches. A reduced speed limit of 50mph is maintained throughout the staggered junction layout and street lighting is also present.

279. The second pattern is associated with vehicles turning from the A47 on to the B1140 (South Walsham Road and Acle Road). In total there were 16 collisions of which five were rear end shunts and 11 involved drivers turning across the path of an oncoming vehicle.

280. To mitigate the potential for construction traffic to escalate the identified pattern of rear end shunts it is proposed to provide a 'Queuing Ahead' sign. This sign would provide advance warning of potential queuing at the staggered B1140 junction reducing the potential for rear end shunts. This commitment is contained in the OTMP (document reference 8.8)

281. No construction traffic is projected to turn from the A47 into the B1140 north or south. Therefore, it is considered that the increase in traffic through this junction will not exacerbate the existing pattern of collisions.

282. It is considered that the proposed signage would be appropriate to mitigate the impact of the development traffic if the RIS schemes are not completed on time and therefore the magnitude of effect would be reduced to very low on a high sensitive receptor resulting in a **minor adverse** residual impact.

24.7.7.3.4 Cluster site 13

283. Cluster site 13 is located in the vicinity of the grade separated signalised junctions between the A47 and A146.

284. There have been 26 collisions within the last five years of which 13 are located at the

northbound off-slip from the A47 with the A146 and eight are located at the southbound off-slip from the A47 with the A146.

285. In total, approximately nine collisions were rear end shunt type collisions and 14 were vehicles turning across the path of an oncoming vehicle. It is therefore concluded that there is a pattern of rear end shunts and non-compliance with the traffic signals.

286. A review of the baseline highway environment has identified that the junctions are signalised and include advanced warning and direction signs with evidence of high friction surfacing on the approaches.

287. It is noted that whist there is a pattern of collision types, the junctions are of a modern standard and benefit from existing targeted road safety measures. Therefore, the junction is considered a low sensitivity receptor.

288. Cluster 13 is located on link 8 that is projected to experience an increase in HGV traffic of up to 42.7%. This is considered to represent a low magnitude of effect on a low sensitivity receptor resulting in a **minor adverse** impact.

24.7.7.3.5 Cluster site 15

289. Cluster site 15 is located at the priority junction of the A146 and B1136. The junction also includes a left turn deceleration lane from the A146 to B1136. The A146 is a single carriageway road with the traffic lanes separated by a narrow hatched central area. The B1136 is a single carriageway road which approaches the A146 from the village of Hales from the east immediately after a sharp bend in the road.

290. The junction has experienced 12 collisions within the last five years. A review of these 12 collisions has identified that three involve vehicles turning off the A146 being struck from behind and eight collisions involve vehicles right turning from the B1136 colliding with oncoming vehicles. It is therefore considered that there is a pattern of right turn collisions.

291. A review of the baseline highway environment in the locality of the junction has identified that there is good visibility from the B1136 of oncoming vehicles. However, vehicles using the off-slip from the A146 to B1136 could mask oncoming vehicles reducing the forward visibility of oncoming vehicles.

292. Cluster 15 is located on link 8 that is projected to experience an increase in HGV traffic of up to 42.7%; however, no traffic is projected to turn from the A146 into the B1136. Therefore, it is considered that the increase in traffic through this junction will not exacerbate the existing pattern of collisions.

293. In view of the above, the magnitude of effect is assessed as low on a medium

sensitivity receptor resulting in a **minor adverse** impact.

24.7.7.3.6 Cluster site 16

294. Cluster site 16 is located on the A146 (Beccles Road) at a priority junction with a hand car wash / dealership.

295. The junction has experienced six collisions within the last five year period. All recorded collisions occurred on the eastbound carriageway with traffic waiting to turn right being hit from the rear.

296. Whilst there is a pattern of collisions, a review of the baseline highway environment in the locality of the junction has identified that there is sufficient forward visibility of stationary right turning vehicles. It is therefore considered that driver inattention is the most likely cause of collisions at this junction. Therefore, the junction is considered to be of medium sensitivity.

297. Cluster 16 is located on link 8 that is projected to experience an increase in HGV traffic of up to 42.7%. This is considered to represent a low magnitude of effect on a medium sensitivity receptor resulting in a **minor adverse** impact.

24.7.7.3.7 Cluster site 18

298. Cluster site 18 is located at the four arm roundabout of the A140 and B1149 and the priority junction of the B1149 and Holly Lane immediately to the north of the roundabout.

299. Cluster site 18 has experienced 12 collisions within the last five years. These 12 collisions form two discrete clusters, with five centred around the junction of the B1149 and Holly Lane and seven at the roundabout junction of the A140 and B1149.

300. Cluster 18 is located at the intersection of links 36, 38 and 39 and would therefore experience an increase in HGV traffic of up to 147.5%.

301. However, both of the considered junctions are located adjacent to the recently completed NNDR and are subject to a number of highway layout revisions. These revisions include:

- The stopping up of Holly Lane to create a 3m wide 'private means of access' with combined cycle track; and
- Conversion of the current roundabout to a five arm roundabout which includes an on and off slip road connecting to the NNDR and additional footway/ cycleway facilities.

302. It is considered that the recently completed NNDR improvements would remove the conflict at the junction of the B1149 and Holly Lane and would be appropriate to

mitigate the existing road safety issues at the roundabout junction. Therefore, the cluster is assessed as a very low sensitivity receptor on a high magnitude of effect resulting in a **minor adverse** impact.

24.7.7.3.8 Cluster site 19

303. Cluster site 19 is located between the two roundabout junctions of the A12 within Lowestoft town centre south of the A12 Bascule Bridge.

304. There have been 17 collisions within the last five years at cluster site 19. A review of the incidents indicates that:

- Six involve collisions between vehicles and pedestrians/ cyclists;
- Five are rear end shunt type collisions;
- Four are collisions between vehicles negotiating the eastern roundabout; and
- The remaining two collisions include a motorcycle losing control and a collision between a cyclist and pedestrian off road on the shared use cycleway.

305. Based on the above assessment, it is considered that there may be an emerging pattern of rear end shunt type collisions, collisions involving pedestrians and cyclists and collisions between vehicles negotiating the eastern roundabout. The following paragraphs therefore provide a further review of these collisions. For these particular collision types, five occurred at the toucan crossing between the two roundabouts and eight occurred at the eastern ASDA roundabout.

306. The five collisions at the toucan crossing between the two roundabouts resulted in two rear end shunts and three collisions between vehicles and pedestrians/ cyclist. As such, it is considered that there is a pattern where drivers fail to stop in time for the crossing or have to break sharply resulting in rear end shunts.

307. A review of the baseline highway environment in this location identifies that the crossing is within a section of road that is street lit and subject to a 30mph speed limit. Furthermore, there is good forward visibility to the signal heads, including secondary high mounted signals and high friction surfacing on the approaches. It is therefore reasoned that the collisions at this location are more likely attributable to inattention rather than issue with the highway layout.

308. The eight collisions at the ASDA roundabout included three rear end shunt type collisions, four collisions between vehicles negotiating the roundabout and one collision between a car and cycle crossing the roundabout. As such, it is considered that there is a pattern of drivers failing to appreciate the intended direction of travel of another road user and having to take evasive action including heavy breaking.

309. A review of the baseline highway environment in this location identifies that the

roundabout is of a modern standard, with good visibility on all approach and within the circulatory area of the roundabout. In addition, the roundabout is street lit, subject to a 30mph speed limit and benefits from direction signing on the main approaches, supported by clearly defined lanes within the roundabout. It is therefore reasoned that the collisions at this location are more likely attributable to poor position and driver inattention rather than issue with the highway layout.

310. It is considered that the likely causes of collisions at this cluster are attributable to driver inattention and poor position rather than issues with the highway layout. Noting this juxtaposition (i.e. the highway complies with modern safety standards but behaviour is resulting in collisions), cluster 19 is assessed as a medium sensitivity receptor.

311. Cluster 19 is located on link 64 that is projected to experience an increase of HGV traffic of up to 50.3%. This quantum is considered to represent a medium magnitude of effect on a medium sensitivity receptor resulting in an impact of **moderate adverse**.

312. The mitigation strategy for cluster 19 reflects the need to raise awareness of the types of collision occurring at this location and introduce techniques to address inattentiveness. In this regard, it is considered that 'enhanced' TMP measures are provided in additional to those contained in a 'typical' TMP to minimise road safety impacts through measures such as driver training and toolbox talks.

313. Further details with regards to the enhanced mitigation measures to be contained within the finalised TMP are outlined in Table 24.28.

314. It is considered that the enhance TMP would be appropriate to mitigate the impact of the development traffic and therefore the magnitude of effect would be reduced to low on a medium sensitive receptor resulting in a **minor adverse** residual impact.

24.7.7.3.9 Other points of access

Onshore project substation access

315. An A47 Access Technical note provided to stakeholders details a number of access options for the onshore project substation and National Grid substation extension access off the A47. The technical note has been provided as Appendix 24.21.

316. The note details three access options as follows;

- Access A: Existing Necton National Grid Substation access utilising a U-turn strategy at Dereham to remove right turn access off the A47;
- Access A1: Upgrading the existing Necton National Grid Substation access to a DMRB compliant access; and

- Access B: Construction of a new DMRB compliant access opposite 'Spicers Corner' junction.

317. Based on an evaluation of road safety and environmental impact, the technical note concludes there are no overriding reasons to reject any of these three access options.

318. The technical note further concluded, there are no overriding technical/policy constraints preventing A or A1 being utilised concurrently with B. Rather, there are potential road safety benefits to be achieved by removing vehicle conflicts between the onshore project substation and National Grid substation traffic.

319. The Outline AMP (document reference 8.10) commits to further consultation post-consent with highway stakeholders to finalise the onshore project substation access strategy.

Road crossings and side accesses

320. A number of proposed (new) access points will be utilised on the highway network to access the onshore cable route infrastructure components. The accesses would introduce slow moving HGV traffic with the potential to lead to adverse road safety impacts.

321. In order to manage the potential impacts at the new accesses, each access would be designed in accordance with the relevant standards providing appropriate geometry and visibility splays. In addition, advanced warning signing and temporary speed limits would also be provided as required.

322. The exact design of each access would be developed and agreed post-consent with Norfolk County Council and Highways England and presented within the final AMP. Generic designs are included in the Outline AMP (document reference 8.10).

323. All new access points will be subject to an independent road safety audit.

24.7.7.4 Impact 4: Driver delay

324. The GEART screening thresholds do not apply to this effect as the potential impact is defined as significant when the traffic system surrounding the proposed project under consideration is at or close to capacity.

325. To facilitate the assessment of driver delay, Norfolk County Council and Highways England have identified four junctions that they consider most sensitive (section 24.6.5).

326. The project's peak hour traffic demand has been assigned to the sensitive junctions to facilitate an assessment of impact significance. Table 24.35 details the resultant

traffic flows at the junctions during the network peak hours.

Table 24.35 Peak hour traffic flows through sensitive junctions

Junction	Junction arm	Arrivals per arm	
		Light vehicles	HGVs
Junction 1: **Roundabout junction of the A47 / Gapton Hall** Network peak hours 08:00-09:00 and **16:30-17:30**	A47 (north)	0	37
	Pasteur Road	0	0
	A47 (south)	5.5	37
	Gapton Hall Road	0	0
Total arrivals		79.5	
Junction 2: Scenario 1 - Great Yarmouth origin port **Roundabout junction of the A47 'Vauxhall roundabout'** Network peak hours 07:45-08:45 and **17:00-18:00**	A47 (north)	3	32
	Runham Road	0	0
	A149 (southeast)	1	32
	A47 (southwest)	1	0
Total arrivals		69	
Junction 2: Scenario 2 - Lowestoft origin port **Roundabout junction of the A47 'Vauxhall roundabout'** Network peak hours 07:45-08:45 and **17:00-18:00**	A47 (north)	3	22
	Runham Road	0	0
	A149 (southeast)	1	15
	A47 (southwest)	1	16
Total arrivals		79	
Junction 3: **Roundabout junction of the B1141 and A149** **'Fuller's Hill Roundabout'** Network peak hours 07:45-08:45 and **16:15-17:15**	A149 – Lawn Avenue	2	15
	Fuller's Hill	0	0
	North Quay	0	47
	A149 – Acle New Road	0	32
Total arrivals		96	
Junction 4: **Roundabout junction of the A47 and A1064 at Acle** Network peak hours **07:00-08:00** and 16:45-17:45	A1064	0	0
	A47 (east)	0	32
	A47 (west)	5	32
	New Road	0	0
Total arrivals		65	
Notes The network peak hour with the highest traffic flows per junction is displayed in **bold**			

327. As detailed in paragraph 110, Junctions 1 (Gapton Hall Roundabout) and 2 (Vauxhall Roundabout) form part of the proposed A47 corridor improvement RIS scheme due to commence construction in 2020, with a likely completion by 2022, (the same year when the project's peak construction is due to start).

328. The Highways England RIS scheme has been proposed to tackle increasing congestion and capacity issues at junction 1 and 2 which are causing significant queuing and driver delay.

329. The RIS scheme has announced its preferred option however no technical data of the final layout of junction 1 and 2 are available at this time. During consultation with Highways England, it was noted that an assessment of the likely traffic impacts of Norfolk Vanguard would be required on the existing junction layout in the event that the RIS scheme was to be delayed.

330. A proportional approach for assessing the congested junctions was agreed during consultation with Highways England. A comparison of capacity results between the 2022 future year forecast flows against the 2022 future year plus development flows has determined the impact of development traffic on the junctions.

331. An assessment of daily peak hour total vehicle fluctuations on the Trunk Road junction arms has served to quantify the magnitude of impact.

332. Junction 3 at Fuller's Hill Roundabout falls under Norfolk County Council's jurisdiction and has recently (March 2017) completed a junction improvement scheme to mitigate current and future capacity issues. Norfolk County Council has provided a layout plan for the purpose of the assessment.

333. Junction 4 at Acle is an unchanged junction and standard methods of assessing driver delay and capacity were agreed.

24.7.7.4.1 Junction 1 Roundabout junction of the A47 'Gapton Hall roundabout'

334. Junction 1 forms the roundabout junction of the A47, Gapton Hall Road and Pasteur Road to the west of Great Yarmouth town centre.

335. MCTC data for this junction has been taken from traffic counts provided by Norfolk County Council which were undertaken on the 23rd October 2012, Appendix 24.22 shows the surveyed traffic flows. These data have been factored from vehicles to Passenger Car Units (PCUs) and factored from 2012 to 2022, Appendix 24.23 shows the peak hour flow matrices including growth factors.

336. Table 24.36 summarises the modelled RFC, queuing and delay for junction 1 between 16:30-17:30 for the forecast year of 2022 with and without development. Full junction model outputs can be found within Appendix 24.24.

Table 24.36 Junction 1 modelling results summary

Arm	2022 forecast baseflows 16:30 – 17:30			2022 forecast baseflows plus development traffic 16:30 – 17:30		
	DoS (Degree of Saturation)	Delay (s)	MMQ (pcu)	DoS	Delay (s)	MMQ (pcu)
A47 North - Ahead	78.9%	24.5	13.7	83.5	27.1	16.5
A47 South - Ahead	154.7%	719.7	184.8	162.4%	781	207
Practical Reserve Capacity over all lanes	-71.9%			-80.5%		

337. As shown in Table 24.36, Junction 1 operates over capacity at -71.9% Practical Reserve Capacity (PRC) for the 2022 forecast year. The addition of 80 vehicles in the peak hour increases capacity issues to -80.5% PRC. There are also increases in Degree of Saturation (DoS), delay and queuing on the trunk road arm approaches.

338. The peak hour daily traffic flow fluctuations for junction 1 was derived for the northern A47 approach arm from traffic data sourced from TRADS. A neutral month (June) in 2017 has been selected and the daily peak hour flows averaged over the month to culminate in a fluctuation of flows in the order of 181 vehicles. The daily fluctuation calculations for junction 1 can be found in Appendix 24.25.

339. A proportional approach has been undertaken to compare fluctuation in daily peak hour traffic flows on the northern A47 approach arm against development traffic entering the junction on the same arm. When compared with the development flows of 37 HGVS entering the junction it is considered that the development flows at peak hour would be indiscernible from day to day traffic fluctuations. Therefore, the junction is assessed as a high sensitivity receptor on a very low magnitude of effect resulting in a **minor adverse** impact.

24.7.7.4.2 Junction 2 Roundabout junction of the A47 'Vauxhall roundabout'

340. Junction 2 forms the roundabout junction of the A47, A149 to the northwest of Great Yarmouth town centre.

341. MCTC data for this junction has been taken from traffic counts provided by Norfolk County Council which were undertaken on the 23rd October 2012, Appendix 24.26 shows the surveyed traffic flows. These data have been factored from vehicles to PCUs and factored from 2012 to 2022, Appendix 24.27 shows the peak hour flow matrices and growth factors.

342. Two scenarios are presented for junction 2 which assesses the different construction traffic assignment at the junction based on the two port origins of Great Yarmouth

and Lowestoft.

Junction 2: Scenario 1 - Great Yarmouth port origin results

343. Table 24.37 summarises the modelled RFC, queuing and delay for junction 2 (Scenario 1) between 17:00-18:00 for the forecast year of 2022 with and without development. Full junction model outputs can be found within Appendix 24.28.

Table 24.37 Junction 2 modelling results summary – Scenario 1 - Great Yarmouth port origin

Arm	2022 forecast baseflows 17:00 – 18:00			2022 forecast baseflows plus development traffic 17:00 – 18:00		
	RFC	Delay (s)	MMQ (pcu)	RFC	Delay (s)	MMQ (pcu)
A47 North	0.81	13.17	4.26	0.86	17.37	5.93
Runham Road	1.89	768.32	37.46	3.27	3108.22	54.42
A149	1.07	118.94	79.61	1.1	156.1	109.18
A47 South	1.21	410.07	160.23	1.24	480.65	185.54

Junction 2: Scenario 2 - Lowestoft port origin results

344. Table 24.38 summarises the modelled RFC, queuing and delay for junction 2 (scenario 2) between 17:00-18:00 for the forecast year of 2022 with and without development. Full junction model outputs can be found within Appendix 24.29.

Table 24.38 Junction 2 modelling results summary – Scenario 2 - Lowestoft port origin

Arm	2022 forecast baseflows 17:00 – 18:00			2022 forecast baseflows plus development traffic 17:00 – 18:00		
	RFC	Delay (s)	MMQ (pcu)	RFC	Delay (s)	MMQ (pcu)
A47 North	0.81	13.17	4.26	0.85	16.39	5.5
Runham Road	1.89	768.32	37.46	3.01	2777.07	52.62
A149	1.07	118.94	79.61	1.1	160.03	109.74
A47 South	1.21	410.07	160.23	1.26	529.09	214.51

345. As shown in Table 24.36 and Table 24.38, Junction 2 operates significantly over capacity for the 2022 forecast year with three arms showing RFC significantly above the 0.85 recognised threshold for RFC.

346. With the additional 69 development vehicles from the origin port assignment to Great Yarmouth, and the 79 development vehicles from Lowestoft origin port assignments in addition to the 2022 forecast flows shows the junctions experiences further deterioration in RFC, queues and delays.

347. Runham Road in particular experiences an exponential growth in RFC and delays for both scenario 1 and 2.

348. The peak hour daily traffic flow fluctuations for junction 2 has been derived for the northern A47 approach arm from traffic data sourced from TRADS. A neutral month (June) in 2017 was selected and the daily peak hour flows were averaged over the month culminating in a fluctuation of flows in the order of 158 vehicles. The daily fluctuation calculations for junction 2 can be found in Appendix 24.30.

349. A proportional approach has been undertaken to compare fluctuation in daily peak hour traffic flows on the northern A47 approach arm against development traffic entering the junction on the same arm. When compared with the development flows of 32 HGVS entering the junction it is considered that the development flows at peak hour would be indiscernible from day to day traffic fluctuations. Therefore, the junction is assessed as a high sensitivity receptor on a very low magnitude of effect resulting in a **minor adverse** impact.

24.7.7.4.3 Junction 3 – Junction of the B1141 and A149 'Fuller's Hill Roundabout'

350. Junction 3 forms the roundabout junction of the B1141, A149 and North Quay to the northwest of Great Yarmouth town centre.

351. MCTC data for this junction has been taken from traffic counts provided by Norfolk County Council which were undertaken on the 15th October 2015, Appendix 24.31 shows the surveyed traffic flows. These data have been factored from vehicles to PCUs and factored from 2015 to 2022, Appendix 24.32 shows the peak hour flow matrices and growth factors.

352. Fuller's Hill roundabout has recently completed a junction improvement scheme to increase capacity of the roundabout and reduce congestion particularly on the North Quay approach where significant queuing was experienced. The improved layout scheme can be found in Appendix 24.33.

353. Classified turning count survey data for 2015 was provided by NCC. The flows have been factored up to the future year of 2022 by a weekday PM factor of 1.1197.

354. Table 24.39 summarises the modelled RFC, queuing and delay for junction 3 between 16:15-17:15 for the forecast year of 2022 with and without development. Full junction model outputs can be found within Appendix 24.34.

Table 24.39 Junction 3 modelling results summary

Arm	2022 forecast baseflows 16:15 – 17:15			2022 forecast baseflows plus development traffic 16:15 – 17:15		
	RFC	Delay (s)	Queue (pcu)	RFC	Delay (s)	Queue (pcu)
North Quay (north)	0.56	3.94	1.24	0.59	4.4	1.43
Fuller's Hill	0.35	4.11	0.53	0.37	4.56	0.59
North Quay (south)	0.84	17.31	5.09	0.94	35.18	11.19
Acle New Road	0.93	26.27	10.4	0.99	54.81	24.19

355. Table 24.39 shows that without the development traffic the junction exhibits one arm exceeding the recognised 0.85 threshold for RFC with queues up to 11 PCUs. Due to this baseline condition the introduction of relatively modest flows (less than a 3% increase in total traffic), of 96 vehicle movements (94 HGVs and two cars) the junction performance deteriorates further, with queues exceeding 24 PCUs.

356. For Junction 3 the magnitude of effect is therefore assessed as very low on a high sensitivity receptor and the impact is predicted to be **minor adverse**.

24.7.7.4.4 Junction 4 – Junction of the A1064 and A47

357. Junction 4 forms the roundabout junction of the A1064, A47 and New Road east of Acle.

358. MCTC data for this junction has been taken from traffic counts commissioned by Norfolk Vanguard Limited on the 8th February 2018. Appendix 24.35 shows the surveyed traffic flows. These data have been factored from vehicles to PCUs. Appendix 36 shows the surveyed traffic flows from February 2018 and Appendix 24.37 shows the peak hour flow matrices.

359. Table 24.39 summarises the modelled RFC, queuing and delay for junction 4 between 07:00-08:00 for the forecast year of 2022 with and without development. Full junction model outputs can be found within Appendix 24.38.

Table 24.40 Junction 4 modelling results summary

Arm	2022 forecast baseflows 07:00-08:00			2022 forecast baseflows plus development traffic 07:00-08:00		
	RFC	Delay (s)	Queue (pcu)	RFC	Delay	Queue (pcu)
A1064	0.82	21.1	4.32	0.86	28.41	5.74
A47 (east)	1	67.88	24.58	1.07	127.32	54.24
A47 (west)	0.56	3	1.24	0.58	3.2	1.4
New Road	0.55	11.79	1.22	0.59	13.65	1.41

360. Table 24.40 shows that without the development traffic the junction exhibits one arm exceeding the recognised 0.85 threshold for RFC with queues up to 25 PCUs. With the addition of the proposed development traffic (less than a 3% increase in total traffic), of 69 vehicle movements (64 HGVs and five cars) there would be a slight increase in RFC with an associated increase to 55 PCU queues.

361. For Junction 4 the magnitude of effect is therefore assessed as very low on a high sensitivity receptor and the impact is predicted to be **minor adverse**.

24.7.8 Potential Impacts during Operation

362. During the operational phase, traffic movements would be limited to those generated by the daily operation and periodic maintenance at the onshore project substation and National Grid substation and at link boxes/test pits along the onshore cable route.

363. Along the onshore cable route, periodic access to installed link boxes and test pits may be required for inspection, (estimated to be annually). These test pits will be accessible from ground level and will be located close to existing access routes where possible. Access to the cable easement will be required to conduct emergency repairs if necessary.

364. The onshore project substation will not be manned; however, access will be required periodically for routine maintenance activities, estimated at an average of one visit per week for each of the onshore project substation and National Grid substation extension.

365. Considering the activities listed above, no significant traffic impacts are anticipated during the operational phase.

24.7.9 Potential Impacts during Decommissioning

366. This section describes the potential impacts of the decommissioning of the onshore infrastructure with regards to impacts on traffic and transport. Further details are provided in Chapter 5 Project Description.

367. No decision has been made regarding the final decommissioning policy for the onshore cables, as it is recognised that industry best practice, rules and legislation change over time. It is likely the cables would be pulled through the ducts and removed, with the ducts themselves left in situ.

368. In relation to the onshore project substation the programme for decommissioning is expected to be similar in duration to the construction phase. The detailed activities and methodology would be determined later within the project lifetime, but are expected to include:

- Dismantling and removal of outside electrical equipment from site located outside of the onshore project substation buildings;
- Removal of cabling from site;
- Dismantling and removal of electrical equipment from within the onshore project substation buildings;
- Removal of main onshore project substation buildings and minor services equipment;
- Demolition of the support buildings and removal of fencing;
- Landscaping and reinstatement of the site (including land drainage); and
- Removal of areas of hard standing.

369. Whilst details regarding the decommissioning of the onshore project substation are currently unknown, considering the worst case scenario which would be the removal and reinstatement of the current land use at the site, it is anticipated that the impacts would no worse than those during construction.

370. The decommissioning methodology would need to be finalised nearer to the end of the lifetime of the project so as to be in line with current guidance, policy and legislation at that point. Any such methodology would be agreed with the relevant authorities and statutory consultees. The decommissioning works could be subject to a separate licencing and consenting approach.

24.8 Cumulative Impacts

371. The assessment of cumulative impact has been undertaken as a two stage process. Firstly, all the impacts from previous sections have been assessed for potential to act cumulatively with other projects. This summary assessment is set out in Table 24.41.

Table 24.41 Potential cumulative impacts

Impact		Potential for cumulative impact	Rationale
Construction			
1	Severance	Yes	Cumulative impacts arising from two or more projects are possible due to the increase in traffic from the projects.
2	Pedestrian amenity	Yes	Cumulative impacts arising from two or more projects are possible due to the increase in traffic from the projects.
3	Road safety	Yes	Cumulative impacts arising from two or more projects are possible due to the increase in traffic from the projects.
4	Driver delay	Yes	Cumulative impacts arising from two or more projects are possible due to the increase in traffic from the projects.
Operation			
No cumulative impacts are anticipated as there are no operational impacts associated with Norfolk Vanguard.			
Decommissioning			
The detail and scope of the decommissioning works will be determined by the relevant legislation and guidance at the time of decommissioning and agreed with the regulator. A decommissioning plan will be provided. As such, cumulative impacts during the decommissioning stage are assumed to be no worse than those identified during the construction stage.			

372. The second stage of the CIA is an assessment of the onshore project area and the potential effects of other projects scoped into the CIA upon the same receptors. To identify whether this may occur, the potential nature and extent of effects arising from all projects scoped into the CIA have been identified.

373. The projects identified for potential cumulative impacts with Norfolk Vanguard have been discussed during ETG meetings with stakeholders and the full list has been agreed in consultation with local authorities.

374. Table 24.42 summarises those projects which have been scoped into the CIA due to their temporal or spatial overlap with the potential effects arising from the project. The remainder of the section details the nature of the cumulative impacts against all those receptors scoped in for cumulative assessment.

Table 24.42 Summary of projects considered for the CIA in relation to traffic and transport

Project	Status	Development period	[7]Distance from Norfolk Vanguard site (km)	Project definition	Project data status	Included in CIA	Site location / rationale
National Infrastructure Planning							
Norfolk Boreas Offshore Wind Farm	Pre-Application	Expected construction date 2026	0 – projects are co-located	Pre-application outline only	High	Yes	Overlapping proposed project boundaries may result in impacts of a direct and / or indirect nature during construction.
Hornsea Project Three Offshore Wind Farm	Pre-Application	Expected construction date 2021	0 – cable intersects project	Full PEIR available: http://hornseaproject3.co.uk/Documents-library/PEIR-Documents	High	Yes	Overlapping proposed project boundaries may result in impacts of a direct and / or indirect nature during construction.
Dudgeon Offshore Wind Farm	Commissioned	Constructed	0	http://dudgeonoffshorewind.co.uk/	High	No	Construction complete, minimal operational traffic demand.
A47/A12 Junction enhancements to the following junctions and roundabouts: Vauxhall, Gapton Hall, Harfreys, Bridge	Pre-application	Starts 2019/2020 with projected finish year of 2022	26.7km	https://infrastructure.planninginspectorate.gov.uk/projects/eastern/a47-north-tuddenham-to-easton/	Medium	Yes	Insufficient information in the public domain with regards to final scheme proposal. However, Norfolk Vanguard Limited have liaised with Highways England to establish a suitable 'reference case' for highway capacity assessments, therefore it is taken forward into the CIA

[7] Shortest distance between the considered project and Norfolk Vanguard – unless specified otherwise.

Project	Status	Development period	[7]Distance from Norfolk Vanguard site (km)	Project definition	Project data status	Included in CIA	Site location / rationale
Road and James Paget Hospital.							
A47 corridor improvement programme – A47 Blofield to North Burlingham	Pre-application	Expected construction date 2021-22	25	https://infrastructure.planninginspectorate.gov.uk/projects/eastern/a47-blofield-to-north-burlingham/	Medium	Yes	
A47 corridor improvement programme – A47 / A11 Thickthorn	Pre-application	Expected construction date 2020-21	18	https://infrastructure.planninginspectorate.gov.uk/projects/eastern/a47a11-thickthorn-junction/	Medium	Yes	
Norwich Western Link	Pre-application	2022	2.8	https://www.norfolk.gov.uk/roads-and-transport/major-projects-and-improvement-plans/norwich/norwich-western-link/timeline	Medium	No	If consent is granted, Norfolk Vanguard Limited and its contractors would engage stakeholders to try and establish opportunities to co-ordinate activities and avoid peak traffic impacts.
Third River Crossing (Great Yarmouth)	Pre-application	Expected to start in 2020	28	https://www.norfolk.gov.uk/roads-and-transport/major-	Medium	No	

Project	Status	Development period	[7]Distance from Norfolk Vanguard site (km)	Project definition	Project data status	Included in CIA	Site location / rationale
				projects-and-improvement-plans/great-yarmouth/third-river-crossing			
King's Lynn B Power Station amendments	Pre-application	Construction expected 2018-2021	28	https://www.kingslynnbccgt.co.uk/	Medium	No	The King's Lynn B Power Station site is located west of the project's traffic study area. The traffic and transport study area has been carefully screened by assigning traffic demand to the network and determining the scope and scale of the project's potential traffic impact. Traffic impacts outside of the traffic and transport study area are deemed to be 'insignificant' it therefore follows that there would not be a significant cumulative impact associated with King's Lynn B Power Station.

Project	Status	Development period	[7]Distance from Norfolk Vanguard site (km)	Project definition	Project data status	Included in CIA	Site location / rationale
NNDC							
PF/17/1951 Erection of 43 dwellings and new access with associated landscaping, highways and external works	Awaiting decision	Anticipated Q2 2018	0.7	https://idoxpa.north-norfolk.gov.uk/online-applications/applicationDetails.do?activeTab=summary&keyVal=_NNORF_DCAPR_92323	High	Yes	Sub-regional growth in housing as adopted by the region's Local Plans has been captured within TEMPro future year growth factors for 2022. Therefore, the cumulative effect of housing projects is inherent in the traffic and transport impact assessments.
Bacton Gas Terminal Extension	Approved	Approved 20/09/2016. Expires 20/09/2019	3.0	Approved PDS available https://idoxpa.north-norfolk.gov.uk/online-applications/applicationDetails.do?activeTab=summary&keyVal=_NNORF_DCAPR_88689	Medium	No	Project would not result in an increase in traffic movements, therefore not taken forward into CIA.
Bacton Gas Terminal Coastal Protection	Approved	Approved 18/11/2016. Expires 18/11/2019	2.5	Approved PDS available	Medium	No	Project would not result in an increase in traffic movements.

Project	Status	Development period	[7]Distance from Norfolk Vanguard site (km)	Project definition	Project data status	Included in CIA	Site location / rationale
Bacton and Walcott Coastal Management Scheme	Approved	Expected construction date 2018	1.0	Public information leaflets available: https://www.north-norfolk.gov.uk/media/3371/bacton-to-walcott-public-information-booklet-july-2017.pdf	Medium	No	Project would not result in an increase in traffic movements.
Breckland Council							
21-31 new dwellings in Necton (BLR/2017/0001/PIP)	Awaiting decision	Not known. Application submitted November 2017.	1.0	http://planning.breckland.gov.uk/OcellaWeb/showDocuments?reference=BLR/2017/0001/PIP&module=pl	Medium	Yes	Sub-regional growth in housing as adopted by the region's Local Plans has been captured within TEMPro future year growth factors for 2022. Therefore, the cumulative effect of housing projects is inherent in the traffic and transport impact assessments.
4-8 new dwellings in Necton (BLR/2017/0002/PIP)	Awaiting decision	Not known. Application submitted November 2017.	1.0	http://planning.breckland.gov.uk/OcellaWeb/showDocuments?reference=BLR/2017/0002/PIP&module=pl	Medium	Yes	

Project	Status	Development period	[7]Distance from Norfolk Vanguard site (km)	Project definition	Project data status	Included in CIA	Site location / rationale
70 dwellings (3PL/2016/0298/D) (Phase 2 of 3PL/2012/0576/O)	Approved (21/09/16)	Not known. Application submitted March 2016.	6.4	http://planning.breckland.gov.uk/OcellaWeb/planningDetails?reference=3PL/2016/0298/D&from=planningSearch	Medium	Yes	Sub-regional growth in housing as adopted by the region's Local Plans has been captured within TEMPro future year growth factors for 2022. Therefore the cumulative effect of housing projects is inherent in the traffic and transport impact assessments.
98 dwellings at Swans Nest with access from Brandon Road (3PL/2017/1351/F) (Phase 3 of 3PL/2012/0576/O)	Awaiting decision (due 30/03/2018)	Not known. Application submitted Jan 2016.	6.4	http://planning.breckland.gov.uk/OcellaWeb/planningDetails?reference=3PL/2017/1351/F&from=planningSearch	Medium	Yes	
175 dwellings with access at land to west of Watton Road, Swaffham (3PL/2016/0068/O) (Swans Nest Phase B)	Awaiting decision (due 13/10/2017)	Not known. Application submitted Jan 2016.	6.4	http://planning.breckland.gov.uk/OcellaWeb/planningDetails?reference=3PL/2016/0068/O	Medium	Yes	

375. With reference to paragraph 112, the Department for Transport Trip End Model Presentation Programme (TEMPro) has been used to calculate future year baseline traffic flows. This has captured sub-regional growth in housing and employment as adopted by the region's Local Plans. This information has been taken into account when undertaking the CIA.

24.8.1 Cumulative Impacts during Construction

24.8.1.1 Norfolk Boreas Offshore Wind Farm

376. As identified in Table 24.42, through one of its subsidiaries, Vattenfall Wind Power Ltd is developing the Norfolk Boreas Offshore Wind Farm (herein the 'Norfolk Boreas project') (sister project to Norfolk Vanguard) located to the north of NV East, with the DCO application for Norfolk Boreas following approximately one year behind the Norfolk Vanguard DCO submission. The development of Norfolk Boreas will use the same onshore cable route as Norfolk Vanguard with the addition of a spur to the Norfolk Boreas onshore project substation.

377. The latest indicative programme of onshore activities relating to Norfolk Boreas has been provided by Norfolk Boreas Limited and is provided below:

- Main works for onshore project substation infrastructure - 2024 to 2025;
- Installation of cables and onshore project substation plant for phase 1 – 2026; and
- Installation of cables and onshore project substation plant for phase 2 – 2027.

378. It can therefore be noted that in 2024 and 2025 there could be an overlap between the construction of the Norfolk Boreas project substation and the Norfolk Vanguard cable pull, joint and commissioning phase.

379. It can be noted from Table 24.12 the worst case assessment for Norfolk Vanguard includes the overlap of onshore project substation and duct installation activities along the onshore cable route. This scenario generates greater traffic demand and associated impact than that of a Boreas onshore project substation and Norfolk Vanguard cable pull, joint and commissioning cumulative activities. It is therefore concluded that any potential cumulative impacts associated with Norfolk Boreas have been adequately assessed within the Norfolk Vanguard (worst case) impact assessment.

24.8.1.2 Hornsea Project Three Offshore Wind Farm

380. Ørsted is proposing to develop an offshore wind farm located in the southern North Sea, with a total generating capacity of up to 2,400MW.

381. The outline Export Cable Route (ECR) of the Hornsea project will make landfall at a location between Sheringham and Cley next the Sea. From the landfall location, the ECR heads approximately 55km south to connect to the Norwich Main National Grid Substation.

382. A high level construction programme indicates that onshore construction is currently planned to commence in 2021 and last for a period of six years. The key onshore infrastructure indicative construction durations are:

- Onshore project substation: Q3 2021 – Q3 2024; and
- Onshore cable route: Q1 2023 – Q1 2025.

383. From the above indicative programme, Hornsea Project Three construction will likely coincide with Norfolk Vanguard's duct installation and onshore project substation construction works period.

384. Ørsted has submitted a Hornsea Project Three PEIR in July 2017 and an investigation into the traffic demand set out in Chapter 7 Traffic and Transport of the Hornsea Project Three PEIR has been undertaken.

385. The Hornsea Project Three study area has been segregated into 183 highway links. The onshore cable route has been split into 34 sections which are served by 75 potential access points. Total HGV traffic demand has been presented for each of the 34 onshore cable route sections with an associated maximum daily HGV movement per section. Crucially, the Hornsea Project Three PEIR does not include an assignment of daily HGV movements to the 183 highway links.

386. The Hornsea Project Three application for development consent was submitted in May 2018 and therefore the pre-application stage is running almost concurrently with Norfolk Vanguard. At the time of writing, the data necessary for Norfolk Vanguard to undertake a full CIA taking into account Hornsea Project Three was not publicly available. However, Norfolk Vanguard Limited and Ørsted are in regular and on-going dialogue and Norfolk Vanguard Limited will seek to continue working closely with Ørsted, and with statutory consultees to assess potential cumulative impacts. This approach complies with the relevant EIA Regulations and is consistent with that taken for other applications, where relevant environmental information has become available after the point of the DCO application submission.

24.8.1.3 A47 Corridor improvement programme

387. Highways England has proposed six improvement schemes for the A47 as part of the Roads Investment Strategy announced in 2014. The schemes have been identified as congestion hotspots and significant growth has been predicted in the areas which the proposed improvements will help to support.

388. The A47 corridor improvement programme is classed as a NSIP and would be required to make a DCO application. Current timescales estimate that the DCO will be submitted in summer 2018, with construction commencing in spring 2020.

389. Four of the six schemes that could potentially impact on the project include:

- North Tuddenham to Eastern dualling;
- A47 / A11 Thickthorn Junction;
- A47 Blofield to North Burlingham dualling; and
- Great Yarmouth junction enhancements.

390. The programme of construction works for the schemes is due to start in 2020 and predicted to end in 2022. The works are likely to finish before the main construction works of the project, however this does not allow for slippage in the programme.

391. At this stage, three of the four identified schemes have announced their preferred scheme options and further consultation is ongoing. The full DCO planning process has not yet begun.

392. With regards to highway capacity assessment, it has been agreed with Highways England that a suitable 'reference case' would be to assume no improvements are in place. This reference case forms the basis of the highway capacity assessments set out within section 24.7.7.4.

393. With regards to the potential for cumulative impacts associated with the potential overlap of construction traffic, noting the lack of information available at this stage, it is not possible to provide a meaningful assessment of cumulative impacts.

394. It is therefore proposed that, if approved, through the development of the TMP, Norfolk Vanguard Limited and its contractors would engage Highway England to establish opportunities to co-ordinate activities and avoid peak traffic impacts.

24.8.2 Cumulative Impacts during Operation

395. No cumulative impacts are anticipated as there are no operational impacts associated with Norfolk Vanguard.

24.8.3 Cumulative Impacts during Decommissioning

396. Decommissioning of Norfolk Boreas and Hornsea Project Three may potentially take place at the same time as the Norfolk Vanguard project. The detail and scope of the decommissioning works for the Norfolk Vanguard project will be determined by the relevant legislation and guidance at the time of decommissioning and agreed with the regulator. A decommissioning plan will be provided. As such, cumulative impacts during the decommissioning stage are assumed to be no worse than those

identified during the construction stage.

24.9 Inter-relationships

397. In order to address the environmental impact of the proposed project as a whole, this section establishes the inter-relationships between traffic and transport and other physical, environmental and human receptors. The objective is to identify where the accumulation of impacts on a single receptor, and the relationship between those impacts, may give rise to a need for additional mitigation. Table 24.43 summarises the inter-relationships that are considered of relevance to traffic and transport and identifies where they have been considered within the ES.

Table 24.43 Chapter topic inter-relationships

Topic and description	Related Chapter	Where addressed in this Chapter	Rationale
The relationship between traffic delay and traffic noise upon local residents.	Chapter 25 Noise and Vibration	Traffic data included in the assessment is presented in Chapter 25 Noise and Vibration.	Increased traffic has the potential to increase noise disturbance temporarily.
The relationship between traffic delay and traffic related air quality upon local residents.	Chapter 26 Air Quality	Traffic data included in the assessment is presented in Chapter 26 Air Quality.	Traffic has the potential to temporarily affect air quality.
The relationship between traffic delay and traffic related emissions upon the health of local residents.	Chapter 27 Human Health	Traffic data included in the assessment is presented in Chapter 26 Air Quality and Chapter 27 Human Heath.	Traffic movements associated with construction may generate localised dust emissions leading to potential complaints.

398. The potential for inter-relationship impacts on a link by link basis has been identified and is set out in Appendix 24.38, which sets out a link by link analysis of the accumulation of effects and reviews the mitigation proposed.

24.10 Interactions

399. The impacts identified and assessed in this chapter have the potential to interact with each other, which could give rise to synergistic impacts as a result of that interaction. The worst case impacts assessed within the chapter take these interactions into account and for the impact assessments are considered conservative and robust. For clarity the areas of interaction between impacts are presented in Table 24.44 along with an indication as to whether the interaction may give rise to synergistic impacts.

Table 24.44 Interactions between impacts

Potential interaction between impacts				
Construction				
	1. Severance	**2. Pedestrian Amenity**	**3. Highway Safety**	**4. Driver Delay**
1. Severance	-	Yes	Yes	No
2. Pedestrian Amenity	Yes	-	Yes	No
3. Highway Safety	Yes	Yes	-	Yes
4. Driver Delay	No	Yes	Yes	-
Operation				
No significant impacts.				
Decommissioning				
It is anticipated that the decommissioning impacts will be no worse than those of construction.				

24.11 Summary

400. This chapter of the ES has assessed the potential impacts of the onshore element of the Norfolk Vanguard project on the surrounding traffic sensitive receptors.

401. This chapter has been developed with regards to the legislative and policy framework outlined in section 24.2.1 and further informed by consultation with Highways England and Norfolk County Council.

402. Traffic demand has been calculated with regards to an access strategy that has been adopted for the project and is secured through an OTMP (document reference 8.8) an OTP (document reference 8.9) and an OAMP (document reference 8.10).

403. In accordance with national guidance (GEART) a traffic and transport study area was identified, baseline conditions established and sensitive receptors identified. The traffic and transport study area was screened to identify routes that could be potentially impacted by the projects' traffic generation.

404. A total of 86 highway links within the traffic and transport study area have been assessed for the effects of severance, pedestrian amenity, road safety and driver delay. With the application of mitigation measures (as appropriate) the residual impact for all highway links (bar link 69) was assessed to be not significant.

405. Link 69 has a mitigated traffic demand of 48 daily HGV movements and the effect is considered to be of low magnitude. However, noting the high sensitivity of the receptor it is expected that the residual impact significance would be marginally **moderate adverse**.

406. The assessed impact is very localised (impacting on a small number of dwellings) and is for a relative short duration. It is considered community engagement to establish clear lines of communication to the appointed contractor would serve to identify periods that are particularly sensitive to HGV movements and that could further mitigate this impact.

407. The OTMP (document reference 8.8) contains a specific commitment to managing the HGV movements on link 69 and notes the need for community engagement.

408. Table 24.45.summarises the traffic and transport impact assessment.

Table 24.45 Potential impacts identified for traffic and transport

Potential impact	Receptor	Value/ sensitivity	Magnitude	Significance	Mitigation	Residual impact
Construction						
Impact 1: Pedestrian Severance	Links: 6, 8, 9, 10, 13a, 13b, 14, 16, 17, 18, 19, 21, 22, 24, 25, 29, 30, 32, 33, 34, 35a, 35b, 36, 37, 40a, 40b, 41, 42, 44a, 44b, 45, 46, 47b, 47c, 49, 52, 53, 54, 55, 56, 57, 58, 59, 60, 64, 65, 66, 67, 68, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79.	Low – High	Very Low -	Negligible - Minor	N/A	Negligible – Minor
	69	High	High	Major	Specific targeted TMP measures.	Moderate
Impact 2: Pedestrian Amenity	Links: 6, 8, 9, 10, 13a, 13b, 14, 16, 17, 18, 19, 21, 22, 24, 25, 29, 30, 32, 33, 34, 35a, 35b, 36, 37, 40a, 40b, 41, 42, 44a, 44b,	Low – High	Low – High	Minor – Major	Specific targeted TMP measures.	Minor

Potential impact	Receptor	Value/ sensitivity	Magnitude	Significance	Mitigation	Residual impact
	45, 46, 47b, 47c, 49, 52, 53, 54, 55, 56, 57, 58, 59, 60, 64, 65, 66, 67, 68, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79.					
	69	High	High	Major	Specific targeted TMP measures.	Moderate adverse
Impact 3: Road Safety	Clusters: 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19	Negligible - Medium	Low - Medium	Minor - Moderate	Specific targeted TMP measures.	Minor adverse
Impact 4: Driver Delay	Junctions: 1, 2, 3, 4	High	Low - Very Low	Minor	n/a	Minor adverse
Operation						
All impacts	All links	Low - High	Very Low	Negligible, or up to localised minor adverse	n/a	Negligible, or up to localised minor adverse
Decommissioning						
Impacts upon those links serving the cable route works would be significantly less than the construction phase whilst impacts upon those links primarily serving the onshore project substation (link 1) would be no worse than construction. Therefore, the overall magnitude of effect would be negligible to minor adverse and where appropriate similar mitigation strategies as presented for construction would be valid.						
Cumulative during construction						
Norfolk Boreas Offshore Wind Farm	As per construction.					
Hornsea Project Three Offshore Wind Farm	Refer to section 24.8.1.2					

Potential impact	Receptor	Value/ sensitivity	Magnitude	Significance	Mitigation	Residual impact
Dudgeon Offshore Wind Farm	As per construction.					
Bacton Gas Terminal Extension	As per construction.					
Bacton Gas Terminal Coastal Protection						
Bacton and Walcott Coastal Management Scheme						
A47 Improvement Corridor Programme	As per construction.					
A47/A12 Junction enhancements to the following junctions and roundabouts: Vauxhall, Gapton Hall, Harfreys, Bridge Road and James Paget Hospital.	As per construction.					
Norwich Western Link	As per construction.					
Third River Crossing (Great Yarmouth)	As per construction.					
King's Lynn B Power Station amendments	As per construction.					

Potential impact	Receptor	Value/ sensitivity	Magnitude	Significance	Mitigation	Residual impact
PF/17/1951 Erection of 43 dwellings and new access with associated landscaping, highways and external works, and amendments to substation)	As per construction.					
Cumulative during operation						
No cumulative impacts are anticipated as there are no operational impacts associated with Norfolk Vanguard.						
Cumulative during decommissioning						
The detail and scope of the decommissioning works will be determined by the relevant legislation and guidance at the time of decommissioning and agreed with the regulator. A decommissioning plan will be provided. As such, cumulative impacts during the decommissioning stage are assumed to be no worse than those identified during the construction stage.						

24.12 References

Breckland Council (2009). Adopted Core Strategy and Development Control Policies Development Plan Document. Available online at: https://www.breckland.gov.uk/media/1574/Core-Strat-Final-20-03-2012/pdf/Core_Strat_Final_20_03_2012 Accessed 04/09/2017.
Breckland Council (2017). Breckland local Plan Pre-Submission Publication Emerging Single Local Plan 2011-2036. Available online at: https://www.breckland.gov.uk/media/4486/Pre-Submission-Publication-Part-1/pdf/Breckland_Local_Plan_Pre-Submission_Publication_Part1 Accessed 04/09/2017.
Broadland District Council (2015). Development Management DPD Adopted. Available online at: https://www.broadland.gov.uk/downloads/file/1118/development_management_dpd_adopted Accessed 04/09/2017.
Crashmap (2017). Crashmap. Available online at: http://www.crashmap.co.uk/ Accessed 13/04/2017.
Greater Norwich Development Partnership (2014). Joint Core Strategy for Broadland, Norwich and South Norfolk. Available online at: https://www.broadland.gov.uk/downloads/file/1310/joint_core_strategy_adopted_document_2014 Accessed04/09/2017.
Institute of Environmental Assessment (1993). Guidelines for the Environmental Assessment of Road traffic.
Norfolk County Council (2011). Norfolk County Council Local Transport Plan 3, Norwich: Norfolk County Council.
Norfolk County Council (2017). Transport Asset Management Plan, Norwich: Norfolk County Council.
Norfolk Vanguard Limited (2017). Norfolk Vanguard Offshore Wind Farm Preliminary Environmental Information Report.
North Norfolk District Council (2008). Core Strategy - Incorporating Development Control Policies.
Norwich City Council (2014). Norwich Local Plan - Development Management Policies Plan.
Royal HaskoningDHV (2016). Norfolk Vanguard Offshore Wind Farm Environmental Impact Assessment Scoping Report.
South Norfolk District Council (2015). South Norfolk Local Plan - Development Management Policies Document Adopted Version. Available online at: https://www.south-norfolk.gov.uk/sites/default/files/Development_Management_Policies_Document_0.pdf Accessed 04/09/2017.
Waveney District Council (2009). The approach to Future Development in Waveney to 2021 Core Strategy Development Plan Document. Available at: http://www.eastsuffolk.gov.uk/planning/local-plans/waveney-local-plan/existing-waveney-local-plan/core-strategy/adopted-core-strategy/ Accessed 04/09/2017.
Waveney District Council (2011). Policies to Help Make Decisions on Planning Applications Development Management Policies Development Plan Document. [Online] Available online at: http://www.eastsuffolk.gov.uk/planning/local-plans/waveney-local-plan/existing-waveney-local-plan/development-management-policies/adopted-development-management-policies/ Accessed 04/09/2017.

APPENDIX 3

NORFOLK VANGUARD DCO – DESIGN & ACCESS STATEMENT

Royal HaskoningDHV
Enhancing Society Together

VATTENFALL

Norfolk Vanguard Offshore Wind Farm

Design and Access Statement

Applicant: Norfolk Vanguard Limited
Document Reference: 8.3
APFP Regulation: 5(2)(q)

Date: June 2018
Revision: Version 1
Author: Royal HaskoningDHV

Photo: Kentish Flats Offshore Wind Farm

Document Reference: 8.3

June 2018

For and on behalf of Norfolk Vanguard Limited

Approved by: Ruari Lean, Rebecca Sherwood

Signed: [redacted]

Date: 8th June 2018

For and on behalf of Royal HaskoningDHV

Drafted by: Ruth Henderson

Approved by: Jon Allen

Signed: [redacted]

Date: 24th May 2018

Date	Issue No.	Remarks / Reason for Issue	Author	Checked	Approved
14/05/18	01D	First draft for Norfolk Vanguard Limited Review	RH	AH	JA
24/05/2018	01F	Final for DCO submission	RH	AH	JA

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Figures

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Plates

Glossary

CWS	Country Wildlife Site
DAS	Design Access Statement
DCO	Development Consent Order
EIA	Environmental Impact Assessment
ES	Environmental Statement
GW	Gigawatt
HDD	Horizontal Directional Drilling
HVAC	High Voltage Alternating Current
HVDC	High Voltage Direct Current
NCA	National Character Area
NPSs	National Policy Statements
NSIPs	Nationally Significant Infrastructure Projects
OLEMS	Outline Landscape and Ecological Management Strategy
PRoW	Public Right of Way
SCADA	Supervisory Control and Data Acquisition
SEO	Statement of Environmental Opportunity
SoS	Secretary of State
SUDs	Sustainable Urban Drainage

Terminology

Cable Relay Station	Primarily comprised of an outdoor compound containing reactors (also called inductors, or coils) and switchgear to increase the power transfer capability of the cables under the HVAC technology scenario as considered in the PEIR. This is no longer required for the project as the HVDC technology has been selected.
Indicative mitigation planting	Areas identified for mitigation planting at the onshore project substation and National Grid substation extension.
Jointing pit	Underground structures constructed at regular intervals along the cable route to join sections of cable and facilitate installation of the cables into the buried ducts.
Landfall	Where the offshore cables come ashore at Happisburgh South.
Landfall compound	Compound at landfall within which Horizontal Directional Drilling (HDD) drilling would take place.
Link boxes	Underground chambers or above ground cabinets next to the cable trench housing low voltage electrical earthing links.
Mobilisation area	Areas approx. 100 x 100m used as access points to the running track for duct installation. Required to store equipment and provide welfare facilities. Located adjacent to the onshore cable route, accessible from local highways network suitable for the delivery of heavy and oversized materials and equipment.
Mobilisation zone	Area within which the mobilisation area will be located.
National Grid new / replacement overhead line tower	New overhead line towers to be installed at the National Grid substation.
National Grid overhead line modifications	The works to be undertaken to complete the necessary modification to the existing 400kV overhead lines
National Grid substation	The permanent footprint of the National Grid substation extension.

extension	
National Grid temporary works area	Land adjacent to the Necton National Grid substation which would be temporarily required during construction of the National Grid substation extension.
Necton National Grid substation	The existing 400kV substation at Necton, which will be the grid connection location for Norfolk Vanguard.
Onshore 400kV cable route	Buried high-voltage cables linking the onshore project substation to the Necton National Grid substation.
Onshore cable corridor	200m wide onshore corridor within which the onshore cable route would be located as submitted for PEIR.
Onshore cable route	The 45m easement which will contain the buried export cables as well as the temporary running track, topsoil storage and excavated material during construction.
Onshore cables	The cables which take the electricity from landfall to the onshore project substation.
Onshore project area	All onshore electrical infrastructure (landfall; onshore cable route, accesses, trenchless crossing technique (e.g. Horizontal Directional Drilling (HDD)) zones and mobilisation areas; onshore project substation and extension to the Necton National Grid substation and overhead line modification).
Onshore project substation	A compound containing electrical equipment to enable connection to the National Grid. The substation will convert the exported power from HVDC to HVAC, to 400kV (grid voltage). This also contains equipment to help maintain stable grid voltage.
The Applicant	Norfolk Vanguard Limited.
The OWF sites	The two distinct offshore wind farm areas, Norfolk Vanguard East and Norfolk Vanguard West.
The project	Norfolk Vanguard Offshore Wind Farm, including the onshore and offshore infrastructure
Transition pit	Underground structures that house the joints between the offshore export cables and the onshore cables within the landfall
Trenchless crossing zone (e.g. HDD)	Temporary areas required for trenchless crossing works.
Workfront	The 150m length of onshore cable route within which duct installation would occur

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1 INTRODUCTION

1.1 Purpose of the Design and Access Statement

1. The purpose of this Design and Access Statement (DAS) is to provide details of the use, layout, scale and appearance of the Norfolk Vanguard offshore wind farm (the 'project'). The DAS supports the application for a Development Consent Order (DCO) for the project and should be read in conjunction with the DCO and supporting documentation.

2. This application is based on realistic worst case dimensions for the proposed installed infrastructure. The design will continue to be developed post-consent and a detailed design will be submitted for approval in accordance with DCO Requirement 16 and any principles included within this DAS.

3. The project is described in more detail in section 4 of this DAS and in Chapter 5 Project Description of the Environmental Statement (ES).

4. The DAS focuses on demonstrating the design and development of the Norfolk Vanguard permanent above ground infrastructure such as the onshore project substation and National Grid substation extension including overhead line modifications.

5. The DAS explains the principles and concepts that have influenced the form and appearance of the elements of the onshore project area and provides a tool to communicate how the requirements for good design and access provision have been considered, and will be considered for the detailed design of the substation in due course.

6. Information contained in the ES has been used to inform the preparation of this DAS, and reference should be made to the ES for full details of both the offshore and onshore project components and their relationship to the receiving environment, particularly:

    - Chapter 2 Need for the Project;
    - Chapter 3 Policy and Legislative Context; and
    - Chapter 5 Project Description.

2 PLANNING CONTEXT AND GUIDANCE

2.1 National Policy Statements

7. National Policy Statements (NPSs) form primary planning policy documents that are specifically provided for by the Planning Act 2008 to guide decision making on Nationally Significant Infrastructure Project (NSIP) applications. The application for the project will be determined in accordance with relevant NPSs.

8. Further detail on the planning policies associated with the project is found in the Norfolk Vanguard ES, Chapter 3 Policy and Legislative Context.

9. The three NPSs that hold particular relevance for offshore wind and its associated onshore development are:

- Overarching NPS for Energy (EN-1, July 2011) (DECC 2011a);
- NPS for Renewable Energy Infrastructure (EN-3, July 2011) (DECC 2011b); and
- NPS for Electricity Networks Infrastructure (EN-5, July 2011) (DECC 2011c).

2.1.1 Overarching NPS for Energy (EN-1)

10. Existing policies set out within EN-1 make clear the requirements for good design in energy projects. Paragraph 3.7.1 of EN-1 explains that much of the new electricity infrastructure that is needed will be located in places where there is no existing network infrastructure. It acknowledges that this is likely to be the case for many wind farms, or where there may be technical reasons why existing network infrastructure is not suitable for connecting the new generation infrastructure.

2.2 Guidance

11. There is no specific guidance provided for the preparation of design and access statements in relation to NSIPs.

12. This DAS has been prepared in line with The Commission for Architecture and the Built Environment guidelines (CABE, 2007). The bullet points below set out the key parameters set out in the CABE guidelines:

- Use – the purpose of the onshore project substation and how it will fit within the surrounding environment;
- Amount – size and volume of the onshore project substation and its constitute elements;
- Layout – the relationship between the onshore project substation and the surrounding buildings;
- Scale – the physical size and shape of the onshore project substation development;

- Appearance – the physical look of the onshore project substation specifically the design and materials;
- Landscaping – how mitigation proposals will be applied to screen the development from wider views; and
- Access – inclusive of construction and operational traffic and how crossings over roads and watercourses will be achieved.

13. These parameters are discussed in section 6 of this DAS.

3 DESCRIPTION OF THE DEVELOPMENT

3.1 The Project

14. The project comprises two distinct offshore areas, Norfolk Vanguard East (NV East) and Norfolk Vanguard West (NV West) ('the OWF sites'). The offshore wind farm sites are located approximately 47km from their closest point to the Norfolk Coast and would be connected to the shore by offshore export cables from the wind farm to a landfall point at Happisburgh South, Norfolk. From there, onshore cables would transport power over approximately 60km to the onshore project substation at Necton, Norfolk.

15. Once built, Norfolk Vanguard would have a capacity of up to 1800MW. The offshore components include:

- Wind turbines;
- Offshore electrical platforms;
- Accommodation platforms;
- Interconnector cables; and
- Export cables.

16. The onshore components of the project include:

- Landfall;
- Onshore cable route, accesses, trenchless crossing technique (e.g. Horizontal Directional Drilling (HDD)) zones and mobilisation areas;
- Onshore project substation; and
- Extension to the Necton National Grid substation and overhead line modifications.

17. The onshore and offshore project areas are shown on Figure 1 and Figure 2. A full description of the project for offshore and onshore is available in Chapter 5 Project Description of the ES.

18. Given their distance offshore there is not considered to be any visibility of the offshore infrastructure from the coast, and any requirement for a landscape and visual impact assessment has been scoped out of the EIA. As such, this DAS considers the onshore infrastructure only.

19. Table 3.1 provides a list of key onshore parameters and their associated characteristics for the project.

Table 3.1 Indicative onshore project characteristics

Parameter	Characteristic
Landfall	
Landfall	Happisburgh South
Onshore Cable Route	
Export cable route length (km)	60 (approximate)
Number of onshore cable trenches	Up to Four
Number of ducts	Up to six
Jointing Bays	Up to 150
Onshore Project Substation	
Onshore project substation area (m x m)	Up to 250 x 300
Number of substations within compound	One substation (comprised of two convertor halls)
Onshore project substation tallest building (m)	Up to 19 (HVDC converter hall)
Onshore project substation tallest structure (m)	Up to 25 (Lightning protection mast)
Onshore project substation fence height (m)	Up to 3.5
National Grid substation extension	
Grid connection location	Necton National Grid substation
National Grid substation extension area (m x m)	Up to 200 x 150
National Grid substation extension tallest structure (m)	Up to 15 (Outdoor AIS busbar and landing gantries)
Overhead Line Modifications	
Net number of permanent new towers	1
Tallest new tower (m)	Up to 55m

4 SITE SELECTION PROCESS

4.1 Introduction

20. The siting, design and refinement of the project has followed a site selection process, taking account of environmental, physical, technical, commercial and social considerations and opportunities as well as engineering requirements with the aim of identifying sites that will be environmentally acceptable whilst also enabling, in the long-term, benefits of the lowest energy cost to be passed onto the consumer. A multi-disciplinary design team was formed to undertake the site selection process which included a team of specialists comprising engineers and EIA consultants whose expertise were drawn upon throughout the site selection process.

21. The site selection process is shown in Plate 1, and outlined in more detail in Chapter 4 Site Selection and Assessment of Alternatives. Each stage of the site selection process forms part of an iterative design process undertaken to identify the most suitable locations and configuration for project infrastructure. The framework for the site selection process is based upon a set of design principles and engineering requirements.

22. The details of how sensitive site selection has shaped the final project design are also discussed in section 6 of this DAS.

4.2 Consultation

23. Norfolk Vanguard Limited has undertaken pre-application engagement with stakeholders, communities and landowners in order to inform the submitted project design and communicate decisions on refinements (for further information see the Consultation Report (document reference 5.1)). The Scoping Report (Royal HaskoningDHV, 2016) and the Preliminary Environmental Information Report (PEIR) (Norfolk Vanguard Limited, 2017) set out the process for the development of the onshore and offshore elements of the projects showing a series of search areas for the landfall, onshore cable corridor, cable relay station (CRS) locations (no longer required) and onshore project substation locations.

24. The refinements in the project layout and configurations have been communicated to relevant audiences through the informal and formal pre-application stages (20 month period) between scoping in October 2016 and the application, and feedback received has been taken into consideration where possible.

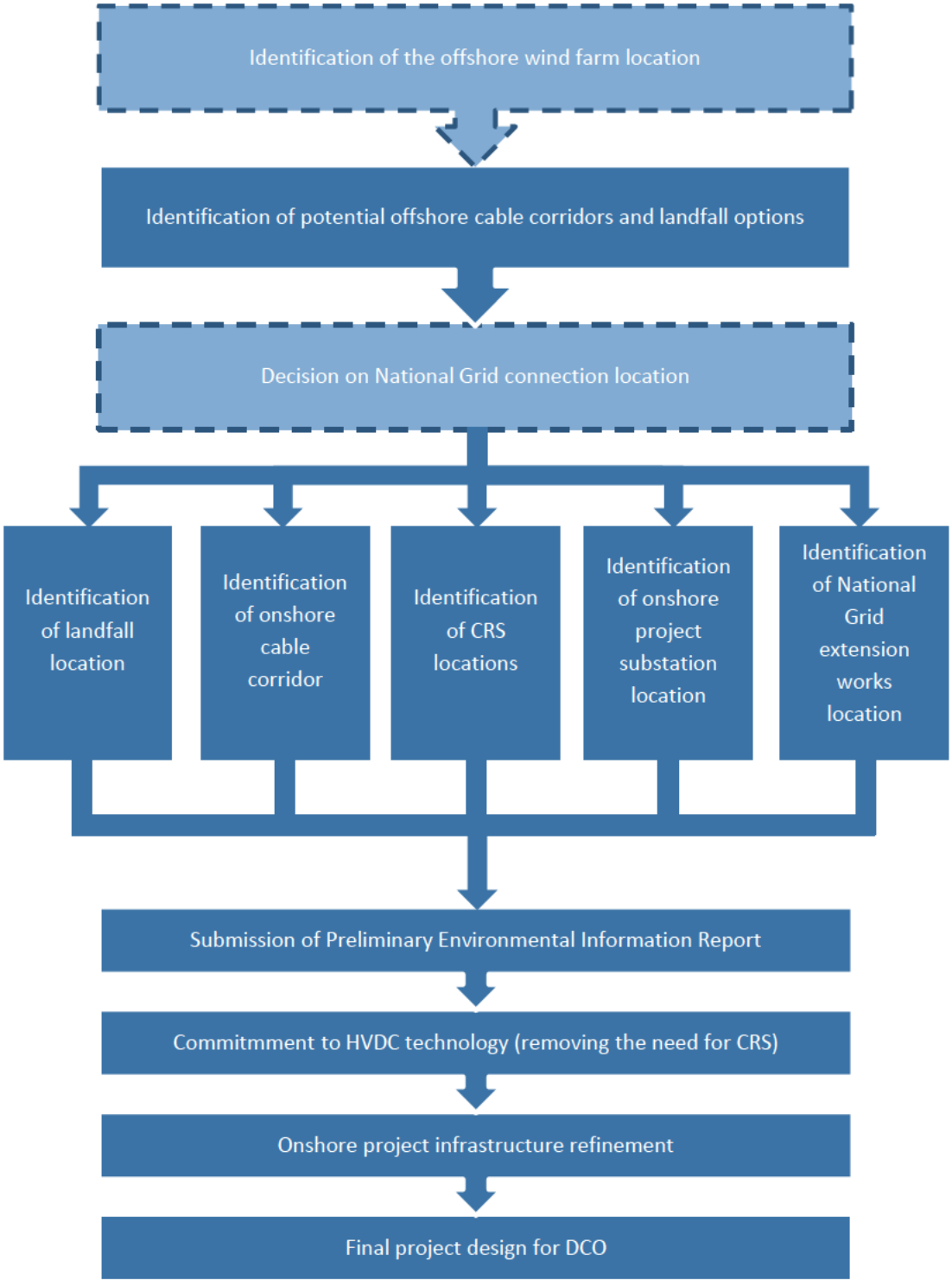


Plate 1 Site selection process[1]

1 Strategic decisions regarding fundamental project locations such as the offshore wind farm location and grid connection point have been made in conjunction with the Crown Estate and National Grid respectively.

5 DESIGN CONSIDERATIONS

5.1 Consideration of Alternatives Influencing the Project Design

25. A number of alternatives have been considered as part of the design decision-making process to date. Assessment of alternatives has been considered from the outset of the project, and were reported within the Scoping Report (Royal HaskoningDHV, 2016) and PEIR (Norfolk Vanguard Limited, 2017), and alternatives have been considered throughout the refinement of the project.

26. As project design is an iterative process, and a multidisciplinary approach, alternatives have been considered incorporating engineering, buildability, cost, environmental, landowner, community, and stakeholder considerations to inform the final design.

27. The early strategic project consideration of alternatives which fed directly into the site selection process, are detailed in Table 5.1.

Table 5.1 Strategic project alternatives considered

Alternatives considered	Decision	Benefit
• Strategic approach to delivering Norfolk Vanguard and Norfolk Boreas • No elements of Norfolk Boreas considered within the design envelope for Norfolk Vanguard	**To take a strategic approach to delivering Norfolk Vanguard and Norfolk Boreas.**	This strategic approach would allow the main civil works for the cable route to be completed in one construction period and in advance of cable delivery, preventing the requirement to reopen the land in order to minimise disruption. Co-location of onshore project substations will keep these developments contained within a localised area and, in so doing, will contain the extent of potential impacts.
• Overhead lines along the ~60km route from landfall to grid connection location • Buried onshore cables within ducts along the ~60km route from landfall to grid connection location	**Buried onshore cables within ducts**	The environmental benefits of this are to minimise visual impacts and to deliver the project within the timeframes set by the UK government in relation to targets on renewable energy and CO_2 reduction.
• Ducts laid in a sectionalised approach to enable cable pull through at a later stage • Open cut and direct lay of onshore cables along the full length of the cable route	**Ducts laid in a sectionalised approach to enable cable pull through at a later stage**	The environmental benefit of this would minimise the amount of land being worked on at any one time and would also minimise the duration of works on any given section of the route.

5.2 Identification of Onshore Project Substation Location

28. In order to identify the most appropriate location to site the onshore project substation, National Grid's Guidelines on Substation Siting and Design (The Horlock Rules) have been taken into consideration. These guidelines document National Grid's best practice for the consideration of relevant constraints associated with the siting of substations. The Horlock Rules have been considered as part of the development of the onshore project substation location and those relevant to design are outlined within Table 5.2.

Table 5.2 Application of Horlock Rules (relevant to design) to onshore project substation

National Grid's Approach to Design of Substations	Norfolk Vanguard onshore project substation considerations
Design	
In the design of new substations or line entries, early consideration should be given to the options available for terminal towers, equipment, buildings and ancillary development appropriate to individual locations, seeking to keep effects to a reasonably practicable minimum.	HVDC technology has been committed to which removes the requirement for a cable relay station. In addition, onshore cable will be buried to avoid introducing new overhead power lines. Overhead line modification is unavoidable as part of the National Grid extension works however, the number of new towers has been minimised by upgrading an existing tower. The net increase in new towers will be one, which will be located in proximity to existing towers to reduce the potential proliferation of energy infrastructure. Realistic worst case dimensions have been proposed for the substation infrastructure, taking into account the largest structure (the converter hall at up to 19m tall).
Space should be used effectively to limit the area required for development consistent with appropriate mitigation measures and to minimise the adverse effects on existing land use and rights of way, whilst also having regard to future extension of the substation.	Permanent footprints for the onshore project substation are based on realistic preliminary layouts. During detailed design, consideration will be given to space-efficient solutions where appropriate. The location of the onshore project substation has avoided direct impacts to public rights of way.
The design of access roads, perimeter fencing, earth shaping, planting and ancillary development should form an integral part of the site layout and design to fit in with the surroundings.	A detailed landscape and visual impact assessment has been undertaken to support the application. This process has informed the approach to landscape planting to minimise potential visual impacts. The choice of substation site was driven by the existence of existing woodland, and the proposed landscape planting will reinforce these areas. The presence of access roads, perimeter fencing and ancillary development were taken into account as part of this assessment.
Line Entry	
In open landscape especially, high voltage line entries should be kept, as far as possible, visually separate from low voltage lines and other overhead lines so as	All new cabling between the landfall and the onshore project substation (approximately 60km) will be buried underground to avoid the introduction of new

National Grid's Approach to Design of Substations	Norfolk Vanguard onshore project substation considerations
to avoid a confusing appearance.	overhead lines in an open landscape. Modifications to the existing overhead line structures are required at Necton to accommodate the newly installed infrastructure. The net new number of towers required to accommodate the works is one, and will be in proximity to the existing corner tower (to the north east of the existing Necton National Grid substation) to minimise proliferation of energy infrastructure and additional clutter.
The inter-relationship between towers and substation structures and background and foreground features should be studied to reduce the prominence of structures from main viewpoints. Where practicable the exposure of terminal towers on prominent ridges should be minimised by siting towers against a background of trees rather than open skylines.	Overhead line modification is unavoidable as part of the National Grid extension works however, the number of new towers has been minimised by upgrading an existing tower. The net increase in new towers will be one, which will be located in proximity to existing towers to reduce the potential proliferation of energy infrastructure.

5.3 Design Principles and Recommendations

29. The final design of the onshore project substation and National Grid substation extension are subject to detailed design post-consent. In order to minimise visual impacts as far as possible, the appropriate building design and materials will be considered, to ensure blending with the local environment and minimisation of impacts as far as possible.

Table 5.3 Design Principles for the onshore project substation and National Grid substation extension.

Principle	Description
1	Continue to engage relevant authorities on detailed design and landscaping proposals as detailed design progresses.
2	Actively seek appropriate building design and materials (e.g. building materials, shape, layout, coloration and finishes).
3	The design of the onshore project substation will be within the parameters set out in Requirement 16 of the DCO, namely: • Buildings must not exceed a height of 19m; • External electrical equipment must not exceed 25m; • The total footprint of each building housing the principal electrical equipment must not exceed 110m by 70m; and • The fenced compound area must not exceed 250m by 300m.
4	The design of the National Grid substation will be within the parameters set out in Requirement 16 of the DCO, namely: • The total number of buildings housing principal electrical equipment must not exceed two; • The total net number of new overhead line towers must not exceed two, and must not exceed a height of 55m; • Buildings and external electrical equipment must not exceed a height of 15m; and • The fenced compound area (excluding accesses) must not exceed 200m by 150m.
5	Landscaping to minimise the visual impacts, and respond to local landscape character and biodiversity will be undertaken and considered with building design and layout of ancillary structures. Delivery of this principle will be guided by implementation of the Outline Landscape and Ecological Management Strategy (OLEMS) (document 8.7).
6	A detailed SUDS drainage strategy will be developed.

6 ONSHORE PROJECT DESIGN

6.1 Introduction

30. There will be no above ground permanent infrastructure associated with the landfall and this is not considered within this DAS. The onshore cable route will be buried underground in ducts); the only potential above ground infrastructure associated with the cable route is the inclusion of link boxes, which are considered within this DAS. Other than link box design, the DAS focuses on the design and development of the Norfolk Vanguard onshore project substation and National Grid substation extension (including overhead line modifications).

31. As set out in section 2.2 the approach within any DAS is to consider the use, amount, layout, scale, appearance, landscaping (where relevant) and access of the permanent above ground infrastructure.

6.2 Link Boxes Design

6.2.1 Use, Amount, Scale, Appearance

32. The onshore cable route will be approximately 60km in length, from the landfall to the onshore project substation at Necton. Sections of cabling would be connected together in jointing bays along the route and link boxes are required in proximity (within 10m) to a subset of jointing pit locations. Link boxes would be the only potential permanent above ground feature associated with the onshore cable route.

33. Link boxes would not be required at all jointing locations and can typically be placed at 5km intervals. The number and placement of the link boxes would be determined as part of the detailed design post-consent.

34. The link boxes, with maximum dimensions 1.5m x 1.5m, per circuit, would either be buried to ground level within an excavated pit, providing access via a secured access panel (refer to Plate 2) or alternatively, above ground link box cabinets (1.2m x 0.8m x 1.8m) may be utilised which are typically sited on a 0.15m deep concrete slab.

35. There is no requirement for permanent lighting at link boxes.

Plate 2 Example below ground link box following reinstatement (Source: Rey Wind Farm, Vattenfall Wind Power Ltd.)

6.2.2 Layout

36. The link boxes would be located at approximately 5km intervals along the onshore cable route.

6.2.3 Access

37. Access to link boxes is only required for periodic testing purposes, which is typically every 5 years. Where possible, the link boxes would be located close to field boundaries and in already accessible locations. No additional formal access is proposed to each link box.

6.3 Onshore Project Substation Design

6.3.1 Use

38. The onshore project substation converts the HVDC electrical power from the Norfolk Vanguard export cables to HVAC which is the appropriate voltage required for connection to the National Grid system. Filtering, switchgear and associated protection and control equipment is also located at the onshore project substation to comply with the technical requirements of the National Grid and allow safe operation of the Norfolk Vanguard connection.

6.3.2 Amount, Scale

39. The onshore project substation will consist of up to two converter stations, each having a power transfer capability of between 800MW and 1000MW. As such, the onshore project substation will consist of:

- 2x converter buildings - housing DC filter equipment and power electronics to convert HVDC to HVAC power for connection to National Grid;
- 2x outdoor HVAC compounds – each compound will contain one or more 400kV transformers, plus HVAC filters, busbars and cable sealing ends;
- Control building – housing SCADA and protection equipment;
- Access roads – for operation and maintenance access to equipment; and
- Associated connections between equipment via overhead busbar and cabling, including buried earthing system.

40. The largest equipment within the onshore project substation will be the converter halls which will not exceed a height of 19m, all other equipment will not exceed a height of 13m. The tallest structure at the onshore project substation site will be the lightning protection masts at a height of 25m. The total land requirement for the onshore project substation to the perimeter fence is 250m x 300m.

41. Permanent palisade fencing will be installed around the onshore project substation compound up to a height of 2.4m.

42. The final appearance of the onshore project substation is subject to detailed design post consent. For the purposes of the DAS, indicative maximum parameters (as set out in Table 5.4 and DCO Requirement 16) have been provided with reference to a Rochdale Envelope approach in terms of realistic worst case design parameters.

6.3.3 Layout and Appearance

43. In addition to the main converter halls, the onshore project substation compound would contain electrical equipment including power transformers, switchgear, harmonic filters, cables, lightning protection masts, control buildings, communications masts, backup generators, access, fencing and other associated equipment, structures or buildings. The onshore project substation would have a compact layout, with the majority of equipment contained in agricultural style buildings.

44. The onshore project substation would be enclosed by a fence surrounding the external equipment outlined above. Other infrastructure and equipment will be included within the compound such as interconnecting cables, access tracks, hard standing, car parking, water tanks, communications mast, diesel generators and welfare facilities.

45. The onshore project substation would be connected to the existing Necton National Grid substation by means of HVAC underground cables.

46. An indication of the typical appearance and layout of a HVDC substation is shown on Plate 1.

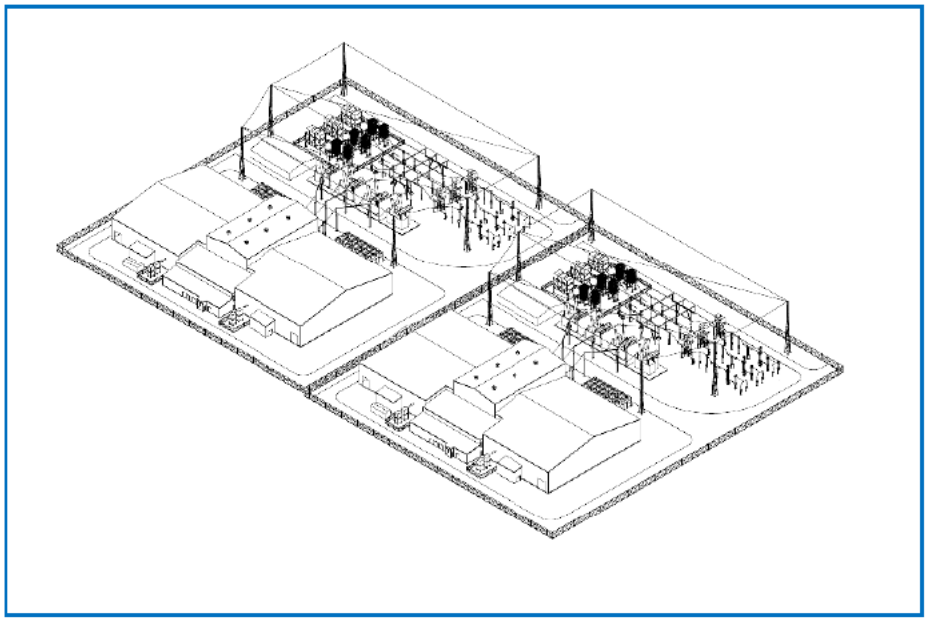


Plate 61 Indicative onshore project substation layout – HVDC

6.3.4 Access

47. The onshore project substation will be accessed from the A47. Three access options have been considered:

- Access A: Existing Necton National Grid Substation access utilising a U-turn strategy at Dereham to remove right turn access off the A47;
- Access A1: Upgrading the existing Necton National Grid Substation access to a Design Manual for Roads and Bridges (DMRB) compliant access; and
- Access B: Construction of a new DMRB compliant access opposite 'Spicers Corner' junction.

48. Further consultation with highway stakeholders will be undertaken post-consent to finalise the onshore project substation access strategy.

49. During operation, the onshore project substation would not be manned, however access would be required periodically for routine maintenance activities, estimated at an average of one visit per week.

6.3.5 Lighting

50. Normal operating conditions would not require lighting at the onshore project substation, although low level movement detecting security lighting may be utilised for health and safety purposes. Temporary lighting during working hours will be provided during maintenance activities only.

6.4 National Grid Substation Extension and Overhead Line Modifications

6.4.1 Use, Amount, Layout, Scale and Appearance

51. The existing Necton National Grid substation would require an extension to accommodate the Norfolk Vanguard connection points. The National Grid substation extension would need to accommodate circuit breakers and associated busbar structures which allow connection onto the existing 400kV overhead line for generation to be transmitted onto the wider National Grid system.

52. The National Grid substation outdoor busbar will be extended in a westerly direction to a total length of 200m, with seven new AIS bays installed along the busbar extension for Norfolk Vanguard. The substation extension will be similar in appearance to the existing National Grid substation at Necton as it is in simply an extension to the existing busbar and AIS bays.

53. During operation, the Necton National Grid substation would not normally be illuminated. However, lighting would be used when conducting inspection and maintenance activities (during working hours only).

54. In addition to the existing Necton National Grid substation itself, modifications to the existing overhead line structures adjacent to the substation would be required to provide a double turn-in arrangement[2].

55. Two new overhead line towers will be required in proximity to the existing corner tower (to the north east of the existing Necton National Grid substation) with a maximum height of 55m. The existing corner tower will be demolished such that the net new number of towers will be one.

6.4.2 Access

56. The existing Necton National Grid substation has an existing access from the A47. This would continue to be used during operation. However, this access may be

[2] Each overhead line tower carries two 400kV circuits. In this arrangement, both circuits are turned into the substation busbar structure.

subject to some upgrades associated with the onshore project substation – see section 6.3.4.

57. The National Grid substation extension and overhead line modification would not be manned; maintenance of the substation would be undertaken approximately every three years. Visual checks would be undertaken on a monthly inspection visit to the site.

6.5 Onshore project substation and National Grid Substation Extension Landscaping

58. The onshore project substation site benefits from some substantial existing hedgerows and woodland blocks within the local area. These would provide mitigation of landscape and visual effects from the outset and can be strengthened during the early phases of the proposed project to ensure robust screening. The extent of mitigation planting incorporated into the design is presented on Figure 3 and Figure 4 and mostly comprises indigenous woodland species and would be located around the onshore project substation and along the southern edge of the National Grid substation extension. Owing to the dimensions of the onshore project substation site, the National Grid substation extension, and the associated mobilisation areas construction activities would be required to level existing contours. The earthworks required for the cut and fill to create the level platform would produce surplus soil which would be used to form subtle earthwork bunds of up to 2m along the western side of the onshore project substation. This would help to give an incremental increase to the overall height of screening along this sensitive boundary which is not constrained by planting restrictions associated with underground cables.

59. The mitigation planting would be designed to comprise a mix of faster growing 'nurse' species and slower growing 'core' species. The core species would comprise a mix of preferred native, canopy species that would outlive the nurse species and characterise the woodland structure over the longer term. It is anticipated that 5m to 7m growth would take 20 years and the nurse species would have reached approximately 7.25m to 9.75m (assuming planting height of 1m) after 25 years. The nurse species would be sufficiently fast growing to provide substantial screening of the onshore project substation after 20 years.

60. The proposed landscaping is described in more detail in the OLEMS (document 8.7), with regard to the re-establishment of hedgerows and tree planting. The landscaping works will be designed in detail post-consent in accordance with DCO Requirement 18.

7 SUMMARY

61. This DAS forms part of the suite of documents submitted as part of the DCO application for the project, and sets out the various principles, concepts and considerations incorporated into the design of the onshore electrical transmission works.

62. The design of the project is part of an ongoing process in which Norfolk Vanguard Limited is committed to optimising the quality of the design. The design-development process has been informed by consultation particularly in relation to site selection, design evolution and accessibility considerations.

63. Although indicative at this stage, the design for the onshore project substation and National Grid substation extension will set out to achieve a high standard of design whilst at the same time balancing the operational requirements of the facility with the character and appearance of the existing environment.

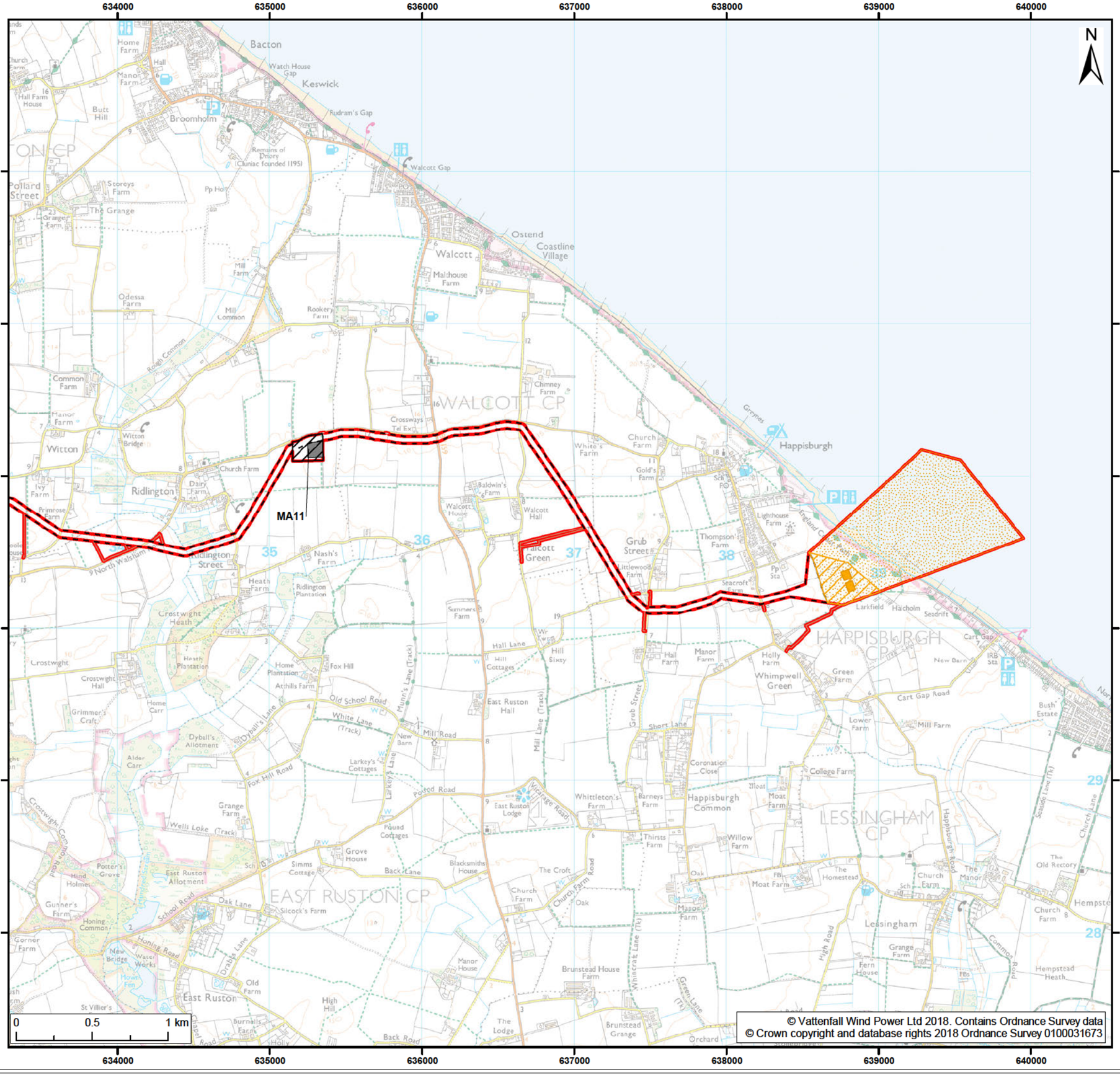
64. There will be no requirement for public access to the onshore project station or National Grid substation extension, and appropriate security measures will be installed to prevent unauthorised access to the onshore electrical transmission works once operational.

65. Integration of the building into the local landscape will be further assisted by detailed landscape design including planting using a selection of appropriate indigenous species to increase site biodiversity.

8 REFERENCES

CABE (2007) Design and Access Statements: How to write, read and use them. Online, available at: http://webarchive.nationalarchives.gov.uk/20110118111019/http://www.cabe.org.uk/files/design-and-access-statements.pdf . Accessed 14/05/2018.
Department of Energy and Climate Change (DECC) (2011a). National Policy Statement for Energy (EN-1) July 2011, DECC Publications.
Department of Energy and Climate Change (DECC) (2011b). National Policy Statement for Electricity Networks Infrastructure (EN-5) July 2011, DECC Publications.
Department of Energy and Climate Change (DECC) (2011c). National Policy Statement for Renewable Energy Infrastructure (EN-3) July 2011, DECC Publications.
Norfolk Vanguard Limited (2017). Norfolk Vanguard Preliminary Environmental Information Report
The Planning Inspectorate (2012) Advice note nine: Rochdale Envelope. Online, available at: https://infrastructure.planninginspectorate.gov.uk/wp-content/uploads/2011/02/Advice-note-9.-Rochdale-envelope-web.pdf accessed 14/05/2018.
Royal HaskoningDHV (2016). Norfolk Vanguard Scoping Report

9 FIGURES



Legend:

- Norfolk Vanguard onshore red line boundary

Landfall

- Landfall zone
- Landfall compound zone
- Indicative landfall compound

Onshore cable route

- Onshore cable route
- Mobilisation zone
- Indicative mobilisation area compound

Access

- Construction access
- Operation access

NOTE: MA = Mobilisation area; TC = Trenchless crossing

Project:	Report:
Norfolk Vanguard	Design and Access Statement

Title:

Onshore project area
(map 1 of 9)

Figure: 1 | Drawing No: PB4476-006-010-001

Revision:	Date:	Drawn:	Checked:	Size:	Scale:
01	14/05/2018	LB	GK	A3	1:25,000

Co-ordinate system: British National Grid **EPSG:** 27700

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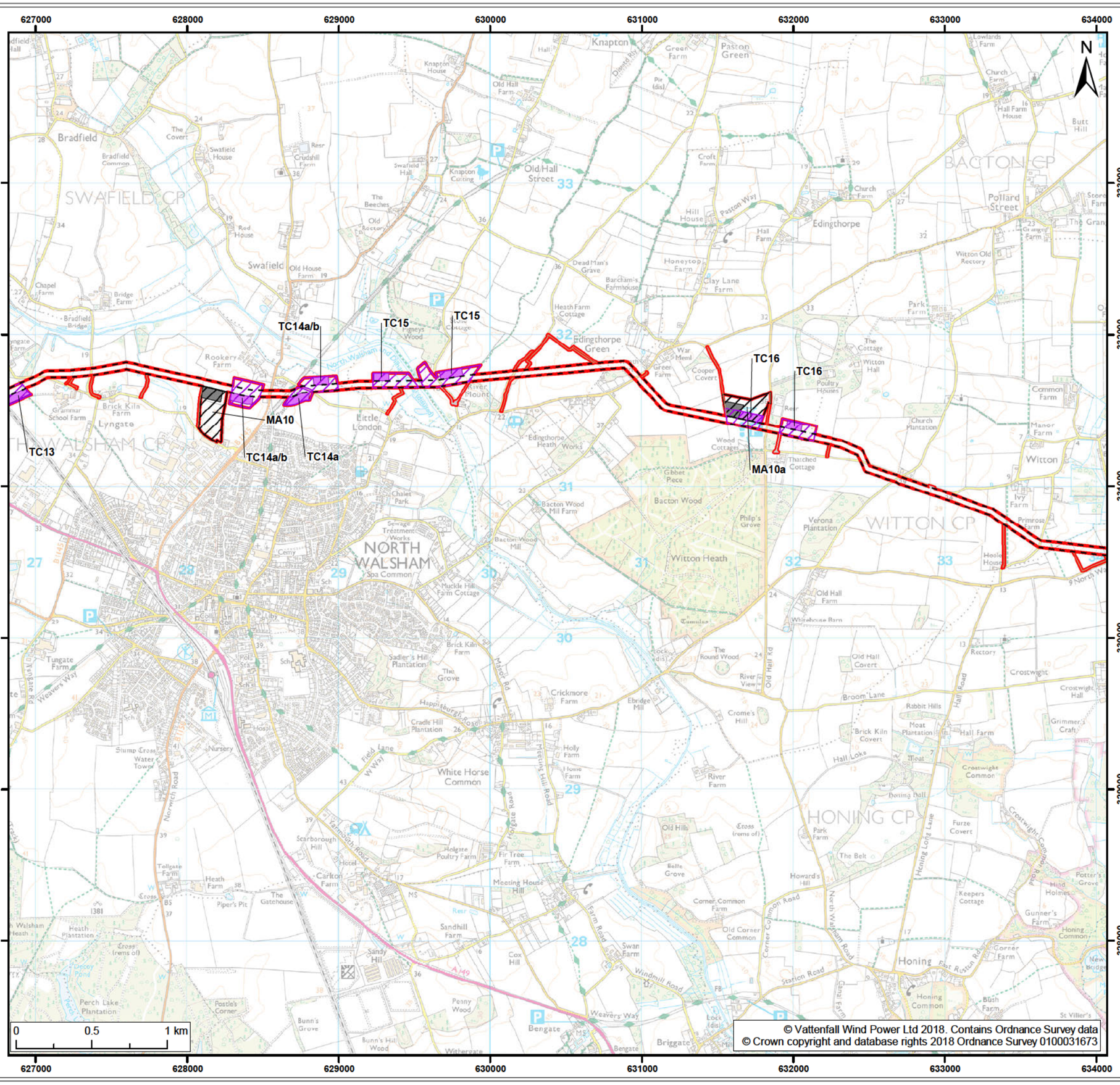

Legend:

- Norfolk Vanguard onshore red line boundary

Onshore cable route

- Onshore cable route
- Trenchless crossing zone (e.g. HDD)
- Indicative trenchless crossing compound
- Mobilisation zone
- Indicative mobilisation area compound

Access

- Construction access
- Operation access

NOTE: MA = Mobilisation area; TC = Trenchless crossing

Project:	Report:
Norfolk Vanguard	Design and Access Statement

Title:

Onshore project area
(map 2 of 9)

Figure: 1 | Drawing No: PB4476-006-010-001

Revision:	Date:	Drawn:	Checked:	Size:	Scale:
01	14/05/2018	LB	GK	A3	1:25,000

Co-ordinate system: British National Grid **EPSG:** 27700

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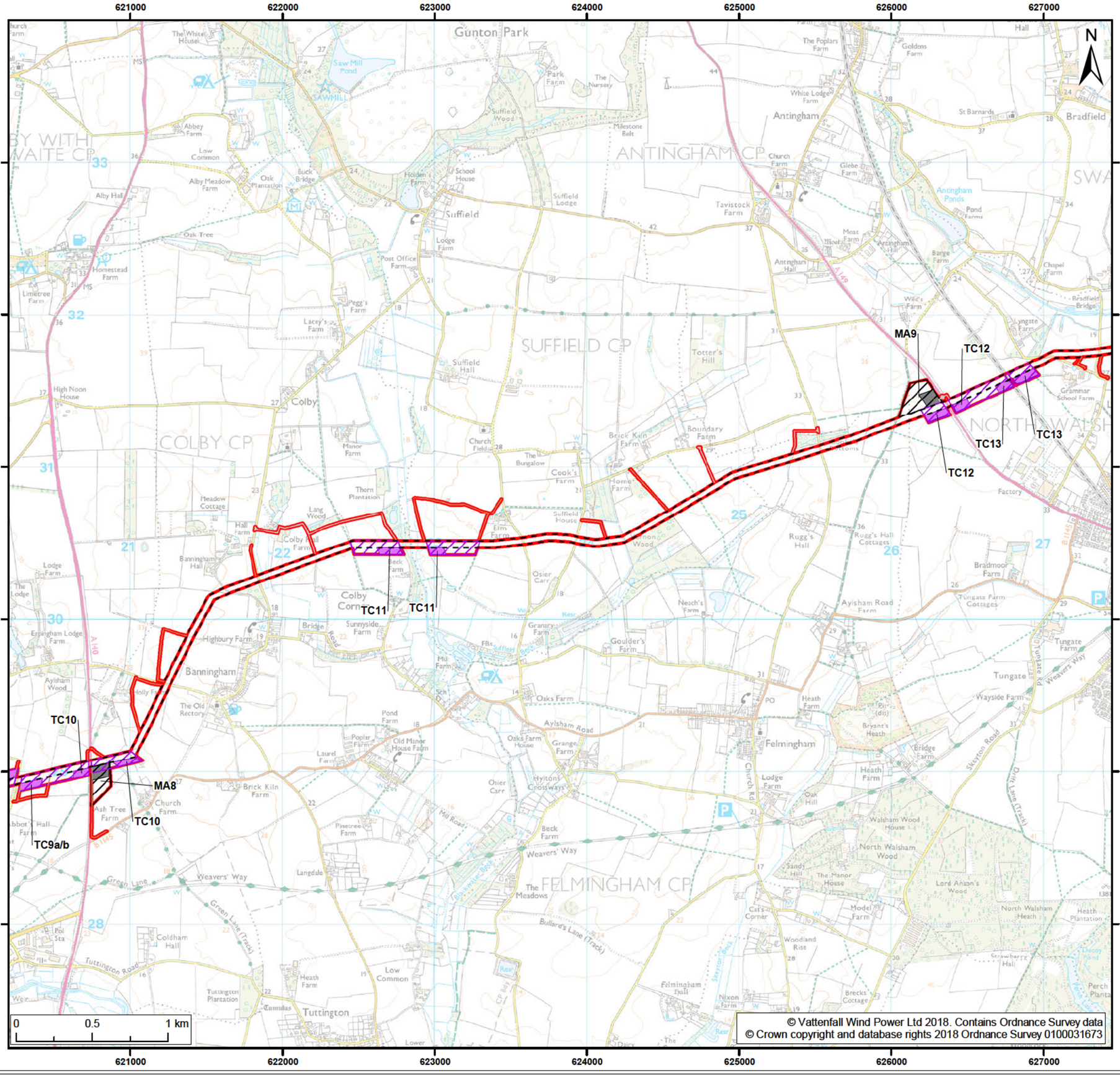

Legend:

- Norfolk Vanguard onshore red line boundary

Onshore cable route

- Onshore cable route
- Trenchless crossing zone (e.g. HDD)
- Indicative trenchless crossing compound
- Mobilisation zone
- Indicative mobilisation area compound

Access

- Construction access
- Operation access

NOTE: MA = Mobilisation area; TC = Trenchless crossing

Project:	Report:
Norfolk Vanguard	Design and Access Statement

Title:

Onshore project area
(map 3 of 9)

Figure: 1 | Drawing No: PB4476-006-010-001

Revision:	Date:	Drawn:	Checked:	Size:	Scale:
01	14/05/2018	LB	GK	A3	1:25,000

Co-ordinate system: British National Grid **EPSG:** 27700

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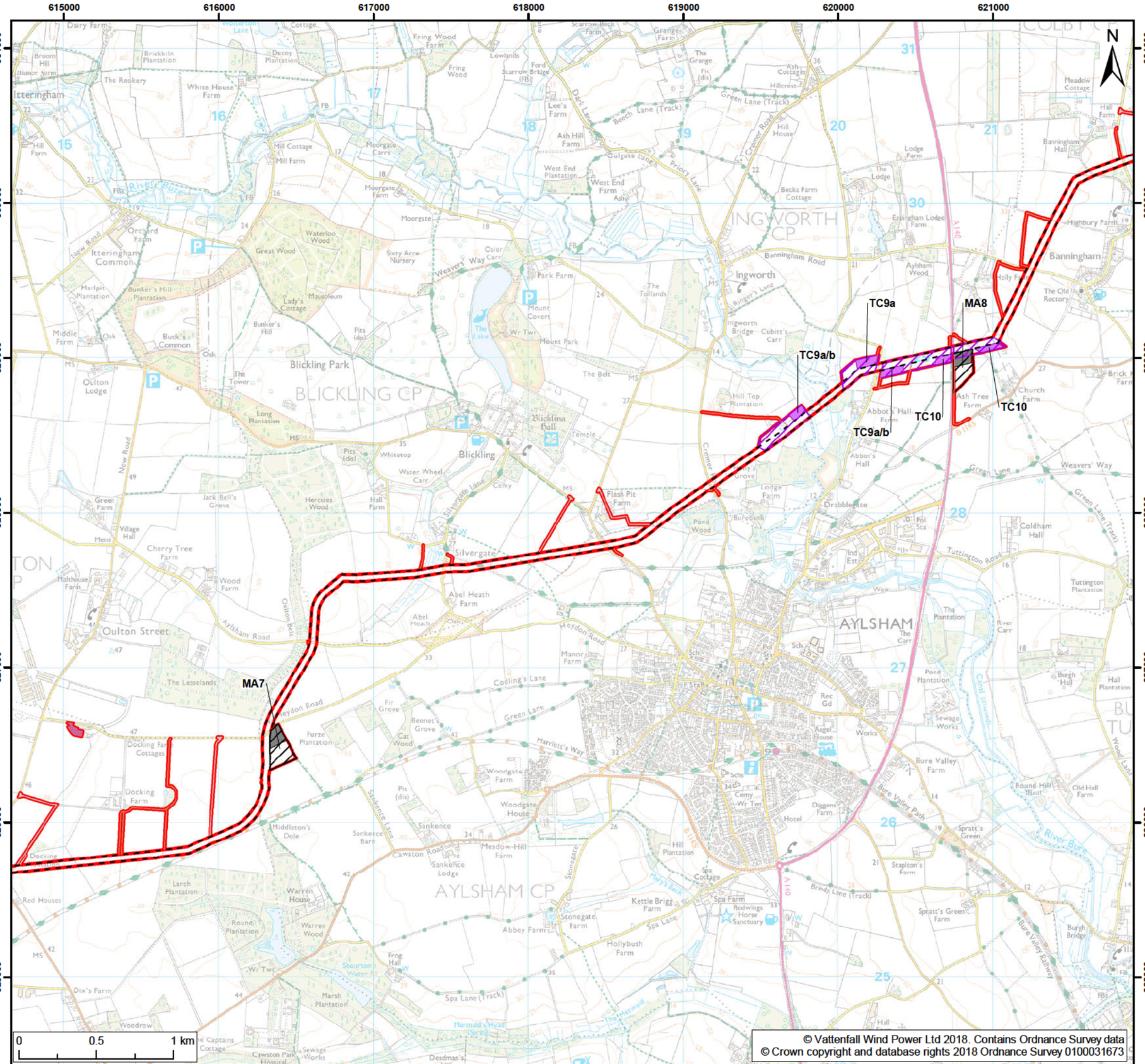

Legend:

- Norfolk Vanguard onshore red line boundary

Onshore cable route

- Onshore cable route
- Trenchless crossing zone (e.g. HDD)
- Indicative trenchless crossing compound
- Mobilisation zone
- Indicative mobilisation area compound
- Cable logistics area

Access

- Construction access
- Operation access

NOTE: MA = Mobilisation area; TC = Trenchless crossing

Project:	Report:
Norfolk Vanguard	Design and Access Statement

Title:

Onshore project area
(map 4 of 9)

Figure: 1 | Drawing No: PB4476-006-010-001

Revision:	Date:	Drawn:	Checked:	Size:	Scale:
01	14/05/2018	LB	GK	A3	1:25,000

Co-ordinate system: British National Grid **EPSG:** 27700

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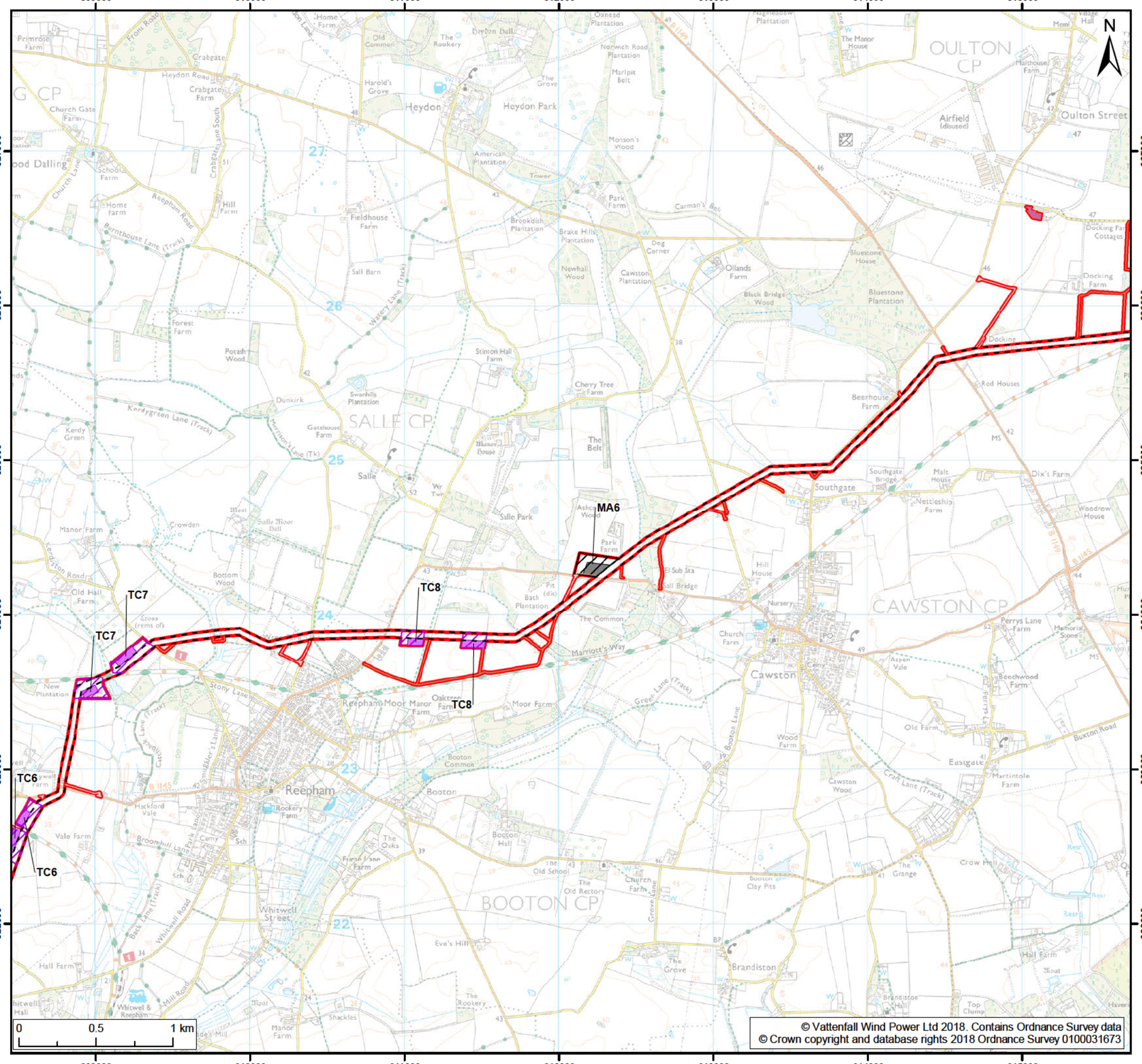

Legend:

- Norfolk Vanguard onshore red line boundary

Onshore cable route

- Onshore cable route
- Trenchless crossing zone (e.g. HDD)
- Indicative trenchless crossing compound
- Mobilisation zone
- Indicative mobilisation area compound
- Cable logistics area

Access

- Construction access
- Operation access

NOTE: MA = Mobilisation area; TC = Trenchless crossing

Project:	Report:
Norfolk Vanguard	Design and Access Statement

Title:

Onshore project area
(map 5 of 9)

Figure: 1 | Drawing No: PB4476-006-010-001

Revision:	Date:	Drawn:	Checked:	Size:	Scale:
01	14/05/2018	LB	GK	A3	1:25,000

Co-ordinate system: British National Grid **EPSG:** 27700

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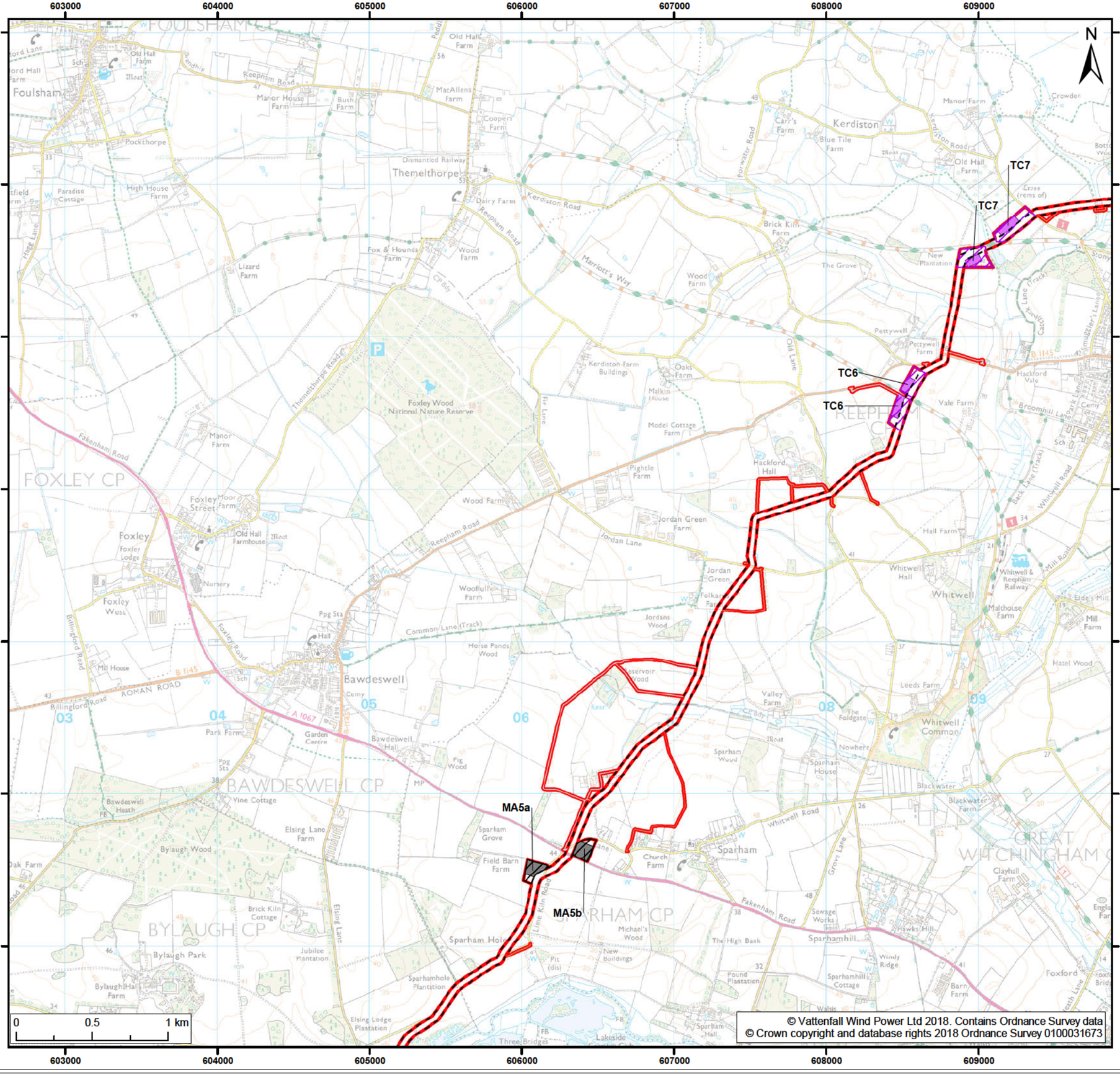

Legend:

- Norfolk Vanguard onshore red line boundary

Onshore cable route

- Onshore cable route
- Trenchless crossing zone (e.g. HDD)
- Indicative trenchless crossing compound
- Mobilisation zone
- Indicative mobilisation area compound

Access

- Construction access
- Operation access

NOTE: MA = Mobilisation area; TC = Trenchless crossing

Project:	Report:
Norfolk Vanguard	Design and Access Statement

Title:

Onshore project area
(map 6 of 9)

Figure: 1 | Drawing No: PB4476-006-010-001

Revision:	Date:	Drawn:	Checked:	Size:	Scale:
01	14/05/2018	LB	GK	A3	1:25,000

Co-ordinate system: British National Grid **EPSG:** 27700

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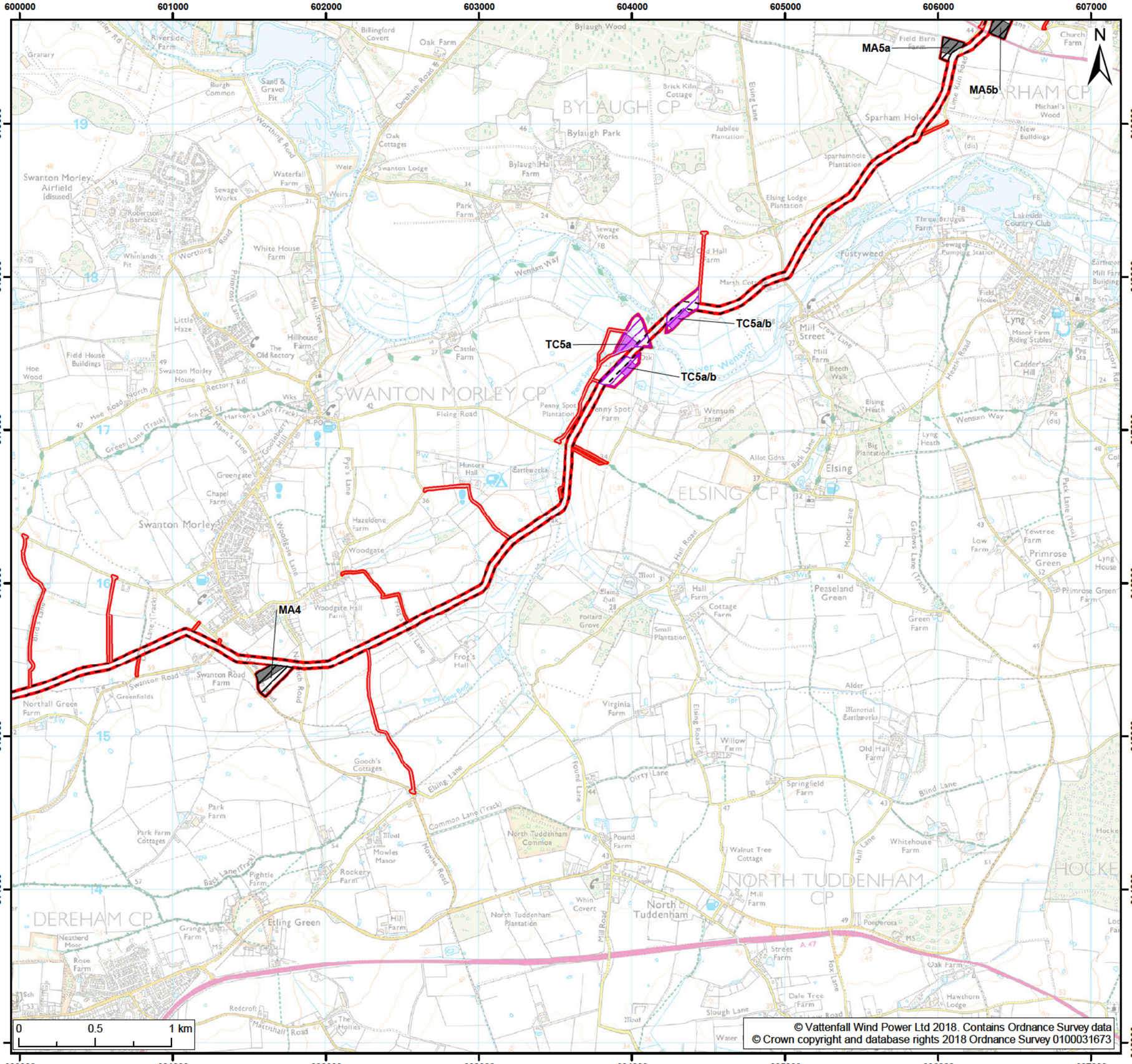

Legend:

- Norfolk Vanguard onshore red line boundary

Onshore cable route

- Onshore cable route
- Trenchless crossing zone (e.g. HDD)
- Indicative trenchless crossing compound
- Mobilisation zone
- Indicative mobilisation area compound

Access

- Construction access
- Operation access

NOTE: MA = Mobilisation area; TC = Trenchless crossing

Project:	Report:
Norfolk Vanguard	Design and Access Statement

Title:

Onshore project area
(map 7 of 9)

Figure: 1 | Drawing No: PB4476-006-010-001

Revision:	Date:	Drawn:	Checked:	Size:	Scale:
01	14/05/2018	LB	GK	A3	1:25,000

Co-ordinate system: British National Grid **EPSG:** 27700

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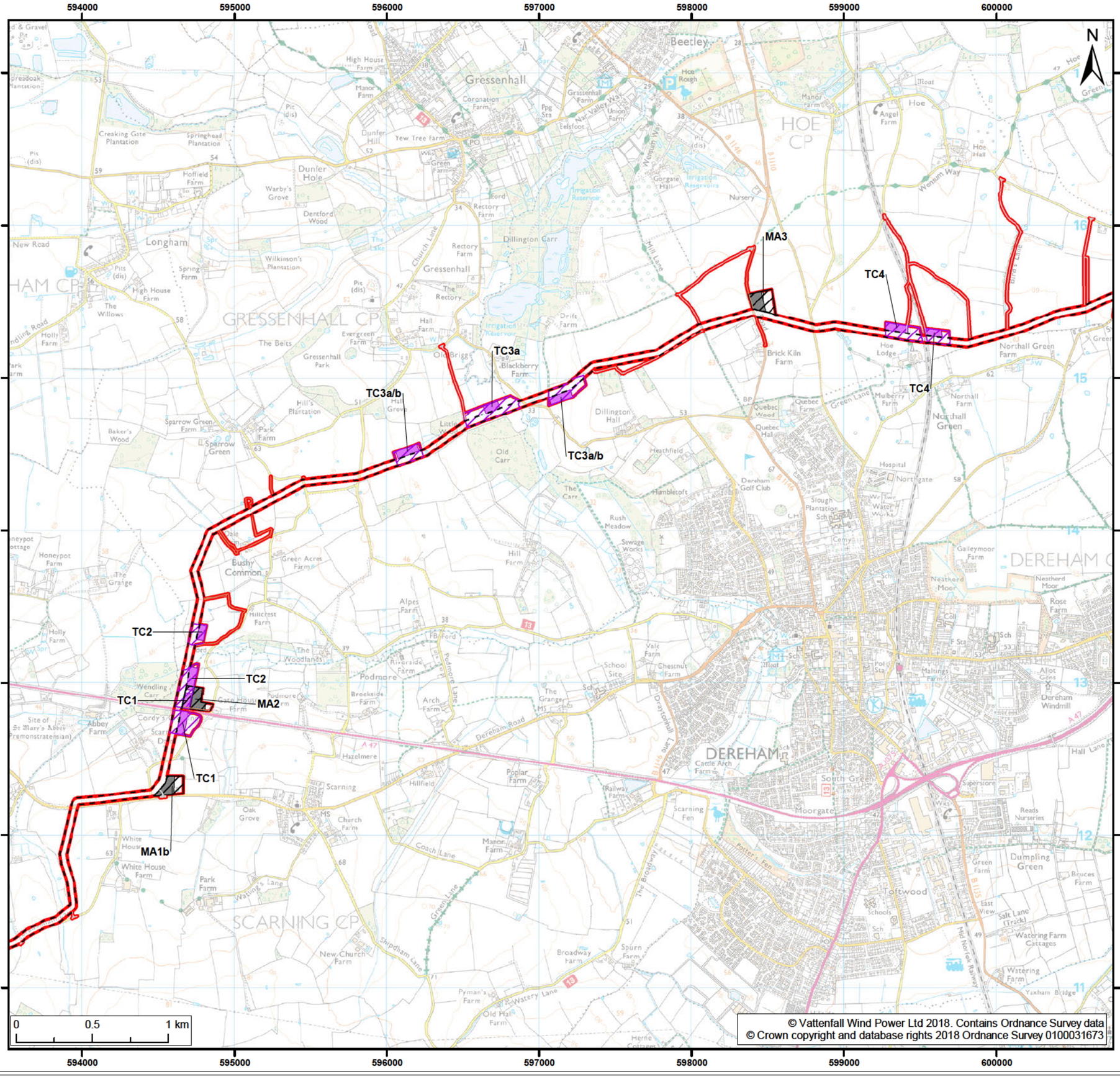

Legend:

- Norfolk Vanguard onshore red line boundary

Onshore cable route

- Onshore cable route
- Trenchless crossing zone (e.g. HDD)
- Indicative trenchless crossing compound
- Mobilisation zone
- Indicative mobilisation area compound

Access

- Construction access
- Operation access

NOTE: MA = Mobilisation area; TC = Trenchless crossing

Project:	Report:
Norfolk Vanguard	Design and Access Statement

Title:

Onshore project area
(map 8 of 9)

Figure: 1 | Drawing No: PB4476-006-010-001

Revision:	Date:	Drawn:	Checked:	Size:	Scale:
01	14/05/2018	LB	GK	A3	1:25,000

Co-ordinate system: British National Grid **EPSG:** 27700

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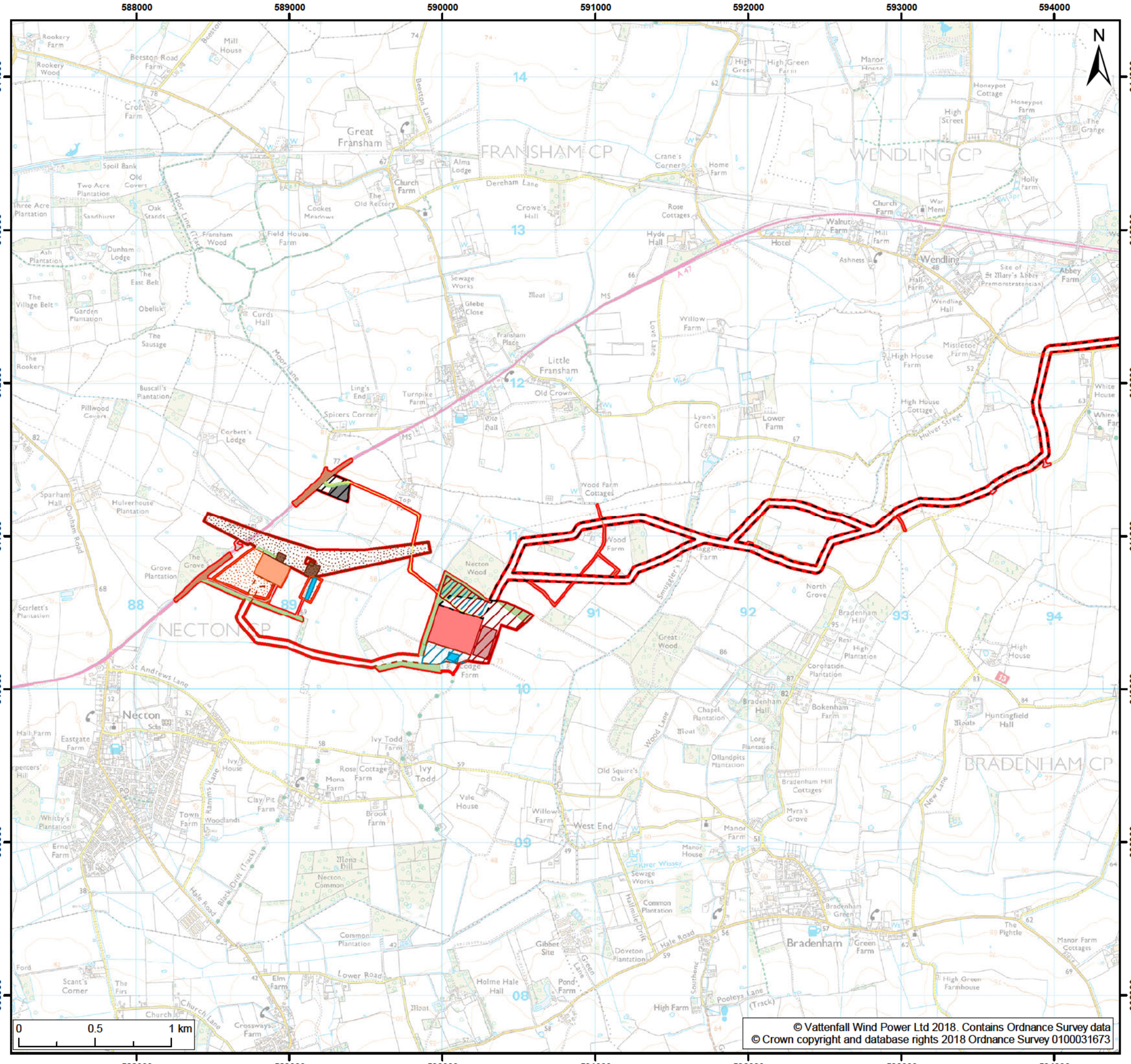

Legend:

- Norfolk Vanguard onshore red line boundary

Onshore cable route
- Onshore cable route
- Onshore 400kv cable route
- Mobilisation zone
- Indicative mobilisation area compound

Access
- Permanent access
- Construction access
- Operation access

Onshore project substation
- Onshore project substation
- Onshore project substation temporary construction compound zone
- Indicative onshore project substation temporary construction compound

National Grid
- National Grid substation extension
- National Grid new / replacement overhead line tower
- National Grid temporary works
- Overhead line temporary works

Mitigation areas
- Attenuation pond zone
- Indicative attenuation pond
- Indicative mitigation planting

NOTE: MA = Mobilisation area; TC = Trenchless crossing

Project:	Report:
Norfolk Vanguard	Design and Access Statement

Title: Onshore project area (map 9 of 9)

Figure: 1 | Drawing No: PB4476-006-010-001

Revision:	Date:	Drawn:	Checked:	Size:	Scale:
01	14/05/2018	LB	GK	A3	1:25,000

Co-ordinate system: British National Grid **EPSG:** 27700

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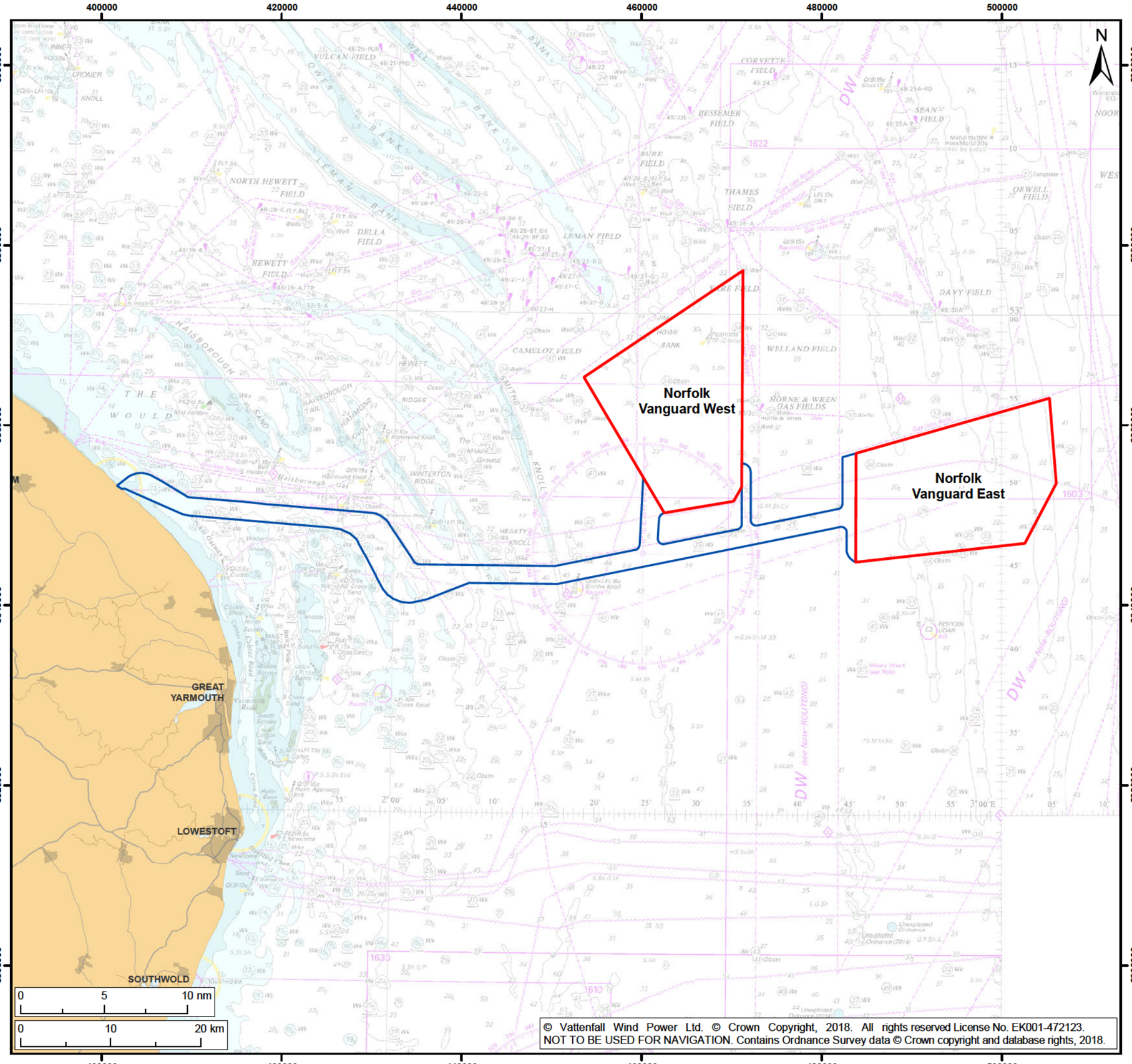

Legend:

- Norfolk Vanguard
- Offshore cable corridor

Project: Norfolk Vanguard	Report: Design and Access Statement

Title: Offshore project area

Figure: 2 | Drawing No: PB4476-006-010-002

Revision:	Date:	Drawn:	Checked:	Size:	Scale:
01	14/05/2018	LB	GK	A3	1:425,000

Co-ordinate system: ETRS 1989 UTM Zone 31N **EPSG:** 25831

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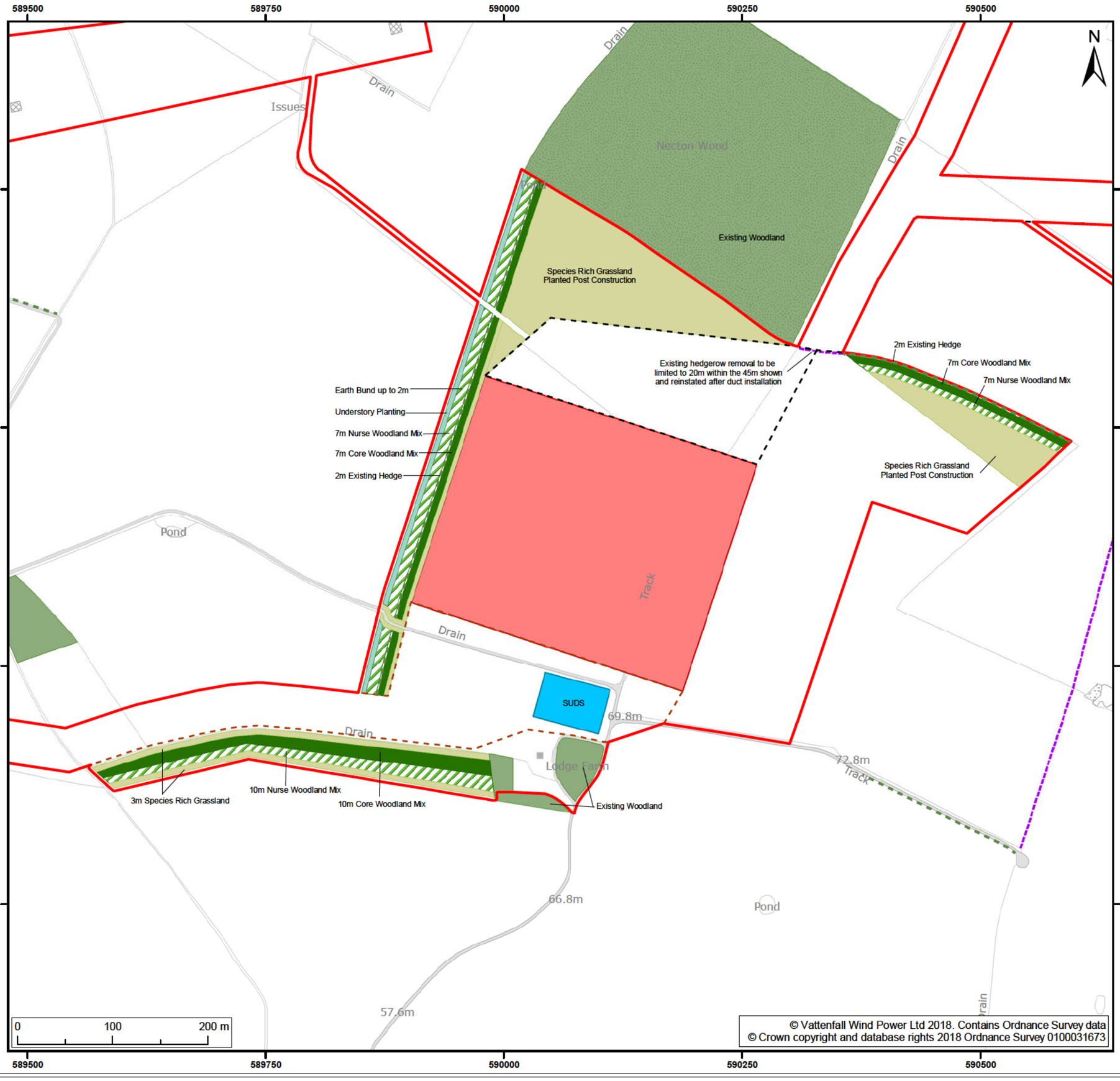

Legend:

- Norfolk Vanguard onshore red line boundary

Onshore cable route

- Onshore cable route
- Onshore 400kv cable route

Onshore project substation

- Onshore project substation

Existing vegetation

- Existing woodland
- Existing hedgerow

Proposed mitigation area

- Proposed core woodland
- Proposed nurse woodland
- Proposed understorey planting
- Proposed species rich grassland
- Indicative attenuation pond
- Proposed hedgerow

Project:	Report:
Norfolk Vanguard	Design and Access Statement

Title:

Indicative Mitigation Planting Onshore Project Substation – Norfolk Vanguard

Figure: 3 | Drawing No: PB4476-006-010-003

Revision:	Date:	Drawn:	Checked:	Size:	Scale:
01	15/05/2018	LB	GK	A3	1:4,000

Co-ordinate system: British National Grid **EPSG:** 27700

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589750 590000 590250 590500

310750 310500 310250 310000

N

Issues

Drain

Necton Wood

Pond

Drain

Pond

Track

Drain

SUDS

69.8m

Drain

Lodge Farm

72.8m

Track

Species Rich Grassland

7m Nurse Woodland Mix

7m Core Woodland Mix

Proposed Hedge

Pond

10m Core Woodland Mix

10m Nurse Woodland Mix

66.8m

Pond

57.6m

Track

Drain

Pond

0 100 200 m

Legend:

- Norfolk Vanguard onshore red line boundary

Onshore cable route

- Onshore cable route
- Onshore 400kv cable route

Onshore project substation

- Onshore project substation
- Norfolk Boreas onshore project substation

Existing vegetation

- Existing woodland
- Existing hedgerow

Proposed mitigation area

- Proposed core woodland
- Proposed nurse woodland
- Proposed understorey planting
- Proposed species rich grassland
- Indicative attenuation pond
- Proposed hedgerow
- Replacement hedge (in areas of removal)

Project:	Report:
Norfolk Vanguard	Design and Access Statement

Title:

Indicative Mitigation Planting Onshore Project Substation – Norfolk Vanguard and Norfolk Boreas

Figure: 4 | Drawing No: PB4476-006-010-004

Revision:	Date:	Drawn:	Checked:	Size:	Scale:
01	15/05/2018	LB	GK	A3	1:4,000

Co-ordinate system: British National Grid **EPSG:** 27700

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APPENDIX 4

NOTE OF THE OPTIONS FOR ALTERNATIVE WAYS TO ALLOW HEAVY VEHICULAR ACCESS ACROSS THE CARPENTERS' LAND IN A WAY THAT DOES NOT REQUIRE A PERMANENT ACCESS ROAD TO BE LAID

1. We have considered reasonable alternative access options well known to construction companies that deliver major infrastructure projects.

2. The alternatives can be generally categorised as follows:

2.1 Permanent subterranean sub-base layer;

2.2 Import of materials when work is required;

2.3 Matting / geo-matting; and

2.4 Soil stabilization methods.

3. These possibilities are summarised below. Our previous representations have touched briefly on the options set out at 2.2 to 2.4 above[1].

4. The **first possibility**, in principle, would be to lay a sub-base layer being but then overlain by topsoil, thereby creating the structural base for a haul road for larger vehicles if ever needed.

4.1 Whilst this is possible it is rarely pursued. One issue is that, often, not a great enough depth of topsoil can be established over the sub-base layer. The increased drainage capacity resulting from the sub-base is likely to result in grass die-back and bare patches throughout much of the summer and in drier periods. The underlying road base would therefore be visible as a strip and the use of the agricultural land for grazing or arable purposes would be undermined for a considerable part of a year.

4.2 If enough soil could be established then the sub-base material is likely to be so deep that it would need to be considerably built up prior to use. This could effectively double the cost of the sub-base base and render it an unviable option.

4.3 Conversely, if the sub-base layer was raised then the effect of drying out would be enhanced and what would be established would be little more than a 'grasscrete' solution which would basically negate grazing and arable use entirely.

5. The **second possibility** is the import of stone when works are required. No sub-base is proposed to lie dormant with this option.

5.1 With this option the task of sourcing, transporting and laying the material is laborious, time consuming and very expensive. The cost involves the cost of the stone, the transportation charges as well the labour charges to layout the stone. All of these factors may cause delay which may unacceptable depending on the urgency of the works.

6. The **third option** is a very common solution involving the use of composite matting / geo-mats or other 'matting' material (such as chained sleepers) to construct haul roads.

6.1 The layout process is more convenient and less time consuming. Composite track mats are engineered such that they can take the loads cited by Aquind and more. However, expense

[1] Deadline 5 submission setting out our Compulsory Acquisition Hearing 2 (CAH2) 11th December 2020 case at 'Appendix J: Proposed Landscaping - Excessive Unjustified Land Take' (REP5-126)

may cancel this option out depending on terrain and, most importantly, the time the temporary roads are needed. The longer that timeframe the more unviable the solution becomes because of matting rental costs.

6.2 Owing to the high charges of renting mats, this option could be suitable for shorter-term projects/needs. Nonetheless, **depending on the nature of the requirement it could be an option**.

6.3 It is notable that the Vanguard DCO, to which we have referred previously because of its proposed converter station, proposed both matting and stone solutions and referred to the temporary haul roads as "*running tracks*"[2]. The onshore cable route was separated into 20 cable route sections, which would be accessed from the mobilisation areas via these running tracks. The running track would provide safe access for construction vehicles along the onshore cable route, from mobilisation areas to duct installation sites. This solution was proposed as 6m wide tracks for approximately 60km.

7. The **fourth and final option** is the use of various soil stabilization techniques and products that are now available, and have been for a considerable time, that can create high performance haul roads from existing soils by enhancing the properties of the existing soil.

7.1 This option has many advantages. There is no need to replace poor/medium grade soils with higher-quality aggregates. This saves money and time that can be invested elsewhere. Nor is there a need to pay the rental charges associated with matting and solutions can often be delivered much more quickly that the import of stone. Depending on the solution employed smooth, dust-free access roads can be formed for as long as needed.

7.2 The binding agents vary depending on the soil structure, soil type and the requirements of the project, but in general can be categorised as follows:

7.2.1 Traditional chemical stabilizers including:

(a) Cement;

(b) Lime;

(c) Fly ash;

(d) Bituminous materials,

or any combination of these), and

7.2.2 Non-traditional stabilizers which are typically grouped into seven categories:

(a) Chlorides (chlorides, salts, calcium chloride, magnesium chloride, sodium chloride);

(b) Clay additives (clay additives, clay, filler, bentonite, montmorillonite);

(c) Electrolyte emulsions (electrolyte stabilizers, ionic stabilizers, electrochemical stabilizers, acids);

(d) Enzymatic emulsions (enzymatic emulsions, enzymes);

(e) Lignosulfonates (lignosulfonates, lignin, lignin sulfate, lignin sulfides);

(f) Synthetic-polymer emulsions (synthetic-polymer emulsions, polyvinyl acetate, vinyl acrylic); and

[2] See Outline Traffic Management Plans (APP-032 and Rep7-010 to Rep7-013)

(g) Tree-resin emulsions (tree-resin emulsions, tall-oil emulsions, pine-tar emulsions).

7.3 We are aware that these solutions are being successfully deployed in the delivery of HS2 where contractors need temporary roads across agricultural land and have been so for a considerable time. Such techniques were employed in relation to the, now decommissioned, Richborough Power Station.

7.4 Moreover, and most importantly, once the works are completed the compounds creating these roads can be broken down to return the agricultural land into full use.

7.5 We understand anticipated loads could be as much as 300t. We have been advised that there are soil stabilisation solutions available where relatively low dosage rates can yield load-bearing results of over 6 MPa. To make this easily comparable 1 MPa is 101.97162 ton/m2. Therefore, 6 MPa equates to a load of 611.82972778674 ton/m2[3] and is easily ample for the 300t envisaged by Aquind.

7.6 Whilst the figures above relate to the testing of one particular product, the fact that such results clearly show much greater loads can be accommodated and that we can source this information easily means that a number of soil stabilization solutions are reasonably likely to be available for this project. With such loads being able to be accommodated such solutions can be used for sealing or stabilizing haul roads, side tracks, car parks, construction or military camps, container hardstands, railroad yards, and even forming temporary landing areas.

7.7 This begs the question; if this option is good enough to deliver major infrastructure projects such as HS2 why would it not be adequate for Aquind?

8. **In conclusion**, we do not consider that the alternative access construction options have been adequately assessed and judged. The Applicant's mind has been closed from the start so as to seek to ensure by one means or another a permanent road and it has sought to justify only that throughout due to the other opportunities that road enables. This approach breaches theSecretray of State's guidance requirement on the Applicant to take "all reasonable steps" to avoid cpo (rather than to all reasonable steps to ensure cpo as Aquind Limited has done here).

9. If necessary to provide a haul road, the preferred option should be to use soil stabilization solutions to enable haul road access for the construction phase, and this can be grubbed up and relaid if required for temporary operational phase access and for the decommissioning phase.

[3] https://www.convertunits.com/from/Mpa/to/ton/square+metre#:~:text=How%20many%20Mpa%20in%201,for%20pressure%20is%20the%20pascal

APPENDIX H

OfCom s106 Direction under Communications Act 2003

Direction under section 106(3) of the Communications Act 2003 applying the electronic communications code

Background

1. The Applicant has applied to Ofcom for a direction applying the Code to the Applicant.

2. The date on which Ofcom received a completed application that meets the statutory requirements with respect to the content of an application for a direction applying the Code and the manner in which such an application is to be made was 8 August 2019.

3. By virtue of regulation 3 of the Electronic Communications and Wireless Telegraphy Regulations 2011 (SI 2011 No. 1210), except in cases of expropriation, Ofcom must make its decision within 6 months of receiving the completed application.

4. Prior to giving a decision under section 106(3) of the Act to apply the Code to the Applicant, Ofcom must publish a notification of its proposal to give the direction and consider any representations about that proposal that are made to Ofcom within the period specified in the notification.

5. On 21 January 2020, Ofcom published, in accordance with section 107(6) of the Act, a notification of its proposal to give a direction applying the Code to the Applicant for the reasons set out in the consultation document accompanying that notification. That notification invited representations to Ofcom by no later than 5pm on 21 February 2020.

6. Ofcom received one response objecting to the proposal. The respondent was concerned that granting the Code powers would obviate the need for Aquind Limited to obtain relevant planning consents in connection with the installation of a power transmission link running from the south of England to Normandy in France (the Aquind Interconnector).

7. Having considered the objections raised, Ofcom has concluded that the conditions for granting Code powers have been met by the Applicant and it would be inappropriate to withdraw, withhold or delay the granting of it on the grounds stated by the respondent. Ofcom is only empowered to give a direction granting Code powers in relation to the provision of an electronic communications network. Ofcom has also set the scope of the Code powers to exclude the UK Aquind Interconnector Fibre which would be deployed in the Aquind Interconnector. The Applicant has indicated that it will seek development consent for this part of the electronic communication network under the Planning Act 2008.

8. For the reasons set out in the explanatory statement accompanying Ofcom's consultation, Ofcom has had regard, in particular, to each of the matters set out in section 107(4) of the Act. Furthermore, Ofcom has considered and acted in accordance with its general duties in section 3 of the Act and the six Community requirements in section 4 of the Act.

Decision

9. Ofcom hereby directs, in accordance with section 106 of the Act, as follows—

(a) the Code shall apply to the Applicant for the purposes of the provision by the Applicant of part of an electronic communications network, namely, the

Applicant's electronic communications network excluding the UK Aquind Interconnector Fibre, as defined in this direction; and

(b) that application of the Code shall have effect throughout England.

10. This Direction shall take effect on the day it is published.

Interpretation

11. In this Direction—

(a) "**Act**" means the Communications Act 2003;

(b) "**Applicant**" means Aquind Limited, whose registered company number is 06681477;

(c) "**Code**" means the electronic communications code set out in Schedule 3A to the Communications Act 2003;

(d) "**Ofcom**" means the Office of Communications.

(e) "**UK Aquind Interconnector Fibre** " means the part of the Applicant's electronic communications network in England, which is deployed in the Applicant's marine and underground electric power transmission link that runs between the south of England and Normandy in France, and is subject to a Direction issued on 30 July 2018, by the Secretary of State for Business, Energy and Industrial Strategy, pursuant to section 35 of the planning Act 2008.

12. For the purpose of interpreting this Direction—

(a) headings and titles shall be disregarded;

(b) the Interpretation Act 1978 shall apply as if this Notification were an Act of Parliament.

Signed

[redacted]

Brian Potterill

Competition Policy Director

A person duly authorised in accordance with paragraph 18 of the Schedule to the Office of Communications Act 2002

27 March 2020